

Volume II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

J. Mark Hayes, II, Circuit Court Judge

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JUN 23 2013

S.C. Supreme Court

SANTIAGO RIOS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213256

APPENDIX

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Dominic Baird - Cross-examination
by Mr. Brannon

- 1 A That actually worked the scene that night or---
- 2 Q Went into the house.
- 3 A Went into the house total. Probably maybe five.
- 4 Q Okay. So, over half of the force at the current, at
- 5 the current number of CSI's, correct?
- 6 A Yes, sir.
- 7 Q All right. How many deaths have you investigated
- 8 during your employment with the Spartanburg County Sheriff's
- 9 Department?
- 10 A I hate to guess, sir. I mean we get, you know, average
- 11 maybe 15 or so. If you want to say a year or something like
- 12 that homicides maybe, not counting natural deaths, suicide,
- 13 I've been there three years---
- 14 Q Well, I want to talk about suicides.
- 15 How many suicides have you---
- 16 A Numerous.
- 17 Q Numerous?
- 18 A Yes, sir.
- 19 Q You testified that it appears that the, the gun was
- 20 fired at a close proximity to the victim's entrance wound,
- 21 correct?
- 22 A Yes, sir.
- 23 Q Most suicides that are shootings take place from a
- 24 close proximity, don't they?
- 25 A Generally, yes, sir.

Dominic Baird - Redirect examination
by Mr. Brannon

1 MR. BRANNON: Nothing further, Your Honor. Thank you.

2 THE COURT: State, State may redirect.

3 SOLICITOR GOWDY: Thank you, Your Honor.

4 Very briefly.

5 REDIRECT EXAMINATION

6 BY MR. BRANNON:

7 Q Is it typical in a suicide that the weapon would be
8 fairly close to the body?

9 A Yes, sir.

10 Q Despite the fact that half of your forensic unit went
11 to the crime scene, did you ever find a weapon capable of
12 firing a .38 caliber slug?

13 A I did not search the residence, sir.

14 Q You did not search the residence?

15 A No, sir.

16 Q Thank you.

17 A Yes, sir.

18 THE COURT: Recross?

19 MR. BRANNON: No.

20 THE COURT: You may step down, sir.

21 WITNESS: Thank you, sir.

22 THE COURT: Ask the attorneys to approach.

23 (Whereupon, a bench conference was held out of the
24 hearing of the jury at this time.)

25 THE COURT: All right. Ladies and gentlemen of the

1 jury, at this point in time we're going to break for lunch.
2 I'm gonna give you the same instructions I've given you
3 before just so we're sure you understand that you're not to
4 gather any information outside of the courtroom. Don't
5 listen to, watch, or read any media reports. Again, don't
6 allow anyone to discuss the case with you, and don't put
7 yourself in a position where you might overhear some
8 conversations concerning the case.

9 Again, if anyone tries to contact you concerning your
10 participation in the trial, please report that upon your
11 return to the courthouse and we'll be glad to take the
12 appropriate action.

13 At this time we are gonna break for lunch. I'll ask
14 that you be back in your, in the jury room at let's say
15 1:45. That should give you plenty of time to take care of a
16 personal matter, and have lunch, and be back here, and be
17 ready to start again. So, we'll say at 1:45 we'll resume.

18 Thank you very much.

19 You're free to go.

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

22 THE COURT: All right. Court will be in recess then
23 until 1:45 and defendant remains in custody.

24 Thank you very much.

25 MR. BRANNON: Thank you.

1 (Whereupon, Court was in recess for the lunch break.)

2 THE COURT: State ready?

3 SOLICITOR GOWDY: Yes, sir, Your Honor.

4 SOLICITOR CRICK: Yes, Your Honor.

5 THE COURT: Defense ready?

6 MR. COLLINS: Yes, Your Honor.

7 THE COURT: All right. We can bring the jury in.

8 (Whereupon, the following takes place within the
9 presence of the jury.)

10 THE COURT: The record will reflect that all jurors
11 have returned to the courtroom.

12 I hope everyone had a good lunch and we're now ready to
13 begin the afternoon of the trial. The State is still in the
14 process of calling its witnesses.

15 And you may call your next witness, Mrs. Crick.

16 SOLICITOR CRICK: Thank you, Your Honor.

17 The State calls Suzanne Cromer.

18 THE COURT: Ma'am, come forward to be sworn.

19 SUZANNE CROMER, being first duly
20 sworn, testified as follows:

21 THE COURT: Ma'am, please have a seat in the witness
22 stand, and once you're seated, I'd ask that you state your
23 name for the record.

24 WITNESS: Okay. My name is Suzanne Cromer,

25 C-R-O-M-E-R.

Suzanne Cromer - Direct examination
by Solicitor Crick

1 THE COURT: Mrs. Crick, your witness.

2 SOLICITOR CRICK: Thank you, Your Honor.

3 DIRECT EXAMINATION

4 BY SOLICITOR CRICK:

5 Q Mrs. Cromer, can you tell the jury where you work?

6 A I am employed by the South Carolina Law Enforcement
7 Division commonly known as SLED as a firearms and tool mark
8 examiner.

9 Q And what is that mean in your job title?

10 What do you actually do there at SLED?

11 A What I do is examine ammunition components such as
12 bullets and cartridge cases to determine whether or not they
13 were fired by a specific gun or loaded into and extracted
14 out of a specific firearm.

15 Q How long have you been at SLED?

16 A I've been with SLED just under ten years. I've been in
17 my current position just over eight.

18 Q Have you ever testified in Court before with regard to
19 ballistics?

20 A Yes, ma'am.

21 Q Do you know about how many times you've, you've
22 testified?

23 A Yes, ma'am, eleven times. Once in Federal Court, nine
24 times in General Sessions Court, and once in a coroner's
25 inquest.

Suzanne Cromer - Direct examination
by Solicitor Crick

1 Q Okay. And have you ever been qualified as an expert
2 before?

3 A Yes, ma'am.

4 Q You were qualified as an expert in what?

5 A Firearms identification.

6 SOLICITOR CRICK: Your Honor, at this time I would like
7 to qualify her as an expert in firearms identification.

8 MR. COLLINS: No objection, Your Honor.

9 THE COURT: Without objection then she'll be qualified
10 as an expert within that field.

11 And you may proceed, Mrs. Crick.

12 SOLICITOR CRICK: Thank you.

13 Q At some point did you receive item number nine known as
14 a fired bullet in this particular case?

15 A Yes, I did.

16 Q I'm gonna show you something.

17 (Whereupon, the fired bullet was marked as State's
18 Exhibit No. 40 for identification purposes only at this
19 time.)

20 Q That is been marked as State's Exhibit 40, and I
21 realize those are packages within packages.

22 But can you identify item number nine within that
23 package?

24 A First off, this is my packaging. That's my initials,
25 the date I sealed it, and also this fired bullet has my lab

Suzanne Cromer - Direct examination
by Solicitor Crick

1 number, my item number, and my initials described on the
2 actual bullet.

3 Q So, that is the bullet that you tested in this case?

4 A Yes, ma'am, it is.

5 SOLICITOR CRICK: Your Honor, at this time I'd like to
6 offer that into evidence.

7 THE COURT: Any objection?

8 MR. COLLINS: No, Your Honor.

9 THE COURT: Without objection it will be received into
10 evidence.

11 (Whereupon, State's Exhibit No. 40 was received into
12 evidence at this time.)

13 Q Let me start kind of from the beginning so that they
14 have a little understanding of what you do.

15 When you get a bullet or projectile, what kind of
16 testing do you do?

17 A First thing I do is I remove it from the package and I
18 look at it, visually inspect it. After that, I weigh it, I
19 measure the diameter, and then I go straight to the
20 microscope.

21 Rifling is what's left on a bullet after it's been
22 fired from a firearm. Rifling is what's placed inside the
23 gun barrel during, during the manufacturing process, and
24 what rifling is it's a series of lands and grooves, raised
25 and indented areas. And it's put there to put rotary motion

Suzanne Cromer - Direct examination
by Solicitor Crick

1 on the bullet. Very similar to a football player throwing,
2 a quarterback throwing a football. He puts it in a tight
3 spiral so it will go more accurately to its target.

4 Well, that's what the rifling is designed to do. It's
5 designed to make that bullet go into a tight spiral---

6 THE COURT: Just one second, ma'am.

7 MR. BRANNON: Your Honor, I apologize. But---

8 THE COURT: She, she may not be aware.

9 Ma'am, we have interpreters who are, in two languages,
10 who are interpreting for the defendant, and you talk a
11 little bit fast.

12 WITNESS: Sorry.

13 THE COURT: So, I'm gonna ask you to slow down some---

14 WITNESS: Okay.

15 THE COURT: ---so that they can keep up. So, just be
16 mindful of the fact that we do have those two interpreters
17 working.

18 MR. BRANNON: Your Honor, it's also a problem that she
19 is facing the jury. So---

20 THE COURT: All right. And ma'am, if we can move close
21 to the microphone. Sometimes that microphone will cut out
22 on you. But usually it's working.

23 WITNESS: Okay.

24 Q So, different guns might have different, might leave
25 different markings?

1 A Correct. What we call general rifling characteristics.
2 It's the number of land and grooves varies from gun to gun.
3 You -- some guns will have five. Some guns will have nine.
4 It just depends on the manufacturer.

5 Also type of rifling. You can have conventional
6 rifling, which is right angles, or you can have polygonal
7 rifling, which is more of a rounded angle. You can also
8 have twists, which refers to the way or direction that the
9 bullet is gonna spin, whether it's gonna spin to the left or
10 whether it's gonna spin to the right.

11 Q So, normally do you take a fired bullet and compare it
12 to a gun?

13 A No, what we would actually do is if I have a gun, I
14 would look at it. I would test fire it with comparable
15 ammunition to what I received. And then I would look at the
16 test fires first versus each other and then versus my
17 evidence or my unknown.

18 Q So, you could determine whether or not that bullet was
19 fired from that gun?

20 A Correct.

21 Q In this case did you have a gun to compare this
22 projectile to?

23 A No, I did not.

24 Q Are there occasions when you might not have a gun?

25 A If it's, you know, a random homicide or something like

Suzanne Cromer - Direct examination
by Solicitor Crick

1 that we might not have a gun. And then I give them what we
2 call a GRC list, General Rifling Characteristic List, which
3 has many of the guns that have that same rifling
4 characteristics, five right, conventional rifling. And I
5 give that to the investigator to use as an investigative
6 tool.

7 Q So, essentially, if you don't have a gun to compare it
8 to, you will enter what you do know into a computer to get
9 general information?

10 A Yes, we do. It's a computer program called our GRC
11 program. It was done by the FBI and that's what we plug in
12 our measurements, the sizes of the lands, the sizes of the
13 groove, the rate or the, the direction of twists, the type
14 of rifling, and the caliber, and then that gives us a list
15 of possible firearms that could of fired that weapon.

16 Q Okay. Now, in this specific case, you received a
17 projectile, correct?

18 A That is correct.

19 Q And that's the one I just showed you?

20 A Yes, ma'am.

21 Q When you got it, what did you do with it?

22 A I looked at it, I weighed it, I measured it, and then I
23 took it to my microscope to measure the lands and grooves,
24 and then I put that information into the computer program.

25 Q Now, just looking at it initially, did you have any

Suzanne Cromer - Direct examination
by Solicitor Crick

1 idea of what kind of bullet that might be?

2 A Initially it looked very similar to me to a .38 caliber
3 bullet.

4 Q Do you see a lot of those types of bullets?

5 A That's probably the most common type that we see.

6 Q So, it's something familiar to you?

7 A Yes, it is.

8 Q Did you say that you looked at the lands and grooves on
9 this bullet?

10 A Yes, I did.

11 Q What did you find?

12 A I found that this particular bullet was fired from a
13 firearm with five lands and grooves with a right twist.

14 Q And with that information, what did you do?

15 A I also weighed it and I determined that it was most
16 likely consistent with .38 Special. I looked at the lands
17 and grooves under the microscope, and I noticed misalignment
18 or slippage marks, which is common from a revolver. Because
19 when a bullet is being fired from a revolver, it's not
20 already in the barrel of the gun. A revolver, it has to go
21 through from the cylinder into the barrel. So, there's
22 usually some slippage there, and it did have those
23 characteristics.

24 Q On this particular projectile?

25 A Yes, it did.

Suzanne Cromer - Direct examination
by Solicitor Crick

1 Q Was the computer able to give you a list of possible
2 guns in this case?

3 A Yes, it did.

4 Q And you documented that in a report?

5 A I did.

6 Q Were you able to -- well, let me ask you this.

7 What were the findings that you came up within your

8 report?

9 A I determined that what was listed as my item nine, the
10 item nine bullet, was most consistent with bullets loaded
11 into .38 Special caliber cartridges.

12 Q And what---

13 A And it was suitable for identification.

14 Q Why was it most consistent with a .38 Special?

15 A Well, because it was most consistent with a .38 Special
16 because of the diameter of the bullet, which was
17 approximately -- it was damaged a little bit, the shape of
18 it was damaged. So, it was between .334 and .362 of an
19 inch, which .38 Special is usually around .335.

20 The weight, it was a, 130 grains. We use grains as a
21 unit of measurement. It takes 7,000 grains to equal one
22 pound, and commonly -- the most common .38 Special
23 ammunition we see is the Remington UFC 130 grain full metal
24 jacket, which means it has a cooper jacket around the whole
25 outer case of the bullet except for the space is open.

Suzanne Cromer - Direct examination
by Solicitor Crick

1 So, I determined that it was most consistent with .38
2 Special, 130 grain.

3 Q And not to ask a dumb question, but it had been fired?

4 A Yes, ma'am, it had.

5 Q If you had a gun in this case, could you tell us if
6 that projectile came from that particular gun?

7 A I might have.

8 Q One last question.

9 Do you generally, when you deal with suicide cases, do
10 you generally have a firearm if one was used?

11 A Yes, I do.

12 MR. COLLINS: Your Honor, I would object as to this,
13 this, this general characterization of what would typically
14 happen in a suicide as opposed to a murder case. I believe
15 this Court's prior rulings have indicated that you wanted
16 questions limited, based on facts that have been produced in
17 evidence; and I think this would, would go against the grain
18 of those previous rulings.

19 THE COURT: Ma'am.

20 SOLICITOR CRICK: Your Honor, she's testifying in her
21 experience what circumstances she would or would not most
22 likely---

23 THE COURT: This witness has been qualified as an
24 expert within the field. The other witnesses I believe,
25 when I made that prior ruling, were not qualified as experts

Suzanne Cromer - Direct examination
by Solicitor Crick

1 within any particular field. So, I'll allow the question
2 because this witness is an expert.

3 Q Can you tell the jury, based on what you had to
4 examine, whether or not you can determine how many pounds of
5 pressure had to be used to fire that bullet?

6 A No, not without having the firearm.

7 Q So, if you had the firearm, you could tell them say it
8 would take two pounds of pressure versus four pounds of
9 pressure?

10 A Yes, I would.

11 Q But not having that, you can't say?

12 A No, I can't.

13 Q Nothing further.

14 THE COURT: Cross-examination, Mr. Collins.

15 MR. COLLINS: Please the Court, Your Honor?

16 THE COURT: Yes, sir.

17 CROSS-EXAMINATION

18 BY MR. COLLINS:

19 Q Mrs. Cromer, how you doing this afternoon?

20 A I'm fine.

21 How are you?

22 Q I'm all right.

23 I guess the big question first. You've talked about
24 the details of this particular bullet.

25 You don't have any particular evidence that would say

1 this bullet is the one that killed Eliza Hernandez, do you?

2 A No, I don't.

3 Q Okay. And you don't have any scientific evidence that
4 would indicate who fired the gun this particular bullet came
5 from?

6 A No, sir, I don't.

7 Q Okay. Now, the bullet itself, what was this particular
8 bullet made from?

9 A It seemed to be, without elemental testing, it looks
10 like a cooper jacketed lead core bullet.

11 Q And the particular type of ammunition this comes from,
12 in your experience, how much gun powder is, is in a bullet
13 like that?

14 A I would not know that. Gun powder is not my area of
15 expertise.

16 Q Okay. So, it's just the bullets, the, the, the lead
17 portion that comes out?

18 A The bullets, the cartridge cases, and whether or not
19 they're fired by a specific firearm.

20 Q Okay. Now, the cartridge case, that's, that's the
21 whole, the whole package, right, that's the---

22 A No, sir.

23 Q ---the shell, the bullet, the gun powder?

24 A The cartridge, that would be a cartridge. The
25 cartridge case is actually the part that holds the bullet.

Suzanne Cromer - Cross-examination
by Mr. Collins

1 Sorry.

2 Q That's all right. It goes, it goes in and out on us.

3 A The cartridge case is, is an empty -- with a, with a,
4 sorry, a fired bullet, you'll have a, you'll have a
5 cartridge, which has the cartridge, the primer, the gun
6 powder, and the bullet. Well, when it's fired, you'll have
7 a cartridge case and a bullet.

8 Q So, you don't deal with these things before they're
9 fired?

10 You don't know---

11 A I can look at them before they're fired to determine
12 whether they were loaded into and extracted out of a gun.
13 But I don't look at gun powder.

14 MR. COLLINS: Okay. Your Honor, if I may have just a
15 moment?

16 THE COURT: Yes, sir.

17 (Pause.)

18 Q You don't -- let me strike that just a second.

19 Not knowing then the particular type of cartridge that
20 this ball came from, you can't take a guess at the
21 manufacturer of that particular ammunition, cartridge?

22 A Well, I figured the bullet was, looked most commonly
23 like a Remington --

24 Q All right.

25 A -- based on its design, its shape, its weight.

Suzanne Cromer - Cross-examination
by Mr. Collins

1 Q All right. Well, given that assumption, a Remington
2 .38 caliber cartridge, how much gun powder is in there in a
3 typical Remington cartridge?

4 A I don't know, sir.

5 Q So, you, you can, you can tell me who made it and what
6 it looks like, but you can't tell me how much gun powder is
7 in there?

8 A Usually when I get it the gun powder is gone.

9 Q Okay. Now, this particular bullet looks to be in
10 pretty good shape at this point, is that correct?

11 A It is correct. There is some distortion to the size,
12 which is why I did not put it into our Integrated Ballistics
13 Identification System.

14 Q But it's not much room or---

15 A No, sir, it's not.

16 Q Do you have any idea how far one of those Remington
17 cartridges would project?

18 A That's more trajectory and we don't do that.

19 Q And this particular list of guns that the GRC program
20 gave to us, it's not an all inclusive list, is it?

21 A No, sir, it's not. It's just used as an investigative
22 tool to help the investigators and also us where they don't
23 bring us a whole bunch of firearms that might not have the
24 right rifling.

25 Q Okay. And I believe the particular list that you

Suzanne Cromer - Cross-examination
by Mr. Collins

1 produced had, was it nine or twelve different makes or
2 manufacturers that produce these type of weapons?

3 A Fourteen.

4 Q Fourteen.

5 And so, just, just to make sure I understand it,
6 essentially what you can tell us is that this bullet may be
7 a .38 caliber bullet?

8 A It's consistent with .38 Special caliber.

9 Q And it may have come from one of fourteen or, or more
10 different manufacturers of handguns?

11 A That's correct.

12 MR. COLLINS: Your Honor, I have no further questions.

13 THE COURT: Redirect?

14 SOLICITOR CRICK: Just briefly, Your Honor.

15 THE COURT: Yes, ma'am.

16 REDIRECT EXAMINATION

17 BY SOLICITOR CRICK:

18 Q Mrs. Cromer, if you had the gun, could you possibly
19 tell the jury what manufacturer made it?

20 A The actual ammunition?

21 Q If you had the gun.

22 A If I had the gun, I could tell you what manufacturer
23 fired that, that bullet, yes.

24 Q But you didn't in this case?

25 A No, I did not.

Suzanne Cromer - Redirect examination
by Solicitor Crick

1 Q Nothing further.

2 THE COURT: Recross?

3 MR. COLLINS: Your Honor, nothing, nothing further at
4 this point.

5 THE COURT: Ma'am, you may step down. Thank you very
6 much.

7 You wish for this witness to be excused?

8 SOLICITOR CRICK: Yes, sir, please.

9 THE COURT: Any objection?

10 MR. COLLINS: No, Your Honor.

11 THE COURT: Ma'am, you're free to go as well. Thank
12 you very much for coming today.

13 WITNESS: Thank you.

14 The State may call its next witness.

15 SOLICITOR CRICK: Thank you, Your Honor.

16 The State calls Laurie Shacker.

17 THE COURT: Come forward, ma'am, to my left to be sworn
18 please.

19 LAURIE SHACKER, being first duly
20 sworn, testified as follows:

21 THE COURT: Have a seat in the witness stand, and once
22 you're seated I'd ask you to state your name for the record
23 please.

24 WITNESS: Laurie Shacker.

25 THE COURT: Mrs. Crick, it's your witness.

Laurie Shacker - Direct examination
by Solicitor Crick

1 SOLICITOR CRICK: Thank you, Your Honor.

2 THE COURT: And ma'am, move as close to that microphone
3 as you can, and sometimes it tends to cut out. But we, just
4 keep on giving your testimony.

5 Thank you.

6 DIRECT EXAMINATION

7 BY SOLICITOR CRICK:

8 Q Tell the jury where you work.

9 A I work for the South Carolina Law Enforcement Division
10 commonly known as SLED.

11 Q How long have you been at SLED?

12 A I've been there for nine years.

13 Q What department are you in at SLED?

14 A I'm in forensic toxicology.

15 Q Can you just briefly explain to the jury what you do?

16 A Sure. What we do is we test biological samples such as
17 blood and urine for the presence or absence of alcohol,
18 drugs, poisons, and then we interpret those results in
19 courts of law or for coroners or for police officers.

20 Q And how -- have you ever testified in Court before?

21 A Yes, I have.

22 Q Do you know about how many times you have testified?

23 A Approximately 30.

24 Q And you testified as an expert in---

25 A In forensic toxicology.

Laurie Shacker - Direct examination
by Solicitor Crick

1 SOLICITOR CRICK: Your Honor, at this time I'd like to
2 offer her as an expert in forensic toxicology.

3 MR. COLLINS: No objection, Your Honor.

4 THE COURT: All right. She'll be then qualified as an
5 expert within that field.

6 You may proceed, Mrs. Crick.

7 SOLICITOR CRICK: Thank you, Your Honor.

8 Q I'm gonna refer to your SLED Lab Number L0616464.

9 Did you receive, receive something called item one in
10 this case?

11 A I did.

12 Q Can you tell the jury what that was?

13 A That -- item one was a blood sample labeled Hernandez,
14 Eliza.

15 Q A sample of blood?

16 A Yes, that's right.

17 Q When you received that, was it still sealed and in
18 tact?

19 A Yes, that's correct.

20 Q And did you perform a test on that?

21 A I did.

22 Q Can you explain to the jury what that test was?

23 A I did a alcohol analysis as well as a drug screen.

24 Q And I know it probably goes without saying, but you are
25 looking for any type of drug?

Laurie Shacker - Direct examination
by Solicitor Crick

1 A Well, we look for probably the most commonly abused
2 classes of drugs.

3 Q And alcohol?

4 A Yes, that's right.

5 Q Did you generate a report based on your findings in
6 this case?

7 A Yes, I did.

8 Q Can you tell the jury what the results, what your
9 findings were in this case?

10 A Sure. The blood sample was negative for alcohol as
11 well as negative for all the classes of drugs that I
12 screened for.

13 SOLICITOR CRICK: I think that's it at this time, Your
14 Honor.

15 THE COURT: Mr. Collins.

16 MR. COLLINS: Very briefly, Your Honor, if I may.

17 THE COURT: Yes, sir.

18 CROSS-EXAMINATION

19 BY MR. COLLINS:

20 Q Mrs. Shacker, how are you doing this afternoon?

21 A Good.

22 Q I hope to be very brief. So --

23 A Okay.

24 Q Your tests are not comprehensive, are they?

25 A Not on, in this case, no.

1 Q Okay. Now, having looked at your report, the negative
2 results that you have, does that mean there was a complete
3 absence of the test, of the drugs you tested for or---

4 A No, that just -- basically we have a screen. We have
5 what we call a cutoff. If it screens below that cutoff,
6 then we would consider it negative. It doesn't mean that
7 there was absolutely none of that drug present. It just
8 means it was below our cutoff.

9 Q And your test does not indicate the manner in which or
10 would not, would not reveal the manner in which
11 Mrs. Hernandez died, would it?

12 A No.

13 Q Okay. Would not reveal in any way, shape, or form her
14 state of mind prior to her death, would it?

15 A Oh.

16 Q Other than it would be influenced by drugs that may of
17 been in her system.

18 A Right. That's right.

19 MR. COLLINS: Your Honor, I have no further questions
20 for this witness.

21 THE COURT: Redirect?

22 SOLICITOR CRICK: No, sir.

23 THE COURT: Ma'am, you may step down.

24 And, again, do you wish to have this witness excused?

25 SOLICITOR CRICK: Yes, sir.

Matt Fitts - Direct examination.
by Solicitor Crick

1 THE COURT: Any objection?

2 MR. COLLINS: No objection, Your Honor.

3 THE COURT: Ma'am, you're free to go if you'd like.
4 Thank you very much.

5 WITNESS: Thank you.

6 THE COURT: State may call its next witness.

7 SOLICITOR CRICK: Thank you, Your Honor.

8 The State calls Matt Fitts.

9 THE COURT: Sir, if you would, come forward to my left
10 and be sworn please.

11 MATT FITTS, being first duly sworn,
12 testified as follows:

13 THE COURT: Have a seat in the witness stand, sir. And
14 once you're seated, I'd ask that you state your name for the
15 record.

16 WITNESS: Matthew Graham Fitts, F-I-T-T-S.

17 THE COURT: All right. Your witness.

18 SOLICITOR CRICK: Thank you.

19 DIRECT EXAMINATION

20 BY SOLICITOR CRICK:

21 Q Mr. Fitts, where do you work?

22 A I work with the South Carolina Law Enforcement Division
23 forensic DNA and serology laboratory.

24 Q How long have you been with SLED?

25 A I was with SLED for nine years and then I left for

Matt Fitts - Direct examination
by Solicitor Crick

1 three, and I've returned and been back for another about two
2 and a half years.

3 Q What do you do at SLED just in general terms?

4 A We receive evidence from crimes. We try to identify
5 stains, body fluids, biological material, attempt to get DNA
6 profiles from that material, and compare it to blood samples
7 or oral swabs from the victims and subjects to either
8 include or exclude an individual as a possible contributor
9 to that biological material.

10 Q And the purposes that you might use that information
11 for, is it just for Criminal Court?

12 A No, the -- it's for the same type of testing. It's for
13 paternity issues of, in issues of paternity, missing
14 persons, body identifications. You know, same, same type of
15 testing as used for other things.

16 Q Have you ever been qualified as an expert in the
17 courtroom before?

18 A Yes, I have.

19 Q Do you know about how many times?

20 A I'd say approximately 30 times.

21 Q And when you were qualified, you were qualified as an
22 expert in---

23 A Forensic DNA and serology.

24 SOLICITOR CRICK: And Your Honor, at this time I'd like
25 to have him qualified as an expert in forensic DNA.

Matt Fitts - Direct examination
by Solicitor Crick

1 THE COURT: Any objection?

2 MR. COLLINS: No objection, Your Honor.

3 THE COURT: Without objection, he'll be so qualified.
4 You may proceed, Mrs. Crick.

5 Q Just to give the jury a little bit of background, not
6 too technical, can you explain to them what DNA is.

7 What are you testing?

8 A DNA is a compound that's found in most of the cells in
9 your body, and half of it you've inherited from your mother,
10 and the other half you've inherited from your father.

11 Q And that can come in the form of many different things,
12 DNA, correct?

13 A DNA is found in most living systems.

14 Q Skin?

15 A Oh, okay. Yes, it's, it's spread throughout -- most,
16 most of your cells in your body have the same copy of DNA
17 throughout in bone, blood, tissue, saliva.

18 Q Any of that?

19 A Yes, ma'am.

20 Q Okay. Once you -- well, let me ask you this.

21 Does anybody have identical DNA?

22 A Only identical twins would, would have the same DNA.

23 Q When you get, let's say a sample of blood or whatever
24 it may be, can you just test that and determine who it
25 belongs to?

Matt Fitts - Direct examination
by Solicitor Crick

1 A We can test that and compare it to something.

2 Q So, in order to make that determination, you need what?

3 A Well, we need a standard that is been collected from an
4 individual to, to make the comparison.

5 Q So you can compare one DNA sample with another one?

6 A Correct.

7 Q And you are looking to see what?

8 A If they match.

9 Q And when you say match, what does that mean?

10 A We don't look at the entire DNA molecule. We look
11 at -- and it's kind of like looking at a book. If the book
12 has a thousand pages in it, we don't look at all, every
13 page. We go to very specific pages and make a comparison on
14 those pages and these are pages that we know individuals
15 differ at and that's what we compare. And so, we'll look at
16 the -- we'll have one book from this sample and one book
17 from this sample, and we'll turn those, to those pages and
18 make the comparison.

19 Q In this particular case, and I think the SLED lab
20 number is L0616464, did you receive some samples to test for
21 DNA?

22 A Yes, I did.

23 Q Can you describe to the jury what those samples were?

24 A I received a number of items. Some described as hair
25 from the floor in the living room, hair from the couch in

Matt Fitts - Direct examination
by Solicitor Crick

1 the living room, several swabs from the bedroom floor. I
2 received a projectile. I received some fingernail scrapings
3 and then some oral swabs as standards from Santiago Pasqual,
4 Pasqual and another swab from Eliza Hernandez.

5 Q And I'm gonna step back to the ones you said were a
6 projectile.

7 Now, you normally don't deal with ammunition and that
8 sort of thing, do you?

9 A No, I don't.

10 Q What was your reason for having the projectile?

11 A It was requested to have DNA analysis performed on the,
12 that projectile.

13 Q Did you look at the projectile?

14 A I did.

15 Q And did you do a swab of the projectile?

16 A I did. The, the type of testing we do is, is very
17 sensitive. I didn't see any obvious stains. So, I didn't
18 do any serology testing to determine whether there was blood
19 present or, you know, saliva or any type of tissue present.
20 But it's sensitive enough that I can -- if I could pick up
21 some cells by swabbing that bullet, I, I might be able to
22 develop a DNA profile from it.

23 Q So, you would of been the one to swab the projectile?

24 A I did.

25 Q Okay. I'm gonna walk through with you.

Matt Fitts - Direct examination
by Solicitor Crick

1 Did you generate a report based on your testing?

2 A I did.

3 Q I'm gonna walk through your report with you, and, and
4 we can let the jury know what your findings were.

5 A Okay.

6 Q Okay. Starting with -- I guess we'll just start with
7 item number two, which would of been what?

8 A Hair from, hair from the floor in the living room.

9 Q And could you determine who that belonged to?

10 A Yes, I did. It matched the DNA profile of Santiago
11 Pasqual.

12 Q Okay. Now, I'm gonna move on to items four and six.
13 Can you tell the jury what those items were?

14 A These were swabs from the bedroom floor.

15 Q And what were your findings with regard to the swabs
16 from the bedroom floor?

17 A On these swabs, blood, the presence of blood was
18 indicated and the DNA profiles developed from them matched
19 Eliza Hernandez.

20 Q With respect to items number seven and eight, what are
21 those items?

22 A Those were also swabs from the bedroom floor.

23 Q And what were your findings with regard to those two
24 items?

25 A Blood was indicated on those swabs as well, and these

Matt Fitts - Direct examination
by Solicitor Crick

1 swabs the DNA profiles developed from these swabs were
2 mixtures of at least two individuals. The, the major
3 contributor to this mixture, the DNA profile of the major
4 contributor matched Eliza Hernandez, and Santiago, Santiago
5 Pasqual could not be excluded as a possible minor
6 contributor to these mix, mixtures.

7 Q Now, when you do your DNA testing, are you able to, I
8 guess the way to put it is date DNA?

9 A No.

10 Q So, there's no way you can make a determination as to
11 how long the DNA had been on the bedroom floor?

12 A No.

13 Q But you could tell us that there may of been a mixture
14 there?

15 A Yes.

16 Q I'm gonna skip down to number five.

17 What is that?

18 A It was described as hair from the bedroom floor.

19 Q Okay. And what were your findings with regard to that?

20 A When -- we developed what's referred to as a partial
21 DNA profile from, from the hair. In that, we attempt, if I
22 use the book analogy, we look at 15 different sites on the
23 DNA or 15 different pages. But if the quality and quantity
24 of the DNA is poor, we don't get copies of all 15 pages. We
25 may only get eight or nine.

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by Solicitor Crick

1 And so, this is a, referred to as a partial DNA
2 profile, and we got a partial DNA profile on that particular
3 item. And Santiago Pasqual could not be excluded as a
4 possible contributor to that profile, but Eliza Hernandez
5 could be excluded.

6 Q And now I'm gonna ask you about the projectile, the
7 swab you did off of the bullet.

8 Did you do testing with regard to that?

9 A Yes, I did.

10 Q Can you tell the jury what you found?

11 A Similar to item five, it was also a partial DNA profile
12 developed because of either the quality or quantity of DNA
13 that was recovered was poor, but from the, the partial DNA
14 profile, Eliza Hernandez could not be excluded as a possible
15 contributor to the partial DNA profile from that bullet.
16 Santiago Pasqual could be excluded.

17 Q Okay. So, you got, on certain, I'll use your term,
18 pages from the book, some of those matched Mrs. Hernandez?

19 A That's correct.

20 Q And some were missing?

21 A Correct.

22 Q How many do you have to have to have a match?

23 How many alleles?

24 A When we include or exclude someone, it's, if --

25 sometimes you may only have one page to compare. So, you're

Matt Fitts - Direct examination
by Solicitor Crick

1 either gonna -- they either match or don't. So, you include
2 or exclude, and you keep looking at more and more pages.

3 So, as long as they keep matching, they're still
4 included and that's the, in this case, with the partial DNA
5 profile, the, that there was nothing there to say that Eliza
6 Hernandez could not be a contributor to that partial DNA
7 profile.

8 Q And you got information on how many of your 15,
9 alleles?

10 A Nine of the fifteen sites that we, we looked at we got
11 information from.

12 Q And of those nine sites, the DNA was the same as her
13 profile?

14 A That's correct.

15 SOLICITOR CRICK: One moment, Your Honor, please.

16 (Pause.)

17 Q Did you also do testing on scrapings from fingernails
18 in this case?

19 A I, I, did not do testing. I, I looked at those. And,
20 you know, the fingernail scrapings are usually -- they are
21 collected, someone uses a toothpick, whether it's plastic or
22 wood, and they will scrape the fingernails, and then fold
23 this up in a piece of paper. And, and then that's how I
24 received it. And I opened it up to, and look at it visually
25 to determine whether there's any biological material

Matt Fitts - Direct examination
by Solicitor Crick

1 suitable for DNA testing.

2 And in this case I didn't see anything from the
3 fingernail scrapings that would be suitable for DNA testing.

4 Q From either party?

5 A Correct.

6 Q Nothing further at this time.

7 THE COURT: Your witness..

8 MR. COLLINS: Please the Court, Your Honor?

9 THE COURT: Yes, sir.

10 CROSS-EXAMINATION

11 BY MR. COLLINS:

12 Q Good afternoon, Mr. Fitts.

13 A Good afternoon.

14 Q Now, just to clarify, you are not involved in any way
15 in collecting the particular evidence that you then test,
16 correct?

17 A No, I was not.

18 Q So, somebody at, at the local law enforcement level
19 gets the, gets the material, packages it up, and sends it to
20 you, is that correct?

21 A In most cases, yes.

22 Q And then, and then you or someone in your office
23 actually runs the DNA test?

24 A That's correct.

25 Q All right. And now the DNA test itself has multiple

Matt Fitts - Cross-examination
by Mr. Collins

1 parts to it, correct?

2 A Yes, sir.

3 Q There's some parts that are I guess completely
4 mechanical or computerized, and then there's some parts that
5 I think involve some human interpretation, correct?

6 A That's correct.

7 Q And in, in this particular case, you were the human
8 that did the interpretation?

9 A That's correct.

10 Q To talk about the DNA, I guess the source materials
11 themselves first, I think you said that, that skin and hair,
12 pretty much all of our, our, our living tissue, has the same
13 DNA, correct?

14 A That's correct. It's pretty much the red blood cells
15 that, that lose -- once these cells mature into mature red
16 blood cells, they lose their DNA. So, that's the cell type
17 that actually does not have any, any DNA in it.

18 Q That's the one that doesn't have DNA?

19 A Correct.

20 Q Everything else does?

21 A Pretty much.

22 Q Okay. If -- let me ask it this way.

23 Can I leave DNA behind by, by touching something?

24 A You can.

25 Q For example, if, if my hands are sweaty standing up in

Matt Fitts - Cross-examination
by Mr. Collins

1 front of the jury, I touch this, this bar, I could leave DNA
2 behind, correct?

3 A Yes, you could.

4 Q Um---

5 A You'd have to leave enough for us to detect. But, yes,
6 you can.

7 Q Okay.

8 A That is a category we refer to as touch DNA where
9 people, some, an individual has handled something and we
10 just swab it to see if we can get a DNA profile.

11 Q Okay. And I guess if, if two people touched the same
12 item and, and leave enough DNA behind, that would leave a
13 mixture of DNA, correct?

14 A That's correct.

15 Q And some of those mixtures you would have or I'm
16 assuming in all those mixtures you would have a major and a
17 minor donor of the material?

18 A That's only -- it's, it's fairly quantitative. So,
19 that's left equal -- if you left equal amounts of skin
20 cells, we couldn't determine a major or a minor. It's if
21 someone has less, has left a lot of material versus someone
22 leaving a little material, you're gonna have a major
23 contributory and a minor contributor. But if it's equal,
24 it's gonna be determined as a mixture, but we won't have a
25 major and minor contributor that we can talk about.

Matt Fitts - Cross-examination
by Mr. Collins

1 Q Okay. So, it's, it's quantitative, it's---

2 A Yes.

3 Q Basically if, if we had a scale that was small enough
4 for cells, whoever had the most cells on that scale would be
5 the major and then the, the other would be the minor?

6 A That's correct.

7 Q All right. If you'll bare with me just a second. I'm
8 going to try to use this projector.

9 Your Honor, if I may?

10 THE COURT: Yes, sir.

11 Q Now, Mr. Fitts, you -- this is what's been introduced
12 as one of the State's Exhibits. It's a diagram of the, the
13 home where Mrs. Hernandez was found dead.

14 Okay?

15 A All right.

16 Q You've never been in this home, have you?

17 A No.

18 Q The designations that you talked about in your report,
19 the, the living room, the bedroom, those were designations
20 that were given to you by law enforcement; is that correct?

21 A That's correct.

22 Q The individuals who actually took the samples or, or
23 prepared the packaging to send to you?

24 A That's correct.

25 Q Okay. Now -- and I have to ask this. You've got each

Matt Fitts - Cross-examination
by Mr. Collins

1 one of these items numbered in your report. But there were
2 some numbers that were missing.

3 Do you know why I think it's numbers one, ten,
4 thirteen, and fourteen were absent from your report?

5 A They would be absent from my report if, if no DNA
6 testing was requested on those items. So, I don't -- if
7 you -- the only items that would be listed on my, on my
8 report are the ones that were sent to me when the DNA
9 request was made.

10 Q Okay. So, is it fair to say there's a, a package of
11 materials that comes from local law enforcement to SLED and
12 then is divvied upon between the different departments?

13 A That's correct.

14 Q So -- and so, if there were twenty samples, twenty
15 different items, you may of only gotten a small portion of
16 them?

17 A A subset.

18 Q Okay. And so, you may or may not be able to tell us,
19 on this particular screen, there are numbers in the living
20 room and the bedroom. Those numbers do not, to the best of
21 your knowledge, correspond to the numbers in your report.

22 A That's correct. There's the local agency item numbers,
23 and then once they're submitted to our laboratory they're
24 given their own item numbers.

25 Q For example, the, the projectile that you tested I

Matt Fitts - Cross-examination
by Mr. Collins

1 think was photographed as Number 19, but it came to you as
2 number nine?

3 A That's correct.

4 Q Okay. All right. At this point I don't think we need
5 this anymore. So, we'll take it down.

6 If this is the home where Eliza Hernandez and her
7 husband, Santiago, I think you referred to him as Pasqual or
8 Pasqual, or Rios, we'll just call him Santiago, if this is
9 the home where they lived, is it fair to assume that both of
10 them would have left DNA in various parts of the home?

11 A Yes.

12 Q Okay. And that DNA would hang around for some period
13 of time?

14 A Yes, it can.

15 Q So -- and I think you said earlier your testing just
16 tests for the presence of something. You can't time stamp
17 it or date stamp how old that particular item is.

18 A No, I can't.

19 Q For example, the, the swabs from the bedroom where
20 Eliza is the primary donor, and there was a minor donor
21 which you could not include or exclude Mr. Rios as, there's
22 no, no way to tell that they got there at the same time or
23 if one came before the other, is that correct?

24 A That's correct.

25 Q So, Mr. Rios may of left touch DNA on the, on the, by

Matt Fitts - Cross-examination
by Mr. Collins

1 walking across the floor, but then the blood may of later
2 landed on top of him?

3 A That's a possibility.

4 Q Okay. But now, the, the hair that you tested from the
5 living room that you positively identified as Santiago's and
6 no one else's, correct?

7 A That's correct.

8 Q When these things come to SLED and, and come through
9 the testing process, do you get the items first or would,
10 are they just kind of divvied up on, on who's available at
11 the time?

12 A If I understand your question, when the items show up,
13 they're, they're sealed in SLED evidence packages at the
14 evidence custodian who receives this and enters all this
15 information into our computer system. And then they are put
16 into what's referred to as a DNA box where our technician
17 comes down from our laboratory, will grab that evidence, and
18 bring it up to our laboratory, and then the case gets
19 assigned to whichever analyst is up next on the rotation.

20 Q So, you, you don't have any control over whether or not
21 say a projectile goes to ballistics first or to DNA first?

22 A Only, only if -- I don't have any control of that, no.

23 Q Okay. Do you know, in this particular case, if the
24 projectile you tested came to Mrs. Cromer first or came to
25 you first?

Matt Fitts - Cross-examination
by Mr. Collins

1 A As I understand it, it came, it, it went to her first.

2 Q So, she actually ran her, did her microscope and
3 everything else on it before it came to your office?

4 A That's correct.

5 Q And when you got it there were no visible, you said no
6 visible blood stains on it?

7 A That's correct.

8 Q So, we don't know if the, the DNA you were able to
9 extract from it was touch DNA or any, or, or blood DNA or
10 wherever the source was?

11 A No. No, I don't know that.

12 Q And as a matter of fact, we can't specifically say that
13 it was Eliza Hernandez's DNA on that particular projectile?

14 A What, what we do to try to provide some weight to an
15 inclusion or exclusion, the, the DNA information that we did
16 get, the nine pages we were able to look at, we use the
17 FBI's data base to calculate how often that profile would
18 appear in, in the general population. And I reported that,
19 for that particular partial profile from the bullet, and
20 what this means is if I just started randomly testing the
21 entire population, it, the, the, the probability of finding
22 someone to match that partial DNA profile is, is one in 3.3
23 million people.

24 So, that's saying, on average, one person out of every
25 3.3 million people would produce a profile that I could not

Matt Fitts - Cross-examination
by Mr. Collins

1 exclude them as possibly contributing to what I, I detected
2 on the bullet.

3 Q So, what you're saying is you can't positively say that
4 that's her DNA, but you can't exclude her as a possible
5 donor on that projectile either before or after it was shot?

6 A I can't, I can't exclude her as a possible donor from
7 the DNA profile I developed from that bullet.

8 MR. COLLINS: Okay. Your Honor, I -- if I may have
9 just one moment?

10 THE COURT: Yes, sir.

11 (Pause.)

12 Q Just a couple of more questions.

13 None of the information that you had from local law
14 enforcement indicated any of these swabs came from an
15 indentation in the bedroom floor, did it?

16 A No.

17 MR. COLLINS: Okay. Your Honor, I believe those are
18 all the questions we have.

19 THE COURT: Redirect?

20 SOLICITOR CRICK: No, sir.

21 THE COURT: Sir, you may step down.

22 Again, do you wish to have this witness excused?

23 SOLICITOR CRICK: Yes, sir, please.

24 THE COURT: Any objection?

25 MR. COLLINS: No objection, Your Honor.

Ila Simmons - Direct examination
by Solicitor Gowdy

1 THE COURT: He's free to go. Thank you, sir.

2 State may call its next witness.

3 SOLICITOR GOWDY: May it please the Court, Your Honor.

4 The State would call Special Agent Ila Simmons.

5 THE COURT: Come forward, ma'am, be sworn over here to
6 my left.

7 Ila Simmons, being first duly
8 sworn, testified as follows:

9 THE COURT: Have a seat in the witness stand please,
10 ma'am. And once you're seated, I'd ask that you state your
11 name for the record.

12 WITNESS: My name is Ila Simmons.

13 THE COURT: Mr. Gowdy, your witness.

14 SOLICITOR GOWDY: Thank you, Your Honor.

15 May it please the Court?

16 THE COURT: Yes, sir.

17 DIRECT EXAMINATION

18 BY SOLICITOR GOWDY:

19 Q Special Agent Simmons, I am going to remind myself
20 while I remind you to speak slowly, more slowly than usual
21 and to project your voice as best you can so that the
22 translators are able to translate as well as the last lady
23 and gentlemen in the jury box can hear you.

24 Okay. Having said that, can you introduce yourself to
25 the jury, tell them where you work, and what department.

Ila Simmons - Direct examination
by Solicitor Gowdy

1 A My name is Ila Simmons. I work at the South Carolina
2 Law Enforcement Division also known as SLED in the forensics
3 laboratory in the trace evidence department.

4 Q How long have you worked at SLED?

5 A Eight years.

6 Q And in all of those eight years, have you been in the
7 trace department or GSR department?

8 A Yes, sir, I have.

9 Q All right. Can you give the jury the benefit of your
10 educational background?

11 A I have a Bachelors of Science Degree in Chemistry.
12 After completing that I began working at SLED in the
13 forensics laboratory. The first three years that I worked
14 there I underwent an in-house training program where I
15 worked with a trace court certified examiner who taught me
16 how to collect trace evidence, process trace evidence, use
17 the instrumentation that we have to have to analyze trace
18 evidence.

19 During that time I took written, oral, and competency
20 examinations in all these areas and passed them
21 successfully. I am a member of the Gunshot Residue
22 Symposium that's held by the FBI. The FBI invites the top
23 gunshot residue analyst from around the world to come
24 together at Quantico Virginia to discuss and set the
25 standards and protocols that are used for everyone else to

Ila Simmons - Direct examination
by Solicitor Gowdy

1 analyze gunshot residue.

2 Q Agent Simmons, how long have you worked with the bureau
3 or the FBI on their standards committee?

4 A Three years.

5 Q Is that by invitation or does one volunteer for that?
6 Were you asked?

7 A It was -- I was asked -- I was invited: yes, sir.

8 Q Have you testified as an expert before in any state or
9 federal courtroom in South Carolina?

10 A Yes, sir, over a hundred times.

11 Q Over a hundred times?

12 A Yes, sir.

13 Q With the particular expertise in gunshot residue?

14 A Yes, that is among the areas of discipline that I have
15 been qualified in.

16 SOLICITOR GOWDY: All right. Your Honor, with that, we
17 would move Agent Simmons in as an expert.

18 MR. COLLINS: No objection, Your Honor.

19 THE COURT: Without objection she'll be qualified as an
20 expert within that field.

21 You may proceed, Mr. Gowdy.

22 SOLICITOR GOWDY: Thank you, Your Honor.

23 Q Agent Simmons, can you tell the ladies and gentlemen of
24 the jury what is GSR or gunshot residue?

25 A Gunshot residue is a mixture of microscopic chemicals

Ila Simmons - Direct examination
by Solicitor Gowdy

1 that come out of a gun when it's fired. It comes from the
2 primer end of a cartridge. The cartridge is placed in the
3 gun, the trigger is pulled, firing pin strikes the primer.
4 It contains shock sensitive chemicals, which means when
5 something strikes it it makes a spark. The spark goes
6 through, ignites the gun powder, pressure builds up, and
7 pushes the bullet out of the gun.

