

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

TE'QUAN PERRY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000175

APPENDIX

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STATE OF SOUTH CAROLINA COURT OF GENERAL SESSIONS

COUNTY OF CHARLESTON 2016-GS-10-01058
2016-GS-10-01059
2017-GS-10-01410
2016-GS-10-00538
2017-GS-10-01475

STATE OF SOUTH	)	
CAROLINA,	)	
	)	TRANSCRIPT OF RECORD
	)	
PLAINTIFF,	)	
	)	
VS.	)	JUNE 12-15, 2017
	)	CHARLESTON, SC
	)	
TE'QUAN PERRY	)	
DEVIN MIDDLETON,	)	
	)	
DEFENDANTS.	)	
	)	

B E F O R E:

HONORABLE R. ROGER COUCH, JUDGE

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

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1 The following proceedings were held June 12,
2 2017, Charleston County, South Carolina, @ 11:43
3 a.m.)

4 (The following proceedings were held
5 outside the hearing of the prospective jurors with
6 all parties present.)

7 THE COURT: We are back on the record
8 in the cases of the State v. Davontay Bryant,
9 Te'Quan Perry and Devin Middleton. I did receive
10 an e-mail directed to all parties from the State
11 concerning a request for a continuance in one of
12 the cases. I think we probably ought to take that
13 up first.

14 MR. OSBORNE: Thank you, Your Honor.
15 Yes, we are requesting a continuance in the case
16 against Davontay Bryant. We have been unable to
17 secure one witness in particular that we think is
18 going to be crucial to us to proceed for with the
19 case against him. So for that reason we would
20 request that continuance.

21 That witness's presence does not --
22 although it doesn't help, it does not affect our
23 ability to go forward against Devin Middleton and
24 Te'Quan Perry, so we would ask that you grant the
25 continuance to decide how we are going to proceed

1 forward with them in the future.

2 THE COURT: Help me with the procedural
3 history of the case. I haven't been involved in it
4 before last Monday. Have there been any
5 continuances granted before in the case?

6 MR. OSBORNE: There has not, Your
7 Honor. In all fairness to Mr. Bryant, and I just
8 can't recall his bond condition, but I can tell you
9 that I know for a fact that Mr. Perry and Mr.
10 Middleton's bond conditions state that if the case
11 is not tried by I think it's June the 19th, it
12 could be this week, I'm not sure, that their bonds
13 would revert to a PR bond. I think that's only
14 fair to extend the same thing to Davontay Bryant,
15 but I would ask that we move that to a PR bond at
16 the end of this week.

17 THE COURT: Is that the same condition?

18 MR. OSBORNE: It is, yes, Your Honor.

19 THE COURT: I'll hear from the defense.
20 You first since it's your client.

21 MR. DAVIS: Thank you, Judge. Judge, I
22 tried to find a case factually similar, but as I'm
23 sure you are not surprised, there is not really --
24 a request for continuance is almost always from
25 this side of the courtroom. So the case --

1 THE COURT: There is a motion pending
2 right now to sever the cases.

3 MR. DAVIS: There is.

4 THE COURT: I haven't decided that one
5 way or the other.

6 MR. DAVIS: We did not file that.
7 Co-counsel for the --

8 THE COURT: There is a motion pending.

9 MR. DAVIS: I would argue that 2012
10 changed things. You were on the commission after
11 that. And while that's now five years old, we are
12 still working through that. My client has been in
13 jail since arrest, August 20th of 2015. We have
14 attempted bond a couple times. We do have a bond
15 hearing. I have provided to the Court if you want
16 from February 14th denying reduction at that time.
17 But Judge Dennis did state if trial not held before
18 June 12th then the bond will modified to a PR bond.
19 We are ready. We are ready to go. We have been
20 waiting on this for almost two years now. We
21 understand the State has a witness issue. But per
22 Langford they have the ability to call or postpone
23 at will. We would argue this is completely within
24 your discretion.

25 THE COURT: It is within my discretion,

1 no question about it.

2 MR. DAVIS: Judge, certainly there -- I
3 can contrast it. Situations where the defense has
4 asked for a continuance to have expert witnesses
5 denied, you should have been ready, even without
6 the witness list from the State, sorry, but you
7 should have been prepared to go forward if you need
8 more time.

9 THE COURT: An expert witness is a
10 little different than that. My understanding is
11 from what I read the gentleman who was mentioned in
12 Monday's hearing as being on the porch up the
13 street.

14 MR. OSBORNE: That is correct.

15 THE COURT: Was involved in identifying
16 the Defendants or some of the Defendants.

17 MR. OSBORNE: All of them, yes, Your
18 Honor.

19 MR. DAVIS: That's correct, Your Honor,
20 but again the case law is usually requests from the
21 defense and almost --

22 THE COURT: Expert witness is somebody
23 employed by the counsel and they have a lot more
24 control over you than a person of the public.

25 MR. DAVIS: Certainly. But not knowing

1 you needed that expert until the time of trial and
2 then asking for more time to get that expert has
3 been upheld granting a continuance for that reason
4 was not sufficient.

5 So there is evidence to argue that
6 there is thankfully a procedure in place that has a
7 step that the State or the defense must go through
8 to meet its burden for a continuance. And at this
9 point all I have done is ask for the Court and
10 given the reason. There's a specific procedure if
11 there is a witness absent issue. The State has not
12 met its burden on that. We are prepared to go.

13 THE COURT: He says you have to prove
14 some more than what you have told me.

15 MR. OSBORNE: I am not sure what he is
16 referring to that we have to prove. Maybe he can
17 enlighten us.

18 MR. DAVIS: I don't think that's my
19 job, Your Honor.

20 THE COURT: I don't know. You are
21 supposed to inform the Court of the law, aren't
22 you?

23 MR. DAVIS: I understand, Judge.

24 THE COURT: Maybe that is your
25 obligation.

1 MR. DAVIS: Rules of Criminal
2 Procedure, if you want me to site it to you --

3 THE COURT: Please do.

4 MR. DAVIS: Rule 7 of the Rules of
5 Criminal Procedure deals with this very issue. It
6 sets forth what any moving party must show. 7B.
7 Continuance because of absence of a witness. If
8 the State can meet its burden, then I understand,
9 but they have not at this point.

10 (Brief pause.)

11 MR. OSBORNE: We can meet each of
12 those.

13 THE COURT: Well, you have to put
14 something. He is saying you have put that on the
15 record. I'm asking you to put the factors on the
16 record.

17 MR. OSBORNE: State calls Detective
18 Paul Krasowski.

19 THE COURT: Come forward, sir, and be
20 sworn.

21 PAUL KRASOWSKI

22 having been duly sworn, testifies as follows:

23 THE COURT: Please state your name once
24 you are seated.

25 THE WITNESS: Detective Paul

1 K-R-A-S-O-W-S-K-I.

2 THE COURT: Thank you. Counsel, your
3 witness.

4 DIRECT EXAMINATION

5 BY MR. OSBORNE:

6 Q. Detective Krasowski, how long have you
7 worked at the Charleston Police Department?

8 A. I'm coming on my 11th year come July,
9 end of July.

10 Q. Are you familiar with an individual by
11 the name of Marvin Johnson?

12 A. I am.

13 Q. And how many times would you say that
14 you have seen Marvin Johnson hanging out in area of
15 Back to Green during your career as a police
16 officer?

17 A. Little hard to put a number on that,
18 but it was fairly frequent. He is a known
19 individual to that area and it's common to have
20 sightings of Marvin.

21 Q. Have you -- go ahead.

22 A. His name -- his real name is Marvin,
23 but he goes by the name of Louie as well.

24 Q. And where would you commonly see Mr.
25 Johnson?

1 A. Specifically in the area of ■ Norman
2 Street. That's the residence that he is associated
3 with.

4 Q. And is it fair to say that when you saw
5 the surveillance video from this incident you saw
6 an individual at ■ Johnson?

7 A. That's correct.

8 Q. Or was it --

9 A. ■ Norman, that is correct. So the
10 video pans like we saw last week and there were
11 several times when the video panned where you saw a
12 subject out on that porch and he identified himself
13 on that porch.

14 Q. Okay. When you first saw that video
15 and you saw that individual did you know who he
16 was?

17 A. I did not. So Detective Bailey who you
18 heard from last week, he was very familiar with
19 that area and I don't know that the video was clear
20 enough to say definitively that that's Marvin or
21 Louie. But we were able to put that together once
22 he identified himself out there.

23 Q. Did you have the occasion to speak to
24 him?

25 A. I did so. Louie was interviewed on

1 three different occasions during this
2 investigation. And I interviewed him the third
3 time.

4 Q. Okay. Well, go ahead and tell the
5 judge what is it that Mr. Johnson brings to this
6 investigation of significance.

7 A. Well, Mr. Johnson conducted -- there
8 were three different lineups that were conducted
9 where he provided positive identifications of
10 subjects involved in this incident. Furthermore,
11 much of his testimony when he provided us in his
12 statement was corroborating with the video
13 surveillance consistent with that. And also he
14 provided it in an audio component that the video
15 could not capture. And as the shots -- initial
16 shot was fired, there were subsequent shots after
17 that, but in between those shots, that first shot
18 and the rest of them, he heard two subjects that he
19 identified saying finish him, finish him or finish
20 it, finish it. And then more shots rang out and
21 that's when he also heard at least one of those
22 subjects say come on, come on, like hurry up.

23 Q. Okay. So a shot, then a pause, then
24 two individuals saying finish him, finish him,
25 finish him and then a volley of more shots?

1 A. That's correct.

2 Q. And who did he identify as being the
3 two individuals he said finish him, finish him,
4 finish him?

5 A. He identified Devin Middleton in a six
6 pack lineup and he also identified Davontay Bryant
7 in a six pack lineup the subjects that those words
8 came from.

9 Q. Okay. Now, did you interview another
10 witness who corroborated a shot, then a pause, then
11 more shots?

12 A. I did. That was a subject that was
13 completely on the other side of the incident
14 location, so he was traveling on the crosstown.
15 His name -- his first name is Hugo. His last name
16 starts with a D. I am drawing a blank at the
17 moment, but he heard -- he was waiting on a red
18 light in the right most lane. And he heard a
19 gunshot and then he started scanning the area, saw
20 more gunshots and then was able to direct his
21 attention to this alley adjacent to ■ Norman
22 Street.

23 Q. So the pause in the gunshot was
24 substantiated by Hugo Delatorre --

25 A. Delatorre, that's correct.

1 Q. -- statement. Okay. And so let's get
2 back to Louie. So when you presented him a lineup,
3 you presented him a lineup I assume of Devin
4 Middleton and Davontay Bryant?

5 A. Yes. Those were presented by Detective
6 Bailey.

7 Q. And he identified both as being
8 individuals who made those comments?

9 A. That's correct.

10 Q. Okay. Now, from his perspective, from
11 Marvin Johnson's perspective, could he have seen
12 the shooting?

13 A. No. So his front porch was facing the
14 roadway of Norman Street. And this was just down
15 about two or three houses from where his
16 perspective was. He was able to see that
17 altercation that occurred in the roadway, but the
18 fight transitioned into the alleyway, the side
19 yard, if you will, and that's -- he would have lost
20 perspective at that point.

21 Q. Okay. Did he see anyone come out of
22 the alleyway after the shooting?

23 A. He did.

24 Q. Who -- did he identify that individual?

25 A. He did identify that person. First he

1 described that person as wearing a raincoat, but
2 then ultimately once we were able to develop the
3 case, the investigation, he identified Te'Quan
4 Perry as the subject in the raincoat and the
5 subject -- the last subject that fled from the
6 alley.

7 Q. From the lineup?

8 A. That's correct.

9 Q. Okay. Now, as we were getting closer
10 to trial, were you asked by Investigator Haupt to
11 try to locate Marvin Johnson?

12 A. I was.

13 Q. Tell the judge what happened when you
14 made that attempt, if you did?

15 A. Made a couple of attempts. But made
16 contact at ■ Norman Street and met with several of
17 his relatives. One relative said that she hadn't
18 seen him in quite some time, that he possibly went
19 to Atlanta. Another relative stated that he comes
20 and goes and just wasn't able to keep track of him.
21 And so we served subpoenas on two of those family
22 members, but we were unable to serve a subpoena on
23 Louie, Mr. Johnson.

24 Q. And the Charleston Police Department,
25 we have talked about this, there's surveillance

1 cameras in that area; is that correct?

2 A. That's correct.

3 Q. Or Mr. Johnson's house?

4 A. Yes, sir.

5 Q. And you can actually manipulate and
6 control those cameras to a certain degree?

7 A. In a live view you have the ability to
8 remotely control the zoom and how it pans. But
9 it's only when it's a live view you can do that.

10 Q. Is it fair to say that there are people
11 with the Charleston Police Department actively
12 looking at that view trying to locate Mr. Johnson?

13 A. That's correct. So in preparation for
14 this trial Detective Bailey was logged into the
15 camera service and was routinely checking that area
16 just via camera. We also notified our field
17 intelligence unit which we usually task them with
18 trying to locate different subjects and they are
19 aware of that Louie -- we are trying to find Mr.
20 Johnson.

21 MR. OSBORNE: Your Honor, we have no
22 further questions.

23 THE COURT: Counselor, do you wish to
24 cross-examine the witness?

25 MR. DAVIS: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. DAVIS:

Q. Detective, you're the lead detective on this case fair to call you?

A. Yes, the case agent.

Q. Okay. So even though you had help from other detectives you would be aware of the progress of the investigation, right?

A. Yes, sir.

Q. Okay. And I think you just testified that even though there were three interviews you were only a part of the third interview with Mr. Johnson, right?

A. That is correct.

Q. Have you reviewed that third interview for preparation to testify in trial this week?

A. It's on my to do list in preparation for later in the week. I was focused on some pretrial testimony review.

Q. All right. You were not the only detective in that interview, correct?

A. In that third interview?

Q. We are talking August 29th, 2016, that would have been the third interview?

A. August 29th with Louie? I thought that

1 interview was conducted at the end of July. I
2 thought it was July 28th.

3 Q. All right. You have already testified
4 about the phrase finish it or finish him that Mr.
5 Johnson indicated, correct?

6 A. That's correct. That's what I obtained
7 in my third interview. Detective Bailey in earlier
8 interviews it was documented as finish him, finish
9 him. And in that third interview I was trying to
10 understand a little bit more and that's when
11 possibly finish it, finish it was being said.

12 Q. Before the third interview you were
13 made aware of the general nature of his statement
14 before you interviewed him in July or August,
15 correct?

16 A. That's correct.

17 Q. So again you were aware that the
18 understanding was he heard finish him, you wanted
19 to clarify that among other things in your
20 interview, correct?

21 A. Yes. I just wanted a better feel for
22 his statement altogether.

23 Q. So then you would have known that on
24 the previous interview he specifically indicated he
25 recognized Kevin's voice; do you recall that?

1 A. I do. I know that he referred to him
2 as Kevin.

3 Q. That's something else you wanted to
4 clear up, correct?

5 THE COURT: Well, are you going into
6 the factors concerning the case or are you going
7 into cross-examining him on the statements that
8 he --

9 MR. DAVIS: I am, Judge, because what
10 they must show is that the testimony is material to
11 support for action. I am getting anything out
12 whether it is actually material or not.

13 THE COURT: This is not a discovery
14 deposition.

15 MR. DAVIS: I understand.

16 THE COURT: Let's go to the factors
17 that are in the motion.

18 BY MR. DAVIS:

19 Q. The only name he identified as the one
20 who may have said finish it or finish him is Kevin
21 or Devin. He never mentions Davontay or Smash,
22 does he?

23 A. No. I believe that he said that they
24 were both saying that in unison for finish him,
25 finish him or if --

1 Q. He said two suspects. My point being
2 he never by name unlike Kevin or Devin says
3 Davontay or Smash? He never told you or any other
4 detective my client's name or street name, did he?

5 A. Well, he identified Davontay Bryant as
6 the second person that was with Devin Middleton and
7 said that they were saying that in unison so I'm --

8 Q. He said in a previous interview that
9 one was saying finish him, he mentioned Devin. Do
10 you recall that? Were you made aware of that by
11 another detective?

12 A. I would have to see that to refresh my
13 memory on that.

14 Q. In your interview with him he indicated
15 to you that he knew Kevin's voice, but the second
16 voice sounded like a girl? Did he not tell you
17 that during your interview?

18 A. He said he sounded like a female?

19 Q. Um-hmm.

20 A. I don't recall that.

21 Q. You have indicated that Detective
22 Bailey had been watching live cameras in the area
23 of Back to Green to see if Louie was around,
24 correct?

25 A. Yes, that he was.

1 Q. You were also told by family members
2 that he may have gone to Atlanta?

3 A. Yes. I'm not sure if that was Vivian
4 or Deloris. I'm not sure which one said that.

5 Q. Have you made any contact at all in
6 Atlanta or Georgia to follow up on that?

7 A. No, we didn't. We talked about
8 reaching out to the fusion center, but we were
9 getting very conflicting information because the
10 patrol officer said that he saw him days before
11 thought he did, but wasn't positive and so we were
12 just trying to work our local avenues.

13 MR. DAVIS: Your Honor, if I may have
14 just one moment.

15 THE COURT: Yes, sir.

16 (Attorney confers with client.)

17 MR. DAVIS: Thank you, Detective. No
18 other questions. Thank you very much.

19 THE COURT: Redirect?

20 MR. OSBORNE: No, Your Honor.

21 THE COURT: All right, sir. You may
22 step down. Thank you very much.

23 THE WITNESS: Thank you, Your Honor.

24 THE COURT: State may call its next
25 witness.

1 MR. OSBORNE: Your Honor, I think we
2 met the burden set forth in Rule 13 subsection (b)
3 if you would like to hear it.

4 THE COURT: Well, I'm looking at it.
5 Was there a subpoena issued for this witness?

6 MR. OSBORNE: There was not, Your
7 Honor.

8 THE COURT: I thought I heard there was
9 a subpoena issued. It was served on some family
10 members.

11 MR. OSBORNE: On family members there
12 was a subpoena -- there were subpoenas issued. We
13 attempted to serve Mr. Johnson, but could not
14 locate him.

15 THE COURT: So they have not been
16 served.

17 MR. OSBORNE: That's correct, Your
18 Honor. So our position is that takes us to
19 subsection (2).

20 THE COURT: Okay. All right. I will
21 hear from the State in support of their motion for
22 continuance.

23 MR. OSBORNE: So I have tracked the
24 elements of this section to say the first element,
25 the motion is not intended for delay. We don't

1 want to delay this case against Davontay Bryant.
2 We want to go forward against him. We have made
3 enormous attempts to locate Mr. Johnson and
4 continue to make attempts. The only reason why I
5 sent that e-mail on Wednesday was because quite
6 honestly I didn't want Mr. Perry's attorney or Mr.
7 Middleton's attorney to now be sandbagged Monday
8 morning and say we didn't know he was going to drop
9 the case against Davontay. I would have loved to
10 have three or four more days to try to locate him.

11 The second element is made solely
12 because we cannot safely go to trial without such
13 testimony. Well, Mr. Johnson is the one that gives
14 us the encouraging, the aiding, the abetting,
15 elements to hand of one hand of all. Without that
16 it's going to be difficult. Now, he does go hands
17 on -- Mr. Bryant goes hands on with the victim.
18 You can see the video where he jumps and tries to
19 punch him. It would be our contention, too, that a
20 jury could look at the video and see. He's the
21 last one that seems to push him into the alley
22 where the State contention's would be Te'Quan Perry
23 is waiting to gun him down.

24 So I think that -- I mean we talked
25 about this at length. It's close. But without

1 that finish him, finish him I think it's going to
2 be difficult and I don't think that we can go
3 forward successfully. And that brings us to the
4 last. Will satisfy the Court that this motion --
5 not intended as a delay, and made use of such
6 diligence to procure the testimony of the witness.
7 Detective Krasowski has said they have people that
8 are monitoring that video right now trying to
9 locate him. We just can't do it. And Detective
10 Krasowski has testified to meet subsection (2) that
11 the witness will say or what we believe he will say
12 if he does testify. Obviously you never know
13 exactly what he's going to say and his materiality
14 of the testimony regarding impeachment which I
15 think is what Mr. Davis is coming to isn't
16 envisioned in the section. It's just what we
17 believe how important that testimony would be to go
18 forward against that Defendant.

19 THE COURT: All right. Hear from Mr.
20 Davis.

21 MR. DAVIS: I have got the order maybe
22 slightly different than the State. Material to the
23 case, I would argue they have not shown that he was
24 material by the State. In argument there's a
25 video. It doesn't show the shooting, but it shows

1 the last physical -- there is physical contact
2 between the deceased and my client. That's for the
3 jury to interpret what is going on there and what
4 that means. So independent of this witness they
5 still have photographic video evidence that they
6 can still rely on. They can go without the
7 witness. They are not entitled to -- I will argue
8 to a perfect trial, but a realistic trial. They
9 have evidence to that element to conspiracy. If
10 the jury believes it we are in trouble. If they
11 don't hopefully we are going to be all right.

12 So I would argue they have not shown
13 that this singular witness is material to go
14 forward without him. I do not believe it is
15 intended for delay. We concede that point. I will
16 argue they have not provided sufficient proof of
17 due diligence to procure the testimony. They are
18 watching cameras in that neighborhood. They also
19 indicated they notified the field service unit, I
20 didn't get the language right. Those are the only
21 two proactive steps they have taken.

22 THE COURT: They said they sent people
23 out to talk to relatives.

24 MR. DAVIS: After they served the
25 subpoenas or attempted to serve the subpoenas.

1 Once they realized not right here right now, they
2 watched cameras, they have told the field units
3 hey, if you happen to see him, that would be great.
4 There has been no indication of a state-wide notice
5 to SLED, Georgia authorities or Atlanta
6 authorities. They have not shown, Judge, they have
7 used due diligence to procure the testimony. They
8 did proffer his testimony, but I would argue they
9 have still not met the subsection (b)(1). I know
10 those subpoena was served, but (b)(1) talks about
11 even when the subpoena is not served what must be
12 provided to the Court. They have not met that
13 burden or that element, Your Honor.

14 THE COURT: Do you have a copy of the
15 subpoenas?

16 MR. OSBORNE: We, do Your Honor. And
17 if Your Honor feels that the (b)(1) is appropriate
18 I can call Investigator Haupt who has sworn on the
19 back that he --

20 THE COURT: Show that to him.

21 MR. OSBORNE: (Handing.)

22 (Attorney confers with client.)

23 MR. DAVIS: Would you like to review
24 it?

25 THE COURT: Well, I'm going to ask him

1 if he wants to make it an exhibit for the hearing.

2 MR. OSBORNE: Yes, Your Honor. This
3 could be State's 300.

4 THE COURT: Any objection to it being
5 made an exhibit?

6 MR. DAVIS: No, Your Honor.

7 THE COURT: All right. If you will
8 pass it to the court reporter and have her mark it.
9 I would like to see a copy.

10 MR. OSBORNE: I have marked it as a
11 State's Exhibit.

12 THE COURT: How is it marked?

13 MR. OSBORNE: State's 300.

14 THE COURT: 300.

15 (State's Exhibit 300 marked.)

16 THE COURT: All right. Anything
17 further from the defense?

18 MR. DAVIS: So that Exhibit 300
19 purports to be the subpoena for Mr. Johnson and on
20 the back it is noted it was not served. The only
21 thing we would point out is that it was issued on
22 March 31st and then on the back says attempted I
23 believe multiple dates. So I'm not sure exact date
24 or how often, but that's been an active subpoena to
25 be served since the end of March, all of April, all

1 of May, and other than multiple dates the due
2 diligence part we would argue is still lacking.
3 Thank you, Your Honor.

4 THE COURT: All right. Reviewing the
5 rule in connection with the continuances, it
6 appears the primary focus of the Court should be as
7 to whether or not reasonable efforts were made to
8 procure the witness's presence, whether or not the
9 witness is of such importance to the State's case
10 that they can't safely go to trial without such
11 testimony. It doesn't talk in terms of the perfect
12 trial or whether or not they don't go to trial at
13 all. It uses the words "safely go to trial." So
14 it is not an absolute test. And it says due
15 diligence must have been had to try to procure the
16 witness and when a subpoena is issued a copy ought
17 to be presented. We have received that.

18 It does appear that was issued some
19 month and-a-half before the trial. It does appear
20 that there were multiple efforts to try to serve
21 that subpoena based on the information on the back.
22 Testimony indicated that efforts were made to try
23 to locate the witness at his residence or in the
24 neighborhood. The only information apparently
25 provided to the State was that he might be in

1 Atlanta. The last time I checked I believe Atlanta
2 has a population greater than the State of South
3 Carolina. So that doesn't narrow it down very
4 well, I don't think, as far as procuring his
5 presence.

6 I have not heard any information that
7 would indicate that the State is asking for this
8 solely for the purpose of delay. And that's again
9 one of the primary focuses of the rule. For those
10 reasons I will grant the State's request for a
11 continuance in the case. That case will be
12 continued.

13 Now, let's talk about the bond
14 situation.

15 MR. DAVIS: May I approach? I have
16 shown the State a copy of the bond or the order
17 from February 14th. I would ask you to rule on
18 that today, Judge, because the date on the order
19 from February 14th does say today's date.

20 I have drafted a proposed order that I
21 am showing to the State now that I would like you
22 to review. If you find it appropriate we would ask
23 that you sign it today. There is no need to wait
24 until the end of the week. If we don't start
25 together we are not going to join this trial on

1 Wednesday or Thursday.

2 THE COURT: I will hear from the State.

3 MR. OSBORNE: The only thing that I
4 would ask, Your Honor, and I realize what the order
5 says. I would ask that he remain in custody and I
6 know you haven't heard a lot of facts on the case
7 and until we can try these individuals and I'm not
8 going to sit here and tell the Court that we have
9 witnesses intimidation issues regarding Mr. Davis's
10 client. We do not. But we do have witness
11 intimidation and numerous ones from Mr. Perry and
12 Mr. Middleton. And our theory on this case was
13 that they were working in consort, that it was a
14 conspiracy. The rubber meets the road now. This
15 week is going to be when it happens so we would ask
16 he remain in custody five more days until we can
17 conclude the trial.

18 THE COURT: From the Defendant.

19 MR. DAVIS: Try it if you are so
20 concerned. Because if the only reason it is not
21 being tried is Mr. Johnson, that means they have no
22 other proof, Judge, as to that. They have numerous
23 phone records.

24 THE COURT: Well, I'm going to go by
25 the terms of the order issued by Judge Dennis. It

1 says if trial not held before June 12th which is
2 we're here, then the bond will be modified. So I'm
3 going to modify the bond at this time.

4 Now, I will as part of that bond and I
5 am not making any findings by doing this. To
6 preserve the sanctity of the trial that I am about
7 to conduct, I will make a condition of that bond
8 that your client is not to contact anyone involved
9 in the trial of the other two Defendants or
10 initiate such contact through other parties. Any
11 other safeguards the State requests concerning the
12 witnesses?

13 MR. OSBORNE: Well, can we put him on
14 house arrest just for this week?

15 THE COURT: Says PR bond. I can't
16 modify the terms of Judge Dennis' order. To the
17 extent that I will grant the no contact, I want to
18 point out to you, counselor, we don't have a lot of
19 history. You call anybody in the Seventh Circuit,
20 and I take no contact orders extremely seriously.
21 I will tell your client that if he fails to comply
22 with the no contact order, that means directly or
23 indirect contact, if he were to post on a social
24 media site something about this case or directed
25 towards someone in this case, if he were to send an

1 e-mail, a text message, if he were to send a friend
2 over to talk to someone, those are all indirect
3 forms of contact. The bonds man should make it a
4 requirement that he not have direct or indirect
5 contact with these people. I can assure him that
6 if I determine he has violated the terms of the no
7 contact order that I have issued he will go back to
8 jail and he won't get out until the case is ended
9 if needed.

10 Can I make that any clearer?

11 Sir, no contact to this judge means
12 exactly that. No contact. There are no excuses.
13 You see someone involved in this case on the
14 street, you turn and go in the opposite direction
15 without saying a word. Do you understand what I'm
16 saying?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: It's pretty simple. I have
19 a firm belief that people in America over the age
20 of 18 can control who they have contact with. So
21 that needs to be a condition of the bond before I
22 sign. Thank you.

23 MR. DAVIS: May we approach, Your
24 Honor?

25 THE COURT: Yes.

1 (Off-the-record conference.)

2 THE COURT: We have other motions that
3 we need to proceed with. I have received a request
4 to supplement the record. And I will hear from --
5 I see he's already standing. Yes, sir.

6 MR. APICELLA: I wanted to alert the
7 Court that my client needs to use the mens room.

8 THE COURT: Okay. We will take a
9 five-minute break.

10 (A recess transpired.)

11 MR. APICELLA: Your Honor, I did
12 communicate with chambers and the co-counsel and
13 the State requesting for supplement the record with
14 a case who we argue in the first part of my motion
15 to suppress Mr. Middleton's statements and also the
16 seizures of the cell phones and arguably his
17 clothes and the pepper spray based upon the police
18 conduct that day.

19 Now, Your Honor ruled that the
20 statement was voluntary and to the extent that what
21 he said before he invoked his right to counsel and
22 effectively ended his Miranda waiver is admissible.
23 That was your ruling.

24 THE COURT: Yes, sir.

25 MR. APICELLA: But we still have a

1 second part of the motion. I am respectfully
2 saying the first part is not really -- I would say
3 is not law of the case as to the issue of what was
4 my client's status during the course of that
5 interview where he said, and there was a transcript
6 so I am paraphrasing. He said, "I need a lawyer, I
7 am not going to talk any more." At that point we
8 have all agreed that he ended his Miranda waiver
9 and at that point anything he says is inadmissible
10 as evidence in the trial.

11 But what did happen after that is
12 relevant to what his status was on the issue of
13 whether or not the search warrant was lawfully
14 obtained. And the argument is, Judge, he said,
15 "I'm leaving" and the officer said, "You ain't
16 leaving."

17 So at that point, the legal question is
18 what is his status at that period. Is he in
19 custody? Is he under arrest?

20 THE COURT: Now, there weren't any
21 other statements taken or used from that point on.

22 MR. APICELLA: Well, we have agreed
23 because it's clear that when he said I want a
24 lawyer that the police couldn't ask him any
25 questions.

1 THE COURT: I don't think the State is
2 tendering or offering any other statements after
3 that point.

4 MR. APICELLA: That's correct. But
5 what happened, Judge, is my client wanted to leave
6 and the officers said you can't leave because we
7 are getting a search warrant for your clothes, the
8 pepper spray and the phones which were on the table
9 in front of the police.

10 THE COURT: Yes, sir.

11 MR. APICELLA: Detective Bailey left
12 and they brought in another officer who was to keep
13 custody of my client while they went to apply for a
14 search warrant. And during that period --

15 THE COURT: Just one second. We seem
16 to be skipping into a new motion.

17 MR. APICELLA: Yes.

18 THE COURT: My understanding is your
19 requesting was to be able to supplement the record
20 of the motion concerning the statements that I had
21 already ruled could come in by using the case that
22 came down to the Fourth Circuit last week.

23 MR. APICELLA: You are correct.

24 THE COURT: Let's deal with that and
25 then we will deal with the next. We are here all

1 day if we have to be so we are going to get to
2 those other motions as soon as possible.

3 MR. APICELLA: So the case is United
4 States v. Glidden. I believe it came down the day
5 after we argued on June 5th.

6 THE COURT: I read it.

7 MR. APICELLA: On June 6th I read the
8 case and the case the facts are similar. I would
9 even go so far as to say very similar. Had I known
10 the case was going to come down I would have used
11 it. I didn't until I saw it on my e-mail from the
12 court. But be that as it may, in our case we have
13 Officer Bailey telling my client --

14 THE COURT: Does the State have any
15 objection to the Court considering this case in
16 regard to the issue?

17 MR. OSBORNE: No, Your Honor.

18 THE COURT: Okay. So I will allow you
19 to supplement it and then if you want to make
20 additional argument based on that case I'll
21 certainly be glad to hear you.

22 MR. APICELLA: Thank you, Judge,
23 because I think the issues spill over into the next
24 part of the motion as to the --

25 THE COURT: We will see about that. I

1 don't know where we are going from here. You folks
2 know a lot more about this case than I do. But
3 let's talk about this in relationship to my
4 previous ruling.

5 MR. APICELLA: Well, okay. In relation
6 to your previous ruling, Judge, in our case
7 Detective Bailey said that he invited Mr. Middleton
8 to come to the police station to answer questions
9 about the homicide.

10 THE COURT: Yes, sir.

11 MR. APICELLA: Mr. Middleton got in the
12 car voluntarily and agreed to go to the police
13 station. Once there --

14 THE COURT: I think he went in a police
15 vehicle.

16 MR. APICELLA: Police vehicle, yes.
17 Once at the police station then they sat him down
18 and Detective Bailey said, "Listen, you are not in
19 any trouble."

20 So my argument was that he was in
21 trouble. He was a suspect in a murder case and in
22 fact --

23 THE COURT: The difference between what
24 happened in this case and the case you submitted,
25 the case you submitted they already had a warrant

1 for his arrest.

2 MR. APICELLA: They did.

3 THE COURT: For the robberies in that
4 case. It wasn't a murder. In this case it was not
5 an outstanding warrant for your client's arrest.

6 MR. APICELLA: There was not. At some
7 point they decided to get a search warrant and
8 that's --

9 THE COURT: Not a warrant for his
10 arrest.

11 MR. APICELLA: No.

12 THE COURT: I am trying to
13 differentiate and see the similarities between this
14 case and the one that we have got here.

15 MR. APICELLA: Similarities are the use
16 of the exact same phrase "you're not in any
17 trouble."

18 THE COURT: But at that time in the
19 case you submitted, the new case, that Defendant
20 was. He was named in an arrest warrant that was in
21 the hand of the detective.

22 MR. APICELLA: Correct.

23 THE COURT: To be served, and in this
24 case your client was in the police station without
25 any warrant having been issued against him. He

1 certainly was a person of interest in the
2 investigation, he was being asked questions about
3 it.

4 MR. APICELLA: He was. At some point,
5 this is the key issue, I submit, that we have to
6 determine at a hearing, is when did the police
7 decide that they were going to get a search
8 warrant.

9 THE COURT: Well, my inquiry here is
10 given the totality of the circumstances that
11 existed at the time that he was questioned at the
12 police station, would a reasonable person in the
13 position of your client have felt that they were in
14 custody and therefore some coercion resulted from
15 that.

16 MR. APICELLA: Exactly, Judge.

17 THE COURT: That's what I am supposed
18 to do.

19 MR. APICELLA: Exactly.

20 THE COURT: So I am trying to put
21 himself in his shoes. Now, I'm not going imbue to
22 your client any knowledge that the investigator or
23 the detective had in his mind unless it was
24 communicated to your client in some fashion.

25 MR. APICELLA: Exactly, Judge.

1 THE COURT: I didn't hear that it was.

2 MR. APICELLA: Well, exactly. And
3 indeed what happened was my client said, "I'm not
4 going to answer any more questions. I'm going to
5 leave."

6 At which point the police said you
7 ain't leaving. So the question is at that point my
8 client --

9 THE COURT: He invoked his
10 Constitutional right which he has a Constitutional
11 right to do.

12 MR. APICELLA: He also has a right to
13 leave if he is not under arrest.

14 THE COURT: Well --

15 MR. APICELLA: This whole probable
16 cause to arrest him.

17 THE COURT: I don't know what effect
18 that has on the statements that he's already given
19 which is what I have ruled on so far.

20 MR. APICELLA: This is a separate issue
21 now.

22 THE COURT: Again you're asking to
23 supplement the prior argument. That's what your
24 e-mail to me said. And let's deal with that now.
25 We are going to get to those next arguments. You

1 keep wanting to jump over to other motions and we
2 are going to get there.

3 MR. APICELLA: I thought you already
4 granted my request to supplement.

5 THE COURT: I did grant your request to
6 supplement. But you want me to reconsider my
7 ruling?

8 MR. APICELLA: I would ask you to
9 reconsider.

10 THE COURT: Then let's talk about that
11 ruling. Let's not talk about serving warrants and
12 things that -- I have not ruled on any search
13 warrants.

14 MR. APICELLA: Very well.

15 THE COURT: Let's try to focus on what
16 I have done so far so I can hopefully move on.
17 There we go.

18 MR. APICELLA: As Your Honor has
19 correctly and astutely pointed out, that's a long
20 opinion to read that the police did not have
21 probable cause to arrest him. However, he was a
22 suspect. My position was when I argue the motion
23 now is saying he was not in trouble is a
24 misstatement in our case designed to induce him to
25 waive a constitutional right which is and in

1 Gliddon it is the same language.

2 THE COURT: Which again what you are
3 looking at is the totality of the circumstances.
4 And there's no question that police -- I can't
5 recall exactly how the witness characterized it,
6 but he said I do think that he was a person of
7 interest. He was being questioned about the
8 incident. I think they questioned him at the scene
9 as I recall. When the police showed up they at
10 least talked to him. He was seen at the scene.

11 MR. APICELLA: He was seen at the
12 scene.

13 THE COURT: So I would suspect he might
14 be someone they might want to ask questions of. It
15 wouldn't be surprising to me if I were him that the
16 police would come ask me some more questions if I
17 were at the scene when somebody got shot. So that
18 wouldn't be surprising to me. I am trying to look
19 at it from your client's perspective because I
20 think that's what I am supposed to do in lieu of
21 what he would have known or felt, whether he would
22 have felt coerced.

23 Now, the case you submitted what they
24 did was they had seized this guy's car. They had
25 his car because it had been used by some other

1 people in a burglary and they told him he was not
2 going to be able to get his car back unless he
3 talked to them. This didn't happen in this case.

4 MR. APICELLA: Did not.

5 THE COURT: So that's not -- so when
6 you are looking at the totality of the
7 circumstances, I didn't see that it exactly fit
8 into our case.

9 MR. APICELLA: It doesn't fit exactly,
10 but I am asking you to take into consideration as
11 you put the facts of this case into the hopper to
12 decide whether or not my client at some point felt
13 that his liberty was restricted and he was in
14 custody. I submit that after he said I'm not
15 answering any more questions, I want a lawyer, and
16 I want to leave when the police officer said --

17 THE COURT: Any statements he gave
18 after that the State is not offering so I'm not
19 letting it in.

20 MR. APICELLA: Right.

21 THE COURT: So we are in agreement on
22 those statements that may have occurred after that.
23 So my only question is how would it affect my prior
24 ruling. And that only dealt with things that
25 happened before he invoked his rights. And I want

1 to be sure we uphold that invocation of rights.

2 MR. APICELLA: My argument, Judge, is
3 it's a most recent court discourse on this subject.
4 It's the law has really not changed since 1992 when
5 I cited United States v. Anderson.

6 THE COURT: Again, you are taking the
7 totality of the circumstances in these cases. I
8 will hear from the State on this. Anything further
9 you want to state on this?

10 MR. OSBORNE: No, Your Honor. The
11 custody issue goes to Miranda. He was advised of
12 his Miranda from his perspective. Mr. Apicella is
13 right. We do agree at that moment he was not free
14 to go, but everything prior to that he was.

15 THE COURT: Okay. My ruling will
16 remain the same. I will allow you to supplement
17 the record by adding the case of U.S. v. Glidden,
18 so that's been noted. The Court has reviewed it,
19 but does not change its prior ruling.

20 MR. APICELLA: Thank you, Judge.

21 THE COURT: Now, the State was in the
22 process of presenting evidence concerning the
23 motions that are pending before the Court. I'm not
24 sure we got finished with you presenting that
25 evidence. So help me with where you think we are

1 as far as the information you were providing.

2 MR. OSBORNE: I think, Your Honor --

3 THE COURT: Do you have that order
4 ready?

5 MR. DAVIS: We are working on it.

6 MR. OSBORNE: We did end with, and I
7 think you have heard all of our arguments and our
8 brief concerning our ability to utilize the
9 Section 19-5-20 which will allow us to enter in the
10 business records from Sprint, T-Mobile, Facebook
11 without satisfying the condition precedent of
12 calling a custodian of records to authenticate
13 those records.

14 THE COURT: Yes, sir.

15 MR. OSBORNE: The last issue that we
16 are left with.

17 THE COURT: I sent an e-mail indicating
18 that I would make a ruling on that at this time.
19 Anything further the defense wants to raise
20 concerning that issue?

21 Now, let's define the issues so we
22 don't jump off what we are talking about. The
23 issue that's before me is whether or not the
24 records from Facebook -- help me, Solicitor, any
25 other records?

1 MR. OSBORNE: There is. There is
2 Facebook records from the Taliban mbmb user name,
3 the user name GeezQuez Otf and T-Mobile records and
4 record from Sprint.

5 THE COURT: And my understanding is you
6 have certifications from the keepers of those
7 records on both of those documents.

8 MR. OSBORNE: We do all those
9 documents, yes, Your Honor.

10 THE COURT: All right. I will hear
11 from the defense. You wish to raise any other
12 matters or argue it further?

13 MS. VAN PALA: Thank you, Your Honor.
14 May it please the Court, Tamara Van Pala. Thank
15 you, Judge. Not to belabor the point, but if I can
16 just make a couple arguments on the specific issue
17 of whether the Facebook records and phone records
18 are specifically self-proving and
19 self-authenticating business records.

20 They are not trustworthy business
21 records. The custodian of records and the
22 custodian of records affidavit and law enforcement
23 who the solicitor would seek to authenticate these
24 records through do not have personal knowledge.
25 The records are not self-authenticating because

1 they are not -- the whole purpose behind having
2 business records and records of this like that are
3 to be self-authenticating through a custodian of
4 records is because they are proven to be verified
5 and trustworthy. Also based on the accuracy,
6 continuity and regularity of businesses.

7 Businesses depend on the accuracy of
8 these records, records such as volume, transmission
9 for purposes of payroll, revenue.

10 The custodian does not have knowledge
11 of the transmission. They only know about the
12 manner of the transmission. There is nothing else
13 about what the records are. As part of the
14 Defendant --

15 THE COURT: Now, when we argued this
16 motion I specifically limited the issue that was
17 before us not to whether or not these documents are
18 admissible later on, but whether or not he would be
19 -- the State would be required to produce a witness
20 to authenticate those records. The only question
21 is whether authentication is required. Whether
22 they are admissible for other purposes later on, I
23 indicated you have a right to raise those
24 objections as they come along. So I am more
25 concerned with the authentication issue.

1 MS. VAN PALA: Yes, Your Honor. And
2 like I said before, I think that as an umbrella
3 idea of authentication they are -- in order to
4 admit the records, which is what the State is
5 ultimately seeking here, they have to show that
6 there is some kind of accuracy that makes these
7 records worthy of being self-proving.

8 THE COURT: Yes, ma'am. I agree with
9 you, but I know that's not the issue I am deciding
10 right now. Later on when they put in the context
11 of whatever testimony they are offering, I'm sure
12 that they will be -- should be in a position to
13 establish what the relevance is, they will have to
14 somehow prove the author of them, where they came
15 from, that sort of thing. So there's a lot of
16 things that they would still have to show before
17 they become admissible into evidence.

18 Again, the question is whether or not
19 he has to produce the witness from California to
20 come here to say those are the records from
21 Facebook when they have admitted those records with
22 a statement that says those are the records from
23 Facebook.

24 MS. VAN PALA: Yes, Your Honor. And
25 finally, if I can just supplement by citing to

1 Melendez-Diaz which is a United States Supreme
2 Court court case which I believe is on point as to
3 the self-authenticating issue. Further cases that
4 I have --

5 THE COURT: Do you have a copy of that
6 handy?

7 MS. VAN PALA: Yes, Your Honor, I do.
8 Court's indulgence.

9 THE COURT: Yes. Seems like we may
10 have wasted last Monday. I think we are rearguing
11 everything.

12 MS. VAN PALA: Well, I was just going
13 to site a few more cases.

14 THE COURT: I am not preventing you
15 from siting anything. I am just pointing out that
16 last Monday we were supposed to be arguing these
17 and I thought we had our whole argument.

18 MS. VAN PALA: I apologize, Your Honor.
19 I think I paraphrased the cases and I specifically
20 didn't hand them up to you. I apologize. I don't
21 have them at the ready right now. I also will hand
22 you a copy of Hassan, Judge, Griffen, Shaw and
23 specifically as to whether the phone records are
24 self-authenticating. I believe a South Carolina
25 case on point was Whatley. So I'll also hand that

1 up. Thank you, Your Honor.

2 THE COURT: Do you want me to read
3 these right now or do you want to argue?

4 MS. VAN PALA: If I understanding your
5 ruling, my argument -- I think you're asking me to
6 put -- to complete the rest of my argument at the
7 time that the State seeks to admit the records. I
8 filed a motion to suppress all of these records.
9 And the basis of my motion to suppress and exclude
10 them from evidence is based on these cases and it
11 is a relevance argument, authentication argument,
12 foundation argument, hearsay argument and character
13 argument and best evidence rule argument.

14 THE COURT: And I have the right not to
15 rule until it comes up at trial.

16 MS. VAN PALA: Thank you.

17 THE COURT: Now, let's go back to the
18 issue at hand. Ma'am, stand back up. I am not
19 through talking to you.

20 MS. VAN PALA: I apologize, Your Honor.

21 THE COURT: Thank you. Now, are these
22 cases all on authentication issue?

23 MS. VAN PALA: They address the
24 authentication issue. They do not --

25 THE COURT: Tell me the importance of

1 them. I would like to hear it from you.

2 MS. VAN PALA: They do not specifically
3 address the statute which the solicitor is
4 referring to and the specific nature of the statute
5 that --

6 THE COURT: I haven't found anything
7 that addresses the statute.

8 MS. VAN PALA: That was my argument
9 from last week, Your Honor. So the cases site the
10 self-authenticating issue as part of the larger
11 issue as to whether they are admissible as
12 self-authenticating records or as --

13 THE COURT: Under this statute?

14 MS. VAN PALA: Not under the statute.

15 THE COURT: So what are these?

16 MS. VAN PALA: These cases support my
17 argument that they're inadmissible. My motion in
18 limine.

19 THE COURT: I ruled that they are
20 admissible.

21 MS. VAN PALA: Right.

22 THE COURT: It's kind of hard to pin
23 you down on this. I am trying to get to where I
24 can understand exactly what you're arguing in these
25 cases. You handed up about a three-quarters of an

1 inch thick stack of cases and I assume you reviewed
2 them since you handed them up and that you would be
3 able to tell me how they relate to the statute and
4 whether or not this statute would make those
5 document self-authenticating. I thought we
6 completed that argument on Monday. But apparently
7 not.

8 MS. VAN PALA: No, I apologize. They
9 do not relate specifically to the statute. They
10 relate to my general argument.

11 THE COURT: Which is?

12 MS. VAN PALA: That they are
13 inadmissible.

14 THE COURT: You are not seeking to
15 admit anything.

16 MS. VAN PALA: It is the subject of my
17 motion in limine and I just wanted to put it -- I
18 just wanted that to be clear.

19 THE COURT: State wish to make any
20 comment on these cases we are talking about?

21 MR. OSBORNE: No, because that deals
22 with another issue down the road.

23 THE COURT: That's what I am thinking.
24 My ruling will remain. I will find that they are
25 self-authenticating under the statute which is code

1 Section 19-5-510 and 520 and therefore there will
2 not be a need for a separate authenticating
3 witness. Now, where are we, Mr. Solicitor?

4 MR. OSBORNE: So, Your Honor, I have
5 given each defense counsel -- Your Honor, may I
6 approach?

7 THE COURT: Yes.

8 MR. OSBORNE: I have printed out each
9 of their motions and I have ordered them so we can
10 all keep track on the same sheet.

11 THE COURT: Very good, thank you.

12 MR. OSBORNE: I think we can address
13 many of them or give you the State's position
14 regarding many of these motions and hopefully we
15 move through them kind of quickly.

16 THE COURT: Very good.

17 MR. OSBORNE: The first motion is by
18 Mr. Apicella, motion to determine the admissibility
19 of prior convictions. We do not seek to admit any
20 of the Defendant's prior convictions if they were
21 to testify or for any other purpose.

22 THE COURT: That satisfy your motion,
23 sir?

24 MR. APICELLA: It does.

25 THE COURT: Stand up when you talk to

1 me.

2 MR. APICELLA: Yes, sir.

3 THE COURT: Thank you.

4 MR. OSBORNE: This one is a little more
5 difficult motion, to exclude testimony of prior bad
6 acts. I would tend to say that we are not going to
7 introduce any of that evidence, although a traffic
8 stop was supposedly a bad act or at least it was
9 interpreted that way. So it's a little difficult
10 for me to say. But I can tell you from our point
11 of view we don't have any prior bad acts we are
12 seeking to introduce.

13 THE COURT: Is that Mr. Apicella's
14 motion? Sir, does that satisfy your motion?

15 MR. APICELLA: Yes, sir.

16 THE COURT: Thank you.

17 MR. OSBORNE: The next is also from Mr.
18 Apicella. Motion to join co-defendant's pretrial
19 motion in limine to the extent that it applies that
20 are not inconsistent with our defense. States
21 takes no position as on that.

22 THE COURT: Okay.

23 MR. OSBORNE: The next, motion to
24 suppress statements and physical evidence taken
25 from Mr. Middleton on March 23rd, cell phone

1 records that were the fruit of the unlawful search.
2 We have Detective Krasowski here. He can testify
3 because he's the affiant of that search warrant.
4 And I just would point out that the challenge --
5 it's my reading of the South Carolina law says the
6 challenge of a search warrant on its face, the
7 defense just doesn't get a second bite a the apple
8 simply because they ask for it. They have to
9 articulate something in the affidavit that improper
10 or incorrect. I believe Mr. Apicella has done
11 that. There is a section of the warrant that I
12 believe even that perhaps isn't proper in there or
13 for the magistrate to consider, even if you were to
14 take that out it's still valid, the rest of the
15 warrant is. So I think a hearing is necessary to
16 determine whether the search warrant to seize Devin
17 Middleton's property was valid.

18 THE COURT: You agree with that
19 characterization of that motion, Mr. Apicella?

20 MR. APICELLA: Yes, I do, Your Honor.

21 THE COURT: I am noting that we are
22 probably going to need to take a break for lunch at
23 this point in time. We will come back and begin
24 with that hearing. I am looking at the clock. We
25 will start back about 1:15. So -- 2:15. 2:15. Be

1 back in the courtroom. We will be in a position to
2 start with that motion at that time. Thank you
3 very much.

4 (Lunch recess from 12:49 p.m. to
5 2:20 p.m.)

6 THE COURT: When we broke earlier I
7 think we were ready to pursue the motion to
8 suppress statements and physical evidence taken
9 from Mr. Middleton.

10 MR. OSBORNE: Yes, Your Honor.

11 THE COURT: You may proceed, counsel.

12 MR. OSBORNE: State calls Detective
13 Paul Krasowski.

14 THE COURT: Come forward and be sworn,
15 sir.

16 PAUL KRASOWSKI

17 having been duly sworn, testifies as follows:

18 THE CLERK: Can you state your first
19 and last name and spell your last name for the
20 record.

21 THE WITNESS: My first name is Paul, my
22 last name is spelled K-R-A-S-O-W-S-K-I.

23 DIRECT EXAMINATION

24 BY MR. OSBORNE:

25 Q. Briefly, Detective Krasowski, where do

1 you work?

2 A. For the City of Charleston Police
3 Department.

4 Q. And what is your assignment there?

5 A. I am a detective in the violent crimes
6 unit also known as the homicide unit and I am also
7 an auxiliary polygraph examiner.

8 Q. Okay. And in reference to this
9 investigation into the murder of Brandon
10 Washington, what was your role in that case?

11 A. I became the case agent in this case.
12 My unit was called out to the scene. It occurred
13 shortly after we left -- we all left work and we
14 were all called back in and we all responded to the
15 scene and I was later assigned the case early into
16 the investigation.

17 Q. Now, where we left off the other day
18 with Detective Thomas Bailey's testimony, he was
19 interviewing Devin Middleton. Were you aware that
20 that interview was taking place?

21 A. I was -- simultaneously I was
22 interviewing somebody else. So I came out of the
23 room and he briefed me on what was going on at
24 whatever point that was.

25 Q. Okay. Now, when he came out and he

1 briefed you as to what was going on or what he was
2 learning at that point after -- well, first of all,
3 what did he tell you?

4 A. I can't remember precisely. I think it
5 was actually at that point that I was briefed that
6 Devin requested an attorney at that point. But
7 Detective Bailey essentially said that he admitted
8 to wearing the same clothing that he wore on the
9 day of the incident. That when contact was made
10 with him initially prior to coming down to the
11 station there was pepper spray on him. And during
12 his statement he advised that he never -- he wasn't
13 part of the shooting, he wasn't part of anything,
14 but he may have pointed a can of pepper spray at
15 the victim during that time before the shots rang
16 out.

17 Q. I am showing you what's been marked --
18 MR. APICELLA: Can I go to the jury
19 box?

20 THE COURT: As long as the Solicitor
21 doesn't object I don't object.

22 MR. OSBORNE: No, Your Honor.
23 BY MR. OSBORNE:

24 Q. Showing you what's been marked as
25 State's Exhibit 86. Can you take a look at that

1 and tell me if you recognize it.

2 A. Yes. This is the search warrant that I
3 drafted with the information that was learned
4 during Devin Middleton's statement.

5 Q. Okay. Let's go through the search
6 warrant. Okay. The front page of the search
7 warrant?

8 A. Yes, that's correct.

9 Q. That's your name?

10 A. Yes.

11 Q. And the date?

12 A. Date is March 25th, 2015.

13 Q. All right. Let's go through the search
14 warrant itself. Can you read it okay?

15 A. I can.

16 Q. All right. What is the person to be
17 searched? What do you have listed?

18 A. For description of premises what's to
19 be searched I listed person of Devin Middleton, Jr.
20 Date of birth of [REDACTED] of '93. And I also noted
21 that Devin Middleton, Jr. is currently located at
22 180 Lockwood Boulevard which is CPD headquarters.

23 Q. In search of property what did you
24 list?

25 A. Clothing worn by Devin Middleton which

1 consisted of multi-colored Nike shoes, blue jeans,
2 black T-shirt and black hooded sweatshirt. Also to
3 include 2 LG cellular telephones serviced by
4 T-Mobile. The first one the serial number
5 409CYB116025, that was a model LGD415. The second
6 serial number was 411CYUK599742-5 and that was
7 model LGD 1415 and also one can of paper spray
8 located on his person.

9 Q. But you or Detective Bailey were
10 already in possession of the pepper spray; is that
11 correct?

12 A. Yes. Yes. Detective Bailey seized
13 that for officer safety reasons.

14 Q. Okay. And down here we have a couple
15 signatures or we have one signature. Do you recall
16 which judge you presented this to?

17 A. I believe that was Judge Mendelson.

18 Q. And he was a magistrate judge?

19 A. That's correct.

20 Q. All right. So I'm going to skip ahead
21 to that portion. When you met with Judge Mendleton
22 did he swear you in to the facts of this warrant?

23 A. He did.

24 Q. And that's his signature?

25 A. That's correct.

1 Q. That's the search warrant. We will
2 move on to the affidavit. That's your name at the
3 top?

4 A. That's correct.

5 Q. And you just repeated the same
6 description of property as well as the premises to
7 be searched?

8 A. That's correct.

9 Q. Actually got it backwards?

10 A. It's just the opposite.

11 Q. All right. Let's go through it. What
12 did you say was the reason that you felt that you
13 needed to search Mr. Middleton?

14 A. Okay. The affidavit portion states
15 that on that March 23rd, 2015, at approximately
16 1750 hours CP officers responded to the area of ■
17 Norman Street which is located in the city in
18 County of Charleston in reference to shots fired.
19 Upon arrival CPD officers located the victim
20 Brandon Washington lying unconscious alongside the
21 residence of ■ Norman Street suffering from
22 multiple gunshot wounds. EMS responded to the
23 victim and declared him deceased immediately. City
24 of Charleston video surveillance cameras captures a
25 portion of the incident which is summarized below.

1 Brandon was on the sidewalk in front of ■ Norman
2 Street prior to being murdered and was involved in
3 an altercation with several other black male
4 subjects. See attachment A.

5 Q. Okay. Before we move into that whose
6 signature is that above affiant?

7 A. That's my signature.

8 Q. Whose signature is that above the
9 judge?

10 A. That's Judge Mendelson's.

11 Q. The date?

12 A. It's March 25th of 2015.

13 Q. Okay. Moving on ahead to attachment A.
14 Do you recognize that?

15 A. I can. So this is attachment A. This
16 is continued from what we just read. Continues.
17 "This altercation escalated when Brandon was
18 forcefully pushed off the sidewalk and into the
19 roadway. Several other subjects surrounded
20 Brandon. Brandon attempted to grab a portion of a
21 bed frame that had been curbside and raised it
22 above his head as an apparent means to defend
23 himself. Brandon did not swing" -- typo -- "to
24 board at anyone and dropped it seconds after
25 picking it up. The physical altercation continued

1 as Brandon and others jockeyed in position while in
2 the roadway. Brandon was then lured into an alley
3 between two houses and depicted Brandon raising
4 both hands above his head as if someone threatened
5 him with a firearm.

6 The camera panned away and during its
7 next rotation it captured a subject that was
8 believed to be the shooter flee the alleyway and
9 run through the neighborhood. Across this next
10 camera pan it captured some of the black males that
11 participated in the altercation observing the
12 police response from across the street from the
13 incident location.

14 Responding officers made contact with
15 these subjects and identified one as Devin
16 Middleton. Detectives backtracked the recording
17 and were able to determine that Devin confronted
18 Brandon while in the roadway and pointed an unknown
19 dark object at him. The video also depicts Devin
20 pull out what appeared to be his cellular phone and
21 began using it during the police response."

22 Q. Let me stop you right there. I'm going
23 to move now to State's Exhibit 9. Your affidavit
24 stated that you saw Devin Middleton using a
25 cellular phone?

1 A. Yes, that was at 6:01 and --

2 Q. Now, everything that you have mentioned
3 up to this point is based on your observations from
4 this camera?

5 A. That's correct, Ashton and Norman
6 Street camera.

7 Q. So I'm going to play it from only a few
8 seconds at 5:59:06. Guy in the white shirt is
9 Brandon?

10 A. That's correct.

11 Q. Okay. Now, you mentioned an object.
12 Is that Devin right there with the arm extended?

13 A. Yes. Might be both arms extended. And
14 when you play that around you could see that
15 there's like either a hand cupped or something
16 around something.

17 Q. (Video played.) I'm going to flip
18 ahead. That's Devin and Te'Quan still across the
19 street?

20 A. Yep, Devin is a little behind him.

21 Q. Head to the next image. We are at
22 6:01:18 now. Okay. When you mentioned in your
23 affidavit that you saw Devin on a cell phone after
24 the shooting is that what you were referring to?

25 A. Yes. Appears that he's operating a

1 cell phone there.

2 Q. Okay. Okay. You ended with the police
3 response.

4 A. "On 3-25-15 Devin Middleton provided a
5 statement post-Miranda that admitted to being part
6 of the altercation that took place with the victim.
7 Devin was high on Molly an X, therefore he claimed
8 that the event was difficult for him to recall. He
9 admitted to possibly brandishing a bottle of pepper
10 spray during the altercation but had no further
11 involvement. Devin also advised that he wore the
12 same clothing that he wore during his involvement
13 in this altercation with Brandon. Detective
14 Krasowski had frequent contact with Brandon's
15 mother Peggy Mitchum throughout the investigation
16 and she heard rumors that Brandon had been set up
17 to be killed. She heard that he was called to the
18 area and the subject acted in concert by attacking
19 Brandon and then lured him into the alley where he
20 was shot and killed. Detectives were able to
21 obtain the identities of several other subjects
22 associated with the physical altercation against
23 Brandon through witness statements. This affiant
24 believes most of the identified subjects routinely
25 hang out together and have been documented through

1 field contacts and CP records management system.
2 Furthermore, video surveillance from before the
3 incident also captured the group hanging out
4 together. This affiant believes that the actions
5 of the subject depicted on video surveillance
6 suggest that the subjects, including Devin
7 Middleton, acted in concert during their assault on
8 Brandon. Their coordinated effort ultimately led
9 to the murder of Brandon. Based on the rumors that
10 surfaced about Brandon's murder being planned as
11 well as the close relationship between the group of
12 black males, it's likely that their efforts were
13 discussed electronically through cellular phones.
14 Through training and experience this affiant knows
15 that such efforts are usually relayed though text
16 messages which are generally stored in electronic
17 devices such as telephones.

