

VOLUME II of III

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

May 11 2022

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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1 courtroom at 4:59 p.m.)

2 THE COURT: State may call its next
3 witness.

4 MR. OSBORNE: State calls Officer Jason
5 Shepherd.

6 THE COURT: For the jury's information,
7 during your absence I did not make any rulings in
8 the case.

9 JASON SHEPHERD

10 having been duly sworn, testifies as follows:

11 THE CLERK: If your could state and
12 spell your first and last name.

13 THE WITNESS: Jason Shepherd,
14 S-H-E-P-H-E-R-D.

15 DIRECT EXAMINATION

16 BY MR. OSBORNE:

17 Q. Good afternoon, officer. It's getting
18 kind of late so we are going to move a little
19 quickly, but maybe not too fast. So where do you
20 work?

21 A. City of Charleston Police Department.

22 Q. And how long have you worked there?

23 A. Ten years.

24 Q. What are some of the various
25 assignments that you have held?

1 A. I started off in 2007 as a patrol
2 officer and I moved throughout my tenure through
3 the gang unit, addiction unit, rapid response team
4 and my last assignment was supervisor for ACU flex
5 squad. We look for guns and drugs.

6 Q. On March the 23rd of 2015 what was your
7 assignment then?

8 A. I initially got appointed as a
9 supervisor, as the ACU flex squad supervisor and
10 that specific day I was assigned to assist Sergeant
11 Robinson who was the on duty team two -- team one
12 second shift supervisor.

13 Q. Briefly again explain to the jury what
14 are the boundaries of team one?

15 A. Team one back when I started was from
16 Pittsburgh Avenue to Cannon Street, but now it is
17 extended to Calhoun Street as far east as the port
18 and as far west as the Citadel.

19 Q. Okay. Are you familiar with Back to
20 Green?

21 A. Yes, sir.

22 Q. Is that neighborhood team one?

23 A. Yes.

24 Q. The area or a road on the outside of I
25 think it's Hagood, does that road end up going to

1 the Crosstown?

2 A. Yes.

3 Q. And next to Hagood and the Crosstown,
4 is there a business there of some sort, restaurant?

5 A. There's several businesses on that
6 road.

7 Q. Showing you State's Exhibit 11. Do you
8 happen to know where the McDonald's is?

9 A. Yes. If you look down Hagood you will
10 see Hagood and Spring Street, there is a triangle
11 right there which is a median on the left-hand
12 side. You will see a red roof. That's the
13 McDonald's right there.

14 Q. I said the Crosstown. It kind of turns
15 into Spring?

16 A. Yes.

17 Q. You can mark on the screen where is the
18 McDonald's.

19 A. Right there.

20 Q. Where is the Taco bell?

21 A. Would be across the street from the
22 McDonald's. Should be right there.

23 Q. And the Back to Green subdivision?

24 A. Is up here.

25 Q. Okay. Now, let's go specifically to --

1 well, did you have the occasion to respond to an
2 auto ped accident?

3 A. Yes, sir.

4 Q. That would be where a car collided with
5 a person?

6 A. Yes, sir.

7 Q. Do you recall about what time that call
8 was dispatched? I can show you if it would help.

9 A. I can't remember off the top of my
10 head.

11 Q. Your Honor, may I approach? I will
12 show you what's been marked for ID purposes. Look
13 at it and see if this helps refresh your memory.
14 It's 153.

15 A. That would be about 5:50.

16 Q. So the auto pedestrian collision was
17 dispatched at what time?

18 A. 1750, which is 5:50 p.m.

19 Q. Did you -- well, what officer first
20 responded?

21 A. Initially I believe Officer Callahan
22 which was working the east side. He was initially
23 assigned to the call, but Officer Shelby who is now
24 Officer Storm, said that it was her beat and that
25 she would handle the accident.

1 Q. Officer Shelby, was she relatively new
2 at the time?

3 A. I believe she had only about
4 approximately 18 months of experience.

5 Q. You were a supervisor?

6 A. Yes.

7 Q. Did she ever have the occasion to ask
8 for assistance from you?

9 A. Yes, that was the reason I was in that
10 area. She had called me over the phone and said
11 she didn't know the proper procedures on how to
12 complete an auto ped TR310 which is the accident
13 report.

14 Q. So when you respond to the scene do you
15 advise the dispatch of what time you get there?

16 A. Normally what I do -- what I did then
17 was I have an in car computer. I normally -- we
18 have access to the call logs. I just hit arrival
19 or on scene; it's a touch screen computer.

20 Q. So that's a way to signify everyone who
21 has the computer terminals to let them know where
22 you are?

23 A. Yes, sir.

24 Q. Do you recall what time you arrived on
25 this scene?

1 A. I believe was 1753.

2 Q. So just a few minutes later. Now,
3 describe to the jury when you first pulled up, do
4 you recall how you first pulled up to the scene?

5 A. The way I responded, because I believe
6 I was coming from Rosemount assisting another
7 officer. I came down Huge Street to the side gates
8 of the Citadel and I ended up going down Hagood
9 toward the McDonald's.

10 Q. Can you put where your car was or to
11 the best of your recollection in the direction in
12 which it was facing? If you need me to move the
13 map.

14 A. Basically I came down Hagood this way.

15 Q. And now mark where your car was.

16 A. Initially there was an EMS van right
17 here and I initially parked right in front of the
18 EMS --

19 Q. Okay.

20 A. -- ambulance.

21 Q. Did anything else -- did you hear or
22 see anything of significance after you parked
23 there?

24 A. As soon as Officer Shelby came to and
25 asked me her question I answered her question. I

1 thought I heard approximately three gunshots in the
2 area.

3 Q. Approximately three gunshots?

4 A. Yes.

5 Q. Did you hear a single shot, then a
6 pause and then more, or hear a volley of gunshots?

7 A. It was more of just one after the
8 other. But then again there were some buildings
9 over there so there could have been a pause, but I
10 wouldn't know.

11 Q. Now, were you sure they were gunshots
12 or may they have been something else?

13 A. No, I'm pretty positive based off my
14 training and experience I knew they were gunshots.

15 Q. Okay. So after you heard the gunshots
16 did anyone flag you down?

17 A. After I heard the gunshots I told
18 Officer Shelby, I asked her if she needed me there
19 anymore on her scene at the auto ped and she said
20 no, go ahead handle those shots fired call at which
21 time I was -- I continued to drive down Hagood. I
22 ended up turning my vehicle around in this little
23 lot right here the street, turning it around and I
24 ended up actually running into Mr. Hugo who he said
25 he was coming down Allway Street. And then that's

1 where he flagged me down right at the corner of
2 Allway and Hagood.

3 Q. So an individual name Hugo flagged you
4 down?

5 A. Yes, sir.

6 Q. Was he upset when he flagged you down
7 or calm?

8 A. He wasn't calm. He looked very scared,
9 very hysterical. When he came up to me he goes
10 officer, officer, I just saw somebody get shot.
11 That's when I said okay, sir, stand with me.

12 Q. Okay. So at that point you changed
13 your mission I guess from responding to what you
14 thought was gunshots to now talking to Hugo?

15 A. Yes, sir.

16 Q. Because he said he had witnessed
17 something?

18 A. Yes, sir.

19 Q. So what did you do? I guess sort of
20 just start talking to Hugo then and waiting for
21 detectives?

22 A. I spoke with Hugo, but I didn't want to
23 question him too much and go into too much detail
24 because I knew a detective had to come and talk to
25 him. At that point I notified another supervisor,

1 Sergeant Damian Seabrook. I notified him and
2 updated about what I had. At that time Sergeant
3 Seabrook and his team had responded and secured the
4 inner perimeter. And I notified him over the
5 radio, said this was what I have and I will be
6 standing by for a central detective to come and
7 speak with the gentleman.

8 Q. So I just want to backtrack a second.
9 So how long do you estimate from the time that you
10 heard the gunshots then Hugo flagged you down?

11 A. No more than 45 seconds to a minute.

12 Q. Okay. Now, once you pulled over and
13 you waited for detectives did you activate your
14 lights or were they already activated, if you can
15 recall.

16 A. I believe my lights were already
17 activated.

18 Q. Once you pulled over to assist with the
19 traffic collision?

20 A. Yes, sir.

21 Q. When your police car -- at that time
22 when you activated the lights, does anything else
23 also activate?

24 A. Yes, sir. I have an in car camera for
25 that unit which was unit 211. Once the blue lights

1 activated it also activates the camera or if you go
2 more than 70 miles per hour it automatically
3 activates the camera.

4 Q. So once you click on the blue lights
5 they turn on or if you go over 70?

6 A. Or the third option is the officer has
7 the ability to hit the computer and hit the record
8 button.

9 Q. So your lights were turned on and so
10 your camera came on?

11 A. Yes.

12 Q. All right. So it's fair to say that I
13 mean after you released Hugo or after Hugo went to
14 speak to the detective you were unaware of anything
15 significant if there was anything significant on
16 your camera; is that fair to say?

17 A. Yes. Because the whole time I was not
18 speaking with Mr. Hugo inside my unit. I was
19 speaking outside on the curb so I really wasn't in
20 my vehicle at all monitoring the camera.

21 Q. So in preparation for this trial did
22 you have the occasion to view some footage from
23 your camera from that day?

24 A. Yes, sir.

25 Q. How do you know it was from your car?

1 A. My camera, not only does it record the
2 GPS location, but it also records what computer it
3 came from. And that day we keep records -- when we
4 come at the beginning of the shift we have to go
5 into our team office and actively record and log
6 out which computer we are using for that ten-hour
7 shift. And it just so happens that day I checked
8 out computer No. 70 so that's how I knew that video
9 came from that computer I checked out that same
10 day.

11 Q. And the video, specifically on the
12 images on the video did you see a significant
13 police response on the images that were on your
14 video?

15 A. Yes, sir.

16 Q. And how many -- can you estimate -- I
17 know you might not know, how many police cars
18 actually responded?

19 A. Approximately four police cars that I
20 saw on the video responded using their emergency
21 equipment lights and sirens. Went down Hagood
22 Avenue where my car was stationed.

23 Q. So you saw that on your video?

24 A. Yes, sir.

25 Q. Now, you said that you spoke to Hugo.

1 Did you also see Hugo on your video toward the end?

2 A. I don't recall that.

3 Q. Do you recall seeing Hugo's vehicle?

4 A. Yes, sir.

5 Q. Do you also recall EMS responding to
6 the hit and run?

7 A. Yes.

8 Q. Your Honor, may I approach?

9 THE COURT: You may.

10 Q. Showing you State's 57 and 58. Do you
11 recognize those items?

12 A. Yes, sir.

13 Q. What is State's 57?

14 A. That is a copy or the video from my
15 camera.

16 Q. And State's 58, what is that?

17 A. That is video clips from my camera.

18 Q. How do you know that that is what's on
19 those CDs?

20 A. These are the CDs and video that I have
21 seen before.

22 Q. How do you know that?

23 A. Because my initials was on both of
24 these CDs.

25 Q. Your Honor, at this time I would seek

1 to admit State's Exhibit -- well, let me just ask
2 you this. So the clips are taken from the entire
3 video. These are just clips from this?

4 A. Yes, sir.

5 Q. So at this time, Your Honor, we would
6 seek to introduce State's 58 in evidence.

7 THE COURT: Any objections?

8 MS. VAN PALA: No, sir.

9 MR. APICELLA: I have no objection.

10 THE COURT: It will be admitted as it's
11 been marked.

12 (State's 58 in evidence.)

13 BY MR. OSBORNE:

14 Q. So while that's being pulled up, you
15 said there was auto pedestrian collision. Do you
16 know the name of the individual that was hit by the
17 car?

18 A. No, sir, I do not.

19 Q. Would it help if I were to show you a
20 cab report taken from that auto pedestrian
21 collision?

22 A. Yes, sir.

23 Q. Showing you State's 153. Does that
24 help refresh your memory?

25 A. Yes.

1 Q. So do you know the name of the
2 individual that was hit by the car?

3 A. I believe it was Mr. Smalls.

4 Q. Clayton Smalls?

5 A. Yes, sir.

6 Q. Okay. Play clip No. 3. Are those the
7 police vehicles responding?

8 A. Yes, sir.

9 Q. Is it dark outside?

10 A. It's overcast, cloudy.

11 Q. Is it dark?

12 A. No, sir.

13 Q. Now I'm going to play clip No. 1. This
14 is 6:07; is that correct?

15 A. Yes, sir.

16 Q. And what are you doing?

17 A. Just basically after I asked Officer
18 Shelby if she needed my assistance. She said no.
19 That's when I went to assist in the outer perimeter
20 of the scene of the incident.

21 Q. Whose truck is that?

22 A. That looks like to Mr. Hugo's.

23 Q. That person right there that you take
24 or stop, is there any significance to this
25 individual? Did you even notice him?

1 A. No, sir.

2 Q. Which direction is he walking?

3 A. Towards the McDonald's.

4 Q. I want to go back to State's 11 again.

5 Can you tell us where your car was positioned when
6 the individual wearing all black came walking
7 across?

8 A. The accident occurred approximately in
9 that area. I turned my car around and the
10 individual came out Allway Street. So my car was
11 right about here.

12 Q. Facing in that direction?

13 A. Yes.

14 Q. In all fairness I mean it's kind of
15 hard to tell for sure I guess from that image
16 whether he is coming from Allway, but at least in
17 that direction; is that fair to say?

18 A. Yes, sir.

19 MR. OSBORNE: No further questions.

20 THE COURT: Mr. Apicella, did you wish
21 to cross-examine?

22 MR. APICELLA: No questions, Your
23 Honor.

24 THE COURT: Ms. Van Pala.

25 CROSS-EXAMINATION

1 BY MS. VAN PALA:

2 Q. Mr. Hugo arriving on scene is not
3 captured on the dash cam, right?

4 A. No, ma'am.

5 Q. And by the time you had arrived on
6 scene Mr. Smalls was already hit?

7 A. Yes, ma'am.

8 Q. And he was already hit by the vehicle
9 by the time you heard gunshots, right?

10 A. Yes, ma'am.

11 Q. Court's indulgence.

12 (Off-the-record conference.)

13 MS. VAN PALA: No further questions.

14 THE COURT: Redirect?

15 MR. OSBORNE: No, Your Honor.

16 THE COURT: Do you wish to excuse the
17 witness?

18 MR. OSBORNE: I do, Your Honor.

19 THE COURT: Any objection?

20 MR. APICELLA: No objection.

21 THE COURT: You are free to go. Thank
22 you very much. You may step down.

23 Ladies and gentlemen of the jury, again
24 I'm going to discuss something briefly with the
25 attorneys on scheduling tomorrow. I will let you

1 step back in the jury room while I have those
2 discussions. I will bring you back and give some
3 indication of our schedule tomorrow.

4 Again, as you leave the courtroom don't
5 discuss the case with anyone else. Thank you very
6 much.

7 (Thereupon, the jury exited the
8 courtroom at 5:20 p.m.)

9 THE COURT: Ms. Van Pala, I know that
10 there are some other motions you wish to address.
11 Can you tell me the ones you would like to take up
12 tomorrow?

13 MS. VAN PALA: Court's indulgence. I
14 think the only one I believe, Your Honor, is my
15 general motion to exclude Facebook in general and
16 Facebook videos and Facebook accounts.

17 THE COURT: That's the only motion you
18 want to take up?

19 MS. VAN PALA: I believe so. My
20 co-counsel is checking.

21 THE COURT: Be sure. Because I am
22 going to hold you to it.

23 (Off-the-record conference.)

24 MS. VAN PALA: The only one I don't
25 know if the Court ruled on is the motion to exclude

1 jail calls and video cassettes.

2 THE COURT: Well, my ruling on the jail
3 call issue I indicated the other evening that in
4 looking at the definition of testimonial statements
5 for purposes of the confrontation clause I was
6 concerned that those jail calls when someone checks
7 into the jail it is explained those calls will be
8 recorded and that they can be used in a court.
9 Then it appears to me that they are -- I think it
10 is No. 3 of the test that would apply. It's items
11 that are being created in anticipation that they
12 may be used at trial I think is the way it is
13 defined under the definition.

14 So I would find that those jail calls
15 are subject to the confrontation clause. If the
16 State intends to use them then that's a problem. I
17 was told the State did not intend not to use them
18 if I made that ruling.

19 MR. OSBORNE: If the ruling led to a
20 severance, then, yes, we would not introduce that
21 specific.

22 THE COURT: Well, it would have led to
23 a severance.

24 MR. OSBORNE: And I think the standard
25 on that would be like an objective standard. If

1 they objectively believe that statement would be
2 used in anticipation of litigation. And what we
3 are -- we are talking about a jail call, you
4 haven't heard it, I understand, and the jail call
5 that we would seek to introduce is one in which
6 Te'Quan Perry tells an individual to tell Devin to
7 get at a witness.

8 So if the objective reading on No. 3
9 would be that Te'Quan Perry would then be using
10 that statement to intimidate a witness by getting a
11 co-defendant to get at him in anticipating for
12 litigation. And the State's position would be that
13 that would be reading that --

14 THE COURT: Well, I'm going to exclude
15 the jail calls because I did not severe the case.

16 MR. OSBORNE: We will just ask that the
17 -- other jail calls there's no mention of a
18 co-defendant. So it is just that one clip that one
19 jail call where Te'Quan Perry mentions Devin.

20 THE COURT: You need to bring that one
21 that you want to introduce for me to consider
22 tomorrow.

23 MR. OSBORNE: That's the one we would
24 take out. The other 20 would be he's not talking
25 about Devin.

1 THE COURT: I am having a hard time
2 following you. It seems to be weakly shifting
3 sand. Maybe I am misunderstanding.

4 MR. OSBORNE: I know we are talking
5 about a jail call. Again you haven't heard it. So
6 there are 21 jail clips that we seek to introduce
7 that Te'Quan Perry made while he was in jail. We
8 will have relevance for each one, why they were
9 important, et cetera.

10 The one jail clip that deals with
11 Te'Quan Perry directs an individual to tell Devin
12 to get at Nardo. If the Court is ruling that's
13 confrontation and that clip is inadmissible then so
14 be it. There is still 20 other clips that we will
15 still seek to introduce.

16 THE COURT: What did they say? They
17 must have some relevance.

18 MR. OSBORNE: Yeah, and I don't know
19 that I can really do it justice. You almost have
20 to hear it, Your Honor. There is an urgency
21 involved. There is witness intimidation get at
22 him, get at him now. And I don't want to over
23 speak, but I think on one he says when I get out of
24 here these bodies are going to be falling. It's
25 going to be like Chiraq out there. I need to get

1 to these people. There are other calls where he
2 talks about he tells his brother to get onto his
3 Facebook account and communicate with this girl
4 named Jasmine.

5 Right after that we have the Facebook
6 message between -- where the Facebook message says
7 my brother says put some minutes on your phone so
8 he could call you. There are other calls where he
9 talks to his mother right after he gets locked up.
10 It is the first call he makes, the first statement
11 he makes to his mom. Did the police search the
12 house. Did they find anything in the house. She
13 tells him no. He asks again did you find anything
14 in the house. No.

15 Later on you'll hear Ashland Horlback
16 who talks to the Defendant and she in essence tells
17 him they found the gun. He says what? She says
18 they found the thing. That's why we tried to
19 subpoena the brother, but that's why the mother is
20 under subpoena. It's the State's position that
21 she --

22 THE COURT: If a witness is available
23 to be cross-examined then it is not a confrontation
24 problem.

25 MR. OSBORNE: Well, it is a

1 confrontation problem if the Court rules in
2 reference to Te'Quan directing another individual
3 to tell Devin to get at Nardo. We don't have that
4 individual. Well, we do have that individual we
5 think, but he's mentioning Devin in that and if
6 your ruling is that that is confrontation because
7 he has implicated a co-defendant then we can take
8 that clip out.

9 THE COURT: Yes, ma'am.

10 MS. VAN PALA: Thank you, Your Honor.
11 Our position is that the Court already ruled that
12 you said that they are subject to confrontation and
13 since you didn't sever the trial doesn't --

14 THE COURT: Ma'am, I didn't know I was
15 ruling on 30 phone calls, okay, until just now. So
16 whatever ruling I gave doesn't -- I am going to
17 reconsider that if you think I gave it.

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

19 THE COURT: If there is 30 different
20 phone calls, I'm going to have make 30 different
21 rulings probably.

22 MS. VAN PALA: And I would ask that you
23 go one by one. There are according to my notes 22
24 for Te'Quan.

25 THE COURT: 22.

1 MS. VAN PALA: And there are clips.
2 And then 8 for Devin. So I think realistically we
3 could take them one by one, hear each one of them
4 in camera and make our argument. My arguments are
5 based on not only Crawford, but for rules of
6 evidence and decide on their admissibility at that
7 point.

8 So I think we can take that up pretrial
9 or that would be my proposal.

10 THE COURT: We have already started the
11 trial, the presentation of the evidence. I will
12 hear from the State.

13 MR. OSBORNE: So --

14 THE COURT: My question I thought was
15 pretty simple. How long are we going to need in
16 the morning? I am not getting any clear answers,
17 which is not unusual. I am beginning to get used
18 to that in Charleston.

19 MS. VAN PALA: May I have a moment?

20 THE COURT: Yes, ma'am.

21 MS. VAN PALA: Judge, I think we would
22 need at least a couple of hours in the morning. I
23 think a safe estimate would be --

24 THE COURT: I want a safe estimate.
25 Don't do like we have done in the past.

1 MS. VAN PALA: I think the safe
2 estimate would be asking the jury come back after
3 lunch and spending the morning reviewing the
4 Facebook records and the jail calls.

5 MR. OSBORNE: I think we can do that in
6 the amount of time.

7 THE COURT: I would think these jail
8 calls are logged and numbered or something and they
9 have been provided to the defense?

10 MR. OSBORNE: They have.

11 THE COURT: An agreed upon number or
12 something for each one of them?

13 MR. OSBORNE: We are not -- what we
14 have given to the defense is all of the jail calls
15 and then we told them this is what we intend to
16 introduce, which is about 22 clips. So if there's
17 anything else that's out there we are not going
18 there. We will only deal with those 22 clips. I
19 think the longest clip is about a minute long.

20 THE COURT: All right.

21 MS. VAN PALA: Your Honor, as far as
22 the Facebook records, we have some of the Facebook
23 records that the State gave us pretrial. I'm not
24 sure whether that's all they're intending on
25 introducing. But I also think that the Facebook

1 records should be taken one by one. That would be
2 more efficient so that we can address the
3 objections on each one of them before the State
4 seeks to admit them, then I can just object.

5 THE COURT: Are there different
6 objections to each one of them?

7 MS. VAN PALA: I think -- yes. There
8 will be different objections to each one. They
9 will be based on generally relevant, authenticity,
10 foundation, character, hearsay. But for different
11 reasons because they are each going to be different
12 so they are each going to show different things so
13 the argument will be slightly different based on
14 the rules of evidence.

15 MR. OSBORNE: I agree. We intend to
16 cover each one of those relevant to authorship and
17 relevance to our presentation.

18 THE COURT: I'm going to tell the jury
19 to come in at 1:00.

20 MS. VAN PALA: Thank you, Your Honor.
21 We ask if the State would tell us which witnesses
22 they intend on calling tomorrow afternoon. Rough
23 estimate.

24 THE COURT: They have given you a list
25 of witnesses.

1 MS. VAN PALA: Right. And we are just
2 asking for a --

3 THE COURT: You all can talk about
4 that. I am not going to order them to do that. Is
5 there a rule that says they have to list -- give
6 you a list who they are going to call next? They
7 have given you a list of witnesses in the
8 discovery. I have never ordered the State to tell
9 what order they are going to call their witnesses
10 to the other side. I have never done that. That
11 is news to me.

12 MR. OSBORNE: Your Honor, from our
13 perspective we will tell them who we plan on
14 calling. I don't want her or the defense to come
15 back later and say you called him out of order.
16 That could happen. That's why I am hesitant, but
17 we will tell you who we intend on calling.

18 MS. VAN PALA: And --

19 THE COURT: He says he will inform you.

20 MS. VAN PALA: Thank you, Your Honor.
21 And I think the State as well also for the purposes
22 of arranging my expert, my expert is out of the
23 country and I am corresponding with him and I was
24 hoping to get a better idea of what day or dates we
25 would be looking at for his testimony.

1 THE COURT: You are asking me?

2 MS. VAN PALA: That's what --

3 THE COURT: I don't know who his three
4 witnesses are tomorrow, let alone the rest of his
5 case. I suggest you talk to each other and get an
6 idea how many more witnesses you are going to call,
7 what length he thinks they are. I don't know his
8 case. I'm going to be here until the case is
9 ended.

10 MS. VAN PALA: Thank you. We would
11 just like to know when the State intends on calling
12 that expert.

13 THE COURT: Once again, talk to your
14 co-counsel. You all need to communicate. I have
15 been around a long time. Collegiality among the
16 bar is a good thing. Talking to your co-counsel
17 and opposing counsel is not a bad thing. Those
18 discussions are good and I recommend that you try
19 that.

20 MS. VAN PALA: I asked the solicitor
21 last night.

22 THE COURT: You certainly have the
23 right to ask him again.

24 MR. OSBORNE: I gave it to her. She
25 asked me to tell her what three witnesses I was

1 going to call. I told her and told them what they
2 were going to say.

3 MS. VAN PALA: I asked --

4 THE COURT: Ma'am, let's move on.
5 Anything else as far as the motion? We have gotten
6 off on other issues. The time I leave for motions
7 tomorrow. I am saying I will have the jury come in
8 at 1:00 p.m. Anybody have any problem with that?

9 MR. OSBORNE: No, Your Honor.

10 MS. VAN PALA: No, Your Honor.

11 THE COURT: Thank you.

12 MR. APICELLA: Your Honor?

13 THE COURT: Yes, sir. You have been
14 very quiet.

15 MR. APICELLA: Just to alert the Court
16 what I think is still outstanding in my motions.

17 THE COURT: Yes, sir.

18 MR. APICELLA: The first one is the
19 hearing that we started and my motion to controvert
20 the search warrant, the Facebook search warrant and
21 then my motion in limine to exclude that evidence
22 should it come in pursuant to Evidence Rule 403.

23 THE COURT: Facebook, we are going to
24 bring up the Facebook issues tomorrow.

25 MR. APICELLA: As to the jail calls,

1 Your Honor, I have an additional -- actually not
2 additional argument but, I would like to -- I want
3 to preserve the record that those jail violate my
4 client's Fifth Amendment Right to remain silent. I
5 am relying on that Court of Appeals case that I
6 sent to everyone last night. It's out of state,
7 but it's right on point and that concurring opinion
8 indicates that had the issue been preserved they
9 would have loved to consider it. As far as I know
10 there's no other cases up there. I hope there is
11 no need to have this case to be appealed.

12 THE COURT: I suspect it might be. Go
13 ahead.

14 MR. APICELLA: Your Honor actually
15 predicted that argument yesterday without having
16 the benefit of even knowing there was a case in a
17 sister state, recognizing that there is an inherent
18 unfairness to give a jail inmate the Hobson's
19 choice I make no phone call, I never talk to my
20 family, never talk to anybody or I waive my Fifth
21 Amendment rights and take my chances.

22 THE COURT: I don't think I went quite
23 that far in my analysis. You are taking some
24 liberty with that. That's okay.

25 MR. APICELLA: I am trying to be an

1 advocate. I want to make that argument and give
2 Your Honor the opportunity to consider the issues
3 and make a ruling.

4 THE COURT: Okay. Will that require
5 longer than 1:00?

6 MR. APICELLA: No. The other thing,
7 Judge, is maybe it's just --

8 THE COURT: I just want to get some
9 time set aside to set it up.

10 MR. APICELLA: I think we also need an
11 audibility hearing on these jail tapes. It may
12 just be me, but I can't understand 99 percent of
13 them. My client translates some of them for me and
14 he can't understand some.

15 So to the extent that Your Honor rules
16 they are inaudible my motion is they not be played
17 for the jury.

18 THE COURT: Tell me that again.

19 MR. APICELLA: An audibility hearing to
20 see whether or not the tapes are audible enough,
21 understandable enough to play for the jury. If
22 it's just gibberish --

23 THE COURT: Talking about the jail
24 calls?

25 MR. APICELLA: Talking about the jail

1 calls, any recorded conversation.

2 THE COURT: We are going to take that
3 up tomorrow.

4 MR. APICELLA: Yes.

5 THE COURT: How much time do I need is
6 my only question.

7 MR. APICELLA: It is up to you, Judge.
8 Are you going to listen to 22 of Mr. Perry's calls
9 and I think six of my clients and you have to
10 decide whether or not --

11 THE COURT: He tells me they are a
12 minute, minute and-a-half maximum each. Are you on
13 with 1:00?

14 MR. APICELLA: I am.

15 THE COURT: Okay. Bring the jury in.

16 (Whereupon the jury entered the
17 courtroom is 5:39 p.m.)

18 THE COURT: Ladies and gentlemen of the
19 jury, we are going to break for the evening. My
20 instructions to you as you leave the courthouse
21 will be as they were at lunch.

22 Don't discuss the case with anyone.
23 Don't allow anyone to discuss it with you. Don't
24 attempt to gather any information about the case on
25 your own. Don't listen to, watch or read media

1 reports. Should anyone try to contact you during
2 your absence please report that to the Court.

3 I have got a couple of things tomorrow
4 that I have to take up with the attorneys. They do
5 not involve you and so rather than have you come
6 and sit in that little room and wait, what we are
7 going to do is ask you to be here at the courthouse
8 at 1:00 in the afternoon.

9 We should complete those preliminary
10 matters that I need to take up at that time and we
11 should be able to start with testimony again at
12 that time. So I will ask you to be back here at
13 the courthouse 1:00 tomorrow afternoon. We will
14 resume shortly thereafter. Hope you have a great
15 evening. We will see you tomorrow at 1:00. Thank
16 you very much.

17 (Thereupon, the jury exited the
18 courtroom at 5:41 p.m.)

19 THE COURT: Court will be adjourned.
20 We will resume this trial at 9:30 in the morning.
21 I will be in the courtroom at 9:00. There is a
22 plea that I am taking at that time. So that's in a
23 different case. So I will be taking the plea at
24 9:00. We will start the case at 9:30. Be here
25 sharp. Thank you.

1 (Proceedings adjourned at 5:42 p.m. on
2 June 13, 2017.)
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1 (The following proceedings were held June
2 14, 2017, Charleston County, South Carolina, @
3 9:48 a.m. outside the presence of the jury.)

4 THE COURT: We are on the record again
5 in the case. At this time we are considering
6 motions made by the defense. Ms. Van Pala, I will
7 be happy to hear from you.

8 MS. VAN PALA: Yes, Your Honor. Which
9 motion would you like to take up first?

10 THE COURT: Whichever one you want to
11 take up first.

12 MS. VAN PALA: If we can start with the
13 jail calls, Your Honor.

14 THE COURT: Is the State ready to
15 consider the jail calls?

16 MR. OSBORNE: We are, Your Honor.

17 THE COURT: All right. Mr. Apicella,
18 how are you this morning?

19 MR. APICELLA: Very well, Judge. And
20 yourself?

21 THE COURT: Fine. Are you ready to go
22 forward on this?

23 MR. APICELLA: I am.

24 THE COURT: Okay, sir. First of all, I
25 need you to state your motion.

1 MS. VAN PALA: Yes. My motion to
2 exclude the jail phone calls.

3 THE COURT: In total.

4 MS. VAN PALA: Yes, Your Honor.

5 THE COURT: For what reason?

6 MS. VAN PALA: For the reason that they
7 are inadmissible. They are irrelevant. They are
8 unduly prejudicial and confusing because many of
9 them are taken out of context. They contain
10 impermissible character evidence and a lot of them
11 -- a lot of jail phone calls, they contain
12 statements from other people. I don't think they
13 can be authenticated.

14 I don't know if the State is going to
15 be able to call anyone who can authenticate the
16 voices on the jail calls and many of them are
17 irrelevant.

18 THE COURT: You already said relevance.
19 Anything else?

20 MS. VAN PALA: No, Your Honor. Thank
21 you.

22 THE COURT: I will hear from the State.

23 MR. OSBORNE: Your Honor, we could
24 address those clips through Detective Krasowski.
25 He will be the witness that we would seek to

1 publish those clips to the jury.

2 THE COURT: So he is going to
3 authenticate them as well?

4 MR. OSBORNE: He can authenticate the
5 voice and there's other authentication procedures
6 that he can go through his testimony and other
7 things that he has learned.

8 THE COURT: Do you want to call him?

9 MR. OSBORNE: Yes, Your Honor.

10 THE COURT: All right. Come forward.
11 I believe you have been placed under oath in this
12 case before; is that right?

13 THE WITNESS: That's correct, sir.

14 THE COURT: Do you acknowledge that
15 that oath still applies to your testimony?

16 THE WITNESS: I do.

17 THE COURT: So you are under oath at
18 this time.

19 THE WITNESS: Okay, sir.

20 THE COURT: Thank you. Yes, sir. Mr.
21 Osborne.

22 DIRECT EXAMINATION

23 BY MR. OSBORNE:

24 Q. Thank you, Your Honor. Detective,
25 throughout your investigation in this case did you

1 have the occasion to listen to jail calls from the
2 Defendant, Te'Quan Perry?

3 A. I did.

4 Q. Let's tell the judge how are those jail
5 calls captured?

6 A. At the jail when they are brought into
7 intake at some point in the process they are
8 assigned a PIN number for them to use.

9 MS. VAN PALA: Objection, Your Honor.
10 The detective can't testify as to his personal
11 knowledge or his expert opinion about the jail
12 procedures for --

13 THE COURT: He's not offering that as
14 an expert opinion. He has not been qualified as an
15 expert.

16 MS. VAN PALA: And as a detective I
17 don't think he can testify as to the jail's
18 internal procedures for --

19 THE COURT: I will caution the witness
20 to testify from his personal knowledge, but if you
21 have personal knowledge of these things, you have
22 the right to testify about them. To that extent
23 that's overruled. But I will ask you to confine
24 your testimony to what you know happens yourself.

25 THE WITNESS: Yes, sir.

1 THE COURT: You may proceed.

2 A. What I know is that they are assigned a
3 PIN number and that PIN number allows them to make
4 the phone call when they engage in the call.

5 BY MR. OSBORNE:

6 Q. Okay. And but let's be fair. An
7 inmate can give that PIN number to someone else;
8 isn't that correct?

9 A. That is true.

10 Q. And you know that from experience, that
11 actually happens?

12 A. That happened in one of my cases, yes.

13 Q. Okay. So now, you said that they get a
14 PIN number. When they are making a phone call
15 through your experience they will hear an
16 introduction; is that correct?

17 A. That is correct.

18 Q. And then right after the introduction I
19 believe it says something like you are receiving a
20 call from; is that correct?

21 A. That's correct. It's a recording.

22 Q. And then the person whose PIN number or
23 who is giving the PIN number, they then record
24 their name?

25 A. There's a recording that allows them to

1 state their name or however they want to be
2 identified.

3 Q. And that is a little preclude to all
4 the calls that an inmate makes?

5 A. That's correct.

6 Q. That you receive?

7 A. Yes, sir.

8 Q. Okay. Now, you said that you obtained
9 -- listened to some calls. You believe our office
10 did too as well, right?

11 A. Yes, sir.

12 Q. Kind of duplicative efforts, but we
13 ended up getting the calls as well?

14 A. Yes.

15 Q. Have you had a chance to listen to a
16 large majority of those calls?

17 A. I did.

18 THE COURT: Mr. Apicella, you can go
19 move a little closer so you can hear better.

20 MR. APICELLA: Thank you.

21 Q. Your Honor, we are going to play some
22 clips of State's 126. You have heard these clips
23 before, is that correct, Detective Krasowski?

24 A. I have.

25 Q. We are going to start with clip one.

1 And before I actually play the clip what is the
2 date and time on this clip?

3 A. So you can see midway down it says
4 recorded, says 3-26-2015 and the time is 2303.

5 Q. Okay. March the 26th at 11:00 p.m.
6 What time was Te'Quan Perry arrested again?

7 A. He was arrested around 7:30. He was
8 brought down to the station around 8:00 and
9 interviewed soon thereafter.

10 Q. Do you have any estimation as to what
11 time he would have left the station?

12 A. I know our interview concluded around
13 8:50 and I'm sure he hung around there for a little
14 while, but he was brought to detention center
15 probably around nine or 9:30, 10.

16 Q. Okay. So this would have been shortly
17 after that?

18 A. Yes, sir.

19 Q. (Clip played.)

20 So when it says please enter your
21 number and the inmate started entering in the
22 number, is that where he enters the PIN?

23 A. That's correct.

24 Q. So had that recording been allowed to
25 finish it would have said something like please

1 enter your security code or PIN code?

2 A. Yes.

3 (Clip played.)

4 Who was that call from?

5 A. Identified himself as Left.

6 (Clip played.)

7 Q. Okay. So the inmate said they search
8 your house?

9 A. Correct.

10 Q. And the caller that he's talking to
11 said yes?

12 A. Yes.

13 Q. Did the police search --

14 MS. VAN PALA: Objection, Your Honor.
15 He doesn't need to be narrating the jail calls that
16 we just heard. And he doesn't have personal
17 knowledge as to what the people who were party to
18 that conversation or were actually talking about.
19 He is coming -- he is listening to the jail calls
20 after they are made, not a party to them and he is
21 interpreting them and that's improper.

22 MR. OSBORNE: I didn't interpret it.

23 THE COURT: Are you talking about the
24 solicitor?

25 MS. VAN PALA: The detective.

1 THE COURT: I thought you were
2 objecting to what the solicitor did.

3 MS. VAN PALA: I am objecting to the
4 detective's opinion testimony.

5 THE COURT: I will overrule that
6 objection. Are you objecting to something further?

7 MS. VAN PALA: The basis of my
8 objection is that the detective doesn't have
9 personal knowledge and he's offering improper
10 opinion because he wasn't a party to.

11 THE COURT: I have asked him to testify
12 from his personal knowledge only. I assume that he
13 is doing that. I will overrule the objection.

14 MR. APICELLA: Your Honor, I want to
15 enter my objection to the detective telling the
16 Court and telling the record what he thinks he
17 hears on that jail call. If Your Honor cannot hear
18 it, then that's an issue. If the tape is
19 inaudible --

20 THE COURT: The question was that it
21 was prefaced by did he ask if the house had been
22 searched and the answer was yes. And I think the
23 point of the question before when the objection was
24 interposed was that somehow he was interpreting the
25 call. But I think what he was going to was the

1 house, in fact, searched before the call was made.

2 Now, the detective was involved in the
3 search I suppose, I don't know, we will find out if
4 he ever gets to answer it. And so I don't know
5 that we have an interpretation of the phone call.
6 He is asking him was the house searched before the
7 phone call. Was that the point of the question?

8 MR. OSBORNE: This is the point, Your
9 Honor.

10 MR. APICELLA: My objection is I
11 certainly could not understand a word. I could
12 hear speaking. I couldn't understand a word. I
13 couldn't understand what his name was. The
14 detective said Left.

15 THE COURT: I caught Left. I heard it.

16 MR. APICELLA: Well. The question is
17 the jury --

18 THE COURT: Ms. Van Pala, did you catch
19 left? Ms. Van Pala, did you hear him say Left?

20 MS. VAN PALA: I did hear that
21 personally on the tape, Judge.

22 THE COURT: I have some hearing
23 problems too. I understand, but I heard that.

24 MR. APICELLA: Judge, the ultimate
25 question is if at the trial -- a witness can't tell

1 the jury what is being said. It's for the jury to
2 understand.

3 Now, we have not been provided with a
4 transcript so we could see what the State's
5 interpretation of what was said prior to this
6 trial. In fact, these were only finalized days
7 ago. So at this point --

8 THE COURT: Can we agree they are
9 speaking English on the tapes?

10 MR. APICELLA: Judge --

11 THE COURT: I have never had an
12 objection to people don't understand the English
13 language.

14 MR. APICELLA: To me this is -- this is
15 a dialect of the English language. This is I mean
16 for want of a better description it's the Gullah
17 Geechee Charleston mélange of language where the
18 words may be spelled similarly, but the
19 pronunciation is different or the pronunciation is
20 different, but they are spelled the same. The
21 grammar, the context, the meaning is not like
22 standard English.

23 THE COURT: I'll overrule the
24 objection.

25 MS. VAN PALA: I apologize, Judge.

1 THE COURT: You don't need to apologize
2 about a thing.

3 MS. VAN PALA: I join Mr. Apicella in
4 his objection.

5 THE COURT: I will overrule it.

6 MS. VAN PALA: And I have a case on
7 point as to my objection. But I will first state
8 that the detective shouldn't be allowed to testify
9 interposing his interpretation of what was said on
10 those phone calls.

11 THE COURT: Let me ask you this. What
12 was said on the phone call that he has said --
13 testified to that was not stated? Help me here.
14 This is an example. Let's be specific in other
15 words.

16 MS. VAN PALA: Right. So --

17 THE COURT: So far off of that clip has
18 he testified that is not on that clip?

19 MS. VAN PALA: Well, I think what he's
20 testifying to is talking about what he thinks they
21 are talking about.

22 THE COURT: What do you think they are
23 talking about that's different from what he said?

24 MS. VAN PALA: Well, I understand that,
25 but if the detective was part of the search warrant

1 and the search warrant execution that's what he has
2 personal knowledge of.

3 THE COURT: We didn't get that far I
4 don't think.

5 MS. VAN PALA: And I objected
6 beforehand because I believe that's where we are
7 going, is that he is going to go beyond his
8 personal knowledge of the execution of the search
9 warrant and start interpreting what is being said
10 between these two people on the phone call.

11 THE COURT: Any time you make an
12 objection, and I am not telling you you can't make
13 an objection, any time you make an objection I
14 would like you to specifically state what was said
15 on the tape that he is interpreting or giving you a
16 different interpretation for that you think is
17 wrong.

18 MS. VAN PALA: Yes.

19 THE COURT: I listened to someone
20 speaking on a phone and then I am testifying about
21 what they said, as long as I related it correctly I
22 don't see its objection. I have that had that
23 happen -- that happens all the time. Do you follow
24 me?

25 MS. VAN PALA: Yes.

1 THE COURT: Now, if someone is stating
2 something different from what was said on the tape,
3 then certainly you have a right to object to that
4 he's mischaracterizing the evidence. I will try to
5 see that he doesn't do that. I am not saying you
6 can't object. But right now again I have asked a
7 specific question. What in the tape thus far has
8 he incorrectly related?

9 MS. VAN PALA: I didn't take down his
10 testimony verbatim before I objected, Your Honor.
11 But my interpretation of what Detective Krasowski
12 was testifying about is what he thinks they are
13 talking about.

14 THE COURT: Again, I think they are
15 speaking English. I understand there is some
16 belief it may be a dialect of some kind, but it may
17 be some street language. He might be familiar with
18 that. He is a detective and been on the street a
19 lot. I don't know.

20 MS. VAN PALA: Yes, Judge, and I think
21 -- I also think that it's a dialect or ebonics or
22 street language. And I do have a case on point
23 that I think is on point that would prohibit law
24 enforcement from opining in that regard.

25 THE COURT: State the case.

1 MS. VAN PALA: It's Johnson. It's a
2 Fourth Circuit case. I have a site. It's 617 F 3d
3 386.

4 THE COURT: You got a copy?

5 MS. VAN PALA: I would have to find it.

6 THE COURT: I encourage you to do so.

7 MS. VAN PALA: Court's indulgence.
8 Judge, I think that it's at my office. If I can
9 ask my --

10 THE COURT: Ma'am, I need it now if you
11 are going to raise the objection now.

12 MS. VAN PALA: I don't have it with me
13 right now, Judge.

14 THE COURT: Do you have a citation?

15 MS. VAN PALA: Yes, Judge. 617 F 3d
16 386. Oh, I apologize, Judge. I just found it.
17 And I have copies for the solicitor as well. May I
18 approach?

19 THE COURT: Yes, ma'am.

20 MS. VAN PALA: The language that I am
21 looking at is under subsection B headnote six.
22 It's the second full paragraph after they quote
23 Rule 701.

24 (Brief pause.)

25 THE COURT: I will hear from the State.

1 MR. OSBORNE: Your Honor, my quick
2 reading of that case to the one question in
3 particular was to the agent, I'm going to -- so the
4 agent listened to the call and the agent
5 interpreted "I'm going to hit you and let you know
6 what's happening."

7 The question wasn't what was said
8 there. The question was what's that mean? Well,
9 we are not asking or at least we haven't so far
10 Detective Krasowski what does that mean. We are
11 simply asking what did you hear.

12 Now, this is a good example right here
13 I think of Ms. Van Pala's opportunity to
14 cross-examine him and Mr. Apicella's opportunity to
15 cross-examine him. If he represents something that
16 he heard that we can all hear in the courtroom was
17 not there or could be heard another way, that's
18 perfect fodder for cross and I have heard defense
19 attorneys do it before. He says he heard something
20 a certain way. Defense counsel will say but he
21 could have said this, isn't that correct? And then
22 he either says it or he looks not credible on the
23 stand. This is no different than what I did with
24 Officer Shepherd in this very case. I showed him a
25 surveillance video. I asked him if it was dark

1 outside. He used his own perception to look at the
2 video and say no, it was not. That wasn't
3 objectionable. Of course it wasn't because he was
4 looking at something. This is hearing. So it's no
5 different.

6 THE COURT: Well, I think their concern
7 is that if there is some -- and I haven't -- I have
8 listened to probably now three seconds of these
9 tapes. Might be five. We got a long way to go.
10 But at any rate, this case stands for the fact that
11 if some type of code language is being used and for
12 him to testify about it he has either got to
13 establish some specialized knowledge or have to be
14 qualified as an expert. So to that extent I don't
15 disagree with you.

16 Now, I heard the word "Left." I didn't
17 think that was an interpretation. And I asked
18 specifically on this clip what was being
19 interpreted. And I heard the word "Left". I heard
20 Left.

21 MS. VAN PALA: Yes, Your Honor. I
22 don't think that the detective needs to testify
23 about what we can all clearly hear. And I believe
24 that this is where he is going.

25 THE COURT: Well, then answering

1 questions about it he may have to say on the tape
2 they said such and such. If he mischaracterizes
3 the evidence, that's the one objection. If he is
4 interpreting what somebody said, as in this case
5 somebody said I'm going to hit you, and the witness
6 tries to give that word "hit" a different meaning
7 other than its dictionary meaning, then this case
8 is implicated at that point in time. So I'm not
9 overruling your objection. I just am saying if
10 interpretations are taking place, you need to tell
11 me specifically when you think he is interpreting
12 some type of code language.

13 Then the question becomes does he have
14 sufficient knowledge, does he qualify under 701 or
15 702 to testify in this manner.

16 MS. VAN PALA: Yes, Your Honor.

17 THE COURT: So I am not overruling the
18 objection but right now I haven't heard a specific
19 instance where he is somehow interpreting some type
20 of code language.

21 MS. VAN PALA: Yes, Your Honor.

22 THE COURT: You may proceed.

23 BY MR. OSBORNE:

24 Q. Thank you, Your Honor. So we left off
25 we were talking about clip No. 1. Now, through --

1 you are the case agent in this case?

2 A. I was.

3 Q. And you reviewed all the reports, you
4 have talked to the officers, is that all correct?

5 A. Yes.

6 Q. In fact, many times you were directing
7 officers, is that correct, being the case agent as
8 part of your responsibilities?

9 A. That is correct.

10 Q. Was a search warrant executed at
11 Te'Quan Perry's house?

12 A. Yes, sir.

13 Q. Okay. And on the recording he asked
14 did they search my house; is that correct?

15 A. That's correct.

16 Q. And what does the caller on the other
17 end say?

18 A. Yes, she knew.

19 Q. Okay. So and then the next question I
20 think was well, did they find anything; is that
21 correct?

22 A. That's right.

23 Q. Now, well did y'all find anything?

24 A. No. Other than just an ID card, that
25 was it.

1 Q. Okay. Let's look at this call here.
2 So he called [REDACTED]. Does that number have
3 any significance in this investigation?

4 A. It does.

5 Q. In what way?

6 A. So in the investigation I attempted to
7 make contact at Te'Quan Perry's house after this
8 arrest. I spoke with his uncle briefly. His uncle
9 gave me a phone number for his mother and he gave
10 me the number [REDACTED] for his mother, Te'Quilla
11 Perry.

12 Q. Did you call Ms. Perry?

13 A. I did. I actually spoke with her
14 briefly on the phone and we never -- arrangements
15 were never made to make contact.

16 Q. So this number, you spoke to an
17 individual at this number who was identified as Ms.
18 Perry, being the Defendant's mom?

19 A. Yes, sir.

20 Q. And this call starts I think with
21 saying mom?

22 A. There is a reference of mom in this
23 recording.

24 Q. Okay. We will go to clip two. What's
25 the date and time on this clip?

1 A. This same evening. So it's March 26th,
2 2015, and this is at 11:03 p.m. or 2303 p.m.

3 Q. Okay. I think this --

4 A. I think that was the same time as the
5 other one.

6 Q. Okay. Same number?

7 A. Same number.

8 Q. Okay.

9 (Clip played.)

10 Q. So asks the same question, did they
11 search your house?

12 A. That's correct.

13 Q. This time she says they did search my
14 house, but they didn't find anything.

15 (Clip played.)

16 What is the date and time of this call?

17 A. This is on the 27th of March, 2015 and
18 the time is 2:48.

19 Q. Before I go any further, did you have
20 the occasion to speak to the Defendant Te'Quan
21 Perry?

22 A. I did.

23 Q. How long do you think you spoke to him?

24 A. The interview started just after eight
25 and it ended at 8:50, so it was probably about

1 40 minutes or so given the breaks and in between.

2 Q. Okay. On those first two clips you
3 could hear the inmates' voices?

4 A. Yes, the voice is consistent with what
5 I recall of Te'Quan Perry's.

6 Q. Okay. If I forget to ask you that as
7 we move along these clips, if any of these calls
8 from the inmate don't sound like Te'Quan Perry,
9 alert the Court.

10 A. Okay.

11 (Clip played.)

12 Q. I want to play one portion of this
13 again.

14 (Clip played.)

15 Q. Did you hear what he said there?

16 A. Yes.

17 Q. What did he say?

18 A. The "N" word be singing.

19 Q. What is your position with the
20 Charleston Police Department?

21 A. Detective in the homicide unit.

22 Q. And how long have you worked there?

23 A. I have been a detective in the homicide
24 unit since 2014. Prior to that I was a detective
25 in the robbery division for a year and-a-half or

1 so. And in total I have been a law enforcement
2 officer for almost 11 years now.

3 Q. Okay. And during that time how many
4 shooting investigations would you say you have
5 worked?

6 A. It is hard to actually put a number. I
7 have been the case agent in eight murders, so I was
8 the lead detective in eight different murders. I
9 have worked probably about 16 to 18 murders
10 altogether and shootings I have worked probably
11 upwards of a hundred shootings I would say at
12 least.

13 Q. And how many violent crime
14 investigations would you say that you have
15 investigated as your tenure as a detective?

16 A. Well, typically all I work are violent
17 crimes. I would say upwards of a couple hundred
18 violent crimes since I have been a detective.

19 Q. Okay. And during that time how many
20 witnesses would you say that you have spoken to,
21 approximately?

22 A. I interview people almost daily. I
23 would say probably it would be fair to say probably
24 interviewed over a thousand people during my time.

25 Q. Have you ever heard the term "snitch"

1 being used?

2 A. I have.

3 Q. And what does that mean?

4 MS. VAN PALA: Objection, Your Honor,
5 improper opinion. I don't think -- I think what
6 the State is attempting to do is qualify the
7 detective as an expert in some kind of field where
8 he is interpreting street language. According to
9 the Johnson case that I handed up, the detective
10 cannot testify as to what the street language means
11 in the personal -- by a case based on personal
12 knowledge as a lay witness.

13 I think what the State is attempting to
14 do is qualify him as an expert. I don't think that
15 he can be qualified as an expert in that regard.
16 Therefore, I don't think that -- I apologize. I
17 don't think he can opine about what those phrases
18 mean.

19 THE COURT: I will hear from the State.

20 MR. OSBORNE: I haven't got there yet,
21 Your Honor.

22 THE COURT: He asked what the word
23 "snitch" means.

24 MS. VAN PALA: Yes.

25 THE COURT: Look it up. What does it

1 mean right now? Look it up. The reason I am
2 asking is that doesn't sound like code language. I
3 think snitch means somebody who is telling on
4 somebody.

5 MS. VAN PALA: The jury is allowed to
6 infer that from listening to the tape.

7 MR. OSBORNE: Your Honor, to answer
8 your question, the definition of snitch, verb, one,
9 to steal; two, to inform on someone. Quote she
10 wouldn't tell who snitched on me.

11 THE COURT: That's just English.

12 MS. VAN PALA: Yes, Your Honor.

13 THE COURT: I don't think that requires
14 an opinion to state what snitch means.

15 MS. VAN PALA: And I think it's clear
16 from the tape that was played so the jury is --

17 THE COURT: As to that word overruled
18 because snitch has a plain meaning. We are going
19 to get to this point shortly, I believe.

20 BY MR. OSBORNE:

21 Q. We will get there right now. So in
22 your experience as an officer you said that you
23 spoke to hundreds, is that correct, maybe even
24 more?

25 A. If we are talking about just interviews

1 altogether I would venture to say probably in the
2 thousand mark at this point.

3 Q. And through your experience do you find
4 that witnesses are readily available and want to
5 talk to you?

6 A. That's very difficult.

7 Q. Okay. Through your experience have you
8 heard of the term "singing"?

9 A. I have.

10 Q. And what does that mean?

11 MS. VAN PALA: Objection. I believe
12 that the detective would try to offer a definition
13 of the word "singing" that in this case is not the
14 traditional English language definition.

15 THE COURT: I'm going to agree with you
16 on that. We finally got there. Same objection as
17 you had in the past.

18 MS. VAN PALA: Same objection and 403.
19 I think it's going to be unduly prejudicial and it
20 is inviting the jury to interpret a fact based on
21 an improper basis.

22 THE COURT: Now, Mr. Osborne, it is
23 time to discuss whether or not -- I assume you have
24 not offered him as an expert witness at this point
25 in time.

1 MR. OSBORNE: No, I have not.

2 THE COURT: So I assume you are
3 expecting his testimony to come in under Rule 701.

4 MR. OSBORNE: I have not offered him as
5 an expert witness, Your Honor. I would think
6 that --

7 THE COURT: 702 deals with experts.
8 701 is an opinion given by a lay witness.

9 MR. OSBORNE: It is, Your Honor. And I
10 think that if I could -- I had this case -- I think
11 that I can qualify him as an expert in the field of
12 homicide investigations based on his experience.

13 THE COURT: Well, you are probably
14 going to have to lay some foundation the basis for
15 the expert opinion and training. This case goes on
16 to talk about that. If you are going to go 702 I
17 will have go to a different location in the case.

18 An expert must have specialized
19 knowledge that would assist the trier of fact and
20 knowledge, skill, experience, training and
21 education that qualifies him on the subject of
22 testimony. Must be based on sufficient facts or
23 data and the witness must use reliable principles
24 and methods and apply those principles and methods
25 reliably to the facts of the case. Goes on to say

1 it's well established that narcotics officers can
2 be appropriately designated as experts on market --
3 drug market and drug charges. And that refers to
4 United States v. Hopkins.

5 Goes on to say this court outlined the
6 appropriate manner about which narcotic officers
7 should be qualified as experts. The United States
8 v. Wilson. In that case the Defendant objected at
9 trial to the detective being designated an expert
10 witness when he failed to provide adequate support
11 and methodology regarding his opinions on drug
12 charges and code. The court found that the
13 detective had adequately stated his methodology the
14 court cited the code used by the targets of the
15 drug investigation and affirmed the district court.
16 We noted the detective pointed to a pattern of
17 language that emerged over time regarding certain
18 words that were used out of context for their
19 dictionary meaning.

20 Although most of the detective's
21 testimony was properly admitted we caution the
22 district court erred in failing to exclude
23 Seebolt's testimony when that testimony could
24 either interpret language that needed no
25 interpretation.

1 Again, I am trying to keep us from
2 interpreting things that don't need interpretation,
3 or when Seebolt did not adequately explain his
4 methodology in reaching a questionable
5 interpretation. The net effect was harmless in
6 that case.

7 So I think in order for him to be
8 qualified as an expert, 702 expert, he is going to
9 have to go through some methodology or methods that
10 he used and it can be applied to this case. In
11 other words, if certain words appear throughout all
12 of the calls used out of the ordinary meaning, but
13 fit within some context overall, that he needs to
14 testify how he figured out how those words was --
15 what method he used before I can qualify him as an
16 expert.

17 So if you are going to offer him as an
18 expert you got to go through that this case says
19 and I don't disagree with them.

20 BY MR. OSBORNE:

21 Q. All right. Detective Krasowski,
22 through your experience as a homicide detective
23 have you often heard terms that are used outside of
24 the normal meaning of the term?

25 A. I have.

1 Q. Okay. Now, during your experience as a
2 homicide detective, and you had mentioned that
3 oftentimes individuals aren't willing to come
4 forward and give information forthright?

5 A. That's correct.

6 Q. Through your experience as a homicide
7 detective have you seen or heard individuals
8 express negative connotations towards people who do
9 speak to the police?

10 A. Absolutely.

11 Q. Would you say that's common or
12 uncommon?

13 A. It's very common.

14 Q. And what are some of the ways in which
15 individuals express a negative connotation towards
16 individuals who cooperate with the police that's
17 outside the normal meaning of those words through
18 your experience?

19 A. I mean specific words? I mean some of
20 them are derogatory in nature, you know, I'm not
21 sure what --

22 Q. Have you ever heard of the term through
23 your experience "singing"?

24 A. I have heard it before, yes.

25 Q. Okay. So going outside the normal

1 definition of the term "singing", if someone were
2 to sing, what does that mean to a homicide
3 detective through your experience?

4 A. Well, in the context that was used it
5 would imply that people loosely stating facts about
6 a case, something to that regard.