8 Well, as a mixture of all these chemicals come out of
9 this gun in a cone shaped cloud, and it can get on anything
10 in proximity of this weapon when it's fired including the
11 hands of the person firing the gun.

12 Q Agent Simmons, does SLED provide for local law
13 enforcement GSR collection kits?

14 A Yes, sir, they do.

15 Q Are those kits uniform across the State?

16 A Yes, sir, the ones that we provide are, yes.

17 Q Okay. And are there instructions within those kits
18 detailing for local law enforcement how they are to perform
19 the test?

20 A Yes, they are.

21 Q I think we heard testimony earlier that the use of a
22 word dauber and swab.

23 A Yes, sir.

24 Q Understanding that your expertise is broader than the
25 administration of the test, can you give the jury a sense of

Ila Simmons - Direct examination
by Solicitor Gowdy

1 how the GSR test would be done on someone's hands?

2 A Yes, I can. The kit, as we were saying, is uniform.

3 The -- what was before mentioned as daubers are also called

4 particle lifts. What it is is double sided sticky carbon

5 tape on a small handle. And what happens is the person

6 takes it, takes the double sided sticky tape, holds it by

7 the handle, it never makes contact with the sticky tape.

8 This air -- this is then placed, dabbed on top of the hand

9 of the person that is suspected they had gunshot residue on
10 their hands.

11 After that is completed, a sample is taken from the
12 palm of the right-hand, the back of the right-hand, the palm
13 of the left-hand, and the back of the left-hand. Then
14 cotton swabs, just like cotton swabs everyone uses at home,
15 are also used. A small amount of dilute nitric gas is
16 placed on the swabs and then they're swabbed over the same
17 area of the hands. The same sample is collected.

18 Q Is there a time limit within which SLED demands that
19 GSR tests be done?

20 A Yes, sir, on a living person, gunshot residue will only
21 remain for six hours after a shooting incident. If the kit
22 is collected on a living person after a six hour time frame,
23 it's six hours happened between the time of the shooting at
24 the time of collection, then we will not analyze the gunshot
25 residue kit.

Ila Simmons - Direct examination.
by Solicitor Gowdy

1 Q So, within six hours for a living person.

2 What about for a deceased person?

3 A It -- gunshot residue will remain on someone who is
4 deceased indefinitely. It would be just like an inanimate
5 object. If a gun was fired near this counter it would
6 remain on there until someone came by and cleared, cleaned
7 it off because it doesn't sweat. It doesn't make contact
8 with anything. Until it was removed, it would remain on the
9 hands of the deceased person.

10 Q So, is it fair to say that SLED has a, a, a separate
11 set of requirements with respect to time for GSR tests done
12 on living people versus deceased people?

13 A Yes, sir.

14 Q Okay. All right. Can you give the jury a sense --
15 let's focus on living people.

16 Living people whose test is taken within that six hour
17 time period, can you give the jury a sense of what
18 environmental factors could influence the presence of
19 gunshot residue?

20 A If someone were to wash their hands, if someone were to
21 fire a gun and wash their hands, it would remove the gunshot
22 residue from their hands. If they were sweating profusely
23 it would remove gunshot residue from their hands. If they
24 were to put their hands in and out of their pockets, wipe
25 their hands with towels, this would all be possibilities of

Ila Simmons - Direct examination
by Solicitor Gowdy

1 removing gunshot residue from the hands of someone who had
2 shot a gun.

3 Q Agent Simmons, you cited that list of environmental
4 factors by leading off with saying washing hands.

5 A Yes, sir.

6 Q Is that the single best way to remove gunshot residue?

7 A Yes, if the hands are well washed, then there will be
8 no gunshot residue left on the hands.

9 Q All right. Hand washing is number one.

10 A (Witness nods affirmatively.)

11 Yes.

12 Q You mentioned other environmental factors.

13 Could opening a door, using your hands to lift off of a
14 seat of a car, could that influence the validity of GSR test
15 results?

16 A Yes, because every time you make contact with something
17 using your hands, gunshot residue can be removed.

18 Q What about using a telephone to make a telephone call,
19 could that, as an environment factor, influence the presence
20 of gunshot residue?

21 A Yes, sir, it can.

22 Q All right. Going to the bathroom?

23 A Yes, sir.

24 Q Could that---

25 A That too could remove gunshot residue from the hands.

Ila Simmons - Direct examination
by Solicitor Gowdy

1 Q Okay. Did you analyze the GSR kit performed on
2 Santiago Rios?

3 A Yes, sir, I did.

4 Q And you found negative results for GSR on the palms and
5 the backs of the hands?

6 A That's correct.

7 Q I want you to assume for the sake of this hypothetical
8 that there was testimony that he had gone to the bathroom at
9 least once and possibly twice.

10 Would you be surprised at not finding gunshot residue
11 given that hypothetical?

12 A That is a possibility, yes.

13 Q Okay. Even within that six hour time period, would you
14 expect the results to be more valid at the one hour time
15 period or the five hour time period or is that not a factor?

16 A It would be -- you would find more gunshot residue
17 within the one hour time period because every minute that
18 passes after a gun is fired is, is, gunshot residue begins
19 to be removed immediately. So, you would have more, more
20 closely to the time of the shooting.

21 Q So, if a gun were fired at 9:30 p.m. and the gunshot
22 residue test were done at 12:40 a.m., that's more than three
23 hours?

24 A (Witness nods affirmatively.)

25 Q And if that suspect had gone to the bathroom at least

Ila Simmons - Direct examination
by Solicitor Gowdy

1 once and possibly twice, would you be surprised at not
2 finding gunshot residue on his hands?

3 A No, sir.

4 Q Okay. Did you also receive a gunshot residue kit
5 performed on the hands of a deceased woman by the name of
6 Eliza Hernandez?

7 A Yes, sir.

8 Q All right. You testified previously for the jury that
9 the, the rules are different for deceased people.

10 A Yes, they are.

11 Q All right. Presumably because they can not wash their
12 hands or do any of the other environmental things that we
13 described earlier?

14 A Correct.

15 Q Well, let me ask you this though. Let me ask you this.
16 I want you to assume that there was blood on hands.

17 In fairness, could that influence whether if GSR were
18 there, and blood were present, could that influence the test
19 result from the GSR?

20 A It can, yes.

21 Q Have you -- if blood were on the back of say a person's
22 right-hand, but were not on the back of a left-hand or the
23 palm of either, would you expect to find gunshot residue if
24 that person had fired a gun?

25 A Yes, because the blood would only influence the area on

Ila Simmons - Direct examination
by Solicitor Gowdy

1 which it was located.

2 Q All right. Let me ask you this.

3 Have you, in your -- how many GSR examinations have you
4 done?

5 A Probably 15,000 GSR examinations.

6 Q 15,000.

7 In your 15,000, have you ever found examples where
8 there was blood on a person's hand and you still found
9 gunshot residue?

10 A Yes, we have.

11 Q And again, the test for, on Eliza Hernandez hands were
12 negative on both palms and the back of both hands?

13 A That's correct.

14 Q If Eliza Hernandez were, handled a gun at 9:30 p.m. and
15 shot herself or had her hands on a gun that shot her, and no
16 other environmental factors other than blood on the back of
17 one hand were in existence, would you expect to find gunshot
18 residue on her hands?

19 A Yes, I would.

20 Q Agent Simmons, let's switch gears with you for one
21 second. The jury has seen a photograph of a, for want of a
22 better word, a mark on a hand.

23 Were you sent a section of skin where portions of skin
24 to be tested by local law enforcement in Spartanburg sent to
25 a lab in Columbia?

Ila Simmons - Direct examination
by Solicitor Gowdy

1 A Yes, it was.

2 MR. BRANNON: Objection, Your Honor.

3 May we approach?

4 THE COURT: Yes, you may.

5 Ladies and gentlemen of the jury, this is one of those
6 opportunities when you'll have to go back to the jury room.

7 I'll ask you to please not discuss the case in anyway until

8 I've advised you to do so.

9 You may retire to the jury room.

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

12 THE COURT: All right. I believe, Mr. Brannon, at the
13 side bar, you indicated to the Court that perhaps you had
14 not received any information concerning a sample having been
15 sent to this witness for testing from the autopsy.

16 MR. BRANNON: Yes, Your Honor, and, and Your Honor, I'm
17 gonna tell the Court right now I may be in error. I, I was
18 aware of Doctor Wren's test. But---

19 THE COURT: Well, I'll give you a chance to take a look
20 at what you do have and we'll see where we are.

21 (Pause.)

22 MR. BRANNON: Your Honor, I was in error. Forgive me.

23 THE COURT: You do have---

24 MR. BRANNON: Yes, sir.

25 THE COURT: ---have that report?

1 MR. BRANNON: Yes, sir.

2 THE COURT: All right. Then why don't we just go ahead
3 while we're out, and take about a five minute break.

4 Ma'am, I'm gonna caution you not to discuss your
5 testimony with anyone now that you've begun your testimony
6 in the case.

7 Court will be in recess for about five to ten minutes.
8 Thank you very much.

9 (Whereupon, a short recess was taken at this time.)

10 THE COURT: All right. Is the State ready?

11 MR. BRANNON: Yes, sir, Your Honor.

12 THE COURT: Defense ready?

13 MR. COLLINS: Yes, sir, Your Honor.

14 THE COURT: All right. Mr. Bailiff, I'll get the jury
15 back.

16 You can bring them back in.

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

19 THE COURT: All right. The jury has returned to the
20 courtroom.

21 You may proceed, Mr. Gowdy.

22 SOLICITOR GOWDY: Thank you, Your Honor.

23 May it please the Court?

24 THE COURT: Yes, sir.

25 CONTINUED DIRECT EXAMINATION

Ila Simmons - Direct examination
by Solicitor Gowdy

1 BY SOLICITOR GOWDY:

2 Q Agent Simmons, before we took a brief break I had asked
3 you whether or not you received a small portion of skin from
4 local law enforcement in Spartanburg and if you were asked
5 to perform tests on that small portion of skin.

6 A Yes, I was.

7 Q And did you find the presence of lead or any gun powder
8 particles whatsoever in the portion of skin that you
9 examined?

10 A No, I did not.

11 Q Agent Simmons, thank you. Please answer any questions
12 the defense attorney may have.

13 THE COURT: Mr. Collins, your witness.

14 MR. COLLINS: Thank you, Your Honor.

15 THE COURT: Yes, sir.

16 CROSS-EXAMINATION

17 BY MR. COLLINS:

18 Q Mrs. Simmons, how you doing today?

19 A Doing well. Thank you.

20 Q Now, you said earlier you had performed I think it was
21 about 15,000 GSR tests in your career?

22 A Yes, sir.

23 Q Out of those 15,000 tests, have you ever known of
24 someone who fired a, fired a weapon and then tested negative
25 for GSR?

Ila Simmons - Cross-examination
by Mr. Collins

1 A Yes, I have.

2 Q Okay. So, when Mr. Gowdy was asking you if, in certain
3 hypothetical situations you expect to find GSR, that's an
4 expectation. It's not a 100 percent guarantee,

5 Correct?

6 A That's correct.

7 Q And I think, in fact, all of the tests that you
8 performed were negative for GSR?

9 A That's correct.

10 Q And those were Santiago's hand test, Eliza's hand
11 tests, and then the one from the, the piece of skin that was
12 cut out, correct?

13 A That's correct.

14 Q You did not test any clothing or other items?

15 A No, sir, I did not.

16 Q And you are not involved in collecting the, the GSR
17 test itself, are you?

18 A No, sir, I do not collect the kits.

19 Q You, you know how to do it and, and you've apparently
20 got some expertise in actually helping set the protocol and
21 how it's done, but local law enforcement does that process?

22 A Yes, sir, they did in this case. They did the GSR
23 kits.

24 Q And is it fair to say that the quality of your results
25 is directly tied to the quality of the test taking?

Ila Simmons - Cross-examination
by Mr. Collins

1 A Yes, sir, it is.

2 Q So, if somebody makes a mistake in taking the sample,
3 it would produce, I guess, erroneous results on your end?

4 A Yes, sir, that is a possibility.

5 Q You, you can't fix a bad test at the end when you test
6 it, correct?

7 A No, sir, I have to go with what was given to me.

8 Q You get what -- you got to work with what you get?

9 A Yes, sir.

10 Q And the, the, the spot from Eliza's hand that Mr. Gowdy
11 was talking about, that actually came to you I think encased
12 in wax, is that correct?

13 A Yes, sir, it did.

14 Q So, somebody actually had to physically remove it from
15 her hand, somehow encase it in this wax, preserve it for I
16 think about 16 months before it got to you, correct?

17 A I'm not sure when it was collected.

18 Q You remember when you tested it?

19 A Yeah, I can check for you.

20 Q Please.

21 A Yes, sir, I tested it on February 4th of 2008.

22 Q Okay. So, earlier this year?

23 A Yes, sir.

24 Q Which I think was, rough guess, about 16 months after
25 it was, after Eliza died in November of '06?

Ila Simmons - Cross-examination
by Mr. Collins

1 A Yes, sir.

2 Q Okay. Now, how does the, I guess, the spread of this,
3 this chemical mixture, is it dependent upon the type of gun
4 that produces the, the spray?

5 A Yes, sir, a, a revolver, which is a weapon that has a
6 cylinder that turns, the cartridge's are loaded in the
7 cylinder and they turn around, produces, generally produces
8 more gunshot residue than does a semiautomatic where you
9 load the cartridge and then the cartridge casing is ejected.
10 So, yes, type of weapon does -- it does depend on type of
11 weapon that's fired.

12 Q And in Eliza's case -- let me back up and ask it this
13 way.

14 You talked about several different environmental
15 factors that can affect whether or not gunshot residue is
16 there when a test is taken, correct?

17 A Yes, sir, I did.

18 Q And those include hand washing, sweating, actually
19 putting hands in and out of pockets, or wiping them down---

20 A Yes, sir.

21 Q ---those type of things.

22 If someone were to render medical assistance to a, a,
23 the victim of a gunshot, is it possible that the EMT's or
24 the medical providers could be one of those environmental
25 factors that could remove GSR?

Ila Simmons - Cross-examination
by Mr. Collins

1 A If something were done to the hands, that is a
2 possibility it could be removed, removed.

3 MR. COLLINS: Okay. Your Honor, I believe those are
4 all the questions I have for Mrs. Simmons.

5 THE COURT: Redirect?

6 SOLICITOR GOWDY: Nothing on redirect, Your Honor.

7 THE COURT: Ma'am, you may step down. Thank you very
8 much.

9 Any objection to this witness being excused?

10 MR. COLLINS: No, Your Honor.

11 THE COURT: Ma'am, you're free to go if you'd like.
12 Thank you very much.

13 State may call its next witness.

14 SOLICITOR GOWDY: Your Honor, may it please the Court.
15 The State would call Doctor John David Wren.

16 THE COURT: Sir, come forward please to be sworn.

17 DOCTOR JOHN WREN, being first duly
18 sworn, testified as follows:

19 THE COURT: Have a seat in the witness stand please,
20 sir. And once you're seated, I'd ask that you please state
21 your name for the record

22 WITNESS: John David Wren.

23 THE COURT: Mr. Gowdy, your witness.

24 SOLICITOR GOWDY: Thank you, Your Honor.

25 May it please the Court?

Doctor John Wren - Direct examination
by Solicitor Gowdy

1 Could I have just a couple of seconds for Madam Court
2 Reporter to finish marking some things..

3 THE COURT: That'd be fine.

4 SOLICITOR GOWDY: Thank you, Your Honor.

5 (Whereupon, five photographs were marked as State's
6 Exhibit Nos. 41 through 45 for identification purposes only
7 at this time.)

8 DIRECT EXAMINATION

9 BY SOLICITOR GOWDY:

10 Q Good afternoon, Doctor Wren.

11 A Afternoon.

12 Q Could you give the jury the benefit of your educational
13 background?

14 MR. BRANNON: Your Honor, defense would stipulate that
15 Doctor Wren is more than qualified to be an expert in
16 forensic pathology.

17 THE COURT: Does the State accept the stipulation?

18 SOLICITOR GOWDY: I'm delighted to accept it, Your
19 Honor, yes, sir.

20 THE COURT: Okay. He then will be qualified as an
21 expert in the forensic, I guess, pathology?

22 SOLICITOR GOWDY: Forensic pathology, yes, sir.

23 THE COURT: You may proceed.

24 SOLICITOR GOWDY: Thank you, Your Honor.

25 Q Doctor Wren, can you give the jury a sense of how many

Doctor John Wren - Direct examination
by Solicitor Gowdy

1 autopsies you have performed in your career?

2 A About 3,000.

3 Q Can you give the jury a sense of how many times you
4 have testified, testified in either State or Federal Court?

5 A Between two and three hundred.

6 Q Doctor Wren, did you perform an autopsy on Eliza
7 Hernandez on November the 24th of 2006?

8 A Yes, I performed an autopsy on that individual in the
9 Spartanburg Regional Medical Center Autopsy Room on
10 11/24/2006 beginning at approximately 11:20 a.m.

11 Q Doctor Wren, let me start by showing you State's 43 and
12 44 and ask whether or not you recognize what is depicted in
13 those photographs.

14 A Well, this is the right-hand of a person that the skin
15 is relatively dark that has two little blemishes that are
16 darker in color than the rest of the skin.

17 Q Do you---

18 A And I believe it was from the individual in question.

19 Q Do you recall, either yourself or in consultation with
20 the derma-pathologist, investigating what that mark may have
21 been?

22 A Yes, as I recall, at the autopsy, I did not mention
23 that in my report, but once I finished they were taking a
24 few more pictures, and they, the police officers asked me if
25 I thought that could be a defense tattooing of the skin

Doctor John Wren - Direct examination
by Solicitor Gowdy

1 from, like she had on her face, and I told them no, but that
2 I would take a section of it and look at it under the
3 microscope. And I completely forgot about it because it
4 was, in my opinion, non-pertinent to the case because, as it
5 turns out, I went back to it, and it is nothing more than an
6 old tattoo that somehow some foreign material that was
7 pigmented got under the skin and was working its way to the
8 surface. I have one on my hand too.

9 SOLICITOR GOWDY: Your Honor, we would move State's 43
10 and 44 into evidence.

11 THE COURT: Any objection?

12 MR. BRANNON: I haven't seen them.

13 THE COURT: All right.

14 MR. BRANNON: No objection, Your Honor.

15 THE COURT: All right. Without objection, they'll be
16 admitted.

17 SOLICITOR GOWDY: Thank you, Your Honor.

18 (Whereupon, State's Exhibit Nos. 43 and 44 were
19 received into evidence at this time.)

20 Q Now, Doctor Wren, to your autopsy on Eliza Hernandez,
21 can you tell the jury what you found during the course of
22 your autopsy with specific reference to a gunshot wound?

23 A She had a through-and-through gunshot wound to the
24 head. The entrance was just to the side of the nose on the
25 left side. It had tattooing of powder, burning powder

Doctor John Wren - Direct examination
by Solicitor Gowdy

1 deposition around that wound indicating it was more than a
2 distant wound, and it went through her head and came out
3 just to the right of midline at the vertex of her head.

4 Q Doctor Wren, can you classify for the jury or
5 distinguish for them contact, near contact, and distant
6 gunshot wounds?

7 A Well, there's another one in -- there's -- contact is
8 actually with the weapon pressed against the skin. Now it
9 can be tight contact or it can be loose contact. Usually in
10 tight contact gunshot wounds the powder and gases coming out
11 of the barrel, the burning powder and the gases following
12 the bullet go into the, follow the bullet into the skin.
13 And since it's tight against the skin, and usually it has to
14 be, more than, more often than not, it should be against a
15 harder surface or at least it's real tense there to whether
16 the gases, of course, having to expand blow back past the,
17 the barrel and they tear the skin around the wound. That's
18 a characteristic of a tight contact gunshot wound.

19 Now, loose contact gunshot wound, the, the barrel is
20 actually still against the skin, but the gases can escape
21 around the sides or, or at least there's not enough pressure
22 to hold the barrel in place so that the gases come out
23 beside the wound. The burning powder goes into the wound.
24 So, one can take tissues deep in the wound, assuming it has
25 enough powder for the higher caliber gunshot wounds, one can

1 see that powder in the wound itself.

2 A distant gunshot wound is a, is a, a wound that is so
3 far away that there's no tail-tail characteristics. There
4 will just be a hole there where the bullet passed into
5 there.

6 Now, there's a range between contact and distant in
7 which the powders and the soot coming out of the barrel will
8 actually deposit on a surface. If the surface is light
9 colored or if it's skin in the way, it doesn't necessarily
10 happen with darker, the darker the clothing or the more
11 irregular the fabric weave, then the less chance you have of
12 seeing that. But under the microscope you could still see
13 the powder deposited in the cloth.

14 But somewhere between contact and distant, as the, as
15 the powder, burning powder and the soot comes out of the
16 barrel, it expands like a cone and it expands further and
17 further until it reaches a point where it, it doesn't go any
18 further. And that is the, the point at which an
19 intermediate contact, an intermediate gunshot wound becomes
20 a distant one.

21 With handguns, it's somewhere between six and
22 twelve inches usually where one will not see any indication
23 that, that those two things happened. Now, with rifles and
24 shotguns, it can be even further. Anybody that's shot a, a
25 shotgun knows that the pellets, as they come out, they

Doctor John Wren - Direct examination
by Solicitor Gowdy

1 expand outwardly and make a big round pattern on the target
2 they hit.

3 Q Doctor Wren, I believe that you concluded this was a
4 single apparent extremely close range contact gunshot wound?

5 A Extremely close range gunshot wound, yes.

6 Q Okay. Doctor Wren, with that description of the wound
7 and given where the entrance point is, would you expect to
8 see blood and other tissue blow back or would you not or do
9 you have an opinion?

10 A Usually in intermediate range, unless the barrel is
11 actually against the skin, one, one does not see any blow
12 back.

13 Q Doctor Wren, were you able, in examining the entrance
14 and the exit wounds, to reach any conclusions with respect
15 to the size of the caliber of the projectile or the weapon
16 that was used?

17 A Well, the wound was, was definitely not caused by a
18 small caliber gunshot wound. It wouldn't a .22 or a .25
19 caliber. Anywhere from a .32 to a .44 or .45 could of
20 caused it. And the reason I say that is because skin is
21 loose. It can be, of course, tight. And once a person
22 expires or the body moves in another position, the skin will
23 reorient.

24 So, if you measure the diameter of a wound, and let's
25 say for argument sake, sake it's perfectly round, and that

1 wound measures 1-inch in diameter, then that wound or the,
2 the, the object that caused that 1-inch diameter wound can
3 vary plus or minus 25 percent. In other words, if you take
4 1-inch and add 25 percent, it's a fourth of an inch. So, it
5 could of actually have been one and a quarter inch in
6 diameter when it went in. And in that case, the skin may
7 have been pulled tight, and when it relaxed it came back and
8 made a smaller hole to make the 1-inch hole. On the other
9 hand, if it was real loose, and, and pushed in a little bit,
10 and then once the person moved again and it's expanded back
11 out, it could go back to the 1-inch.

12 So, any -- so 1-inch diameter wound mean that they, the
13 object that caused that was between points three quarters of
14 an inch and one and a quarter inch. And, and in this case,
15 the wound to her lip, and it's not a perfectly round one,
16 but it does measure thirty-five one-hundredths of an inch
17 wide and a half inch long meaning it was going in at an
18 angle. So, the, the long dimension would not be as big as
19 it is. The 35-inch would, thirty-five one-hundredths of an
20 inch would be the one that you would use as the probable
21 diameter of the wound if it were round.

22 So, for a rule of thumb, we'll use thirty-six one
23 hundredths and a fourth of that's nine. So, nine from
24 thirty-six is twenty-seven hundredths, and nine plus
25 thirty-six would be forty-five hundredths. So, the, the

Doctor John Wren - Direct examination
by Solicitor Gowdy

1 wound would be somewhere between, I mean the object that
2 caused that wound should be somewhere between twenty-seven
3 hundredths and forty-five hundredths of an inch in diameter.
4 And the sort of low probability, it's most probably that
5 size, thirty-five one hundredths. But it could be a, a .27.
6 We don't have any .27 caliber gunshots, I mean guns. So,
7 it's bigger than a .25, and it's less than a, a .50 caliber.
8 So, it's somewhere medium caliber to a possibly large, but
9 more than likely medium.

10 Q And a .38 caliber projectile could fit within the range
11 that you---

12 A Very easily, yes, sir.

13 Q All right. Doctor Wren, if I am reading the first page
14 of your autopsy correctly, inspection of the head reveals
15 that she had a full head of dark hair with some leaves
16 embedded in the hair.

17 Am I reading that correctly?

18 A That's correct.

19 Q Okay. Along with caked blood?

20 A Yes.

21 Q Doctor Wren, in addition to your examination of the
22 entrance and the exit wounds, do you use any instruments to
23 assist you in determining the angle of the projectile?

24 I think some might, some people refer to it as a dowel.

25 Do you use anything that visualizes the angle of the

Doctor John Wren - Direct examination
by Solicitor Gowdy

1 projectile during your autopsy?

2 A I usually use a long slender rod that I try to get
3 through the wound. Sometimes, if the person is contorted at
4 a certain awkward dimension and they're stiff or, or
5 becoming stiff, it's hard to get that, that project, I mean
6 that object through there. But in this case it, it was, it
7 was pretty easy to push, put it through there, and then
8 rather than use a protractor to measure the angles, I just
9 do it sort of by eye.

10 SOLICITOR GOWDY: Your Honor, a moment of the Court's
11 time if I could?

12 THE COURT: Yes, sir.

13 (Pause.)

14 Q Doctor Wren, let me show you what's been marked as
15 State's Exhibits 41 and 42, and ask you whether or not you
16 recognize what is depicted in those photographs.

17 A Yes, this is the, one of the rods I used to put the,
18 to, to show the actual path of the bullet.

19 SOLICITOR GOWDY: Okay. Your Honor, we would move
20 those exhibits into evidence and ask permission to publish
21 to the jury.

22 MR. BRANNON: No objection.

23 THE COURT: Without objection, they'll be received.
24 Have they been marked?

25 SOLICITOR GOWDY: Yes, sir, Your Honor.

Doctor John Wren - Direct examination
by Solicitor Gowdy

1 THE COURT: As marked.

2 (Whereupon, State's Exhibit Nos. 41 and 42 were
3 received into evidence at this time.)

4 THE COURT: You may publish.

5 Q Let me first show you State's Exhibit 41.

6 Are you able to see both ends of the rod?

7 A Yes, sir.

8 Q And your examination, your testimony is that the

9 entrance wound is below the nose above the lip?

10 A Yes.

11 Q Okay. And that would show the angle of the projectile?

12 A From the side, yes.

13 Q Yes, sir.

14 Let me show you State's Exhibit 42. Doctor Wren, it
15 appears as if the entrance wound is on the left side of the
16 midline and the exit wound is on the right side of the
17 midline.

18 A That's correct.

19 Q All right. So, it would be entering here, but exiting
20 on this side of the midline?

21 A That's correct.

22 Q And at a, at a upward angle?

23 A Well, looking at those pictures, it looked like it was
24 upward at about 75 to 80 degrees from the, from the right
25 angle, going up about 75 degrees to 80 degrees. And it's,

Doctor John Wren - Direct examination
by Solicitor Gowdy

1 it's going from left to right. That is a little bit
2 misleading because this is an oblique view. If you had a
3 straight on view, it would probably be about ten or fifteen
4 degrees, no more than that, because it was just slightly to
5 the right of the midline of the head, and, of course, it's
6 slightly to the left of the midline of the face. So, it's
7 probably ten, at the most, twenty degrees---

8 Q Okay.

9 A ---to the right. And, of course, it's front to back
10 and you can use another dimension, but you only need three,
11 two, two measurements and three dimensions.

12 SOLICITOR GOWDY: One moment, Your Honor.

13 THE COURT: Yes, sir.

14 (Pause.)

15 Q Doctor Wren, thank you for your time. Please answer
16 any questions the defense attorneys may have for you.

17 THE COURT: Mr. Brannon.

18 CROSS-EXAMINATION

19 BY MR. BRANNON:

20 Q Good afternoon, Doctor Wren.

21 A Good afternoon.

22 Q I -- we've met before and, and you know that sometimes
23 I don't understand your answers.

24 Six to twelve inches you said, is that the point at
25 which a intermediate shot becomes a distant wound, is that

Doctor John Wren - Cross-examination
by Mr. Brannon

1 correct?

2 A Yes, sir.

3 Q All right. And in your report I believe you described
4 this as an extremely close range gunshot wound, correct?

5 A Right.

6 Q Okay. Extremely close is that inter -- since it's not
7 a contact wound, that make it necessarily an an
8 intermediate shot?

9 A Yes.

10 Q Okay. So, because it's not an actual contact wound,
11 it's considered intermediate?

12 A Well, in this case I could not exactly say that it was
13 not loose contact. So, I used the word extremely close and
14 I think I put slash or hyphen close contact because there
15 was burning of the, the lip, which means that, that the
16 barrel had to have actually probably hit the lip after it
17 became hot and burned the, the face.

18 Q Okay.

19 A Let's see. I said, said extremely close range loose
20 contact.

21 Q Got you.

22 A So, it was extremely close.

23 Q All right. So -- all right. All right. I understand
24 that.

25 Any of the tests or examinations or observations that

1 you made during your, your autopsy tell you who was holding
2 the weapon that fired the projectile that passed through
3 her, her, her face?

4 A No.

5 Q No.

6 Okay. That projectile, those pictures were a little
7 bit distorting, but that projectile was going at an upward
8 angle, is that correct?

9 A That's correct.

10 Q From front to back?

11 A If I---

12 Q Correct?

13 A If her face, head were perfect, were vertical.

14 Q Okay. It could have been shot like this, couldn't it?

15 A No.

16 Q Why not?

17 A It would come out the back of your head.

18 Q Okay. But it could of been -- okay. So, it could of
19 been shot like that then?

20 A Yes.

21 Q Okay.

22 A It was.

23 Q Right.

24 A Yes, it was.

25 Q So---

Doctor John Wren - Cross-examination
by Mr. Brannon

1 A Absolutely.

2 Q The weapon could have been in her left-hand and fired
3 like that, correct?

4 A That's correct.

5 MR. BRANNON: Okay. One second.

6 (Pause.)

7 MR. BRANNON: Nothing further, Your Honor. Thank you.

8 THE COURT: Mr. Gowdy.

9 SOLICITOR GOWDY: One moment, Your Honor.

10 THE COURT: Yes, sir.

11 (Pause.)

12 REDIRECT EXAMINATION

13 BY SOLICITOR GOWDY:

14 Q Doctor Wren, the defense attorney asked you about
15 shooting herself. I understood your original testimony to
16 be that the barrel had to have been, when it was hot, it
17 would of made contact with the skin after it became hot.

18 A Well, it, it burned the skin of her lip, and the only
19 way it could of, her skin could of gotten burned was for the
20 barrel to actually hit it or be in, in contact with it when,
21 when it discharged. I mean it has to touch it after it
22 discharged.

23 Q Right.

24 A Now, whether, whether it was laying up against it when
25 it discharged and it stayed there long enough to burn it or

Doctor John Wren - Redirect examination
by Solicitor Gowdy

1 whether it, her head recoiled and hit it, or whether whoever
2 did it pushed it up against there, I can't tell.

3 Q Okay.

4 A But nevertheless, after the barrel, after the gun shot
5 was discharged, the barrel was hot and either the powder,
6 which didn't, didn't show tattooing, it was more like a, a,
7 like a burn from something touching it rather than things
8 hitting it, little particles hitting it. It had to have
9 been up against it after it was discharged.

10 Q Thank you, Doctor Wren.

11 MR. BRANNON: Nothing further.

12 THE COURT: Recross?

13 Sir, you may step down. Thank you very much.

14 THE COURT: You wish to have this witness excused?

15 SOLICITOR GOWDY: Yes, sir, Your Honor.

16 THE COURT: Any objection?

17 MR. BRANNON: None, Your Honor. Thank you.

18 THE COURT: You're free to go, sir.

19 State may call its next witness.

20 SOLICITOR CRICK: Your Honor, before we call our next
21 witness we actually have a matter we need to take up outside
22 the presence of the jury.

23 THE COURT: All right. Ladies and gentlemen of the
24 jury, I'll ask you to retire to the jury room. Don't begin
25 any discussions until I've advised you to do so.

1 You may retire.

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

4 THE COURT: All right. Mrs. Crick, I'll be happy to
5 hear from you.

6 SOLICITOR CRICK: Thank you, Your Honor.

7 I know that we did a motion at the beginning of the
8 trial addressing potential Lyle evidence or information.

9 The only remaining witness we have is an individual who may
10 have, who actually will testify that he had been around the
11 defendant when he carried a gun in his waistband before,
12 when he had been drinking, that he had pulled the gun out
13 and showed the gun to people in the home. And I don't know
14 if Mr. Brannon objects to that or not. But I wanted to give
15 him an opportunity.

16 MR. BRANNON: Yeah, I object. If the Court, Court will
17 let me get my rule book out here so I --.

18 THE COURT: Yes, sir.

19 (Pause.)

20 MR. BRANNON: Your Honor, Rule 404(a) says character
21 evidence general, assuming that's what they're claiming this
22 is, evidence of a person's character or trait of character
23 is not admissible for the purpose of proving action and
24 conformity there with on a particular occasion except
25 evidence of a person, of a pertinent trait or character

1 offered by an accused or by the prosecution to rebut the
2 same.

3 Your Honor, I believe they're trying to offer this to
4 bolster their position or, or to present the position that
5 he was known to carry a gun. That's not, that's the
6 opposite of this exception to the rule and would ask the
7 Court to not allow that testimony to be placed in front of
8 the jury.

9 SOLICITOR CRICK: Your Honor, we're not offering it to
10 show action and conformity therewith. We're actually
11 referring to 404(b), which does provide exceptions. And in,
12 in this case, the defense -- I mean they're several
13 statements in and they're several versions in. Some of
14 those being accident, mistake, or she killed herself. We
15 don't have any evidence that she carried a gun or owned a
16 gun or had a gun. What we would like to provide is evidence
17 that he was known to carry a gun on his person, that he had
18 access to the gun.

19 I know, in Mr. Collins' opening statement, he told the
20 jury that Eliza introduced the gun into a family fight. We
21 would like the opportunity to show that that was not the
22 case, and, and to rebut the fact that she was the one that
23 went and grabbed the gun.

24 THE COURT: She's referring to 404(b) and I suppose the
25 portion of that that says that evidence of other crimes,

1 wrongs, or acts are not admissible to prove the character of
2 a person in order to show action and conformity therewith.
3 That's the general rule.

4 MR. BRANNON: Right. Right.

5 THE COURT: However, they may be admissible to show
6 motive, identity, existence of a common scheme, scheme, or
7 plan, the absence of mistake or accident, or intent.

8 MR. BRANNON: Your Honor, I guess, I guess I'm -- I
9 mean are they -- I don't, I don't know of a mistake. I
10 don't know, I don't know where this fits in. Just to say
11 the man had a gun or somebody saw him with a gun at some
12 time in the past, I don't think it falls into, under that,
13 under that provision.

14 THE COURT: Well, again, Mrs -- she, she had indicated
15 and I do recall in the opening statement the argument was
16 made to the jury that the proof was going to show that the
17 victim introduced the gun into a fight.

18 MR. BRANNON: I do -- I, I absolutely agree with the
19 Court. That statement was made in the opening, opening
20 argument. But that, that wasn't talking about Santiago
21 Rios. Now they're wanting to talk about Santiago Rios.

22 It may, however, be admissible to show motive. I mean
23 this isn't motive.

24 Identity, well, there's no question of identity.

25 Existence of a common scheme or plan, there's no

1 evidence at all that he had been planning the demise of his
2 wife.

3 And, Your Honor, I don't think there was any mistake.

4 THE COURT: Well, again, there's -- I've heard the
5 argument thus far that -- and, and I think there's been
6 questioning along the lines that perhaps a struggle may of
7 ensued, that a gun went off by accident or mistake. I've
8 heard questioning along that line.

9 MR. BRANNON: I, I -- Your Honor, there's no doubt
10 there's questioning along that line, and there's no doubt,
11 Your Honor, that this woman died as a result of a, of a
12 bullet fired from a gun. I mean there was a gun in the
13 house. Nobody's disputing that.

14 The, the question is for the jury, do they believe that
15 the victim presented the gun or do they believe the
16 defendant presented the gun. Your Honor, evidence that my
17 client may of had a gun at some time in the future is
18 extremely prejudicial.

19 THE COURT: I guess in the past before the---

20 MR. BRANNON: In the past, excuse me, in the past. I
21 mean that is, that is -- there's no question there's a gun
22 involved. It's, it's there. But the fact that he may of
23 had a gun a week before or a year before, that is extremely
24 prejudicial and it's really not probative at all because we
25 know that there was a gun there that day.

1 Your Honor, they all---

2 THE COURT: Let me, let me hear from her.

3 SOLICITOR CRICK: First of all, Your Honor, we have
4 introduced evidence -- the jury already knows there were
5 guns in the home. Even in his statement, one of his
6 statements, which is in evidence, he said she had, she went
7 and grabbed the gun. We struggled. I told her to let go.
8 She had her finger on the trigger and I had the barrel.

9 We would like to be able to, to provide evidence that
10 shows that that's not the case. We're not talking about a
11 prior crime. We're not talking about a wrong necessarily.
12 But an act, which is covered under this section. And if any
13 of his -- we don't know. We don't know what they're gonna
14 argue. So, we have to guess as best we can based on the
15 statements that are in evidence.

16 And based on the opening that said she introduced the
17 gun, it would go to absence of mistake or accident over a
18 struggle, it accidentally going off, or her accidentally
19 shooting herself with the gun.

20 THE COURT: Now---

21 MR. BRANNON: Your Honor, mistake---

22 THE COURT: Well, let me finish questioning her for
23 just a second.

24 MR. BRANNON: Thank you.

25 THE COURT: You originally said the witness was going

1 to testify not only that he carried a gun, but at times when
2 he had been drinking, he brandished the gun or took it out
3 and showed it to others.

4 Is that what you -- is that the proffer or what you're
5 telling me this witness is going to be testifying to?

6 SOLICITOR CRICK: Essentially, yes, Your Honor.

7 Another part of his statement indicated that he had been out
8 drinking I think the night before and actually had been
9 drinking on this particular night. I think he said wine at
10 his sister's home.

11 What the, what the witness is gonna testify to is that
12 he had known him to carry a gun, he had seen him with a gun
13 actually on his person. Not in the home. But on his person
14 while he was in the home, and that he had brandished it on
15 occasion or pulled it out to show other people, from his
16 clothing or from his person, and in those occasions he
17 generally was drinking.

18 MR. BRANNON: Well, Your Honor, according to
19 Mrs. Crick, they want to produce this testimony to eliminate
20 the possibility of mistake. Your Honor, that, that's not,
21 that's not the mistake this rule is talking about. The
22 mistake this rule is talking about is I think it's Jim, but
23 no, it's Joe.

24 Your Honor, there's no mistake. It was Eliza
25 Hernandez, Santiago Rios in a room. There was a gun in the

1 room. The prejudicial effect of allowing them to produce
2 testimony from somebody that said they saw him with a gun at
3 some time before this so greatly outweighs its probative
4 value because, Your Honor, the probative evidence is already
5 before the jury.

6 There was a gun in the room. It doesn't matter how it
7 got there. There was a gun in the room. And whether he had
8 a gun yesterday or five years ago doesn't help this jury
9 determine who shot the gun.

10 SOLICITOR CRICK: Your Honor, it also goes to---

11 THE COURT: One more time.

12 SOLICITOR CRICK: ---intent, which, again, is an
13 exception under this. They're saying that she went into the
14 bedroom to arm herself with a weapon. We're saying that he
15 followed her in the bedroom with the intent to shoot her
16 because he was leaving her. So, it also goes to intent.

17 MR. BRANNON: Well, Your Honor, there's absolutely no
18 evidence that he was leaving her. In fact, it's quite the
19 contrary. Her mom was coming to get her. She was leaving
20 him.

21 I, I mean how does him being in possession of a gun
22 some time before this incident prove his intent on November
23 the 23rd of 2006?

24 It doesn't.

25 THE COURT: Let me, let me ask you again about the

1 testimony of the witness.

2 Is the witness expected to testify that this occurred
3 on several occasions, that he had been seen as a matter of
4 habit of having the gun, or is it simply an isolated
5 incident when he may of had a gun on the one occasion?

6 SOLICITOR CRICK: It happened---

7 MR. BRANNON: Your Honor?

8 THE COURT: Let, let me ask my question.

9 MR. BRANNON: Your Honor, the interpreter is, is saying
10 he needs to stop. I'm sorry. Forgive me, Your Honor.

11 THE COURT: Stop for what?

12 MR. BRANNON: He said he needs a break.

13 THE COURT: We're gonna take one as soon as we finish
14 this.

15 Can we go on about five more minutes?

16 MR. BRANNON: Five more minutes.

17 THE COURT: Well, I think I've heard -- answer the one
18 question I had.

19 Is this more than one occasion or an isolated incident?

20 SOLICITOR CRICK: It was several occasions, Your Honor.

21 The last one being January of this year.

22 THE COURT: All right. January of that year which was?

23 MR. BRANNON: '06.

24 SOLICITOR CRICK: 06.

25 THE COURT: Ten months earlier?

1 SOLICITOR CRICK: Correct. That's also the last time
2 he saw the defendant.

3 THE COURT: I'm gonna take a break and take a look at
4 it.

5 MR. BRANNON: Thank you, Your Honor.

6 SOLICITOR CRICK: Thank you, Your Honor.

7 MR. BRANNON: Approach, approach briefly, Your Honor?

8 THE COURT: Yes, sir.

9 (Whereupon, a short recess was taken at this time.)

10 THE COURT: All right. After reviewing the rules that
11 have been cited and in consideration of the proffer or the
12 statement by the State as to what the, the testimony would
13 be, I'm gonna rule that the prejudicial effect would
14 outweigh its probative value. I'm not going to allow the
15 testimony.

16 Now, does the State have other witnesses to call?

17 Will that be the end of the State's case?

18 SOLICITOR GOWDY: Your Honor, I'm not hesitating cause
19 I don't know. It, it -- the answer to that is 90 percent
20 yes. And the only caveat is if the Court were going to
21 break now for the day, we would have another witness
22 tomorrow morning. If the Court were going to make the
23 defense go forward, then I would rest. There is a witness
24 who we do not have today and will not have until tomorrow.
25 And if the Court wanted to march forward, then I would have

1 no---

2 THE COURT: I think the case is gonna go into tomorrow
3 whether I break now or don't break.

4 MR. BRANNON: And, Your Honor, we, we would ask the
5 Court to allow us to break because we need some time with
6 the client and the translators to prepare for tomorrow.
7 So --.

8 THE COURT: I understand.

9 Okay. Well, why don't we call it a day. I won't ask
10 you whether you're going to rest or not. We'll take it up
11 in the State's case in the morning.

12 SOLICITOR GOWDY: Thank you, judge.

13 THE COURT: Bring the jury in.

14 (Whereupon, the following takes place within the
15 presence of the jury.)

16 THE COURT: All right. The record will reflect that
17 the jury has come back into the courtroom.

18 And ladies and gentlemen of the jury, because of a
19 ruling that I've just made, there's some issues concerning
20 witness scheduling and we're already at 4:30, and I think I
21 kept you over the last two days. So, I'm gonna let you go a
22 little early today.

23 So, I told you that, that the -- obviously we don't
24 keep a regular schedule here. You're learning that now as
25 when we, as when we come and go and I think you realize I

1 told you the truth about that.

2 So, we're gonna break for the evening at this time. I
3 will caution you again, as I always have, don't attempt to
4 gather any information outside. Don't talk to anyone about
5 the case. Please don't pay any attention to any media
6 reports or attempt to gather any information from those
7 sources. And again, should anyone try to contact you
8 concerning your participation, please let us know and I'll
9 and I'll take the appropriate action.

10 Please be back in the jury room at nine o'clock in the
11 morning. We should be in a position to proceed with the
12 trial. And based on what I have, information I have,
13 there's a chance that, a good chance that the case will go
14 to the jury perhaps some time later tomorrow. And if it
15 does go to, to the, to you at that time I would have, I
16 would remind you of the fact that once you begin your
17 deliberations, we may stay after five o'clock, and, and it
18 may be a very long day if we go in that direction.

19 So, let anyone know that needs to where you're gonna be
20 tomorrow. And what we normally do is if we did go beyond
21 five o'clock, I will get numbers from you as to people we
22 can call and let them know that you're safe and sound here
23 at the courthouse, and that you're working with us over that
24 time. So, be prepared to give us that information as to who
25 we should contact if we need to should we get into that

1 situation. I'll just make you aware that could happen. So,
2 let's be prepared.

3 Hope you have a good evening. Be back in the jury room
4 at nine o'clock in the morning.

5 Thank you very much.

6 (Whereupon, the following takes place outside the
7 presence of the jury.)

8 THE COURT: All right. The Court is in recess until
9 nine o'clock in the morning, morning.

10 The defendant remains in custody.

11 Thank you very much.

12 SOLICITOR GOWDY: Thank you, Your Honor.

13 SOLICITOR CRICK: Thank you.

14

15 (Whereupon, Court was in recess for the evening.)

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1 Thursday, May 1st, 2008

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

4 SOLICITOR GOWDY: Yes, sir, Your Honor.

5 THE COURT: Is the defense ready to proceed?

6 MR. COLLINS: Yes, Your Honor.

7 THE COURT: Your situation, Mr. Prosecutor?

8 SOLICITOR GOWDY: We are closing, Your Honor.

9 THE COURT: All right. Then there's some matters that
10 I will need to go over with the defense at this time.

11 Any motions?

12 MR. BRANNON: Yes, Your Honor. I have what may be a
13 rather lengthy motion for directed verdict to make.

14 THE COURT: Be happy to hear from you.

15 MR. BRANNON: Thank you, Your Honor.

16 We're making this motion based on the corpus delicti
17 and the corroboration rule, Your Honor. I've provided you
18 with a stack of case law. I believe they're four cases
19 there. I've also given a copy of the same to the State.

20 Your Honor, beginning with the first case I've provided
21 you is State v. Thomas. It's a 1952 case, Your Honor. It's
22 an old case, but it's still good law. And in that case,
23 Your Honor, we learn that the corpus delicti of the crime of
24 murder is a two prong -- the State has a two prong burden to
25 carry. Your Honor, first, they must prove and we would

1 stipulate they have proved that there was a death, and that
2 death was Eliza Hernandez. Your Honor, the second burden,
3 the second prong to that is they must prove that the death
4 of, in this case Eliza Hernandez, was caused by the criminal
5 act of another and not a natural death or in an accidental
6 nature.

7 Your Honor, the general rule is if there be any
8 evidence tending to prove a fact in issue or which
9 reasonably conduces to its conclusion as a fairly logical
10 and legitimate deduction, and not merely such as raises a
11 suspicion or conjecture in regard to it, the case should be
12 submitted to the jury.

13 In this case, Your Honor, the criminal act in this case
14 if the State were or if the jury is to, is to return a
15 verdict of murder, the State must prove that Santiago Rios
16 fired the weapon that shot the projectile that caused Eliza
17 Hernandez death. Your Honor, I then ask you turn to the
18 Osborne case. These two have to be read in, in conjunction
19 with one another.

20 Osborne says a conviction can not be had on the extra
21 judicial, judicial confessions of a defendant unless they
22 are corroborated by proof aliunde or outside of the corpus
23 delicti, of, outside of his statement. Your Honor,
24 there's -- the only evidence, only evidence in this case and
25 it's only evidence that he touched the gun is Santiago's own

1 statement. In his statement, in the second statement, he
2 says his hand was on the barrel. That is the only evidence,
3 Your Honor, in this case. That is his extra judicial
4 statement.

5 Now, Your Honor, I believe the State will argue that
6 Isabel Rios, in her written statement, says that, at the
7 very end of her statement, Santiago came out of the room and
8 said he shot Isabel or Isabel was shot, and then the
9 statement goes on to say she can't remember the exact words.
10 Your Honor, that is the second statement. But Your Honor,
11 it is recantation of Santiago Rios' extra judicial
12 statement. He can make the same statement to a hundred
13 people, and it's still his extra judicial statement.