18 Based on Devin Middleton's admission
19 and participating in the attack of Brandon, his
20 close relationship with other participants on the
21 day of the incident as well as historical records
22 to further suggest their coordinated efforts,
23 sufficient probable cause exists to seize the
24 cellular phones from Devin Middleton to further
25 this investigation. Devin Middleton is currently

1 located at CPD headquarters and in possession of
2 two cellular phones and pepper spray."

3 Q. Underneath that above the judge's
4 signature who signed that?

5 A. The judge's signature I believe is
6 Judge Mendelson.

7 Q. And that was on March 25th?

8 A. 2015.

9 Q. Is that your signature there?

10 A. That's my signature as the affiant.

11 Q. Okay. After the warrant was signed
12 what did you do then?

13 A. I notified Detective Bailey that the
14 warrant was signed and he went through the process
15 of seizing those objects and the clothing.

16 Q. Your Honor, I may approach?

17 THE COURT: You may.

18 BY MR. OSBORNE:

19 Q. I am showing you State's Exhibit 99,
20 91, 88 and 87. Tell me if you recognize those?

21 A. I do. So those were the two cellular
22 phones that we talked about. And that was 91 and
23 90. 88 is the Nike multi-colored shoes as well as
24 dark blue jeans. And 87 is a black T-shirt and a
25 black zipped up or a zip hoodie.

1 Q. And all these items were taken from
2 Devin Middleton on March the 25th?

3 A. That's correct.

4 Q. And they were seized from him after the
5 search warrant was signed by the judge?

6 A. That's correct.

7 Q. Okay. After these items were seized
8 from Mr. Middleton what happened to him?

9 A. He was ultimately released at that
10 point.

11 Q. All right. And I believe Detective
12 Bailey already testified he left in a paper blue
13 suit that was provided to him?

14 A. That's correct. I can't recall if he
15 was -- I want to say that he left the -- refused to
16 ride. I'm not positive on that.

17 Q. Okay. Now, turn to the next page. And
18 this is the return?

19 A. That's correct.

20 Q. For the search warrant. Okay. Go
21 ahead and read what it says as far as executing the
22 warrant.

23 A. "I received the attached search
24 warrant" and the date is 3-25-2015," and have
25 executed it as follows. On 3-25-2015 at

1 14:58 o'clock p.m. I searched the person described
2 in the warrant in the premises. I left a copy of
3 the warrant with Devin Middleton, name of person
4 searched or at the place of search. And together
5 with the receipt of this item seized following is
6 an inventory of property taken pursuant to the
7 warrant."

8 And listed below that is clothing and
9 listed as a black colored T-shirt, black jeans and
10 multi-colored sneakers. And there is another title
11 of phones. No. 1 was an LG touchscreen phone with
12 a serial number of 409CYB11625, the second an LG
13 touchscreen phone with a serial number of
14 411CYUK599742-5 and pepper spray.

15 Q. And the inventory was made in the
16 presence of you and Detective Bailey?

17 A. That's correct.

18 Q. And again that's the judge's signature
19 on March 25th above the signature of judge?

20 A. That's correct.

21 Q. And is that your signature above
22 signature of officer executing the warrant?

23 A. Yes, sir.

24 MR. OSBORNE: No further questions,
25 Your Honor, with reference to this search warrant.

1 THE COURT: You wish to cross-examine?

2 MR. APICELLA: I do, Judge.

3 THE COURT: Yes, sir.

4 CROSS-EXAMINATION

5 BY MR. APICELLA:

6 Q. Do you have a hard copy of that warrant
7 in front of you or do you need to rely on the
8 overhead projector --

9 A. I would have to rely on the overhead
10 projector.

11 Q. -- to answer questions about it. So
12 the homicide occurred on March 23rd, 2015, correct?

13 A. That's correct.

14 Q. About 6:00 in the evening, thereabouts?

15 A. Yes, thereabouts.

16 Q. And the search warrant affidavit was
17 prepared on March 25th, 2015, correct?

18 A. That's correct.

19 Q. And did you prepare the affidavit?

20 A. Yes, I did.

21 Q. You wrote it yourself?

22 A. I did.

23 Q. Did you have it approved by anyone?

24 A. Well, I can't say for certain, but I
25 think I probably -- typically what I do is try to

1 have somebody familiar with the case review it and
2 then probably would have been Detective Bailey. It
3 was all a quick process so typically he would
4 review it. I'm not positive that he did.

5 Q. Do you have a recollection of whether
6 or not he reviewed it?

7 A. You know, when I was writing it I think
8 he was out of the room so he probably was over my
9 shoulder.

10 Q. And my client, Devin Middleton, was at
11 that police station at that time also, correct?

12 A. Yes.

13 Q. And he was there in the interview room
14 with Detective Bailey?

15 A. Leading up to that, yes.

16 Q. Sorry?

17 A. Leading up to that, yes.

18 Q. And I think you told us that at the
19 same time you were interviewing another witness?

20 A. Yes, I was interviewing Justice
21 Johnson.

22 Q. Who?

23 A. Justice Johnson.

24 Q. And at some point you left the
25 interview room where Mr. Justice Johnson was

1 interviewed and came out and spoke to Detective
2 Bailey?

3 A. My interview was fairly brief and it
4 was -- I didn't receive much cooperation with that
5 so it wasn't a lengthy interview.

6 Q. And that morning had you interviewed
7 any other witnesses who had information about the
8 case?

9 A. Formal interviews? I can't say for
10 certain.

11 Q. My question may be too ambiguous. I'm
12 talking at the police station that morning. You
13 interviewed Justice Johnson. Anyone else?

14 A. I don't think I conducted any other
15 interviews at the station because this was around
16 noon. I think I went to the MUSC pathology in the
17 that morning and then came back to the station and
18 that's why I was delayed to when contact was made
19 with them initially.

20 Q. Be fair to say you were the lead
21 detective on this case?

22 A. I was.

23 Q. And you picked up this case on
24 March 23rd?

25 A. We all responded out there. I don't

1 know when it was assigned to me. Typically it's a
2 group team effort response, not knowing exactly
3 whose case it will be. So I can't say if I knew it
4 was going to be mine that night or was it the
5 following morning.

6 Q. Did you have anything to do with the
7 decision to bring -- to try to speak with Devin
8 Middleton?

9 A. It was on our to do list. Our to do
10 list was quite lengthy. In the early stages names
11 were coming in as being out there at the time of
12 it. So we were working our way through that. So I
13 would have been aware that we wanted to speak with
14 him.

15 Q. Prior to Mr. Middleton being brought to
16 the police station were you aware of the fact that
17 the police had picked him up and were bringing him
18 there?

19 A. So that's when it comes back to the
20 field intelligence unit. That was Sergeant
21 Harrison and I think he had contact with Detective
22 Bailey that he located because I think Devin
23 Middleton and Justice Johnson were together at that
24 time when he got out with him. And then I became
25 aware that they were both -- that they had contact

1 with both of them and that's when I was advised of
2 that and that's when I came back to the station and
3 I believe that they were already there at that time
4 or they were just arriving.

5 Q. Did they arrive together? I say they,
6 Justice Johnson and my client?

7 A. So they weren't -- I know that
8 Detective Bailey testified that Devin Middleton was
9 in his vehicle. I don't know -- I don't believe
10 that Justice was in his vehicle. I maybe --
11 possibly Sergeant Harrison brought him down there
12 or he came down on his own accord; I'm not
13 positive.

14 Q. And did you have a conversation with
15 Detective Bailey when you exited the room where you
16 were speaking with Justice Johnson?

17 A. Afterwards? Yes.

18 Q. And who initiated that conversation, if
19 you remember?

20 A. I couldn't tell you. We were in pretty
21 close proximity so it's not like we have to go out
22 of our way to initiate any conversation.

23 Q. Well, as the lead detective would you
24 have been interested in what Devin Middleton said?

25 A. Absolutely.

1 Q. Did you ask Detective Bailey what did
2 he say?

3 A. Yes. I don't even know if I had to or
4 he just voluntarily told me.

5 Q. So at some point he told you what Devin
6 Middleton had told him?

7 A. That's correct.

8 Q. Now, prior to bringing Mr. Middleton to
9 the police station was there a plan to seize any
10 evidence that Mr. Middleton may have had on his
11 person either pursuant to an arrest on consent or
12 search warrant if necessary?

13 A. There was no plan. We had no idea what
14 was going on. We didn't know that there was pepper
15 spray involved leading up to his statement. We
16 also didn't know he would be wearing the same
17 clothing that he had admitted to wearing during
18 this incident either. So we really didn't -- there
19 was absolutely no plan going into that that this
20 was going to happen.

21 Q. You and I have had some contact in the
22 two years this case had been pending, correct?

23 A. Absolutely.

24 Q. In fact, you testified at the
25 preliminary hearing and I cross-examined you?

1 A. You did.

2 Q. Do you remember that?

3 A. I remember going through that; I don't
4 remember precisely.

5 Q. And can we agree that after you first
6 viewed the surveillance video, the one that was
7 played just a few minutes ago, when you saw my
8 client pointing something at the deceased either
9 with one hand or two hands, that in your mind as an
10 experienced detective that could have been a gun?

11 A. It could have been, yes, and we --
12 that's part of the reason why I went down to MUSC
13 that morning because we were trying to gather all
14 the information we could. So there were some
15 witness statements that were not lining up with the
16 fact that a firearm was shot in the street. That
17 was -- we were trying to focus on that pretty early
18 on because that was suggested that it is possible.
19 And I even went down to the pathologist and tried
20 to figure out what wounds were lethal, what wounds
21 maybe allowed him to continue moving around. So we
22 were trying to put these pieces together early on
23 if, in fact, he possibly was aiming a firearm at
24 that point.

25 Q. So fair to say that you had determined

1 that my client probably was not the shooter?

2 A. I mean we didn't know. We kept our
3 options open with that. It was suspicious to us
4 and it was consistent with possible. We just
5 didn't know at that time.

6 Q. So as an experienced detective, you
7 weren't foreclosing the possibility that my client
8 indeed had a gun?

9 A. Couldn't rule it out and couldn't say
10 one way or another at that point.

11 Q. And Detective Bailey then told you Mr.
12 Middleton said that he didn't have a gun, but he
13 had pepper spray?

14 A. That's correct.

15 Q. And was there a decision made at some
16 point that you were going to take possession of
17 pepper spray, phones and his clothes?

18 A. There was.

19 Q. When was that decision made?

20 A. Well, learning that information through
21 his statement at that point we understood that we
22 wanted to gain his clothing for identification
23 purposes and however this progressed. The pepper
24 spray was obviously important because he was aiming
25 pepper spray at somebody in a physical altercation

1 moments before this person was killed. And then
2 the cell phone, through our experience we know that
3 communication is constant and instantaneous on cell
4 phones and there was an image of him going to what
5 appeared to be a cell phone on the video soon after
6 this incident.

7 Q. When you look at that video you see he
8 was operating a cell phone, can you see him dialing
9 a number?

10 A. No. Just it was consistent -- his
11 movement was consistent with possibly using --
12 utilizing a cell phone looking at it, something to
13 that effect, but you could tell -- the video wasn't
14 clear enough to see that.

15 Q. You say utilizing a cell phone. Would
16 that be consistent with a cell phone, taking the
17 phone out of his pocket and looking to see if he
18 had any calls, messages or texts?

19 A. It's hard to say because the camera
20 pans so soon after when you see him looking down at
21 an object in his hand. So it is hard to say. It's
22 possible.

23 Q. Did you discuss asking Mr. Middleton to
24 consent to give his clothes, cell phones and his
25 pepper spray?

1 A. Well, I think at the point that I was
2 informed of all this he invoked his right to an
3 attorney. So I would think consent was a concern
4 at that point if he were to turn these items over
5 after he invoked his right.

6 Q. You have a clear recollection of that?

7 A. I believe so. I mean how piecing this
8 all together and trying to go through those steps,
9 I think it was determined that we were going to
10 need a search warrant for those items.

11 Q. And in order to get a search warrant
12 you needed an affidavit that would be sworn to be
13 brought to a judge or a magistrate?

14 A. That's correct.

15 Q. You already read the whole thing so I'm
16 not going to ask you to do that again. But
17 directing your attention to -- now I can't find it.
18 Reference to an e-mail.

19 A. The victim's mother.

20 Q. Okay. Fifth paragraph down, this is
21 where you talk about your interaction with Peggy
22 Mitchum, the mother of the deceased?

23 A. Yes, sir.

24 Q. And you wrote that you had frequent
25 contact with her throughout the investigation?

1 A. I did. I had almost daily or weekly
2 contact with her probably for the first year of
3 this investigation. She had my cell phone number
4 and it was -- I spoke with her routinely.

5 Q. I'm going to direct your attention to
6 when you wrote this on March 25th, 2015, the case
7 was two days old?

8 A. Yep.

9 Q. Probably less than two days old. So
10 when was the first time that you had contact with
11 Peggy Mitchum on this case?

12 A. If it wasn't the evening that our
13 response occurred it was the following morning.

14 Q. So would be March 24th?

15 A. That's correct.

16 Q. And after that contact on March 24th
17 did you have any other contact with her?

18 A. I mean early on it was daily. It was
19 multiple times a day.

20 Q. Sorry?

21 A. Yeah. Most likely I had probably
22 contact with her multiple times a day for the first
23 couple of weeks. It was routine.

24 Q. Detective, I appreciate that, but I am
25 concerned with the time before you wrote this

1 affidavit on March 25th.

2 A. Okay.

3 Q. So we have established you speak to her
4 for the first time on March 24th?

5 A. Yes, at least if not earlier, but yes.

6 Q. And after you spoke to her March 24th
7 did you speak to her again before you wrote the
8 affidavit?

9 A. Probably. I can't say with certainty,
10 but I know I have documented that I spoke with her
11 on the 24th in my supplemental report and it
12 probably was multiple times that day and there on
13 out so...

14 Q. Do you have a recollection, can you
15 tell the Court how many times you spoke with her
16 before you wrote the affidavit?

17 A. It would probably be more than what I
18 documented in the report. I do have at least one
19 time that I documented on the 24th that I reached
20 out to her or she reached out to me and we had a
21 conversation, but I don't know. I can't say how
22 many times she spoke with me.

23 Q. Detective, you said it was frequent
24 contact?

25 A. Then, yes, it would have at least been

1 a few times leading up to that.

2 Q. You can't tell when those meetings
3 were?

4 A. Well, I can tell you on the 24th I did
5 document that I spoke with her. It was my first
6 paragraph on the 24th, Tuesday the 24th.

7 Q. Did you have a Rule 5 number for that?
8 Is there a discovery number for what you were
9 reading from?

10 A. No. It is page 44 of the incident
11 report.

12 Q. What's the date of that report?

13 A. Tuesday, March 24th, 2015.

14 Q. Okay. And how long did that contact
15 last?

16 A. This specific phone call? I didn't
17 document that.

18 Q. The contact was a phone call?

19 A. Yes.

20 Q. Did you meet with her in person before
21 you wrote this affidavit?

22 A. I would have -- most likely no.
23 Probably phone contact, but I'm not positive.

24 Q. So the contact that you had with her
25 was by phone?

1 A. Primarily my contact with her was on
2 the phone. I don't think I obtained a formal
3 statement from her until the first of April.

4 Q. Were you using a cell phone when you
5 spoke with her?

6 A. Might have been mixed between my cell
7 -- so we were issued cell phones that can only call
8 contact people in the contact list. So I end up
9 using my personal cell phone and it would have
10 probably -- most of my contact would have been
11 through my personal cell phone.

12 Q. Still have a cell phone?

13 A. I do.

14 Q. Save a record of the phone calls?

15 A. I don't.

16 Q. They have been deleted?

17 A. Well, an i-Phone only goes back just a
18 few days. I suppose phone records dating back
19 could have that, but I don't know.

20 Q. Prior to your first contact with Peggy
21 Mitchum in this case had you ever met her before?

22 A. No.

23 Q. She had never given you any information
24 about anything else, correct?

25 A. That's correct.

1 Q. And you had no way to know whether or
2 not the information she was giving you was
3 reliable, correct?

4 A. No, but what you saw on the video it
5 was fairly consistent with what she was offering.
6 And when I spoke with her I remember that she said
7 that they were targeting her son and on the video
8 you can see there are several subjects that are
9 targeting her son.

10 Q. You described what she told you was a
11 rumor, correct?

12 A. I guess I could have said it in a
13 number of different ways, just information, you
14 know. It's pretty basic information, it's unvetted
15 information at that point. But it was going along
16 with what I saw on this video.

17 Q. You chose to use the word "rumor"
18 because you wrote this?

19 A. Yeah, because I don't know with
20 certainty and I don't know where the source of that
21 information was coming from at that point.

22 Q. Directing you to paragraph 7, last one
23 from the bottom, I believe you begin by saying,
24 "This affiant believes that the actions of the
25 subjects depicted acted in concert during their

1 assault on the Brandon."

2 A. Yes.

3 Q. And then you said their coordinated
4 effort ultimately led to the murder of Brandon.
5 That was your theory of the case?

6 A. It was looking like that.

7 Q. Did you have a witness that told you
8 that that indeed happened from personal knowledge?

9 A. Ask that question again, please.

10 Q. I will restate. At the time you wrote
11 the affidavit did you have information from a live
12 witness stating that the -- what's depicted in that
13 video ultimately led to the murder of Brandon?

14 A. So I mean there were statements
15 obtained at that point, but just --

16 Q. Statements of what?

17 A. There were statements obtained at that
18 point of this by the 25th. But viewing the video I
19 mean we are talking about seconds between that
20 physical altercation that was in the roadway that
21 transitioned into that side yard where the camera
22 panned away and when the camera panned back we knew
23 the incident had already occurred at that point.

24 Q. So the answer is no?

25 A. That we had statements? We did have

1 statements at that point.

2 Q. You had a statement from a witness
3 saying that that action in the street caused his
4 death?

5 A. Well, it was -- we believe it to. We
6 believed that there was a physical altercation, the
7 victim was targeted and moments after this physical
8 altercation he ends up with multiple -- suffering
9 from multiple gunshot wounds.

10 Q. Then you wrote, "Based on the rumors
11 that surfaced about Brandon's murder being planned
12 as well as the close relationship between the black
13 males, it's likely that the efforts were discussed
14 electronically through cellular telephones."

15 A. Yes.

16 Q. You wrote that?

17 A. Yes.

18 Q. Now, had you had information prior to
19 writing this that what was portrayed on that video
20 was described by witnesses as play fighting?

21 A. It was. So Demarco Jones was
22 interviewed on the 23rd soon after we cleared from
23 our response of this incident. And he classified
24 it as play fighting. That was one of many.

25 Q. One of many descriptions of what's on

1 the as video play fighting?

2 A. It was arranged and being called sky
3 lacking I believe it is.

4 Q. Sky lacking?

5 A. Sky lacking, play fighting, those were
6 the terms that described what was occurring there.

7 Q. It's true, is it, that nobody said that
8 it was an assault?

9 A. Well, an assault -- the striking of a
10 person, it would appear to me that he was being
11 dropped kicked by one subject. We find out that he
12 was being pepper sprayed by another, it was -- I
13 would say that's an assault.

14 Q. Devin Middleton in his statement to the
15 police denied any involvement, correct?

16 A. He did.

17 Q. You didn't put any of the facts that --
18 can we agree that when you describe frequent
19 contact with Peggy Mitchum that would really
20 happen, looking back now was not a frequent
21 contact?

22 A. I don't know that I can agree to that.
23 I would get phone calls from her constantly. And I
24 know I have one documented in here, but I'm sure
25 there were plenty more than that leading up to this

1 point. I would guess there was at least a few at
2 that point.

3 Q. So assuming that there were a few phone
4 calls, although you can't be specific, can we agree
5 that what she was telling you was what she heard
6 from other people?

7 A. Yes. I wasn't able to validate it
8 going directly to the source. She was giving me
9 some information which at that point I was taking
10 as a direction towards this investigation. Trying
11 to keep an open ear to what she had to say, but
12 continuing to work on the hard facts that I'm
13 finding.

14 Q. So when you write this affidavit --
15 withdrawn. You knew that Devin Middleton had
16 withdrawn his Miranda waiver and wanted to leave,
17 correct?

18 A. Yes.

19 Q. So that caused you to think that time
20 was of the essence for you to get this search
21 warrant, correct?

22 A. I did. So I thought that because
23 everything that we were trying to obtain would have
24 been difficult to obtain at a later point. And so
25 we felt that it was imperative to seize these items

1 obviously quickly as we operated as quickly as we
2 could with that before he left because we probably
3 wouldn't see these items again.

4 Q. At some point he was going to be
5 permitted to leave?

6 A. Yes.

7 Q. But at the point when you decided to
8 get the search warrant he was not permitted to
9 leave?

10 A. That's right.

11 Q. So he was in police custody?

12 A. Yeah, he was at the police station.

13 Q. So the answer would be yes?

14 A. Yes. He was advised that he was not
15 free to leave.

16 MR. APICELLA: No further questions.

17 THE COURT: You wish to cross-examine
18 the witness?

19 MS. VAN PALA: No, Your Honor.

20 THE COURT: Redirect?

21 MR. OSBORNE: Just two questions.

22 REDIRECT EXAMINATION

23 BY MR. OSBORNE:

24 Q. You said you had witness statements
25 that indicated that it was play fighting. Do you

1 recall Mr. Johnson indicating that yes, it was play
2 fighting and at another point he said just hard to
3 tell what these fellows are doing sometimes,
4 whether they are playing around?

5 A. Yes. I do believe that again that was
6 collected by Detective Bailey, but there was a
7 variation of that, yes.

8 Q. You said Ms. Peggy you called a lot.
9 Many times when she called was she upset that her
10 son just got murdered?

11 A. Yes.

12 Q. And you didn't document every single
13 time she called?

14 A. No.

15 Q. Some of it was repetitive?

16 A. Absolutely.

17 MR. OSBORNE: No further questions.

18 THE COURT: Wish to follow up on those?
19 You may step down. Does the State wish to call
20 other witnesses on this point?

21 MR. OSBORNE: No, Your Honor.

22 THE COURT: Defense wish to call any
23 witnesses on this issue?

24 MR. APICELLA: No, Your Honor.

25 THE COURT: It's defense's motion. I

1 will be happy to hear from you.

2 MR. APICELLA: Your Honor, I would
3 submit that a fair reading of the search warrant
4 affidavit shows that it doesn't reach the level
5 showing probable cause. It's a collection of
6 opinion and it's supported in the main by the
7 statement of Ms. Mitchum who was described as
8 someone that he had frequent contact with. I will
9 submit to the Court that's an inaccurate
10 description designed to convince a judge that there
11 is probable cause when there isn't. The case law
12 is pretty clear that if you are going to use the
13 information given you by an informant you have to
14 give the magistrate a reason as to why what the
15 informant says is reliable. The detective said
16 they were rumors from unnamed sources. The
17 detective said in the hearing that they had no
18 contact.

19 THE COURT: Does someone have a copy of
20 the warrant that I can be looking at? I didn't
21 mean to interrupt. You are referring to his
22 reference to the person he talked to on the
23 telephone you are saying?

24 MR. APICELLA: Yes, I am referring
25 generally to the whole warrant and honing in on the

1 end of the warrant with the detective is I submit
2 attempting to convince the judge why this is
3 probable. And the main thrust of what he is saying
4 is I have a witness Peggy Mitchum who I have
5 frequent contact, which I submit is not an accurate
6 statement, and she has given me information which
7 are rumors that she has heard on the street from
8 unnamed people, but based upon that in my opinion
9 this is probable so I think you should issue the
10 warrant.

11 And I would submit, Judge, that there
12 is not anything in this warrant. And I haven't
13 heard any testimony. I suppose we can reopen the
14 hearing, but I don't think it would be worthwhile,
15 that when the detective went before the magistrate,
16 submitted a warrant it wasn't supplemented by any
17 oral testimony. If it was then I will stand
18 corrected. But I don't believe that happened in
19 this case. I'm not sure that it happens in
20 Charleston with any great frequency, but certainly
21 the only thing that he had is this search warrant
22 affidavit and I would submit, Judge, that based
23 upon the testimony of a fair reading of this
24 affidavit it doesn't reach the level of probable
25 cause.

1 THE COURT: Thank you.

2 MR. APICELLA: And the other argument,
3 because I have just referred to it so many times,
4 the detective told us that my client was in
5 custody, wasn't being allowed to leave, so time is
6 of the essence because at some point they would
7 have to let him leave so they had to get the
8 warrant. And I would submit that that's tantamount
9 to him being under legal arrest.

10 THE COURT: Let's assume that he was
11 being confined.

12 MR. APICELLA: He was confined. And I
13 think that goes into what you should take into
14 consideration in judging whether or not what the
15 police did in this was authorized or not. I submit
16 that it wasn't and this evidence should be
17 suppressed.

18 THE COURT: Put it in the context of we
19 all do with traffic stops where police come, stop
20 someone, perhaps a drug dog walked around the car,
21 alerts, that gives some measure of probable cause
22 and then they hold the car and the person there
23 while they get permission to search.

24 MR. APICELLA: This is not a car stop.
25 This is not exigent circumstances. This is not

1 some exception to the Fourth Amendment.

2 THE COURT: Aren't you dealing with
3 items that were present at the time that could be
4 removed and taken and destroyed or cell phones can
5 disappear, can be crushed, can be --

6 MR. APICELLA: This is true, but the
7 reality is what happened was placed in motion by
8 the police inviting my client in and then telling
9 him he wasn't in trouble when he was. Then
10 inducing him to waive his Miranda rights and then
11 after he gave statements which he thought were
12 exculpatory suddenly the police came to the
13 conclusion oh, he has evidence on him we need to
14 get. We don't have enough probable cause to arrest
15 him. Now we have a problem. What are we going to
16 do? We will get a search warrant.

17 THE COURT: Let me hear from the State.

18 MR. OSBORNE: All right. Your Honor, I
19 will deal with the first issue that he brought up
20 and this is covered in State v. Gore 408 S.C. 237
21 and basically that case kind of gives the Court
22 some guidelines and to how to test whether a search
23 warrant is invalid based on misstatements. I think
24 that's kind of what Mr. Apicella is eluding to,
25 that the statement regarding Ms. Mitchum's

1 statements to Detective Krasowski are wrong or
2 somehow adding that into the search warrant is a
3 mistake.

4 So the first thing to look at to
5 mandate an evidentiary hearing there must be
6 allegations of deliberate falsehood or of reckless
7 disregard for the truth which must be accompanied
8 by an offer of proof. Even if he gets passed that
9 first step, the second step says the Court must
10 then consider the affidavit's remaining contents
11 with the affidavit's false material set aside.

12 So the State's position is the Court
13 could take out the entire statements by Ms. Peggy
14 Mitchum and there's still probable cause in the
15 search warrant. The information that was --

16 THE COURT: That's what I was looking
17 at when I asked for it. The narrative of the
18 statement begins with this was all captured on
19 video, the police reviewed the videos and the video
20 is summarized as follows. So there's -- most of
21 the material in there is information that came
22 either from the video or from the Defendant's
23 statement.

24 MR. OSBORNE: That's correct, Your
25 Honor.

1 THE COURT: That I was ruled was
2 admissible.

3 MR. OSBORNE: That's right.

4 THE COURT: I understand there is this
5 quotation from the one individual who is not
6 identified as confidential -- reliable confidential
7 informant, but there's a lot more to the statement
8 than it appears.

9 MR. OSBORNE: That's correct, Your
10 Honor. That is the State's position. This
11 information came from a witness identified as Peggy
12 Mitchum, but she's saying that's what she heard or
13 saw, so I will agree that part should be taken out
14 or could be taken out and probable cause still
15 exists in the affidavit even with that taken out.

16 THE COURT: How about his problem with
17 him saying that his client was being confined,
18 under arrest, if he wasn't under arrest he was
19 liable to leave. He didn't keep him.

20 MR. OSBORNE: That's right. He was --

21 THE COURT: Seemed like I remember from
22 last Monday that there was testimony to the effect
23 that your stuff is going to stay, whatever you want
24 to do is fine, get your clothes, pepper spray and
25 cell phones, but --

1 MR. OSBORNE: That is correct. And
2 then he followed that up with we will get a warrant
3 and that's exactly what the police did. They got a
4 warrant. To follow the rationale, and I agree this
5 is not a vehicle, but the idea is still the same.
6 There's evidence that the police believe is
7 probably more probable than not related to a
8 criminal investigation. To let him walk out and
9 take the evidence away puts the police in a bad
10 spot. I mean he presents evidence that is involved
11 in this murder investigation. They get a search
12 warrant at his request and then seize that
13 evidence.

14 Was he detained in custody for two
15 hours? Yes. The remedy for that is not
16 suppression of evidence that they lawfully got
17 after getting a warrant. The remedy for that would
18 be to suppress any statement that he made after the
19 invocation which we are not introducing anyways.

20 THE COURT: Yes, sir.

21 MR. APICELLA: Just a brief response.
22 I know you understand the issues. Police already
23 had possession of evidence that they wanted to
24 seize. By their actions they already had, he was
25 in the police station in an interview room. His

1 phones were on the table. They already had the
2 pepper spray for personal safety. It was their
3 actions that placed them in the constitutionally
4 area --

5 THE COURT: I recall the cell phone was
6 sitting in the middle of the table and they put an
7 officer just to watch it. Isn't that what I heard
8 on Monday?

9 MR. APICELLA: Look, here's what
10 happened, Judge. Then my client said I'm leaving,
11 I'm taking my stuff. They said no, you are not.
12 You are not leaving. That has legal consequences.
13 What in effect happened here is a police seized
14 evidence and then got the warrant afterwards to
15 make it legal and I would submit, Judge, as a final
16 argument we have all seen this video. You can put
17 it in slow motion. You can put it backward. You
18 can put it forward. Look at it once or a hundred
19 times. It is ambiguous at best. It's in the eye
20 of the beholder.

21 THE COURT: The street video.

22 MR. APICELLA: Yes.

23 THE COURT: Not the interview video.

24 MR. APICELLA: No, the street video.

25 Which I suppose a way to analyze it is based on

1 that video is that probable cause. I would submit
2 that it's not. An outside person analyzing it and
3 then writing about it may or may not accurately
4 reflect what's in it on the issue of whether it is
5 probable cause. I would submit when the police
6 officer looks at it he sees things to him and he
7 said in my opinion we have probable cause.

8 I would submit, Your Honor, that a
9 judge looking at that would say I'm going to need
10 something more before I'm going to issue a search
11 warrant. Let's put you under oath. Can you
12 testify? Give us a witness, a named witness that
13 is going to give me the probable cause I need
14 before I sign the search warrant. I would submit
15 that the detective told us there was no live
16 eyewitness, so I would submit, Judge, that while
17 the police were in a quandary it was a quandary of
18 their own creation and the appropriate remedy is
19 suppression.

20 THE COURT: Anything further?

21 MR. OSBORNE: No. I would just add
22 obviously the probable cause as stated in the
23 affidavit doesn't have to meet absolute certainty.

24 THE COURT: Well, the point I was
25 making if search warrants are made on affidavits of

1 police officers who have done the investigations it
2 is not unusual. There needs to be facts, not
3 conclusions. I have seen the video myself and it's
4 somewhat grainy, but certainly to the eye of the
5 trained observer, the facts that are related could
6 be observed in the video.

7 I'm going to deny the motion. I find
8 that there was probable cause.

9 MR. OSBORNE: Thank you, Your Honor.
10 That brings us to the next search warrant
11 suppression motion which deals with Detective
12 Krasowski obtaining a search warrant to download
13 the information that was obtained on the phone that
14 was seized from Mr. Middleton.

15 THE COURT: All right.

16 MR. OSBORNE: The State calls Detective
17 Krasowski.

18 THE COURT: Sir, you are already under
19 oath. You admit that you are still under oath?

20 THE WITNESS: I do, Your Honor.

21 THE COURT: Have a seat, please. You
22 may proceed, counsel.

23 DIRECT EXAMINATION

24 BY MR. OSBORNE:

25 Q. Showing you State's Exhibit 89. Can

1 you take a look at that and tell me if you
2 recognize it?

3 A. Oh, this is a search warrant for the
4 phone downloads of Devin Middleton.

5 Q. Now, where we have left off you had
6 possession of Mr. Middleton's two cell phones.
7 What did you elect to do after that?

8 A. To get a search warrant signed for that
9 execution of the phone downloads. So we have a
10 digital evidence unit that conducts those
11 downloads. So that our procedure is that we get
12 the search warrant to allow us to download the
13 phones and then fill out the paperwork and let them
14 know when that search warrant is signed.

15 Q. Okay. And so the search warrant, well
16 here. I will just go ahead and show you. State's
17 Exhibit 89, you don't have the serial number, but
18 the premises to be searched, how do you describe it
19 briefly?

20 A. It was one black gray colored LG
21 touchscreen smart phone serial No. 409CYB116025.
22 The model is an LGD 415 and the second is a black
23 gray colored LG touchscreen smart phone, serial
24 number is 411CYUK599742-5. And the model is an LGD
25 415. Both phones belonged to Devin Middleton.

1 Both phones are located in evidence at CPD
2 headquarters which is 180 Lockwood Boulevard,
3 Charleston, South Carolina, 29403.

4 Q. What property were you looking for from
5 those phones?

6 A. It's all electronically stored digital
7 information, communications files, including
8 incoming and outgoing calls, digital images, voice
9 recordings, incoming and outgoing texts, contact
10 names, profile information, phone numbers and any
11 other digital information stored on the device or
12 stored on electronic storage media associated with
13 the device both current and historical.

14 Q. Whose signature is that, do you
15 remember?

16 A. I just flipped to my report to verify
17 that. I didn't recognize. That's Judge Gosnell's
18 signature right there.

19 Q. Now, prior to him signing that warrant
20 did he swear you in to the affidavit's
21 truthfulness?

22 A. He did.

23 Q. What date was that?

24 A. That was on April 6th, 2015, and the
25 time was 12:10.

1 Q. Okay. We will move ahead. Now, up
2 here personally appear before me, I see this is
3 blank. Why is that blank?

4 A. I am supposed to write my name or the
5 affiant writes their name on this line and that's
6 me in this case. And I forgot to write it.

7 Q. Okay. Property sought, person to be
8 searched, that's all the same as you just
9 mentioned?

10 A. Yes.

11 Q. From the warrant itself?

12 A. It's repetitive in nature in those two
13 boxes.

14 Q. Signature of the judge. Is that Judge
15 Gosnell's signature again?

16 A. That is.

17 Q. And over affiant, whose signature is
18 that?

19 A. That's my signature.

20 Q. It's the same affidavit. Read that for
21 me.

22 A. "That on March 23rd, 2015,
23 approximately 1750 hours CPD officers responded to
24 the area of ■ Norman Street which is located in
25 the city and County of Charleston in reference to

1 shots fired. Upon arrival CPD officers located the
2 victim, Brandon Washington, lying unconscious
3 alongside the residence at ■ Norman Street
4 suffering from multiple gunshot wounds. EMS
5 responded to the victim and declared him deceased
6 immediately. City of Charleston video surveillance
7 camera captured a portion of the incident which is
8 summarized below.

9 Brandon was on the sidewalk in front of
10 ■ Norman Street prior to being murdered and was
11 involved in an altercation with several other black
12 male subjects. See attachment A:"

13 So this is a continuation of the
14 affidavit. This is attachment A. It continues
15 with, "The altercation escalated when Brandon was
16 forcefully pushed off the sidewalk and into the
17 roadway. Several of the other subjects surrounded
18 Brandon. Brandon attempted to grab a portion of a
19 bed frame that he had -- that had been curbside and
20 raised it above his head as an apparent means to
21 defend himself. Brandon did not swing the board at
22 anyone and dropped it seconds after picking it up.

23 The physical altercation continued as
24 Brandon and the others jockeyed in position while
25 on the roadway. Brandon was then lured into an

1 alley between two houses and depicted Brandon
2 raising both hands above his head as if someone
3 threatened with a firearm. The camera panned away.
4 During its next rotation it captured a subject that
5 was believed to be the shooter flee from the
6 alleyway and run through the neighborhood.

7 During the next camera pan it captured
8 some of the black males that participated in the
9 altercation observing the police response from
10 across the street of the incident location.
11 Responding officers made contact with these
12 subjects and identified one as Devin Middleton.

13 Detectives backtracked the recording
14 and were able to determine that Devin confronted
15 Brandon while in the roadway and pointed an unknown
16 dark object at him. The video also depicted Devin
17 pull out what appeared to be his cellular phone and
18 begin using it during the recent response. One
19 witness to be named later heard Devin and another
20 subject yell "finish him, finish him," or excuse
21 me, just "finish him" as the shooter fired multiple
22 shots hitting the victim."

23 Q. Stop right there. That's something
24 different. That one witness, who was that?

25 A. That was Marvin AKA Louie Johnson.

1 Q. Go ahead.

2 A. "On 3-25-2015 Devin Middleton provided
3 a statement post Miranda and admitted to being part
4 of the altercation that took place with the victim.
5 Devin was high on Molly and X and therefore claimed
6 the event was difficult for him to recall. He
7 admitted to possibly bringing a bottle of pepper
8 spray during the altercation but had no further
9 involvement. Devin also advised that he wore the
10 same clothing that he wore during his involvement
11 in the altercation with Brandon.

12 Detective Krasowski had frequent
13 contact with Brandon's mother Peggy Mitchum
14 throughout the investigation and she heard rumors
15 that Brandon had been set up to be killed. She
16 heard that he was called to the area and the
17 subjects acting in concert by attacking Brandon and
18 then lured him into the alley where he was shot and
19 killed.

20 Detectives were able to obtain the
21 identities of several other subjects associated
22 with the physical altercation against Brandon
23 through witness statements. This affiant" -- there
24 is a typo here. "This affiant most of the
25 identified subjects routinely hang out together and

1 have been documented through field contacts in CPD
2 records management system. Furthermore, video
3 surveillance from before the incident also captured
4 the group hanging out together. This affiant
5 believes that the actions of the subjects depicted
6 on the video surveillance suggest the subjects
7 including Devin acted in concert during their
8 assault on Brandon. The coordinated effort
9 ultimately led to the murder of Brandon. Based on
10 the rumors that surfaced about Brandon's murder
11 being planned as well as the close relationships
12 between the black males, it is likely their efforts
13 were discussed electronically through cellular
14 phones.

15 Through training and experience this
16 affiant knows that such efforts are usually relayed
17 through text messages which are generally stored in
18 electronic devices such as telephones. Based on
19 Devin's admission and participating in the attack
20 on Brandon prior to being murdered, his close
21 relationship with other participants involved in
22 the altercation, sufficient probable cause exists
23 to download the digital content within Devin's
24 cellular phones to further this investigation."

25 Q. Above issuing?

1 A. Judge Gosnell and the time is 12:10 on
2 April 6th, 2015.

3 Q. And your signature above that?

4 A. That's correct.

5 Q. Okay. Once the search warrant was
6 signed what did you do then?

7 A. That's part of the process. There's
8 two forms to fill out once a search warrant is
9 obtained and those forms are sent over to the
10 digital evidence unit for them to seize the phone
11 from evidence and then take it and conduct their
12 forensic download of the phone.

13 Q. That's the form attached to the
14 warrant?

15 A. Yes. So this is the first of two
16 forms. This just certifies that we have been
17 granted access by means of a search warrant.

18 Q. You said here you are asking them to
19 search?

20 A. Yes, it's basically just giving them a
21 little bit more information about what we are
22 looking into and just notes that there is a search
23 warrant for this phone and says the date and then
24 just services needed by, put as soon as possible,
25 ASAP.

1 Q. And Rodney Van Horn, was he one of the
2 forensic examiners?

3 A. He was. He has since retired from the
4 police department, but he's the one that conducted
5 the download here.

6 Q. Showing you now a document that's
7 labeled return. The date of the execution and time
8 of the execution is what?

9 A. On the top here said I received the
10 attached search warrant on 4-06 of '15 and executed
11 as follows. So my execution time is when I
12 actually forwarded the forms to the DE unit for the
13 search to be conducted which was just later that
14 afternoon about an hour and-a-half or hour and
15 20-minutes after the warrant was signed.

16 Q. And what's the date there on the
17 return?

18 A. On the bottom? That's May 20th, 2015.

19 Q. That's the day you presented it back to
20 the judge?

21 A. It is. So that's when I waited for --
22 to receive the results of the search warrant of the
23 phone download and that's -- at that time that's
24 when I presented this to the judge of what we
25 actually obtained through that search.

1 Q. So that's your signature above
2 executing warrant?

3 A. It is. And then the inventory was made
4 in the presence of Corporal Van Horn, Jerry Roberts
5 who is associated with the digital evidence unit
6 and then I put myself there.

7 Q. I am showing you State's Exhibit 54
8 just for ID purposes. Do you recognize that?

9 A. Yes. This would be the CD or the DVD
10 that contains the information that they extracted
11 from the phones.

12 Q. Okay. Do you remember who did the
13 examination, do you know if it was Mr. Van Horn or
14 Mr. Roberts?

15 A. I believe it was Van Horn that
16 completed this.

17 Q. Okay.

18 MR. OSBORNE: Your Honor, no further
19 questions.

20 THE COURT: Yes, sir.

21 CROSS-EXAMINATION

22 BY MR. APICELLA:

23 Q. Looking at the dates of the affidavit
24 of this particular warrant, this was a short time
25 after you got the warrant to actually seize the

1 cell phones, correct?

2 A. Yes, it was about a week, I guess a
3 little more than a week.

4 Q. Approximately a week. And appears to
5 be in substance very similar to the other affidavit
6 as far as the information that was in it, correct?

7 A. That's correct.

8 Q. There is an additional factor, though,
9 that you included, the statement that you got from
10 another witness, Mr. Johnson?

11 A. That's correct.

12 Q. That's the witness that is not
13 available and to testify at this trial?

14 A. At this point no contact has been made.

15 Q. And prior to Mr. -- withdrawn. This
16 was on April 6. Do you remember the date or dates
17 you spoke to Mr. Johnson prior to writing this
18 affidavit?

19 A. Yes. So the first time that Marvin
20 Johnson was interviewed I believe it was the 24th.
21 So that was actually a day before we had contact
22 with Devin Middleton. So --

23 Q. And after you met him on 3-24 did you
24 meet with him prior to April 6th?

25 A. Oh, that was -- yes, we also -- well,

1 Detective Bailey met with him on the 26th of March
2 as well, so we had two dates of contact with him
3 prior to this.

4 Q. Now, prior to first interviewing Mr.
5 Johnson on March 24th -- withdrawn. That was the
6 first time that he was interviewed by the police as
7 far as you know?

8 A. As far as I know for this incident,
9 yes. This was conducted by Detective Bailey.

10 Q. So prior to that he was not
11 interviewed? Specifically on the date of the
12 shooting, March 23rd, he was not interviewed by any
13 police officers?

14 A. That night no, he was not.

15 Q. Now, prior to meeting with Mr. Johnson
16 on the 24th -- did you meet with him on the 24th?

17 A. No. Detective Bailey conducted that.
18 I don't know if I said hello in passing or spoke
19 with him briefly, but it was handled by Detective
20 Bailey.

21 Q. And on March 26th did you meet with Mr.
22 Johnson?

23 A. Again that was conducted by Detective
24 Bailey. In passing I may have, but my sole
25 interview with Mr. Johnson was conducted later. It

1 was -- I think it was July 28th.

2 Q. So that's well after this search
3 warrant?

4 A. Yes.

5 Q. So you relayed in the search warrant
6 affidavit as to what Mr. Johnson said was told to
7 you by another police officer?

8 A. Yes, Detective Bailey.

9 Q. Prior to Johnson speaking with
10 Detective Bailey had he ever given information to
11 the police previously?

12 A. I can't say for certain. I would
13 imagine so, but I can't say for certain.

14 Q. Why do you say you imagine so?

15 A. I believe he's a life-long resident of
16 that area so I would imagine that contact would
17 have been had with him before. I personally never
18 have. I don't know if Detective Bailey had or
19 hadn't.

20 Q. Did you ask Detective Bailey if he knew
21 that Johnson was reliable?

22 MR. OSBORNE: Objection, Your Honor.
23 May we approach?

24 THE COURT: Yes, you may.

25 (Off-the-record conference.)

1 THE COURT: You may proceed.

2 BY MR. APICELLA:

3 Q. So again, you put in that affidavit
4 your conclusion that Mr. Middleton used the phone
5 after that shooting?

6 A. I believe it was probable based on what
7 you saw on video.

8 Q. Sorry?

9 A. I believe that was probable based on
10 what you saw on the video of all his actions.

11 Q. And, again, if I asked you the same
12 questions did you see him make a call, your answer
13 would be no?

14 A. Yes. It panned away soon after you saw
15 him motion like he had a cell phone in his hand.

16 Q. And the best that we can glean from
17 that brief interlude of action on the video is that
18 it's consistent with someone perhaps taking out a
19 cell phone and looking at it?

20 A. Possible utilizing it consistent with
21 that.

22 Q. Well, possibly using it, possibly
23 Facetiming it, possibly answering it, seeing it's
24 nothing, possibly seeing if his battery is charged
25 or a hundred other things that I could maybe think

1 about if I put my mind to it, correct? We can't
2 say what he was doing?

3 A. I can't say with certainty, no.

4 Q. You didn't say that in the affidavit,
5 that you just suspected that he was using his
6 phone?

7 A. Yeah. I think I just said it was
8 consistent with. The exact language I think it was
9 consistent with it I think was what I used. Now I
10 can't find it. I can't find it. Do you know what
11 paragraph you were referring to? Do you know what
12 paragraph you were referring to?

13 Q. Third paragraph on the top.

14 A. Okay. I was looking lower. I just
15 said the video also depicted Devin pull out what
16 appeared to be his cellular phone and begin using
17 it during the police response.

18 Q. Using it. What you -- you wrote it.
19 What did you see in that video to indicate that
20 what you saw is using his cell phone?

21 A. Well, it appeared that he pulled out
22 something consistent with the cell phone and held
23 it consistent with a cell phone. And then the
24 camera pans away, but he pulled it out. That's
25 what I was referencing here.

1 MR. APICELLA: I have no further
2 questions.

3 THE COURT: State?

4 MR. OSBORNE: Briefly, Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. OSBORNE:

7 Q. So this case is a murder investigation?

8 A. Yes, sir.

9 Q. Is it fair to say that it was a
10 complicated case or was this run of the mill,
11 ordinary, or not ordinary, but run of the mill not
12 too complicated case? How would you describe it?

13 A. I would say this was a pretty
14 complicated case and the video helped make it more
15 complicated because we saw all the ins and outs
16 what was occurring right before.

17 Q. When I say complicated, I mean like
18 involved, lots of people you had to talk to; fair
19 to say?

20 A. There were a number of people and
21 number of moving parts to this.

22 Q. And Mr. Apicella was asking about using
23 the phone. So on the video it appears that he
24 picks up the phone and looks at it, but you don't
25 know for sure whether he actually called anyone or

1 anything like that, do you?

2 A. That's correct. We don't know.

3 Q. You don't know whether he texted anyone
4 or got on the internet or anything like that?

5 A. I don't know.

6 Q. How many people called 911 for this
7 shooting?

8 A. We had one caller to 911.

9 Q. Was that Devin Middleton?

10 A. It was not.

11 MR. APICELLA: Objection.

12 THE COURT: Sir?

13 MR. APICELLA: I am moving to suppress
14 that download not in evidence yet. We are going
15 ahead to try to introduced evidence which may or
16 may not exist to try to refute what I elicited from
17 cross-examination.

18 THE COURT: Relevance?

19 MR. OSBORNE: The relevance is through
20 cross-examination Mr. Apicella went into a lot of
21 detail regarding whether he used the phone.
22 Relevance being that this was his friend. He said
23 it was. He was just gunned down. He sees him on
24 the phone. We know one person he didn't call.
25 Didn't call 911.

1 THE COURT: I will overrule the
2 objection. You may proceed.

3 BY MR. OSBORNE:

4 Q. Who called 911?

5 A. It was a female. Her first name was
6 Lakesha. I can't recall her last name at the
7 moment.

8 MR. OSBORNE: No further questions.

9 THE COURT: All right.

10 MR. APICELLA: Nothing further.

11 THE COURT: You wish to ask any
12 questions of this witness?

13 MS. VAN PALA: Your Honor, I don't have
14 any questions as to this search warrant. I just
15 have a matter of law. I think that we should
16 address the issue of severance because I think we
17 need to know what parts of the search warrant for
18 Devin's clothing and phone and the data on his
19 phone the State is intending on introducing against
20 Te'Quan. I think it would be more prudent to do
21 the severance first so that we can have some
22 clarity as to what the State is seeking to
23 introduce in this portion of their case against my
24 client.

25 MR. OSBORNE: I can certainly address

1 that, Your Honor.

2 THE COURT: Yes. So we are now
3 switching to the severance motion? We are skipping
4 all over the place here. Nobody objected to this
5 order of calling the motions until now.

6 MS. VAN PALA: Judge, on Monday I did
7 list out all my motions and I --

8 THE COURT: You mentioned that there
9 was a severance motion. I didn't say you didn't do
10 that. I am just saying there has been no objection
11 to the order in which we are taking them until now.

12 MS. VAN PALA: On Monday I said that I
13 thought the severance was the most important.

14 THE COURT: Again, the order was not
15 objected to I don't think, but that's the way I
16 took it.

17 MS. VAN PALA: Yes, Your Honor.

18 THE COURT: We will let him address it.
19 Yes, sir.

20 MR. APICELLA: Your Honor, while
21 co-counsel is reviewing documents, my client needs
22 to use the rest room.

23 THE COURT: We will take a five-minute
24 break. I will stay on the bench.

25 (A recess transpired.)

1 THE COURT: Did you wish to ask any
2 questions of this witness?

3 MS. VAN PALA: No questions at this
4 time, Judge. We would just object to the exhibits
5 that the State intends to introduce through the
6 witness because they do not pertain to Te'Quan
7 Perry. They are irrelevant and prejudicial.

8 THE COURT: Do you intend to introduce
9 any evidence at this time?

10 MR. OSBORNE: No, Your Honor.

11 THE COURT: Are you attempting to
12 introduce any evidence at this time?

13 MS. VAN PALA: The State did show me
14 exhibits marked 109 through 113. We object to
15 those as regard to --

16 THE COURT: He's not intending to
17 introduce those at this time.

18 MS. VAN PALA: Yes, Your Honor.

19 THE COURT: When he does you can
20 object.

21 MS. VAN PALA: Yes, Your Honor. I just
22 want the record to note my --

23 THE COURT: Well, you are confusing the
24 record. There is nothing to rule on as far as the
25 introduction of the evidence. Those pieces of

1 evidence -- I think he showed them to you at your
2 request. He hasn't presented them to be
3 introduced. There is nothing for me rule on on the
4 introduction of that evidence at this time. That
5 time may be coming, I don't know. But right now it
6 is not before me.

7 MS. VAN PALA: Yes, Your Honor.

8 THE COURT: I haven't seen them. I
9 have got no clue what you're talking about.

10 MS. VAN PALA: Judge, I think we are
11 just muddying the waters here.

12 THE COURT: You seem to be. I am
13 trying to keep it to this issue right now and you
14 have asked me now to take up a severance. I am
15 probably going to do that if we can ever get there.

16 MS. VAN PALA: Yes, Your Honor.

17 THE COURT: I am trying to deal with
18 this issue.

19 MS. VAN PALA: Yes, Your Honor.

20 THE COURT: I am giving you an
21 opportunity to cross-examine this witness if you
22 wish to do so.

23 MS. VAN PALA: Not at this time. Thank
24 you.

25 THE COURT: Okay. Anything further

1 from the State on this particular issue?

2 MR. OSBORNE: No, Your Honor.

3 THE COURT: I will hear arguments.

4 Yes, sir. Your motion.

5 MR. APICELLA: Thank you, Judge. My
6 first argument on sufficiency of the affidavit is
7 similar to the one I have already made. Your Honor
8 ruled on it. I would submit that based upon the
9 cross-examination that there is no probable cause
10 to indicate that my client was using the cell phone
11 based upon the video in a way that would make it
12 more likely than not or probable that it would be
13 evidence relevant to this case. That's my first
14 argument.

15 THE COURT: Yes, sir.

16 MR. APICELLA: My second argument,
17 Judge, is based upon the search warrant itself and
18 the testimony induced about it. The return of the
19 search warrant was filed more than ten days after
20 it was executed. Pursuant to the statute it
21 violates the statute and I would move that based
22 upon that violation that the download should be
23 suppressed.

24 THE COURT: I will hear from the State
25 on those two issues.

1 MR. OSBORNE: So the staleness is what
2 he's referring to in reference to suppression based
3 on the execution of the search warrant and the
4 return. And the cases that I have looked up on
5 that allow the Court to look at the complexity of
6 the investigation or other factors that might come
7 into play that would cause a delay.

8 Detective Krasowski has talked about
9 this being a complicated, multiple co-defendant
10 murder investigation, lots of witnesses. And in
11 addition to the fact that when he placed the
12 request it took the examiners time to actually get
13 to the phone and examine the phone. And I don't
14 have it right in front of me, but I believe there
15 was a prejudice element too. I don't see any
16 prejudice to the Defendant. Detective Bailey
17 testified on Monday that they told Mr. Middleton
18 that if you'd like the phone back just contact us.
19 They received no contact. They did not contact him
20 because he didn't give them any phone number or an
21 address to locate him.

22 The second issue regarding the probable
23 cause of the affidavit itself. The standard that
24 Mr. Apicella is hinting to would be to require the
25 officers or a witness to actually see him make a

1 phone call and then somehow tie that phone call
2 into the murder itself. That's a high standard.
3 And that's not the purpose to a search warrant,
4 more probable than not. I would submit that the
5 fact that you have multiple individuals working in
6 concert for what appeared to be this common
7 objective, the fact that he was in possession of a
8 phone would have given them probable cause through
9 his training and experience like the search
10 warrant. He says he knows individuals to
11 communicate through phones. We all know that. But
12 he has more. On the video he actually sees Devin
13 pick up the phone. Now, doesn't mean that he
14 texted or anything like that. I don't think he has
15 to.

16 THE COURT: Well, you can pick up a
17 phone, though, and see a text that you received.

18 MR. OSBORNE: That's true too.

19 THE COURT: Just look it at, not touch
20 the phone.

21 MR. OSBORNE: The State's position
22 would be the shooter had fled so, yes, Your Honor.

23 THE COURT: Okay. Anything further?

24 MR. APICELLA: No, Your Honor.

25 THE COURT: The question he raises is

1 the issue on the delay on the return requirement,
2 that there be some showing that was prejudicial.

3 MR. APICELLA: The only showing that I
4 could make is that it's prima facie prejudicial
5 once ten days passes and you can't get the phone
6 back. The fact that no request was made is
7 immaterial.

8 THE COURT: But it was never requested.

9 MR. APICELLA: From what I have heard
10 the evidence adduced at these hearings no, but he
11 couldn't get the phone back after ten days because
12 the State --

13 THE COURT: You could have made a
14 motion to the Court to be allowed to do independent
15 testing on the phone. I just got in the case last
16 Monday. Was such a motion made?

17 MR. APICELLA: No, Judge.

18 THE COURT: All right. I'm going to
19 find that there was probable cause. Based on the
20 evidence and the viewing of the video, it appears
21 to be something in the individual's hand, appears
22 that it could have been the use of a cell phone if
23 for nothing else than to receive a message.

24 I do find that the failure to return
25 under the statute did not cause any prejudice and

1 it is a complicated case. So both motions are
2 denied.

3 Now, you have indicated you would take
4 up the severance motion. Any objection, State?

5 MR. OSBORNE: The only thing that I
6 would suggest is that, and I think what part of the
7 argument she's going to make is that she was going
8 to argue Crawford issues, things of that nature.
9 That's going to be difficult for the Court to rule
10 on that without having seen that.

11 So what I would suggest is allow the
12 State to respond to each of these other motions.
13 We can roll through this pretty quickly. Then save
14 the Facebook stuff, the cell phone stuff for the
15 last motion and I have got all the questions ready
16 and then do that through Detective Krasowski, have
17 the Court see the full picture then --

18 THE COURT: If I had taken the
19 severance motion up to begin with, I know a lot
20 more about the case now than I did at that time. I
21 don't think I could have ruled on it at that point
22 in time because when you are ruling on a severance
23 motion you got to determine whether or not there is
24 any prejudice, someone is being prevented from
25 exercising his rights. You got to know something

1 about the case.

2 So I find that what's going on thus far
3 has been helpful to me. Do you have any problem
4 proceeding as the solicitor suggested?

5 MS. VAN PALA: Your Honor, I think we
6 are really getting to the meat of it now and that's
7 why I felt compelled to stand up and clarify that I
8 do object to taking that order. Because I think
9 that Te'Quan Perry, we need to know what evidence
10 the State is intending on producing through
11 Detective Krasowski and through Detective Bailey in
12 the testimony.

13 THE COURT: Are you taking these as
14 discovery motions?

15 MS. VAN PALA: No, Your Honor. Well, I
16 mean the Defendant filed the motion to suppress so
17 if you were to rule against the Defendant's motion
18 to suppress then that means that the State would
19 intend on introducing it if they could, you know,
20 follow all the rules of evidence, but we just need
21 to know at this point what parts of this evidence
22 that's subject to motions in limine is going to be
23 used against Te'Quan.

24 THE COURT: Why?

25 MS. VAN PALA: At this point, Judge, so

1 that I can object to it. So I can object to it as
2 it pertains to Te'Quan because if we go forward
3 with the joint trial then we are going to have to
4 be very careful about which evidence the State is
5 using to prove Devin guilty versus which evidence
6 the State is using to prove Te'Quan's guilt.

7 THE COURT: So you think that's
8 preventing you from objecting to these things?

9 MS. VAN PALA: I think it would -- I
10 mean if we go forward with this severance and if
11 the Court rules --

12 THE COURT: I have to know enough about
13 the case to be able to rule on the severance
14 questions. I am learning a lot as we go along. I
15 find this is very helpful to that ultimate
16 decision.

17 MS. VAN PALA: Yes, Your Honor. And if
18 the Court were to grant the severance and instruct
19 that the Defendants be tried jointly, if Te'Quan is
20 to be tried this week, then Devin's pretrial
21 motions are irrelevant. Like we might end up
22 duplicating --

23 THE COURT: I am going to follow the
24 State's suggestion as to how we proceed. I want to
25 learn a little more about it before we take up the

1 severance issue.

2 MS. VAN PALA: Thank you, Your Honor.

3 THE COURT: You may proceed.

4 MR. OSBORNE: And to that point we are
5 actually finished with Devin Middleton's motions
6 with the exception of Facebook and severance and I
7 would ask that we deal with these. Let me start
8 dealing with Mr. Perry's motions.

9 THE COURT: Is that okay?

10 MR. APICELLA: Facebook motions? Okay.

11 MR. OSBORNE: So the State's response
12 to Mr. Perry's motion, Defendant's motion for
13 disclosure of jury information, we have provided to
14 them. Defendant's motion for witness's criminal
15 records, we have provided that to them.