7 Q. Or maybe not, maybe they're just lying,
8 correct?

9 A. Yeah, that's true.

10 Q. But either way they are cooperating or
11 talking to the police or authorities?

12 A. Yes, doing what -- against what is
13 suggested.

14 Q. Okay. And that sort of brings us to
15 another thing. You said that you had spoken to
16 several people. Do you find that there is sort of
17 a code among people on the street?

18 A. Yes.

19 Q. And what is that code?

20 A. One of the codes is don't talk to the
21 police.

22 Q. Have you ever interviewed people that
23 will have shirts on coming into the interview room
24 that will say things like don't talk to the police?

25 A. I haven't specifically seen a shirt. I

1 know there are apps on phones that talk about that.
2 Talk about people's rights and don't talk to the
3 police period. I have seen that on social media
4 quite often, and I am told that often that I can't
5 talk to the police.

6 Q. Stop snitching?

7 A. Stop snitching.

8 THE COURT: Yes, ma'am.

9 MS. VAN PALA: Judge, I do not think
10 that Detective Krasowski can be -- based on that
11 brief voir dire can be qualified as an expert in
12 this field because I do not think he has testified
13 as to a method, a reliable method, that is standard
14 in his field as a police officer or that is
15 consistent within his investigation in this case.
16 Particularly just saying that there is a code that
17 applies in this case, a street code, without
18 explaining why that is a code, what makes it a
19 code, the distinguishing features, without saying
20 that, he's not really offering any kind of expert
21 opinion on the methods applied. And without being
22 able to testify as an expert as to the method --

23 THE COURT: Let me ask you a question,
24 Ms. Van Pala. In reading the case you submitted it
25 just struck me that the Court is saying that part

1 of the person's expertise can be based upon their
2 experience as an officer. It also can be based
3 upon their review of the language that is used
4 between the particular parties involved in the
5 cases being investigated. And if certain patterns
6 emerge, if certain things are said consistently
7 between those people, then the patterns give rise
8 to a meaning, basically you could testify from your
9 review of the case before the court. Do you get
10 that meaning? I am referring to page 294 after
11 No. 1 where they start talking about 702 testimony.

12 MS. VAN PALA: Yes, Your Honor.

13 THE COURT: And goes on to say that
14 testimony must be based on facts sufficient or data
15 that witness must use reliable principles and
16 methods, apply the principles and methods to the
17 facts of the case, talking about the case. Goes on
18 to say that the court outlined the appropriate
19 manner in which a narcotics officer could testify.
20 Defense objected to designate an expert witness
21 where he failed to provide adequate support
22 regarding his opinions on drug code jargon.

23 It says the court found the detective
24 had adequately stated his methodology for
25 deciphering the codes used by the targets of the

1 drug investigation he was talking about, that using
2 his expertise as an investigator he reviewed all of
3 the discussions or the tapes or whatever he had the
4 people involved in that case and if those calls
5 developed a pattern then the officer could testify
6 about that. That's what that appears to say. I am
7 asking if you disagree with that, not -- he hasn't
8 testified to that yet. And so at this point I am
9 sustaining your objection. But do you agree that
10 that's where we are in this case?

11 MS. VAN PALA: I agree that's what the
12 case said. I disagree that I don't think Detective
13 Krasowski will be able to --

14 THE COURT: I don't know. You are
15 talking about future testimony now. We will talk
16 about that when we get to it. I am just asking you
17 -- I am trying to get your position on the law.

18 MS. VAN PALA: Judge, I think that
19 Wilson and Hopkins are distinguishable in this case
20 because they are drug cases. And with drug cases
21 that I believe -- I mean we are talking about
22 quantities, types of drugs. What we are talking
23 about here in the case --

24 THE COURT: We are talking about
25 jargon. They are using a jargon. I'm not sure

1 that the subject of the jargon -- I don't see any
2 on the subject of the jargons. I think it's where
3 a police officer attempts to interpret jargon
4 that's heard in a particular case.

5 MS. VAN PALA: Yes, Judge. And I would
6 point the Court to the paragraph right after that
7 right before the page turns to 295. What I believe
8 this case stands for is that there's got to be some
9 kind of separate reliable principles and methods
10 that the detective would apply to apply in this
11 case. And in this case --

12 THE COURT: I don't know -- we haven't
13 gotten to whether he did or didn't. I would think
14 that if I heard the word -- pick a word, bird,
15 mentioned 10 or 15 times, when you put that in the
16 context of whatever is being talked about in those
17 particular conversations, maybe you can decipher
18 from the pattern what that means if you have
19 experience with street language in the past.

20 That's what I take that paragraph to
21 talk about. I don't know whether there's a
22 pattern; I haven't heard but two or three sentences
23 of the third tape now.

24 So I don't know if there's a pattern in
25 this case. I am just asking you if you agree that

1 that's what the case says, Johnson. You submitted
2 it. I just want to be sure I understand it.

3 MS. VAN PALA: I don't agree that -- I
4 do not agree that just based on finding a pattern
5 in one case that makes him an expert.

6 THE COURT: I didn't say that either.
7 I said he would have to have some experience and
8 knowledge and use of street language in the past
9 and he applies that to the facts in this case and
10 using a method of comparing similar words, similar
11 conversations, putting them in context, he perhaps
12 would have deciphered and if that's what he did
13 then we are past the Johnson case. You don't have
14 to answer the question if you don't want.
15 Apparently you don't want to.

16 MS. VAN PALA: I don't agree.

17 THE COURT: Okay. Can you tell me how?

18 MS. VAN PALA: I don't think that just
19 by drawing conclusions across the span of one case,
20 I think that you have to have some basis to know
21 why there's a method that's credible in this case
22 before you can just ad hoc decipher your own
23 methods.

24 THE COURT: All right. At this point
25 in time I am sustaining her objection.

1 MR. OSBORNE: Thank you, Your Honor.
2 I'm going to ask you two questions, then we will
3 move on.

4 BY MR. OSBORNE:

5 Q. As an officer how many times would you
6 say or how many jail calls would you say you have
7 listened to?

8 A. It depends. Probably couple of hundred
9 I think is fair to say over the course of my time.

10 Q. Okay. And I'm not asking you what your
11 opinion of the term "singing" means. But through
12 all of those jail calls and through all of your
13 experience with talking to witnesses and all of
14 your experience being a homicide detective, do you
15 know that the term "singing" has an alternate
16 meaning?

17 MS. VAN PALA: Objection. Just because
18 the solicitor said I'm not asking you for your
19 opinion doesn't mean that's what he's actually
20 asking for. He is asking the officer to opine
21 about what singing means and has not qualified him
22 as an expert.

23 THE COURT: Sustain the objection.

24 MR. OSBORNE: All right. Let's go to
25 clip four.

1 BY MR. OSBORNE:

2 Q. What's the date and time of this?

3 A. This is March 27th, 2015, at 2:48.

4 (Clip played.)

5 Q. All right. The individual on the video
6 wearing the tan jacket that you last see on [REDACTED]
7 Norman camera, where is he coming from?

8 A. Out of the alleyway.

9 Q. All right. Clip five.

10 (Clip played.)

11 Q. Let me stop before we get started.
12 What is the date and time on this call?

13 A. This is March 27th, 2015; this is at
14 9:57.

15 Q. Okay. The number who is being called
16 here, or what is the phone number?

17 A. The phone number is [REDACTED].

18 Q. All right. And whose number is that?

19 A. That's Ashland Horlback.

20 Q. So let me ask you something on a side
21 note real quick. You had the occasion to get the
22 phone records for [REDACTED]?

23 A. Yes, sir.

24 Q. Did you see this phone number [REDACTED]
25 appear on the [REDACTED] phone records?

1 MS. VAN PALA: Objection to the
2 [REDACTED] records that were part of one of my other
3 pretrial objections because I don't think that the
4 detective can lay the appropriate foundation and
5 authenticate it and testify as to its relevance
6 because --

7 THE COURT: I have already ruled on
8 authentication of the phone records, have I not?

9 MR. OSBORNE: You have, Your Honor, and
10 what she is objecting to is exactly what we are
11 trying to do.

12 THE COURT: Haven't I ruled on that
13 already?

14 MS. VAN PALA: Yes, Your Honor.

15 THE COURT: Authentication. All right.
16 Is that what you are trying to object to?

17 MS. VAN PALA: Renewing my objection.

18 THE COURT: You are renewing your
19 objection. Well, I am not changing my ruling so
20 overruled.

21 BY MR. OSBORNE:

22 Q. How many communications did you see
23 between the [REDACTED] number and this number right here?

24 A. There was over a hundred points of
25 contacts in the phone records for the time that I

1 obtained.

2 Q. And how long was that time period?

3 A. It was just a few days before the
4 murder. It was I think no more than two weeks. It
5 was maybe less than that.

6 Q. Over a hundred contacts between the two
7 weeks between the [REDACTED] number and [REDACTED] number?

8 A. That's correct.

9 Q. And you said this is Ashland Horlback.
10 Who is that?

11 A. That was Te'Quan Perry's girlfriend.
12 (Clip played.)

13 MS. VAN PALA: Objection. This is one
14 of the clips that I believe is subject to your
15 prior ruling about the co-defendant. Te'Quan says
16 what's Devin talking about and he also refers to
17 Taliban and the detective would testify that
18 Taliban is Devin's moniker. So I believe this is
19 subject to your prior ruling.

20 MR. OSBORNE: Well, Your Honor, I went
21 back and looked at the case that you cited and read
22 it more carefully last night. And I do believe you
23 are correct in the way that it is worded. I wish
24 they would have changed the word a little bit. So
25 on No. 3 on Crawford being implicated it says,

1 "Statements made under circumstances that would
2 lead an objective witness to reasonably believe
3 that the statement would be available for use at
4 later trial."

5 I thought it would have read to be used
6 at trial. It's simply availability. And based on
7 that, any mention on these jail calls of the word
8 Devin or Taliban if the defense is requesting we
9 will redact that I believe --

10 THE COURT: I will order the redaction.

11 MR. OSBORNE: Moving on to clip six.

12 MS. VAN PALA: Judge, we think that the
13 entire clip should be excluded because at the
14 beginning of the clip he references Devin and
15 that's the subject of the clip. So I believe the
16 whole clip should be redacted.

17 THE COURT: I'm not sure I understand
18 what you are talking about.

19 MS. VAN PALA: The subject of the clip
20 is Devin.

21 THE COURT: Are you talking on the
22 computer?

23 MS. VAN PALA: The clip that we just
24 listened to in its entirety, the voice mentions
25 Devin at the beginning.

1 THE COURT: I redacted any mention of
2 Devin from any of it.

3 MS. VAN PALA: So that means that the
4 entire clip is excluded?

5 THE COURT: No, that's not what that
6 means. That means it will be redacted so that you
7 cannot see or decipher any reference to Devin.

8 MS. VAN PALA: And Taliban?

9 THE COURT: And Taliban.

10 MR. OSBORNE: Your Honor, to that
11 extent --

12 THE COURT: So I haven't analyzed the
13 clip yet to see. I'm sure you will raise an
14 objection if they don't properly redact. Once you
15 see the redacted versions, then you can object to
16 whether it has been properly redacted or not.

17 MS. VAN PALA: Yes, Your Honor.

18 THE COURT: But to simply exclude the
19 entire clip, no, I am not doing that now.

20 MS. VAN PALA: Yes, Your Honor.

21 MR. OSBORNE: To that extent I
22 anticipated this might be where it went once I read
23 the case a little bit closer. So I have asked
24 Investigator Haupt to go ahead and get started on
25 that. It may very well be that clip five is

1 useless to us once that word is redacted.

2 THE COURT: I understand that. I think
3 you're going to have to arrive at a redacted
4 version, make that available to the defense and
5 then --

6 MR. OSBORNE: We will.

7 THE COURT: -- if there are objections
8 to that version, then there's something for me to
9 rule on.

10 MR. OSBORNE: Thank you, Your Honor.
11 Clip six.

12 (Clip played.)

13 BY MR. OSBORNE:

14 Q. Nardo. Who is Nardo?

15 A. Denardo Felder.

16 Q. And the date and time, this is the same
17 call?

18 A. Yes, March 27th, 2015, at 9:57.

19 Q. Okay. And she asked or the caller
20 asked Nardo is 17?

21 A. Yes. And then this was corrected and
22 it was suggesting that Duke was 17.

23 Q. Who is Duke?

24 MS. VAN PALA: Objection. Renewing my
25 objection about Duke in reference to Demarco Jones

1 for my pretrial motion.

2 MR. OSBORNE: I don't know how we are
3 going to avoid that. Duke is on the video, Your
4 Honor. He is Brandon's cousin. On that text
5 message where Brandon communicates with Lefty and
6 tells him who to trust, Duke is my blood, I'm
7 paraphrasing. Duke is referenced in there. Duke
8 is on the video meeting up with Brandon.

9 THE COURT: The issue about Duke was
10 that he was subsequently murdered I think. I said
11 there couldn't be any mention of that murder.

12 MS. VAN PALA: Also, to the extent that
13 the detective tries to offer any explanation as to
14 Duke's part in this investigation, that's hearsay
15 that doesn't meet the exceptions for --

16 THE COURT: Now, the question he asked
17 was who was Duke.

18 MS. VAN PALA: The question --

19 THE COURT: Isn't what you asked him?

20 MR. OSBORNE: Yes.

21 THE COURT: You are objecting to asking
22 who is Duke?

23 MS. VAN PALA: Yes, Judge, and because
24 I think that's where it's going if the detective is
25 going to --

1 THE COURT: I don't know where it's
2 going. Overruled.

3 MS. VAN PALA: And it's irrelevant.

4 THE COURT: Overruled.

5 BY MR. OSBORNE:

6 Q. I believe that was clip six. We are
7 going on to clip seven.

8 (Clip played.)

9 The date and time of this call?

10 A. I believe it's the same. It's
11 March 27th, 2015 at 9:57. The phone number is

12 [REDACTED].

13 Q. Ashland Horlback?

14 THE COURT: Before we do that, we are
15 going to take about a ten-minute break. Court will
16 be in recess for that length of time. Thank you
17 very much. You may step down. Just don't discuss
18 your testimony.

19 (A recess transpired.)

20 THE COURT: I will ask the attorneys to
21 approach, please.

22 (Sidebar conference held.)

23 THE COURT: This may be an exercise in
24 futility, but how much longer? I have got a jury
25 coming in at 1:00. So what's the number clip?

1 MR. OSBORNE: Seven.

2 THE COURT: Seven. How much longer?

3 MS. NORRIS: I am not asking questions,
4 Judge.

5 THE COURT: Just you can tell me what
6 you think.

7 MS. NORRIS: It was my suggestion that
8 the jury come back at one so if I am wrong about
9 that I apologize. That was my suggestion.

10 THE COURT: The question is how much
11 longer? Help me. I can call them and not have
12 them come up here. I don't want them to waste
13 another day sitting up here.

14 MS. VAN PALA: I would suggest that,
15 Judge.

16 THE COURT: So you think it's going to
17 take all day?

18 MS. VAN PALA: I have been wrong this
19 whole time, Judge.

20 THE COURT: Is this an effort to delay
21 the trial?

22 MS. VAN PALA: No, I object to that. I
23 objected to that repeatedly, Judge, because I filed
24 all these pretrial motions weeks before this trial.
25 And I told the Court last Monday that I thought

1 these were the biggest issues. And just because I
2 didn't specifically object to every time the
3 solicitor wanted to call a motion -- the solicitor
4 called the motions. Just because I didn't object
5 doesn't mean that I still didn't try to warn
6 everybody. And I really do not appreciate --

7 THE COURT: I didn't hear that warning.
8 I am sorry. I must have missed it.

9 MS. VAN PALA: I specifically remember
10 on Monday, the first Monday 2:00, reading all my
11 motions into the record.

12 THE COURT: Oh, yes. When you read the
13 motions in the record, that's interesting, but it
14 doesn't tell me how long it is going to take to
15 argue that. You were here and knew when I set up
16 the schedule. You didn't say, Judge, that's not
17 going to work.

18 MS. VAN PALA: That's correct and I
19 apologize.

20 THE COURT: I don't know what all the
21 arguments are. I don't know what issues you are
22 going to bring up about the rest of these things.
23 You have a right to do that. I am not saying you
24 don't have the right to do it, but I have a duty to
25 plan the schedule. I have got to kind of keep

1 things moving. That's my job. And I am asking for
2 some assistance right now. How much longer? It's
3 only about the fourth time I have asked the
4 question.

5 MS. VAN PALA: I have proven to be
6 really bad at estimating times.

7 THE COURT: I hope we are improving.

8 MS. NORRIS: My suggestion is tell the
9 jury to come back tomorrow. Are we going to lose
10 any witnesses?

11 MR. OSBORNE: Yes. We have our
12 scheduled witnesses based on the belief that this
13 was going to be over at 12:00. This could go on
14 for days at this point.

15 THE COURT: Looks like we are going to
16 be doing pretrial motions for a week.

17 MS. VAN PALA: I am just objecting to
18 the testimony as it's coming out, Judge. If we do
19 what we have done before, if the State wants to
20 call a witness they don't want to testify to the
21 jail records in the case we can try it again.

22 THE COURT: We are breaking the case up
23 terribly. I don't like that.

24 MS. VAN PALA: Honestly, Judge --

25 THE COURT: I am trying to be

1 accommodating to both sides, but --

2 MS. VAN PALA: Honestly, Judge, I
3 apologize. I did not give you an accurate time. I
4 apologize for that, but that is not intentional.
5 And I want to try to fix that.

6 THE COURT: I am asking you to try to
7 fix the problem. What witnesses are you talking
8 about?

9 MR. OSBORNE: We have the responding
10 officer, Officer Medlin.

11 THE COURT: If I stop this and take up
12 witnesses then we are back to doing this again in
13 the morning so we are chopping the case up. So I
14 want to avoid that if I can.

15 MR. OSBORNE: I understand that, Your
16 Honor, and based on the representation that we were
17 going to be ready at 1:00, we told a witness who
18 hasn't been great for us, but he's been willing to
19 come in, to come here every day. Because we can't
20 contact him, he doesn't have a phone number. So he
21 literally has to come in tomorrow morning. We told
22 him to be back at 1:00. He has already been
23 threatened regarding testifying in this case. We
24 would really appreciate it if we can get him up
25 here, hear his testimony, get him on his way. So

1 we have a responding officer, two custodians and
2 this lay witness.

3 THE COURT: I am sorry?

4 MR. OSBORNE: So the responding officer
5 we think is brief, no jail calls.

6 MR. APICELLA: He will be brief.

7 MR. OSBORNE: We have a jail custodian
8 who will authenticate the jail recordings. We
9 won't play it, just ID purposes. Then we have a
10 custodian for the surveillance video. And she will
11 ID that and we will publish them, we will ID, move
12 them, publish them.

13 THE COURT: So does that implicate any
14 of the stuff that's left in your motion?

15 MR. OSBORNE: No.

16 MR. APICELLA: The problem is by
17 identifying these as jail calls it sort of lets the
18 genie out. Now they know they made the jail calls.

19 THE COURT: I assume they realize that
20 they were arrested and were in jail at some point.

21 MR. APICELLA: But --

22 THE COURT: I don't think that would be
23 a surprise to anybody.

24 MR. APICELLA: Let's assume that after
25 we hear all of our motions you suppress all of

1 these jail calls for a variety of purposes.

2 MR. OSBORNE: That hurts us.

3 MS. VAN PALA: That's why we filed the
4 motion.

5 MR. APICELLA: At that point you have
6 to now instruct the jury to disregard all that
7 testimony, tell them it has nothing to do with the
8 case. To the extent that you heard anything don't
9 consider it.

10 MR. OSBORNE: They are calling
11 witnesses. That hurts us.

12 MR. APICELLA: You did say that if the
13 Court was going to rule granting a severance that
14 you would be willing to not use any of those calls.

15 THE COURT: Well, I think that he
16 pretty much just did that. I just told him to
17 redact any reference to any co-defendant anywhere
18 anyhow anyway. They are banned from those
19 documents, those calls. You won.

20 MR. APICELLA: I know I did. Judge,
21 the problem is what does the redaction sound like?
22 If it's just --

23 THE COURT: I told you you can object
24 to that once he does it. I haven't ruled on that
25 yet.

1 MR. APICELLA: I don't want that to
2 take over three days.

3 THE COURT: I have never had a case
4 that's taken this long with pretrial motions
5 period. I have had some pretty big ones. Not
6 that we don't -- I am not saying we can't raise the
7 issues. But what I am saying is sometimes we need
8 to narrow the fight the battles we can win and not
9 fight the battles we can't win. But at any rate, I
10 am here.

11 Now, the question remains what do we do
12 with our schedule and he has got some witness
13 issues and had I known that this was not going to
14 go at all today I could have told the jury to come
15 back tomorrow. He's got a legitimate gripe too.

16 MR. APICELLA: He does.

17 THE COURT: What are they going to
18 testify to?

19 MR. OSBORNE: Nothing. These witnesses
20 we are calling only thing that -- well, Officer
21 Sherbine who works at the detention center. All we
22 are going to say is he is a custodian.

23 MS. VAN PALA: He can come any time.

24 MR. OSBORNE: No, he can't. Are you
25 aware of his schedule? We need him to come and ID.

1 MS. VAN PALA: Just a suggestion.

2 MR. OSBORNE: Have him ID and we won't
3 publish it.

4 MR. APICELLA: He will come back?

5 MR. OSBORNE: No.

6 THE COURT: Of course we could --
7 there's another way to handle this. If the defense
8 would just say they would stipulate that they are
9 authentic.

10 MS. VAN PALA: I don't think so, Judge.

11 THE COURT: Then you are asking for it.
12 That's why he is going to have to do it. You got
13 me in a box and you want to talk?

14 MR. APICELLA: Yes, may we please?

15 (Off-the-record conference.)

16 MS. VAN PALA: We can stipulate to the
17 jail calls which would eliminate the need for
18 Sherbine.

19 THE COURT: Okay. We will put that on
20 the record before you turn him loose. You want to
21 do that now?

22 MR. OSBORNE: Yes, Your Honor.

23 THE COURT: Okay. Now, the other
24 witnesses.

25 MR. OSBORNE: Officer Medline is the

1 responding officer. Should be quick. Jessica
2 Sanford is the custodian for the surveillance
3 videos.

4 THE COURT: Let's take them at 1:00.
5 Then we chop the case up.

6 MR. OSBORNE: Okay.

7 THE COURT: I don't see a choice.

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

9 THE COURT: I have held a brief
10 conference with the attorneys about scheduling
11 which has been a problem in this case. And it
12 appears that there was at least out of that
13 conference has come one stipulation.

14 My understanding is the State was
15 intending to have a witness appear at 1:00 this
16 afternoon for the purposes of authenticating the
17 jail phone call recordings.

18 In discussing that with the defense
19 counsel, they now indicate that they are able to
20 stipulate to the recordings themselves and in doing
21 so they are not waiving her right to object to any
22 portion of those calls. And we will continue to
23 review them subject to their objections. The only
24 matter that's been resolved at this time is that
25 the calls themselves are authenticated, they are

1 taken from the records of the detention center and
2 they represent the regularly kept records of those
3 calls. Have I correctly stated what we are doing?

4 MR. OSBORNE: That is correct, Your
5 Honor. For the record, there is State's Exhibit
6 126 and 147, 126 being Te'Quan Perry's jail clips
7 and 147 being the clips from Devin. We understand
8 they are making some redactions to those.

9 THE COURT: I have ordered certain
10 redactions. As I said, we are not dealing with any
11 of the issues as how they are to be presented to
12 the jury or whether there will be other changes or
13 parts of them excluded. We are simply stipulating
14 that they are the authentic records from the jail
15 of those phone calls.

16 Ms. Van Pala, have I correctly stated
17 our conference?

18 MS. VAN PALA: Yes.

19 THE COURT: You agree to that
20 stipulation?

21 MS. VAN PALA: Yes, Your Honor.

22 THE COURT: And, Mr. Apicella, do you
23 agree with that?

24 MR. APICELLA: Yes. So stipulated.

25 THE COURT: You stipulate. Ready to

1 resume with the witness?

2 MR. OSBORNE: We are, Your Honor.

3 BY MR. OSBORNE:

4 Q. Detective Krasowski, I believe we left
5 off with clip seven.

6 (Clip played.)

7 Q. I am sorry. So who is this call to
8 again?

9 A. This is the [REDACTED]. This is
10 Te'Quan's girlfriend at the time, Ashland Horlback.

11 Q. The day and time of this phone call?

12 A. March 27th, 2015, 9:57.

13 Q. Okay.

14 (Clip played.)

15 Okay. There were two --

16 MS. VAN PALA: Objection.

17 THE COURT: He hadn't asked the
18 question yet.

19 MS. VAN PALA: My objection is to the
20 jail call itself.

21 THE COURT: Yes, ma'am.

22 MS. VAN PALA: Judge, we submit that at
23 the beginning of this clip it is the young lady on
24 the other end of the phone doing most of the
25 talking and, in fact, Te'Quan says what you talking

1 about, girl? He doesn't know what she is talking
2 about. So that's hearsay. That's what she is
3 saying and it can't be considered an admission by
4 Te'Quan as an exception or as nonhearsay, excuse
5 me, because he doesn't know what she was talking
6 about. I think everything up until the point where
7 well, this is what I need you to do would be
8 inadmissible hearsay because it's the girl talking.
9 It's Te'Quan specifically saying he doesn't know
10 what she is talking about.

11 THE COURT: I will hear from the State.

12 MR. OSBORNE: She is going to testify.

13 THE COURT: Beg your pardon?

14 MR. OSBORNE: She is going to testify.

15 The person that's on the other end of that call
16 will testify. Now, she might deny it, she might
17 say that's not my voice, but Ashland Horlback will
18 testify.

19 THE COURT: I will reserve any rulings
20 until the time of trial.

21 BY MR. OSBORNE:

22 Q. Fat Boy, were there Fat Boys in this
23 investigation?

24 A. There were, one on the other side.

25 Q. Brandon had a friend named Fat Boy?

1 A. Yes. His name was Jacquan Spann.

2 Q. Okay. Did the Defendant Te'Quan Perry
3 have an individual in his family that went by Fat
4 Boy?

5 A. Yes, his brother.

6 Q. What was his name?

7 A. His real name? I'm not sure.

8 Q. You weren't there when this search
9 warrant was executed?

10 A. That's correct.

11 Q. Okay. Clip No. 8.

12 A. March 27, 2015, call at 9:57 and the
13 call was to [REDACTED] which is Ashland.

14 (Clip played.)

15 Q. Okay. On the video from the
16 surveillance video from that incident, you saw the
17 guy in the rain jacket?

18 A. Yes.

19 Q. Did you track him down Bogard?

20 A. Yes.

21 Q. Did you track him down Norman?

22 A. We did.

23 Q. Did you track him down Allway?

24 A. We did.

25 Q. And you have an image of an individual

1 in the McDonald's?

2 A. That is correct.

3 Q. And Te'Quan Perry in his jail call says
4 he went from Bogard to Norman to Allway to
5 McDonald's?

6 A. Yes, sir, McDonald's.

7 Q. And then Romney?

8 A. And then Romney.

9 Q. All right. Clip nine.

10 (Clip played.)

11 Q. Okay. What's the date and time of this
12 call?

13 A. March 27th, 2015. Now, this is at
14 10:16 in the morning and again this is to [REDACTED],
15 which is Ashland's.

16 Q. Okay.

17 (Clip played.)

18 Q. That clip is just indicating that the
19 beginning of this call the individual had entered
20 his PIN number again?

21 A. That's correct.

22 Q. And that came back to a prerecorded
23 message of Lefty?

24 A. Of Left.

25 Q. Or Left, sorry.

1 State's 126, clip ten.

2 (Clip played.)

3 Q. Again, it's Ashland Horlback?

4 A. Yes, [REDACTED].

5 Q. Same call?

6 A. Yes.

7 (Clip played.)

8 MS. VAN PALA: Objection. Judge, may
9 it please the Court, this clip is taken so far out
10 of context that what the solicitor is offering it
11 as a threat when, in fact, I believe if you listen
12 to the whole clip or more of the clip that would
13 give you context. You would see that Te'Quan is
14 talking about hiring a private attorney and getting
15 an investigator who would go out and interview
16 witnesses. This was on 3-27 so that was before he
17 was appointed an attorney.

18 And many of his jail calls discuss
19 going out and getting a lawyer. So this is --

20 THE COURT: He is not offering that
21 whole conversation.

22 MS. VAN PALA: Yes, and the basis of my
23 objection is that without that whole conversation
24 it's infringing -- irrelevant and it's prejudicial
25 under 403 and will be so confusing.

1 MR. OSBORNE: Under the rule of
2 completeness we would have no issue with playing
3 that entire call.

4 MS. VAN PALA: And what we are really
5 getting at here is that that's infringing on his
6 right to counsel which is he is talking about
7 getting a lawyer and that shouldn't be held against
8 him. And the fact --

9 THE COURT: They are willing to take --
10 on one hand you say they need to put it in and on
11 the other hand then you're saying they need to put
12 it out.

13 Now at some point in time I need to
14 know your position.

15 MS. VAN PALA: Yes, Judge.

16 THE COURT: In or out. They took it
17 out I think probably for the very reason you're
18 saying it's talking about getting a lawyer, am I
19 correct?

20 MR. OSBORNE: I really can't recall the
21 whole nature of the call, but anything that had to
22 do with an attorney we took out.

23 THE COURT: If you feel that's
24 necessary to mitigate -- so the whole call to get
25 completeness we have to put that in there. Maybe

1 it's a Hobson's choice for you, I don't know. But
2 sometimes we make those decisions in law. I don't
3 know which way you want it. Do you want it in or
4 out?

5 MS. VAN PALA: I am moving to exclude
6 the whole tape because without the impermissible
7 references to the attorney, you can't have any kind
8 of context and if you don't have the context then
9 it's unduly prejudicial and confusing.

10 MR. OSBORNE: Merely talking about
11 getting an attorney is not impermissible. There is
12 nothing prejudicial about that. In fact, I would
13 think if I were sitting on the jury he should get
14 an attorney. We are facing that type of charge.
15 They would expect him to. In fact, he did get an
16 attorney. She is standing right there.

17 MS. VAN PALA: That was before he was
18 screened by my office for a public defender.

19 THE COURT: But I tend to agree with
20 the solicitor in that the mere fact that someone is
21 telling someone I'm going to get an attorney, that
22 is not a privileged communication I don't believe.

23 MS. VAN PALA: Court's indulgence.

24 THE COURT: Yes, ma'am.

25 (Off-the-record conference.)

1 MS. VAN PALA: Judge, can we play the
2 entire clip to give it the context?

3 THE COURT: Mr. Osborne? Do you have
4 the entire clip?

5 MR. OSBORNE: I do, Your Honor. It
6 will take a second.

7 (Clip played.)

8 MR. OSBORNE: Your Honor, we don't have
9 any objection to playing the whole clip. We will
10 redact Devin's name that's on there and we will
11 abide by her request to play the whole clip.

12 MS. VAN PALA: Thanks, Judge. If we
13 can just preserve my objection to the whole clip in
14 its entirety based on the implication of infringing
15 on Te'Quan's right to counsel. We would prefer --
16 if you are going to let it in, we would prefer the
17 whole thing be played so that the last part is not
18 taken out of context. But I still want to preserve
19 my objection for the record.

20 THE COURT: All right. We will go in
21 that fashion.

22 BY MR. OSBORNE:

23 Q. Detective, we are going to pick back
24 up. I think this is clip 11. Some of this may be
25 duplicative.

1 THE COURT: We are going to go about
2 ten more minutes and then we will break for lunch
3 because we have got a jury coming in at 1:00.

4 MR. OSBORNE: Okay.

5 (Clip played.)

6 MR. OSBORNE: Apologize. That is the
7 clip that I took out so since we are playing the
8 whole clip we won't play clip 11. Now we are going
9 to clip 12.

10 BY MR. OSBORNE:

11 Q. What number is that?

12 A. Phone number is [REDACTED].

13 Q. Was that number significant at all to
14 the investigation?

15 A. It was. So this was the phone number
16 that Te'Quan Perry identified as his own when he
17 provided us a statement.

18 Q. Okay. Did you notice in the phone
19 records for the [REDACTED], did you notice any
20 communication between that phone number and
21 [REDACTED]?

22 A. I don't know that I actually cross
23 referenced that phone number. That was the one
24 that I actually didn't do in preparation for this.

25 Q. What's the date and time?

1 A. This is the 27th of March. It is now
2 10:45 for this call.

3 (Clip played.)

4 Q. All right. And that was on the 27th in
5 the morning.

6 A. It was.

7 Q. Okay. And that number was a number
8 that Te'Quan associated was being his number?

9 A. Yes, he identified that as his own.

10 Q. And the day after he was arrested that
11 phone call was made. All right. Clip 13.

12 (Clip played.)

13 Q. What was the same call?

14 A. It was.

15 Q. And once again he is talking about
16 searching the house?

17 A. That's correct.

18 Q. And the individual that he is talking
19 to said yes, they did?

20 A. They did search. He asked specifically
21 if they searched his room, where else in the house.

22 Q. Okay. Clip 14.

23 (Clip played.)

24 Q. What did he call him?

25 A. Fat Boy.

1 (Clip played.)

2 Q. Okay. What's the date and time of
3 this?

4 A. This is 10:45 on March 27th, 2015.

5 Q. And he tells his brother --

6 MS. VAN PALA: Objection.

7 Q. -- to tell Jasmine Murphy to put
8 minutes on the phone, correct?

9 MS. VAN PALA: Objection.

10 Q. Is that right?

11 THE COURT: Ma'am?

12 MS. VAN PALA: Objection based on
13 relevance. I don't know what relevance Jasmine
14 Murphy has in this case.

15 MR. OSBORNE: I'm about to say.

16 THE COURT: Let's let him say.

17 MR. OSBORNE: You have a copy of the
18 statement.

19 BY MR. OSBORNE:

20 Q. All right. May I approach the witness?
21 Showing you State's Exhibit 124; before I show it
22 to the judge do you recognize that?

23 A. I do. So these are the Facebook
24 business records that I obtained through my search
25 warrant.

1 Q. All right. What was the date? Again
2 that was March the 27th that he was talking to his
3 brother and he said tell Jasmine Murphy to put
4 minutes on her phone?

5 A. That is correct.

6 Q. And what's her number?

7 A. Yes.

8 Q. Read that text right there, March 27th?

9 A. So this is if you can slide that over
10 just a little bit. The author is this is GeezQuez
11 Otf. It says -- the body of what was said is, "My
12 brother say put some minutes on your phone. What's
13 your number?"

14 Q. Exactly what the caller from the jail
15 asked him to do?

16 A. That's correct.

17 Q. Okay.

18 MS. VAN PALA: Objection.

19 THE COURT: Yes, ma'am.

20 MS. VAN PALA: I don't think that
21 Jasmine Murphy's relevant in this case. It sounds
22 to me like a phone call and what I think the
23 solicitor is trying to do here is link up the
24 Defendant talking on the jail phone to what's in
25 the Facebook records; however, looking at State's

1 Exhibit 124 which the solicitor has put on the Elmo
2 we have Imperfection Jasmine. That's the name of
3 the user name. Who is Imperfection Jasmine? We
4 don't know who that is. Whoever imperfection
5 Jasmine is has no relevance to this case.

6 Further, the State is trying to say
7 that Te'Quan's brother was on his Facebook as
8 GeezQueez OFT.

9 Now the State is trying to connect
10 GeezQueez Otf with Te'Quan. And it's inherently
11 contradictory that they're now saying that and it
12 proves my point that Jacquan Perry was on Te'Quan's
13 Facebook, not Te'Quan. This can't be imputed to
14 Te'Quan. It's irrelevant and it's unduly
15 prejudicial and confusing.

16 MR. OSBORNE: We are only dealing with
17 at this point the relevancy of that specific jail
18 call. I think I have laid it out pretty well that
19 jail call is very relevant. If she wants to deal
20 with authorship of Facebook records, we were going
21 to deal with that later and not combine the two.

22 MS. VAN PALA: I understand.

23 THE COURT: We will reserve. You can
24 make that objection when you get to the point where
25 he tries to link it to Facebook.

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

2 THE COURT: Let's stop at this time.
3 We will return at 1:00 or shortly thereafter. Say
4 about ten minutes after one. I will take the
5 bench. Thank you very much. We will be starting
6 with the jury.

7 (A luncheon recess transpired.)

8 (Following proceedings held outside
9 jury's presence.)

10 THE COURT: I will ask the attorneys to
11 approach, please.

12 (Sidebar conference.)

13 THE COURT: I have received a note from
14 one of the jurors. I will read the note to you.
15 Juror 332, Leila Schardt I guess.

16 "I would like to speak to the judge
17 privately. When I first heard about the trial I
18 was not affected by it. Once I learned more about
19 it it reminded me of a case one of my former
20 employers was in. It had a very emotional effect
21 on me. It seems to be transferred over to this
22 case. It kept me up most of the night and is truly
23 affecting me. Currently I do not mean -- it's
24 affecting me currently. I do not mean to disrupt
25 this case in any way. I did want to be fair," and

1 I guess that's fair. Spell F-A-R-E. I guess
2 that's supposed to be fair and honest." I'm not
3 sure what to do in this case which is why I wanted
4 to speak with you privately."

5 My intention is to call the juror in
6 and ask her some questions on the record in the
7 courtroom. I don't intend to speak with her
8 privately. I don't think I'm allowed to speak to
9 her privately and ask her if I understand that's
10 affecting her in this fashion, if that in any way
11 would interfere with her ability to be fair and
12 impartial in judging the case as judge of the
13 facts. And of course if she says it affects her
14 impartiality, I will probably relieve her at this
15 point in time. But I wanted to make you aware I
16 received the transmission and what's going to
17 happen with it. Okay.

18 (Following proceedings were held in
19 open court.)

20 THE COURT: I would ask the bailiff if
21 you would ask Juror No. 332 to step into the
22 courtroom, please.

23 (Juror 332 brought to the courtroom.)

24 BY THE COURT:

25 Q. Ma'am, have a seat there in the first

1 seat will be fine. Ma'am, your name is Leila
2 Schardt?

3 A. Yes.

4 Q. Now, you have sent me a note that I
5 have read. You had asked that you be allowed to
6 speak with me privately. I hope you understand
7 that given the position that we're in, you are on
8 the jury and I as the judge, I'm not allowed to
9 speak with jurors privately as the trial is
10 proceeding.

11 So if I discuss this matter with you it
12 has to be on the record in front of the lawyers
13 that are present and so I hope you understand why I
14 have asked you to step in.

15 A. Absolutely.

16 Q. Do you wish to discuss this with me in
17 this fashion?

18 A. Yes.

19 Q. All right. In reading the note you
20 indicated that you answered, I assume you answered
21 the questions to the Court honestly yesterday and
22 completely when jury selection took place?

23 A. Correct.

24 Q. And at that time you had not felt like
25 the case would affect you in any way. But

1 according to your note apparently because of a case
2 one of your former employers was involved in, this
3 case is beginning now to affect you in some
4 fashion?

5 A. Correct.

6 Q. Now, is that -- are you speaking
7 emotionally?

8 A. Yes.

9 Q. Can you tell me what the effect is?

10 A. It is very emotional. I was not
11 friends with my former employer, but he was very
12 close to those who worked for me for four years and
13 it was a very -- almost identical case and
14 obviously before I was selected to be a juror, I
15 was not aware of the exact situation that the case
16 was in.

17 Q. We don't give you a lot of facts. You
18 understand that because we don't want people
19 prejudging the case.

20 Now, I my question is based on this
21 effect that it's had on you, would that affect your
22 ability to be fair and impartial to both the State
23 in deciding this case at this time?

24 A. I thought a long time about it. And
25 because of the way that you had talked to some of

1 the other jurors or almost jurors I think that it
2 actually might.

3 Q. Okay. Ma'am, what I think I am going
4 to do is I'm going to release you from any further
5 responsibility in the case. So you will be free to
6 go. I have instructed you not to discuss the case
7 with anyone. I will ask that you continue not to
8 discuss the case until this case is ended. After
9 this case is ended you're free to talk about what
10 you know or not. You don't have to talk to anyone
11 about it.

12 A. Okay.

13 Q. The bailiff will check you out and you
14 will be free to go at this time. Thank you for
15 your service. I note that Juror 332 was alternate
16 number two. So this will not affect the makeup of
17 the jury. It just means that we are down to one
18 alternate. I will have her note to me marked as a
19 court exhibit and made a part of the record.

20 (Court Exhibit 1 marked.)

21 THE COURT: State ready to proceed at
22 this time?

23 MR. OSBORNE: We are, Your Honor. Just
24 a housekeeping, we were unsure whether this witness
25 Clayton Small was going to appear or not. The

1 defense has requested a Bigger's hearing. Our
2 suggestion would be to call two witnesses, the
3 responding officer, custodian for the surveillance,
4 then if we have that matter of law then deal with
5 this then, then call Clayton as a witness.

6 THE COURT: That will be fine with me
7 if you want to go in that fashion. Defense ready
8 to proceed at this time?

9 MS. VAN PALA: Court's indulgence, Your
10 Honor.

11 We are ready, Judge, thank you.

12 MR. APICELLA: Yes, Your Honor, just
13 wanted to confer with co-counsel.

14 THE COURT: I understand. I just want
15 to be sure you are ready for me to bring the jury
16 in.

17 MR. APICELLA: Yes, sir.

18 THE COURT: Bring the jury in.

19 (Whereupon the jury entered the
20 courtroom at 1:15 p.m.)

21 THE COURT: Ladies and gentlemen, when
22 you left yesterday I gave you some instructions
23 concerning your behavior while you were away from
24 the courthouse. If any of you had any problems or
25 difficulty in complying with my instructions,

1 please stand. It appears that all jurors have been
2 able to comply with my instructions thus far.

3 Just a moment ago I have released one of
4 the alternates from the jury for cause and so we
5 are proceeding with -- ma'am, you are the only
6 alternate we have back there now. As you come and
7 go, there are no assigned seats in the jury box
8 except the alternates have to sit on the back row.
9 So just fill in and sit wherever you want. You
10 don't have to sit in any particular seat as you
11 come and go.

12 The State is in the process of calling
13 witnesses. Mr. Osborne.

14 MR. OSBORNE: Thank you, Your Honor.
15 State calls Jessica Sanford.

16 JESSICA SANFORD

17 having been duly sworn, testifies as follows:

18 THE CLERK: If you can state your first
19 and last name and spell your last name.

20 THE WITNESS: Jessica Sanford,
21 S-A-N-F-O-R-D.

22 THE COURT: Your witness, counselor.

23 DIRECT EXAMINATION

24 BY MR. OSBORNE:

25 Q. Good afternoon, Ms. Sanford. Where are

1 you employed?

2 A. City of Charleston Police Department.

3 Q. All right. What's your position there?

4 A. I'm the data integration and analysis
5 manager.

6 Q. Okay. What do you do in that position?

7 A. I oversee our team of crime analysts.
8 I oversee the camera staff and I'm system
9 administrator for the RMS and CAD data bases. I
10 maintain some of the mobile computers.

11 MS. VAN PALA: Your Honor, I believe we
12 have a matter of law. May I approach, please?

13 (Following proceedings were held at the
14 bench.)

15 MS. VAN PALA: My intern who is sitting
16 on the front row in our office just now texted me
17 and told me that they saw one of the jurors on our
18 panel sitting in the jury box in the solicitor's
19 office. I just got the text from her so I have not
20 been able to ask her because she texted me just as
21 the solicitor was calling this witness.

22 THE COURT: Is somebody communicating
23 with this juror?

24 MS. VAN PALA: I don't know.

25 THE COURT: Then I suggest you gather

1 your information and let me know if you think it is
2 something I should consider.

3 MS. VAN PALA: And that's why I asked
4 to approach.

5 THE COURT: That's fine.

6 MS. VAN PALA: I don't know what the
7 information is.

8 THE COURT: The fact that somebody may
9 have gone by the solicitor's office does not mean
10 they are tainted.

11 MS. VAN PALA: I don't even know what
12 happened. I just --

13 THE COURT: I don't either.

14 MS. VAN PALA: Well, may I request a
15 brief recess that I can ask?

16 THE COURT: We are not going to recess.
17 They can text you again. If she can come up if you
18 need a break -- if she here right now?

19 MS. VAN PALA: I think she is sitting
20 in the front row.

21 THE COURT: She is in the courtroom
22 texting you in the courtroom?

23 MS. VAN PALA: It just came up.

24 THE COURT: Maybe that's why cell
25 phones should not be allowed in the room. Is there

1 a rule about that?

2 MS. VAN PALA: I think the lawyers are
3 excluded from that rule and I just got the text.

4 THE COURT: We are going to get through
5 this case.

6 MS. VAN PALA: I just think it's
7 something that we should address.

8 THE COURT: Let's just stop texting.

9 MS. NORRIS: She just saw him standing
10 at the lobby. She wasn't aware that's what
11 happened.

12 MS. VAN PALA: Thanks, Judge.
13 Appreciate it.

14 (Following proceedings were held in
15 open court.)

16 BY MR. OSBORNE:

17 Q. All right. So you said that you were a
18 data integration analyst manager and part of that
19 last response was that your responsibility is to
20 maintain RMS and CAD?

21 A. Yes.

22 Q. RMS is records management system?

23 A. Correct.

24 Q. And what about CAD?

25 A. Computer aided dispatch.

1 Q. Okay. So we will move on. Does that
2 also include the upkeep of the city surveillance
3 cameras?

4 A. Yes, it does.

5 Q. Let's talk about those cameras for a
6 bit. When were they first installed or put up?

7 A. Around 2010.

8 Q. Now, they were installed I guess by the
9 city. Grants were granted by, what, the City of
10 Charleston?

11 A. Yes. The city applied for I believe it
12 was a public safety grant. Part of that grant
13 included public safety cameras and that's --

14 Q. What was the purpose or the goal in
15 instituting or installing these cameras?

16 A. It was to reduce crime, the perception
17 of crime.

18 Q. Hopefully prevent, assist with
19 investigations, things of that nature?

20 A. Yes.

21 Q. We will cover this a little bit more in
22 a second. Just generally where are some of the
23 cameras located?

24 A. The locations that were chosen for
25 cameras, they are all downtown on the Peninsula and

1 they're in historically higher crime neighborhoods
2 and high traffic tourist areas were the areas that
3 were chosen.

4 Q. Okay. So tourism and high violent
5 areas?

6 A. Yes.

7 Q. High crime areas. All right. So as a
8 data integration manager can you access live feeds
9 from those cameras?

10 A. Yes, we can.

11 Q. All right. Now, also when the cameras
12 are recording do they store the video in some way?

13 A. Yes, they store the footage on the
14 server for 14 days.

15 Q. For 14 days?

16 A. Fourteen days; that was part of the
17 agreement.

18 Q. What do you mean part of the agreement?

19 A. When the cameras were first purchased
20 through the grant the city got together with a
21 variety of community stakeholders and looked into
22 their concerns about the surveillance cameras being
23 placed. And one of the agreements that was reached
24 was that the camera footage would only be stored
25 for 14 days which would give investigators time to

1 identify if we needed to look at cameras due to an
2 incident and then after 14 days the footage at that
3 point is purged unless before then we have exported
4 it for a case file.

5 Q. I see. So the 14-day limit was an
6 agreement made by leaders of the city as well as
7 the police department?

8 A. For public privacy.

9 Q. For privacy issues. Okay. Now, you
10 say stored them and you said if the investigator
11 needs one. If they do need surveillance video do
12 they contact your unit for that?

13 A. Yes. They will e-mail. We have a
14 camera room e-mail group. It will go to the camera
15 room employees as well as the analyst. They
16 usually identify an area or a location that the
17 incident occurred in. They will give us a general
18 time frame and then we will go through and review
19 the footage. We usually will export all the
20 cameras just so that they can also see all the
21 footage, but we will let them know if we saw
22 anything that they may want to focus on.

23 Q. I see. And was that request made by
24 Charleston Police Department detectives in this
25 case?

1 A. Yes.

2 Q. And did your unit then provide them
3 with surveillance images?

4 A. We did.

5 Q. All right. I'm showing you what's
6 already been marked and admitted as State's
7 Exhibit 11. Are you familiar with the Back to
8 Green neighborhood?

9 A. Yes.

10 Q. Generally speaking, just mark on that
11 map where the neighborhood is. You can touch that.
12 Sorry.

13 A. Here. (Drawing.) That's generally
14 what we would consider Back to Green.

15 Q. So some of it's public housing, some of
16 it might be considered just residential homes?

17 A. Um-hmm.

18 Q. Okay. Does this map right here, do you
19 recall generally speaking where -- do you have
20 cameras at Back to Green?

21 A. Yes, we do.

22 Q. And do you know generally where they
23 are located?

24 A. They're spread out throughout the
25 neighborhood. We have one at Ashton and Norman. I

1 think Allway and Flood. There was along Line
2 Street in front of the school. I think we have
3 five total.

4 Q. I have another map I'll show you later
5 and we will get more specific, but all right. So
6 these cameras, are they stationary, do they stay
7 fixed or do they rotate?

8 A. They are in fixed locations, but they
9 do rotate on what we call a patrol schedule, so
10 they rotate every to 60 seconds. Again, that was
11 one of the concerns that the community voiced for
12 privacy. So unless we have an investigator or a
13 camera room person specifically watching an
14 incident they will rotate on a set schedule so that
15 nothing is focused on.

16 Q. Okay. So back on March 22nd, 2015, and
17 March the 23rd, 2015 were your cameras operational
18 then?

19 A. Yes.

20 Q. In the Back to Green subdivision? How
21 do you know that?

22 A. Because there was footage to pull.

23 Q. Okay. Now, do you have any policy or
24 procedures in effect to check whether the system is
25 functioning correctly?

1 A. Yes. So the camera staff has been
2 tasked with when they are on shift if they notice a
3 camera or cameras being down for an extended period
4 of time, longer than 45 minutes to an hour, they
5 will contact the vendor directly and copy me on it
6 and get the vendor involved in resolving those
7 camera issues.

8 Q. Your Honor, may I approach?

9 THE COURT: You may.

10 BY MR. OSBORNE:

11 Q. Showing you what's been marked as
12 State's Exhibit 8. Can you take a look at that and
13 tell me if you recognize it?

14 A. I do.

15 Q. What is that?

16 A. It's the Ashton and Norman camera
17 export.

18 Q. From what date?

19 A. The 22nd.

20 Q. Okay. How do you know that's what's on
21 that CD?

22 A. I initialled it.

23 Q. Let's talk about the -- and you had the
24 opportunity to view that --

25 A. I have.

1 Q. -- video. All right. The time on
2 there, can you make any representations regarding
3 the accuracy of the time?

4 A. The time will be fairly accurate. We
5 have had a problem with the server in the past.
6 Because it's its own stand-alone server, it is not
7 synced to the rest of the city network. It does
8 tend to be off. I forget forward or backward. It
9 does tend to be off a little bit. That's another
10 one of the cameras room staff duties is to keep
11 track if they notice that it's fluctuating from the
12 actual city network time, they do have the ability
13 to go in and fix it.

14 Q. When would they fix it, do you have
15 parameters in place fix it?

16 A. We ask them to check it a couple of
17 times during their shift. So as long as somebody
18 is working and they don't have something else going
19 on.

20 Q. Asked another way, if it's off a few
21 minutes do you have a policy in place that tells
22 them to fix it then?

23 A. Yes, we do have instructions and
24 everything. If they notice it being off they are
25 supposed to fix it.

1 Q. If it were off by days would they fix
2 it?

3 A. They should know well before then, but
4 yes.

5 MR. OSBORNE: Your Honor, may I
6 approach?

7 THE COURT: You may.

8 BY MR. OSBORNE:

9 Q. I'm going to kind of give you all of
10 these State's Exhibits 9, 10, 73, 74, 75 and 76.
11 And then I'll ask you about them individually.
12 State's Exhibit 9, do you recognize that?

13 A. I do.

14 Q. What is that?

15 A. It's another export from Ashton and
16 Norman.

17 Q. What's the date on that?

18 A. The 23rd.

19 Q. Okay. And how do you know?

20 A. I initialled. I viewed it.

21 Q. All right. State's Exhibit 74, do you
22 recognize that?

23 A. Yes. That's another Ashton and Norman.

24 Q. 74, are those simply clips?

25 A. Yes.

1 Q. So those would be clips taken from
2 nine?

3 A. Yes.

4 Q. Nine shows the whole video from that
5 time frame, 74 is clips from it; is that correct?

6 A. Correct.

7 Q. State's Exhibit 10, what is that?

8 A. That is the President/Bogard camera.

9 Q. How do you know?

10 A. I initialled it after viewing it.

11 Q. So let me ask you this. President and
12 Bogard is a separate camera from Ashton and Norman;
13 is that correct?

14 A. Correct.

15 Q. The time that's going to display or
16 that displays on the President and Bogard camera,
17 is that going to be synced to the camera time
18 that's on Ashton and Norman?

19 A. Yes.

20 Q. So while those two camera times may be
21 off a little bit, those two times will be the same?
22 They will be synced together?

23 A. Correct. All of the cameras feed off
24 the same server so if the server time gets a little
25 off it will be reflected on all the cameras

1 simultaneously.

2 Q. All right. State's Exhibit 75, do you
3 recognize that?

4 A. Yes.

5 Q. What is that?

6 A. That is the clips from President and
7 Bogard.

8 Q. From March 23rd?

9 A. Yes.

10 Q. So State's 57 contains clips from
11 State's 10, correct?

12 A. Yes.

13 Q. All right. State's Exhibit 76, do you
14 recognize that?

15 A. Yes. That is the Allway and Flood
16 export.

17 Q. From March 23rd?

18 A. Yes.

19 Q. And how do you know?

20 A. I viewed and I initialled it.

21 Q. All right. And State's Exhibit 73?

22 A. Is clips from Allway and Flood.

23 Q. So 73 contains clips from 76? How do
24 you know?

25 A. Yes, I initialled and viewed those as

1 well.

2 Q. Okay. Did you have the occasion on
3 State's Exhibit 73 to view some of those clips?
4 Did you see any police response if you remember?

5 A. I did.

6 Q. And where was that police response?

7 A. All in the streets.

8 Q. Was it fairly large?

9 A. There were a handful of cruisers there.

10 Q. Did you see EMS?

11 A. I didn't watch the full clip. I just
12 saw the cruisers.

13 Q. Okay. Now, you said that you have
14 access to the records management system. Are you
15 aware of any significant event that would require
16 numerous police response to ■ Norman on March
17 the 23rd?

18 A. Yes.

19 Q. What?

20 A. It was a homicide.

21 Q. And that corresponded to the
22 surveillance video, at least the portion you saw?

23 A. It did.

24 Q. And do these CDs that I have shown you
25 accurately depict the events contained on the

1 video, at least to the limitations of that
2 particular surveillance system?

3 A. It does.

4 Q. Your Honor, at this time we would seek
5 to admit 8, 9, 10, 74, 75 and 76 in that list.

6 THE COURT: Any objection?

7 MR. APICELLA: No.

8 MS. VAN PALA: Subject to my motion in
9 limine.

10 THE COURT: Subject to the previous
11 motion my ruling will be the same. They will be
12 admitted.

13 MR. OSBORNE: Thank you, Your Honor.

14 (State's Exhibits 8, 9, 10, 74-76 in
15 evidence.)

16 BY MR. OSBORNE:

17 Q. I'm showing you State's Exhibit 14.
18 Can you look at that and tell me if you recognize
19 it?

20 A. I do.

21 Q. What is that?

22 A. That is a map of our current camera
23 locations on the Peninsula.

24 Q. That was a map that you generated?

25 A. Yes.

1 Q. Okay. So this map shows all of the
2 locations of all the cameras in the City of
3 Charleston?

4 A. Yes.

5 MR. OSBORNE: Your Honor, at this time
6 I would seek to admit State's Exhibit 14 into
7 evidence.

8 THE COURT: Objections?

9 MS. VAN PALA: Previous motion, Your
10 Honor.

11 MR. APICELLA: Join in the previous
12 motions for this one.

13 THE COURT: All right. Motions are
14 noted. It will be admitted. The ruling remains
15 the same.

16 (State's Exhibit 14 in evidence.)

17 BY MR. OSBORNE:

18 Q. We are talking about camera locations.
19 Just circle the area in which the cameras are
20 located in Back to Green.

21 A. (Witness complies with request.)

22 Q. So we have five in the Back to Green
23 subdivision?

24 A. Correct.

25 Q. All right. Looks like there is a

1 concentration of cameras over there in the south
2 and green area. Circle that. I think there is
3 five there as well?

4 A. Yes.

5 Q. And then you have what looks like
6 various cameras up and down King?

7 A. We have them along the King Street
8 corridor, that area.

9 Q. And this is a concentration looks like
10 on Market Street?

11 A. Correct.

12 Q. Okay. So the tourist area being King
13 Street?

14 A. King and Market.

15 Q. As far as neighborhoods go, there's a
16 concentration in Back to Green and the east side?

17 A. Yes.

18 MR. OSBORNE: No further questions.

19 THE COURT: You may cross-examine.

20 CROSS-EXAMINATION

21 BY MR. APICELLA:

22 Q. Good afternoon.

23 A. Good afternoon.

24 Q. These cameras work 24/7?

25 A. They do.

1 Q. So they are able to take photographs or
2 videos at night?

3 A. Yes.

4 Q. And these cameras were first installed
5 in 2010?

6 A. Yes.

7 Q. And you told us that they were
8 installed only in what you described as a
9 historically high crime neighborhood?

10 A. Yes, those were the priorities.

11 Q. How many historically high crime
12 neighborhoods were these cameras installed in?

13 A. The two main ones, Back to Green and on
14 the east side, those were the two main ones
15 downtown.

16 Q. Now, are the crime statistics reviewed
17 at any time to decide whether or not there is
18 historically high crime?

19 A. They are.

20 Q. And since the cameras have gone up has
21 crime increased or reduced or stayed the same?

22 A. To my knowledge it stayed about the
23 same in those neighborhoods.

24 Q. Are there any plans to install these
25 cameras in any other neighborhoods?

1 A. There are. Since 2010 -- well, 2010 to
2 present that's how many cameras we currently have.
3 It's been kind of a phased in process. We do have
4 additional cameras going up around Johnson Street
5 and we are in discussions about getting some out in
6 the West Ashley area.