14 The State has to has proof aliunde that he held a gun
15 and they don't have it. Your Honor, there is not one police
16 officer that said they could prove he held a gun. There was
17 no gunshot residue. There was no -- he had no, no blood
18 splatter on his shirt, on his person, anywhere. There's no
19 DNA evidence. There's no fingerprint evidence. There is no
20 evidence other than his statement that his hand was on the
21 barrel of the gun.

22 Your Honor, even if the Court finds that there is
23 circumstantial evidence to support his hand on the gun, that
24 doesn't support the charge of murder, and, therefore, the
25 State has failed to prove the second prong of the corpus

1 delicti of murder with, with evidence outside of his own
2 statement. There is no evidence, outside of his statement,
3 or allunde, that he touched a gun.

4 Your Honor, in State v. Buckman, it's a 2001 case, it
5 said the trial judge -- excuse me. Back up: When a
6 directed verdict motion is made in a criminal case where the
7 State relies exclusively on circumstantial evidence, the
8 trial judge must submit the case to the jury if there is
9 substantial circumstantial evidence which reasonably tends
10 to prove the guilt of the accused. The second part of that
11 same Buckman case says a trial judge should grant a motion
12 for directed verdict when the evidence merely raises a
13 suspicion the accused is guilty.

14 Your Honor, the only thing the State has proved in this
15 case is that Santiago Rios was in the room at the time that
16 Eliza was killed or that she died. That's the only thing
17 they've proved. That doesn't get this case to the jury,
18 Your Honor. It merely raises a suspicion of his guilt.

19 Your Honor, 2001, The State versus Russell, back to the
20 corroboration rule, Your Honor, the corroboration rule is
21 satisfied if the State provides sufficient independent
22 evidence which serves to corroborate the defendant's extra-
23 judicial statements, and together with such statements,
24 permits a reasonable belief that the crime, that the
25 defendant committed the crime.

1 Your Honor, his extra judicial statement is the only
2 evidence that he ever touched a gun, and his statement is
3 that his hand was on the barrel while her finger was on the
4 trigger.

5 Your Honor, according to State v. Russell in 2001, they
6 have to have some other evidence that he touched a gun.

7 They can't rely on his statement only. Isabel Rios puts him
8 in the room. That, that will get him in the room. But

9 there's no evidence. Isabel Rios didn't see what happened,
10 what happened in that room. His statement was she
11 introduced the gun, her finger was on the trigger, his hand
12 was on the barrel.

13 THE COURT: You've gone over that with me. I know what
14 the statement was. Okay.

15 MR. BRANNON: There is no allunde, no evidence
16 allunde produced by the State that he ever possessed a gun,
17 held a gun, or touched a gun.

18 Your Honor, I believe the evidence, the circumstantial
19 evidence produced by the State in this case is that evidence
20 that may, merely raises a suspicion, and, therefore, this
21 case should not be sent to the jury. Your Honor, we ask for
22 a directed verdict as to not guilty on the charge of murder.

23 Thank you.

24 THE COURT: Hear from the State.

25 SOLICITOR GOWDY: Your Honor, may it please the Court.

1 THE COURT: Yes, sir.

2 SOLICITOR GOWDY: Citing from the case that Mr. Brannon
3 was good enough to provide the Court and to the prosecution,
4 the law demands the best proof, which in the nature of the
5 case, is attainable. Direct and positive evidence is not
6 essential, and then I'm gonna put an ellipsis in there, may
7 be sufficiently proved by presumptive or circumstantial
8 evidence where that is the best evidence attainable.

9 Your Honor, I'm reluctant even to address the corpus
10 delicti line of cases because that deals with confessions
11 where there is no corroborating evidence. There is no
12 confession in this case. We have two people going into a
13 room, one person walks out, one person is dead. It's either
14 homicide, accident, or suicide.

15 There is no evidence whatsoever of a suicide. There's
16 no suicide note. There's no statement ahead of time I'm
17 going to kill myself. There is nothing to support suicide.

18 Accident and homicide.

19 With respect to homicide, you have false exculpatory,
20 false exculpatory statements by the defendant. A series of
21 them. You have exfoliated evidence where he destroyed the
22 evidence that could link him to the crime. You have a
23 statement that he made to his mother, that the jury is free
24 to believe or not to believe, I shot Eliza or Eliza has been
25 shot. You have no GSR on the victim's hands.

1 All of that is wonderful argument for a jury. But to
2 ask a Court to direct a verdict when two people walk into a
3 room that, that, that there's no evidence of an outside
4 actor, there's no evidence of a bullet through a window.
5 She was shot by one of the two people in the room either
6 herself, for which there is no evidence, or this defendant,
7 for which there is no circumstantial evidence. Indeed it would
8 argue to the Court that there is direct evidence because he
9 directly walked into the room.

10 There's no circumstantial evidence he walked into the
11 room. He walked into the room and he walked out while she
12 was dead. No GSR on her hands. False exculpatory
13 statements by him.

14 Your Honor, I think it's a jury issue.

15 THE COURT: Mr. Brannon, I'll allow you to follow-up on
16 that.

17 MR. BRANNON: Your Honor, and I only have one point of,
18 of follow-up, and it deals with confessions versus
19 statements.

20 Your Honor, I would admit there is no confession in
21 this, in this case. But in the State versus Osborne case,
22 they clarify the law. Your Honor, it combines, in the
23 corroboration rule, confessions and admissions. Basically,
24 Your Honor, what they're saying is statements of the
25 defendant, whether they be a confession or simply an

1 admission, are covered by the corroboration rule, Your
2 Honor.

3 In this case, he made a statement. It was not a, a
4 confession to the crime. But it was a statement. And that
5 evidence alone is not sufficient to carry the burden of
6 proof in this case.

7 Thank you, Your Honor.

8 THE COURT: What, what page are you on in the Osborne
9 case?

10 MR. BRANNON: As far as that, that point I just made,
11 Your Honor?

12 THE COURT: Uh-huh. (Affirmative).

13 MR. BRANNON: Just one second and I will tell you, Your
14 Honor.

15 (Pause.)

16 MR. BRANNON: Your Honor, it says -- Your Honor, I am
17 on page four of six at the, in, almost the very bottom, the
18 last full paragraph before the bottom. And it says at .9,
19 we clarify the law in this State that consistently with the
20 Opera case---

21 THE COURT: Just one -- let me get there.

22 Okay?

23 MR. BRANNON: Okay.

24 THE COURT: Slow down.

25 Page four of six?

1 MR. BRANNON: Yes, Your Honor.

2 THE COURT: Which paragraph?

3 MR. BRANNON: The last full paragraph that starts with
4 this standard enunciated.

5 THE COURT: All right. I'm there now.

6 Go ahead.

7 MR. BRANNON: Okay. And then if Your Honor, Your Honor
8 will look for 9

9 THE COURT: .9?

10 MR. BRANNON: About midway through the paragraph. It
11 says we clarify.

12 THE COURT: I see that now.

13 Okay.

14 MR. BRANNON: It says we clarify the law in this State
15 that consistently with Opera and prodigy, the corroboration
16 rule is satisfied that the State provides sufficient
17 independent evidence of the crime -- I'm sorry, Your Honor.
18 I'm at the wrong -- Okay. We think the accused's admission
19 is central facts -- same page. Top of the page, page, Your
20 Honor. It starts we think.

21 We think that an accused admissions of essential facts
22 or elements of the crime subsequent to the crime are of the
23 same character as confessions and that corroboration should
24 be required. Forgive me for the wrong location. But that
25 was the point I was trying to make, Your Honor.

1 THE COURT: Well, they're still talking about an
2 admission of essential fact.

3 MR. BRANNON: Your Honor, he admits that he was in the
4 room. He admits that his hand was on the barrel of the gun.
5 It is not---

6 THE COURT: Yes, but the State is making the point that
7 a confession or an admission is what we're talking about,
8 and here he's giving exculpatory statements.

9 MR. BRANNON: But he's making an admission that places
10 himself in that room.

11 THE COURT: I don't think he ever admitted to any
12 essential fact of the crime, did he?

13 MR. BRANNON: No, I don't believe he did.

14 THE COURT: Okay.

15 MR. BRANNON: I don't believe he did.

16 THE COURT: Okay. I still don't see -- they're talking
17 about admissions of essential facts or elements of the
18 crime. You're making a distinction that they're, they're
19 talking, that that would include exculpatory statements too.
20 And I don't recall your client ever making an admission in
21 any of the statements I heard of an essential element of the
22 crime.

23 MR. BRANNON: No, Your Honor. That's, that's correct.
24 Other than putting himself in the room and his hand on the
25 barrel of the weapon.

1 THE COURT: Again, that doesn't make him guilty of a
2 crime. None of those two facts do.

3 MR. BRANNON: That's correct. That's correct.

4 THE COURT: And so, again, the State's position was
5 we're dealing with the issue of admissions or---

6 MR. BRANNON: Confessions.

7 THE COURT: Confessions. And this, this says
8 admission of essential, essential facts are the same as
9 confession. We're going to treat them the same.

10 MR. BRANNON: Right.

11 THE COURT: Okay.

12 MR. BRANNON: Okay. So, in this case then, there isn't
13 even a statement that could be bolstered by evidence
14 allunde.

15 THE COURT: Well, the only, the only potential,
16 potential one would be the statement made by his mother that
17 he said something upon exiting the room.

18 MR. BRANNON: But again, that would be an extra
19 judicial statement made by the client.

20 THE COURT: That's your position on that.

21 MR. BRANNON: That's correct.

22 THE COURT: I understand that. But I'm just saying
23 that's the only thing, that's only time I recall anybody
24 saying that he admitted an essential element of the crime.

25 MR. BRANNON: Correct.

1 Thank you, Your Honor.

2 THE COURT: All right. Now, let me ask you a question.

3 MR. BRANNON: Yes, Your Honor.

4 THE COURT: The 9-1-1 tape, it was properly translated?

5 MR. BRANNON: Yes, Your Honor.

6 THE COURT: Would be an indication that there was
7 effort by the defendant to, if it's true, and you, it could
8 be taken by a reasonable person to be an effort by him to do
9 away with some of the evidence in the crime.

10 MR. BRANNON: Your Honor, Your Honor---

11 THE COURT: Of the alleged crime. Throw the gun---

12 MR. BRANNON: Right.

13 THE COURT: ---is the statement I'm referring to.

14 MR. BRANNON: But, Your Honor, he's not charged with,
15 with the crime---

16 THE COURT: No, but, but---

17 MR. BRANNON: ---after the fact.

18 THE COURT: As I recall somewhere evidence of someone
19 running from the scene, doing things that would appear to,
20 to, would, might be an indication of guilt. I'll look up
21 those cases if I need to.

22 But am, am I correctly stating that, that those are
23 admissible things that indicate someone might be guilty of a
24 crime?

25 SOLICITOR GOWDY: Your Honor?

1 THE COURT: Efforts to flee the scene, efforts to do
2 something?

3 MR. BRANNON: Okay. You're, you're, you're saying that
4 there's case law that says fleeing the scene, and, and in
5 this case you're saying it's throw the gun?

6 THE COURT: And it's---

7 MR. BRANNON: Okay.

8 THE COURT: --attempting to hide evidence that might
9 be important. You know, when someone commits suicide or
10 someone dies by an accidental shooting, it would not, it
11 would be an unusual circumstance for a person who was
12 present when that occurred to try to destroy the evidence of
13 the fact they killed themselves.

14 MR. BRANNON: Your Honor, I would, I would agree with
15 the Court. And I, I understand full well that this is not
16 before the Court. But Spanish Catholics can't commit
17 suicide. They're not going to heaven if you do.

18 THE COURT: Well, again, a jury has a right to weigh
19 these factors. All right. And that's the question, that's
20 the point I'm trying to get to is that there is some
21 independent evidence, and it's, and it's on the tape, and
22 it's out of your client's, I don't know if it's out of your
23 client's own mouth, but it's an action that he took that
24 would indicate that there was an effort to either, I'm not,
25 he didn't try to flee the scene, but there's an effort that

1 he was trying to potentially secrete evidence of a crime.

2 MR. BRANNON: Well, Your Honor, I understand that it,
3 it could be looked at as though he was trying to secrete
4 evidence. But Your Honor, it's also clear evidence that he
5 didn't have the gun in his hand at the time he was making
6 the statements. So, therefore, he could of been telling the
7 person who did shoot her to throw the gun, Your Honor.
8 It's evidence---

9 THE COURT: Well, I got, I got a feeling if there was
10 another person -- he did, he did make a statement alleging
11 somebody else did shoot her. But I -- okay. I understand
12 what you're saying.

13 But do you follow what I'm saying?

14 MR. BRANNON: I do.

15 THE COURT: There is some evidence other than just an
16 admission he made to someone that he was doing things that
17 could be admissible evidence to show that someone may have
18 committed a crime.

19 MR. BRANNON: I, I, I understand the Court's position.

20 THE COURT: All right. I'm going to deny the motion.
21 Anything further?

22 MR. BRANNON: No, not on that, Your Honor.

23 THE COURT: All right. Now, any other motions before
24 we begin your case?

25 And I do need to talk to your client obviously as well.

1 MR. BRANNON: No, Your Honor. There are no other
2 motions and we would ask for a brief recess so we can talk
3 to him before, before.

4 THE COURT: All right. We'll take about a five minute
5 recess.

6 MR. BRANNON: Thank you, Your Honor.

7 Your Honor, would the Court give us authority to speak
8 with him and a family member in one of the conference rooms?

9 THE COURT: As long as security can work that out
10 either in the jail room or the conference room.

11 MR. BRANNON: That's -- either way, that's fine.

12 THE COURT: However, they -- I'll let them decide
13 what's best.

14 Court's in recess.

15 (Whereupon, a short recess was taken at this time.)

16 THE COURT: All right. Is the State ready to proceed
17 at this time?

18 SOLICITOR GOWDY: Yes, sir, Your Honor.

19 THE COURT: Defense ready to proceed?

20 MR. BRANNON: Yes, Your Honor.

21 THE COURT: Madam Clerk, it's gonna be necessary you
22 swear the defendant at this time.

23 I'd ask that he please stand. You'll need to continue
24 to translate for him.

25 (Whereupon, the defendant was placed under oath at this

1 time.)

2 THE COURT: You can be seated, sir.

3 MR. BRANNON: Your, Your Honor, this might be a little
4 unorthodox, but if I might -- we have had lengthy
5 discussions with our client. He indicates to me that he
6 does not wish to testify. That might make your questioning
7 easier of him, Your Honor.

8 THE COURT: I understand. But I still want to go over
9 with him and be sure in, on the record, that we've had this
10 discussion.

11 Mr. Rios, at this time I am going to explain certain of
12 your Constitutional rights. In particular, your right to
13 remain silent. When I finish, if you do not understand, I
14 will give you an opportunity to ask questions concerning
15 this.

16 We have now reached the stage of this trial where you
17 have the right to present your defense. You also have the
18 right to claim a protection which is given to you by the
19 Fifth Amendment to the United States Constitution. This
20 amendment states in part that no person shall be compelled,
21 in any criminal case, to be a witness against himself.

22 What this means is that you can not be required to
23 testify in this case. You have the right to testify.
24 However, no one can make you testify. The right to remain
25 silent is a personal right. No one can give up this right

1 except yourself.

2 I will tell you that if you decide to testify your
3 testimony will be subject to the same rules that apply to
4 other witnesses. That means you will be examined by your
5 attorneys and you will be cross-examined by the State.
6 Should you have any matters on your criminal record
7 involving a dishonesty or a false statement or any crime
8 punishable by imprisonment for more than one year and this
9 Court determines that the probative value of admitting the
10 evidence outweighs any prejudicial effect to you---

11 INTERPRETER GALLIGOS: I'm sorry, Your Honor.

12 Can you repeat that?

13 THE COURT: You want me to repeat that?

14 INTERPRETER GALLIGOS: Yes.

15 THE COURT: All right. If you have convictions
16 involving dishonesty or false statements or, or for crimes
17 punishable by imprisonment for more than one year and this
18 Court determines that the probative value of admitting the
19 evidence outweighs its prejudicial effect to you, the
20 prosecutor would be able then to introduce your record to
21 attack your credibility. If you decide to testify, that
22 decision must be made freely, voluntarily, and intelligently
23 considering both the protections given to you by the Fifth
24 Amendment and the consequences of your decision to testify
25 if you decide to do that.

1 I will tell you that if you decide to testify I will
2 instruct the jury -- excuse me. If you decide not to
3 testify, I'm sorry, I will instruct the jury that they can
4 not give your silence any consideration whatsoever, and
5 there would be no prejudice to you because you did not
6 testify. The decision as to whether to testify is entirely
7 left up to you. You may discuss the decision with anyone
8 you wish to, but the decision is ultimately yours.

9 Mr. Rios, do you understand what I've explained to you?

10 DEFENDANT: Yes.

11 THE COURT: Do you have any questions concerning what I
12 have explained?

13 DEFENDANT: No.

14 THE COURT: Have you had an opportunity to discuss this
15 decision with anyone you cared to discuss it with including
16 your attorneys?

17 INTERPRETER GALLIGOS: The interpreter would like to
18 clarify that I'm just trying to look for other words so he
19 can try to---

20 THE COURT: I understand. If, if I need to word it
21 some other way I can.

22 My, my question is has he had an opportunity to discuss
23 this decision?

24 DEFENDANT: Yes.

25 THE COURT: Does he wish to take more time at this time

1 to discuss it further?

2 DEFENDANT: It's okay. I don't need more time.

3 THE COURT: All right. Now, sir, do you wish to
4 testify in this case?

5 DEFENDANT: No.

6 THE COURT: All right. Any other questions that the
7 State would like to, the Court to ask?

8 SOLICITOR GOWDY: No, sir, Your Honor.

9 THE COURT: Any other questions that the defense would
10 like for the Court to ask?

11 MR. BRANNON: No, thank you.

12 THE COURT: All right. Thank you. He can be seated.

13 All right. Now, just for the Court's edification, do
14 you have other witnesses that you do intend to call?

15 MR. BRANNON: We do not.

16 THE COURT: All right. Then I will take that as a
17 rest. We'll do all this on the record in front of the jury.

18 Does the State have any motions that it would like to
19 make at this point in time?

20 Let's try to get all of this out of the way before we
21 get the jury in and then we'll go through it.

22 SOLICITOR GOWDY: I, I can't think of anything, Your
23 Honor.

24 THE COURT: Okay. All right. Now, can I discuss with
25 the attorneys the charge that I'm going to be giving?

1 Lesser included offenses, defense have any request on
2 lesser included offenses?

3 MR. BRANNON: Your Honor, we would ask for a charge on
4 the, on the defense of accident. We would ask for a charge
5 on the defense of self-defense. Would ask for a charge on
6 the lesser included of voluntary manslaughter and the lesser
7 included offense of involuntary manslaughter.

8 THE COURT: And the State?

9 SOLICITOR GOWDY: Your Honor, I think he's entitled to
10 accident. I don't think he's entitled to self-defense. I
11 don't think he's entitled to voluntary manslaughter partly
12 for the same two reasons, partly for the same reason, and I
13 don't think he's entitled to involuntary manslaughter for a
14 different legal reason.

15 THE COURT: All right. I'll be happy to hear you on
16 those.

17 SOLICITOR GOWDY: With respect to self-defense and
18 voluntary manslaughter, Your Honor, it is my understanding
19 that that requires a killing. The, the whole premise behind
20 self-defense is that I committed a homicide, I shot someone,
21 but I did so in self-defense.

22 At no point has this side of the courtroom ever
23 admitted they shot Eliza Hernandez. Never once. Finger was
24 not on the trigger. That's an accident.

25 Self-defense is you break into my room, I'm legally

1 justified to shoot you if I meet all four requirements. He
2 doesn't even admit he shot her. So, he's not entitled to
3 self-defense.

4 Voluntary manslaughter is a killing without malice in
5 the sudden heat and passion without sufficient legal
6 provocation. Again, he doesn't admit that he shot her. And
7 I would invite the Court's attention -- although I know the
8 Court is already familiar with the case of State v. Light, I
9 am struck by the factual similarities between this case and
10 State v., v. Light. I'm, I'm delighted to pass up a copy to
11 the Court.

12 THE COURT: I, I would like to see a copy of it.

13 SOLICITOR GOWDY: Yes, sir.

14 You want me to approach now or---

15 THE COURT: Yes, sir, pass, pass it up here.

16 SOLICITOR GOWDY: Okay.

17 THE COURT: Okay. Thank you.

18 SOLICITOR GOWDY: Yes, sir.

19 THE COURT: Okay. I -- you may proceed.

20 SOLICITOR GOWDY: Your Honor, as I understand
21 involuntary manslaughter, it is an unlawful killing of
22 another in sudden heat and passion without sufficient legal
23 provocation. This defendant, at no point, has ever admitted
24 killing Eliza Hernandez. The un, unmistakable testimony in
25 this case is that the barrel was pointed towards him, his

1 hands were on the barrel, it was never on the trigger, he
2 never caused the weapon to discharge. That's just not
3 voluntary manslaughter.

4 MR. BRANNON: We would withdraw that request, Your
5 Honor. We would withdraw the request for a charge on the
6 lesser included of voluntary manslaughter.

7 THE COURT: All right. How about involuntary, do you
8 still want that?

9 MR. BRANNON: Yes, Your Honor, and, and I believe that
10 we're entitled to self-defense, Your Honor, because the
11 current law on self-defense in this state is if there is any
12 evidence that could cause a jury to believe that the
13 defendant was acting in self-defense, the Court must give
14 that charge.

15 And Your Honor, in his statement, which the State
16 introduced, is he said it was self-defense. That's any
17 evidence and I believe that entitles us to a charge, Your
18 Honor.

19 SOLICITOR GOWDY: With all due respect to Mr. Rios,
20 Your Honor, I don't know that if he hasn't heard of Miranda,
21 I'm pretty sure he doesn't know the four elements of
22 self-defense. The fact that he uses a colloquial phrase in
23 his fifth exculpatory statement I don't think meets the
24 elements that this Court has to find. If you look at the
25 elements of self-defense, it is the killing of another human

1 being because I had to do so. He has never admitted to
2 killing her. She either killed herself or it was an
3 accident.

4 So, with, with respect to involuntary, and it's a
5 slightly different analysis, it's got to be one of two
6 things, an unlawful act not amounting to a felony. We can
7 stop right there.

8 There was no unlawful act that he committed. There's
9 been no testimony that he committed an unlawful act. He
10 wasn't a felon in possession of a firearm. He doesn't even
11 admit that he was in possession of a firearm. So, there's
12 no unlawful act that he admitted that, that he, that there's
13 any evidence of or a lawful act done with reckless disregard
14 for the safety of others, which is why I think the Light
15 case is so important.

16 What evidence of recklessness is there in this case?

17 He clearly, clearly there, according to him, there was
18 a struggle over either to keep her from killing herself or
19 to kill other people, had his hand on the barrel, her finger
20 was on the trigger.

21 Where's the recklessness?

22 He did nothing reckless according to his version.

23 There's nothing reckless that he did. It's not an unlawful
24 act. He didn't handle the weapon recklessly, which is what
25 the Light case speaks to.

1 So, under the -- my reading, and, of course, I'd defer
2 always to the Court, I don't think he's entitled to
3 involuntary manslaughter. It's an -- it's either an
4 accident or it's a killing, the intentional killing of
5 another with malice aforethought. It's certainly not
6 voluntary. So, can't be a malice-less killing. They don't
7 even admit to killing her.

8 THE COURT: Well, how about, Mr. Solicitor, though,
9 and, and I know you may have, may not have wanted this
10 charge, but we'll talk about it in just a second cause I'm
11 concerned, on voluntary manslaughter, there's, there is
12 evidence of a fight or a struggle that occurred before the
13 shooting took place.

14 SOLICITOR GOWDY: Yes, sir.

15 THE COURT: Parts of his hair were found in another
16 room on the floor, which indicates obviously to me that
17 there may have been a struggle, some type of provocation.
18 Something that may of caused him to fly hot in the sudden
19 and heat of passion may have committed this offense.

20 SOLICITOR GOWDY: Yes, sir, I agree whole heartedly
21 with the Court that---

22 THE COURT: So, voluntary seems like to me, and you,
23 you may want to withdraw it, and if you do you certainly
24 have a right to withdraw it, that's certainly your decision
25 as to what you want me to charge, what you want to request,

1 but I see a situation where there could be a decision by a
2 jury that would indicate that they got in an argument over
3 the sandwich or the turkey, they ended up in a physical
4 altercation, he somehow, in the other room, had hair jerked
5 out of his head, which may have provoked him into a later
6 act.

7 SOLICITOR GOWDY: I defer to the Court's wisdom on, on
8 voluntary. I frankly think voluntary is closer than
9 self-defense or involuntary. I was, of course, hung up on
10 the defense version, which is, at no time, did we ever shoot
11 her.

12 THE COURT: But I'm, I'm looking more at a little bit
13 of the physical evidence that was there.

14 SOLICITOR GOWDY: Yes, sir.

15 THE COURT: Because there are several versions given.
16 I'm not sure which one the jury will pick.

17 THE COURT: There was a physical altercation. I'm, I'm
18 not going to argue -- there is a line of cases that if, that
19 if, you know, is interesting under his, under his statement
20 he shoved her first, defended yourself can never be legal
21 provocation, but I'm going to skip over that. I do see the
22 Court's point. I defer to the Court's wisdom on voluntary
23 manslaughter.

24 THE COURT: And an argument -- there's evidence the
25 argument continued into the bedroom.

1 SOLICITOR GOWDY: Yes, sir.

2 THE COURT: There was shouting and that sort of thing
3 going on. So -- and, of course, I understand words are
4 never sufficient provocation. But there's evidence of---

5 SOLICITOR GOWDY: Yes, sir.

6 THE COURT: ---some physical injury.

7 SOLICITOR GOWDY: Yes, sir.

8 THE COURT: Okay.

9 MR. BRANNON: I'm -- Your Honor, I'm going to defer --
10 I, I, I would like the jury to have as many options as
11 possible, and, therefore, if the Court was inclined to give
12 you---

13 THE COURT: I mean I'm inclined to charge voluntary.
14 I'm not necessarily charging, inclined to charge involuntary
15 because, again, that involves recklessness, doing something,
16 playing with a gun, things of that nature, and I don't see
17 that as being the case here, in here.

18 MR. BRANNON: Your Honor, I think there could be. I
19 think there's an argument that, that both Santiago and Eliza
20 could have been acting recklessly with the gun. So, I, I
21 mean that would be the position that I would take. I
22 believe that we are entitled to an involuntary, but
23 certainly I know this Court has much greater wisdom on the
24 subject than I do.

25 But Your Honor, I believe that we're entitled to

1 self-defense because the State's the one who introduced the
2 statement, and in his statement written by the State's agent
3 he says I was acting in self-defense.

4 THE COURT: I would agree with the solicitor. His
5 characterization of whether it's self-defense or not does
6 not bind the Court. I've got to look at the elements of
7 self-defense. And I think, in that same statement, or
8 there's so many of them I could be wrong, and tell me if I
9 am, cause I haven't seen, heard, I've just heard them, but
10 the, but in that he indicates he may of shoved her first,
11 and---

12 MR. BRANNON: That was, that was not even in the same
13 room. At that, at that point there's---

14 THE COURT: It's hard to segregate what went on at that
15 house that night into well, whatever happened in this room
16 doesn't apply to that room. I find it hard to make that
17 distinction when a fight is going through the house. I have
18 a problem with that.

19 So, I understand what you're saying, but I don't make
20 that distinction myself. I see that they had an
21 altercation, started in the kitchen over the food, and
22 apparently went to the living room where there's hair on the
23 floor, ended up in the bedroom where a killing occurred,
24 somebody got killed.

25 So, I'm, I'm -- I don't know that I can say what

1 happened in this room doesn't apply to that room.

2 Do you follow what I'm saying?

3 MR. BRANNON: I do. I do.

4 THE COURT: Okay. So, where we are is again I think
5 his statements indicated it was either the intruder
6 statement or he may have shoved her first.

7 MR. BRANNON: Correct.

8 THE COURT: If it's, if it's -- if there's another
9 story out there, tell me because---

10 MR. BRANNON: No, again---

11 THE COURT: ---because I---

12 MR. BRANNON: And Your Honor, I understand you can't
13 segregate what happened in the living room from what
14 happened in the bedroom. But the, the shove isn't what
15 caused Eliza to die, and the shove isn't what caused his
16 hair to be---

17 THE COURT: Well, but you can't be -- in self-defense,
18 you can't be the person who brings on the difficulty.

19 MR. BRANNON: Not the primary aggressor.

20 THE COURT: Okay. And that's what I'm getting at. And
21 I don't have any evidence that she was the primary
22 aggressor. I haven't heard any.

23 MR. BRANNON: There's evidence that she's the one that
24 got the gun.

25 THE COURT: She's not the primary aggressor. When

1 people start the physical altercation, start shoving,
2 pushing, hitting each other, whatever they're doing, it ends
3 up in this -- again, I'm not so sure -- I don't have any
4 evidence that indicates that she was the primary aggressor
5 against him or that he was not, they weren't participating
6 in mutual combat, which, again, is an exclusion to, to
7 self-defense.

8 MR. BRANNON: I understand you. But Your Honor--

9 THE COURT: And him characterizing it as self-defense
10 is not binding on this Court as to what the elements of
11 self-defense are.

12 MR. BRANNON: Right. But, but I mean the current case
13 law says if there is any evidence, and, and, and, Your
14 Honor, I'm---

15 THE COURT: I'm asking for any evidence that would
16 indicate that he was not the person who did, made the first
17 physical---

18 MR. BRANNON: And I can't, I can't provide the Court
19 with that. I can not provide the Court with that.

20 THE COURT: And they weren't engaged in mutual combat.

21 MR. BRANNON: I can't provide the Court with any
22 evidence that he didn't push her first or that they were not
23 involved in mutual combat or what I can tell the Court is
24 that if, in fact, he pushed her first, and she responded
25 with a gun, that that would not be an appropriate response

1 to a push.

2 THE COURT: But then again, he did not arm himself and
3 defend himself. They ended up in mutual combat and ended up
4 in a shot firing. I don't mind charging accident. I agree
5 accident should be charged. I don't mind charging
6 voluntary, voluntary manslaughter. I can go with that one.

7 But have, I do have a problem with a situation where
8 we're saying that it was self-defense, and self-defense
9 requires that I'm sitting here defending myself; I'm, I'm
10 either holding my ground. I guess he's at his home, he's
11 got a right to hold his ground -- you know, I, I saw from
12 what -- everything I've seen indicates that there was a
13 argument that escalated. The only statement I have is that
14 he might of struck the first blow.

15 MR. BRANNON: Your Honor, I don't have---

16 THE COURT: I don't see self-defense in here.

17 MR. BRANNON: Could I have 30 seconds to confer with
18 co-counsel?

19 THE COURT: Certainly.

20 (Pause.)

21 MR. BRANNON: Your Honor, I would ask the Court to
22 charge voluntary and accident as well as the, the murder
23 charge.

24 THE COURT: Murder.

25 SOLICITOR GOWDY: Defer to the Court's wisdom. I have

1 no objection to that.

2 THE COURT: All right. That's what I intend to charge.

3 MR. BRANNON: Thank you, Your Honor.

4 THE COURT: Okay. Anything further before we bring the
5 jury in?

6 What I intend to do is I'll, since the -- as far as the

7 jury knows, we're still in the State's case. We'll go

8 through the resting on the record.

9 Yes, ma'am.

10 SOLICITOR CRICK: Thank you, Your Honor.

11 In talking with the court reporter yesterday, we
12 realized we had pictures from the last trial with numbers on
13 them, and also from this trial. And we in, inadvertently
14 gave you two with the same number.

15 THE COURT: All right.

16 SOLICITOR CRICK: So, we just wanted to change that on
17 the record. It would of been the second No. 14, which
18 was -- it's a picture from the bedroom into the kitchen, and
19 I believe that's now gonna be No. 45.

20 THE COURT: Any objection to that---

21 MR. BRANNON: None whatsoever.

22 THE COURT: ---making that, changing that?

23 All right. It will be changed on the record to Exhibit
24 No. 45.

25 (Whereupon, State's Exhibit No. 14 was changed to

1 State's Exhibit No. 45 and received into evidence at this
2 time.)

3 THE COURT: All right. Now, let's, let's talk about
4 the order of the final arguments.

5 Defense did introduce an exhibit as I recall?

6 Is that correct?

7 SOLICITOR GOWDY: Yes.

8 MR. BRANNON: Yes.

9 THE COURT: Okay. So, we will allow then you to go
10 forward followed by the State.

11 MR. BRANNON: Your Honor, do they intend to open on the
12 law, close on the facts, or---

13 SOLICITOR GOWDY: I've never thought it fair to go
14 twice, judge. So, I would just go once.

15 THE COURT: All right. Is that, that okay with you?

16 MR. BRANNON: Yes, sir.

17 THE COURT: Are you prepared?

18 MR. BRANNON: Yes.

19 THE COURT: All right. Are we ready to go forward
20 then?

21 SOLICITOR GOWDY: Yes, sir.

22 THE COURT: Defense ready to go forward?

23 MR. BRANNON: Yes, Your Honor.

24 THE COURT: Let's bring the jury in.

25 (Whereupon, the following takes place within the

1 presence of the jury.)

2 THE COURT: Good morning, ladies and gentlemen.

3 We got a little late start this morning. We have been
4 going over some things here in the courtroom that perhaps
5 will make things go a little quicker this morning. I trust
6 everyone's had a good evening, and we're ready to begin
7 again.

8 When we finished yesterday the State was still in the
9 process of calling its witnesses.

10 The State may call its next witness.

11 SOLICITOR GOWDY: Your Honor, may it please the Court.

12 The State of South Carolina rests.

13 THE COURT: All right. Ladies and gentlemen, that
14 completes the evidence to be presented by the State in this
15 case, and I indicated then when we reached this stage of the
16 trial the defense has the right to present any evidence that
17 it chooses to present.

18 The defense may call its first witness.

19 MR. BRANNON: Your Honor, at this time the defense
20 would rest.

21 THE COURT: All right. Ladies and gentlemen, that
22 completes the presentation of evidence in this case. I told
23 you when we reached this stage of the proceedings that we
24 would allow the attorneys to make their final arguments or
25 final statements to the Court.

1 And at this point in time the defense may proceed.

2 Mr. Brannon, are you going first?

3 MR. BRANNON: Yes, Your Honor.

4 THE COURT: All right. You may proceed, sir.

5 MR. BRANNON: Ladies and gentlemen of the jury, I want,
6 I want to first thank you for these, these four days out of
7 your life. Thank you for paying attention and listening to
8 sometimes what was monotonous and sometimes what probably
9 sounded ridiculous. And most of those ridiculous points
10 would of been raised by me.

11 On November the 23rd, 2006, Eliza Hernandez died. We
12 know that. But I would submit to you, ladies and gentlemen,
13 that we don't know much more than that after three plus days
14 of trial. We don't know much more than that.

15 At the end of these closing arguments Judge Couch is
16 gonna tell you what the law is, and, and it's gonna be your
17 job to apply the law as he tells you to the facts as they
18 came from this witness stand and from these documents and
19 photos and so on and so forth. But one of the laws and one
20 of the, one of the rules of law that he is going to tell you
21 is that the State, Mr. Gowdy and Mrs. Crick, have the burden
22 to prove the elements of the crime of murder beyond a
23 reasonable doubt.

24 Now, the judge is gonna tell you what a reasonable
25 doubt is. But I'm gonna tell you that a reasonable doubt is

1 the kind of doubt that would make a reasonable person like
2 each one of you, a reasonable person hesitate to act.

3 I'm just country. What that means to me is it makes
4 somebody go hum. If it makes you go hum, he's not guilty.
5 And they have the burden to make you look at each piece of
6 evidence, each element of the crime of murder, and have you
7 no, I didn't say hum. And if they can do that, he's guilty.
8 But ladies and gentlemen, that's their burden and I ask you,
9 I ask you to hold them to their burden.

10 Now, let's talk about what we know. Again,
11 November 23, 2006, Eliza Hernandez dies. What we know,
12 because Isabel Rios testified she saw her son follow his
13 wife into a bedroom and they locked the door, we know that.
14 Isabel Rios testified to it. Santiago Rios' statement is in
15 writing. It's in here and he tells you that.

16 Okay. Now, ladies and gentlemen, that's his second
17 statement. The first one was the three masked men. I don't
18 know why he said that. I've asked him and he says he
19 doesn't know why he said that.

20 SOLICITOR CRICK: Your Honor, I'm gonna object. I hate
21 to do that. But I think we're limited to things that are in
22 the record as evidence.

23 THE COURT: I'm gonna sustain the objection. The last
24 statement will be stricken from the record and disregarded
25 by the jury.

1 You may proceed.

2 MR. BRANNON: He has written statements that are before
3 you. You will able, be able to read those. We know that
4 Isabel Rios sat here and said she watched her son follow his
5 wife into the bedroom. His written statement says he went
6 into the bedroom and that she locked the door. So, we know
7 that the two of them are in the bedroom and we know that she
8 died as the result of a gunshot wound.

9 There is no gun. There are no fingerprints. There is
10 no gunshot residue. The State has provided you with no
11 evidence whatsoever that Santiago Rios ever held the gun in
12 such a manner as to pull the trigger ever. The only
13 evidence that he ever touched the gun is his own statement.
14 That's it. He says in his statement she pushed me to the
15 bed. She pushed me on to the bed. She had the gun and she
16 pointed it at me. It's in his statement.

17 Ladies and gentlemen, I'm not gonna put them on the, on
18 the projector because I know that some of you don't want to
19 look at them. But there was the picture of Mrs. Hernandez
20 with the rod through her, with the rod through her. If she
21 is seated -- excuse me. If he is seated on the bed, and she
22 is standing, and she had the gun in her hands, and she's
23 pointing the gun at him like this, and if he does what he
24 says he does in his statement, if he takes his hands and he
25 puts them on the gun, and he does this, ladies and

1 gentlemen, look at the rod. Look at the trajectory. It's
2 exactly the way it would be if the, if what happened in that
3 bedroom is the way Santiago Rios said it happened.

4 Look at it. He's sitting down on the bed. She's
5 standing up. The trajectory of the bullet was upward. It's
6 the only story that makes sense. I'm gonna tell you why.

7 ~~The trajectory was upward. I believe, I believe the~~
8 ~~State wants you to think that she was lying down and that~~
9 ~~Santiago Rios shot her. And the reason I think they want~~
10 ~~you to believe that is because of that indentation in the~~
11 ~~floor that, that they kind of made a deal out of.~~

12 Well, a couple of things. First off, there's no blood
13 in the indentation. The indentation is a good six to
14 eight inches away from where her body lie in those pictures.
15 You heard the SLED expert testify he was provided no swab or
16 DNA evidence from the indentation in the floor. None
17 whatsoever. None.

18 If she was lying down, and if that's what the State
19 wants you to believe, that bullet wouldn't of been lying
20 against the, the, the molding across the floor. It would of
21 been buried in that floor below her head.

22 The only story that makes sense is her standing over
23 him with the gun. Her standing over him with the gun, and
24 in his own defense, taking her hands, taking the gun, and
25 turning it away.

1 Ladies and gentlemen, Eliza Hernández died of a
2 terrible accident. There's some other scientific evidence,
3 some things that we know. They found the projectile.

4 Remember that the State's expert witnesses, DNA guys,
5 people from SLED, Mr. Fitts, that was his name, he tested
6 the projectile. It had no evidence of DNA belonging to
7 Santiago Rios. None whatsoever.

8 But it did have, have evidence, one in three million,
9 one in three million, DNA evidence, of Eliza Hernandez.
10 Keep thinking though because remember Fitts said there was
11 no sign of blood evidence on the bullet.

12 Mr. Collins said yesterday, Mr. Fitts, if I do this, if
13 I touch this table and the, or this bench, am I leaving DNA?

14 And he said yes.

15 Ladies and gentlemen, I submit to you that when she
16 loaded the gun with the .38 caliber bullet she left her DNA
17 evidence on it. Ladies and gentlemen, she told you she
18 loaded the gun.

19 Now, ladies and gentlemen, you're gonna get up --
20 you're gonna hear in a few minutes, when Mrs. Crick gets up,
21 that there was no GSR evidence or, or remnants on Santiago
22 Rios' hand. None whatsoever. There was none on Eliza
23 Hernandez either.

24 Officer Baldarama sat right here and he told you that
25 he took the first statement from Santiago Rios. Remember,

1 that was the one that he said he completed at 11:20, but
2 then maybe 11:20 was when he started it. Something like
3 that. But during that time, he was interrupted by Officer
4 Davis, Deputy Davis who took his GSR test.

5 Ladies and gentlemen, Santiago Rios hadn't been to the
6 bathroom before Davis came in. He hadn't. Santiago Rios
7 didn't wash his hands before Davis tested his hands for
8 gunshot residue.

9 The other reason we know that the only story that
10 matches is, this story is because of Doctor Wren. Doctor
11 Wren is a brilliant man. Doctor Wren told you that it was
12 an extremely close contact wound. That means that Santiago
13 Rios wasn't standing up at a woman lying on the floor
14 pulling the trigger. He was doing this defending himself.

15 You know, the other real interesting thing that we
16 don't know, but we could have, Santiago Rios had on a white
17 T-shirt. It was torn. The gunshot residue expert testified
18 that gunshot residue will settle on anything, on any solid
19 subject. It would have settled on his white T-shirt. They
20 didn't even test it.

21 We know there was no blood splatter. There was no
22 gunshot residue test done on his shirt. His hands were
23 protecting himself like this. She was standing up, and he
24 was on the bed.

25 Ladies and gentlemen, I have told you the State has the

1 burden to prove beyond a reasonable doubt all and each of
2 the elements of the crime of murder. The only thing that
3 they have proved to you is that Santiago Rios was in the
4 room and that Eliza Hernandez is dead. That's it.

5 I know that this is gonna be probably the most
6 difficult thing that any of you have ever done. But I'm
7 gonna ask you -- there are, there are -- you have heard
8 things. You have heard things that I'm sure are difficult.

9 But ladies and gentlemen, at the time that the 9-1-1
10 phone call was made, Eliza Hernandez was already dead. What
11 he said on the 9-1-1 tape doesn't matter. She's already
12 gone.

13 What matters is what happened in that room with that
14 gun. They have to prove to you that he had the gun in his
15 hand with his finger on the trigger and that he thought
16 about it and he pulled the trigger and he killed his wife.
17 And they haven't done that. They can't do it.

18 What he did after Eliza Hernandez was dead does not
19 matter. It doesn't.

20 The judge is gonna tell you what the law in this case.
21 He's gonna tell you what the law on murder is. He's also
22 gonna tell you what the law on accident is. But there's a
23 third law that he's gonna tell you about, and that's the law
24 of voluntary manslaughter. That's the taking of a life in
25 the heat of passion. He's gonna tell you about that.

1 The decision is now in your hands, ladies and
2 gentlemen. They have to prove, beyond a reasonable doubt,
3 Santiago Rios had the gun in his hand with his finger on the
4 trigger and caused his wife's death intentionally. They
5 haven't proved it. But for his own statement, they haven't
6 even put his hand on the gun.

7 ~~Ladies and gentlemen. Eliza Hernandez is dead. But~~
8 ~~she's dead because of the terrible, a terrible and tragic~~
9 accident. Nothing else.

10 Thank you again for your time and your consideration.

11 THE COURT: Mr. Gowdy.

12 SOLICITOR GOWDY: Thank you, Your Honor.

13 SOLICITOR CRICK: Thank you, Your Honor.

14 May it please the Court?

15 THE COURT: Mrs. Crick, I'm sorry.

16 You may proceed.

17 SOLICITOR GOWDY: Your Honor, do you mind if I move
18 this for her?

19 THE COURT: Not at all.

20 SOLICITOR CRICK: And Your Honor, I'm going to set up
21 the computer so that they can hear the tape.

22 (Whereupon, State's Exhibit No. 15, the 9-1-1 tape, was
23 played for the jury at this time.)

24 SOLICITOR CRICK: That was the first lie. The first
25 lie came on Thanksgiving around 9:30 in a call to 9-1-1.

1 There were masked men. It was a robbery. We've been
2 robbed. They shot my wife in the face.

3 The next lie came at the Sheriff's Office when he was
4 talking to investigators about this case and they wrote it
5 down. And now it was there were three masked black men who
6 came in the door. They had guns. I don't remember if they
7 used a knee or a foot. But they came in and, and she was
8 pale and, and they shot her in the face. A very detailed
9 two page statement about how he carried her into the bedroom
10 and laid her on the ground. But every single bit of that
11 was an absolute lie.

12 You know now that there were no men. There were no
13 masked men. There were no black men. It wasn't a robbery.
14 It wasn't a home invasion.

15 What it was was a wife who had spent all day making
16 Thanksgiving dinner for a family. It was a husband who came
17 home late again, after drinking, who asked her to get up and
18 make him some turkey. And it was a wife who wasn't too
19 thrilled, after him being out again all night, about jumping
20 up and making him a plate of turkey to eat after everyone
21 had cleaned up, after everyone had already gone to bed that
22 evening.

23 And after he shoved her, and after she tried to fight
24 him off, it was simply a woman who wanted to leave. Her mom
25 was coming to pick her up. She was just gonna leave him.

1 And she just walked away, went to the bedroom to pack her
2 stuff, and leave. But he followed because he wasn't gonna
3 let her leave. Not alive anyway.

4 So, he followed her to, into the bedroom and in that
5 bedroom it was not Eliza. It was not three masked men. It
6 was not Santa Claus. It was Santiago Rios who shot his wife
7 in the face and put a bullet through her head. And as a
8 result of what he did, he is here before you today charged
9 with murder.

10 And briefly I'm gonna tell you what that is because
11 before you look at evidence you sort of have to know what
12 the law is and the judge is gonna explain it to you too.
13 But murder is very simple. The killing of another person
14 with malice aforethought. And I think Solicitor Gowdy told
15 you in his opening what malice is, a wicked intention, a
16 wicked intention.

17 Aforethought doesn't mean you have to plan it for a
18 month, a week, a day, an hour, or even ten minutes. It's
19 something that can exist in a second before you pull that
20 trigger, in the second before you pull that trigger. And it
21 can be implied from the use of a deadly weapon like a gun.

22 So, what's the issue in this case?

23 Well, it's kind of hard to decipher with all the
24 stories we've heard. But I think he wants you to believe it
25 wasn't three black men that shot his wife. It wasn't him.

1 It may or may have been a struggle over the gun. And I
2 think we heard a little something, questioning about
3 suicide. He says he was just a grieving husband, and it was
4 an accident or it was a struggle or it was a suicide.

5 It was only when he was confronted with the evidence
6 and the stories from his family members that his story
7 actually started to change at the Sheriff's Office. So, now
8 he's got a new story. I think it's fair to say we all know
9 now there were no intruders. So, we can count the call to
10 9-1-1, and we can count the statements to the investigators
11 at the Sheriff's Department as lies number one and two.

12 Now, let's stop here for a second. He doesn't know why
13 he gave the statement he gave. A big deal was made out of
14 the fact that maybe he does or doesn't know English or
15 Spanish. He's been in this country for at least ten years
16 living, working, socializing, and presumably was married.

17 His younger brother and sister, both eight weeks, eight
18 years old or so, speak English. He has a TV. He understood
19 enough to sit through 40 hours of training at Milliken in
20 English and pass all of the tests required for each section
21 that he was thought in English and pass them.

22 And you heard Robert Reeder say that when he spoke to
23 him he spoke the Queens English. He talked about sports.
24 He talked about his family. He talked about where he grew
25 up.

1 He understood enough about the legal system to know to
2 hide the gun, to get rid of it when the police were coming.
3 You could hear him, the police are coming, the police are
4 coming, throw the gun, throw the gun. He understood enough
5 to do that. He understood enough to tell his family members
6 no digus nada, don't tell anything, don't say anything to
7 the police. Yet we're suppose to believe that he didn't
8 understand he had a right to remain silent. He didn't
9 understand that he could no digus nada, not say anything to
10 the police.

11 Common sense tells you that the statement that he gave
12 were his words just as he told them to George Baldarama and
13 Angel Diaz, just how they wrote them down on that paper.