16 THE COURT: Just one second. Are these
17 in order here?

18 MR. OSBORNE: Yes, Your Honor.

19 THE COURT: Just one second. Let me
20 catch up with you.

21 MR. OSBORNE: Yes, sir.

22 THE COURT: You are skipping over the
23 Facebook motions, is that what's happening?

24 MR. OSBORNE: That's correct, Your
25 Honor.

1 THE COURT: All right. I just caught
2 up with you. The one on criminal records, you say
3 you have provided that.

4 MR. OSBORNE: Yes, Your Honor, we have
5 to Ms. Van Pala as well as Mr. Apicella.
6 Defendant's motion for regular courtroom hours.
7 Leave that to the Court's discretion.

8 THE COURT: Tell me what that is about.

9 MS. VAN PALA: Thank you, Your Honor.
10 We just simply ask that the Court follow the normal
11 hours of 9 to 5 with a lunch break as opposed to
12 taking testimony early in the morning or late at
13 night so that we can adequately have time for
14 restroom breaks, lunch breaks and to prepare.

15 THE COURT: Ma'am, I take plenty of
16 breaks, but I'm not going to be limited on how I
17 run my courtroom. If you need a break ask for it.
18 I have had several times that have been breaks
19 already. I have never failed to grant one.

20 MS. VAN PALA: We just ask that hours
21 be limited to 9 to 5 with the lunch break.

22 THE COURT: I will not grant that
23 motion.

24 MS. VAN PALA: Thank you, Your Honor.

25 MR. OSBORNE: The next motion is

1 Defendant's motion for bench conference on the
2 record. The State takes no position on the motion.

3 THE COURT: We try to do that. We will
4 -- I have no problem with taking bench conferences
5 at a microphone. I will grant that motion.

6 MR. OSBORNE: The next motion is
7 Defendant's motion to exclude testimony is prior
8 bad acts. Your Honor, so you alluded to discovery.
9 We have provided discovery in this case to the
10 defense. Earlier she asked for a traffic stop to
11 be redacted. We granted that. We have redacted
12 that. Anything that she has asked for she could
13 just specifically list then we could -- it's
14 difficult for me respond to this motion.

15 THE COURT: Is there something in
16 particular that you are seeking to exclude?

17 MS. VAN PALA: This is a pro forma
18 motion in limine to exclude the bad acts. I think
19 the bulk of my objection will be covered by my more
20 specific motions in limine that I filed.

21 THE COURT: So you are not prepared to
22 tell me a specific bad act we are talking about
23 here.

24 MS. VAN PALA: I think I covered them
25 mostly in the other pretrial motions that I filed.

1 I tried to specify in the following pretrial
2 motions what I specifically thought that could be
3 issues that would implicate Lyle and 404 (b).

4 THE COURT: I'm not sure what that
5 means, but we will move along.

6 MR. OSBORNE: The next motion that I
7 have seems to be the same position, but stated a
8 different way. Defendant's motion to reveal 404
9 (b) and Lyle evidence.

10 MS. VAN PALA: That one, Your Honor,
11 specifically, and I filed a motion to compel
12 afterwards along with this motion to reveal. It's
13 specifically in regards to the suggestion that what
14 happened the night before the incident is related
15 to the crime.

16 THE COURT: What do you mean happened
17 the night before?

18 MS. VAN PALA: I believe that the State
19 would intend to introduce evidence that the young
20 men involved in this case had a meeting the night
21 before and I think that they are intending on
22 producing that as evidence to prove the conspiracy.
23 I don't think that under 404 (b) --

24 THE COURT: Now, a meeting in and
25 itself would not be a bad act.

1 MS. VAN PALA: Yes, Your Honor.

2 THE COURT: You got a constitutional
3 right to gather and meet.

4 MS. VAN PALA: And mere association
5 doesn't prove criminal conspiracy either, Your
6 Honor.

7 THE COURT: I understand, but you are
8 objecting to Lyle evidence, so is there something
9 about that meeting that would make that a bad act?

10 MS. VAN PALA: The State intending on
11 introducing I think hearsay evidence about what
12 happened that night because they don't have any
13 eyewitness testimony.

14 THE COURT: Are you going to ever share
15 with me what you think they are going to try to
16 show happened at that meeting?

17 MS. VAN PALA: Louie Johnson would have
18 testified that he saw the boys gathering the night
19 before.

20 THE COURT: Doing what?

21 MS. VAN PALA: The young men involved
22 in this case gathering the night before. Jacquan
23 Spann would testify that he said perhaps observed.
24 A lot of witness testimony that I believe the State
25 is going to -- the State will call these witnesses.

1 They are going to be testifying to hearsay,
2 irrelevant hearsay, prejudicial hearsay.

3 THE COURT: I'm going to ask one more
4 time. What specific bad act are you saying the
5 State is going to try to introduce from that night
6 before?

7 MS. VAN PALA: It's about a stolen gun.

8 THE COURT: So they met about a stolen
9 gun is what you think the State is going to try to
10 show.

11 MS. VAN PALA: Yes, Judge.

12 THE COURT: And so you're concerned
13 that your client's involvement with the stolen gun
14 would be Lyle evidence.

15 MS. VAN PALA: Yes, Judge.

16 THE COURT: Finally got to the bottom
17 line. Thank you. Go ahead.

18 MR. OSBORNE: A little more involved
19 than that. So what we would seek to introduce is
20 the motive. And motive being that the victim went
21 to the same location that he was murdered and he
22 met up with a group of people. At the conclusion
23 of that meeting he went into the car with Jacquan
24 Spann. Jacquan Spann says -- that is what he told
25 the police. We don't know how the testimony is

1 going to be.

2 He told the police that when he got
3 into the car the victim said them boys just tried
4 to kill me. He said who? He said Lefty. And we
5 plan to present evidence that Lefty is indeed
6 Te'Quan Perry. And that he said what's it all
7 about, and I am paraphrasing some of this, but
8 something like dude, one of the individuals that
9 were out there on the video told them that I stole
10 his gun and now they are trying to kill me.

11 THE COURT: Now, is that what you think
12 they are going to try to show?

13 MS. VAN PALA: Yes, Your Honor.

14 THE COURT: Okay. Now.

15 MS. VAN PALA: I think there are
16 multiple levels of inadmissible hearsay here.
17 Besides the hearsay that I don't think that is --
18 that will ultimately come in, witnesses would
19 testify as to the meeting itself or what they
20 observed in the meeting. Gestures, whether there
21 was a gun involved, appearance, association, all of
22 that the State is trying to say is motive which
23 would make it an exception to character. But like
24 we said before, there's no -- it is just evidence
25 of association. They can't prove that that

1 association is linked to a motive, is linked to
2 this rumor from the victim's mom.

3 THE COURT: Is that witness Spann, is
4 he available to testify in a pretrial hearing?

5 MR. OSBORNE: He is, Your Honor. He is
6 in custody on a separate charge.

7 THE COURT: I see.

8 MR. OSBORNE: We will have him here.

9 THE COURT: Okay. How do you propose
10 we take that up, as a proffer during the trial?

11 MR. OSBORNE: Well, I mean quite
12 honestly it was very difficult to address this
13 because it wasn't specifically laid out. If that
14 is the objection then I would suggest that yes, we
15 do it through a proffered statement or proffer
16 testimony from Mr. Spann, whether it's an excited
17 utterance that he heard the victim say to him they
18 just tried to kill me, if it comes in under that.
19 To address the Lyle issue, the Lyle issue deals
20 with prior bad acts. To us this is all part of res
21 gestae motive, one act. But that's how we would
22 recommend proceeding with that.

23 THE COURT: I see. Yes, ma'am.

24 MS. VAN PALA: Thank you, Your Honor.
25 Additionally, in addition grounds, the solicitor --

1 THE COURT: Whoa, whoa. We haven't
2 finished dealing with that first thing. Let's
3 don't get additionally yet. He is suggesting that
4 we take it up as a proffer during the trial so that
5 it won't be presented to the jury until that person
6 is put on the stand, listen to his testimony, you
7 preserve your objection to that time. Any problem
8 with that?

9 MS. VAN PALA: No, Your Honor. We just
10 ask the solicitor not mention it in his opening.

11 THE COURT: He is shaking his head no.
12 I'm going to get you to state on the record --

13 MR. OSBORNE: I will, Your Honor. I am
14 trying hard not to make any promises in my opening
15 I won't be able to deliver. This is going to be
16 one of those cases where we are going to put
17 witnesses on the stand and see how it unfolds.

18 But to that issue I have no plan on
19 mentioning anything regarding the night before.

20 THE COURT: Okay. That motion in
21 limine will be held in abeyance until it is
22 presented at trial. I will ask the State to inform
23 me when they intend to call that witness so that we
24 can take a proffer and the jury not be present.
25 You will then preserve your objections to that

1 testimony until that time.

2 MS. VAN PALA: Thank you, Your Honor.
3 As an additional grounds under my umbrella Lyle
4 motion, the State has made a big deal about witness
5 intimidation. I think that's explosive character
6 evidence extraordinarily and inflammatory
7 prejudicial. We ask the State be limited in
8 mentioning any kind of witness intimidation
9 evidence.

10 MR. CORVEY: Your Honor, with regards
11 to witness intimidation evidence, I would site the
12 Court to State v. Edwards 383 S.C. 66. I have a
13 copy if Your Honor would like it.

14 THE COURT: Pass it up.

15 MR. CORVEY: Your Honor, State v.
16 Edwards stands for the proposition that evidence of
17 witness intimidation if properly attributed to
18 being made by the Defendant can be introduced as
19 consciousness of guilt. So to me that issue is
20 fairly clear, Judge. I think really there will
21 have to be contemporaneous rulings on each
22 individual issue with some subissues, but as a --

23 THE COURT: If you -- let me hear from
24 her.

25 MS. VAN PALA: Thank you, Your Honor.

1 Specifically regards to the Edwards case, the
2 Edwards case stands for the reliability test. And
3 that reliability test says that the witness
4 intimidation evidence has to be directly linked to
5 the Defendant and it has to be some kind of clear
6 witness intimidation. In this case I would site
7 Hayden for the proposition that what we have here
8 are vague threats. This is not the kind of case
9 where you are going to hear how witnesses come
10 forward and say yes, Mr. Perry intimidated me and
11 this is how he intimidated me. So I don't think it
12 passes the Edwards test and I have Hayden.

13 THE COURT: You can pass it up. We
14 will take that up at the time and see what they
15 say.

16 MS. VAN PALA: May I approach?

17 THE COURT: Certainly. This is a
18 Fourth Circuit case.

19 MS. VAN PALA: Yes, Your Honor.

20 THE COURT: Looks like a couple of
21 issues they ruled that witness intimidation was
22 admissible in this case; is that right?

23 MR. CORVEY: That is correct, Your
24 Honor. And I guess to get back to the point, I
25 agree that we would have to meet the burden of

1 proving and linking the intimidation to the
2 Defendant.

3 THE COURT: Absolutely.

4 MR. CORVEY: And we fully intend on
5 doing that. So I just site Edwards as the kind of
6 umbrella proposition that we can do so as long as
7 we meet our burden of doing so which we feel very
8 comfortable we are ready to proceed.

9 THE COURT: I will keep both of these
10 cases and when we get to that point in the trial I
11 will certainly consider that. Can the State
12 identify when they intend to introduce that type of
13 evidence and we will take that proffer outside of
14 the jury's hearing.

15 MR. CORVEY: Judge, I think we may end
16 up getting to some of that later this afternoon. I
17 think the primary source of that witness
18 intimidation material comes from I guess two
19 sources. One being Facebook which I think we will
20 take up this afternoon, the other being jail calls.
21 So Facebook, I think we may get to a lot of that
22 later today.

23 THE COURT: All right.

24 MS. VAN PALA: Your Honor, we ask the
25 State not mention any kind of witness intimidation

1 evidence in their opening.

2 THE COURT: Well, he said we may end up
3 ruling on some of it this afternoon so I will wait
4 and see with that.

5 MS. VAN PALA: Yes, Your Honor. And
6 the third character -- inadmissible character
7 evidence I believe the State will seek to admit
8 against Mr. Perry is any kind of gang association
9 evidence. That's explosively prejudicial and it
10 doesn't tend to prove the conspiracy in this case
11 so it is also irrelevant.

12 THE COURT: Character evidence. Are
13 you talking about something in particular?

14 MS. VAN PALA: I believe the State is
15 going to try to use the Facebook records and the
16 jail phone calls to --

17 THE COURT: Since I've not seen those
18 records I have no clue what you're talking about.
19 Again, you are going to have give some information
20 for me to understand what the objections are. It's
21 like you don't want to talk about these things, but
22 you got to talk to me about it.

23 MS. VAN PALA: Right. The images that
24 the State would want to admit against Mr. Perry in
25 making hand signs, making hand gestures on a

1 variety of different media and using phraseology in
2 his messages, Facebook posts.

3 THE COURT: Such as?

4 MS. VAN PALA: Such as like the name of
5 his -- the Facebook name that the State would
6 attribute to him as Otf, only in the family, or any
7 kind of lingo that is common between Devin and
8 Te'Quan that the State would say is part of like a
9 gang association.

10 THE COURT: State?

11 MR. OSBORNE: Sorry, Your Honor.
12 Detective Krasowski is going to cover all of that.
13 We were going to get to that during the Facebook
14 motion.

15 MS. VAN PALA: I object to the
16 solicitor's ordering of things. I think that for
17 my objection --

18 THE COURT: I am controlling the order
19 of things. I told you just a few minutes ago if
20 you want me to consider your severance motion I
21 need to know more about the case. So I am taking
22 up these other motions to learn that and I am
23 learning. I am having to drag it out of you from
24 time to time, but I am learning as we go along
25 what's in the case. So I am taking it up in this

1 order because I want to.

2 MS. VAN PALA: Yes, Your Honor.

3 THE COURT: That's my ruling.

4 MS. VAN PALA: Yes, Your Honor.

5 MR. OSBORNE: Your Honor, the next
6 motion is the Defendant's motion to suppress
7 identification.

8 THE COURT: Yes.

9 MR. OSBORNE: So most of this we kind
10 of covered already because we have witness location
11 issues. If we intend on calling a witness who has
12 made an identification via photographic lineup, I
13 would request that we have that hearing outside the
14 presence of the jury when the witness is here.
15 It's kind of pointless for us to have a hearing
16 like we tried before when I don't even know we are
17 going to get these witnesses here.

18 THE COURT: I will be glad to take it
19 up as the trial proceeds.

20 MR. OSBORNE: The next motion is
21 Defendant's motion to compel specific discovery.
22 Specifically she requests all statements made by
23 co-defendants or jailhouse informants. We have no
24 jailhouse informants and I have given her all the
25 statements of the co-defendant.

1 THE COURT: Do you have any reason to
2 believe there is something you have not received?

3 MS. VAN PALA: Not with the solicitor's
4 reply, no, Your Honor.

5 THE COURT: Okay. Move to the next.

6 MR. OSBORNE: Defendant's motion
7 objecting to sequestration of jurors. State takes
8 no position on that.

9 THE COURT: I don't intend to sequester
10 jurors.

11 MR. OSBORNE: Next motion is
12 Defendant's motion to exclude inadmissible hearsay
13 and character testimony, and there are a lot of
14 people mentioned on here, many of whom I don't know
15 who they are so that's difficult for me to respond.

16 MS. VAN PALA: Judge, I listed a number
17 of names that have appeared in the discovery that
18 are concerning because I believe that witnesses
19 will try to testify that these people told them
20 that certain facts in this case exist.

21 THE COURT: Did what?

22 MS. VAN PALA: That the people I have
23 listed in my motion, I am concerned that the
24 witnesses who will actually testify in this case
25 will reference these people as telling -- as saying

1 these people told me that.

2 THE COURT: That's when you get up and
3 object to hearsay.

4 MS. VAN PALA: Yes, Your Honor. And I
5 think you kind of heard a little bit of it with
6 Detective Krasowski's testimony on the search
7 warrants about how a lot of the evidence in this
8 case is coming from the victim's mom and a lot of
9 it's unsubstantiated rumors. And so that's the
10 concern of this motion.

11 THE COURT: How do I rule on it
12 pretrial when he is saying a lot of these names
13 aren't even on his witness list? I don't know what
14 they are going to say.

15 MS. VAN PALA: And if they don't come
16 to trial then they are --

17 THE COURT: I will have to rule on
18 these as they come up.

19 MS. VAN PALA: We ask the solicitor not
20 mention any of these people or their potential
21 testimony in his opening.

22 THE COURT: No, ma'am. I won't grant
23 that motion. He can't even mention their names?

24 MS. VAN PALA: If they are -- if they
25 would be a proponent of hearsay testimony, that's

1 my objection.

2 THE COURT: Ma'am, I have been doing
3 this a long a time. I never heard of a judge
4 ruling that a lawyer can't talk about a witness to
5 the jury if that person might give some hearsay
6 testimony. Never heard of that.

7 MS. VAN PALA: Judge, I have filed a
8 lot of motions in this case because as Detective
9 Krasowski told you it is very complicated. And I
10 am trying to highlight some of the issues that I
11 think that are going to be the source of our
12 argument.

13 THE COURT: You can do that with a
14 pretrial brief and make me aware of that. You
15 don't have to make motions on every possible thing
16 that could ever come up in a trial.

17 MS. VAN PALA: Well, I think that these
18 are the biggest issues in this case and that's why
19 I filed a motion.

20 THE COURT: I am not telling you not to
21 object if it occurs. But for me to rule on it
22 pretrial I have got to have something to rule on.
23 You are telling me you don't know if they are going
24 to testify, if they are going to testify what they
25 are going to say. What I am supposed to rule on in

1 that situation? I will enforce the hearsay rules.
2 That's all I can tell you. If you make the
3 appropriate objection I can assure you I will
4 enforce hearsay rules.

5 MS. VAN PALA: We also would like the
6 State to address who they are going to call.

7 THE COURT: Didn't you send out a
8 witness list?

9 MR. OSBORNE: I did, Your Honor.

10 MS. VAN PALA: Last night.

11 THE COURT: You have seen it?

12 MS. VAN PALA: Last night, Your Honor,
13 yes.

14 THE COURT: Have you seen it?

15 MS. VAN PALA: Yes, Your Honor.

16 THE COURT: Okay. He has given you a
17 list of the potential witnesses. I read it so I
18 know he sent it. I want to be sure you got a copy.

19 MS. VAN PALA: Yes, Your Honor.

20 THE COURT: Okay.

21 MR. OSBORNE: The next motion is
22 Defendant's motion to suppress and exclude pepper
23 spray and pepper spray analysis. This sort of gets
24 to in the State's opinion what this trial could
25 evolve to. We have a SLED analyst get up and here

1 and testify that he got the victim's hat. He
2 tested it. It came back positive for pepper spray
3 on the back of the hat. On the video you can see
4 the victim with the back with his hat turned
5 backwards. That goes to the weight, not the
6 admissibility. Almost feels like we are going to
7 proffer every witness's testimony before we get to
8 do it live in front of the jury. I would just say
9 put the witness up there. He's a SLED trace
10 analyst. Hear the testimony and it's up to the
11 jury.

12 MS. VAN PALA: The expert himself said
13 that there was no way he could conclude that there
14 was pepper spray on the hat. The expert himself
15 said that that's not what the evidence is going to
16 show. Judge, I think that's a fatal misstatement
17 of the evidence. What the analyst found he put in
18 his record which was provided to us in discovery.

19 THE COURT: Do you have a copy of the
20 report? Let me look at it.

21 MS. VAN PALA: Court's indulgence.

22 THE COURT: Yes.

23 MR. OSBORNE: May I approach?

24 THE COURT: Show it to her, make sure
25 she agrees that's what we are talking about.

1 MR. OSBORNE: (Handing.)

2 THE COURT: Thank you. Yes, ma'am. I
3 am ready.

4 MS. VAN PALA: Thank you, Your Honor.
5 What the analyst concluded is that there was oleo
6 resin. There's no way to draw the conclusion that
7 what oleo resin -- excuse my pronunciation, Judge.
8 What OC is what it is called, the abbreviation OC
9 resin, there is no way to conclude that's actually
10 pepper spray. There has to be some sort of aerosol
11 propellant carrier or something that weaponized it
12 and made it pepper spray. Otherwise it's just
13 pepper. It could come from chili, it could come
14 from vegetables, it could come from analgesics,
15 food products, the list goes on and on.

16 And the expert is not going to testify
17 that that is pepper spray. So to the solicitor's
18 point that it goes to the weight, not the
19 admissibility, at some point the judge is the
20 gatekeeper for expert testimony and the judge is
21 the gatekeeper to make sure that irrelevant and
22 confusing, highly prejudicial information is not
23 presented to the jury.

24 This is just that, Judge. Saying that
25 there was pepper extract or pepper residue on the

1 victim's hat is not the same thing as saying it's
2 pepper spray and that the victim was pepper
3 sprayed. It is not relevant. It is not reliable.
4 Doesn't pass Daubert and it shouldn't be presented
5 to the jury.

6 THE COURT: You are mixing some things
7 here. I want to be sure that I understand what
8 you're saying. I assume you are relying upon this
9 expert's testimony to the extent that the
10 methodology that he used is generally accepted
11 chemical analysis because what I read was that he
12 collected several swabs, that they were analyzing
13 using a gas chromatography mass spectrometry. I
14 have run into that a few times. I think it's a
15 fairly standard way of doing a qualitative analysis
16 of a chemical on some other substance.

17 So if you are asking me to find that he
18 used improper science or didn't follow proper
19 procedures in doing the testing, that's entirely
20 different from an objection to say it is not
21 relevant for some reason. Do you follow me?

22 MS. VAN PALA: Yes, Judge.

23 THE COURT: The gatekeeping function
24 for the Court is to decide whether or not an expert
25 is using reliable methods, peer reviewed, proper

1 scientific methods in doing whatever conclusion he
2 reaches and he reaches the same conclusion that you
3 say he reaches. This is -- he found residue from
4 in effect peppers which is used in pepper spray,
5 but it also can be found in food items and things
6 of that nature.

7 So he reaches the same conclusion that
8 you are arguing. Am I reading this right?

9 MS. VAN PALA: Yes, Judge. And there's
10 nothing in his report that supports --

11 THE COURT: So you are not challenging
12 his science?

13 MS. VAN PALA: Well, I believe that you
14 can do a quantitative analysis. You did say a
15 qualitative analysis to see if OC residue can be
16 detected in the GSMS machine. You can also do a
17 quantitative analysis which would help you
18 determine, the scientist determine whether there
19 was, in fact, pepper spray.

20 THE COURT: Do you have testimony from
21 an expert to that effect?

22 MS. VAN PALA: We could proffer that.

23 THE COURT: Well, do you?

24 MS. VAN PALA: Yes, Judge.

25 THE COURT: So you have hired an expert

1 to refute this.

2 MS. VAN PALA: Yes, Judge.

3 THE COURT: For suppression?

4 MS. VAN PALA: No, Judge, and that's
5 because we had asked for Mr. Tang who is the
6 analyst in this case to be present for the pretrial
7 hearings so that we could do the voir dire in
8 camera prior to trial and he is not here.

9 THE COURT: Okay.

10 MR. OSBORNE: So I will just address
11 one issue in reference to this expert. We would
12 ask through reciprocal Rule 5 which if that all had
13 been done, if she does have papers or documents or
14 reports from this expert, that she go ahead and
15 turn that over to us.

16 THE COURT: That person issued a
17 report?

18 MS. VAN PALA: No, Your Honor.
19 Pursuant to Rule 5 we don't have anything that
20 would fall under that rule to turn over to the
21 State.

22 THE COURT: Okay.

23 MR. OSBORNE: The other issue that I
24 would just say, if she's bringing in an expert to
25 say that this could be something other than OC,

1 that goes to the weight, not the admissibility.
2 That's exactly what we are saying. The report even
3 says that. It could be something else. The fact
4 Mr. Middleton said that he may have been using
5 pepper spray on the video and that's what the video
6 does depict I think overcomes that level.

7 THE COURT: Looks like you are going to
8 end up as you said double trying the case looks
9 like. So I will reserve that until it's presented
10 and you can challenge the qualifications of the
11 SLED expert at that time.

12 MS. VAN PALA: Yes, Your Honor.

13 THE COURT: You want this back?

14 MR. OSBORNE: Yes, Your Honor.

15 MS. VAN PALA: Oh, we would ask that
16 the State allow us a little scheduling so that I
17 can make our expert available because we have to
18 book a hotel.

19 THE COURT: I was going to talk about
20 that.

21 MS. VAN PALA: Thank you, Your Honor.

22 MR. OSBORNE: The next motion is
23 Defendant's motion to suppress and exclude
24 surveillance videos and surveillance still
25 photographs. Argument it is not

1 self-authenticating. We have a custodian, Jessica
2 Sanford, is going to testify.

3 THE COURT: You plan to authenticate
4 it?

5 MR. OSBORNE: Yes, Your Honor.

6 THE COURT: Okay. Anything else we
7 need to consider on that, Ms. Van Pala?

8 MS. VAN PALA: Judge, there's a major
9 issue with the surveillance that like we just said,
10 I don't think -- it doesn't go to the weight, but
11 it goes to the admissibility. I mean I think the
12 issue with the surveillance is that all of the time
13 stamps are different. None of them match up.
14 There's no way to know what times are right. The
15 detectives in this case have done some mathematical
16 equations and put pictures together to try to
17 assign time stamps to the video. It is very
18 confusing. We don't know what we are working with.
19 I have heard a time range difference anywhere from
20 ten minutes to Ms. Sanford says that she tries to
21 keep the clock from getting 40 minutes off.

22 So I think that's a major issue with
23 this case that the jury is going to see the
24 surveillance and the officers will testify to what
25 time it is, but what times are on the surveillance,

1 but there's no way to know if that's correct. It's
2 highly prejudicial. It is very confusing. I don't
3 think that the custodian will be able to rectify
4 that, will be able to connect the dots for us.

5 THE COURT: I will hear from the State.

6 MR. OSBORNE: We have the testimony of
7 Officer Jamal Medlin. He is the first officer on
8 scene. He can see himself on the video. He said
9 that is indeed me. You compare that to the CAD
10 report when the 911 call was placed. You can see
11 and estimate the time of the shooting on the
12 surveillance video based on everyone running from
13 the area at that time. The call comes in. Officer
14 Medlin then shows up he says about a minute or two
15 later. That's corresponded by the CAD report. So
16 can we say to the second? No. But we can say that
17 we believe the camera is about seven, maybe six
18 minutes fast. To the second -- well, that's what
19 we can say.

20 MS. VAN PALA: I have heard everything
21 from five minutes, six minutes, seven minutes,
22 eight minutes, ten minutes. We also have issues
23 with McDonald cameras. And I think the problem
24 here is that there are going to have -- the State
25 is not going to have any witnesses who will be able

1 to testify either in their lay perception and as to
2 their personal knowledge of what happened and how
3 the camera got off and what it means.

4 THE COURT: Let me ask you this. What
5 role does the time play?

6 MS. VAN PALA: The time is significant
7 because factually speaking, the time is significant
8 as you have seen on the surveillance, but also the
9 Defendant --

10 THE COURT: Clocks get off. I mean my
11 watch doesn't say what that clock says. So that
12 happens.

13 MS. VAN PALA: And this is the
14 government's surveillance. The surveillance camera
15 that the State will submit.

16 THE COURT: What I am saying is perhaps
17 a correction to the jury to disregard the time on
18 the video and let the people testify as to when
19 they arrived and what they did or when they did it.
20 I am just trying to explore the possibility.

21 MS. VAN PALA: Yes, Your Honor.

22 THE COURT: But I am trying to find out
23 from you what importance the time has in the case.

24 MS. VAN PALA: It is important as to
25 when witnesses were on scene.

1 THE COURT: Some of it you see in the
2 video.

3 MS. VAN PALA: And then the camera
4 pans. So it is going to be important to determine
5 who were actually eyewitnesses, who were witnesses
6 that have personal knowledge about what happened
7 that day. We can satisfy the elements of this
8 case. Also what's important in this case is the
9 Defendant was seen at McDonalds a little bit later
10 on and I think we need to know or the jury will
11 want to know how much, how far after the incident.

12 THE COURT: Let's assume the clock is
13 wrong.

14 MS. VAN PALA: Then --

15 THE COURT: Does that make the whole
16 video inadmissible?

17 MS. VAN PALA: I think it strikes at
18 the heart of it. If the Court were to rule that
19 the video is admissible we ask that the time stamps
20 be removed.

21 THE COURT: I'm not sure that's
22 possible.

23 MS. VAN PALA: We specifically do
24 object to --

25 THE COURT: Let me hear from the State

1 on this.

2 MR. OSBORNE: I just am repeating
3 myself a lot. It goes to the weight, not the
4 admissibility. That's great fodder during closing
5 to we don't know what time anything happened. But
6 we will have witnesses that will make sense of it
7 or at least it's the State's position.

8 THE COURT: But even your witnesses
9 you're saying are going to testify that the time
10 stamp on the video is not accurate.

11 MR. OSBORNE: That is correct, Your
12 Honor. In fact, Detective Krasowski spent a lot of
13 time putting together a sheet that explains the
14 times and how you come about his explanation of the
15 times, how they are off, which cameras are off and
16 what the time should be. But, again, all of that
17 goes to the weight, not the admissibility.

18 MS. VAN PALA: We have to take care
19 here that our witnesses that the State has
20 testifying about the surveillance in the times that
21 they either testify as lay witnesses or testify as
22 an expert. I think the case law is really clear
23 that law enforcement, they can't testify as to what
24 they personally saw at the scene because they
25 weren't there. Detective Krasowski can't testify

1 as to what happened in this Charleston Police
2 Department headquarters where the surveillance is
3 being taped and is being extracted and once it was
4 extracted it was put on a thumb drive and handed to
5 Detective Krasowski. He also can't testify as an
6 expert because although he's putting together --

7 THE COURT: He tells me that you are
8 going to bring in the custodian, the person who
9 does this? They are going to testify about those
10 things?

11 MR. OSBORNE: Right. So the way we are
12 going to do it, the way we intend on doing it,
13 Jessica Sanford, that's her job. She works for the
14 central intelligence unit at CPD. It is her job to
15 maintain these videos, to put people in charge of
16 watching the videos and when a request is made by a
17 detective to her unit to burn a CD or time frames
18 from that area that they are investigating, her
19 unit does that. They make those CDs. We are going
20 to show her those CDs tomorrow. She will then
21 verify those CDs are made, they are kept by her
22 unit.

23 Now, what she's referring to is the
24 weight of it. How important is it. Can the State
25 prove to the second that this is what they are

1 saying happened. Those are all good arguments to
2 make. But it doesn't go to the admissibility.
3 It's a prima facie showing that what's on that
4 video is what we claim it to be and you can see an
5 enormous police response to the area of [REDACTED] Norman
6 on March 23rd around 6:00 and there were no other
7 reported homicides or no other significant events
8 in that area on that day at that time.

9 MS. VAN PALA: And what the custodian
10 will also tell you is that there's no -- although
11 that part of the maintenance and care of the
12 surveillance cameras is correct, that this is how
13 they are kept, this is how they were reported, this
14 is what we do, she will also tell you that there's
15 no way to know what the time difference is.

16 THE COURT: He agrees the time is
17 wrong.

18 MS. VAN PALA: It is going to be
19 extraordinarily confusing to the jury to hear
20 testimony from a custodian that says I don't know
21 what time it is. There's no way for us to know.

22 THE COURT: Except that there's certain
23 things that occur that he says they can pin the
24 time down.

25 MS. VAN PALA: And the officers can

1 testify as to what happened and what time they
2 thought that happened. But they can't draw any
3 conclusions as to what time is on the video.

4 And --

5 THE COURT: I'm going to overrule the
6 objection.

7 MS. VAN PALA: Thank you, Your Honor.

8 MR. OSBORNE: Next motion is
9 Defendant's motion to sequester witnesses. We
10 agree.

11 THE COURT: We agree. I will issue a
12 sequestration order. I have already have done
13 that.

14 MR. OSBORNE: Next motion is
15 Defendant's motion to exclude Defendant's
16 statement. We have already had the Denno hearing.

17 MS. VAN PALA: Your Honor, I apologize.
18 If I could on the record supplement my argument.
19 It didn't occur to me --

20 THE COURT: You know we are not
21 supposed to let you do that. Is there a new case?

22 MS. VAN PALA: No. I was reviewing the
23 redacted clips and noticed some areas where we
24 believe it should be further redacted. The basis
25 for my objection is that the Defendant is pictured

1 in handcuffs.

2 THE COURT: We have got to bring some
3 finality to all these motions at some point in
4 time. If we just keep going back and revisiting
5 them the next day, that's not the way this is
6 supposed to work.

7 MS. VAN PALA: Yes, Your Honor. The
8 Defendant appears in shackles and is told he is
9 under arrest and read his Miranda rights and other
10 prejudicial images and words that law enforcement
11 use that signal that he is in police custody which
12 infringes on the Sixth Amendment right -- excuse me
13 -- the presumption of innocence. It conflicts the
14 presumption of innocence because to the jury it
15 signals that he is already -- since he is the
16 accused in shackles then he's already guilty.

17 Plus there are segments of the
18 interrogation where officers say things like we
19 have all this evidence that quote unquote, we know
20 you were out there. We have all these witnesses
21 who can come in and say, we have all this
22 information. But then they never say it. And
23 that's implying that there is evidence that law
24 enforcement and the State has that the jury will
25 never see. And it's also burden shifting because

1 it puts the idea in the jury's mind that since law
2 enforcement has all this evidence that we haven't
3 seen it's up to the Defendant to prove his the
4 innocence, to prove that law enforcement is wrong.

5 MR. OSBORNE: We covered this I think
6 verbatim. And my response to that was any comments
7 that are made during an interrogation, which again
8 to repeat, an interrogation with an accusatory
9 atmosphere, it's not information gathering like an
10 interview, it's an interrogation, that's what it
11 is. If anything like that is elicited through
12 other witnesses as well as she has a remedy for
13 that. That's her closing. She can say you haven't
14 seen anything that they said they could do. That's
15 the remedy to that. We have already covered this.

16 It is difficult for me address these
17 specific issues without watching the whole video.

18 THE COURT: The interrogation took
19 place when he was arrested?

20 MR. OSBORNE: And that too, Your Honor.
21 And to cut out the Miranda warnings, I have got to
22 cross the gate. The gatekeepers are the jury to
23 determine the voluntariness and they have to hear
24 that Miranda. If we are not allowed to represent
25 that evidence then we might have passed your

1 threshold for voluntariness, but we haven't passed
2 theirs.

3 THE COURT: They have got to rule on
4 it. This is all information that was available at
5 an earlier hearing. The ruling stands.

6 MS. VAN PALA: Thank you, Your Honor.

7 MR. OSBORNE: The next motion is
8 Defendant's motion to determine the admissibility
9 of prior convictions. We don't intend on
10 introducing any evidence of Mr. Perry's prior
11 convictions.

12 The next motion is Defendant's motion
13 to exclude reference to Demarco Jones. This we do
14 take exception to.

15 THE COURT: Who is Demarco Mr. Jones?

16 MR. OSBORNE: Demarco Jones is the
17 victim's cousin. Demarco Jones is the individual
18 that you will see in the video who is wearing the
19 blue sweatshirt. Demarco Jones played a factor in
20 this case. Demarco Jones is the individual that
21 the State hopes to introduce evidence to say that
22 Demarco is the one who told Te'Quan Perry that it
23 was his cousin Brandon who stole his gun. And
24 that's what set everything into motion.

25 Now, Demarco is present during the

1 assault. Demarco leaves with one of the
2 individuals, Denardo Felder, who is also in the
3 assault. And afterwards Demarco Jones is murdered.
4 He is murdered in a North Charleston. It's a
5 homicide investigation. It is still open. These
6 two individuals were incarcerated at the time. So
7 there's no evidence to suggest that they are
8 responsible for Demarco Jones' murder. I don't
9 intend on -- I have thought about this and I think
10 the way we can do it, we don't have to say Demarco
11 Jones is murdered. That's not important to me.

12 What is important to the State is to
13 say that Demarco Jones won't be testifying because
14 he is deceased. And that's what I would like to
15 get out. Is simply ask Detective Krasowski where
16 is Demarco Jones now. Demarco Jones is deceased.
17 And leave it at that. Of course if they were to
18 open any doors, well, then it comes back, but
19 that's the only testimony we would get out.

20 I am more than certain the jury will be
21 curious where are the individuals who were standing
22 right there and witnessed the murder.

23 MS. VAN PALA: The State is just
24 inviting a hearsay objection. The State is
25 intending to present evidence from a dead man.

1 Nothing -- Demarco Jones is dead. He can't
2 testify. The officers can testify as to what they
3 learned as a result of their investigation because
4 that's their job. That's within their rational
5 interpretation and their personal knowledge. They
6 can't say Demarco Jones told me that. That's rank
7 hearsay, Judge.

8 So why even reference Demarco? He is
9 irrelevant. And if Mr. Perry and Mr. Middleton are
10 not implicated in Demarco's murder then why is it
11 that relevant to this case at all? Why is Demarco
12 Jones's death relevant to Brandon's death? It's
13 not. It's highly prejudicial and extraordinarily
14 confusing.

15 In criminal trials the defense can make
16 in closing argument who the State doesn't produce
17 to testify. For instance, any of those random
18 unknown black males on the surveillance footage.
19 That's right. But in this case you can't say that.

20 THE COURT: Well, isn't he an
21 unavailable witness under 804?

22 MS. VAN PALA: He was also charged with
23 obstruction of justice in this case before his
24 death for giving --

25 THE COURT: Whoa, whoa, whoa. Let's go

1 back to you answer my question.

2 MS. VAN PALA: Court's indulgence, Your
3 Honor.

4 Judge, I don't think the rule says
5 anything about --

6 THE COURT: The rule is entitled
7 hearsay exceptions. Declarant unavailable. And
8 then it goes on to talk about when the declarant is
9 unavailable. No. 4 is unable to be present or
10 testimony at the hearing because of death. It's an
11 exception to the hearsay rule.

12 MS. VAN PALA: So that the officers can
13 testify as to what Demarco -- what they learned
14 from Demarco before his death. But his death isn't
15 relevant and his death is prejudicial.

16 THE COURT: They have got to be able to
17 show in order to qualify for the exemption that he
18 is dead.

19 MS. VAN PALA: And the jury will be
20 confused --

21 THE COURT: About what? That he is
22 dead?

23 MS. VAN PALA: That Mr. Perry and Mr.
24 Middleton had something to do with his death.

25 THE COURT: I don't think so. People

1 die for a lot of reasons. You can't make believe
2 that somebody is murdered if we don't mention a
3 murder. I am not going to let them talk about the
4 murder.

5 MS. VAN PALA: Court's indulgence.

6 THE COURT: Yes, ma'am.

7 (Off-the-record conference.)

8 MS. VAN PALA: Yes, Judge, thank you.

9 What I was looking at is his unavailability is only
10 the first part of the hearsay rule. The second
11 part is also fitting an exception. So what former
12 testimony is Demarco Jones going to testify to? Or
13 he is not going to -- excuse me.

14 THE COURT: I will hear from the State
15 on this.

16 MR. OSBORNE: That's a separate
17 question. So let me just address that first
18 question that she brought up regarding in the
19 motion, what the motion said. Us even referencing
20 Demarco Jones' name. We need to reference Demarco
21 Jones name as part of our res gestae, the
22 presentation of the case. It tells the story as to
23 why there is a missing link in this case. And the
24 reason why there is a missing link and the res
25 gestae of this shows that, he can't be here.

1 And my initial idea was to tell -- was
2 to present evidence to say that these guys didn't
3 do it. We are not suggesting that they did it, but
4 they didn't like that. So now we won't do that.
5 Now my next option would be to say he is simply
6 deceased. I won't even say that he was murdered.
7 We will just say he is deceased and leave it at
8 that.

9 Now, to address her other issue
10 regarding the unavailability, the exception to
11 hearsay, that is correct. I hesitate to fall back
12 on that only because I don't know that I'm going to
13 get a witness in here that is going to give me the
14 excited utterance that I need.

15 So if I don't have that I don't want to
16 submit the argument to the Court that I want to
17 talk about Demarco Jones to get an excited
18 utterance if I don't know I can get it. So I just
19 want to mention Demarco Jones is deceased as part
20 of our res gestae presentation of the case. If we
21 get to that witness and I can get in the excited
22 utterance, then I will seek to do so.

23 THE COURT: He is an unavailable
24 witness. Okay.

25 MS. VAN PALA: And I don't think that

1 the State needs to even highlight that. Because
2 Demarco Jones -- the State doesn't have to use
3 Demarco Jones' name. The officer --

4 THE COURT: I'm not going to let you
5 tell the State how to try their case. If they
6 think that's important in their case and it is
7 admissible under the rules then it could come in.

8 MS. VAN PALA: Judge, we also object to
9 the State seeking to enter hearsay from Marvin
10 Johnson. Marvin is maybe --

11 THE COURT: Wait a minute. I am
12 dealing with this written motion. Is that a new
13 motion?

14 MS. VAN PALA: Judge, it's a similar
15 argument. New motion.

16 THE COURT: Is this a new motion? Is
17 there a motion in here on this same on that other
18 person?

19 MS. VAN PALA: No, Your Honor.

20 THE COURT: Okay.

21 MS. VAN PALA: Because we have learned
22 recently today that the State's not able to bring
23 Mr. Johnson to testify.

24 THE COURT: He's not dead.

25 MS. VAN PALA: Right. And I ask that

1 the State not --

2 THE COURT: I don't think he is. We
3 don't know for sure.

4 MS. VAN PALA: And if he is not going
5 come to court to testify then --

6 THE COURT: They would have to bring it
7 in under one of the exceptions to the hearsay rule.
8 I don't know what that might be any given time. If
9 they attempt to introduce any statements from him
10 you have to right to object to them as hearsay.
11 And then I have to determine whether it fits within
12 any of the exceptions because he is not going to be
13 here I am told. So he won't be present to testify
14 himself. So I am preserving your right to make
15 that objection, but I am not going to rule on it
16 pretrial since I have no clue what they might be
17 trying to get in.

18 MS. VAN PALA: We ask the State not
19 mention Demarco Jones or Marvin Johnson in their
20 opening.

21 THE COURT: Denied.

22 MR. OSBORNE: Next motion, Defendant's
23 motion to permit jurors to visit the crime scene.
24 We would object to that. I think we have
25 photographs of the crime scene. I don't see a need

1 to take the jury out there.

2 THE COURT: I will be glad to hear from
3 you in support of that motion. There is a video of
4 the crime scene, but it does not show everything
5 out there. What importance would a visit -- we
6 can't narrate the visit. A visit means they ride
7 out, look around, come back. There is no testimony
8 given at that time, no statements. So what would
9 be gained by doing that?

10 MS. VAN PALA: Yes, Your Honor. Thank
11 you. The witnesses in this case will testify to as
12 what the scene looked like and that testimony is
13 going to be inaccurate and will be contradicted by
14 some of the photographs. A lot is going to be made
15 of what actually -- what the area actually looked
16 it. Brandon was killed in a driveway that was
17 obscured from the video. An issue in this case is
18 going to be if the eyewitnesss saw anything what
19 did they see and what does it actually looks like
20 in that driveway. I think that the standard
21 discretionary --

22 THE COURT: Are there photographs of
23 the scene, the alleyway? I know they haven't been
24 put before me yet, but I would suspect that when
25 the crime scene investigation unit went out there

1 they took pictures of everything I would think.

2 MR. OSBORNE: They did, Your Honor.
3 And I don't know that we can recreate how that
4 scene looked two plus years ago. I think pictures
5 do that better than us going out there.

6 THE COURT: I will reserve my ruling.
7 You can make that request if you would like during
8 the trial. I will reserve my ruling on that, but
9 if the photographs and videos show the scene
10 adequately, when you do something two years later
11 you run the risk of the scene having changed.

12 MS. VAN PALA: And the photos are
13 incomplete.

14 THE COURT: We will see. I haven't
15 seen them all.

16 MS. VAN PALA: Thank you, Your Honor.

17 MR. OSBORNE: Defendant's motion for
18 prohibiting reference to gang association and
19 witness intimidation. I think we are covering like
20 Mr. Corvey said a good bit with Facebook testimony
21 through Detective Krasowski. The jail calls are
22 also going to deal with witnesses, so we can
23 address that later.

24 The next motion, Defendant's motion to
25 -- I will let Mr. Corvey do this one.

1 THE COURT: Let me point out we are
2 going to be picking a jury at 9:30 in the morning.
3 If there are matters that I should consider that
4 you want me to rule on before we pick that jury be
5 prepared to tell me that pretty soon. Okay?

6 MR. OSBORNE: In that case, Your Honor,
7 can we just get into the crux of this Facebook
8 testimony now through Detective Krasowski?

9 THE COURT: Well, I'm prepared to stay
10 as late as you need to stay tonight, but I am -- we
11 discussed the schedule and agreed upon it Monday a
12 week ago that we would do jury selection on Tuesday
13 morning. I have got the jury coming in at 9:30.
14 At that time the question was some of the rulings
15 might affect jury selection, but I have received
16 voir dire from all parties now. So all that's been
17 proposed to me. So if there's something I need to
18 today consider before jury selection takes place,
19 now is the time to mention it.

20 MR. OSBORNE: Actually, Your Honor,
21 from our perspective the Facebook stuff we can deal
22 with during Detective Krasowski's testimony. The
23 only -- I hate to -- I really do, I am sorry for
24 this, but the more I start to think about my
25 opening and running it through my mind, I don't

1 want to say anything, I don't want to go out on a
2 limb and say something. There is evidence --

3 THE COURT: How much longer do you
4 anticipate pretrial motions taking in this case?

5 MR. OSBORNE: That's difficult to
6 estimate. I would say that if we are dealing with
7 the Facebook issues, my questioning of Detective
8 Krasowski maybe 15, 30 minutes maybe. And then I
9 would then show the probable cause that Detective
10 Krasowski developed. I would show the exhibits
11 that he used to develop that probable cause and
12 then I will also show the exhibits that we intend
13 to introduce and the relevance to those exhibits.
14 So I would say I think I can do that in about
15 30 minutes.

16 MS. VAN PALA: Your Honor, I would
17 object. I would ask for an adjournment at 5:00. I
18 believe that the clerk of court --

19 THE COURT: No, ma'am.

20 MS. VAN PALA: I did alert the Court on
21 last Monday that I was concerned that because of
22 the amount of pretrial motions that we had we were
23 going to run into this stacking problem, that I was
24 going to be constrained in arguing my pretrial
25 motions.

1 THE COURT: I am not constraining you
2 from arguing anything. Ma'am, I have tried cases
3 until 11:00 at night before. I have taken verdicts
4 at midnight. That happens quite often in court.
5 No one is constrained. They can talk as long as
6 they need today to talk. So I am not going to
7 limit what you say to me in any way.

8 MS. VAN PALA: Thank you, Your Honor.

9 THE COURT: But I also have other
10 considerations. You have got how many people on
11 the jury panel?

12 THE CLERK: 110.

13 THE COURT: 110 people who have been
14 told to be here at 9:30 in the morning. They were
15 here this morning and were available, but I already
16 said we will wait until Tuesday to give you time to
17 get these motions in.

18 So if there are any of these motions
19 that you think you need me to take up before we do
20 jury selection, I am prepared to hear you.

21 MS. VAN PALA: Judge, I think we need
22 to take up all of them. I think we're nearing the
23 end, but as I said --

24 THE COURT: That's fine. You said all
25 of them. We will do all of them.

1 MS. VAN PALA: Thank you, Your Honor.

2 THE COURT: Ready to proceed?

3 MR. OSBORNE: Yes, Your Honor, we are.

4 THE COURT: You may do so.

5 MR. OSBORNE: Detective Krasowski.

6 DIRECT EXAMINATION

7 BY MR. OSBORNE:

8 Q. Let's talk about the victim, Brandon
9 Washington, his cell phone. Did you ever come into
10 position of that cell phone?

11 A. We did. It was slightly delayed. It
12 wasn't found on his person at the time of response.
13 It was subsequently turned over to his mother. I
14 collected it from his mother on April 1st, 2015.

15 Q. April 1st, so about six days after the
16 murder?

17 A. That's correct.

18 Q. And when you came into possession of
19 the cell phone what did you do?

20 A. Well, she confirmed it was, in fact,
21 her son's. She was able to -- it was password
22 protected and she gave me the password to it. And
23 she was able to provide a phone number that was
24 associated with that phone and it was, in fact,
25 that number when it was downloaded. It was exactly

1 what she said it would be.

2 Q. Okay. So you did the same thing that
3 you did with Mr. Middleton's cell phone, you did a
4 forensic download of the phones?

5 A. I did. I put the request in. There
6 was no search warrant associated with it. It was
7 the victim's cell phone, no expectation of privacy.

8 MR. OSBORNE: I have given Mr. Apicella
9 and Ms. Van Pala copies of everything that I am
10 presenting them.

11 BY MR. OSBORNE:

12 Q. Detective, I am showing you what's been
13 marked as State's Exhibit 39. Did that come from
14 the victim's phone?

15 A. This did. This is a printout of his
16 dialed call logs.

17 Q. Okay. That's on March 22nd?

18 A. Yes, it is.

19 Q. So that would be the night of the
20 murder?

21 A. That's correct. This is the Sunday
22 night before the murder.

23 Q. So at 10:35 the victim called Lefty?

24 A. Yes. So in his phone he had a contact,
25 saved numbers and what you see here is this column

1 with the names, that's the name assigned to the
2 number that's just to the left of it.

3 Q. And the number for Lefty is [REDACTED]?

4 A. That's correct, 843.

5 Q. You also see a call to Duke at 10:38?

6 A. That's correct.

7 Q. And you see other calls to Lefty?

8 A. That were several calls in between with
9 that.

10 Q. I am going to show you State's
11 Exhibit 41. Those are received calls?

12 A. These are received calls; so these are
13 the calls that came in his phone and they are all
14 -- some of these are from the 22nd and some are
15 from the 23rd.

16 Q. Going into that night?

17 A. Yes.

18 Q. So momma called him, Fat Boy called
19 him?

20 A. You see Lefty at 2216, 2224 or time is
21 when he received calls from Lefty.

22 Q. And then State's Exhibit 43 we have
23 some missed calls?

24 A. That's correct. So these are the
25 missed calls listed in his phone and you see that

1 he had a missed call from Nardo on the 22nd, call
2 from Lefty on the 22nd, two missed calls.

3 Q. Going into the 23rd, not that it is
4 relevant for this, but there is a call to Fat Boy
5 on the 23rd; is that correct?

6 A. That's correct.

7 Q. There are some missed calls here?

8 A. That is correct. So this is his missed
9 call log. There is one from the day of the
10 incident, then afterwards you see missed calls.

11 Q. That's State's 44. Lastly State's 42,
12 these are some received calls?

13 A. That's correct.

14 Q. So we see at 1612 received call from
15 Lefty?

16 A. That is correct.

17 Q. And March 23rd at 5:05 received call
18 from Lefty?

19 A. That's correct.

20 Q. Okay. I want to show you State's
21 Exhibit 45. These are just some contacts that are
22 in his phone, not all of them though, right?

23 A. That's right. We are missing some out
24 of that.

25 Q. Okay. Some of these names were

1 relevant to the case, Duke, Nardo, Devin?

2 A. That's correct.

3 Q. Now, I want to go to State's 46. These
4 are text messages from the night before the murder?

5 A. That is correct. You see the time so
6 this is the night before, it's March 22nd at
7 2159 hours.

8 Q. 10:00 we have "Sup fool. I need some
9 weed."

10 A. That's right.

11 Q. That is sent to Fat Boy?

12 A. That is from the victim's phone sent to
13 Fat Boy?

14 Q. And right after that?

15 A. He also sent that as well.

16 Q. Now, State's Exhibit 47. That's a text
17 from the victim to Lefty?

18 A. That's correct.

19 Q. And what's the time on that?

20 A. So 2254, so that's 10:54 p.m. on the
21 22nd.

22 Q. Okay. Read that if you would, please.

23 A. So this is a little bit lengthy, but
24 this was sent to Lefty.

25 So it says, little bro. I don't steal.

1 I take my N little bro. I hustle for mine. I
2 didn't come back there cuz I a street N and my
3 sentence started going crazy man my N. I will ask
4 you F or whatever I want to got to steal rather you
5 can do it or not. My loyalty to my to N got me F
6 right now bro cuz of S like what Duke just pulled
7 on his F blood LOL. Who to trust. Get at me I
8 gone tell you once and no more. It will be me who
9 at B there when nobody wouldn't ha, exclamation
10 point multiple times.

11 Q. It will be me who will be there when
12 nobody wouldn't ha?

13 A. Yes.

14 Q. When you read that it appears there was
15 some sort of dispute perhaps between Lefty and the
16 victim?

17 A. That's how I took it, yes.

18 Q. The night before?

19 A. Yes.

20 Q. And involving Duke?

21 A. That's correct.

22 Q. Involving some allegation of the victim
23 stealing something?

24 A. That is correct.

25 Q. Now, State's Exhibit 48.

1 A. So this is on the 23rd. So this is the
2 day of our incident. This is at 5:06 p.m., so this
3 is about 50 minutes give or take before the murder
4 occurred. And this was to Lefty at [REDACTED]. This
5 says come roll on me bra. Walk like you coming to
6 dab spot.

7 Q. Okay. And that's the last
8 communication on the victim's phone?

9 A. Yes.

10 Q. As a result of that were you interested
11 in getting some information on that phone number?

12 A. Of the [REDACTED], yes.

13 Q. So what did you do?

14 A. At that point we completed a -- I
15 drafted a search warrant for that phone number to
16 determine who that is registered to and the full
17 extent of phone records to determine more about
18 that person.

19 Q. Your Honor, I would suggest that we
20 keep moving on and move on into the Facebook.
21 There is nothing that's articulated in the
22 defense's motion regarding this search warrant that
23 needs to be addressed by the Court.

24 THE COURT: All right.

25 MR. OSBORNE: She doesn't address any

1 misstatements unlike Mr. Apicella so I don't think
2 there's any grounds to grant her motion to suppress
3 this search warrant, nor the results.

4 MS. VAN PALA: May it please the Court,
5 Judge, I object to these exhibits and the search
6 warrant to Brandon's phone. I don't have any
7 specific objections, but I do object to these
8 exhibits and I think that line of questioning is
9 relevant to get to the meat of the Facebook issue.

10 THE COURT: This is off the cell phone.

11 MS. VAN PALA: Right. I am unclear as
12 to where the State's going.

13 THE COURT: Well, he is stopping with
14 this. This is the information he plans to use off
15 the cell phone.

16 MR. OSBORNE: That's correct, Your
17 Honor. That is the information that is retrieved
18 from the victim's cell phone which we obviously say
19 they don't have any standing to object to. That
20 information is what led to the search warrant for
21 the [REDACTED] number and our position is that they
22 haven't stated anything in their motion to say that
23 there's any misstatements or anything that needs to
24 be challenged in this search warrant, unlike Mr.
25 Apicella's motion which stated that there are

1 misstatements. That's why I thought that a hearing
2 was appropriate. A hearing is not appropriate on
3 this because there is nothing in here that she's
4 challenging.

5 MS. VAN PALA: I did file a motion. I
6 am objecting to the use of this cell phone number,
7 the [REDACTED]. So law enforcement got the [REDACTED]
8 number from Brandon's phone. Then they used that
9 [REDACTED] number to obtain the next search warrant and I
10 did file a motion that was asking to exclude any
11 evidence in regards to the [REDACTED] number.

12 THE COURT: On what basis?

13 MS. VAN PALA: Because there's no way
14 that the State can prove that that [REDACTED] number goes
15 back to Mr. Perry.

16 MR. OSBORNE: We are not there yet.

17 MS. VAN PALA: That's the basis of my
18 objection.

19 MR. OSBORNE: We are not there yet. We
20 are going to get there, but we are not there yet.

21 THE COURT: Let's move on.

22 BY MR. OSBORNE:

23 Q. So once you saw that and you did a
24 search warrant, got the phone records back from
25 [REDACTED]?

1 A. That's correct.

2 Q. And it was Sprint I think that did
3 this?

4 A. Yes, I believe.

5 Q. Now, at a certain point in the
6 investigation you had the occasion to meet with a
7 Kayla Seabrook; is that right?

8 A. I did.

9 Q. What, if anything, of significance did
10 Kayla provide to this investigation?

11 A. I met with her at the end of March.
12 March 30th. And she -- I was in contact with her
13 regarding Facebook information that she found that
14 was pertinent to this case.

15 Specifically, there was a video that
16 she wanted to inform me on and she came down to the
17 station and started that ball right there.

18 Q. Were you able to capture this video
19 that she was informing of you?

20 A. We were in a little bit different. So
21 she saw this Facebook on a Facebook page that was
22 named, I believe it was named Taliban mbmb
23 GeezQueez. She knew that Facebook name to be
24 associated to Devin Middleton.

25 That Facebook post was a video that was

1 captured of Devin Middleton and another subject
2 that you can see, it was like from them visiting
3 Te'Quan Perry in jail. They filmed from their
4 phone through the Plexiglass screen and you can see
5 Te'Quan in that video. And the video showed what
6 they were as well. So you are able to see it was
7 Devin Middleton clearly and Justice Johnson in that
8 video.

9 Q. Okay. I'm going to show you State's
10 Exhibit 102.

11 (Video played.)

12 BY MR. OSBORNE:

13 Q. Okay. I have a screenshot if you
14 can --

15 A. This is a little blurry. So you can
16 see free brother out. It is blurry.

17 Q. Okay. So Kayla comes in. She says
18 there is a video. You all try to get it. You have
19 a little bit of difficulty, but ultimately you end
20 up retrieving the video?

21 A. She was trying to retrieve it from
22 Facebook page. It was taken off the Facebook page.
23 When she came in she had saved it from that
24 Facebook page prior and that's how she was able to
25 transfer it to me.

1 Q. And when she told you that -- let's
2 talk about what you see on that video for just a
3 moment. Did you recognize the individual?

4 A. We do. This was a little blurry, but
5 yes you can recognize him. You can tell that's
6 Te'Quan Perry behind the glass and then the monitor
7 where it shows the other half of it, you can see
8 Justice Johnson pretty clearly and I know that
9 because I interviewed him just days before I saw
10 this video.

11 And that video was difficult to see,
12 but Devin Middleton's face is exposed at one point
13 in there.

14 Q. Well, we will move on. So when you saw
15 that did you think Facebook was an important part
16 of this investigation or it could be?

17 A. Absolutely.

18 Q. So what did you do as a result of that?

19 A. Well, I personally monitored Facebook.
20 So our intelligence unit typically monitors
21 Facebook regardless, but specifically I had
22 obviously a vested interest. It's my case. Myself
23 and Detective Bailey routinely checked Facebook
24 with different names that we knew associated with
25 that neighborhood. And also what we had believed

1 to be associated with Devin Middleton and all the
2 other subjects involved.

3 Q. Okay. Now, so you said that Ms.
4 Seabrook told you Taliban mbmb. Did you have the
5 occasion to search that user name through Facebook?

6 A. I did. So this was early on, mind you.
7 This was end of March, early April when I was
8 conducting these initial searches. And I did come
9 across that Facebook page.

10 Q. Your Honor, I am showing State's
11 Exhibit 103, again all this the defense already has
12 a copy of. Now I want to -- okay. So what is the
13 user name?

14 A. So the user name is Taliban mbmb
15 GeezQueez. You can see that in the search bar at
16 the top and also to the right of the picture that's
17 near the top of the page.

18 Q. Now, what is that green box over there
19 says add a friend?

20 A. So that's if you would try to become
21 friends with this page that we are viewing. So it
22 says add a friend. There's two different boxes.
23 You can see a green one. So it shows that we are
24 not friends so what we are seeing here is
25 accessible to the public.

1 Q. So you are not friends with him. Did
2 you use any police procedures or overcome any
3 security measures using any police techniques to
4 get to this screenshot?