7 Q. And just to clarify for me if you
8 would, how long are the images stored before they
9 are automatically erased?

10 A. Fourteen days.

11 Q. After 14 days they can't be retrieved?

12 A. No.

13 Q. And were you monitoring those cameras
14 in real time when you saw the police activity?

15 A. I personally was not. I would have to
16 go back and see if there was a camera room staff
17 working that day. But normally when they are
18 working if they hear a tone go out for a
19 significant incident they will look to see if
20 there's a camera in the area and if there is they
21 will focus on the incident.

22 Q. You answered the solicitor's question
23 whether there was significant police activity on
24 that date, you said yes, then you described it as a
25 homicide?

1 A. Yes.

2 Q. How do you know that if you didn't see
3 it?

4 A. From viewing the camera exports.

5 Q. You were asked to review it by someone?

6 A. Yes.

7 Q. Who was that?

8 A. I reviewed it with Ray.

9 Q. When did you review it?

10 A. Today.

11 Q. That is the first time you saw it?

12 A. Yes.

13 MR. APICELLA: No further questions.

14 CROSS-EXAMINATION

15 BY MS. VAN PALA:

16 Q. You don't have any way to tell exactly
17 out how the clocks were from real time on the date
18 of March 22nd and 23rd, right?

19 A. No, correct.

20 Q. And you do not know who was in charge
21 of the camera room on those dates March 22nd and
22 23rd, correct?

23 A. Not without going back and checking the
24 schedule.

25 MS. VAN PALA: Thank you.

1 MR. OSBORNE: Two questions.

2 THE COURT: Are you finished?

3 MS. VAN PALA: Court's indulgence.

4 THE COURT: I thought you might be
5 talking to co-counsel.

6 MS. VAN PALA: Yes.

7 REDIRECT EXAMINATION

8 BY MR. OSBORNE:

9 Q. First question. When someone takes
10 over the camera and they can manually manipulate
11 it, they can actually then turn the camera and
12 focus on a specific event; is that correct?

13 A. They can.

14 Q. Okay. So if no one does that then the
15 camera will continue rotating on a regular pan; is
16 that correct?

17 A. Correct. The camera has no way of
18 knowing what's going on around it.

19 Q. So as far as knowing the exact time, do
20 you think it would be helpful to have someone who
21 was actually on the video say yes, that's me, and
22 then be able to find out what the time might be
23 then?

24 A. Yes.

25 Q. What it be helpful then to look at the

1 CAD report from the 911 call to be able to mirror
2 that to what's happening on the video to be able to
3 determine what time it is?

4 A. Yes.

5 MS. VAN PALA: Objection.

6 THE COURT: Beg your pardon?

7 MS. VAN PALA: Objection. Speculation.

8 THE COURT: Overruled.

9 MR. OSBORNE: No further questions,

10 Your Honor.

11 THE COURT: Recross?

12 MR. APICELLA: No.

13 MS. VAN PALA: No, Your Honor.

14 THE COURT: Ma'am, you may step down.

15 Thank you very much. You wish to excuse the
16 witness?

17 MR. OSBORNE: Yes, Your Honor.

18 THE COURT: Any objection?

19 MS. VAN PALA: No objection.

20 MR. APICELLA: No objection.

21 THE COURT: Ma'am, you are free to go.

22 Thank you for coming today. State may call its
23 next witness.

24 MR. OSBORNE: State calls Officer Jamal
25 Medlin.

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JAMAL MEDLIN

having been duly sworn, testifies as follows:

THE CLERK: State your full name and spell your last name.

THE WITNESS: Officer Jamal Medlin, M-E-D-L-I-N, first name J-A-M-A-L.

THE COURT: Thank you. Counselor, your witness.

DIRECT EXAMINATION

BY MR. OSBORNE:

Q. Good afternoon, officer. Where are you employed?

A. City of Charleston Police Department.

Q. How long have you worked there?

A. Approximately six years.

Q. During your employment with the CPD what have been some of your various assignments?

A. Right now I'm a detective with special investigations unit. Prior to that I was a member of the community action team and I was on patrol.

Q. Okay. What unit are you assigned to now?

A. Special investigations.

Q. That's narcotics?

A. Yes, sir.

1 Q. Okay. As a patrol officer what were
2 some of your duties and responsibilities?

3 A. As a patrol officer my routine
4 responsibilities were answering calls for service,
5 also reducing crime in areas through community
6 relation and police work.

7 Q. Okay. Let's go back to March of 2015.
8 Were you working specifically on March the 23rd,
9 2015?

10 A. Yes, sir.

11 Q. What was your assignment then?

12 A. I was directing patrol in the Gadsden
13 Green Community.

14 Q. What else is Gadsden Green known as?

15 A. Back to Green.

16 Q. Do you know why?

17 A. I have no idea.

18 Q. Did you have the occasion to respond to
19 a shots fired call for service?

20 A. Yes, sir.

21 Q. Where were you dispatched?

22 A. Excuse me?

23 Q. You were dispatched?

24 A. Yes, sir.

25 Q. Where was that?

1 A. To the area of ■ Norman Street.

2 Q. In the City of and County of
3 Charleston?

4 A. Yes.

5 Q. What time were you dispatched?

6 A. It was 5:55.

7 Q. 5:55 p.m.?

8 A. Yes, sir.

9 Q. All right. And you know that how?

10 A. We reviewed the tapes prior to this
11 trial.

12 Q. Okay. The CAD reports?

13 A. Yes, sir.

14 Q. All right. Where were you when you
15 received the call?

16 A. I was parked in the parking lot at I
17 believe it was Line and President Street.

18 Q. How long did it take you to get there?

19 A. It was under a minute.

20 Q. Showing you State's Exhibit 11. Where
21 is Line and President?

22 A. Line and President is right here and I
23 was in this area right here.

24 Q. Okay. And where is ■ Norman?

25 A. ■ Norman would be here. Above that.

1 Q. And how -- so that's not far. So when
2 you responded do you recall which way you went?

3 A. Went down President Street and I made a
4 left on Bogard and down Allway and -- Norman Street
5 from Bogard.

6 Q. Do you mind just doing it on the map?

7 A. (Witness complies with request.)

8 Q. Okay. So less than a minute?

9 A. Yes.

10 Q. I want to point out a couple of things
11 on this map right here. Do you know where Green's
12 Grocery is?

13 A. Yes, sir. On the map?

14 Q. Where is Green's Grocery?

15 A. Right here.

16 Q. Okay. Where is the intersection of
17 President and Crosstown? President and Crosstown?

18 A. Yes.

19 Q. Can you mark it?

20 A. That's the Crosstown up here.

21 Q. And ■ Norman one more time, I am
22 sorry.

23 A. (Indicating.)

24 Q. Now, this area Back to Green or the
25 Gadsden Green housing project, is this an area that

1 you patrol when you are on patrol?

2 A. Yes, sir.

3 Q. Now, let me ask you this: Is it a high
4 crime area?

5 A. Yes.

6 Q. Would you characterize it as being one
7 of the higher crime areas in the City of
8 Charleston?

9 A. Yes, sir.

10 Q. Do you find that through your
11 experience as an officer when you worked Back To
12 Green, did you find that you had issues with the
13 people who lived there or the people who hung out
14 there?

15 A. People who hung out there. Most of
16 them didn't live there.

17 Q. Why did you not have problems with the
18 people who lived there?

19 A. They didn't want to get kicked out of
20 their place of residency.

21 Q. So if an individual gets in trouble and
22 they live there they are subject to possibly being
23 kicked out?

24 A. Yes, sir.

25 Q. That's in the team one area?

1 A. Yes, sir.

2 Q. All right. Let's get to you responding
3 back to the scene of the murder. Did you respond
4 alone or were you accompanied by another officer?

5 A. Seabrook was with me.

6 Q. Sergeant Seabrook?

7 A. Yes.

8 Q. How far behind was he from you?

9 A. He was pretty close right behind me.

10 Q. All right. Tell the jury what happened
11 when you got on the scene?

12 A. I received the call. I was responding
13 to the area. I saw two parties hanging out in the
14 area of Allway and Norman Street. At that time due
15 to the nature of the call I approached them. When
16 I approached them, I advised them to put their
17 hands on their head and face the wall. Conducted a
18 patdown for weapons, which I didn't find any.
19 While I was doing that Sergeant Seabrook began
20 walking down Norman Street. And I saw the
21 gentleman gesturing towards Sergeant Seabrook
22 pointing this way. That's when Sergeant Seabrook
23 started going towards ■ Norman Street.

24 Pretty much as soon as he got in that
25 area looking down the little alleyway he started

1 yelling my name. Medlin, get over here. Then I
2 let those guys go. I went over there with him.
3 That's when I discovered the victim on the ground
4 there.

5 Q. So you said -- I'm going to go back
6 slower. So you said whenever you respond you saw
7 two individuals?

8 A. Yes, sir.

9 Q. Okay. Did you see anyone else in the
10 area?

11 A. No, sir, it was just them two.

12 Q. Just them two?

13 A. Um-hmm.

14 Q. You decided to stop them?

15 A. Yes, sir.

16 Q. I imagine working in team one you have
17 responded to shots fired calls before?

18 A. Yes, sir.

19 Q. Is it common for people to just hang
20 around when shots are being fired?

21 A. No, sir.

22 Q. Is that part of your reason why you
23 decided to stop them?

24 A. Yes.

25 Q. All right. So whenever you stopped

1 them you said you patted them down for weapons?

2 A. Yes, sir.

3 Q. And I assume part of your decision to
4 do that was due to the nature of the call?

5 A. Yes, sir.

6 Q. Did you find any weapons on them?

7 A. No, sir.

8 Q. Now, you said that Sergeant Seabrook
9 alerted you that there was an individual shot in
10 the alley?

11 A. Um-hmm.

12 Q. Were you finished with your stop of
13 these two individuals, or did you have to cut it
14 kind of short?

15 A. The way Sergeant Seabrook was yelling
16 for me I knew it was pretty urgent. I just cut it
17 short and let them go.

18 Q. Is it true that the primary
19 responsibility of a responding officer to the scene
20 of a crime is to render aid to the victim?

21 A. Yes.

22 Q. Secondary would be to detain suspects
23 or make arrests?

24 A. Yes, sir.

25 Q. First is to treat victims?

1 A. Yes, sir.

2 Q. Okay. Now, when you went into the
3 alley Sergeant Seabrook was there. Tell the jury
4 what you saw.

5 A. I saw a black male on the ground. He
6 was facing upward. Appeared he had been shot
7 several times. He was in a white shirt with blue
8 jeans. Had on black shoes. I also noted a black
9 fitted ballcap approximately ten yards west of his
10 position.

11 Q. Was there anyone else in the alley with
12 him?

13 A. No, sir.

14 Q. Just Sergeant Seabrook and you?

15 A. Yes, sir.

16 Q. The two individuals that you let go, at
17 this moment did you have any reason to go back and
18 try to catch them, any evidence to suggest they
19 were involved?

20 A. No, sir.

21 Q. Okay. Are you aware that there are
22 security cameras in that area?

23 A. Yes, sir.

24 Q. Through your experience, and you said
25 you work on the community action team, correct?

1 A. Yes, sir.

2 Q. And part of that objective is to
3 maintain ties with the community?

4 A. Yes, sir.

5 Q. In doing so you often talk to people in
6 the community?

7 A. Yes, sir.

8 Q. Through your experience is it or is it
9 not common knowledge that there is cameras in the
10 area?

11 A. Yes.

12 Q. In fact, deterrents of crimes just like
13 this is one of the reasons why it was put up,
14 right?

15 A. Yes, sir.

16 Q. All right. Beg the Court's indulgence.

17 THE COURT: Yes, sir.

18 Q. I am showing you State's 9. We are
19 going to pick up right here at six minutes and
20 24 seconds.

21 (Video played.)

22 I'm going to flip ahead. We are at
23 6:01:19 now.

24 (Video played.)

25 One more, 6:02:23.

1 (Video played.)

2 Q. Is that you coming down?

3 A. Yes.

4 Q. What road is that again?

5 A. That is Bogard.

6 Q. Is that Sergeant Seabrook?

7 A. Yes, sir.

8 Q. Okay. Explain to the jury the
9 difference between a search and a patdown or
10 commonly referred to as a Terry frisk?

11 A. A Terry frisk is just looking for
12 weapons. In order to search you have to have
13 probable cause to be able to tell you to give
14 consent to search, but a Terry frisk is just
15 looking for weapons.

16 Q. With a frisk are you going in someone's
17 pocket?

18 A. No.

19 Q. Did you conduct a search or a frisk
20 here?

21 A. Frisk. I just patted them down.

22 Q. 6:03:26. I don't see you on the camera
23 any longer. Are you in the alley now?

24 A. Yes, sir.

25 Q. With Sergeant Seabrook?

1 A. Um-hmm.

2 Q. This individual -- I want to back this
3 up just a little bit. This individual right here,
4 is he the one who flagged down or told Seabrook to
5 go to the alley?

6 A. Yes.

7 Q. How would you describe his emotional
8 state?

9 A. He was pretty agitated, pretty excited,
10 hysterical.

11 Q. Was he upset?

12 A. Yes.

13 Q. So you said the call came in at 5:55;
14 isn't that right?

15 A. Yes.

16 Q. And do you have any idea about what
17 time you arrived on scene?

18 A. Was pretty quick. I mean a matter of
19 seconds.

20 Q. Matter of seconds. The call came out
21 at 5:55. You saw that that was on the camera?

22 A. Yes.

23 Q. We have you there 6:02 video time.
24 That's you coming in the police car?

25 A. Yes.

1 Q. Call came out at 5:55, you arrived in a
2 matter of seconds. So fair to say that camera is
3 about seven minutes fast?

4 A. Approximately, yes, sir.

5 Q. You said that you had went into the
6 alleyway. Your Honor, may I approach?

7 THE COURT: You may.

8 Q. Showing you what's been marked as
9 State's Exhibit 6. Can you tell me if you
10 recognize it.

11 A. (Witness complies with request.) This
12 is the alleyway where the victim was located, ■
13 Norman.

14 Q. And how do you know that? Do you see
15 someone in the picture?

16 A. Yes, that is me standing in the back.

17 Q. Okay.

18 MR. OSBORNE: Your Honor, at this time
19 we would seek to admit State's Exhibit 6 in
20 evidence.

21 THE COURT: Any objection?

22 MR. APICELLA: No.

23 MS. VAN PALA: None, Your Honor.

24 THE COURT: It will be admitted as
25 marked. You may proceed.

1 (State's Exhibit 6 admitted.)

2 BY MR. OSBORNE:

3 Q. That's you in the background?

4 A. Yes, sir.

5 Q. At the time this picture was taken this
6 -- I mean obviously that's not the condition that
7 Mr. Washington was in when you found him; is that
8 correct? Someone put a tarp over him?

9 A. Yes, sir.

10 Q. And you mentioned there was a hat on
11 the scene. Is that the black hat right there?

12 A. Yes.

13 Q. Now, you had testified earlier that I
14 showed you State's Exhibit 11 and you said that
15 President and Crosstown was behind. Actually it's
16 right there, is it not?

17 A. Behind those trees and stuff right
18 there.

19 Q. That car right there, is that actually
20 stopped at President and Crosstown?

21 A. Yes.

22 (Crying spectator left the courtroom.)

23 BY MR. OSBORNE:

24 Q. I'm showing you what's been marked as
25 State's Exhibits 7 and 14. Do you recognize them?

1 A. Exhibit 7 is a picture of the victim.

2 Q. Okay. Is that the condition that he
3 was in when you first arrived on scene?

4 A. Yes, sir.

5 Q. Okay.

6 MR. OSBORNE: Your Honor, at this time
7 we would seek to admit State's Exhibit 7 into
8 evidence.

9 THE COURT: Any objection?

10 MS. VAN PALA: No.

11 MR. APICELLA: No.

12 THE COURT: Without objection it will
13 be admitted as it's been marked. You may proceed
14 or publish.

15 (State's Exhibit 7 in evidence.)

16 BY MR. OSBORNE:

17 Q. Showing you State's 7. On the previous
18 photograph you can see Mr. Washington's right arm
19 extended there on State's Exhibit 6; is that
20 correct?

21 A. Yes.

22 Q. And State's 7 is just without the tarp;
23 is that correct?

24 A. Yes, sir.

25 Q. All right. I hand you State's

1 Exhibit 14 I think. Can you take a look and tell
2 me if you recognize it for ID purposes only.

3 A. It's a black fitted ballcap.

4 Q. Is that the hat that was laying next to
5 Mr. Washington's body?

6 A. Yes, sir.

7 Q. May I approach?

8 THE COURT: You may.

9 Q. That's State's 14 for ID purposes.
10 Let's go back. When you responded on the scene you
11 said that you stopped two individuals. Who was one
12 of the individuals that you stopped, if you know?

13 A. One of them was Devin Middleton. I
14 didn't know the smaller one. He was the bigger
15 one.

16 Q. So you didn't know the other
17 individual, but you knew Devin Middleton. Do you
18 see Devin Middleton in the courtroom here today?

19 A. Yes, sir.

20 Q. Can you pick him out and say what he is
21 wearing?

22 A. Sitting in the second row there wearing
23 a blue button up shirt.

24 Q. Okay. I want to go back to State's 9
25 one last time. Play it at 5:17:10. See the

1 individual in the white shirt there?

2 A. Yes, sir.

3 Q. That look like the individual you saw
4 deceased in the alleyway?

5 A. Yes.

6 Q. What about the other guy there with the
7 hooded sweatshirt on, do you recognize him?

8 A. Yes, that's Devin Middleton.

9 MR. OSBORNE: No further questions.

10 CROSS-EXAMINATION

11 BY MR. APICELLA:

12 Q. Good afternoon, officer.

13 A. How are you doing, sir?

14 Q. Back on March 23rd, 2015, you were a
15 patrol officer in the neighborhood, correct? You
16 were patrolling the Back to Green neighborhood?

17 A. Yes, I was patrolling the area.

18 Q. And you patrolled that neighborhood in
19 a marked police car, correct?

20 A. Yes.

21 Q. In uniform?

22 A. Yes.

23 Q. That was your job?

24 A. Yes.

25 Q. You went to crimes?

1 A. Yes.

2 Q. And you were also community relations?

3 A. Yes.

4 Q. So that would entail knowing what's
5 going on in the neighborhood?

6 A. Yes. Doing relations with the
7 residents in the area.

8 Q. And you did that, right? You talked to
9 people, drive around, see what was going on?

10 A. Yes.

11 Q. And you knew today you were going to
12 testify in the case against Devin Middleton, my
13 client, right?

14 A. Yes.

15 Q. So you knew you were going to identify
16 him today, correct?

17 A. Yes.

18 Q. And when you were first officer on the
19 scene you frisked my client, Devin Middleton?

20 A. Yes.

21 Q. And you knew him previously?

22 A. Yes, sir.

23 Q. So would it be fair to say Devin
24 Middleton was no stranger to that neighborhood?

25 A. No.

1 Q. Wouldn't be fair?

2 A. What do you mean by not fair?

3 Q. You know what? I will clarify. You
4 had seen Devin Middleton in that neighborhood
5 before?

6 A. Yes.

7 Q. Many times?

8 A. Yes.

9 Q. It was not unusual for him to be in
10 that neighborhood?

11 A. No.

12 Q. You say he was like a lamppost, always
13 there?

14 A. I wouldn't say a lamppost, but he's
15 there.

16 Q. He's there frequently?

17 A. Yes.

18 Q. And that's how come you knew him and
19 that's why you identified him, because you knew him
20 previously, right?

21 A. What do you mean I identified him?

22 Q. Withdrawn. I will move on. You were
23 the first officer to respond to the radio shots
24 fired?

25 A. Yes.

1 Q. And when you got there there were no
2 other police cars?

3 A. No, sir, I was the first one on scene.

4 Q. You were the first one. And the first
5 two people you saw were the two people that are
6 displayed on the video that you stopped?

7 A. Yes.

8 Q. And you frisked them as you told us
9 looking for weapons. And you found no weapons on
10 my client, Mr. Middleton?

11 A. No.

12 Q. And at some point you told us that
13 somebody yelled they went that way, pointing down
14 the street?

15 A. No, sir. He didn't give anything about
16 they. He was pretty excited. He was directing
17 y'all need to check right here. He didn't say this
18 area. He was like you need to look around.

19 Q. He said check here. What was right
20 here?

21 A. He was pointing towards ■ Norman, like
22 the alley.

23 Q. Pointing towards?

24 A. ■ Norman Street. That's what he was
25 like.

1 Q. Norman Street where the scene was in
2 the alley?

3 A. He was gesturing towards the alleyway
4 like y'all need to check that area right here.

5 Q. He wasn't gesturing toward my client?

6 A. No, he wasn't, no, sir.

7 Q. He wasn't indicating anything about
8 Devin Middleton?

9 A. No.

10 Q. And after you found no weapons on my
11 client then you proceeded to walk towards the alley
12 and begin your duties as a police officer, correct,
13 attend to anybody that was in need of medical
14 attention?

15 A. Yes. After I completed the patdown
16 Sergeant Seabrook started calling for me. He was
17 pretty adamant about me coming to him. So after
18 hearing that I went back there. That's when I
19 discovered the victim.

20 Q. Would it be fair to say at that point
21 after you frisked my client and found nothing and
22 left him that your involvement with my client
23 ended?

24 A. Yes.

25 MR. APICELLA: Thank you. No further

1 questions.

2 THE COURT: Yes, ma'am. You may also
3 cross-examine.

4 CROSS-EXAMINATION

5 BY MS. VAN PALA:

6 Q. Court's indulgence. Officer?

7 A. Yes, ma'am.

8 Q. State's Exhibit 6, you can't see the
9 corner of president and Norman, right?

10 A. No.

11 Q. You can't see the street sign, correct?

12 A. You can see the intersection though.

13 Q. The headlights are on on those cars?

14 A. Yes.

15 Q. You can't make out exactly what kind of
16 cars those are, correct?

17 A. No. One of them appears to be a truck
18 and based on a profile of the second one possibly
19 an SUV.

20 Q. ■ Norman, that's a house, correct?

21 A. It's apartments there. I would say at
22 one time it was a large house, but broken up
23 different apartments on the bottom floor and the
24 second floor.

25 Q. And the driveway, the solicitor called

1 it an alley, it's a driveway, correct?

2 A. Depends on how you would interpret it.
3 I have never seen any cars parked in there.

4 Q. There's a door that's right off the
5 driveway, correct?

6 A. Yes. If you look at the picture there
7 you see the little stair right there in the left.
8 That's to the doorway.

9 Q. And that's a breezeway?

10 A. No, it's a door. Then as soon as you
11 go to the door's apartment, the apartment and then
12 goes upstairs and there are more apartments
13 upstairs.

14 Q. And the driveway leads to the backyard,
15 correct?

16 A. Yes. Where I was standing is the
17 backyard.

18 Q. And right up against up the backyard is
19 the Crosstown, correct?

20 A. Yes.

21 Q. And Crosstown is Highway 17?

22 A. Yes.

23 Q. Six-lane highway?

24 A. Yes.

25 Q. There are sidewalks on either side?

1 Withdrawn. There are sidewalks on that side of the
2 Crosstown?

3 A. Close to where I was standing?

4 Q. Yes?

5 A. Yes.

6 Q. And the driveway, it's a cut-through
7 from Ashton Street to the Crosstown, right?

8 A. What do you mean by that?

9 Q. Excuse me. Norman Street to the
10 Crosstown?

11 A. What do you mean by a cut-through?

12 Q. The driveway is in between Norman
13 Street and the Crosstown, correct?

14 A. Yes.

15 Q. Court's indulgence.

16 (Off-the-record conference.)

17 BY MS. VAN PALA:

18 Q. And the driveway, you can't see the
19 driveway on the cameras, correct?

20 A. What do you mean, like the city
21 cameras? No, you cannot see back there, no.

22 Q. Thank you. Court's indulgence.

23 MS. VAN PALA: No further questions.

24 Thanks.

25 THE COURT: You may

1 redirect.

2 REDIRECT EXAMINATION

3 BY MR. OSBORNE:

4 Q. Mr. Apicella asked and said that Devin
5 was no stranger to the neighborhood Back to Green?

6 A. Um-hmm.

7 Q. That's correct?

8 A. Yes.

9 Q. He hangs out there a lot?

10 A. Yes, sir.

11 Q. Let's go back to State's Exhibit 6. So
12 Ms. Van Pala was asking about this photograph
13 again. Is it dark outside?

14 A. No, sir, it's daylight.

15 Q. She also asked about the time. That
16 right there, is that the street post that holds the
17 traffic sign?

18 A. Yes.

19 Q. And then lastly I think Mr. Apicella is
20 the one that asked, he said that you worked as part
21 of a community neighborhood watch?

22 A. Community action team.

23 Q. And in your responsibility in that
24 position you were to speak to individuals that were
25 in the community?

1 A. Yes, sir.

2 Q. Did you find that individuals were
3 happy to talk to police and forthright in giving
4 information?

5 A. For the most part they were. Being in
6 that area sometimes it can have a negative
7 repercussion of being seen talking to the police,
8 but that's why, you know, in my unit I would make
9 people feel a lot more comfortable speaking with
10 us. We build those personal relationships. A lot
11 of times people pull us to the side, you might want
12 to check this out or, you know, be more willing to
13 give information. You build that relationship with
14 them.

15 Q. But you had to be careful the way you
16 spoke to them?

17 A. Yes.

18 Q. You talked to them on the side so you
19 didn't want anyone else or at least these people
20 didn't want other people to see you speaking to
21 them; is that correct?

22 A. Yes, sir.

23 MR. APICELLA: Objection, leading.

24 THE COURT: I will ask you not to lead
25 the witness.

1 MR. OSBORNE: No further questions.

2 THE COURT: Mr. Apicella, you may
3 re-cross.

4 MR. APICELLA: No thank you.

5 THE COURT: You wish to recross?

6 MS. VAN PALA: No questions.

7 THE COURT: You wish to excuse the
8 witness?

9 MR. OSBORNE: Yes, Your Honor.

10 THE COURT: Any objection?

11 MS. VAN PALA: No.

12 MR. APICELLA: No.

13 THE COURT: You are free to go. You
14 may step down. Thank you very much.

15 Ladies and gentlemen of the jury, it's
16 been over an hour. I'm going to take a short break
17 at this time. I will allow you to move around,
18 stretch your legs, step back to the jury room.

19 And as you know, when you leave the
20 courtroom I'm going to instruct you not to discuss
21 anything about this case even among yourselves
22 until I ask you to begin deliberations. You may
23 retire to the jury room.

24 (Thereupon, the jury exited the
25 courtroom at 2:12 p.m.)

1 THE COURT: We will be in recess for
2 about ten minutes.

3 (A recess transpired.)

4 (Following proceedings held outside the
5 jury's presence.)

6 THE COURT: State ready to proceed?

7 MR. OSBORNE: We are, Your Honor, with
8 that Biggers hearing.

9 THE COURT: Okay. As you indicated
10 there might be a need for a Biggers hearing. You
11 may call your witness on that.

12 MR. OSBORNE: Well, let me just ask the
13 Court, I think this is all the Court's discretion.
14 My reading of Biggers is it's necessary when there
15 is a witness to a crime. Our next witness, Mr.
16 Smalls, is not a witness to the crime.

17 What Mr. Smalls is a witness to is he
18 saw an individual wearing a rain jacket about
19 30 minutes before the shooting. He saw a gun in
20 this individual's left pocket. He was presented a
21 photographic lineup by Detective Krasowski. He
22 identified Te'Quan Perry as being that individual.

23 My reading of Biggers is when there is
24 a witness to a crime, then the suggestiveness of
25 the lineup or whether it was or not, that question

1 is then determined in the Biggers hearing. Since
2 he is not a witness to a crime, I don't believe
3 that a Biggers hearing is necessary. But I do
4 understand it's the Court's discretion.

5 MS. VAN PALA: Thank you, Your Honor.
6 I think the standard here is when there is a
7 previous out of court identification and the State
8 is seeking to identify the Defendant in court. So
9 I believe an evidentiary hearing and argument on
10 whether the identification is admissible is
11 required in this situation.

12 THE COURT: Mr. Apicella, do you wish
13 to be heard?

14 MR. APICELLA: No, Your Honor. Thank
15 you.

16 THE COURT: Give me one second.

17 MR. OSBORNE: Your Honor, if I may, I
18 case a found on point was State v. McKee 408 S.C.
19 278.

20 In that case there was a dispatcher, a
21 cab dispatcher who ended up seeing the Defendant in
22 the area, but it was some time. It was about a
23 year before the crime, and the police showed that
24 dispatcher a single photograph and the dispatcher
25 said yeah, I have seen that guy in the area before,

1 about a year before the crime. We have a 30-minute
2 window here, but what I took away from that was
3 that Biggers factors apply only to identification
4 testimony from an eyewitness to a crime. In fact,
5 Mr. Smalls is adamant he did not witness the crime.
6 In fact, he almost demands we ask him that.

7 MS. VAN PALA: Your Honor, although Mr.
8 Smalls did not witness the shooting, he will
9 testify that he was on scene prior and he will
10 testify that Te'Quan Perry was on scene. The State
11 will use that testimony to prove identity and will
12 use that testimony to prove that -- to get the
13 description of what the alleged shooter was
14 wearing, and to get Mr. Smalls to identify Te'Quan
15 in court as the shooter.

16 I believe that I have to look up the
17 case yet, Judge, I just got the cite, but I think
18 when the State is trying to introduce the ID we are
19 entitled to an evidentiary hearing and to argue
20 whether the ID and the identification is
21 suggestive.

22 THE COURT: Okay. Mr. Osborne, I'm
23 going to take the position since it was so close to
24 the time to the event and also as being related to
25 the event I suppose by the clothing and by the

1 presence of the firearm I'm going to require a
2 hearing.

3 MR. OSBORNE: Okay, Your Honor. We
4 will call Detective Krasowski to handle a couple of
5 factors in Neil v. Biggers and then follow up with
6 Mr. Smalls.

7 THE COURT: Yes, sir. Officer, I will
8 remind you that you are still under oath in this
9 case.

10 THE WITNESS: Yes, Your Honor.

11 THE COURT: You acknowledge that fact?

12 THE WITNESS: I do, Your Honor.

13 THE COURT: Thank you.

14 DIRECT EXAMINATION

15 BY MR. OSBORNE:

16 Q. I am showing you what's been marked as
17 State's Exhibit 139. Do you recognize that?

18 A. I do.

19 Q. What is that?

20 A. The first page is the photo admonition
21 form that we use, standard format Charleston Police
22 Department. Page 2 of this is the lineup
23 containing six different subjects and the third
24 page is just the name.

25 Q. How did you come about meeting with Mr.

1 Smalls?

2 A. He responded to the station on his own
3 accord. I didn't reach out to him. He came to me.

4 Q. What date did he respond to the
5 station?

6 A. That was in April, I have to refer to
7 my report. I believe was April 16th. It was, in
8 fact, April 16th.

9 Q. So the date of the shooting was on
10 March the 23rd?

11 A. That's correct.

12 Q. So we are looking at 21 days later?

13 A. Yes, sir.

14 Q. Okay. And so briefly, why did you feel
15 the necessity to show a lineup to Mr. Smalls? What
16 did he say?

17 A. So he advised that he had been out
18 there in the neighborhood just before this incident
19 occurred. And I was able to corroborate that
20 because he was actually a part of the auto
21 pedestrian accident that occurred on Hagood Street
22 that we heard yesterday. So I backed tracked to
23 that point and then realized, sure, he definitely
24 was out there. Reviewed some video surveillance,
25 captured him on video. I think it was around 5:00

1 that he was on video and first was able to get him
2 to identify himself on the video. He described
3 himself and then I showed him a picture because it
4 was consistent and he was able to identify himself
5 as on Norman Street.

6 Q. Your Honor, may I approach?

7 THE COURT: Certainly.

8 BY MR. OSBORNE:

9 Q. So I am showing you what's been marked
10 as State's Exhibit 164. Do you recognize that?

11 A. I do. So this is a still image from a
12 video surveillance what we referred to now. And it
13 is a picture of determined to be Clayton Smalls and
14 he identified himself and notated that
15 identification on this.

16 Q. Okay. You said that he saw an
17 individual in the alley?

18 A. He did so. He told me that he had been
19 out there. I just referred to my report. This was
20 at 1712 hours according to the time stamp on the
21 video. And he said he went to ■ Norman Street,
22 met up with approximately five black males and
23 purchased some marijuana and then continued on his
24 way soon thereafter.

25 Q. Did he notice anything significant

1 about one of the individuals?

2 A. He did. He described one of his
3 subjects as wearing uniquely -- a rain coat that
4 was fairly unique in nature.

5 Q. Was there anything of significance in
6 that person's possession?

7 A. There was. He observed a firearm
8 partially hanging out of the jacket and alerted the
9 subject and then made some comment of sort of what
10 kind of caliber is that, a .38 or is that a .32,
11 something to that effect.

12 Q. Did he describe that individual to you?

13 A. He did.

14 Q. How did he describe him?

15 A. I have that. I will refer to my report
16 to get that correct. He described the subject in
17 the camouflage jacket as follows: Black male,
18 younger, dark complexion, thin build, had facial
19 bumps slash scarring and wore a tannish yellow-ish
20 camouflage jacket and khaki colored pants.

21 Q. Did you find that description to match
22 any suspects in this case?

23 A. It did. It matched the suspect
24 description of what we had identified as the
25 shooter at that point.

1 Q. Who was?

2 A. Te'Quan Perry.

3 Q. Okay. We are going to go back to let's
4 start with 164. This is the photograph that you
5 showed to Clayton, still frame image?

6 A. That is.

7 Q. This would have been maybe 30 minutes
8 before the shooting, something like that?

9 A. Yes. This apparently took off the time
10 stamp, but I have notated in my report that it was
11 at 1712, so that was about 45 minutes or so.

12 Q. And this is Clayton identifying him?

13 A. That's correct.

14 Q. And then he pointed to the side and
15 said something five men?

16 A. That's where he observed the subjects.
17 He described them being in the breezeway or doorway
18 of ■ Norman.

19 Q. Okay. Now, going to State's
20 Exhibit 139. Now, we don't have this lineup
21 presentation memorialized through video or audio.
22 Why is that?

23 A. Well, this interview was completed in
24 an interview room and we have the Ersa recording
25 system. During this time period we had a lot of

1 issues with it. And I believe -- I was under the
2 impression that this was being successfully
3 recorded and I didn't realize it until the fact
4 that it wasn't recorded.

5 So this was not documented by audio or
6 visual unfortunately.

7 Q. So the date here is April 16th, 17:05?

8 A. That's when I presented -- the date and
9 time that I presented this lineup.

10 Q. All right. And who prepared this
11 lineup?

12 A. This lineup had been prepared by CIU
13 and this was what was utilized earlier on in the
14 investigation so it was already archived in our
15 system.

16 Q. Tell the judge how you went about
17 presenting the lineup.

18 A. So my presentation style for these, I
19 have two different ways that I do this. One I
20 present it from a folder, a Manila folder, or I
21 just present the lineup with the admonition form on
22 top. I first get the description of the subject
23 that we're attempting to identify and then once I
24 do that I complete this form and I read these
25 directions out loud. Do you want me to read those

1 to you?

2 Q. Yes.

3 A. "I am going to show you a group of
4 photographs. These photographs may or may not
5 contain the picture of the person who comitted the
6 above offense which is under investigation at this
7 time. Keep in mind that photos may show a variance
8 in complexion, hair, eyes, facial hair, et cetera.
9 If you recognize anyone in any of these photos as
10 the person who comitted the crime against you or
11 you are a witness to, I will ask you to initial and
12 circle the photo.

13 Upon viewing these photos do not
14 discuss the results of this procedure with other
15 victims or witnesses."

16 Q. After you read that go about presenting
17 the lineup in this case?

18 A. So it was one of those two ways. I
19 can't recall exactly, but my main purpose for
20 concealing the photograph page is to insure that
21 there's no way that they are suggesting that I am
22 pointing to a photograph or anything of that sort.
23 So I want them on their terms to be able to flip
24 open the lineup to view it.

25 So again I don't remember if I the

1 admonition form on top of it or I had it in a
2 folder.

3 Q. So one way you would present it is just
4 like this, stapled and then flip it over and the
5 other way you would have had it in a Manila
6 envelope?

7 A. Absolutely.

8 Q. But what you would have not, and
9 correct if I'm wrong, is to present it like this
10 showing the pictures?

11 A. Absolutely not.

12 Q. Now, is this the lineup that you showed
13 to Mr. Smalls?

14 A. That is the lineup.

15 Q. Did he identify anyone in the lineup?

16 A. He did. He identified photograph No.
17 3.

18 Q. And then looks like is that his
19 handwriting?

20 A. This is. I typically ask them to
21 initial by where they circle as well as kind of a
22 duplication of the process, but he wrote gun there.

23 Q. Is that his signature?

24 A. That is and then he notated his
25 selection at the bottom of the page and signed it.

1 Q. What level, if any, of certainty did he
2 acknowledge to you or indicate to you when he
3 identified No. 3?

4 A. He expressed he was certain, he didn't
5 notate a 100 percent, but there was clearly no
6 issue with him. It was a very quick identification
7 process.

8 Q. Did you indicate to him after he had
9 identified him that you got it right, picked the
10 right guy?

11 A. No, I did not.

12 Q. There was some -- the report mentioned
13 something about that he may have said to you or
14 said to you that he saw the individual had already
15 been arrested, saw him on the news?

16 A. Yes. From my recollection of this
17 interaction he stated that he read the newspaper
18 after this incident occurred and realized that --
19 saw a picture of the subject that was arrested and
20 he then was able to make a connection and thought
21 it was important that he come down to the station
22 and provide this.

23 Q. Did he state that he was identifying
24 photograph No. 3 because he saw him on the news or
25 because he saw him in the alley?

1 A. No. That's what I wanted to verify,
2 that we were identifying the person that he saw in
3 that alleyway with the raincoat, not the subject
4 that he saw on the news.

5 MR. OSBORNE: No further questions for
6 this witness, Your Honor.

7 THE COURT: Mr. Apicella, you wish to
8 cross-examine?

9 MR. APICELLA: No, Your Honor.

10 THE COURT: You may proceed.

11 CROSS-EXAMINATION

12 BY MS. VAN PALA:

13 Q. The photograph of Te'Quan in the lineup
14 is his booking photo, correct?

15 A. Is a booking photo. I don't believe
16 it's for this most recent -- the arrest for the
17 murder.

18 Q. And if I could show you State's 139,
19 the second page, Te'Quan is No. 3?

20 A. That's correct.

21 Q. And he's the only one with black spots
22 on his face, correct?

23 A. I would agree with that.

24 Q. Does the individual No. 1 have black
25 spots on his face?

1 A. There are some.

2 Q. Are the spots on the face of No. 2, is
3 that sweat or are those marks?

4 A. I believe those are marks.

5 Q. No. 5, he does not have black spots on
6 his face, right?

7 A. There are a few on his forehead. There
8 is less, but there are some.

9 Q. Clayton wrote down that his comments on
10 the identification were that the suspect was
11 wearing Khaki pants, correct?

12 A. That's correct.

13 Q. And he described the camouflaged jacket
14 as a Khaki camouflaged flak jacket?

15 A. I don't believe so.

16 Q. Did he describe it as a black and green
17 jacket?

18 A. I have documented that he described it
19 as a tannish yellow-ish colored camouflaged jacket.

20 Q. Clayton was brought to the station for
21 the identification, correct?

22 A. He -- not brought.

23 Q. Not by law enforcement, but by Peggy
24 Mitchum, correct?

25 A. That is my understanding, yes.

1 Q. And he's old friends with Peggy
2 Mitchum?

3 A. They were friends, yes.

4 Q. And it was after Clayton ran into Peggy
5 Mitchum that he came down to the station to -- for
6 identification, correct?

7 A. Yes, to provide a statement.

8 Q. And Peggy Mitchum asked him to go down
9 to the station?

10 A. I know she had communication with him.
11 He said he felt obligated to come down because it
12 was a family friend.

13 Q. And Peggy Mitchum offered him \$60 to
14 come down to the station?

15 MR. OSBORNE: Objection, Your Honor.
16 That's beyond his knowledge.

17 THE COURT: You are going to have to
18 lay some foundation for that.

19 BY MS. VAN PALA:

20 Q. Even though the interview was not
21 recorded you took notes, correct?

22 A. I did.

23 Q. And you typed up a report, correct?

24 A. I did.

25 Q. And you're confident that it is

1 accurate, correct?

2 A. I am. So typically when I know an
3 incident or a statement is going to be recorded I
4 might have less notes just because I can refer back
5 to it, but I know that the description -- I know
6 that that is accurate because I wrote this soon
7 thereafter.

8 Q. If I could go back to State's
9 Exhibit 164. You were describing the time stamps.
10 Did you say that you showed Clayton the
11 surveillance at 5:07 p.m.?

12 A. The lineup?

13 Q. The surveillance, this image of Clayton
14 on surveillance camera?

15 A. This is a still shot of the video when
16 the time stamp was at 5:12.

17 Q. Okay. And you showed that to Clayton
18 before the identification, correct?

19 A. That's correct.

20 Q. And Clayton said that he had seen
21 Te'Quan's booking photo prior to the
22 identification?

23 A. He did -- from my best recollection of
24 this I don't know if there was -- it was lost in
25 translation, but I understood it as he saw the

1 newspaper and saw a picture of him prior to this.

2 Q. And he didn't say it was his booking
3 photo?

4 A. I'm sorry. I'm not tracking.

5 Q. Did he say it was Te'Quan's booking
6 photo that he saw on the paper?

7 A. I would imagine so, it was related to
8 this incident. That's how he first realized what
9 he saw beforehand.

10 Q. And in your report it said that he saw
11 his booking photo in the newspaper?

12 A. Okay. Then yes because it referenced
13 the incident so that would make sense.

14 Q. Court's indulgence.

15 (Off-the-record conference.)

16 MS. VAN PALA: Thank you, Your Honor.
17 No further questions.

18 THE COURT: Redirect?

19 MR. OSBORNE: Just briefly.

20 REDIRECT EXAMINATION

21 BY MR. OSBORNE:

22 Q. Look at this picture. Look at that
23 picture. Is that the same one?

24 A. Yes.

25 Q. That's 5:12?

1 A. Yes.

2 Q. So this is just a screenshot that you
3 took?

4 A. Yes.

5 Q. So just to double check, you didn't
6 suggest in any way who he should pick out when you
7 showed him the lineup?

8 A. Absolutely not.

9 Q. And let's go back to this lineup real
10 quick. We were talking about bumps on the
11 individuals face. And you said that two had bumps,
12 am I right?

13 A. Two had the most significant.

14 Q. Other than Perry? And three, what
15 about him?

16 A. Three is Te'Quan Perry.

17 Q. Four, sorry?

18 A. Four, there are some bumps mainly on
19 his forehead.

20 Q. Five?

21 A. Some on his forehead.

22 Q. Anything on six?

23 A. Probably not too, too many. Not seeing
24 it as much as the other ones.

25 Q. And one?

1 A. One I see a few under his eyes, but
2 again not much as No. 2 or No. 3.

3 MR. OSBORNE: Your Honor, may I
4 approach?

5 THE COURT: You may.
6 BY MR. OSBORNE:

7 Q. Showing you the lineup. You can see it
8 a little better in person.

9 A. Yes. So in person one has a few more
10 bumps than what appeared on the screen here.

11 Q. Okay. Was that part of the goal, to
12 compose a lineup in which they had similar physical
13 characteristics to the suspect?

14 A. That is correct.

15 Q. Okay.

16 MR. OSBORNE: No further questions,
17 Your Honor.

18 THE COURT: You wish to recross?

19 MS. VAN PALA: No thank you.

20 THE COURT: Sir, you may step down.
21 For purposes of the Biggers hearing you may call
22 your next witness.

23 MR. OSBORNE: State calls Clayton
24 Smalls.

25 THE COURT: Sir, come forward and be

1 sworn, please.

2 CLAYTON SMALLS

3 having been duly sworn, testifies as follows:

4 THE CLERK: Please state your first and
5 last name and spell your last name.

6 THE WITNESS: Clayton
7 Smalls, S-M-A-L-L-S.

8 THE COURT: Thank you, sir. Counsel,
9 your witness.

10 DIRECT EXAMINATION

11 BY MR. OSBORNE:

12 Q. Can you just pull that up a little bit.
13 It will be hard to hear you, Mr. Smalls.

14 First I want to apologize. I know we
15 have asked you to come a number of times and you've
16 got a job. We won't make this too long, okay?

17 A. Yes, sir.

18 Q. And just right off the bat, you didn't
19 witness Brandon Washington get murdered, did you?

20 A. No, I didn't even know who Brandon
21 Washington was until I met with his mother.

22 Q. So you have no idea who killed Brandon
23 Washington?

24 A. No, sir, I don't.

25 Q. Okay. Now, let's talk about the mom

1 real quick. Do you know Brandon's mom?

2 A. No, sir, I don't know her. She was
3 introduced to me by a lady by the name of Peggy
4 because Sam, the guy who building that I rented
5 from, I lived on top of the store.

6 I was just talking to him. He was
7 saying like I heard someone got shot or killed. I
8 said yeah, I heard the same thing. I said I was
9 not too long around that area and the lady Peggy
10 went back and told the deceased's mother that guy
11 in the store said that somebody was not too long
12 around that before it happened. You know, was a
13 little bit later, you know.

14 Q. Let me ask you one question real quick.
15 Do you know Brandon's mom's name?

16 A. Her name is Peggy as well, Ms. Peggy is
17 what I call her.

18 Q. Ms. Peggy is Brandon's mom and then you
19 had that conversation where another Peggy happened
20 to overhear that?

21 A. She didn't overhear it. Her and Sam
22 were talking when they -- as they were talking
23 about it I happened to come downstairs. Like I
24 said, it was the store under where I live. I was
25 just getting some things out of the store and after

1 I got, you know, when I went down she was in there
2 and then he told her who I was. She just telling
3 me about. I told her, you know, I said I don't
4 know anything about who was killed or what was
5 going on in there. But like I said and say again,
6 my condolences goes to both sides of the court with
7 the Defendant as well as the deceased because
8 that's the tragedy. I really think that, you know,
9 it is sad that, you know, young black men and women
10 are dying at this rate from what's going on, but --

11 Q. Let's just get into what you did see,
12 okay, on that day. I think you were involved in
13 another collision, right?

14 A. After -- sometime after or after -- I
15 don't know -- I did -- I was in an accident. I got
16 hit by a car.

17 Q. Sometime prior to that did you have the
18 occasion to go in the area in which Brandon was
19 later shot?

20 A. Okay. From what I was told that the
21 place that I had left from is where a murder had
22 taken place.

23 Q. You don't know?

24 A. Exactly. Like I stated in the
25 beginning, there was nobody dead when I was there.

1 There was no argument. There was no murder. There
2 was nothing going on, you know, that warned me, you
3 know, that something had taken place or was --

4 Q. What did you go to that area for?

5 A. Actually I went to that area because
6 there's a guy that was trying to help me get, you
7 know, a job because I was about to lose my place
8 and I don't know if I will be in trouble, but I go
9 there. I was like smoking a joint and that was
10 basically, you know.

11 Q. When you went into that area, okay, is
12 it a driveway or an alleyway in between two houses?

13 A. Yes, sir. It's like a driveway, just
14 happened to be like walking through. I seen some
15 guys, you know, just was going to still go inside,
16 but I wound up staying a little bit longer than I
17 expected to stay, like four minutes at tops. He
18 never came to the door, never answered and then
19 after that, you know, just was like waiting for a
20 few minutes to see if he had ever came.

21 Q. Never came?

22 A. No.

23 Q. You said you saw a few guys. When you
24 left did you see anything significant on one of the
25 guys?

1 A. Not to say that I could verify by
2 holding it or that anything was like shown to me
3 like this, to know what, you know, it just appeared
4 to me that it was something, but the rails on the
5 steps because I went back there before. But I just
6 -- I did not see anybody like pulling out a gun or
7 shooting a gun. I just was looking. There was
8 just a lot of activity going on around.

9 Q. The individual that you said you saw
10 something, where was it on his person?

11 A. Like there's a banister so, you know,
12 the banister could have been hanging out like from
13 the back like leaning on it. Because or it could
14 have been a pistol, it was one of the two, but I'm
15 not sure of what, you know, because I never seen
16 it. And then just like when he asked me in the
17 back about my statement to the person, you know, if
18 that was a .32 or a .38. He asked me that. I just
19 went over that with him, you know. Like I said, I
20 didn't see.

21 Q. Let's talk about that. Did you say
22 anything to him when you saw that object in his
23 pocket?

24 A. I did. And it wasn't no response made
25 to me.

1 Q. What did you say?

2 A. I said, you know, what is that,
3 something to that reference and that's when the
4 guys kept on with their conversation about the, you
5 know, the drugs. And then after that, you know, it
6 was less than three minutes I told the guy excuse
7 me at the front door. There is another guy with
8 the black hoodie on outside.

9 Q. Let me ask you this, Mr. Smalls. Do
10 you remember asking him is that a .32 or a .38?

11 A. That's what I said. There was never --

12 Q. So whenever -- the individual that had
13 this or had an object in his pocket and you asked
14 if it was a .32 or .38, what was he wearing?

15 A. I think he had on like the same color
16 clothes, like Khaki pants if I am not mistaken.

17 Q. What about his jacket if it was a
18 jacket?

19 A. I know it was like gold, like how that
20 picture showed me. If I am not mistaken, one of
21 the guys could have had on like a hoodie or could
22 have been like -- I know it was dark, then there
23 was a white colored like with like beige, but --

24 Q. Okay. And this individual that had the
25 object that could or could not have been a gun, did

1 you see him? You spoke to him, right?

2 A. They were like -- I spoke to everyone
3 that was there.

4 Q. Yes. But you asked him specifically is
5 that a .32 or a .38 or were they all armed?

6 A. As far as I'm concerned -- not
7 concerned, but as far as I understand I mean there
8 was more like several people there. Anything could
9 have been concealed in like. Basically a plain and
10 simple man, I asked a question. They were like
11 five other people, six other people, seven other
12 people in there. And I was out of place being in
13 that because I'm an older person.

14 Q. Wasn't for you to be there?

15 A. Yeah.

16 Q. So when you asked him if it's a .32 or
17 .38 did he say anything?

18 A. No. The gentlemen, they made -- the
19 conversation wasn't directed to me because I wasn't
20 like in their circle to be like understanding some
21 of the things, the questions.

22 Q. So the answer would be he didn't say
23 anything, right?

24 A. The only thing that was said was he
25 might have talked to his friend or the friend said

1 where did you get this from or who got that, you
2 know what I'm saying? Who did you buy this from.

3 Q. So you were there long enough to at
4 least ask him a question and then observe him then
5 talk to other people?

6 A. No. After I asked the question that I
7 asked, I got up. I said excuse me and I was out.

8 Q. Okay. Now, at some point later after
9 you had that conversation with Ms. Peggy or with
10 Sam and then gets relayed to Ms. Peggy the victim's
11 mom, does she come to you, approach you?

12 A. Ms. Peggy or the Peggy that was
13 talking, the victim's mom? Yes, she came to my
14 apartment. She came up the steps. Knocked on the
15 door. Asked me if I -- she told me come with her
16 to the police station. I was like why am I going
17 to a police station? And she explained to me that
18 her son was killed and I gave my condolences and we
19 went through and they were asking me, you know,
20 what happened, whatnot. Showed me some pictures of
21 some guys.

22 But I don't remember, you know, who was
23 who because like I said, I don't know these guys.
24 I go to and from.

25 Q. You don't know them?

1 A. No.

2 Q. But do you remember them showing you a
3 lineup?

4 A. Yes, I do remember them showing me a
5 lineup.

6 Q. Let's see if this helps refresh your
7 memory a little bit. State's 139, is that your
8 signature there at the bottom?

9 A. Yes, sir.

10 Q. And then is this your handwriting where
11 you say Khaki pants. Camouflaged jacket. Gun in
12 the left pocket?

13 A. Right. But at the same time I wasn't
14 sure if it was a gun because I never seen it.

15 Q. Fair enough. Even some fake guns look
16 real?

17 A. Or could have been the bannister of the
18 wood that he was leaning on, too, from the steps.

19 Q. Fair enough.

20 A. I was just when she was there.

21 Q. And so is that your circling right
22 there and writing gun?

23 A. I don't remember circling that, but I
24 remember the detective asking me because I wasn't
25 sure if I had seen any of these guys because just

1 the other day it may have been any of those guys
2 who said that they was going to shoot me with a
3 gun. That was just Saturday.

4 Q. All right. What happened on Saturday?

5 A. I went to the store and the guy said
6 I'm going to shoot -- he said I can kill you
7 because you signed something on someone. I was
8 like I didn't sign anything on anybody to cause any
9 trouble because just like I was telling you and
10 anybody else, I wasn't at that place when this took
11 place. I didn't see anything, you know. They
12 didn't show me a gun or put a gun in front of me or
13 anything. And I just felt that that would be
14 unfair for me to get up here and be able to say
15 something that I have no information of.

16 Q. Okay. But back on April the 16th when
17 that man right there, Detective Krasowski, met with
18 you, didn't you say that that guy right there in
19 photograph No. 3 had an object you believed to be a
20 gun in his left pocket?

21 A. Just like I told him, we went through
22 the line and I said I wasn't too sure of who
23 actually really was, you know. I mean I have seen
24 all of these little fellows here somewhere around.

25 Q. So you have seen him before, No. 3?

1 A. I have seen him. I have seen the guy
2 in the middle. Seen the guy --

3 Q. You have seen No. 3 prior to that day?
4 You just said you saw him prior to that day?

5 A. I'm not sure if it was prior to that
6 day or if it was that day because I mean I have
7 seen --

8 Q. I see.

9 A. I don't know them by names. I don't
10 know guys by names. I don't know them by name, but
11 I seen some of those guys come and go. Just like
12 the guy Saturday, he could have been inside there
13 and I wouldn't be able to say that he was the one
14 who told me that he shoot me.

15 Q. You do remember when -- my investigator
16 spoke to you a couple times, right?

17 A. Um-hmm.

18 Q. And he did ask you, sounds like he just
19 asked you, if the individual that you identified,
20 if he was the person that you saw in the alleyway
21 and you said yes; isn't that right?

22 A. He didn't ask me.

23 Q. What about previous times you spoke to
24 him?

25 A. Like you said, we met on two occasions.

1 This was like two and-a-half years I think ago that
2 all of this happened. I don't even remember. But
3 I have been through a lot and I don't even see why
4 I am being taken through this.

5 Q. Let me ask you this: Is it fair to say
6 that your level of certainty decreased
7 substantially once your life was threatened?

8 A. I'm not going to say that my memory or
9 anything has decreased tremendously because of a
10 threat because that wasn't the first time. I was
11 threatened. I am still here by the grace of God
12 because --

13 Q. Let me ask just you this: I don't want
14 to cut you off, but we have to move it along. Do
15 you have anything to gain by coming in here
16 testifying?

17 A. The only thing I want to gain from
18 anything that I'm doing is to be righteous and put
19 God first with whatever decision that you all make
20 with these people's feelings and their life because
21 I mean it's not that anybody is going to be
22 concerned about me regardless of what goes on with
23 this situation. I just don't see where I make a
24 difference in right here. I am not going to gain
25 anything by this. But I am saddened by the whole

1 thing and I really wish that I was not here to have
2 to waste any of y'all time dealing with already
3 tragic enough incident and I could probably be
4 another one or there might be other people that is
5 going to get killed because of whatever transpired
6 two and-a-half years ago.

7 MR. OSBORNE: Okay. No further
8 questions.

9 THE COURT: Mr. Apicella, did you wish
10 to cross-examine?

11 MR. APICELLA: No.

12 THE COURT: Yes, ma'am.

13 CROSS-EXAMINATION

14 BY MS. VAN PALA:

15 Q. Mr. Smalls?

16 A. Yes, ma'am.

17 Q. I am Tamara Van Pala. I represent
18 Te'Quan.

19 A. Yes, ma'am.

20 Q. I want to ask you a few more questions
21 about how this kind of worked out. So you had seen
22 Te'Quan before, right?

23 A. What's that?

24 Q. You have seen -- excuse me. I take
25 that back. I'll show you the identification sheet.

1 Do you remember this young man in No. 3?

2 A. If I remember this?

3 Q. Have you seen him before?

4 A. I have seen this before.

5 Q. You saw him before?

6 A. You said seen this before. I have seen
7 this before.

8 Q. You remember seeing -- you remember
9 that because that's when you met with the
10 detective, right?

11 A. I seen it just a few minutes ago and
12 seen it I met with the detective yes, ma'am but as
13 I mean -- like I'm saying to you right, everybody
14 in here has on a black T-shirt. They are all --
15 that six young black men right there. I'm not
16 affiliated or know any of them personally. I have
17 guys that look like this here I see on the bus. I
18 have guys that I see at work. Just the reason
19 being I mean I don't know these guys, you know, so
20 it's not like I could see them and recognize them
21 all the time when I see them or know them
22 personally to call his name out or something like
23 that.

24 Q. Sure. But would you say that you have
25 seen that young man in No. 3 before on the street?

1 A. I could have seen him before. I could
2 have. I can't honestly say that I can put my hand
3 on him. Looking at him right now, I can't even see
4 him in here.

5 Q. Do you remember when you were talking
6 with Detective Krasowski that day, that day that
7 you first identified?

8 A. Is that Brandon's cousin?

9 Q. The detective in this case?

10 A. Talking about the guy?

11 Q. Let me ask you a question. Hold on.
12 You remember meeting with Detective Krasowski?

13 A. That was the guy here she just
14 re-introduced me to.

15 Q. Right. And that's when you filled out
16 this identification, right?

17 A. Yes, ma'am. And that lady, the other
18 lady, Kelly, I think she had like a news clip or
19 something that she spoke about. I'm not sure. She
20 had like an article, I don't remember, if a picture
21 or what she spoke about it because she was really
22 hurt about this right here. And she kept on. But
23 I didn't want her to get, you know, nobody's hopes
24 up or get me involved in something that I knew
25 nothing of because she was saying that this person

1 might have done or that person done it. And that's
2 not -- I don't know.