14 And if they were gonna make up a story, would it really
15 be that one?

16 That doesn't make any sense whatsoever.

17 So, the grieving husband saying okay, I'll get my
18 family to lie and help me out. You can hear them on the
19 9-1-1 call. No digus nada, don't tell anything. And he
20 stuck to the plan because we know when he first got to the
21 police department what he said was he and Eliza were
22 watching TV, someone knocked on the door, and he went out
23 there. Gave all this detail about how people kicked in the
24 door and he told Eliza to get behind me, they can take
25 anything they wanted, they came at me, I defended myself, I

1 heard the gun discharge, Eliza covered in blood, I grabbed
2 her, laid her down on the floor, and called 9-1-1.

3 He did stick with his story and his family tried to
4 stick with the story. You heard from little ^{Alex P.} and
5 Investigator Reid Lindsay and he said when he got to the
6 Sheriff's Office ^{Alex P.} said I was asleep, I don't remember,
7 and he was hesitant to talk to him.

8 But when he told him it was okay to tell the truth,
9 what did ^{Alex P.} say?

10 What did he say?

11 He said well, okay. There was an argument. Eliza and
12 Santiago were fighting and me and my sister were peeking out
13 and saw the fight going on. And I didn't see anything
14 because my mother got up and closed the door. Now this is
15 the same mother who got on the stand and testified she was
16 asleep, but he says she got up and she closed the door, and
17 then he said he heard a gun go off in his brother's room.

18 And the reason he didn't tell the truth from the
19 beginning, he said because his brother told him to say that
20 three men came into the house. His brother told him to say
21 that three men came into the house. And when Investigator
22 Lindsay asked why didn't you just tell the truth, he said I
23 was scared of what would happen to my brother.

24 Well, you can all rest assured that at this point he
25 has an idea of what might happen to his brother. He has

1 been living in the same house with his brother and his
2 mother for that matter and talking to them everyday and
3 seeing them everyday even though Isabel Rios says that, oh,
4 well, you now what, the subject never came up. We've never
5 discussed this case. We've never talked about coming to
6 Court. It never, never came up.

7 But when Alex came in here and testified, what we heard
8 was I don't remember, I was asleep, I don't remember. The
9 same thing that his mother, Isabel Rios, got up on the stand
10 and said a million times. I don't remember. I was asleep.
11 I was in shock. I don't remember.

12 But she did remember. Things she didn't remember were
13 the things that hurt her son. But luckily we had her
14 statement and she stopped and started several of those. And
15 you heard them read into the record. And I'm gonna go over
16 that with you real quick.

17 The first one she said was hey, I'm gonna stick to the
18 story of intruders. I tell you what. Eliza was making
19 turkey around 5:00 p.m. We sat down to eat around 6:30. It
20 was Eliza, me, ^{Alex P.} and Cynthia. We ate. We washed
21 dishes. We watched TV. We went to bed. Everyone was
22 falling asleep. I did not hear when my son, Santiago,
23 arrived home. When I was sleeping I heard a gun discharge,
24 but I didn't wake up. I heard my son knocking on my door
25 saying that they had killed his wife. They had killed his

1 wife. Intruders.

2 But when Investigator Reid, Reid Lindsay came into that
3 room and started telling her that I've talked to your kids,
4 not getting the same story, what did we hear?

5 What did we hear?

6 I was lying in bed with Cynthia P. I know you guys are
7 not gonna have this back in the jury room. This is what she
8 said. I was lying in bed with Cynthia P. Alex P. and Eliza were
9 watching TV. Alex P. came in my room and told me Santiago had
10 arrived home and was asking my daughter-in-law to feed him
11 supper because he was hungry. Eliza said she wasn't gonna
12 feed him.

13 She said she went to the kitchen to keep Santiago and
14 Eliza from arguing. And during that time they had gotten
15 each other's hair. Eliza told him that her mother was
16 coming to get her because she was leaving him, and it was at
17 this time Mrs. Rios said she stepped in-between to try to
18 break up the argument. Eliza went to the bedroom first, and
19 Santiago followed behind.

20 I tried knocking. They wouldn't answer. I tried to
21 get Santiago to come talk on the phone to his sister. They
22 wouldn't open the door. I was talking to my daughter on the
23 phone when I heard a shot. I told my daughter on the phone
24 I heard a shot. I immediately hung up. Santiago came
25 running out of the room telling me that he had shot Eliza or

1 Eliza was shot. I don't remember the exact wording. I
2 don't remember the exact wording.

3 Isn't it odd that when they called 9-1-1 and when they
4 all got down there to the Sheriff's Office they were all
5 saying masked intruders?

6 They all had the same story and we know now that was
7 unequivocally a complete lie, right?

8 We know that's a lie. I think everybody acknowledges
9 that was a lie.

10 But when did they come up with that?

11 It had to be before they called 9-1-1. He's on the
12 phone talking about masked intruders. She's in the
13 background, and I apologize for saying this, but translates
14 into these bastards won't get away with it. Oh, the drama.
15 These bastards won't get away with it. Oh, someone is come
16 in and shot my wife.

17 What a great performance. A story they made up while
18 presumably Eliza was lying on the ground in a pool of her
19 own blood shot in the face.

20 But the problem came when they got to the Sheriff's
21 Office and the stories started coming out and the facts
22 started coming out and the truth started coming out. And
23 they didn't have a chance at the Sheriff's Office to get
24 together and get the second story straight. They were
25 separated.

1 But funny enough, the details that were coming from the
2 kids and coming from his mother were very much the same. It
3 was only when he was confronted with that information that
4 he finally says okay, you're right, there were no masked
5 intruders. Let me try this story.

6 And that's when he says yes, okay. We did have an
7 argument, but she attacked me. She was the aggressor. She
8 came at me.

9 Well, what do we know in his second statement?

10 He himself said he was out the night before drinking at
11 his sister's house, ended up sleeping in the car. He got up
12 the next morning. His father came and got him out the car.
13 He went to work, got off early at twelve o'clock noon. He
14 showered, left, went to his sister's house, the same place
15 he had been the night before. He came back home and he said
16 he left again to go get some candles.

17 The defense said he ran out for a quick errand to go
18 buy some candles for the shrine you saw in the picture. Yet
19 he returned home after everyone else had already eaten
20 Thanksgiving dinner, had already washed all the dishes, had
21 already watched TV, had already gone to bed. It was late.
22 And I submit to you he was not out at Garden Ridge or
23 Michael's or wherever shopping for candles on Thanksgiving
24 night. I submit to you he was doing the same thing he did
25 the night before, which is going out and drinking and coming

1 home late.

2 He said when he got home he asked his wife for food, to
3 get up and get him some turkey.

4 Now, let's pause here for a moment. Husband comes home
5 after being out all night the night before, missing
6 Thanksgiving dinner, drinking, and tells you to get up and
7 go make a plate of turkey.

8 Well, you guys can look at this picture just as well as
9 I can. If he wanted turkey, all he had to do was get up,
10 walk in the kitchen, go to the stove and get it right out of
11 that container that's sitting on top of it. But he didn't
12 want to do that. And when she wouldn't fix his turkey for
13 him, he got angry.

14 He said she said I could eat my old lunch and I shoved
15 her. Those are his words. She would not make me turkey and
16 I shoved her.

17 By his own admission he was angry with her because she
18 wouldn't make turkey for him. And by his own admission he
19 struck her first.

20 Did she grab his hair?

21 Did she try to fight back?

22 I don't know. We don't know how long hairs are on the
23 floor. And frankly, we can't really blame her if she did.

24 But what we do know is what her state of mind was at that
25 time because Santiago said in his statement she told me her

1 mom was on the way to pick her up. I asked her why and she
2 said because she did not want to be with me anymore. She
3 was leaving me.

4 She went to the bedroom. He followed her. Her walking
5 away from him is not the action of the person who's the
6 aggressor in the situation. She walked away from him and he
7 followed. He was the last one in the bedroom. He was the
8 last one to touch the door knob and I submit to you he's the
9 one that locked that door and we know there's only one door
10 in and out of that bedroom and he claims he couldn't get out
11 because she was throwing him on the bed and hitting him in
12 the mouth with a two or three pound dumbbell.

13 Yet, not one officer noticed any injury to his mouth.
14 No teeth hanging out. No blood. No injury. Didn't have
15 trouble speaking.

16 Hit in the mouth with a dumbbell?

17 No injuries whatsoever. And those dumbbells, and you
18 can look just as easily as I can again, are stacked very
19 neatly exactly where they should be under that weight bench.

20 I don't think she got up after she was shot and tidied
21 up. I don't think she stopped in the middle of an argument
22 to make sure they were all lined up properly.

23 He says she grabbed a gun and we struggled. She had a
24 finger on the trigger and I had the barrel. I was defending
25 myself. And during the struggle, a shot was fired. When I

1 saw blood, I called the ambulance. It was self-defense.

2 Now, for somebody who doesn't understand the legal
3 system, he understood what self-defense meant. He claims it
4 was self-defense when he followed her into that room. It
5 doesn't make sense.

6 And since that didn't make sense, we heard some
7 questioning about could she have shot herself in the face,
8 Doctor Wren?

9 Could it be a suicide if she just shot herself in the
10 face?

11 Well, I can only assume that the gun he refers to on
12 the 9-1-1 call is the same gun used to shoot Eliza. And in
13 that phone call he says y mi pistola, y mi pistola. My gun.
14 Not her gun. Not their gun. Not the gun. My gun.

15 And if it's his gun, common sense tells you it may of
16 been in his possession. And I submit to you that it was.
17 When he left the house, he had the gun. When he came back
18 to the house, he had the gun. And when he went in that
19 bedroom, he had that gun.

20 Now, he says could, you know, there's no blood spatter.
21 I couldn't have been that close to her. Although he said
22 his hand was on the barrel. But anyway, I couldn't have
23 been that close to her because there's no blood splatter on
24 my shirt.

25 Well, let's think back about that just for a second.

1 Remember where he had been.

2 Where was he that night?

3 He wasn't at home eating and in bed with everybody
4 else. He had been out and about.

5 And what do we know about the weather that night?

6 Mr. Rios got on the stand and testified that it was so
7 cold outside she had to ask an officer for a jacket. Even
8 Investigator Gary said it was so cold outside he didn't want
9 to talk to them there. We moved everybody to the Sheriff's
10 Office. Yet, Mr. Brannon just got up here and told y'all
11 all he had on was a white T-shirt.

12 Common sense tells you that he probably had on another
13 layer of clothing when he came into that house. And if he
14 had time to make up a story, if he had time to tell his
15 family members what to say, he certainly, and hide a gun, he
16 certainly had time to change the top layer of his clothing.

17 Look at the angle and path of the bullet. Mr. Brannon
18 asked you to do that. She had stippling and burns on her
19 face, a close contact wound, and he wants you to believe
20 that, I guess, as the gun, in a struggle, was at her lip,
21 that suddenly at that moment is the moment she decided hey,
22 let's pull the trigger. When it was so close that it had to
23 be touching, loose contact with her skin, she decided at
24 that moment, okay, I'm gonna go ahead and pull the trigger,
25 and he got up here and he made a big deal about how he was

1 sitting down and pointing up and, and all of this stuff.

2 But you can look at the statement just as easily as I
3 can. There's nothing in that defendant's statement that
4 says he was sitting down on the bed and she was standing up
5 over him and pointing the gun and, and a struggle took
6 place.

7 What I'll ask you to do, ladies and gentlemen, is take
8 a look at the pictures that were in evidence. Take a good
9 hard look at where she was, and let's talk a second about
10 GSR, gunshot residue. She didn't have a single bit of it on
11 her hands. Not the front, not the backs, not the right, not
12 the left.

13 And you heard Ila Simmons testify there should have
14 been gunshot residue on her hands if she pulled that
15 trigger. There should have been if she pulled that trigger.

16 Now, we can explain why there wasn't any on his hands.
17 He was up, running around, making up stories, maybe
18 sweating, hiding guns, talking to police officers, going in
19 and out of the bathroom, changing clothes, whatever he was
20 doing. We can explain why there's no GSR on his hands.

21 We can't explain why it's not on hers. She wasn't
22 sweating. She wasn't moving. She wasn't washing her hands.
23 She certainly wasn't going to the restroom. Yet, there's
24 nothing at all to indicate that she ever even touched a gun
25 on her hands.

1 And one other kind of funny thing. This is where it
2 gets interesting. The, the gun was never found. The gun
3 was never found. And I -- and I, again, I'm confused. I
4 don't know if it's suicide or accident or what here. But
5 it's crazy that we would think Eliza would get up after
6 shooting herself in the face and hiding the gun.

7 The problem is nobody else seems to know where the gun
8 is.

9 Mrs. Rios, where's the gun?

10 I don't know. I never saw a gun. I just went in
11 there. I was nervous. I was shocked. I didn't notice.

12 Alex P. do you know where the gun is?

13 No, I don't know.

14 We still don't have a gun. We still do not have the
15 gun to check for prints, to test it to see if the projectile
16 matches that gun, to see how many pounds of pressure you
17 have to apply to pull that trigger to be an accident because
18 he got rid of it. He got rid of the evidence.

19 And interesting too, no bullet holes in the ceiling or
20 walls. He himself just said that she was standing up when
21 she was shot. They're no bullet holes in the ceiling.
22 They're no bullet holes in the wall, and the only fresh mark
23 we see anywhere is the one on the floor just to the left and
24 up of her head. The same trajectory as the projectile on
25 hard food floors.

1 So, yes, I do submit to you that he had her down on the
2 ground, and that he shot her in the face, and that's why the
3 only mark you see is on that hardwood floor right beside
4 where her body was found. And the DNA on that bullet was
5 consistent with her. I don't know how many bullets they
6 fired off in the bedroom. But hey, they found one and the

7 DNA on that is consistent with Eliza Hernandez.

8 A .38 caliber bullet, .38 caliber ammo in the bedroom,
9 but no .38 caliber gun found in the residence. And you
10 heard it. Half of the crime scene investigators unit came
11 out. They looked inside the house, outside the house, in
12 every single car, under every car, came back again, searched
13 the field around the area.

14 And guess what?

15 There is no gun. The gun that could tell us a whole
16 lot about what happened in this case.

17 We'll never know if her prints are on the gun, and
18 that's because of him. You have to ask yourselves why.

19 Why would an innocent man have to make up a lie and
20 tell it to 9-1-1?

21 Why would an innocent person say throw the gun, throw
22 the gun?

23 Why would an innocent man have to tell his family
24 members to lie for him?

25 Why would he tell police officers that three black

1 masked intruders broke into his house and shot his wife?

2 How can you, after lie, after lie, after lie, after
3 lie, believe what they say now?

4 Accident, suicide, he could of told anybody. He could
5 of told Deputy Kesler it was, she shot herself or it was an
6 accident. He could of told Investigator Gary, George
7 Baldarama, Angel Diaz. The list goes on and on. But he
8 didn't. And they're only two people that know the truth
9 about really, what really happened. I mean the whole truth
10 about what happened that night.

11 One of those people has told lie after lie after lie.
12 And one of those people has attempted to get family members
13 to lie for him. He's tried to get young children to lie for
14 him. And one of those people has been living in the home
15 with each and every witness who is in that house the, the
16 day this shot was fired. He has the ability to talk to them
17 every single day, every single day about, about what to say
18 in Court.

19 He has not told the truth and the other person who
20 knows the truth can't tell you. She did not have an
21 opportunity to pick up the phone and tell 9-1-1 my husband
22 shot me in the face. She didn't have the opportunity to
23 tell her family members to make up lies and help get
24 Santiago. She didn't have a chance to do any of that.

25 She, despite what they're saying as being an angry wife

1 who went on the attack, and, and then ended up somehow
2 shooting herself in the face, can not come here and tell you
3 what happened or what she was thinking at the time. But I
4 can bet she wasn't thinking her holiday would end up like
5 this. One minute she's cooking a Thanksgiving dinner for
6 her family, and the next minute she's lying on the hardwood
7 floor shot in the face by her own husband. And this was a
8 husband she just wanted to get away from.

9 Her mama was on the way. Her mom was on the way. And
10 she was leaving.

11 This was not self-defense or an accident or a suicide.
12 It was simply an execution and I keep thinking about what
13 the defendant said to Deputy Angel Diaz that day. When I
14 get angry, I don't know what will happen. I can not be held
15 back.

16 His mother couldn't hold him back and Eliza could not
17 hold him back and I think it's safe to say that now we all
18 know what happened when he gets angry. And all I'm asking
19 is that you hold him accountable today for it.

20 Thank you.

21 THE COURT: All right. Ladies and gentlemen of the
22 jury, I told you that once we had completed the closing
23 statements, statements or arguments made by counsel it would
24 be my responsibility to charge you concerning the law.

25 First of all, I want to thank you for your attention

1 thus far during this trial. Secondly, I want to point out
2 to you the fact that I do appreciate how well you have paid
3 attention.

4 In this case, the defendant's native language is the,
5 is Tarascan. He is entitled, under our law, to have the
6 proceedings translated into his native tongue. I realize
7 that there have been some distractions because of that, but
8 I think you've paid attention throughout the trial. And I
9 want to make you aware there's to be absolutely no prejudice
10 to the defendant for the fact that he has had the
11 proceedings translated into his native tongue. He has a
12 right to do that and that is provided by the Court.

13 And so, I just want to, again, thank you for your
14 attention and how you paid attention during these
15 proceedings. They're a little different than our normal
16 trial. And so, it's been a learning experience for all of
17 us.

18 First of all, I want to go over with you the fact, as I
19 did at the very beginning of this trial, that there is an
20 indictment before this Court. And as I told you at the
21 beginning of the trial, the indictment is simply the
22 document that brings this case before this Court. It
23 informs the defendant of the charges which have been lodged,
24 lodged against him and it informs this Court of the charges
25 that are to be tried during this trial.

1 I will again, go over the indictment with you so that
2 you understand again the charge has been brought with the
3 caution that an indictment can not be used in any fashion
4 whatsoever in determining the guilt or the innocence of the
5 defendant. It does set forth, however, the charge to be
6 tried and the charge that is required to be proven by the
7 State.

8 In this particular case, as I indicated, the indictment
9 is for the offense of murder. The indictment states that
10 Santiago Pasqual Rios did, in Spartanburg County, on or
11 about November the 23rd of 2006, feloniously, willfully,
12 and with malice aforethought cause the death of one Eliza
13 Hernandez by shooting her with a gun, and that the victim
14 died as a proximate result thereof all in violation of Code
15 Section 16-3-10 and 16-3-20 of the Code of Laws of South
16 Carolina, 1976 as amended, against the peace and dignity of
17 the State and contrary to the statute in such case made, as
18 made and provided.

19 Now, the document again is simply the formal instrument
20 that brings this case before this Court, and it contains the
21 charges against the defendant, which, which have been lodged
22 and are tried in this courtroom.

23 Now, I indicated to you earlier the defendant has pled
24 not guilty to the indictment. That plea and the laws and
25 the Constitution of this state places then the burden upon

1 the State to prove the defendant guilty. A person charged
2 with a crime or committing a crime or offense in South
3 Carolina is never required to prove himself innocent of that
4 offense. I charge you that it's an important rule of law
5 that a defendant, in a criminal trial, no matter what the
6 seriousness of the charge might be, will always be presumed
7 to be innocent of the crime for which the indictment has
8 been issued until and unless guilt has been proven by
9 evidence satisfying you, the jury, of that guilt beyond a
10 reasonable doubt.

11 The presumption of innocence does not end when you
12 begin your deliberations. It accompanies the defendant
13 throughout the proceedings in this trial until such time as
14 you have reached a verdict of guilt based upon evidence
15 satisfying you of that guilt beyond a reasonable doubt.

16 The presumption of innocence has been described
17 sometimes as the robe that I wear into this courtroom. It's
18 placed about the shoulders of the defendant and it remains
19 about his shoulders throughout the trial again until it has
20 been stripped from the defendant by evidence which satisfies
21 you of the defendant's guilt beyond a reasonable doubt. The
22 presumption of innocence is not a mere legal theory and it's
23 not just a legal phrase. It is a substantial right that all
24 citizens and defendants are entitled to until and unless
25 you, the jury, are satisfied from the evidence of a

1 defendant's guilt beyond a reasonable doubt.

2 Now, probably for what you've heard thus far in my
3 charge you now understand that the concept or the
4 requirement of proof beyond a reasonable doubt is a very
5 important concept in our criminal law, in our criminal
6 justice system.

7 You may ask yourself well, just what is meant by a
8 reasonable doubt?

9 A reasonable doubt is that kind of doubt which would
10 cause a reasonable person to hesitate to act. The State has
11 the burden of proving the defendant guilty beyond a
12 reasonable doubt. Some of you may have served or been
13 involved in civil trials that are tried in our court system.
14 And in those particular cases, there's a different standard
15 of proof that's required. That's proof -- in those cases,
16 the proof that is required in order for a party to prevail
17 is proof, proof by the greater weight or the preponderance
18 of the evidence.

19 In civil cases they talk about the scales of justice
20 tilting ever so slightly in favor of the plaintiff or in
21 favor of the defendant. That is not, again, the standard of
22 proof that's used in this trial, a criminal trial. The
23 proof that's required in this case is more powerful than
24 that required in a civil case.

25 In a criminal case, the State must prove its case

1 beyond a reasonable doubt and proof beyond a reasonable
2 doubt is that kind of proof which leaves you firmly
3 convinced of the defendant's guilt.

4 Now, our law recognizes that there are few things that
5 occur in our lives that can be proven beyond any doubt, and
6 the State does not have that burden in the case of beyond
7 any doubt. If, based on your consideration of the evidence,
8 you are firmly convinced that the defendant is guilty of the
9 crime before you, then you must find the defendant guilty.
10 However, on the other hand, if there is a real possibility
11 that the defendant is not guilty, you must give the
12 defendant the benefit of that doubt and find him not guilty.

13 I remind you that during the trial that you and I have
14 had different functions in this courtroom. As the trial
15 judge, it's been my responsibility to preside over the
16 proceedings, to rule on the admissibility of evidence, or on
17 the appropriateness of questions. You are to consider only
18 the evidence that was entered into the record.

19 If there was any matter that I ordered excluded or
20 stricken from the record during the proceeding, you are to
21 give those matters no consideration whatsoever in reaching
22 your verdict. You should consider only the evidence that
23 was properly admitted into the record in reaching your
24 verdict in this case, and any stipulations or agreements as
25 to the facts made by the attorneys for the parties before

1 the Court.

2 I now have the additional duty of charging you
3 concerning the law to be applied in this case. And as I
4 told you at the beginning of the trial, the laws and the
5 Constitution of this state make me the sole judge of the law
6 to be applied in this matter. It's your duty, as jurors, to
7 accept the law as I give it to you, apply it to the facts as
8 you find them to be, and thereby reach a just and a true
9 verdict in this case.

10 I've already told you that if you came into this
11 courtroom with any notion or idea as to what the law is or
12 what the law ought to be, that notion should be left outside
13 of the jury room during your deliberations. You should
14 consider only the law as I give it to you now. And again,
15 apply it the facts as you find them to be because it, in
16 every case in this Court you are the sole judges of the
17 facts in this case. You're the sole and exclusive judges of
18 the facts in this case.

19 I cautioned you at the beginning of the trial, and I
20 will repeat the caution now, that if I said anything or did
21 anything in the discharge of my duties as the presiding
22 officer in this Court, and you took from my actions that I
23 have any opinion whatsoever as to how you determine the
24 facts in this case, I will tell you now to disregard that
25 notion in its entirety. The law does not allow me to have

1 an opinion concerning your determination of the facts. I
2 can assure you I have no opinion as to how you determine the
3 facts in this case.

4 Now, the same law that places that burden upon me
5 places the same burden upon you to accept the law as I give
6 it to you, and apply it to the facts as you find them to be
7 in reaching your verdict. It's your duty, as jurors, to
8 determine the effect, the value, the weight, and the truth
9 of the evidence which you have heard during this trial.

10 Now, I will tell you that in any trial that is tried
11 before this Court there are two types of evidence that you
12 have the right to consider in reaching your verdict. The
13 first type of evidence is that evidence which is described
14 as direct evidence.

15 Direct evidence is testimony given by a witness who
16 claims to have direct knowledge of the facts about which the
17 witness testifies. Someone who is an eye witness to an
18 event, a participant in an event, somebody who claims to
19 have either seen, experienced, smelled, touched, had direct
20 experience as to the facts about which that person
21 testified. That's what is referred to in our Courts as
22 direct evidence.

23 There's a second type, type of evidence which you, as a
24 jury, are allowed to consider in reaching a verdict in any
25 case, and that evidence is described as circumstantial

1 evidence.

2 Now, circumstantial evidence is proof of a chain of
3 facts or circumstances which indicates the existence of some
4 other fact. Circumstantial evidence is evidence which
5 immediately establishes collateral facts from which a main
6 fact might be reasonably inferred. Therefore,

7 ~~circumstantial evidence is based on inference and not upon~~
8 ~~personal knowledge or observation.~~

9 I like to give a very simple description of how you
10 might consider circumstantial evidence as proving some other
11 fact. Let's say last night before you went to bed, paused,
12 looked out the window of your home, and the driveway in
13 front of your house was dry, the stars were shining. You
14 went to bed. You slept soundly all night. This morning
15 when you woke up when you looked outside, there was water
16 dripping off the trees, puddles in the driveway. The grass
17 in front of the house was wet. Even though the sun's
18 shining, you didn't see it rain, you didn't hear it rain,
19 but from the facts that you know to be true, you could
20 reasonably infer that some time during the night it did, in
21 fact, rain.

22 That's what is meant by proving a central fact from
23 proof of collateral facts. The inference of one fact based
24 on facts that you know to be true.

25 Now, the law makes absolutely no distinction between

1 the weight or the value that you, as a jury, can give to
2 either direct evidence or to circumstantial evidence. Nor
3 is there a greater degree of certainty required of
4 circumstantial evidence than that of direct. You, the jury,
5 have the right to weigh all of the evidence, both direct and
6 circumstantial. Give it the weight that you think it
7 deserves. And if, after weighing all of the evidence,
8 you're not convinced of the guilt of the defendant beyond a
9 reasonable doubt, then you must find the defendant guilty.
10 If, however, you are firmly convinced beyond a reasonable
11 doubt of the defendant's guilt, you must find the defendant
12 guilty.

13 Now, I told you at the beginning of the trial, and I
14 want to emphasize this to you again that you, as the sole
15 judges of the facts, have the duty in this case of
16 determining the credibility or the believability of the
17 witnesses who have testified during this trial. Credibility
18 simply means that. It means believability.

19 It's your duty, as jurors, during your deliberations,
20 to analyze and evaluate the evidence, and determine which
21 evidence convinces you of its truth. And in determining the
22 believability of witnesses who have testified in this case,
23 I told you that you should use your own good common sense in
24 reaching that determination.

25 You have the right to believe one witness who testified

1 against every other witness or all witnesses against one.
2 You, as the sole judges of facts, have the right to believe
3 all of what a witness has told you, part of what a witness
4 has told you, or none of what a witness has told you.
5 You're the sole judges of the facts in this case. That
6 makes you then the sole judges of the credibility or the
7 believability of the witnesses who have testified in this
8 case.

9 I told you, in using your own good common sense, you
10 have the right to consider such factors as to whether or not
11 the witness has some stake in the outcome of the case,
12 whether or not the witness might have a bias or prejudice
13 either in favor of or against either the State or the
14 defense, and you have observed -- and whether or not the
15 witness -- again, how they delivered their testimony, the
16 way they testified, how they spoke from the witness stand.

17 Take all of those factors into consideration, use your,
18 excuse me, use your own good common sense in making a
19 determination as to whether or not a witness is entitled to
20 a finding of credibility or believability in this case.

21 Excuse me.

22 Now, during the trial, there were several witnesses who
23 testified as expert witnesses in the case, and I stopped, I
24 stopped briefly to explain to you what that designation
25 meant and I want to tell you a little more about that at

1 this time.

2 The rules of evidence, again, that we operate under in
3 our Court system ordinarily do not permit witnesses to
4 testify concerning their opinions or their conclusions. An
5 exception for that rule exists for those witnesses that we
6 designate are called expert witnesses. That's a witness who
7 possesses, because of their education, their job experience,
8 they have become an expert in either some art, some science,
9 some profession, or calling. Those particular witnesses are
10 allowed to state their opinion as to relevant and material
11 matters within their field of expertise.

12 They also have the right then to state their opinions
13 for the reasons, for the opinions that they hold concerning
14 those matters. You, as a jury, should consider any expert
15 testimony received in this trial like any other evidence
16 that's been received. Give it the weight you think it
17 deserves. If you decide the opinion of an expert is not
18 based on sufficient education or experience or should you
19 conclude that the reasons given in support of an expert's
20 opinion are outweighed by other evidence, you have the
21 right, as the sole judges of the facts, to disregard an
22 expert's opinion in its entirety.

23 An expert's opinion or testimony is to be given no
24 greater weight than that of any other witness simply because
25 we designate that witness as an expert. Further, you're not

1 required to accept an expert's opinion even though it might
2 not be controverted by other evidence. Again, as the sole
3 judges of the facts, you give it the weight you think it
4 deserves based on the facts and circumstances as you find
5 them be.

6 Now, I also will instruct you, and I'm going to
7 emphasize to you the fact that the defendant did not testify
8 in this trial is not a factor that can be considered by you
9 in any fashion in your deliberations and in your
10 consideration of the question of the guilt or the innocence
11 of the defendant. It must not be considered by you in any
12 manner whatsoever.

13 A defendant has the constitutional right to remain
14 silent. The assertion of the right must not be considered
15 by you in your deliberations. I repeat that, under the oath
16 that you have taken as jurors, you're not, you're to give
17 the fact that the defendant did not testify no consideration
18 whatsoever. The fact that the defendant did not testify
19 should not even be discussed by you in the jury room.

20 The burden of proof in this case, as I have told you,
21 is upon the State. The defendant is not required to prove
22 himself innocent, and the burden remains upon the State,
23 that burden of proof remains with the State until the State
24 has proved his guilt beyond a reasonable doubt.

25 Now, in order to establish criminal liability generally

1 for almost all crimes that come before this Court and in
2 this case, this crime, criminal intent is required. For
3 example, the mental state required to be proven by the State
4 for a particular crime might be intent, it might be
5 knowledge, it might be recklessness, or it could be criminal
6 negligence. Criminal intent must be proven by the State
7 beyond a reasonable doubt.

8 Now, criminal intent is always a matter that must be
9 determined by circumstantial evidence or by inference
10 because at, given the state of our science these days, we
11 have no way of looking inside somebody's brain at the moment
12 they do an act and know what their intent was in any given
13 moment. We can't cut open their head and look into their
14 brain and determine that. So, therefore, criminal intent is
15 always a matter that must be established by the facts and
16 circumstances that existed at the time of the act as
17 determined by you, the jury.

18 That's how you make a determination of whether or not
19 the element requiring intent was present, was present. It's
20 not necessary to establish, again, intent by direct or
21 positive evidence. Intent, intent may be established by
22 inference the same way as any other fact might be proven
23 taking into consideration the acts of the parties, all the
24 facts and circumstances of the case.

25 Now, criminal intent is a mental state. It's a

1 conscious wrongdoing. It's up to you to determine what the
2 defendant intended to do based on the facts and
3 circumstances that have been shown to you to have existed at
4 the time of the alleged act.

5 Criminal intent can arise from a failure to act or from
6 negligence or recklessness or an indifference to duty or to
7 the consequences of one's acts. Those can be considered by
8 the law to be the equivalent of criminal intent.

9 Now, there has been evidence presented that witnesses
10 in this case may have made prior statements which were not
11 consistent with the witness' present testimony. You may use
12 this evidence to decide whether to believe the witness. You
13 may use the evidence of earlier contradictory statements to
14 determine the truth of those statements. It's up to you, as
15 the jury, to decide whether to believe the earlier
16 statements or the testimony given at trial.

17 If a witness is shown to have knowingly testified
18 untruthfully to any matter, you may consider this in
19 determining whether to trust the witness' testimony as to
20 other matters. You may reflect upon all of the testimony
21 that a witness might give or give all or part of the
22 testimony the weight you think it deserves.

23 Now, when evidence is lost or destroyed by a party, you
24 may infer that the evidence which was lost or destroyed,
25 destroyed by that party may have been adverse to that party

1 if you find first that the evidence was spoiled or
2 destroyed, and if you further find that the evidence could
3 have helped establish some of the elements of the alleged
4 crime. You may then consider those facts in deciding
5 whether or not the State has made its, met its burden of
6 proof in this case.

7 Also, statements have been entered into evidence during
8 this trial which are alleged to have been made by the
9 defendant. While the Court has determined that the
10 statements were admissible, I instruct you, the jury, that
11 you make the ultimate decision whether or not the defendant
12 made the statement. If the defendant did make the
13 statement, then you must determine whether the statement
14 made by the defendant was voluntary and of his own free
15 will. This means that the statement was not caused by
16 pressure, force, fear, threats, coercion, intimidation, by
17 hope, or a promise of leniency, or a reward of any kind. In
18 determining whether a statement was voluntary, you should
19 consider both the characteristics of the defendant and the
20 details of the questioning that occurred.

21 Some of the factors that you may consider are the age
22 of the defendant, the defendant's lack of education, the
23 defendant's mental ability or capacity, the defendant's
24 intelligence, the defendant's background or environment, the
25 defendant, the place and the length of the detention during

1 which the statement was taken, the nature of the
2 questioning, and the advice or lack thereof to the defendant
3 of his or her Constitutional rights including but not
4 limited to the right to remain silent, that the statement
5 could be used against him or her in a Court of law, the
6 right to have a lawyer present, that if he or she could not
7 afford a lawyer, a lawyer would be appointed to represent
8 him or her without any cost, and that that person making the
9 statement could stop making the statement at anytime. You
10 must carefully consider all the surrounding circumstances
11 before you give any weight to an alleged statement made by a
12 party before the Court or a person who is before the Court.

13 The State has the burden of proving beyond a reasonable
14 doubt that an alleged statement was voluntary. If you
15 determine that it was, then you may give the statement any
16 further consideration that you deem to be proper. If you
17 decide -- you must then decide what weight, if any, should
18 be given to the alleged statement. However, if you
19 determine that the alleged statement was not a free and
20 voluntary statement by a person or a defendant, then you
21 must not consider the statement at all.

22 Also, during the trial you've heard testimony from
23 someone who is under the age of 18, someone who's considered
24 to be a minor, a child, before the law. Where a witness is
25 a child, you, as a jury, must determine, as with any other

1 witness, whether the testimony is believable.

2 In deciding the believability, you may consider not
3 only the matters that I've already discussed with you
4 concerning other witnesses, but you may also consider the
5 age of the child, the child's ability to observe and
6 remember facts, the child's ability to understand and answer
7 the questions.

8 Because young children may not fully understand what is
9 happening here in this courtroom, it's up to you, the jury,
10 to decide whether the child understood the seriousness of
11 appearing as a witness in a criminal trial, whether the
12 child understood the questions that were asked, whether the
13 child had a good memory, whether the child understands the
14 difference between lying and telling the truth. In
15 addition, young children may be influenced by the way in
16 which questions are asked. It's up to you to determine
17 whether the child understood the questions that were asked
18 during this proceeding.

19 Now, ladies and gentlemen, I've already gone over with
20 you the indictment in this case and the indictment is for
21 the crime of murder, and I'm going to explain that
22 particular offense to you first. The defendant is charged
23 with murder. The State must prove, beyond a reasonable
24 doubt, that the defendant killed another person with malice
25 aforethought.

1 Malice is hatred, ill will, or hostility toward another
2 person. It is the intentional doing of a wrongful act
3 without just cause or excuse and with an intent to inflict
4 an injury or under circumstances that the law will infer an
5 evil intent. Malice aforethought does not require that
6 malice exist for any particular length of time before the
7 act is committed. But malice must exist in the mind of the
8 defendant just before and at the time of the act; that the
9 act is committed. Therefore, there must be a combination of
10 both a previous evil intent and the act that is, that is
11 accused.

12 Malice aforethought may be either expressed or
13 inferred. The terms expressed and inferred don't describe
14 different kinds of malice, but merely, merely the manner or
15 the way that they might be shown, that it might be shown to
16 have existed. That is either by direct evidence or by
17 inference or circumstantial evidence from the facts and
18 circumstances which are proven.

19 Express malice is shown when a person speaks, speaks
20 words of express hatred or ill will for another or when a
21 person prepared beforehand to do the act which was later
22 accomplished. For example, lying in wait for a person or
23 any other act of preparation going to show that the deed was
24 within the defendant's mind would be expressed malice.

25 Malice may also be inferred from the conduct showing a

1. disregard or a total disregard for human life. Inferred
2. malice may also arise when the deed is done with a deadly
3. weapon.

4. A deadly weapon is any article or instrument or
5. substance which is likely to cause death or do great bodily
6. harm. Whether an instrument is been used as a deadly weapon
7. depends upon the facts and circumstances of each, of each
8. case.

9. I will tell you now that examples of items which are
10. considered to be deadly weapons or have been considered to
11. be deadly weapons in other cases in this state are a pistol,
12. a shotgun, a knife, a rifle, a dagger, slingshot, metal
13. knuckles, razors, gasoline fire bombs, things of that
14. nature. A gun can be considered to be a deadly weapon even
15. when it is not operating.

16. Now, that is the charge of murder. Now, under our law,
17. there are also what are called lesser included offenses, and
18. I'm going to explain to you now a lesser included offense.

19. The first question that you'll need to answer, as a
20. jury, will be the question of whether or not the defendant
21. is guilty of the crime for which the indictment was issued.
22. That being murder. If you find that the State has failed to
23. meet its burden of proof on the charge of murder, then you
24. must consider whether or not the State has met its burden of
25. proof on the lesser included offense. That being voluntary

1 manslaughter, and I'm going to explain that charge to you
2 now.

3 Excuse me.

4 To prove voluntary manslaughter, the State must prove,
5 beyond a reasonable doubt, that the defendant took the life
6 of another in the sudden heat or, of, of passion or based on
7 sufficient legal provocation. Both heat of passion and
8 sufficient legal provocation must be present at the time of
9 the killing to constitute voluntary manslaughter. Sudden
10 heat of passion may, for a time, affect a person's
11 self-control and temporarily disturb a person's reason.
12 Sudden heat of passion must be the type that would make an
13 ordinary person unable to coolly reflect upon his actions
14 and would produce an uncontrollable impulse to do violence.

15 Sufficient legal provocation must be the type that
16 would make a person of ordinary reason and caution become
17 enraged and to lose control temporarily. The provocation
18 needed for voluntary manslaughter must come from some act
19 or, of or related to the victim. Words alone, however
20 vulgar or insulting, are not enough to be a legal
21 provocation.

22 Where a death is caused by the use of a deadly weapon,
23 the words must have, must be accomplished, accompanied by
24 some overt threatening act which would have produced the
25 heat of passion. The exercise of a legal right, no matter

1 how offensive it is to another, is never sufficient legal
2 provocation; provocation for voluntary manslaughter,
3 manslaughter.

4 If the heat of passion has cooled or there's been
5 enough time between the provocation, if any, and the
6 killing, the passion, excuse me, and the killing, the, the,
7 then the killing would not be voluntarily manslaughter. In
8 deciding whether a reasonable person would have enough time
9 to cool off, you should consider all of the circumstances
10 surrounding the killing. You may consider the nature of the
11 provocation, if any, the defendant's mental or physical
12 state, and the circumstances and relationships between the
13 parties.

14 The defendant has raised the defense of, of accident.
15 An act may be excused on the grounds of accident if it is
16 shown that the act was unintentional, that the defendant was
17 acting lawfully, and that reasonable care was used by the
18 defendant in the handling of a weapon given the facts and
19 circumstances as you find them to be. The burden of proof,
20 excuse me, the burden again is upon the State to prove,
21 beyond a reasonable doubt, that an act was not an accident,
22 but was an unlawful activity by the defendant.

23 Now, ladies and gentlemen of the jury, as I indicated
24 to you earlier in this case, your verdict must be unanimous.
25 That means each and every one of you must agree upon the

1 verdict before it becomes the verdict of the jury.

2 I'm going to, in a few minutes, submit to you a written
3 verdict form, and on that verdict form there will be several
4 choices, and I'm going to explain that to you in just a few
5 minutes.

6 Mr. Linduff, if you'll raise your hand please.

7 (Juror complies.)

8 THE COURT: You happen to be sitting in the right seat
9 because you're going to be the foreperson of the jury. You
10 can put your hand down, sir.

11 Now, I indicated to you at the beginning of the trial
12 that the foreperson has no greater say in the outcome of
13 this case than any other juror. It will be your
14 responsibility to preside over the deliberations of the jury
15 as they go forward.

16 Should the jury have any question of the Court during
17 your deliberations, I'll ask that you have the jury agree
18 upon the form of the question, place the question in
19 writing, knock on the door, inform the bailiff that you have
20 a question, and pass it to the bailiff. He'll bring the
21 question then to me and I'll consider the question and
22 determine the appropriate response that should be made.

23 I will caution you that I'm not allowed to answer each
24 and every question that you may have in your deliberations
25 cause I've explained we have different functions in this

1 trial. And I can't enter into your determination of the
2 facts of this case.

3 However, I can answer questions concerning the
4 procedure that we follow, the evidence that you've heard, or
5 the law as I charged it to you. But again, don't let that
6 stop you from asking any question that you might have. Any
7 question that you have, place it in writing, submit it
8 through the foreperson to the bailiff, and I'll consider the
9 appropriate response and I'll respond to your question back
10 in open court before we send you back in for your
11 deliberations.

12 Again, as I've indicated to you, your verdict in this
13 case must be unanimous. Each and every one of you must
14 agree on the verdict before it becomes the verdict of the
15 jury.

16 Now, at this time, I, however, am going to do, do this
17 to you one more time. I'm gonna ask you to step into the
18 jury room. Don't begin your deliberations. I'm going to go
19 over my charge with the attorneys to be sure there's no
20 objections or that I have not omitted anything that should
21 of been included. Also I will go over with them the form of
22 the verdict, and we will also go through the evidence
23 because the evidence will be sent back with you into the
24 jury room. I want to be sure that only the properly
25 admitted evidence is submitted to you for your

1 consideration.

2 So, we got a few little housekeeping things to do and
3 I'll ask you to step back there. Again, don't begin your
4 deliberations until I've brought you back into the courtroom
5 and instructed you to do so.

6 You may retire at this time.

7 ~~Whereupon, the following takes place outside the~~
8 ~~presence of the jury.)~~

9 THE COURT: Any objections to my charge from the State?

10 SOLICITOR GOWDY: No objections, no exceptions.

11 THE COURT: Defense?

12 MR. BRANNON: None, Your Honor. Thank you.

13 THE COURT: All right. I would ask that you step
14 forward and let's go through the exhibits. I'll retrieve
15 the verdict form and we'll go over that in just a moment.

16 (Pause.)

17 MR. BRANNON: It's all there, Your Honor. Thank you.

18 THE COURT: Could I get counsel to step around?

19 We have the verdict form on the, my law clerk's
20 computer and see if you have any objection to the form
21 before we print it.

22 We'll be, we'll be -- if you want to step out for just
23 a moment, it will take a second for us to send it out and
24 have it printed and him to get a copy. So, you, you can
25 step out if you need to go to the restroom or something.

1 SOLICITOR GOWDY: Two minutes?

2 THE COURT: Yeah, just a few minutes.

3 (Pause.)

4 THE COURT: Mr. Brannon, are the interpreter's ready?

5 MR. BRANNON: Yes.

6 THE COURT: Okay. Mr. Gowdy or, or Mrs. Crick, have
7 you had an opportunity to review the evidence?

8 SOLICITOR GOWDY: Yes, sir, Your Honor.

9 THE COURT: And are you in agreement that the documents
10 are in the files that go back into the jury room?

11 SOLICITOR GOWDY: Yes, sir, Your Honor.

12 THE COURT: And have you reviewed the verdict form?

13 SOLICITOR GOWDY: Yes, sir, Your Honor.

14 THE COURT: Any objection?

15 SOLICITOR GOWDY: No, sir, Your Honor.

16 THE COURT: And for the defense?

17 MR. BRANNON: Your Honor, yes. We've, we've reviewed
18 both, both stacks of evidence, and we approve those to go
19 back to the jury, and, and the verdict forms as well, Your
20 Honor.

21 THE COURT: All right. We can bring---

22 MR. BRANNON: Your Honor?

23 THE COURT: Yes, sir.

24 MR. BRANNON: At this point -- I don't know if this is
25 an appropriate time. I'd just like to renew my motions and

1 objections at this point in time in the record.

2 THE COURT: As to --?

3 MR. BRANNON: Anything.

4 THE COURT: All right. I'll allow you to do so. Thank
5 you.

6 MR. BRANNON: Thank you, sir.

7 THE COURT: Bring the jury in.

8 (Whereupon, the following takes place within the
9 presence of the jury.)

10 THE COURT: All right. The record will reveal that the
11 jury has returned to the courtroom.

12 Mr., Mr., Mr. Foreman, I am going to pass to you the
13 verdict form that's going to be used in this case, and I'll
14 go over that with you briefly. If you'll look at the
15 document, and I'll let you get your glasses on.

16 Okay. Now, sir, the document will have at the top the
17 caption of the case, and the Court in which this case is
18 being held. Also the case number of the indictment. Then
19 below the caption there is a one word verdict. The first
20 question you're, that you're asked is as to the indictment
21 which was issued for the charge of murder. The choices
22 there are not guilty or guilty of the offense of murder.

23 Please do not take from the fact that I have placed
24 those choices in any particular order on the form that I
25 have any preference whatsoever as to how you determine the

1 case. There's two possible choices, either guilty or not
2 guilty. That happens to be the order in which I've placed
3 them on the form. It indicates no preference on my part as
4 to which one you might choose.

5 Now, if you determine that the State has failed to meet
6 its burden of proof for the charge of murder, and, and your
7 verdict is not guilty, then you would go on to question two,
8 which is as to the lesser included offense of voluntary
9 manslaughter. And again, the choices there are either not
10 guilty or guilty.

11 Now, if you -- again, if the State has proven the
12 indicted offense, the verdict would be guilty. That would
13 end your consideration. If you find that the defense has
14 prevailed on its defense of accident, in other words, the
15 State has failed to meet its burden of proof beyond a
16 reasonable doubt to prove that it was not accident, then the
17 verdict would be not guilty. So, that's -- there's not a
18 separate form for the defense of accident. You, you
19 understand that.

20 Now, I'm going to ask you to retire to the jury room at
21 this time to begin your deliberations. I will tell the
22 alternates, we're going to ask that you have a seat back in
23 the jury assembly room. Please do not discuss the case with
24 anyone even among yourselves at that point in time. Should
25 any of the jurors fall ill, have an emergency, and I don't

1 know how long the deliberations will take, they'll take
2 whatever time they think is necessary, it might be necessary
3 for you to have to join the jury at some point in time as a
4 member of the jury.

5 So, again, please keep yourselves with an open mind
6 until such time as you might be called. We'll try to make
7 you comfortable and you should be able to relax in that
8 room. The jury's not gonna be coming back, the other pool.

9 So, they shouldn't be bothered in that room at that time.

10 But as to the regular jurors, at this time, it will be
11 your responsibility to retire and begin your deliberations.

12 Let me make you aware of one thing. One piece of
13 evidence I know of is the CD containing the 9-1-1 call. We
14 do not have a facility in the jury room to play that for
15 you. If the jury finds it necessary to listen to that piece
16 of evidence, it will be necessary for you to come back in
17 the courtroom and have it played on a device that, that
18 would allow us to do that.

19 So, if that becomes necessary, inform the bailiff.
20 We'll make arrangements for you to come back. It is in
21 evidence. You're entitled to review it if you wish to. We
22 just don't have the facilities in the, there for you to be
23 able to review it in the jury room. So, let us know if you
24 need to do that. The rest of the evidence will be with you
25 in the jury room, and you'll have a right to consider that.

1 So, at this time I'll ask the alternates to remain
2 seated. The jury may retire to the jury room to begin its
3 deliberation.

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

6 THE COURT: And to the alternates, this gentleman will
7 escort you to the assembly room. Thank you very much.

8 (Whereupon, the alternate jurors were removed from the
9 courtroom at this time.)