5 A. No.

6 Q. Now, let's move ahead right here. He
7 says he's an undertaker at Fielding Funeral Homes?

8 A. That's right.

9 Q. And Fielding Funeral Homes is located
10 in Charleston?

11 A. That's a local funeral home here.

12 Q. He said he lives in New Orleans. Is
13 that correct?

14 A. That's not correct.

15 Q. Well, I mean is that what it says?

16 A. Yes, it says that he lives in New
17 Orleans, Louisiana.

18 Q. Born on [REDACTED] of 1993. Is that
19 Devin Middleton's date of birth?

20 A. Yes, his date of birth is [REDACTED]
21 of '93 which is consistent with what you see
22 associated with this Facebook page.

23 Q. Did you recognize the person or persons
24 on the couch?

25 A. I recognize the one to the right so it

1 is a little bit difficult to see as it transfers
2 here, but yeah, you can see.

3 Q. Now, what does the post say?

4 A. I just want to point out one other
5 thing too. You see here it says 46 mutual friends.
6 So this is the work account what I use at work. So
7 we are not -- I'm not directly friends with this
8 page, but it does show a lot of mutual friends just
9 to also show that just because it says New Orleans,
10 this is more someone that's local to our community.

11 But in reference to this post that you
12 see here posted by Taliban mbmb GeezQueez, it says
13 three hours ago. So I am not sure the time that I
14 snipped this photo. Says hash tag NNN free our
15 brother Lefty. He got bumped for murder and
16 paranoid but bro ain't even worried. Judge on his
17 deed so he used the jury. We just hope they don't
18 give him the jersey. Then it's hash tag reckless
19 clan, hash tag on and on. But there is one other
20 thing -- I recognize this to be lyrics to a rap
21 song. But you also do see the last part that he
22 has of the hash tags, you see GeezQueez Otf. That
23 was another name we learned through Kayla
24 Seabrook's statement was that she knew that name to
25 be associated with Te'Quan Perry.

1 Q. Now, as this investigation went on did
2 you continue to monitor Facebook?

3 A. We did.

4 Q. I'm going to show you State's
5 Exhibit 104. Now, is this another public page?

6 A. This is -- so you can see again it's
7 from the same page, Taliban mbmb GeezQueez. And on
8 the right-hand side you can see where it says add
9 friends. So we are not friends so this is again
10 accessible from the public view.

11 Q. I see he changed his profile picture.
12 What is the date and time of that?

13 A. So that signifies that he changed his
14 Facebook picture associated with this profile.
15 That's the 26th. It is a little difficult to see
16 through this monitor, but it is the 26th and it is
17 10:02 p.m.

18 Q. Why is that significant?

19 A. Well, Te'Quan Perry was taken into
20 custody on his murder warrants on the 26th, but a
21 little bit earlier in the evening around 7:30 p.m.
22 so this was a few hours afterwards.

23 Q. Show you State's Exhibit 105. Is this
24 another public page that you screenshot?

25 A. This is. I was not friends with that

1 Facebook page so what you see here is what anybody
2 could see if they go to his -- that page.

3 Q. Is that the same or appear to be the
4 same sweatshirt that Devin was wearing when he was
5 -- when you seized his property?

6 A. It does. It's a black hooded
7 sweatshirt, nothing unique, but it was a zip up
8 just like what he had on when he was taken or that
9 was seized from him.

10 Q. Date on this post is March 26th?

11 A. This was the 26th.

12 Q. When does that say?

13 A. Says free my bruda Lefty. Everything
14 is a process. You gone make it out. Minor set
15 back. Ain't "S" to a giant. SIP sleezy jeezy and
16 reckless quest.

17 Q. Do you know what SIP means?

18 A. Sleep in peace.

19 Q. So we got a couple of things there.
20 Free my bruda Lefty. You have already testified
21 Lefty was significant to you in your investigation
22 because it seemed like the victim was having a
23 dispute with Lefty?

24 A. That's correct.

25 Q. And now this bruda, was that

1 significant in any way?

2 A. It became more significant as this
3 investigation continued.

4 Q. In what way?

5 A. Well, through the phone downloads that
6 we -- from Devin Middleton's phone he had a contact
7 saved in his phone by the name bruda spelled just
8 like that with a No. 2 behind it. And that was
9 assigned the number of [REDACTED] which was the
10 number that we knew to be Lefty's.

11 Q. The number that victim had as Lefty in
12 his contact?

13 A. Yes.

14 Q. Okay. Now, I'm going to show you
15 State's Exhibit 106. So up there in the URL it
16 says Little Devin 19?

17 A. Yes.

18 Q. Okay. Now go ahead.

19 A. So this -- I captured this which led me
20 to do a search warrant for Facebook. And as it
21 turns out this was my first search warrant for
22 Facebook. So I along the way in speaking with
23 getting help through their online service, I
24 recognized that Little Devin 19 is actually the
25 true name associated with this Facebook account.

1 There's a title that can be changed. I know this
2 partially from my own experience, but a title that
3 your profile social with on Facebook could be
4 renamed, but what you see in the URL sticks with
5 that account indefinitely.

6 Q. Okay. Let's look at this post. What's
7 the date on this post?

8 A. So this post was June 30th and it was
9 posted at 1:17 p.m.

10 Q. Go ahead.

11 A. So it is hash tag TNT now. I'm the
12 type that will die for N no matter how deep the
13 water is. I'll ride for my N. I don't give a F.
14 I'll give my last dime to my N. Save my heart but
15 keep it real at all times with my N. Look that's
16 for my N, if he on murder charge Imma make sure he
17 got no witnesses you know. Without no witnesses no
18 way he can be convicted. While he down I will
19 handle business for him. My N real. And then hash
20 tag several names and then you see at the bottom
21 there's a picture of Te'Quan Perry underneath of
22 that.

23 Q. What's the date of this post?

24 A. That's June 30th, 2015, at 1:17 p.m.

25 Q. And the photograph you said here is

1 Te'Quan Perry?

2 A. That's correct.

3 Q. So on this date on June 30th Te'Quan
4 Perry was in jail for murder?

5 A. That's correct.

6 Q. Those could be rap lyrics as well?

7 A. Yes. I recognize this as rap lyrics to
8 BG, Baby Gangsta out of New Orleans, Louisiana.

9 Q. All right. Now, you have mentioned
10 earlier that Kayla Seabrook had stated that she
11 knew Lefty to utilize the Facebook page of GeezQuez
12 Otf; is that correct?

13 A. That is correct.

14 Q. Now, so as a result of that
15 investigation did you have the or what was told to
16 you, did you have the occasion to go back and check
17 GeezQuez Otf?

18 A. I did.

19 Q. And do you recall the date of birth
20 that was associated with that?

21 A. Yes. And there is a correction that I
22 realized in preparation for this trial. There was
23 a date of birth, only partial date of birth for --
24 no, there was a partial date of birth for General
25 Taliban GeezQuez. So General Taliban was a

1 different name than what we talked about earlier.
2 We just said Taliban mbmb GeezQueez. That had a
3 full date of birth which was consistent with Devin
4 Middleton's. When I went to General Taliban
5 GeezQueez to do this search warrant there was only a
6 partial date of birth and it was [REDACTED] without a
7 year of birth so there was only a partial date of
8 birth associated with General Taliban. As for
9 going back to GeezQueez Otf which we believe to be
10 associated with Te'Quan Perry, there was a date of
11 birth of [REDACTED] of 1993.

12 In my search warrant I wrote down that
13 that was the same birthday as Te'Quan Perry. That
14 is wrong. His date of birth is [REDACTED] of '94. And I
15 was off by that year and I only caught that in
16 preparation yesterday evening when I saw that.

17 Q. So the date of birth was off a year.
18 Perry's is '94, you put down '93?

19 A. That's correct.

20 Q. And '93, [REDACTED]-93 is what GeezQueez Otf
21 stated his date of birth was?

22 A. That's correct.

23 Q. Now, did you have the occasion to look
24 at any of GeezQueez Otf's public information?

25 A. Yes. I was not friends with him either

1 and I don't know that I have any screenshots of
2 that, but there were just no direct posts coming
3 from him. But there was just him being tagged in
4 saying free Lefty, things of that accord.

5 Q. So you saw photographs of Perry on that
6 account as well?

7 A. Which people tagged his account. So
8 when somebody writes at the bottom they can tag
9 other people and it shows up on their profile page.
10 So you can have activity on your profile page when
11 you don't touch Facebook at all. It's a setting
12 that allows for that.

13 Q. Okay. So as a result of that you got
14 search warrants for General Taliban and GeezQuez
15 Otf?

16 A. That's correct.

17 Q. So we will look at State's 115.
18 July 27, 2015, is the date. You are seeking
19 property from Facebook?

20 A. That's correct. So that first box
21 right up there you see it is Facebook, Inc. and
22 security department, custodian of records. It has
23 their address and also their e-mail where they
24 received these subpoenas.

25 Q. This one so you just copied the URL?

1 A. So the description of the property is,
2 in fact, it is just a copied URL address so that's
3 that HTTPS sign there that you would see affixed to
4 every regular page that you look on the internet.
5 And specifically Facebook then where you see Little
6 Devin 19, that's how they truly determine whose
7 account that is.

8 Q. A few days before the murder looking
9 for subscriber information, blogs, private
10 messages, things of that nature?

11 A. That's correct.

12 Q. Do you know who that judge or whose
13 signature that is?

14 A. Yes, I recognize that. That is Judge
15 Florez's signature.

16 Q. What's the date of that?

17 A. July 27th, 2015.

18 Q. Did she swear you in while or before
19 reviewing this warrant?

20 A. She did.

21 Q. All right. Those are both the same?

22 A. That is correct.

23 Q. And again this is July the 27th, is
24 that Judge Florez's signature above signature of
25 judge?

1 A. It is.

2 Q. And is that your signature by affiant?

3 A. Yes, sir.

4 Q. You can read it.

5 A. So it says that on March 23rd, 2015, at
6 approximately 1754 hours CPD officers were
7 dispatched to the area of ■ Norman Street which is
8 in the city and County of Charleston in reference
9 to a shots fired call for service. Upon arrival
10 officers found the victim, Brandon Washington,
11 unresponsive on the ground suffering from multiple
12 gunshot wounds. EMS responded and declared Brandon
13 deceased on scene.

14 Detectives interviewed several
15 witnesses and also reviewed video surveillance that
16 captured a portion of the incident prior to the
17 shots being fired. Based on all the interviews and
18 video, detectives learned the following. See
19 attachments A and B.

20 Q. Before you read it, is that Judge
21 Florez's signature again?

22 A. That is.

23 Q. And your signature by affiant?

24 A. Yes, sir.

25 Q. Can you see it okay?

1 A. I can. So continuing on with that
2 narrative, "Witnesses that were nearby the victim
3 at the time of the incident stated that the suspect
4 wore a tannish colored camouflaged raincoat, shot
5 and killed the victim while in the side yard of [REDACTED]
6 Norman Street. Prior to the shooting a group of
7 black males were playing around fighting in the
8 roadway with the victim. The victim then walked
9 into the side yard where the suspect in the
10 raincoat brandished a firearm and shot the victim.
11 One of the witnesses knew the suspect in the
12 raincoat as Lefty. Lefty was later identified as a
13 suspect in the raincoat and as a suspect that
14 murdered Brandon Washington.

15 Detectives were familiar with a subject
16 named Lefty from a previous investigation that fit
17 physical description of the suspect. Te'Quan Perry
18 was positively identified through a six pack
19 photographic lineup and subsequently arrested on
20 March 26th, 2015."

21 Q. Let's stop right there because this is
22 significantly different than the other search
23 warrant. So one of the witnesses knew the suspect
24 in the raincoat as Lefty. Who is that?

25 A. Denardo Felder.

1 Q. Lefty was later identified as a suspect
2 in a raincoat and as a suspect that murdered
3 Brandon Washington. Who is that?

4 A. That would have been Louie Johnson.

5 Q. Detectives were familiar with a subject
6 named Lefty from previous investigations that fit
7 the physical description of the suspect.

8 A. So this is slightly out of order, but
9 that's when during our statement with Denardo he
10 stated that he knew the subject in the raincoat as
11 Little Lefty or Lefty and that's when Detective
12 Bailey was familiar with that street name and he
13 referred back to a previous investigation that he
14 had correspondence with North Charleston and that's
15 how he learned Te'Quan Perry went by the name of
16 Lefty.

17 Q. Well, so I do want to correct you a
18 little bit. Because the way you put it was Lefty
19 was later identified as a suspect in the raincoat
20 as the suspect that murdered Brandon Washington.
21 Don't you have to kind of combine witness
22 statements to make that statement?

23 A. I do, yes.

24 Q. How do you do that?

25 A. This is a summary. I am sorry?

1 Q. What witness's statements did you
2 combine to make that statement right there?

3 A. Okay. So Demarco Jones states that the
4 shooter had a raincoat on. He viewed the video
5 surveillance and the last person that was leaving
6 that alleyway near ■ Norman Street was the person
7 in the raincoat. He said that that's the shooter.
8 The shooter was wearing the raincoat. That's the
9 shooter. He was the last person that came out of
10 that alley.

11 We spoke with Louie or Mr. Johnson,
12 Marvin Johnson, who advised that the person in the
13 raincoat was the person that did the shooting, but
14 also more importantly Denardo Felder was a subject
15 that we interviewed and he was able to say that the
16 person in the raincoat went by the name of Lefty or
17 Little Lefty. And ultimately we showed him a six
18 pack photographic lineup with Te'Quan Perry in that
19 lineup and he positively identified Te'Quan Perry
20 as a subject that wore the raincoat and goes by the
21 name of Lefty.

22 Q. So you didn't spell all that out, but
23 what you are saying here is correct?

24 A. Right.

25 Q. So what you're -- let me just summarize

1 and tell me when I am wrong. Denardo Felder says
2 that the guy in the raincoat is Lefty?

3 A. Yes.

4 Q. And you show him a lineup and he says
5 yep, Te'Quan Perry is Lefty; is that correct?

6 A. That's correct.

7 Q. And then Demarco Jones tells you the
8 shooter is wearing a raincoat?

9 A. Yes. We spoke to Demarco before
10 Denardo so we knew the subject -- going into the
11 interview with Denardo, we knew the subject that
12 did the shooting was in the raincoat.

13 Q. So Demarco says the shooter is wearing
14 a raincoat, Denardo says the guy is Te'Quan Perry,
15 and Marvin Johnson said the guy in the raincoat is
16 Te'Quan Perry?

17 A. Yes.

18 Q. That statement combined all of them?

19 A. Yes.

20 Q. Not incorrect, correct?

21 A. Correct.

22 Q. Keep going. Video surveillance is
23 where you left off.

24 A. "Video surveillance captured the
25 altercation in the roadway before the murder

1 occurred. The video depicted the victim in a
2 confrontation with several other black males. One
3 subject engaged the victim -- with the victim was
4 identified as Devin Middleton. At one point during
5 the altercation Middleton extended his arm and
6 pointed a small dark colored object at the victim.
7 The victim defensively ducked out of the way and
8 transitioned into the side yard at ■ Norman
9 Street. The camera panned a rotation then captured
10 several of the black males flee the area. The
11 video captured Devin Middleton move to the opposite
12 side of the roadway from ■ Norman Street which
13 another subject identified as Davontay Bryant. The
14 suspect in the raincoat emerged from the side yard
15 and fled the area both hands in his pocket.

16 One witness specifically identified
17 Devin Middleton and Davontay Bryant as spectating
18 the murder and yelling finish him, finish him
19 between gunshots. Both Middleton and Bryant then
20 yelled come on, come on as the suspect fled.
21 Middleton and Bryant remained across the street
22 during CPD response and were stopped by officers."

23 Q. Let me stop you. One witness
24 specifically identified Devin Middleton, that one
25 witness being Marvin Johnson?

1 A. Yes.

2 Q. So you have added something here. Not
3 only did Marvin say that Devin and Davontay in
4 between shots said finish him, finish him, he also
5 said he heard them say come on, come on?

6 A. Yes. And I actually -- the day after
7 this was signed and executed I interviewed him
8 again. That's where we got the possible variation
9 of finish it, finish it, but that was said in
10 unison. But going back to this that was after this
11 search warrant was executed.

12 Q. Go ahead.

13 A. "Several witnesses stated that they
14 were play fighting with the victim prior to the
15 murder and that it was not a real fight. The
16 victim's mother, Peggy Mitchum, said that the play
17 fighting's purpose was to have contact with Brandon
18 to see if he was armed. The play fighting appeared
19 to be coordinated as everyone acted in concert all
20 targeting the victim. Additionally it was learned
21 from the statements from Brandon's friend that
22 Brandon believed that Lefty and Duke intended to
23 kill him the previous night but it didn't happen."

24 Q. Stop right there. So additionally it
25 was also learned through statements from Brandon's

1 friend, that's Jacquan Spann?

2 A. Yes.

3 Q. The play fighting appeared to be
4 coordinated. You're talking about what you see
5 from your own personal observation on the video?

6 A. That's correct.

7 Q. Then we have more comments from the
8 mom?

9 A. That's correct.

10 Q. Several witnesses said they were play
11 fighting. Are these some of the same people who
12 were involved in the fighting?

13 A. It was.

14 Q. Keep going. March 25th?

15 A. "On March 25th, 2015, Devin Middleton
16 provided a statement at CPD headquarters and
17 advised that he didn't remember anything because he
18 was high. He did advise that he was play fighting
19 with the victim and aimed a cannister of pepper
20 spray at the victim while in the roadway.

21 Middleton identified himself from a
22 still image captured from the video surveillance
23 of him aiming the pepper spray at the victim. See
24 attachment B."

25 Q. And then on attachment B is that Judge

1 Florez's signature?

2 A. That is correct.

3 Q. July 27th?

4 A. That is correct.

5 Q. Whose signature is that?

6 A. That's my signature. This is a
7 continuation.

8 "While monitoring Facebook detectives
9 believed that Facebook name General Taliban
10 GeezQuez" and then it's the HTTPS Facebook.com Lil
11 Devin 19, "belonged to Devin Middleton based on the
12 contents of his Facebook messages, a plethora of
13 single images that clearly depicted Devin Middleton
14 and listed a partial date of birth as [REDACTED]. It is
15 also noted that Devin Middleton's date of birth is
16 [REDACTED] of '93.

17 The day after Te'Quan Perry's arrest
18 Devin posted an image from the Charleston County
19 Detention Center depicting Perry incarcerated and
20 making a hand gesture. The image also captured
21 Devin in a closed circuit television set during the
22 visit.

23 Since Te'Quan's arrest Devin posted
24 numerous posts that reference Perry by his street
25 name Lefty, by his Facebook page GeezQuez Otf and

1 photographs of him."

2 "Specifically on June 30th, 2015, Devin
3 posted on his account, this is in quotations,"
4 "Hash tag TNT now I'm the type will die for him.
5 No matter how deep the water is I'll ride for my N.
6 I don't give an F. I will give my last dime to my
7 N, save my heart but keep it real, at all times
8 with my N. Look that's for my N. If he on murder
9 charge Imma make sure he got no witnesses you know.
10 Without no witnesses no way he can be convicted.
11 While he down I'll handle business for N my N real
12 hash tag SIP Romney Street Gs and Reckless and
13 Romney Street Gs and two others."

14 "In addition to this the post an image
15 of Te'Quan Perry was posted underneath signifying
16 that it referenced Perry. This affiant believes
17 that the play fighting was a coordinated effort
18 between Perry and other subjects that were present
19 including Devin Middleton. In addition, Devin was
20 identified as aiding and abetting Te'Quan Perry
21 during the shooting by yelling finish him, finish
22 him. Based on this affiant's training and
23 experience it is known that social media outlets
24 such as Facebook are often utilized as
25 communication to -- as a communication device."

1 "Devin is clearly -- has clearly
2 utilized Facebook to discuss events related to the
3 arrest of Te'Quan Perry. In addition, the above
4 listed Facebook post referenced concerning
5 concerning threats in that Devin will make sure
6 that he, Perry, has no witnesses that will testify.
7 This affiant believes that it is probable that
8 additional conversations exist about this case.
9 Furthermore, it is important to obtain a formal
10 record of these Facebook posts and attach full
11 ownership of this account to Devin Middleton. This
12 affiant is aware that Facebook maintains detailed
13 records of user information, account contents such
14 as photographs, messages, post messaging, but not
15 limited to just these specifically."

16 Q. When Judge Florez signed this search
17 warrant did you then submit the search warrant to
18 Facebook?

19 A. I did.

20 Q. And did they respond back?

21 A. They did. I received the information
22 back through a secured log in.

23 Q. You forwarded that information on to
24 us?

25 A. I did.

1 Q. All right. When did you take the
2 return back to Judge Florez?

3 A. So this was taken back to Judge Florez
4 on August 19th, 2015, and it was actually taken
5 back by my supervisor at the time which was
6 Sergeant Craig Kosarko.

7 Q. You said August 19th?

8 A. Yes, August the 19th.

9 Q. And it shows property, that's basically
10 listing the property that was retrieved or given to
11 you by Facebook?

12 A. That's correct. Just to note on that
13 last sheet, actually if you go can back. The
14 second line when I actually executed this it was on
15 the 27th, the same day that it was signed and I
16 sent it over to Facebook at 1500 hours, that was
17 three p.m. that afternoon.

18 Q. This is showing that, this e-mail, the
19 next page is showing?

20 A. If you could just bring it down a
21 little bit for me. Yes. You can see the time that
22 I sent this to Facebook. It was at 3:00 p.m.

23 Q. And this is the cover sheet to their
24 response?

25 A. Yes. So there were several thousand

1 pages that were obtained from his account through
2 this search warrant so I attached just a few pages
3 to show that this was the beginning of what was
4 actually obtained through that warrant.

5 Q. Your Honor, what we would ask is that
6 to deal with the relevance of the exhibits that we
7 have already talked about after we deal with the
8 actual search warrant, and I wouldn't have any more
9 questions for Detective Krasowski regarding the
10 search warrant for Taliban mbmb.

11 THE COURT: Cross-examination?

12 MS. VAN PALA: Your Honor, I object to
13 doing it piecemeal like that. I think that all --

14 THE COURT: She objects. Go ahead.

15 BY MR. OSBORNE:

16 Q. After that, did you decide to do
17 another search warrant?

18 A. I did.

19 Q. Defense has copies of this. Showing
20 you Exhibit 16. Do you recognize that?

21 A. I do. So this is a search warrant that
22 I completed for GeezQuez Otf. Again was July 27th,
23 2015, and I was the officer that executed this
24 search warrant.

25 Q. Just out of curiosity, GeezQuez, what's

1 that?

2 A. So those were two subjects, Quez is
3 LaQuez Lincoln and Geez was D'Angelo Walker. They
4 were two subjects that died in a car accident.

5 Q. Running from the police?

6 A. Yes, in North Charleston.

7 Q. So let's go through what is the
8 description of the premises to be searched?

9 A. So this is again the same thing. It's
10 Facebook, Inc. and it was sent to their security/
11 custodian of records department in California and
12 that was served through subpoena at Facebook.com.

13 Q. Let's look at this one. I do want to
14 talk about it. Can you go ahead and under property
15 you listed is that URL that you saw for GeezQuez
16 Otf?

17 A. That's what I cut and pasted into this
18 so that way they would know exactly what account
19 that I am looking for here.

20 Q. Gives you a user name after that long
21 set of numbers?

22 A. That's correct. That long set of
23 numbers is the identifying number for this account,
24 but it was GeezQuez Otf.

25 Q. That's what Facebook needs to find it?

1 A. Yes, I think the numbers from the name,
2 like the last one that we had a change in how they
3 actually archive and file these different Facebook
4 accounts.

5 Q. So again you are looking for basic
6 subscriber information, photos, private message?

7 A. That's correct, everything contained
8 within the Facebook account.

9 Q. Did you meet with Judge Florez on this
10 one as well?

11 A. I did, the same day, same time.

12 Q. Did she swear you in to the accuracy of
13 the affidavit?

14 A. Yes.

15 Q. You have property and premises. Those
16 are the same, Facebook?

17 A. Yes, they are.

18 Q. I notice here you didn't sign it?

19 A. I overlooked that. I didn't sign where
20 the affiant position was on this.

21 Q. Let's go through the probable cause on
22 this one.

23 A. "On March 23rd, 2015, at approximately
24 1754 hours CPD officers were dispatched to the area
25 of ■ Norman Street which is in the city and County

1 of Charleston in reference to a shots fired call
2 for service. Upon arrival officers found the
3 victim, Brandon Washington, unresponsive on the
4 ground suffering from multiple gunshot wounds. EMS
5 responded and declared Brandon deceased on scene.
6 Detectives interviewed several witnesses and also
7 reviewed video surveillance that captured a portion
8 of the incident prior to the shots being fired.
9 Based on all the interviews and video detectives
10 learned the following. See attachment A and B."

11 Q. Before we go through this, I see a
12 signature?

13 A. I did. That is my signature.

14 Q. And above Judge that is Judge Florez's
15 signature?

16 A. That is.

17 Q. Same day?

18 A. Same day.

19 Q. Can you see it?

20 A. I can see. So the narrative is
21 continued.

22 "Witnesses that were nearby the victim
23 at the time of the incident stated that the suspect
24 wore a tannish colored camouflaged jacket or
25 raincoat, shot and killed a victim while in the

1 side yard of ■ Norman Street. Prior to the
2 shooting a group of black males were playing around
3 fighting in the roadway with the victim. The
4 victim then walked into the side yard when the
5 suspect in the raincoat brandished a firearm and
6 shot the victim. One of the witnesses knew the
7 suspect in the raincoat as Lefty. Lefty was later
8 identified as the subject in the raincoat and as
9 the suspect that murdered Brandon Washington.
10 Detectives were familiar with the subject named
11 Lefty from a previous investigation and fit the
12 physical description of the suspect. Te'Quan Perry
13 was positively identified through a six pack
14 photographic lineup and subsequently arrested on
15 March 26th, 2015.

16 Video surveillance captured the
17 altercation in the roadway before the murder
18 occurred. The victim depicted -- the video
19 depicted the victim in a confrontation with several
20 other black males. One subject engaged with the
21 victim was identified as Devin Middleton. At one
22 point during the altercation Middleton extended his
23 arm and pointed a small dark colored object at the
24 victim. The victim defensively ducked out of the
25 way and transitioned into the side yard at ■

1 Norman Street. The camera panned a rotation and
2 then captured several black males flee the area.
3 The video captured Middleton move to the opposite
4 side of the road from ■ Norman Street with another
5 subject. The suspect in the raincoat emerged from
6 the side yard and fled the area with both hands in
7 the pocket."

8 "One witness specifically identified
9 Devin Middleton and another subject Davontay Bryant
10 as spectating the murder and yelling finish him,
11 finish him between gunshots. Both Middleton and
12 Bryant then yelled come on, come on as the suspect
13 fled. Middleton and Bryant remained across the
14 street during CPD's response and were stopped by
15 officers. Several witnesses say that they were
16 play fighting with the victim prior to the murder
17 and that it was not a real fight. The victim's
18 mother Peggy Mitchum heard that the play fight's
19 purpose was to have contact with Brandon to see if
20 he was armed. The play fighting appeared to be
21 coordinated as everyone acted in concert all
22 targeting the victim. Additionally, it was also
23 learned in statements from Brandon's friends that
24 Brandon believed that Lefty and Duke intended to
25 kill him the previous night, but it didn't happen.

1 On March 25th, 2015, Devin Middleton provided a
2 statement at CPD headquarters and advised that he
3 did not remember anything because he was high. He
4 did advise he was play fighting with the victim and
5 aimed a cannister of pepper spray at the victim
6 while in the roadway."

7 "Middleton identified himself from a
8 still image captured from the video surveillance of
9 him aiming pepper spray at the victim."

10 So this is attachment B.

11 The narrative continues. "The day
12 after Te'Quan Perry's arrest an image from the
13 Charleston County Detention Center depicting Perry
14 incarcerated and making hand gestures was posted on
15 Facebook. Since Te'Quan's arrest numerous messages
16 referencing Perry by his street name Lefty had been
17 posted as well as links to his Facebook page
18 GeezQuez Otf. While monitoring Facebook detectives
19 believe the Facebook name GeezQuez Otf," then the
20 account number which was "10000435904516 and the
21 Facebook page of HTTPWWW Facebook.com profile and
22 that same number that I just referenced belonged to
23 Te'Quan Perry based on the contents of the Facebook
24 messages, images that clearly depicted Te'Quan
25 Perry," and this is where I messed up, "the date of

1 birth as [REDACTED] of '93." Which is Te'Quan Perry's
2 real date of birth. That is not correct. His real
3 birth day is [REDACTED] of '94.

4 Continuing on. "Specifically on
5 June 30th, 2015, Middleton posted on his account
6 hash tag TNT now I'm the type that will die for N.
7 No matter how deep the water is I will ride for my
8 N. I don't give a F. I will give my last dime to
9 my N. Save my heart, but keep it real at all times
10 with my N. Look that's for my N. If he on murder
11 charge Imma make sure he got no witnesses you know.
12 Without no witnesses no way he can be convicted.
13 While he down I'll handle business for him my N
14 real then hash tag SIP Romney Street GeezQueez and
15 so on. In addition to this post an image of
16 Te'Quan Perry was underneath signifying that it
17 referenced Perry. This affiant believes the play
18 fighting was a coordinated effort between Perry and
19 other subjects that were present. Due to the
20 coordinated effort between multiple subjects along
21 with Perry this affiant believes that it is
22 possible that contents with Te'Quan Perry's
23 Facebook may shed light, additional light on the
24 incident and also if any plans had been discussed.
25 In addition, it may also be possible that

1 discussion took place after the fact via Facebook
2 between the subjects involved. Based on this
3 affiant's training and experience it is known that
4 social media outlets such as Facebook are often
5 utilized as a communication device. Facebook
6 clearly has been used in referencing the arrest of
7 Te'Quan Perry. In addition to above listed
8 Facebook posts reference concerning threats and
9 that Devin will make sure that he, Perry, has no
10 witnesses that will testify this affiant believes
11 that it is probable that additional conversations
12 exist about this case. Furthermore, it is
13 important to obtain formal record of these Facebook
14 posts and attach full ownership of the account to
15 Devin Middleton." That's a scrivener's error.
16 That should have been changed to Te'Quan Perry.

17 "This affiant is aware that Facebook
18 maintains detailed records of user information,
19 account contents such as photographs, message, post
20 messaging, but not limited to just these
21 specifics."

22 Q. When the search warrant was signed by
23 Judge Florez did you then e-mail Facebook with the
24 request?

25 A. I did. So if you just pull it up more

1 I can show you this was September at 4:00 p.m. to
2 the subpoena compliance, the records at Facebook.

3 Q. Take you back to the return. Shows
4 that you received it on July 27th; is that right?

5 A. That's correct. So there was actually
6 -- I just remembered when I submitted this --
7 because I did also a Facebook search warrant for
8 Demarco Jones. And I documented this in my report.
9 I mixed up a couple of the pages and I had to go
10 back to the judge to insure that this was the full
11 content of that search warrant and had to resubmit
12 this to Facebook, a corrected version of that.

13 Q. Okay. So did you get an inventory of
14 the property?

15 A. I did. And that's noted inventory
16 below, just the contents associated with this
17 Facebook profile name.

18 Q. And this return again was done by
19 Sergeant Kosarko?

20 A. It was and this was because I had left
21 town for training for at least three months so he
22 had to complete these returns.

23 Q. Okay. Facebook responded back?

24 A. That's correct. So what you see here
25 is just the page one, maybe another page of the

1 beginning of what was obtained through the warrant.
2 This one was a little bit shorter than Devin's. I
3 think it was only few hundred pages compared to a
4 few thousand.

5 Q. Okay. I have no further questions in
6 reference to the probable cause to establish the
7 search warrant for General Taliban and GeezQueez.

8 THE COURT: Thank you. You may
9 cross-examine. We will take about a five-minute
10 break.

11 MS. VAN PALA: Your Honor, may we
12 approach?

13 THE COURT: Certainly.

14 (A recess transpired from 5:51 p.m. to
15 6:04 p.m.)

16 THE COURT: Let's come back to order.
17 We have had a brief sidebar and I have discussed
18 the scheduling problems that we are having with
19 this case with the attorneys. My understanding is
20 that -- and I have informed the attorneys that I
21 feel that I am in a position to consider the motion
22 to sever the case and of course we will go ahead
23 and entertain that motion at this time. We will
24 finish the cross-examination of this witness
25 probably in the morning.

1 My understanding is once the motion to
2 severe has been decided we can make plans to go
3 forward with the jury selection at 9:30 in the
4 morning and complete the remainder of the pretrial
5 motions thereafter. Have I correctly stated our
6 sidebar?

7 MR. OSBORNE: Yes, Your Honor.

8 THE COURT: Ma'am?

9 MS. VAN PALA: Yes, Your Honor.

10 MR. APICELLA: Yes, Your Honor.

11 THE COURT: All right. Thank you. So
12 at this point in time I believe there is a motion
13 to severe. Ma'am, I will be happy to hear from you
14 on that motion.

15 MS. VAN PALA: Thank you, Your Honor.
16 May it please the Court, we are making -- the basis
17 of our motion to sever is on Devin's Facebook
18 records which the Court just saw, his phone records
19 and also the jail calls which you haven't had a
20 chance to hear yet, but we have heard --

21 THE COURT: You can tell me about them
22 since you want me to know about it.

23 MS. VAN PALA: Yes, Judge. The phone
24 records if I could address that since that's what
25 we recently went over, the phone records, the issue

1 here is that the State is going to present evidence
2 that implicates Te'Quan based on and what's found
3 in Devin's phone book.

4 The State is going to say that the
5 [REDACTED] number is Te'Quan's number and part of the
6 reason why they say that that's Te'Quan's number as
7 Detective Krasowski just told you is because he is
8 saved as Lefty in Brandon's phone or he also
9 appears in Devin's phone.

10 However, the problem here is going --
11 the Crawford problem here is that I cannot ask
12 Devin questions about what that phone number means
13 and what the assignment of that contact in his
14 phone book means because he's a nontestifying
15 co-defendant. I also can't ask Devin about the
16 rest of the contents of his phone. That would
17 clarify that issue of whether this number belongs
18 to Te'Quan.

19 The jail phone records he -- before I
20 move from the phone number issue, what the
21 detective would tell you is that that -- why this
22 is so crucial that I be able to cross-examine Devin
23 on the phone number issue is because Brandon is
24 dead. So I can't ask Brandon about the phone
25 record in his phone book and what that means what,

1 what the [REDACTED] number being attributable to Lefty
2 means. I can't ask Devin what it means in Devin's
3 phone book. It is saved as B-R-U-D-A 2, but also
4 completely randomly under a girl's name, same phone
5 number.

6 The reason why that line of questioning
7 is so crucial is because the phone number, the [REDACTED]
8 phone number, actually comes back to either Joe
9 Brown or a Justin Brown. And law enforcement did
10 track down or attempt to track down one of those
11 two individuals, spoke with that individual and it
12 was determined that that individual has nothing --
13 no connection to Te'Quan whatsoever.

14 So that's the important Crawford part
15 from the phone records.

16 And the jail calls issue, Court's
17 indulgence, the State -- a big part of the State's
18 case is attributing the nickname Lefty to Te'Quan
19 and in Devin's phone -- jail phone calls it sounds
20 to me paraphrasing the best I can that he's singing
21 a rap lyric or something that --

22 THE COURT: What?

23 MS. VAN PALA: He's singing a rap song
24 or rap. I don't know the relevance of that jail
25 call. We haven't had a chance to argue the

1 relevance of that jail call. But he does mention
2 Lefty. So I think that's a testimonial statement
3 too that would implicate Crawford factually
4 speaking. The Facebook records, you saw some of
5 them. They are all pretty much similar where Devin
6 is tagging pictures of Te'Quan and is referring to
7 Lefty which the State says is very important in
8 this case.

9 But the Crawford issue is that it's
10 Devin's Facebook. He is making statements that are
11 being used prosectorially against him and they are
12 also being used against Te'Quan and I will not have
13 the ability to cross-examine him and inquire about
14 those records since he's a nontestifying
15 co-defendant.

16 Judge, the specific trial rights that
17 are jeopardized here are the Fifth
18 Amendment right to remain silent I would say
19 because throwing a picture of Te'Quan on the Elmo
20 in front of the jury that is from Devin's Facebook
21 that attributes so many prejudicial images, words,
22 all of that, would infringe on Te'Quan's right to
23 remain silent.

24 This is what Devin puts on the internet
25 and it's going to be confusing and highly

1 prejudicial for the jurors because the jurors will
2 see all of this imaging of Te'Quan on Devin's
3 Facebook and think that those are Te'Quan's
4 statements when they are Devin's statements. And I
5 will not be able to cross-examine Devin and ask him
6 about that and clarify that for the jury.

7 THE COURT: You're saying that the
8 statements that you are complaining about are on
9 Devin's Facebook page, photographs. You are saying
10 the jury would assume Te'Quan put them on his
11 Facebook page?

12 MS. VAN PALA: Yes, Judge. I am
13 characterizing what is on Devin's Facebook as
14 statements that would trigger a Crawford problem,
15 Brewton problem here, and I am objecting -- to be
16 clear, objecting to them on all grounds of
17 relevance, authenticity, lack of foundation,
18 hearsay, improper character and best evidence. But
19 specifically for my Brewton argument and my
20 Crawford argument, the concerning part is that
21 since they can't be redacted which redaction will
22 play into this, I'm sure this argument, they are so
23 embroiled, they are so intertwined in what's
24 happening on Devin's Facebook that it's implicating
25 my client. That's where we have a Crawford issue

1 and our Brewton issue.

2 What Devin is putting on his Facebook
3 are statements that implicate my client. A big
4 part of the State's case is going to be trying to
5 prove conspiracy. They are going to try to use the
6 exceptions to the hearsay rule for statements made
7 by co-conspirators in furtherance of the
8 conspiracy. They are going to try to use the
9 motive, intent, plan, common scheme and action, all
10 the exceptions to character. They are going to
11 attempt to introduce all of this inflammatory
12 material in the case to try to prove not only
13 Brandon's murder, but the conspiracy that involves
14 Te'Quan to murder Brandon and the issue is that --
15 I apologize -- Court's indulgence. I lost my train
16 of thought.

17 THE COURT: Point to specifically what
18 in Devin's page implicates your client in the
19 murder.

20 MS. VAN PALA: Yes, Judge. The State
21 will try to use exceptions to the character and
22 hearsay rules to prove that their association, when
23 Devin is saying free will Lefty out of the slammer,
24 free my brother, and later on as you will see the
25 Facebook messages, Devin's private Facebook

1 messages that implicate witness intimidation issues
2 that would further prove the conspiracy, that also
3 feature pictures and aliases that are attributed to
4 Te'Quan. That's the incriminating part.

5 And the State will try to use the
6 exceptions to our character rules or our hearsay
7 rules to get those into evidence. The Brewton and
8 the Crawford problem is that they facially
9 implicate and incriminate Te'Quan in the murder and
10 the conspiracy. Meanwhile Te'Quan is in jail the
11 whole time.

12 THE COURT: You're saying all the right
13 words, but you are not arguing the facts. I am
14 trying to get you to point specifically to what in
15 those pages do what you say they do.

16 MS. VAN PALA: Court's indulgence. Let
17 me get there. State's Exhibit 103. May I
18 approach?

19 THE COURT: Yes, ma'am.

20 MS. VAN PALA: Which you have already
21 seen is one example the State will I'm sure argue
22 that when Devin posted that picture on the day that
23 Te'Quan was arrested that proves an association.
24 Additionally --

25 THE COURT: Well, now let's look at

1 103. I don't purport to understand all of this
2 language that's being used.

3 MR. OSBORNE: And, Your Honor, we
4 haven't even got to the relevancy of that. It's
5 more than --

6 THE COURT: She is using it for a --

7 MR. OSBORNE: And --

8 THE COURT: -- severance motion.

9 MR. OSBORNE: Right. So what that's
10 talking about is Crawford. But you can't just say
11 I have the right to cross-examine the co-defendant.
12 She is never going to have that right. So what
13 and, in fact, there's case -- this case State v.
14 Crow 258 S.C. -- 188 S.E. 2d 379. A defendant is
15 not entitled as a matter of right to a separate
16 trial in order to make a co-defendant available to
17 testify. He must show some prejudice arising out
18 of the joint trial.

19 Now, what she's saying is that somehow
20 that she has a -- let me stay with the first issue
21 with her right to cross-examine Devin Middleton.
22 She says Crawford. Because she cannot
23 cross-examine posts is a Crawford violation. Well,
24 these posts were made. They are nontestimonial
25 right from to getgo. And if they are

1 nontestimonial then she doesn't have a right to
2 cross-examine the post. When the post was made
3 they weren't made in anticipation of litigation.
4 So Crawford's not even implicated in this argument
5 at all.

6 So now we are just talking about
7 severance here, which is I think what we are just
8 talking about, the right to cross-examine the
9 Defendant, she's never going to have so that's not
10 a good grounds to separate.

11 Now, if she wants to argue the
12 relevance, the 403 nature of each specific exhibit,
13 we can deal with that. But that's no grounds to
14 severe the case.

15 MS. VAN PALA: May it please the Court.

16 THE COURT: Are you saying these
17 statements were made in anticipation of litigation?

18 MS. VAN PALA: The solicitor quoted the
19 general rule, but another side of that prism is
20 that they are going to be used persecutorily to
21 attempt to prove facts in this litigation. They
22 don't just have to be made in anticipation of
23 litigation.

24 THE COURT: You got a case?

25 MS. VAN PALA: Court's indulgence,

1 Judge.

2 THE COURT: I always thought it had to
3 be testimonial in nature.

4 MS. VAN PALA: And our argument is
5 that. Our argument is that these are testimonial
6 in nature because of the very nature that the
7 prosecutor -- why doesn't the prosecutor intend to
8 introduce them in trial.

9 THE COURT: You can say that about any
10 piece of evidence the prosecutor puts up in trial.
11 I assume everything he puts up he thinks helps the
12 case. What year was Crow decided?

13 MR. OSBORNE: Crow, it was decided in
14 1972.

15 THE COURT: I wanted to be sure I had
16 the right case. I do.

17 MS. VAN PALA: Judge, I apologize for
18 belaboring this. I know I have another case, but
19 that general proposition is from Melendez-Diaz
20 which Justice Scalia's opinion that I had handed up
21 and provided to the prosecutor where he discusses
22 the general nature of business records and the
23 general nature of testimonial, nontestimonial
24 documents. And really the crux of my argument here
25 is I know I can't cross-examine a record. But we

1 are not dealing with records here, Judge. We're
2 dealing with a co-defendant who used Facebook as a
3 means to post images and words that the State is
4 seeking to use against him to prove his guilt in
5 this trial and to prove the criminal conspiracy
6 that embroils my client. I'm not -- and the reason
7 why I can't and it's -- the question is not whether
8 I can cross-examine a record. The question is
9 whether I can cross-examine a nontestifying
10 co-defendant. And I can't. That's why we have
11 Brewton issues here. This is akin to the line of
12 Brewton cases. Very solid in our state and they
13 are getting more and more clear about statements
14 and what statements are from co-defendants. And
15 whether severance -- whether there is a major
16 Crawford problem and if there is a major Crawford
17 problem then severance is warranted.

18 THE COURT: Again, you are making all
19 the good arguments, but you need to make it
20 specific to this case. You are stating
21 propositions of the law and I understand that. How
22 does it apply to this case? Now, you mentioned the
23 Melendez case. Point to me to what you're talking
24 about in that case. I am looking at it now.

25 MS. VAN PALA: The pertinent

1 information is under --

2 THE COURT: I am looking at Roman
3 Number II. Talks about Sixth Amendment right to
4 confront a witness. Talks about Crawford and it
5 goes on to describe the documents that are in
6 question in this case. And there it talks about
7 the fact that the documents in question in this
8 case are affidavits, they are -- let me see how
9 they describe them, the confrontation clause is
10 implicated by extra judicial statements only
11 insofar as they are contained in formalized
12 testimonial materials such as affidavits,
13 depositions, prior testimony.

14 The documents at issue here while
15 denominated by Massachusetts law and certificates
16 are quite plainly affidavits, declarations of the
17 facts written down and sworn to by the declarant
18 before an officer authorized to administer oaths.
19 They are incontrovertibly a solemn declaration or
20 affirmation made for the purposes of establishing
21 or proving some fact.

22 So what the cases are and what the
23 documents are in this case are in effect affidavits
24 being offered to prove the facts in the affidavits
25 which would make them testimonial in nature.

1 MS. VAN PALA: That's right, Judge.

2 THE COURT: Here we are not dealing
3 with affidavits, depositions, prior testimony. We
4 are dealing with statements made on a Facebook
5 page.

6 MS. VAN PALA: We are --

7 THE COURT: So I'm trying to figure out
8 how you quoted this case as applying. I see it
9 factually different if I am reading the right case.

10 MS. VAN PALA: Judge, I think really
11 and the part of the opinion that I was really
12 focusing on is section D.

13 THE COURT: I will be happy to go
14 there. It appears what they are trying to do in
15 the case is to get in scientific evidence by way of
16 statements, not by presenting the witnesses; is
17 that right?

18 MS. VAN PALA: Yes, Judge.

19 THE COURT: Again, those statements
20 would have been prepared to be utilized at trial.
21 They would be testimonial in nature. I doubt
22 anybody posted anything on these Facebook pages for
23 purposes of preparing for trial.

24 MS. VAN PALA: The aspect of they are
25 -- they don't -- and here's where South Carolina

1 case law comes in and where South Carolina has
2 expanded upon what statements that could reasonably
3 expect to be used persecutorily in trial.

4 THE COURT: Tell me what case you are
5 talking about now.

6 MS. VAN PALA: They did not have to be
7 made with that specific design of being --

8 THE COURT: What case are we talking
9 about now?

10 MS. VAN PALA: Court's indulgence. The
11 main case that I would cite is Jackson which is the
12 most recent.

13 THE COURT: Help me with that name
14 again.

15 MS. VAN PALA: Jackson. I have a copy.
16 McDonald. Mitchell. Martin. I have those cases,
17 Judge, if I may approach. I will give a copy to
18 the solicitor. The fact that --

19 THE COURT: Just one second. Let me
20 read the case.

21 (Brief pause.)

22 I will hear from you now. I have read
23 it. I read McDonald which I think is the most
24 recent, is it not?

25 MS. VAN PALA: Either that one or

1 Johnson or Jackson, Judge, yes, but specifically in
2 McDonald I think what the Court's report getting to
3 is the nature of the statement. What the statement
4 is, what it's actually saying and the implication
5 --

6 THE COURT: Well, in McDonald it was a
7 confession.

8 MS. VAN PALA: And traditionally there
9 are confessions where one co-defendant implicates
10 the other and we have those line of cases that
11 discuss where reduction is appropriate and it not
12 appropriate. But the general rule is that is in
13 McDonald under headnote one and two, III these
14 powerfully incriminating extrajudicial statements
15 of a co-defendant are not only devastating to the
16 Defendant, but also their credibility is inevitably
17 suspect.

18 That is our general rule that we are
19 dealing with here. Redaction was only mentioned in
20 Brewton in a footnote as one possible way to deal
21 with this problem.

22 Specifically factually what we are
23 dealing with here is the inference that will be
24 drawn and we are dealing with the actual substance
25 of what the statements are. Not necessarily its

1 form, not whether we call them a business record or
2 whatever we call them, what the State will present
3 to the jury will look like Devin and Te'Quan that
4 looked like gangster thugs on the day that Te'Quan
5 was arrested, that will leave them with the
6 inference that they are coconspirators who
7 conspired to comit this crime. Especially when
8 Devin goes out of his way to caption the photograph
9 discussing freeing Lefty out of jail.

10 Meanwhile, Te'Quan has nothing to do
11 with this because he's in jail. There are also
12 some exhibits that you saw, Judge, during Detective
13 Krasowski's testimony are similar to that. There
14 are also Facebook messages. We haven't gotten to
15 those messages yet so I will summarize what they
16 are.

17 The messages are Devin messaging random
18 people on his Facebook about Te'Quan's case. About
19 Te'Quan being in jail. About Demarco going down to
20 the state police station and snitching and about
21 eliminating witnesses. A big theme in the State's
22 case is witness intimidation. Devin is the one who
23 posted and mentioned about witness intimidation.
24 Just because he attached an image and the alias or
25 moniker associated with Te'Quan doesn't connect

1 Te'Quan. That's where we have a fundamental
2 Brewton issue. That's where our prejudice is that
3 would support severance. The witness intimidation
4 issue is major, Judge.

5 I'm not sure of what other exhibits the
6 State's intending on entering into evidence. I
7 have the rest of the exhibits that Detective
8 Krasowski testified about just now in the pretrial
9 hearing, but like the State said, there are
10 thousands of pages worth of this information. We
11 don't know what the State is planning on
12 introducing, but that's factually the gist of it.

13 THE COURT: Thank you. Mr. Apicella,
14 you wish to be heard?

15 MR. APICELLA: I do, Judge. I might
16 have a slight disadvantage because my motion for
17 severance is really based on the jail calls which I
18 just received the final version of Mr. Perry's jail
19 calls the State wants to admit, but based upon what
20 I have heard so far in the calls, I am moving for a
21 severance for Mr. Perry's case because Mr. Perry in
22 his jail calls implicates my client in at least the
23 conspiracy and that would allow the jury just to
24 make the next step and convict him of --

25 THE COURT: What did he specifically

1 say?

2 MR. APICELLA: Yes, Your Honor.
3 Specifically in one of the calls Mr. Perry is
4 speaking to a woman right after he gets arrested.
5 And he is saying get in touch with Devin. Once you
6 get my Rule 5 I will know who the witnesses are
7 against me. Tell Devin to take care of it, words
8 to that effect.

9 In another post or phone call Mr. Perry
10 was speaking to a person and says call Devin, tell
11 him to call Nardo or Nardo's son. Tell him I said
12 get at him. And I think if they come in, it's that
13 he is directing my client to go out and take care
14 of witnesses and intimidate witnesses.

15 I won't be able to cross-examine Mr.
16 Perry. It would be absolutely devastating and
17 Crawford I think is implicated as is Brewton. As I
18 said, I haven't listened to the final version, but
19 I am assuming those calls made the final cut and
20 that the remedy would be take those calls out and
21 I'm sure the State would not want to do that.

22 So my motion is to severe. That's the
23 only remedy for my client to get a fair trial in
24 this case.

25 THE COURT: Let me hear from the State.

1 MR. OSBORNE: Your Honor, I will bring
2 it back to Crawford because that's kind of what
3 they keep talking about.

4 The Melendez-Diaz, been a while since I
5 have read it, but you are right. So the way I read
6 what the State was trying to do is not call the
7 scientist who did the analysis on the drugs. And
8 they just wanted to push in the lab report. Well,
9 why did they analyze drugs, why did they do a lab
10 report? They did so in anticipation of litigation.
11 It is impossible to argue that Devin Middleton or
12 Te'Quan Perry made any of these posts or any of
13 these comments in anticipation of litigation,
14 especially considering the nature of the calls.

15 Now, again, you know, Ms. Van Pala says
16 she wants to cross-examine. Well, that right, that
17 confrontation right in Crawford is explained in the
18 case of Melendez-Diaz v. Crawford. And it starts
19 with the analysis is the evidence testimonial or
20 nontestimonial. If it's nontestimonial, then there
21 isn't a right to confrontation. They don't have a
22 right to confront that accuser and especially in
23 this case.

24 Now, all the cases that she cited right
25 here are all dealing with a co-defendant's

1 confession that the State wanted to admit and they
2 were having problems with redaction. The Court was
3 trying to interpret how to redact this without
4 letting the jury think that the redacted individual
5 is the other co-defendant and in essence using that
6 statement against them.

7 That's not what we are doing. We do
8 have statements in which I think Te'Quan says that
9 that's his homeboy and they are friends. Now, we
10 sat here and listened to it. But I even sent
11 e-mails to them. I said tell me, you want it out,
12 I will put it out. But didn't hear anything back.

13 Devin Middleton gave a written
14 statement to their private investigator and in that
15 written statement he mentions Te'Quan is on the
16 scene. I get it. That's a problem. How do you
17 want to handle it because he said that Te'Quan, he
18 might have been on scene, he didn't do it. I know
19 he didn't do it. So it's good and bad.

20 So I asked him, this was about a month
21 ago. Tell me what you want me to do. You want to
22 redact it. We can redact it. All right.

23 So the redaction issue, that's a whole
24 other issue. We are willing to lay down and
25 cooperate with them on the redaction issues, but we

1 haven't heard anything they want anything redacted.
2 So then it comes down to Facebook. So now we are
3 talking about relevance.

4 MS. VAN PALA: If I may, Your Honor,
5 because I filed a blanket objection. I don't think
6 I was under any duty to try to stipulate --

7 THE COURT: I'm going to let him finish
8 his argument.

9 MS. VAN PALA: Thank you, Your Honor.

10 MR. OSBORNE: So you haven't seen this
11 evidence, I kind wanted to do this in a particular
12 order.

13 So you heard some testimony about the
14 McDonalds. He said that he went to McDonalds.
15 Well, you will see some better images of that. We
16 are going to contend that that's Te'Quan Perry and
17 based on what the defense just said I think they
18 are going to admit. The sign is in the worst
19 possible spot, but at certain elements you will be
20 able to see that looks a lot like Te'Quan Perry.
21 Seems like they are going to admit to that.

22 Let me back up. He's wearing the same
23 shirt. There's more relevance to this than just
24 what's on the post. But the posts are relevant to
25 because it goes to state of mind, goes to witness

1 intimidation. They are working together. They are
2 charged with conspiracy. I agree with everything
3 Ms. Van Pala said in the sense that we are going to
4 try to use all the rules of evidence to introduce
5 evidence that they are working together. Well, we
6 are. And there is a lot of evidence that they are
7 working together.

8 We haven't even gotten to some of the
9 other stuff. But in regards to severance the
10 Crawford argument I think falls flat because all of
11 this is nontestimonial.

12 THE COURT: You know, in looking at the
13 McDonald case, it does not talk whether the
14 statement, confession is testimonial or not, but by
15 definition if someone's talking to the police and
16 they are taking a confession it is being taken for
17 the purposes of being used at the trial if
18 necessary.

19 MS. VAN PALA: But there's no rule that
20 says that a testimonial piece of evidence is
21 prepared in anticipation of litigation. That's
22 from the business records exception. So it's not
23 limited, Judge.

24 THE COURT: Just a minute. Wait a
25 minute. In Crawford after reviewing the historical

1 underpinnings we held that a right to confront
2 those who bear testimony against him, bear
3 testimony in quotes, a witness's testimony against
4 the Defendant is thus inadmissible unless the
5 witness appears at trial or if the witness is
6 unavailable, the Defendant had a prior opportunity
7 to cross-examine.

8 So again they are talking about bearing
9 testimony.

10 MS. VAN PALA: But being prepared --

11 THE COURT: Let me go on. There is
12 little doubt that the documents at issue in this
13 case fall within the core class of testimonial
14 statements thus described.

15 So they are talking about testimonial
16 statements. And I have not looked at all the cases
17 you gave me from South Carolina. I have pulled up
18 Kennedy, I mean McDonald, excuse me. In McDonald
19 they are using a confession which would be a
20 document prepared in anticipation of litigation to
21 go to trial. It would be testimonial in nature.
22 Do any of those cases that you mentioned show me
23 one where it's something from somebody's journal
24 they wrote down at their house or something of that
25 nature that wasn't prepared in anticipation of

1 trial? That case, the Melendez case is again after
2 the affidavits that were prepared to go to trial in
3 the place of a witness appearing.

4 MS. VAN PALA: That's what the State is
5 trying to do with admitting this.

6 THE COURT: Answer my question. You
7 don't answer my questions. Point to one of the
8 cases you gave me from South Carolina where the
9 statement in question was not testimonial in
10 nature.

11 MS. VAN PALA: I would need to find it.
12 I have a lot of cases, Judge.

13 THE COURT: I didn't say you didn't. I
14 want you to point me to one that is a
15 nontestimonial setting that they ruled implicated
16 Crawford.

17 MS. VAN PALA: I would have to find
18 one, Judge. I apologize.

19 THE COURT: Now would be a good time to
20 find one. I will give you few minutes to look
21 through them. Take as much time as you need.

22 MS. VAN PALA: My general argument is
23 that there are statements. The Sixth Amendment
24 is --

25 THE COURT: Please answer my question.

1 The Kennedy case that you cited, do you have a year
2 when that was decided?

3 MS. VAN PALA: I'm not sure if I cited
4 a Kennedy case.

5 THE COURT: Maybe I misunderstood. You
6 listed off a whole lot of cases.

7 MS. VAN PALA: I sure did.

8 THE COURT: You didn't give me any
9 details about any of them.

10 MS. VAN PALA: Those are the most
11 recent cases on this issue.

12 THE COURT: I have looked at the
13 McDonald case.

14 MS. VAN PALA: There is Mitchell and
15 then Martin and Jackson.

16 THE COURT: Jackson.

17 MS. VAN PALA: Is from 2014, a year
18 before McDonald.

19 THE COURT: Jackson also involves a
20 statement given to police in anticipation of trial.
21 A confession. What was the next one you said?

22 MS. VAN PALA: Martin and Mitchell.
23 Mitchell was 2008. Mitchell also involved the
24 statement given by a co-defendant to the police
25 prior to trial.

1 THE COURT: I think what I am going to
2 do is in the morning I have a civil motion to
3 reconsider at 9:00. So we would be in the
4 courtroom at 9:00. It's from Horry County. It is
5 not anything on your docket. You don't have to do
6 anything with that.

7 As soon as I finish that motion I will
8 be happy to hear from you if you come up with any
9 case that says that a nontestimonial statement is
10 in this if any exists. Right now my inclination is
11 to deny the motion because I do think that in order
12 to implicate Crawford and Brewton the statements
13 must be testimonial in nature. A confession,
14 statement given to police, a formal statement that
15 could be used at trial against someone when it was
16 given. That's what it appears to me to exclude.
17 And I don't see any cases that say otherwise.

18 If you have something I will be glad to
19 take a look at that and I will spend some time
20 tonight myself looking to see.

21 But I do intend to -- if I decide not
22 to sever the cases we will pick a jury at 9:30. I
23 noticed you gentlemen talking. Is there some talk
24 about some redactions or anything?

25 MR. OSBORNE: No.

1 THE COURT: Jailhouse conversations.

2 Let me be sure I have got this.

3 Mr. Apicella, you're objecting to the
4 jailhouse conversation.

5 MR. APICELLA: I am, as a basis for
6 severance.

7 THE COURT: You're saying the basis for
8 is simply the inability to cross-examine?

9 MR. APICELLA: Well, because they are
10 testimonial in nature, they implicate my client in
11 conspiracy which --

12 THE COURT: When they were given were
13 they given with the anticipation of being used at
14 trial?

15 MR. APICELLA: No. That's not what
16 Crawford said, Judge.

17 THE COURT: What does it say?

18 MR. APICELLA: Well, my understanding
19 of Crawford is a statement that's testimonial in
20 nature. Clearly I submit the jail calls are
21 testimonial in nature which is going to be used for
22 their truth by a nontestifying witness or violating
23 the Sixth Amendment and Crawford prohibits it. It
24 was new law at the time and seems to be --

25 THE COURT: Let me ask the State a

1 question about those jailhouse calls. I'm not
2 normally from Charleston. I would suspect when you
3 enter the jail there's something that you sign or
4 information you are given about the jailhouse calls
5 that might indicate that they will be recorded and
6 can and will be used against you in a court of law.

7 MR. OSBORNE: Yes, Your Honor.

8 THE COURT: That may make them
9 testimonial in nature because if you are putting --
10 if I were wanting to put testimony out into a trial
11 and I wanted to implicate someone else, why not
12 make a phone call and tell on somebody in the phone
13 call and I don't have to testify. It's in the
14 phone records and here we go.

15 MR. OSBORNE: Okay.

16 THE COURT: Do you follow what I am
17 saying?

18 MR. OSBORNE: That's not what happened
19 here.

20 THE COURT: I didn't say that's what
21 happened here, but I am saying that if I make a
22 phone call with knowledge that it's going to be
23 recorded and knowledge that it can and will be used
24 in a court of law, that is just like I might as
25 well give a statement to the police.