3 Q. That's what Ms. Peggy Mitchum was
4 saying?

5 A. The one who went and told her mother,
6 Peggy who was inside the store.

7 Q. Peggy Blake?

8 A. She was just giving me different people
9 who she thinks done it because of different things
10 that may have happened when she saw me walking in.
11 That's what she just kept saying. She wasn't
12 saying who, but she told me who she thinks may have
13 done that, who she felt may have done that or
14 causing problems or something.

15 Q. Peggy Blake said that she knew somebody
16 was causing problems?

17 A. Yes, that's what she said.

18 Q. That was your conversation?

19 A. That was what she told me, you know,
20 because it wasn't a conversation because like I
21 said, I do not know -- those were somebody --
22 people that she knows. She sit on her porch. She
23 said, you know, sit on her porch, you know, so I
24 don't know who sits on her porch, but I guess there
25 was a beef or something may have happened prior.

1 Q. Let me ask you this. So when you ran
2 into Peggy Blake at the store, right?

3 A. Yes.

4 Q. And that was about four weeks after
5 your accident, correct?

6 A. No, I won't say weeks. This was -- I
7 don't remember. It was a few days. It was days.

8 Q. So you remember you got hit on your
9 bike?

10 A. Right.

11 Q. On March 23rd?

12 A. That was the date? I don't know.

13 Q. And you remember meeting with the
14 detective and Detective Krasowski and you filled
15 out this form?

16 A. Which date was that that I met with
17 him? It was the 16th. So from the date that it
18 happened to the 16th is when I guess they had the
19 chance to meet or something like that.

20 Q. Sure. And do you remember --

21 A. I was just caught by surprise that the
22 victim's mother was knocking at my door or that
23 other lady Peggy had even pulled me into the
24 situation knowing that I really did not have --

25 Q. Yeah. And you remember when you were

1 talking to Detective Krasowski on the 16th since
2 this is jogging your memory, right, the 16th you
3 were talking to Detective Krasowski?

4 A. 16th I was talking?

5 Q. And you remember when you were talking
6 to him you told him that you were old friends with
7 Peggy Mitchum or friends with her?

8 A. Um-hmm.

9 Q. That's what you told Detective
10 Krasowski?

11 A. I have seen her before. I thought she
12 was a lady from downtown near Maverick Street, but
13 I don't know her personally.

14 Q. And --

15 A. I don't know her personally.

16 Q. Sure. Do you remember telling
17 Detective Krasowski that you had seen this picture
18 in the newspaper before? Let me show you.

19 A. Like I said, I was talking with Peggy.
20 You would have to show me the newspaper clip and
21 then I could probably --

22 Q. You think that sounds about right?

23 A. I don't want to like make up anything
24 that's not true. If you can like show me the paper
25 clipping or Ms. Peggy still had that paper

1 clipping.

2 Q. If I said Detective Krasowski wrote in
3 it in his report that you said that you saw his
4 booking photo, that sound about right?

5 A. Miss, I don't remember saying that -- I
6 don't remember a booking photo. I remember this
7 and I remember Ms. Peggy, I remember seeing a
8 picture of the deceased on the shirt and that's --
9 I don't know who and what happened after I left.
10 That's all I can speak of.

11 Q. So let's go back to that day when Ms.
12 Peggy came knocking on your door. Do you remember
13 that? She was the one who wanted you to go to the
14 police station, right?

15 A. Yes, ma'am.

16 Q. And she said that -- you told her you
17 didn't want to be involved, right?

18 A. I didn't want to be, yeah.

19 Q. And she said that she had recently come
20 into some insurance money?

21 A. No. Ms. Peggy did not say that right
22 then at that time, but we had a conversation where
23 Ms. Peggy you had gotten me something to eat and
24 Ms. Peggy had given me some change.

25 Q. So she gave you \$60 and a bucket of

1 chicken?

2 A. I'm not sure of the amount of money.
3 I'm not sure about the bucket of chicken. I might
4 have gotten like two \$5 fill ups. I'm not sure. I
5 don't remember everything verbatim.

6 Q. And she gave you some cash though?

7 A. Yes, ma'am, just to help me along
8 because I wasn't having a job. I was like kind of
9 -- I was on drugs, okay, and I am not on drugs
10 right now and if I owe Ms. Peggy or anybody some
11 money I got to pay --

12 Q. Let's just go back to talking about
13 that day.

14 A. I got a job now. I have been trying to
15 stay on the job.

16 Q. Sure. Back on that day when Ms. Peggy
17 came to your apartment she gave you 60 bucks?

18 A. Like I said, I don't remember no
19 pricing. It wasn't like she came and knocked on
20 the door and said here is \$60 or anything or any
21 money. It was where I got a ride with Ms. Peggy to
22 the police station and I was adamant about saying I
23 do not know what had happened. I think somewhere
24 along that line I was telling Ms. Peggy that I
25 didn't have any money and I was hungry or something

1 like that.

2 Q. And you remember talking to the
3 solicitor in this case and his investigator?

4 A. Yes, ma'am, I do remember talking to
5 them just the other day.

6 Q. And you told the investigator that Ms.
7 Peggy gave you \$60 that day?

8 A. This is your third time saying that,
9 right? This is going to be my third time saying
10 I'm not too sure how much money that I had gotten.

11 Q. I will move on. So when you were at
12 the police station meeting with Detective Krasowski
13 she waited for you, right?

14 A. Yes, ma'am. I'm not sure where she was
15 at waiting because I was in a room and I was
16 telling the detective that I do not really know who
17 these people are. I wasn't 100 percent.

18 Q. She gave you ride a back, right?

19 A. I wasn't 100 percent sure if it was,
20 you know, that man right there and I also said to
21 him that, you know, I may have seen this guy or
22 right here before too, but I'm not sure. He was
23 like was this one there? I was like I'm not sure.
24 I may have seen all of them before.

25 Q. You're saying that you told the

1 detective you're not sure that No. 3 was there?

2 A. I said it was three and the guy right
3 there to the bottom, not No. 3. I was like I have
4 seen them all before, but I wasn't sure if any of
5 them who was there and No. 2. I was like I'm not
6 sure who was there.

7 Q. So what you said --

8 A. I said I remember something
9 distinctive. It was like one of the guys had like
10 a black out that you put on your face or something
11 like that. That was the only thing that I remember
12 saying to him.

13 Q. Do you remember telling the detective
14 that you went over to ■ Norman Street to buy
15 drugs?

16 A. I did tell them that I was going to get
17 marijuana just like I told you. I went for the
18 job, you know, because that's what the guy was
19 going to help me with the job and I wasn't lying to
20 him or you about it just now. I made sure I stated
21 that, you know, I was doing drugs.

22 Q. Just one second. Court's indulgence,
23 please. Thank you, Mr. Smalls. Thank you, Judge.

24 THE COURT: Redirect?

25 MR. OSBORNE: Just a couple of

1 questions.

2 REDIRECT EXAMINATION

3 BY MR. OSBORNE:

4 Q. So maybe, maybe not, Ms. Peggy gave you
5 cash prior to speaking to Detective Krasowski; is
6 that right?

7 A. It wasn't prior to, you know, I don't
8 think she meant it and it wasn't prior, but she,
9 you know, she offered because I needed some money
10 and then she came and knocked on the door and took
11 me down there to the people, but I was just saying
12 that I did not know.

13 Q. Did you lie to the police?

14 A. No, sir.

15 Q. Okay. Next question. When Detective
16 Krasowski presented you this lineup did he tell you
17 who to pick out?

18 A. I told him just like I told you that I
19 seen --

20 Q. Mr. Smalls, please just answer my
21 question.

22 A. No, he didn't tell me.

23 Q. Did he tell you in any way who to pick
24 out in this lineup?

25 A. No.

1 Q. Did he suggest to you who to pick out
2 in this lineup?

3 A. He didn't like pinpoint, say this guy
4 or that guy or that guy.

5 Q. So answer this question right here yes
6 or no. Did Detective Krasowski suggest to you in
7 any way who you should pick out in that lineup?

8 A. Like I said again --

9 Q. Yes or no?

10 A. No.

11 MR. OSBORNE: No further questions.

12 THE COURT: Recross?

13 RECROSS-EXAMINATION

14 BY MS. VAN PALA:

15 Q. What were you trying to say, Mr.
16 Smalls?

17 A. I don't understand like they showed me
18 what am I to explain or -- what I am trying to see
19 and see where I am at. Why am I even involved in
20 this, because of a conversation I had with a man at
21 the store about I heard someone got shot. I mean
22 how does this put me into play if you all -- I
23 don't really understand what's going on right now.
24 I really don't and I would like to just get this
25 over and done with.

1 MS. VAN PALA: Thank you.

2 THE COURT: Sir, you may step down.
3 Thank you very much. I believe they are going to
4 ask you to wait outside the courtroom, sir.

5 THE WITNESS: Okay.

6 (Witness exited the courtroom.)

7 THE COURT: It's defense's motion to
8 suppress. I will hear from you.

9 MS. VAN PALA: Your Honor, I apologize.
10 Beg the Court's indulgence just for a minute.

11 (Off-the-record conference.)

12 MS. VAN PALA: Thank you, Your Honor.
13 May it please the Court, we are asking the Court
14 suppress this identification. I believe Mr. Smalls
15 just testified that he wasn't sure that No. 3 was
16 out there at the time and No. 3 is who he
17 identified as the Defendant. He also said that he
18 thinks he got some money from the victim's mom for
19 going down to the police station.

20 Detective Krasowski testified that Mr.
21 Smalls told him he saw Te'Quan's booking photo
22 before identifying him. Detective Krasowski wasn't
23 able to tell us whether it was the same booking
24 photo, but what Detective Krasowski also told us
25 was that he showed Clayton the surveillance footage

1 beforehand too. So he showed him the footage
2 before the ID. Additionally Mr. Smalls said that
3 he was on drugs at the time, that he went down to
4 ■ Norman to buy drugs. And, again, that he
5 couldn't be sure who he saw.

6 And I think he just testified that he
7 couldn't be sure whether there was a second
8 individual appearing in that lineup that the State
9 is seeking to admit that could have been done there
10 at the time. So, Judge, we would ask that ID be
11 suppressed.

12 MR. OSBORNE: Thank you, Your Honor.

13 The whole purpose of the hearing is to
14 determine whether the out-of-court identification
15 procedure was unduly suggestive and conducive to
16 irreparable misidentification. That's the whole
17 purpose to it. I maybe kind of went a little bit
18 too far with it. But the purpose to the hearing is
19 that and what -- this pretrial identification
20 procedure, the first thing the Court is to look at
21 is was the identification procedure conducted in
22 the manner that was unduly suggestive.

23 We only go to No. 2 if the procedure
24 was unduly suggestive. In this case it was not.
25 Detective Krasowski told the Court, testified to

1 the manner in which presented the lineup. He made
2 no suggestion who Mr. Smalls should identify. Mr.
3 Smalls, even though he was all over the place, he
4 would say that, that Detective Krasowski did not
5 indicate in any way who he should pick out or who
6 he wanted him to pick out.

7 So my position to the Court would be we
8 don't even go to No. 2, the factors. Because No. 2
9 is if so, then we go into the factors. So the
10 lineup presentation and the procedure wasn't unduly
11 suggestive so therefore, we don't even go to No. 2.
12 But if we did go to No. 2 I think we are okay
13 because there's nothing in all -- everything she
14 mentioned is perfect grounds for cross and
15 impeachment. I will be impeaching him. So I think
16 that's perfect fodder for that.

17 THE COURT: What I am looking at is
18 State v. Moore. It says in evaluating an
19 out-of-court identification the trial court should
20 follow a two-step procedure as you stated. One,
21 was the out of court identifying process unduly
22 suggestive; and if so, was the identification
23 nevertheless so reliable there is no substantial
24 likelihood of misidentification existed.

25 Now, I will go to State v. Jones 273

1 S.C. 723 in which the Court stated reliability is
2 the linchpin in determining the admissibility of
3 identification testimony. There are five factors
4 the court said you can consider in determining
5 reliability. One, the witness's opportunity to
6 view the person at the time of the event; two, the
7 witness's degree of attention; three, the accuracy
8 of the witness's prior description of the person;
9 four, the witness's level of certainty at the time
10 of identification; and five, the time between the
11 crime and the identification.

12 It says against these factors, this is
13 from State v. Benson must be weighed the corruption
14 effect of an unnecessarily suggestive procedure.

15 So all of those factors are things that
16 I should consider in whether to allow this to
17 proceed forward, not just the two-step process.

18 MR. OSBORNE: Okay. Your Honor, in
19 reference to those the factors, the witness's
20 opportunity to view the subject at the time. Mr.
21 Smalls has testified that he walked in the alley,
22 the driveway. He saw five individuals. He spoke
23 to them. He waited for a response from the one
24 individual in particular. He did not respond. The
25 witness's degree of attention. He was there long

1 enough to ask him a question and face him and talk
2 to him. The accuracy of the witness's prior
3 description. We get that from Detective Krasowski.
4 He was about six-foot tall, he had pock marks on
5 his face. He was thin build. He was an
6 African-American. He was younger. Those were the
7 descriptions that Detective Krasowski had for
8 Te'Quan Perry.

9 The witness -- this is the key here. I
10 think the witness's level of certainty at the
11 confrontation, and that would be at presentation of
12 the lineup, not now. At the presentation of the
13 lineup Detective Krasowski is saying that he was
14 positive in his identification. The length of time
15 between the crime and confrontation. In this case
16 it was only three weeks.

17 Now, you know, like I said, I think
18 when he gets on the stand if he behaves the way he
19 did just now and she's got plenty of material to
20 impeach him on, including my own investigator. But
21 that doesn't make his lineup identification
22 inadmissible because it's totality of
23 circumstances. It is not every factor that I
24 understand it to be. And so I think we have met
25 our burden.

1 MS. VAN PALA: Your Honor, I think what
2 Mr. Smalls just testified to was that -- not
3 whether he could be sure it's identification right
4 now, but that he told Detective Krasowski at that
5 time that he couldn't be sure whether it was No. 3
6 or whether it was another person in the lineup.
7 Detective Krasowski testified and his report
8 reflects that Clayton had seen Te'Quan's booking
9 photo prior.

10 THE COURT: That in and of itself does
11 not exclude an identification. There's a case
12 right on point on that. I mean that's interesting.

13 MS. VAN PALA: I will move on. The
14 interview of this identification procedure was not
15 recorded. So we can't look at that.

16 THE COURT: I don't see that in any of
17 my factors. It doesn't have to be recorded.

18 MS. VAN PALA: Additionally I submit
19 that No. 3 is the only one with the distinguishing
20 dark spots on his face. I think that's plain from
21 the photos. Thank you, Your Honor.

22 THE COURT: Mr. Osborne, maybe you can
23 address, he did -- he was waffling even as to his
24 certainty at the time he made the identification.
25 He not only waffled, he waffled all over the place.

1 MR. OSBORNE: I will agree, Your Honor,
2 and I would think that from our position Detective
3 Krasowski said he did not. He was positive at the
4 time and not only that, I think the lineup itself
5 even shows that. He mentioned on two occasions
6 that it was a gun. I think that when he testified
7 it could have been a railing to steps I think. If
8 that had been the case and that's what he had
9 represented at the time, I think the lineup would
10 have presented that. That goes to the impeachment
11 issues here. And even if the witness's level of
12 certainty, if we're to believe Mr. Smalls'
13 testimony, the other factors I think still meet the
14 burden in Neil v. Biggers for its admissibility.

15 THE COURT: All right. We will take
16 about a five or ten-minute break.

17 (A recess transpired.)

18 THE COURT: All right. I have had an
19 opportunity to review a case, one in particular
20 caught my attention which is State v. Cane.
21 Interestingly enough, this is a 2006 court of
22 appeals case. It at that time was an unpublished
23 opinion and I realize those are not to be used for
24 precedent, nevertheless, this case cites several
25 cases that I would use or to consider in making

1 this decision.

2 It describes the identification process
3 as being the Court should go through a two-part
4 analysis. As the State pointed out, first of all,
5 you should look to whether or not the process was
6 unduly suggestive and the other prong slipped my
7 mind briefly is --

8 MR. OSBORNE: Second prong being if so,
9 was the procedure so suggestive as to give rise to
10 a very substantial likelihood of irreparable
11 misidentification under the totality of the
12 circumstances.

13 THE COURT: As you indicated, the
14 procedure has been described to us and even
15 confirmed by the last witness. There was not a
16 suggestion made to him as to who he should pick. I
17 find that the lineup is proper. I didn't see that
18 there was a great difference in the individuals
19 that were shown on there. Appears to me that they
20 are similar in nature. I don't find the lineup
21 itself was suggestive.

22 Of course this witness didn't indicate
23 that anybody suggested anything to him. What he,
24 in fact, is doing is appears to be attempting to
25 either say that he has forgotten or he is recanting

1 that testimony that he previously gave and in that
2 case Cane that I was talking about, and by the way,
3 it's got a Westlaw cite of 2006 Westlaw 7287053.

4 There are an identification that the Court found to
5 be suggestive and even -- but then they found that
6 the indicia of reliability would allow it still to
7 come in even though it was a show up line up so it
8 is different in that regard.

9 One thing caught my eye, there was also
10 an attempt to in this case for a witness to recant
11 his testimony.

12 And in that particular case they cited
13 the South Carolina Supreme Court has previously
14 held, "That recantation of testimony ordinarily is
15 unreliable and should be subjected to the closest
16 scrutiny when offered in court."

17 That's State v. Porter 269 S.C. 618 at
18 page 621, 1977 case. The case I am citing is a
19 2006 case. It cites that Porter case.

20 And when issues of credibility do arise
21 the trial court has the discretion to weigh that
22 credibility and the factors that may have gone into
23 what occurred.

24 So my finding is that this lineup was
25 not overly suggestive. The testimony from the

1 police officer would have been sufficient to
2 establish that had the -- of course had the
3 identifying witness confirmed all of that, there
4 wouldn't be much of a question in this case.

5 However, he did not. He was very
6 waffling. Again, when there's a recantation that's
7 viewed by the Court with great suspicion and
8 scrutiny. He did indicate that his memory was
9 probably better before than it was now in his
10 testimony.

11 So I am not going to exclude it. I
12 will allow you to cross-examine him thoroughly on
13 all of those issues. It was not overly suggestive
14 and so I am not going to get to the indicia of
15 reliability that would overcome a suggestive lineup
16 because I find it not to be suggestive.

17 MR. OSBORNE: Your Honor, we would call
18 Mr. Smalls and before I forget I would ask a little
19 bit of leeway in leading him so that we don't get
20 some of that witness intimidation stuff out. I
21 don't know that that's relevant in this case.
22 These two Defendants were incarcerated at the time.
23 And if I can just get bit of permission and to
24 bring him in a little bit and try to keep him on
25 focus.

1 THE COURT: Do you have any problem
2 with him doing that or do you want him to have a
3 chance to go out and instruct the witness not to
4 get into that?

5 MS. NORRIS: We want him to do both,
6 Judge.

7 THE COURT: All right. I will give you
8 a moment to step outside and instruct the witness
9 as to the intimidation factors should not be
10 discussed in his testimony.

11 (Brief pause.)

12 THE COURT: Ready to go?

13 MR. OSBORNE: Yes.

14 THE COURT: Defense attorneys ready to
15 proceed?

16 MS. VAN PALA: Yes, Your Honor.

17 MR. APICELLA: Yes, Your Honor.

18 THE COURT: Bring the jury in.

19 (Whereupon the jury entered the
20 courtroom at 3:46 p.m.)

21 THE COURT: Let the record reflect the
22 jury has returned to the courtroom. Ladies and
23 gentlemen, I want to thank you for your patience
24 again.

25 As I indicated at the beginning of the

1 trial, from time to time I have to take up matters
2 concerning the admissibility of the evidence with
3 the attorneys outside of your hearing and we have
4 been in the process of doing that while you were
5 outside of the courtroom. I apologize for the
6 delay that we have caused you and I wish that we
7 could avoid that, but we will do the best we can.
8 But nevertheless from time to time that's
9 necessary.

10 That's what we were doing during this
11 long pause. At this time the State may call its
12 next witness.

13 MR. OSBORNE: Thank you, Your Honor.
14 State calls Clayton Smalls.

15 THE COURT: Sir, if you will come
16 forward and be sworn to my left.

17 CLAYTON SMALLS

18 having been duly sworn, testifies as follows:

19 THE CLERK: Please state your first and
20 last name and spell your last name.

21 THE WITNESS: Clayton
22 Smalls, S-M-A-L-L-S.

23 THE COURT: Counsel, your witness.

24 DIRECT EXAMINATION

25 BY MR. OSBORNE:

1 Q. Mr. Smalls, fair to say you don't
2 really want to be here; is that right?

3 A. Yes, sir, you are right.

4 Q. And the only reason why you are here
5 basically is because we subpoenaed you; is that
6 right?

7 A. Yes, sir.

8 Q. And tell the jury -- you didn't see who
9 murdered Brandon Washington, did you?

10 A. No, I wasn't there at all to see
11 anything that happened. I was away. I was not
12 there.

13 Q. Right. So you don't have any idea who
14 shot Brandon Washington, do you?

15 A. It had to have been a person who didn't
16 like him.

17 Q. Well, let me --

18 A. For some reason.

19 Q. Let me just stop you from speculating,
20 okay? I am not trying to -- just please answer my
21 questions, okay? You don't have any idea who shot
22 him do, you?

23 A. Right offhand I don't. I don't know
24 who shot him.

25 Q. Okay. And on March the 23rd you were

1 hit by a car, weren't you?

2 A. Yes.

3 Q. Okay. Was that on the Crosstown or
4 thereabouts?

5 A. It was near the Crosstown, but it was
6 right at Hagood and Spring Street where the blind
7 side coming out of Taco Bell is at, yes, sir.

8 Q. Okay. And there's a McDonald's near
9 there?

10 A. Just across the parking lot, across the
11 street from the parking lot.

12 Q. I am showing you what's been marked as
13 No. 31. Can you look at that and tell me if you
14 recognize it?

15 A. Yes, sir.

16 Q. What is it?

17 A. That's the driveway, that's the
18 apartment and that's another apartment.

19 Q. On the day that we are talking about
20 here on March the 23rd, did you have the occasion
21 to walk into that alley or drive?

22 A. Yes, sir.

23 Q. Okay. Your Honor, at this time I would
24 seek to admit State's Exhibit 31 into evidence.

25 MS. NORRIS: No objection.

1 MR. APICELLA: No objection.

2 THE COURT: Without objection it will
3 be admitted as marked and you may publish that to
4 the jury.

5 (State's Exhibit 31 in evidence.)

6 BY MR. OSBORNE:

7 Q. So you said that you did have the
8 occasion to go or walk into the alley or driveway.
9 Was that --

10 A. I got a chance to walk into that door
11 to the left. As far as, you know, whatever else is
12 there, I walked into this apartment building, the
13 yellow apartment building.

14 Q. Okay. And that would have been
15 sometime prior to you getting hit by a car?

16 A. Yes, sir.

17 Q. I am showing you State's Exhibit 9.
18 I'm going to play it right here at 5:06:12. Tell
19 me if you recognize anyone on this video.

20 (Video played.)

21 A. Clayton.

22 Q. Who is that?

23 A. That's me.

24 Q. Okay. That picture that I showed you
25 before, these are the two houses right here?

1 A. Yes.

2 Q. So you would have went into that
3 driveway right there?

4 A. Yes, sir.

5 Q. Okay. Back to State's Exhibit 31, when
6 you walked into that alley you said that you had
7 went -- you walked into the door over there over to
8 the left?

9 A. Yes, sir.

10 Q. There was a group of individuals there;
11 is that correct?

12 A. Yes, sir.

13 Q. Okay. One of the individuals did you
14 notice anything peculiar in his pocket?

15 A. When I walked into there?

16 Q. Well --

17 A. When I walked into there there were
18 like four or five little guys, four or five little
19 guys just sitting there, you know, sitting on the
20 steps. The apartment where the 16 is at was the
21 door that I was to go to to talk with the guy about
22 landscaping work. And like I said, I did get some
23 marijuana, you know, went to get some marijuana.
24 And I was going to wait for him to come back and,
25 yeah, I was there.

1 Q. Did you go inside that apartment?

2 A. I didn't go in the apartment. I was in
3 that alleyway, that breezeway, not alleyway in that
4 breezeway of the apartment. Two apartments
5 downstairs, two apartments upstairs steps.

6 Q. Okay. And so you were about to say and
7 I interrupted you, I apologize. As you were coming
8 out did you see anyone with anything peculiar on
9 their pocket?

10 A. It was strange when I was coming out,
11 you know, I wasn't too sure, but like I said and,
12 you know, I asked a question.

13 Q. What question did you ask?

14 A. It was either what is that hanging out
15 your pocket or is that a .32 or a .38 or something
16 like that hang out your pocket.

17 Q. Let me interrupt you. A .32 and .38,
18 those are handguns?

19 A. They could be handguns because I never
20 had one. I don't know if that was a handgun in his
21 pocket or not, if that was the railing that you
22 lean on. I never got a chance to see it exposed.
23 It was never brandished out in front of me.

24 Q. Interesting you just pointed to your
25 left pocket. Was the handgun in his left pocket?

1 A. Well, see, that's the thing again. You
2 still asking me if it was the handgun in his
3 pocket, but I did not -- he never pulled out
4 anything and showed it to me. I don't know, you
5 know, so I can't really say that it was a gun.

6 Q. Good point. Whatever it was that you
7 saw it elicited the question from you to say is
8 that a .32 or a .38?

9 A. Yes.

10 Q. Is that correct? Yes or no?

11 A. I seen, yes.

12 Q. Okay. And whatever that was, whether
13 it be a piece of wood or who knows, that would have
14 been in the individual's left pocket?

15 A. Yes, could have been and should have
16 from where I was sitting at, yeah.

17 Q. Yeah. Okay. All right. So that
18 individual with an object that may have or may not
19 have been a gun that elicited the question is that
20 a .32 or .38, that individual, what was he wearing?

21 A. He was pretty much almost like the same
22 things that I had on besides a camouflage coat.

23 Q. He was wearing a camouflage coat. All
24 right.

25 A. Like the same colors.

1 Q. Similar colors?

2 A. I believe so. Then there was guys in
3 there with black on, guys with like a hoodie on.

4 Q. Okay. Now, I did want to go back to
5 State's 9 for one quick second. So this is at
6 5:06.

7 A. Wait a minute.

8 Q. Okay. So we are talking this is at
9 5:12, so about six minutes later. Is that you
10 coming out?

11 A. Um-hmm.

12 Q. Okay. So you were in there for about
13 six minutes?

14 A. That's what I said.

15 Q. I didn't say you didn't. I am sorry.
16 So about six minutes. During that time you see
17 this guy, something in his left pocket. You ask
18 him if it was .32 or .38. Are you familiar with a
19 .32 and .38, are they big guns or small guns?

20 A. I don't know. Only thing about guns is
21 when I see it on television because I never had a
22 gun. I ave never shot a gun either.

23 Q. Okay. Now --

24 A. In US marshal school they did have a
25 gun, but it was like a Beretta. It was big, but I

1 like western movies and yeah.

2 Q. Okay. Now, this individual that was
3 wearing this jacket with this object coming out of
4 his left pocket, did you notice anything unique or
5 interesting about his face?

6 A. Yeah. I told you it was like the black
7 out stuff like guys use it.

8 Q. Let me ask it another way. Did you
9 notice anything interesting or unique about his
10 skin?

11 A. Yes, I was saying like the black out
12 stuff that, you know, people use.

13 Q. Do you remember sitting down with
14 Detective Krasowski on April the 16th, about three
15 weeks after this incident, that man right there?

16 A. Yes.

17 Q. And do you remember him asking you to
18 describe the individual?

19 A. I remember him saying that it was -- if
20 it was acne or if it was acne or something to that
21 nature like that. And like I said, you know, they
22 had some type of salve or something, you know, what
23 I am saying, like the black out or whatever they
24 use, you know, to help cure rash or bump or
25 whatever.

1 Q. My mistake. I thought black out meant
2 that he had something covering his face. You're
3 saying he had some sort of medication on his face,
4 that's what it appeared like because he had acne?

5 A. Yes, sir. I don't mean like a hood or
6 anything like that.

7 Q. Okay. I didn't understand what you
8 meant. I'm sorry. On that date did Detective
9 Krasowski present you a lineup of individuals to
10 see if you happened to recognize the person?

11 A. Yes, sir, the one that you all just
12 went over just now.

13 Q. Just answer the question.

14 A. Yes, sir.

15 Q. May I approach?

16 THE COURT: You may approach.

17 Q. Showing you what's been marked as
18 State's Exhibit No. 139. Do you recognize that,
19 yes or no?

20 A. Yes, sir.

21 Q. Is that the lineup that Detective
22 Krasowski presented to you?

23 A. Yes, sir.

24 MR. OSBORNE: Your Honor, at this time
25 I would seek to admit State's Exhibit 139 into

1 evidence.

2 THE COURT: Objections?

3 MS. NORRIS: Subject to our prior
4 objections.

5 THE COURT: Subject to the prior
6 objection.

7 MR. APICELLA: Yes, sir.

8 THE COURT: The Court will make the
9 same ruling. It will be admitted.

10 (State's Exhibit 139 in evidence.)

11 BY MR. OSBORNE:

12 Q. That's your name there. That was that
13 your phone number at the time; is that correct,
14 813-3623?

15 A. I believe you are right.

16 Q. So that's on April the 16th, at 5:05?

17 A. Um-hmm.

18 Q. Now, this paragraph here, I'm going to
19 ask did Detective Krasowski read this to you. It
20 says, "I'm going to show you a group of
21 photographs. The photos may or may not contain the
22 picture of the person who committed the above
23 listed events which is under investigation at this
24 time. Keep in mind that the photo may show a
25 variance in complexion, hair, eyes, facial hair, et

1 cetera. If you recognize anyone in any of these
2 photos as the person who committed the crime
3 against you or you were a witness to I will ask you
4 to initial and circle the photo. Upon viewing the
5 photos don't discuss the procedure with anyone
6 else."

7 You didn't witness a crime at all in
8 all fairness; is that correct?

9 A. Right.

10 Q. But he still showed that to you. And
11 now I see there is a check here by I was able to
12 make an identification. Photo No. 3. Is that your
13 signature right there?

14 A. Yes, sir.

15 Q. Then it says khaki pants camouflage
16 jacket, gun in the left pocket; is that correct?

17 A. Yes, sir.

18 Q. And is that your handwriting?

19 A. My signature.

20 Q. Did you write that?

21 A. I wrote my signature.

22 Q. You didn't write the Khaki pants,
23 misspell camouflage jacket, gun left pocket?

24 A. I don't remember writing that, no, sir.
25 That doesn't even look like my handwriting.

1 Q. Okay. Do you remember writing gun?

2 A. I remember the picture. I don't
3 remember writing that. Like I said it was two
4 and-a-half years ago. I don't remember writing
5 that, but I remember that picture.

6 Q. You don't think he wrote that, do you?

7 A. I don't remember writing that. I
8 didn't write -- I don't remember writing that. You
9 know. Not saying that I didn't. I was under -- I
10 was there with Ms. Peggy. I was caught off guard,
11 taken to the police precinct and asked questions
12 about this. I don't remember writing it, but if he
13 said that I did it then I wrote it. I don't
14 remember.

15 Q. That's your signature there?

16 A. I know my signature is there. I
17 definitely said that, but I do not remember writing
18 gun.

19 Q. Circling Photo No. 3, okay.

20 MR. OSBORNE: No further questions.

21 MR. APICELLA: No questions.

22 THE COURT: Cross-examination?

23 CROSS-EXAMINATION

24 BY MS. NORRIS:

25 Q. Hey, Ms. Smalls. I am Theresa Norris,

1 one of Mr. Perry's attorneys.

2 A. Hey, Ms. Norris.

3 Q. You mentioned that you were caught off
4 guard and taken down to the police station to make
5 a statement.

6 A. Yes.

7 Q. It was Brandon Washington's mother who
8 took you there, right?

9 A. Yes, ma'am.

10 Q. And you told the police at the time
11 that you were old friends with her?

12 A. I didn't say that I was old friends
13 with her. I said I remember her. I have seen her
14 before, not that she was my friend.

15 Q. Okay. And if I were to call Detective
16 Krasowski and he says Mr. Smalls said they were old
17 friends do you deny that?

18 MR. OSBORNE: Objection. That's
19 pitting.

20 THE COURT: You can't pit witnesses
21 against each other. There has not even been any
22 testimony on this subject from that witness.
23 Rephrase the question.

24 MS. NORRIS: May we approach?

25 THE COURT: I have ruled on that.

1 MS. NORRIS: Yes, sir.

2 BY MS. NORRIS:

3 Q. Now, when you made this initial
4 statement to the police officers it was about three
5 weeks after all this happened, right?

6 A. According to that paper from you said
7 that it happened like March the 22nd or something
8 like that. And then on the 16th or whatever month
9 that was, I mean I have been like really going
10 through a lot at that point in time.

11 Q. And I didn't ask all that. I just
12 asked you if it was three weeks later?

13 A. I don't know how long it was. Say
14 again. I don't understand what you're asking me.

15 Q. My question is the incident when you --
16 the same day you were hit by a car on March 23rd,
17 2015?

18 A. Okay.

19 Q. That's the day you saw this gentleman
20 with -- this gentleman out there in the breezeway,
21 right?

22 A. Yes, ma'am.

23 Q. And the statement you made, the photo
24 that was shown to you on the wall there was
25 April 16th?

1 A. That was before -- that was after
2 everything had already taken place.

3 Q. Three weeks after?

4 A. Yes, ma'am.

5 Q. Okay. When you went down to the police
6 station, Brandon Washington's mother picked you up
7 and she also gave you some money that day, right?

8 A. Yes, ma'am. I mean she got me
9 something to eat and give me some money, yes,
10 ma'am.

11 Q. And was it in the range of 50 to \$60?

12 A. I don't remember how much money it
13 actually was; I can't really like --

14 Q. And did she ask you to say that you
15 were a witness to her son's murder?

16 A. She didn't ask me. I am not going to
17 lie on her. She didn't ask me to be a witness. I
18 made sure what I told her as well as I told the
19 officer as well as I told the solicitor and his
20 partner, I said that I do not know anything about
21 the murder. I wasn't there. I didn't see it. As
22 you all saw --

23 Q. I understand but --

24 A. The only thing she was venting her son
25 had been killed and she was letting me know that it

1 could have been his cousin.

2 Q. I didn't ask you all that. Do you
3 recall talking to the solicitor, I believe his
4 investigator, on May 11th of this year, just a
5 month or so ago?

6 A. Um-hmm.

7 Q. And did you tell them at the time that
8 she asked you to say that you were a witness to the
9 murder?

10 A. I don't recall her ever saying that to
11 me, but they had me under the assumption prior --

12 Q. Listen to my question. Did you tell
13 them that?

14 A. I don't remember telling them anything
15 like that, that she told me to be a witness.

16 Q. And if I were to call the solicitor's
17 investigator and he testified that you said she
18 asked you to be a witness, do you deny that?

19 A. When you say witness, you are kind of
20 throwing me off because I didn't witness anything.

21 Q. I understand that. I am not trying to
22 say you did. I am asking did she ask you to tell
23 the police that you saw something you did not see?

24 A. She asked me to come to the police
25 station and talk to the private investigator or the

1 gentleman there with the glasses on. She asked me
2 to go there and talk with him. He took me in the
3 room and I spoke with him, but they said that I
4 wouldn't be a witness. That's what I was told.

5 Q. Okay. Mr. Smalls, my question is --

6 A. She didn't ask me to be a witness. She
7 basically -- she just took me down to the
8 courtroom -- I mean to the police department. I
9 went with her.

10 Q. All right. Now, the guy you saw out
11 there, you said he had on Khaki pants, right?

12 A. Yes, ma'am.

13 Q. And a jacket was Khaki as well?

14 A. It was a fatigue, like Army fatigue
15 jacket. Was like a fatigue or camouflage jacket or
16 something like that, like a hoodie.

17 Q. All right. And the pictures that you
18 are shown, you said that you're not sure whether
19 you wrote gun there, right?

20 A. I'm not sure, but I could have done
21 that because I was at that office, but I'm not --

22 Q. And you are not sure that's the guy you
23 actually saw out there either, right?

24 A. Well, like I said, I have seen -- I
25 don't know all these guys faces.

1 Q. I am just asking --

2 A. I'm not sure if I have seen all these
3 guys faces. I have seen them probably in passing
4 and I don't want to make a mistake and accuse me of
5 seeing that one and then that might not be him or I
6 don't want to be the person that cause any mishaps
7 anything that's going on because I don't want to
8 like pinpoint and say I don't know which one of
9 these guys exactly I have seen him before. I have
10 seen two. I have seen three. I have seen four. I
11 even think I seen one before, you know?

12 Q. So you have seen at least five of these
13 guys?

14 A. I seen -- I might have seen one of them
15 on the bus. I mean I got people that say things to
16 me. I don't even know their names. I remember who
17 they are, but they grown up. I'm 46.

18 Q. Before you went down to the police
19 station and were shown the photo lineup, Brandon
20 Washington's mother showed you a newspaper article
21 with Te'Quan Perry, No. 3, with his picture in it,
22 didn't she?

23 A. No. Not Brandon's mother. Another
24 lady named Peggy.

25 Q. Okay.

1 A. Who was talking to the guy at the
2 store. Yeah, her name was Peggy, too.

3 Q. Okay. So before you went to the police
4 station you were shown a newspaper article saying
5 this guy has been charged with the murder and got a
6 picture here?

7 A. She had a paper clipping. She was like
8 showing it as I was walking down the street with
9 her and, sorry, I don't really pay, you know, much
10 attention to, you know, she just had it. I don't
11 know. I didn't know who Brandon even was until his
12 mother showed me on her shirt.

13 Q. Give me just a second.

14 (Off-the-record conference.)

15 BY MS. NORRIS:

16 Q. Mr. Smalls, I don't mean to be
17 personal, but do you have a problem reading and
18 writing or reading?

19 A. Well, you know, I got dyslexia, but I
20 don't know, like I can figure out some things.

21 Q. Well, may I approach, Your Honor?

22 THE COURT: You may.

23 Q. Let me show you, put that in front of
24 you. First let me ask you when you talked to Mr.
25 Osborne were you aware that your interview was

1 being recorded?

2 A. No, ma'am. Nobody -- I don't remember
3 that.

4 Q. Okay. Well, if you would read that and
5 see if that sounds like the conversation you had
6 with the -- or sounds like, see if it is the
7 conversation you had with the solicitor a month
8 ago?

9 A. (Witness complies with request.)

10 Yes, I see in that Exhibit 2 where like
11 I said right and the other girl tried to make me be
12 like a witness knowing that I wasn't no witness.

13 Q. Okay. So that is your statement?

14 A. Yes, ma'am.

15 Q. If you go over to page 13 for me?

16 A. Okay.

17 Q. Right at the bottom of page 12, top of
18 page 13, this is you talking. "She couldn't tell
19 me to say anything because I wasn't listening. She
20 just wanted me to try to make it seem like I seen
21 something that I didn't see. You know, she's like
22 well, tell them that you know the guy. You have
23 seen the guy who had seen the guy who is fighting
24 with my son. I did not see any of it."

25 A. I didn't.

1 Q. But my question is that's what you told
2 the solicitor a month ago?

3 A. If you got that recorded, got my voice
4 on it, then that's what it is.

5 Q. All right. Let me get that back from
6 you.

7 A. I didn't even know it was recorded me
8 talking.

9 MS. NORRIS: I don't have anything
10 further.

11 MR. OSBORNE: Beg the Court's
12 indulgence.

13 (Off-the-record conference.)

14 REDIRECT EXAMINATION

15 BY MR. OSBORNE:

16 Q. Just briefly, Mr. Smalls. Did Ms.
17 Peggy Mitchell, you see her in the courtroom?

18 A. Yes, sir.

19 Q. That's her in the white?

20 A. Yes, sir.

21 Q. Did she ever tell you to lie to the
22 police?

23 A. No, sir. She didn't tell me to lie to
24 the policeman.

25 Q. Okay. Did you lie to the police?

1 A. No, sir.

2 Q. Okay. Now, Ms. Norris asked you about
3 this lineup. When Detective Krasowski presented
4 this lineup to you did he say pick that guy?

5 A. No, sir, he didn't specifically say --
6 he didn't in no way shape or form like tell me to
7 pick anybody.

8 Q. Okay.

9 A. He asked me if I ever seen any of these
10 guys, if I knew any if these guys or something.

11 Q. Right. And Ms. Norris asked you, you
12 said you had actually seen No. 3 before, haven't
13 you?

14 A. I said I could have seen -- I may have
15 three, two, and four before and even one.

16 Q. Okay. So you have seen them?

17 A. I said I may have seen them before.

18 Q. And that's the guy in the Khaki pants,
19 camouflaged jacket, gun in the left pocket.

20 Now, you had mentioned going up there.
21 There were other guys in the alley?

22 A. Yes, there was like four or five
23 different guys in that area.

24 Q. But only one was wearing a camouflaged
25 jacket, right?

1 A. To my recollection, yes, I think just
2 one of them because one had on like a blue, other
3 one like had black and blue and stuff, black and
4 blue and things like that were on him, dark colors.

5 MR. OSBORNE: No further questions.

6 MS. NORRIS: Nothing further.

7 MR. APICELLA: No.

8 THE COURT: Anything? You may step
9 down, sir. You wish to excuse the witness?

10 MR. OSBORNE: We do, Your Honor.

11 THE COURT: Any objection to his being
12 excused?

13 MS. NORRIS: No, sir.

14 MR. APICELLA: No.

15 THE COURT: Sir, you are free to go at
16 this time. Thank you very much. I will ask the
17 attorneys to approach, please.

18 (Following proceedings were held at the
19 bench.)

20 THE COURT: Any other witnesses?

21 MR. OSBORNE: We have a few chain
22 witnesses that I think will be relatively quick.

23 THE COURT: We will try to get those
24 done.

25 MS. NORRIS: For the record, I was

1 operating under Rule 613 (b). If they are going to
2 offer exculpatory evidence of a prior inconsistent
3 statement you have to give me the opportunity to
4 deny. That's all I was trying to do.

5 THE COURT: What you were asking him
6 was if someone -- so you were to testify in such
7 and such a fashion would you disagree with that.

8 MS. NORRIS: I think that's what
9 Rule 613 (b) is.

10 THE COURT: Well, I will look at it,
11 but I think pitting one witness against another,
12 you are trying to get him to confirm another
13 witness's statements and I don't allow that.

14 MS. NORRIS: I understand.

15 (Following proceedings were held in
16 open court.)

17 THE COURT: You may call your next
18 witness.

19 MR. CORVEY: State calls Angela Casey.

20 THE COURT: Come forward and be sworn,
21 please.

22 ANGELA CASEY

23 having been duly sworn, testifies as follows:

24 THE CLERK: Please state your first and
25 last name and spell your last name.

1 THE WITNESS: Angela Casey, C-A-S-E-Y.

2 DIRECT EXAMINATION

3 BY MR. CORVEY:

4 Q. Good afternoon, Ms. Casey.

5 A. Good afternoon.

6 Q. How are you doing?

7 A. Fine. Yourself?

8 Q. Fine. Thank you. Where do you work?

9 A. Charleston County Consolidated Dispatch
10 Center.

11 Q. For the jury explain to them what you
12 do with Charleston County Dispatch?

13 A. I'm an analyst for the department. I
14 handle FOIA, Rule 5s or subpoenas for cases like
15 this.

16 Q. You said Rule 5s. Can you explain to
17 them for a moment what that is?

18 A. Rule 5s are basically a request from
19 attorneys or from attorneys who are looking for the
20 audio or the recordings or documentation of the
21 case and we turn those over to the attorney at
22 their request.

23 Q. So you go into y'all's database or
24 server and retrieve records out and then provide
25 them to attorneys?

1 A. Correct.

2 Q. In doing so are you certifying to the
3 attorney that they are authentic?

4 A. Yes.

5 Q. Before we get a little bit into the
6 records in this case, if you could, just explain to
7 the jury what we mean when we say consolidated
8 dispatch?

9 A. Consolidated dispatch, prior to 2009
10 all police department, fire department and EMS in
11 Charleston County had their own separate
12 dispatchers. As of November of 2013 all the
13 departments with North Charleston, City of
14 Charleston, Mt. Pleasant, came into one building.
15 So you now have call takers who only answer the
16 phones whether or not they are 911 or admin calls
17 and then we just have dispatchers. So we are all
18 under one building so we can all communicate
19 quicker and faster.

20 Q. And so as a part of that I guess
21 summing up what you said, you handle all the
22 dispatch for all of the emergency personnel in the
23 county?

24 A. Yes.

25 Q. So it being centralized, all of the

1 information with regards to say Charleston City
2 Police Department case would be stored and kept by
3 you guys?

4 A. Correct.

5 Q. And what is the type of information
6 that you guys do store in relation to helping and
7 coordinating a case like that?

8 A. CAD report which documents, some call
9 it a transcript, documents what the caller says to
10 the dispatcher. That dispatcher then relays that
11 information to the officer. That's kept for a
12 period of three years and for the 911 recordings or
13 the video transmission, that is audio recording
14 that's kept for one year.

15 Q. Now, you talked about the CAD report.
16 Can you describe for the jury a little bit about
17 how those documents are generated and from the
18 initiation of a case, 911 call to when a case is
19 cleared on the scene?

20 A. The documentation of the CAD report,
21 once the operator answers the phone and she hits
22 one button saying it is for a call for service, the
23 time that call came in is documented. Every time
24 they have a specific question to ask, whether or
25 not it's the caller name, number, the address, what

1 type of incident is going on, it is typed onto a
2 piece -- into the computer and the computer
3 generates a documentation for that officer or for
4 the citizen or a FOIA or for a lawyer.

5 Q. So I guess, and correct me if I'm
6 wrong, a CAD report is basically a running
7 transcript of every radio transmission or call that
8 is associated with a certain case?

9 A. Correct.

10 Q. Now, if you could, describe for the
11 jury a little bit about how after the case is
12 closed at least as far as dispatch is concerned,
13 obviously police departments may have to
14 investigate further, but with regard to your guys
15 job, then what happens with those records after
16 they are finalized and turned over to you?

17 A. Once the officer has finished the call
18 that documentation -- the computer holds the
19 information from the documentation for three years.
20 We can retrieve it and save it to our PC which we
21 do or we can have it saved into the data file. If
22 no one asked for it those documentation are purged.
23 If someone asked for it we then keep it in our PC
24 files until someone else needs it for further
25 investigation or for any type of trials or

1 anything.

2 Q. Now, in relation to this case, were you
3 asked to pull any CAD reports for this case?

4 A. Correct, yes.

5 Q. Did you do so?

6 A. Yes.

7 Q. Your Honor, may I approach?

8 THE COURT: You may.

9 BY MR. CORVEY:

10 Q. Handing you what's been marked as
11 State's Exhibit 153 and State's Exhibit 154. Could
12 you take a moment to look at those documents.

13 A. (Witness complies with request.) Yes.

14 Q. Do you recognize what those are?

15 A. Yes. Both of them are it's titled
16 incident detail report, but we call them a CAD
17 report which is a computer aided dispatch report.

18 Q. And are those the exact copy of the
19 records as they would appear in your system?

20 A. Correct, yes.

21 Q. How do you know that?

22 A. Just basically this is what we call
23 historical when it's longer than the date that it
24 actually did. And this is how it would have looked
25 when it came out of the computer before the

1 historical files.

2 Q. You can say that those are the
3 authentic records as it pertains to those two
4 incidents?

5 A. Yes.

6 Q. They are. Now, we talked about how
7 those records are stored and are they stored in the
8 ordinary course of business for the consolidated
9 dispatch for every single case?

10 A. Correct.

11 Q. And are they manipulated or changed or
12 is it just an accurate running transcript of what
13 occurred on a given incident?

14 A. It's just automatically stored. It's
15 not documented. We cannot take it out of the
16 computer and change information. And if so someone
17 is changing, then your initials are on back on it
18 what you did to the documentation.

19 Q. To document that something has been
20 changed or altered from the records?

21 A. Correct.

22 Q. Now, and then are these then kept I
23 think you mentioned for at least CAD reports kept
24 for up to three years?

25 A. Correct.

1 Q. Is that done in the ordinary course of
2 the consolidated dispatch's day-to-day business
3 operations?

4 A. Correct, yes.

5 Q. Your Honor, at this time I will seek to
6 admit State's Exhibit 153 and 154 into evidence.

7 THE COURT: Objection?

8 MS. VAN PALA: Court's indulgence.

9 (Off-the-record conference.)

10 MS. VAN PALA: Your Honor, I object.

11 THE COURT: Yes, ma'am.

12 MS. VAN PALA: I believe we have a
13 matter if we could approach the bench.

14 THE COURT: Let's ask the jury to step
15 back in the jury room. I will ask you not to
16 discuss anything during your absence. Please step
17 back to the jury room. Thank you.

18 (Jury exited the courtroom at
19 4:31 p.m.)

20 (The following proceedings were held
21 outside the hearing of the jurors.)

22 THE COURT: Ms. Van Pala.

23 MS. VAN PALA: Thank you, Your Honor.
24 May it please the Court, I'm objecting on the basis
25 that I don't think the police reports are

1 admissible. I think the CAD report is akin to a
2 police report. And police reports are not
3 admissible and I believe that that document
4 contains hearsay. I think as a custodian of
5 records maybe she could testify to the accuracy of
6 the CAD report, but I don't know what testimony
7 about what's in these CAD reports she would offer
8 that isn't hearsay as an evidence custodian.

9 MR. CORVEY: Your Honor, the business
10 records exception to the hearsay rule exists for a
11 reason. We have I think thoroughly gone through
12 these are kept in the ordinary, everyday course of
13 their business. These are merely data compilations
14 in relation to a police involved incident which her
15 organization keeps track of, then logs in these
16 records which they are then kept like I said in the
17 everyday, ordinary course of business. These are
18 classically defined 803(6) records that should be
19 admitted under that rule.

20 MS. VAN PALA: Sure. Since she is a
21 custodian. I am not questioning that she is a
22 custodian and that the records themselves are
23 accurate because she just testified that they are
24 and how they are kept. What is not a business
25 records is the contents. And the contents of CAD

1 reports are things such as statements by witnesses
2 and statements made by dispatch. So I think the
3 underlying statements are hearsay and the State
4 would be required to call someone to testify as to
5 what is actually contained in those CAD reports.

6 THE COURT: The rule that you are
7 siting 803(6) does have an exception. It says that
8 provided however subjective opinions and judgments
9 that are found in business records are not
10 admissible.

11 Now, I have not seen those records. I
12 don't know if there are subjective opinions in
13 there. Maybe if the objecting party could point
14 specifically to what you are claiming violates that
15 rule.

16 MS. VAN PALA: Specifically in the CAD
17 report, Your Honor?

18 THE COURT: That's what you're
19 objecting to.

20 MS. VAN PALA: Right, Judge. I was
21 pulling it up in one of the CAD reports. I'm not
22 sure which one, it is the dispatch operator taking
23 notes on the call in regard to Clayton Smalls. His
24 bicycle accident. I think that's hearsay.

25 THE COURT: Well, the record itself is

1 an exception to the hearsay rule except -- let me
2 read what the rule says so I'm sure we all have an
3 understanding of it. It talks about any
4 memorandum, report, record, data compilation in any
5 form of acts, events, conditions, diagnosis made at
6 or near the time or from information transmitted by
7 a person with knowledge if kept in the course of
8 regularly conducted business activities.

9 And if it was a regular practice of
10 that activity to make the memorandum, report,
11 record or data compilation. All is shown by the
12 testimony of the custodian or other -- are you
13 listening to me?

14 MS. VAN PALA: I apologize, Judge. I
15 was following along.

16 THE COURT: Or other qualified witness
17 unless the source of the information or method or
18 circumstances of preparation lack trustworthiness.
19 Provided however, this is the part that I'm
20 referring to, that subjective opinions and
21 judgments found in business records are not
22 admissible. Now, it's been testified to that's a
23 regularly kept compilation or report that's kept in
24 the ordinary course of business. It does not
25 require the custodian to testify, but any qualified

1 individual who can verify that's what it is, how it
2 was generated can also verify that under the rule.

3 Now, I guess your objection was to the
4 fact that there might be some subjective opinions
5 in there. I am asking you to point them out.

6 MS. VAN PALA: Yes, Judge.

7 MR. CORVEY: Judge, may I be heard
8 briefly? I think there's testimony from the
9 witness that I don't think there is anything
10 subjective in here. I think everything would be
11 objective. It's being relayed to a dispatcher who
12 is then recording the information. And to the
13 extent that there is anything actually subjective
14 in here, I think you would have no issue redacting
15 that information if the defense can cite anything
16 that they have a concern about regarding subjective
17 opinion.

18 MS. VAN PALA: I don't even know what
19 the State is seeking to admit out of it. I don't
20 even know what's relevant.

21 THE COURT: Have you been provided a
22 copy of that?

23 MR. CORVEY: They certainly have, Your
24 Honor.

25 MS. VAN PALA: Can I look at that, Mr.

1 Corvey? I am trying to find it.

2 THE COURT: Ma'am, are you telling me
3 you are making objections to things you don't even
4 know what it is?

5 MS. VAN PALA: Your Honor, I am trying
6 to locate the exact language so I can answer your
7 question.

8 In 154, boy shooting guns. Advised
9 shots just been fired. To me that's hearsay
10 because --

11 THE COURT: We are talking about an
12 exception to the hearsay rule. So it may be
13 hearsay if it's a regularly kept record. I just
14 read all the things it is. That's an exception to
15 the hearsay rule. Even though it may contain
16 hearsay it comes in if it qualifies as a business
17 record as defined by the rule. Might be hearsay.
18 That's not a valid objection to this. It appears
19 to me from the testimony that I have heard this is
20 a regularly kept record that's kept in the ordinary
21 course of business that's compiled by them. This
22 person is aware of how it was done. She said that
23 this is accurately taken from the records. First
24 of all, is there some objection to its accuracy or
25 what it is?

1 MS. VAN PALA: No, Judge.

2 THE COURT: Then I assume your
3 objection would be to subjective opinions contained
4 therein.

5 MS. VAN PALA: Yes, Judge.

6 THE COURT: Once it is business records
7 it's passed the hearsay problem. But they are not
8 allowed to include in those business records
9 subjective opinions.

10 MS. VAN PALA: And my argument is that
11 the language that's contained in these CAD reports
12 are subjective opinions.

13 THE COURT: In what fashion?

14 MS. VAN PALA: Because there are people
15 describing what is happening so this is a record
16 that's taking that --

17 THE COURT: May even be in under res
18 gestae exception.

19 MR. CORVEY: And present sense
20 impression.

21 THE COURT: I won't go there. I don't
22 have to go there.

23 MS. VAN PALA: It's an opinion by
24 witnesses memorialized in --

25 THE COURT: I'm going to overrule the

1 objection. I'm going to allow it in. While the
2 jury is out, let's -- when we had our last bench
3 conference my previous ruling as to the
4 appropriateness of the case was called into
5 question. So let's talk about that for just a
6 second.

7 MS. NORRIS: Your Honor, are you
8 referring to my question?

9 THE COURT: Yes, ma'am.

10 MS. NORRIS: I wasn't complaining,
11 Judge. I just wanted to point out that what I was
12 trying to do was comply with Rule 613 which in
13 essence says you can't use extrinsic evidence of a
14 prior.

15 THE COURT: I understand exactly what
16 you are doing. My ruling was you had to rephrase
17 the question. That's what I told you. Let me
18 explain in the future so we won't run afoul of each
19 other on this because you questioned my ruling
20 later on. I want you to understand exactly why I
21 did what I did.

22 Now, if you read the rule, and I have
23 got the rule indicating that you were following 613
24 (b). It says in there that extrinsic evidence,
25 this is (b), of a prior inconsistent statement by a

1 witness is not admissible unless the witness is
2 advised of the substance of the statement, the time
3 and place it was allegedly made and the person to
4 whom it was made is given an opportunity to explain
5 or deny the statement.

6 Now, what you were doing was if so and
7 so were to come in here and testify to this thing.
8 That's not what the rule says you can do. What you
9 can do, you can advise them on such and such a date
10 talking to and so, whoever that is, did you, in
11 fact, say whatever, the quote is you want to
12 question. They have a right to admit or deny
13 having made that statement.

14 Now, if they don't admit it, the way I
15 understand the rule works then you would have the
16 right when that person is called to testify to ask
17 them for extrinsic evidence to show that on this
18 occasion that witness has given a prior
19 inconsistent statement. If the witness admits
20 having made the prior inconsistent statement,
21 that's the end of the matter. But it's not done by
22 saying if somebody were to come testify, that calls
23 for speculation, the person in fact will confirm
24 that, when they testify, and I found that question
25 to be inappropriate asked in that fashion. So I am

1 not trying to keep you from going into prior
2 inconsistent statements. I want you to follow the
3 rule not to use some comparing what one witness
4 might say in the future and trying to pit the
5 witnesses against each other. To say somebody here
6 is lying. That's not what the rule allows you to
7 do. It allows you to introduce extrinsic evidence
8 to show that a prior inconsistent statement was
9 made if you ask it in this fashion.

10 MS. NORRIS: Yes, sir.

11 THE COURT: That was that basis of my
12 ruling. So in the future if you want to do that
13 please do. I have no problem with you impeaching
14 witnesses, but I won't allow you to do it by should
15 somebody come in and testify and say so and so on
16 such a date would that be true? That's not what
17 this allows you to do so I won't allow that.

18 MS. NORRIS: Yes, sir.

19 THE COURT: Bring the jury in.

20 (Whereupon the jury entered the
21 courtroom at 4:44 p.m.)