10 THE COURT: Any objection to my final instructions to
11 the jury from the State?

12 SOLICITOR GOWDY: No, sir, Your Honor.

13 THE COURT: Any from the defense?

14 MR. BRANNON: No, Your Honor.

15 THE COURT: All right. At this point in time the Court
16 will be in recess until such time as a verdict is reached.

17 The defendant remains in custody.

18 Thank you very much.

19 (Whereupon, the jury began deliberations at 11:40 and
20 returned with a verdict at 1:09.)

21 THE COURT: All right. I have been informed that the
22 jury has reached a verdict.

23 Is the State ready?

24 SOLICITOR GOWDY: Yes, sir, Your Honor.

25 THE COURT: Is the defense ready?

1 MR. COLLINS: Yes, Your Honor.

2 THE COURT: All right. Bring the jury in.

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

5 THE COURT: All right. Mr. Foreman, I've been informed
6 that the jury has reached a verdict.

7 Is that correct?

8 FOREMAN: Yes, Your Honor.

9 THE COURT: If you'll pass it to the bailiff please.

10 FOREMAN: Yes, sir.

11 (Foreman complies.)

12 THE COURT: Madam Clerk, you may publish the verdict.

13 CLERK: In the State of South Carolina, in the Court of
14 General Sessions, Spartanburg County, the Seventh Judicial,
15 Judicial Circuit Court, the plaintiff, Santiago, Santiago
16 Pasqual Rios, the verdict, as to, as to Indictment Number
17 2008-GS-42-170, murder, we, the jury, unanimously find the
18 defendant, Santiago Pasqual Rios, guilty.

19 I certify this decision was the unanimous decision of
20 the jury. Signed by the foreperson on the 1st day of May,
21 2008.

22 Ladies and gentlemen of the jury, is this your verdict
23 and still your verdict, please do so by indicating in
24 raising your right-hand, yes, right-hand.

25 (Whereupon, all jurors raise their hands at this time.)

1 THE COURT: Thank you very much.

2 Anything further from the State before I release the
3 jury?

4 SOLICITOR GOWDY: No, sir, Your Honor.

5 THE COURT: Anything further from the defense before I
6 release the jury?

7 MR. COLLINS: Not before release of the jury, Your
8 Honor.

9 THE COURT: All right.

10 (Whereupon, the jury panel was dismissed at this time.)

11 THE COURT: All right. Anything further from the State
12 at this time?

13 SOLICITOR GOWDY: No, sir, Your Honor.

14 THE COURT: From the defense?

15 MR. BRANNON: Your Honor, at this point I would make a
16 motion for judgment notwithstanding the verdict, Your
17 Honor, and I don't believe the State met its burden of
18 proof. I believe the verdict was, is in, in deference to
19 the weight of the evidence presented in this case.

20 THE COURT: All right. That motion would be denied.

21 All right. We can proceed with sentencing.

22 Do you need -- I think there's some paperwork that
23 needs to be done.

24 SOLICITOR GOWDY: They're doing it right now.

25 MR. BRANNON: We're doing it right now, Your Honor.

1 THE COURT: Okay.

2 MR. BRANNON: Your Honor, I, I would also then make a
3 motion for a new trial.

4 THE COURT: All right. Motion will be denied.

5 MR. BRANNON: Thank you, Your Honor.

6 (Pause.)

7 THE COURT: Can I get you to move the equipment there?

8 SOLICITOR CRICK: Your Honor, may I approach?

9 THE COURT: You may. Thank you.

10 The jury having found the defendant guilty of the
11 offense of murder, I'll be happy to hear from the defense in
12 mitigation.

13 Mr. Collins.

14 MR. COLLINS: Your Honor, you've spent the last three
15 days in this courtroom with Santiago. Santiago, as you
16 know, is in his mid-20's at this point. When this happened
17 he was a 23 year old young man. He and his wife had been
18 married for seven or eight years. They have no children.
19 He does have the support of an extended family that has been
20 with him through this entire process.

21 It's been a difficult trial to say the least. He's a
22 young man that's been thrust into a justice system which,
23 until this point, I don't believe he fully understood.

24 Prior to Thanksgiving of 2006 he, he had been a
25 productive member of our community. He'd worked for

1 Milliken, paid taxes, supported his family. He understands
2 that with the jury's verdict today that the sentence he will
3 receive will be very substantial. And that, to be quite
4 honest, when whatever sentence the Court imposes is over, he
5 will most likely have to leave the country.

6 What he does ask of the Court is to impose a sentence
7 that, once he is released, would allow him enough time to
8 become a productive member of society again.

9 Thank you, Your Honor.

10 THE COURT: Mr. Brannon, do you wish to be heard?

11 MR. BRANNON: No, Your Honor.

12 THE COURT: Does the defendant wish to speak?

13 DEFENDANT: About what?

14 (Pause.)

15 DEFENDANT: What I want is to help my parents and my
16 family.

17 THE COURT: I'm sorry.

18 DEFENDANT: What I want is to hug my parents and my
19 family and my sisters are here.

20 THE COURT: Anything else he'd like to say?

21 DEFENDANT: That's all.

22 MR. COLLINS: That's all.

23 THE COURT: Anything further from the defense?

24 MR. COLLINS: That's all from the defense, Your Honor.

25 THE COURT: The State.

1 SOLICITOR GOWDY: Your Honor, may it please the Court.

2 THE COURT: Yes, sir.

3 SOLICITOR GOWDY: The Court is immanently familiar with
4 every detail of this case having presided over it for now
5 the second time and for over three days now.

6 Eliza's family has sat in Court and they specifically
7 wanted me to thank the Court for what they perceived as the
8 fairness of our country's justice system. They also wanted
9 me to let the Court know that Eliza was a good, honest,
10 kind, hard working person, and that they value her life.
11 And that they trust the Court to sentence him accordingly.

12 THE COURT: Any prior record for this individual?

13 SOLICITOR GOWDY: No prior convictions, Your Honor.

14 THE COURT: One thing I would like the State to address
15 before I consider the sentence is the statement made by the
16 defense. This gentleman's -- it's not been a part of my
17 inquiry thus far as to his status as a foreign national.

18 Does the Court -- is the State aware of his status in
19 this country?

20 SOLICITOR GOWDY: I am not, Your Honor. I have taken
21 and still take, at their word, my defense counsel, who says
22 that he is legally a resident. I don't know whether or not
23 he is a formal resident, whether he is a guest worker. I
24 can not, I can not speak to that.

25 THE COURT: The reason, the reason I ask the question

1 is I realize that whatever sentence I impose he will
2 probably be in prison for 20 some years at a minimum. We're
3 looking at -- and I don't know whether that means he would
4 be released to remain in this country or whether he would be
5 released to return to his native land. That's of some
6 concern to me, and I'd like to know the answer to that
7 before I pass sentence.

8 So, given -- and I realize the status of that law may
9 change before this occurs. But I would like to know what
10 that is at this time.

11 SOLICITOR GOWDY: Yes, sir.

12 THE COURT: Can you help me with that, Mr. Collins?

13 MR. COLLINS: Your Honor, if I could have just a
14 moment. I can get what documentation I have as to his legal
15 status.

16 THE COURT: All right. Thank you, sir.

17 (Pause.)

18 SOLICITOR GOWDY: Your Honor, I am looking at a, at a
19 South Carolina driver's license, a United States Social
20 Security card, and a permanent resident card. What I can
21 not tell the Court, because it's been six years since I've
22 practiced in the federal system, is whether or not a felony
23 conviction automatically results in the deportation of a
24 permanent resident, whether or not there's a hearing process
25 that they have to go through. Whatever I've told the Court

1 would be conjecture and I don't want to conject.

2 THE COURT: Well, then what I'm gonna do is I'm gonna
3 take a short recess.

4 SOLICITOR GOWDY: Yes.

5 THE COURT: And then I'd like you to inquire of the
6 U.S. Attorney's Office.

7 SOLICITOR GOWDY: Yes, sir, certainly.

8 THE COURT: So that perhaps we can get an answer to
9 that question before I pass sentence. So, I'm gonna defer
10 sentencing at this time. We'll take a 15 minute break or so
11 and then I'll step back on once you let me know.

12 SOLICITOR GOWDY: Thank you, Your Honor.

13 THE COURT: Court will be in recess for about 15
14 minutes.

15 SOLICITOR GOWDY: Thank you, Your Honor.

16 (Whereupon, a short recess was taken at this time.)

17 THE COURT: All right. Mr. Solicitor, do you have a
18 report?

19 SOLICITOR GOWDY: Your Honor, may it please the Court.

20 Thank you for giving us a, a period of time to contact
21 our colleagues at the United States Attorney's Office who
22 put us, put us in touch with INS.

23 I talked to a young lady from INS by the name of
24 Andrea. She tells me that immediately a detainer will be
25 placed on this defendant in state custody. That when his

1 sentence is satisfied, that he will be brought before an
2 immigration judge, that they will move to have him deported.
3 He has the right to contest that, and the word that she
4 used, and I had her to repeat it twice for me, is he is
5 likely to be deported. I apologize that I can not report an
6 absolute to the Court. Dealing with the federal government,
7 that's probably the best as I can get.

8 THE COURT: I understand, sir.

9 Any further comment from the defense based on that
10 statement?

11 MR. BRANNON: No, Your Honor.

12 MR. COLLINS: Nothing else, Your Honor.

13 THE COURT: All right. Again, I've, I've sat through
14 the case, this, partially once before, and this time and
15 have had an opportunity to listen to and review the
16 evidence. One thing that I have noticed about this matter
17 is that Mr. Rios has reported to court every time that he
18 was asked to. He was out on bond for a long period of time
19 and had no offenses during that period of time as well. And
20 quite frankly, up until this point in his life, has no
21 brushes with the law and has not been in trouble in any
22 fashion whatsoever.

23 This particular incident, the jury has found him guilty
24 of murder, and that is the, the sentence that he will
25 suffer. Given his age, if I give him the minimum sentence,

1 as opposed -- and my choices, of course, are life or 30.

2 MR. COLLINS: Yes, sir.

3 THE COURT: Would, he would spend more time in jail
4 than he has lived thus far.

5 Also, to a certain extent, the report the solicitor
6 just gave me is somewhat more comforting to me in that there
7 will be a determination, if the law stays the same at the
8 end of any sentence I impose, to determine whether he's been
9 a good prisoner, whether he has lived a model life, and has
10 exhibited some reformation in his life. We can view prison
11 not only as a punishment, but as an effort to try to reform
12 individuals as well.

13 Given all of the factors that I just mentioned, his
14 work history, his history concerning his, his criminal
15 record, and up until this particular incident, taking all of
16 those factors into consideration, but also taking into, into
17 consideration the life that he took, the effect that that
18 will have on all of those people, I understand and, and
19 can't fully appreciate your loss, but I certainly understand
20 the loss that you each suffered, and no matter what I do,
21 that loss will not be totally rectified in this courtroom
22 today.

23 But being mindful of all of those factors, it is the
24 Sentence of this Court that the defendant be confined for a
25 period of 30 years.

1 Good luck to you, sir.

2 SOLICITOR GOWDY: Thank you, Your Honor.

3
4 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 28th, 29th, 30th day of April and the 1st day of May, 2008.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

May 22nd, 2008



PAMELA E. GREEN, Court Reporter

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
Roger L. Couch, Circuit Court Judge
2008-GS-42-0170

STATE OF SOUTH CAROLINA,

Respondent.

-VS-

RIOS, SANTIAGO a/k/a SANTIAGO PASQUAL,

Appellant.

FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION TO SUPPRESS HIS OUT OF COURT STATEMENTS TO THE POLICE BECAUSE THE STATEMENTS WERE TAKEN WITHOUT A KNOWING AND INTELLIGENT WAIVER OF APPELLANT'S MIRANDA RIGHTS?
2. DID THE TRIAL COURT ERR IN REFUSING AND/OR FAILING TO INSTRUCT THE JURY ON INVOLUNTARY MANSLAUGHTER?
3. DID THE TRIAL COURT ERR IN REFUSING AND/OR FAILING TO INSTRUCT THE JURY ON SELF-DEFENSE?

STATEMENT OF THE CASE

The Appellant (hereinafter "Rios") was indicted by the Spartanburg County Grand Jury under Indictment Number 2008-GS-42-0170 for the offense of Murder. The indictment alleges that Rios on or about November 22, 2006, caused the death of Eliza Hernandez by shooting her with a gun. A jury trial commenced in Spartanburg County on April 28, 2008. On May 1, 2008, the jury returned a verdict of guilty and Rios was sentenced by the Court to thirty years imprisonment. Rios timely filed a Notice of Intent to Appeal.

FACTS OF THE CASE

Rios is a native of a small village located 12 or 15 kilometers from the State of Michoacán in the Country of Mexico. (R. p. 209, lines 3-10; R. p. 210, lines 10-22) Rios' native language is the language of that region of Mexico and is known as P'urhepechas or Tarascan. (R. p. 101, lines 9-20) He has finished four years in school and has indicated that he is unable to read or write English. (R. p. 671, Court's Exhibit 3 - Statement of Rios)

At the time of the events alleged in the Indictment Rios was married to Eliza Hernandez (hereinafter "Hernandez"). Rios and Hernandez lived in Spartanburg, South Carolina with Rios' parents, two sisters, and younger brother.

On November 23, 2006, Thanksgiving Day, Rios went to work at the Milliken Cotton Blossom plant in Spartanburg with a lunch packed by his wife. After leaving work early Rios returned home with his uneaten lunch and left again to visit his sister and to do errands. Sometime later Rios returned home and asked his wife for a Thanksgiving meal. Hernandez refused and became angry with Rios. An argument ensued which resulted in Hernandez confronting and attacking Rios. This argument moved from the kitchen to the living room where some of Rios' hair was pulled out and a medallion was ripped from his neck scratching his chest. The argument moved to a bedroom and continued behind locked doors. Hernandez pushed and threatened Rios and at one point stated her intention to kill him. Hernandez armed herself with a handgun placing Rios in fear for his life. A struggle for the gun took place and Hernandez was shot in the face and fatally wounded. (R. p. 672, Court's Exhibit 4 - Statement of Rios)

Rios called 9-1-1 and the police responded. (R. p. 672, Court's Exhibit 4 - Statement of Rios) All occupants of the house were taken to the Spartanburg County Sheriff's Department where they were separated. (R. p. 320, line 21- R. p. 321, line 6; R. p. 321, line 25 - R. p. 322, line 4) Rios was taken into an interview room by Spartanburg County Sheriff's Deputies for purposes of an interview. (R. p. 45, lines 6-25) He was presented by Sheriff's Deputies with a Pre-Interrogation Waiver form written in English and a written version of Miranda rights printed in Spanish. (R. p. 46 line 1 - R. p. 48,

line 13) Rios subsequently gave a statement to the police asserting that three masked intruders entered the home and shot Hernandez. (R. p. 50, lines 6-9; R. p. 671, Court's Exhibit 3 – Statement of Rios) He gave a second statement without further Miranda, detailing the events of the day and describing the argument with Hernandez, the physical confrontation between them, and the struggle for the gun. (R. p. 84, line 25 - R. p. 86 line 25; R. p. 672, Court's Exhibit 4 – Statement of Rios)

ARGUMENTS

1. BECAUSE THE STATE FAILED TO PROVE THAT RIOS KNOWINGLY AND INTELLIGENTLY WAIVED HIS MIRANDA RIGHTS THE TRIAL COURT ERRED IN DENYING RIOS' MOTION TO SUPPRESS THE TWO STATEMENTS GIVEN TO THE POLICE.

The State's case rested largely on the two statements which Rios gave to the police after he was taken to the Spartanburg County Sheriff's Department on the night of November 23, 2006. In a Jackson v. Denno hearing, Rios sought to exclude two written statements taken by Officer Baldarama and Officer Diaz at the Sheriff's Department. (Transcript. p. 58, lines 5-12) Rios sought to exclude the statements on the ground that the statements were given without a knowing and intelligent waiver of his Miranda rights. (R. p. 110, lines 7-12)

In support of his argument Rios relied heavily on the case of People v. Jiminez, 863 P.2d. 981 (1993). This Colorado decision is similar to Rios' case in dealing with the issue of language and cultural factors preventing an individual from making a knowing and intelligent waiver of his rights under Miranda. The Jiminez decision relies on well developed United States Supreme Court decisions which establish principles governing

the application of Miranda. The Jiminez court correctly states the Miranda rule as follows:

"In Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d. 694 (1966), the United States Supreme Court established procedural safeguards to protect the Fifth Amendment privilege against self incrimination held by persons subjected to interrogation while in police custody. *Id.* at 467, 478, 86 S. Ct. at 1624, 1630. In recognition of the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," *id.* at 467, 86 S. Ct. at 1624, a person subjected to such questioning must first be given certain warnings. *Id.* at 479, 86 S.Ct. at 1630."

"He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."

... "A person so advised may waive these rights "provided the waiver is made voluntarily, knowingly and intelligently." Miranda, 384 U.S. at 444, 86 S.Ct. at 1612; accord Colorado v. Spring, 479 U.S. 564, 572, 107 S.Ct. 851, 856, 93 L.Ed.2d. 954 (1987) *Citations Omitted* "But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." Miranda, 384 U.S. at 479, 86 S.Ct. at 1630. The prosecution has the burden of proving waiver by a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157, 168, 107 S. Ct. 515, 522, 93 L.Ed.2d 473 (1986)" *Citations Omitted*

"The determination of whether a waiver is voluntary, knowing, and intelligent requires two distinct inquiries:

First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness, both of the nature of the right being

abandoned and the consequences of the decision to abandon it.”

“*Spring*, 479 U.S. at 573, 107 S.Ct. at 857; *May*, 859 P.2d at 882 (quoting *Hopkins*, 774 P.2d at 851 (in turn quoting *Moran v. Burbine*, 475 U.S. 412, 421, 106 S.Ct. 1135, 1140, 89 L.Ed.2d 410 (1986))). The issue of voluntariness addresses the “presence or absence of coercion which primarily concerns the effect of police conduct.” *May*, 859 P.2d at 882--83. Additional to and distinct from that issue is, the issue of whether the waiver was the product of knowing and intelligent action on the part of the person being interviewed.”

“A waiver, however, may be voluntary but still fail to satisfy the requirement that it also be knowing and intelligent. The latter requirement is met only if the person waiving the privilege was “fully aware of the nature of the right to remain silent that he was abandoning and the consequences of abandoning that right.” *Id.*; accord *Spring*, 479 U.S. at 574, 107 S.Ct. at 857; *Patterson v. Illinois*, 487 U.S. 285, 292, 108 S.Ct. 2389, 2394, 101 L.Ed.2d 261 (1988); *Burbine*, 475 U.S. at 421, 106 S.Ct. at 1140” *Citations Omitted Jiminez*, 863 P.2d at pp.983-984.

It is this latter requirement that Rios asserts entitles him to suppression of the two statements. Rios was not fully aware of the nature of the right to remain silent, that he was abandoning that right and the consequences of abandoning that right because of language and cultural barriers which existed for him. Rios, like Jiminez, has very limited formal education and his native language does not include words for concepts such as rights or Courts. (R. p. 100, line 25 – R. p. 104, line 13)

Rios was taken to the Investigative Division of the Spartanburg County Sheriff's Department by Deputy Baldarama who was met there by another investigator in the case. (R. p. 45, lines 1-20) Deputy Baldarama's role was to serve as translator for the investigator and Rios. (R. p. 45, lines 24-25) Deputy Baldarama testified that he advised

Rios of his Miranda rights in Spanish. (R. p.46 L. 1-8.) Rios was read his Miranda rights through the use of a Miranda card called the Command Spanish. (R. p. 46, lines 9-16) Deputy Baldarama then testified that he spoke entirely in Spanish to Rios. (R. p. 46, lines 21-25) Deputy Baldarama utilized two forms for the purpose of informing Rios of his Miranda rights and for obtaining a waiver of those rights. These documents were marked as Court Exhibits 1 and 2 and are respectively the Miranda Warning (Spanish) and a Pre-Interrogation Waiver form. (R. pp. 669-670) Deputy Baldarama testified that prior to the taking of the written statements challenged by Rios that he read to Rios the statements contained in Court Exhibit 1, the Miranda Warning (Spanish) and as to that form the following testimony was given:

“Q Do you have him acknowledge that he’s read or understands each of those rights? (Emphasis Added)

A Yes, ma’am, on the Spanish one, he initialed it all the way down after I had got done with each and every Miranda right.” (R. p. 48, lines 3-7)

It was at this time that Deputy Baldarama proceeded to take the first statement from Rios. (R. p. 48, lines 8-14)

This testimony is insufficient to demonstrate, under all of the circumstances, that Rios was fully aware of the nature of the right to remain silent, that he was abandoning that right and of the consequences of doing so as is required under the cases. Rios’ initials on each of the enumerated rights on Court’s Exhibit 1 Miranda Warning (Spanish) may constitute at most an acknowledgement that he has been read the words on the page but not that he fully understands his rights and not that he waives those rights.

Court's Exhibit 2, the Pre-Interrogation Waiver form, is printed in English and contains a statement of waiver. Deputy Baldarama testified that he read the bottom portion of Court's Exhibit 2, the Pre-Interrogation Waiver form, aloud to Rios in Spanish. (R. p. 74, lines 5-9) The Pre-Interrogation Waiver form indicates that Rios has finished four years in school and can write in Spanish but cannot read and write the English language. Under these circumstances, the printed waiver form is not sufficient for the state to meet its burden of proving a knowing and intelligent waiver.

Subsequent to the giving of the first statement to Deputy Baldarama Rios was asked to give a second statement to Deputy Angel Diaz. (R. p. 80, lines 2-9) Deputy Diaz did not give Rios Miranda warnings again nor did he seek a waiver of Miranda. (R. p. 80, lines 21-23) After speaking with his Mother, Rios gave a second statement in which he described the fight with Hernandez on the night in question. (R. p. 84, line 7 - R. p. 85, line 11; R. p. 672, Court's Exhibit 4 - Statement of Rios)

The Evidence presented by the State in the Jackson v. Denno hearing, taken in its totality, is lacking on the question of whether Rios knowingly and intelligently waived his Miranda rights. While there is an assertion by Deputy Baldarama that he felt that the defendant understood his rights, this is no proof that the defendant understood that he was waiving those rights and what the consequences of that could be. There is much evidence to suggest that the defendant was, as the defendant Jiminez was, incapable of understanding and therefore knowingly and intelligently waiving his Miranda rights because of the language and cultural barriers that existed. It was not proven that Rios'

waiver was the product of knowing and intelligent action on his part and therefore the trial Court should have suppressed the statements.

2. THE TRIAL COURT ERRED IN REFUSING AND/OR FAILING TO INSTRUCT THE JURY ON INVOLUNTARY MANSLAUGHTER BECAUSE THERE WAS EVIDENCE OF A STRUGGLE OVER THE GUN.

Rios' statement detailing the argument and fight with Hernandez was ultimately admitted into evidence after the Motion to Suppress the statement was denied at the Jackson v Denno hearing. (R. p. 398; lines 18-24; R. p. 672, Court's Exhibit 4 - Statement of Rios) The statement was published to the jury verbatim. (R. p. 400, line 21 - R. p. 402, line 25) In the statement, Rios described a struggle for the gun which eventually fired and fatally wounded Hernandez. (R. p. 402, lines 6-18) At the conclusion of the evidence trial counsel requested a charge on Involuntary Manslaughter. (R. p. 589, lines 1-7) During the course of argument on the request to charge trial counsel reiterated his request for an instruction on Involuntary Manslaughter. (R. p. 591, lines 7-10) Trial counsel for a third time indicated his desire for instructions on all forms of lesser included verdicts and defenses during the course of argument. (R. p. 595, lines 9-12) In colloquy between trial counsel and the Court, the Court indicated that it was not inclined to give the requested instruction on Involuntary Manslaughter. (R. p. 595, line 13 - R. p. 599, line 16)

In State v. Light, the South Carolina Supreme Court held under similar factual circumstances to the present case, that a trial Court's denial of an instruction on Involuntary Manslaughter was error. The Supreme Court found that the fact that there

was a struggle over a weapon was sufficient evidence to support an Involuntary Manslaughter charge to the jury. State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008).

Rios concedes that trial counsel's statement near the end of the charge conference could be taken as withdrawal of the request to charge Involuntary Manslaughter and Self-Defense. (R. p. 599, lines 17-23) However, the trial Court has the duty to instruct the

jury on any lesser included offense that is supported by the evidence. "The evidence presented at trial determines the law to be charged." State v. Wrigington, 375 S.C. 25, 649

S.E.2d 185 (S.C. Ct. App. 2007) at 649 S.E.2d p.188. Trial counsel reiterated his request for an instruction on Involuntary Manslaughter on three separate occasions and the statement of trial counsel seeming to withdraw the request for Involuntary Manslaughter came only after dissuasion by the Court. Under these circumstances, the trial Court's denial of the request to instruct on Involuntary Manslaughter was error and the Court's subsequent failure to instruct Involuntary Manslaughter was likewise error.

3. THE TRIAL COURT ERRED IN REFUSING AND/OR FAILING TO INSTRUCT THE JURY ON SELF-DEFENSE BECAUSE THERE WAS EVIDENCE BY WHICH A JURY COULD HAVE FOUND THAT RIOS WAS ACTING IN SELF-DEFENSE.

Rios statement also provides evidentiary support for the jury to have been instructed on the defense of Self -Defense. Rios stated:

"We both were in the room. She had me by neck. She grabbed a two-three pound weight and hit me in the mouth with it. She told me that her mom was on the way to pick her up. I asked why. She said she did not want to be with me no more. She pushed me on the bed. She went after the gun. I was afraid. I wanted to get to, I wanted to get it from her, but she was pointing, pointing it at me.

She turned. I wanted to open the door, but I could not. She turned her face and I grabbed the gun. We struggled. I told her to let go. She had her finger on the trigger, and I had the barrel.

I told her you're going to kill me. She said yes, so you won't belong to no one else. We Struggled. I was defending myself. I thought that a bullet might come out and hit me or her or my mom. During the struggle, a shot was fired ..." (R. p.402 L. 2-17)

Defense counsel specifically requested an instruction on Self-Defense on two different occasions during the charge conference: (R. p. 589, lines 1-7; R. p. 591, lines 7-10) On a third occasion trial counsel inferentially requested a charge on Self-Defense by stating his desire to have the jury consider as many options as possible. (R. p. 595, lines 9-12) After lengthy argument on trial counsel's request for, among other things, a Self-Defense instruction the trial Court denied the request to charge Self-Defense.

"The Court: I don't see self-defense in here." (R. p. 599, line 16)

In Light, *Id.* the Court states, "A self defense charge is not required unless it is supported by the evidence." Light, 664 S.E.2d at 649. In Light the Court held that the defendant was entitled to a Self-Defense charge under very similar circumstances to those presented in this case. Rios indicated in his statement that Hernandez pointed a gun at him, that he was afraid, and that Hernandez threatened to kill him. This constitutes sufficient evidence for the Court to have instructed the jury on Self-Defense.

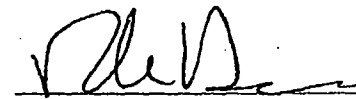
Again, Rios concedes that trial counsel's statement near the end of the charge conference could have been taken as withdrawal of the request to charge Self-Defense. However, Rios reiterates his position that the Court had already, in essence, denied the request to charge Self-Defense and that trial counsel's statement seems to be the result of

dissuasion by the Court. Rios again asserts, as with the requested instruction for Involuntary Manslaughter, that under the circumstances the trial Court was in error in its refusal to instruct as to Self-Defense and in its failure to do so in its' charge to the jury.

CONCLUSION

~~Under the arguments and authorities above cited and for the reasons above stated~~
the Appellant requests that the verdict of guilty and his sentence be vacated and that he receive a new trial.

Respectfully Submitted,



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May 20, 2009

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
Roger L. Couch, Circuit Court Judge
2008-GS-42-170

STATE OF SOUTH CAROLINA,

Respondent,

V.

SANTIAGO PASQUAL RIOS,

Appellant,

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Santiago Pasqual Rios, is presently confined at the Perry Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for Spartanburg County. The Appellant was indicted at the January 7, 2008 term of the Court of General Sessions for Spartanburg County for murder. 08-GS-42-0170. R.p. 5. He was charged with murdering Eliza Hernandez on November 23, 2006 by shooting her with a gun. R.p. 6.

On April 28, 2008, his case was called to trial before a jury and the Honorable Roger L. Couch, Presiding Judge. Rios was present and represented by David M. Collins, Jr. and N. Douglas Brannon of the Spartanburg County Bar. The prosecution was represented by Seventh Circuit Solicitor Trey Gowdy and Assistant Solicitor Cindy Crick.

On May 1, 2008, the jury found the Appellant guilty of murder. R. 658, Tr. p. 674, ll. 13-18. After a plea in mitigation, Judge Couch sentenced the Appellant to a sentence of thirty (30) years, the minimum sentence for murder. R. 666, Tr. 682.

This appeal follows. In the appeal the Appellant is represented by Ricky Harris.

STATEMENT OF THE STATE'S VERSION

The State's Version of the Case

- When he gets angry, nobody can hold him back. (Rios to Sgt. Diaz, R. 399, Tr. 415)
- "y mi pistola" - "and my gun," not their gun or her gun. (Rios)
- "no digus nada" - "don't say anything." (Rios)
- "Benude, benude" - shut up, shut up (Rios).
- "Este cabron no se salve" - "This bastard is not going to get away with it."¹
- "quanica pistola" - "throw the gun"
- "alecia policia, alecia policia, quanica pistola, quanica pistola" -
Here's the police, here's the police, throw the gun throw the gun"
- "asaaminango, asaaminago way" - don't tell anything .

R. 184-85, 191, 199, 201, 203, Tr. 200-201, 207, 215, 217, 219 (9-1-1 tape).

On November 23, 2006 around 9:30 p.m., Santiago Rios calls 9-1-1. In the call, he uses a mixture of three languages: English, Spanish, and Tarascan. He describes for the operator how four or five masked men enter his home and kick in the door. He tells the operator that they have been robbed and that his wife, Eliza, was shot in the face. He asked the operator to please come. Within the tape various commands are made by Rios to family members directing their attempted cover-up of the real nature of the crime. The police arrive and they take the family to the Sheriff's Department. Since some of the family don't speak English, bilingual deputies are

¹Also, "this bastard will not be saved. R. 191, Tr.p. 207.

called in to assist. State Exhibit 13. R. 171, Tr.p. 187.

Rios then tells his same masked intruder story to Deputy Kesler, but with a variation that they were "masked black intruders" that came with guns. R. 166, Tr.p. 182. Similarly, this version is given to Sgt. Balderama. R. 361-63, Tr.p. 377-379.

The version shifts from a home invasion robbery by masked intruders to the killing by Rios of his wife in a statement given to Officer Diaz, after he confronts his mother about the versions she is giving to the police. R. 228-226, 395 Tr.p. 244, 342, 412.

During the investigation of the home, there are no signs of struggle at the door. R. 159, 220-21, 223, Tr.p. 175, 236-237, 239, The table has candles lit with money undisturbed on the table. Bicycles in the room are upright. Id. There is no sign of a gunshot in the front room, no blood on the floor, no blood leading to Eliza Hernandez body in the back bedroom. Id. R. 220-23, Tr. 236-239.

The police separate the family at the Sheriff's Department. While Rios gives his varied masked intruder version, his young brother and mother ultimately tell police that there was no home invasion. Instead, it was revealed Rios came home late on Thanksgiving Day and wanted his wife to cook him a Thanksgiving meal. She said no and Rios shoved her. She responds by saying she is leaving and was going to call her mother, he follows her to the back bedroom, locks the door, and is shot in the face. R. 258-262, Tr. 274-278 (A. P to Officer Lindsay)², R. 364-

²10 year old A. P. gave a statement to Officer Lindsay. In the statement, rather than masked intruders given to him by the Appellant, he described being asleep with his mother when the gun went off. R. 258, Tr.p. 274. After Lindsay had further discussions with the sister and mother, A.P. described peeking through the door and seeing his brother and his wife fighting in the kitchen. He said then his mother shut the door. He said that he was scared to tell because he was afraid of what would happen to his brother. R. 258-61, Tr.p. 274-277. It must be noted that the Appellant was on bond and living with A.P. In his mothers house up to the day of the trial. In

after the shooting and after he had been to the bathroom. R. 533, 327, 360, Tr.p. 549, 343, 376, According to the pathologist, based upon the through and through wound she received, she was shot at extremely close contact range within 6 to 12 inches. R. 547-48, Tr.p. 563-564. The location of the projectile damage to the bedroom floor [R. 466, Tr.p. 482] and the upward angle (75-80 degrees) [R. 552, Tr.p. 568] from left to right on her face wound (R. 552, Tr.p. 568) suggests that suggests that victim may have been on the floor when shot.

Further, despite Rios' reference to the gun in the 9-1-1 tape and in his version to Officer Diaz, the gun was not located. R. 236, 255, 330, 441, Tr.p. 252, 271, 346, 457. Also, Rios told his family while on the 9-1-1 telephone "no digus nada" (don't say anything), "benude, benude" (shut up, shut up) and "asaaminango, asaaminango way" (don't tell anything). R. 184-85, 191, 199, 201, 203, Tr. 200-201, 207, 215, 217, 219.

ARGUMENT

- I. The trial court properly concluded that the State had satisfied its burden of proof that Rios' statements were freely and voluntarily given waiving his rights to remain silent and counsel where an investigator adequately interpreted the matters in Spanish to the Appellant.

The trial judge concluded after a Jackson v. Denno hearing that the statements given to law enforcement were freely, voluntarily, and knowingly given. R. 117-18, Tr. 133-34. In particular, Judge Couch concluded that there was no coercion "and I find that the Miranda warnings given were sufficient." R. 118, Tr. 134. In particular, he distinguished a case Appellant relied upon, People v. Jimenez, 863 P.2d 981 (Colo. 1993), where there was specific testimony from a psychologist and Spanish culture expert about the defendant's particular functioning as a six year old with difficulty in understanding concepts with the instant case. Instead, Judge Couch concluded there was no testimony during the hearing about Rios' inability to function. To the contrary, he found persuasive evidence from his employee at the Milliken Plant that Rios functioned very well, that Rios spoke both English and Spanish fluently while at the job. Judge Couch rejected the assertion that Rios would have had a limited vocabulary based upon the evidence presented. R. 117, Tr. p. 133, ll. 8-25. There is sufficient probative evidence to support these conclusions. This exception is without merit.

In his appeal, the Appellant asserts that there was no knowing waiver of his right to remain silent. He asserted that he was not fully aware of the right "because of language and cultural barriers." Particularly, he claimed that he had a limited education and his native language [P'urhepechas or Tarascan] does not include words for concepts such as "rights" or

"courts." He claims that the Spanish interpretation of Miranda was insufficient to demonstrate his awareness and waiver of these rights. A review of the record, under the appropriate standard of review, requires a rejection of his claim and affirmance of the trial courts determination.

How the Issue was Raised at Trial

At the outset of the trial, a Jackson v. Denno [378 U.S. 368 (1964)] hearing was held based upon the Appellant's motion to suppress. R. 43-118, Tr. 58-134. The State initially called Sgt. George Baldarama, Sr. of the Spartanburg Sheriff's Department. R. 43, Tr. 58. He testified that he is a desk sergeant and serves as an interpreter and translator for the Hispanic community for the Solicitor's Office. He becomes involved when there is a Hispanic case and is called upon to interpret because of his ability to speak English and Spanish fluently. R. 43, Tr. p. 59, ll. 9-20. Sgt. Baldarama, a Hispanic, testified that he took Spanish in college and different seminars and has taught classes also. His involvement in the present case occurred on November 23, 2006 when he was called to the scene to interpret. He arrived at the scene and assisted with the family who were transported to the Department. R. 44-45, Tr. 60-61.

He stated that he spoke to Rios with another investigator. He said he was there to serve as a translator for the investigator and for the defendant.

Baldarama said that he advised Rios of his Miranda rights that he gave to him in Spanish. R. 46, Tr. 62. He declared that he also gave it to him by using a card that was created by Command Spanish in Mississippi. R. 46, Tr. 62.

Baldarama stated that when he initially went to speak with Rios they had no trouble with understanding each other in Spanish. R. 46, Tr. p. 62, ll. 17-24. He knew the family also spoke another dialect, but they did not speak it with him. R. 46-47, Tr. 62-63. He felt Rios did not

have any problem understanding him. R. 47, Tr. 63.

Baldarama described State Exhibit 1 as the Miranda warnings in Spanish and Exhibit 2 was an interrogation waiver form with the Miranda warnings in English. R. 47-48, Tr. 63-64. He said he had Rios acknowledge that he read or understood each of the rights by initially the Spanish one after he got done with each right. R. 48, Tr. p. 64, ll. 3-7. He said when he was done Rios, Investigator William Gary and himself each signed the form. After he signed the forms, they proceeded with a statement. He denied that Rios asked for a lawyer at that point. R. 49, Tr. p. 65, ll. 6-8.

Baldarama described the procedures used in the taking of the statement. R. 49, Tr. 65. Baldarama wrote the statement in English as they were speaking in Spanish based upon what Rios was telling him. R. 49, Tr. p. 65, ll. 12-18. He denied that he ever threatened Rios. Also, Rios was allowed to have water or something to eat. R. 50, Tr. 66.

State Exhibit 3 was the statement he gave him, but it was in Baldarama's handwriting and in English. R. 50, Tr. p. 66, ll. 6-9. This statement, taken on November 23, 2006 read:

I and Eliza were watching TV in our room when someone knocked at the door. I told Eliza that someone is knocking at the door. She said to go and look. I said I would go.

As I went toward the door, she followed behind me like she always follows me. She was turning on the light as I was opening the door. She then quickly turned off the light and said don't open the door. I had already unlocked the door and told her to turn the light back on. She said no, they have on masks. She looked pale. We did not say anything more.

The next thing I know is the door is being kicked open. I don't remember if they used the knee or their foot. I moved back startled, but Eliza said don't be afraid, they won't shoot. I told her to get behind me. That's when I told them to take what they

wanted, but don't do anything to us.

It was this time that they started coming at me and I knew I had to defend myself. They started hitting me and one of them hit me in the mouth with a solid object while the others were trying to get around me. I think my wife, Eliza, was trying to help me.

That is when I heard the gun discharge. Then I said Eliza, are you okay. She said yes, yes. Then when I saw her covered with blood, they, they, the suspects ran out of the house. I grabbed her and asked her if she was okay, but she did not respond. I thought she had a flesh wound on her face.

When I saw all the blood I just laid on her, I just laid her on the floor and got the phone to call 9-1-1. I was still talking on the phone when the police arrived.

End of statement. Written for Santiago Pasqual by Sergeant G. Baldarama.

R. 361-363, Tr. p. 377, l. 23 - p. 379, l. 4. Baldarama described that if Rios did not understand or a term did not translate, he would try to describe it to him. R. 50, Tr. 66.

Baldarama admitted that he usually would prefer to have the subjects write their statements and that he would then translate what they wrote. However, on this night, Rios asked Baldarama to write it out. R. 50-51, Tr. 66-67. He said after the statement, Rios was allowed to go to the restroom. R. 51-52, Tr. 67-68.

Baldarama said he made no promises or offers to Rios and no one coerced him into telling him what was in the statement. R. 52, Tr. 68. Importantly, he declared that he did not feel that Rios had any trouble understanding what he was saying. R. 52, Tr. 68. Further, he opined that the statement was given freely and voluntarily. Id.

On cross-examination, Baldarama said part of his job, since he was bilingual, was to deal extensively with the Hispanic community to assist with citizens and address complaints. R. 54,

Tr. 70. He said he averaged from two to six each day in person or on telephone calls. R. 54-55, Tr. 70-71.

He described the Miranda form and the consent form. R. 62, Tr. 78. He noted that on the English version, Miranda warning number two was "anything I say can and will be used against me in a court of law." R. 62, Tr. 78, ll. 9-12. However, in the Spanish version, it states:

"Whatever thing you say can be used against you in a court of law." R. 62, Tr. p. 78, ll. 13-16.

Baldarama admitted that it was not a literal word for word translation of English form to Spanish form because "and will" was not included. R. 63-64, Tr. 79-80.

Baldarama stated that Rios understood Spanish. R. 64, Tr. 80. Although he did not see Rios write in Spanish, Rios told him that he could. R. 64, Tr. 80.

Baldarama believed that Rios understood his right to remain silent. R. 64, Tr. 80, ll. 12-14. When asked if Baldarama knew that Rios understood that if he said something not only that it could be used against him, but that it would be used against him, he felt he did because he read Rios his rights, he asked him if he understood and he said yes, and Rios then initialed it. R. 65, Tr. 81, ll. 4-11.

Baldarama stated that he did not write the statement in Spanish because Rios asked him to writ it and I just wrote it in English. R. 65, Tr. 81. He said, according to his notes that Rios could read and write in Spanish. R. 65-66, Tr. 81-82. Baldarama stated that after he wrote the statement, he read it back to him in Spanish. R. 66, Tr. 82.

Baldarama stated that he was familiar with Mexican culture and felt that they have a judicial system. R. 67, Tr. 83. He was told by Rios that he had a fourth grade education. R. 68, Tr. 84. Baldarama described how he would translate and define a court to someone who has no

idea ("place of judgment"), something against you, rights "through the law." He said after the rights, he would ask Hispanics "do you understand what I just said" in Spanish. R. 69-70, Tr. 85-86.

Baldarama admitted that different interpreters could interpret phrases differently. He said he spoke Spanish as a child, but not as fluently as now.

Baldarama acknowledged that Rios had been in the U.S. eight to ten years. R. 72, Tr. p. 88, ll. 3-5.

On re-direct examination, Baldarama read Court Exhibit 1, the Miranda warnings in English from Spanish:

It says before I ask you any questions, I'm gonna let you know what your rights are. You have the right to remain silent... Anything that you say can be used against you in a court of law. You have the right to consult with a lawyer and that that lawyer can be present with you during the time of this interrogations. If you cannot pay for the services of a lawyer, then one will be named for you free of charge so that he can let you know before and after this interrogation if you desire it. You have the right to stop this interrogation at any moment you desire.

R. 73-74, Tr. 89-90.

Baldarama stated he wrote the statement in English also for the benefit of William Gary who did not read Spanish. R. 75, Tr. 91. He also did not know if four years of education in Mexico was the same as the U.S. R. 75-76, Tr. 91-92.

Deputy Angel Diaz testified that he grew up in the Spanish culture and was proficient in Spanish. R. 79, Tr. 95. He also worked as a translator within the Sheriff's Department for eleven years. R. 79, Tr. 95.

On November 23, he was asked to assist in the investigation to help interview Rios.

R. 80, Tr. 96. He interviewed Rios with Investigator Gary. Diaz said he did not have any trouble communicating with Rios in Spanish. R. 81, Tr. p. 97, ll. 4-6. He spoke with him in Spanish the whole time because before he arrived he was advised that Rios did not speak English. R. 81, Tr. 97. Diaz also stated that he never had any trouble understanding Rios' Spanish. R. 81, Tr. p. 97, ll. 11-15. He described asking Rios if he understood.

Diaz said he was aware of the earlier statement given to Sgt. Baldarama. He said he was brought in because Baldarama went to speak with other family members. R. 82, Tr. 98. During their discussion, Rios told Diaz that when he became angry, he could not control himself. R. 83, Tr. 99.

Subsequently, Rios gave a different version of the death. R. 83-84, Tr. 99-100. This occurred after his mother came into the interview room and had a discussion with Rios. R. 84, Tr. 100. Diaz stated he did not threaten, coerce, deprive of food, water, or medicine, or make assurances to Rios. R. 84, Tr. 100.

After Rios spoke with his mother, he gave a different version. R. 85, Tr. 101. State Exhibit 4. Diaz said he wrote it as close to verbatim albeit in a different language, and did not make additions or deletions. Diaz said he heard what Rios' version was and then they came back and wrote the statement. He asked him to tell it to him again, and wrote it down as he was telling it. R. 85-86, Tr. 101-02. After it was written, he read it back to Rios in Spanish and gave him the opportunity to make changes, additions or deletions. Then, Diaz asked Rios to sign each page after it was read to him.

In this statement to Diaz, written in English he stated the following:

It says I got home. We did not argue about food. As I read this,

I'm - - I've wrote it as he was telling me..

I got home. We did not argue about food. My wife went to the kitchen to warm my food. I followed her. I went to get the plate of food that she was warming up. She was angry. When she got, when she got angry she would not bring me food. She was angry because of the last Wednesday I got out at 6:00 p.m. from work and I got home at 6:25 at my sister's house. I was drinking wine. I got, I got to my house about 11:00 or 11:30. I did not bother my wife. I slept in my car.

My dad came out and asked me to come inside. I got out of my car and came inside. I went to bed. I fell asleep.

Thursday morning I went to work at 8:00 a.m. I got out at 12:00 p.m. She, my wife, was at home when I got home. I asked her to get my lunch out of my lunch box because I did not eat it. I showered and went with my dad to my sister's house. We stayed about 20 minutes. We went back home and my wife and mom were cooking.

I went out to get some candles. That's what you people saw inside my door. When I got home, I asked my wife for food. But she was upset that I did not eat my lunch yesterday. I told her that the reason I did not eat my lunch was because I got off early from work. So, she heated up my old lunch and gave it to me. I thought she was going to give me turkey. She said no.

My mom went to the kitchen and asked her to give me turkey. She said I'm, I'm going to eat my old lunch. **I shoved her and she pushed, and she pulled my hair and also pulled my medallion.** She went to the room. I followed her. She locked the door. I told her not to lock the door.

We both were in the room. She had me by the neck. She grabbed a two to three pound weight and hit me in the mouth with it. She told me that her mom was on the way to pick her up. I asked why. She said she did not want to be with me no more. She pushed me on the bed. She went after the gun. I was afraid. I wanted to get to, I wanted to get it from her, but she was pointing, pointing it at me.

She turned. I wanted to open the door, but I could not. She

turned her face and I grabbed the gun. We struggled. I told her to let go. She had her finger on the trigger, and I had the barrel.

I told her you're going to kill me. she said yes, so you won't belong to no one else. We struggled. I was defending myself. I thought that a bullet might come out and hit me or her or my mom. During the struggle, a shot was fired. She fell. I thought she was playing, but she was not.

When I saw the blood I called the ambulance, 9-1-1-. It was in self-defense and the officer showed, an officer showed - - I asked for an ambulance. I don't want police. I want an ambulance.

And then it says this statement was given to me by Mr. Pasqual in Spanish. He can not read or speak English. I took it for him. I took the statement for him. I also read it, all four pages back to him in Spanish before he signed it.

R. 400-03, Tr. 416-19.

Diaz stated that he wrote the statement in English because the trial would be in English.

R. 87, Tr. 103. He stated he wrote down verbatim in English what he was told in Spanish, to the best of his ability. R. 87, Tr. 103.

On cross-examination, the defense returned to the Spanish Miranda card to confirm that they are not word for word translations. R. 88-89, Tr. 104-105. However, Diaz stated: "I don't see why he would not understand that what he would say would be used against him in a court of law." R. 89, Tr. 105.

Diaz said he learned that Rios had already been Mirandized when he got to the Department and did not re-Mirandize him. R. 91, Tr. 107. Diaz rejected the assertion that Spanish people who do not understand respond in the affirmative applying to the rights, because Rios understood Spanish because he was speaking to Rios like he was speaking to counsel.

R. 91-92, Tr. 107-08.

Robert Reeder, Education and Safety Director at the Cotton Blossom Plant of Milliken Company, stated he knew Rios. R. 93, Tr. 109. He described the orientation and training given for 40 hours. He said the training was done in English. R. 94, Tr. 110. He specifically recalled interaction he had with Rios and question and answers he would go over with each employee in English. He recalled talking with Rios in English about sports and his experiences in the U.S. R. 96, Tr. 112. They also had conversation with Reeder's son, a power point presentation and about football. R. 96, Tr. 112.

Reeder said he had no problem understanding Rios when he spoke to him in English. R. 96, Tr. 112.

On cross-examination, Reeder admitted that he did not discuss the U.S. court system with Rios. R. 96, Tr. 112. He said he understood that Rios was from another country and that English was not his primary language. However, the purpose of his program was to make sure they understand and speak English before they are hired. Reeder recalled that in Rios' 40 hour class ere 3 or 4 other people. R. 97-98, Tr. 113-14.