1 MR. OSBORNE: I understand what you are
2 saying. It would be a perfect way to exonerate
3 yourself.

4 THE COURT: I am not saying that
5 happened in this case, but if I am giving
6 statements that I know are going to be used in a
7 court of law maybe they are testimonial in nature.
8 They are documents or information that can be used
9 in a court of law.

10 MR. OSBORNE: So what we can talk
11 about, I think the best thing for us to do would be
12 to actually hear the jail calls to see what's being
13 said and see how they are implicating other
14 individuals or other co-defendants in this case and
15 then address that matter.

16 THE COURT: This is a part of his
17 joining in the motion to sever and what I would
18 tell you is that if you want to try the cases
19 together and I determine that they are testimonial
20 in nature then you will have to exclude them or
21 redact them in a fashion that takes out any
22 reference to co-defendants, something of that
23 nature, to cure that problem. Otherwise I would
24 grant his motion to sever.

25 MR. OSBORNE: We are prepared to go

1 forward with trial if the Court rules that we can't
2 get any of those jail calls in. Those are just
3 other evidence that we seek to admit that helps us
4 prove our case.

5 THE COURT: I understand that. But I
6 am tending to agree with him. When I go in the
7 jail and I sign a statement knowing that that's
8 going to be recorded and knowing it can be used at
9 trial, then anything I say on a jail call I know is
10 going to potentially be in court used against
11 somebody in some way. That's tantamount to giving
12 a statement to the police.

13 MR. OSBORNE: Judge, I am having a hard
14 time remembering. Other than one comment that
15 Te'Quan Perry said regarding Devin saying get at
16 Nardo, get at Nardo. And if that ends up -- if the
17 Court rules that that statement is testimonial,
18 that clip can't come in for that reason, then we
19 have 20 other clips.

20 So if that clip is testimonial in
21 nature, that should not affect our ability to move
22 forward with the joint trial I guess would be the
23 State's position.

24 THE COURT: Well, we will talk about it
25 in the morning, but I think you understand my

1 position.

2 MR. APICELLA: I do, Judge.

3 THE COURT: As soon as I finish that
4 motion hearing we will talk about that further.
5 And, ma'am, if you come up with any cases that show
6 that it doesn't have to be some type of testimonial
7 statement I will be happy to look at it.

8 MS. VAN PALA: Yes, Your Honor.

9 THE COURT: You can e-mail them tonight
10 if you come up with something. We will recess.
11 Court will resume at 9:00. This case will resume
12 at 9:30.

13 (Proceedings adjourned at 7:05 p.m. on
14 June 12, 2017.)

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1 (The following proceedings were held
2 June 13, 2017, Charleston County, South Carolina, @
3 9:09 a.m.)

4 MR. APICELLA: Your Honor, yesterday my
5 client contacted me to approach the solicitor for a
6 plea offer. So I did and he just told me that the
7 offer is a negotiated 20 years for voluntary
8 manslaughter. I think that's more than he was
9 looking for, but I would like to go downstairs and
10 just convey the offer to him.

11 THE COURT: Sure. Absolutely.

12 MR. APICELLA: Quickly. I will be
13 right back up.

14 THE COURT: You have got to do that.

15 MR. APICELLA: I don't want to delay
16 the trial.

17 THE COURT: It wouldn't be the first
18 time.

19 MR. APICELLA: That's true, but it
20 wasn't me, Judge.

21 THE COURT: I didn't say it was.

22 MR. APICELLA: Thank you.

23 (A recess transpired.)

24 MR. OSBORNE: Your Honor, just so the
25 record is clear, I would like to put this

1 rejection. We did extend an offer to Mr. Middleton
2 and now we have learned he has rejected the offer.
3 The offer was to a negotiated voluntary
4 manslaughter plea at 20 years and that's no longer
5 on the table.

6 THE COURT: Counsel, is that your
7 understanding of the offer?

8 MR. APICELLA: Yes, sir.

9 THE COURT: Was it transmitted to your
10 client?

11 MR. APICELLA: It was.

12 THE COURT: And has he, in fact,
13 rejected that offer at this time?

14 MR. APICELLA: He has.

15 THE COURT: Was that done with the
16 understanding that the offer will now be withdrawn
17 if he fails to accept it?

18 MR. APICELLA: Yes.

19 THE COURT: Thank you. All right.
20 When we ended yesterday we were discussing the
21 severance of the case. As part of that issue the
22 defense has raised the issue of the confrontation
23 clause, the Crawford case in regards to the
24 Facebook postings that I had reviewed yesterday,
25 social media matters.

1 I extended to the defense the
2 opportunity to review the cases that they relied
3 upon to indicate any situations where
4 non-testimonial evidence was implicated by the
5 Crawford decision. I did some independent research
6 on that myself last night. So I will be happy to
7 hear from the defense at this time.

8 MS. VAN PALA: Your Honor, may it
9 please the Court, Tamara Van Pala. Thank you,
10 Judge.

11 As to your specific question whether I
12 found a case that supported the proposition that
13 testimonial evidence could include statements that
14 are not made under circumstances such as custodial
15 interrogation, confessions and the like.

16 THE COURT: What I learned actually is
17 that the most recent case in South Carolina to
18 discuss what testimonial statements include was a
19 case just decided last month in which the court
20 defined the testimonial statements to include one,
21 ex parte in court testimony or its functional
22 equivalent to extra judicial statements contained
23 in formalized testimonial material, No. 3,
24 statements made under circumstances that would lead
25 an objective witness to reasonably believe that the

1 statements would be available later or have a
2 trial; and four, statements taken by police
3 officers in the course of the interrogations.
4 That's how the Court defined the testimonial
5 evidence.

6 MS. VAN PALA: Judge, what case is
7 that? I'm not sure.

8 THE COURT: The case that I am citing
9 was decided in May of this year by the court of
10 appeals. It is State v. Trapp. That opinion was
11 filed May the 24th last month, about three weeks
12 ago.

13 MR. APICELLA: Can you repeat that?

14 THE COURT: State v. Trapp, T-R-A-P-P,
15 filed in May of this year.

16 MS. VAN PALA: Do you have the cite,
17 Your Honor?

18 THE COURT: Well it's on the -- it's
19 Opinion No. 5487, has not been formerly published
20 yet. It's on the Supreme Court website, look under
21 opinions for the court of appeals and look up May.
22 It's posted there.

23 MS. VAN PALA: Court's indulgence.

24 THE COURT: I found that case contained
25 a very good and thorough discussion of the

1 confrontation clause as it stands in our state.

2 Ms. Van Pala.

3 MS. VAN PALA: Yes, Your Honor. I just
4 refreshed my memory. I did read that case. And
5 what I believe that case stands for is drawing a
6 distinction between business records and evidence
7 logs in this case and what they are going to be
8 used for in trial. And then the kind of records
9 that are cited in Melendez-Diaz which is the case
10 we discussed yesterday where Justice Scalia
11 instructs that it's what the facts are underlying
12 that document is what determines whether they are
13 testimonial in nature.

14 I did not find a case to answer your
15 specific question.

16 THE COURT: I don't think that is part
17 of the discussion here. They talk about -- what
18 they say is the United States Supreme Court has
19 held the confrontation clause prohibits the
20 admission of out of court testimonial statements of
21 a witness unless the witness is available to
22 testify and the Defendant had prior opportunity to
23 cross-examine the witness. It cites Crawford. The
24 Crawford court stated the class of testimonial
25 statements includes and it gives those four

1 definitional things. I don't see that relies on
2 the facts contained in the statements. It has to
3 do with the nature of the statements themselves,
4 under what circumstances were they produced.

5 The case here in Trapp that involved
6 information that had been filed by evidence
7 custodians, signed by them, put on that record and
8 so, in fact, the court in this case even though you
9 would think that those documents would most
10 probably end up in court, the court in this case
11 said that they were not testimonial in nature and
12 therefore they were properly allowed to come in.

13 Here we have got statements made on a
14 social media site by individuals communicating with
15 other people on a social media site. I am having
16 difficulty in stretching that communication to fit
17 that definition given by the Crawford court. I
18 don't see that relies on what facts are stated in
19 the statement. It relies on the nature of the
20 statement and what someone making that statement
21 would have expected at the time that they made it.

22 MS. VAN PALA: As to the testimonial
23 aspect we would rest on our argument and my
24 summation of Melendez-Diaz from yesterday. I
25 believe that applies.

1 THE COURT: Okay. Well, I'm going to
2 find that the statements on Facebook were not
3 testimonial in nature. Yes, sir. Stand up. I am
4 sorry. I didn't give you a chance to be heard.

5 MR. APICELLA: No, you didn't.

6 THE COURT: I'm going to give you a
7 chance before I make my ruling.

8 MR. APICELLA: Thank you. This morning
9 I sent out a case of People v. Johnson to all
10 parties.

11 THE COURT: I was specifically talking
12 about the Facebook pages. I am not talking to her
13 about jailhouse calls. I will get to that next if
14 we get there. I was moving on the Facebook pages.

15 MR. APICELLA: Appreciate my concern.

16 THE COURT: I understand your concern.
17 But I'm trying to -- I look at those as different
18 animals, okay? So right now I'm ruling on the
19 Facebook pages.

20 You want to be heard on that? I am not
21 going to cut you off, but I don't think you argued
22 the Facebook pages yesterday.

23 MR. APICELLA: I just want to
24 reiterate, Judge, that I disagree with your
25 interpretation that it is not testimonial. It's

1 being offered in this trial as testimonial by an
2 unavailable witness for its truth because if the
3 State didn't allege that this was truthful it would
4 be character evidence and Your Honor would keep it
5 out. In fact --

6 THE COURT: I'm not ruling on its
7 admissibility now. I am just ruling as to whether
8 or not it would be excluded by the confrontation
9 clause.

10 MR. APICELLA: Respectfully I think in
11 order to make that decision correctly you would
12 have to -- in determining is this testimony, is it
13 going to come in as testimony by an unavailable
14 declarant for its truth and the answer
15 unequivocally is yes and because that answer is yes
16 Crawford is implicated because to the extent that
17 -- to the extent that it applies to my client for
18 anything that his co-defendant said on social media
19 that leads to him, his constitutional right to
20 confront Mr. Perry about what he said is impacted.

21 THE COURT: I understand your position.
22 However, I don't think it falls within the Crawford
23 definition. And therefore that's the definition
24 our courts have adopted. So I am going to allow it
25 to come in. If it passes other tests for

1 admissibility you certainly reserve the right to
2 reject it on other grounds. But as to whether or
3 not those statements violated the confrontation
4 clause, I find that they do not fit the definition
5 of testimonial evidence. Therefore, they won't be
6 excluded for that reason. Yes, ma'am.

7 MS. VAN PALA: Thank you, Your Honor.
8 Aside from the specific testimonial issue, and
9 aside from Crawford, I have two more cases that
10 just stand for general propositions that I argued
11 yesterday that we need to look at the kind of
12 inference drawn from the evidence. They also
13 discuss a harmless error analysis because I believe
14 that evidence in this case if admitted would be
15 harmful error.

16 And also discussing other statements
17 made in the context of a conspiracy trial. But
18 aside from the specific testimonial issue that you
19 just ruled on, the general rule of severance is
20 that the Defendant should be entitled to a fair
21 trial free from confusion and bias and prejudice.
22 I believe that we return to the general rule that
23 severance is to prohibit prejudice.

24 If these Facebook records are admitted
25 in Te'Quan Perry's trial he will be unduly

1 prejudiced and I believe will still have a
2 severance issue.

3 THE COURT: Anything you would like to
4 add, Mr. Apicella?

5 MR. APICELLA: No, Your Honor. Join in
6 the argument of my co-counsel.

7 THE COURT: Thank you. I will hear
8 from the State.

9 MR. OSBORNE: The only case that I
10 would cite is State v. Dennis, 337 S.C. 275,
11 severance should be granted only where there is a
12 serious risk that a joint trial would compromise a
13 specific trial right of a co-defendant or prevent a
14 jury from making a reliable judgment about the
15 co-defendant's guilt. Part of what we're -- part
16 of the whole case is that these two individuals
17 were working together and the spill over from one
18 Defendant to another, the case has already said
19 that that is not a grounds for severance. And that
20 is in essence what she's asking. That the spill
21 over that would come on to her client somehow
22 prejudices it's a specific right. Well, that's
23 part of the conspiracy charge. We need that spill
24 over evidence to show they were working together.

25 THE COURT: Severance is denied. Now,

1 anything else we need to take up before we begin
2 the jury selection?

3 MR. OSBORNE: No, Your Honor.

4 THE COURT: Anything else you want from
5 the defense? I know there may be just a couple
6 more motions. We are close to the end on that, but
7 I want to go deal with the jury selection at this
8 time. If there's something important we need to
9 take up before jury selection now is the time to.

10 MR. APICELLA: Your Honor, we are in
11 the middle of my motion to controvert the search
12 warrant for the Facebook posts. I never got a
13 chance to cross-examine Detective Krasowski or to
14 make my --

15 THE COURT: I'm going to give you an
16 opportunity to do that before the jury is sworn.

17 MR. APICELLA: Very well. Well, since
18 I made a request this morning, and I apologize for
19 doing it so late, Judge, the issue really wasn't
20 crystalized to me until I've analyzed the jail
21 calls and Facebook posts, but can we have all
22 reference to my client's nickname of Taliban
23 excised from this case?

24 THE COURT: I have got that this
25 morning I think.

1 MR. APICELLA: Until it's decided I
2 would ask Your Honor not to mention that word.

3 THE COURT: Well, I haven't -- I didn't
4 intend to mention that word. State intend to
5 mention that word during jury selection?

6 MR. OSBORNE: No, Your Honor.

7 MR. APICELLA: Also I submitted I think
8 four brief voir dire questions I would ask the
9 Court to ask.

10 THE COURT: I certainly will review
11 them. Of course voir dire is up to the Court and I
12 will decide appropriate questions.

13 MR. APICELLA: Thank you, Judge.

14 THE COURT: You can always ask me to
15 supplement my questions and I will give you an
16 opportunity to do that.

17 MR. APICELLA: Thank you, Judge.

18 THE COURT: Yes, ma'am.

19 MS. VAN PALA: Thank you, Your Honor.
20 Just one additional potential voir dire question
21 that we would ask. Since Judge Jefferson
22 specifically didn't ask the question of whether
23 jurors would be available to sit in a two-week
24 trial yesterday during the general qualifications,
25 we would ask that you make a special voir dire

1 question that specifically asks the jurors if they
2 will be able to stay potentially two weeks.

3 THE COURT: All right. I will ask a
4 question. I won't ask it in that fashion, but I
5 will ask the question being proper for them staying
6 for additional days should the case go beyond this
7 week. I don't know it will take a full two weeks,
8 but I certainly will ask. Just one moment.

9 Now, on strikes we had some discussion
10 about strikes. My understanding is the State would
11 get ten, defense each would get ten.

12 MR. OSBORNE: State would get five I
13 believe and each defense would get ten.

14 THE COURT: Let's look at that statute.

15 MS. NORRIS: The statute does say the
16 State gets ten.

17 MR. OSBORNE: We will welcome ten.

18 THE COURT: The statute says you get
19 ten. And now I don't know it mentions selection of
20 alternates for multiple Defendants. I don't recall
21 it saying that. If you have got a copy of the
22 statute I can pull it up.

23 MS. NORRIS: Your Honor, it's
24 14-7-11-20 in a criminal case the prosecutor is
25 entitled to one and the Defendant to two peremptory

1 challenges for each alternate juror called.

2 THE COURT: That's a standard in the
3 case of multiple Defendants. I don't recall a
4 different rule.

5 MS. NORRIS: It does not mention
6 multiple Defendants.

7 THE COURT: So in regular jury
8 selection each side will get ten, each of the two
9 Defendants. Now, as to the alternate selection, I
10 don't know if you want to reach an agreement as to
11 how to handle strikes on alternates. You may want
12 to talk to your co-counsel. Since you get two I
13 don't know who is responsible for deciding how you
14 exercise those. Before we get into that situation
15 I will give you a moment to talk about it.

16 MS. NORRIS: Your Honor, I would
17 contend that each Defendant is entitled to two
18 because --

19 THE COURT: Does it say --

20 MS. NORRIS: -- the statute is worded
21 the Defendant. There's two of them.

22 THE COURT: -- each Defendant?

23 MS. NORRIS: Yes, sir.

24 THE COURT: Okay. Then we will -- any
25 objection the State be allowed four strikes total

1 to the defense on each alternate?

2 MR. OSBORNE: No.

3 THE COURT: Now, do we have a number to
4 cover all of that?

5 THE CLERK: We are bringing up 75 right
6 now and we have 30 more sitting downstairs.

7 THE COURT: If we need more to be
8 brought up then we will do that. Now, we will take
9 a five-minute break before we bring the jury up.
10 Court will be in recess for that length of time and
11 I will stay on the bench.

12 (A recess transpired.)

13 MR. OSBORNE: Your Honor, we have two
14 additional witnesses for our witness list.

15 THE COURT: One second.

16 MR. OSBORNE: Sabrina Williams and
17 Tiffany Washington. They will -- Sabrina is a
18 custodian on the McDonalds video if we need it and
19 Tiffany would just help with impeachment if we need
20 it.

21 THE COURT: All right. Ms. Van Pala,
22 are you ready?

23 MS. VAN PALA: Yes, Your Honor.

24 THE COURT: And, Mr. Apicella, are you
25 ready?

1 MR. APICELLA: I am, Your Honor.

2 THE COURT: All right. Let's bring the
3 jury panel in.

4 MS. VAN PALA: Your Honor if I may, I
5 apologize, I did not read my notes. Defense would
6 request formal arraignment.

7 THE COURT: Any objection from the
8 State?

9 MR. OSBORNE: No, Your Honor.

10 THE COURT: Okay.

11 MS. VAN PALA: Thank you, Your Honor.

12 THE COURT: Do you want that done in
13 front of the jury panel I presume?

14 MS. VAN PALA: Yes, Your Honor.

15 THE COURT: Are you also requesting
16 formal arraignment?

17 MR. APICELLA: No, Your Honor.

18 THE COURT: Okay. So this will just be
19 Mr. Perry; is that right?

20 MS. VAN PALA: Yes, Your Honor.

21 THE COURT: You are waiving; is that
22 correct?

23 MR. APICELLA: Yes, Your Honor.

24 THE COURT: I need to get a statement
25 from your client that he is also waiving.

1 MR. APICELLA: Yes, Your Honor. I've
2 explained to him what he's waiving.

3 THE COURT: And he agrees?

4 MR. APICELLA: He does.

5 THE COURT: Mr. Middleton, do you agree
6 to waive the formal arraignment?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Thank you.

9 (Thereupon, the prospective jurors were
10 brought to the courtroom at 10:15 a.m.)

11 MR. OSBORNE: Your Honor, may we
12 approach briefly. I just wanted to make sure that
13 we had the right indictment.

14 THE COURT: Just one second.

15 (Conference held at bench.)

16 MR. OSBORNE: I wanted to look. Okay.

17 THE COURT: That's the one you wanted?

18 MR. OSBORNE: Yes, Your Honor. Thank
19 you.

20 (Following proceedings were held in
21 open court.)

22 THE COURT: Good morning, ladies and
23 gentlemen. First of all, let me introduce myself
24 to you. My name is Roger Couch. I am a circuit
25 court judge. I reside in Spartanburg, South

1 Carolina. My status at this point in time is a
2 senior retired active judge, which means that while
3 I am retired I've made myself available to the
4 court system to hold terms of court at the request
5 of the chief justice and I have been assigned to
6 hold a term of general session court here in
7 Charleston County this week and next week.

8 It's my pleasure to be here serving
9 with you. First of all, I want to thank you very
10 much for your willingness to come forward and serve
11 on a jury in this court. I'm not so naive that I
12 don't know that you got a subpoena, you didn't have
13 much choice but to be here; however, you have
14 appeared voluntarily. We didn't send the sheriff
15 out to haul or bring you in so I want to thank you
16 for your willingness to come forward and serve in
17 our court system in this fashion.

18 It's my personal belief that service on
19 a jury panel is the second highest service that a
20 citizen can render to your government. Of course
21 the highest level of service would involve military
22 service. We are not asking anyone to carry a
23 weapon here or risk their lives; however, I realize
24 any time you do a duty for your government it's an
25 inconvenience in your personal life. We take that

1 inconvenience seriously.

2 I want you to know that I will do
3 everything that I can do to try to minimize the
4 inconvenience; however, it's the nature of the
5 beast. You're here away from your family and your
6 personal business and I want to thank you very much
7 for your participation in that fashion.

8 As I tell juries all the time, the
9 right to a trial by jury is guaranteed in our
10 Constitution both in this state and the United
11 States of America and the Bill of Rights in the
12 Constitution. The right to a jury by trial goes
13 back to a document known as the Magna Carta that
14 was signed in England in the year 1215. So that
15 means the right to a trial by jury is a human
16 institution and a right that has survived
17 800 years. So there's very few things I think if
18 you look around created by human beings that is
19 still in use 800 years after it was begun.

20 So it's a system that we've relied on
21 for a long time in resolving disputes in our
22 courts. I want to thank you for your presence
23 again in being here. I guess that means that
24 jurors have been trying to avoid jury duty now for
25 about 800 years. So it's a long tradition that we

1 have here in our court systems and again I thank
2 you for your presence.

3 Today we are about to begin a trial and
4 in this trial this is a general sessions court, so
5 the matters that are coming before me this week
6 involve situations where citizens have been charged
7 with the commission of a crime. There are two
8 Defendants being tried in the first case before the
9 Court. And at this time I'm going to go over with
10 you the indictments in the case.

11 Let me explain to you that the
12 indictment is the document that brings the case to
13 this court. It informs this court of the charge
14 that has been lodged and informs the Defendant of
15 the charge that's been lodged against him. At this
16 time I am going to arraign -- one of the Defendants
17 has requested arraignment on the charges that are
18 before the Court. So as I go over these charges, I
19 want you to listen carefully. I'm going to ask you
20 some questions. This information that I am about
21 to go over with you may be useful to you in fully
22 and completely answering the questions I'm about to
23 ask. So please pay attention as we go through this
24 process.

25 Mr. Perry, I'm going to ask you to

1 please stand. Please place Mr. Perry under oath at
2 this time.

3 (Defendant sworn.)

4 THE COURT: Sir, your name is Te'Quan
5 Jamar Perry; is that correct?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Mr. Perry, I'm going to go
8 over with you the indictments that I have received
9 in this matter. When I complete going over the
10 indictments and each of them I will be asking you
11 how you plead. If you are pleading not guilty I
12 will be asking you how you wish to be tried. Do
13 you understand what I am doing at this time?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: All right. The first
16 indictment that I will discuss with you is case
17 number 2016-GS-10-1058. That charge is for the
18 offense of murder. The indictment states that in
19 Charleston County, South Carolina, on or about
20 March the 26th of 2015 the Defendant, Te'Quan Jamar
21 Perry, with malice a forethought did kill and
22 murder Brandon James Washington by means of
23 shooting with a firearm and Brandon James
24 Washington did die in Charleston County as a
25 proximate result thereof on or about March

1 the 23rd, 2015, in violation of Section 16-310 of
2 the code of laws of South Carolina 1976 as amended
3 against the peace and dignity of the state and
4 contrary to the statute and such case made and
5 provided.

6 Now, sir, did you understand the
7 indictment that I just went over?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Do you have any questions
10 concerning that indictment?

11 THE DEFENDANT: No, sir.

12 THE COURT: How are you pleading?

13 THE DEFENDANT: Not guilty.

14 THE COURT: How do you wish to be
15 tried?

16 THE DEFENDANT: By God and my country.

17 THE COURT: May God grant you a speedy
18 delivery. The next charge that I am going to
19 discuss with you is case number 2016-GS-10-1059.
20 This is for the offense of possession of a weapon
21 during the commission of a violent crime.

22 This indictment states that in
23 Charleston County, South Carolina, on or about
24 March 26th of 2015 the Defendant, Te'Quan Jamar
25 Perry, did possess a firearm or did visibly display

1 what appeared to be a firearm or did visibly
2 display a knife during the commission or attempted
3 commission of a violent crime, to wit, murder, in
4 violation of Section 16-23-49 of the code of laws
5 of South Carolina 1976 as amended against the peace
6 and dignity of the state and contrary to the
7 statute made and provided.

8 Mr. Perry, did you understand that
9 indictment?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: How are you pleading to
12 that indictment?

13 THE DEFENDANT: Not guilty.

14 THE COURT: How do you wish to be
15 tried?

16 THE DEFENDANT: By God and my country,
17 sir.

18 THE COURT: Again may God grant you a
19 speedy delivery.

20 The next indictment is case number
21 2017-GS-10-1410, that is for the offense of
22 criminal conspiracy. This indictment states that
23 in Charleston County, South Carolina, on or about
24 March 23rd of 2015 the Defendant, Te'Quan Jamar
25 Perry, did combine, conspire, confederate, agree or

1 have tacit understanding with another or others for
2 the purpose of accomplishing an unlawful object or
3 a lawful object by unlawful means in violation of
4 Section 16-17-410 of the code of laws of South
5 Carolina 1976 as amended against the peace and
6 dignity of the state and contrary to the statute
7 and such case made and provided. Did you
8 understand that indictment?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: How are you pleading to
11 that indictment?

12 THE DEFENDANT: Not guilty.

13 THE COURT: How do you wish to be
14 tried?

15 THE DEFENDANT: By God and my country.

16 THE COURT: God grant you a speedy
17 delivery. That completes the arrangement. You can
18 be seated. Thank you very much.

19 Ladies and gentlemen of the jury, as I
20 indicated, there are two Defendants in the case.
21 There are two other dockets. Mr. Middleton is not
22 asking for formal arraignment on the charges, but I
23 will go over the indictments with you. The case
24 are case number 16-GS-10-538. That indictment is
25 for the offense of murder. That indictment states

1 that in Charleston County, South Carolina, on or
2 about March the 23rd of 2015 the Defendant, Devin
3 Middleton, with malice aforethought did kill and
4 murder Brandon Washington by means of shooting a
5 firearm and that Brandon James Washington did die
6 in Charleston County as a proximate result thereof
7 on or about March 23rd, 2015, in violation of
8 Section 16-3-10 of the South Carolina code of laws
9 1976 as amended against the peace and dignity of
10 the state and contrary to the statute and such case
11 made and provided.

12 The other indictment against that
13 Defendant Mr. Middleton is case No. 17-GS-10-1475,
14 that is for criminal conspiracy that states that in
15 Charleston County, South Carolina, on or about
16 March 23rd, 2015, the Defendant, Devin Middleton,
17 did combine, conspire, confederate, agree or have a
18 tacit understanding with another or others for the
19 purpose of accomplishing an unlawful object or a
20 lawful object by unlawful means in violation of
21 Section 16-17-410 of the code of laws of South
22 Carolina 1976 as amended against the peace and
23 dignity of the state and contrary to the statute
24 made and provided.

25 Now, again, that Defendant has pled not

1 guilty to those indictments. I again go over those
2 with you simply for informational purposes. An
3 indictment cannot be used by a juror in any fashion
4 in determining the guilt or the innocence of a
5 Defendant. They do not constitute evidence.
6 Again, they are simply informational documents that
7 bring the cases into this court.

8 Now, I'm going to be asking you a --
9 let me go over some more informational matters. I
10 am going to ask that the attorneys involved in this
11 case introduce themselves to you. And in the case
12 of the Defendant I will ask that you introduce the
13 Defendant to the jury.

14 First of all, for the State if the
15 attorneys would introduce themselves.

16 MR. OSBORNE: Thank you, Your Honor.
17 Good morning, ladies and gentlemen. My name is
18 David Osborne. I am an assistant solicitor with
19 the Ninth Circuit. This is Ted Corvey, also an
20 assistant solicitor.

21 This is detective Paul Krasowski. He
22 works in the Charleston Police Department. He is a
23 homicide detective. This is investigator Ray
24 Haupt. He is my investigator. He works for the
25 Ninth Circuit as well and this is Jason Peghey. He

1 is a law student at the Charleston School of Law
2 interning with us and helping us out.

3 THE COURT: Thank you very much. Now,
4 for the defense. Ma'am, if you will proceed first.

5 MS. VAN PALA: Thank you, Your Honor.
6 Good morning. My name is Tamara Van Pala. I
7 represent Te'Quan Perry. My co-counsel is Theresa
8 Norris.

9 THE COURT: Thank you very much. You
10 can be seated. And for Mr. Middleton.

11 MR. APICELLA: Good morning, ladies and
12 gentlemen. My name is John Apicella. I am
13 representing my client Devin Middleton in this
14 case.

15 THE COURT: Thank you very much. Now,
16 ladies and gentlemen, it's important that the
17 information that you are about to supply and answer
18 to my questions is truthful, honest and complete
19 information. Later on when we start striking a
20 jury or choosing a jury in this case this
21 information may be used by the attorneys in making
22 decisions as to how they are going to exercise the
23 strikes that they are provided by law to exercise
24 in these cases.

25 So the information is important in that

1 regard. For that reason it is necessary that you
2 be placed under oath concerning the responses you
3 are about to give to this court. Madam clerk.

4 (Prospective jurors sworn.)

5 THE COURT: The record will reflect
6 that by being seated all members of the jury panel
7 acknowledge that they have accepted the oath now
8 administered by the clerk.

9 Now, ladies and gentlemen, I'm going to
10 go through a process somewhat similar to what you
11 went through in qualification. I know Judge
12 Jefferson handled that yesterday. I will be asking
13 questions of you. If you have a response to those
14 questions I am asking that you stand. I will call
15 on you individually as I go through the responses
16 and when I do that I'm going to ask you for your
17 name and your juror number before we discuss your
18 response. There is a reason we do that. Not to be
19 just so formal, it's this lady over here to my left
20 is taking down everything that is said in the
21 courtroom. She is the court reporter. And later
22 on if someone were to read the record of this case
23 for them to be able to understand who I am talking
24 to from your group, we have to have that
25 identifying information.

1 So I need your name and number before
2 we discuss any response that you might have to my
3 questions. I will inform you that if there is any
4 matters that I ask about that you feel would be
5 embarrassing or you don't want to discuss in open
6 court in front of me, when I finish my questioning
7 I will give you an opportunity to speak with me in
8 a more private situation.

9 When I say more private, obviously the
10 attorneys are allowed to listen to all responses so
11 they would have to be present and the response has
12 to be placed on the record so we will meet over
13 here in front of the court reporter to discuss any
14 matters such as that.

15 As I go through my questioning if
16 there's anything that you feel that you would not
17 want to discuss in open court, we will allow you
18 that opportunity to speak in a more private
19 situation. We are not here to embarrass people,
20 but we are here to get truthful, honest and
21 complete answers. So we will handle that in that
22 fashion.

23 The first question that I have for you
24 is has any member of this jury panel ever been
25 related by marriage or are you related by blood or

1 have you ever had a close personal, social or
2 business relationship with any of the following,
3 Devin Middleton, Te'Quan Perry or the alleged
4 victim, Brandon James Washington? If that's true,
5 please stand.

6 (No response from jurors.)

7 Is there any member of the jury panel
8 whose ever been represented by any of the attorneys
9 that are involved in this case or have ever
10 appeared on the other side of a legal matter from
11 you? If that applies to you, please stand.

12 (No response from jurors.)

13 Is there any member of the jury panel
14 who has ever been related by marriage or are you
15 related by blood or have you had a close social,
16 personal or business relationship with any of the
17 attorneys that are involved in the trial of the
18 case? If that is true, please stand.

19 (No response from jurors.)

20 I am now going to go over with you a
21 list of people who have been identified to me as
22 possible witnesses in the case. There is a good
23 number so please listen carefully. I think what I
24 am going to do is I'm going to call out the first
25 12 and then going to call out the next 12 since

1 there is a good number so you can remember who I'm
2 identifying. And in the case where I have been
3 given information concerning their associations or
4 employment, I will give you that information as
5 well.

6 The list of witnesses includes Lisa
7 Batton, Kaille Hutchinson, Taylor Grice, Madison
8 Hutchinson, Benson Gomez, Zellas Robert, Nicky
9 Harter, Ashley Young, Rhonda Young, Lucas Bias,
10 Helen Bone, Detective Rebecca Bailey with the North
11 Charleston Police Department. So that's the first
12 12 and as to those individuals, is there any member
13 of the jury panel who has ever been related by
14 marriage or are you related by blood or have you
15 ever had a close social, personal or business
16 relationship with any of the people that I have
17 named thus far as possible witnesses? If that's
18 true, please stand.

19 (No response from jurors.)

20 THE COURT: The next group I'll
21 identify are as follows: Lisa Kubisko with the
22 North Charleston Police Department, Sergeant Scott
23 Wyant with the North Charleston Police Department,
24 Agent Henry Cook, Jane Bell with the Charleston
25 County Department of Social Services, Elizabeth

1 Pilcher with the Department of Corrections, Daniel
2 Nichols with the Department of Corrections, Carol,
3 this is a tough one, I will spell
4 it, S-W-E-I-C-I-C-I-K-I. The next individual is
5 Dr. John Melville, Sabrina Williams, Tiffany
6 Washington, Jack Scarborough, Deloris Johnson,
7 Vivian Johnson. As to those individuals, is there
8 any member of the jury panel who has ever been
9 related by marriage or have you ever had a close
10 social, personal or business relationship with any
11 of those individuals? If that's true, please
12 stand.

13 (No response from jurors.)

14 JUROR NO. 200: Judge, can you repeat
15 Detective Scott's last name?

16 THE COURT: The very last name I
17 called?

18 JUROR NO. 260: No. Detective Scott
19 was towards the beginning.

20 THE COURT: I am sorry. There is a
21 Sergeant Scott Wyant, W-Y-A-N-T.

22 JUROR NO. 260: I believe he worked
23 part time at our --

24 THE COURT: I need your name and
25 number.

1 JUROR NO. 260: Paula Moore, and my
2 number is 260.

3 THE COURT: Thank you, ma'am. Now we
4 can talk.

5 JUROR NO. 260: Sorry. I believe he
6 worked part time as a security guard at a place
7 where I used to work.

8 THE COURT: So you no longer have that
9 connection. Now, let me ask a followup question,
10 ma'am. If you were to be selected on the jury and
11 that individual appears as a witness in the trial,
12 would that affect your ability to be fair and
13 impartial to both the State and the defense?

14 JUROR NO. 260: I believe I could be
15 fair.

16 THE COURT: You believe what?

17 JUROR NO. 260: I could be fair.

18 THE COURT: So you could be impartial?

19 JUROR NO. 260: Yes.

20 THE COURT: Okay. Thank you, ma'am.
21 You can be seated.

22 Anyone else? I have just a few more
23 names. I may have named some of those already. If
24 I name them twice, I apologize. First of all,
25 Investigator Perry Long with the Charleston County

1 Public Defender's Office, James Randolph, Amber
2 Matthews, Eric Matthews, Vivian Smith, Deloris
3 Johnson, and Dr. Christopher A. Riley who is
4 employed at the University of Utah.

5 Now, as to the individuals that I just
6 named is there any member of the jury panel who has
7 ever been related by marriage or related by blood
8 or have you ever had a close social, personal or
9 business relationship with the last group that I
10 just named? If that's true, please stand.

11 JUROR NO. 134: 134. Mr. Long, friend
12 of mine about 20 years ago.

13 THE COURT: So you knew him sometime in
14 the past?

15 JUROR NO. 134: Yes.

16 THE COURT: Now, again if you were
17 selected to serve on the jury, he appeared as a
18 witness to some facts of the case, would that fact
19 affect your ability to be fair and impartial to
20 both sides?

21 JUROR NO. 134: Wouldn't have a
22 problem.

23 THE COURT: Thank you. You can be
24 seated.

25 MS. NORRIS: Your Honor, I apologize

1 for interrupting. May we approach?

2 THE COURT: Yes, ma'am.

3 (Following proceedings were held at the
4 bench.)

5 MS. NORRIS: Your Honor, that is the
6 witness list you had read for the case, I don't
7 think we have it. We haven't covered the State's
8 witness state.

9 MR. OSBORNE: That's the same copy,
10 yes.

11 MS. NORRIS: The witness list you had
12 does not relate to this case.

13 MR. OSBORNE: You can have that.

14 THE COURT: The witness list I have was
15 in the trial brief that you sent.

16 MR. OSBORNE: No.

17 THE COURT: Did I pull the wrong trial
18 one?

19 MR. OSBORNE: No harm, no foul.

20 THE COURT: So I need to name all these
21 folks too.

22 MR. OSBORNE: Yes, Your Honor.

23 THE COURT: All right.

24 (Following proceedings were held in
25 open court.)

1 THE COURT: I have been informed that
2 there is another witness list that I did not call
3 out so I'm going to go over those individuals with
4 you as well.

5 Detective Paul Krasowski. I don't know
6 if all of these people will appear as witnesses,
7 but they are possible witnesses. Charleston Police
8 Department, Detective Paul Krasowski,
9 K-R-A-S-O-W-S-K-I. Charleston Police Department
10 Detective Thomas Bailey, Charleston Police
11 Department Craig Kosarko, Charleston Police
12 Department Jamal Medlin, Charleston Police
13 Department Sergeant Shepherd, Jason Shepherd,
14 Charleston Police Department, Officer Sean
15 Flaherty, police officer with Charleston Police
16 Department, Jennifer Wooley, W-O-O-L-E-Y. Ninth
17 Circuit Solicitor's Office Investigator Ray Haupt,
18 H-A-U-P-T. Public Defender's Office Investigator
19 Matthew Davis. I think I have already named him.
20 Witnesses Marvin Johnson, Clayton Smalls, Hugo
21 Paredes, Michael Gregory, Je'Quan Perry, Ashland
22 Horlback, Xavier Spann, Peggy Mitchum, Akeim
23 Felder, Denardo Felder, Kayla Seabrook, Jacquan
24 Spann, Dimeeche Pinckney, Te'Quilla Perry, I will
25 stop at that.

1 As to those individuals, is there any
2 member of the jury panel who has ever been related
3 by marriage or you are related by blood or have you
4 had a close social, personal or business
5 relationship with them? Sir, your name and number?

6 JUROR NO. 211: Watson Knight, 211.
7 Jennifer Wooley.

8 THE COURT: Can you tell me something
9 about how you know her?

10 JUROR NO. 211: Very close personal
11 friends.

12 THE COURT: At the present time?

13 JUROR NO. 211: Yes.

14 THE COURT: If she were to appear as a
15 witness in the trial and you were on the jury,
16 would that affect your impartiality?

17 JUROR NO. 211: No, sir.

18 THE COURT: Thank you very much. You
19 can be seated. Anyone else? The remainder of that
20 list includes SLED agent Hue Tang, SLED agent James
21 Green, Rodney Vanhorn, MUSC Dr. Erin Presnell,
22 Willis Walker, Charleston County Dispatch Angela
23 Casey, Charleston County Dispatch Tonette Mitchell,
24 Charleston Police Department Jessica Sanford,
25 Tijuana Harrison, Charleston County Sheriff's

1 Office Kevin Sherbine, Sheriff's Office Lisa
2 Bloodworth, Charleston County Police Department
3 David Crosby, Jay Fordham, Mohammad Yousel. From
4 SLED Jackie Davis, also from SLED Amy Stephens,
5 SLED is the state law enforcement division. SLED
6 Doris Yarbrough, SLED Megan Fletcher, Charleston
7 Police Department Sarah Gladwell, Charleston Police
8 Department Linda Wilson, Charleston Police
9 Department Randy Unterbrink.

10 Now, as to those individuals is there
11 any member of the jury panel who has ever been
12 related by marriage or are you related by blood or
13 have you ever had a close social, personal or
14 business relationship with those individuals? If
15 that's true, please stand.

16 (No response from jurors.)

17 I will ask the attorneys to approach,
18 please.

19 (Bench conference outside hearing of
20 prospective jurors.)

21 THE COURT: I'm not finding your trial
22 brief. Do you have any specific questions?

23 MR. OSBORNE: (Hanging.)

24 THE COURT: Thank you very much.

25 (Following proceedings were held in

1 open court.)

2 THE COURT: Has any member of the jury
3 panel or a member of your immediate family ever had
4 any criminal charges which were handled by the
5 Ninth Circuit Solicitor's Office, that's the
6 prosecutor's office here in Charleston County? If
7 that's true, please stand.

8 Yes, ma'am, name and number.

9 JUROR NO. 287: Terri Perkins, 287. My
10 son was charged with possession.

11 THE COURT: All right. Now, ma'am, is
12 that charge still pending?

13 JUROR NO. 287: No, sir.

14 THE COURT: Would that fact affect your
15 ability to be fair and impartial to both the State
16 and the defense?

17 JUROR NO. 287: No, sir.

18 THE COURT: Thank you. Ma'am?

19 JUROR NO. 57: 57. My daughter was a
20 victim of a robbery.

21 THE COURT: I see. She was involved in
22 a case handled by them?

23 JUROR NO. 57: Correct.

24 THE COURT: She was not charged with a
25 crime?

1 JUROR NO. 57: No.

2 THE COURT: Would that fact affect your
3 impartiality in this case, ma'am?

4 JUROR NO. 57: No.

5 THE COURT: Thank you. You can be
6 seated. Is there any member of the jury panel who
7 has a personal, political or religious belief that
8 would prevent that person from sitting on a
9 criminal jury and determining the guilt or the
10 innocence of a criminal Defendant? If that's true,
11 please stand.

12 (No response from jurors.)

13 Is there any member of the jury panel
14 who has had any particular experience with law
15 enforcement or a law enforcement officer such that
16 it would taint your view of the law enforcement's
17 officer testimony or in their capacity to be
18 truthful? If that's true, please stand.

19 (No response from jurors.)

20 Is there any member of the jury panel
21 who would have any difficulty in following the law
22 as instructed to you by the judge even though you
23 may personally disagree with that law or have
24 opinions as to whether that law is valid or not?
25 So if you have any difficulty in following the

1 judge's legal instructions, please stand.

2 (No response from jurors.)

3 This gets a fairly large response so I
4 will ask you anyway. Those of you who are not
5 native Charlestonstions, that means you were born
6 in some other location than Charleston County,
7 please stand. I suspected that might be the case.
8 It might be the majority. What I'm going to do,
9 I'll ask everyone on the front row to remain
10 standing. The rest of you can sit down. I will
11 call you rows at a time.

12 Now, my question of you is going to be
13 if you would give us your hometown or where you are
14 actually from and so if you would start, tell me
15 your hometown and then you can be seated.

16 JUROR NO. 140: 140. Greenville, South
17 Carolina.

18 THE COURT: Thank you, sir.

19 JUROR NO. 148: Toledo, Ohio.

20 JUROR NO. 21: 21, Mobile, Alabama.

21 JUROR NO. 1: Brad Acrey, Durham, North
22 Carolina.

23 JUROR NO. 36: Jeffery Bonifer, 36,
24 Alexandria, Virginia.

25 JUROR NO. 85: Jennifer Cromwell, 85,

1 Closter, Virginia.

2 JUROR NO. 30: Leilani Black 30,
3 Buffalo, New York.

4 JUROR NO. 57: 57, California.

5 JUROR NO. 31: No. 31, Beverly,
6 Massachusetts.

7 JUROR NO. 62: Charlotte
8 Capertonkilburn, No. 62, Collinwood, Tennessee.

9 JUROR NO. 44: Roger Boenstiter,
10 No. 44, Urbana, Ohio.

11 THE COURT: Second row if that applies
12 to you, please stand.

13 JUROR NO. 181: No. 181, Pennsylvania.

14 JUROR NO. 171: Kim Hendriks, 171,
15 Waterford, Wisconsin.

16 JUROR NO. 230: No. 230. I was born in
17 Frankfort, Germany. I am an Army brat.

18 JUROR NO. 220: Matt Leibengoh,
19 Juror 220, Monroe, Michigan.

20 JUROR NO. 234: 234, Hamilton, Ohio.

21 JUROR NO. 238: No. 238, Birmingham,
22 Alabama.

23 JUROR NO. 82: No. 82, Elizabethtown,
24 Kentucky.

25 JUROR NO. 92: Dennis Curtis, 92,

Greensburg, North Carolina.

JUROR NO. 118: Caroline Fabian, 118,
Atlanta, Georgia.

JUROR NO. 94: Salem, Massachusetts
No. 94.

JUROR NO. 113: 113, Augusta, Georgia.

THE COURT: Third row. Please stand.

JUROR NO. 260: Paula Moore, 260, I
grew up in Falls Church, Virginia.

JUROR NO. 275: Laura Overcash, 275,
Columbia, South Carolina.

JUROR NO. 273: No. 273, Cleveland,
Ohio.

JUROR NO. 298: No. 298, Rock Hill,
South Carolina.

JUROR NO. 291: 291, Orange County,
California.

JUROR NO. 287: 287, born in Augusta,
Georgia, raised in Alexandria, Virginia.

JUROR NO. 191: Robert James, 191,
Locust, North Carolina.

JUROR NO. 162: 162, Sumpter, South
Carolina.

JUROR NO. 156: Legare Gresham, No.
156, Columbia.

1 JUROR NO. 199: 199, born in Chicago,
2 Illinois, but raised in Charleston.

3 THE COURT: Thank you. Next row.
4 Stand, please.

5 JUROR NO. 344: From Germany.

6 JUROR NO. 331: From Illinois.

7 JUROR NO. 339: No. 339. Grew up in
8 Ann Arbor, Michigan.

9 JUROR NO. 332: No. 332. Born in
10 Heidelberg, Germany.

11 JUROR NO. 338: 388, Cheraw, South
12 Carolina.

13 JUROR NO. 270: 270, Alexandria,
14 Virginia.

15 JUROR NO. 245: 245, Richland, South
16 Carolina.

17 JUROR NO. 255: 255, Everette,
18 Washington.

19 THE COURT: Thank you. Next row.
20 Please stand if it applies to you.

21 JUROR NO. 348: Jeff Smith, 348,
22 Michigan. My family is from the Charleston area.

23 JUROR NO. 358: 358, Brooklyn, New
24 York.

25 JUROR NO. 352: 352, Bethlehem,

1 Pennsylvania.

2 JUROR NO. 351: Leigh Stephens, 351,
3 Atlanta, Georgia.

4 JUROR NO. 367: 367. I was born in
5 Sidney, Australia.

6 JUROR NO. 366: Sue Triplett, 366,
7 Charlotte, North Carolina.

8 JUROR NO. 353: 353, Darlington, South
9 Carolina.

10 JUROR NO. 314: Born in Patterson, New
11 Jersey, raised in Charleston.

12 JUROR NO. 327: 327, New York.

13 JUROR NO. 139: I got a nephew that
14 works for the city.

15 THE COURT: Okay. Somebody works for
16 the city police department?

17 JUROR NO. 139: Yes.

18 THE COURT: Would that affect your
19 impartiality?

20 JUROR NO. 139: No, sir.

21 THE COURT: Thank you. You can be
22 seated. Anyone else?

23 JUROR NO. 140: Your Honor, I stated
24 that Greenville is my hometown. It is. I was born
25 in Fort Campbell, Kentucky.

1 THE COURT: Thank you very much. Truly
2 indicates we are from all over. My next question
3 probably will get a large response as well. We
4 will see. Is there any member of the jury panel
5 who uses social media such as Facebook? If you
6 actively use that, please stand. Looks like we
7 might be better off asking those who don't do that
8 to stand.

9 So if you folks will be seated, those
10 who do not use social media sites, please stand. I
11 am going to ask you to give your name and number is
12 the only thing I am asking.

13 JUROR NO. 148: Juror 148, Steven Gose.

14 JUROR NO. 21: 21.

15 JUROR NO. 57: Jeri Cabot.

16 JUROR NO. 238: Janet McClain.

17 JUROR NO. 139: Joe Gilliard.

18 JUROR NO. 94: Judith Davis.

19 JUROR NO. 118: Carolyn Fabian.

20 JUROR NO. 260: Paula Moore, 260.

21 JUROR NO. 134: Mike Gallagher.

22 JUROR NO. 199: Cheryl Jones.

23 JUROR NO. 211: Watson Knight.

24 JUROR NO. 335: Mark Sharpe.

25 JUROR NO. 344: 344, Gerda Skarke.

1 JUROR NO. 241: Jamie McFadden.

2 JUROR NO. 352: William Stephens.

3 JUROR NO. 366: Susan Triplett.

4 JUROR NO. 353: Thomas Stokes, 353.

5 THE COURT: Thank you very much. Has
6 any member of the jury or a member of your
7 immediate family or even a close personal friend of
8 yours ever been employed by any law enforcement
9 department, law enforcement agency, both civil
10 and/or military? Have you had legal training such
11 as a paralegal, legal secretary or attorney, or
12 have you or a member of your immediate family or
13 close personal friend of yours ever been employed
14 in any capacity with a court or judicial system or
15 a solicitor's office or attorney general's office?
16 If that's true, please stand. Sir, I will start
17 with you in the front row.

18 JUROR NO. 1: My wife's grandfather was
19 a retired deputy sheriff in North Carolina. I am
20 close with him.

21 THE COURT: Would that affect your
22 impartiality if you were on the jury?

23 JUROR NO. 1: No.

24 THE COURT: Thank you, sir. Ma'am.

25 JUROR NO. 30: No. 30. My

1 brother-in-law is currently an FBI agent and my son
2 and his wife are corporate litigators.

3 THE COURT: Would that affect your
4 impartiality in this case?

5 JUROR NO. 30: No, sir.

6 THE COURT: Thank you, ma'am.

7 JUROR NO. 58: 58. My cousins Robert
8 and Brian Fultcher is affiliated with the
9 solicitor's office and SLED.

10 THE COURT: Would that fact affect your
11 impartiality if you were seated on the jury?

12 JUROR NO. 58: It would not.

13 JUROR NO. 31: No. 31. My deceased dad
14 was a police officer, my husband is almost 20 years
15 Coast Guard reservist and I'm an attorney.

16 THE COURT: I see. Would that affect
17 your impartiality if you were seated on the jury?

18 JUROR NO. 31: It would not.

19 THE COURT: Thank you.

20 JUROR NO. 35: 35. My uncle is a now
21 disabled retired highway patrolman and my dad and
22 my half sister were part of the sheriff's office.

23 THE COURT: Would that affect your
24 impartiality, ma'am?

25 JUROR NO. 35: No, sir.

1 THE COURT: Thank you.

2 JUROR NO. 44: Roger Branstiter,
3 No. 44. My brother is a retired state trooper in
4 Ohio and I have a good friend retired from
5 Charlotte and the other is a current state attorney
6 in Connecticut.

7 THE COURT: Would any of those factors
8 affect your impartiality?

9 JUROR NO. 44: No, sir.

10 THE COURT: Thank you.

11 JUROR NO. 64: No. 64. My brother is
12 retired military.

13 THE COURT: Thank you, ma'am.

14 JUROR NO. 220: No. 220. My brother
15 was with the sheriff's department from 1970 to
16 1976.

17 THE COURT: Would that affect your
18 impartiality?

19 JUROR NO. 220: No, sir.

20 THE COURT: Ma'am?

21 JUROR NO. 234: My father was a patrol
22 officer and my cousin is a state highway man in
23 Ohio.

24 JUROR NO. 139: 139. My nephew is in
25 law enforcement.

1 THE COURT: Would that affect your
2 impartiality?

3 JUROR NO. 139: No, sir.

4 THE COURT: Ma'am?

5 JUROR NO. 133: My son was in the
6 United States Army.

7 THE COURT: Would that affect your
8 impartiality?

9 JUROR NO. 133: No, sir.

10 THE COURT: Ma'am?

11 JUROR NO. 99: My husband was retired
12 law enforcement.

13 THE COURT: Would that affect your
14 impartiality?

15 JUROR NO. 99: No.

16 JUROR NO. 298: No. 298. My cousin is
17 a retired state trooper and my grandfather on my
18 mom's side is a retired Marine and then my
19 grandfather on my dad's side is retired Air Force.

20 THE COURT: Would any of those factors
21 affect your impartiality?

22 JUROR NO. 98: No, sir.

23 THE COURT: Thank you.

24 JUROR NO. 292: My uncle used to be
25 chief of police years ago.

1 THE COURT: Would that affect your
2 impartiality?

3 JUROR NO. 292: No.

4 JUROR NO. 287: My deceased father was
5 military police. My cousin is a state trooper in
6 Virginia.

7 THE COURT: Would that affect your
8 impartiality?

9 JUROR NO. 287: No, sir.

10 JUROR NO. 124: Police officer in the
11 family.

12 THE COURT: Would that affect your
13 impartiality?

14 JUROR NO. 124: No.

15 THE COURT: Ma'am?

16 JUROR NO. 156: My brother worked for
17 FBI and several family that have been in the Navy.

18 THE COURT: Would that affect your
19 impartiality?

20 JUROR NO. 156: No.

21 THE COURT: Thank you.

22 JUROR NO. 199: Cheryl Jones. I have
23 an uncle who is retired LAPD officer.

24 THE COURT: Would that affect your
25 impartiality?

1 JUROR NO. 199: No.

2 THE COURT: Thank you. Sir.

3 JUROR NO. 211: I'm friends with DNR
4 federal marshal.

5 THE COURT: Would that affect your
6 impartiality?

7 JUROR NO. 211: No, sir.

8 THE COURT: Starting over here.

9 JUROR NO. 335: Mark Sharpe, No. 335.
10 I'm a lawyer.

11 THE COURT: Would that affect your
12 impartiality?

13 JUROR NO. 335: No, Your Honor.

14 JUROR NO. 304: 304, my in-laws are
15 retired military.

16 THE COURT: Would that affect your
17 impartiality?

18 JUROR NO. 304: No.

19 JUROR NO. 339: No. 339. My mother's
20 father and grandfather and my mother's current
21 husband are all in the military.

22 THE COURT: Would that affect your
23 impartiality in the case?

24 JUROR NO. 339: No, sir.

25 THE COURT: Yes, ma'am?

1 JUROR NO. 296: No. 296. I was a
2 solicitor in DJJ and I have in-laws retired
3 military.

4 THE COURT: Would that affect your
5 impartiality?

6 JUROR NO. 296: No, sir.

7 THE COURT: Thank you.

8 JUROR NO. 270: 270. Every member of
9 my family is in law enforcement, military or FBI.

10 THE COURT: Would that affect your
11 impartiality?

12 JUROR NO. 270: No, sir.

13 THE COURT: All right. Thank you.
14 Yes, ma'am.

15 JUROR NO. 255: My name is Elizabeth
16 Mills. My number is 255. My deceased grandfather
17 was retired Navy and my cousin is currently in the
18 Coast Guard.

19 THE COURT: Would that affect your
20 impartiality?

21 JUROR NO. 255: No, sir.

22 THE COURT: Thank you.

23 JUROR NO. 250: 250. My husband is in
24 detention, my mother is retired Navy. My father's
25 side they are all lawyers and paralegals.

1 THE COURT: Would that affect your
2 impartiality?

3 JUROR NO. 250: No.

4 THE COURT: Sir?

5 JUROR NO. 358: No. 358. I have a
6 cousin who is a retired New York City police
7 officer.

8 THE COURT: Would that affect your
9 impartiality?

10 JUROR NO. 358: No, sir.

11 THE COURT: Thank you.

12 JUROR NO. 352: William Stephens, 352,
13 ex-Air Force captain.

14 THE COURT: Would that affect your
15 impartiality?

16 JUROR NO. 352: No.

17 JUROR NO. 351: 351. I have had
18 several family members in the military.

19 THE COURT: Would that affect your
20 impartiality?

21 JUROR NO. 351: No.

22 THE COURT: Yes, ma'am?

23 JUROR NO. 367: No. 367. Friend is an
24 ADA for New York state.

25 THE COURT: Would that affect your

1 impartiality?

2 JUROR NO. 367: No, sir.

3 THE COURT: Yes, ma'am?

4 JUROR NO. 366: 366. I was in the
5 Coast Guard and I am married to a retired Marine.

6 THE COURT: Would that affect your
7 impartiality?

8 JUROR NO. 366: No, sir.

9 JUROR NO. 353: Tom Stokes, 353. I
10 have a grandfather who was a former sheriff and an
11 uncle and a cousin who are both former SLED.

12 THE COURT: Would that affect your
13 impartiality?

14 JUROR NO. 353: No, sir.

15 JUROR NO. 327: 327. I have a
16 grandfather that was a detective, both father and
17 father-in-law were in military and numerous lawyers
18 in my family.

19 THE COURT: Would that affect your
20 impartiality?

21 JUROR NO. 327: No.

22 THE COURT: Thank you very much.

23 JUROR NO. 36: Your Honor, 36, my
24 father is retired Air Force, also a retired
25 attorney.

1 THE COURT: Okay. Would that affect
2 your impartiality?

3 JUROR NO. 36: No, sir.

4 THE COURT: Has any member of the jury
5 panel or a member of your immediate family or a
6 close personal friend of yours ever been the victim
7 of a violent crime? If that's true, please stand.

8 JUROR NO. 30: No. 30. My daughter was
9 mugged in Washington, D.C.

10 THE COURT: I assume that case has
11 ended?

12 JUROR NO. 30: Yes.

13 THE COURT: Or is over with. Would
14 that affect your ability to be fair and impartial
15 if you were on this jury?

16 JUROR NO. 30: No, sir.

17 THE COURT: Thank you.

18 JUROR NO. 67: Juror 67, armed robbery.

19 THE COURT: Would that affect your
20 impartiality if you were seated on the jury?

21 JUROR NO. 67: I don't know.

22 THE COURT: Well, I have to have an
23 answer to that. It has to be positive one way or
24 the other. Could you be impartial, would that fact
25 affect your impartiality if you were seated on the

1 jury to be fair and impartial to both the State and
2 the defense?

3 JUROR NO. 67: No.

4 THE COURT: Your hesitation is such
5 that I'm going to excuse you from the trial of the
6 case. Ma'am, I'm going to ask you to have a seat.
7 You no longer have to answer my questions, but I
8 will ask that you remain in the courtroom. Thank
9 you very much.

10 JUROR NO. 31: No. 31. I had a high
11 school boyfriend who was later in life murdered in
12 Florida and never solved.

13 THE COURT: Would that fact affect your
14 impartiality if you were seated on this jury?

15 JUROR NO. 31: It would not.

16 THE COURT: Thank you.

17 JUROR NO. 275: Laura Overcash, 275.
18 My mother was a recent victim of an aggravated
19 assault and robbery.

20 THE COURT: Would that affect your
21 impartiality if you were seated on the jury?

22 JUROR NO. 275: No, sir.

23 THE COURT: Thank you.

24 JUROR NO. 287: Terri Perkins, 287. My
25 son was robbed and shot in the leg.

1 THE COURT: Would that affect your
2 impartiality if you were seated on the jury?

3 JUROR NO. 287: No, sir.

4 JUROR NO. 118: 118, Carolyn Fabian.
5 My daughter was raped and not completed yet.

6 THE COURT: Would that affect your
7 impartiality in this case?

8 JUROR NO. 118: No.

9 THE COURT: Thank you.

10 (Cell phone ringing.)

11 THE COURT: Ma'am.

12 JUROR NO. 208: 208. I was held up at
13 gunpoint in a convenience store.

14 THE COURT: Would that affect your
15 impartiality in this trial?

16 JUROR NO. 208: No.

17 THE COURT: Thank you. Ma'am?

18 JUROR NO. 199: Cheryl Jones and my
19 father was murdered when I was a baby, but the fact
20 that it didn't even dawn on me until now I will say
21 I'm impartial.