22 THE COURT: Let the record reflect the
23 jury has returned to the courtroom. During your
24 absence I have overruled the objection and admitted
25 the document in question. You may proceed.

1 (State's Exhibit 154 in evidence.)

2 MR. CORVEY: Permission to publish
3 State's Exhibit 154.

4 THE COURT: You may.

5 BY MR. CORVEY:

6 Q. Ms. Casey, just for the jury's benefit
7 so if they want to later review these records,
8 could you kind of walk through and let me know if
9 you need flip to page what we are looking at and
10 how these records kind of detail an incident
11 report?

12 A. This is called an incident report. The
13 first information you will have the call taker.
14 Call taker name is first by call taker. Then you
15 will have the response area which would define the
16 team or the area that the City of Charleston will
17 respond. Then you have the status when it was
18 closed. At incident location you will have the
19 incident when the call came in, then which would be
20 ■ Norman Street. Once you go down to the bottom
21 receipt of the caller's name will be the caller who
22 calls it in. The problem will be the problem
23 nature, what kind of incident is going on, is
24 occurring. The agency will be the law agency which
25 jurisdiction will be the City of Charleston. Team

1 one which would be the area that the officer would
2 be responding. Cross street would give the cross
3 street of the incident. You can turn to the next
4 page. Time stamp basically defines when the call
5 into the police department. The first key stroke
6 is the time. When the dispatcher gives the call --
7 the call taker gives it to the dispatcher will be
8 the next pending in que. And the call taking
9 completeness will be at 1757 once she's finished
10 talking to the caller who calls in it. The first
11 unit will be for the officer. First unit who was
12 assigned to the incident. And the next one will
13 be, if you go up to the top, will be when the
14 officer arrived to the scene.

15 Q. And then this section on the below
16 part, those are the police units assigned to the
17 incident?

18 A. Correct. All of the units, their
19 assigned times, their route and arrival and
20 completion.

21 Q. And then more of the same and then
22 actually listing out who those officers are?

23 A. Correct.

24 Q. And then I think this is where we get
25 into the narrative where the actual call taker is

1 explaining or dispatcher explaining what's going on
2 during the incident is based on the radio dispatch
3 as they happen?

4 A. Correct.

5 Q. That then continues until the incident
6 is over?

7 A. Correct.

8 MR. CORVEY: Thank you very much, Ms.
9 Casey. No further questions, Your Honor.

10 THE COURT: Any questions?

11 MR. APICELLA: No, Your Honor.

12 MS. VAN PALA: No, Your Honor.

13 THE COURT: Ma'am, you may step down.
14 Do you wish to excuse the witness?

15 MR. OSBORNE: Yes, Your Honor.

16 THE COURT: Any objection?

17 MS. VAN PALA: No.

18 THE COURT: Without objection you are
19 free to go.

20 MR. OSBORNE: We have Sarah Gladwell.
21 Should take a matter of moments.

22 THE COURT: Come forward, ma'am, and be
23 sworn.

24 SARAH GLADWELL

25 having been duly sworn, testifies as follows:

1 THE CLERK: Please state your
2 first and last name and spell your last name.

3 THE WITNESS: My name is Sarah
4 Gladwell, G-L-A-D-W-E-L-L.

5 DIRECT EXAMINATION

6 BY MR. CORVEY:

7 Q. Good afternoon, Ms. Gladwell. If you
8 can please describe what your occupation is?

9 A. I am a crime scene investigator. I
10 work for the forensic services division of the
11 Charleston Police Department.

12 Q. What are the various duties and roles
13 that you have as a forensic investigator with the
14 police department?

15 A. As an investigator we pretty much
16 respond to an assortment of various crime scene
17 calls where we document, photograph, collect
18 evidence.

19 Q. As a part of your duties in the crime
20 scene unit do you have occasion to deliver evidence
21 to other labs or for example, in this case SLED
22 state lab?

23 A. Yes, sir, quite often.

24 Q. Did you do that in this case?

25 A. I did.

1 Q. On June 5th, 2015, did you make a trip
2 to SLED?

3 A. I did.

4 Q. Do you remember what you delivered up
5 to SLED in relation to the case from that incident?

6 A. I don't remember all of the items.

7 Q. Would you recognize them if I showed it
8 to you?

9 A. Yes.

10 Q. May I approach?

11 THE COURT: You may.

12 BY MR. CORVEY:

13 Q. Showing you what's been marked as
14 State's Exhibit 14 for ID purposes as well as 18,
15 19, 20, 21 and 22.

16 A. Okay.

17 Q. Do you recognize those items? Would a
18 copy of your report help you?

19 A. Yes.

20 Q. May I approach, Your Honor?

21 THE COURT: You may.

22 Q. (Handing.)

23 A. Yes, sir.

24 Q. So you recognize those items as
25 pertaining to this case?

1 A. Yes, sir.

2 Q. How do you know that?

3 A. The case number matched as far as the
4 evidence and what's printed out on this chain of
5 custody report and with the chain of custody it
6 says that I picked up these specific items.

7 Q. You do that quite often?

8 A. Yes.

9 Q. I imagine it can be hard to remember
10 exactly. Could you describe a little bit about
11 Charleston Police Department's chain of custody
12 protocol in relation to delivering evidence to
13 labs?

14 A. Okay. For the most part we deliver our
15 own evidence to SLED which is the state lab for
16 South Carolina. We go to our evidence unit which
17 is at the police station and we sign out the items
18 that we are supposed to transport to SLED and it's
19 verified that items that are on our list, what we
20 need is the ones that we actually take and then we
21 leave the evidence unit at the police station and
22 we drive up to SLED where we hand them over to
23 evidence custodians that work there.

24 Q. And so once you sign them out from your
25 crime scene unit you then -- or your evidence unit

1 -- drive up to Columbia. Is that where SLED is
2 located?

3 A. Yes, sir.

4 Q. The entire time that you would have
5 driven up to Columbia in this case would those
6 items have been in your possession and control?

7 A. Yes, sir.

8 Q. Were they tampered with at all?

9 A. No, sir.

10 Q. Did they appear to be tampered with at
11 all when you picked them up?

12 A. No, sir.

13 Q. Once you got to SLED what happened?

14 A. When we get to SLED we wait for them to
15 call for us. We go to a window where there's an
16 evidence technician. We hand them paperwork for
17 the specific items that we have brought to them and
18 they have us repack items if need be and they
19 take them into their system and that's it. We go
20 back home.

21 Q. So specifically regarding items 18
22 through 22 and Item 14, do you recognize those as
23 ones you took to SLED on June 5, 2015?

24 A. Yes.

25 MR. CORVEY: No further questions, Your

1 Honor.

2 THE COURT: Mr. Apicella?

3 MR. APICELLA: No questions.

4 MS. VAN PALA: No, Your Honor.

5 THE COURT: Okay. You may step down
6 and you are free to go I believe unless there is
7 any objection to her leaving.

8 MS. VAN PALA: No.

9 MR. APICELLA: No, Your Honor.

10 THE COURT: You are free to go. I will
11 ask the attorneys to approach, please.

12 (Following proceedings were held at the
13 bench.)

14 THE COURT: First of all, do you have a
15 call in system we can give them the number they can
16 me call back?

17 THE CLERK: We can do that.

18 THE COURT: You can set that up for us?

19 THE CLERK: Yes. Just to have to know
20 what time.

21 THE COURT: I can tell them to call in
22 at noon tomorrow and we will have a message what
23 time we will need them.

24 THE CLERK: Yes.

25 THE COURT: That will work.

1 THE CLERK: I think.

2 THE COURT: Okay. I want to be sure.
3 How much longer -- are we going to get through the
4 motions? Let's hope we are getting better at that.

5 MS. VAN PALA: Let's get a real agenda.
6 I am really bad at that.

7 THE COURT: I think we have got the
8 rest of the --

9 MS. VAN PALA: Jail calls.

10 THE COURT: We have got the Facebook I
11 know.

12 MS. VAN PALA: Yes.

13 THE COURT: What else?

14 MS. VAN PALA: I think that's it.

15 MR. APICELLA: Jail calls.

16 THE COURT: We have the rest of the
17 calls. We will deal with those. The Facebook.
18 What challenges do we have to deal with?

19 MR. APICELLA: Just my request to
20 protect all of the nickname Taliban.

21 THE COURT: I have already said I will
22 do that. You won.

23 MR. OSBORNE: For the jail calls.

24 THE COURT: For the jail calls. I
25 don't know if it appears somewhere else or not.

1 MR. APICELLA: Appears in lots of
2 Facebook posts.

3 THE COURT: We will see about that.
4 How long do you think it is going to take is the
5 \$64 question.

6 MR. APICELLA: For my part it won't
7 take that long.

8 THE COURT: Well, I would agree with
9 you on that. You haven't taken very long.

10 MS. VAN PALA: We have gone through 17
11 of the jail calls; is that correct?

12 MR. OSBORNE: 14.

13 MS. VAN PALA: 14 out of 22.

14 THE COURT: So we are getting better
15 than halfway down.

16 MS. VAN PALA: Right.

17 THE COURT: The Facebook, is that going
18 to be -- again we have to go through every potion.

19 MS. VAN PALA: Yes, I think that's the
20 best way.

21 THE COURT: How long are talking about
22 on that?

23 MS. VAN PALA: That's up to the State.

24 MR. OSBORNE: I think it's about 15.

25 THE COURT: I won't have a plea in the

1 morning so we will start earlier. We will have a
2 little more time. I will have them call in at noon
3 and we will see where we are at that time.

4 MR. CORVEY: Judge, for the evening we
5 have one more chain witness here. Should be
6 quicker than the last one.

7 THE COURT: We will take that
8 one.

9 (Following proceedings were held in
10 open court.)

11 THE COURT: State may call its next
12 witness.

13 MR. CORVEY: State calls Randy
14 Unterbrink.

15 RANDELL UNTERBRINK
16 having been duly sworn, testifies as follows:

17 THE CLERK: Please state your first and
18 last name and spell your last name.

19 THE WITNESS: Randell
20 U-N-T-E-R-B-R-I-N-K.

21 DIRECT EXAMINATION

22 BY MR. CORVEY:

23 Q. Good afternoon, Mr. Unterbrink.

24 A. Good afternoon.

25 Q. Where are you employed?

1 A. With the Charleston County Police
2 Department.

3 Q. How long have you been with the CPD?

4 A. Approaching 27 years.

5 Q. What is your job?

6 A. I am currently assigned with the crime
7 scene unit.

8 Q. And we have heard a little bit about
9 this from Ms. Gladwell, but as it pertains to you
10 can you tell the jury a little bit about what your
11 duties and roles are inside the crime scene unit?

12 A. We respond to a variety of different
13 calls. The goal is to find evidence that will
14 relate to that particular scene to help us to
15 understand what transpired. So we can look for
16 evidence, collect evidence and we preserve
17 evidence.

18 Q. Do you as part of that ever have the
19 opportunity to make any drop offs to the state lab
20 or labs across the state?

21 A. Yes.

22 Q. If you could briefly describe the
23 general process you go through when making such a
24 drop off.

25 A. What we do is we go to the evidence

1 office which is at the main station on Lockwood
2 Boulevard and while there I am given pieces of
3 evidence that is sealed that need to be transported
4 to SLED. And once I'm at SLED then the evidence is
5 turned over to them and then I'm finished with
6 that.

7 Q. When you take an item from your
8 evidence room to SLED is it in your custody and
9 control for the entire time?

10 A. It is.

11 Q. You tamper with it in any way?

12 A. No.

13 Q. If you notice an item did appear to
14 have been tampered would you submit it to SLED?

15 A. No.

16 Q. Did you have the occasion to be
17 involved in this case?

18 A. Yes.

19 Q. How so?

20 A. I was assigned to transport evidence in
21 August 2015 and so I went to the evidence office to
22 collect the evidence and transport it to SLED.

23 Q. Your Honor, may I approach?

24 THE COURT: You may.

25 Q. Hand you what's been marked for ID as

1 State's 29. Do you recognize that item?

2 A. Yes, sir.

3 Q. How do you recognize it?

4 A. With signatures.

5 Q. That's the item that you delivered to
6 SLED on August 13th, 2015?

7 A. Yes, sir, it would be.

8 Q. It is.

9 MR. CORVEY: Thank you, Your Honor. No
10 further questions.

11 MR. APICELLA: No questions.

12 MS. VAN PALA: No questions.

13 THE COURT: All right, sir. You may
14 step down. I assume you wish to excuse the
15 witness; is that right?

16 MR. CORVEY: Yes.

17 THE COURT: Any objection?

18 MS. VAN PALA: No.

19 MR. APICELLA: No objection.

20 THE COURT: You are free to go at this
21 time. Thank you very much.

22 Ladies and gentlemen of the jury, we
23 are going to break for the evening at this point in
24 time. My instructions to you will be consistent
25 every time you leave. You are not to try to gather

1 any information on your own, don't listen to or
2 watch media reports should they exist, don't
3 discuss the case with anyone or allow anyone to
4 discuss it with you. And if anyone tries to
5 contact you please report that upon your return.

6 We are going through a process as I
7 told you earlier wherein there are matters that I
8 feel that I need to take up with the attorneys
9 outside of your hearing concerning questions being
10 asked or the admissibility of evidence that I ask
11 you to step out of the courtroom while I do that.
12 I explained that at the beginning of the trial.
13 Tomorrow morning again I'm going to go through some
14 of those discussions with the attorneys. I can't
15 see any reason to bring you here and having you
16 wait while that goes on.

17 So we are going to -- you were given a
18 call in number on Monday to get information.
19 Before you leave we will be sure you have that call
20 in number. At noon tomorrow if you will call that
21 number, we will give you specific instructions as
22 to when we will resume after I have those hearings.
23 So at this point in time you will be free until at
24 least noon tomorrow. Call in, we will give you
25 instructions on that phone number as to how we will

1 proceed thereafter.

2 So the clerk will step in. If any of
3 you need that phone number again they will be happy
4 to give that to you so you will have it with you.
5 Call in at noon tomorrow. We will give you
6 instructions at that time on the message machine.
7 Thank you very much for your cooperation today.
8 Step back to the jury room. The clerk will be sure
9 you have that number. Thank you.

10 (Thereupon, the jury exited the
11 courtroom at 5:04 p.m.)

12 THE COURT: I don't have other hearings
13 in other matters in the morning. So we will resume
14 at 9:00 in the courtroom. We will start back with
15 the phone messages -- phone calls from the jail and
16 we will proceed from that point forward. We are in
17 recess until 9:00. Thank you.

18 (Proceedings adjourned at 5:00 p.m. on
19 June 14, 2017.)
20
21
22
23
24
25

1 (The following proceedings were held
2 June 15, 2017, Charleston County, South Carolina, @
3 9:00 a.m.)

4 (Following proceedings held outside
5 presence of the jury.)

6 THE COURT: State ready to proceed?

7 MR. OSBORNE: Good morning. We are.

8 THE COURT: Defense ready to proceed?

9 MS. VAN PALA: Yes.

10 MR. APICELLA: Ready, Judge.

11 THE COURT: I believe we are in the
12 process of reviewing the calls made from the jail.
13 Officer, if you will resume the stand and you
14 acknowledge that you are still under oath at this
15 time.

16 THE WITNESS: I do, Your Honor.

17 THE COURT: Thank you. If you will
18 have a seat, please.

19 DIRECT EXAMINATION

20 BY MR. OSBORNE:

21 Q. Detective, I think we left off on clip
22 No. 14 so we will move on to clip number 15.

23 (Clip played.)

24 A. This monitor is not showing.

25 THE CLERK: I had to restart it all.

1 Q. What is the date and time of this call?

2 A. The date is March 27, 2015, and this is
3 10:45.

4 Q. And the phone number?

5 A. The phone number is [REDACTED].

6 Q. Okay.

7 (Clip played.)

8 Okay. So the name Lefty, again how is
9 that significant in this case?

10 A. That's the street name for Te'Quan
11 Perry.

12 Q. And in the victim's phone records was
13 the victim communicating the night before with the
14 contact by the name of Lefty?

15 A. He was. That was clip 15.

16 Q. That was clip 15. We will play clip 16
17 with the understanding any reference to Devin is
18 being redacted right now I think.

19 (Clip played.)

20 And what is the date and time on this
21 call?

22 A. The date is March 27th, 2015, the time
23 is 11:44.

24 (Clip played.)

25 Q. All right. Nardo, did the name Nardo

1 play any significance in the case?

2 A. Yes.

3 Q. And in what way?

4 A. He was -- his name is actually Denardo
5 Felder. He was a witness that we interviewed and
6 his interview allowed us for probable cause to
7 arrest Te'Quan Perry.

8 Q. All right. And on the video where was
9 Nardo positioned at the time in which you believe
10 the victim to have been shot?

11 A. He was just on the sidewalk on Norman
12 Street outside of that alleyway or driveway.

13 Q. Okay. From that position would he have
14 been able to see into the alleyway?

15 A. Yes, he would have.

16 MS. VAN PALA: Objection, Your Honor.
17 For this clip Te'Quan starts by referencing Devin.
18 So I think that the whole thing should be redacted
19 and I think if you redact Devin from the --

20 THE COURT: How did you hear him
21 reference Devin?

22 MS. VAN PALA: At the beginning where
23 he says call Devin. And so I think that if you
24 redact the call Devin part from this clip it is not
25 going to make sense. So we would ask that the

1 entire clip be redacted because he can't be
2 reading.

3 THE COURT: Where does it go from
4 there, Mr. Osborne? Call Devin.

5 MR. OSBORNE: He says --

6 THE COURT: I want to be sure I heard
7 it right. I'm sure you have studied it.

8 MR. OSBORNE: I have, Your Honor. He
9 says holler at Devin. We take that part out. Then
10 it goes tell him to get at that boy, to get at that
11 boy for real. He needs to get at Nardo. Tell him
12 to get at Nardo. That's Nardo's son. He needs to
13 get at him and get at him for real.

14 We take the portion of Devin out. He's
15 clearly telling this caller to tell someone else to
16 get at him. No reference at all to it being Devin.
17 It could have been anyone.

18 MS. VAN PALA: Judge, I still don't
19 think it's going to make any sense. I think that's
20 going to be confusing under 403 for the jury to
21 hear did he act in this way. Additionally, I think
22 that this is one of the examples of a jail call
23 being cut down, clipped down so short that it's
24 lost all of its context. To put it in context --

25 THE COURT: You must have think it has

1 context because you are objecting to it as
2 prejudicial. So it must have some content,
3 otherwise it would make no sense whatsoever, it
4 couldn't be prejudicial.

5 MS. VAN PALA: Yes.

6 THE COURT: Okay. Your argument is not
7 consistent is what I am trying to say, but that's
8 okay.

9 MS. VAN PALA: I think it's taken out
10 of the context.

11 THE COURT: That's different. I am
12 listening.

13 MS. VAN PALA: The context of this call
14 like the others that we addressed yesterday morning
15 is Te'Quan discussing the discovery in his case,
16 talking about getting a lawyer, and talking about
17 having his friends help him, going into the
18 community and talk to witnesses and he's
19 specifically asking for Denardo who is an
20 eyewitness to come down to the public defenders's
21 office and give a statement which is, in fact, what
22 he did. A statement that exonerated my client.
23 This is the State offering this as witness
24 intimidation when, in fact, Denardo Felder of his
25 own volition when Te'Quan was in jail came down to

1 the public defender's office and voluntarily gave
2 us a statement exonerating him.

3 That's what this clip is talking about.
4 So I think it's taken out of context. I think it's
5 very prejudicial under 403. Also it's talking
6 about Te'Quan assisting his lawyer in the
7 preparation of his defense so I think that's
8 infringing on his Sixth Amendment right to counsel.

9 MR. OSBORNE: That goes to the weight,
10 not the admissibility. She is interpreting what's
11 been said on that call. Obviously we have a
12 different interpretation of it. He clearly does
13 not say tell Denardo to come in and exonerate him.
14 He tells this individual to get at Denardo, get at
15 him for real. Quite a few interpretations.
16 Certainly fodder that she can address in closing.
17 We would argue a different way.

18 MS. VAN PALA: I think this is an
19 example of the colloquial language, Judge. Really
20 if we could listen to the clip in its context, he
21 is talking about going to bond court, he's
22 talking --

23 THE COURT: Well, that's not what they
24 are offering into evidence.

25 MS. VAN PALA: Right. And if --

1 THE COURT: Are there things that you
2 think should be added to it, what they are offering
3 into evidence?

4 MS. VAN PALA: I think it should be
5 excluded and if the Court is not inclined to
6 exclude it --

7 THE COURT: I don't know how I am right
8 now. I'm trying to figure out exactly -- I haven't
9 read all the full clips. I don't know what's on
10 the rest of it. I have to ask these questions to
11 try to get an idea what you are talking about. So
12 if your objection is as to completeness, that there
13 is a need or additional information for it to make
14 sense, that's one thing. Yes. Mr. Apicella.

15 MR. APICELLA: Perhaps the State would
16 stipulate that two days later the person he is
17 talking about in this phone came into the public
18 defender's office to give a statement.

19 MR. OSBORNE: We will stipulate to that
20 if they will stipulate that he also identified the
21 shooter I think it is as being in a raincoat to the
22 police.

23 MS. VAN PALA: That's incorrect.

24 MR. OSBORNE: Maybe you can correct
25 that.

1 THE WITNESS: I can correct that. So
2 he identified the person in the raincoat as Te'Quan
3 Perry and knew that he went by the name of Little
4 Lefty or Lefty. And he places him in the alleyway
5 around the time the shots are fired.

6 MS. VAN PALA: He doesn't identify him
7 as the shooter and then he later voluntarily --

8 THE COURT: He said it was identified
9 as being the person in the raincoat.

10 MS. VAN PALA: He does not put a gun in
11 his hand.

12 THE COURT: He didn't say that. I
13 agree.

14 MR. OSBORNE: So, Your Honor, we will
15 stipulate that -- what we would stipulate to is
16 that Denardo came into the station.

17 THE COURT: I can't make you stipulate
18 to anything. Why don't you folks take a moment and
19 talk and see if you can work that stipulation out.

20 (Off-the-record conference.)

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

22 THE COURT: You haven't talked to the
23 solicitor.

24 MS. VAN PALA: Excuse me?

25 THE COURT: I asked you to talk with

1 the solicitor and see if you could work out a
2 stipulation. I have been observing you. You
3 talked to Mr. Apicella, but you have never said
4 anything to the solicitor. I take it you're not
5 making an effort to do it.

6 MS. VAN PALA: I talked to my
7 co-counsel and I don't think we are going to be
8 able to stipulate.

9 THE COURT: Okay. Thank you. Back to
10 the objection.

11 MS. VAN PALA: The first basis for my
12 objection is the fact that it mentions Devin. If
13 he takes Devin out of it it doesn't make any sense.
14 I think it's subject to your prior ruling that --

15 THE COURT: As to what?

16 MS. VAN PALA: That the jail calls,
17 that Te'Quan's jail calls that reference Devin
18 should be redacted.

19 THE COURT: That was not my ruling.
20 References to Devin should be removed so that there
21 is no reference to him and no indication that the
22 calls are relating to him. But I didn't say all
23 jail calls that reference Devin should be totally
24 excluded. That was not my ruling. That's the
25 reason we are having this hearing.

1 MS. VAN PALA: Yes, Your Honor. That's
2 what I am asking for as my first grounds for
3 relief.

4 THE COURT: You want me to do what now?

5 MS. VAN PALA: Exclude this jail call
6 altogether because it's not going to make sense if
7 you take out the Devin part. The solicitor's
8 argued that you can take out the Devin part, the
9 reference to Devin, and it makes sense. I
10 disagree. I don't think it makes sense. I think
11 it's inherently prejudicial and it's going to be --

12 THE COURT: The question is whether or
13 not the prejudicial effect outweighs its probative
14 value. Not just prejudicial. I would assume all
15 the evidence the solicitor is intending to
16 introduce in his case will probably be prejudicial
17 to your client. The question is whether or not the
18 prejudicial effect outweighs the probative value.

19 MS. VAN PALA: And I think that when
20 prejudice substantially outweighs the probative
21 value under 403 is when it invites the jury to come
22 to a conclusion on the evidence based on an
23 improper basis such as confusion.

24 THE COURT: Such as what?

25 MS. VAN PALA: Confusion, rank

1 speculation, spurious inferences of guilt. I think
2 spurious inferences of guilt would be a good
3 concept to apply here because the solicitor and I
4 have two completely different interpretations of
5 this call.

6 THE COURT: Yes, ma'am. And I am not
7 allowing them to interpret the calls at all unless
8 there is some -- we went through that yesterday.
9 And they have to be able to meet the test to do
10 that. So I am not allowing them to interpret it.

11 Now, when you make your argument to the
12 jury you have the right to ask them to draw certain
13 inferences from the evidence. I'm sure he's going
14 to argue his version of that. And if it comes I'm
15 sure you are going to argue your version of that.
16 So I mean it is not unusual for lawyers to take
17 different views on the evidence and then argue
18 those views to the jury. That doesn't make the
19 evidence not admissible. That's the nature of
20 evidence and the nature of the business.

21 MS. VAN PALA: Yes, Your Honor. My
22 argument is that this evidence, this call should
23 not be admitted into evidence.

24 THE COURT: I understand that.

25 MS. VAN PALA: Because the solicitor's

1 interpretation is that this is evidence of witness
2 intimidation. However, I don't think the solicitor
3 is going to say -- to be able to bring in Denardo
4 Felder who is the subject of this proposed --

5 THE COURT: I think he's deceased.

6 MR. OSBORNE: Denardo Felder was
7 involved in a serious moped accident after this and
8 suffered traumatic brain injury.

9 THE COURT: I see.

10 MS. VAN PALA: And even if the State
11 brings him in and asks him whether he felt
12 specifically threatened by Te'Quan which is the
13 standard under Edwards and under Hayden for witness
14 intimidation, they are not going to be able to
15 particularly and specifically tie that to Te'Quan
16 and tie that to this jail call.

17 In contrast, Denardo Felder is a
18 witness in this case. The context of this call is
19 Te'Quan seeking to have his friends in the
20 community help him gather witnesses to prepare for
21 his defense and, in fact, Denardo Felder of his own
22 volition met with our investigator at a public
23 place, reached out to our investigator, not the
24 other way around, and gave our office a statement
25 exonerating Te'Quan.

1 I would submit that those are the facts
2 and that is what happened. It is not witness
3 intimidation. The State, they don't even have
4 Denardo Felder here to proffer to the Court that
5 there would be a potential.

6 THE COURT: Mr. Solicitor, how are you
7 going to tie this in? Don't you have to show that
8 the Defendant was the originator of the
9 intimidation and, in fact, the intimidation took
10 place?

11 MR. CORVEY: Well, Judge, I do not
12 think we have to actually show that intimidation
13 took place. The very thought of this idea is that
14 it's a consciousness of guilt that leads towards a
15 guilty conscience.

16 THE COURT: Tell me the case on that.

17 MR. CORVEY: State v. Edwards, Your
18 Honor. I believe I gave a copy to the Court the
19 other day. The site specifically is 383 S.C. 66.
20 And in this Edwards case, Your Honor, this was a
21 criminal sexual conduct case in which --

22 THE COURT: Is that a Supreme Court
23 case?

24 MR. CORVEY: It is, Your Honor. In
25 which the father or the stepfather of the female

1 victim in this case relayed threatening remarks
2 with regard to her daughter, the victim of that
3 crime, testifying against him in a criminal sexual
4 conduct trial. I find nothing in the facts
5 provided by the Court or the summary of the
6 testimony that the mother of the child provided
7 that or ever once suggested that those threats
8 ended up being relayed to the minor child.

9 On the basis of that I think just
10 merely making the threats in and of themselves is
11 enough to show the consciousness of guilt. The key
12 here is tying it to Mr. Perry. We have already had
13 Mr. Krasowski testify that he has spent time with
14 Mr. Perry, he interviewed him, and that the call
15 that he is identifying -- the voice he is
16 identifying on these calls is that of Mr. Perry's.
17 And not to mention I don't believe that we have
18 gotten to these specific calls yet, but there is
19 other calls when taking the totality of the jail
20 calls that I think bolsters the content of this
21 call towards one practically believing it to be
22 witness intimidation. There is other calls where
23 he explains to a female where he is talking to that
24 when he gets out that witnesses are going to be
25 dropping or maybe Mr. Osborne can address that.

1 MR. OSBORNE: We are going to hear
2 another clip in a minute where he says when I get
3 my discovery and I find out who these witnesses are
4 bullets are going to be falling and bodies are
5 going to be dropping. So to say that he is trying
6 to get witnesses to come in and give statements,
7 when later he clearly says when I find out who they
8 are they are going to be dead, that's an absurd
9 interpretation of what we are hearing, Your Honor.

10 THE COURT: Are there later clips that
11 say that?

12 MS. VAN PALA: Those are the clips that
13 come after this one, yes. However, they do talk
14 about gathering witnesses. He specifically talks
15 about his discovery. Specifically talks about the
16 affidavit. Specifically talks --

17 THE COURT: When he is talking about
18 this he is talking to someone he called I assume.
19 Help me, Mr. Osborne, on a phone where he has
20 signed a statement that he knows it is going to be
21 recorded and that he knows can be used against him
22 in a court of law.

23 MR. OSBORNE: That is correct, Your
24 Honor.

25 THE COURT: And you are claiming

1 attorney/client privilege when he makes that kind
2 of statement on a public phone basically that is
3 being recorded and can be used in court.

4 MS. VAN PALA: The jail call -- Yes, I
5 am.

6 THE COURT: Go ahead.

7 MS. VAN PALA: My argument is that
8 using these jail calls taken so out of context is
9 infringing on Te'Quan's right to counsel because
10 it's in essence asking the jury to hold it against
11 him for talking to his lawyer.

12 THE COURT: I have thought about this
13 jail call thing since it came up and Mr. Apicella
14 provided me with a case from New York and I took a
15 look at that case.

16 South Carolina generally has admitted
17 jail calls in court. That's not something that has
18 been prevented in this state.

19 There is nothing to prevent a Defendant
20 from talking directly to his lawyer in person. If
21 he wants to maintain his attorney/client privilege
22 he can call his lawyer and say come see me. Hang
23 up. So I don't know the fact that he is using a
24 phone the jail provided that he knows is going to
25 be recorded and knows can be used against him in

1 court, then later on claim that he's entitled to
2 protections when in effect he waived by doing that.
3 I have a little bit of a problem with making that
4 leap.

5 MS. VAN PALA: I disagree.

6 THE COURT: Well, are you telling me
7 that the jail doesn't provide a secure place for
8 attorneys to talk to their lawyers in the jail?

9 MS. VAN PALA: I am not arguing that.
10 My argument is the Charleston County Detention
11 Center, the chime or warning at the beginning of
12 the jail call just says this call may be monitored
13 or recorded. It does not specifically state that
14 it can be used against you by the government.

15 THE COURT: Earlier I asked something
16 is there some kind of thing when they check they
17 sign and I was told there was.

18 MR. CORVEY: There is, Your Honor.
19 Before they make their first call there's
20 announcements that are played to them with regards
21 to it being recorded. All phone calls are
22 monitored and recorded. I believe there are signs
23 which we would have asked Mr. Sherbine had he been
24 here, they stipulated that he doesn't need to, on
25 the calls themselves, little signs right in front

1 of you that say calls are being recorded.

2 THE COURT: On the phone you mean.

3 MR. CORVEY: On the phone, Your Honor.

4 THE COURT: All right. That's okay.

5 Yes, ma'am.

6 MS. VAN PALA: We do not contest that.
7 Specifically Defendants are not warned by the jail
8 at any point that a government body which is the
9 jail, which is the solicitor, could use the calls
10 against them. My argument is that they should be
11 more properly Mirandized and warned of their
12 constitutional rights.

13 THE COURT: Is there a South Carolina
14 case that says jail calls require a Miranda warning
15 every time before they use the phone? I'm not
16 aware of that.

17 MS. VAN PALA: Court's indulgence.

18 (Off-the-record conference.)

19 MR. CORVEY: For the proposition that
20 calls are subject to the attorney/client privilege,
21 I think the Court is aware, I'm not aware of any
22 South Carolina case that addressed that. However,
23 the United States V Lentz is a case out of the
24 Eastern District of Virginia. The cite for that is
25 419 F. Supp 2d 820. Pin cite specifically is 828.

1 I believe that case deals with this exact issue and
2 deems that calls of their own volition does not
3 violate the attorney/client privilege.

4 THE COURT: Does it implicate Miranda?

5 MR. CORVEY: That's not my reading,
6 Your Honor. To clarify, of course that doesn't
7 apply to phone conversations with their actual
8 attorney, merely third parties.

9 THE COURT: I understand. I would not
10 allow you to use the phone call with the attorney
11 at all.

12 MR. APICELLA: May I interject a point,
13 Judge? I have not had the opportunity to --
14 restate. I don't think the detective testified
15 about anything concerning my client's jail calls.
16 So I have not cross-examined him to determine
17 whether or not --

18 THE COURT: We are trying to get
19 through the first set of phone calls.

20 MR. APICELLA: To the extent that you
21 suggested that you are concerned as to whether or
22 not there were Miranda warnings.

23 THE COURT: I wasn't concerned. My
24 understanding of the law in this state, the Miranda
25 warning is not required to be given before someone

1 makes a jail call that will be recorded. I have
2 never heard of that. She is making that argument
3 and I said if there is authority tell me.

4 MR. APICELLA: My understanding based
5 upon people that I have spoken to, people not
6 including my client, is that there is -- let me
7 just withdraw that. Information and belief that
8 there is no sign where the phones are to indicate
9 that --

10 THE COURT: At a bare minimum I hear it
11 on the tape.

12 MR. APICELLA: That warning -- what you
13 hear on the tape, Judge, is the first time an
14 inmate makes a jail call, gets his PIN number and
15 he says whatever his phone name is going to be that
16 is used in every single call.

17 THE COURT: It has the warning in it.

18 MR. APICELLA: And the warning that is
19 given is given at that time. All your calls are
20 recorded.

21 THE COURT: Okay. There's a warning.

22 MR. APICELLA: It's given the very
23 first time. It's not as if every time you go to
24 make a phone call there's a sign there.

25 MR. CORVEY: Your Honor, these warnings

1 are given every single time. The prerecorded
2 section where I agree they notify their name once
3 is played for about 35 to 45 seconds every single
4 call. There's no way to skip beyond that.

5 THE COURT: Okay. He says it is. Yes,
6 ma'am.

7 MS. VAN PALA: I'm not contesting that
8 point. My argument is that the -- I believe the
9 Court understands my argument.

10 THE COURT: Well, let's get back to it.
11 Tell me exactly what you're arguing because you
12 seem to -- every time I question you you go to a
13 different argument. So tell me what I am ruling
14 on. You made an objection. My understanding is
15 you say that the information is that -- the
16 probative value of this information is outweighed
17 by its prejudicial effect number one. Number two,
18 you don't think that it makes sense, that it has
19 been cut back so that much that there's no
20 probative value. And, of course, I realize that
21 you are arguing both, that it does have value and
22 doesn't have probative value. Anything else?

23 MS. VAN PALA: Yes, Your Honor.
24 Specifically to the solicitor's argument about the
25 jail calls that follow this that they are

1 suggesting show a pattern of witness intimidation.
2 The solicitor I believe was paraphrasing and said
3 bullets. I submit that you won't hear bullets, the
4 word bullets. And the bodies dropping Chiraq is a
5 rap song and it is rap song about a famous rapper
6 who had a good attorney. And the context is in --

7 THE COURT: I haven't gotten there yet.

8 MS. VAN PALA: But my point is that the
9 solicitor is using those future jail calls to prove
10 witness intimidation of Denardo Felder.

11 THE COURT: What he is doing, correct
12 me if I'm wrong, Mr. Osborne, and I have been up
13 here reading State v. Edwards and it's a case from
14 Charleston County, Judge Dennis. It talks about
15 the fact that where someone attempts witness
16 intimidation that can be evidence that they are
17 trying to -- of guilt to a certain degree. And the
18 jury has the right to draw whatever inferences they
19 would like to draw from those facts. Am I
20 correctly stating it? It's a question for the jury
21 to decide.

22 MR. OSBORNE: You are correct, Your
23 Honor. And just to add this other point, they were
24 incarcerated for over two years. We had to cherry
25 pick calls over a two-year period. This is over a

1 two-day period.

2 THE COURT: Anything else, ma'am?

3 MS. VAN PALA: Yes, Your Honor. I
4 submit that this does not rise to the particular
5 standard from Edwards. I have the statement from
6 Denardo Felder where he freely and voluntarily came
7 to our office. He signed it and the statement
8 specifically says I have read the foregoing
9 statement or had it read to me and it is true and
10 accurate to the best of my knowledge. I have given
11 this statement freely and voluntarily and
12 understand I have a right to a copy of such.

13 I would submit that because the fact
14 that the jail calls are all in the context of
15 asking witnesses to write statements and that the
16 specific witness in this case did, in fact, come
17 down to our office -- meet our investigator at a
18 public place freely and voluntarily while my client
19 was in jail and signed this statement, I don't
20 think that all of that being considered the
21 solicitor can prove witness intimidation. And I
22 think that this is unduly prejudicial, inherently
23 prejudicial and very harmful because I think I'm
24 holding evidence in my hand that proves otherwise.
25 It is inviting the jury to engage in rank

1 speculation and it is asking the jury to decide
2 that Te'Quan in this clip was intimidating Denardo
3 Felder on an improper basis because I can prove
4 that it was an improper basis.

5 MR. CORVEY: I suggest you do so.

6 THE COURT: You're saying --

7 MS. VAN PALA: We have no burden.

8 THE COURT: Sorry?

9 MS. VAN PALA: We have no burden.

10 THE COURT: I didn't ask you to prove
11 anything.

12 MS. VAN PALA: Mr. Corvey said we
13 suggest you do so.

14 THE COURT: Well again, this Court is
15 not going to require you to prove anything.

16 MS. VAN PALA: Thank you, Your Honor.
17 I have one final --

18 THE COURT: You can make that argument
19 to the jury. You object, it will be stricken.

20 MS. VAN PALA: I have one final point.
21 Should the Court rule that this clip should come
22 in, we are asking under the rule of completeness
23 you play the whole clip for the context just like
24 we did yesterday.

25 THE COURT: You are waiving your

1 objection to mentioning the co-defendant?

2 MS. VAN PALA: Your Honor, that's my
3 alternate --

4 THE COURT: Are you waiving that
5 objection now?

6 MS. VAN PALA: I am not waiving that
7 objection. But should the Court overrule my
8 objection the relief that I seek --

9 THE COURT: Are you waiving that
10 objection?

11 MS. VAN PALA: Court's indulgence.

12 (Off-the-record conference.)

13 MR. CORVEY: Your Honor, just regarding
14 State v. Edwards, the case law in no way seems to
15 suggest or any other case law that we need to
16 actually take the additional step of proving the
17 intimidation happened. Merely contemplating it is
18 what arises.

19 THE COURT: If you read Edwards it
20 talks in terms if a person whose a suspect and
21 charged, I got the charge, attempts to take efforts
22 to intimidate a witness then that is evidence that
23 he -- of some evidence of guilt.

24 MR. CORVEY: Exactly, Your Honor.

25 THE COURT: Doesn't really say that the

1 threat has to be delivered. It does not say that
2 it has to be effective in intimidating someone. I
3 don't see that requirement in Edwards.

4 MS. VAN PALA: It says it needs to be
5 reliable.

6 THE COURT: Well, here we have got a
7 statement by the Defendant on a recorded call.

8 MS. VAN PALA: And I have a statement.

9 THE COURT: Are you saying that's not
10 reliable?

11 MR. CORVEY: Your Honor, if I could
12 just respond regarding Mr. Felder's statement.
13 That is a separate issue. If anything, I believe
14 our position would be that is further evidence of
15 witness intimidation if we were to trace that back
16 to its logical conclusion.

17 THE COURT: I was thinking that could
18 cut both ways.

19 MR. CORVEY: Certainly, Your Honor.

20 MS. VAN PALA: Judge, and my argument
21 is that if you listen to the whole context of the
22 tape you would see that it's talking about
23 witnesses.

24 THE COURT: I find that the evidence --
25 the probative value of the evidence is not

1 outweighed by its prejudicial effect. I find that
2 it is a reliable recording. I do continue with my
3 redaction of it as to the co-defendant being
4 mentioned in any way. I do not find that it has no
5 probative value as was argued on both sides by the
6 defense, but I do find it does have probative
7 value, that probative value outweighs any
8 prejudicial value. I see Mr. Apicella wanting to
9 get up. Yes, sir.

10 MR. APICELLA: If I may, Judge, I want
11 to join in my co-counsel's objection to the extent
12 that it affects my client. It does affect him even
13 though his name is not going to be mentioned on
14 any --

15 THE COURT: Is there something else you
16 think needs to be taken out of that clip so there
17 is no reference to your client?

18 MR. APICELLA: I join co-counsel that
19 the whole clip should be --

20 THE COURT: You didn't answer my
21 question.

22 MR. APICELLA: No, Judge. What I am
23 saying is the --

24 THE COURT: Was the answer no?

25 MR. APICELLA: Yes.

1 THE COURT: Thank you.

2 MR. APICELLA: My client is being
3 harmed for the reasons that we argued when we first
4 started the severance motion and this is going to
5 continue to come up now through every tape and if
6 they come in through the trial in that Brewton and
7 Crawford are implicated and really the only way in
8 my humble opinion, I am not a judge, I'm a defense
9 lawyer. In my opinion these cases should have been
10 severed. It would have been much cleaner. This
11 way evidence would come in. My evidence would come
12 in. And facts would not be distorted by the
13 Court's attempt to try to save a joint trial where
14 in this case there shouldn't be joint trial.

15 I keep going back to what the solicitor
16 said because I submit that he was correct in his
17 analysis, Judge. We don't even need these jail
18 calls. If you tell me you are going to sever we
19 will take them all out to save the joint trial. So
20 if that's what is so important to the State and I
21 know it is important to the Court, but my
22 application is you should sever the cases with this
23 trial. We will give an instruction to the jury and
24 if you are not going to do that then I want to have
25 the record reflect that I object.

1 THE COURT: I understand your
2 objection. I have already ruled on that.

3 MR. APICELLA: I know, Judge, but I
4 want to give the Court the chance to if you are
5 persuaded to avoid error.

6 THE COURT: Well, somebody else will
7 make that determination, not me.

8 MR. APICELLA: Hopefully it won't be
9 necessary. Thank you for letting me expand the
10 record.

11 MS. VAN PALA: Since you have overruled
12 my objection we ask under the rule of completeness
13 the whole clip be played.

14 THE COURT: Again, are you asking that
15 the whole clip be played?

16 MS. VAN PALA: With the exception of
17 redacting the reference to Devin, yes.

18 THE COURT: All right. My
19 understanding is there was some reference to his
20 discovery that's been taken out maybe.

21 MR. OSBORNE: What we are working on
22 taking out right now is Investigator Haupt is
23 working on that. He is taking out any mention of
24 Devin. Let me just make one point here, Your
25 Honor.

1 And this is going to cause another
2 delay. This process of just redacting sounds easy.
3 It is very time consuming. Ray worked late
4 yesterday. He came in today. He is working on it
5 again. While we have listened to that complete
6 call here in this courtroom I heard several things
7 in that call that if I were a defense attorney I
8 would want out. They said nothing about it. I
9 told Ray take it out. I know what's going to
10 happen when I give them a copy. They're going to
11 listen again, then they are going to hear it. Want
12 it out. And I would guarantee that's going to
13 happen with this call.

14 THE COURT: I guess what I am saying,
15 Ms. Van Pala, be careful what you ask for here.

16 MS. VAN PALA: Yes, Your Honor.
17 Court's indulgence.

18 (Off-the-record conference.)

19 MR. OSBORNE: Just to bring it to their
20 attention, in that call, he mentions just getting
21 out of jail a month ago. She made no objection to
22 that being in and she wanted the whole call in.
23 Ray asked do I take it out? I said take it out.
24 And I know they are going to want it out.

25 MS. VAN PALA: Court's indulgence.

1 (Off-the-record conference.)

2 MR. OSBORNE: In that same call he
3 mentions a buddy of his beating a charge for murder
4 and he is going to do the same thing as soon as he
5 gets a real attorney. She made no objection to
6 that. I said take it out. It puts me in a trick
7 bag because then they will come back and argue
8 under the rule of completeness I should have left
9 it in. And by the way, that buddy was none other
10 than Devin.

11 MR. APICELLA: Sorry?

12 MR. OSBORNE: In that jail call that I
13 told my investigator to take out he said that he
14 was going to beat a murder charge just like he did
15 by getting a real attorney.

16 THE COURT: Be careful what you ask
17 for.

18 MS. VAN PALA: Withdrawn.

19 THE COURT: Withdrawn?

20 MS. VAN PALA: Yes, Your Honor.

21 THE COURT: I ruled in your favor.

22 MR. OSBORNE: Thank you, Your Honor.

23 THE COURT: Mr. Apicella, you are still
24 standing so there must be another question.

25 MR. APICELLA: Well, I was talking to

1 my client, Judge.

2 THE COURT: I didn't know why you were
3 standing so I am trying to find out.

4 MR. APICELLA: And so the whole jail
5 call is not going to come in.

6 THE COURT: She just withdrew her
7 request which then unless you ask for it all.

8 MR. APICELLA: No. I wouldn't be
9 asking.

10 THE COURT: Thank you. I will rule in
11 your favor. You may proceed.

12 BY MR. OSBORNE:

13 Q. Thank you, Your Honor. Moving along,
14 this is State's 126, clip 17. What is the date on
15 this?

16 A. Is March 27th, 2015, and time is
17 2:51 in the afternoon.

18 Q. Okay. So again this is the day after
19 he was arrested?

20 A. That's correct.

21 (Clip played.)

22 Q. Bra said he was going to see what they
23 are talking about?

24 A. Yeah.

25 Q. All right. States's 126, clip 18.

1 What is the date on this call?

2 A. March 27th, 2015, and this is 11:25 in
3 the evening.

4 Q. Okay.

5 (Clip played.)

6 We are going to redact Devin or Taliban
7 on that call. State's 126, clip 19.

8 (Clip played.)

9 And that was one day after his arrest?

10 A. That's correct. That was the 27th.

11 Q. Clip 20, State's 126.

12 (Clip played.)

13 My mistake. We do not intend on
14 introducing that clip during the trial. The only
15 thing we would use that clip for clip 20 is to
16 authenticate the jail video that was taken by Kayla
17 Seabrook if necessary. On this call which is on
18 March the 28th he said Devin and mini just visit
19 me. The recording from the Kala Seabrook video the
20 State's position would have occurred on March
21 the 27th just prior to this. And we also have jail
22 visitation to further authenticate the date in
23 which that recording was made. So I'm going to
24 take that out. I accidentally played.

25 The other only two clips that we have

1 is going to be clip 21 and clip 22. On both of
2 those clips the caller is talking to Ashland
3 Horlback.

4 I would ask you to just reconsider
5 No. 2 on the Crawford issue in regards to this. So
6 Crawford is implicated when a statement is made and
7 it can be used during trial. I don't have the
8 exact word but --

9 THE COURT: Available.

10 MR. OSBORNE: Available. I was hoping
11 it would be used, but it's available. So this will
12 be the State's position. If Ashland Horlback gets
13 on the stand we believe that we should be able to
14 ask her did you speak to Te'Quan Perry while he was
15 incarcerated? Yes. Did he direct you to do
16 anything. Or what did he say to you? And then she
17 can then say that, if she will say it, that Te'Quan
18 Perry directed her to get at Demarco Jones, to get
19 at the little bra, and to coach him up.

20 THE COURT: You are talking about not
21 using the clip, you are talking about asking her
22 directly about it.

23 MR. OSBORNE: Yes, Your Honor.

24 THE COURT: Okay.

25 MR. OSBORNE: In reference to the audio

1 jail claims that's all we have. We have two video
2 clips that we intend on introducing. They didn't
3 mention anything about that yesterday, but I
4 imagine they probably would.

5 THE COURT: All right.

6 MS. VAN PALA: Judge, we would object
7 to 21.

8 MR. OSBORNE: We are not offering 21.

9 THE COURT: He indicated he was not
10 going to play 21.

11 MR. OSBORNE: Your Honor, we are ready
12 to move on to the jail video portion. We have two
13 jail video clips that we would seek to play. I'm
14 not sure if there is any objection.

15 THE COURT: Are there any objections?

16 MS. VAN PALA: Yes, Your Honor.

17 THE COURT: Okay.

18 BY MR. OSBORNE:

19 Q. Detective, have you had the occasion to
20 review jail video visitations from Te'Quan Perry?

21 A. I have.

22 Q. I'm showing you now State's
23 Exhibit 162. This is clip No. 1. Again any
24 mention of Devin or Taliban will be redacted.

25 (Clip played.)

1 I'm going to come roll on you, bra.
2 What was the text between the victim and Lefty just
3 prior to his death?

4 A. Something to the effect of come roll
5 with me over to that spot.

6 (Video played.)

7 Q. He says he is not going back there any
8 more. What did he say his address was when you
9 interviewed him?

10 A. [REDACTED] Saratoga, North Charleston.

11 Q. On this call he says that the only
12 reason he went back there was to meet up with him?

13 A. With that man, yeah.

14 Q. All right. May I approach?

15 THE COURT: You may.

16 BY MR. OSBORNE:

17 Q. Do you remember what date that
18 recording was made?

19 A. This recording, I am not positive on
20 this one.

21 Q. I'm going to show you State's
22 Exhibit 160. Can you take a look at that and I'm
23 going to help you out with references a little bit
24 here. This clip if you look up here on the top
25 left, Detective, is 19975. You should be able to

1 reference that or 199765 and reference that on the
2 visitation logs.

3 A. Yes. So the confirmation number says
4 199765 that was on March -- May 31st, 2016. It was
5 1:00 to 1:30 p.m.

6 Q. Okay. And I believe I heard him
7 reference the girl as being Nari. What is the
8 visitor's name?

9 A. The visitor's name is Sunari M. Jones.

10 Q. I am showing you clip two. And just go
11 ahead and look. If you don't recall, this is
12 218753. What's the date of this clip or this
13 visitation?

14 A. So the date of this is July 24th, 2016,
15 and the time range was 7:10 p.m. to 7:38 p.m.

16 Q. Visitor?

17 A. That's Emery S. Lewis.

18 Q. (Clip played.)

19 Okay. D's dead. Whose D?

20 A. I wasn't able to hear that. Can you
21 turn it up.

22 Q. Sure.

23 (Clip played.)

24 Do you know the individual named D or
25 first name of D who is no living that's part of

1 this investigation?

2 MS. VAN PALA: Objection. Your Honor,
3 Detective Krasowski while he can testify about the
4 people in this case whose names start with D,
5 there's absolutely no indication of which
6 individual these people are talking about. The way
7 to prove that this tape or shore up relevance for
8 admissibility of this tape is to call this person
9 Emery Lewis to testify as to what they were talking
10 about. We have already gone over that Detective
11 Krasowski can't interpret what they are meaning.

12 THE COURT: I will sustain the
13 objection unless you can somehow lay some
14 foundation. We went through that the other day for
15 him to be able to interpret the meaning of words or
16 in this case a letter I guess.

17 MR. OSBORNE: So I wouldn't be asking
18 him to interpret. I kind of caught myself. So the
19 question the way I would ask it would be are you
20 aware of anyone in this investigation with the
21 first initial of D in their name who is no longer
22 living.

23 MS. VAN PALA: Objection, leading.
24 Subject to my previous motion in limine. It's
25 inherently prejudicial because it's inviting the

1 jury to draw the conclusion that Te'Quan while he
2 was in jail murdered Demarco Jones. And we know
3 that didn't happen.

4 MR. OSBORNE: Absolutely not. In fact,
5 he said it. Little boy is playing F up. He's not
6 saying that he did it. We wouldn't suggest that he
7 did it. In fact, I mean you can see right there
8 where he is.

9 THE COURT: I'm not sure what the
10 probative value is. Help me with the probative
11 value if it's not being used for that purpose.

12 MR. OSBORNE: The probative value is to
13 show that he's not at all concerned any more about
14 Duke because Duke is no longer living. Prior to
15 Duke's passing he was concerned about Duke. And he
16 is going to mention another individual here in a
17 second who he was also concerned. He is going to
18 express on here the individual that he is talking
19 about there, Emery is also deceased. We can't call
20 him. The next individual that is --

21 THE COURT: Lot of people are no longer
22 around.

23 MR. OSBORNE: That's correct. And the
24 next individual that he is talking about after that
25 is Denardo. And Denardo, Duke, Davontay, Devin,

1 were all there and Te'Quan. And so the fact that
2 Duke and Denardo are no longer available is no
3 longer a concern of his.

4 THE COURT: I am trying to find out what
5 the probative value is whether or not he actually
6 committed this crime might be. I understand you
7 can show all those things. You are not making an
8 effort to tie him to Denardo's death directly
9 because he was in jail at the time.

10 MR. OSBORNE: What we are doing is
11 showing the guilty conscience that he has at this
12 point. If Duke was indeed on the scene, which we
13 believe we are going to be able to prove, and Duke
14 would have been able to witness the murder because
15 the video shows the last image we see Duke is
16 standing right there, Duke's passing away, if he
17 was indeed innocent should be something that would
18 bother him, not something that he's relieved of.
19 That makes it more probative than not that he is
20 actually the individual that committed the crime.
21 Goes to his guilty conscience.

22 THE COURT: That's a little different.
23 Yes, ma'am.

24 MS. VAN PALA: As to that last point,
25 if the solicitor is seeking to admit this rank

1 character under one of the exceptions for motive,
2 intent, it's got to be proven through clear and
3 convincing evidence. The solicitor just listed
4 four or five individuals with the name of starting
5 with D. There's no way that any witness who is not
6 Emery, this person on the screen can testify as to
7 who Te'Quan was talking about.

8 THE COURT: He said his question was
9 going to be is there anybody in the case with the
10 first initial D who is deceased. He said he's
11 dead. Are there more than one?

12 MS. VAN PALA: Yes, Your Honor.

13 THE COURT: Tell me who is involved in
14 the case with the first initial D that was deceased
15 at that time.

16 MS. VAN PALA: Nobody is deceased at
17 that time. Demarco is the only individual in this
18 case who is deceased. Therefore if the solicitor
19 is allowed to ask the detective and the detective
20 states that Demarco is dead right after hearing
21 this conversation it's going to invite the jury to
22 conclude --

23 THE COURT: Of course your client
24 stating he's dead, he's already dead, I think
25 that's what he said. Isn't that what he said?

1 MS. VAN PALA: Court's indulgence.

2 (Off-the-record conference.)

3 MS. VAN PALA: Judge, he wasn't dead at
4 the time. He was not dead at the time.

5 THE COURT: Let's find out about that.

6 MS. VAN PALA: The solicitor produced
7 the incident report for the Demarco Jones murder
8 investigation.

9 THE COURT: What date did Demarco Jones
10 die?

11 MR. OSBORNE: You know what? Mr.
12 Corvey just reminded me, we are going to have to
13 withdraw this because he's alleging right now Duke
14 is dead, then he may be and the jury could make a
15 reference to that he is in fact saying that Duke
16 would be dead. So we won't play this.

17 THE COURT: That clip is out. You won.

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

19 MR. OSBORNE: I think that would be too
20 prejudicial.

21 THE COURT: Probably would be.

22 MR. OSBORNE: So take the clip out. We
23 are down to the first clip and that's all we would
24 seek to introduce in inference to Te'Quan Perry.

25 We can move into Devin Middleton now.

1 THE COURT: Ready to move to Mr.
2 Middleton?

3 MR. APICELLA: Yes, sir.

4 THE COURT: All right. You may do so.

5 MR. OSBORNE: All right.

6 BY MR. OSBORNE:

7 Q. Detective, as part of the investigation
8 have you had the opportunity to listen to some jail
9 clips of Devin Middleton while he was incarcerated?

10 A. I have.

11 Q. All right. I'm going to State's 147.
12 What's the date and time on this call?

13 A. This is August 2nd, 2015 at 1:55.

14 Q. When was Devin Middleton arrested?

15 A. He was arrested and warrants were
16 obtained at the end of July. I think he was
17 arrested right in the first few days of August. He
18 was arrested August 1st, 2015.

19 (Clip played.)

20 What does he want the caller to get?

21 A. His hammer.

22 Q. Now, the caller identified himself in
23 the beginning as Taliban. Had that name or that
24 nickname or moniker, was that relevant in any way
25 in this investigation?

1 A. It was. It was his social media
2 Facebook page partial of his name.

3 Q. "Him" being Devin Middleton?

4 A. Yes, sir.

5 Q. All right.

6 Clip two.

7 (Clip played.)

8 Date and time on this?

9 A. This is August 2nd, 2015, at 1:55.

10 Q. Same call?

11 A. Yes.

12 Q. Did you hear the last thing he said?

13 A. It was a continuation of hammer, but
14 the last part I wasn't --

15 THE COURT: What?

16 THE WITNESS: Excuse me?

17 THE COURT: You said a continuation of?

18 THE WITNESS: Speaking about hammer.
19 But the last part I wasn't -- I didn't catch.

20 BY MR. OSBORNE:

21 Q. See if you can hear what he says about
22 the situation.

23 (Clip played.)

24 A. I thought it said I'm going to need
25 that when I get out.

1 MR. APICELLA: Your Honor, objection to
2 him interpreting and we are now on the second clip.
3 Are we going to discuss these all after we hear?

4 THE COURT: We have been doing them one
5 at a time. I think you indicated that this second
6 one is a continuation of the same call.

7 MR. OSBORNE: Same call, yes, Your
8 Honor.

9 MR. APICELLA: Actually they are all
10 the same call.

11 THE COURT: Every one of them is the
12 same call.

13 MR. APICELLA: This was the first call
14 that he made after he was arrested.

15 THE COURT: Let's take the clips
16 individually.

17 MR. OSBORNE: Back to the first one.

18 MR. APICELLA: First of all, I object
19 to any mention of the name Taliban for the same
20 reasons I made before and put on the record, Judge.
21 There is no more prejudicial name other than Adolf
22 Hitler that we have.