The State also had the 9-1-1 tape of Rios telephone call made part of the record that had been previously played to the judge. R. 99, Tr. 115. Solicitor Gowdy said it "speaks to the issue of whether or not he's able to speak English at all." R. 99, Tr. p. 115, ll. 1-12 (Court Exhibit 5).

In response, the defense called Joaquin Marquez. Mr. Marquez testified that he had lived in Michocan, Mexico, but for the last sic months live in Portland, Oregon. R. 100, Tr. 116. He stated that P'urhepechas or Tarascan was a primary language. R. 101, Tr. 117. He stated in his culture there was no word for "court", because in his community they did not have a court, a

judge, a right to remain silent, or lawyer. R. 102, Tr. 118. He stated they had a few "indigenous lawyers", but they need to take the courses in Spanish. R. 102, Tr. 118. He said if someone commits a crime in Michocan, they call "minnio statio publico" (a person in charge of the law) from a larger town. He said if that person asked a question, they would have to answer it or be beaten (kicked or punched). R. 103, 104, Tr. 119, 120. Marquez said Rios was from O'odham, about 15 miles from his town. R. 103, Tr. 119.

Counsel Brannon relied upon People v. Jimenez, 863 P.2d 981 (1993). He asserted it was factually close to the present case. In that case, the court found the defendant did not have the capacity to understand because the defendant did not have a Kickapoo translator and only a Spanish one.

Counsel contended that although the officers here spoke Spanish, they did not speak P'urhepechas. Further, he contends that when a person doesn't understand, they will respond in the affirmative. He further argued that certain terms and concepts do not exist in the Tarascan culture. R. 106, Tr. 122. He also relied upon State v. Newell, 303 S.C. 471, 401 S.E.2d 420 (S.C.Ct.App. 1991).

Counsel argued that in Rios, there was an incomplete Miranda because prong two on the Spanish form says "anything you say can be used against you" and did not say "will be used against you." The court inquired about State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985) which held a talismatic incantation of Miranda was not required. R. 108, Tr. p. 124, ll. 6-8. Counsel asserted that saying might be used against you is different than we're going to use it against you. R. 108, Tr. p. 124, ll. 12-16. Judge Couch initially opined the language used was sufficient even though it left out the word "will." R. 109, Tr. p. 125, ll. 10-12.

The defense further complained that the waiver was taken at 11:10 a.m. and in merely 9 minutes Officer Baldarama was able to complete the written statement. R. 109-10, Tr. 125-26. He complained we are to assume that he understood everything that he said including Miranda for which he had no cultural comprehension or the ability to comprehend. R. 110, Tr. 126.

Counsel Brannon stated that he was not contending the statements were coerced or not freely given, but that they were not knowingly and intelligently given. He stated Rios could not understand his Miranda rights because his Mexican community did not have a right to remain silent. Here, police in Apartment with guns and badges asked him questions and he answered them. R. 110, Tr. 126.

Solicitor Gowdy relied upon Singleton. He noted that he was Mirandized in English and had no inability to communicate in that language based upon Mr. Reeder's testimony about the orientation and the English on the 9-1-1 tape. R. 111, Tr. 127. Further, he was Mirandized in Spanish which clearly he understands because he was spoken to in Spanish while his Tarascan interpreter was testifying. R. 111, Tr. p. 127, ll. 16-20. Solicitor Gowdy rejected the argument that anyone from a culture other than ours can never be Mirandized because you cannot explain what a right to remain silent means. Solicitor Gowdy noted Rios had been in the U.S. and worked at Milliken for ten (10) years. R. 111-12, Tr. 127-28.

After further argument, the court noted its impression that on the 9-1-1 tape, Rios spoke in all three languages. R. 113-14, Tr. 129-30.

As stated above, after reviewing Jimenez, the trial judge concluded the statements were admissible. R. 117-18, Tr. 133-34.

STANDARD OF REVIEW

The trial court's "determination of the voluntariness of a statement will not be disturbed unless so manifestly erroneous as to show an abuse of discretion amounting to an error of law." State v. McLeod, 303 S.C. 420, 423, 401 S.E.2d 175, 177 (1991), overruled on other grounds by State v. Evans, 307 S.C. 477, 415 S.E.2d 816 (1992). "The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances." State v. Peake, 291 S.C. 139, 352 S.E.2d 487, 488 (1987). See also State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990) (trial judge's determination of whether statement was knowingly, intelligently and voluntarily made requires examination of totality of circumstances surrounding waiver). "A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise." Peake, 291 S.C. at 139, 352 S.E.2d at 488.

In State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979), our Supreme Court addressed the voluntariness requirement of a waiver of rights:

The signing of the waiver form alone is not conclusive; the State still has the burden of showing the waiver was voluntary. This requires an examination of the totality of the circumstances surrounding the waiver, including the background, experience, and conduct of the accused. (citations omitted).

Doby, 273 S.C. at 708, 258 S.E.2d at 899. State v. Kennedy, 325 S.C. 295, 302-306, 479 S.E.2d 838, 841 - 844 (S.C.App., 1996).

STANDARD OF PROOF

In State v. Washington, 296 S.C. 54, 370 S.E.2d 611 (1988), our Supreme Court announced the standard of proof applicable in a Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774,

12 L.Ed.2d 908 (1964), hearing to determine admissibility of a statement: "It has been uniformly held, a confession may be introduced upon proof of its voluntariness by a preponderance of the evidence." State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977). "[T]he burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived." State v. Neeley, 271 S.C. 33, 40, 244 S.E.2d 522, 526 (1978). "[T]he prosecution must prove ... by a preponderance of the evidence that the confession was voluntary." Lego v. Twomey, 404 U.S. 477, 489, 92 S.Ct. 619, 627, 30 L.Ed.2d 618, 627 (1972).

Where voluntariness of a statement is at issue the trial judge must make an initial determination based upon the preponderance standard. If the statement is found to have been given voluntarily, it is then submitted to the jury, where its voluntariness must be established beyond a reasonable doubt. Washington, 296 S.C. at 55-56, 370 S.E.2d at 612.

LAW/ANALYSIS

The Miranda Rule

A statement, whether exculpatory or inculpatory, obtained as a result of custodial interrogation is inadmissible unless the person was advised of and voluntarily waived his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The purpose of Miranda is to prevent "government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." Arizona v. Mauro, 481 U.S. 520, 529-30, 107 S.Ct. 1931, 1937, 95 L.Ed.2d 458 (1987).

Miranda Warnings

A suspect in custody may not be subjected to interrogation unless he is informed that: he

has the right to remain silent; anything he says can be used against him in a court of law; he has a right to the presence of an attorney; if he cannot afford an attorney, one will be appointed for him prior to any questioning, if he so desires; and he has the right to terminate the interrogation at any time and not to answer any further questions. Miranda, *supra*.

It is sufficient if the warnings reasonably convey to a suspect his rights as required by Miranda. Duckworth v. Eagan, 492 U.S. 195, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989). A "talismantic incantation" is not required. State v. Singleton, 284 S.Ct. 333, 326 S.E.2d 153, cert. denied, 471 U.S. 1111, 105 S.Ct. 2346, 85 L.Ed.2d 863 (1985) (omission of phrase "in court" did not render warning inadequate).

Of course, as the Court has explained, the right to counsel during a custodial interrogation can be waived:

Miranda holds that the defendant may waive effectuation of the rights conveyed in the warnings provided the relinquishment of the right must have been voluntary [and] the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986) (internal quotation marks omitted). Thus, the Fifth Amendment question raised in the Miranda Claim is whether the Miranda warnings given at the Balderama Interview were sufficient to make Rios aware of his rights and the consequences of waiving them.

It is important that, as the Supreme Court has explained, Miranda does not mandate a precise formulation of its warnings. See Duckworth v. Eagan, 492 U.S. 195, 202, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989). Instead, "[t]he inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by Miranda." *Id.* at 203, 109 S.Ct. 2875 (internal

quotation marks omitted). In *Duckworth*, the suspect was read a waiver form which, in advising him of his *Miranda* rights, included a provision that a lawyer would be appointed "if and when you go to court." *Id.* at 198, 109 S.Ct. 2875. Duckworth signed the waiver and then made an exculpatory statement to the officers. *See id.* His exculpatory statement conflicted, however, with an inculpatory statement he made to the authorities at a later date. *Id.* at 199, 109 S.Ct. 2875. When the conflicting statements were both presented against Duckworth at trial, the court ruled that the *Miranda* warnings had been adequate, observing that "th[e] instruction accurately described the [state's] procedure for the appointment of counsel." *Id.* at 204, 109 S.Ct. 2875. See *Cummings v. Polk*, 475 F.3d 230, 240 -241 (4th Cir. 2007). It should be noted that the verbiage on the F.B.I card cited in *Duckworth* is identical to challenged language on the Spanish *Miranda* card here where it states: "anything you say can be used against you in court." *Duckworth*, 492 U.S. 195, 203, n. 4.

VOLUNTARINESS OF STATEMENT

"The test of admissibility of a statement is voluntariness. If a defendant was advised of his *Miranda* rights, but nevertheless chose to make a statement, the "burden is on the State to prove by a preponderance of the evidence that his rights were voluntarily waived." *State v. Washington*, 296 S.C. 54, 370 S.E.2d 611 (1988); *State v. Neeley*, 271 S.C. 33, 244 S.E.2d 522 (1978). The State bears this burden of proof even where a defendant has signed a waiver of rights form.... The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience and conduct of the accused. *State v. Linnen*, 278 S.C. 175, 293 S.E.2d 851 (1982). The trial judge's resolution of

the issue will not be disturbed absent an error of law. State v. Atchison, 268 S.C. 588, 235 S.E.2d 294, cert. denied, 434 U.S. 894, 98 S.Ct. 273, 54 L.Ed.2d 181 (1977). Franklin, 299 S.C. at 137-38, 382 S.E.2d at 913-14.

Once Miranda rights are validly and voluntarily waived, the waiver continues until such time as the individual being questioned revokes the waiver or circumstances are such that his will is overborne and his capacity for self-determination is critically impaired. State v. Moultrie, 273 S.C. 60, 251 S.E.2d 294 (1979). If his will is overborne and his capacity for self-determination critically impaired, use of the resulting confession offends due process. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). In determining whether an individual's will was overborne, "the Court has assessed the totality of all the surrounding circumstances--both the characteristics of the accused and the details of the interrogation." *Id.* at 226, 93 S.Ct. at 2047. Important factors for consideration include the individual's education, youth, low intelligence, receipt of Miranda warnings, repeated and prolonged nature of the questioning, and physical abuse. Schneckloth, *supra*.

FACTUAL ANALYSIS

Here, the trial judge did not abuse his discretion in admitting the two statements from Sgt. Balderama and Officer Diaz by Rios. It cannot be seriously tested that the warnings themselves were deficient. The language used on the Spanish version was consistent with the F.B. I. Language cited with approval in Duckworth. Similarly, there is a plethora of cases that have found Miranda warnings sufficient by the use of "anything you say can be used against you" in court language. Under the precedent of Duckworth and Singleton, the mere language issue is

without merit.⁴

It is apparent that the Appellant sought to craft his argument around People v. Jimenez, supra. However much he attempted to shade his facts to fit Jimenez, there were significant failings upon the critical points which the trial court understood. Simply put, his generalities about the culture and the language revealed in the Jackson v. Denno testimony did not overcome the probative testimony about Rios, himself.

The issue he directs his argument to is that people from his culture would not understand right to silence because they had no right to silence in Mexico. He claims that in that area, they had to speak with the police or be beaten. He attempts to bolster it by suggesting in the indigenous language there were no words for right or judge because they did not exist in that particular community.

His complaint fails to show an abuse of discretion. First, there is a plethora of testimony from Balderama and Diaz, who both spoke fluent Spanish, that Rios understood and could converse in the Spanish language. This was not the same setting as Jimenez where the court concluded that Jimenez capacity was not a language barrier but a mental competency barrier. There has been no showing to suggest the existence of the same deficiencies present in that case.

Although mere silence may not to show a waiver, it can be inferred from the actions and words of the person interrogated. N.C. v. Butler, 441 U.S. 373 (1979). Here, appellant indicated

⁴The Appellant's brief is not continuing this argument raised below before this court. There, it appeared his argument was in fact based upon the difference between the Spanish Miranda form and the English acknowledgment of rights form. This difference is a red herring because each was sufficient on its face under Miranda.

verbally and checking that he understood each of the rights as it was read to him in Spanish. He had the opportunity to read each of the rights as it was read to him. In addition, his ability to communicate in Spanish was never at question. Both interrogators questioned him and had affirmative discussions with him.

Although the officer were of the impression that he could not speak English, the additional English information supported his knowledge of the same rights he had been advised of in Spanish. The Appellant had spoken in English on the 9-1-1 call. The Appellant worked in a English speaking environment at Milliken. He had been able to participate in the 5 man or less group English orientation over a 40 hour period where he passed training tests in English and conversed with his trainer in English about his country, sports, and family. Further, he had lived here for 10 years.

If the Appellant's assertion is accepted as adequate, it would create a new and unnecessary barrier to prosecutions. Despite strong evidence of understanding English and Spanish, Rios has only presented a possibility that people from his area may not be exposed to the same culture that Rios has lived in for 20 years. Contrary to the unstated thesis of his argument, there has been no showing that he did not understand Spanish where evidence was he was able to communicate in it fluently. Contrary to his thesis, that the culture did not understand the concept right to silence, there was evidence that Rios certainly understood the concept of right to silence which he reveals in two languages on the 9-1-1 call to encourage the family to "no digus nada" (don't say anything), "benude, benude" (shut up, shut up) and "asaaminango, asaaminango way" (don't tell anything) [R. 184-85, 191, 199, 201, 203, Tr. 200-201, 207, 215, 217, 219], in addition to the direct advice he received from Balderama. Under any totality test,

language barriers are a factor to consider. However, with the two fluent translators, language was not a barrier in the initial and continuing interrogation of Rios. Clearly, individuals who speak Spanish and a different culture and are not originally from the U.S. are capable of applying Miranda warnings. See, Rivera-Reyes v. Kentucky, 2006 Westlaw 2986495 (Ky. 2004)(Spanish speaking defendant was properly advised of his Miranda rights); Commonwealth v. Diaz, 901 N.E.2d 670 (Mass. 2009).

The determination by the trial judge was an appropriate use of discretion.

II. Where there was evidence that Rios initiated the altercation by a shoving assault upon his wife based upon her refusal to cook for him, there was no evidence to support instructions on involuntary manslaughter or self-defense when the victim attempted to flee from him and then arm herself after he followed. Further any issue concerning the failure to request is barred where the requests were abandoned at trial.

In his second and third arguments, he contends that the trial court erred in failing to instruct the jury on the lesser included offense of involuntary manslaughter and the defense of self-defense. He contends that the admission of his statement to Officer Diaz included information about a struggle over a gun between Rios and the victim. He contends that based upon the recent decision in State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008), he was entitled to the instructions. However, he concedes that these issues may not be properly before the Court because the Appellant's counsel appeared to withdraw the requests for the instructions, citing R. 599, Tr.p. 615, l. 17-23. Attempting to bypass this procedural bar, he contends that the Court still has a duty to instruct. Respondent submits that this issue is not properly before the court because it was abandoned and withdrawn in the trial court. Further, there was no duty to instruct on a lesser offense where it is not requested and abandoned. Finally, a close reading of the

statement given by Rios to Diaz does not provide evidence of involuntary manslaughter or self defense.

A. This Issue Is Procedurally Barred Because The Request To Charge Was Abandoned At the Trial Court.

As the Appellant professionally concedes, the record supports the conclusion that Rios abandoned his earlier request to instruct on involuntary manslaughter and self-defense at the charge conference. Initial Brief of Appellant, p. 9, 10.

The record reveals that at the conclusion of the trial, counsel initially requested a charge on accident, self-defense, voluntary manslaughter and involuntary manslaughter. R. 589, Tr. 605. The prosecution asserted that Rios was entitled to accident, but not self-defense, voluntary or involuntary manslaughter. Solicitor Gowdy contended that there was no evidence that Rios had admitted killing in self-defense. He never asserted that his hand was on the trigger, instead asserting that it was an accident. The prosecution noted that he did not meet all four requirements for self-defense. As to voluntary manslaughter, because he does not admit he shot her, the State felt he failed to show a killing without malice in the sudden heat and passion without sufficient legal provocation. R. 590, Tr. 606.

Concerning an instruction on voluntary manslaughter, he asserted that the testimony was that the gun barrel was pointed towards him and his hands were on the barrel, but never on the trigger and that he thereby never caused the weapon to discharge. R. 591; Tr. 607. At that point defense counsel specifically withdrew his request for voluntary manslaughter. R. 591, Tr. p. 607, II. 4-6.

The trial judge then inquired of the Appellant's counsel if he still wanted involuntary

manslaughter and he declared at that point that he did. R. 591, Tr.p. 607, ll. 9-10. Counsel Brannon further continued his assertion that he was entitled to self-defense because if there was any evidence that he was acting in self defense the court must give the charge. Brannon contended there was such evidence "because [the defendant] said it was self-defense." R. 591, Tr.p. 607, l. 16. He asserted that that was "any evidence." R. 591, Tr.p. 607, ll. 12-13.

Solicitor Gowdy retorted that he doubted that Rios knows the four elements of self defense. He stated that the fact he used a colloquial phrase in his fifth exculpatory statement does not meet the standard. Since he never admitted killing her, he had not met the killing her because he had to requirement: "She either killed herself or it was an accident." R. 592, Tr.p. 608.

The Solicitor then argued why he felt there was no evidence if involuntary manslaughter in the case. He initially asserted that it failed the unlawful act not amounting to a felony prong because there had been no testimony that Rios had committed an unlawful act. He noted that Rios was not a felon in possession of a firearm and he does not admit he was ever in possession of a firearm.

Solicitor Gowdy further argued that there was no evidence of recklessness. Although there was a claimed struggle over the gun, it was to keep her from killing herself or to kill other people was the reason he had his hand on the barrel while her finger was on the trigger. R. 592, Tr.p. 608, l. 17-24. He asserted that he did not handle the gun recklessly.⁵ He contended that under these facts it was either accident or its an intentional killing of another with malice.

⁵The Solicitor made reference to the Light case in this argument. However, the opinion he is referring to was the Court of Appeals opinion, State v. Light, 363 325, 664 S.E.2d 465 (S.C. App. 2005). This case was reversed after the trial by the Supreme Court in State v. Light, 378 S.C. 641, 664 S.E.2d 465 (July 14, 2008).

Judge Couch inquired about the voluntary manslaughter charge because there was evidence of a fight or struggle that took place before the shooting. Judge Couch noted that parts of his hair was found in another room on the floor which indicates a struggle and provocation. He noted this could be something that could cause him to "fly hot in the sudden heat of passion." R. 593, Tr.p. 609, ll. 14-19. He said that voluntary seems to fit, although the defense may and has a right to withdraw it. He noted that there could be a decision by the jury that they got into an argument over the food, ended up in a physical altercation and that he somehow had the gun jerked out of his head which provoked him. R. 594, Tr.p. 610, ll. 1-6.

Solicitor Gowdy (not Court) noted that under his statement he shoved her first, but he then deferred to the court wisdom on voluntary manslaughter. R. 594, Tr. 610. The Court noted that the argument continued into the bedroom with shouting, which alone is insufficient, but there was evidence of physical injury.

Judge Couch then stated that he was inclined to charge voluntary manslaughter, but was not inclined to charge involuntary manslaughter because that involves recklessness - doing something like playing with a gun and he did not see that present here. R. 595, Tr.p. 611.

Counsel Brannon asserted that there could be recklessness present. He asserted that both Rios and Eliza could have been acting recklessly with the gun and thereby are entitled to involuntary, "but I certainly know this Court has more wisdom on the subject than I do." R. 595, Tr.p. 611, ll. 24-25.

At that point counsel Brannon asserted that he was entitled to self defense because it was in the state's statement that Rios said the he was acting in self-defense. R. 595-97, Tr.p. 611-13.

Judge Couch opined that he agreed with the State. Rios own characterization of his act as

self-defense is not binding on the court. He noted that he had to look and determine if the elements are met. He noted one deficiency because he indicated that he shoved her first. R. 596, Tr.p. 612, ll. 8-13. Although Brannon asserted that shove was in a different room, the court opined it went throughout the house and cannot be segregated. He noted that the altercation started in the kitchen over food, went into the living room where there was hair on the floor and ended up in the bedroom where someone got killed.

The Court stated that they were left with either the intruder version or his version that he shoved first. R. 597, Tr.p. 613, ll. 2-6. Counsel asserted that he was not relying on any other version. Brannon contended that the shove did not cause Eliza to die or the hair pulled. However, the Court noted that in self-defense you cannot be the person that brings on the difficulty as the primary aggressor. Brannon stated that there was evidence that she was the aggressor because she got the gun. R. 597-98, Tr. 613-614. The Court rejected it stating that she is not the primary aggressor when people start hitting and shoving.

Counsel Brannon admitted that he could not provide the court with any evidence that he did not push her first or that they were not involved in mutual combat. R. 598, Tr.p. 614. He suggested that he pushed her first and she responded with a gun that would not be an appropriate response to the push. R. 598-99, Tr.p. 614-615. However, the Court asserted that Rios did not arm himself and defend himself. They ended up in mutual combat and a shooting.

The Court then stated that he did not mind charging accident, and voluntary manslaughter. However, he asserted that he did have a problem with self-defense where what he saw was an argument that escalated. Judge Couch noted that the only evidence he had was that Rios had struck the first blow and that he did not see self-defense in there. R. 599, Tr.p. 615, ll.

7-16.

At that point, counsel Brannon asked for a brief break. He then returned and specifically asked the court to voluntary manslaughter, accident and murder. R. 599, Tr.p. 615, ll. 21-24. He did not request either involuntary manslaughter or self-defense at that time. Solicitor Gowdy deferred to the court's wisdom. R. 599-600, Tr. 615-616.

It is clear that an issue abandoned at trial cannot be raised on appeal. See, State v. Jackson, 364 S.C. 429, 613 S.E.2d 474 (S.C. Sup. Ct. filed May 9, 2005) (appellant waived any argument he had when he acquiesced the next morning and stated he would ask witness if he had administered a polygraph and "leave it at that"); State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000), cert. denied 530 U.S. 1209 (2000); TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998) (an issue conceded at trial cannot be raised on appeal); Ex parte McMillan, 319 S.C. 331, 461 S.E.2d 43 (1995) (a party cannot acquiesce to an issue at trial and then complain on appeal); State v. Mitchell, 330 S.C. 189, 498 S.E.2d 642 (1998) (on the first day of trial, appellant stated he wanted the solicitor's entire file on a State's witness to see if she had charges pending; the solicitor said there was no agreement with the witness regarding her testimony; the judge said appellant could ask the witness if she had pending charges but could not go into specifics; appellant said "Right"; appellant acquiesced in the judge's limitation of cross-examination and made no other objection regarding wanting the criminal files; appellant cannot complain now); Condor, Inc. v. Board of Zoning Appeals, 328 S.C. 173, 493 S.E.2d 342 (1997).

Here, Respondents admit that requests were initially made for the jury instruction on both issues. However, a plain reading of the discussion reveals that Rios abandoned both requests for

involuntary manslaughter and self-defense when he took a break in the discussions and returned and then asked only for accident, voluntary manslaughter and murder. Each of these issues are procedurally barred from appellate review. A jury charge is not preserved for appellate review unless a party either requested the charge and obtained a ruling or objected on specific grounds to the charge as given. State v. Staten, 364 S.C. 7, 610 S.E.2d 823 (Ct. App. 2005)(failed to request charge on mere suspicion before trial judge administered charge and did not request instruction after charge given). Here, he ultimately abandoned his request after conceding that the evidence to support the charge did not exist.⁶ Factual support for the earlier forfeiture of this request is seen where he did not object to the charge as given. R: 652, Tr. 668.

B. There was no evidence to support the instruction request on involuntary manslaughter.

The Petitioner contends that evidence of a mere struggle over a weapon is sufficient to require an instruction on involuntary manslaughter. His analysis is in error.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied. State v.

⁶This is not a situation where he got an unfavorable ruling and refused to renew an objection at the conclusion of the trial. Rather, it was acquiescence into the trial judge's analysis and a decision to affirmatively abandon the requests after a discussion. Cf. Where a party requests a jury charge and after an opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request or to object to the failure to give the charge, at the conclusion of the jury instructions. State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998), clarifying State v. Whipple, 324 S.C. 43, 476 S.E.2d 683, cert. denied 519 U.S. 1045, 117 S.Ct. 618, 136 L.Ed.2d 541 (1996); State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980).

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The law to be charged must be determined from the evidence presented at trial. State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000). A trial judge is required to charge a jury on a lesser-included offense if there is evidence from which it could be inferred a defendant committed a lesser rather than a greater offense. State v. Mathis, 287 S.C. 589, 594, 340 S.E.2d 538, 541 (1986). Conversely, a trial judge does not err by refusing to charge a lesser-included offense where there is no evidence tending to show that the defendant was guilty only of the lesser offense. State v. Murphy, 322 S.C. 321, 325, 471 S.E.2d 739, 741 (Ct. App. 1996); State v. Funchess, 267 S.C. 427, 429, 229 S.E.2d 331, 332 (1976). A trial court should refuse to charge a lesser-included offense only where there is no evidence the defendant committed the lesser rather than the greater offense.

Involuntary manslaughter has been defined as (1) the *unintentional* killing of another without malice, but while engaged in an unlawful activity *not naturally tending to cause death or great bodily harm*; or (2) the *unintentional* killing of another without malice, *while engaged in a lawful activity with reckless disregard for the safety of others*. State v. Chatman, 336 S.C. 149, 519 S.E.2d 100 (1999) (while defendant and victim were facing one another on the ground, defendant had his shoulder pressed into victim's neck, defendant was not attempting to strangle victim by placing his hands around victim's neck, and defendant's battery was not such that naturally tended to cause death or great bodily harm). Stated another way, the Court has recently defined it as "the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others." State v. Reese,

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370 S.C.21, 36, 633 S.E.2d 898, 900 (2006).

Under the first "unlawful act" theory, for an involuntary manslaughter charge to stand, the accompanying unlawful act must not be a felony nor naturally tend to cause death or great bodily harm. State v. Avery, 333 S.C. 284, 509 S.E.2d 476 (1998). A person who *points* or *presents* a loaded or unloaded firearm at another is guilty of a felony. S.C. Code Ann. § 16-23-410 (2003).⁷

In contrast, the mere unlawful carrying of a pistol is a misdemeanor. S.C. Code Ann. § 16-1-

100(C) and § 16-23-20 (2003). However, it has been stated that the mere negligent handling of a loaded gun will support a finding for involuntary manslaughter. State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999); State v. White, 253 S.C. 475, 478, 171 S.E.2d 712, 714 (1969).

"An unintentional killing resulting from an unlawful assault and battery, not of a character of itself to cause death, is involuntary manslaughter..." Chatman, at 152-53, 519 S.E.2d at 101 citing 40 C.J.S. Homicide § 40 (1991). See also People v. Johnson, 100 Ill.App.2d 13, 241 N.E.2d 584 (1968)(death resulting from blow from fist may be involuntary manslaughter because although unlawful, a blow to the face with hand is not likely to be attended with dangerous or fatal consequences); State v. Cobo, 90 Utah 89, 60 P.2d 952 (1936)(the great weight of authority is that an unintentional killing, resulting from an unlawful assault and battery which in and of itself is not of a character to cause death, is held to constitute involuntary

⁷ In State v. Reese, supra, the Court held that the act of pointing or presenting a firearm was a felony which precluded a finding of involuntary manslaughter because the "pointing and presenting" was not "an unlawful act not amounting to a felony." Recently, in State v. Childers, in concurrence, Chief Justice Toal speculated that the trial judge in that case charged involuntary manslaughter, "perhaps because it was possible for the jury to believe that the defendant's initial returning of fire was justified, but ultimately find that the defendant was criminally reckless in firing multiple times over his shoulder as he retreated. Without any evidence supporting the view that the defendant fired the fatal shots while under an "uncontrollable impulse to do violence," the trial court properly declined to charge the law of voluntary manslaughter to the jury."

manslaughter). Compare, State v. Tyler, 348 S.C. 526, 529, 560 S.E.2d 888, 889 (2002); (“Tyler’s conduct does not fit within either definition of involuntary manslaughter. It is patent that her conduct in pouring gasoline on her husband’s head and igniting him was not a lawful activity. It is likewise patent that her conduct would naturally tend to cause death or great bodily injury. Accordingly, she was not entitled to an involuntary manslaughter charge”); State v. Young, 319 S.C. 33, 39-40, 459 S.E.2d 84, 87-88 (1995) (finding the defendant was not entitled to a charge of involuntary manslaughter despite his statement that the gun “just went off” because his statement also indicated he was committing the felony of armed robbery at the time of the shooting).

In State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), the Court held that a person can be acting lawfully, even if he is in unlawful possession of a weapon, *if he was entitled to arm himself in self-defense at the time of the shooting.*⁸ In Burriss, the defendant was threatened and then attacked by the victim and another male. After being pushed to the ground, the defendant drew a gun and fired two rounds into the ground. One attacker backed away, but urged his accomplice -- the victim -- to attack the defendant again. At this point, the defendant was on the ground, separated from his gun. When the victim began moving threateningly toward Burriss, he snatched his gun up and it fired. Burriss stated he was scared and his hand was shaking when the gun went off: “It was an accident. I didn’t try to shoot nobody.” Burriss, 334 S.C. at 263, 513 S.E.2d at 108. At one point, however, Burriss also testified that “my hand was

⁸ To constitute involuntary manslaughter in this setting, there must be a finding of criminal negligence, statutorily defined as a “reckless disregard of the safety of others.” Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991); S.C. Code Ann. § 16-3-60 (1985).

on the trigger. The trigger was pulled or whatever.” The Court found that evidence that he was acting lawfully in self defense when his negligent handling of a loaded weapon caused the weapon to fire and kill the victim. The Court found error in the refusal to charge involuntary manslaughter.

Likewise in State v. Crosby, 355 S.C. 47, 50, 584 S.E.2d 110, 111 (2003), the Court held that involuntary manslaughter should have been instructed because there was evidence that the victim was charging the appellant with his hand behind his back and the appellant closed his eyes and fired the gun, without even realizing he had pulled the trigger. In both Crosby and Burris, the appellants were entitled to a charge of involuntary manslaughter because there was evidence from which the jury could infer they were *lawfully* acting in *self-defense* when they unintentionally fired a gun.

In State v. Light, *supra*, the South Carolina Supreme Court concluded that he was entitled to a charge on involuntary manslaughter and self defense. As to involuntary, the Court concluded that although he was lawfully armed in self-defense, there was also evidence of recklessness where “recklessly handled the gun because according to Light’s testimony, it fired almost immediately after he fired it. Further, the Court concluded that the fact Light and Davis were struggling over the weapon was sufficient evidence for involuntary manslaughter.

In State v. Mekler, 379 S.C. 12, 664 S.E.2d (2008), the Court also found that Mekler was entitled to an involuntary manslaughter instruction. In Mekler, the Court concluded there was sufficient evidence when Mekler did not remember pulling the trigger or the shotgun discharging, that the gun was positioned at her hip so that she could cock the hammer back and that her finger must have slipped causing the gun to discharge, that a neighbor saw one of Mekler’s arm down

by her side and that other waving when she talked and her insistence at trial that she did not intend to shoot the victim.

In State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009), the Court recently found that involuntary manslaughter was correctly not charged. The Court determined that even assuming Wharton did not intentionally fire the gun at victim, by pointing the gun and waiving it in the air, Wharton committed an *unlawful* act that would naturally tend to cause death or great bodily harm. Therefore the element removed the possibility of the charge.

The Appellant relies upon his statement given to Officer Diaz to base his request for involuntary manslaughter. In its pertinent part, that statement states:

... When I got home, I asked my wife for food. But she was upset that I did not eat my lunch yesterday. I told her that the reason I did not eat my lunch was because I got off early from work. So, she heated up my old lunch and gave it to me. I thought she was going to give me turkey. She said no.

My mom went to the kitchen and asked her to give me turkey. She said I'm, I'm going to eat my old lunch. I shoved her and she pushed, and she pulled my hair and also pulled my medallion. She went to the room. I followed her. She locked the door. I told her not to lock the door.

We both were in the room. She had me by the neck. She grabbed a two to three pound weight and hit me in the mouth with it. She told me that her mom was on the way to pick her up. I asked why. She said she did not want to be with me no more. She pushed me on the bed. She went after the gun. I was afraid. I wanted to get to, I wanted to get it from her, but she was pointing, pointing it at me.

She turned. I wanted to open the door, but I could not. She turned her face and I grabbed the gun. We struggled. I told her to let go. She had her finger on the trigger, and I had the barrel.

I told her you're going to kill me. she said yes, so you won't belong to no one else. We struggled. I was defending myself. I thought that a bullet might come out and hit me or her or my mom. During the struggle, a shot was fired. She fell. I thought she was playing, but she was not.

When I saw the blood I called the ambulance, 9-1-1-. It was in self-defense and the officer showed, an officer showed - - I asked for an ambulance. I don't want police. I want an ambulance.

R. 400-03, Tr. 416-19.

The trial judge agreed to charge voluntary manslaughter and accident based upon this statement. The trial court was correct that the statement does not evidence the normal concept of recklessness associated with involuntary manslaughter. The Appellant began the fracas by pushing his wife after she refused to serve him. The struggle escalated into him putting and pleas that she was leaving him. A critical factor undermining this is the fact that in this statement he is acting unlawfully by the initial assault on his wife by the shove where he initiates the contact and becomes the aggressor. In addition, he was mad about the circumstances. For it to be involuntary manslaughter, it must be an *unintentional* killing of another *without malice*, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm. Here, the evidence within the statement is that he was also acting maliciously. While we recognize that "an unintentional killing resulting from an unlawful assault and battery, not of a character of itself to cause death, is involuntary manslaughter...", it is required to be without malice. Here, the anger against his wife elevated and revealed in his escalating actions presented a clear case of malice. The Court correctly denied the request on that prong.

Similarly, it did not meet the prong of "the *unintentional* killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others."

Unlike Light, under this version, Rios was not engaged in a lawful activity at that time because of the ongoing assault. The issue of recklessness by the alleged struggle over the weapon does not exist where the Appellant began the assaultive behavior and the victim, not Rios was arming

herself in self defense. It was Rios, not Eliza who struck the first blow. It was Rios, not Eliza who went into the bedroom first. It was Rios, not Eliza who followed her into the room rather than leaving. It was Eliza, not Rios, who had told him that her mother was on her way over to take her and that she was leaving him. Unlike Light, this was not a struggle over a gun, but a struggle initiated by Light that led to the victim seeking out a gun and an attempt by the perpetrator to get the gun after the victim had armed herself in self defense. The Judge properly did not charge sua sponte the instruction.

C. There was no evidence to support the instruction request on self-defense.

The focus of the argument for the self defense instruction was "because Rios said in his statement " It was in self-defense." R. 403, Tr. 419. As the state and the Court recognized, this comment alone does not mandate the giving of the self-defense instruction. The focus of the opposition to the request was first that Rios was the initial perpetrator in the matter and second that he never claimed to have done the killing. There was no requirement for the Court to sua sponte instruct on self-defense as a matter of law.

A self-defense charge is not required unless the evidence supports it. State v. Slater, 644 S.E.2d 50 (S.C. 2007); State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994). To establish self defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent

danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger. State v. Bruno, 322 S.C. 534, 473 S.E.2d 450 (1996); State v. Bryant, 336 S.C. 340, 520 S.E.2d 319 (1999). "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error." State v. Miller, 282 S.C. 10, 316 S.E.2d 409 (1984):

Here, the instruction was properly denied because there is no evidence to support the initial requirement by his own statement. The evidence before the Court as conceded by the defense is that Rios arrived at the house and began the altercation by shoving his wife after she refused to cook a new dinner for him. This shove excluded him from a potential self defense because "(1) the defendant must be without fault in bringing on the difficulty." Here, Rios was not without fault - he created the difficulty and altercation. Self-defense provided no sanctuary for his aggressive behavior that created the incident. Further, after the shoving and hair pulling, when his mother got between them and his wife removed herself to the bedroom, rather than leaving and cooling off, he followed her there. This fails another element of self-defense - "(4) the defendant had no other probable means of avoiding the danger." Plainly stated, the court was correct in not charging self defense because the evidence to support it did not exist by the Appellant's own statement. It must be denied.

CONCLUSION

For all the foregoing reasons, the appeal should be denied and the judgment of conviction must be affirmed .

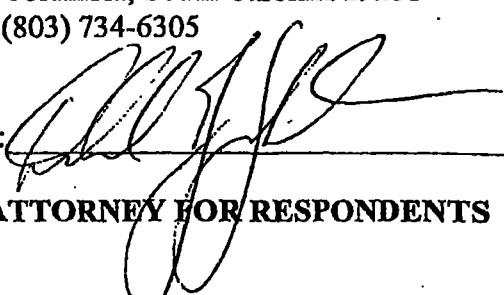
Respectfully submitted,

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By: 

ATTORNEY FOR RESPONDENTS

May 29, 2009

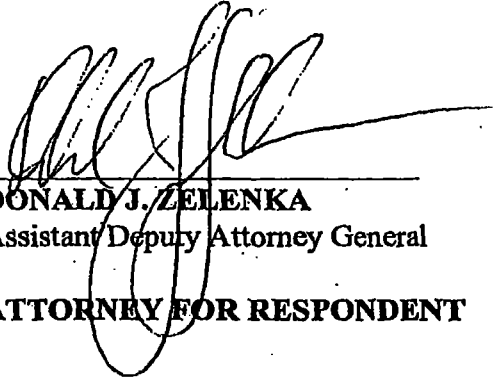
CERTIFICATE OF SERVICE

I, Donald J. Zelenka, counsel for the Respondent, certify that I have served the within Final Brief of Respondent in the foregoing action on the Appellant by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Ricky Harris, Esquire
145 N. Church Street, # 34
Spartanburg, South Carolina 29306

I further certify that all parties required by Rule to be served have been served.

This 29th day of May, 2009.



DONALD J. ZELENA
Assistant Deputy Attorney General
ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
Roger L. Couch, Circuit Court Judge
2008-GS-42-0170

STATE OF SOUTH CAROLINA,

Respondent.

-vs-

RIOS, SANTIAGO a/k/a SANTIAGO PASQUAL,

Appellant.

FINAL REPLY BRIEF

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ARGUMENT

- 1) DEFENSE TRIAL COUNSEL'S REQUEST TO INSTRUCT THE JURY ON INVOLUNTARY MANSLAUGHTER AND SELF-DEFENSE SHOULD NOT BE DEEMED ABANDONED WHERE, AS HERE, THE COURT HAD ALREADY RULED THAT THE INSTRUCTIONS WOULD NOT BE GIVEN AND DOUBT EXISTS AS TO WHETHER DEFENSE TRIAL COUNSEL'S STATEMENTS WERE INTENDED AS ACQUIESCENCE IN THE COURT'S RULINGS.

In reply to the argument found at Part H Part A of the Respondent's Initial Brief, there was no abandonment of the request to instruct the jury on Involuntary Manslaughter and Self-Defense where the trial Court had already denied Defense counsel's request for instructions and where doubt exists as to whether Defense counsel's statements were intended as acquiescence in those rulings.

In response to Defense trial counsel's repeated requests for an instruction on Involuntary Manslaughter the trial Court stated that it was not inclined to give the requested instruction on Involuntary Manslaughter.

THE COURT: I mean I'm inclined to charge voluntary. I'm not necessarily charging, inclined to charge involuntary because, again, that involves recklessness, doing something playing with a gun, things of that nature, and I don't see that as being the case here, in here. (R. p. 595, lines 13-17)

The trial Court indicated that it would not charge self-defense.

THE COURT: I don't see self-defense in here. (R. p. 599, line 16)

Defense counsel stated as follows to the Court:

MR. BRANNON: Your Honor, I would ask the Court to charge voluntary and accident as well as the, the murder charge. (R. p. 599, lines 21-23)

Rios argues that it was not Defense counsel's intention to acquiesce in the trial Court's denial of the request to instruct the jury on Involuntary Manslaughter and Self-Defense. Rather, the forgoing statement may be taken as simply Defense counsel's reiteration of what the Court had already ruled would be charged as lesser-included offenses and defenses.

The trial Court, after having instructed the jury, requested of counsel that the exhibits and verdict forms be inspected before submission to the jury. (R. p. 652, line 13 – R. p. 653, line 20) Prior to the jury being brought back to the courtroom for the exhibits and the verdict form to be submitted for their consideration the following occurs:

THE COURT: All right. We can bring- - -

MR. BRANNON: Your Honor?

THE COURT: Yes, sir.

MR. BRANNON: At this point - - I don't know if this is an appropriate time. I'd just like to renew my motions and objections at this point in time in the record.

THE COURT: As to - -?

MR. BRANNON: Anything.

THE COURT: All right. I'll allow you to do so. Thank you.

MR. BRANNON: Thank you, sir.

THE COURT: Bring the jury in. (R. p. 653, line 21- R. p. 654, line 7)

Defense trial counsel made an attempt on the record prior to the deliberation of the jury to preserve the record. Inferentially, or perhaps more so, this may be construed to include the original request to charge Involuntary Manslaughter and Self-Defense. Rios acknowledges the potential applicability of Rule 20, SCRCrimP.

The trial Court has a duty to instruct where instruction is appropriate. The trial Court should have instructed the jury on Involuntary Manslaughter and Self-Defense.

Respectfully Submitted,



Ricky Harris

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May 20, 2009

Attorney for Appellant

S.C. Bar # 2750

3710
THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Santiago Rios, a/k/a
Santiago Pasqual,

Appellant.

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 4710
Heard May 19, 2010 – Filed July 14, 2010

AFFIRMED

Ricky Keith Harris, of Spartanburg, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Donald J.
Zelenka, all of Columbia, and Solicitor Harold W.
Gowdy, III, of Spartanburg, for Respondent.

LOCKEMY, J.: Santiago Rios appeals his conviction for murder, arguing the trial court erred in (1) denying his request to suppress two statements he made to investigators because he did not knowingly and intelligently waive his Miranda¹ rights and (2) failing to charge the jury on involuntary manslaughter and self-defense. We affirm.

FACTS

Rios was indicted for murder in Spartanburg County. The State alleged Rios shot and killed his wife, Eliza Hernandez, in their home on November 23, 2006. The night of the shooting, Rios told a responding police officer three black male intruders robbed their home and shot Hernandez. Later that evening, investigators questioned Rios at the Spartanburg County Sheriff's Department (the Department). Initially, Rios maintained that intruders shot Hernandez. However, Rios later changed his story and told investigators he and Hernandez got into an argument that led to a physical confrontation and a struggle between them for the gun. According to Rios, the physical altercation started when he shoved Hernandez after she refused to fix him Thanksgiving dinner. Rios told investigators Hernandez then pulled his hair and the medallion around his neck. Rios stated he followed Hernandez into their bedroom, where she grabbed a gun and pointed it at him. Rios told investigators the two struggled with the gun and it fired. Rios claimed he was defending himself when the gun fired. Tests revealed no gunshot residue on either Rios's or Hernandez's hands, and the gun was never located.

At a pre-trial Jackson v. Denno² hearing, defense counsel argued Rios's statements to investigators were not knowingly and intelligently given. Defense counsel asserted Rios, a native of Mexico, did not have the capacity to waive his Miranda rights because his native language was Tarascan, and he was given Miranda warnings in Spanish. According to defense counsel, there is no right to remain silent in Tarascan culture and no translation for the

¹ Miranda v. Arizona, 384 U.S. 436 (1966).

² Jackson v. Denno, 378 U.S. 368 (1964).

terms "court" or "judge." The State noted Rios had lived in the United States for ten years and argued Rios was able to communicate in English and Spanish. After hearing testimony, the trial court found Rios's statements to investigators were freely, voluntarily, and knowingly given. Following trial, a jury found Rios guilty of murder, and he was sentenced to thirty years' imprisonment. This appeal followed.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, this court is bound by the trial court's factual findings unless they are clearly erroneous. Id. "On review, this [c]ourt is limited to determining whether the circuit court abused its discretion." State v. Simmons, 384 S.C. 145, 158, 682 S.E.2d 19, 26 (Ct. App. 2009). "This [c]ourt does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the circuit court's ruling is supported by any evidence." Id.

LAW/ANALYSIS

I. Miranda Warnings

Rios argues the trial court erred in denying his motion to suppress the statements he made to Sergeant George Balderama and Officer Angel Diaz the night of the shooting. Specifically, Rios maintains he did not knowingly and intelligently waive his Miranda rights. We disagree.

At the Jackson v. Denno hearing, Sergeant Balderama, a Spanish interpreter for the Department, testified he utilized two forms for the purpose of informing Rios of his Miranda rights. First, Sergeant Balderama advised Rios of his Miranda rights in Spanish by reading the rights from a card printed in Spanish. Sergeant Balderama testified Rios acknowledged that he read or understood each right by initialing the card next to each enumerated right. Sergeant Balderama also presented Rios with a pre-interrogation waiver form with his Miranda rights printed in English. According to

Sergeant Balderama, he asked Rios if he understood his Miranda rights, and Rios said "yes."

After Rios was advised of his rights, he provided an oral statement to Sergeant Balderama and Investigator William Gary in Spanish, and Sergeant Balderama transcribed the statement in English. Rios told the investigators Hernandez was shot by masked intruders. Sergeant Balderama testified he read Rios's statement back to him in Spanish and Rios signed the statement. Sergeant Balderama testified he never threatened Rios or coerced him into giving a statement. According to Sergeant Balderama, Rios spoke to him in Spanish and never used another dialect or language. Sergeant Balderama testified he had no trouble communicating with Rios in Spanish and never felt Rios had trouble understanding him. Later that night, Rios gave a second statement to Officer Diaz, another Spanish interpreter for the Department. Rios told Officer Diaz he and Hernandez got into an argument and were struggling over the gun when it fired. Officer Diaz transcribed Rios's statement in English and then read it back to him in Spanish. Rios was given the opportunity to make changes, additions, or deletions to his statement. Officer Diaz also testified he did not have any difficulty communicating with Rios in Spanish.

At the hearing, Rios relied on People v. Jiminez, 863 P.2d 981 (Colo. 1993), to support his argument that his waiver of his Miranda rights was not knowing and intelligent. In Jiminez, the Colorado Supreme Court upheld the lower court's suppression of Jiminez's confession on the grounds that Jiminez's waiver of his Miranda rights was not knowing and intelligent. 863 P.2d at 985. Jiminez functioned at the level of a six year old, had never been to school, and had a very limited vocabulary even in his native language, Kickapoo. Id. at 982. Because a Kickapoo translator was not available, Jiminez selected Spanish for the interrogation. Id. The Colorado Supreme Court affirmed the lower court's suppression of Jiminez's confession on the grounds that his mental disability rendered him incapable of understanding his rights, and not on the grounds that he was culturally unable to understand his rights. Id. at 985. Here, the trial court distinguished the present case from Jiminez and determined Rios's statements were freely, voluntarily, and knowingly given. The trial court noted Rios presented no testimony concerning his mental capacity or ability. Furthermore, the trial court found

the State presented evidence Rios communicated fluently in Spanish and in English while on the job, and noted Rios presented no evidence he had a limited vocabulary in any of the languages he spoke.

On appeal, Rios argues his initials on each of the enumerated rights on the Miranda card may constitute an acknowledgement that he was read the rights, but do not indicate he fully understood his rights and his waiver of those rights. Specifically, Rios asserts language and cultural barriers prevented him from fully understanding his rights. Rios claims he has a limited education and Tarascan does not include words for concepts such as "rights" and "courts." Rios contends the Spanish interpretation of Miranda was insufficient and prevented him from understanding his right to remain silent.

We find the trial court did not abuse its discretion in admitting the statements Rios made to Sergeant Balderama and Officer Diaz. Evidence in the record indicates Rios knowingly and intelligently waived his right to remain silent. See State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987). ("The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances."). While Rios argues his understanding of his waiver was limited because of language and cultural barriers, evidence in the record reflects Rios did not have trouble communicating in Spanish or understanding his rights. Sergeant Balderama and Officer Diaz both testified they had no trouble communicating with Rios in Spanish. Furthermore, Sergeant Balderama testified he specifically asked Rios if he understood his Miranda rights and he said "yes." Moreover, Robert Reeder, the trainer and safety director at the Milliken Cotton Blossom plant where Rios worked, testified Rios completed forty hours of training in English and was able to communicate in both English and Spanish. Rios had also lived in the United States for ten years at the time of his arrest. Accordingly, we affirm the trial court's decision to admit Rios's statements.