22 THE COURT: You could be impartial?

23 JUROR NO. 199: Exactly.

24 THE COURT: Thank you.

25 JUROR NO. 350: Thomas Stelling.

1 No. 350. I'm a victim of two armed robberies.

2 THE COURT: Would that affect your
3 impartiality if you were seated on this jury?

4 JUROR NO. 350: No, sir.

5 THE COURT: Thank you.

6 JUROR NO. 358: 358, robbed at
7 gunpoint.

8 THE COURT: Would that affect your
9 impartiality if you were seated on this trial?

10 JUROR NO. 358: No, sir.

11 THE COURT: Thank you.

12 JUROR NO. 298: 298. A few months ago
13 we were robbed at gunpoint.

14 THE COURT: Would that affect your
15 impartiality in this trial?

16 JUROR NO. 298: No.

17 THE COURT: Sir?

18 JUROR NO. 376: 376. April of last
19 year close personal friend was murdered in North
20 Charleston.

21 THE COURT: Would that affect your
22 impartiality if you were seated on the jury?

23 JUROR NO. 376: I believe it would,
24 yes.

25 THE COURT: I'm going to excuse you

1 from the trial of the case. You don't have to
2 answer my questions, but please remain seated.

3 Has any member of the jury panel ever
4 served as a member of a jury in the past? If you
5 have served as a member of a jury in the past,
6 please stand.

7 JUROR NO. 140: Michael Glass, 140.

8 THE COURT: Was it a criminal or civil
9 case?

10 JUROR NO. 140: Civil case.

11 THE COURT: And would that experience
12 affect your impartiality?

13 JUROR NO. 140: It would not.

14 JUROR NO. 61: Russ Campbell, both
15 civil and criminal.

16 THE COURT: So you have been on both
17 kinds of juries.

18 JUROR NO. 61: Yes, sir.

19 THE COURT: Would that experience
20 affect your impartiality if you were selected on
21 the case?

22 JUROR NO. 61: No, sir.

23 JUROR NO. 58: 58, civil.

24 THE COURT: And?

25 JUROR NO. 58: No, it would not.

1 JUROR NO. 133: No. 133, it was civil
2 and it will not affect me.

3 THE COURT: Sir?

4 JUROR NO. 82: Rick Cox, No. 82. I
5 have been on both and would not affect me.

6 JUROR NO. 92: No. 92, Dennis Curtis,
7 it was a criminal and no.

8 THE COURT: Thank you.

9 JUROR NO. 118: 118, Carolyn Fabian,
10 criminal, it would not affect me.

11 JUROR NO. 40: No. 40. I think both.
12 It was a while back.

13 THE COURT: Sorry?

14 JUROR NO. 40: I was on both.

15 THE COURT: Would that affect your
16 impartiality if you were selected?

17 JUROR NO. 40: No.

18 JUROR NO. 249: 249. I have been on
19 both.

20 THE COURT: Would it affect your
21 impartiality?

22 JUROR NO. 249: No, sir.

23 THE COURT: Thank you.

24 JUROR NO. 275: Laura Overcash, 275,
25 civil.

1 THE COURT: Would that affect your
2 impartiality?

3 JUROR NO. 275: No, sir.

4 THE COURT: Thank you. Ma'am?

5 JUROR NO. 156: 156, criminal, would
6 not.

7 JUROR NO. 199: Cheryl Jones. I have
8 been seated on two criminal cases.

9 THE COURT: Thank you. Would it affect
10 your impartiality?

11 JUROR NO. 199: No.

12 JUROR NO. 352: 352, civil and no.

13 THE COURT: Thank you. Is there any
14 member of the jury panel who would believe the
15 testimony of a police officer more than other
16 witnesses simply because that person is employed as
17 a police officer? If you have that belief, please
18 stand.

19 (No response from jurors.)

20 Is there any member of the jury panel
21 who has any particular beliefs or opinions
22 concerning firearms or someone's Second Amendment
23 right such that it would interfere with your
24 ability to be fair and impartial jurors in a case
25 involving the use of a firearm? So if you have

1 such an opinion or belief, please stand.

2 JUROR NO. 241: No. 241.

3 THE COURT: Your situation?

4 JUROR NO. 241: Truthfully I don't
5 think that people should so easily own guns.

6 THE COURT: Yes, sir. My question was
7 does that belief, would that affect your ability,
8 though, to be fair and impartial to the State and
9 the defense if you were seated on the jury?

10 JUROR NO. 241: No, sir.

11 THE COURT: Thank you, sir. Is there
12 any member of the jury panel who has a moral,
13 philosophical or religious opposition to or opinion
14 concerning rap music? If that's true, please
15 stand.

16 (No response from jurors.)

17 Is there any member of the jury panel
18 who believes that video surveillance of
19 neighborhoods is not an appropriate tool to be used
20 by law enforcement? If that's true, please stand.

21 (No response from jurors.)

22 Is there any member of the jury panel
23 who has either resided in or has friends in or has
24 some connection with a community in the city that
25 would involve Gadsen Green or Back to Green

1 neighborhoods? If that's so, please stand.

2 Is there any member of the jury panel
3 who has any connection with, who has lived in or
4 has any knowledge of a neighborhood identified as
5 Gadsen Green or Back to Green neighborhoods.

6 JUROR NO. 199: Cheryl Jones. I have
7 students that reside in that community.

8 THE COURT: If this case involves
9 something that happened in those neighborhoods
10 would that affect your ability to be fair and
11 impartial?

12 JUROR NO. 199: No.

13 THE COURT: Thank you.

14 JUROR NO. 296: Debra President Stokes.
15 296.

16 THE COURT: Again, if this case
17 involved something that happened in those
18 neighborhoods would the fact that you have some
19 connection affect your ability to be fair and
20 impartial?

21 JUROR NO. 296: It won't.

22 THE COURT: Can you tell me the nature
23 of your connection?

24 JUROR NO. 296: My sister used to live
25 in Back to Green.

1 THE COURT: Thank you, ma'am.

2 THE BAILIFF: Your Honor, I have one
3 juror that got up and walked out to use the
4 restroom. She missed about five or six questions.

5 THE COURT: Give me that name and
6 number.

7 JUROR NO. 313: Monique Robins.

8 THE COURT: I'm going to excuse you
9 from the trial of the case. You no longer have to
10 answer my questions.

11 JUROR NO. 313: Okay.

12 THE COURT: Anyone else needs to leave
13 let us know before you go.

14 THE CLERK: I think it's 313. You said
15 Monique Robins? 313.

16 THE COURT: Thank you very much. Now,
17 has any member of the jury panel gathered any
18 information from media or from any other sources
19 about the matters that might be involved in the
20 trial of this case such that it would cause you to
21 either form or express an opinion about any of the
22 issues that might be involved in this trial? So if
23 you have gathered or received such information,
24 please stand.

25 Is there any member of the jury panel

1 who is aware of any bias or prejudice that you
2 might have either for or against either the State
3 or the defense in this case? If that's true,
4 please stand.

5 Is there any member of the jury panel
6 who has served on the Charleston County grand jury
7 during any of the last five calendar years? If
8 that's true, please stand.

9 Is there any member of the jury panel
10 who is a member of or a contributor to any group
11 which has as its primary concern the promotion of
12 law enforcement and/or victim's rights? Now, these
13 groups can include such groups as Mothers Against
14 Drunk Driving, Students Against Drunk Driving,
15 Citizens Against Violent Crime, the South Carolina
16 Sheriff's Association, the South Carolina Troopers
17 Association, or other similarly oriented
18 organizations. So if you are a member of or a
19 contributor to such a group, please stand.

20 JUROR NO. 31: No. 31. ACLU.

21 THE COURT: Would that affect your
22 ability to be fair and impartial?

23 JUROR NO. 31: It would not.

24 JUROR NO. 273: Nancy Orosz. 273, I
25 contribute to MADD and ACLU.

1 THE COURT: Would those facts affect
2 your impartiality?

3 JUROR NO. 273: No.

4 THE COURT: Thank you. Anyone else?
5 Now, ladies and gentlemen, I will tell you that I
6 have been a trial judge for 14 years. I have been
7 a judge for a little over 20 years. And during
8 that time I have learned that predicting the length
9 of the trial is sometimes difficult to do.
10 Sometimes they go much faster than we think, they
11 sometimes will go much slower than we think.

12 This particular case I guess you
13 realize with the number of witnesses that have been
14 identified, and again I don't believe all those
15 witnesses will be called, but they are going to be
16 identified as possible witnesses in the case. This
17 case could possibly go over to some days next week.
18 So I will make you aware of that fact.

19 Now, as I indicated jury service
20 involves some hardship in your personal life and so
21 general hardships and things like that are to be
22 accepted. However, if someone has for example, a
23 medical procedure for next week or someone has some
24 issue that you think that the Court should be aware
25 of, I'm going to ask you to come forward in just a

1 moment when I speak with people privately about
2 some matters that I told you I would do. So I will
3 be glad to take up those issues.

4 But again it's got to be something that
5 would be very difficult for us to work around. So
6 I will just leave it with you at that. I will let
7 you know I don't know if this case will take more
8 than this week to try, but should that occur, we
9 will continue with the jury that we have seated.

10 So I will make you aware of that. We
11 will go until the case is ended. I cannot give you
12 an exact prediction. I won't try to predict. I
13 will tell you that it's a possibility. That's the
14 way I will put it to you.

15 Now, is there any member of the jury
16 panel who is aware or knows of any reason
17 whatsoever why he or she should not serve as a
18 juror in this case with particular emphasis being
19 placed upon your ability to be fair and impartial
20 to both the State and the defense? If you know of
21 such a reason, please stand.

22 All right. Now, at this time I will
23 give you an opportunity to speak with me in a more
24 private situation and discuss any hardships that
25 you might want me to be aware of. The bailiff will

1 form a line and he will allow you to come up one at
2 a time to speak with me. The attorneys are allowed
3 to come up and listen to these conversations. Step
4 to the bailiff over here in the blue jacket if you
5 want to speak with me in a more private situation.

6 (Following proceedings were held at the
7 bench.)

8 THE BAILIFF: Juror No. 35.

9 THE COURT: Come forward, ma'am.

10 JUROR NO. 35: You said next week. I'm
11 going to be out of town as of Saturday. I have a
12 school event that I have to be out of South
13 Carolina. I'm going to be gone from Saturday to
14 about Wednesday.

15 THE COURT: What I can do is I could
16 move you to another week of service. I won't
17 excuse you from jury service for that reason. But
18 I will be glad to move you to another week. You
19 have to come back on another occasion. If you can
20 stay and not do that then I won't have to do that,
21 but I won't excuse you for that reason from total
22 jury service, but --

23 JUROR NO. 35: You can take me off this
24 trial.

25 THE COURT: And come back another

1 occasion.

2 JUROR NO. 35: Another complete week?

3 THE COURT: Beg your pardon?

4 JUROR NO. 35: I have been missing
5 three weeks of work.

6 THE COURT: I am sorry. It's your
7 choice. How do you want to handle it? You may not
8 get selected to the case. I don't know what's
9 going to happen.

10 JUROR NO. 35: I don't really have a
11 choice in anything. I don't have much of a choice.
12 I guess then I will -- stay.

13 THE COURT: Stay with us?

14 JUROR NO. 35: Sure.

15 MS. NORRIS: We don't object to
16 excusing her.

17 MR. APICELLA: I consent.

18 THE COURT: It is my call. I made the
19 call. Let's move. Next, please.

20 THE BAILIFF: Juror No. 62.

21 THE COURT: She is staying with us.

22 JUROR NO. 62: I'm self-employed. I
23 can't miss two weeks of work. I'm the only person
24 bringing in money. There is no one who works for
25 me.

1 THE COURT: Did they ask you about if
2 you weren't there they had to close?

3 JUROR NO. 62: She did not ask me that.
4 So I'm a dietitian. I work with people who have
5 eating disorders. I do counseling individually for
6 them. Most of them are on weekly care.

7 THE COURT: You work for a business?

8 JUROR NO. 62: I work for myself.

9 THE COURT: Are you the only employee?

10 JUROR NO. 62: I am.

11 THE COURT: And if you are not there
12 the business closes?

13 JUROR NO. 62: Exactly.

14 THE COURT: I'm going to excuse you for
15 the trial of this case. No. 62 will be excused.

16 THE BAILIFF: Juror No. 30.

17 JUROR NO. 30: I'm very willing to
18 serve. But I am leaving for a family wedding a
19 week from Thursday in Jamaica.

20 THE COURT: Here's the situation. I'm
21 treating everybody the same. If I release you at
22 this point in time, you really haven't been on the
23 jury, I would ask you to come back another week for
24 service.

25 JUROR NO. 30: Okay.

1 THE COURT: And so we can't excuse you
2 from service altogether, but I can take you out of
3 this case.

4 JUROR NO. 30: Right. I don't know.

5 THE COURT: Or I can let you stay, in
6 which case if the case were to go past next
7 Thursday that could be a problem. We have
8 alternates. If alternates were available I could
9 make arrangements for you if the alternative are
10 still on the jury.

11 JUROR NO. 30: Okay.

12 THE COURT: How do you want to handle
13 it?

14 JUROR NO. 30: I guess I will take the
15 risk and stay.

16 THE COURT: Okay. Thank you. She's
17 going to stay with us.

18 THE BAILIFF: Juror No. 85.

19 JUROR NO. 85: I guess it is still
20 morning? I have a flight out of the country
21 Saturday morning. This week I'm good.

22 THE COURT: Here's what I can do. I
23 can remove you from this case, but if I do that
24 then I will have to call you back for another week
25 of service since you didn't serve the full week.

1 JUROR NO. 85: Sure.

2 THE COURT: If you want to do that I
3 can arrange it that way. If you get picked on the
4 jury you will be here until the case is ended or
5 until we could agree to replace you with an tear
6 alternate. I can't guarantee that. Do you want me
7 to excuse you and you will have to come back?

8 JUROR NO. 85: That's fine.

9 THE COURT: All right. Thank you. She
10 will be excused and resummoned for future jury
11 service.

12 THE BAILIFF: Juror No. 36.

13 JUROR NO. 36: I'm not asking to be
14 excused. I just want to make you aware that I
15 suffer from depression and anxiety and I have been
16 seeing a psychiatrist for 18 years.

17 THE COURT: Well, do you have a job?

18 JUROR NO. 36: No, I'm retired.

19 THE COURT: You take some medication?

20 JUROR NO. 36: He moved me off down
21 eight months ago.

22 THE COURT: You think you can?

23 JUROR NO. 36: Yes.

24 THE COURT: We are glad to have you.

25 Thank you.

1 THE BAILIFF: Juror No. 338.

2 JUROR NO. 338: I have two questions.
3 I have had former students whose name is Brandon
4 Washington. Those both would have been from North
5 Charleston. I taught them 2009 to 2010. I don't
6 know.

7 THE COURT: Anybody know where Mr.
8 Washington went to school?

9 MR. OSBORNE: I don't.

10 THE COURT: So it may be somebody
11 different then. If you were seated on the jury
12 would it affect your impartiality?

13 JUROR NO. 338: Probably not. The
14 other thing --

15 THE COURT: Tell me for sure.

16 JUROR NO. 338: No. Next week I have a
17 contract to work for the government doing an
18 engineering camp.

19 THE COURT: Well, what I have been
20 doing is people who have conflicts if I rearrange
21 to take you off the case. There is not going to be
22 any other cases this week. So I can bring you back
23 for another week of service at some other date. If
24 you stay and you get on the jury you are on the
25 jury until we finish.

1 So it's your call. If you want to come
2 back for another week, if you want to stay and take
3 your chances glad to have you. This is the only
4 case we are picking a jury for. What do you want
5 to do?

6 JUROR NO. 338: I will take my chances.

7 THE COURT: Okay.

8 THE BAILIFF: Juror No. 367.

9 JUROR NO. 367: More than 20 years ago
10 I was raped by an off duty police officer. It was
11 in San Diego.

12 THE COURT: Okay. I am sorry. Now,
13 tell me, would that experience affect your ability
14 to be fair and impartial if you were on the jury?

15 JUROR NO. 367: No, sir.

16 THE COURT: Thank you for letting us
17 know that.

18 MR. CORVEY: What was your number?

19 JUROR NO. 367: 367.

20 THE BAILIFF: Juror No. 220.

21 JUROR NO. 220: I'm a project manager
22 for a defense contractor. I have people coming in
23 town from Monday to Wednesday next week for a
24 scheduled validation that's been planned for three
25 months in advance.

1 THE COURT: Let me tell you what I have
2 been doing with people that have work problems.
3 This is the only case we are going to pick a jury
4 for this week. So if you were not picked on this
5 jury that would allow you to complete your
6 obligation, but if I release you now then you would
7 have to come back and serve. That's just what my
8 normal practice is to have you resummoned as such
9 back for a week where you will serve. So it would
10 be your choice. If you want to stay and take your
11 chances on being pulled, you will stay through the
12 trial. Or I could release you and you will be
13 summoned some future week to come back again.

14 I can't make that decision for you, but
15 you tell me.

16 JUROR NO. 220: I will stay.

17 THE COURT: Okay. Thank you very much.

18 THE BAILIFF: Juror No. 353.

19 JUROR NO. 353: My stepson is getting
20 married Saturday. They are horse people.

21 THE COURT: Quarter horse?

22 JUROR NO. 353: We leave Wednesday.

23 THE COURT: This coming?

24 JUROR NO. 353: Next week. This week
25 is not an issue. But we have already paid for

1 everything.

2 THE COURT: I understand. Let me tell
3 you how I am handling that. This is the only case
4 we are going to try this week. Once I finish
5 selecting a jury everybody else will be released
6 for the rest of the week. If you are selected on
7 this jury there's a chance it will go over for a
8 few days next week. I don't know how long. But if
9 you are on you are on. Now, if you want me to
10 excuse you what my normal practice is if you don't
11 really serve here we call you back for another week
12 of service sometime in the future.

13 JUROR NO. 353: I understand.

14 THE COURT: So you make that choice.
15 It's a tough call and so I won't order you to do
16 anything. Those are the options, either serve now,
17 take your chances on the draw if you get drawn to
18 be here or I will put you on another list and you
19 can go home.

20 JUROR NO. 353: My wife wouldn't
21 forgive if I missed it.

22 THE COURT: You want to stay?

23 JUROR NO. 353: Yes.

24 THE COURT: All right.

25 THE BAILIFF: Juror No. 234.

1 JUROR NO. 234: I have a research trip
2 planned to work at Rutgers University. My flight
3 leaves Monday morning.

4 THE COURT: That's interesting
5 sounding. Where is Rutgers?

6 JUROR NO. 234: New Brunswick, New
7 Jersey. Reservations are already made. I can't
8 change them.

9 THE COURT: I will tell you how I am
10 handling those things. If I release you, which I
11 will be glad to do so because of that, I would
12 require that you come back for another week of
13 service because you haven't served.

14 JUROR NO. 234: Put me back in the
15 pool.

16 THE COURT: We will do that. This
17 juror will be resummoned for another week of
18 service.

19 THE BAILIFF: Juror No. 238.

20 JUROR NO. 238: I am scheduled for a
21 knee surgery next Monday morning.

22 THE COURT: Scheduled for what?

23 JUROR NO. 238: Knee surgery.

24 THE COURT: Wow. You'd probably rather
25 stay here.

1 JUROR NO. 238: It's tempting.

2 THE COURT: I will excuse you from the
3 case.

4 JUROR NO. 238: Thank you.

5 THE COURT: She is excused from the
6 case. Just have a seat, ma'am. You don't have to
7 answer the questions any more.

8 THE BAILIFF: Juror No. 113.

9 JUROR NO. 113: You asked if somebody
10 close to us has been part of a crime. My friend
11 witnessed her ex-husband shoot and kill himself.

12 THE COURT: Can you hear her? Speak
13 up.

14 JUROR NO. 113: My best friend
15 witnessed her husband shoot and kill himself.

16 THE COURT: Would that affect your
17 impartiality?

18 JUROR NO. 113: No.

19 THE COURT: Okay. Thank you. Anyone
20 else?

21 MR. CORVEY: Judge, we have one issue.
22 Juror 199 was a hostile witness in a drug
23 trafficking case about a month ago involving our
24 office. She was originally charged as a
25 co-defendant in a case. Those charges were

1 dropped. She testified in a hearing. It was
2 extremely hostile. In fact, she left her notes
3 regarding the other prosecutor in our office on the
4 witness stand. We asked if she or a close personal
5 friend had ever been charged. She neglected to
6 answer that.

7 THE COURT: Number?

8 MR. CORVEY: 199.

9 THE COURT: Juror 199, if you will come
10 forward, please.

11 MR. CORVEY: We ask that she be
12 excused. Juror 199.

13 (Juror 199 approached the bench.)

14 JUROR NO. 199: Hi.

15 THE COURT: My understanding is from
16 what I have just been told is perhaps you may have
17 at some point in time been charged with the
18 comission of a crime?

19 JUROR NO. 199: Never have been.

20 THE COURT: Can you help me with that
21 then?

22 MR. CORVEY: That was my understanding
23 of what it was.

24 JUROR NO. 199: You are very mistaken.

25 THE COURT: She is under oath so under

1 oath you're telling me you have never been?

2 JUROR NO. 199: Never.

3 THE COURT: Thank you.

4 (Juror 199 left the bench.)

5 THE COURT: That's what you have
6 strikes for. Now, anybody else you want me to call
7 anybody up privately, any issues that you want me
8 to discuss with anybody privately? All right.

9 (Following proceedings were held in
10 open court.)

11 THE COURT: Any additional requests or
12 questions from the State?

13 MR. OSBORNE: None.

14 THE COURT: From the defense?

15 MS. NORRIS: No, Your Honor. Just as
16 we had previously requested.

17 THE COURT: Well, I understand that. I
18 have combined some things like that. So without
19 any further questioning I will declare that the
20 remaining members of the jury panel are qualified
21 to serve as jurors in this case.

22 At this time I'm directing the clerk to
23 prepare a list of potential jurors in this case.
24 Let me explain to you how that is done. We have a
25 computer program that is approved by the court

1 system that randomly selects names from your group.
2 Those names are placed on a list the order in which
3 the computer selects them. We will be calling
4 those names individually starting at number one and
5 working our way down the list.

6 When your name is called I'm going to
7 ask that you come forward. If you will step up
8 beside this roster in the middle of the courtroom,
9 face the back of the courtroom. At that time the
10 attorneys will be in a position to decide whether
11 or not they wish to exercise their strikes in the
12 case.

13 Now, in this case the State will be
14 getting ten strikes, the defense will be getting
15 ten strikes for each Defendant. We are taking two
16 alternates with the State having one strike, the
17 defense having two strikes each for the alternate.
18 Any personal belongings that you brought into the
19 courtroom, pocketbook, a book, anything, sweater,
20 whatever you might have brought, bring that with
21 you if your name is called to the roster because if
22 you are selected to serve on the jury you will
23 immediately have a seat in the jury box. You will
24 not be going back to your seat. So bring it with
25 you when your name is called.

1 We will begin the jury selection
2 process. Madam clerk.

3 THE CLERK: Juror No. 249, Kimberly
4 Mepeake. What say you for the State?

5 MR. OSBORNE: Please present Ms.
6 Mepeake.

7 THE CLERK: What say you for Defendant
8 Perry?

9 MS. NORRIS: Could we have a moment.
10 (Off-the-record conference.)

11 MS. VAN PALA: Please swear the juror.

12 THE CLERK: What say you Defendant
13 Middleton?

14 (Off-the-record conference.)

15 MR. APICELLA: Please excuse the juror
16 with our thanks, Judge.

17 THE CLERK: Ma'am, have a seat. You
18 have been excused from the trial of this case.

19 Juror No. 273, Nancy Orosz. What say
20 you for the State?

21 MR. OSBORNE: Please present Ms. Orosz.

22 THE CLERK: What say you for the
23 Defendant Perry?

24 MS. VAN PALA: Please swear Ms. Orosz.

25 THE CLERK: What say you for Defendant

1 Middleton?

2 MR. APICELLA: Also please swear this
3 juror.

4 THE CLERK: Ma'am, please have a seat
5 in the jury box. You have been selected as a juror
6 in the trial of this case.

7 Juror No. 191, Robert James. What say
8 you for the State?

9 MR. OSBORNE: Please present Mr. James.

10 THE CLERK: What say you for the
11 Defendant Perry?

12 MS. VAN PALA: Court's indulgence.
13 Please swear the juror.

14 THE CLERK: What say you for Defendant
15 Middleton?

16 MR. APICELLA: Please seat the juror.

17 THE CLERK: Sir, please have a seat in
18 the jury box. You have been selected as a juror
19 for the trial of this case.

20 Juror No. 1, Bradford Acrey. What say
21 you for the State?

22 MR. OSBORNE: Please present Mr. Acrey.

23 THE CLERK: What say you for the
24 Defendant Perry?

25 MS. NORRIS: Just a moment.

1 (Off-the-record conference.)

2 MS. VAN PALA: Please swear Mr. Acrey.

3 THE CLERK: What say you for Defendant
4 Middleton?

5 MR. APICELLA: Please seat the juror.

6 THE CLERK: Please have a seat in the
7 jury box. You have been selected as a juror for
8 the trial of this case.

9 Juror No. 366, Susan Triplett. What
10 say you for the State?

11 MR. OSBORNE: Please present Ms.
12 Triplett.

13 THE CLERK: What say you for the
14 Defendant Perry?

15 MS. VAN PALA: Court's indulgence.

16 (Off-the-record conference.)

17 MS. VAN PALA: Please excuse the juror.

18 THE CLERK: Ma'am, have a seat back in
19 the audience. You have been excused from the trial
20 of this case.

21 Juror No. 260, Paula Moore. What say
22 you for the State?

23 MR. OSBORNE: Please present Ms. Moore.

24 THE CLERK: What say you for the
25 Defendant Perry?

1 MS. VAN PALA: Please excuse the juror.

2 THE CLERK: Ma'am, have a seat back in
3 the audience. You have been excused from the trial
4 of this case.

5 Juror No. 350, Thomas Stelling. What
6 say you for the State?

7 MR. OSBORNE: Please present Mr.
8 Stelling.

9 (Off-the-record conference.)

10 THE CLERK: What say you for the
11 Defendant Perry?

12 MR. APICELLA: Please excuse the juror
13 with our thanks.

14 THE CLERK: Thank you. You may have a
15 seat back the audience. You have been excused from
16 the trial of this case.

17 Juror No. 353, Thomas Stokes. What say
18 you for the State?

19 MR. OSBORNE: Please present Mr.
20 Stokes.

21 (Off-the-record conference.)

22 THE CLERK: What say you for the
23 Defendant Perry?

24 MS. VAN PALA: Please excuse the juror.

25 THE CLERK: Sir, have a seat back in

1 the audience. You have been excused from the trial
2 of this case.

3 Juror No. 199, Cheryl Jones. What say
4 you for the State?

5 MR. OSBORNE: Please excuse Ms. Jones.

6 THE CLERK: Ma'am, have a seat back in
7 the audience. You have been excused from the trial
8 of this case.

9 Juror No. 140, Michael Glass. What say
10 you for the State?

11 MR. OSBORNE: Please present Mr. Glass.

12 THE CLERK: What say you for the
13 Defendant Perry?

14 MS. VAN PALA: Court's indulgence.

15 (Off-the-record conference.)

16 MS. VAN PALA: Please excuse the juror
17 with our thanks.

18 THE CLERK: Sir, you can have a seat in
19 the audience. You have been excused from the trial
20 of this case.

21 Juror No. 230, Alisha Martini. What
22 say you for the State?

23 MR. OSBORNE: Please present Ms.
24 Martini.

25 THE CLERK: What say you for Defendant

1 Perry?

2 (Off-the-record conference.)

3 MS. VAN PALA: Please excuse the juror.

4 THE CLERK: Ma'am, have a seat back in
5 the audience. You have been excused from the trial
6 of this case.

7 Juror No. 115, Pamela Evans. What say
8 you for the State?

9 MR. OSBORNE: Please excuse Ms. Evans.

10 THE CLERK: Ma'am, have a seat back in
11 the audience. You may be excused from the trial of
12 this case.

13 Juror No. 388, Janice Williams. What
14 say you for the State?

15 MR. OSBORNE: Please present Ms.
16 Williams.

17 MR. APICELLA: Your Honor, may we
18 approach?

19 THE COURT: Certainly.

20 (Following proceedings were held at the
21 bench.)

22 MR. APICELLA: I just wanted to alert
23 the Court and the solicitor that I'm concerned that
24 the only strikes that he's exercising is for black
25 jurors. There are so few to begin with. I just

1 wanted to put everyone on notice that seems to me
2 to be a pattern that is emerging.

3 THE COURT: Well, I would hope that he
4 would have race neutral reasons why he is making
5 those strikes. We will find out if you raise that
6 issue at the close of the jury selection. I don't
7 know where we go from here.

8 MR. APICELLA: I am just concerned that
9 if we wait until the end of the case and --

10 THE COURT: First, I think I know why
11 he struck the first one.

12 MR. APICELLA: Well --

13 THE COURT: She was a hostile witness
14 in another case.

15 MR. APICELLA: Yes, he did.

16 THE COURT: Let's let it run the
17 course.

18 MR. APICELLA: Okay. Thank you, Judge.
19 I wanted to alert the Court. Thank you.

20 (Following proceedings were held in
21 open court.)

22 THE COURT: You may proceed.

23 THE CLERK: What say you for Defendant
24 Perry?

25 MS. VAN PALA: Court's indulgence.

(Off-the-record conference.)

MS. VAN PALA: Please excuse this juror with our thanks.

THE CLERK: Please have a seat back in the audience. You have been excused from the trial of this case. Juror No. 291, An Pham. What say you for the State?

MR. OSBORNE: Please present Ms. Pham.

THE CLERK: What say you for the Defendant Perry?

MS. VAN PALA: Please swear Ms. Pham.

THE CLERK: What say you for Defendant Middleton?

MR. APICELLA: Please excuse this juror with our thanks.

THE CLERK: Have a seat back in the audience. You have been excused from the trial of this case. Juror No. 118, Carolyn Fabian. What say you for the State?

MR. OSBORNE: Please present Ms. Fabian.

THE CLERK: What say you for Defendant Perry?

MS. VAN PALA: Court's indulgence.

(Off-the-record conference.)

1 MS. VAN PALA: Please excuse the juror.

2 THE CLERK: Ma'am, have a seat back in
3 the audience. You have been excused from the trial
4 of this case.

5 Juror No. 296, Debra President Stokes.
6 What say you for the State?

7 MR. OSBORNE: Please excuse Ms.
8 Stokes.

9 THE CLERK: Have a seat back in the
10 audience. You have been excused from the trial of
11 this case.

12 Juror No. 133, Mozetta Gadsden. What
13 say you for the State?

14 MR. OSBORNE: Please present Ms.
15 Gadsden.

16 THE CLERK: What say you for Defendant
17 Perry?

18 MS. NORRIS: Court's indulgence.
19 (Off-the-record conference.)

20 MS. VAN PALA: Please seat ms. Gadsden.

21 THE CLERK: What say you for the
22 Defendant Middleton?

23 MR. APICELLA: Please seat the juror.

24 THE CLERK: Ma'am, have a seat in the
25 jury box. You have you been selected as a juror

1 for the trial of this case.

2 Juror No. 148, Steven Gose. What say
3 you for the State?

4 MR. OSBORNE: Please present Mr. Gose.

5 THE CLERK: What say you for the
6 Defendant Perry?

7 MS. VAN PALA: Court's indulgence.

8 (Off-the-record conference.)

9 MS. VAN PALA: Please excuse the juror
10 with our thanks.

11 THE CLERK: Sir, have a seat. You have
12 been excused from the trial of this case.

13 Juror No. 82, Rick Cox. What say you
14 for the State?

15 MR. OSBORNE: Please present Mr. Cox.

16 THE CLERK: What say you for Defendant
17 Perry?

18 MS. VAN PALA: Court's indulgence.

19 (Off-the-record conference.)

20 MS. VAN PALA: Please excuse Mr. Cox.

21 THE CLERK: Sir, have a seat back in
22 the audience. You have been excused from the trial
23 of this case.

24 Juror No. 157, Randell Grespin.

25 (No response from juror.)

1 THE COURT: Go to the next name.

2 THE CLERK: Juror No. 335, Mark Sharpe.

3 What say you for the State?

4 MR. OSBORNE: Please excuse Mr. Sharpe.

5 THE CLERK: Sir, have a seat back in
6 the audience. You have been excused from the trial
7 of this case.

8 Juror No. 275, Laura Overcash. What
9 say you for the State?

10 MR. OSBORNE: Please present Ms.
11 Overcash.

12 THE CLERK: What say you for the
13 Defendant Perry?

14 MS. VAN PALA: Court's indulgence.

15 (Off-the-record conference.)

16 MS. VAN PALA: Please excuse the juror
17 with our thanks.

18 THE CLERK: Ma'am, have a seat back in
19 the audience. You have been excused from the trial
20 of this case.

21 Juror No. 92, Dennis Curtis. What say
22 you for the State?

23 MR. OSBORNE: Please present Mr.
24 Curtis.

25 THE CLERK: What say you for Defendant

1 Perry?

2 MS. VAN PALA: Court's indulgence.

3 (Off-the-record conference.)

4 MS. VAN PALA: Please excuse this
5 juror.

6 THE CLERK: Sir, please have a seat
7 back in the audience. You have been excused from
8 the trial of this case.

9 Juror No. 21, Kenneth Bell. What say
10 you for the State?

11 MR. OSBORNE: Please present Mr. Bell.

12 THE CLERK: What say you for the
13 Defendant Perry?

14 (Off-the-record conference.)

15 MS. VAN PALA: Again with our thanks
16 please excuse the juror.

17 THE CLERK: Sir, have a seat back in
18 the audience. You have been excused from the trial
19 of this case.

20 Juror No. 61, William Campbell. What
21 say you for the State?

22 MR. OSBORNE: Please present Mr.
23 Campbell.

24 THE CLERK: What say you for the
25 Defendant Perry?

1 (Off-the-record conference.)

2 MS. VAN PALA: Please swear Mr.

3 Campbell.

4 THE CLERK: What say you for Defendant

5 Middleton?

6 MR. APICELLA: Please seat the juror.

7 THE CLERK: Sir, please have a seat in
8 jury box. You have been selected as a juror in the
9 trial of this case.

10 Juror No. 211, Watson Knight. What say
11 you for the State?

12 MR. OSBORNE: Please seat Mr. Knight.

13 THE CLERK: What say you for the
14 Defendant Perry?

15 MS. VAN PALA: Court's indulgence.

16 (Off-the-record conference.)

17 MS. VAN PALA: Your Honor, may we
18 approach?

19 (Following proceedings were held at the
20 bench.)

21 MS. VAN PALA: Your Honor, he said that
22 he knows one of the State's witnesses Jennifer
23 Wooley who is a custodian and a crime scene tech
24 for CPD which is a law enforcement agency. We will
25 make a challenge for cause.

1 MR. APICELLA: I agree to that.

2 THE COURT: I specifically inquired as
3 to whether or not that would affect his
4 impartiality. I believe his response said it would
5 not affect his impartiality.

6 MR. OSBORNE: Right.

7 MS. VAN PALA: He said close personal
8 friend.

9 THE COURT: Close personal friend.
10 Well, still doesn't mean -- this person is an
11 evidence tech?

12 MR. OSBORNE: That's it. She's an
13 evidence tech and she picked up a piece of evidence
14 and brought it from one place to another.

15 THE COURT: I understand your motion.
16 Denied.

17 MS. VAN PALA: Thank you, Your
18 Honor.

19 (Following proceedings were held in
20 open court.)

21 MS. VAN PALA: Please excuse the juror.

22 THE CLERK: Sir, please have a seat.
23 You have been excused from the trial of this case.

24 Juror No. 36, Jeffery Bonifer. What
25 say you for the State?

1 MR. OSBORNE: Please present Mr.
2 Bonifer.

3 THE CLERK: What say you for the
4 Defendant Perry?

5 (Off-the-record conference.)

6 MS. VAN PALA: Please swear the juror.

7 THE CLERK: What say you for Defendant
8 Middleton?

9 MR. APICELLA: Please excuse this juror
10 with our thanks.

11 THE CLERK: Sir, have a seat back in
12 the audience. You have been excused from the trial
13 in this case.

14 THE COURT: I have nine for Middleton
15 at this time.

16 THE CLERK: Three strikes remaining for
17 the Defendants.

18 Juror No. 339, Elizabeth Siddique.
19 What say you for the State?

20 MR. OSBORNE: Please present Ms.
21 Siddique.

22 THE CLERK: What say you for the
23 Defendant Perry?

24 MS. VAN PALA: Please swear Ms.
25 Siddique.

1 THE CLERK: What say you for the
2 Defendant Middleton?

3 (Off-the-record conference.)

4 MR. APICELLA: Please seat the juror.

5 THE CLERK: Please have a seat in the
6 jury box. You have been selected as a juror for
7 the trial of this case.

8 Juror No. 352, William Stephens. What
9 say you for the State?

10 MR. OSBORNE: Please present Mr.
11 Stephens.

12 THE CLERK: What say you for the
13 Defendant Perry?

14 MS. VAN PALA: Please swear the juror.

15 THE CLERK: What say you for Defendant
16 Middleton?

17 (Off-the-record conference.)

18 MR. APICELLA: Please seat this juror.

19 THE CLERK: Sir, please have a seat in
20 the jury box. You have been selected as a juror
21 for the trial of this case.

22 Juror No. 298, Danielle Ragazzini.
23 What say you for the State?

24 MS. VAN PALA: Your Honor, may we
25 approach?

1 THE COURT: Certainly.

2 (Following proceedings were held at the
3 bench.)

4 MS. VAN PALA: Thank you, Your Honor.
5 She said that she and her husband were recently
6 robbed at gunpoint. We would make a challenge for
7 cause on that basis.

8 THE COURT: Again, I inquired of her as
9 to whether or not that would affect her
10 impartiality. She indicated it would not affect
11 her impartiality.

12 MR. APICELLA: Would you consider a bit
13 more probing voir dire?

14 THE COURT: I asked for additional
15 questions when I finished and you had the
16 opportunity to request all that you wanted at that
17 time.

18 MR. APICELLA: We did, Judge.

19 THE COURT: Denied.

20 MS. VAN PALA: Thank you.

21 (Following proceedings were held in
22 open court.)

23 THE CLERK: What say you for the State?

24 MR. OSBORNE: Please present Ms.
25 Ragazzini.

1 THE CLERK: What say you for the
2 Defendant Perry?

3 MS. VAN PALA: Please excuse the juror.

4 THE CLERK: Ma'am, have a seat back in
5 the audience. You have been excused from the trial
6 in this case. Two strikes remaining for the
7 Defendant.

8 THE COURT: One for each. There is
9 nine each?

10 THE CLERK: Yes, sir. So one strike
11 for each Defendant.

12 THE COURT: I have nine for each
13 Defendant.

14 THE CLERK: Juror No. 367, Stephanie
15 True. What say you for the State?

16 MR. OSBORNE: Please excuse Ms. True.

17 THE CLERK: Ma'am, have a seat back in
18 the audience. You have been excused from the trial
19 in this case.

20 The State has now used five of their
21 strikes.

22 Juror No. 35, Margaret Bokern. What
23 say you for the State?

24 MR. OSBORNE: Please excuse Ms. Bokern.

25 THE CLERK: Ma'am, have a seat back in

1 the audience. You have been excused from the trial
2 in this case. Juror No. 99, Emily Dickerson. What
3 say you for the State?

4 MR. OSBORNE: Please present Ms.
5 Dickerson.

6 THE CLERK: What say you for Defendant
7 Perry?

8 MS. VAN PALA: Please swear Ms.
9 Dickerson.

10 THE CLERK: What say you for Defendant
11 Middleton?

12 MR. APICELLA: Please seat this juror.

13 THE CLERK: Ma'am, have a seat in the
14 jury box. You have been selected as a juror for
15 the trial of this case.

16 Juror No. 250, Jennifer Menzie. What
17 say you for the State?

18 MR. OSBORNE: Please present Ms.
19 Menzie.

20 THE CLERK: What say you for the
21 Defendant Perry?

22 MS. VAN PALA: Court's indulgence.

23 (Off-the-record conference.)

24 MS. VAN PALA: Please swear Ms.
25 Menzie.

1 THE CLERK: What say you for Defendant
2 Middleton.

3 MR. APICELLA: Please seat this juror.

4 THE CLERK: Ma'am, have a seat in the
5 jury box. You have been selected as a juror in the
6 trial of this case.

7 Juror No. 358, Vincent Tedeschi. What
8 say you for the State?

9 MR. OSBORNE: Please present Mr.
10 Tedeschi.

11 THE CLERK: What say you for the
12 Defendant Perry?

13 MS. VAN PALA: Court's indulgence.

14 (Off-the-record conference.)

15 MS. NORRIS: May we approach, Your
16 Honor.

17 THE COURT: You may.

18 (Following proceedings were held at the
19 bench.)

20 MS. NORRIS: Your Honor, this is
21 another one that was a victim of an armed robbery
22 and we move to challenge him for cause.

23 THE COURT: Well, again he indicated in
24 our questioning that that particular incident would
25 not cause him to be able -- would not prevent him

1 from being impartial to both sides.

2 MS. NORRIS: Your Honor, I think every
3 juror wants to say that they can be fair.

4 THE COURT: Every victim of a crime
5 does not forfeit their right to serve on a jury
6 just because they are a victim of a crime.

7 MS. NORRIS: But there are other
8 jurors.

9 THE COURT: I asked if he can be
10 impartial. I will deny the motion.

11 MS. NORRIS: Yes, sir. Thank
12 you.

13 (Following proceedings were held in
14 open court.)

15 MS. VAN PALA: Please swear the juror.

16 THE CLERK: What say you for Defendant
17 Middleton?

18 MR. APICELLA: Please swear the juror.

19 THE CLERK: Sir, please have a seat in
20 the jury box. You have been selected as a juror
21 for the trial of this case.

22 Juror No. 139, Joseph Gilliard. What
23 say you for the State?

24 MR. OSBORNE: Please seat Mr. Gilliard.

25 THE CLERK: What say you for the

1 Defendant Perry?

2 (Off-the-record
3 conference.)

4 MS. VAN PALA: Please swear Mr.
5 Gilliard.

6 MR. APICELLA: Please seat this juror.

7 THE CLERK: Please have a seat in the
8 jury box.

9 Juror No. 348, Jeffery Smith. What say
10 you for the State?

11 MR. OSBORNE: Please present Mr. Smith.

12 THE CLERK: What say you for the
13 Defendant Perry?

14 (Off-the-record conference.)

15 MS. VAN PALA: Please swear the juror.

16 THE CLERK: What say you for the
17 Defendant Middleton?

18 MR. APICELLA: Please excuse the juror.

19 THE CLERK: Sir, you may have a seat
20 back in the audience. You have been excused from
21 the trial in this case.

22 Defendant Perry only has one strike
23 remaining. Defendant Middleton has exhausted all
24 strikes.

25 Juror No. 241, Jamie McFadden. What

1 say you for the State?

2 MR. OSBORNE: Please excuse Mr.

3 McFadden.

4 THE CLERK: Sir, have a seat back in
5 the audience. You have been excused from the trial
6 in this case. State has three strikes remaining.

7 Juror No. 331, Michelle Sanders. What
8 say you for the State?

9 MR. OSBORNE: Please present Ms.
10 Sanders.

11 THE CLERK: What say you for the
12 Defendant Perry?

13 MS. VAN PALA: Court's indulgence.

14 (Off-the-record conference.)

15 MS. VAN PALA: Please excuse the juror.

16 THE CLERK: Ma'am, have a seat back in
17 the audience. You have been excused from the trial
18 in this case. That exhausts all of Defendant's
19 strikes.

20 Juror No. 31, Marlaine Black. What say
21 you for the state?

22 MR. OSBORNE: Please excuse Ms. Black.

23 THE CLERK: You may have a seat. You
24 have been excused from the trial in this case.

25 Juror No. 129. Teveion Freeman. What

1 say you for the State?

2 MR. OSBORNE: Please present Mr.
3 Freeman.

4 THE CLERK: Any challenges from
5 Defendant Perry?

6 MS. VAN PALA: No.

7 THE CLERK: Any challenges from
8 Defendant Middleton?

9 THE COURT: You have the right for
10 cause if you feel that it is appropriate.

11 MR. APICELLA: No challenges for cause.

12 THE CLERK: Sir, have a seat in the
13 jury box. You have been selected as a juror for
14 the trial of this case.

15 THE COURT: We will now pick first
16 alternate.

17 THE CLERK: Juror 327, Ellen Rubino.
18 What say you for the State?

19 MR. OSBORNE: Please present Ms.
20 Rubino.

21 THE CLERK: What say you for the
22 Defendant Perry?

23 MS. VAN PALA: Court's indulgence.

24 (Off-the-record conference.)

25 MS. VAN PALA: Please excuse Ms.

1 Rubino.

2 THE CLERK: Ma'am, have a seat back in
3 the audience. You have been excused from the trial
4 of this case. Defendant Perry has one strike.

5 Juror No. 30, Leilani Black.

6 MR. OSBORNE: Please present Ms. Black.

7 THE CLERK: What say you for the
8 Defendant Perry?

9 MS. VAN PALA: Court's indulgence.

10 (Off-the-record conference.)

11 MR. APICELLA: Please excuse this juror
12 with our thanks.

13 THE CLERK: You can have a seat back in
14 the audience. You have been excused from the trial
15 of this case.

16 Juror No. 58, Judith Callan. What say
17 you for the State?

18 MR. OSBORNE: Press present Ms. Callan.

19 THE CLERK: What say you for the
20 Defendant Perry?

21 (Off-the-record conference.)

22 MS. VAN PALA: Please excuse this
23 juror.

24 THE CLERK: Ma'am, have a seat. You
25 have been excused from the trial of this case.

1 First alternate Perry has used both strikes.

2 Juror No. 64, Carol Carlow. What say
3 you for the State?

4 MR. OSBORNE: Please present Ms.
5 Carlow.

6 THE CLERK: Any challenges from the
7 Defendant Perry?

8 MS. VAN PALA: No.

9 THE CLERK: What say you for the
10 Defendant Middleton?

11 (Off-the-record conference.)

12 MR. APICELLA: Please seat this juror.

13 THE CLERK: Please have a seat in the
14 jury box. You have been selected as a juror.

15 THE COURT: We will now select the
16 second alternate.

17 THE CLERK: Juror No. 332, Leila
18 Schardt. What say you for the State?

19 MR. OSBORNE: Please present Ms.
20 Schardt.

21 THE CLERK: What say you for the
22 Defendant Perry?

23 MS. VAN PALA: Court's indulgence.

24 (Off-the-record conference.)

25 MS. VAN PALA: Please swear the juror.

1 THE CLERK: What say you for Defendant
2 Middleton?

3 MR. APICELLA: Please swear this juror.

4 THE CLERK: Ma'am, please have a seat
5 in the jury box. You have been selected as a juror
6 in the trial of this case.

7 THE COURT: Thank you, madam clerk.
8 Any objections to the jury selection process from
9 the State?

10 MR. OSBORNE: None.

11 THE COURT: From the defense?

12 MS. VAN PALA: No, Your Honor.

13 MR. APICELLA: A moment, Judge.

14 (Discussion off the record.)

15 MS. VAN PALA: May we approach.

16 THE COURT: Certainly.

17 (Following proceedings were held at the
18 bench.)

19 MS. VAN PALA: I apologize. I spoke
20 too soon. Mr. Apicella and I would like to raise a
21 Batson challenge.

22 THE COURT: Okay.

23 (Following proceedings were held in
24 open court.)

25 THE COURT: I'm going to ask the

1 bailiff if you would take the jurors in the jury
2 box back to the jury room, please.

3 MS. NORRIS: Your Honor, could my
4 client have a --

5 THE COURT: Let me get the jury clear,
6 please.

7 (Thereupon, the jury exited the
8 courtroom at 12:47 p.m.)

9 THE COURT: You indicated?

10 MS. NORRIS: He needs a bathroom break.

11 THE COURT: We will take a five-minute
12 break before we take up the motion. Court will be
13 in recess. I will stay on the bench.

14 (A recess transpired.)

15 THE COURT: Let's come back to order.
16 At the sidebar I was informed that Defendants wish
17 to make a Batson motion.

18 MR. APICELLA: That is correct.

19 THE COURT: You may do so.

20 MR. APICELLA: Yes, I will with the
21 Court's permission. Yesterday we attended the
22 initial jury qualification in the large jury room.
23 I was able to observe the pool of jurors. And I
24 listened to the deputy clerk explain how jurors
25 were selected in the County of Charleston. And

1 they come from a pool of people that have driver's
2 licenses, state ID and voter registration cards.
3 And you would think that would result in a fair
4 representation of the citizens of Charleston County
5 and indicate a racial makeup of the county.

6 And I think we can all take notice of
7 the fact that there is a substantial
8 African-American population in Charleston County,
9 especially in the city, and indeed in the state,
10 but looking at Charleston County, my observations
11 indicate to me it's probably less than two percent
12 maybe of African-American potential jurors in that
13 pool of --

14 THE COURT: You are talking about the
15 pool in this case?

16 MR. APICELLA: No, I am just -- I am
17 trying to make my argument, give the background,
18 Judge, to indicate why I am making the motion.

19 THE COURT: I was asking you are
20 talking about the pool specifically in this case?

21 MR. APICELLA: Well, I will get that.

22 THE COURT: Okay.

23 MR. APICELLA: Just generally my
24 observations I would ask Your Honor to take note,
25 you picked many juries here, because I know you

1 like the circuit, I have seen you in trial before,
2 that the amount of jurors of color is not
3 proportionate to the population.

4 And I would submit first of all, that
5 the selection process that is used is
6 discriminatory. Be that as it may, we did
7 initially qualify our jury yesterday and at random
8 another pool was brought into this courtroom and
9 again the percentage of what appeared to be
10 African-Americans was few. I would say you don't
11 have a count, but --

12 THE COURT: I have done the math.
13 Seventeen percent black according to my figures.

14 MR. APICELLA: The solicitor challenged
15 to my count four veniremen without giving a reason.
16 I would submit that facially that raises the issue
17 of Batson in exercising his peremptory challenges
18 in the race discriminatory manner. And I would
19 especially note that the last juror that he did
20 challenge during the Court's voir dire indicated
21 that he had a very strong position on firearms. He
22 didn't think that people should have firearms.

23 To me, Judge, if I was a prosecutor it
24 will be my juror, but yet he was challenged.
25 Another juror --

1 THE COURT: You are getting into the
2 individual jurors. I think you are skipping ahead
3 in the Batson procedure.

4 MR. APICELLA: I am. I just wanted
5 to --

6 THE COURT: Let's not do that.

7 MR. APICELLA: This is not a pro forma
8 motion. That we believe we are aggrieved. I would
9 ask the Court to require the State to offer --

10 THE COURT: What actually happened in
11 the case is I believe the State exercised a total
12 of eight peremptory challenges of which four were
13 black and four were white. Am I correct?

14 MR. OSBORNE: That's correct, Your
15 Honor.

16 THE COURT: Okay. Now, the jury that
17 was seated has four members that are black, which
18 is one-third of the jury pool is minority, but the
19 jury panel is minority as opposed to the entire
20 pool, which was 17 percent black. So the jury that
21 was seated has a larger representation of black
22 members than the pool had, almost double.

23 MR. APICELLA: But it's still a
24 minority jurors.

25 THE COURT: Well, they were a minority

1 at the pool. What I have got -- I am trying to
2 find out if the jury selection is on its face
3 unfair or on its face discriminatory. So I am
4 putting these figures out. I kept score on them
5 because you called a sidebar and cautioned us that
6 you intended to make a motion after his first two
7 strikes.

8 MR. APICELLA: Well --

9 THE COURT: So I began to keep the
10 numbers.

11 MR. APICELLA: I am so glad you did,
12 Judge, but if I may just correct the record. My
13 intention to do that was to put everyone on notice
14 to indicate that to me it appeared --

15 THE COURT: It's on the record. You
16 indicated at the sidebar.

17 MR. APICELLA: It is.

18 THE COURT: That you were concerned
19 about his strikes already after he had made two
20 strikes. And they were both African-American.

21 MR. APICELLA: I understand that that's
22 not quite the way it is done in this county and I
23 do appreciate the Court granting me that
24 indulgence, at least make that record and alert
25 everybody that that was a potential motion that we

1 were going to make. And after he exercised the
2 rest of his strikes the challenge of
3 African-American jurors. We are now making that
4 motion.

5 THE COURT: At that point forward he
6 had two other strikes of African-Americans and four
7 strikes of Causations.

8 MR. APICELLA: Correct.

9 THE COURT: Okay. I will hear from the
10 other Defendant. Are you joining in the motion?

11 MS. NORRIS: Yes, Your Honor. We join
12 the motion.

13 THE COURT: Now, I will hear from the
14 State on the first prong of the Batson motion, that
15 is, whether or not there appears to be a
16 nonracially neutral reason for strikes will be
17 exercised, in other words, some apparent or some
18 appearance of discrimination.

19 MR. OSBORNE: Yes, Your Honor. And I
20 can go through that pretty quickly in my
21 decision-making process.

22 THE COURT: We are not ready to talk
23 about necessarily whether your reasoning for any
24 specific strike.

25 MR. OSBORNE: Okay.

1 THE COURT: Right now I am asking you
2 do you wish to challenge whether or not there is an
3 appearance of discrimination based on what happened
4 thus far?

5 MR. OSBORNE: I see. Yes, Your Honor.
6 There is no appearance of discrimination. We sat
7 -- and you just did the numbers and I was going
8 through it myself. When I struck eight individuals
9 four were white, four were black. We sat, one,
10 two, three, four I am counting alternates too. I
11 got five jurors that were African-American. We
12 didn't strike anyone because they were black. We
13 had other reasons.

14 THE COURT: All right. Anything
15 further? I am asking anything further on the first
16 part of the Batson challenge?

17 MR. APICELLA: No, Your Honor. I think
18 we have made out that prong.

19 THE COURT: All right. Well, I'm going
20 to ask that the defense tell me what strikes you
21 are challenging.

22 MR. APICELLA: I am challenging two
23 strikes, Your Honor.

24 THE COURT: Which strike are you
25 challenging?

1 MR. APICELLA: The first strike would
2 be the woman where the State asked for a sidebar on
3 the record and alleged to the Court that that woman
4 was the Defendant in a case.

5 THE COURT: That's No. 9, Cheryl Jones,
6 Juror 199.

7 MR. APICELLA: That is correct, Your
8 Honor.

9 THE COURT: Which other juror are you
10 challenging?

11 MR. APICELLA: And informed the Court
12 that she in that case acted hostile towards the
13 State.

14 THE COURT: Now, the State is the one
15 that has to give the racially neutral and so I'm
16 going to be asking you simply which strikes are you
17 challenging?

18 MR. APICELLA: Yes. That's the first
19 one.

20 THE COURT: Yes, sir.

21 MR. APICELLA: Second one would be the
22 gentleman, the last strike that indicated in
23 response to the Court's voir dire that he was
24 against guns and thought that the proliferation of
25 firearms in Charleston was something that he

1 disagreed with.

2 THE COURT: That wasn't a strike, was
3 it?

4 MR. OSBORNE: Yes, it was, Your Honor.

5 THE COURT: The last one?

6 MR. APICELLA: That was a peremptory
7 challenge.

8 THE COURT: Your last strike was of the
9 State as Juror 31, Marlaine Black.

10 MR. OSBORNE: This was right before
11 that, Your Honor. It was Juror No. 241.

12 THE COURT: That's the last one you
13 struck.

14 MR. APICELLA: I meant the last of
15 African-American.

16 THE COURT: I am sorry. I was looking
17 at the last strike.

18 MR. APICELLA: You are a bit more
19 precise.

20 THE COURT: So you are challenging
21 Juror 241 and Juror 199.

22 MS. NORRIS: Your Honor, we would add
23 to that Juror 115 and Juror 296. It was State's
24 strike two and three out of the first three strikes
25 there.

1 THE COURT: They are challenging all
2 strikes of African-Americans.

3 MS. NORRIS: Yes.

4 THE COURT: Thank you. Now, I will ask
5 you for a racially neutral reason for your
6 exercising.

7 MR. OSBORNE: Yes, Your Honor. The
8 first, Juror 199, actually Mr. Corvey has more
9 information on Juror 199.

10 MR. CORVEY: Your Honor, I misspoke. I
11 thought she was originally a Defendant. I
12 conferred with our colleagues following our
13 original conversation at the bench. She was
14 accurate. She was not originally charged. She
15 was, however, a witness in the case. She was the
16 mother of the Defendant's child. She was hostile
17 during the case. The prosecutor in my office
18 indicated that Judge Jefferson indicated she found
19 her testimony lacked credibility and the Defendant
20 or the witness also said on the record that she
21 does not trust or like law enforcement. State's
22 main concern regarding that is she was asked on the
23 record if her and family members or close personal
24 friends have been prosecuted by the solicitor's
25 office.

1 That happened less than two months ago.
2 She was a hostile witness in that case. I would
3 submit that she lied under oath to the Court. That
4 would be the reason for why we struck her, Your
5 Honor.

6 THE COURT: All right. Let's move on
7 now to No. 115. Pamela Evans.

8 MR. OSBORNE: Ms. Evans has two
9 arrests, the most recent conviction being use or
10 manufacture of counterfeit certificate third
11 offense which would indicate there had to be two
12 others prior to that. And then we have an open
13 container in 2013. Unsure of the disposition on
14 that.

15 My take on the arrest or the
16 conviction, I looked at a couple of different
17 things. I looked at the remoteness. I did have an
18 individual prior to that who had a conviction from
19 the 70s I was willing to overlook. Two convictions
20 was too much. This indicated there was four
21 convictions, some were in there. And in addition
22 to that, the other individual that came before
23 that, Juror 350, whose conviction I did ignore in
24 the 70s was also a victim two times from an armed
25 robbery which I thought was good for us. So I was

1 willing to overlook that conviction.

2 THE COURT: I see. Let's move on to
3 strike 16. Juror 296, Debra President Stokes.

4 MR. OSBORNE: Beg the Court's
5 indulgence.

6 296, Ms. Stokes, or President Stokes
7 has a conviction in 2011 or 2001 for fraudulent
8 check. She has, this may be a fraudulent check
9 conviction in 2007 and a DUS conviction in 2005,
10 three different arrests fairly recent was the
11 reason why she was struck.

12 THE COURT: Three recent convictions.
13 I believe that the last one is the gentleman number
14 241, Jamie McFadden.

15 MR. OSBORNE: Right. That response was
16 -- I mean to be perfectly frank -- a little odd to
17 me. I had a hard time understanding what he was
18 saying. He seemed to be adamant against anyone
19 having a gun or holding a gun. That's not the law
20 in this county. People can lawfully possess a gun.

21 THE COURT: It's a constitutional
22 right.

23 MR. OSBORNE: Thank you, Your Honor.
24 So I want people that are going to listen to the
25 law that is instructed by you and not have their

1 own personal strong opinions on that matter. So
2 that's quite honestly why I struck him.

3 THE COURT: All right.

4 MS. NORRIS: Your Honor, if I may, on
5 that last one, I don't believe that the juror was
6 so adamant. I think what he said was that people
7 should not so easily be allowed to get guns. And I
8 think that, you know, we are all aware of the
9 media, probably arises from Dylann Roof and the
10 controversy there of being able to get a gun. I
11 think that's what he was talking about.

12 THE COURT: Okay.

13 MS. NORRIS: In other words, he was not
14 adamantly opposed to guns.

15 THE COURT: I'm trying to keep them in
16 the order in which we are doing them if I can.

17 MS. NORRIS: Yes, I apologize.

18 THE COURT: That's quite all right.
19 The next step in the proceeding is for you to have
20 an opportunity to show why the reasons given are
21 pretextual reasons. And it was your motion from
22 Middleton. Do you want to go first?

23 MR. APICELLA: Give me a second to
24 confer with my colleague.

25 (Off-the-record conference.)

1 THE COURT: So we will take these in
2 the order in which they were stricken. Juror 199,
3 Cheryl L. Jones. The reason given was that she had
4 appeared in a recent case, appeared as a hostile
5 witness to the State and appeared to be hostile to
6 them at that time.