23 THE COURT: I don't disagree with you
24 at all on that point, but I got a feeling the State
25 is going to say that they need to identify who is

1 on the call.

2 MR. OSBORNE: That's correct, Your
3 Honor.

4 THE COURT: Now, if you are going to
5 say that it was a call made by your client, then no
6 need to identify him.

7 MR. APICELLA: There is no need to
8 identify him. Just to expand on this so Your Honor
9 has a clearer picture, there were two additional
10 clips that the State wanted to play. And when we
11 got them I listened to them and to me it was not my
12 client. And I went back to the State and I told
13 Mr. Osborne and he first agreed with me, but said
14 I'll have my guys look at it and we will take a
15 look. Sure enough he agreed with me and took it
16 out. Indicating that, you know, what it indicates,
17 what he has done in this case so far indicates that
18 he will strike hard balls, but not foul balls. As
19 an officer of the court he took that evidence out
20 because he realized it was not my client.

21 THE COURT: As he should have.

22 MR. APICELLA: As he should have.
23 Should these come in I am not going to contest that
24 it is not my client's voice. I will have some
25 cross-examination.

1 THE COURT: Absolutely.

2 MR. APICELLA: I don't want to
3 stipulate to it.

4 THE COURT: Well, the Court has to --
5 there has to be some finding that this is made --
6 for it to be relevant got to be your client.

7 MR. APICELLA: They can say it is my
8 client Devin Middleton.

9 MR. OSBORNE: My only issue with this,
10 Your Honor, is there is a lot of examples in
11 prosecutions of cases in which the defense would
12 like to stipulate to something so we don't get to
13 talk about it, but the jury is left wondering and I
14 think this is a perfect example of this. This was
15 a through investigation. All the pieces fit
16 together and when they don't get to Demarco Jones,
17 this is a fluid investigation, this is happening
18 quick. I didn't realize that until literally just
19 now when Ted told me I think he was dead when that
20 call was made. And we took it out. But the things
21 that are fitting we want to bring in. This is one
22 of them and if we leave that portion of it out when
23 we start to talk about Facebook, start to talk
24 about this, it's not making a lot of sense. Part
25 of our res gestae in the case. I understand that

1 Taliban, that moniker might be somewhat
2 prejudicial, but nevertheless that's the one he
3 chose and we are using it for identification to tie
4 all the pieces of evidence together.

5 And the only reason why we agreed to
6 taking it out in Te'Quan jail calls is because we
7 have the Crawford issue.

8 MR. APICELLA: I don't want that name
9 mentioned. No Taliban. To the extent that he may
10 need it in his in Facebook, we haven't even got
11 there yet, Judge.

12 THE COURT: I'm going to reserve my
13 ruling until I see where it is in the Facebook
14 situation.

15 MR. APICELLA: Exactly, because if the
16 Facebook evidence does not come in then the issue
17 is moot. If it comes in then we can discuss
18 further what might happen.

19 THE COURT: All right. I will reserve
20 the ruling until then. It's hard for me to judge
21 the relevance of the probative value without having
22 seen what's on the Facebook page. So I'll take a
23 look at that.

24 MR. APICELLA: Thank you. As to the
25 content, and please correct me if I'm wrong, I

1 assume that the only thing of evidence that you
2 hear in that reference is don't give my S-H-I-T
3 away. That's the second clip.

4 MR. OSBORNE: He says hammer.

5 MR. APICELLA: The second clip he says
6 hammer again?

7 MR. OSBORNE: He keeps talking about
8 his hammer.

9 MR. APICELLA: Let's talk about S-H-I-T
10 first. I use that word all the time. I won't use
11 it in court. But it can mean lots of things. It
12 can mean your stuff. And, in fact, when I carry
13 this is that I am carrying a lot of S-H-I-T. So to
14 give a pejorative meaning to it is unfair. And
15 anything that a Defendant says, Judge, is
16 prejudicial and if it's not the State thinks it is.
17 But in the question is it unfairly prejudicial,
18 does it allow the jury to speculate that this has
19 evidential value for the State for all the wrong
20 reasons and because he said don't give any S-H-I-T
21 away, it could be anything. Could be his personal
22 possessions. He knows he is going to be locked on up
23 a murder charge. You have heard reference that he
24 faced these charges previously and that case was
25 dismissed. Everything was expunged. However, I

1 ask you to take judicial notice of the fact, Judge,
2 this case is over two years old. My client has
3 been in jail without bail and every time he made a
4 bail application the State keeps bringing up the
5 Facebook post which was the BG rap lyrics
6 indicating that he is a danger to the community and
7 every time the judge heard that.

8 THE COURT: Let's don't argue the bond.
9 Let me talk for a second. I have tried to be as
10 liberal as I can in the motions. I mean this is
11 now our fourth day in dealing with motions.
12 Sometime or another. So let's not get into bond
13 hearings unless this has direct application to the
14 case.

15 MR. APICELLA: The point I was trying
16 to make, Judge, is that he knew he was going to be
17 locked up for a long time. S-H-I-T means his
18 personal possessions. I'm going to be away while
19 this case is pending. Don't give my stuff away,
20 don't give my S-H-I-T away. Or it could be
21 something worse, could be drugs.

22 THE COURT: The statement is don't give
23 my hammer away?

24 MR. OSBORNE: It starts with I
25 think S-H-I-T and then everything after that is

1 hammer, hammer, hammer.

2 MR. APICELLA: Let's talk
3 about S-H-I-T. Because I have a separate argument
4 for hammer. It allows the jury to speculate. The
5 unfair prejudice is -- first of all, there is no
6 probative value and it's unfairly prejudicial
7 because it allows the jury to speculate. The one
8 thing that you don't want this jury to do is
9 speculate. They have to decide the case on
10 evidence or lack of evidence. You are going to
11 instruct them. And you want them to follow your
12 instructions. You let this in and it is going to
13 just open up the flood gates and the jury is going
14 to be playing detective back there and trying to
15 figure out all sorts of stuff.

16 It is unimportant. It doesn't matter
17 and you should keep it out.

18 THE COURT: All right.

19 MR. APICELLA: Hammer. They are going
20 to say hammer means firearm or gun.

21 THE COURT: Well, I don't know what
22 they are going to say.

23 MR. APICELLA: Isn't that what you are
24 going to say?

25 MR. OSBORNE: That's absolutely what we

1 are going to say.

2 MR. APICELLA: They are not going to
3 say he works as a carpenter and he needs his
4 favorite hammer. Let's get off the hammer. This
5 is South Carolina.

6 THE COURT: Yes.

7 MR. APICELLA: Guns are legal. You can
8 go out and buy a gun.

9 THE COURT: They are legal all over the
10 nation, Second Amendment.

11 MR. APICELLA: And people buy guns.
12 Some just like to shoot because it's fun. Some
13 like to maybe relive their past military days, but
14 lots of people want it for personal protection. A
15 lot of crime in Charleston and the state
16 Constitution and federal Constitution says you can
17 buy a gun for personal protection. You walk into
18 the Palmetto armory and pick out whatever you want,
19 you take it, keep it in your car. There it is.

20 So what is the probative value of that.
21 My client cannot own a gun? Really? We are going
22 to go down that slope too and open up the jury to
23 speculate about this? You can have a gun; that's
24 not illegal.

25 THE COURT: Let me hear from Mr.

1 Osborne.

2 MR. OSBORNE: If we are talking about
3 the hammer conversation I'd really like to listen
4 to all the calls and then see the context in which
5 is the urgency. The first call that he makes
6 whenever he goes to -- after he is incarcerated for
7 a murder and he mentions that, when you listen to
8 all the calls in context you can see what's
9 happening. He needs that hammer. He says get it
10 for me. Later on don't get caught with my hammer.
11 Don't go anywhere with my hammer. I need my
12 hammer. And then I think at one point he even says
13 when I get out I'm going to need my hammer. And
14 that's true. He can argue that maybe he is
15 building a home. Maybe that's possible and he will
16 start as soon as he gets out.

17 But the other plausible inference is
18 that when he gets out he's going to do some harm to
19 witnesses. And that once again comes back to
20 witness intimidation and the other element here is
21 that this is a murder involving a firearm. It's
22 not involving an ax or strangulation or anything
23 like that. So part of it is that we have to prove
24 that he was shot by a gun. Now he has access to a
25 firearm.

1 THE COURT: Now, I haven't heard any
2 evidence thus far that puts a gun in the possession
3 of this Defendant at the scene.

4 MR. OSBORNE: That's correct. But this
5 is a hand of one hand of all case and so we are
6 going with conspiracy and we are arguing that they
7 are working together in concert, and I mean again
8 just to correct, 403 and I have heard this a couple
9 different times, 403, doesn't say that it's
10 inherently prejudicial and I know Your Honor knows
11 this. I am just trying to say that the probative
12 is substantially outweighed, substantially, not
13 more, not less, substantially outweighed.

14 THE COURT: I understand.

15 MR. APICELLA: I will try to address
16 all the points if I can. First of all --

17 THE COURT: I'm going to listen to the
18 entire clip and then I will make a ruling on that
19 question of the hammer.

20 MR. APICELLA: Okay. Just as a point
21 of law, Judge, I understand my client is charged
22 with conspiracy. The darling of all prosecutors.

23 THE COURT: I'm sorry, what?

24 MR. APICELLA: The famous quote from a
25 bunch of conspiracy cases, that -- withdrawn. The

1 conspiracy ended as a matter of law when my client
2 was arrested. No. Conspiracy ended as a matter of
3 law after the crime was committed. And I believe
4 that the indictment mentions the date of the
5 conspiracy. He's not charged with a separate
6 conspiracy afterwards to cover up or obstruct
7 justice or to do anything.

8 This conspiracy that he is charged with
9 from the indictment and from the opening of the
10 solicitor is that he conspired with other people to
11 cause the death of Brandon Washington and in order
12 to further that conspiracy he was there that day.
13 He helped in getting Mr. Washington into the
14 alleyway so he could be killed by somebody else.
15 That's the conspiracy. Once that happened the
16 conspiracy was over. He is not charged with a
17 separate conspiracy.

18 THE COURT: I understand your position.

19 MR. APICELLA: Thank you.

20 THE COURT: Thank you.

21 MR. APICELLA: I will reserve all my
22 other arguments after we hear the whole thing.

23 THE COURT: He said I needed to take it
24 in the context of the entire tape. And I will do
25 that.

1 MR. APICELLA: Thank you.

2 THE COURT: Then I will make a ruling.

3 MS. VAN PALA: If I just could note my
4 objection based on my pretrial motions renewing
5 those for any reference by the co-defendant to my
6 client.

7 THE COURT: Is there a reference in
8 here?

9 MS. VAN PALA: To the jail calls in
10 general, all of the clips.

11 THE COURT: That's not specific enough
12 for me to be able to respond. I mean I don't know
13 exactly what you're talking about other than you
14 made a lot of motions. I'm not sure which ones you
15 are talking about. I'm not sure what specifically
16 you are objecting to. I think I'm entitled to know
17 that in order to be able to make a ruling on what
18 you just said. Are you just wanting to renew all
19 your previous objections?

20 MS. VAN PALA: As it pertains to these
21 jail calls, yes.

22 THE COURT: These being the one that I
23 have heard so far on this Defendant or all the ones
24 I have heard in the whole case.

25 MS. VAN PALA: Specifically for

1 Devin's.

2 THE COURT: Okay. Objection is noted.
3 You may proceed. My ruling will stand as far as
4 removing any kind of reference to co-defendants.

5 MR. OSBORNE: Yes, Your Honor. State's
6 147.

7 BY MR. OSBORNE:

8 Q. This is from the same call?

9 A. It is. August 2nd, 2015.

10 (Clip played.)

11 Q. State's 147, clip three.

12 THE COURT: Why don't we take about a
13 five or ten-minute break right now. Court will be
14 in recess for that length of time. Thank you.

15 (A recess transpired.)

16 THE COURT: Mr. Osborne, you may
17 proceed.

18 BY MR. OSBORNE:

19 Q. Thank you, Your Honor. Moving ahead to
20 clip three. State's 147. Again, this is from the
21 same call?

22 A. Yes. August 2nd, 2015.

23 Q. Was there anyone in this investigation
24 that went by the moniker of Smash?

25 A. Yes, Davontay Bryant.

1 Q. At that time did you get the warrants
2 for Davontay Bryant and Devin Middleton at the same
3 time?

4 A. We did.

5 Q. Okay.

6 (Clip played.)

7 Was there an older individual who was a
8 witness in this incident?

9 A. Yes, Marvin Johnson.

10 (Clip played.)

11 Clip No. 4.

12 (Clip played.)

13 Clip five.

14 (Clip played.)

15 And clip six. These are all from the
16 same call, is that correct?

17 A. Yes.

18 (Clip played.)

19 MR. OSBORNE: That's it, Your Honor.

20 THE COURT: Mr. Apicella.

21 MR. APICELLA: I am getting a
22 translation.

23 THE COURT: Tell me when you're ready.
24 Yes, ma'am.

25 MS. VAN PALA: I am just renewing my

1 objection to any reference to Te'Quan or Lefty. I
2 think I heard Lefty on clip four.

3 THE COURT: All right. Do clip four
4 and see if there is any reference. Tell me when
5 you say you hear it.

6 (Clip played.)

7 MR. OSBORNE: And he did.

8 THE COURT: That one will be redacted.

9 MR. OSBORNE: Yes, sir.

10 MS. VAN PALA: Thank you. Could we
11 listen to clip one more time?

12 THE COURT: Certainly.

13 (Clip played.)

14 MS. VAN PALA: We think we heard for
15 Lefty's situation at the end.

16 MR. OSBORNE: I didn't hear that. But
17 we can take out the last words.

18 THE COURT: Okay. Solve the problem?

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

20 THE COURT: Mr. Apicella, are you ready
21 to discuss it with me?

22 MR. APICELLA: I am.

23 THE COURT: Yes, sir.

24 MR. APICELLA: I already argued about
25 the fact hammer. I think you have --

1 THE COURT: I have heard that argument,
2 yes.

3 MR. APICELLA: I know you did. On the
4 third clip where he mentions Smash. The nickname
5 of the co-defendant who is not here. Again, it's
6 unfairly prejudicial because it's mentioning his
7 co-defendant. Wouldn't you think that someone who
8 has just been arrested for the murder with getting
9 his first jail call would tell people hey, I just
10 got arrested for murder? No way. Really. Yeah.
11 Yeah. Yeah. Tell Smash that they are saying he's
12 my co-defendant so alert him, let him know.

13 Now, he says tell me to go low or
14 whatever. But there is nothing nefarious about
15 wanting to a co-defendant to know that he's being
16 wanted. It would give that co-defendant the
17 opportunity to retain counsel, make arrangements to
18 surrender, all those things which would arguably
19 help him in that case. Or I suppose the State will
20 say they can be telling him to get out of town or
21 flee, but it's two different interpretations.

22 Again, are we going to ask the jury to
23 just speculate about this call? And let's take it
24 in context, Judge. This is his first free call.
25 Jurors know this from TV and novels. You get a

1 phone call. You do a phone call. And this is
2 relevant so I might as well say it now when I argue
3 as a matter of law that you should keep these out.
4 Part of the coerciveness and the non-voluntary
5 nature of defendants making these calls, especially
6 the first one, is that they have no choice really
7 either make the call or don't ever make a call.
8 Don't get your freedom phone call, don't tell the
9 person you called that you have been arrested, why
10 you have been arrested. You got to take care of my
11 stuff. Tell the co-defendants involved in the
12 case. And how does Mr. Middleton know this?
13 Because when he is arrested he's shown his arrest
14 warrant. All this information is in the arrest
15 warrant, including the reference to someone saying
16 that they heard Mr. Middleton say words to the
17 effect finish it, finish it, get him, get him while
18 the shots were being fired. That witness is Marvin
19 Johnson who is unavailable. That witness has a
20 given a lot of statements, Judge. He has given at
21 least two statements to the State that were
22 recorded. He has given to my investigator where we
23 contend he redacts his allegation that my client
24 was involved and we were are prepared to call
25 witnesses to indicate that what he said previously

1 is factually erroneous.

2 But he's not going to be here. I am
3 probably not going to call my witnesses if he
4 doesn't testify. So he's out of the case. And the
5 State knows he's out of the case. I submit the
6 reason they want this in is to back door that
7 allegation that my client is accused of being in
8 this case and an accessory to the crime of murder
9 really based on what Marvin Johnson told the
10 police. He was -- Marvin made that statement
11 March 25th, I believe two days after the murder.
12 We know from the officer who testified in the trial
13 that while Marvin Johnson was out there he was the
14 older gentleman who acted very, very upset, seemed
15 to be upset. And he never told anybody that he
16 heard anybody say anything, certainly not something
17 of such evidential value as hearing my client say
18 get him, get him, finish him, finish him while the
19 shots were being fired.

20 All he did was tell the cop over there,
21 pointing to the alley as if to say why are you
22 messing with those guys. It's there. So when you
23 use the description unfairly prejudicial, what
24 could be more unfairly prejudicial than to back
25 door that statement of my client where he's

1 reciting what his arrest warrant says explaining to
2 the person he called I just got arrested for
3 murder. Really? I can't believe it. Yeah, yeah,
4 yeah, I got arrested for murder. It is because Old
5 School supposedly said I said get him, finish him,
6 finish it. And realizing that that's absolutely
7 untrue because he knows he didn't say. This is why
8 he's so upset. Now, they have their own
9 interpretation to that, Judge, but the witness is
10 not here. You can't bring in his hearsay statement
11 because I can't cross-examine him. I can't bring
12 in any witnesses to indicate what he says is
13 factually impossible for him to have heard. And
14 they are trying to bring it in under the rubric of
15 a jail call. That's why it is unfairly
16 prejudicial. It should not be in this case, but
17 that especially should be taken out.

18 And moving on where he is telling this
19 potential call someone, tell him to get that
20 picture up on Facebook. Now, I am assuming that
21 that -- the State can't possibly allege that's now
22 evidence of guilt to get a picture up on Facebook
23 after he was arrested, especially if they find out
24 his Facebook page had no filters in it. It was
25 open to the world. Anybody could go on that

1 Facebook page and read every post, all 2,600 some
2 posts that he made while that Facebook account was
3 out there. So that's not why they want it in.
4 They want it in to somehow tie it in if they get
5 the Facebook posts in.

6 So the evidential value is minimal,
7 especially since we haven't even gotten to the
8 Facebook yet. But the unfairly prejudicial is
9 obvious to deny my client a fair trial so that
10 should be taken out.

11 And getting back to Old School, in the
12 end of clip No. 5 he's explaining to the person
13 he's talking to why he's in jail. He has now been
14 charged with murder six months after the crime
15 occurred. And he is saying that he is because Old
16 School said that I said those words, his position
17 being that he never said it. So that's why he's so
18 upset. And that's why he now wants to start to
19 mount this defense and tell someone to get that
20 picture up on Facebook because he thinks it is
21 going to help him.

22 And to the fact that an inmate would be
23 explaining the charges and telling someone why the
24 police say this is probable case to arrest him is
25 not an admission. It's reciting what's in their

1 arrest warrant. What else would a person be
2 talking about in their first jail call, especially
3 one when they are given 15 minutes. So it's
4 unfairly prejudicial. There is absolutely no
5 probative value. My request is that you keep out
6 all these calls and if Your Honor denies that then
7 certainly take out -- you can't really take out
8 just these because then the rest of the calls
9 obviously have no probative value. I am asking you
10 to take out all the calls.

11 THE COURT: I will hear from Mr.
12 Osborne.

13 MR. APICELLA: But I have an additional
14 legal argument.

15 THE COURT: Excuse me?

16 MR. APICELLA: Do you want to hear my
17 Johnson argument now?

18 THE COURT: Let's get to it. I am not
19 trying to cut you off. I thought you had ended
20 your argument. Go ahead.

21 MR. APICELLA: Do you think now is the
22 appropriate time to argue that?

23 THE COURT: Whenever you feel that the
24 objection should be raised now is the time. I am
25 getting ready to go to Mr. Osborne and let him

1 argue why they should come in. So if you want to
2 raise that objection.

3 MR. APICELLA: My preference would be
4 to permit Mr. Osborne to register his objections to
5 my argument about the substance and the fact that I
6 say they are unfairly prejudicial.

7 THE COURT: I was moving on to him.

8 MR. OSBORNE: All right. I will try to
9 take them in order. I guess the hammer we have
10 already argued. The Smash comment. When Devin
11 Middleton was interviewed by Detective Thomas
12 Bailey, we already heard that interview, they
13 presented him images of Devin standing with another
14 individual. He says he doesn't know that
15 individual. Never seen him before.

16 The State's position is going to be
17 that that's Davontay Bryant, the fact they didn't
18 charge Davontay Bryant on this recording right here
19 where he says tell Smash they going to have a
20 warrant out for him too. Well, that's further
21 indication that more than two people or more than
22 one person here are working together and also it
23 invalidates his comment he doesn't even know who
24 that individual was. Davontay Bryant AKA Smash.
25 He calls him both. First he says tell Smash, then

1 he says first and last name. Get Davontay Bryant.
2 He's probably got a warrant too. The second
3 issue --

4 MR. APICELLA: Can I respond?

5 THE COURT: Mr. Apicella wants to
6 continue his argument. Yes.

7 MR. APICELLA: If the Court pleases, I
8 think we are making a clear response to each
9 particular point. If not, what's your preference?

10 THE COURT: I have recognized you. You
11 let's go.

12 MR. APICELLA: Thank you, Judge. I
13 appreciate it. I ask the Court to take judicial
14 notice of the fact that when he was interviewed, my
15 client was interviewed by the police when he
16 voluntarily appeared on March 25th and was shown
17 that picture. That was six months before this
18 phone call was made. In those six months Mr. Perry
19 was arrested. So everyone knew that he was
20 arrested in this case. Everyone knew that he was
21 charged with the murder of Brandon Washington.
22 Everyone knew that they would be talking to the
23 police. In fact, Mr. Middleton did talk to the
24 police and he told them I don't know that guy.
25 There is nothing inconsistent with him when he is

1 arrested having been out six months, having visited
2 Mr. Perry in the jail, having known about the case
3 to now know who Bryant is. He's a co-defendant in
4 the case. Now, the police are charging him.

5 Certainly within that time he would know who Bryant
6 was. It is not unreasonable to find that he had
7 gained knowledge that that person that was there
8 that day who he didn't said he didn't really know.

9 THE COURT: So while this was the first
10 jail call, it was made some six months after.

11 MR. APICELLA: Six months after. So
12 again, putting this call in is going to allow the
13 jury to speculate. And certainly if he's going to
14 try to make the argument in summation there been no
15 evidence that my client didn't really know Smash
16 when he told the police I don't know who he is.

17 THE COURT: Mr. Osborne.

18 MR. OSBORNE: I have heard that a
19 couple of different times. Giving the jury the
20 opportunity to speculate. Well, that's exactly
21 what closing arguments are. We as attorneys get up
22 and argue our position. We draw inferences from
23 the evidence.

24 THE COURT: There's a difference
25 between speculation and drawing inferences.

1 Although it's a fine line sometimes.

2 MR. OSBORNE: And in this case if Mr.
3 Apicella wants to argue that he somehow gained and
4 developed a relationship or at least knew who
5 Davontay was during that period, he can certainly
6 draw that inference from the time gap. We would
7 draw an inference that that call demonstrates
8 familiarity.

9 THE COURT: I think he's arguing that
10 goes to the probative value and it does. Go ahead.

11 MR. OSBORNE: And the other obvious
12 part of it, if he's saying that he doesn't know the
13 individual Davontay Bryant AKA Smash, this goes to
14 once again show he did. Because on the video we
15 are going to -- the State's position is going to be
16 that person -- that he was there with the person
17 that he was acting in concert with, the person that
18 was later charged with murder is none other than
19 Davontay Bryant. So then for him to come and tell
20 Detective Bailey that he had no idea who that
21 individual was goes against what we see on the
22 video and goes against what we heard on the jail
23 call.

24 MR. APICELLA: The date on that video
25 is? The date of the video that you propose to put

1 into evidence?

2 THE COURT: The audio.

3 MR. OSBORNE: August the 2nd.

4 MR. APICELLA: How many months after
5 the -- again, no probative value, Judge. Six
6 months later.

7 THE COURT: I'm going to sustain the
8 objection on that. The gap in time is too great.
9 Obviously he was involved with his counsel at this
10 time since he was in jail or involved at least in
11 preparing for trial with someone. Certainly he
12 could have learned that name in the meantime.

13 So I don't find that probative value
14 outweighs the prejudicial effect. So I will
15 sustain that objection.

16 MR. OSBORNE: The second issue that he
17 -- No. 3 is the Marvin Johnson comments in relation
18 to the arrest warrant. This is a perfect example
19 of the juxtaposition between how defendants behave
20 when they see an arrest warrant. We have already
21 seen Te'Quan Perry recite facts in his search
22 warrant. As soon as he recited those facts, and
23 that's what Mr. Apicella is contending here, that
24 he's reciting facts that are in the arrest warrant,
25 as soon as Te'Quan Perry recites those facts he

1 immediately denied it. He said what do they expect
2 me to do? I was in the alley. There were shots
3 fired. I ran. That's all I did. We did not hear
4 any sort of denial come out of Devin Middleton.

5 In fact, the next thing that comes
6 after him is to say get at Old School and let him
7 know I'm mad. I'm mad. It's nothing more than an
8 admission to what he's saying. Te'Quan Perry, an
9 individual who is claiming his innocence, denies
10 it. What does that mean? Doesn't mean anything.
11 He doesn't do anything of the like.

12 MR. APICELLA: Judge, it goes to the
13 question of what is the probative value of this
14 jail call, this subject. The State takes the
15 position I suppose that every Defendant, in fact,
16 this is what Defendants, everybody, always do when
17 they get arrested. Well, presumed to be innocent.
18 He may, in fact, be innocent. This may be an
19 innocent person wrongfully accused of a crime. Be
20 that it as may, to talk about your charges is
21 natural and when you are talking about lay people
22 who are not schooled in the law to try to spin or
23 stretch or mold their statements to allow --

24 THE COURT: The last argument about him
25 not denying I am not putting any burden of proof on

1 your client to deny anything. The proof is
2 innocence. I am not going there. Now, at some
3 point in time he starts talking about getting at
4 Old School.

5 MR. OSBORNE: He does, Your Honor.

6 THE COURT: That's the more troubling
7 of the statements I heard.

8 MR. OSBORNE: That's on clip five -- he
9 does say that.

10 THE COURT: Let's talk about that.

11 MR. APICELLA: Let's talk about it,
12 Judge.

13 THE COURT: I understand your argument
14 about back dooring the statement.

15 MR. APICELLA: Once Mr. -- we are
16 getting at Mr. Old School can have many, many
17 interpretations, but the one that I would say is as
18 true as the negative one is that we need to get at
19 him to get his statement because I never said that.
20 He knows I never said that. And you have to
21 understand who Marvin Johnson is, Judge. He's an
22 older man who has been a life-long narcotic addict.
23 He's been a snitch for the Charleston Police
24 Department for years. That's how he gets on in
25 life. Everybody knows that. And his nickname is

1 Low Life. Even his sisters call him LL. So
2 credibility wise, that's not the most credible
3 witness.

4 THE COURT: Well, it is not being -- I
5 don't think -- maybe I am jumping the gun by
6 talking about your argument. Mr. Osborne, tell me
7 what you are offering it for.

8 MR. OSBORNE: Well, what I am offering
9 it for is once again to go to witness intimidation.
10 He is telling this individual on the phone to get
11 at Old School. I know we are not talking about the
12 credibility of Marvin Johnson. Mr. Apicella
13 mentioned this a number of times. I'm going to
14 just mention it from the State's point of view.
15 Marvin Johnson did give several statements. That's
16 because he was asked to. On one occasion he was
17 made to. This would be the State's position.

18 Devin Middleton brought Marvin Johnson
19 to the public defender's office, brought him there,
20 and gave a statement to the public defender's
21 office with Devin Middleton right there. And, Your
22 Honor, that right there goes to nothing more than
23 witness intimidation. He is saying right here that
24 you need to get at Old School. He's already gotten
25 at Old School at that point. He gets arrested at a

1 later date. And it was Devin Middleton who ended
2 up contacting the public defender's office to come
3 in and give a statement and brought Old School with
4 him to give that statement.

5 MR. APICELLA: You have heard a
6 reference in this case my client faced a prior
7 murder charge. I believe -- he had retained
8 counsel. Those charges were dropped. The case was
9 expunged. First thing a lawyer, a good lawyer,
10 does is try to interview the witnesses as soon as
11 possible. Knowing how long these cases last
12 witnesses disappear.

13 THE COURT: The lawyer does.

14 MR. APICELLA: Yes, the lawyer does.
15 He already had a lawyer. Retained a lawyer. He
16 didn't retain a lawyer in this case, he has court
17 appointed lawyers, but he knew you have to get at
18 the witnesses, get them available so we can get
19 their statements and we can work on my defense.
20 That's consistent with a person wrongfully accused
21 of a crime he didn't comit.

22 THE COURT: You gentlemen have both
23 argued the inferences that can be drawn from this
24 very well. It's the jury's job to weigh those
25 inferences and decide which one is true.

1 MR. APICELLA: Inferences can only be
2 drawn from facts, facts that the jury can find are
3 true. This is my argument. There's no evidence in
4 the case about Marvin Johnson. There's no evidence
5 in the case about any of this. Hasn't even come in
6 yet. So to base your ruling on what I may or may
7 not be able to argue on summation --

8 THE COURT: I am saying that there are
9 inferences that can be drawn both ways and the fact
10 that any piece of evidence may give rise to
11 different inferences doesn't make that evidence
12 excluded. It may be that it ought to be included
13 for the jury to do that. I'm going to charge them
14 it's their job to draw the inferences from the
15 evidence.

16 MR. APICELLA: They can only draw
17 inferences from probative evidence that's not
18 unfairly prejudicial.

19 THE COURT: I understand that, but the
20 fact that it's two inferences can be drawn from a
21 piece of evidence does not in and of itself make
22 that evidence excludable.

23 MR. APICELLA: But the hearsay
24 statement of Marvin Johnson should not be part of
25 this case.

1 THE COURT: I didn't say it should, but
2 now what I am really getting into is the fact that
3 he said you need to get at Old School. I may be
4 misquoting it now, but something to that
5 everything.

6 MR. OSBORNE: That is correct, Your
7 Honor.

8 THE COURT: That goes back to our
9 discussion about witness intimidation.

10 MR. APICELLA: Which my client is not
11 charged with, only the co-defendant is charged
12 with.

13 THE COURT: Well again, the case, was
14 it the Edwards case that we talked about earlier
15 talked in terms of when someone attempts to or
16 begins a process of witness intimidation that that
17 is some evidence of guilt and is relevant on that
18 point. And that's my concern about that statement
19 is that if he is saying we need to get at somebody
20 who he is referring to as a witness in the case
21 then the jury -- that's a piece of evidence.
22 Several inferences could be drawn from that. The
23 jury is entitled to hear the evidence and draw
24 their own inference is the way I understand how
25 that works.

1 MR. APICELLA: That's uncharged crime
2 evidence which the State said they weren't going to
3 use.

4 THE COURT: What uncharged crime?

5 MR. APICELLA: Intimidating a witness.
6 My client is not charged with intimidating a
7 witness. You can't ask to draw that inference for
8 a crime that he is not charged with unless we have
9 a hearing to determine whether or not it meets all
10 the criteria of uncharged acts. He has waived
11 that, Judge. He said I'm not doing that. Now he
12 is trying to back door in an uncharged act through
13 my client's jail call. That's why it's unfairly
14 prejudicial and should not be part of the case and
15 the jury should not be invited to draw an inference
16 from inadmissible evidence.

17 MS. VAN PALA: May it please the Court,
18 I want to join in on Mr. Apicella's motion and add
19 --

20 THE COURT: That's noted.

21 MS. VAN PALA: I think that this is the
22 quintessential situation where this type of
23 explosively prejudicial evidence is asking the jury
24 to draw spurious inferences of guilt here. The
25 State will tell you that Marvin Johnson gave three

1 statements to law enforcement.

2 THE COURT: I'm not going to allow any
3 of those statements to come in unless there's some
4 unusual rule of evidence that you know about. He's
5 not available for trial.

6 MS. VAN PALA: Yes, Your Honor.

7 THE COURT: That's not -- if you are
8 arguing his statements, they are not coming in.

9 MS. VAN PALA: Yes, Your Honor.

10 THE COURT: So there is no need to
11 argue whether the statements come in.

12 MS. VAN PALA: My point is that he gave
13 three statements to law enforcement. Then he gave
14 a statement to my office. He also gave a statement
15 to Mr. Apicella's investigator. In none of them is
16 there any mention of any kind of improper witness
17 intimidation. He is the reason why Smash, Davontay
18 Bryant, is not on trial this week. It is
19 inherently prejudicial and I think that the
20 solicitor said at the beginning of our pretrial
21 motions that Mr. Johnson is unavailable purely by
22 means of his own volition. The solicitor has told
23 you --

24 THE COURT: I don't know if there is
25 any evidence as to he was unavailable.

1 MS. VAN PALA: Well, the solicitor has
2 told us that he thinks that he is on a drug bender
3 in Atlanta and on the run because he's got a
4 warrant. His sister who he lives with hasn't seen
5 him in a week.

6 THE COURT: Again, that's the solicitor
7 speculating. Is there any evidence why this
8 gentleman has left town?

9 MR. OSBORNE: Well, we do -- so
10 evidence. The word on the street.

11 THE COURT: Well, let's not go there.

12 MS. VAN PALA: My argument is that we
13 have no reason, the solicitor and I have no reason
14 to think that or no basis to argue that Mr. Johnson
15 is unavailable by reason of Devin or Te'Quan. In
16 fact, just like we had with Demarco and just like
17 we had with Denardo, there is evidence to the
18 contrary. This is not a witness intimidation
19 issue.

20 MR. OSBORNE: Your Honor, if I may,
21 just a couple quick points to address what Ms. Van
22 Pala just said. It is true that Mr. Johnson did
23 not report he was being intimidated while he was
24 being questioned by representatives from both the
25 Defendants. He didn't mention that part. But the

1 other mention is the witness intimidation, what
2 they are asking you to do is to read Edwards to say
3 that the message had been delivered and that had to
4 have an effect. That's not what Edwards said.

5 THE COURT: While she was doing that I
6 was getting Edwards back up. I want to read what
7 Edwards said. The holdings in that case, I am
8 reading, witness intimidation evidence if linked to
9 the Defendant may be admitted to show a
10 consciousness of guilt. And witness intimidation
11 evidence is admissible or was admissible because
12 the mother of the victim identified the Defendant
13 as the author of the intimidation.

14 MR. APICELLA: Can I address the Court?

15 THE COURT: Certainly. That's a
16 Supreme Court case from 2009.

17 MR. APICELLA: Hopefully I can resolve
18 all of this substantively. We have a witness on
19 the stand who has not testified about the jail
20 calls. May I ask just a few questions?

21 THE COURT: Well, I will allow you to
22 cross-examine him.

23 BY MR. APICELLA:

24 Q. Be more direct actually. Talking about
25 my client's jail phone call. The very first one he

1 made of these clips were taken from?

2 A. Yes, sir.

3 Q. Is there someone in this case that goes
4 by the nickname Fat Rat?

5 A. Fat Rat and Mini Rat.

6 Q. Fat Rat is Joaquin Johnson?

7 A. Yes, Joaquin Marion I think.

8 Q. Joaquin?

9 A. I think it's Joaquin.

10 Q. And he is Marvin Johnson's nephew?

11 A. Correct.

12 Q. So they're blood relatives?

13 A. As far as I know, yes.

14 Q. And the person that my client is
15 talking to on that phone call is Fat Rat?

16 A. I believe I thought it was either Fat
17 Rat or Mini Rat.

18 MR. APICELLA: So getting to the
19 substance of the argument, Judge, the State is
20 asking the Court to get this in so they can ask the
21 jury to draw an inference that my client is
22 threatening Marvin Johnson by telling his nephew
23 I'm going to threaten Marvin Johnson. This is what
24 we are going to do. You are going to get at him
25 and make sure that he doesn't testify.

1 THE COURT: Tell him I'm mad. Isn't
2 that what he said?

3 MR. APICELLA: Yes.

4 MR. OSBORNE: That's the way I hear it.

5 MR. APICELLA: Tell him I'm mad and the
6 inference -- the inference is that he is mad
7 because he said something that wasn't true and now
8 he's involved in a murder case.

9 THE COURT: Again, the Court is not
10 going to find as a matter of law which inference
11 the jury should decide. Again, I'm having problems
12 with an objection that a piece of evidence might be
13 excludible because you can draw more than one
14 inference from it.

15 MR. APICELLA: But the evidence --

16 THE COURT: Now, if your objection is
17 that one of those inferences is that the
18 prejudicial effect substantially outweighs the
19 probative value, that's a whole different matter
20 than you simply saying well, you know, they could
21 draw an inference that would be prejudicial to my
22 client. Again, I take it that almost every piece
23 of evidence that comes in lawyers can argue they
24 can take it one way or the other.

25 MR. APICELLA: That is my contention

1 for all these jail calls, Judge, that certainly
2 they're prejudicial. We all know that. But
3 they're unfairly prejudicial for a number of
4 reasons. This is unfairly prejudicial because it
5 back doors in the statement from a witness that
6 is --

7 THE COURT: Back dooring of the
8 statement concerns me, but I didn't hear that in
9 there that there was anything other than you say
10 reading of his --

11 MR. APICELLA: No, this is where he
12 said Old School said that I said get him, get him,
13 finish him, finish him.

14 THE COURT: That concerns me. But the
15 statement go tell him that -- get to him and tell
16 him I'm mad, that doesn't have -- get to the text
17 of the statement.

18 MR. APICELLA: No.

19 THE COURT: That gets to the fact your
20 client made that statement and according to
21 Edwards, witness intimidation evidence, if that
22 would be evidence of witness intimidation, if it's
23 linked to the Defendant and here he's the one
24 talking, it may be admitted to show a consciousness
25 of guilt.

1 MR. APICELLA: Evidence can only be
2 admitted, Judge, if it's a reasonably probative
3 statement.

4 THE COURT: The question is can that
5 evidence be taken as probative of witness
6 intimidation or evidence of something else?

7 MR. APICELLA: Well, that's --

8 THE COURT: You follow -- you are going
9 to disagree with me at the end anyway. I am not
10 asking you to agree with that. I am trying to
11 explain to you my thought process.

12 MR. APICELLA: Your Honor, hopefully
13 this will clarify. Can we just play the very, very
14 end of that clip where they say he said I'm mad.
15 It's the very end.

16 THE COURT: Replay it.

17 (Clip played.)

18 THE COURT: Is that the part you wanted
19 to play?

20 MR. APICELLA: I didn't hear him say
21 tell him I'm mad at him.

22 THE COURT: Do you want to isolate
23 where he says it if you can.

24 MR. APICELLA: I'm the wrong person to
25 say that. The question is whether you can hear it,

1 Judge.

2 MR. OSBORNE: This is clip five.

3 (Clip played.)

4 THE COURT: I heard tell him I'm mad.
5 I think I heard that.

6 MR. OSBORNE: Sounds like he may have
7 said Smash. We will take the Smash part out, any
8 reference to Davontay.

9 MR. APICELLA: I've just been informed,
10 Judge, that the two leading cases in South Carolina
11 that talk about this Edwards, both of those cases
12 the witness who was allegedly intimidated
13 testified.

14 THE COURT: Well, I agree that there
15 are cases that say, but doesn't require that.
16 Let's look at them. If you are going to tell me
17 about the case then I need to review it on the
18 Edwards case. I'm going to look at them. Tell me
19 what they are. Ms. Van Pala, I believe you are the
20 source of that so help me.

21 MS. VAN PALA: In Edwards the mom of
22 the victim testified as to the threats.

23 THE COURT: Yes. Apparently she was
24 testifying as to the source of the threats being --
25 she didn't have a recording of the telephone

1 conversation, I agree.

2 MS. VAN PALA: Yes. And we would
3 contend that's what makes the threats meet the
4 reliability standard in Edwards. I am saying that
5 this case is distinguishable because all we have is
6 one side of the threat. We don't have anybody else
7 on the other side of the threat testifying.

8 THE COURT: Stop right there. What it
9 says, I'm reading from Edwards what it says. It
10 says witness intimidation evidence if linked to the
11 Defendant, I'm reading from the holdings, let's
12 stop right there. Here we have got the Defendant
13 talking on a recording. I can link it to the
14 Defendant or the jury certainly can.

15 Now, in Edwards I think that what we
16 have was a criminal sexual conduct case. The
17 mother said that -- apparently testified that the
18 Defendant somehow was trying to intimidate
19 witnesses through her. She was the one that said
20 he was the source of the intimidation. The Court
21 allowed in. If anything, Edwards would be a less
22 reliable link up with the Defendant than the case I
23 am looking at. Because you are depending on the
24 mother of the victim to link the Defendant to the
25 witness intimidation. Do you follow me there?

1 MS. VAN PALA: Yes, Your Honor, I do.

2 THE COURT: And so I find that less
3 reliable than listening to actually the Defendant
4 talking on a telephone.

5 MS. VAN PALA: I understand.

6 THE COURT: The other case you want me
7 to review?

8 MS. VAN PALA: Thank you. Was Hayden,
9 was the Fourth Circuit case that I had mentioned
10 before. And I say that my argument is that this
11 case is also distinguishable because there was
12 testimony as what these statements actually mean.

13 In this case we have a detective on the
14 stand who the Court's already ruled isn't qualified
15 to interpret some of these phrases.

16 THE COURT: That was phrases. Right
17 now I'm inclined based on what I have heard so far,
18 he's investigated the case and as far as the
19 nicknames of the monikers that were used by the
20 different people, he specifically I'm sure has
21 investigated the case. Those people go by those
22 names. He's certainly heard on the street used
23 those for those people. That's a whole different
24 matter than trying to determine the meaning of the
25 word hammer. You follow me?

1 MS. VAN PALA: Yes, Your Honor.

2 THE COURT: So talking about names of
3 people, nicknames they go by, unless you can show
4 that he is not -- his investigation didn't show
5 that to him I'm going to let him talk about who
6 Lefty is or Left. Apparently people on the street
7 go by nicknames. I'm sure during his investigation
8 he has learned who goes by what nicknames.

9 MS. VAN PALA: I understand that, Your
10 Honor. And my contention is the second part, the
11 alleged threat, specifically in this instance the
12 hammer. Who is going to testify what that means?

13 THE COURT: Well, you are skipping to
14 the hammer. We are not on the hammer just yet.

15 MS. VAN PALA: I understand your point
16 that the detective could be -- I understand.

17 THE COURT: I'm trying to do this in a
18 logical progression. And right now we are talking
19 about the statement where he said -- I am losing my
20 train of thought on what he said. See Old School,
21 get to him and tell him I'm mad. Is that what I am
22 talking about?

23 MS. VAN PALA: That's right, Judge.

24 THE COURT: So let's talk about that
25 one and then we will get on to the others if you

1 will let me.

2 MS. VAN PALA: And who is going to
3 testify as to get at him or get to him?

4 THE COURT: That's a phrase in English.
5 I'll let the jury figure out what that means.
6 That's English language. I understand what that
7 means. Myself. I think the jury will probably
8 understand what it means to get at somebody. I
9 don't find that to be street language.

10 MS. VAN PALA: The solicitor is going
11 to interpose his interpretation in his closing
12 arguments based on no testimony in the record.

13 THE COURT: Overruled on that point.

14 MR. APICELLA: Your Honor, on the issue
15 of whether or not my client says the words tell him
16 I'm mad at him, I still haven't heard the State
17 just isolate that. Unless you heard it, Judge.

18 THE COURT: Well, I heard somebody say
19 the words tell him I'm mad at him. Get a little
20 closer. I will take a few minutes for you to
21 listen to it.

22 (Clip played.)

23 MR. APICELLA: If you heard that I'll
24 accept that it is not tell him I'm mad, tell him
25 the reason I'm mad. That is different, Judge.

1 THE COURT: You certainly can argue
2 that to the jury. Now, let's see.

3 MR. APICELLA: Judge --

4 THE COURT: This isn't by argument by
5 free association because you are supposed to handle
6 the case.

7 MR. APICELLA: I am.

8 THE COURT: I have been very liberal in
9 letting you do some things.

10 MR. APICELLA: I appreciate it, Judge.
11 But when my client -- I will have him testify in
12 camera, Judge, that's not what he said. It is not
13 tell him the reason I'm mad. It's tell him the
14 reason I'm bad? Why he's locked up being the
15 reason is because you said that I said get him, get
16 him.

17 THE COURT: I think that goes to the
18 same issue. That's what he is going to say. As to
19 whether or not the jury will interpret that as
20 being witness intimidation evidence.

21 This case is never going to end if we
22 just have arguments about issues, then we get to
23 the point, I am ready to make a ruling, then we do
24 additional arguments about some issues, then we do
25 additional arguments about it.

1 I want you to just give me your
2 argument and let me make a ruling. You walk back
3 and then comes another argument on the same issue.
4 And I just would like -- let's try to argue the
5 issues and move on.

6 MR. APICELLA: My position as I have
7 stated previously, the tape is very difficult to
8 hear and understand. In many respects it is
9 inaudible. People hear different things. If it's
10 not audible, if everyone listening to it doesn't
11 agree on what the words are, that goes to whether
12 or not it should be admitted into evidence as being
13 probative of any issue. If it's inaudible it
14 shouldn't come into evidence. If it's as my client
15 says I'm bad and bad means jail.

16 THE COURT: Bad and mad are pretty
17 close together.

18 MR. APICELLA: Well, they are.

19 THE COURT: I understand that.

20 MR. APICELLA: They are. So unless we
21 have -- I can't even call experts, I would say it's
22 just too ambiguous, Judge. It's not the type of
23 evidence that should be admitted into a trial in
24 this scenario. If there's --

25 THE COURT: Okay.

1 MR. APICELLA: I don't know how I could
2 state it any clearer, Judge. Invite the jury to
3 guess or speculate on a very minor thing that has
4 nothing to do really with whether or not my client
5 --

6 THE COURT: Is there a transcript of
7 these?

8 MR. OSBORNE: There is not, Your Honor.
9 The only thing that I would add to this, and I know
10 if you need me to argue more, I think we have
11 argued enough. There is definitely a sense of
12 urgency in this call. There is hammer mentioned
13 over and over again. There is get at Old School
14 mentioned. We will redact the Smash and Davontay
15 portion of it as the Court I am assuming will order
16 and we will also redact the portion where there is
17 mention of what's being said at the warrant in
18 particular and with special emphasis on what Old
19 School told to the police in regards to finish him.

20 THE COURT: I'm going to rule that out.

21 MR. APICELLA: On the issue of hammer,
22 there has been --

23 THE COURT: Don't argue it. I'm going
24 to exclude it unless there is some definition that
25 you are asking him to define.

1 MR. OSBORNE: Yes, Your Honor.

2 THE COURT: I have already ruled on
3 things that require definition.

4 MR. OSBORNE: We did not cover hammer,
5 but I do intend on asking Paul Krasowski some
6 questions in regards to what a hammer is. I
7 thought when he said --

8 THE COURT: What I heard so far
9 wouldn't get it in.

10 MR. OSBORNE: Detective Krasowski --

11 THE COURT: Time out. I have got the
12 jury calling in at noon. So we probably ought to
13 discuss where we go from here. I suggest we have
14 them call in after 6:00 p.m. this evening.

15 This has gone on all morning and we are
16 still not through the phone calls. We did it
17 yesterday. Still not through with the phone calls.
18 And I would imagine the Facebook pages are going to
19 be the same way.

20 MR. OSBORNE: If not longer.

21 THE COURT: After 6:00 tell them to
22 call back in. Now, you may proceed.

23 MR. OSBORNE: So we spoke about this
24 quite a bit yesterday. I just want to go very
25 quickly.

1 BY MR. OSBORNE:

2 Q. You have been a homicide detective for
3 how long again?

4 A. Since summer of 2014 I went into the
5 homicide unit.

6 Q. During that time you said you had the
7 occasion to interview what, hundreds, thousands of
8 people?

9 A. I would venture to upward of a thousand
10 interviews I have conducted.

11 Q. And numerous shootings, we have already
12 talked about that?

13 A. Yes, sir.

14 Q. And what have been some of the training
15 classes that you have been to as a police officer?

16 A. I went to several different interview
17 courses through the federal government as well as
18 their inspector general's training interviews of
19 some private company interviews. Went to a
20 homicide investigative class in Greenville that was
21 I believe three days in length and just numerous in
22 office training that we have had that's been
23 conducted.

24 Q. And now, you said that you went through
25 interview and homicide classes. As part of those

1 interview and homicide classes were you taught to
2 recognize certain patterns and certain lingo and
3 certain things that were being said and pay
4 particular attention?

5 A. More so in the homicide course rather
6 than the interview courses.

7 Q. What were you trained to do in those
8 homicide courses in reference to interview
9 techniques?

10 A. There were a variety of -- that comes
11 back to the interview courses, but just try pick up
12 on different cues, what people might be saying or
13 might be inferred through various means.

14 Q. Okay. So is it fair to say you were
15 trained to pay attention to words?

16 A. Yes.

17 Q. Now, as a police officer you carry a
18 pistol; is that correct?

19 A. I do.

20 Q. And that pistol has several different
21 working mechanisms within it; is that correct?

22 A. That is correct.

23 Q. And if you are to pull the trigger of a
24 pistol what goes back and then strikes the bullet?

25 A. A hammer does that.

1 Q. Hammer. Okay. So a hammer is a vital
2 part to the functioning of a pistol?

3 A. That's correct.

4 Q. Now, through your tenure as a detective
5 and as a police officer have you heard various
6 terms being used to describe a gun?

7 A. I have.

8 Q. So is it fair to say that people don't
9 always just say gun?

10 A. That is correct.

11 Q. Well, tell the judge what are some of
12 the various words that you have heard to describe
13 the term or a gun?

14 A. I have heard the burner, gat, biscuit,
15 heat, my nine, regardless of it being a nine
16 millimeter or not, all firearms as a Glock, just a
17 variety of different slang terms.

18 Q. Have you ever heard the term "hammer"?

19 A. I have.

20 Q. And to describe what?

21 A. A firearm.

22 MR. OSBORNE: No further questions,
23 Your Honor.

24 THE COURT: Wish to cross-examine him?

25 CROSS-EXAMINATION

1 BY MR. APICELLA:

2 Q. So the knowledge that you gained about
3 firearms you learned in various courses?

4 A. That and conducting interviews.
5 Interviewing people they share what they refer to
6 it as or things of that nature.

7 Q. And when you went to these various
8 courses did you take exams?

9 A. I don't know if there were
10 examinations; I don't believe so.

11 Q. So if I understand your testimony,
12 hammer is one of many, many words that are used to
13 describe firearms?

14 A. Yes, that's correct.

15 Q. But you will concede that when someone
16 uses the word "hammer" it doesn't necessarily mean
17 that it is a firearm, correct?

18 A. Correct.

19 MR. APICELLA: Nothing further.

20 THE COURT: You wish to cross-examine?

21 MS. VAN PALA: No questions, but
22 argument.

23 THE COURT: Mr. Osborne?

24 MR. OSBORNE: Nothing further, Your
25 Honor. We can address our position.

1 THE COURT: I want you to if you are
2 not calling another witness.

3 MR. OSBORNE: We are not, Your Honor.
4 We are not seeking to admit Detective Krasowski as
5 an expert or qualifying him as an expert. We are
6 seeing to admit this testimony regarding hammer
7 under Rule 701. Specifically we are moving to
8 section A and B Because I think A and B both cover
9 it. He has testified to his understanding, his
10 personal experience, his understanding of the term
11 through not only his training, but also through
12 witnesses that he interviewed, all of his time,
13 through all of his experience as a police officer.
14 It's going to be no different than any other
15 question that I ask him in reference to what type
16 of -- what have you learned through your tenure as
17 being a police officer in regards to communicating
18 with them in the public, in regards to crime scene
19 investigation, what does this normally -- what
20 inferences do you draw from this.

21 And not to mention this isn't even a
22 leap maybe jurors aren't familiar with gat or
23 burner, but hammer in and of itself, the gun itself
24 actually has a hammer.

25 So it is not a stretch, it's not a

1 connotation that is bizarre to anyone. And I think
2 it's pretty common knowledge as well that hammer is
3 a term used to describe a handgun.

4 THE COURT: Mr. Apicella.

5 MR. APICELLA: Even assuming that
6 hammer means gun, I reiterate all my previous
7 arguments that I have stated just as if I am
8 stating them now.

9 It is not illegal to carry a gun in
10 South Carolina. Therefore the purpose for which it
11 is being admitted is unfairly prejudicial. Has no
12 probative value in this case because my client is
13 not accused of being the shooter. He did not
14 possess a gun on the day of the murder. This call
15 is made six months after the alleged -- after the
16 murder was committed. So therefore it is not
17 probative. It is remote. It is unfairly
18 prejudicial and should be excluded.

19 MR. OSBORNE: To address that issue,
20 this goes to witness intimidation. This is the
21 very first call that he makes after he is
22 incarcerated. He is trying to get his hands on a
23 hammer and he doesn't mention it once. He mentions
24 it over and over and over and over again. This
25 situation is critical. I need my hammer. I need

1 my burner. I need it now. Don't get caught with
2 it. I need it now. In that same phone call he
3 talks about getting at Old School.

4 MR. APICELLA: Every time I respond it
5 reinforces the fact that if it comes in I can argue
6 my position to the jury. The point is, Judge, that
7 the evidence is not probative of an issue in this
8 case. He is not accused of intimidating any
9 witnesses.

10 MR. OSBORNE: Doesn't matter, Your
11 Honor. That's guilty conscience.

12 MR. APICELLA: Your Honor has the
13 issues.

14 MS. VAN PALA: May it please the Court,
15 we would object to this line of questioning. This
16 is exactly what the Court ruled on yesterday. It
17 is covered under Johnson. Johnson discusses when a
18 law enforcement officer is relying on specialized
19 training in some way.

20 THE COURT: Might have been the day
21 before yesterday.

22 MS. VAN PALA: Excuse me?

23 THE COURT: I think I am losing track
24 of the days myself.

25 MS. VAN PALA: I stand corrected. I am

1 quoting directly from the case, Judge. His post
2 talk assessment cannot be credited as a
3 substitute --

4 THE COURT: Ma'am, you can stop. I
5 sustained the objection. The reason is it is
6 remote. It would require some interpretation by
7 the officer or what that might mean and I realize
8 it is not as great a jump as others. I didn't hear
9 anything in the conversation or related to me by
10 counsel that tied getting the hammer to using it
11 for any particular purpose such as show it to Old
12 School or whatever you are going to do. I did not
13 hear it related to that. And so I find that the
14 prejudicial effect does substantially outweigh any
15 probative value. I have granted your motion, Mr.
16 Apicella.

17 MR. APICELLA: Thank you, Judge. And
18 what about Johnson?

19 THE COURT: As to the statement as to
20 go talk to Old School, that's coming in. I will
21 deny the motion on that.

22 MR. APICELLA: And does that also
23 include the reference to he said I said finish it,
24 finish it?

25 THE COURT: We have already agreed

1 whatever Mr. Johnson might have said is not coming
2 in. I have already said that's not coming in.

3 MR. APICELLA: So what my client says
4 Johnson said that I said get --

5 THE COURT: I am not going to let
6 Johnson's statement into the case. I am trying to
7 let you win. You want to argue with me?

8 MR. APICELLA: No, I don't, Judge.

9 THE COURT: Ma'am, what are you
10 standing for?

11 MS. VAN PALA: I object to the
12 admission of this evidence against Te'Quan Perry
13 based on the confrontation clause and spill over
14 prejudice.

15 THE COURT: You have made the
16 objection.

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

18 THE COURT: Any other issues as to that
19 particular call? Now, is there any other clips?

20 MR. OSBORNE: No, Your Honor.

21 THE COURT: All right. Are we going to
22 move to Facebook at this time?

23 MR. OSBORNE: We are ready to.

24 THE COURT: Okay.

25 MR. OSBORNE: Your Honor, I know this

1 whole thing has been kind of odd. We left off with
2 the search warrants for GeezQuez and Taliban mbmb
3 and that's sort of where we left off.

4 I have gone through the testimony with
5 Detective Krasowski establishing what the State
6 would propose is probable cause to validate those
7 warrants.

8 THE COURT: I received some copies of
9 Facebook posts you provided me earlier.

10 MR. OSBORNE: Well, so it is two
11 issues. We are -- Your Honor, so what I have
12 discussed so far is how Detective Krasowski came
13 about getting these search warrants. So everything
14 that proceeds after that is what he got as a result
15 of these search warrants. If there is some
16 objection to the exhibits that I have already laid
17 out as foundation to get these search warrants,
18 that's going to be separate.

19 THE COURT: I guess we should find out
20 what the specific objections to the search warrants
21 might be, if there are.

22 I am looking at State's Exhibit 98. Is
23 that the warrants in question?

24 MR. OSBORNE: State's Exhibit 115 and
25 116 are the two search warrants in question.

1 They're labeled General Taliban and GeezQuez Otf.

2 THE COURT: I am sorry. Those numbers
3 again were?

4 MR. OSBORNE: 115 and 116.

5 THE COURT: I found 115 and 116. Mr.
6 Apicella, any objection to those search warrants?

7 MR. APICELLA: Sorry?

8 THE COURT: I am calling on you first
9 because they told me you would go first in
10 everything so I am doing that to try to follow what
11 you told me to do. So Exhibit 115 and 116 are the
12 search warrants apparently that they used to obtain
13 the information from Facebook, Inc. in California.
14 And I am asking you do you have specific objections
15 to the search warrants?