II. Jury Charges

Rios also argues the trial court erred in failing to charge the jury on involuntary manslaughter and self-defense. Specifically, Rios contends he

was entitled to an involuntary manslaughter charge because he presented evidence he and Hernandez struggled over the gun. Rios also maintains he was entitled to a self-defense charge based on his statement to investigators that he was defending himself at the time of the shooting. In response, the State contends Rios abandoned his requests to charge involuntary manslaughter and self-defense when he withdrew the requests during the charge conference. We find this issue is not preserved for our review.

During the charge conference, Rios asked the trial court to charge the jury on accident, self-defense, voluntary manslaughter, and involuntary manslaughter. The State asserted Rios was entitled to an accident charge, but not self-defense, voluntary manslaughter, or involuntary manslaughter charges. In response, Rios withdrew his request for a voluntary manslaughter charge. Subsequently, the trial court stated it was inclined to charge voluntary manslaughter, but was not inclined to charge involuntary manslaughter because it involved recklessness. Rios asserted recklessness could have been present, but conceded "I certainly know this Court has more wisdom on the subject than I do." Rios also argued he was entitled to a self-defense charge because he told investigators he was acting in self-defense. The trial court stated that Rios's own characterization of his actions as self-defense was not binding on the court. Thereafter, the trial court noted Rios's statements indicated either intruders were responsible for the shooting or Rios shoved Hernandez first. The trial court also noted Rios presented no evidence Hernandez was the primary aggressor. Rios admitted he could not provide the court with any evidence that he did not push Hernandez first or that he and Hernandez were not involved in mutual combat.

The trial court then stated it did not mind charging accident or voluntary manslaughter, but that it did not "see self-defense in here." At that point, Rios asked for a 30-second break to confer with his co-counsel. Thereafter, Rios asked the trial court to charge voluntary manslaughter, accident, and murder. The trial court agreed to the proposed charges, and neither the State nor Rios objected. Later, after charging the jury, the trial court asked if there were any objections to the charges given. Neither the State nor Rios had any objections.

We find Rios's argument is not properly before us for review because he abandoned his request for jury charges on involuntary manslaughter and self-defense when he acquiesced and asked the trial court to charge voluntary manslaughter, accident, and murder. Therefore, Rios waived appellate review of this issue because an issue conceded in the trial court cannot be argued on appeal. See, e.g., State v. Jackson, 364 S.C. 329, 336, 613 S.E.2d 374, 377 (2005) (appellant waived any argument he had when he acquiesced the next morning and stated he would ask witness if he had administered a polygraph and "leave it at that"); State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (holding that when an appellant acquiesces to the trial court's limitation of cross-examination, he cannot complain on appeal); Ex parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (a party cannot acquiesce to an issue at trial and then complain on appeal).

Rios also failed to make a contemporaneous objection to the jury charges. See State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (holding a contemporaneous objection must be made to preserve an issue for appellate review). Rios did not object at any point to the trial court's decision not to charge involuntary manslaughter and self-defense. Even after the trial court specifically asked if there were any objections to the charges given, Rios responded, "None." By failing to contemporaneously object to the jury charges, Rios has waived his right to allege error on appeal. Thus, we affirm the trial court's decision not to charge the jury on involuntary manslaughter and self-defense.

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.

KONDUROS and GEATHERS, JJ., concur.

760 08-2565



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July 30, 2010

REMITTITUR

The Honorable M. Hope Blackley
Post Office Box 3483
Spartanburg, SC 29304

Re: The State v. Rios, Santiago
2008-GS-42-00170

Dear Ms. Blackley:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

We are returning the following exhibits that were filed in this case to you:

- *Court's Exhibit 5 (911 Recording)
- State's Exhibits 5-14 (Photographs)
- State's Exhibits 23-45 (Photographs)
- Defense's Exhibit 1 (Photograph)
- *Court's Exhibit 5 (911 recording) was received as State's Exhibit 15,
- State's Exhibits 23-26, 28, 30-39, 41-45 (photographs)
- State's Exhibit 40 was a bullet and was returned to the Clerk of Court

Please sign and return the enclosed copy of this letter acknowledging receipt of these items.

Sincerely,

V. Claire Allen

V. Claire Allen
Deputy Clerk of Court

VCA/tf

cc: Ricky Keith Harris, Esquire
Assistant Deputy Attorney General Donald J. Zelenka
Harold W. Gowdy, III, Esquire

Receipt Acknowledgment

Name: _____ Date: _____

Rios Santiago, #328137
Perry C.I. Q-1-A 209
430 Oaklawn Rd.
Pelzer, S.C. 29669

Date: September 27, 2010

Clerk of Spartanburg County
P.O. Box 3483
Spartanburg, S.C. 29304

Re: Filing of PCR Application

Dear Clerk:

Enclosed please find my PCR application completely filled out for your filing. Your quickest attention on this matter is most greatly appreciated. Also please find my PCR brief therewith.

Sincerely,

Rios Santiago

Rios Santiago, #328137
Perry C.I. Q-1-A 209
430 Oaklawn Rd.
Pelzer, S.C. 29669

CC: Filed

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CLERK OF COURT
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2010 OCT 13 AM 9:06
M. HOPE BLANCHARD

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

V.

Applicant contends that his trial counsel was ineffective for failing to argue 3rd party guilt. Applicant had no blowback on him or powder burns on his hands. There was no evidence presented that would prove Applicant shot his wife. See trial transcript.

CONCLUSION

Applicant contends that his conviction and sentence should be vacated based on his ineffective assistance of counsel claims and clear showing of a miscarriage of justice.

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF Spartanburg)

Rios Santiago, #328137
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

2010-CP-42-5461

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Perry Corr. Inst.
2. Name and location of Court which imposed sentence Spartanburg County General Sessions
3. Name(s) of co-defendant(s) (if any) none
4. The indictment number or numbers (if known) upon which and the offenses for which

sentence was imposed:

(a) 08-GS-42-0170 Murder

(b) _____

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) May 1, 2008 30 years

(b) _____

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- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. July 14, 2010
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Opinion No.: 4710
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

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- (a) Ineffective Assistance of Trial Counsel
- (b) Due Process
- (c) 3rd Party Guilt

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

- (a) See attached Memorandum of Law
- (b) _____
- (c) _____

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

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

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. _____
 - ii. _____
 - iii. _____

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iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This is my first PCR and can only be raised in PCR

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

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- (a) your arraignment and plea? _____
- (b) your trial, if any? X
- (c) your sentencing? X
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? X
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- David Collins, 111 South Spring St. Spartanburg, S.C. 29306
 - Douglas Brannon, 175 Magnolin St. Suite 101 Spartanburg, S.C. 29306
 - Ricky Harris, 145 N. Church St. #34 Spartanburg
- (b) the proceedings at which each such attorney represented you:
- Trial
 - Trial
 - Appeal
19. State clearly the relief you seek in filing this application:
Reverse and remanded for new trial
20. Are you now under sentence from any other court that you have not challenged?
No

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Rios Santiago, #328137
Applicant,

v.

State of South Carolina,
Respondent.

Cas **2010-CP-42-5461**

STATEMENT OF CASE

STATEMENT OF CASE

Rios Santiago was indicted by a Spartanburg grand jury on January 7, 2008 for murder. Indictment No.: 08-GS-42-0170.

On April 28, 2008 his case was called to trial before a jury and the Honorable Roger L. Couch.

Rios was represented by David M. Collins and N. Douglas Brannon. The prosecution was represented by Trey Gowdy and Cindy Crick. On May 1, 2008 a jury found him guilty of murder and Judge Couch sentenced him to 30 years in prison.

A direct appeal was filed by Ricky Harris and affirmed by S.C. Court of Appeals. The PCR is as follows.

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INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

I.

Applicant contends that his due process was violated and his trial counsel was ineffective for failing to request a polygraph test based on the state's version of how the murder took place.

Polygraph test would have showed Applicant was not guilty of murder and also would have proven the shooting was an accident. *Houston v. Lockhart*, 982 F.2d 1246.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

II.

Applicant contends that his trial counsel was ineffective for failing to interview or call any character witnesses, failed to prepare a defense and failed to proffer a written charge on accident death, involuntary manslaughter and voluntary manslaughter. See *Kemp v. Leggett*, 635 F.2d 453 (5th 1981).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

III.

Applicant contends that his trial counsel was ineffective for failing to investigate the possibilities of distinguishing exemplar of Applicant's voice from voice in the back ground on the 911 tape, where the 911 tape was really the only evidence of Applicant's guilt. *U.S. v. Barnes* 687 F.2d 659 (3rd 1982).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

IV.

Applicant contends that his trial counsel was ineffective for failing to put up any kind of defense to the facts presented. If defense counsel would have put up any kind of defense Applicant could have been convicted of the lesser charge of involuntary manslaughter or accidental death. Instead defense counsel chose not to put up a defense based on trial strategy. Counsel was ineffective in making that decision. See *Strickland v. Washington* 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984).

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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Rios Santiago, #323137

Applicant,

v.

State of South Carolina,

Respondent.

Case No: 2010-CP-42-5461

AFFIDAVIT

PERSONALLY, appears before me, Rios Santiago, who duly affirmed and states as follows:

- 1) My name is Rios Santiago, I am over the age of twenty-one (21) years, Applicant in the above captioned matter, incarcerated at Perry Correctional Institute in Pelzer, S.C. 29669.
- 2) I am the applicant who honors the truth and makes this affidavit in support of my application for (PCR) relief.
- 3) On the night my wife was shot it was an accident.
- 4) When my wife and I got into the fight I did not know she had a gun.
- 5) When my wife pulled the gun out, I tried my best to talk her into putting the gun back in her pocketbook.
- 6) When my wife told me she was going to get her gun I heard for my life.
- 7) When I tried to take the gun away from her the gun went off.

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SEVENTH JUDICIAL CIRCUIT
SPARTANBURG COUNTY
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3) My wife's death was an accident.

9) I did not kill my wife.

10) It was an accident and I am not guilty of murder.

11) I am competent to testify to the facts in this matter when my (PCR) hearing is held.

Dated this 27th day of September 2010

Pelzer, S.C. 29669

SUBSCRIBED AND SWORN TO before me

This 27th day of September, 2010

Notary: James T. McNeely

Expire: January 2 2016

Rios Santiago

Rios Santiago

Perry Corr. Inst.

Pelzer, S.C. 29669

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SOUTH CAROLINA
2010 OCT 13 AM 9:06
M. HOPE BLACKEY

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

Santiago

I, *Santiago*, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

x Rios Santiago
Applicant

SWORN or affirmed to and subscribed before me this

27th day of September, 2010.

Notary Public
Notary Public

My Commission Expires: October 7, 2016

2010 OCT 13 AM 9:06
 CLERK OF COURT
 TAMERSON COUNTY
 M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA

)

)

VERIFICATION

County of

)

Santiago

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

Luis Santiago

SWORN to and subscribed before me this 27th
day of September, 2010.

Steven T. Melanley (L.S.)
Notary Public

My Commission Expires: January 7, 2016

FILED
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SOUTH CAROLINA
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STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Rios Santiago, #328137

Applicant,

v.

State of South Carolina,

Respondent.

2010-CP-42-5461

MOTION FOR TARASCAN
INTERPRETER TO BE PRESENT
AT THE PCR HEARING

I, Rios Santiago, respectfully request the Honorable PCR Court to grant this motion for a Tarascan Interpreter to be present at my PCR hearing when the date is set.

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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

COUNTY OF SPARTANBURG)

Rios Santiago, #328137,
aka Santiago Rios,)

2010-CP-42-5461

Applicant,)

v.)

RETURN

State of South Carolina,)

Respondent.)

In response to the post-conviction relief application filed on October 13, 2010, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the January 2008 terms of General Sessions for murder (2008-GS-42-0170). David M. Collins, Esquire, and N. Douglas Brannon, Esquire, represented the Applicant. On May 1, 2008, the Applicant was convicted of these charges by a jury. The Honorable Roger L. Couch sentenced the Applicant to thirty years for murder.

A timely Notice of Appeal was filed on Applicant's behalf by Ricky K. Harris, Esquire, and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Rios, Op. No. 4710 (filed July 14, 2010). The Remittitur was returned on July 30, 2010.

II.

In his application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that;
 - a. Counsel failed to request a polygraph test for Applicant,
 - b. Counsel failed to interview or call any character witnesses,
 - c. Counsel failed to prepare or present a defense,
 - d. Counsel failed ask for a jury charge of accidental death, involuntary manslaughter and voluntary manslaughter,
 - e. Counsel failed to investigate the voice of Applicant versus voice in background on 911 tape,
 - f. Counsel failed to argue third party guilty.

For the purpose of this Return, the Respondent incorporates the trial transcript, the Clerk of Court records, Applicant's appellate records and the South Carolina Department of Corrections' records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Respondent asserts that the Applicant's allegation of ineffective assistance of trial counsel is without merit. Respondent asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment. Strickland, 466 U.S. 668, 104 S. Ct. 2052. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington. Second, counsel's deficient performance must have prejudiced the Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Cherry, 300 S.C. at 117, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

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

IV.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

V.

WHEREFORE, the Respondent requests an evidentiary hearing solely for the purpose of determining whether the Applicant's trial counsel was ineffective.

Respectfully submitted,

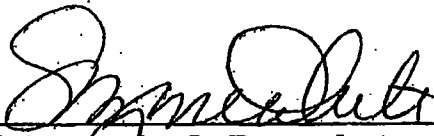
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

By:


Attorneys for the Respondents
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

April 26, 2011.

DATED this 26th day of April, 2011.

1 STATE OF SOUTH CAROLINA

2 COUNTY OF SPARTANBURG

COURT OF GENERAL SESSIONS

4 SANTIAGO RIOS,

5 APPLICANT,

6 VS.

7 STATE OF SOUTH CAROLINA,

8 RESPONDENT.

TRANSCRIPT

OF

RECORD

2010-CP-42-5461

September 19th, 2011
Spartanburg, South Carolina

14 B E F O R E:

15 THE HONORABLE J. MARK HAYES, II, Judge.

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

17 SUSANNAH C. ROSS

18 ESQ.

19 Attorney for the Applicant

20 SUZANNE WHITE

21 Assistant Attorney General

Attorney for the Respondent

22 PAMELA FAUCETTE

23 Circuit Court Reporter

Seventh Judicial Circuit

24
25 Transcribed by Pamela E. Green, Circuit Court Reporter

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E X H I B I T S

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P R O C E E D I N G S.

THE COURT: All right. Madam Interpreter, will you please stand and give your name to the court reporter?

INTERPRETER: Damarie Revera.

THE COURT: Could you spell that for her?

INTERPRETER: D-A-M-A-R-I-E. Rivera. R-I-V-E-R-A.

THE COURT: Madam Interpreter, will you please raise your right-hand?

(WHEREUPON, the interpreter was placed under oath at this time.)

THE COURT: Thank you, ma'am. You may be seated.

MS. WHITE: Your Honor, this is the case of Santiago Rios versus the State of South Carolina. It's Case Number 2010-CP-42-5461.

Mr. Rios is represented today by Susannah Ross. He was originally represented at trial by David Collins and Doug Brannon. He was indicted in January of 2008 for the charge of murder, proceeded to trial, and was convicted May 1st, 2008. Received a sentence of thirty years. An appeal was filed. His conviction was confirmed. The remittitur was filed July 30th, 2010, and he filed this PCR application October 13th, 2010.

The claims he is filed regarding ineffective assistance of counsel in that counsel failed to request a polygraph

1 test for the applicant, failed to interview any or all
2 character witnesses, failed to prepare and present a
3 defense, failed to seek a jury charge of accident,
4 involuntary, or voluntary manslaughter. Counsel failed to
5 investigate the applicant's voice versus the voices in the
6 9-1-1 tape background, and counsel failed to argue third
7 party guilt. Those are the claims he presented in his
8 application.

9 At this point I will turn it over to Ms. Ross.

10 MS. ROSS: Thank you, Your Honor.

11 May it please the Court.

12 I will add Ms. Rivera is a qualified interpreter.
13 However, she is not certified. I would just ask that if
14 there are any problems with the interpretation, I've
15 instructed her to raise her hand. I've also advised
16 Santiago to raise his hand if they're having difficulty.
17 So, I'd just ask that we recognize that.

18 Secondly, I have prepared -- Mr. Santiago did, did
19 prepare an application. I made my own notes and I just
20 noted my arguments here and include the case law. I would
21 ask -- this is not a brief or anything. It simply outlines
22 the issue we plan to present.

23 Just going through, the first one, I always make the
24 argument that the return was not filed within thirty days as
25 required by statute, and I'd just like to put that argument

1 on the record. The application was filed September 27th,
2 2010, and the reply was filed -- the return was filed April
3 26th, 2011. So, that was not within the thirty day
4 statutory period.

5 I've next alleged ineffective assistance of counsel and
6 that is based on the charge request. Essentially the --
7 there was no objection to the charge as given, and counsel
8 withdrew a charge of voluntary manslaughter, but that
9 eventually was given. Then abandoned the charge of
10 involuntary manslaughter as well as self-defense. Both of
11 which are applicable to this case. The State continued to
12 argue State v. Light as support of they're not giving that,
13 that instruction, and I included that case in my
14 presentation there in that it was reversed and it did not
15 stand for the proposition the State said it does.

16 We also would present evidence that the defense lost
17 final closing, closing argument, yet did not put up a
18 defense case and that was problematic. Closing argument,
19 final closing is a good tool for a defense attorney to
20 address the jury last. That tool was lost by putting in one
21 photograph.

22 I went to the Court Clerk's Office to look for that
23 photograph. It's not there. I think it's still with the
24 Attorney General's Office. Those exhibits have not been
25 returned to the Clerk's Office, but that was the reason for

1 the loss of final closing, and I will put up testimony that
2 my client did not get the chance to explain more on
3 self-defense, and was not advised that he would lose the
4 jury's consideration of self-defense when he did not
5 testify.

6 I also have a number of areas where there were failures
7 to object and I just ask that, that my outline be made a
8 Court Exhibit because it will show each of those failures or
9 I can go through them, whichever you prefer.

10 THE COURT: You wish to have the, the outline that you
11 gave to the Court to be part of the record of the case?

12 MS. ROSS: I'd ask you to consider that and just -- I
13 can go through each page number on the record where there
14 was a failure to object, but then I put them all down in the
15 outline that I presented to the Court.

16 THE COURT: All right. I will make the document that
17 you presented to me a Applicant's Exhibit.

18 You want to---

19 (WHEREUPON, the outline was marked as Applicant's
20 Exhibit No. 1 and received into evidence at this time.)

21 MS. ROSS: And that would simply show page numbers
22 throughout the record where I saw objections were either not
23 made or not perfected or withdrawn such that they could not
24 be appealed. Those allowed a lot of leading and an instance
25 of vouching and a lot of redirect where the

Santiago Rios - Direct examination
by Ms. Ross

1 cross-examinations has not opened the door for any redirect.
2 So, it was simply reiterations of the State's same issues
3 again.

4 Also, we'd say that there was no voir dire requested
5 specifically at all. Especially in light of the, the
6 subject matter of this case, there was no voir dire
7 requested addressing specifically, as foreign nationals are
8 entitled to the same rights to a fair trial as anyone else,
9 if you feel you can't be fair to both sides involving a
10 foreign national from the stand, and that's a voir dire
11 question that's being used in many Federal Courts now. Also
12 no jury instructions were handed up.

13 So, that would be what we intend to present today, and
14 I would first call to the stand Santiago Castell Rios.

15 THE COURT: Come on up here.

16 SANTIAGO RIOS, being first duly
17 sworn, testified as follows:

18 THE COURT: Just have a seat.

19 DIRECT EXAMINATION

20 BY MS. ROSS:

21 Q All right. Mr. Rios, we talked about this, but do you
22 understand what happens if you win your PCR?

23 A Yes.

24 Q And do you understand that you'll be back in the same
25 position you were in before your trial?

Santiago Rios - Direct examination
by Ms. Ross

1 A He understands.

2 Q And is it your wish to still go forward today?

3 A Yes.

4 Q Why do you want to take that chance?

5 A Because I'm not guilty of this.

6 Q All right. Now, you gave a statement and you said it,

7 it was self-defense.

8 What did you mean by that?

9 A I was trying to defend my life.

10 Q Now, when you say that, the day that your wife was
11 killed you were trying to defend your life or the day she
12 died or at that trial?

13 A The day that all of this took place.

14 Q All right. How were you trying to defend your life?

15 A She had the gun pointed at me, and I was trying to also
16 protect the life of my family.

17 Q And where were they that day?

18 A They were, they were at the door, but they couldn't --
19 he was trying to get to the door to open it, but he
20 couldn't.

21 Q All right. And had, had the, there been an argument
22 outside of the bedroom door where your mother was there?

23 A It was in the kitchen.

24 Q Did you start an argument?

25 (WHEREUPON, the applicant responds without

Santiago Rios - Direct examination
by Ms. Ross

1 translation.)

2 A No.

3 (WHEREUPON, the question was translated to the
4 applicant at this time and responded to as follows.)

5 A No.

6 Q Okay. Now I want to talk about what English you
7 understand.

8 A What percentage?

9 Q Yes.

10 Let's talk about today, what percentage, cause it was
11 obvious you understood my question to you just then.

12 A I did understand that because being in the situation
13 that I'm in today, incarcerated, that question comes up a
14 lot, and I do understand it, what you said today, that
15 particular question.

16 Q All right. And you told me to get an interpreter today
17 because you feel more comfortable---

18 A Yes.

19 Q ---with big words.

20 A Yes.

21 Q So, going back to the date of your trial, what
22 percentage of English do you think you understood then?

23 A Back then, about twenty percent. That's why I don't
24 feel confident because I understand that my -- I have
25 limited understanding of the language.

Santiago Rios - Direct examination
by Ms. Ross

1 Q All right. And when -- were you, back then, easily
2 confused by questions?

3 A Yes.

4 Q Now, what did you tell your lawyers about what you
5 could understand in English?

6 A I told the Spanish interpreter at the time that I only
7 understood twenty percent, but I was not confident or
8 comfortable with the, the English. That is the reason why
9 that, that came about.

10 Q All right. And what happened when you gave statements
11 to the police in Spanish?

12 (WHEREUPON, Ms. Ross interrupts the witness answering
13 in Spanish.)

14 Q Santiago, let her interpret before you go one. She
15 needs a chance---

16 INTERPRETER: Yeah.

17 Okay.

18 A What he -- when I made my statement to the police
19 officer, I clearly stated to him that I did not speak -- I
20 was not comfortable with the English. The police officer, I
21 told him I could do it in Spanish. So, I wrote a statement
22 in Spanish. The police officer said he will try his best to
23 interpret the document that was given that he had written
24 in, in what he made his statement of confession.

25 He doesn't know, only God knows, how that was

Santiago Rios - Direct examination
by Ms. Ross

1 interpreted. He was trusting that the police officer
2 interpreted, to the best of his ability, what he stated and
3 what he wrote on that confession statement, and the
4 gentleman did it in English. He did it in Spanish. The
5 police officer did it in English. So, he's trusting the
6 fact interpretation was as accurate as what he believes in
7 Spanish.

8 Q So, when you signed a statement with English words on
9 it, you were just trusting that that was the correct
10 translation?

11 A I didn't want to sign it. I didn't want to sign it,
12 but the police officer told me that I had to sign it. He
13 explained to me that I basically---

14 (WHEREUPON, the interpreter began speaking to Mr.
15 Santiago in Spanish, and Mr. Santiago responded to the
16 interpreter in Spanish.)

17 A For him to go to -- for me to go to jail, I had to sign
18 it. According to the police officer I had no choice. I had
19 to sign it and for it to be valid.

20 Q Okay. But answer my question.

21 When you signed that piece of paper, could you read
22 what was written in English on that piece of paper?

23 A No, because everything was in English like I just said.
24 He read everything that he wrote, but just the same, I still
25 didn't understand it.

Santiago Rios - Direct examination
by Ms. Ross

1 Q Read it in English or Spanish?

2 A He said it in Spanish, but he said it so fast that it
3 was the same to me. I still didn't understand it.

4 Q Now, at your trial a man from Milliken testified named
5 Robert Reeder.

6 A Yes.

7 Q Had you worked at Milliken the prior, about two years
8 prior to the incident?

9 A I worked about a year.

10 Q All right. And what English did you speak at work?

11 A I never spoke English because the people that I worked
12 with were basically -- they were Mexican.

13 Q And who -- did someone interpret for you?

14 A There was always someone there who would give orders to
15 the workers. The gentlemen who would run things for the
16 Mexicans, his name, I'm not too sure. It's either Lorenzo or
17 Alphonso. I think it is Alphonso, his name.

18 Q All right. And Robert Reeder testified that you took a
19 forty hour safety course.

20 A Yes, I did take a course for forty hours.

21 Q Was that in English?

22 A At the time there was a young lady present who was my
23 bilingual and she was present during the time of this

24 course, and she was helping him copy her answers. Her name
25 is Lynn Valadez.

Santiago Rios - Direct examination
by Ms. ROSS

1 Q All right. But the jury didn't get to hear about that,
2 did they?

3 A No.

4 Q All right. Now I want to ask you about your plea
5 offer.

6 Were you given a plea offer?

7 A The -- a lawyer did give me a plea bargain of ten
8 years, of a ten year sentence, but he never came back to
9 bring that to the table.

10 Q All right. And was that in writing?

11 Is it written down?

12 A It was verbal.

13 Q All right. And you say he never came back.

14 Did you say no to that offer or what happened?

15 A I was not opposed to the offer, but since he never got
16 back to me, no, nothing came out of it.

17 Q All right. Now I want to ask about the 9-1-1 tape.

18 Now, there is some English on that 9-1-1 tape.

19 A Yes. True.

20 Q And, and whose voice is that?

21 A Mine. If you pay attention and if you analyze the
22 tape, you will notice that the words that are being used are
23 simple term English. I did use Spanish and I also spoke in
24 my dialect cause I didn't, at that moment, know how to ask
25 for the help that I needed at that time.

Santiago Rios - Direct examination
by Ms. Ross

1 Q And why did you tell a story of being robbed by
2 robbers?

3 A Because I was afraid.

4 Q What were you afraid of?

5 A Because I was afraid that I was gonna be blamed for
6 something that I didn't do, and, in the end, that's exactly
7 what happened.

8 Q And why did you say to hide the gun?

9 A Yes, I did say that. Yes, but I was running around
10 with my mind lost, like a crazy person, and I was talking to
11 myself as a crazy person.

12 Q And you said before you were scared.

13 Were you scared because you knew you were guilty of
14 murder?

15 A No.

16 Q What -- did you think you had shot Eliza?

17 A No, because we were fighting over -- we were both
18 struggling with the gun together. He said the, the gun
19 shot.

20 Q All right. Now, you did not testify at trial.

21 A No.

22 Q Why did you not testify?

23 A Because it was recommended to me not to testify in
24 court because it was, it was also going -- they told me it
25 was going well. It would go well with him.

Santiago Rios - Direct examination
by Ms. Ross

1 Q Did you realize that the jury would not get to consider
2 self-defense if you didn't testify?

3 MS. WHITE: Your Honor, I'm gonna object. I don't
4 think he can actually testify to that. I think that would
5 be speculation. He doesn't have any knowledge as to whether
6 or not they could actually consider self-defense without his
7 testimony. I think there could be other things that could
8 have led to that jury charge without his testimony. I don't
9 believe his, he has the knowledge to know whether or not a
10 jury charge can be considered with or without his testimony.

11 THE COURT: All right. I'll allow the question.

12 Q Did your lawyers warn you that if you did not take the
13 stand that the jury might not consider self-defense?

14 (WHEREUPON, the defendant answers the question without
15 it being translated.)

16 A No.

17 (WHEREUPON, the interpreter speaks to the applicant in
18 Spanish.)

19 INTERPRETER: He understood. That's because he said no
20 before I said it to you in Spanish.

21 (WHEREUPON, the interpreter speaks to the applicant in
22 Spanish.)

23 INTERPRETER: Okay. Okay. I'm sorry cause my sore
24 throat too. I'm sorry.

25 (WHEREUPON, the interpreter speaks to the applicant in

Santiago Rios - Direct examination
by Ms. Ross

1 Spanish.)

2 A No, I didn't understand because no one told me that.

3 Q So, when you made the decision not to testify, you had
4 not talked to your lawyers about what the jury would hear or
5 not hear?

6 A No.

7 Q All right. And, and I'd also like to ask you about the
8 interpreters. You talked about them going too fast during
9 trial.

10 what did you mean by that?

11 A When the solicitor's were speaking during the case he
12 had two interpreters. One that spoke his Indian dialect and
13 the other that spoke Spanish. During the course of the time
14 that the solicitor's were speaking, they speak about 15
15 minutes talking about the case. However, the interpreters
16 did not effectively, he felt, interpret that length of time,
17 and it created a lot of confusion and he felt that things
18 were not interpreted properly.

19 Q Did you feel like you missed some things?

20 A Just about everything because, like I said, they spoke
21 for a long length and they would only give me two or three
22 words out of the whole case. That was it.

23 Q All right. I don't have any other questions.

24 Is there anything else that you feel the judge needs to
25 hear about your case?

Santiago Rios - Direct examination
by Ms. Ross

1 A Yes. I just want -- I do want to speak. I just want
2 the judge to know that I am not guilty of what I have been
3 charged with. It is true that I was there, but I didn't
4 cause all of that. It is for that reason that I'm asking
5 for my case to be heard cause I feel that with what's been,
6 what's been, what has been happened to me, what's been put
7 against me now, that is something that I can not carry
8 because it is a weight that I carry everyday.

9 Q All right.

10 A This is all I'd like to say.

11 Q Now you're gonna have some questions from the State.
12 So, I'd ask you to answer those questions.

13 A Yes.

14 Q Thank you.

15 CROSS-EXAMINATION

16 BY MS. WHITE:

17 Q I just have a few questions for you.

18 In your application, and in the original statements you
19 made to police, you accused in your application, or in your
20 original statements, you accused a group of masked men, and,
21 and then in your application you said that counsel was
22 ineffective for failing to argue third party guilt.

23 So, you admit today that there was no third party
24 involved?

25 It was simply you and your wife arguing and struggling

Santiago Rios - Cross-examination
by Ms. White

1 over a gun?

2 A It is true because I am -- the, the police officers or
3 the solicitors failed to mention -- I'm sorry.

4 Can I just clarify?

5 MS. WHITE: Sure.

6 A There was none of that third party issue, but it was
7 the lawyers who failed to ask about it and to question it
8 and to challenge him on it and no one did.

9 Q Okay. I'm, I'm trying to understand.

10 If you admit that there was no third party involved,
11 why are you saying that the attorneys should of questioned
12 you on it?

13 A Okay. Because that was the argument. That was what
14 was being brought against me and I thought it was in the
15 attorney's ability to question it and no one asked.

16 Q So, you expected -- even though your attorneys knew the
17 truth, that you and your wife were the only ones in the room
18 with a gun, you wanted your attorneys to argue a situation
19 which was a lie to the Court?

20 A Well, why did they mention it in the first place when
21 he had already testified that the argument was only between
22 him and his wife?

23 THE COURT: Madam Interpreter, I'm gonna need you to
24 speak up as well cause this court reporter has got to be
25 able to hear you.

Santiago Rios - Cross-examination
by Ms. White

1 COURT REPORTER: I'm having a hard time with what you
2 just said. I'm sorry.

3 INTERPRETER: I'm sorry.

4 COURT REPORTER: That's all right.

5 INTERPRETER: I'm sorry.

6 COURT REPORTER: They mention it---

7 INTERPRETER: They mention it -- if the attorneys --
8 why, why did the attorneys, in the first place, they were
9 already -- they had already mentioned in the statement that
10 there was a third party involved. They already knew --
11 somebody -- what I'm saying is that it was an issue between
12 my wife and I, but it was already stated that there was a
13 third party involved. So, the argument is that it was
14 already placed in there and the attorneys did not represent
15 that properly even though they knew that it was a lie. It
16 was indicated or it was implied that there was a third party
17 involved.

18 Q Do you recall your attorneys filing a pretrial motion
19 to get your statement removed from the, the, the trial that
20 mentions the third party?

21 A That opportunity was never given nor that there was a
22 third party involved.

23 Q My question is was there a pretrial hearing to have
24 your statement regarding the masked men completely removed
25 from being entered at trial?

Santiago Rios - Cross-examination
by Ms. White

1 INTERPRETER: Okay. Okay. He's having a little hard
2 time understanding my Spanish. Sorry.

3 A No.

4 Q If the transcript reflects that they spent a great deal
5 of time arguing with the State, the solicitor, and calling
6 numerous witnesses to try and make sure that any reference
7 to these masked men was not mentioned, would you then agree
8 that that had occurred?

9 A There was no one there, just me and her. So --.

10 MS. WHITE: And, Your Honor, I'll just make a, a note
11 for the Court that if you'll note in the transcript, Page 58
12 is the beginning of the Jackson v. Denno hearing in which
13 the defense attorneys argued against Mr. Rios' two
14 statements. One in which he mentioned the three masked men
15 who came into the house and then the one in which he did---

16 A He, he says he now understands, and you said that in
17 the declaration, but that it wasn't so.

18 MS. WHITE: Okay.

19 INTERPRETER: I'm gonna explain it to -- I'm only
20 speaking to the judge right now.

21 MS. WHITE: Okay. And that motion went on with
22 numerous witnesses, Your Honor, to actually try to get both
23 of his statements out, the statement regarding the masked
24 men and the statement in which he does acknowledge that he
25 and his wife are in the bedroom. Unfortunately, obviously,

Santiago Rios - Cross-examination
by Ms. White

1 they, they did lose that motion and both statements were
2 allowed in I believe at the time.

3 INTERPRETER: Yes.

4 Q Mr. Rios, you testified that you told your lawyers,
5 through your interpreter, that you only understood English,
6 at the time of trial, about twenty percent of the time.

7 A Yes.

8 Q Did you ever tell either of your lawyers, before or
9 after this trial, that you actually understood and could
10 speak English pretty much the entire time?

11 A No.

12 Q Okay. So, you deny telling Mr. Collins that you can
13 read or, excuse me, that you can speak and understand
14 English the entire time of the trial?

15 A It's for that -- no, it's for that reason that I always
16 had an interpreter present whenever I spoke.

17 Q Okay. In regards to the statement on the 9-1-1 tape
18 regarding hide the gun, your claim is that you were
19 struggling with your wife over the gun.

20 A Yes.

21 Q If you had the gun and could bring it forward to show
22 that your wife's fingerprints were on the gun to help
23 support your claim of self-defense, why did you not bring it
24 forward and provide that to your attorneys to help your
25 case?

Santiago Rios - Cross-examination
by Ms. White

1 A If I had the opportunity to present it I would, but at
2 the time that it was going on, like I said, during the 9-1-1
3 tape, I was very confused. I was very afraid. I don't even
4 remember what I did with the gun. If I did have the
5 opportunity I would present it.

6 Q So, your testimony is that, after you hired your
7 attorneys, at that point you could not remember what you had
8 done with the gun?

9 A No, I really tried to remember, but it never came to my
10 mind. It's like I lost my train of thought. I lost my
11 vision. I lost my mind.

12 Q But you did recall all the events leading up to the
13 shooting with the fights, and the struggle over the gun, and
14 the, the argument that led to the shooting, isn't that
15 right?

16 A Yes.

17 Q All right. Now, regardless to the plea offer, you
18 testified that you were offered, at one point, a ten year,
19 ten year offer.

20 A Yes.

21 Q Was that to what charge?

22 A I was never given a charge. I was never given the
23 opportunity under what charge or to tell you what the offer
24 was for. But he did offer ten years and then he never came
25 back.

Santiago Rios - Cross-examination
by Ms. White

1 Q And which attorney offered, told you about this?

2 A Mr. Collins who I had contracted.

3 Q Were you ever told of a plea to voluntary manslaughter
4 where you can plead to the maximum?

5 A I don't remember.

6 Q And if you don't remember that, you don't remember then
7 if you turned down a plea to voluntary manslaughter?

8 A I do recall, prior to the trial, where we went into the
9 room with the Spanish interpreter and Mr. Collins, and when
10 an offer was made, and the offer that was given to me would
11 have -- I pleaded a sentence for up to thirty years.

12 Q Okay. And you turned that down?

13 A Yes, I did.

14 Q Okay. Did you ever ask what happened to the plea offer
15 of ten years?

16 A Yes.

17 Q And what were you told?

18 A I did ask Mr. Collins. Mr. Collins basically said that
19 it was up to the solicitors with regard to the ten year
20 plea, the ten year agreement.

21 Q And you never asked him again, hey, what happened, can
22 I get the ten years?

23 A I didn't ask anymore. Every other time we talked was
24 about the issues in here and what happened. So, the ten
25 year offer never came up again.

Santiago Rios - Cross-examination
by Ms. White

1 Q You testified the interpreters went too fast at trial
2 and you felt you missed some things.

3 A Almost everything.

4 Q Didn't your attorneys, many times, in fact, ask the,
5 the attorneys or the witnesses to slow down or to speak up
6 for you on behalf of the interpreters?

7 A I recall a couple of times where the solicitors and
8 lawyers were, were asked to please slow down, slow down so
9 that the interpreters could interpret. But it was the same
10 thing. It was like they were speaking a mile a minute and I
11 wasn't getting the interpretation.

12 MS. WHITE: Okay. One second please.

13 (Pause.)

14 A Can I say one more thing?

15 Q In regards to the interpreters, the interpreters?

16 A Yes.

17 Q Go ahead.

18 A Also I had the microphone and headphones. With that
19 also being said, I really couldn't hear a lot of stuff that
20 was being said.

21 MS. WHITE: Okay. Thank you. There's no further
22 questions from, from the State, Your Honor.

23 MS. ROSS: Just a brief redirect.

24 REDIRECT EXAMINATION

25 BY MS. ROSS:

Santiago Ross - Redirect examination
by Ms. Ross

1 Q All right. Regarding the gun, have I asked you where
2 the gun is?

3 A Yes.

4 Q And could you tell me where the gun was?

5 A If I knew where it was I would tell you, but I honestly
6 don't remember. I don't have the mind for it right now. I
7 don't.

8 Q Now, you say you don't remember.

9 Did you hide it somewhere or did someone else?

10 A Like I said to you before, when I was running around
11 with it, and also that I don't remember. However, in the
12 place that I live, there are other people, lots of people in
13 that place, and it could have very well been that someone
14 could have taken the gun.

15 Q Okay. And on the 9-1-1 call, you said earlier you said
16 hide the gun.

17 A Yes.

18 Q Were you talking to yourself or someone else?

19 A I'll repeat what I said previously. I was running
20 around like a crazy maniac and I was speaking to self. I do
21 not remember what I was doing cause I was out of my mind.

22 Q And did you know where the gun was when the police
23 asked you?

24 A When the police arrived they looked through everything,
25 searched through everything, they touched everything, and,

Santiago Ross - Redirect examination
by Ms. Ross

1 like I said, they took me away. I don't remember -- I
2 really don't remember them coming.

3 Q All right. Nothing further.

4 MS. WHITE: Nothing from the State, Your Honor.

5 THE COURT: Thank you, sir. You may step down.

6 MS. ROSS: Now we call Marie Avreal.

7 THE COURT: Ma'am, just come right up here.

8 Does she need the interpreter?

9 MS. ROSS: No.

10 MARIE AVREAL, being first duly
11 sworn, testified as follows:

12 THE COURT: Just have a seat in the chair and pull the
13 chair up to the microphone.

14 DIRECT EXAMINATION

15 BY MS. ROSS:

16 Q All right. Can you tell the judge who you are or give
17 him, give him your name?

18 A Yes, ma'am. My name is Maria Avreal and I am
19 Santiago's sister.

20 Q All right. And you speak English, correct?

21 A Yes, ma'am, I do. Not, not really good good, but yeah,
22 I do.

23 Q All right. And what is the, the language you speak
24 with your family?

25 A It's a dialect.

Marie Avreal - Direct examination
by Ms. Ross

1 Q Of -- are you from Mexico?

2 A Yes.

3 Q And is it the same as Mexican Spanish?

4 A No, not really. It's really different from Spanish.

5 Q Okay. Now, were you there for the trial of your
6 brother?

7 A Yes, ma'am, I was.

8 Q And did you ever see points where you could see the
9 interpretation was not what you were hearing from your
10 Mexican dialect?

11 A Yes, ma'am.

12 Q What were those points?

13 A Well, there was a translator that supposedly spoke what
14 we spoke, but he -- I mean there's a whole lot of like
15 cities in Mexico---

16 Q Uh-huh. (Affirmative).

17 A ---and they speak what we speak, but some words like --
18 like some words that they say we understand in a different
19 way and they understand it in a different way. So, it's
20 really like, like there was some words that they did not
21 translate it right to my brother because of that fact that
22 they do speak what we speak, but they can't -- you -- they
23 understand it in a different way, and that's why they
24 translate it for him. I mean they did -- they don't
25 translate it for him right.

Marie Avreal - Direct examination
by Ms. Ross

1 Q All right. And when you say for him, he did not
2 testify, did he?

3 A No, ma'am, he did not.

4 Q What do you mean by that, when you say for him or
5 against him?

6 A Well, when they like -- like he had a Spanish
7 translator.

8 Q Uh-huh. (Affirmative.)

9 A And he, he had another translator saying what it was,
10 and he translated the dialect that we speak for him, and I,
11 I think he spoke to him first and then he translated it back
12 to the, to the Spanish translator, and the Spanish
13 translated it in English. So, they -- I, I, I pretty much
14 think that they got confused a lot there cause there were
15 some words that weren't pronounced right.

16 Q All right. Do you have any specific examples?

17 A Yes. Yes, ma'am, I do. There is one word that I don't
18 know how I would of translated in, in English. Like I said
19 in my English -- I mean I speak English, but not like really
20 really good, and yeah, there was one word that supposedly
21 they said that it had meant for them that this bastard is
22 not gonna get, get away with it, but really that means
23 something else for us.

24 Q Okay. Now, you saw your mother, Isabel Rios, testify.

25 A Yes, ma'am, she did.

Marie Avreal - Direct examination
by Ms. Ross

1 Q Now, was there any interpretation of her that was
2 incorrect or did you see problems with that?

3 A Yes, yes. There, there was -- like my mom, she don't
4 speak English at all. She don't -- they, they had a whole
5 lot of problems with her. She did not, like, understand
6 some stuff that they told her as much as she doesn't
7 understand Spanish that well like I would. And, so, it
8 would have been hard for her to understand the Spanish
9 translator, and as, as well as they had gotten it hard on
10 her because she -- they had told her about how, what was the
11 length that she seen my brother make the phone call for the
12 9-1-1, and I think she had said a long length, and I do not
13 remember what that length was, but my mom doesn't even know
14 how to tell time. So, she wouldn't know length.

15 Q All right. And if she didn't understand something,
16 could she have said I don't remember when she didn't
17 understand?

18 A Yes, ma'am.

19 Q All right. Now, going back to your brother's fluency
20 in English, did you ever talk to his lawyers regarding how
21 much English he could speak?

22 A Yes, yes, I did. If I remember pretty much, I spoke to
23 Mr. Douglas Brannon or how -- I don't know how to, how to --
24 I'm pronouncing his name right. Yes. Yeah, he had asked me
25 if my brother spoke English and I mean like, like he said

Marie Avreal - Direct examination
by Ms. Ross

1 earlier, I mean who can't speak basic words, and -- but
2 really he doesn't speak -- at that time he didn't speak the
3 English as well as I am speaking to y'all now.

4 Q And, for instance, with his job or anywhere, would he
5 maybe act like he understood when he didn't fully
6 understand?

7 That's requiring supposition. That's okay. You don't
8 have to answer that.

9 But did he ever try to cover like he could speak
10 English or did you ever see that?

11 A (Witness nods affirmatively.)

12 Q Now, at one point you were saying -- I spoke to you
13 briefly during your brother's testimony earlier today.

14 A Yes, ma'am.

15 Q And you, you had a comment on, on that translation.
16 What was he saying that you heard?

17 A Yes, I think he wasn't -- I'm not sure if the
18 translator or he didn't understand if she didn't translate
19 it in the right way and he didn't understand her. But from
20 what I understood what he was trying to say as the lady
21 sitting in blue made him a question about a third party of
22 something like that, and what he was trying to say was when
23 the solicitor, that the solicitor kept saying that there was
24 someone else in the room with him at that time, and what he
25 was trying to say was that why didn't, why, why did his

Marie Avreal - Direct examination
by MS. ROSS

1 lawyers back then not defend him on that, not tell him -- I
2 mean like not give him his right like to, to defend him and
3 tell him that there was no one else there. That's what he
4 was trying to say was that the solicitors back there kept
5 insisting that there was somebody else there with him.

6 Q All right. Okay. As far as the gun, I've been in
7 meetings with you, correct?

8 A Yes.

9 Q And what have I asked about the gun?

10 A Where's the gun, does anyone know where the gun is, and
11 no, ma'am, no one knows where the gun is.

12 Q I've got no further questions.

13 MS. WHITE: Just briefly, Your Honor.

14 CROSS-EXAMINATION

15 BY MS. WHITE:

16 Q Maria, how old are you now?

17 A I am twenty years old.

18 Q Okay. And at the time of the trial in May of 2008, how
19 old were you?

20 A I think I was 18.

21 Q Okay. And, in fact, this -- he was actually arrested
22 and indicted in January of '08.

23 Is that the time that the shooting actually occurred?

24 A Could you repeat that question please, ma'am?

25 Q Did the shooting -- he was indicted on the charge of

Maria Avreal - Cross-examination
by Ms. White

1 murder in January of '08.

2 when did the actual shooting, the incident occur?

3 A Well, the truth, I wasn't here at the time that the
4 incident occurred. At that time I was in Mexico with my
5 husband and I found out because my mama had called me and
6 gave me the bad news.

7 Q Okay. Were you living currently in Mexico at the time?

8 A No, ma'am, I had went back home to, to -- cause my
9 husband then had asked me to go back with him to meet his
10 family. So, I had went back just for a little while.

11 Q Okay. And you're not a qualified interpreter?

12 A No, ma'am, I'm not.

13 Q And you're not a certified interpreter?

14 A No, ma'am.

15 Q Okay. How long have you lived in America?

16 How long have you been away from the village that y'all
17 lived in in Mexico when you only spoke the dialect?

18 A Is your question how long was I here in the United
19 States?

20 Q Right.

21 When did you move to the United States, your parents?

22 A I've been here since I was four years old.

23 Q Okay. And did you live here primarily since you were
24 four until now?

25 A Yes, ma'am.

Maria Avreal - Cross-examination
by Ms. White

1 Q Okay. And how many other brothers and sisters do y'all
2 have?

3 A Five girls and two boys.

4 Q So, five girls and two boys?

5 A Yes, ma'am.

6 Q And is Santiago the oldest?

7 A Yes, ma'am, he is. Well, of the boys, yes.

8 Q Okay. Okay. I think that's all the questions I have.

9 Thank you.

10 THE COURT: Any redirect limited to what she went into?

11 MS. ROSS: No, no redirect, Your Honor.

12 THE COURT: Thank you, ma'am. You may step down.

13 Lawyers approach a moment.

14 (WHEREUPON, a bench conference was held at this time.)

15 MS. ROSS: At this time, briefly call Damarie Rivera to
16 the stand.

17 THE COURT: Let me swear you in. Just go in front of
18 the Bible if you would.

19 DAMARIE RIVERA, being first duly
20 sworn, testified as follows:

21 THE COURT: Thank you, ma'am. Have a seat in the chair
22 and pull the chair up to the microphone.

23 DIRECT EXAMINATION

24 BY MS. ROSS:

25 Q All right. Ms. Rivera, I just would ask you to

Damarie Rivera - Direct examination.
by Ms. Ross

1 address -- what kinds of Spanish do you speak?

2 A I am -- first of all, I'm a second generation Peridian.
3 So, the Spanish that I speak is Puerto Rican Spanish, and my
4 first language is English. So, just to clarify that as
5 well.