7 MR. APICELLA: Well, I will note,
8 Judge, that the sidebar was recorded, that there
9 were no additional questions by the Court or I
10 don't believe you gave the attorneys the
11 opportunity to respond. You just merely said she
12 is excused. Seems that took the word of the
13 solicitor.

14 THE COURT: Whoa, whoa, I didn't excuse
15 her. She was in the jury venire. He struck her.

16 MR. APICELLA: You are right.

17 THE COURT: That's not what happened.

18 MR. APICELLA: You are right, Judge.
19 You did not excuse her. But the State then
20 exercises a peremptory challenge. We would submit
21 that the reason is pretextual.

22 THE COURT: They asked me to excuse her
23 and they challenged her for cause and I did not
24 grant that challenge.

25 MR. APICELLA: You did not.

1 THE COURT: They then struck her when
2 her name was called during the jury selection.

3 MR. APICELLA: Right, Judge. And the
4 explanation given by the State I submit is
5 pretextual because she was not a Defendant in the
6 case as initially stated. And the fact that a
7 solicitor or some member of the prosecutor thought
8 that she was hostile is -- back up a second.

9 Based upon my observations, based upon
10 the way that strike was executed, since she was the
11 first African-American juror that was selected the
12 reason given was pretextual. I would submit --

13 THE COURT: Usually that's shown by
14 showing that there was other similarly situated
15 jurors who were presented that were not stricken by
16 the State. Do you know of any in this situation?

17 MR. APICELLA: Well, I don't, Judge,
18 but I don't have access to all the records that the
19 solicitor has as to whether or not any of the
20 jurors have prior records well not enough to excuse
21 them from the jury pool initially.

22 THE COURT: So the answer to my
23 question is you don't have information.

24 MR. APICELLA: The answer to the
25 question is I do not, but as soon as that

1 peremptory was exercised it raised my antenna and
2 when the second one was raised it further raised my
3 antenna.

4 THE COURT: We are at that point now I
5 am trying to get the reasons why you believe that
6 the racially neutral reasons given by the State,
7 and he has given racially neutral reasons, for each
8 of the strikes you challenge and your co-defendant
9 has challenged. Now, we are to the point where it
10 is your obligation to show that that racially
11 neutral reason given is pretextual as to that
12 juror, and generally that is shown by the State did
13 not act consistently with other jurors. In other
14 words, the basis that he gave was not exercised in
15 all jurors cases.

16 And so I am asking you do you have any
17 information that would show that that's pretext?

18 MR. APICELLA: Judge, there weren't any
19 black jurors for him to consider.

20 THE COURT: I don't know what's that
21 got to do with my question?

22 MR. APICELLA: It has everything to do
23 with your question.

24 THE COURT: It doesn't.

25 MR. APICELLA: Because the fact that he

1 didn't challenge -- there were no other black
2 people called that he could challenge.

3 THE COURT: There's four on the jury,
4 five counting the alternates.

5 MR. APICELLA: But there's 12 people on
6 the jury. It's still a minority.

7 THE COURT: And he still has strikes
8 left. He only exercised eight strikes. So again I
9 am back to the pretext issue. If you're not going
10 to address that, I will move on to the next one.

11 MR. APICELLA: Well, Judge, based upon
12 what Mr. Osborne said I am constrained to -- I
13 don't want to concede the point, Judge, but I am
14 constrained to say that I can't effectively
15 counteract.

16 THE COURT: It doesn't hurt to concede
17 the point on at least one of them. It doesn't
18 require that you argue against everything, the law
19 doesn't.

20 MR. APICELLA: My DNA has been wired.

21 THE COURT: Perhaps so. I will ask Mr.
22 Perry's attorneys as to that juror.

23 MR. APICELLA: It's a long learning
24 process, every day of our lives.

25 THE COURT: In fact, the Court

1 appreciates when attorneys concede arguments that
2 they shouldn't make.

3 MR. APICELLA: Second juror, Judge?

4 THE COURT: No, I am asking the other
5 Defendant. They joined in your motion. This is
6 your opportunity to show that Juror 199, Cheryl
7 Jones, who was excluded because of her hostility in
8 previous dealings with the solicitor's office
9 should be, that reason is pretext.

10 MS. NORRIS: We don't have anything to
11 add to that, Judge.

12 THE COURT: Thank you. I will find
13 that that strike was exercised properly.

14 Now, as to the next juror, Juror
15 No. 115, Pamela Evans, the reason given by the
16 State is that she has had two recent arrests and
17 convictions which indicate that she had been
18 convicted two times previously. So the State is of
19 the opinion she has had four recent convictions. I
20 will hear from you, sir.

21 MR. APICELLA: Well, I wasn't privy to
22 that information. I didn't have -- I wasn't
23 presented with the entire records. And I
24 understand that there was an opportunity to look at
25 it, but maybe I was in the mens room, I don't know,

1 but I understand that you can't copy it or look at
2 it, you just make notes.

3 THE COURT: It was made available to
4 the defense.

5 MR. OSBORNE: At Mr. Perry's request,
6 but he is right, SLED requirements say that once we
7 run that NCIC rap sheet it is our responsibility.
8 We have to hold on to it. We have to destroy it.
9 When we run it for the purpose code or a criminal
10 investigation, and correct me if I'm wrong in what
11 I am saying. And this was not run for criminal
12 investigation. We own it. If we don't destroy it
13 we can lose our NCIC certificate and privileges.

14 MS. NORRIS: Your Honor, just for
15 clarification, they were handed to us while the
16 jury was in there and we were trying to make notes
17 so we handed it to our students that were working
18 with us and the four of them didn't between them
19 didn't get through all the stacks. So to say we
20 had a meaningful opportunity is inaccurate.

21 THE COURT: Whoa, whoa, whoa. I asked
22 him for his reasons. He made the motion. You
23 joined. I will let you go second. Yes, sir.

24 MR. APICELLA: It's a reason that I
25 can't address because I wasn't able to review

1 the --

2 THE COURT: So the answer is you don't
3 have any information to tell me on that issue.

4 MR. APICELLA: I do not and I feel that
5 the defense, if that's the procedure is at a
6 disadvantage because if you could spend some time
7 and go through the records then you would know
8 which potential venireman would be liable to have a
9 cause challenge or if you didn't rise to the level
10 of cause because they are facially qualified would
11 rise to the level of being an explainable
12 peremptory challenge based upon the fact of the
13 criminal record. I don't have that. I can't
14 respond to it. I submit, Judge, that that
15 challenge was made because she was
16 African-American.

17 THE COURT: I will hear from you.

18 MS. NORRIS: Thank you, Your Honor.
19 Your Honor, Ms. Van Pala pulled up the detention
20 center website and I believe she is out on bond.
21 So we do not dispute what the State has said about
22 her arrest.

23 THE COURT: Okay. I will find that
24 that one was not improperly exercised.

25 The next one is Juror No. 296. Debra

1 President Stokes who has three recent convictions
2 according to the State.

3 MR. APICELLA: Your Honor, on the other
4 side the convictions didn't disqualify her. She
5 has got a sister who is in law enforcement.

6 THE COURT: Did she answer
7 affirmatively say that had been previously
8 convicted?

9 MR. OSBORNE: That question was asked
10 in an -- I don't remember it coming out here, but
11 in qualifications it was asked.

12 THE COURT: Didn't I ask if anybody had
13 any arrest?

14 THE CLERK: Only on charges that are
15 more than one year, not municipal charges.

16 MR. OSBORNE: Or charges that are being
17 handled by our office. I don't know these --

18 THE COURT: I don't think either
19 responded to that.

20 MR. OSBORNE: These are fraudulent
21 checks of the U.S. I don't know that our office
22 would handle it.

23 MR. APICELLA: My notes indicate that
24 this particular juror was employed as a medical
25 assistant at MUSC and she has also a relative, I

1 believe a sister who used to live in the
2 neighborhood Back to Green where this incident,
3 this case occurred.

4 But the reason given by the State that
5 she had the prior arrests prior, minor convictions,
6 I think that's pretextual. And she was otherwise
7 qualified to be a juror. She was well spoken. She
8 indicated she could be fair. And I submit that
9 pulling up her criminal records that they had
10 access to is pretextual.

11 THE COURT: I will hear from you on
12 that issue.

13 MS. NORRIS: Your Honor, I have checked
14 the public index and again I don't dispute that she
15 does have the record that the solicitor said, but I
16 do believe that it is pretext. The solicitor has
17 already admitted to us that he seated a white juror
18 who had a prior record.

19 THE COURT: His argument there was that
20 that conviction was 45 years old.

21 MR. OSBORNE: That is correct, Your
22 Honor. He didn't get seated. They struck him.

23 THE COURT: A 46-year old one. That he
24 discounted that. These were all recent
25 convictions.

1 MS. NORRIS: So we don't have access to
2 the rest of the information. I would ask that the
3 solicitor tell us if anybody else seated has prior
4 arrest or convictions that he let through.

5 MR. OSBORNE: No.

6 THE COURT: His representation to the
7 Court is no.

8 Now we are down to the one that we were
9 just about starting with, but we didn't. Jamie
10 McFadden, Juror No. 241. The State said his answer
11 to the gun question did not comply with how the law
12 is. He was concerned about whether or not he would
13 be willing to follow the law.

14 MR. APICELLA: Your Honor, I asked that
15 specific question pursuant to a voir dire request.
16 I don't think it's your normal voir dire, maybe the
17 State's, but I don't remember anyone raising their
18 hand saying can you explain what that means, Judge,
19 or I'm not sure that I would follow the law.

20 THE COURT: He gave the only response
21 to that question I think.

22 MR. OSBORNE: That's correct, Your
23 Honor.

24 MR. APICELLA: I guess I missed that.
25 If I did I did.

1 THE COURT: I will hear from you.

2 MS. NORRIS: Your Honor, again, I don't
3 think he said anything about he wouldn't follow the
4 law. I interpreted that as he was saying the law
5 needs to be changed which I think a great deal of
6 our African-American community in this county would
7 say, particularly after Dylann Roof. And the
8 Charleston loophole as it's been called in the
9 media again, I think it's a pretext.

10 THE COURT: I'm not from Charleston.
11 What's that mean?

12 MS. NORRIS: In essence, Your Honor,
13 Dylann Roof was allowed to purchase a gun. There's
14 like a three-day hold. Even though he had a prior
15 arrest or conviction that precluded him from
16 lawfully purchasing a weapon.

17 THE COURT: That's a national law, not
18 just local law.

19 MS. NORRIS: That's state law I believe
20 or perhaps it is federal law. And --

21 THE COURT: I think restrictions on gun
22 purchases come from the Brady Bill.

23 MR. OSBORNE: They do. It is federal
24 law.

25 MS. NORRIS: In any event, it was part

1 of the media. A great number of victims family
2 members from that case are now advocating for
3 changes in the law. But beyond that, I don't
4 recall seeing any other young black males in our
5 jury panel. He is the one guy that if you are
6 comparing by age, skin color, background, anything
7 else, is closest to these gentlemen. So again I
8 say this is pretext.

9 MR. OSBORNE: Your Honor, just address
10 that last issue, the last juror that I said was a
11 19-year-old black male. He had been to Trident
12 Tech. I still had two strikes left. I didn't
13 strike him.

14 THE COURT: Let's talk about the
15 reasons you gave. Can you elaborate on that at
16 all?

17 MR. OSBORNE: Yes, I said that earlier,
18 Your Honor. I couldn't understand exactly what he
19 was saying, but it seemed to me like, and I even
20 asked Mr. Corvey whenever he said it, did he say
21 was having a problem with individuals owning guns
22 or possessing guns? And I can't recall exactly
23 what he said, but the comment did kind of ring to
24 me untrue in the sense that I thought he had said,
25 and I had hard time hearing him, but I thought he

1 said that he had an issue with individuals owning
2 and possessing guns.

3 Now, if he was talking about the
4 accessibility to guns, I probably still would have
5 struck him. In our law and our state, our county,
6 our city, there is nothing wrong with possessing a
7 guns. If he had mentioned the Charleston loophole
8 being his only issue I would have been on board
9 with that.

10 But I heard him say that he was having
11 issues with individuals possessing guns. I don't
12 want them convicted for possessing guns. I want
13 them convicted because they murdered Brandon
14 Washington.

15 THE COURT: Anything further on that
16 juror?

17 MS. NORRIS: No, sir.

18 MR. APICELLA: I want to correct the
19 record, Judge. In two different portions of your
20 voir dire you address generally whether anyone
21 would have trouble following the law as you gave
22 it. No one answered that question. This juror did
23 stand up and say that he had a problem with people
24 owning firearms. That's why I made a Batson
25 challenge because to me sounded as if that would be

1 the type of juror I would want if I was a
2 prosecutor.

3 THE COURT: You are not trying his
4 case.

5 MR. APICELLA: I am not, Judge, but --
6 we obviously have a very skilled solicitor here.

7 THE COURT: I find the reason given was
8 not pretextual, the strike was -- I will allow the
9 strike to stand. I believe that covers all of the
10 jurors that you are challenging; is that right?

11 MR. APICELLA: Yes, sir.

12 THE COURT: The Batson motion is
13 denied. Now, anything further concerning jury
14 selection from the State?

15 MR. OSBORNE: No, Your Honor.

16 THE COURT: Anything further on jury
17 selection from Mr. Middleton?

18 MR. APICELLA: No, Your Honor.

19 THE COURT: And Mr. Perry?

20 MS. NORRIS: No, sir.

21 THE COURT: I'm going to ask that you
22 first bring the jury panel itself back in from
23 downstairs. Why don't we leave them downstairs.
24 We are not going to need them. I am through with
25 them.

1 THE CLERK: I am going to release them
2 for the day.

3 THE COURT: I think they could leave.

4 THE CLERK: We will make the
5 announcement on the message.

6 THE COURT: I will release the
7 remainder of the panel.

8 THE CLERK: Yes, sir. I will run
9 downstairs right now.

10 THE COURT: Now, let's talk for just a
11 moment about where we go from here. I will hear
12 from the State.

13 MR. OSBORNE: Your Honor, we have three
14 witnesses who were either leaving -- definitely
15 leaving the city. They told us that early on. We
16 had intended on calling them yesterday. Our
17 request for scheduling purposes would be to break
18 for lunch, come back, swear, open.

19 THE COURT: I have got a couple of
20 pretrial motions I think still out there.

21 MR. OSBORNE: We do, Your Honor, but
22 the Facebook issue is the one that's really looming
23 over the case. We don't intend on addressing
24 Facebook at all in our opening. The only issue
25 that's still looming out there at all that we would

1 talk about in our opening, I only say this because
2 I was a little bit unclear. So they asked that --
3 the defense asked that I not mention anything about
4 the night before what we would say is the failed
5 attempt to murder Brandon Washington. I don't plan
6 on mentioning that specifically, but I do plan on
7 mentioning that there was an issue, a dispute
8 between Te'Quan Perry and Brandon Washington. I
9 don't think that specifically addresses that issue.
10 So I did want to clarify that for the Court.

11 The other issue that's still
12 outstanding that we sort of veered off on was the
13 Demarco Jones issue. I will mention nothing about
14 Demarco Jones being deceased in my opening. We can
15 address that later. I won't address Facebook in
16 our opening. Severance has already been issued or
17 dealt with. So from our perspective those first --

18 THE COURT: Will any of those issues be
19 addressed by the first three witnesses?

20 MR. OSBORNE: No, Your Honor.

21 THE COURT: Yes, ma'am.

22 MS. VAN PALA: Your Honor, thank you.
23 I respectfully disagree. We have not yet discussed
24 my motion in limine that I filed in regards to the
25 cell phone records.

1 THE COURT: In regards to what?

2 MS. VAN PALA: The cell phone records.
3 And I believe one of the State's first few
4 witnesses is an expert in historical cell phone
5 data and he will be working with those phone
6 numbers.

7 THE COURT: And what's your objection
8 to the cell phone records? That's some of the
9 records that I ruled did not have to be
10 authenticated.

11 MR. OSBORNE: That's correct, Your
12 Honor. That's the other issue regarding what she
13 was challenging. This is what I mentioned while we
14 were questioning Detective Krasowski. The motion
15 that she filed to challenge the admissibility of
16 those cell phone records did not state with
17 specificity the problem or the defect in the
18 warrant. Therefore, she was not entitled to a
19 hearing on that matter. Unlike Mr. Apicella's
20 motion where he specifically stated the problem
21 with the affidavit and we addressed that.

22 So in regards to the cell phone
23 records, this is exactly what South Carolina courts
24 are saying. A magistrate had already reviewed that
25 affidavit and that search warrant. If there's a

1 problem bring it up. You don't just get a second
2 bite at the apple because you'd like one. That's
3 already been reviewed for probable cause. She has
4 stated nothing, no defects in that warrant that
5 warrant a challenge to it.

6 MS. VAN PALA: May it please the Court,
7 I do not think I am under an obligation to specify.
8 I filed a notice document on 5-18 indicating that I
9 was intending on challenging that record and again,
10 an amended motion challenging that record on 6-1.
11 So I believe that I fulfilled --

12 THE COURT: On any of those did you
13 specifically state what was wrong with the warrant?

14 MS. VAN PALA: I stated that my bases
15 for challenging were under the Fourth Amendment of
16 the United States Constitution and our South
17 Carolina constitution and --

18 THE COURT: I have a hard time getting
19 straight answers sometimes. My question was in
20 either of those motions did you specifically state
21 a defect in the warrant? I didn't ask about the
22 Constitution.

23 MS. VAN PALA: I do not specifically
24 state a proposition.

25 THE COURT: Thank you. I'd like you to

1 answer my question, then I will let you explain.
2 But it seems to me quite often when I ask questions
3 I hear answers to things I didn't ask. So when I
4 ask a question I'm doing that for a purpose.

5 MS. VAN PALA: Yes, sir.

6 THE COURT: I like responses to my
7 questions. Now, I saw you digging for a case.

8 MR. OSBORNE: I do, Your Honor. State
9 v. Johnson 334 S.C. 78, and the excerpt that I have
10 from that is a bare allegation that the evidence
11 was obtained in violation of the Defendant's Fourth
12 Amendment rights will not suffice to justify the
13 duplicative consumption of trial court's time
14 required by suppression hearing. Exactly what we
15 have right here.

16 MS. VAN PALA: Your Honor, I put on the
17 record yesterday my reason for challenging the
18 phone number issue in this case. Specifically that
19 his phone number that the prosecution is --

20 THE COURT: The reason you filed a
21 motion is to put him on notice that he can be
22 prepared to respond.

23 MS. VAN PALA: We were in the middle of
24 that testimony with the detective.

25 THE COURT: That's not what I said.

1 The reason you specify in the motion is because
2 that's what served on the other party. They read
3 the motion and then they know what issue they have
4 to address. It's a notice document, you are right.
5 A motion is -- puts the other side on notice what
6 your position is, what your argument is. If it
7 simply says I am doing it because of violating the
8 Constitution, what violates the Constitution about
9 it? You follow me?

10 I tend to agree with him that when
11 people file motions you just can't throw out a
12 blanket motion that says this violates the law.
13 You got to say what the reasoning is, what the
14 purpose of it is. Why do you think it violates the
15 law so the other side would be on notice to be
16 prepared for whatever argument is about to be made.

17 MS. VAN PALA: Your Honor, I believe I
18 fulfilled my obligation under the rule.

19 THE COURT: I understand that you feel
20 that way. Okay. The case you cited I didn't get
21 to it. Can you help me.

22 MR. OSBORNE: Yes, Your Honor. It is
23 State v. Johnson 334 S.C. 78.

24 THE COURT: What year was that?

25 MR. OSBORNE: 1999.

1 THE COURT: You said 1991?

2 MR. OSBORNE: 1999.

3 THE COURT: Do you have a copy of that?
4 I'm having trouble, I am not coming up with it.

5 MR. OSBORNE: I am trying to pull it up
6 from the source I got it from.

7 THE COURT: Give me the S.C. cite.

8 MR. OSBORNE: I also have 512 S.E. 2d
9 795.

10 THE COURT: I have got it.

11 MR. OSBORNE: Your Honor, if I may, I
12 think State v. Patton even better -- okay. I am
13 sorry, Your Honor. It's State v. Patton,
14 322 S.C. 408. That's a 1996 case. I apologize.
15 All right.

16 THE COURT: All right. Patton seems to
17 talk in terms of the Court's discretion whether or
18 not to hold a suppression hearing based on general
19 allegations. I will hear from you on it.

20 MS. VAN PALA: May it please the Court,
21 I think I also -- if I can refer you to Patton,
22 which also states and I apologize, judge, I am just
23 now seeing this for the first time, Court's
24 indulgence.

25 What it talks about are contested

1 issues of fact. Yesterday we heard from Detective
2 Krasowski that there was, in fact, an error in the
3 Facebook search warrant. And the birthday issue
4 was wrong so there's contested issue of fact that
5 you heard yourself.

6 THE COURT: Aren't we past the
7 Facebook? I thought we were talking about the
8 phone records.

9 MS. VAN PALA: Right. And I think the
10 procedure was a little strange yesterday because
11 how we stopped and started, but Detective
12 Krasowski --

13 THE COURT: I can assure you had the
14 Court been aware of the extent of the pretrial
15 motions and the time necessary to hear them in
16 light of the fact I scheduled jury selection for
17 Tuesday morning, things might have been done
18 differently. The Court wasn't informed by counsel
19 of the need for additional time. So I agree the
20 procedure has been a little unusual.

21 MS. VAN PALA: I did just for the
22 benefit of the record inform Judge Dennis's law
23 clerk multiple times who is our chief
24 administrative judge and I did file these motions.
25 Judge, my last point even --

1 THE COURT: I am talking about the
2 information I got.

3 MS. VAN PALA: Yes, Your Honor.

4 THE COURT: Go ahead.

5 MS. VAN PALA: Even if we do concede
6 that Patton applies and in your discretion you
7 believe that -- you rule that we should have
8 specifically spelled our objections, I am still not
9 prohibited from --

10 THE COURT: I just said I will hear
11 from you on it.

12 MS. VAN PALA: On the phone record
13 issue?

14 THE COURT: I would like to know what
15 you're objecting to on the phone records, tell me.

16 MS. VAN PALA: Yes, Judge. It's what I
17 stated yesterday on the record. That the detective
18 who testified that the phone number [REDACTED] which
19 the State is attributing to Lefty which is saying
20 the alias for Te'Quan Perry, that phone -- those
21 phone records were traced back to a Joe Brown or a
22 Justin Brown.

23 I believe law enforcement followed up
24 with Joe Brown and could not find a Joe Brown or
25 found some trace of Joe Brown and couldn't confirm

1 it. They did, in fact, follow up with a Justin
2 Brown who says he doesn't know Te'Quan Perry, has
3 never met Te'Quan Perry. Te'Quan told the police
4 he had lost his phone, that his phone number was
5 the phone number that was attached to his mom's
6 family plan which was confirmed through other
7 witnesses. So the fact that law enforcement used
8 the [REDACTED] number in obtaining the search
9 warrants for the phone records and for Facebook I
10 think strikes to the heart as well as the -- excuse
11 me -- as well as the birthday issue. I think it
12 goes straight to the heart of the search warrant
13 and invalidates the search warrant.

14 MR. OSBORNE: Your Honor, I just have
15 to point this out now. Okay? We have a witness
16 that's here. Hugo Paredes is leaving this area I
17 believe the country tomorrow morning. Hugo Paredes
18 has spoken to their investigator about a week or so
19 ago. He informed them of that. I don't know
20 whether these are intentional acts to delay this
21 case, but it's getting to the point now we are
22 simply talking about this search warrant. Once
23 again we are getting off rails into other issues.
24 I don't know whether this is intentional or not, I
25 really don't. But if we continue on at this rate,

1 Hugo is gone. He is leaving the country and we
2 can't go any further.

3 To the one issue that we are dealing
4 with right now, probable cause for the search
5 warrant, I do not believe counsel can point to any
6 defects in that search warrant that would warrant a
7 hearing. The authentication and relevance, that's
8 all later.

9 MS. VAN PALA: I object to that
10 characterization again.

11 THE COURT: I will ask my question one
12 more time. What is the defect in the search
13 warrant you wish for me to consider?

14 MS. VAN PALA: That the phone number,
15 the crucial number, the [REDACTED] number as well as
16 the birth date, that those are verified, that the
17 detective would testify, the detective who swore
18 out the warrant would testify that those -- that
19 law enforcement attempted to verify and they did
20 not come back to Te'Quan. Yet they still had a
21 search warrant and are using the results of those
22 search warrants -- of those search warrants against
23 him.

24 MR. OSBORNE: There is no mention of
25 date of birth in the search warrant. There is no

1 mention of tracking done to the individual who owns
2 that phone in the search warrant. Once again,
3 intentional acts to delay.

4 MS. VAN PALA: I object to that
5 characterization, Your Honor.

6 THE COURT: Does the search warrant
7 reference anybody or just refer to a number?

8 MS. VAN PALA: I am sorry, Your Honor?

9 THE COURT: Does the search warrant
10 reference the owner of the number?

11 MS. VAN PALA: Court's indulgence.

12 MR. OSBORNE: It does not, Your Honor.

13 MS. VAN PALA: Does it reference the
14 owner of the number? Right? Because that's --

15 THE COURT: Then let me see it.

16 MR. OSBORNE: (Handing.)

17 THE COURT: What number were we talking
18 about?

19 MR. OSBORNE: The warrant is for the
20 number of [REDACTED].

21 THE COURT: Well, this says that his
22 phone provided the contact name Lefty which is a
23 documented alias of Te'Quan Perry with a phone
24 number of [REDACTED].

25 MR. OSBORNE: That's correct, Your

1 Honor. And to refresh your memory --

2 THE COURT: I remember there was a
3 phone with a set of contacts in it and that's what
4 was in the phone.

5 MR. OSBORNE: That was the victim's
6 phone, yes, Your Honor.

7 MS. VAN PALA: Your Honor, an
8 additional ground I also believe that the
9 characterization of Lefty being a documented alias
10 is incorrect based on what's been provided to us in
11 Rule 5 from the police department which are their
12 internal documents that they use for work ups on
13 subjects, for BOLOs and the like that often include
14 aliases and monikers, Te'Quan's records do not
15 include Lefty.

16 MR. OSBORNE: More intent to delay,
17 Your Honor. Your initial question was find me in
18 the search warrant where Justin Brown's name is.
19 It's not in there. She won't be able to produce
20 that. Now she's moving to informants or aliases of
21 Lefty. That's not even mentioned in the search
22 warrant either. The search warrant mentions that
23 the victim had contact with a contact by the name
24 of Lefty and on the victim's phone it was that
25 number.

1 MS. VAN PALA: I object again to the
2 repeated characterization. I have notified the
3 Court again and again that I had filed many
4 pretrial motions. My co-counsel was able --

5 THE COURT: Ma'am, I am trying to get
6 to your argument on the motions. The banter
7 between counsel is going to stop.

8 MS. VAN PALA: Thank you.

9 THE COURT: I will hold both of you in
10 contempt of court. I do expect answers to my
11 questions.

12 MS. VAN PALA: Could you repeat the
13 question, Your Honor.

14 THE COURT: Well, I asked about was
15 there a specific name or number mentioned in here.
16 The only thing I found was the one that I read and
17 it says there that the contact was Lefty from
18 Brandon's cellular phone and they said it was
19 documented as an alias of Te'Quan Perry with a
20 phone number of dat dat dat. I don't see any other
21 mention of a name or phone numbers in the warrant.

22 I do recall testimony that that was a
23 contact that was in the phone that was recovered.

24 MS. VAN PALA: Yes, Your Honor. In
25 Brandon, the victim's phone. My argument, however,

1 is that law enforcement did follow up with the
2 provider of that number and what the provider
3 provided was that it didn't come back to Te'Quan
4 Perry.

5 THE COURT: This warrant says that that
6 was the contact that was in the phone. It doesn't
7 say that it was recovered from the provider.

8 MS. VAN PALA: Yes, Your Honor.

9 THE COURT: I am trying to get to the
10 defect in the warrant that you are complaining
11 about.

12 MS. VAN PALA: Yes.

13 THE COURT: And since your motion
14 didn't specifically state it I am having to ask
15 detailed questions to find out. I am trying to get
16 to the point where I can do something with the jury
17 sitting down there.

18 So I would like for you to be
19 responsive to my question.

20 MS. VAN PALA: Yes, Your Honor. Our
21 argument is just that, that although the phone
22 number came back to Lefty and Brandon's phone, it
23 was registered to Joe Brown or Justin Brown who are
24 neither Lefty nor Te'Quan. That's a defect and we
25 submit that doesn't rise to the level of probable

1 cause.

2 The additional issue is the alias. We
3 don't know where that information came from, Judge.
4 So I submit that doesn't rise to the level of
5 probable cause.

6 THE COURT: Okay.

7 MS. VAN PALA: As to my motions in
8 general, I would respectfully request a recess,
9 that I do have additional pretrial motions. I have
10 additional pretrial motions that we have not yet
11 gotten to. Specifically --

12 THE COURT: All right.

13 MS. VAN PALA: We are addressing the
14 cell phone.

15 THE COURT: Are you planning on filing
16 more?

17 MS. VAN PALA: The ones that are
18 already filed.

19 THE COURT: I intend to address those
20 before we get to that point in the trial.

21 MS. VAN PALA: Yes, Your Honor.

22 THE COURT: All right. I don't want to
23 go past any of your motions. What we were
24 discussing was he has got three witnesses who after
25 today will be unavailable. He's asking that we go

1 ahead and take those three witnesses. Unless there
2 is something in those motions that would prevent
3 those witnesses from testifying, then I am inclined
4 to go ahead and take those witnesses and then
5 schedule time for you to complete the motions as to
6 information that might be developed from other
7 witness that have not yet testified.

8 MS. VAN PALA: Yes, Your Honor. I
9 understand.

10 THE COURT: Okay. I'm listening.

11 MS. VAN PALA: Court's indulgence.

12 (Off-the-record conference.)

13 MS. VAN PALA: Thank you, Your Honor.
14 I just ask that my objection be noted for the
15 record. I preserve the ability to make further
16 argument at the appropriate time.

17 THE COURT: Objection to what noted for
18 the record?

19 MS. VAN PALA: To not going forward
20 with my motions in limine.

21 THE COURT: Then you have to tell me
22 how it prejudiced you.

23 MS. VAN PALA: Court's indulgence.

24 (Off-the-record conference.)

25 MS. VAN PALA: Thank you, Your Honor.

1 The jury has already been waiting quite some time
2 while we deal with these matters of law. We submit
3 that it would be prejudicial to us to have the jury
4 coming in and out while we take up --

5 THE COURT: I don't intend for them to
6 come in and out.

7 MS. VAN PALA: We take up --

8 THE COURT: I don't intend for them to
9 come in and out. What I would intend to do is if
10 we could do the three witnesses, if you folks can
11 give me a reasonable estimate as how much time it
12 will take to finish the remainder of the motions, I
13 can start in the morning on the motions, have the
14 jury come in tomorrow afternoon. They won't be
15 coming in and out.

16 MS. VAN PALA: Yes, Your Honor.

17 THE COURT: I agree. I don't like them
18 popping just in and out.

19 MS. VAN PALA: I have nothing further.
20 Thank you, Your Honor.

21 THE COURT: So you are not claiming any
22 prejudice if we go forward with the three
23 witnesses; is that what I am hearing? I asked you
24 to articulate what prejudice you will suffer. I am
25 not going to let you get away with not giving an

1 answer, then arguing that later to some other judge
2 down the road. So you have to articulate prejudice
3 if there is any.

4 MS. VAN PALA: Well, it's in regard to
5 that cell phone number because one of the witnesses
6 that the State wants to call --

7 THE COURT: I will make a ruling on the
8 cell phone number. I think you have argued it
9 thoroughly, haven't you?

10 MS. VAN PALA: Yes, Your Honor. And my
11 final point would be under 403 it's unduly
12 prejudicial.

13 THE COURT: You are not seeking
14 admissibility now. The only question is whether or
15 not the search warrant should be suppressed.

16 MR. OSBORNE: That is correct, Your
17 Honor.

18 THE COURT: It is violative of the
19 Fourth Amendment of the Constitution.

20 MR. OSBORNE: Yes, Your Honor.

21 THE COURT: Again, if there is anything
22 else you want me to consider on that I will be glad
23 to hear. I am not trying to cut you off, but you
24 have made your argument on it. If there's
25 something else I will hear it.

1 MS. VAN PALA: Not at this time.

2 THE COURT: Anything from Mr.

3 Middleton's counsel?

4 MR. APICELLA: No, Your Honor.

5 THE COURT: I'm going to deny the
6 motion for suppression of the search warrant. All
7 right. I'm going to bring the jury in. I'm going
8 to schedule a one-hour lunch period. We will start
9 at 3:00. We will have opening statements. They
10 will have to be my opening comments, then we will
11 get to your witnesses. So plan to move along.

12 MR. OSBORNE: Thank you, Your Honor.

13 THE COURT: Let me bring the jury and
14 dismiss them for lunch.

15 (Whereupon the jury entered the
16 courtroom at 1:59 p.m.)

17 THE COURT: Ladies and gentlemen, I
18 want to thank you for your patience with me. This
19 has taken a longer than I anticipated, but at any
20 rate, I'm going to allow you to go get a bite to
21 eat at this point in time. Pretty late lunch, but
22 it's as soon as I could get you there.

23 So you are going to be leaving the
24 courthouse briefly. While you're away I'm going to
25 give you specific instructions. Don't go out and

1 attempt to gather any information about this case
2 from any source outside of the courtroom. You will
3 find that when you take your oath as jurors your
4 obligation is to decide this case solely based on
5 evidence presented during the trial in this
6 courtroom and the law given to you by this court.
7 So it would be a violation of your oath for you to
8 try to gather any information independently from
9 any source outside of this courtroom. Don't allow
10 anyone to discuss the case with you. Don't discuss
11 the case with anyone. We have gone to a lot of
12 trouble to get a jury that has an open mind
13 concerning the issues in this case. If you begin
14 to discuss this case even among yourself, the
15 nature of the charges, the people involved, the
16 personalities involved, that may begin to color
17 your decision and you haven't heard the first word
18 of evidence in this case yet. No testimony,
19 nothing about the law. So don't discuss the case
20 with anyone until I ask you to begin your
21 deliberations. It's okay to tell a family member
22 you have been picked on a jury and that when it is
23 over you will be able to talk about it. That's as
24 far as your conversation should go.

25 Now, it's against the law for anyone to

1 try to influence a jury. If anyone tries to
2 contact you about your service on the jury, report
3 that to this court as soon as possible. I will see
4 that the appropriate action is taken should that
5 occur.

6 I don't know whether this case is being
7 reported in the media. So if you were to be a
8 place where there is a television report, a radio
9 report, a TV report or a newspaper that may mention
10 it, do not read. Don't watch it. Don't listen to
11 it. Again, that would be a source of information
12 out of the courtroom; you should not consider that
13 at all.

14 When you come back I will be asking if
15 you've been able to comply with my instructions.
16 Please be in a position to tell me you have been
17 able to comply with them.

18 We will be back at 3:00 and we should
19 be able to resume shortly thereafter. At this time
20 you are free to go to lunch. The bailiffs will
21 show you out. Thank you very much.

22 (Thereupon, the jury exited the
23 courtroom at 2:05 p.m.)

24 THE COURT: We will resume at 3:00.
25 One thing, counsel, the attorneys remain seated

1 when the jury comes and goes. I think it's a
2 security issue and people are popping up all the
3 time. Just remain seated. Thank you very much.

4 (A luncheon recess transpired.)

5 THE COURT: State ready to proceed?

6 MR. OSBORNE: We are, Your Honor.

7 THE COURT: Ms. Van Pala?

8 MS. VAN PALA: Yes.

9 MR. APICELLA: We are, Your Honor.

10 THE COURT: All right. I understand
11 the jury has returned. Bring them in, please.

12 (Whereupon the jury entered the
13 courtroom at 3:01 p.m.)

14 MS. NORRIS: Your Honor, may we
15 approach?

16 THE COURT: Sure.

17 (Following proceedings were held at the
18 bench.)

19 MS. NORRIS: Your Honor, I wanted to
20 put on the record that the defense counsel have
21 agreed among us that Mr. Apicella will get first
22 opportunity at cross, statements, everything else.

23 THE COURT: So opening statements.

24 MS. NORRIS: He will go first on
25 everything.

1 THE COURT: That would be fine.

2 MS. NORRIS: Thank you, sir.

3 THE COURT: Congratulations, Mr.

4 Apicella.

5 (Following proceedings were held in
6 open court.)

7 THE COURT: Ladies and gentlemen, I
8 trust you had a good lunch break and if any of you
9 had any problems or difficulty in following my
10 instructions during your absence from the
11 courthouse please stand.

12 Let the record reflect that all jurors
13 have been able to comply with my instructions thus
14 far.

15 I told you that upon your return to the
16 courthouse you would be taking an oath concerning
17 your duties and responsibilities as jurors in this
18 case. So at this time I will ask the clerk to
19 please administer that oath. Madam clerk.

20 (Jury sworn.)

21 THE COURT: Let the record reflect that
22 all jurors have accepted the oath. Before we begin
23 the trial there's some things that I want to go
24 over with you. I am doing this because earlier I
25 asked about how many of you may have already been

1 on juries. Some of you have, but some of you
2 haven't. So for those who have never been in this
3 position there is some things I'd like to go over
4 with you so that you will understand a little more
5 about the roles and responsibilities that we have
6 in the trial, our separate responsibilities and
7 your obligations as jurors in this case.

8 If you have never been here before,
9 probably most of what you have learned what jurors
10 do during trials or in court you might have learned
11 from sources like books or television shows or
12 maybe movies you have seen, things of that nature.
13 While those are interesting sources of information
14 of course I hope you realize for example, when you
15 watch TV, an event can occur, they can try the case
16 and have it all wrapped up in the space of one hour
17 and they can still stop four or five times and try
18 to sell you something.

19 So I hope you realize that what you see
20 from those sources of information is sometimes
21 changed or altered to go along with the flow of the
22 story, the plot line of the story. That's because
23 that's intended to entertain you. What you're
24 involved in today and throughout this trial is
25 intended for anything but your entertainment. What

1 you're engaged in is a fundamental part of our
2 governmental structure. If you are looking around
3 the world today most of the governments in the
4 world you will find that most of those governments
5 do not allow their citizens to participate directly
6 in the decision-making process of the courts in
7 those countries.

8 As I indicated earlier, we are
9 different. We have a Constitution both in this
10 state and in the United States that guarantees
11 every citizen the right to a trial by jury of their
12 peers. This courtroom is a place of honor. It's
13 dedicated to the preservation of citizens rights
14 through those Constitutions and the laws both of
15 this state and of the United States.

16 I want to thank you very much again for
17 your willingness to come forward and serve as a
18 juror in this trial. If it weren't for citizens
19 like you who were willing to serve on juries, our
20 system could not function as it was designed by our
21 forefathers to function. So thank you for your
22 service and your duty in this case.

23 The lawyers are here to represent their
24 client's interests. I'm sure they will do an
25 excellent job in presenting their client cases to

1 you during this trial. But first and foremost most
2 laymen do not realize that lawyers are officers of
3 this court. That's their first duty and
4 obligation. And they have taken an oath. They
5 came before some judge and took an oath called the
6 attorneys oath. Part of that oath is that they
7 will assist you in your search for the truth in
8 this trial. For that reason you can expect that
9 the attorneys will act in a reasonable or
10 professional and an ethical matter in the
11 presentation of their cases before you. I will
12 remind you, too, that you just came in in front of
13 the Court. You just took an oath. Your oath is to
14 decide this case based upon the law and the
15 evidence presented during the trial. You, too, are
16 now expected to act in a reasonable or professional
17 and an ethical manner in the discharge of your
18 duties in this court.

19 Now, what I am telling you now is not
20 intended to charge you concerning the law that you
21 will apply in this case. Once all the arguments
22 have been made, all the evidence has been
23 presented, then at that time I will give you the
24 law right before you begin your deliberations. I
25 will charge you with the law at that time. Again,

1 I'm trying to go over with you the procedures and
2 the responsibilities that we both have in the trial
3 of this case.

4 I started the case by going over with
5 you the indictments in the case. I'm not going to
6 read those indictments to you again. I think you
7 recall what the charges are and I will explain to
8 you again that the indictment is simply the
9 document that brings the case to this court.

10 It informs us of the charges to be
11 tried. It informs the Defendants of the charges
12 lodged against them, but those documents are not
13 evidence. They cannot be used by you as evidence
14 of anything. The Defendants have pled not guilty
15 to those indictments. That plea under our system
16 of justice places the burden of proof solely upon
17 the State in this trial. It's the State's
18 obligation to prove the allegations contained in
19 the indictment to you by proof beyond a reasonable
20 doubt. It's your job as jurors to determine at the
21 close of the trial whether the State has met that
22 burden of proof.

23 In doing so, you will find that you
24 will be the sole judges of the facts of this case.
25 And I will serve as the sole judge of the law. I

1 will be presiding over the case. It will be my job
2 to rule on the objections that might be raised,
3 arguments over whether or not evidence should be
4 admitted into the record, whether proper procedure
5 is being followed. I'm going to caution you now
6 don't take from anything that I say or do in the
7 discharge of my duties as the presiding officer to
8 somehow indicate to you that I have an opinion one
9 way or the other as to how you determine the facts
10 of this case. You are the sole judges of the law
11 in the case. The law does not allow me an opinion
12 on the facts and I assure you I have no opinion as
13 to how you should determine the facts in this case.
14 So don't take from what I do or say to indicate
15 otherwise.

16 Now, the same law that makes you the
17 sole judges of the facts makes me the sole judge of
18 the law in the case. At the close of the trial I
19 will charge you on the law to be applied to the
20 facts as you find the facts to be. The law I give
21 you is the only law that you can use under your
22 oath to determine the verdict in the case.

23 If you came into the courtroom with an
24 opinion or an idea as what the law is or what the
25 law ought to be, those opinions should be left

1 outside of the jury room. Your job is to take the
2 law exactly as I give it to you, apply that law to
3 the facts as you decide the facts in the case to
4 be. That should put you in a position to render a
5 verdict in this case.

6 It's going to be your job under your
7 oath to determine the effects, the value, the
8 weight and the interferences that can be drawn from
9 the evidence in this case. I will tell you as the
10 finder of facts it necessarily will become your
11 responsibility to determine the credibility and the
12 believability of the testimony that you hear.

13 In doing that I will ask you to use
14 your good common sense. You do that every day.
15 You don't even think about it, but you make
16 commonsensical decisions every single day as to
17 what you choose to believe and what you choose not
18 to believe.

19 Serving on a jury is no different than
20 that experience. Use your good common sense in
21 deciding which testimony convinces you of its truth
22 or believability or its credibility. In doing that
23 you have the right to believe all of what a witness
24 may state, you have the right to believe part of
25 what witness may state, you have the right to

1 believe none of what a witness may state. You have
2 the right to believe one witness against all the
3 others who testify. You can believe all the others
4 against one. You're the sole judges of the facts.
5 That makes you the sole judges of the credibility
6 or the believability of the witnesses.

7 You have the right to consider such
8 factors as whether or not a witness may have a
9 stake in the outcome of the trial, whether or not a
10 witness may exhibit a bias or prejudice in favor of
11 one side or the other. You have a right to
12 determine whether or not a witness has the ability
13 to know the facts about which that witness may
14 testify. And I have been coming into courtrooms
15 now I hate to say it, it's about 42 years I have
16 been doing that. And I have never been in a
17 courtroom where the witness stand wasn't right
18 beside the jury box. The reason for that is we
19 want the jury to observe the witnesses directly as
20 they testify, the way they speak, how they deliver
21 a response to the questions. You have the right to
22 consider any of the factors I just mentioned using
23 your own good common sense and make a determination
24 as to the credibility or the believability of the
25 testimony that you hear during the trial.

1 For that reason I'm going to ask you to
2 pay close attention to what goes on in the
3 courtroom. Try not to let your thoughts wander.
4 We will try to take a break at least about every
5 hour and-a-half or so to let you refresh yourself
6 so you don't become totally zoned out on it. We
7 want you to be fresh in listening. Try to pay
8 attention to what goes on in the courtroom. Listen
9 to what's being said. Try to be in a position that
10 at the close of the trial when you go into your
11 deliberations to be able to discuss credibility
12 issues with your fellow jurors during your
13 deliberations on the case.

14 Now, I want to caution you about one
15 thing. From time to time it may be my duty to rule
16 on questions of the admissibility of evidence or
17 some document that's being offered into evidence,
18 things of that nature. And if I have to do that
19 and it's my belief that the discussion that I might
20 have with the lawyers may lead to a discussion
21 about some matter that would not be admissible
22 under the rules that govern what comes into a
23 trial, if I think it is going in that direction I
24 may ask you, the jury, to step outside while I have
25 that discussion with the lawyers.

1 Again, it's not me trying to influence
2 your decision on the fact. It is me doing my job.
3 My job is to see to it that you decide the case
4 based only on evidence that's been properly
5 admitted into the record under the rules of
6 evidence that govern the admission of evidence in a
7 courtroom. So if I ask you to leave, don't be
8 surprised. Again, I'm not trying to influence your
9 decisions, but when you come back I will announce
10 whatever ruling I made, we will proceed with the
11 trial. That's the reason I may ask you to leave
12 the courtroom while arguments are taking place
13 concerning certain procedural matters that might be
14 going on in the trial.

15 Now, one other thing I want to point
16 out to you. In a moment we are going to begin the
17 trial. At that time the attorneys will be making
18 statements to you and I will point out to you that
19 during the trial the lawyers are allowed to talk
20 directly to you only on two occasions. One is at
21 the beginning of the trial when they give what is
22 called an opening statement. They tell you a
23 little bit about what the case is about, or perhaps
24 what they expect you to understand about the issues
25 that are before us.

1 Then at the close of the trial once all
2 the evidence is in they are allowed to give their
3 closing argument or summation. At that time what
4 they will do is offer the evidence that you heard
5 in the trial and try to ask you to draw certain
6 inferences from that evidence or conclusions from
7 that evidence. So that's their closing argument or
8 statement. Statements made by lawyers during a
9 trial themselves are not evidence. The only
10 evidence in a trial is the statements of witnesses
11 who under oath who are sworn to tell the truth who
12 testify from that witness stand and whatever
13 documents or other evidence goes into the record of
14 the trial either through that testimony or by
15 agreement by the lawyers for it to go into the
16 record. So that's what we are referring to when
17 you decide the case based on the evidence. That's
18 the testimony of the witnesses, whatever documents
19 or other information comes into the record through
20 that testimony or by the agreement of counsel.

21 Now, I don't want you to think I have
22 forgotten something. I have been doing this now
23 for a while and I'm a little different than the
24 television judges and I don't appoint a foreperson
25 of the jury until I give you my charge on the law

1 right before you begin your deliberations.

2 Up to that point really the foreperson
3 has very little function to do. I do that for a
4 reason I want to stress to you. At the close of
5 the trial when you began your deliberations you
6 cannot reach a verdict in this case unless all 12
7 of you agree upon the verdict. In other words, it
8 is not a verdict of the jury until everyone
9 unanimously agrees to the verdict. For that reason
10 there is no one more important than any other
11 juror. You're all equally important in reaching a
12 decision in this case. I don't want any of you to
13 think that if I pick someone to serve as a
14 foreperson that somehow I have decided that it's
15 the most important person or the smartest person on
16 the jury and you can sit back and just let them
17 listen and do whatever they tell you to do. I want
18 each of you to think that you are going to be the
19 person who is responsible for conducting the
20 discussions of the jury. For that reason I will
21 appoint that person at the close of the trial. It
22 can be any one of you. Pay attention as if it's
23 going to be you because for one of you that will be
24 true.

25 Now, in the meantime if there is some

1 issue or some matter that comes up that you think I
2 need to be aware of, you don't have to go through
3 the foreperson to communicate with me. Just let
4 the bailiffs know whatever issue or problem you
5 have. They will let me know and I will deal with
6 it accordingly. So if you have any problems during
7 the trial, just let us know what's going on and
8 what you think is being improperly done or anything
9 of that nature. I will be glad to deal with that
10 should that come up.

11 Now, I want to be sure I have not
12 violated anyone's rights in what I have said to you
13 thus far. Does the State have any objection to my
14 opening comments?

15 MR. OSBORNE: No, Your Honor?

16 THE COURT: Any objection from the
17 defense?

18 MR. APICELLA: No.

19 MS. VAN PALA: No, Your Honor.

20 THE COURT: Now, what we are going to
21 do as I explained to you, the State has the burden
22 of proof in the trial, the only burden of proof.
23 For that reason the State gets to go first in its
24 opening argument followed by the Defendants and
25 then the State can begin to present their evidence

1 first since they have the burden of proof followed
2 by any evidence the defense wishes to put in.

3 Now, once that evidence has been
4 completed the attorneys will again get another
5 chance to talk to you directly. They will do
6 closing statements. Once the closing statements
7 are completed that's when I charge you on the law.
8 The last thing I will do is appoint that foreperson
9 and then you will go back to the jury room to begin
10 your deliberations. So it is opening statements,
11 presentation of evidence, closing statements,
12 charge on the law and deliberations.

13 So that's what we are going to go
14 through as the trial proceeds. So since the State
15 has that burden of proof, Mr. Osborne, you may
16 proceed for the State.

17 MR. OSBORNE: Thank you, Your Honor.
18 May it please the Court, Back to Green. Back to
19 Green is a neighborhood in Charleston. It's one of
20 the more violent, dangerous neighborhoods in
21 Charleston. It's not far from here. If you are
22 familiar with the Crosstown, there's the
23 McDonald's, the Taco Bell, River Dogs Stadium, it's
24 the neighborhood right there. The men that hang
25 out in Back to Green, they live by their own set of

1 rules. When those rules are broken or they
2 perceive them to be broken they don't call the
3 police, they don't gather evidence and they don't
4 talk to witnesses. If you find yourself on the
5 wrong side of that dispute you can try to talk to
6 them, try to clear your name, but they are not to
7 going want to hear it. They render swift, harsh
8 punishment. These two men are such men. Te'Quan
9 Perry and Devin Middleton.

10 Their decision to coax, then attack,
11 then gun down an unarmed man should have a
12 consequence. And a consequence not on the streets
13 of Back to Green, but right here in this courtroom.

14 Now, the victim in this case, Brandon
15 Washington, was also one of those men. Brandon
16 Washington hung out in Back to Green a lot. And
17 his mother Ms. Peggy Mitchum told him, you got no
18 business down there. What are you going back there
19 for. The lure of Back to Green was just too much
20 for him. And it ended up costing him his life.

21 Brandon had a friend in Back to Green.
22 That man, the second defendant in this case, Devin
23 Middleton. They hung out about every other day.
24 They had known each other for a couple of years,
25 but Devin had a better friend. That man. The

1 first Defendant, Te'Quan Perry. When Te'Quan
2 believed that Brandon had wronged him in some way
3 Brandon would have a problem not just with Te'Quan,
4 he had a problem with Devin too.

5 Now, I mentioned to you that the area
6 of Back to Green is violent. It is. And as a
7 response to that the police department has put up
8 cameras, surveillance cameras throughout Back to
9 Green in an attempt to try to curb the violence.

10 You will see on that surveillance video
11 on the day that Brandon is murdered March 23rd,
12 2015, he comes down to Back to Green. He gets
13 dropped off by his friend in a Dodge Charger.
14 Almost immediately after he is dropped off on
15 Ashton Street right in front of the area in which
16 he would end up getting gunned down he is met with
17 or met by Demarco Jones, AKA Duke, and Denardo
18 Felder.

19 Now, Denardo Felder lives in an
20 apartment that's right there underneath the alley
21 from which Brandon was gunned down. Duke is
22 Brandon's blood. That's his cousin. Duke plays a
23 significant role in this case. Now, when Duke and
24 Denardo end up meeting up with Brandon there's
25 something going on in the background that Brandon

1 is not even aware of. And that something is that
2 there is something being hatched. You will see
3 communication between these two individuals,
4 between the two Defendants, and shortly after
5 Brandon's arrival in Back to Green you will see an
6 individual in a tan jacket arrive.

7 You will watch that tan jacket and you
8 will see communication which the State is going to
9 say and I think we are going to prove to you is
10 between Te'Quan and Brandon. And then you'll see
11 Brandon and the guy in the tan jacket start to meet
12 up, all right? And then you will watch Brandon.
13 He walks toward the tan jacket. He's going to talk
14 to him. Tan jacket is not alone. Got a whole
15 crowd of people behind him. When he comes out of
16 that alley you'll see another person, another
17 person, another, another person. And when Brandon
18 sees that he is not alone he stops dead in his
19 tracks. You will watch what Brandon does then. He
20 start gesturing. He's upset. He thought they were
21 going to talk. That is not a display that lets him
22 think they are going to talk about anything.

23 They coax him over. You will see the
24 crowd. And Brandon falls for it. Brandon comes
25 over. Then the tan jacket and Brandon walk away.

1 And you will see that the individual in the tan
2 jacket and Brandon are having a conversation.
3 Brandon's demonstrative. He's talking to him. He
4 is carrying on. It's very animated. Tan jacket is
5 just standing there. He does not want to hear it.
6 Then tan jacket and Brandon then walk back toward
7 the crowd. That was a mistake Brandon will never
8 overcome because it would be literally on a
9 stopwatch from that moment on where that crowd
10 waited for the right moment and when the right
11 moment came there was a call to arms and it was
12 sounded by Devin Middleton. He is the one that
13 began the attack. He swung at Brandon. Brandon
14 ducks. Moves back. The camera pans.

15 When the camera pans back you will see
16 Brandon. Sleeves coming up, hikes up his pants.
17 He gets in a fighter stance facing off against
18 Devin. This is a fight he won't win. Because
19 almost immediately another individual who is out
20 there, Davontay Bryant, AKA Smash, comes and runs,
21 jumps on some wood and comes and tries to punch
22 Brandon. Brandon ducks again. He moves back.
23 Instinctively he picks up a board to defend
24 himself. At that moment Nardo and Duke then join
25 in.

1 Brandon drops the board. He realizes
2 he's in trouble. He starts to walk around and as
3 he is walking around they circle him. And when
4 they circle the last thing that you will see is
5 Brandon right in front of the alley. I'm going to
6 show you that there is a porch and there's a
7 railing on the porch. You can see a little glimpse
8 of another individual in that alley. Guy in the
9 tan jacket. You know that because after it pans,
10 the camera pans, it will come back and when it does
11 everyone is running. Shots have already been
12 fired. And then you will see the tan jacket come
13 walking out, hands in his pocket and then starts
14 running. Runs right by Devin and Davontay.

15 Now, I have told you a lot about what
16 you are going to see. I will tell you some things
17 that you won't see. This murder happened in an
18 alley. The video is not going to pick that up.
19 The video picks up what's happening on Ashton or
20 Norman, not in the alleyway of ■ Norman. You are
21 not going to have any witnesses that actually saw
22 the shooting. And the reason why that is is
23 because the people that saw the shooting are Devin
24 Middleton, Duke, Denardo and Smash. And the guy
25 that did shoot him. You are not going to have

1 physical evidence that's going to tie Te'Quan Perry
2 or Devin Middleton into actually having pulled the
3 trigger.

4 We will explain to you why that's not
5 uncommon. But what you will see is by the end of
6 this trial I would submit that you are going to be
7 firmly convinced that the individual that was in
8 that tan jacket was none other than the Defendant,
9 Te'Quan Perry. And Devin Middleton assisted him in
10 the murder of Brandon.

11 Now, I want to talk to you briefly
12 about the law. This is something important here.
13 If I say anything that's different, for that
14 matter, Ms. Van Pala, Ms. Norris or Mr. Apicella
15 says anything different than what the judge
16 instructs you at the end of this trial, follow the
17 judge's instructions. Ignore us.

18 We have charged both the Defendants
19 with conspiracy. Conspiracy simply means it's a
20 combination between two or more people for the
21 purpose of accomplishing a criminal object. We
22 will talk about that later.

23 Now, you may be asking yourself you are
24 telling us that the State's position is that
25 Te'Quan Perry is the individual who actually pulled

1 the trigger and shot Brandon. Why is Devin
2 Middleton on trial? In South Carolina the hand of
3 one is the hand of all. If a crime is comitted by
4 two or more people who are acting together in
5 committing a crime, the act of one is the act of
6 all.

7 Both Devin and Te'Quan have been
8 charged with murder. Defendants killed another
9 person with malice aforethought. Malice
10 aforethought is kind of oddly worded. It's an old
11 English term. It's not particularly complicated.
12 We will talk about that at the end of the trial.
13 The judge will you about that too.

14 Te'Quan is the only one whose been
15 charged with possession of a weapon during the
16 commission of a violent crime. The Defendant was
17 in possession of a firearm during the comission of
18 a violent crime. Pretty self-explanatory. Murder
19 is a violent crime. If you believe that Te'Quan
20 Perry is the one who shot and killed Brandon you
21 may also elect to convict him of this crime.

22 When the trial is over I'm going to ask
23 you all to show these Defendants what real justice
24 is. And it's not on the streets of Back to Green.
25 It's in this courtroom. I'm going to ask you to

1 convict them both for murdering Brandon Washington.

2 THE COURT: Thank you. Yes, sir. You
3 may proceed with Mr. Middleton.

4 MR. APICELLA: Thank you, Judge. Good
5 afternoon, ladies and gentlemen. My name is John
6 Apicella. My client is Devin Middleton, gentlemen
7 sitting here in the white shirt. We are here for
8 one reason, because Devin Middleton said he didn't
9 do it. Listen to the judge's brief instructions to
10 you. I know you will listen to them carefully and
11 you noted he said the defense doesn't have to prove
12 anything. The defense has no burden of proof. So
13 the logical question you are asking yourself is
14 well, Mr. Apicella, why are you even talking to us?

15 Now, well I am doing it for two
16 reasons. One it is my one of only two
17 opportunities to talk to you. And second of all,
18 as my duty as an officer of the court I want to
19 outline the case and set what I think the case will
20 show you so that when I finally have my last
21 opportunity to speak with you in summation that I
22 can look all of you in the eye and ask you to
23 acquit my client, been a long day, because there is
24 no evidence to convince you beyond a reasonable
25 doubt that my client committed the two crimes that

1 he is charged with, conspiracy and murder.

2 And I want you to look at what I call
3 facts beyond change. And this should strike a cord
4 with you because the judge told you you are the
5 judges of the facts. Everyone is entitled to their
6 own opinion, but everyone is not entitled to their
7 own facts and what the facts are are very
8 important. The facts are beyond change. Number
9 one, my client did not possess a gun, did not shoot
10 a gun, and did not kill the decedent in this case,
11 Mr. Brandon Washington. You know that from the
12 solicitor's own opening statement because my client
13 is not charged with possessing a gun or the
14 commission of a violent crime so you know that he
15 is not the shooter.

16 He described this neighborhood as some
17 sort of I mean violent hell hole? Really? I don't
18 know when the last time he was there, but it's a
19 wonderful place before they built that stupid
20 Crosstown and now it is divided. But it's not that
21 type of place. It's a neighborhood where people
22 live. People just like you, people like me. Thank
23 goodness there was surveillance video. It is right
24 there on the corner. It's no secret. It's not
25 like it's hidden or even camouflaged. It is there.

1 Everybody knows it is. And I can say for you thank
2 goodness there is surveillance video. You will see
3 that video. And I submit to you that when you see
4 that video and you look at it, it's going to not be
5 the description that the solicitor gave you. First
6 of all, there's no audio. Second of all, it's from
7 a surveillance camera that distorts the view
8 because it is wide angle. It is grainy, but it
9 does show people there. It shows an interaction,
10 shows people running like hell. That's what is
11 important. The witnesses who viewed the action on
12 the street all describe it the same. Play
13 fighting. BS'ing around. Neighborhood guys
14 hanging out doing what they do.

15 In fact, there's a special word for it.
16 Called skylarking, the language of Charleston.
17 It's skylarking. But it's the same thing you have
18 heard, to be narrative, to fool around. Well,
19 that's what this was.