16 MR. APICELLA: Search warrant for my
17 client's Facebook? Yes.

18 THE COURT: I am listening.

19 MR. APICELLA: May I cross-examine the
20 witness?

21 THE COURT: Well, he hasn't testified
22 on them yet.

23 MR. OSBORNE: Actually I am sorry.
24 Actually we did. I know --

25 THE COURT: It's been a long time ago.

1 MR. OSBORNE: We did actually go
2 through each of the Taliban and the GeezQueez Otf
3 search warrant.

4 THE COURT: Yes, sir. If you want to
5 cross-examine him, but I would like to know what
6 the objections are so I know what to listen for in
7 your cross-examination. Helps me to know what the
8 issues are when I am listening to the testimony.

9 MR. APICELLA: Well, the reasons I
10 stated in my affidavit, Your Honor, is that we
11 don't know how the State first became aware that my
12 client had a Facebook. From what I understand it's
13 hearsay from a witness that has not testified.
14 Then the question is how are they able to access
15 that Facebook page. And I believe the witness said
16 that it was open to the public so he was able to do
17 it. We don't know what computer he used, whether
18 or not in order to get on the Facebook page you
19 have to be a member of the Facebook.

20 So the question is did he do it on his
21 own personal Facebook? Did he do it on law
22 enforcement Facebook?

23 THE COURT: How does that affect the
24 validity of the search warrant?

25 MR. APICELLA: Well, in order to get

1 information to put in the affirmation he had to get
2 -- he had to obtain something that would get a
3 judge to say this is why I want to get on the
4 Facebook page.

5 First of all, he got on the Facebook
6 page. How did he do that? Second of all --

7 THE COURT: Okay.

8 MR. APICELLA: -- physically how did he
9 do it? Is there a government or a Charleston
10 Police investigative Facebook page they use now to
11 access Facebook that indicates whether by doing
12 that they are bypassing the requirement for the
13 warrant.

14 MR. OSBORNE: Detective Krasowski did
15 testify to that, that he has a Facebook account of
16 his own he generated and we also showed the screen
17 shot to -- and Detective Krasowski even explained
18 on the screen shot that it said add friend which
19 meant that he was not a friend to this and he used
20 no security or no police.

21 THE COURT: So whatever he saw from his
22 computer he saw as open to the public.

23 MR. OSBORNE: Open to the public as
24 long as you have a Facebook account which he said
25 that he had generated a false one that he could use

instead of using his own personal one.

MR. APICELLA: Second of all, Your Honor, on the second page of his affidavit related to the issuing magistrate it alleges that my client posted on his Facebook. I believe he did read it, what we contend and I think he conceded are lyrics from a song. And I would like to cross-examine him specifically on this point. I would be brief.

THE COURT: I am still trying to find out if there's a defect in the search warrant that you are alleging and for some reason you can't get to that point. Are you alleging a defect in the search warrant?

MR. APICELLA: I am, Judge, because --

THE COURT: What is that defect? Try to keep it simple.

MR. APICELLA: I will. My allegation is that he believed at this time this was prose that my client wrote that he interprets to mean that he is going to intimidate witnesses, kill them so they won't be able to testify and therefore Facebook -- therefore the judge should grant the search warrant because it's going to get evidence to indicate that.

THE COURT: So you think he mislead the

1 judge.

2 MR. APICELLA: Well, I think that he
3 was under I don't know -- I wouldn't say that,
4 Judge. I think if I asked him he would say at the
5 time I didn't know this was a song. I didn't know
6 it was rap lyrics. I thought he wrote it. So that
7 indicated to me that if he is posting on his
8 Facebook page if there is no witnesses then a
9 co-defendant can't be convicted. It is different
10 than if my client is posting words from a 20
11 million CD that was done in 1992. So it's
12 inaccurate and conveys the wrong impression and
13 indeed, Judge, if we were able to go through all of
14 these posts you will see.

15 THE COURT: Go ahead and cross-examine.

16 CROSS-EXAMINATION

17 BY MR. APICELLA:

18 Q. Detective, when you wrote this search
19 warrant affidavit were you aware that these were
20 lyrics from a rap song?

21 A. I don't know that I was certain of
22 that. It's not uncommon for us to see Facebook
23 posts that cite rap lyrics. I don't know if I made
24 that connection at that point or not.

25 But I have since been -- I know exactly

1 what the lyrics of it.

2 Q. But you had access to the internet, you
3 could have researched it?

4 A. I could have. I just don't know
5 exactly when I became aware that was a lyric.

6 Q. You wrote the affidavit on July 27th?

7 A. Yes.

8 Q. And you had viewed that surveillance
9 video way back when the crime first occurred in
10 March?

11 A. Correct, I viewed that many, many
12 times.

13 Q. And you remember testifying at the
14 preliminary hearing, correct?

15 A. I do. It was some time ago.

16 Q. It was a long time ago. I asked you
17 some questions?

18 A. Yes.

19 Q. And do you remember that you conceded
20 in response to my question that the evidence that
21 supported the charge of my client being an
22 accessory to the crime of murder was what you --
23 what is recorded on video 1 and 2 what Marvin
24 Johnson said?

25 A. Those were two very important factors

1 in that, yes.

2 Q. And the preliminary hearing occurred
3 well after July 27th?

4 A. I think it was after I came back from
5 training, yes.

6 Q. And you also said at the preliminary
7 hearing that the evidence against my client was the
8 same on the day of the preliminary hearing that it
9 was back when you first spoke to Marvin Johnson,
10 correct?

11 A. Correct.

12 Q. And the reason he was not arrested was
13 administrative?

14 A. What do you mean by "administrative"?

15 Q. Well, just tell the Court why he was
16 not -- it took six month to arrest him?

17 MR. OSBORNE: Objection, Your Honor. I
18 don't know --

19 MR. APICELLA: Withdraw.

20 THE COURT: He withdrew it.

21 BY MR. APICELLA:

22 Q. At the preliminary hearing you never
23 testified about him posting this excerpt from the
24 rap song suggesting that he was going to intimidate
25 or prevent witnesses from testifying?

1 MR. OSBORNE: Objection, Your Honor.
2 That's beyond the scope of this hearing.

3 MR. APICELLA: Sustained? Or
4 overruled?

5 THE COURT: Well, the question was?
6 What was the question?

7 MR. APICELLA: The question --

8 THE COURT: I was reading the affidavit
9 at the moment. I wasn't paying very close
10 attention to the question.

11 MR. APICELLA: The question was at the
12 preliminary hearing you never testified about these
13 rap lyrics that were on his Facebook post.

14 THE COURT: I will sustain the
15 objection.

16 BY MR. APICELLA:

17 Q. You had access to his Facebook prior to
18 getting the search warrant obviously?

19 A. To his public profile?

20 Q. Yes.

21 A. Yes.

22 Q. So that means you didn't have to send a
23 friend request to look at it?

24 A. Correct, just what he posted to
25 Facebook.

1 Q. You could look at all of his prior
2 posts?

3 A. I don't know if I can look at all of
4 them. Whatever he made public, yes.

5 Q. How many posts did you look at?

6 A. We had been monitoring Facebook from
7 the start of this investigation and maybe not
8 daily, but fairly routinely.

9 Q. Just briefly about Facebook, at the
10 time two years ago when you opened up a Facebook
11 account, Facebook did not verify the information
12 that you had given?

13 MR. OSBORNE: Objection, beyond the
14 scope.

15 THE COURT: Well, he can state whether
16 he's aware of how that works or not.

17 THE WITNESS: Your question was did
18 they verify who I was?

19 BY MR. APICELLA:

20 Q. Yes, did Facebook verify information
21 with respect to the Facebook user before they
22 opened the account for him or her?

23 A. Well, how you verify there is a field
24 for your information to put in. And it doesn't
25 have to be complete. So you can put in very

1 limited information.

2 Q. And if you get a Facebook account then
3 you have a log in password you use to access that
4 account?

5 A. Correct.

6 Q. If the person not the originator of the
7 Facebook account gives his passwords to someone
8 else or someone else gets that password they can
9 log on to the account, correct?

10 A. If it's given out, yes.

11 Q. Or if the account is hacked and someone
12 gets the password they could get on the account?

13 A. Yes, if it is highjacked, sure.

14 Q. That does happen?

15 A. I'm not sure.

16 Q. And you're aware of how tagging works
17 on Facebook?

18 A. I am.

19 Q. And tagging means that someone not you
20 tags you on their post and now goes on your
21 Facebook page, correct?

22 A. So, yes, just like that post that I
23 captured from the 30th Devin I believe tagged
24 GeezQuez Otf and several others.

25 Q. There is also a Facebook -- potential

1 Facebook posting evidence in this case where
2 someone has tagged my client's identification and
3 that jail video ended up on the Facebook page?

4 A. So I believe that jail video that you
5 are referencing, that was I believe posted by Mini
6 Rat and was tagged on to Taliban's Facebook page at
7 that time.

8 Q. So what happens to your knowledge is
9 that some outside person who is a friend tags you
10 and that post now goes on your Facebook page for
11 everyone who has access to it to see?

12 A. Yes, as far as I know.

13 Q. So the fact that you were tagged by
14 someone else putting something on your Facebook
15 page you can't attribute to the owner of the
16 Facebook page, correct?

17 A. That's why when I constructed the
18 search warrant I was very careful in that this post
19 was generated by that Facebook name and that's why
20 I placed it in there.

21 Q. But the answer to my question is the
22 owner of the Facebook account in which a post are
23 tagged on the account is not responsible for that
24 post being on his or her account?

25 A. Sure, if it's tagged, yes.

1 Q. And how many -- withdrawn. No further
2 questions.

3 THE COURT: Beg your pardon?

4 MR. APICELLA: No further questions.

5 THE COURT: Ms. Van Pala, you wish to
6 cross-examine?

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

8 CROSS-EXAMINATION

9 BY MS. VAN PALA:

10 Q. In order to create a page on Facebook
11 you just need three requirements, correct?

12 A. It's been a while. There's a few. You
13 need an e-mail, I know that for certain.

14 Q. And at the time -- if we can go back to
15 the time of the search warrant, Detective,
16 July 2015, at that time all you needed was to say
17 that you are over the age of 13 and an e-mail
18 address; is that right?

19 A. I can't say for certain, but I wouldn't
20 disagree.

21 Q. So you didn't have to put any other
22 personal information in order -- withdrawn. In
23 order to create a Facebook you don't have to put in
24 your birth date, right?

25 A. I don't believe so.

1 Q. And I apologize. We are talking about
2 back in July of 2015 at time of this search
3 warrant?

4 A. In order to create a Facebook page you
5 don't have to put in your Social Security Number.

6 MR. OSBORNE: Your Honor, renew my
7 objection. The purpose of this hearing is the
8 defective search warrant. We are getting into
9 authorship, identification. I am more than certain
10 we are going to have that argument later.

11 THE COURT: Let's stick to the search
12 warrant issue is where we are right now.

13 MS. VAN PALA: Yes, Judge.

14 BY MS. VAN PALA:

15 Q. Specifically in regard to State's
16 Exhibit 116, which is the search warrant for
17 GeezQueez?

18 MR. OSBORNE: Objection, Your Honor, we
19 are not there. We are on 115.

20 MS. VAN PALA: I stand corrected.
21 Court's indulgence.

22 THE COURT: Yes, ma'am.

23 (Off-the-record conference.)

24 Q. In the search warrant for General
25 Taliban, Exhibit 115, you referenced on June 30,

1 2015, a post, correct?

2 A. I did.

3 Q. And it is included in your search
4 warrant beginning with TNT, correct?

5 A. Yes.

6 Q. And Te'Quan Perry was not the author of
7 that post, right?

8 A. Correct.

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

10 THE COURT: Redirect?

11 REDIRECT EXAMINATION

12 BY MR. OSBORNE:

13 Q. So tag versus generate. Explain that
14 to the judge, the difference between the two.

15 A. So if you are tagged that means someone
16 else is including you on the post that they
17 authored so the person that authored it is the
18 person that is tagging other people to be
19 associated with it so it could appear on their
20 profile page and their name is associated with it.

21 THE COURT: My question would be in
22 viewing someone's Facebook page is it designated or
23 clearly evident as to what posts were tagged on to
24 the page? Can you tell that by looking at the
25 page?

1 THE WITNESS: I believe it is. So I
2 think it shows that you are tagged. That's why it
3 is on your page.

4 THE COURT: Okay. That information
5 would be delineated in some fashion on the page.

6 THE WITNESS: Yes.

7 BY MR. OSBORNE:

8 Q. And the posts that you referenced in
9 your search warrant are generated posts, not tagged
10 posts; is that correct?

11 A. In General Taliban that is a generated
12 post.

13 MR. OSBORNE: Thank you, Your Honor.

14 THE COURT: Any follow-up questions,
15 Mr. Apicella?

16 MR. APICELLA: No, Your Honor.

17 THE COURT: Ma'am, did you wish to
18 follow up?

19 MS. VAN PALA: No thank you.

20 THE COURT: Now, on the issue of
21 suppressing the search warrant I will hear from
22 you, Mr. Apicella.

23 MR. APICELLA: Well, Your Honor,
24 looking at the affidavit submitted by Detective
25 Krasowski at page 2.

1 THE COURT: What date?

2 MR. APICELLA: Look at page 2 of the
3 affidavit.

4 THE COURT: I'm there.

5 MR. APICELLA: The fourth paragraph.
6 Again, the detective says that several witnesses
7 stated they were play fighting. Then goes on to
8 say that the victim's mother heard that the play
9 fighting purpose was to have contact with Brandon
10 to see if he was armed. So he had a double
11 hearsay, no reference of where Ms. Mitchell heard
12 that from and whether those people were reliable,
13 had given reliable information in the past. No
14 allegation that Ms. Mitchell was reliable, had
15 given reliable information in the past. And then
16 the conclusion of the affiant, Detective Krasowski,
17 of what it appeared to him was on the page. Then
18 he used -- he came to a legal conclusion that
19 everyone within acted in concert in his opinion.

20 And then additionally it was learned
21 the statements from Brandon's friends that Brandon
22 believed that Lefty and Duke intended to kill him.
23 We don't know who Brandon's friends are who related
24 that information to the detective. And there's no
25 allegation these people were reliable.

1 THE COURT: That is what I wanted to
2 know when we started this. Exactly what you're
3 objecting to in the search warrant. I asked that
4 about three or four times. You never told me this.

5 MR. APICELLA: Yes, Your Honor.

6 THE COURT: I want you to be responsive
7 to my questions. I asked them for a purpose. I
8 say I want you to be responsive to my questions. I
9 ask them for a purpose.

10 MR. APICELLA: I realize that. I am
11 telling you what my objections are to the --

12 THE COURT: I asked that at the
13 beginning of this hearing and you didn't tell me
14 this. So I am now being told the specific
15 objections after I have heard the testimony and the
16 reason I asked at the beginning what the specific
17 objections were so I can be listening to that. And
18 I finally gave up. I asked you three times. I am
19 pointing out you had specific objections, you just
20 wouldn't tell me.

21 MR. APICELLA: That's correct. I could
22 not because they were in my affirmations.

23 THE COURT: If that kind of behavior
24 continues you are going to have a problem with the
25 Court.

1 MR. APICELLA: Yes, Your Honor.

2 THE COURT: You may proceed.

3 MR. APICELLA: Thank you. My specific
4 allegations are that doesn't meet the standard of
5 showing -- level of showing probable cause by
6 witnesses who are reliable. It relates hearsay
7 from unknown people with no support as to their
8 accuracy, therefore the affidavit does not meet the
9 requirement that it shows probable cause, the
10 magistrate shouldn't have accepted it.

11 THE COURT: Let me if ask there is any
12 specific objections from Ms. Van Pala.

13 MS. VAN PALA: My only objection is my
14 pretrial objection under Crawford that the ruling
15 applicable to the evidence against Devin not be
16 imputed to Te'Quan. Renew my objection.

17 THE COURT: I understand that's a
18 continuing objection.

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

20 MR. OSBORNE: So that is the one issue
21 with this search warrant. We have addressed this
22 before. And it's on attachment A of the affidavit.
23 The line that says the victim's mother Peg Mitchum
24 heard the play fighting purpose was to have contact
25 with Brandon to see if he was armed. That line

1 right there should be stricken. And we would
2 contend that case law is pretty good on this to say
3 that you can now strike that line, read the rest of
4 the warrant as if that line weren't there and I
5 think if we do that there is plenty of probable
6 here.

7 What Mr. Apicella is referring to we
8 covered. I stopped after every line and said what
9 witness told you this. Mr. Apicella would -- I
10 assume he is arguing to a new standard that
11 requires Detective Krasowski to name every
12 individual in the warrant. There's no requirement
13 that says that. What he says is witnesses. I
14 searched to find cause law that said that you have
15 to name the witnesses. Doesn't say that. They are
16 named witnesses. In fact, the presumption is that
17 they are named witnesses. There's case law that
18 supports that. They are given more credibility
19 than a confidential informant which is what he is
20 saying. There are no confidential informants in
21 this case.

22 THE COURT: Anything further on the
23 issue?

24 MR. APICELLA: No, Your Honor.

25 THE COURT: I will strike the line that

1 victim's mother Peggy Mitchum heard. That line
2 should be taken out and the search warrant will be
3 upheld. I deny the motion.

4 MR. OSBORNE: Your Honor, now we are
5 moving to 16, the search warrant, which I believe
6 is far similar verbiage GeezQuez Otf and we have
7 already heard testimony on that.

8 THE COURT: Ms. Van Pala, this is
9 involving your client so specific objection to the
10 affidavit to the search warrant.

11 MS. VAN PALA: May I cross him in
12 regards --

13 THE COURT: You can tell me what your
14 specific objections are to the search warrant so
15 that I know what I am listening for. I want to
16 know what your issues are so I can analyze whether
17 or not the evidence you elicit supports that or
18 not. So it is difficult for me to know what you're
19 trying to support if I don't know what your
20 position is.

21 MS. VAN PALA: Yes, Your Honor.

22 THE COURT: It is not -- I have been
23 doing this for a long time. I want attorneys to
24 tell me what the issues are I am looking at before
25 we start talking about them.

1 MS. VAN PALA: I apologize. My
2 specific objections to the probable cause of the
3 search warrant. The search warrant is based on the
4 detective's assertion that the GeezQuez Otf
5 Facebook is attributed to my client because they
6 share the same date of birth. The date of birth
7 that is in the search warrant is [REDACTED]-93. That is
8 what the detective affirmed in his application for
9 the search warrant. That was the date of birth
10 appearing on the page for GeezQuez Otf and he said
11 that that is Te'Quan Perry's real birthday.
12 Te'Quan birthday is [REDACTED]94, not '93.

13 An additional ground is that the
14 affidavit is based on probable cause based on a
15 post on the General Taliban Facebook page on
16 June 30th, 2015, which is after Te'Quan had been
17 arrested and was not authored by him as the
18 detective just testified. The conspiracy has as a
19 matter of law ended at that point. The detective
20 had no legal basis for applying for a search
21 warrant based on the argument that there was a
22 conspiracy because my client had been in jail. And
23 he also used somebody else's Facebook altogether to
24 apply for a search warrant for this -- for this
25 particular search warrant, State's 116.

1 Case law states that the law
2 enforcement standard procedure should be applying
3 for a search warrant to Facebook for the IP address
4 that is associated with the account. At that point
5 the detective would get that information from
6 Facebook, which is public record. There's no
7 reasonable expectation of privacy to an IP address.
8 At that point the detective would take the IP
9 address, put in -- search for it on the internet.
10 There's a uniform data base for searching for an IP
11 address. The IP address would then take him to the
12 provider of the device that posted this
13 information. And from there he could subpoena the
14 provider or get another search warrant from the
15 provider and then the provider would be able to
16 give the detective the name --

17 THE COURT: Ma'am, are we arguing
18 defect in the search warrant?

19 MS. VAN PALA: Yes.

20 THE COURT: Go ahead.

21 MS. VAN PALA: I will wrap it up,
22 Judge. I can give argument at the appropriate
23 time. If the detective did follow that procedure
24 which is clear in case law from South Carolina and
25 the Fourth Circuit, then he would have accurate

1 information, personal identifying data about who --

2 THE COURT: All right. Help me with
3 what case you are talking about in South Carolina.

4 MS. VAN PALA: I e-mailed the cases a
5 couple days ago.

6 THE COURT: Yes, ma'am, you did. I
7 have looked at all those cases.

8 MS. VAN PALA: I have copies for
9 everyone.

10 THE COURT: What I have got is a
11 Westlaw search of all cases in South Carolina that
12 mention the word Facebook. If you will give me the
13 name of that case I won't have to open up my
14 e-mails to find that name. You can just tell me
15 and I can get it right here. So to answer my
16 question, what case are you referring to?

17 MS. VAN PALA: Hasson, Fourth Circuit
18 case, H-A-S-S-O-N.

19 THE COURT: What date was that decided?
20 You have that in front you?

21 MS. VAN PALA: Fourth Circuit, 2014.

22 THE COURT: That's Fourth Circuit. I
23 asked for South Carolina.

24 MS. VAN PALA: Whatley.

25 THE COURT: That was decided when?

1 MS. VAN PALA: Court's indulgence.

2 THE COURT: Yes, ma'am. Did you say
3 Whatley?

4 MS. VAN PALA: Yes. That's a 2007
5 case. Excuse me. I apologize, Judge. That's a
6 district court case. That's not what you asked
7 for.

8 THE COURT: No, it is not.

9 MS. VAN PALA: Court's indulgence.
10 State v. Land, 2016. State v. Odom, 2009.

11 THE COURT: These have to do with
12 Facebook?

13 MS. VAN PALA: These are not the
14 Facebook cases. These are the cases that support
15 my argument. The Facebook page are -- I apologize,
16 Judge. Sovers, 2013, S-O-V-E-R-S.

17 THE COURT: I found that one. You say
18 Sovers?

19 MS. VAN PALA: Yes, Your Honor.

20 THE COURT: Has to do with the
21 procedure that you have to follow to obtain a
22 search warrant.

23 MS. VAN PALA: No, Sovers cites
24 Facebook.

25 THE COURT: Well, it does. In fact, it

1 I think the evidence was allowed in and the judge
2 was upheld from what I have seen so far.

3 MS. VAN PALA: In Sovers, Judge?

4 THE COURT: I am reading the holding.
5 The trial court did not abuse its discretion in
6 finding evidence suggestive of gang association to
7 the murder victim and the witness was not relevant.

8 MS. VAN PALA: Yes, Your Honor. I
9 apologize. That Facebook was not allowed in. And
10 a big part of my argument here, there's a dearth of
11 authority on Facebook itself in South Carolina.

12 MR. OSBORNE: Your Honor, I actually
13 read Sovers this morning. Sovers is a situation
14 where the defense wanted to bring in gang activity
15 of the victim and the victim's witness and that's
16 what was trying to happen in the case. And the
17 trial judge said it is not relevant.

18 THE COURT: Derham Cole, an associate
19 of mine.

20 MR. OSBORNE: That was upheld. So it
21 is a different situation altogether. Talking about
22 a witness, talking about Defendant's gang
23 activities.

24 THE COURT: But we're -- you are
25 arguing to me, Ms. Van Pala, there is somewhere

1 spelled out a procedure that you have to follow to
2 get a search warrant for Facebook information. You
3 said that was spelled out in South Carolina cases,
4 so I haven't located any South Carolina cases. I'm
5 going to look at the others in just a minute to see
6 what they say, but I haven't seen one that spells
7 out the procedure that an officer has to follow in
8 order to get a valid search warrant for Facebook
9 information.

10 MS. VAN PALA: No.

11 THE COURT: Okay. Now, is there one in
12 the federal system?

13 MS. VAN PALA: Yes, Your Honor.

14 THE COURT: I am receptive to that.

15 MR. CORVEY: Your Honor, if I may help,
16 I printed it in advance. I would be happy offer.

17 THE COURT: Which case was that?

18 MR. CORVEY: The Hasson case Ms. Van
19 Pala cited. She is saying that it stands for the
20 proposition that you need to go through the process
21 and identify an internet protocol. I don't think
22 that's what the case said at all. In fact, it was
23 the Facebook records in this case were
24 authenticated via I believe it's 902 11 which is
25 the federal rule that almost corresponds with the

1 statute which we authenticated in this case. They
2 were then ruled admissible and properly
3 authenticated because the detectives in that case
4 were able to tie those Facebook records to both the
5 Defendant's e-mail addresses and IP addresses.
6 That was merely the vehicle that they used to
7 authenticate them, not the steps they took to
8 unveil the record as it may pertain to the search
9 warrant. That certainly is a valid basis for
10 authenticating the records as belonging to the
11 Defendants. It by no means is the only basis for
12 doing so. But as it pertains to the warrant,
13 there's nothing in the Hasson case that I reviewed
14 reading the case that would suggest that's the step
15 that an officer must take in order to obtain
16 records from Facebook or similarly situated
17 records.

18 MS. VAN PALA: Your Honor, as I stated
19 before, there is not a case in South Carolina
20 that's directly on point as to a probable cause for
21 a search warrant for Facebook records. So my
22 argument is to expand our search terms to other
23 types of electronic communications social media.

24 THE COURT: Aren't we dealing with the
25 search warrant?

1 MS. VAN PALA: Yes, Judge. My argument
2 is that because South Carolina doesn't have any
3 case on point that says -- that answers the
4 question of what is probable cause for a search
5 warrant for Facebook, I am looking at what we have
6 in South Carolina and in the Fourth Circuit for
7 other types of electronic information. Like Gmail
8 accounts, My Space, other kinds of internet
9 communications. And I think --

10 MR. CORVEY: Your Honor, if I may
11 respond. The validity of the search warrant deals
12 with probable cause, not authenticating the
13 records. We are only talking about probable cause.

14 THE COURT: That's the only requirement
15 I have seen, it has to be based on the information.

16 MR. CORVEY: There is no case that
17 suggests otherwise.

18 MS. VAN PALA: My argument is that we
19 will not meet the probable cause in this case
20 because the officer -- the information included in
21 the affidavit doesn't -- isn't reliable, there's no
22 way to verify it and it's basically false and
23 misleading.

24 THE COURT: You can make that argument.
25 Do you want to question him on this?

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

3 BY MS. VAN PALA:

4 Q. Detective, as to State's 116 which is
5 the search warrant for -- which is the search
6 warrant for GeezQuez Otf, you don't know that
7 GeezQuez Otf is Te'Quan Perry, right?

8 A. No, I do.

9 Q. You don't know that General Taliban is
10 Devin Middleton, correct?

11 A. I believe I do.

12 Q. All right. You swore out the warrant
13 on July 25th, 2015?

14 A. Yes.

15 Q. And in your affidavit you referenced
16 the only Facebook post that you referenced is a
17 post from June 30th, 2015, correct?

18 A. Yes.

19 Q. And that was a post that appears on the
20 General Taliban Facebook page?

21 A. That's where that was generated from,
22 yes.

23 Q. And you just testified that that was
24 not authored by Te'Quan Perry, correct?

25 A. That's correct.

1 Q. And on June 30th, 2015, when that post
2 was posted to General Taliban's Facebook page,
3 Te'Quan Perry was in jail, correct?

4 A. Correct.

5 Q. Te'Quan Perry was arrested in this case
6 on March 26th, 2015, correct?

7 A. Yes, ma'am.

8 Q. You testified earlier that the way you
9 accessed the General Taliban and the GeezQueez
10 Facebook pages was by creating a fake account,
11 right?

12 A. Yes. Well, we had an account created
13 already, that's how I viewed them, through that
14 account.

15 Q. And you created that account by using a
16 fake birthday, correct?

17 A. So I wasn't a creator of that. I use
18 it in the office, but I don't know if you need to
19 add a date of birth or not.

20 Q. But that sounds about right that at
21 that time in March 2015 you can create a fake
22 account with a fake birthday, right?

23 A. Sure. I suppose you can add what birth
24 date you want in there.

25 Q. Well, the solicitor asked you earlier

1 about -- or excuse me -- I think Mr. Apicella asked
2 you earlier about what the standards were at that
3 time -- or excuse me -- the procedures were at that
4 time for creating a Facebook, right?

5 MR. OSBORNE: Objection. Beyond the
6 scope.

7 MS. VAN PALA: This question was asked
8 of the detective either during direct or cross.

9 MR. OSBORNE: Pretty sure I objected to
10 it then as well.

11 THE COURT: He did. Sustained.
12 BY MS. VAN PALA:

13 Q. Court's indulgence. So you don't know
14 what e-mail address was used to generate that fake
15 account, right?

16 A. It's listed in the search warrant
17 information that was obtained in the Facebook
18 information that was obtained. You wouldn't know
19 that -- I don't believe you would know that
20 necessarily from just viewing Facebook in a public
21 setting.

22 Q. And you testified earlier that you
23 copied and pasted the URL from the internet
24 browser, correct?

25 A. Yes.

1 Q. And you used that to identify the
2 Facebook page?

3 A. That is what is required for Facebook
4 to complete a search warrant request. That's in
5 the first two pages. There's the box to place that
6 in.

7 Q. And you didn't provide an IP address to
8 Facebook, correct?

9 A. Well, an IP address is obtained when a
10 search warrant is completed and Facebook records
11 are provided and pursuant to that warrant. You
12 would not know an IP address until you obtain the
13 records from Facebook.

14 Q. And in the search warrant you stated
15 that date of birth associated with the GeezQuez Otf
16 page was [REDACTED] 93, right?

17 MR. OSBORNE: Objection. Asked and
18 answered. We covered this.

19 Q. And Te'Quan Perry's birthday is
20 [REDACTED] 1994?

21 A. The year is off by one, yes.

22 Q. So back to the tagging, you can tag
23 someone's page and they'd never know about it,
24 correct?

25 A. If they never access the Facebook

1 account, yes, they wouldn't.

2 Q. In fact, there are robot accounts that
3 tag pages, correct?

4 MR. OSBORNE: Objection. Beyond the
5 scope.

6 MS. VAN PALA: He testified that he has
7 personal knowledge of Facebook accounts and his
8 prior testimony up until now would suggest that he
9 is familiar with the tagging we have explored.

10 THE COURT: The objection is whether
11 it's within the scope of the hearing we are having.

12 MR. OSBORNE: Yes, Your Honor.

13 THE COURT: The hearing has to do with
14 the validity of the probable cause of the search
15 warrant.

16 MS. VAN PALA: Yes, Judge.

17 THE COURT: I'm not sure how that
18 relates to the probable cause of the search
19 warrant.

20 MS. VAN PALA: As part of the probable
21 cause is that a Facebook post on General Taliban
22 may have tagged this GeezQueez Otf.

23 THE COURT: His testimony previously
24 has been that they only used information that was
25 not tagged. He already testified to that.

1 MS. VAN PALA: I will move on.

2 BY MS. VAN PALA:

3 Q. When people post on their Facebook
4 accounts they can post pictures of who they want,
5 correct?

6 A. Yes.

7 Q. Without that person's consent, correct?

8 A. Well, that's a privacy setting so you
9 could prevent -- you could lock down a Facebook
10 account to prevent anybody from tagging you at all.
11 And there's a variety of different things you can
12 do. You can say allow only friends to tag you and
13 it's okay. Or you could be notified for each
14 individual tag and you can click yes I want to be
15 tagged or no. So it would depend on his settings.

16 Q. You testified earlier that you
17 generated a fake account so anybody could register
18 as Paul Krasowski as Facebook, correct?

19 A. I suppose so, yes.

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

21 THE COURT: Anything further on this
22 for the witness? I will take argument.

23 MS. VAN PALA: Thanks, Judge. The
24 detective just testified that he used a fake
25 account to access a Facebook account as part of his

1 probable cause. He has basically just said that he
2 used a fake account to get information from a fake
3 account.

4 THE COURT: What?

5 MS. VAN PALA: He generated a false
6 account that is proof that the Facebook records in
7 this case can be product of a false account. And
8 the detective is saying that that is probable cause
9 for a search warrant. He said that he testified
10 generally how tagging works.

11 THE COURT: Let me ask you if it's a
12 fact that -- I don't know, I don't have a Facebook
13 account. I don't know exactly how it works, but my
14 wife uses it all the time. So I think I have got
15 some knowledge of how that works. But if it were a
16 reason to suppress search warrants that people can
17 create fake accounts and Facebook, how would you
18 ever get any search warrant for any Facebook
19 account? Help me with that.

20 MS. VAN PALA: Court's indulgence. I
21 think, Judge, that the officer could have used the
22 information.

23 THE COURT: Well, I guess what I am
24 saying is if a piece of evidence or source of
25 evidence can be corrupted in some fashion, that's

1 the reason why you can't get a search warrant for
2 any of that information, I just don't think that's
3 the law.

4 MS. VAN PALA: Well, my argument is
5 that the law enforcement can use the information
6 that's on the page they are seeking to get the
7 records for. In this case they wanted to get the
8 records for GeezQuez Otf. They used the records
9 that were on the page of General Taliban with no
10 way to connect them other than some kind of picture
11 for some anonymous reference that cannot in any way
12 be tied back to GeezQuez Otf or Te'Quan Perry.

13 And, in fact, in this case I would
14 submit that it is not just a loose connection,
15 maybe they could prove a loose connection, but the
16 birth date is incorrect which would suggest that it
17 is different people.

18 THE COURT: The year is one year off,
19 but the date is the same.

20 MS. VAN PALA: Right. And the date on
21 GeezQuez Otf was 1993. Te'Quan Perry's birth date
22 is 1994.

23 THE COURT: One year off.

24 MS. VAN PALA: Right. Which I am
25 arguing that means they are different people.

1 MR. OSBORNE: Your Honor, that wasn't
2 the only evidence. You have heard all the
3 testimony.

4 THE COURT: Let's be sure she was
5 finished.

6 MR. OSBORNE: Okay.

7 MS. VAN PALA: Further, Judge, the one
8 post from General Taliban that is cited in the
9 search was from June 30th, 2015, which is months
10 after Te'Quan Perry was arrested. As a matter of
11 law, the conspiracy had ended. There's no legal
12 basis to say there was an ongoing conspiracy and I
13 haven't heard any testimony that would shore up the
14 conspiracy.

15 THE COURT: Does that go to the
16 validity of the search warrant?

17 MS. VAN PALA: I think because it's --
18 as a matter of law that's not the correct legal
19 principle. As a matter of law the conspiracy has
20 ended by the time that Detective Krasowski has
21 applied for the search warrant.

22 Would just reaffirm that there is no
23 other personal identifying information that is
24 accurately connected to Te'Quan Perry. None
25 whatsoever besides a moniker and a picture and the

1 detective testified that the picture could be
2 posted by somebody without that person's consent.
3 That's it. That's all there is in the search
4 warrant. That's not probable cause.

5 THE COURT: Sir, you wish to be heard?

6 MR. APICELLA: No.

7 THE COURT: I will hear from the State.

8 MR. OSBORNE: The probable cause
9 determination has already occurred. The magistrate
10 has already reviewed a search warrant and found
11 there to be probable cause. The one issue that she
12 brings up, this is different from Mr. Apicella's
13 assertion, is the date of birth. [REDACTED] 93. It's a
14 scrivener's error. Off a year. Probable cause has
15 already been determined. That's a scrivener's
16 error. She didn't even mention the rumors and
17 hearsay. I imagine she might mention it once I sit
18 down, but other than that the search warrant is
19 valid.

20 THE COURT: Ma'am, is this something
21 new?

22 MS. VAN PALA: I don't think that's
23 correct, Judge. I believe that the birth date that
24 was posted on the GeezQuez Otf page is 1993. And
25 there's no way to know what it is. I tried to look

1 for it. It's gone. So there's no way to know
2 whether it's a scrivener's error because sure, if
3 was it one day off we have got no reason to believe
4 why it wasn't just human error, but we submit that
5 that was the date of birth on Facebook page which
6 would indicate that that is not Te'Quan Perry
7 because that's a different birth date. No other
8 personal identifying information. Thank you.

9 THE COURT: Anything further?

10 MR. OSBORNE: No, Your Honor.

11 THE COURT: All right. I'm going to
12 find that there is sufficient information to uphold
13 the search warrant. Motion is denied. We are
14 going to break for lunch at this time. We will
15 resume at 2:00.

16 (A luncheon recess transpired.)

17 THE COURT: State ready to proceed?

18 MR. OSBORNE: We are.

19 THE COURT: Defense ready?

20 MR. APICELLA: Yes, Your Honor.

21 THE COURT: Okay. I will get you to
22 acknowledge you are still under oath.

23 THE WITNESS: Yes, Your Honor.

24 THE COURT: Thank you.

25 MR. OSBORNE: Your Honor, just for

1 housekeeping purposes, I do want to point out that
2 what we would -- the way we would prefer to move
3 forward and, in fact, the only way we can move
4 forward with it and satisfy 901(b)(4) is to have
5 you hear all of the evidence. Because what we're
6 contending is that there's an internal pattern, a
7 consistency that allows you to make a determination
8 that it is from a single author. So we would ask
9 that we run through all of the exhibits for
10 GeezQuez Otf, then have those arguments.

11 THE COURT: All right. That will be
12 fine. You may proceed.

13 MR. OSBORNE: Thank you, Your Honor.

14 DIRECT EXAMINATION

15 BY MR. OSBORNE:

16 Q. So we left off where you had completed
17 the search warrant for GeezQuez Otf?

18 A. That's correct.

19 Q. And you submitted that search warrant
20 to Facebook; is that correct?

21 A. Yes.

22 Q. And then you ended up getting back some
23 records?

24 A. I did.

25 Q. And GeezQuez Otf, you also did the same

1 for General Taliban?

2 A. I did.

3 Q. And so GeezQuez Otf, is it fair to say
4 that those records were not as extensive as General
5 Taliban records?

6 A. Yes, by means of a couple of thousand
7 pages.

8 Q. Your Honor, may I approach?

9 THE COURT: Yes.

10 Q. I am showing you what's been marked as
11 State's Exhibit 167. Do you recognize that?

12 A. Yes. So this is the first page of the
13 Facebook business records for the Facebook profile
14 of Otf or GeezQuez Otf.

15 Q. Okay. So let's see, just look at
16 information that appears on this page. First thing
17 we see is really the most important piece of
18 evidence on this page, is the target number. You
19 don't have to read the whole number, but the last
20 five digits, 45167?

21 A. Yes.

22 Q. Now, that number, is that the number
23 that's going to be associated with Quez Otf?

24 A. It is.

25 Q. Now, I see first name there is Otf?

1 A. Yep.

2 Q. Last being GeezQueez?

3 A. Yes.

4 Q. We see registered to without going
5 through all those numbers we see 4516 Facebook.com?

6 A. That's correct.

7 Q. What's the date this account was
8 registered?

9 A. This account was registered on 9-16 of
10 2014.

11 Q. Okay. Not quite a year from the date
12 of the murder?

13 A. Yes, just shy of a year.

14 Q. And the current city being?

15 A. New Orleans, Louisiana.

16 Q. Okay. These are just going to be for
17 authentication purposes, we don't intend on
18 introducing this during the trial unless it becomes
19 necessary. Showing you State's 170. Do you
20 recognize this?

21 A. I do.

22 Q. What is that?

23 A. That's a picture of Te'Quan Perry.

24 Q. And was that a document that was
25 included in the record?

1 A. It was.

2 Q. Now, there was some talk earlier about
3 the difference between who generated the post and
4 who tagged the post. From that page here can you
5 tell me who generated this post based on the user
6 ID number?

7 A. Yes. You have to look down -- who
8 generated the post you have to look down to that
9 link line right there where it starts off with the
10 HTML verbiage. And so if you go through that
11 you'll see here near the end of it just before type
12 equals one, you see that same profile of 45167.

13 Q. 45167 again. What is this titled?

14 A. The title is Coolin, how I be coolin.
15 If you don't like me I got two words.

16 Q. Okay. So Coolin, how I be coolin, if
17 you don't like me I got two words. Is the verbiage
18 that the poster associated with that picture?

19 A. Yes.

20 Q. Two words, correct?

21 A. Excuse me?

22 Q. He said two words, he has got two
23 words?

24 A. Yes.

25 Q. Okay. This is another one we wouldn't

1 intend to use during the trial, just for ID
2 purposes. Do you recognize this photo?

3 A. I do. That's Te'Quan Perry.

4 Q. Before I forget, sorry, what was the
5 date that that photo on the previous exhibit, what
6 date was that posted?

7 A. So the one we just spoke about was from
8 3-16 of 2015.

9 Q. Okay. Prior to Mr. Perry's arrest.

10 A. Yes.

11 Q. Back to State's 168. Who posted this
12 photograph?

13 A. So again you look back through the link
14 line there, HTML language, you go near the end you
15 see it's under 45167. That's Te'Quan Perry's
16 account information.

17 Q. The date of that post?

18 A. The date of this post is from
19 3-18-2015.

20 Q. Okay. Again, before Mr. Perry was
21 arrested?

22 A. Yes, sir.

23 Q. Okay. I'm showing you what's been
24 marked as State's Exhibit 97.

25 MS. VAN PALA: Your Honor, I object. I

1 believe the testimony that has just been elicited
2 from Detective Krasowski specifically in regards to
3 the link number, I think he's testified as an
4 expert outside of his personal knowledge and
5 perception as a lay witness and homicide detective.

6 THE COURT: As to what?

7 MS. VAN PALA: As to the Facebook link
8 number that was the subject for 168 and 170.

9 MR. OSBORNE: It's repeating what's on
10 the documentation.

11 THE COURT: He's just reading what is
12 on the document, ma'am.

13 MS. VAN PALA: He is offering a
14 interpretation or an opinion that the link number
15 associated with the photograph means that it shed
16 some light on who generated the photo versus who
17 tagged the photo and he is giving his -- explaining
18 that the link number on one of the pictures
19 corresponds with the link number associated with
20 GeezQuez, therefore he generated it. That's his
21 testimony. Which implies there is some specialized
22 knowledge to draw that conclusion.

23 THE COURT: I haven't heard him mention
24 anybody's name in relationship to who posted
25 anything so far.

1 MS. VAN PALA: I think he testified
2 that the --

3 THE COURT: He said that was the number
4 link to a website.

5 MR. OSBORNE: Your Honor, I can clarify
6 this right here. If Ms. Van Pala will recall, this
7 is to the search warrant which also corresponds to
8 the user of 45617.

9 THE COURT: That's a user number in
10 effect.

11 MR. OSBORNE: That's correct.

12 MS. VAN PALA: I see that, but what I
13 think he is doing is opining about what that really
14 means. He is not an expert on Facebook.

15 THE COURT: I haven't heard him give an
16 opinion in my opinion at this point in time. He's
17 stating the user number that's associated with a
18 website and certain postings, am I correct?

19 THE WITNESS: Correct, Your Honor.

20 MS. VAN PALA: Judge, I think he's
21 drawing a conclusion between who generated and who
22 tagged so he is going to -- I believe probably
23 going to start concluding this --

24 THE COURT: I don't handle anticipatory
25 objections so overruled.

1 BY MR. OSBORNE:

2 Q. So we are back to State's No. 97.
3 Let's talk a second whether you recognize the
4 individual in 97?

5 A. I do.

6 Q. And who is that?

7 A. Te'Quan Perry.

8 Q. Okay. Let me ask you something before
9 we talk about that. What is the date of this post?

10 A. It is 3-17 of 2015.

11 Q. And, Your Honor, I took some liberties
12 and redacted some of the information below that.
13 Defense has copies of this so we want to present
14 the information. Who posted this?

15 A. So again referring back to the link
16 line, if you go to the second line of that HTML
17 verbiage you see 45167.

18 Q. Okay. And what is the title?

19 A. Trill N Tuesday real N, then (Left).

20 Q. Again we are back to the nickname of
21 Left?

22 A. That's correct.

23 Q. So let's talk about the relevance of
24 this particular photograph. When you interviewed
25 Te'Quan Perry just I guess about nine days after

1 this post, what type of clothing did he say that he
2 was wearing when he got out of the cab, walked down
3 Bogard, walked down Norman, then walked down
4 Allway, then went to McDonald's?

5 A. He referred to it as spray paint
6 clothing.

7 Q. I think he said spray paint shirt and
8 spray paint pants?

9 A. Yes.

10 Q. Did you see anyone on the surveillance
11 video from any of the city, McDonald's, anyone
12 wearing spray paint shirt and spray paint pants?

13 A. Nothing resembling this whatsoever from
14 my viewing of the video.

15 Q. How about anyone? Could you see anyone
16 wearing spray paint shirt, spray paint pants?

17 A. I did not see anybody wearing something
18 like this.

19 Q. And I believe that Mr. Perry also said
20 that he spoke to Devin on that day; is that
21 correct?

22 A. He did say that.

23 Q. Did you see anyone wearing clothing
24 similar to this speaking to Devin on that day?

25 A. I did not.

1 Q. Now, showing you State's Exhibit 123,
2 do you recognize the individual?

3 A. It's Te'Quan Perry.

4 Q. Referring back to the link line, who
5 posted this?

6 A. So the link line, the second line you
7 see near the end, you see again that ID number is
8 45167.

9 Q. What is the title of this post?

10 A. In da chum coolin.

11 Q. I want to reference your attention down
12 to some of the responses. The first one there from
13 Kimmy. Says what?

14 A. Hey, Lefty.

15 Q. Let's keep going down. Who appears
16 there? What does Brandon Washington say?

17 A. I still got you little bro.

18 Q. After that?

19 A. 100.

20 Q. Does Te'Quan Perry respond to that?

21 A. He does not.

22 Q. What's the date on Brandon's post?

23 A. 3-18-2015.

24 Q. Five days before he was murdered?

25 A. Yes. I was just going to point out so

1 what you see here are when somebody makes a post
2 you see a response that goes underneath of it. And
3 so you saw here that Kimmy says hey Lefty, then you
4 see GeezQuez Otf; that 45167 response to that
5 comment. And he says sup which cha?

6 Q. Now, he says in da chum cooling. Do
7 you know where that photograph is taken?

8 A. It appears that it could be from Athens
9 Court. I'm not 100 percent certain, but it looks
10 like it may be right around there.

11 Q. What street does Athens Court run off
12 of?

13 A. Romney Street.

14 Q. All right. Now we are going to go into
15 some of the messages. Oh. Let me ask you one
16 other question about these posts that we just
17 looked at. When an individual posts on these
18 accounts, if you know, can anyone respond back and
19 post back on these communications here, or do you
20 have to be friends with them, if you know?

21 A. Anybody can -- like I could comment on
22 that if I wanted to and we are not friends from my
23 understanding.

24 Q. So this post right here and the
25 associated comments below it are open to the public

1 for anyone to see?

2 A. Typically, yes.

3 Q. Okay. Moving to State's 124. I have
4 marked out the parts there that weren't relevant to
5 this discussion. All right. Now, the date on this
6 is March the 26th and it says UTC time of 0243. Do
7 you happen to know how far back UTC time is?

8 A. It's either four hours or five hours
9 depending on Daylight Savings Time.

10 Q. So we will go backwards. So the author
11 here is Imperfection Jasmine. And then we got
12 GeezQuez responding back LOL?

13 A. Yes.

14 Q. We got I know what I am confident you
15 see me call you later or something like that?

16 A. You are zoomed in so I didn't see the
17 last one.

18 Q. Sorry.

19 A. There you go.

20 Q. Keep going backwards here. Now, there
21 is some communication on here about the first entry
22 right there where he says -- what does he say on
23 the first entry at the very top?

24 A. Well, the first -- if you look at the
25 author line you can see GeezQuez Otf, then his

1 identification number. He said I don't have a
2 phone any more. New one come in AM on my mother
3 one.

4 Q. Just to make sure we understand, this
5 is March 26th. This is like if we take a few hours
6 off, that brings us March to 25th?

7 A. This is late hours of the 25th if you
8 do that subtraction.

9 Q. He's arrested on March the 26th like
10 about 7:00 p.m., something like that?

11 A. Yes.

12 Q. It would have been several hours after
13 all these posts?

14 A. Yes, sir.

15 Q. So we continue on backwards. So why is
16 that relevant that GeezQuez Otf is saying that he
17 doesn't have a phone?

18 A. Because in his interview that he gave
19 to us on the 26th he said that he didn't have a
20 phone and he was waiting on his new one.

21 Q. We don't have to go back, but did you
22 notice a drop off in the usage of the call detail
23 records from [REDACTED]?

24 A. I did.

25 Q. More conversation. I think she said

1 something like you keeping the same number. More
2 conversation about the number of minutes on the
3 phone. Now we talked about this before on March
4 the 27th. We have a GeezQuez post here. What does
5 this post say again?

6 A. This one is authored by GeezQuez Otf
7 and it says my brother say put some minutes on your
8 phone and what's your number.

9 Q. Okay. Let's look at this a little bit.
10 So you said that GeezQuez would have been arrested
11 around March the 26th about 7:00 p.m. or something
12 like that. So we are taking a few hours off; is
13 that correct?

14 A. Yes.

15 Q. Taking about four hours off of it so we
16 have this time right here at 2200. So we take some
17 hours off. What does that bring us down to?

18 A. Well, are you talking about 2200 or --

19 Q. 2200?

20 A. So if you minus four hours, that's
21 going to bring you back to 8:00 p.m.

22 Q. And --

23 A. If it's four hours.

24 Q. 1800, right?

25 A. Well, four hours from ten would be

1 eight.

2 Q. Four hours from ten would be six?

3 A. Excuse me.

4 Q. Which would be before he was arrested,
5 before Te'Quan Perry was arrested?

6 A. Yes. I was looking at it as 10:00,
7 2200 hours.

8 Q. All right. And now, after that we have
9 a post from Jasmine and then we have this post that
10 would have been made saying my brother said put
11 some minutes on the phone. That post was made
12 after Te'Quan Perry or Left spoke to the
13 individual. We have heard that jail call?

14 A. Yes.

15 Q. He told him tell Imperfection Jasmine
16 to put some minutes on the phone?

17 A. It's verbatim.

18 Q. So at this point Te'Quan Perry would
19 have been in jail. So let's see if we see any
20 posts after that. So this is a post from
21 Imperfection Jasmine. That would have been when he
22 was in jail. She said it's already there and she
23 leaves a phone number.

24 A. Yes.

25 Q. Now we have a response to that being

1 all right.

2 A. Yes, sir.

3 Q. And then we have tell him to call me
4 ASAP, then we have another response, all right.

5 A. Yes.

6 Q. Now, we are going into State's 127.
7 Relevant part being here at the bottom. So what
8 does the text or message from GeezQueez say?

9 A. Starting at the top here where it's
10 crossed out, it was sent, the author of it GeezQueez
11 Otf and it says hit me fool.

12 Q. What is his response?

13 A. He sends that to Tease and Stacks. And
14 tease and stacks responds what your number is I
15 forget to save it.

16 Q. And what does GeezQueez Otf say his
17 phone number is?

18 A. Responds with [REDACTED].

19 Q. Your Honor, just for housekeeping
20 purposes, I have left it so that the defense can
21 see what I intend on redacting, but when we redact
22 it we are going to take out all that unless there
23 was an objection.

24 THE COURT: I assume this is my copy.

25 MR. OSBORNE: Yes, Your Honor.

1 BY MR. OSBORNE:

2 Q. Now we are moving into State's 128.
3 What is the author saying here? I am sorry, before
4 I go on to 128, what was the date that GeezQuez
5 says that's his phone number?

6 A. That was 3-16 of 2015.

7 Q. So he wasn't incarcerated at that time?

8 A. That's correct.

9 Q. All right. So now we are down here.
10 What does she say?

11 A. So this is -- the author of this is
12 Shae King and she writes to GeezQuez Otf what your
13 number is cuz I just changed my number last night.
14 And GeezQuez Otf responds on 3-18 of 2015 [REDACTED].
15 You gun flam.

16 Q. Te'Quan Perry was not incarcerated at
17 that time?

18 A. That is correct.

19 Q. So on March 16th he said [REDACTED], then
20 on March 18th [REDACTED]?

21 A. Yes.

22 Q. All right. Now we are going into
23 State's 129. There was some general conversation
24 back and forth between GeezQuez and Cheyenne
25 Reading?

1 A. Yes.

2 Q. And then on here it's a little
3 interesting. So Cheyenne says, what's her last
4 message here?

5 A. On the bottom of the screen, it's a
6 little crooked, so Cheyenne says to GeezQuez Otf I
7 am cool and sure.

8 Q. Because he is asking do you want to be
9 friends and hang out?

10 A. Yes. And those two boxes right there,
11 that's typically an emoji that doesn't show up.
12 It's just not recognized as text body.

13 MS. VAN PALA: Objection. I think
14 that's calling for an expert opinion on whether
15 that box is an emoji.

16 THE COURT: Well, he didn't ask for it.
17 He volunteered it. He said I think that's what
18 that is. Ask him what the basis of his knowledge
19 might be.

20 Q. How do you know that?

21 A. Just from looking at phone dumps and
22 downloaded content this is a text body information
23 so a lot of those graphics don't translate into
24 actual text so you often see that instead of the
25 actual picture.

1 THE COURT: Done that many times?

2 THE WITNESS: Many times.

3 THE COURT: He can testify from his
4 experience. Overruled.

5 BY MR. OSBORNE:

6 Q. Now, we are going to continue and we
7 ended with GeezQuez gives response what number?

8 A. So GeezQuez Otf responds with [REDACTED].

9 Q. And then Cheyenne says well I'm about
10 to text you; is that right?

11 A. That's correct.

12 Q. And he says all right?

13 A. All right. And then he also, after he
14 says all right he sends another text to Cheyenne
15 that he changes the number. He says [REDACTED].

16 Q. Okay. So if it was a call it was [REDACTED],
17 if it's a text it's [REDACTED]; is that right?

18 MS. VAN PALA: Objection, speculation,
19 improper opinion.

20 THE COURT: I will sustain the
21 objection as to the question's characterization,
22 but the posts speak for themselves.

23 MS. VAN PALA: I think what the
24 proposition here is that yes, the texts speak for
25 themselves and based on those few posts that we

1 have just seen with the difference between the two
2 numbers the officer is going to draw a conclusion.

3 THE COURT: That's not objectionable.
4 He has a right to investigate the case and draw
5 conclusions from the investigation.

6 MS. VAN PALA: I think that's asking --

7 THE COURT: I did not let him give the
8 opinion. You won. I just said they are what they
9 are. They speak for themselves.

10 MS. VAN PALA: I apologize, Your Honor.
11 Thank you.

12 THE COURT: Thank you.

13 BY MR. OSBORNE:

14 Q. I think this will clarify this issue.
15 This is the State's 131. What is GeezQueez saying
16 here?

17 A. To Nia Breadwinner he says text my
18 phone, don't talk on book.

19 Q. Okay. Nia says and your number?

20 A. He responds with [REDACTED].

21 Q. Okay. That's March the 19th?

22 A. That's correct.

23 Q. All right. Now State's 130. What
24 number is GeezQueez giving as his phone number
25 there?

1 A. You partially cut off the screen.

2 Q. I am sorry.

3 A. So GeezQueez Otf sends Julio sup

4 [REDACTED].

5 Q. State's 132. What does GeezQueez say
6 right there?

7 A. GeezQueez tells Jaz and Renee Washington
8 call me right fast [REDACTED].

9 Q. What's the date on that?

10 A. That is March 19th of 2015.

11 Q. Before he was arrested, right?

12 A. That's correct.

13 Q. March 20th before he was arrested what
14 does GeezQueez say?

15 A. GeezQueez is the author and says call me
16 [REDACTED] ASAP.

17 Q. State's 134, what he say his number is?

18 A. The author GeezQueez Otf says call me
19 [REDACTED].

20 Q. He does it again on March 22nd?

21 A. This is to Tanisha Bonds. Also says
22 GeezQueez says Romney [REDACTED].

23 Q. State's 135 depicts the same thing.
24 GeezQueez saying his number is [REDACTED]?

25 A. That's correct.

1 Q. State 136, now we have GeezQuez on
2 March the 25th saying call this number; is that
3 correct?

4 A. Yes.

5 Q. Go ahead.

6 A. I was going to repeat the number, it's
7 737-3144.

8 Q. Okay. And then the next message is
9 what?

10 A. Next message is GeezQuez Otf again
11 providing another number of [REDACTED], hit me.

12 Q. Who are these messages sent to?

13 A. These are both sent to Taliban mbmb
14 GeezQuez.

15 Q. You said that you thought the UTC would
16 be four hours fast?

17 A. That's correct.

18 Q. So four hours away from 21, what does
19 that bring it down to?

20 A. It would be from 9:00 -- 9:00, four
21 hours before that would be 5:00.

22 Q. Or about 4:30 I guess?

23 A. 4:30, yeah.

24 Q. Okay. The murder happened what time?

25 A. Just before 6:00.

1 Q. All right. State's 137. Now, what
2 does GeezQueez say on March the 25th?

3 A. If you can move that up a little bit.
4 On the 25th GeezQueez Otf says sup bra. T trying
5 trade a burner. You know somebody can.

6 Q. Okay. T trying to trade a burner.
7 This would have been after the murder?

8 A. Yes, this was after the murder. This
9 is 3-25.

10 Q. And what is the response?

11 A. Hell no little bra.

12 Q. And what is response after that?

13 A. GeezQueez Otf says way big bra we got a
14 link.

15 Q. Okay. State's 138. 137 is talk to
16 tray burner, happened on March 25th after the
17 murder and then again on March 25th after the
18 murder. Let's go through this exchange. What does
19 GeezQueez say?

20 A. On the 25th GeezQueez Otf says way
21 little bra and Real Ranger Rel responds.

22 Q. And this time he said what?

23 A. GeezQueez Otf says I got a burner I try
24 and trade.

25 Q. Before we go on to the rest of that, in

1 your experience as an officer what have you heard
2 burner referred to as?

3 A. A firearm.

4 Q. All right.

5 MS. VAN PALA: Objection.

6 THE COURT: Yes, ma'am.

7 MS. VAN PALA: Calls for an expert
8 opinion on what burner means.

9 BY MR. OSBORNE:

10 Q. Well, let's just see what burner means.
11 I think we will have it clarified.

12 THE COURT: We agreed to hold objection
13 rulings until I've heard all the evidence so I will
14 rule on that when we get there.

15 BY MR. OSBORNE:

16 Q. It says what kind?

17 A. What kind.

18 Q. And now we know what a burner is. 357,
19 right?

20 A. GeezQuez Otf responds with 357.

21 Q. Real Range wants to know revolver or
22 pistol?

23 A. Yes.

24 Q. Real Range must not be too familiar
25 with firearms. That's the same thing.

1 A. And GeezQueez Otf responds with R-E.

2 Q. Is that how revolver is spelled?

3 A. R-E.

4 Q. And then do you want to sell it? That
5 is what Real Ranger says, right?

6 A. Yes, he asks if you want to sell.

7 Q. And GeezQueez says nah, if I do I need
8 250.

9 A. Right.

10 MR. OSBORNE: Your Honor, I think
11 that's the extent of what we would seek to admit
12 under GeezQueez Otf Facebook records.

13 Beg the Court's indulgence.

14 (Off-the-record conference.)

15 Q. To make sure I did mention this, during
16 his arrest did Te'Quan Perry state that his phone
17 number was [REDACTED]?

18 A. I think he was referencing that was a
19 number that was listed in some of the posts as
20 well. His mother's number was listed in one of
21 those posts as well.

22 Q. Okay.

23 MR. OSBORNE: No further questions.

24 THE COURT: Ma'am, you wish to
25 cross-examine? I will let you go first since it is

1 your client.

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

3 CROSS-EXAMINATION

4 BY MS. VAN PALA:

5 Q. State's 138, Real Ranger, that is an
6 alias, correct?

7 A. That would be the name of a Facebook
8 page.

9 Q. There is no way for you to say that
10 that Facebook page is associated with a real
11 person, correct?

12 A. Well, it would have to be a real
13 person.

14 Q. You don't know who that person is?

15 A. I don't know who that is.

16 Q. State's 137. Self Made is the name of
17 a Facebook page, correct?

18 A. That's correct.

19 Q. You don't know who that Facebook
20 belongs to, correct?

21 A. Correct.

22 THE COURT: Self Made, you are not
23 seeking to introduce that, are you?

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

1 MS. VAN PALA: It didn't draw an
2 objection. I am asking questions on the --

3 THE COURT: It was characterized to me
4 when they put it up earlier that anything that's
5 stricken through is going to be not offered as
6 redacted.

7 MR. OSBORNE: That is correct, Your
8 Honor.

9 MS. VAN PALA: I apologize. I will
10 withdraw. Thank you, Your Honor.

11 BY MS. VAN PALA:

12 Q. Street Love is a Facebook account,
13 correct?

14 A. That's correct.

15 Q. You don't know who that Facebook
16 account belongs to, correct?

17 A. You are right, I don't.

18 Q. Could you read right there it says
19 body?

20 A. Yes. Says sup bra. T trying trade a
21 burner so no -- you know somebody k.

22 Q. And the sender or author of that?

23 A. GeezQueez Otf.

24 Q. 136. Taliban mbmb GeezQueez, that is a
25 Facebook account, correct?

1 A. Correct.

2 Q. And you don't know who that Facebook
3 account belongs to, correct?

4 A. Well, I didn't get a search warrant for
5 that one. There were similarities to Devin
6 Middleton, but I did not get a search warrant for
7 that one.

8 Q. Yes or no, you do not know who that
9 Facebook account belongs to?

10 A. With 100 percent certainty?

11 Q. Yes or no -- withdraw. Yes or no you
12 do not know that that Facebook account belongs to
13 Devin Middleton?

14 A. My question is 100 percent certainty or
15 believe to?

16 Q. With 100 percent certainty.

17 A. No.

18 Q. State's 135. Patty LaBelle is a
19 Facebook account?

20 A. That's correct.

21 Q. You don't know whose Facebook account
22 that is, correct?

23 A. Correct.

24 Q. 134, Romney Boy Lil Black is a Facebook
25 account, correct?

1 A. Correct.

2 Q. And you don't know who that Facebook
3 account belongs to, correct?

4 A. Correct.

5 Q. Shisha Bonds is a Facebook account?

6 A. Correct.

7 Q. And you don't know who that Facebook
8 accounts belongs to, correct?

9 A. Correct.

10 Q. 133. T Montana?

11 A. I think the top is cut off a little
12 bit, but I don't know who that is.

13 Q. You don't know who that Facebook page
14 belongs to?

15 A. Correct.

16 Q. 132. Apologize. Jasmine Renee
17 Washington. That's a Facebook account?

18 A. That is.

19 Q. And you don't know who that Facebook
20 account belongs to?

21 A. I do not.

22 Q. 130. Julio Low Key Jr. Mitchell.
23 That's a Facebook account?

24 A. Yes.

25 Q. You don't know who that account belongs

1 to, correct?

2 A. Correct.

3 Q. 131, Nia Breadwinner Bish. That's a
4 Facebook account?

5 A. That is correct.

6 Q. And you don't know who that Facebook
7 account belongs to, correct?

8 A. That's correct.

9 Q. 129. Cheyenne Bianca Redding, that's a
10 Facebook account?

11 A. That is correct.

12 Q. And you don't know who that Facebook
13 account belongs to, correct?

14 A. Correct.

15 Q. 128, Shae King, that's a Facebook
16 account, correct?

17 A. Correct.

18 Q. And you don't know who that belongs to,
19 correct?

20 A. Correct.

21 Q. 127. Tease and Stacks. That's a
22 Facebook account, correct?

23 A. Correct.

24 Q. You don't know who that belongs to,
25 correct?

1 A. Correct.

2 Q. 124. Imperfection Jasmine. That's a
3 Facebook account, correct?

4 A. Correct.

5 Q. And you don't know who that belongs to,
6 correct?

7 A. Correct.

8 Q. And if I can clarify, you testified
9 that Te'Quan Perry was talking about Jasmine on a
10 jail phone call, correct?

11 A. Correct.

12 Q. He referenced Jasmine Murphy, correct?

13 A. I don't recall the last name, but
14 possible.

15 Q. There's no way to know that
16 Imperfection Jasmine is the same person as Jasmine
17 Murphy, correct?

18 A. Well, there is a way.

19 Q. In this instance you do not know that
20 Jasmine Murphy is the same person as Imperfection
21 Jasmine?

22 A. I guess outside of major coincidence
23 technically I guess no.

24 Q. With 100 percent certainty you can't
25 say that Jasmine Murphy is the owner of the

1 Imperfection Jasmine Facebook account?

2 A. Right. I didn't dig into that.

3 Q. 123. There is no time stamp on this,
4 correct?

5 A. On the photo itself the metadata is not
6 there, but you can see when it is posted.

7 Q. There is no dates on the photo,
8 correct?

9 A. On the photo itself? No, not on the
10 photo itself.

11 Q. Kiddy Topolstrees Moves On, that's a
12 Facebook account, correct?

13 A. It is.

14 Q. And you don't know who that Facebook
15 account belongs to, correct?

16 A. Correct.

17 Q. Dabone Ramsey, that's a Facebook
18 account?

19 A. Yes.

20 THE COURT: Ma'am, I think we can
21 probably stipulate that he doesn't know. Do we
22 have to go through every one of them?

23 MS. VAN PALA: The solicitor didn't
24 object.

25 THE COURT: Well, I am objecting. It

1 is wasting the Court's time.

2 MS. VAN PALA: Yes, Your Honor.

3 THE COURT: If there is something to be
4 had by going through each one individually
5 establishing that he is not aware of the accounts
6 to which the messages are sent or from which they
7 are sent to this account that he did investigate,
8 can we say that that's the case and move on?

9 MR. OSBORNE: Absolutely, Your Honor.

10 BY MS. VAN PALA:

11 Q. 97. There's no date on this
12 photograph, correct?

13 A. Just the date of the post.

14 Q. And you don't know that -- with 100
15 percent certainty you do not know that this picture
16 was posted on that date?

17 A. On the date that's listed on there?

18 Q. Yes.

19 A. Yes, it states when it is posted.

20 Q. You testified that it says uploaded
21 3-17, correct?

22 A. If you can put that back on I can tell
23 you. Yes, so it was uploaded to Facebook on 3-17
24 of 2015.

25 Q. But you do not know with 100 percent

1 certainty that that means this photograph was
2 uploaded on that date?

3 A. Correct.

4 Q. 168. There's no date on this
5 photograph, correct?

6 A. Correct.

7 Q. And although you testified that there's
8 an uploaded date, there's no way that you know with
9 100 percent certainty that the picture was uploaded
10 on that date, correct?

11 A. No, that is uploaded on that date. I
12 can say that with certainty.

13 Q. With this one?

14 A. Well, I don't see a date on this one.
15 Right there, 3-18 of '15, so I can say with 100
16 percent certainty it is uploaded on that date.

17 Q. Court's indulgence.

18 You cannot say that it was taken that
19 date, correct?

20 A. Yes, just the upload date.

21 THE COURT: Would that be true of
22 upload dates that you got from the Facebook
23 records?

24 THE WITNESS: Correct, Facebook is only
25 tracking when that photo is uploaded to their page

1 or server. As far as the date of the pictures, the
2 only -- I couldn't tell from that. You would have
3 to see that in the metadata of the photo.

4 THE COURT: I understand.

5 BY MS. VAN PALA:

6 Q. Likewise, the last photograph that the
7 solicitor asked you about is 170. You don't know
8 when that picture was taken, right?

9 A. Just the upload date.

10 Q. State's 167, there is no IP address
11 listed on this page, right?

12 A. No, there shouldn't be. I don't
13 believe there should be right here.

14 Q. The IP address listed 73.131.84.178,
15 that IP address, did you subpoena any information
16 to find out who that IP address belongs to?

17 A. For that specific? No, I didn't do any
18 search warrants for IP addresses.

19 Q. Or subpoenas?

20 A. Or subpoenas.

21 Q. Did you type it into your browser to
22 search?

23 A. No, I never conducted a search of an IP
24 address to find its provider.

25 MS. VAN PALA: Court's indulgence.

1 (Off-the-record conference.)

2 BY MS. VAN PALA:

3 Q. This is State's 116. You testified on
4 direct about the Facebook URL. That URL is what's
5 publically available on the internet, correct?

6 A. Correct.

7 Q. It's part of the unique -- withdrawn.
8 There's no way that you know that that URL is
9 connected to a Facebook account, correct?

10 A. Incorrect.

11 Q. You testified that you think that there
12 is a link address by 45167, but that link address,
13 nowhere on the Facebook records that says it's an
14 account number, correct?

15 A. No, incorrect. It says it is an
16 account number. It's the registration number.

17 Q. Registration number, but it is part of
18 the URL?

19 A. That's part of that URL, but that's the
20 identification numeric assigned to that Facebook
21 profile.

22 Q. Court's indulgence.

23 Did you make any attempt to verify or
24 excuse me, withdrawn. Did you make any attempt to
25 identify who those other Facebook accounts belonged

1 to?

2 A. That we just went through?

3 Q. Besides GeezQueez and Taliban?

4 A. Demarco Jones I did, and I attempted
5 with Smash as well.

6 Q. But Demarco Jones wasn't one of these
7 Facebook accounts that we just looked at?

8 A. Correct, that's correct.

9 Q. All the other Facebook accounts,
10 though, you didn't identify who those actually
11 belonged to?

12 A. That's correct.

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

14 MR. OSBORNE: Couple quick questions.

15 THE COURT: Let me see if the other
16 counsel. Sir, do you wish to ask any questions?

17 MR. APICELLA: No, because he didn't
18 mention, we are not doing my client's.

19 THE COURT: I understand. I will give
20 you a chance to cross-examine if you need to at any
21 point in time.

22 MR. APICELLA: No.

23 THE COURT: Mr. Osborne.

24 REDIRECT EXAMINATION

25 BY MR. OSBORNE:

1 Q. Is there any particular reason why you
2 didn't investigate every single person that she
3 went through that whole time?

4 A. It would be extremely time consuming
5 and I think what I was looking for in this
6 investigation I was -- these records will speak for
7 themselves.

8 Q. Is there any of those names associated
9 with killing Brandon Washington?

10 A. Not that I was aware of.

11 Q. Okay. And IP addresses, I want to take
12 you back in time a little bit about 10, 15 years
13 ago. Computers were mostly stationary, right?

14 A. Correct.

15 Q. So you can look at an address and you
16 can say well, it come backs to the computer because
17 it is not going anywhere, desk top, right?

18 A. Correct.

19 Q. And nowadays we carry computers with us
20 in our pocket?

21 A. And there's public wi-fi, unsecured
22 wi-fi.

23 Q. So if I am in this courtroom I am going
24 to be in a different IP address than if I walk
25 across the walkway and go into my office, that's

1 another IP address?

2 A. If it's not the same network it would
3 be a different one.

4 Q. If I drive down the road I might hit
5 another one?

6 MS. VAN PALA: Objection. This is
7 calling for expert opinion.

8 MR. OSBORNE: No further questions.

9 THE COURT: He withdrew the question.

10 MS. VAN PALA: Brief recross.

11 THE COURT: I'm going to hold you to
12 briefly.

13 RECROSS-EXAMINATION

14 BY MS. VAN PALA:

15 Q. Te'Quan was arrested on March 26th; is
16 that correct?

17 A. Correct.

18 Q. And in the jail you're not allowed to
19 have phones, right?

20 A. Correct.

21 Q. And it's the policy of the jail that
22 you are not --

23 MR. OSBORNE: Objection. Beyond the
24 scope.

25 THE COURT: Beg your pardon?

1 MR. OSBORNE: Beyond the scope of
2 recross.

3 THE COURT: Recross should be things
4 that he went into on his redirect.

5 MS. VAN PALA: He was talking about
6 devices and so I am asking about devices such as
7 phones, computers, anything that can access the
8 internet. The solicitor was asking about --

9 THE COURT: It's a stretch. I will let
10 you go.

11 BY MS. VAN PALA:

12 Q. It's a policy of the jail not to have
13 any devices that can access the internet, correct?

14 A. I would imagine so, yes.

15 MS. VAN PALA: Thank you.

16 THE COURT: All right. Sir, anything
17 else?

18 MR. APICELLA: No, not until he talks
19 about my client.

20 THE COURT: All right. Defense motion.

21 MS. VAN PALA: Thank you, Your Honor.
22 May it please the Court, I don't think that -- I
23 think that the detective has drawn a conclusion
24 that the ending digits of the URL which happen to
25 coincide with the link numbers on the Facebook post

1 mean that they came from the same device, person,
2 account, what have you. The detective saying that
3 those numbers if they are the same, that must mean
4 that they were generated by the same person.

5 THE COURT: I don't mean to interrupt
6 you, but I think Mr. Osborne told me at the
7 beginning of this presentation that what he was
8 going to try to do is show by the totality of the
9 messages and all of the factors involved in what
10 the messages said, how they corresponded to other
11 statements that were made, if you take those all
12 into consideration they indicate a certain
13 conclusion.

14 I don't recall the testimony being
15 simply because it has that number it must have come
16 from this man. I don't recall that testimony.

17 MS. VAN PALA: Correct.

18 THE COURT: So I don't think that
19 argument is made. Mr. Osborne, have I correctly
20 stated that?

21 MR. OSBORNE: Absolutely, Your Honor.
22 I didn't have it pulled up, but what we are trying
23 to do is authenticate by 901(b)(4) and then
24 basically by way of illustration only and not by
25 way of limitation, the following are examples of

1 authentication or identification confirming the
2 requirements of this rule and I am going to No. 4.
3 Distinctive characteristics and the like.
4 Appearances, contents, subsense, internal patterns
5 or other distinctive characteristics taken in
6 conjunction with the circumstances.

7 THE COURT: Give me that rule number
8 again. You caught me with my rule book closed.

9 MR. OSBORNE: 901(b)(4).

10 THE COURT: I don't think they made
11 that argument. I don't think they are telling you
12 just because it's from that number, that's one of
13 the factors that shows a consistency, but just one
14 of them.

15 So I don't think he testified that
16 because it came from that number that the Defendant
17 must have posted it. I didn't hear that. You
18 didn't advance that argument earlier.

19 MS. VAN PALA: Then I don't think that
20 the detective needs to testify when -- I don't
21 think the detective needs to read out this is the
22 same number and this is the same number on the --

23 THE COURT: If it's one of the factors
24 for consistency perhaps he can. I don't know, I
25 haven't ruled on it yet, but according to what he's

1 going under, distinctive characteristics and the
2 like, I think that's what you said?

3 MR. OSBORNE: Yes, Your Honor.

4 THE COURT: Go ahead.

5 MS. VAN PALA: Thank you, Judge. I
6 still argue that that line of questioning was
7 calling for an improper opinion implying that the
8 detective has some kind of specialized knowledge
9 about Facebook to assist the trier of fact in
10 determining whether those Facebook numbers are
11 linked to the Defendant.

12 MR. OSBORNE: Your Honor, he basically
13 read what was on the record. He didn't interpret
14 anything. He didn't give any opinions, he read
15 what was on the record.

16 MS. VAN PALA: He said there's a target
17 number associated with GeezQuez Otf, then later on
18 in his testimony he read a link number and said it
19 was the same. So just because there are random
20 numbers on the page doesn't mean that there's a
21 connection. And the officer drew that connection.
22 The officer read a set of random numbers on a page
23 and said oh, because they're the same random
24 numbers that appeared twice on the page there's a
25 connection. I believe that's improper opinion

1 testimony.

2 MR. OSBORNE: It wasn't just five
3 numbers. I tried to do testimony short. There are
4 15 numbers that repeat itself over and over again
5 every time the post came up that I mentioned. It
6 wasn't just a random five, it was 15. That was
7 identified through the target number of GeezQuez
8 Otf.

9 MS. VAN PALA: None of that came out in
10 direct, Your Honor.

11 THE COURT: The documents again speak
12 for themselves. That's on the documents I think.

13 MR. OSBORNE: It is, Your Honor.

14 MS. VAN PALA: Yes, Your Honor. Thank
15 you, Your Honor. Authenticating by internal
16 patterns and consistency under the rule is only one
17 way to authenticate. The basis of my objection to
18 the detective drawing conclusions about what these
19 numbers mean and that these numbers can be
20 connected to Te'Quan, that's asking for an expert
21 opinion and that's not based on his personal
22 knowledge. Just reading numbers on a page doesn't
23 mean that you have personal knowledge that those
24 numbers are connected to the Defendant. And in
25 order to authenticate anything you have got to have

1 either personal knowledge or be an expert. 701 or
2 702. Those are two options in order to move the
3 document.

4 THE COURT: That's talking about
5 opinions. 701 or 702.

6 MS. VAN PALA: Right.

7 THE COURT: What's that got to do with
8 authentication? He is correct, Rule 901 talks
9 about requirement of the authentication or
10 identification. That's the one that he's citing.

11 MS. VAN PALA: That's the personal
12 knowledge -- the baseline principle is that you
13 have to have personal knowledge in order to testify
14 about something before we can even get to the
15 question of how you authenticate the documents.

16 My argument is that the detective is
17 mixing lay opinion and expert opinion and there's
18 no way for us to know that his rational perception
19 is the reason why he is drawing a connection
20 between those numbers and an account and the
21 Defendant.

22 MR. OSBORNE: It is a rational
23 perception because he's reading the number right
24 there on the screen. Anyone can do that.

25 MS. VAN PALA: He is drawing a

1 connection there.

2 MR. OSBORNE: Facebook drew the
3 connection.

4 THE COURT: Let her finish her
5 argument, then I will hear from you, Mr. Osborne.

6 MS. VAN PALA: We would submit that the
7 cases that I cited before in the argument in the
8 motion to suppress the search warrant that are --
9 that's the standard in South Carolina and in the
10 Fourth Circuit.

11 THE COURT: We are back to the search
12 warrant? I have ruled on the search warrant.

13 MS. VAN PALA: Not back to the search
14 warrant. I believe that those cases are applicable
15 here because they are the gold standard for
16 determining whether electronic communications are
17 authenticate and can be moved into evidence. In
18 all those cases there has been a combination of an
19 IP address, some kind of personal identifying data
20 and an e-mail address. The detective didn't
21 testify that [REDACTED]yahoo.com which is the
22 e-mail that appeared on the Facebook pages, he did
23 not testify that those are in any way related to
24 Te'Quan. He did not testify that Te'Quan's
25 birthday appears on any of those documents. He did

1 not testify that Te'Quan's number is actually
2 [REDACTED]. He did not testify that Te'Quan's number
3 is actually [REDACTED]. He did not testify that
4 Te'Quan's number is actually [REDACTED]. He didn't
5 testify that Te'Quan's address was on there. He
6 didn't testify that Te'Quan's name is on there, not
7 even his location. The location, in fact, says New
8 Orleans, Louisiana.

9 In the cases that I had cited before
10 that I provided to the Court and to the solicitor,
11 all of those cases have some combination. They
12 have what we have here, a pattern that is
13 ostensibly based on the plain face of the
14 documents, but believe some kind of identifying
15 features that draw a connection to the Defendant.
16 I submit that otherwise they are just not relevant.
17 There's no foundation here. There are not properly
18 authenticated. They are not relevant. They are
19 prejudicial under 403. There were improper
20 character.

21 Additionally, Judge, even if the
22 detective were able to tell you when those photos
23 were taken, how do those photos have anything to do
24 with Brandon's death? That's the ultimate
25 question, right? These images that were just on

1 the Elmo that the detective testified about, they
2 do not have the tendency to advance any fact that
3 would assist the trier of fact in determining
4 whether Te'Quan killed Brandon. They're
5 irrelevant. Te'Quan drawing up a gang sign,
6 irrelevant. Prejudicial. I could go through. We
7 have them. Some of these pictures I think are
8 taken well before the murder. They were remote.
9 Irrelevant.

10 And the one message that can truly be
11 interpreted to have any bearing or relevance to
12 this case, there's no way to know who sent it and
13 who received it. That draws a spurious inference
14 of guilt. I think that is asking the jury to
15 conclude a fact that Te'Quan is the owner of this
16 page and Te'Quan is the one who had the gun so
17 Te'Quan must be the one who killed Brandon. That's
18 the only relevance. That's the only relevant post
19 here and it's unduly prejudicial and confusing
20 because we are not going to have any testimony that
21 can say yes, GeezQuez is Te'Quan and I know this
22 because --

23 THE COURT: Ma'am, I will ask you to
24 bring this to a close.

25 MS. VAN PALA: Thank you. And my last

1 point is no one will get on the stand and say
2 GeezQuez is Te'Quan and I know this because and
3 give any kind of identifying information.
4 Likewise, the people on the other side of the
5 communication, all these Facebook monikers, none of
6 them will testify in this court to say I am this
7 moniker and I know that Te'Quan Perry is this
8 moniker and this is why I know it.

9 Without this additional information
10 they are not properly authenticated. There is no
11 foundation. They are irrelevant.

12 THE COURT: Ma'am, you have already
13 covered those points with me. Sir, do you wish to
14 speak?

15 MR. APICELLA: No, Your Honor.

16 THE COURT: I wanted to give you an
17 opportunity. Mr. Osborne.

18 MR. OSBORNE: Lot to address there. I
19 will address her cases. Not a single case says
20 that authenticating Facebook records or any social
21 media records requires a more stringent test. And
22 the test is simply the burden to authenticate under
23 901, is not high.

24 Only a prima facie showing is required.
25 She asked Detective Krasowski over and over again

1 are you 100 percent. Well, thank goodness it
2 doesn't say 100 percent. It says prima facie
3 showing. I think all of the internal
4 consistencies, patterns, all point to one thing.
5 This is Te'Quan Perry's account or at the very
6 least that one post that was made post arrest we
7 can identify and we can explain he is directing his
8 brother verbatim what to say. We have
9 authenticated it, Your Honor.

10 THE COURT: I gave you a chance to
11 argue. I gave you a chance to argue. Is there
12 something new that he brought up?

13 MS. VAN PALA: No.

14 THE COURT: You have got to bring this
15 to a close. I have you let you go on and on and
16 on.

17 MS. VAN PALA: Judge, you are the --

18 THE COURT: Is there something new?

19 MS. VAN PALA: Yes.

20 THE COURT: It better be new.

21 MS. VAN PALA: You are the gatekeeper
22 in determining whether evidence is relevant. At
23 some point it is not about weight.

24 THE COURT: Are you through?

25 MS. VAN PALA: Yes.

1 THE COURT: All right. I think I am
2 required to look at the evidence that's being
3 offered, look at all the circumstances and all the
4 facts surrounding it. There are several factors
5 here which would lend themselves to indicate that
6 this was a website owned and operated by the
7 Defendant. In her argument counsel said there is
8 nothing to tie the Defendant to GeezQuez. I am
9 looking at Exhibit 97, this outfit that was spray
10 painted or something, I don't know what it is, the
11 Defendant appears and it says on his stomach
12 GeezQuez. That kind of is an indication that a
13 jury could find that that name GeezQuez is
14 associated with the Defendant that he might have
15 been operating. That's just one of the factors.

16 There's a lot of things here as the
17 State pointed out that would indicate that the
18 Defendant was the owner and operator of the site.
19 Tell me about the phone numbers, the significance
20 of the phone numbers because there is so many
21 numbers tossed around I want to be sure I'm correct
22 on that.

23 MR. OSBORNE: So the significance of
24 the phone numbers is this. Ms. Van Pala says that
25 nowhere could we tie in [REDACTED] to Te'Quan Perry.

1 I believe that Te'Quan Perry said that that was his
2 phone number during the interview. Am I correct?

3 THE WITNESS: You are correct.

4 MR. OSBORNE: And also which brings us
5 to the real crux of our case, the [REDACTED] number.
6 This is the communication between Brandon and that
7 number not only the night before he died, but also
8 on the day that he died. And Brandon had that
9 number saved in his contact as Lefty.

10 So it brings it all together under a
11 res gestae presentation of the case. That's very
12 important to us to establish that he is, in fact,
13 using that phone number and that's why
14 painstakingly I showed all the posts where he
15 identified that as being his number. And testimony
16 earlier elicited numerous contacts, in particular
17 that [REDACTED] number called a number that we associated
18 to Te'Quan's girlfriend Ashland Horlback over a
19 hundred times over a couple week period. Called
20 his mother, called Devin, called several other
21 associates.

22 So to the State's case in tying
23 Te'Quan, Lefty to that [REDACTED] number is vitally
24 important. I think that's what the Facebook
25 records show so that's why I kept showing those

1 messages over and over again.

2 MS. VAN PALA: May I address that
3 point?

4 THE COURT: I was in the process of
5 making my ruling. I asked a specific question of
6 the State. I really wasn't intending to open it up
7 to argument.

8 MS. VAN PALA: I have a very quick
9 point.

10 THE COURT: This is -- I have given
11 time for you to make your arguments and seemed like
12 this is a free flow. It's like whenever you want
13 to bring them up you bring them up. That's not how
14 court works. I will hear you just in an abundance
15 of caution to give your client a full hearing, but
16 that's not how we do business. You know that,
17 don't you?

18 MS. VAN PALA: Yes, Your Honor.

19 THE COURT: I will hear from you.

20 MS. VAN PALA: I would just point out
21 that earlier in the testimony the phone number
22 [REDACTED] when you subpoena Sprint which is the
23 carrier, Sprint gives the personal identifying
24 information to a Joe Brown or a Justin Brown with a
25 random address. Law enforcement followed up with

1 these people or attempted to follow up and did, in
2 fact, follow up with Justin Brown who said he had
3 no idea who Te'Quan Perry is, has no idea who Lefty
4 is and is not related to the case. So I would
5 submit that we have our answer. We know who the
6 [REDACTED] number belongs to. It's Justin or Joe
7 Brown.

8 THE COURT: Mr. Osborne?

9 MR. OSBORNE: I will comment. They
10 spoke to Justin and Joe Brown. He said I don't
11 have any idea what you're talking about. That's
12 not my phone number.

13 THE COURT: He didn't claim the number.

14 MR. OSBORNE: He didn't claim the
15 number. So now we don't know who the number
16 belongs to. That's what this evidence is all
17 about. Tying it into the Defendant. So to say we
18 know who the number belongs to is just inaccurate.
19 He said it wasn't his number.

20 If Joe Brown had said that's my number,
21 y'all got the wrong guy, now it's a whole different
22 conversation. Joe Brown said I don't know whose
23 number that is. It is not mine.

24 THE COURT: Is that information
25 supplied to you?

1 MS. VAN PALA: Yes.

2 THE COURT: Joe Brown denies he ever
3 had that number.

4 MS. VAN PALA: Likewise he denied
5 knowing Te'Quan.

6 THE COURT: He denied that he ever had
7 the number.

8 MS. VAN PALA: And the Sprint records,
9 the business records specifically go to say that
10 person is the owner.

11 THE COURT: Okay. You have made me
12 aware of the situation. I'm going to find it is
13 properly authenticated. It can come in. It is
14 sufficiently authenticated.

15 MR. OSBORNE: We are ready to move to
16 General Taliban?

17 THE COURT: Yes, sir.

18 DIRECT EXAMINATION

19 BY MR. OSBORNE:

20 Q. All right. Detective, showing you
21 State's Exhibit 166, I just numbered this. So
22 let's go through this. Do you recognize this?

23 A. I do.

24 Q. What is this?

25 A. This is the business records for Lil

1 Devin 19's Facebook profile which was titled
2 General Taliban GeezQueez.

3 Q. So when you say the search warrant for
4 General Taliban, you got all the records back.
5 This is page 1 of those records?

6 A. That's correct.

7 Q. You said earlier that it's thousands?

8 A. There were a couple thousand associated
9 with this one.

10 Q. Okay. We are going to deal with the
11 target number. I won't ask you to read out the
12 whole number, but it ends in 23518?

13 A. That's correct.

14 Q. All right. And registered to Lil Devin
15 19?

16 A. That's correct.

17 Q. He lives in Iraq, Bagdad, that's what
18 he said?

19 A. Says current city Bagdad, Iraq.

20 Q. And first name being General Taliban,
21 then last name GeezQueez?

22 A. Correct.

23 Q. This is State's 119. This is page 419.
24 Do you recognize that individual in the photograph
25 there?

1 combination with Perry being arrested Mini Rat and
2 Devin visiting him other than March the 27th, the
3 day after he was arrested for murder?

4 A. That was the only time in those
5 visitation logs.

6 Q. Okay.

7 MS. NORRIS: Judge, if I could
8 interrupt just a second. May we approach?

9 THE COURT: Certainly.

10 (Following proceedings were held at the
11 bench.)

12 MS. NORRIS: Judge, I am sorry for the
13 disturbance, but we were concerned that a witness
14 that's related was in the courtroom. I think that
15 is not true. But I wanted to put on the record we
16 already had one instance this morning where --

17 THE COURT: What?

18 MS. NORRIS: We already had one
19 instance this morning a State's witness was in the
20 courtroom and my client pointed it out and I heard
21 them and there needs to be better --

22 THE COURT: A witness in the courtroom?

23 MS. NORRIS: Not right now. I am just
24 saying that we need to make sure the State's
25 witnesses are not coming in.

1 THE COURT: I have already issued that.
2 If you have an objection to any of them --

3 MS. NORRIS: I don't.

4 THE COURT: -- tell me.

5 MS. NORRIS: I don't. We realized it
6 was not a problem after I had asked for the bench
7 conference.

8 THE COURT: Again, if you see a
9 problem, stand up and raise the objection.

10 MS. NORRIS: Yes, sir.

11 (End of bench conference.)

12 BY MR. OSBORNE:

13 Q. I blacked out the discussion here, but
14 what is the title?

15 A. Free Lefty out da slammer.

16 Q. Okay. Lefty being that same nickname
17 or contact that the victim had in his phone?

18 A. Correct.

19 Q. Okay. Now, I'm showing you
20 State's 120. Do you recognize that individual?

21 A. I do.

22 Q. Who that?

23 A. Te'Quan Perry.

24 Q. Now, the user who posted this, what are
25 the last five of his user name?

1 A. If you go down the second line of the
2 link you see that long number starting with one and
3 many zeros, the last five we are here looking at
4 right here is 23518.

5 Q. Okay. And what does that post say?

6 A. Says free my partner in crime and then
7 it's the @ sign and then it's tagging the Facebook
8 profile GeezQuez Otf. You can see that it is
9 45167.

10 Q. What does it say?

11 A. Says, "Yeah Little Lefty locked up and
12 he ain't got bail, but he can still reach "N" from
13 his jail. When a rat around "N" I know the smell.
14 When "S" come down you never know who will tell. I
15 getting sick and tired of the "MF" snitch "S." I
16 was taught if you get a pop take yo lick. He tell
17 me hold him down and he gone be straight. He throw
18 that rum village up at me at his last court date
19 and (west side)."

20 Q. Okay. Let's talk about the west side.
21 The area of Charleston, do individuals routinely
22 associate with particular areas of Charleston?

23 A. Yes.

24 Q. And what have you often heard
25 individuals affiliated themselves with in regard to

1 geographical locations or terms?

2 A. Well, west side being west of the
3 Ashley, so not downtown.

4 Q. What else have you heard west side
5 being associated with?

6 MS. VAN PALA: Objection. Improper
7 opinion.

8 THE COURT: Overruled.

9 BY MR. OSBORNE:

10 Q. In regard to the Peninsula, have you
11 heard geographical terms or associations in just
12 the Peninsula area?

13 A. Yes, there's several.

14 Q. And particular to west side, where is
15 that located?

16 A. West side is West Ashley. There's the
17 Maryville, Ashleyville area, Ardmore.

18 Q. And in downtown do you have any
19 association at all to west side, do you know?

20 A. Association to west side? Well, I mean
21 there's Back to Green. There's East Side, there's
22 Romney Street area.

23 Q. In the Peninsula is there a west side
24 area?

25 A. Back to Green is associated as a

1 western part of the Peninsula.

2 Q. Okay. East side being what?

3 A. East side being closer to the water
4 side, the port side, and that's east side is
5 America Street and streets over there.

6 Q. Now, do you know if these are rap
7 lyrics?

8 A. I don't know. It's common that people
9 will post rap lyrics on Facebook, on social media
10 sites. I didn't specifically research this.

11 Q. Have you ever -- you have heard the
12 term "snitch" before, right?

13 A. I have.

14 Q. Does this verbiage here sound like a
15 positive connotation towards snitch?

16 A. No.

17 MS. VAN PALA: Objection, improper
18 opinion. I believe the Court ruled the snitch
19 speaks for itself.

20 THE COURT: No, I said snitch had a
21 general meaning. We looked it up. That's an
22 English word.

23 MS. VAN PALA: And my objection is
24 that --

25 THE COURT: Snitch means snitch.

1 MS. VAN PALA: -- the officer doesn't
2 have to offer any kind of testimony to explain.

3 THE COURT: The question was is the
4 general tone of that statement positive or negative
5 towards snitch?

6 MR. OSBORNE: That's correct, Your
7 Honor.

8 MS. VAN PALA: Improper opinion.

9 THE COURT: I will overrule it. He is
10 not trying to define any particular word, he's
11 simply stating his perception of the tone of that
12 message.

13 THE WITNESS: The tone is negative I
14 would say.

15 BY MR. OSBORNE:

16 Q. These next two exhibits I do not intend
17 to introduce at trial, I am simply doing it for
18 authentication purposes for this hearing. State's
19 121, do you recognize this document?

20 A. I do.

21 Q. So this document was posted on General
22 Taliban's account; is that correct?

23 A. That is correct.

24 Q. So you recognize it from there?

25 A. I do.

1 Q. Do you also recognize it in some other
2 way during this investigation?

3 A. I drafted this.

4 Q. What is it?

5 A. This is the narrative to a search
6 warrant that was executed.

7 Q. I want to pay particular attention to
8 in the narrative for the search warrant, correct me
9 if I'm wrong, it was about a good page, maybe two
10 long?

11 A. I think it was about two pages.

12 Q. So in the second paragraph, tell me if
13 I am reading this correctly. It says, "City of
14 Charleston video surveillance from several cameras
15 was obtained and captured the black male suspect in
16 the raincoat as the last subject to leave the side
17 yard at ■ Norman Street after the shots were
18 fired. Demarco viewed this footage and identified
19 the black male suspect in the raincoat as the
20 shooter but denied knowing who he was nor ever
21 seeing him prior to him pushing through the group
22 to shoot Brandon."

23 "Additional footage captured the black
24 male in the raincoat hanging out with Demarco on
25 multiple camera shots within one hour prior to the

1 murder footage. This footage clearly depicted both
2 of them within close proximity of one another
3 during the siting to suggest the black male in the
4 raincoat was not a stranger."

5 That's what you wrote?

6 A. That's correct.

7 Q. What's the first response from Patty
8 LaBelle?

9 A. Wow.

10 Q. And then General Taliban says what?

11 A. Responds with that's Crazy fr smh.

12 Q. Do you use Facebook a lot?

13 A. Yeah, fair amount of time.

14 Q. You text?

15 A. I do.

16 Q. Do you sometimes abbreviate words?

17 A. I do.

18 Q. Do you know what "rf" means?

19 A. For real. And "smh" is shake my head.

20 Q. Patty LaBelle said what?

21 A. Patty LaBelle responds with fr, thought
22 bra been solid.

23 Q. General Taliban says what?

24 A. EB like that sometimes I think.

25 Q. General Taliban again says think.

1 Patty LaBelle says no. And then General Taliban
2 LOL, I know shit real in North Charleston.

3 A. Right.

4 Q. I want to point to General Taliban's
5 post there where it starts but look. What does he
6 say?

7 A. So General Taliban GeezQueez says but
8 look at they at it they him a pic of Lefty. He say
9 that's the dude that shot bra but he don't his name
10 -- his name. Dot dot dot. That still telling cuz
11 he identified the dude in the raincoat as the
12 shooter and Lefty is the "N" in raincoat and he da
13 the only person out they with a raincoat on.

14 Q. This is in response to Patty LaBelle
15 saying he never told the police who Lefty been? He
16 responds to that and then Patty LaBelle says what?

17 A. Responds you hell. Sorry.

18 Q. Says everybody know that's Lefty
19 raincoat and Duke?

20 A. That's right.

21 Q. So that brings us to another thing that
22 we talked about before. When General Taliban
23 posted this to his account it was open to the
24 public for everyone to see?

25 A. This I'm not positive on. It might

1 have been more private. I'm not positive.

2 MR. APICELLA: Objection, Your Honor.

3 THE COURT: What's the objection?

4 MR. APICELLA: If he can't tell then
5 the question and answer should be stricken.

6 THE COURT: Help me, Mr. Osborne. This
7 is information that you obtained from Facebook?

8 MR. OSBORNE: It is, Your Honor.

9 THE COURT: As being responsive to the
10 search warrant.

11 MR. OSBORNE: That is correct, Your
12 Honor.

13 THE COURT: Coming from this account
14 that you issued the search warrant for.

15 MR. OSBORNE: Yes, Your Honor.

16 THE COURT: I'm not sure I understand
17 your objection to have it totally excluded.

18 MR. APICELLA: Well, he asked a
19 specific question requiring either a yes or no
20 answer.

21 THE COURT: The question was whether or
22 not that document was open to the public. He said
23 he wasn't sure.

24 MR. APICELLA: Begging your pardon,
25 Judge, I thought his answer suggested that at that

1 time it could not have been open to the public.

2 THE COURT: The question I believe was
3 was that document open to the public on Facebook.

4 THE WITNESS: That I do not know. So
5 you have the ability -- just because it's in his
6 contents of his Facebook that we obtained does not
7 mean that every aspect was shared with the full
8 public. Some can be restricted in a privacy
9 setting so I don't know.

10 THE COURT: Overruled.

11 BY MR. OSBORNE:

12 Q. Let's move on to State's 122. That's
13 the same portion of -- that's a different portion
14 of the same warrant; is that correct?

15 A. I thought it was the same.

16 Q. Let's look. It is the same. We have
17 the same post yet again of the same search warrant.
18 Look at what is being said after that. Who posted
19 it?

20 A. I don't know that I can say for certain
21 who posted right there.

22 Q. Look at the author right here.

23 A. Author right there. That's Non White.
24 He is responding. Non White said I see the other
25 one yesterday. I can't really see the other one

1 too good though.

2 Q. So Non White is commenting I can't see
3 the other one too good?

4 A. Right.

5 Q. And this is in response to seeing this?

6 A. Right.

7 Q. Okay. And then General Taliban says
8 what?

9 A. The other one say Demarco Jones
10 voluntarily came down day cuz he hear his name
11 being called.

12 Q. Okay. How does Non White respond to
13 that?

14 A. Non White responds his people make his
15 "A" gone there to.

16 Q. And that's actually accurate, isn't it?

17 A. That is. Demarco Jones came down to
18 the police station the night of the murder. He
19 came down before we even heard his name being
20 called. He said that he heard his name being
21 called and felt the need to come down.

22 Q. All right. Now, we have some other
23 symbols there and then General Taliban says what?

24 A. I hear they want beef cuz he rat.

25 Q. Because he rat. Is rat a positive

1 connotation?

2 A. No.

3 Q. And next?

4 A. Non White says hell if I know. He
5 wasn't supposed to tell them people "S" though I
6 don't bf with all them "N" like that though.

7 Q. Okay. More talk about snitching.
8 After all the snitching comment what does General
9 Taliban say?

10 A. Says ain't safe da do a crime in north
11 chas for cause.

12 Q. Ain't safe to do a crime in North
13 Charleston any more. This was more talk going
14 through all of it regarding snitching?

15 MR. APICELLA: Your Honor, I would just
16 ask Mr. Osborne just to stop a second.

17 THE COURT: Okay.

18 (Attorney confers with client.)

19 MR. APICELLA: Mr. Osborne, could you
20 go back to this part of the question, please.

21 BY MR. OSBORNE:

22 Q. So I want to back up and point out one
23 thing that I missed. The last comment here by Non
24 White. What does that say?

25 A. At the bottom of the page? Little Buba

1 point demob out snitching.

2 Q. Okay. Little Buba snitching. Then
3 what does General Taliban say in response to that?

4 A. BTG "N" ain't rated. Please don't let
5 me down please.

6 Q. BTG, what does that stand for in your
7 experience?

8 A. Back to Green.

9 MR. OSBORNE: Beg the Court's
10 indulgence. Your Honor, I have one other exhibit
11 that I did plan to introduce. I don't know how far
12 we want to go with this, but I have several
13 photographs right here of Devin Middleton on his
14 Facebook account. I will just go through
15 relatively quickly.

16 BY MR. OSBORNE:

17 Q. 200, who is that individual?

18 A. Devin Middleton.

19 Q. Who posted it?

20 A. If you can pull that up a little bit.
21 So the link -- if you go to the second line of that
22 link you see the last number. If you can zoom in a
23 little bit. You see 23518.

24 Q. Okay. 201?

25 A. Devin Middleton.

1 Q. Who posted it?

2 A. If you go to the link line you see
3 23518.

4 Q. Okay. 202, do you recognize anyone?

5 A. Yes, Devin Middleton in the middle.

6 Q. 203?

7 A. That's Devin Middleton.

8 Q. 204?

9 A. Little distorted, but I saw this
10 earlier, Devin Middleton.

11 Q. 205?

12 A. Devin Middleton.

13 Q. 206?

14 A. Devin Middleton.

15 Q. Te'Quan Perry, it looks like a
16 different visitation?

17 A. It does appear that way. You see the
18 link line, the second line, you see the identifying
19 number 23518.

20 Q. Now we do have something here. Let's
21 look at the title and what does it say?

22 A. The title is just leaving from seeing
23 this fool free my bruda Lefty out the slammer.

24 Same "N" you think solid ain't right. Keep
25 that "S" street. We on hashtag mace hashtag

1 campaign hashtag merc, so on.

2 Q. So I do want to talk about this. We
3 see the moniker Lefty again there?

4 A. That's correct.

5 Q. And now I want to talk about next to it
6 bruda. Why is a bruda or is bruda significant at
7 all in this investigation?

8 A. So going back to Devin's phone forensic
9 download that we obtained, he listed the [REDACTED]
10 phone number as bruda 2 in his call log.

11 Q. Beg the Court's indulgence.

12 (Off-the-record conference.)

13 Q. I am showing you State's 112. We have
14 Bruda and then Bruda 2 and what phone number is
15 that?

16 A. [REDACTED].

17 Q. And that's on March 23rd?

18 A. That's right, that's the day of the
19 murder.

20 Q. This is communication on the phone that
21 was confiscated from Devin and these are call
22 detail records from that phone?

23 A. That's correct.

24 Q. We see other conversations there from
25 Smash and Duke and Bruda?

1 A. That is correct.

2 Q. 208, if I can ID him here. Do you
3 recognize anyone in that picture?

4 A. I do. You can see Devin Middleton on
5 the left and Te'Quan Perry on the right.

6 Q. And who posted that one?

7 A. Well, actually that is not posted by
8 his page.

9 Q. Okay. 209, do you recognize anyone
10 there?

11 A. I do. Devin Middleton and Te'Quan
12 Perry.

13 Q. And we have another post?

14 A. That's posted by someone else.

15 Q. And 210?

16 A. That is Te'Quan Perry.

17 Q. Devin Middleton in the background?

18 A. It is hard for me to tell.

19 Q. And again that one will be posted by
20 someone else. So of all the pictures that I have
21 showed you, three look to be posted by someone else
22 and this is an example of what it means to tag I
23 assume?

24 A. Correct.

25 Q. This is State's 167. Do you recognize

1 anyone in that picture?

2 A. I do. Te'Quan Perry on the left and
3 Devin Middleton on the right.

4 Q. We have already discussed the relevance
5 of this photograph in particular. This looks to be
6 the same clothing he was wearing when Brandon was
7 murdered; is that correct?

8 A. That's correct.

9 Q. And this is the same shirt that the
10 State's position would be the individual is Te'Quan
11 Perry?

12 A. In the McDonald's, that's correct.

13 Q. And who posted this?

14 A. You can see in the link line this was
15 posted by the General Taliban Facebook page.

16 Q. What does he say that?

17 A. It's hashtag thrill "N" Tuesday I done
18 sleep in hospitals. I done sleep in cells. Half
19 off the "N" I was running with done went to da
20 jail. The other half of my "N" done probably went
21 da hell. I done did everything up in these
22 in SC streets then hashtag free, he lists different
23 people to free.

24 Q. Your Honor, for housekeeping purposes,
25 if 167 is admissible I don't see reference to that

1 particular post other than coming back to 23518,
2 but content I wouldn't seek to admit. No further
3 questions.

4 THE COURT: We will take about a five
5 or ten-minute break. Court will be in recess.

6 (A recess transpired.)

7 MR. OSBORNE: Your Honor, I forgot to
8 ask one last one.

9 THE COURT: I will allow you to ask one
10 last question.

11 BY MR. OSBORNE:

12 Q. Showing you State's 113. Was this
13 image taken from the download from Devin's phone?

14 A. Yes, it is. It's a little pixilated,
15 but it is the same picture.

16 Q. Is that the phone that you took in
17 Devin's possession?

18 A. That's correct.

19 Q. Does that appear to be the same image?

20 A. It does appear.

21 Q. That's 167. No further questions.

22 THE COURT: Mr. Apicella, you have a
23 chance to cross-examine.

24 CROSS-EXAMINATION

25 BY MR. APICELLA:

1 Q. Detective Krasowski, refer you to
2 Exhibit Number 166?

3 A. Yes, sir.

4 Q. You got your search warrant?

5 A. Yes, that's page 1.

6 Q. This contained the information that
7 Facebook gave you pursuant to that search warrant
8 that was served on Facebook?

9 A. Yes, of Lil Devin 19.

10 Q. Directing your attention to the bottom
11 of the page, it appeared two IP addresses to be the
12 same?

13 A. Yes, yes.

14 Q. And are those the IP addresses of the
15 person who owns this Facebook account?

16 A. No, this would be the IP address of the
17 -- you see the date here 7-27-2015 a photo was
18 uploaded, so that IP address is the IP address of
19 the photo that was uploaded. Then you see message
20 sent, so that's going to be the same IP address
21 that sent that message as that photo.

22 Q. The IP address means internet provider,
23 correct?

24 A. Yes, however, it is being utilizing to
25 upload its content.

1 Q. So that indicates the facility that was
2 used to upload that Facebook post?

3 A. The specific files, yes.

4 Q. If it's a mobile device than the person
5 is moving around, the IP address would be different
6 depending on where that device was located and the
7 internet provider that will be picking up that
8 signal and transmit it?

9 A. Correct.

10 Q. So the IP address -- withdrawn. Direct
11 your attention to State's Exhibit 120. You have
12 already said that's a picture of Mr. Perry?

13 A. Te'Quan Perry.

14 Q. And if you can, can you tell us the
15 relevance of that picture to this case?

16 A. Well, it might be the next page might
17 tell the relevance; I'm not sure.

18 Q. Well, is the picture going to be
19 entered into evidence?

20 A. I don't know.

21 MR. OSBORNE: Objection, Your Honor.
22 He is not prosecuting the case. I am.

23 MR. APICELLA: If it's not I won't
24 argue the picture.

25 THE COURT: Do you intend to introduce

1 the picture?

2 MR. OSBORNE: I think I do. I would
3 like to see what is on the second page. I made a
4 copy for everyone else but myself. Yes, I do.

5 THE COURT: We are going to deal with
6 all the objections. I am trying to move this
7 along.

8 BY MR. APICELLA:

9 Q. We know the date the picture was
10 uploaded, but we don't know the date the picture
11 was taken, correct?

12 A. Correct.

13 THE COURT: Referring to the same
14 picture?

15 MR. APICELLA: Yes.

16 THE COURT: It wasn't on the board so I
17 needed to be sure.

18 MR. APICELLA: 120.

19 THE COURT: Thank you.

20 BY MR. APICELLA:

21 Q. Referring you to 167. This is the
22 business record accompanying picture 167.

23 A. Yes, sir.

24 Q. Again we know the date that the picture
25 was uploaded?

1 A. Yes, June 2nd of 2015.

2 Q. And do we know the date the picture was
3 taken?

4 A. Presumably before the murder occurred.

5 Q. Presumably?

6 A. Well, it features Te'Quan Perry in it
7 and we know he was arrested on the 26th, so I guess
8 it was taken before March 26th.

9 Q. But the picture was uploaded to
10 Facebook how many months later?

11 A. June 2nd, so two and-a-half months.

12 Q. March, April, June, July, four months
13 later?

14 A. Well, no, it was uploaded, yes, several
15 months.

16 Q. Sorry?

17 A. Several months.

18 Q. Couple of months. Back to Exhibit 120.

19 A. Yes, sir.

20 Q. And looking at the Facebook response
21 page. Free my partner in crime yeah little lefty
22 locked up. He ain't got no bail. I can still
23 reach a N-I-G-G-A from his jail. When a rat around
24 N-I-G-G-A I know the smell.

25 THE COURT: Can you slide that down?

1 It is cutting off there. Thank you.

2 Q. When a rat around nigga I know the
3 smell. When s-h-i-t come down never know who will
4 tell.

5 So if I keep going on you can still see
6 that words rhyme in that particular Facebook post,
7 correct?

8 A. Yes.

9 Q. And looking at it do you recognize the
10 rhyming words, bail, jail, smell, tell, snitch,
11 B-I-T-C-H, straight and date, correct?

12 A. Correct.

13 Q. Certainly seems like some sort of
14 poetry, right?

15 A. I would assume it's a lyric.

16 Q. To a rap song and it's a fair
17 assumption because many of Mr. Middleton's posts
18 were lyrics from rap songs, correct?

19 A. There were several.

20 Q. And are you familiar with the various
21 genres of rap?

22 A. I can't say that I'm super familiar.
23 When one comes up I Google it.

24 Q. So you had heard of the genre of
25 gangster rap?

1 A. Sure, yes.

2 Q. Old school rap?

3 A. Yes.

4 Q. East Coast, West Coast?

5 A. Sure.

6 Q. Directing your attention to what's been
7 marked as State's 210. So the record is clear, it
8 appears it's three people by a grave; is that
9 correct?

10 A. Correct.

11 Q. And if I showed you the Facebook
12 response you would be able to tell us what date
13 that picture was posted?

14 A. Yes. The photo was uploaded on
15 April 28th, 2015.

16 Q. Are you able to tell us when that photo
17 was taken from the Facebook records?

18 A. I cannot tell you that.

19 Q. Showing you what's been premarked as
20 State's 209. What date was this particular picture
21 posted?

22 A. Looks like it was created on
23 April 21st, 2015. There is some writing above it.
24 Can you slide this down?

25 Q. Sure.

1 A. Well, see, it appears there was some --
2 if you can flip back over because I think there was
3 some writing underneath of the photo that might be
4 the created date. Yes, the upload date is when
5 this photo was uploaded. And it's on the page
6 underneath the photo and it's trying to focus.
7 It's too blurry on my screen to see. Just focused
8 as you pulled it.

9 MR. APICELLA: May I approach the
10 witness, Judge?

11 THE COURT: You may.

12 THE WITNESS: So this photograph was
13 uploaded on 4-21 of 2015.

14 BY MR. APICELLA:

15 Q. Again you can't tell us what date the
16 photo was taken?

17 A. Correct.

18 Q. Directing your attention to
19 State's 208. Please tell us what date the photo
20 was uploaded?

21 A. April 14th, 2015.

22 Q. Tell us the date the photo was taken?

23 A. I don't know that.

24 Q. You have gone over all of these
25 photographs prior to testifying, correct?

1 A. Yes, I believe so.

2 Q. If I showed you the rest of these
3 photographs would your answer be the same to those
4 questions? You can tell us the date it was posted
5 from looking at the internet content determined in
6 the search warrant, but you would be unable to tell
7 us the date that the photographs were taken?

8 A. Correct, just the upload date, that's
9 it.

10 Q. When you read some of the posts you
11 didn't read all of the words because some of them
12 were either offensive, obscene or both, correct?

13 A. Correct.

14 Q. And did you feel the need do to that
15 because you were testifying in court?

16 A. Correct. I don't want to say those
17 words.

18 Q. Because they are offensive, right?

19 A. Yes.

20 Q. Showing you State's 207?

21 A. Yes, sir.

22 Q. Directing your attention to the top of
23 the page?

24 A. Yes.

25 Q. Where there's that post some of those

1 words in there you consider offensive, one that you
2 wouldn't say in open court?

3 A. I wouldn't say the "N" word, the "S"
4 word. There are words that I would not say.

5 Q. Would you submit that the "N" word
6 especially is offensive for you to say?

7 A. Yes.

8 Q. Do you think that a black person would
9 be able to use that word and it wouldn't be
10 offensive?

11 MR. OSBORNE: Objection, relevance and
12 speculation.

13 THE COURT: I will sustain the
14 objection unless you can establish that he has some
15 knowledge of the experience of black people. You
16 are asking from a black person's perspective. I
17 note that he is not black.

18 MR. APICELLA: I appreciate your
19 question. That's the point. It's impossible for
20 someone who is not black to look through.

21 THE COURT: That's the point I am
22 trying to make.

23 BY MR. APICELLA:

24 Q. From your experience as a police
25 officer here in Charleston you have dealt with lots

1 of black people who have been arrested and charged
2 with crimes?

3 A. Yeah, sure.

4 Q. White people too?

5 A. It's across the board.

6 Q. Done a lot of cases, you have arrested
7 hundreds of people?

8 A. I have worked a lot of cases.

9 Q. You have spoken to people on the
10 street, correct?

11 A. I have.

12 Q. Would you agree that the connotation of
13 the "N" word when a white person uses it can be
14 pejorative, in other words it's insulting, it is
15 not a word that indicates favorably to black people
16 as opposed to when a black person says it it may
17 actually be favorable?

18 MR. OSBORNE: Objection, Your Honor.
19 I'm not sure the relevance and calls for
20 speculation, his opinion. There is a lot of
21 objections to that question.

22 THE COURT: I think you stood on an
23 objection because he's not allowed to interpret
24 words or give opinions about. I think you are
25 asking for an opinion. I will sustain the

1 objection. I haven't let him give opinions on
2 other things.

3 BY MR. APICELLA:

4 Q. Directing your attention to what's been
5 marked as State's 122.

6 A. Yes, sir.

7 Q. That's my writing. I am sorry, the
8 solicitor's writing. Directing your attention to
9 this particular message, the author of the post is
10 somebody named Non White. You don't know who that
11 is?

12 A. Correct.

13 Q. But if I understand your direct
14 testimony and the colloquy that went with it, this
15 is a reference to Demarco Jones who was a person
16 involved in this case, correct?

17 A. Correct.

18 Q. And Demarco Jones is deceased?

19 A. That's correct.

20 Q. Demarco Jones was charged as a
21 co-defendant in this case, correct?

22 A. Well, he was charged with obstruction
23 of justice so if that would label him as a
24 co-defendant then, yes. I don't know. That's a
25 separate investigation from our standpoint. I

1 don't know if that's administrative or not if it
2 goes beyond our agency.

3 Q. He was charged with a crime pursuant to
4 events that are encompassed by the case?

5 A. Correct.

6 MR. APICELLA: No further questions.

7 THE COURT: All right. Ms. Van Pala,
8 do you wish to ask questions?

9 MS. VAN PALA: No, Your Honor. Thank
10 you.

11 THE COURT: State, redirect?

12 MR. OSBORNE: Just briefly.

13 REDIRECT EXAMINATION

14 BY MR. OSBORNE:

15 Q. We are going to go to 117. So what we
16 had showed you earlier was just the front page to
17 the download to Lil Devin; is that correct?

18 A. Correct.

19 Q. And that's what I am showing you now at
20 117?

21 A. That's correct.

22 Q. And so this is the entire download
23 which shows over 2,500 pages I think?

24 A. Yes, sir.

25 Q. We talked about IP addresses. Mr.

1 Apicella asked about that. I think we all agree
2 that as you move using a mobile device you get on
3 the internet the IP address will change as you hit
4 different servers?

5 A. That's correct.

6 Q. So these IP addresses here represent
7 all the difference networks or servers that when
8 posts were made to that account that they hit off
9 of to make that post?

10 A. Correct.

11 Q. So let's just look through. These are
12 all IP addresses. So we got about 45 pages of IP
13 addresses?

14 A. Yes. There is at least 40 some pages.

15 Q. Did you look at all the IP addresses?

16 A. I did not.

17 Q. You got about ten or maybe more than
18 per page. All right. So Mr. Apicella asked you
19 about lyrics and them being posted. Well, is it
20 fair to say that the depiction of lyrics that you
21 saw were all negative in nature were of individuals
22 who spoke to the police?

23 A. They were.

24 Q. Did you see any positive comments?

25 A. I can't say I did.

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