20 Now, unfortunately Mr. Washington was
21 killed. The police came. And when they came my
22 client was there standing on the corner a few doors
23 down. All you will see the video. It looks like
24 he is far away, he's really not. He is not more
25 than from the back of that room to where I am.

1 That's the street. It is not that wide. It's two
2 doors down in front of the church just standing
3 there.

4 Police come. First officer on the
5 scene is one of the beat cops. You will hear him
6 testify he knows that neighborhood. He knows
7 everybody in the neighborhood. That's his beat.
8 He drives around. He keeps it under watch. He
9 knows who to stop. He knows who to talk to. He
10 knows what to do. And he sees my client Devin
11 Middleton and you'll see him patting down my
12 client. He notes his name. And then he proceeds
13 to participate in the investigation and give the
14 information of what he saw, namely, my client Devin
15 Middleton there.

16 Now, the police know there is
17 surveillance video. They get that and see a group
18 of guys, neighborhood guys, four to five, sometimes
19 there's six, sometimes there is three, moving in
20 and out. And they see what appears to be an
21 altercation, play fighting, what the solicitor
22 described as a real fight.

23 Our position is it is exactly the way
24 it appears to be on the video. Guys fooling
25 around. You know it's guys fooling around because

1 even if to see himself as he is participating in
2 this skylarking he picks up what looks like a two
3 by four, but it's a piece of a bed frame and
4 threaten to hit somebody with it. But there's no
5 striking anyone. He just throws it back down on
6 the street and they continue.

7 Now, you're going to see a still
8 photograph from that video which the solicitor has
9 prepared and will be put up on the screen. And it
10 shows Mr. Washington and it shows my client Devin
11 Middleton in a position like this. (Indicating.)
12 Like this. And to an officer looking at it it
13 appears like he might have a gun in his hand. And
14 since we have unfortunately a victim of a shooting
15 who died from gunshot wounds, the police think
16 whoa, this might be our guy. I think we should
17 talk to him.

18 So two days later Mr. Middleton is on
19 the street. An officer sees him. He stops him and
20 invites him to come to the police station to speak
21 with him. He goes voluntarily. He sits down and
22 he explains that he was there. He admits that he
23 was there. And the police say you are in trouble
24 because this is all on videotape and you will hear
25 a recording of that interview. You will hear my

1 client's words explaining that he didn't do
2 anything. Police says oh, we have surveillance
3 video. His answer is thank goodness. The video
4 will show that I didn't do anything. Oh, no it
5 shows a lot more than that. No, it doesn't, I
6 didn't do anything. Yes, it does. Wait until you
7 see the video. Well, show it to me. And this goes
8 back and forth.

9 At some point my client tells the
10 police that listen, I didn't do anything. In fact,
11 these are the clothes that I was wearing. You can
12 see me in the video wearing the same clothes. And
13 what I had in my hand was not a gun. It was pepper
14 spray. And that's the same pepper spray that I
15 have on me.

16 Now, the police realize that what first
17 made my client a suspect was their belief that my
18 client was the shooter. Now they realize he's not
19 the shooter. So they get his clothes. They take
20 the pepper spray. They think that's important.
21 And we submit that it is important because it shows
22 that he didn't have a gun. It shows that he did
23 not commit the crime.

24 We are going back to the video, and you
25 will see as the solicitor said that video

1 unfortunately pans around. So we never see what
2 happens in that alley. But what we do see is when
3 it comes around again people running, fleeing, and
4 I believe at the end of the case that the judge may
5 instruct you that flight, you can consider flight
6 an indicia of a guilty conscience. My client
7 doesn't run. He stands there and waits for the
8 police to come. My client voluntarily goes into
9 the police and tells them what happened. The
10 police take his clothes. They take his phones and
11 they let him go. He is not arrested until six
12 months later. And that in the essence is the sum
13 and substance of the evidence in this case. And I
14 submit to you, ladies and gentlemen, that in order
15 to convict my client the people have to prove that
16 play fight caused the death of Mr. Washington and
17 that my client being in that play fight is guilty
18 of the crime of murder, but there is nothing to
19 connect it.

20 And when you hear the law you will hear
21 the judge tell you that mere presence is not
22 enough. Mere presence even with knowledge is not
23 enough. And at the end of the case you will see
24 there is no evidence to connect my client to the
25 shooting of Mr. Washington. The theory is that

1 well, this happened so this happened. And at the
2 end of the case I will refer back to what I am
3 going to say now and then I am going to sit down.
4 There is a Latin phrase that handles and defines
5 this false and faculty logic that because one act
6 happens ergo the second act is caused by the first
7 act.

8 You know, every morning that rooster
9 crows. After that rooster crows the sun rises. It
10 doesn't mean that the rooster caused the sun to
11 rise.

12 Because my client participated in a
13 play fight and Mr. Washington was shot in an alley
14 by one or more unknown shooters doesn't mean that
15 my client is responsible for the death of Mr.
16 Washington. Not without evidence. And I submit
17 what the State is going to attempt to show you is
18 not evidence of my client's guilt. More will
19 follow at the end of the case. I will talk to you
20 again in summation when I am finished.

21 I'm going to look you all in the eye
22 and ask you to acquit my client because there is a
23 reasonable doubt. There is a chasm of doubt in
24 this case. Thank you.

25 THE COURT: Ms. Van Pala, you may

1 proceed.

2 MS. VAN PALA: Thank you, Your Honor.
3 May it please the Court, gentlemen. The solicitor
4 just indicted the entire neighborhood of Back to
5 Green. And Te'Quan Perry doesn't even live there.
6 The State will show you that he lives in North
7 Charleston. Back to Green, this a very violent
8 area that the prosecutor just described to you is a
9 predominantly black neighborhood. The question
10 that I ask myself is what does that prove? What
11 does the fact that a young man was murdered in a
12 predominantly violent area prove? Does it prove
13 that Te'Quan Perry murdered Brandon? I submit to
14 you no, it doesn't. We don't know who killed
15 Brandon.

16 Brandon was killed in an alleyway at ■
17 Norman Street. It's an area between two houses.
18 It's a driveway. You will see that there's an
19 entrance to the driveway. That's the street, the
20 sidewalk. At the end of the driveway you'll see
21 that there is a backyard. They call it the cut.
22 The reason why it's called the cut is because it's
23 a cut through. It cuts through from Norman Street
24 to the Crosstown. Brandon disappeared into that
25 cut and so did his killer. Very busy neighborhood.

1 Back to Green is a very busy area. Daylight at the
2 time. People everywhere. Lot of foot traffic.
3 Bicycles bicycling down Norman Street cutting
4 through the yard to the Crosstown. You'll see that
5 on the surveillance cameras, but you won't see what
6 happened in that cut. The surveillance cameras
7 here are the real witnesses in this case. They sit
8 on top of a pole and they run and they swivel
9 24 hours a day. They are run by the government.
10 Charleston County. They are overseen by the
11 government, Charleston County. Yesterday in jury
12 qualifications Judge Jefferson told you about the
13 high definition bubble cams. Those are like the
14 pole cams on Norman Street. But they will only
15 show you so much. I submit to you that's the real
16 evidence in this case.

17 Mr. Apicella talked about facts beyond
18 change. And I think about it more like what the
19 real evidence is, what the State will prove to you,
20 at the end of the case what you'll know. What
21 you'll know about what happened to Brandon. What
22 you won't see on the surveillance cameras.

23 I'll submit to you that in that
24 driveway there's a door to an apartment complex.
25 It's described as a breezeway. It's described as a

1 hallway. There's an open door. Young men are
2 congregating there often. What happened was the
3 killer could have retreated into the house. The
4 killer could have cut through the neighborhood, hit
5 the Crosstown and was gone.

6 The surveillance will show you that
7 there are young men in the area standing at the
8 mouth of the cut and once the camera pans it will
9 pan back around and you will be able to see again
10 the mouth of the cut at Norman Street. And you'll
11 see an individual in a jacket walk out of the cut
12 and then run. Meanwhile Devin, another individual,
13 young man standing there, stands there and waits
14 for the police. What we think happened is that
15 individual in the raincoat heard shots, then took
16 off running.

17 Another big witness in this case are
18 communications. The communications that the
19 prosecutor told you about. Again, what's the real
20 evidence in this case? What the communications
21 will show you is that these guys were friends, that
22 they knew each other. That they hung out. What
23 does that prove? The communications are like
24 second battalion for law enforcement. The pole
25 cameras show us something, they will show us some

1 of the real evidence and perhaps the communications
2 will show us something.

3 But I don't think they do. Because
4 they are not going to answer the ultimate question
5 in this case. They are not going to answer the
6 question for you whether Te'Quan killed Brandon.
7 The surveillance camera will not show you who
8 killed Brandon. The communications will not show
9 you who killed Brandon. We still will not know who
10 killed Brandon. Te'Quan didn't kill Brandon.

11 A little more about the evidence that I
12 think you will see that I think is real evidence.
13 You will hear about how Te'Quan talked to the cops.
14 He told the officers that he did not have anything
15 to do with Brandon's murder.

16 Now, what you won't see I submit to
17 you, you won't see any pictures of Te'Quan shooting
18 Brandon. You won't touch a smoking gun or any gun
19 for that matter. You are not going to be able to
20 read the DNA results for fingerprints or any other
21 kind of DNA or fingerprinting that points the
22 finger at Te'Quan. None of this evidence that I
23 told you that you will see in this trial will
24 ultimately answer the question of who killed
25 Brandon. Some of these things don't make sense.

1 And I ask you to indulge your curiosity. Please
2 pay attention. Please think critically about what
3 the evidence is actually telling you. Please keep
4 an open mind and think about the kind of evidence
5 that you're seeing and if that kind of evidence
6 will help you answer the ultimate question in this
7 case.

8 The ultimate question in this case is
9 beyond a reasonable doubt did Te'Quan kill Brandon.
10 Te'Quan is cloaked in the presumption of innocence.
11 The judge told you a little bit about your law.
12 The presumption of innocence is the most important
13 canon in our law. The presumption of innocence
14 remains with Te'Quan and it follows him throughout
15 the trial until you are convinced of his guilt
16 beyond a reasonable doubt. You won't be. Beyond a
17 reasonable doubt. That's the most rigorous
18 standard in our law. The highest standard, the
19 most important. I will have plenty of an
20 opportunity to explain to you what I think that
21 means at the end of the trial, but I ask you to
22 think about it this way.

23 A reasonable doubt is something that
24 would make you hesitate. So you are considering
25 the ultimate question in this case, whether Te'Quan

1 killed Brandon, if you think there's a suspicion
2 that he killed him, that is not enough. Does not
3 meet the standard. Not enough. If you think
4 there's a possibility that he killed him, that
5 isn't enough either. If you think it was probably
6 he killed him, that's not enough either. Even if
7 it's likely. That's not enough either.

8 The State will not be able to answer
9 that question and will not be able to satisfy you.
10 The State will not be able to prove beyond a
11 reasonable doubt that Te'Quan killed Brandon.

12 Devin is also charged with murdering
13 Brandon and conspiracy. What's going to be very
14 important in this case is to realize that all these
15 very important legal principles that I just told
16 you about, they belong to Te'Quan separately and to
17 Devin separately. That means that the prosecutor
18 will have to prove to you beyond a reasonable doubt
19 that Te'Quan killed Brandon separately then Devin.
20 The evidence that applies to Devin's case, the
21 evidence that you think will prove Devin's guilt
22 does not apply to Te'Quan. Only the evidence that
23 the State can show you that applies to Te'Quan you
24 can consider. The rules that apply to Te'Quan.
25 You must consider them separate. There are two

1 individuals. There are two separate indictments.
2 And when you retire to your deliberations, you will
3 have to fill out different verdict forms. You will
4 have to make separate decisions. You will have to
5 decide that Te'Quan -- whether Te'Quan is guilty
6 separately then Devin. Please be very careful when
7 you are considering not only the kind of evidence
8 that you are seeing, but also whether it applies to
9 Devin or to Te'Quan. This is an important day for
10 Te'Quan. He is 22 years old. He's in the dawn of
11 his life. Please remember the presumption of
12 innocence and that you're not going to know who
13 killed Brandon. You are not going to see into that
14 cut. You won't know what happened in that hallway.
15 Te'Quan didn't kill Brandon. Te'Quan is not
16 guilty. Thank you.

17 THE COURT: State may call its first
18 witness.

19 MR. OSBORNE: Thank you, Your Honor.
20 State calls Hugo Paredes.

21 HUGO PAREDES

22 having been duly sworn, testifies as follows:

23 THE CLERK: Once seated state your
24 first and last name and spell your last name.

25 THE WITNESS: Hugo Paredes,

1 P-A-R-E-D-E-S.

2 DIRECT EXAMINATION

3 BY MR. CORVEY:

4 Q. Thank you, Mr. Paredes. Is it all
5 right if I call you Hugo?

6 A. Yes.

7 Q. I just want to start before we get into
8 why you are here with just familiarizing the jury a
9 little about yourself. Can you tell us about your
10 background, what you do, where you are from?

11 A. Well, I'm from Mexico. I have been in
12 U.S.A. for 18, 20 years. I'm basically a -- do
13 construction. I am roofing contractor. That is
14 what I do for a living. I have three kids. And
15 that's what I do for a living.

16 Q. You own your own company?

17 A. Yes.

18 Q. For roofing. So with that background,
19 I want to get into a little bit about what was
20 going on with you the day of March 23rd, 2015. Do
21 you remember that day?

22 A. Yes.

23 Q. What were you doing on that day earlier
24 in the day?

25 A. Well, I was visiting some customers

1 around town. That afternoon I went and got one of
2 my kids from school.

3 Q. Picked them up at school?

4 A. Yes.

5 Q. Where was that?

6 A. That was on West Ashley. After that I
7 went around and get my other kid downtown. And
8 then I went driving to Mr. Pleasant to see a
9 customer. On way back I was driving across town
10 over Highway 17.

11 Q. Let me stop you right there.

12 Approximately about what time were you driving back
13 from Mt. Pleasant?

14 A. It was around 4:20, 4:30 in the day.

15 Q. So you are then driving back. You had
16 the meeting with the customer, then time passes and
17 what are you doing?

18 A. After that I was driving back Crosstown
19 to West Ashley and drop my kids with their mom.

20 Q. So you're driving home to drop your
21 kids off at home?

22 A. Yes.

23 Q. Traveling on the Crosstown headed into
24 West Ashley?

25 A. Yes.

1 Q. I want to show you just so the jury can
2 kind of follow along with us while we are going
3 through --

4 MS. NORRIS: Your Honor, we have a
5 matter of law we need to take up.

6 THE COURT: Yes, ma'am.

7 MS. NORRIS: Out of the presence of the
8 jury, please.

9 THE COURT: Can you give me some clue
10 what it might be.

11 MS. NORRIS: Yes.

12 (Following proceedings were held at the
13 bench.)

14 MS. NORRIS: Your Honor, we have been
15 handed photos that they intend to introduce through
16 them and at this point we think this gentleman is
17 going to testify truthfully that he stopped at a
18 red light. He heard some shots. The light
19 changed. He took off driving. Again, he didn't
20 take these photos. They want to put that in front
21 of the jury so they can say well, you know, he had
22 this nice clear shot. These photos weren't taken
23 at the same time or they were taken months later.
24 I can tell you for example --

25 THE COURT: I'm going to listen to his

1 testimony, not yours.

2 MS. NORRIS: I know, Judge. I object
3 to any of this.

4 THE COURT: You can make the objection.

5 MS. NORRIS: In his statement to the
6 police he said he was a hundred yards off from what
7 he says. This picture does not show a football
8 field in question.

9 THE COURT: You can point that out in
10 cross-examination. I can't tell if it's a picture
11 of the scene. If it's not an accurate picture of
12 the scene it goes to his admissibility. You are
13 going to ask him whether or not that would be a
14 picture from his perspective. You can ask him
15 that. Do you want to put that on the record? I
16 don't mind.

17 MS. NORRIS: I thought that was the
18 point.

19 THE COURT: We are on the record.

20 MS. NORRIS: We are on the record.

21 THE COURT: Okay.

22 MS. NORRIS: I'll object.

23 THE COURT: You can make an objection,
24 that's fine.

25 (End of sidebar conference.)

1 BY MR. CORVEY:

2 Q. Hugo, I wanted to show you something
3 just so the jury can follow along with us. How
4 long have you lived in the Charleston area?

5 A. Since 1999.

6 Q. Are you fairly familiar with the area
7 of downtown and the Crosstown you were describing
8 earlier?

9 A. Yes, sir.

10 Q. Your Honor may I approach?

11 THE COURT: You certainly may.

12 Q. Hugo, I am handing you what has been
13 premarked as State's Exhibit 11. Can you take a
14 look at that and let me know if you recognize what
15 that is?

16 A. Yes.

17 Q. What is that?

18 A. That is Highway 17 Crosstown.

19 Q. Is that a map representing the
20 Crosstown area?

21 A. Yes, sir.

22 Q. You recognize that to be the Crosstown
23 area?

24 A. Yes, sir.

25 Q. Lived here for 18 years?

1 A. Yes, sir.

2 Q. It's the Crosstown area that you were
3 driving on the day that we are talking about,
4 March 23rd, 2015?

5 A. Yes, sir.

6 Q. Does that map that you have fairly and
7 accurately depict that area of Charleston?

8 A. Yes, sir.

9 Q. Your Honor, at this time State would
10 move to admit State's Exhibit 11.

11 THE COURT: Any objection to the map?

12 MS. NORRIS: Objection as discussed at
13 the conference.

14 THE COURT: Objection to what?

15 MS. NORRIS: Objection as we discussed
16 at the conference.

17 THE COURT: Okay. Any objection?

18 MR. APICELLA: No, Your Honor.

19 THE COURT: Okay. I'm going to allow
20 it to come in. He has verified that it is an
21 accurate map of the area. It will come in as
22 marked. You wish to publish it?

23 MR. CORVEY: Yes, Your Honor.

24 THE COURT: You may do so.

25 (State's Exhibit 11 in evidence.)

1 BY MR. CORVEY:

2 Q. Mr. Hugo, the map should pop on the
3 screen in front of you. Can you see it?

4 A. Yes, sir.

5 Q. So if you could just for the jury try
6 to describe what we are looking at here.

7 A. Well, we are looking at Highway 17. I
8 was driving Highway 17 south towards West Ashley.
9 I stopped in this stop traffic light on the corner.

10 Q. You should be able to touch the screen
11 in front of you. Can you draw anything on there,
12 circle some areas that you are looking at. Should
13 allow you to do that.

14 A. (Witness complies with request.) Right
15 here.

16 Q. Is it showing up on your screen?

17 A. Yeah.

18 Q. So you were stopped in the area -- the
19 Court's indulgence a moment, Your Honor.

20 THE COURT: Yes, sir.

21 Q. Can you circle the area that you
22 stopped again? Okay, right there. That's
23 Highway 17.

24 A. Yes, sir.

25 Q. Can you please describe for the jury

1 what happened when you are stopped at the red
2 light?

3 A. I stopped at the red light. And then I
4 hear a shot.

5 Q. A gunshot?

6 A. Gunshot and then looking around to the
7 left and to the right I don't see anything. Then
8 turn to the front and I saw a person all the way
9 between two houses.

10 Q. Between two houses. As best you can, I
11 understand that's not the best diagram, try to help
12 you out. From your vantage point could you
13 indicate to the jury where the individual that you
14 just described was standing as far as you can see?

15 A. Um-hmm.

16 Q. If you want for the jury's benefit to
17 mark yourself again at the intersection.

18 A. So I was parking in the intersection
19 here.

20 Q. Then where, approximately, did you see
21 the person you were describing?

22 A. Right there. (Indicating.)

23 Q. Between those two houses?

24 A. Yes.

25 Q. If you could -- looks like there's some

1 trees in that area. If you could try to describe
2 the view that you had from your car parked in the
3 Crosstown?

4 A. It was pretty clear view at the time.
5 I could see some fences and two houses. Yellow
6 house and a green house.

7 Q. Is there a backyard in that area?

8 A. Yes, it was backyard in the area.

9 Q. So is the individual you saw standing
10 in that backyard area between those houses?

11 A. Yes.

12 Q. Now, Your Honor, may I approach?

13 THE COURT: You may.

14 Q. Handing you what's been marked for ID
15 as State's Exhibits 143, 144 and 145. Can you take
16 a moment and review those for me.

17 A. (Witness complies with request.)

18 Q. Do you recognize those?

19 A. Yes.

20 Q. What do those depict?

21 A. Well, there was the two houses that I
22 can see from the street.

23 Q. So as far as what you're looking at,
24 those are videos of your view from the Crosstown?

25 A. Yes.

1 Q. Does that fairly and accurately depict,
2 all three of those pictures, the view that you had
3 on that day?

4 A. Yes.

5 Q. Your Honor, at this time I would move
6 to admit State's 143, 144 and 145.

7 THE COURT: Subject to prior objection?

8 MS. NORRIS: Yes, sir.

9 THE COURT: Same ruling. He has
10 identified it as being an accurate representation
11 of the area. I will allow them to come in unless
12 there's some objection from the other Defendant.

13 MR. APICELLA: No, Your Honor.

14 THE COURT: Thank you. They will be
15 admitted as marked.

16 (State's Exhibits 143, 144 and 145 in
17 evidence.)

18 THE COURT: You may publish. When I
19 say publish, that's what we say in court to show it
20 to you.

21 BY MR. CORVEY:

22 Q. Now, Hugo, I will show you what's been
23 entered as State's 143 into evidence. Now, if you
24 could try to describe to the jury exactly what it
25 is we are looking at here.

1 A. Well, what I was looking on that day
2 was when I turned to the front I was looking
3 between these houses. That's I see right there
4 this area.

5 Q. In between the yellow?

6 A. The yellow and the green.

7 Q. You can see right there?

8 A. Yes, sir.

9 Q. That's where you saw the individual
10 standing in the yard?

11 A. Yes, sir.

12 Q. This is after you heard one gunshot?

13 A. Yes.

14 Q. So I want to pick that up right there.
15 So you hear the first gunshot. You said he looked
16 around. You see the individual standing in the
17 yard. What happens next?

18 A. Well, I turn to the front and I saw the
19 individual like you say with his hand like that.

20 Q. Like that, pointing to something?

21 A. Pointing down.

22 THE COURT: Sir, you can stand up.

23 A. It was pointing down like that.

24 Q. And what was that individual wearing?

25 A. The only thing I see that day was a

1 brown jacket.

2 Q. Is it dark brown or lighter?

3 A. Khaki.

4 Q. A tan?

5 A. Yes.

6 Q. Is that a color you have seen in a
7 particular type of clothing garment?

8 A. It was I want to say tan khaki.

9 Q. Was it a shirt or a jacket?

10 A. It was kind of like a jacket.

11 Q. And were you able to notice anything
12 else about that individual?

13 A. No.

14 Q. Race or anything like that?

15 A. No.

16 Q. So you're still stopped at the red
17 light at this point?

18 A. Yes.

19 Q. So after you saw this individual you
20 just described him for us, what happens then?

21 A. Well, after I hear the shots I drive,
22 you know, light turns green and I just went down to
23 the next street, turned right, saw a patrol with
24 lights on in there. I stopped in there and I just
25 hear some shots.

1 Q. So you hear the first shot, there's a
2 bit of a pause while you then observe the
3 individual, there's several more shots?

4 A. Yes.

5 Q. And then you actually drive into the
6 area to go find a patrol officer?

7 A. Well, I was running back south and one
8 of the next street I saw a patrol turn right in
9 there and I just went with them and say what
10 happened, I hear some shots.

11 Q. You want to just let the officer know
12 what you saw?

13 A. Yes, sir.

14 Q. And based on what you described with
15 the individual pointing down like that, did you
16 perceive the shots were coming from him?

17 MS. NORRIS: Objection, Your Honor.

18 THE COURT: The objection is?

19 MS. NORRIS: He just said he saw him
20 pointing down and he heard shots. There was no
21 connection.

22 THE COURT: The question was did he
23 perceive that the shots were coming from him.

24 MS. NORRIS: Right. And he can't
25 answer that.

1 THE COURT: He can answer his
2 perception. Overruled. You may proceed.

3 BY MR. CORVEY:

4 Q. So my question was from your perception
5 sitting there the individual you saw pointing down
6 like this, were the shots coming from him or at the
7 very least coming from his direction?

8 A. Yes.

9 THE COURT: You have to answer
10 verbally.

11 A. Yes.

12 Q. Your belief was the shots were coming
13 from him?

14 A. Yes.

15 Q. Now, in that backyard before the light
16 turn greens and you go on, you testified earlier
17 regarding this. I will show you State's
18 Exhibit 144 while I ask you. You said you can see
19 clearly into that backyard?

20 A. Yes.

21 Q. Now, on State's 144, this is just an
22 enlarged version of 133 or zoomed in for a little
23 bit further, and as you testified that fairly
24 depicts that backyard area?

25 A. Yes.

1 Q. If there was another individual
2 standing back there with the individual wearing the
3 tan jacket, would you have seen them?

4 A. No.

5 Q. You would not have seen them?

6 A. Yeah. I mean no, if I was watching
7 that section I should be seeing somebody there,
8 somebody else in there.

9 Q. You didn't see anybody else standing
10 back there?

11 A. No.

12 Q. Did you see anyone on the ground?

13 A. No.

14 Q. So all you can see in that sliver right
15 there is an individual in a tan jacket pointing
16 down like this?

17 A. Yes, sir.

18 Q. So you hear several more shots, then
19 you go notify police as to what you saw?

20 A. Yes.

21 Q. Your conversation with the police went
22 a bit further. You give them a statement about
23 what you saw?

24 A. Yes.

25 Q. Did they then take you to see if anyone

1 else in the area at least matched the description
2 of who you were talking about?

3 A. Yes, sir.

4 Q. Did you identify anybody else who was
5 wearing that jacket?

6 A. No.

7 Q. Did you see that person again?

8 A. No.

9 Q. Would you be able to recognize that
10 person in that jacket if I showed it to you?

11 A. Yes.

12 Q. Court's indulgence, Your Honor.

13 (Off-the-record conference.)

14 MR. CORVEY: Your Honor, may we
15 approach?

16 THE COURT: You may.

17 (Following proceedings were held at the
18 bench.)

19 MR. CORVEY: Your Honor, I want to show
20 him the still from the video that we would have
21 gone over if we hadn't had the time delays. We
22 will enter this in through a custodian through the
23 city. My understanding regarding the case law of
24 104 (b) is we are allowed to prove the condition of
25 something that is relevant later in trial.

1 MS. NORRIS: Judge, we object to this
2 on a different basis. He didn't -- as I understand
3 it this is part of the video surveillance of the
4 play fighting.

5 THE COURT: Time out. Do it this way.
6 You can show him the still and ask him whatever you
7 want to ask him about it. And I won't let him
8 publish it until the video comes in for ID
9 purposes. Give it to the court reporter and we
10 will decide whether it comes in at a later date.
11 You don't have to introduce it right now.

12 MR. CORVEY: Understood.

13 MS. NORRIS: We object to it because
14 again they are giving him a picture that came from
15 this. The assumption is this is the guy he is
16 describing. The assumption they are making is that
17 the man that he saw is on this video.

18 THE COURT: No, I said to show him the
19 photo, the still, and see if he can identify that
20 as the person that he saw. If he can't end of
21 discussion.

22 MS. NORRIS: All he said in a prior
23 statement --

24 THE COURT: I don't know what he's
25 going to say.

1 MS. NORRIS: -- was that it was
2 similar.

3 THE COURT: Let's send the jury out I
4 guess and put this on the record.

5 MS. NORRIS: Yes, sir.

6 (Following proceedings were held in
7 open court.)

8 THE COURT: Ladies and gentlemen of the
9 jury, this is one of those times I told you I would
10 have to discuss something with the lawyers outside
11 of your presence. I ask you to step back to the
12 jury room. Please don't discuss anything about the
13 case until I ask you to begin your deliberations at
14 the close of the trial. You may retire to the jury
15 room.

16 (Jury exited courtroom at 4:14 p.m.)

17 THE COURT: The State indicates they
18 wish to show the witness a still from the city's
19 video of the scene. However, that has not yet been
20 put into evidence. The custodian and keeper of
21 that particular video will have to testify at a
22 later time. We have taken the witness out of
23 order.

24 Defense has an objection to -- I'm not
25 sure since he is not offering into evidence at this

1 time. Perhaps you can put on the record what your
2 objection is.

3 MS. NORRIS: Thank you, Your Honor.
4 Our objection has several factors. One is that
5 this video, I believe the solicitor can correct me
6 if I'm wrong, is part of the video surveillance
7 that shows the play fighting out there. This
8 witness never saw that until the detective showed
9 it to him afterwards and said do any of these
10 individuals look similar. And he says -- I've got
11 a transcript of his statement to the police -- that
12 he said that this one looks like. I can't say
13 that's the guy he saw. And so they are going to
14 try to -- they assume by narrowing it down, showing
15 him the video, pick somebody out that who he saw is
16 part of that group. There is a lot of people out
17 there in Back to Green on a day-to-day basis. And
18 Ms. Van Pala pointed out there's another apartment
19 building. We don't doubt his testimony, but he
20 cannot identify someone in that video and say yes,
21 that's the guy. And I am happy to have a proffer
22 of that testimony now. I don't think he can do it.
23 If he does it's news to us. That's not what he
24 told the police before.

25 THE COURT: Well, I'm going to let them

1 ask him about that and see if he says he can't
2 identify that person. I do not know whether he can
3 or can't. You indicated he already testified, he
4 gave a statement.

5 MS. NORRIS: He gave several
6 statements, Your Honor.

7 THE COURT: Not under oath.

8 MS. NORRIS: No, sir.

9 THE COURT: Okay. That's what I was
10 trying to point out. All right. Make the proffer.

11 MR. CORVEY: I think we actually may
12 have solved the issue.

13 THE COURT: Mr. Apicella, I'm sure you
14 will speak up if you have anything you would like
15 to add. Did you wish to add anything to the
16 objection?

17 MR. APICELLA: No, Your Honor.

18 THE COURT: Thank you, sir.

19 MR. APICELLA: Just join in it.

20 THE COURT: Okay. It is before me. Go
21 ahead.

22 MR. CORVEY: We actually had a -- this
23 was a screen shot printout of the video that
24 Detective Krasowski prepared, actually presented to
25 Hugo the day of the incident. He signed off.

1 Rather than get into showing the video I would
2 rather him show the document and have that entered
3 into evidence.

4 THE COURT: Make the proffer.

5 BY MR. CORVEY:

6 Q. Handing you what's been premarked for
7 ID as State's 163. Let me know if you recognize
8 that. What is that?

9 A. That's a person was basically wearing
10 the jacket that I see.

11 Q. And you viewed that photograph before?

12 A. Yes.

13 Q. Whose writing is that on that document?

14 A. That's me.

15 Q. And if you could for the Court describe
16 what you said on that document?

17 A. This is the guy, the color jacket of
18 the incident.

19 Q. So if I am interpreting what you told
20 the police, you're not positive today like you
21 weren't back then that that's the guy you saw doing
22 the shooting; is that right?

23 A. This is the color of the jacket that I
24 see the day.

25 Q. That is the color of the jacket of the

1 individual you saw who you thought was shooting?

2 A. Yes, sir.

3 Q. And that's all you're saying?

4 A. Yes.

5 Q. Okay. Is that a fair and accurate
6 depiction of what was shown to you that day?

7 A. Yes.

8 Q. Is that writing a --

9 A. It is.

10 Q. -- duplicate what you did that day?

11 A. Yes, sir.

12 Q. Thank you, Your Honor.

13 MS. NORRIS: No questions, but we
14 object that on the same base that was shown to him
15 afterwards. He can't say that it's either one of
16 these Defendants.

17 THE COURT: He is not trying to
18 identify them. My understanding of his testimony
19 is he is trying to identify the color of the jacket
20 as being the same. He just said he couldn't
21 identify them as this particular individual. He's
22 just saying the jacket in that photo is the same
23 color as the jacket he saw that day. He is not
24 making an ID of any particular person, is he?

25 MS. NORRIS: No, but I guarantee you

1 the State is going try to argue in the closing who
2 the guy he saw in that picture is and it's Te'Quan
3 Perry.

4 THE COURT: They may. The fact they
5 argue that, that doesn't make it something that he
6 can't ask about because they argue it. What's the
7 objection? The legal basis for the objection?

8 MS. NORRIS: In essence it's similar to
9 a six pack photo lineup that's suggestive. Instead
10 of putting a six pack in front of him they put one
11 picture and say is this the guy.

12 THE COURT: No, they are not asking is
13 that the guy. They are saying is that the color of
14 the jacket you saw.

15 MS. NORRIS: And they are going to try
16 to say that has to be the guy.

17 THE COURT: I will overrule the
18 objection. I think he has the right to identify
19 the color of the jacket he observed as being the
20 color of the jacket in that photo. He is not
21 attempting to make a specific identification of any
22 person so the objection is overruled. I will let
23 ask him about that.

24 Now, that document is not going into
25 evidence until whoever is the custodian of it comes

1 and identifies or authenticates the document and it
2 passes whatever other requirements there are. So
3 you can use that exhibit as for ID purposes only,
4 but it's not being admitted into evidence at this
5 time. Bring the jury in.

6 MR. CORVEY: Understood, Your Honor.

7 (Whereupon the jury entered the
8 courtroom at 4:21 p.m.)

9 THE COURT: I have overruled the
10 objection. You may proceed.

11 BY MR. CORVEY:

12 Q. Hugo, I will hand you what we have
13 premarked for ID as State's 163. Can you take a
14 moment and look at that and let me know if you
15 recognize that?

16 A. (Witness complies with request.) Yes.

17 Q. You recognize that?

18 A. Yes.

19 Q. What is that?

20 A. That's the jacket that I see when I
21 stopped at the traffic light.

22 Q. Is that the same color of the jacket
23 that you saw?

24 A. Same color.

25 Q. So I guess to be more specific for the

1 jury, is that a photograph of an individual in a
2 tan jacket?

3 A. Yes.

4 Q. And in your estimation that's the same
5 color of the jacket that you saw the individual
6 wearing in the alleyway?

7 A. Yes, sir.

8 Q. You can't say whether or not that's the
9 same person or not, just the same color of the
10 jacket?

11 A. Yes.

12 Q. Is that a fair description of that?

13 A. Yes.

14 Q. Understood. And you looked at that
15 photograph and wrote same color in the meeting with
16 Mr. Krasowski?

17 A. Yes.

18 Q. Thank you. Now, I have a few more
19 questions with you. I want to get back to the few
20 things that we talked about before. Your Honor,
21 may I publish the exhibits?

22 THE COURT: Yes, as long as they have
23 been introduced and accepted into evidence.

24 Q. I want to get back to State's 144 that
25 we were looking at a bit earlier. Again, this is a

1 view in the backyard that you can see from where
2 you were stopped at the stoplight?

3 A. Um-hmm. Yes.

4 Q. In the Crosstown?

5 A. Yes.

6 Q. Now, you testified a moment ago before
7 we looked at that photograph that you saw the
8 individual with the hand pointing down standing
9 back there, but you didn't see anyone else?

10 A. Nobody else.

11 Q. Okay. So if we are going to look at
12 that photograph, while you were standing there did
13 you see anyone else running out on this sidewalk
14 area?

15 A. No, sir.

16 Q. Did you see anyone else going into that
17 house in that direction?

18 A. No, sir.

19 Q. So the only person that you saw when
20 you were there at the red light when the shots were
21 going off is the individual in the tan jacket with
22 the hand pointing to the ground?

23 A. Yes.

24 Q. You thought was shooting?

25 A. Yes.

1 Q. So as far as you could tell, was there
2 anyone else fleeing the area at that time?

3 A. No, sir.

4 Q. Okay. And I want to touch -- you drove
5 into the area where you are just assuming gunshots
6 were fired and your kids were in the car with you?

7 A. Yes, sir.

8 Q. You picked them up from school. That's
9 quite brave. I appreciate your bravery in
10 identifying that and bringing that information to
11 the police. Beg the Court's indulgence, Your
12 Honor.

13 THE COURT: Yes, sir.

14 MR. CORVEY: No further questions at
15 this time, Your Honor.

16 MR. APICELLA: No questions, Your
17 Honor.

18 CROSS-EXAMINATION

19 BY MS. NORRIS:

20 Q. Is it Mr. Paredes?

21 A. Yes.

22 Q. I don't want to butcher your name. I
23 apologize.

24 A. No problem.

25 Q. I am Theresa Norris. You and I have

1 not met. I believe you met with our investigator.
2 I want to thank you for that. Just to be clear,
3 when you were at that red light you heard all the
4 shots before you looked; isn't that right?

5 A. No. I hear first shot and then I look
6 around.

7 Q. Okay. Well, do you recall making a
8 statement to the police on March 23rd?

9 A. Um-hmm.

10 Q. The day this happened?

11 A. Yes.

12 Q. Do you recall telling the officer that
13 -- I'm going to read it. Do you recall telling the
14 officer I was in the stoplight in there with more
15 cars around me and I hear like a shot and then I
16 hear another shot and I started looking around. So
17 there were more than one shot before you looked,
18 right?

19 A. Well, I hear a shot, turn to the right,
20 to the left and then look around, yes, ma'am.
21 That's how I did it.

22 Q. And then very shortly the light turned
23 green and you had to keep driving, right?

24 A. Yes.

25 Q. And I believe you described to the

1 police that you were a hundred yards away from
2 where you saw the man standing; is that accurate?

3 A. That's probably what I told the police,
4 yes, ma'am.

5 Q. Is it accurate?

6 A. To be honest with you I was shocked
7 when I saw that and faced with my kids in there so
8 can be 300 to 500 yards. It was difficult for me
9 to --

10 Q. I understand.

11 A. Yes, ma'am.

12 Q. In your example there you said a
13 hundred to 500 yards. So it wasn't any closer than
14 a hundred, right?

15 A. Well, it was hard to me to like I said
16 if it was a hundred or 500 yards. I know it was on
17 the stoplight. I turn to the front between those
18 two houses; that's what I see.

19 Q. So a hundred yards is a football field,
20 American football field. So five hundred yards
21 could be five football fields down the track there?

22 A. Yes.

23 Q. From you were saw this?

24 A. Yes, ma'am.

25 Q. And the photos that the assistant

1 solicitor showed you, you didn't take those, right?
2 You don't know when they were taken?

3 A. No.

4 Q. So the vegetation was different than
5 when you were out there, could have been?

6 A. I know it was pretty clear to see. It
7 was pretty clear to see those two houses.

8 Q. Okay. So all those bushes and things
9 that are in those photos weren't there when you saw
10 it?

11 A. Well, it was there, that tall by that
12 time. It was that tall.

13 Q. And so when you heard the shots and the
14 light turned green you had your kids with you so
15 you took off, right?

16 A. Yes, ma'am.

17 Q. Didn't want to hang around?

18 A. No.

19 Q. You're a smart man.

20 A. Yes.

21 Q. You described the guy that you saw,
22 described the jacket, but didn't he also have on
23 khaki pants?

24 A. I never see the pants. I just saw the
25 jacket.

1 Q. Did you tell the police back on
2 March 23rd, the day this happened, that he was
3 wearing khaki pants too?

4 A. The only thing I can remember about
5 that time, if I remember correct it was I'm sure I
6 saw a brown khaki jacket.

7 Q. Do you recall, and again I will read to
8 you what you said to the police.

9 MR. CORVEY: Objection, Your Honor.
10 She can ask him the question. If she wants to
11 impeach him she needs to do it properly or refresh
12 his memory if she needs to.

13 MS. NORRIS: May I approach?

14 THE COURT: You may.

15 BY MS. NORRIS:

16 Q. Mr. Peredas, if you want to take a
17 minute and have a look at that. Do you have any
18 trouble reading?

19 A. No.

20 Q. Look at that and see if that is, in
21 fact, your statement to the police.

22 A. (Witness complies with request.)

23 Q. Are you satisfied that's your statement
24 or do you need more time?

25 A. A little bit more time.

1 Q. Okay.

2 A. (Reading statement.)

3 Q. Is it your statement?

4 A. Yes, it is.

5 Q. I'm going to ask you to look at page 12
6 down at the bottom. You see numbers over to the
7 left, look at line 23 through 25 for me.

8 A. (Witness complies with request.)

9 Q. That is you talking, right?

10 A. Yes.

11 Q. And you said well, he went out and
12 crossed and start looking. I saw him that he pass
13 away with I think it was khaki too, his pants?

14 A. Yes.

15 Q. So do you remember now that the guy you
16 described had khaki pants?

17 A. That's when I am saying I think I was
18 thinking it's a khaki pants. The bushes was this
19 high. It was hard for me to guarantee it was a
20 hundred percent khaki pants. I am 100 percent sure
21 it was a khaki jacket. That's what I see.

22 Q. All right. So you were having trouble
23 seeing the legs. You also describe that he had a
24 winter hat on, right?

25 A. Yes, covers his -- he was covered, yes,

1 ma'am.

2 Q. With like a winter hat?

3 A. Well -- I can say something. I was
4 real shocked when I hear the shot with my kids in
5 there and I turn to the front and see a person hand
6 like that cover his face. I can guarantee this, I
7 see his jacket and it was khaki.

8 Q. I understand. I am asking you about
9 his hat.

10 A. It was --

11 Q. Wearing a winter hat is how you
12 described it?

13 A. Yes.

14 Q. That was also khaki?

15 A. It was also khaki.

16 Q. And you described that he had -- his
17 shirt was yellow or khaki?

18 A. Yes.

19 Q. So everything was khaki as far as you
20 could tell?

21 A. As far as I can tell. Was hard to see
22 from here down.

23 Q. And now you made the one statement
24 immediately while you were still out there. You
25 never made it home. You stopped, found a police

1 officer. You made the statement that you and I
2 have just looked at. And several months later you
3 went back to talk to the police again, right?

4 A. Yes, ma'am.

5 Q. And when you did that the police
6 officer, I believe Detective Krasowski, do you
7 recognize him?

8 A. Yes, sir.

9 Q. He actually showed you video from out
10 there?

11 A. Yes, ma'am.

12 Q. At least 15 minutes of it, the stuff
13 that was on the video you are -- you never saw it,
14 right?

15 A. Never saw the video. That was my first
16 time.

17 Q. And that last picture you were asked
18 about, does this look like the jacket that came
19 from that video, right?

20 A. Yes, ma'am.

21 Q. Okay. Give me just a second.

22 (Off-the-record conference.)

23 Q. When you said that you saw the
24 gentleman pointing down, you didn't see anybody
25 else, right?

1 A. Nobody else.

2 Q. One guy standing there pointing down.
3 Nobody else around?

4 A. I don't see anybody else.

5 Q. And when you said that you heard the
6 shots, then you looked. And you think the shots
7 were from that direction, right? But you didn't
8 actually see the shots so you can't say for
9 certain?

10 A. The sound of the shot come from that
11 direction.

12 Q. That's as much as you could say?

13 A. Yes, ma'am.

14 Q. Now, I believe when the solicitor was
15 questioning you you said that he was -- the man you
16 saw was in the backyard; is that what you said?

17 A. Yes, ma'am.

18 Q. Now, to the police before you said it
19 was between the two houses, right?

20 A. I call them backyards. Between those
21 two houses it was a backyard. To me it was a back
22 yard in the area and the one that I pointed in
23 here.

24 Q. So it was between them, but it was at
25 the back?

1 A. It was between those two houses.

2 Q. Now, was it -- you described to the
3 police before that it was dark out there; do you
4 recall that?

5 A. I can't remember about that.

6 Q. See if I can find that for us.

7 A. Sure.

8 Q. The statement you have got up there, if
9 you look on page 9 at the bottom line 21, that is
10 you talking. "See, when I hear the first shot, you
11 know, I don't really put attention on in there, you
12 know."

13 The detective asked were you, you
14 continued talking. But the second line, "I start
15 looking around, you know, something is going on
16 here in the dark. Then I see a light coming from
17 the house."

18 So was it dark out there?

19 A. I mean it was five and some p.m. that
20 day. It was not dark like it is now 8:00, but it
21 was visible to see the color of the jacket.

22 Q. I asked -- okay. It was dark, but
23 you're saying you could still see the color?

24 A. It was dark. It was dark and no like
25 nighttime, you can see.

1 Q. Were your headlights on in the car?

2 A. They are automatic so I can't remember
3 if it was on or not to be honest with you.

4 MS. NORRIS: Thank you, sir. No
5 further questions, Judge.

6 THE COURT: Redirect?

7 MR. CORVEY: Just briefly.

8 REDIRECT EXAMINATION

9 BY MR. CORVEY:

10 Q. I want to go over a few things she
11 brought up. Show you again State's Exhibit 143.
12 Now, there was some conversation about distance
13 from the intersection to where you saw the
14 individual. You reviewed this photograph. Does
15 that fairly depict the distance from your viewing
16 window from where you would have been at your car
17 to that backyard?

18 A. Yes.

19 Q. It does. And so for the jury's
20 benefit, when we are talking about this individual
21 standing, please correct me if I'm wrong, is
22 somewhere in this area between the yellow and the
23 green house?

24 A. Yes.

25 Q. You have never had the occasion to go

1 out to that intersection and measure that distance
2 from where the stop bar is for that lane of travel
3 and where that backyard is?

4 A. Never.

5 Q. Two years ago?

6 A. Yes, sir.

7 Q. Fair to say you're just making the best
8 judgment you can, but looking at 143 that's a
9 pretty fair and accurate depiction of what your
10 view would have been into the backyard?

11 A. Yes.

12 Q. Now, she talked to you about it being
13 dark. Looking at this photograph, this occurred
14 around 5:00 p.m., does this photograph also fairly
15 depict what your view would have been with relation
16 to the light at that time?

17 A. Yes, sir.

18 Q. So at that time of year, it's March, I
19 don't know exactly when the sunset would have been
20 at that, but the sun doesn't stay up as it does in
21 the summer?

22 A. Yes, sir.

23 Q. Fair to say not at this time yet, it's
24 maybe dusk or evening time?

25 A. Yes, sir.

1 Q. You can still see clearly into the
2 backyard?

3 A. Yes, sir.

4 Q. And you are positive you saw an
5 individual wearing a tan jacket?

6 A. Yes, sir.

7 Q. She also talked a little bit about the
8 hood. You thought the head was covered?

9 A. Yes, it was covered.

10 Q. And as far as you could tell, the
11 covering was also tan?

12 A. Yes, sir.

13 Q. Could you make out whether or not that
14 was a hood or a hat?

15 A. It was -- I want to say like a hood,
16 like a hood, tan hood over the head.

17 Q. And with the light and kind of getting
18 back and forth between the darkness, if there was
19 anyone else out there standing in the vicinity of
20 them it would have been light enough so you could
21 have seen them?

22 A. Yes, sir.

23 Q. Now, she asked you about whether or not
24 the pants were khaki and you testified this is a
25 fair depiction of that. If you want to stand up

1 and demonstrate for the jury about how much of that
2 person could you have seen from your vantage point
3 I guess from as far as what would have been blocked
4 by the --

5 A. Probably all the way to here.

6 (Indicating.)

7 Q. All the way to there?

8 A. Yes, sir. That's what I say it was
9 khaki because I can tell it was all way to here.

10 Q. So you thought the jacket went all the
11 way down to there?

12 A. Well, from here up it was -- all this
13 was khaki.

14 Q. You couldn't see anything below?

15 A. Nothing else.

16 MR. CORVEY: Court's Indulgence. No
17 further questions, Your Honor.

18 RECROSS-EXAMINATION

19 BY MS. NORRIS:

20 Q. Just briefly. Mr. Peredes, the
21 questioned I asked you about saying it was in the
22 dark, that was from your statement March 23rd about
23 15 minutes after you saw all that, right?

24 A. Yes.

25 Q. Fair to say your recollection was

1 better 15 minutes later than two years later?

2 A. It was -- I probably said the wrong
3 word say dark, but it was light, but you can see;
4 it was visible to see it.

5 Q. I didn't ask you that. I apologize. I
6 will try again. Is it fair to say that 15 minutes
7 later your memory was better than it is two years
8 later?

9 A. I think it was dark, but it was not
10 that dark.

11 Q. I didn't ask you that.

12 THE COURT: Ma'am, he has the right to
13 explain his answer. You can't cut him off.

14 MS. NORRIS: I apologize.

15 THE COURT: Thank you.

16 THE WITNESS: Can you ask me one more
17 time, please.

18 BY MS. NORRIS:

19 Q. Is it fair to say that you could
20 remember what you saw better 15 minutes after it
21 happened than two years later?

22 A. Right now I feel that I can think back
23 two years ago and have it in here what happened
24 today. I can remember pretty good what happened
25 today on this moment.

1 Q. But you can remember it better
2 15 minutes later, right?

3 A. Yes, ma'am.

4 Q. Thank you.

5 THE COURT: You may step down. You
6 wish to excuse the witness?

7 MR. CORVEY: Your Honor, we would ask
8 that he be excused. My understanding is he has
9 plans to travel out of town and I understand
10 defense subpoenaed him as well.

11 THE COURT: Any objection to his being
12 excused?

13 MS. NORRIS: May we approach?

14 THE COURT: Yes, ma'am.

15 (Bench conference.)

16 MS. NORRIS: I don't want to interrupt
17 his travel plans, but if they are still going to
18 come in and try to offer this still and the video
19 we may need him. How long is he going to be gone?

20 THE COURT: He is under subpoena, your
21 subpoena?

22 MS. NORRIS: Yes, we had him under
23 subpoena too.

24 MR. OSBORNE: His wife has a very
25 serious surgery in Mexico. He was leaving tomorrow

1 morning for that surgery. It was my understanding
2 that's what happening.

3 MS. NORRIS: How long is he going to be
4 gone?

5 MR. OSBORNE: We didn't ask that.

6 MS. NORRIS: Why don't we find out if
7 he would be available next week if we need him. I
8 don't have any objection, but I just can't release
9 him when they are still trying to bring in other
10 evidence.

11 MR. CORVEY: He authenticated where the
12 video comes in.

13 MS. NORRIS: I don't know what the
14 detective is going to say. You can tell from his
15 statement that he was shown a video he never saw.
16 I don't know.

17 MR. CORVEY: He signed. He said it's
18 his signature.

19 MS. NORRIS: I am not excusing him from
20 his subpoena unless we know that we can get him
21 back.

22 THE COURT: Send the jury out and we
23 can address it with the witness.

24 (Following proceedings were held in
25 open court.)

1 THE COURT: Ladies and gentlemen of the
2 jury, I'm going to have to take up something
3 outside of your hearing so I am going to ask you to
4 step back to the jury room. Every time you leave
5 the courtroom I will instruct you not to discuss
6 anything about the case during the break. You will
7 get tired of hearing me say it, but I will keep
8 saying it. Thank you very much.

9 (The jury exited the courtroom at
10 4:47 p.m.)

11 THE COURT: Sir, there's some concern
12 that they may need your testimony at some other
13 point later in the trial. My understanding is that
14 you are about to travel to Mexico; is that correct?

15 THE WITNESS: Yes, sir.

16 THE COURT: A family member is having a
17 medical procedure; is that also correct?

18 THE WITNESS: Yes, sir.

19 THE COURT: When will you be returning
20 to this area?

21 THE WITNESS: I will be out -- I am
22 leaving tomorrow and come back the following
23 Saturday.

24 THE COURT: So this coming Saturday?

25 THE WITNESS: No, the next Saturday.

1 THE COURT: Two weeks from now.

2 THE WITNESS: Yes, sir.

3 THE COURT: That means he is probably
4 going to be unavailable for the rest of the trial.
5 So the question becomes you are asking that he be
6 released?

7 MR. CORVEY: We are, Judge.

8 MS. NORRIS: Your Honor, I certainly
9 don't want to interfere with his plans, but the
10 problem I have with just excusing him is that they
11 sill want to offer the video and the still. I
12 don't yet know what that testimony will be. So it
13 seems the simple solution is if the solicitor will
14 agree not to offer that video surveillance and that
15 still that was printed out that I object to, then
16 the problem is resolved.

17 THE COURT: Would you agree to that?

18 MR. CORVEY: Absolutely not, Judge.
19 Those videos I think we will bring in through our
20 witnesses. The still, however, I think we have
21 gone -- assuming that the video comes in, obviously
22 I would assume that that still from the video as
23 she authenticated earlier as the one that he was
24 shown should be able to come in through the video
25 with prior testimony already obviously.

1 THE COURT: You don't intend to use
2 this witness to introduce the video?

3 MR. CORVEY: No, we don't. So I feel
4 like we have the pre-identification necessary for
5 his testimony with relation to the still that if
6 the video is later admitted through other witnesses
7 we may bring in that still with a different
8 witness, likely Detective Krasowski who offered him
9 that photograph.

10 MS. NORRIS: Well, the video I don't
11 have a problem with through other witnesses if it's
12 all that stuff. My objection is simply he never
13 saw it so I still object.

14 THE COURT: He already admitted he
15 never saw it. They showed it to him at some other
16 time.

17 MS. NORRIS: I still object to that
18 still photo. If the State --

19 THE COURT: Ma'am, I am not asking
20 about the still photo right now. I am asking about
21 releasing this witness.

22 MS. NORRIS: What I am saying, Judge,
23 if they agree not to put that still photo they want
24 to put in that he signed saying this looks like the
25 guy, if they agree that doesn't come in --

1 THE COURT: They are not going to agree
2 to that.

3 MR. CORVEY: Judge, I don't think that
4 -- it's not a photo that says that he say a guy.
5 It says the person in the color of the jacket looks
6 --

7 THE COURT: I understand. She keeps
8 saying he ID'd somebody.

9 MR. CORVEY: He didn't.

10 THE COURT: What he did was he said
11 that's the same color jacket as I observed that
12 day.

13 MS. NORRIS: I understand, Judge. But
14 I object to it and if they want to offer that then
15 I am not releasing him from his subpoena. I am
16 very sorry.

17 THE COURT: He is not released from the
18 subpoena. I can't release him.

19 MR. CORVEY: I would ask that, this may
20 be able to satisfy our problem, we proffer
21 testimony from Detective Krasowski just briefly in
22 regards to that still photograph.

23 If after we proffer this testimony from
24 Detective Krasowski if that photograph then becomes
25 admissible --

1 THE COURT: She is talking about she
2 may need him for some -- I can't imagine what it
3 is. I am trying to figure out what it is, but I
4 can't imagine what it might be.

5 MS. NORRIS: I think if we hear
6 Detective Krasowski's testimony on this point that
7 may satisfy the issue. I just don't know what he
8 is going to say.

9 THE COURT: Sir, I will ask you to step
10 down. Wait outside the courtroom, please.

11 (Witness left.)

12 You may make the proffer. Before we do
13 that, we are ten minutes to five. We are not going
14 to get to the witnesses today. I don't see how
15 that is possible. This witness took since 3:00. I
16 thought he would be fairly short. I don't
17 anticipate that happening. So I will make you
18 aware of that at this point in time. I don't know
19 what arrangements you can make to get them back
20 here, but I can't see us going as late as we went
21 last night. We are not going to do that. How long
22 do you anticipate witnesses to be?

23 MR. OSBORNE: Sorry?

24 THE COURT: How long did you anticipate
25 the witnesses to be?

1 MR. OSBORNE: Officer Shepard is the
2 one that's more vital. I don't anticipate him to
3 be very long. He's simply in a car right across
4 the street from the McDonald's and his in car
5 camera is running. He doesn't even know the
6 significance of what he his camera picks up. And
7 so we wanted to bring in video from his in car
8 camera through him. It's his camera. He can see
9 his car moving. He knows this is his car.

10 THE COURT: How about the other
11 witness? You said there were three.

12 MR. OSBORNE: The other one is Willis
13 Walker. He does cell phone mapping from the [REDACTED]
14 number. We will have to tell him that --

15 THE COURT: That's going to take a
16 while.

17 MR. OSBORNE: Yes, Your Honor.

18 THE COURT: We make take up the police
19 officer. You want to make the proffer?

20 MR. OSBORNE: State calls Detective
21 Paul Krasowski.

22 PAUL KRASOWSKI
23 having been duly sworn, testifies as follows:

24 THE COURT: Just one second. Before we
25 take up this proffer, if you are going to put it

1 into the record you probably want to take testimony
2 in front of the jury.

3 MR. OSBORNE: Well, the reason why we
4 decided to do it this way was that if we can get
5 items moved into evidence, the question that we
6 were going to ask Mr. Krasowski or Detective
7 Krasowski, if those questions elicit any needed
8 cross-examination from Hugo, then Hugo is here to
9 accomplish that. I do want to ask these same
10 questions in front of the jury, but I won't go
11 beyond the scope of these questions.

12 So if anything else -- this is going to
13 be the extent of the testimony so Ms. Norris can
14 hear whether there is something elicited from this
15 proffer that she would need to cross-examine Hugo
16 on.

17 THE COURT: Okay. If she's willing to
18 do that we will see.

19 MS. NORRIS: I am willing so far.
20 BY MR. OSBORNE:

21 Q. Detective Krasowski, during your course
22 of the investigation did you have the occasion to
23 meet with Hugo Peredas?

24 A. I did on two different occasions.

25 Q. You met with him on the scene?

1 A. The response on the 23rd of March and
2 then also the second time was June 15th, 2015.

3 Q. About a week -- three weeks later?

4 A. Yes.

5 Q. The second time that you met with him
6 what happened during that meeting?

7 A. Called him back to the station,
8 arranged for him to come back to the station. He
9 hadn't viewed any kind of footage or photographs
10 whatsoever in this case. So I thought it was
11 necessary for him to at least have the ability to
12 see because this color was kind of an elusive
13 description of the jacket so I thought it was
14 imperative for him to at least have the
15 opportunity.

16 Q. Okay. Did you happen to show him a
17 screenshot of an individual wearing a jacket that
18 seemed to be similarly described?

19 A. We did. So I audio recorded this. Was
20 all at my computer because we were watching the
21 video. So we viewed the video and then at that
22 point during the video he said that was the subject
23 that he thought the same color coat. And so to
24 actually capture that, that's when I took a still
25 image of what he observed and then he actually

1 notated that identification there.

2 Q. Your Honor, may I approach? Showing
3 you State's Exhibit No. 163 for ID purposes.

4 A. Yes, this is it.

5 Q. I'm just going to show this to you on
6 the overhead. What was the source of this
7 screenshot?

8 A. This was from the video surveillance
9 system, the City of Charleston safety and security
10 camera system. This is the camera from Ashley and
11 Norman Street. And this is from -- the same kind
12 of footage that we saw yesterday. This was just a
13 still image of a capture from the actual video and
14 I paused it.

15 Q. And the date on this image is March
16 23rd at 6:00?

17 A. That's correct. 6:00, it says 6:00,
18 but we know that's roughly seven minutes ahead of
19 real time.

20 Q. And this is -- the writing over there,
21 that's all Hugo's writing?

22 A. That's correct. He made his comment
23 there and the date and time of it and his
24 signature.

25 Q. Again I think we have already heard

1 from Hugo. He wasn't saying he was positive, he
2 was just saying that looked like the jacket that he
3 saw?

4 A. Correct.

5 Q. Okay.

6 MS. NORRIS: Your Honor, I will have
7 lots of objections to this, but based on that I'm
8 happy for Mr. Paredes to be excused.

9 THE COURT: Okay. Thank you very much.
10 Sir, you may step down. I'm going to ask the
11 witness to step back into the courtroom,
12 please.

13 (Witness returned to courtroom.)

14 THE COURT: Mr. Apicella, do you have
15 any objection to his being released?

16 MR. APICELLA: No, Your Honor.

17 THE COURT: Thank you. Sir, you can
18 wait right here while we go over some matters with
19 the attorneys and at this time you are free to go.
20 Thank you very much. You do not have to return;
21 thank you, sir. Ready to call your police officer
22 witness?

23 MR. OSBORNE: Yes, Your Honor.

24 THE COURT: Bring the jury in.

25 (Whereupon the jury entered the