6 Q All right. And just when Santiago was testifying, it
7 seemed like there was some issues with interpretation.

8 Can you just briefly address that for the record?

9 A Yes, I did notice that there was a -- he did explain,
10 when we spoke in the break room, our dialects are different
11 and that is true. Puerto Rican Spanish, Mexican Spanish,
12 Southern America, Central American is not the same. The
13 dialects are different. It's very easy to misinterpret one
14 word as you had previously explained.

15 He understands most of it, but I think, in being
16 nervous, he gets a little confused. But I believe there's a
17 little bit of confusion yet still, just a little bit, yes.

18 Q I've got no further questions.

19 A Thank you.

20 MS. WHITE: Nothing from the State, Your Honor.

21 THE COURT: Thank you, ma'am. You may step down.

22 (Pause.)

23 THE COURT: All right. We'll step down until 2:15.

24 (WHEREUPON, Court was in recess for the lunch hour.)

25 THE COURT: Does the applicant have any further

1 witnesses?

2 MS. ROSS: No, Your Honor. But I would state that I
3 have made some efforts trying to find a witness from
4 Milliken. My client worked at the Milliken, Milliken Cotton
5 Blossom Plant, which no longer exists. So, I just want
6 to -- I had some difficulty in researching it in the area.
7 I did find a contact there and have called them a number of
8 times last week.

9 There was some testimony about Alphonso or Lettie from,
10 Milliken. I would like to ask if I could leave the record
11 open to present an affidavit from one or the other, if I can
12 locate them within a reasonable period of time, as to
13 whether Mr. Pascal was helped with interpretation there at
14 the Milliken plant or not.

15 Just based on the first name, I don't know if I can
16 locate them at all. But I, I just -- I ran into no phone
17 numbers because the, the Cotton Blossom plant merged into
18 something else. So, I didn't know what I was looking for
19 until recently.

20 Also, there's a picture that I was unable to obtain
21 from the Clerk's Office that was put into evidence. It is,
22 I guess, in Columbia from the appeal still, and I'd ask to
23 be able to keep the record open if it's relevant to get that
24 picture into evidence.

25 MS. WHITE: I can---

1 THE COURT: What's the picture of?

2 MS. WHITE: Well -- and, Your Honor, I was gonna say, I
3 actually -- Mr. Brannon and Mr. Collins can testify to what
4 the picture is of. It's apparently a picture of the scene
5 of, of Mr. Rios' hair is what they've informed me of, of---

6 MS. ROSS: All right.

7 MS. WHITE: ---because of the altercation that occurred
8 in another room other than the bedroom because of, you know,
9 the fight that continued I think into the bedroom. I called
10 the Court of Appeals because when Ms. Ross spoke to them I
11 believe or when the -- she spoke to the Clerk's Office here
12 who indicated -- okay. Sure.

13 (Pause.)

14 MS. WHITE: The Clerk's Office here indicated that they
15 did not have all the exhibits returned, that some were at
16 the Court of Appeals are still checked out. I spoke with
17 the Court of Appeals. They indicated that their deputy
18 clerk had verified that they had been returned, all the
19 exhibits. I spoke with them on Friday.

20 So -- but then apparently somebody from the Clerk's
21 office here had signed saying they did not receive all of
22 the exhibits. So, I believe we -- there's some kind of
23 miscommunication between the clerk's office here and the
24 Court of Appeals as to whether or not the Court has the
25 exhibits or the Clerk's Office here.

1 So, I think we would have to probably do some further
2 investigation to see whose office, the Clerk's Office, or
3 the Court of Appeals actually has the exhibit. I did ask if
4 they did have it, if they could scan it and fax it, but she
5 said they don't have at the Clerk's Office or the Court of
6 Appeals and could not do that anyway. But we can certainly
7 have the two attorneys testify as to what at least the
8 picture was and their reasoning. But I'd actually object---

9 MS. ROSS: I think---

10 MS. WHITE: Yeah.

11 MS. ROSS: That's good enough for me to, to have
12 coverage. I just didn't want to end my case without
13 something on the, on the picture.

14 MS. WHITE: In regards to an affidavit, Your Honor, I
15 would request that if we are gonna have any testimony, I
16 would object to an affidavit being entered. I request that
17 we have the opportunity to actually cross-examine a person
18 instead of actually an affidavit being presented since I
19 wouldn't have the opportunity to, to know this person or, or
20 know who this person was and have an opportunity to
21 question, question them myself.

22 THE COURT: And, and the purpose of, of that witness
23 would be to -- from the applicant's position, the purpose
24 would be to establish that, that, that he did not regularly
25 speak English and when he was working at Milliken?

1 MS. ROSS: Correct, that, that he was assisted with any
2 English that he needed at Milliken, and, again, I have made
3 efforts to, to get that information beforehand. I simply
4 hadn't caught up to the, to -- my husband went to the
5 Citadel with someone at Milliken, and got, got through and
6 found the HR person there. There was a funeral last
7 Thursday and there was things that came up.

8 So, I wouldn't object to a deposition if, and I would
9 present to the Court who I had, why, what I expected them to
10 say and why it would be relevant.

11 MS. WHITE: And, Your Honor, you may want to, to wait
12 and rule after the, the testimony from Mr. Brannon and
13 Mr. Collins as to whether or not that's even necessary. I
14 think whether or not he spoke English or understood I think
15 was pretty thoroughly covered actually at the trial, and
16 whether or not that would be relevant to the claims of
17 ineffective assistance of counsel. We can -- I would
18 suggest maybe could be determined after their testimony as
19 well.

20 MS. ROSS: And I'd have no objection to that.

21 THE COURT: Okay. All right. We'll do that.

22 All right. So, the applicant rests then?

23 MS. ROSS: Yes, Your Honor.

24 THE COURT: Yes, ma'am.

25 MS. WHITE: The State would call Doug Brannon to the

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by Ms. White

1 stand.

2 THE COURT: Come on around, sir, if you would. Place
3 your left-hand on the Bible and raise your right-hand.

4 DOUGLAS BRANNON, being first duly sworn,
5 testified as follows:

6 THE COURT: Thank you, sir. Please have a seat in the
7 chair and pull the chair up to the microphone.

8 DIRECT EXAMINATION

9 BY MS. WHITE:

10 Q If you could, state your name for the record.

11 A Full name is Norman Douglas Brannon.

12 Q And if you could, just give us a brief history of how
13 you became involved in this case.

14 A Mr. Collins and I have been friends for many many
15 years. We regularly try cases together. I think the Rios
16 case was the third or fourth murder trial that he and I had
17 tried together.

18 Q And am I correct in that this was the second trial in
19 this case?

20 A Yes, that, that is correct. The first trial ended in a
21 mistrial. We learned, about one sentence into the first
22 question asked by Mr. Gowdy of the first witness in the
23 first trial, that we did not get the discovery that they
24 intended to use in the case.

25 Q And you were involved in the first trial---

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by Ms. White

1 A Yes.

2 Q ---as well?

3 And just to start with some of the applicant's claims,
4 you were aware obviously the whole time that he had made two
5 statements. The first of which included, I guess, started
6 from his 9-1-1 call and then led to a statement to police in
7 which he alleged masked gunmen had entered the home and
8 killed his wife?

9 A Yes, I was aware that there were two statements the
10 whole time.

11 Q Is that a defense that y'all, you and Mr. Collins, had
12 originally or had ever thought about using at trial?

13 A You mean the, the third party?

14 Q A third party. Use the defense that someone else had
15 been involved in this shooting.

16 A No, because I'm, I'm assuming that it went well before
17 I was involved in the case, but from the time I was involved
18 in the case, and throughout the trial, Mr. Rios had made it
19 be known that the, the masked men was not true and this was
20 an, an accident case.

21 Q And in your conversations with Mr. Rios or to your
22 knowledge and his conversations with Mr. Collins, did you
23 always have an interpreter present?

24 A Every time that I ever spoke with Santiago Rios a
25 translator named Sequora Wok was present. In fact, Mrs.

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1 wall was also present in the courtroom during the trials
2 kind of as a liaison between defense and Mr. Rios.

3 Q And---

4 A Now, I do -- there were a couple of times at the
5 courthouse when I was involved that his sister would
6 translate for us. But that was just short sentences or
7 something like that. But anytime it was meaningful
8 conversation, in preparation for trial, Mrs. Wall was
9 present.

10 Q And was this -- was Mrs. Wall a translator for Spanish
11 to English and English to Spanish?

12 A Yeah, she works for a company called Bilingual
13 Interpreters, Interpreters, and -- so, she was a certified
14 and accredited translator.

15 Q To your knowledge, did you ever have any or did Mr.
16 Rios have any difficulty in any discussions that y'all had
17 in understanding the, the discussions, I guess, you had
18 regarding the, the plans for the trial or defense strategy?

19 A No, I don't, I don't think he had any trouble
20 understanding Mrs. Wall. I know that there were times when
21 the two of them would have a conversation I think trying,
22 trying to flesh out the actual translation. But, again, you
23 know, we were in a conference room in an office that gave
24 them the opportunity to do that.

25 Q You prepared and argued a pretrial motion for a Jackson

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1 v. Denno hearing?

2 A Correct.

3 Q What was the goal in the Jackson v. Denno hearing?

4 A The goal was obviously to get his statement suppressed
5 that, that made mention of the three or six masked men who
6 had entered his home.

7 Q Was that the only statement y'all wanted suppressed?

8 A Well, we asked that all of his statements be
9 suppressed, that both of them be suppressed. But clearly
10 the, the primary goal was, was to have the three masked men
11 suppressed.

12 Q And why, why was that so important in this case, to get
13 that statement suppressed?

14 A Well, because we didn't want Trey Gowdy to sing about
15 it in his opening statement, which, unfortunately, he did.

16 Q Is that primarily because it was a lie to begin with
17 or---

18 A It certainly called into question our client's
19 credibility.

20 Q Okay. Was there any, any corroboration by anyone that
21 backed up that statement or that could support the other
22 statement regarding the accident?

23 A There were no, there was no corroboration of the three
24 masked men story. Again, as long as I was involved in the
25 case, Santiago maintained that he said that because he was

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1 fearful of, of what might happen to him. According to him,
2 the truth was there was a struggle between he and his wife,
3 she grabbed a gun, and, unfortunately it went off. There
4 was significant corroboration that -- at least we believed
5 there were significant corroboration from the family members
6 that were present in the home that night.

7 Q Were the family member's stories always, I guess, the,
8 the word I'm always pretty -- I've, I've lost my word that
9 I'm looking for, but were they always, always the same?

10 A Consistent?

11 Q Consistent. Thank you very much, Mr. Brannon.

12 Were they always consistent in, in what they told as to
13 what had happened that evening?

14 A Minor differences. But, but overall they were, they
15 were consistent, yes.

16 Q Okay. Had any of the family members ever attempted to
17 corroborate the masked men story?

18 A Not as long as I was involved in the case.

19 Q Did anyone on the stand ever testify that they had been
20 told to corroborate the masked men story?

21 A His little brother testified that, something to the
22 effect he said that so that his brother wouldn't get
23 punished or something like that.

24 Q Now, we've already testified, and I guess Mr. Rios has
25 and his sister has, that the gun was never found in this

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by Ms. White

1 case, is that right?

2 A That's correct.

3 Q And in regards to other weapons and, and other ammo,
4 there were some testimony about that at the trial, isn't
5 there, wasn't there?

6 A Yeah, I think there were some other weapons in the
7 laundry room or something like that.

8 Q Okay. And y'all were -- you and Mr. Collins were never
9 able to, to find any of the weapons or use that to show that
10 his wife had ever touched a gun or had a gun, were you?

11 A Never saw the gun, were never able to get it tested
12 for, for prints or anything else, no.

13 Q So, was there any evidence to help support what -- I
14 guess what physical evidence did y'all have to support the
15 accident theory?

16 A Well, there was evidence of a struggle in other rooms
17 of the house, a struggle that was corroborated by other
18 family members as well as Mr. Rios that he and his wife were
19 in a dispute. I think it was over a turkey sandwich. But
20 there was evidence that she was physically attacking him in
21 that there were actually balls of his hair in, that had been
22 pulled from his head.

23 Now, at the time of the trial Mr. Rios has hair almost
24 down the middle of his back that he wore slicked back in a
25 ponytail. So, he had long black hair, and I believe the

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by Ms. White

1 photo that was introduced was one of the pictures of the
2 different balls of hair that had been jerked from his head.

3 Q And, so, that was, to your understanding or your
4 argument, the start of a fight that escalated and led to the
5 shooting in the bedroom?

6 A Yeah, I mean I think the story was that he had been
7 away from the house for some period of time on Thanksgiving
8 day, he came home, and when he came home she was not happy
9 that he had been gone and then he made the mistake of saying
10 something about the turkey sandwich being cold and she said
11 heat it up yourself or something like that, and they began
12 to argue and struggle.

13 Q Okay. Did you -- one of the comments and one of the
14 arguments is that you or Mr. Collins did not object to any
15 of the testimony I guess from Mr. Robert Reeder regarding
16 him, his testimony about Mr. Rios' training in English or
17 his, his ability to testify.

18 Do you recall that testimony?

19 A I remember Mr. Reeder's testimony very well. The one
20 thing that I do remember about that is, you know, we didn't
21 see the State's witness list until the morning of trial.
22 When, when we asked why Robert Reeder was on the witness
23 list and were told that it was because of some training that
24 they do at Milliken, I called my office, and one of my
25 paralegals, Elizabeth, called somebody at Milliken. I

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1 think, like Madam Counsel, she knew somebody who worked for
2 Milliken or something like that, and we asked if that
3 intensive training was provided in Spanish and the response
4 we got was no.

5 But no, I can tell you that I didn't object to
6 Mr. Reeder's testimony, no.

7 Q So, at the time when he, when the State presented him,
8 you were not aware of even what he was there to testify
9 about?

10 A Well, we knew that he was employed by Milliken. So, we
11 had kind of an idea. But, but no, I didn't know exactly
12 what he was gonna testify to.

13 Q Okay. And your officer or your team, I guess, had
14 prepared extensively and worked to, I guess, focus on Mr.
15 Rios' lack of English and comprehension and lack of ability
16 to read and speak English, is that right?

17 A Correct. We had been told that he could read and write
18 in Spanish, but could neither read or write English.

19 Q And explain a little bit about what you had been told
20 about the specific dialect---

21 A Okay.

22 Q ---in regards to what he could understand as well with
23 even Spanish.

24 A We were told, I believe, that the dialect is called
25 Tarascan, which is a very specific dialect of Spanish from a

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by Ms. White

1 mountain regions, a group of villages in the mountains in
2 Mexico.

3 Q And were you able to secure interpreters for both the
4 Tarascan and Spanish for trial?

5 A Well, I wouldn't say we. But there was a Tarascan
6 interpreter that was secured by the Clerk of Court for the
7 first trial, but the Tarascan interpreter came from the
8 State of California. For the second trial, the interpreter
9 came from Washington State, and that interpreter didn't
10 speak English. So, everything had to been translated from
11 English to Spanish, from Spanish to Tarascan, and then back
12 and forth.

13 So, the Tarascan interpreter who did speak Spanish was
14 completely dependent on the Spanish translator who was
15 interpreting English into Spanish. So, every word had to
16 have been said four times before it got to Santiago's ear.
17 So, it was a difficult situation.

18 Q Okay. And you said that you had been told that he
19 could not speak or read anything in English?

20 A Correct.

21 Q Does that mean that, to your understanding, he could
22 not understand when you also spoke in English?

23 A It was my understanding that he spoke no English.
24 There were at least two times that I looked at his sister
25 and asked does he understand anything that we are saying or

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by Ms. White

1 that I am saying. The last time I asked that was the Sunday
2 before we started the first trial, and I asked that because
3 I said something maybe to David, it was, it was somebody
4 other than Santiago, and he responded to what I said. Not
5 to me. But to somebody else.

6 So, I didn't know if he was responding to what I had
7 said to the other person or if he was just speaking Spanish
8 about another topic. I wasn't sure.

9 Q And what was the sister's answer at that time?

10 A That he didn't speak or understand English.

11 Q Okay. And to your understanding did you ever receive
12 any other information about whether or not he could speak or
13 understand English from any later time?

14 A Yeah, almost immediately upon sentencing I learned that
15 he could speak and understand English, but had a family
16 member in Mexico that was an attorney, and was told by his
17 family member to play the, the uneducated immigrant. So, I
18 don't know how much he understood, but we were told by
19 family members that he spoke English and understood what we
20 were doing.

21 Q And, to your understanding, was there ever a plea offer
22 of ten years offered in this case?

23 A There was never a plea offered or discussed during my
24 involvement in this case. My understanding of the plea
25 offer that was made was voluntary and thirty. But then

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by Ms. White

1 again that was made well before I was involved, and the
2 whole time that I was involved it was a trial.

3 Q Okay. In regards to his testimony at trial, did you
4 and Mr. Collins talk with him as to whether or not he would
5 testify on his own defense?

6 A Yes.

7 Q And did he have a, a decision about it?

8 Were y'all -- what was your discussion with him or
9 recommendation or---

10 A Didn't, didn't make a recommendation.

11 Q Okay.

12 A David and I spent, I'm gonna say, a long time talking
13 to him. But it was twenty to thirty minutes talking to him,
14 and, and I think -- well, I know I anticipated, from the
15 beginning of the trial, and I'm confident that David did as
16 well, that Santiago would take the witness stand. But it
17 became abundantly clear that the State was going to question
18 him about the three masked men and other of his
19 indiscrepancies if you will. You know, another
20 indiscrepancy was the language.

21 I mean here we have, in the courtroom, two translators,
22 but they play a 9-1-1 tape where he speaks broken, but still
23 speaks English. When we were talking with him, Santiago
24 said if I take the stand what will they ask me or something
25 to that effect, and we told him about those things.

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by Ms. White

1 Now, I will tell you that we also told him that there
2 was evidence of accident already in the record and, you
3 know, the jury already knew that. But I can -- he, he came
4 out and asked should I testify and both of us said that's
5 your decision, that's not ours.

6 Q And ultimately the, the Court asked him and obviously
7 he did not testify?

8 A Correct.

9 Q Okay. In regards to the question of -- there's some
10 questions I guess about jury charges.

11 A Uh-huh. (Affirmative).

12 Q Some of the issues were raised on appeal. There was a
13 lot of discussion obviously. A lot of back and forth with
14 you and the State. Mr. Gowdy did some argument. You did a
15 good deal of argument.

16 What were the jury charges that ended up going before
17 the jury in that case?

18 A Well, what the jury was ultimately charged on --

19 Q Yes.

20 A -- was accident, voluntary, and murder.

21 Q Okay. What did you originally ask for?

22 A We asked for accident, self-defense, involuntary, and
23 voluntary.

24 Q Okay. And during your discussions with that, I guess
25 how did you feel that -- what was your impression of the

Douglas Brannon - Direct examination
by Ms. White

1 discussions about the jury charge?

2 A Well, we were most concerned with getting the charge of
3 accident because, based on the story that we had been told
4 by Santiago, it was a struggle over the gun. So -- and, and
5 early on in the charging negotiations the state said okay to
6 accident.

7 So, at that point that was a win for us. At least we
8 took it to be a win, and, and, you know, we, we asked for
9 voluntary and involuntary and, and self-defense, but our
10 client had never ever said he shot her in self-defense or
11 never said I was playing with the gun and it accidentally
12 went off or that I came home and she was with another man,
13 so I shot her. It was always there was a struggle over the
14 gun.

15 So, based on the evidence that had been elicited, I
16 mean we didn't build a case for, for self-defense or for
17 involuntary. I wasn't sure I built a case for voluntary,
18 but the Court said we did. So, I, I took it. Okay.

19 Q Now, I do know, at one point, the applicant had made a
20 mention of it, I know I'm just gonna point this out, that I
21 believe it might of been in one of his statements he had
22 thrown something in there about oh, it was self, it was
23 self-defense --

24 A Uh-huh. (Affirmative).

25 Q -- and you did try to, try to I think make that

Douglas Brannon - Direct examination
by Ms. White

1 argument.

2 A Yeah.

3 Q The State did argue against that in the fact that I
4 guess he had just kind of thrown that colloquialism in
5 there, and that, that was kind of it in saying, you know,
6 you can't just throw that in there and then kind of claim

7 it.

8 What was -- as you said, I guess, he never actually
9 said he had the gun and it was a fight for his life.

10 What was gonna be your argument or what was your
11 argument in---

12 A Well---

13 Q ---attempting to get that?

14 A The argument was kind of a totality of the
15 circumstances. You know, Your Honor, if you look at the
16 pictures of the interior of the home and, and the signs of
17 struggle that were apparent on Santiago himself, clearly
18 there was a dispute between he and his wife. But, quite
19 frankly, that was it, along with him, at one point, saying
20 it was self-defense.

21 Q Right.

22 Okay. And at the time the State v. Light case, the
23 fact is I know that, that the case has since been reversed,
24 but at the time it was good law.

25 Is that your understanding?

Douglas Brannon - Cross-examination
by Ms. ROSS

1 A Yeah, it wasn't overturned until after the trial of
2 this case.

3 MS. WHITE: Okay. I believe that's all the questions I
4 have at this time, Your Honor.

5 CROSS-EXAMINATION

6 BY MS. ROSS:

7 Q All right. Yeah, so that the State v. Light, it was
8 the, overturned July 14th of 2008 and this trial was
9 April 28th. So, three months later.

10 A Uh-huh. (Affirmative).

11 Q And the, the overturning of the old State v. Light was
12 still based on the history of self-defense law as long as it
13 has been, and, and essentially wasn't -- it seems like Trey
14 Gowdy's argument was, went to the fact unless you can show
15 whoever did the first push --

16 A Right.

17 Q -- and, and, and you said you couldn't, then, then you
18 couldn't have self-defense.

19 Now, that's not the state of self-defense law as we
20 know it, you would agree?

21 Someone -- I could push you and then that wouldn't
22 allow you to go and get a gun and hold it in my face and try
23 to shoot me and make it so I couldn't defend myself because
24 I pushed you in the first place. It has to be something
25 more to bring on the expectation of having to defend

Douglas Brannon - Cross-examination
by Ms. Ross

1 yourself like that.

2 A Is that a question?

3 Q Yeah.

4 I mean wouldn't you agree that that's the extent of,
5 of, of the self-defense when you talk about bringing on the
6 altercation. It's saying someone doing something that you
7 would expect to bring on that degree of altercation.

8 So, I couldn't throw a snow ball at you and that would
9 allow you to get a gun and kill me where I, well as I
10 couldn't defend myself.

11 A Well, I agree that, that any response has to be similar
12 in nature and severity. I would agree with that if that's
13 what you're suggesting.

14 Q That's what I'm saying.

15 If someone ups the ante, you can't go back and say
16 well, you started it by calling me and then that, a dirty
17 word?

18 A Right. But, but Santiago's story was that there was an
19 argument between he and his wife that basically started at
20 the front door of the house and ended up in the bedroom
21 where his wife grabbed the gun off of the window sill and
22 then they struggled over the gun.

23 Q Okay. Now, let me just go back to -- do you have a
24 copy of the transcript?

25 A I don't.

Douglas Brannon - Cross-examination
by Ms. Ross

1 Q Let me give you mine. I have all this stuff written
2 down in it, and tell me if I'm, what I'm pointing to is not
3 the right place.

4 On Page 614, Line 22 of the transcript, I believe you
5 said that you presented, presented no evidence that she, the
6 victim, had pushed first.

7 A Right.

8 Q Now, I would just turn to Page 288. I believe Isabel
9 Rios, at one point, says Eliza, the victim, pushed first and
10 then I also have as listed there at Page 314, Line 13.

11 A What was that last cite?

12 Q Page 314, Line 13.

13 A Yeah. But at Line 6 she says and he shoved Eliza. So,
14 I mean I don't know that it was---

15 Q Right.

16 But wouldn't you agree there's some testimony in the
17 record -- the jury heard something in that trial where, that
18 met that first element of, of self-defense, that maybe he
19 was without fault in bringing it on because here is some
20 testimony that he, that he was pushed first, that he did not
21 actually bring on the altercation.

22 A You know, ma'am, you're probably right that I misspoke
23 there. I, I probably should of said Your Honor, I can't
24 provide the Court with any evidence that it doesn't already
25 have as to who started the altercation.

Douglas Brannon - Cross-examination
by Ms. Ross

1 Q Right.

2 And all I'm -- would you agree that self-defense was an
3 appropriate charge in this trial?

4 A That's why I asked for it.

5 Q Correct.

6 And, and the reason it was appropriate is there was

7 evidence of self-defense in the testimony and then also in
8 Santiago's actual statement he says I was defending myself.

9 A Which the Court was already aware of, yes.

10 Q Right. Right.

11 Now, moving off of that, I want to sort of change
12 course for a little while.

13 As far as -- the transcript of the first trial, y'all
14 did get some of that transcript. I believe there was some
15 in the records.

16 A I'm sure we did, yeah.

17 Q And -- but it was very short. There wasn't a whole lot
18 to work with there.

19 A No.

20 Q And as far as just going to that 9-1-1 tape, you knew,
21 in your, your dealings with Santiago the whole time, you
22 knew that he had to have some English because you heard his
23 voice on that 9-1-1 tape?

24 A Correct.

25 Q And there were English words spoken?

Douglas Brannon - Cross-examination
by Ms. Ross

1 A Correct.

2 Q But wouldn't you agree that those were rather simple
3 words?

4 It wasn't advanced English that you were hearing?

5 A Right. I agree, yeah.

6 Q All right. And as far as just to give the Court some
7 idea of this Tarascan language, I think you gave him some,
8 but wouldn't you agree that this is a language about a
9 hundred thousand people or so in the whole world speak?

10 A Oh, yeah, and that's why it was so difficult to find a
11 translator, yeah.

12 Q And this is a native tongue that is lyrical and very
13 native and, and nothing like Spanish?

14 These are not the same languages?

15 A I would say that they're dramatically different. But,
16 but to say any more than that I would be speaking beyond my
17 education.

18 Q I don't want you to do that.

19 Okay. Now, just going, flipping over to this picture
20 that was put in evidence.

21 A Uh-huh. (Affirmative).

22 Q So, this was when the State was going through different
23 evidence --

24 A Right.

25 Q -- they chose not to put in --

Douglas Brannon - Cross-examination
by Ms. Ross

1 A Correct.

2 Q -- this glob of hair that belonged to Santiago. So,
3 you put that in evidence at that point.

4 A On cross-examination, yes.

5 Q Okay. And you, and you realized, due to that, you
6 didn't get final closing in the trial?

7 A Well, yeah, I'm certainly aware that if you introduce
8 evidence you lose the opportunity for closing argument.
9 But, again, at that point I, we -- at least I was still
10 contemplating that the client would testify.

11 Q Now, did you ask law enforcement about these, this
12 picture and bring out---

13 A Certainly.

14 Q ---so the jury---

15 A Yeah.

16 Q ---knew that there was this hair?

17 A Yeah.

18 Q And I guess while I'm on the hair, I'm gonna show you a
19 DNA forensic report.

20 A Uh-huh. (Affirmative).

21 Q Now, it says that the hair that was found in the living
22 room was a match for Santiago, not the victim?

23 A Right.

24 Q And that was a clump of hair---

25 A Right.

Douglas Brannon - Cross-examination
by Ms. Ross

1 Q ---that you took the picture---

2 A Right.

3 Q Now, it also -- I just turned to, your attention to the
4 hair from the bedroom floor. There was hair taken from the
5 bedroom floor. That was also analyzed and I'm gonna have
6 this marked and entered into evidence in just a second. I
7 forgot to earlier.

8 But here looking at this, this is the head of hair from
9 the bedroom floor?

10 A Uh-huh. (Affirmative).

11 Q These markers do not match Eliza, the victim?

12 A Right.

13 Q And, so, though it's unsure because there's not
14 sufficient to distinguish, there were enough to see that it
15 was not, not hers?

16 A It was not hers.

17 Q It could of been him?

18 A Right.

19 Q Is that new -- is that right?

20 A Yes.

21 Q Cause---

22 A I mean it says she's excluded, but he can not be
23 eliminated as a possible contributor.

24 Q Right.

25 And that's because there weren't enough markers to say

Douglas Brannon - Cross-examination
by Ms. Ross

1 it's definitely him?

2 A Right.

3 MS. ROSS: And I'd offer that as an exhibit. I believe
4 it's 2.

5 MS. WHITE: I assume that's the -- I haven't seen that,
6 but I guess---

7 MS. ROSS: I'm sorry. Let me---

8 (Pause.)

9 MS. WHITE: No objection.

10 THE COURT: Without objection, be Applicant's 2.

11 (WHEREUPON, the report was marked as Applicant's
12 Exhibit No. 2 and received into evidence at this time.)

13 Q And that was brought out -- I believe that was brought
14 out to the jury as well, that the hair, the hair -- there
15 was hair also found in the bedroom where it could of been
16 his or---

17 A Yeah, I mean there was hair from the living room down
18 the hallway and into the bedroom, and it there -- it may of
19 been in other rooms as well.

20 Q And also he was scratched and injured---

21 A Yes.

22 Q ---himself?

23 A Yes.

24 Q And his shirt was torn?

25 A Yes, I think she ripped a chain off of him. I think

Douglas Brannon - Cross-examination
by Ms. Ross

1. that's what it was.

2 Q Rips a medallion off---

3 A Yeah.

4 Q ---in the living room?

5 A Yeah.

6 Q All right. So, that was all testimony in the record---

7 A Correct.

8 Q ---of some aggression on the victim's part.

9 Now, just going to voir dire, did you -- I didn't see
10 in the Clerk's Office any written voir dire as an exhibit,
11 Court's Exhibit.

12 Did you pass up one?

13 A We asked the Court for some specific voir dire, but I
14 didn't write them down. They were basically standard voir
15 dire questions. I think we asked about the MADD and SADD
16 organizations.

17 Q Okay.

18 A There were two or three that we requested, which are
19 standard voir dire questions upon your request, and, and
20 Judge Couch gave all of those or asked all of those
21 questions.

22 Q All right. And I believe those were on Page 37 and 53
23 in the record, but there were none that specific to foreign
24 nationals---

25 A No, ma'am.

Douglas Brannon - Cross-examination
by Ms. Ross

1 Q ---are entitled to a, a fair trial?

2 A No, ma'am, no.

3 Q And nothing specifically to you must consider though
4 this person may not be an American citizen they're due a
5 fair trial?

6 A I did not ask for that voir dire.

7 Q And two strikes were used on this, on the strikes for
8 the---

9 A I don't know. I know there were two strikes on the
10 first jury selection for the first trial. I, I didn't see
11 the notes on the second jury strike. That, that may be
12 correct. I don't know.

13 Q All right. Now, just one question. I turned your
14 attention to Page 156, Line 3, and this is just a personal
15 thing where Trey Gowdy, in opening, says malice
16 aforethought. Aforethought does not mean premeditated.

17 Now, you didn't object at that time, did you?

18 A No, I didn't.

19 Q But I just show you the definition of aforethought in
20 West Law Dictionary.

21 what does that say aforethought means according to
22 West?

23 A In criminal law, deliberate, planned, premeditated.

24 Q All right. Now, just going through a little bit
25 through the transcript and my review. There were a number

Douglas Brannon - Cross-examination
by Ms. Ross

1 of objections made by the State and I'd draw your attention
2 to Page 222, Line 10.

3 THE COURT: Page 22?

4 MS. ROSS: 222, Line 10.

5 THE COURT: Excuse me.

6 Q Where the State seems to be making more of a statement
7 to the jury during their objection, and that's just an
8 example I picked up.

9 Did you object to that or ask to speak to the Court
10 outside the presence of the jury or anything at that point?

11 A Did I object to his objection?

12 Q No. Yes.

13 A No, I did the best I could to rephrase the question so
14 I, I could get the required or the, or the hoped for
15 response.

16 Q Okay. And then on -- just moving on to Page 436 at
17 Line 2. I think there's an example of Mr. Gowdy talking
18 about the repeated theme of an acute language failure on
19 the---

20 A Uh-huh. (Affirmative).

21 Q ---part of Mr. Santiago regarding questioning, and, and
22 that's part of a long list throughout the transcript of
23 leading questions on the part of the State.

24 Did you object at that time?

25 A No, ma'am, I didn't because I'm aware that leading

Douglas Brannon - Cross-examination
by Ms. Ross

1 questions are not necessarily objectionable as long as
2 they're not going to -- I can't think of the specific
3 language. But I've tried cases against Trey Gowdy for ten
4 years, and maybe, maybe I was wrong, but I, I did not, I did
5 not object and maybe I should have.

6 Q All right. And then just moving on to Page 243, Line
7 17. There's a statement, I don't believe that -- this is
8 cocounsel, Mrs. Crick.

9 A 243. What line?

10 Q Line 17.

11 Did you say I believed the children to the jury?

12 Is that the right cite?

13 A I'm trying to get the context of it here.

14 Q That's fine.

15 A Okay. And Line 17, that's an answer from the witness.

16 That's correct. I believed the children.

17 Q All right. And there was no objection to that,
18 allowing the State's witness to tell the jury who they
19 believed or who they should believe or not believe?

20 You didn't object to bolstering or anything like that?

21 A I did not.

22 Q All right. And then I would just go on to finally --
23 I, I believe on Page 374 and 414, the statement went into
24 evidence during the trial and there was no contemporaneous
25 objection despite the Jackson v. Denno hearing at the

Douglas Brannon - Cross-examination
by Ms. Ross

1 beginning of the trial.

2 A I don't think I'm -- I don't think I objected at the
3 point of admission, but I did object at the close of the --
4 I did raise all previous objections at the close of the
5 State's case.

6 Q All right. And then finally I just point out at, on
7 Page 355, Line 4, what I felt was an improper redirect line
8 of questioning beyond the scope, and while there were many
9 objections to that made I don't believe one was made at that
10 point.

11 A Well, it certainly doesn't appear that I objected. So,
12 I apparently missed one.

13 Q All right.

14 A Another one.

15 Q And -- now, just -- I think you've addressed some, the
16 issue of this Robert Reeder, the Milliken employee --

17 A Uh-huh. (Affirmative).

18 Q -- the twenty year Milliken employee.

19 A Yeah.

20 Q Now, you did object on Page 30, initially on Page 36,
21 Line 4 at the beginning of trial. I believe you did object
22 to him testifying.

23 A Okay.

24 Q Isn't that right?

25 A Yeah.

Douglas Brannon - Cross-examination
by Ms. Ross

1 Q And then later that, that objection was not brought up
2 again at the time that he, he testified in front of the
3 jury.

4 While you did cross to the issue on Page 329, Line 17,
5 you did cross Mr. Reeder to the issue that Santiago had to
6 pass this 40-hour test to get the job at Milliken. So, he
7 had a interest to pretend like he could speak English to
8 pass.

9 You, you pointed that out?

10 A I'm sorry.

11 What line again?

12 I'm sorry.

13 Q Line 17.

14 Did you bring up any of his or bring up the fact that
15 the Milliken records that you had made no mention of this
16 test and did not show any results of this test in---

17 A That's, that's correct and, again, the, the witness
18 testified that the tests were in English as well.

19 Q All right. But the tests -- you had the employee
20 records from Milliken in your file?

21 A I'm pretty sure we do.

22 Q And, and there was nothing -- there were no test
23 results or any showing of any test given in English in those
24 records?

25 A No.

Douglas Brannon - Cross-examination
by Ms. ROSS

1 Q Were there?

2 A No.

3 Q All right. And would you agree that that was some
4 prejudicial testimony from Mr. Reeder suggesting that the
5 whole interpreter of, the two interpreters in this whole
6 process was simply a farce?

7 A I agree it didn't help our case at all.

8 Q Now, as far as -- going back to the self-defense, and I
9 think this is, this is maybe a non-issue, but did you think
10 of going through the, the jury charge or something before
11 deciding whether Santiago would testify to, to ensure you
12 got defenses or had defenses in your jury instructions?

13 A Do you mean do you think I should have looked at the
14 elements to self-defense and tried to bring those out in the
15 questioning?

16 Is that what -- is that your question?

17 Q Yes.

18 A Okay. Well, I mean I, I think I have the four elements
19 to self-defense memorized and have had for ten years.

20 Again, my client's statement, other than the masked men, had
21 always been that he and his wife were in a struggle, that---

22 Q True.

23 But didn't he say he was defending himself?

24 A Yeah, but he also, at one point, told us that it was a
25 suicide attempt on his -- it was a suicide by his wife and

Douglas Brannon - Cross-examination
by Ms. Ross

1 that he couldn't let it be suicide because then she would be
2 damned to hell. So, I mean this case was kind of a moving
3 target all along. What we knew we could get was accident
4 and, and so---

5 Q Wouldn't you agree that, that getting an instruction on
6 accident or involuntary and self-defense are not all
7 mutually exclusive?

8 A You can get all those instructions?

9 A That's why we asked for all of them, that's correct.

10 Q All right. And because -- when Mr. Santiago, Mr. Rios
11 made that decision not to testify, without knowledge of what
12 instructions the jury would be given, was that a knowing and
13 voluntary waiver of his right to testify?

14 A Did he know all, what he could win and lose by---

15 A I remember distinctly, not during our conversation with
16 Santiago about whether he would testify or not testify, but
17 we spent probably four hours on the Sunday before the second
18 trial with our interpreter and we discussed at length
19 self-defense, voluntary, involuntary, and accident. We had
20 case law on all of those jury charges. I think I had the,
21 the G. Ross Anderson's charge book in front of us. I mean
22 we talked about those things at length.

23 So---

24 Q All right. But---

25 A ---I didn't talk about it again in the conversation --

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by Ms. Ross

1 I don't think I talked about it again in the conversation
2 immediately before the Court's questioning Mr. Santiago
3 about his testimony. But I know that we talked about it
4 before the trial. I know that.

5 Q Okay. And just going back to say that there was a
6 victory when you had the accident, now I know David
7 Collins -- you didn't do opening statements.

8 A Right.

9 Q David Collins did.

10 But of my reading of that, self-defense was part of the
11 opening statement that was presented to the jury by
12 Mr. Collins in opening, right?

13 A I agree.

14 Q So, wouldn't you agree that that was a very important
15 part of the jury, once they hear about it in opening, they
16 get some thought from the judge and they can hear about that
17 in closing too, that it's not just disappearing sometime
18 in-between?

19 A I agree that self-defense was more important before the
20 trial started than it was halfway through the trial.

21 Q All right. And -- okay. I'll leave it at that.

22 Now, on Page 688 you didn't object to the jury
23 instruction given, did you?

24 A Did not.

25 Q All right. And thereby, as you can see, see with the

Douglas Brannon - Cross-examination
by Ms. Ross

1 appellate opinion, you, you know, waived the ability to
2 appeal that issue to a Higher Court.

3 A I agree.

4 MS. ROSS: I've got nothing further of this witness.

5 THE COURT: Any redirect limited to what she went into?

6 MS. WHITE: Just briefly, Your Honor.

7 REDIRECT EXAMINATION

8 BY MS. WHITE:

9 Q Mr. Brannon, in regards to a couple of questions on
10 cross, the evidence in regards to self-defense, there were,
11 you said, a story about that he also claimed at one point it
12 was suicide.

13 Had his mother also said something in regards to the
14 story -- what did -- what had his mother, I guess, testified
15 or said in her statement regards to what the applicant had
16 done?

17 Do you recall that?

18 A I'm, I'm sorry. I don't recall. If you can give me a
19 page number I can look at it.

20 Q Okay. One moment and I'll look for that over here.

21 (Pause.)

22 Q And if you remember, recall, was her testimony pretty
23 straight forward?

24 Do you recall his mother's testimony I guess in
25 general?

Douglas Brannon - Redirect examination
by Ms. White

1 A No, ma'am, I really don't remember any testimony
2 specifically.

3 Q And did her statement come in too, at trial?

4 Do you recall?

5 A I don't have any recollection of that.

6 Q Okay. And I am -- I'm trying to find the actual
7 statement. I'm looking at her testimony around 296. I know
8 at one point it was testified to, and I will try to find the
9 statement for, that she said at one point that he had told
10 her he shot Eliza. I shot, I shot her or she was shot.

11 A Yeah. Well now I do remember -- her testimony was that
12 he came out of the bedroom and said either I shot her or she
13 was shot. She didn't remember exactly what he had said.

14 Q And that was part one of the kind of---

15 A Yeah, yeah.

16 Q ---parts of the story as well, is that right?

17 A Yes.

18 Q Okay. In regards to his marks, the scratches that were
19 supposedly on his face as well --

20 A Uh-huh. (Affirmative).

21 Q -- had the applicant also claimed that he had been hit
22 in the face with a weight?

23 Hadn't he testified that---

24 A Yeah, I think, I think---

25 Q ---his wife had hit him in the face with---

Douglas Brannon - Redirect examination
by Ms. White

1 A He testified to something, yeah.

2 Q ---a two or three pound weight?

3 A Yeah.

4 MS. ROSS: And I'd object to that. He never testified.

5 I think that was one of the statements.

6 Q I'm sorry. It was in his statement that was presented.

7 A I remember it being said that, yeah.

8 Q Okay. Was there ever any testimony that there were any

9 marks on his face as a result from that weight or---

10 A I'm sorry, ma'am. I don't remember specifically.

11 Q Okay.

12 A I know he had marks on his face and I remember there

13 being something said about her using an object.

14 Q Okay.

15 All right. That's all I have, Your Honor.

16 MS. ROSS: Just briefly on redirect.

17 THE COURT: Recross.

18 MS. ROSS: Sorry. Recross.

19 RECROSS EXAMINATION

20 BY MS. ROSS:

21 Q I came across this in a lot of the notes that came from

22 I guess your file or Mr. Collins file.

23 Does that look familiar at all?

24 A That's not my writing. I, I don't -- no, I can't say

25 that that looks familiar at all.

Douglas Brannon - Recross examination
by Ms. Ross

1 Q Okay. As far as when Isabel Rios testified, would you
2 agree that there were certainly some interpretation issues
3 during her testimony at trial, some confusion?

4 A Yes, I, I don't know how much of it was the interpreter
5 being unable to hear the response or trouble interpreting
6 what was said. But yes, there was difficulty during her
7 testimony.

8 Q All right. And would you agree that Trey Gowdy made
9 the most of that difficulty with interpretation in an
10 attempt to show deception?

11 A That's Trey Gowdy, yes, ma'am.

12 Q And -- all right. I believe that's all I have.

13 All right. Thank you.

14 THE COURT: All right. Thank you, sir. You may step
15 down.

16 WITNESS: May I be excused, Your Honor?

17 THE COURT: Any objection to the witness being excused?

18 MS. WHITE: No objection from the State, Your Honor.

19 MS. ROSS: None.

20 THE COURT: Thank you, sir. You may be excused.

21 MS. WHITE: The State would call David Collins to the
22 stand, Your Honor.

23 THE COURT: Mr. Collins, come on around and place your
24 left-hand on the Bible and raise your right-hand.

25 DAVID COLLINS, being first duly sworn,

David Collins - Direct examination
by Ms. White

1 testified as follows:

2 THE COURT: Please have a seat in the chair and pull
3 the chair up to the microphone.

4 DIRECT EXAMINATION

5 BY MS. WHITE:

6 Q Mr. Collins, if you could, state your name for the
7 record?

8 A I'm David Michael Collins, Junior.

9 Q And you, I guess we could say, were first chair kind of
10 on this case?

11 A Yes, ma'am, Mr. Rios and his family hired me shortly
12 after this incident around Thanksgiving of 2006.

13 Q And you were the one that brought Mr. Brannon on board,
14 is that correct?

15 A That is correct. As, as, as he indicated, Mr. Brannon
16 and I have, throughout our careers, tried several cases
17 together and we've worked well together. So, when it became
18 clear this was going to be a trial, I asked Mr. Brannon to
19 assist me during the trial of this case.

20 Q And could you explain a little bit, I guess, your
21 strategy in how y'all divided things up?

22 A Yes, ma'am, over the years we found that I tend to be
23 the one that tells the story. Mr. Brannon, at least
24 initially, Mr. Brannon tends to like to make the arguments.
25 So, I usually do the opening. Mr. Brannon does the closing.

David Collins - Direct examination
by Ms. White

1 I tend to handle the more scientific witnesses and some of
2 the lay witnesses that help bring out the story. Mr.
3 Brannon tends to specialize more in the police officers and
4 the more combative witnesses.

5 Q Okay. And in this situation, we've testified about a
6 couple things, and I'll go over a few things that might be a
7 repeat with Mr. Brannon's testimony, and a few things that
8 would be repeat with the applicant's testimony.

9 In regards to the, the third party defense, we're just
10 kind of going over that, your philosophy on the issue of
11 the, the story of the masked men was to do what in regards
12 to that story?

13 A We wanted to get as far away from that story as we
14 could and hopefully minimize it as well as, as we could.
15 There was no doubt that it was going to come up and be an
16 issue especially if the, if the statements came in. But our
17 focus was to -- our best defense, I think, was just to try
18 and minimize it and put the focus elsewhere.

19 Q And what was your main concern if that, that story was
20 presented to the Court or to the jury?

21 A Well, there were a couple of concerns. The, the first
22 one being his lack of credibility because, at this point
23 from the time he picks up the phone call for the 9-1-1 at
24 least for the next four to five hours he's telling the story
25 of, depending on which version you read, somewhere between

David Collins - Direct examination
by Ms. White

1 three and six black masked men come into his family and
2 shoot his wife, and then he changes and tells a different
3 story. So, there's a credibility issue, which was number
4 one.

5 The second concern we had was we were going to have
6 black men and women on the jury. And, so, you know, here we
7 have a Hispanic young man who's blaming somewhere between
8 three and six black men. There -- that added an additional
9 component to, to that story that we wanted to avoid as well.

10 Q Okay. In this case in general, the evidence that you
11 had, what kind of evidence did you think supported your
12 defense?

13 A Well -- and I guess I want to clean up a few things
14 that were, that were said earlier. In my opening statement,
15 the, the, the word self-defense never came out. I don't
16 think that word was ever used by us until the, the jury
17 instructions primarily because the story that had been told
18 to us by our client and the story that we had to work with
19 was that he came home, there was an argument, there was an
20 altercation that spread through the house, they wind up in
21 the bedroom, she introduces the gun into the fight, and
22 then, at that point, the gun goes off and she's dead.

23 At no point did Mr. Rios ever acknowledge that he did
24 the shooting. And, so, accident was the, was the theme of
25 the story that we had from the very beginning, from opening

David Collins - Direct examination
by Ms. White

1 statement through. Had the evidence presented itself, we
2 were hoping for other -- you know, involuntary, voluntary,
3 self-defense were all things that we would of loved to have
4 gotten. But especially by the time we got to the trial, the
5 end of trial and it was conceded essentially that we were
6 going to get a charge on accident, we had -- our, our theory
7 had played out. We didn't get extra stuff that we wanted.
8 But at least what Mr. Rios had told us we had been able to
9 get in front of the jury and at least were in a position to
10 make that argument.

11 Q So, you felt like your story had essentially stayed
12 consistent and been presented as you had wanted it to---

13 A The best---

14 Q ---to the jury?

15 A The best we could. I think Mr. Brannon probably said
16 it best when he said we were working with a moving target.
17 That was, in 13 years, almost 13 years of doing the, this
18 work, this has been, without a doubt, the most frustrating
19 criminal defense case I've ever had. It was extremely
20 difficult to pin down what the truth was, what the story
21 was, what really happened, and what we were going to argue
22 to a jury.

23 So, yes, I mean by the, by the time we got to the end,
24 we felt like we had successfully told and consistently told
25 a story that could hopefully be successful for Mr. Rios.

David Collins - Direct examination
by Ms. White

1 Q And just to follow-up on that, frustrating to pin down
2 the argument because of what?

3 what was the trouble?

4 A Well, basically at the end of -- as Mr. Brannon said,
5 at the end of the second, second trial after the sentencing,
6 it came to our attention that basically Mr. Rios had been
7 told by his family members in Mexico to play the uneducated
8 immigrant. Basically to play stupid throughout the whole
9 process, and that hopefully, by playing stupid, that there
10 wouldn't be enough evidence to convict him. And, so, the
11 lack of cooperation, the lack of information just made it
12 extremely difficult.

13 Q And you didn't have any evidence to assist you in
14 showing that his wife ever had a weapon or had necessarily
15 been violent towards him in the past or did you have any
16 evidence?

17 A No, ma'am, we didn't. We -- that was one thing that,
18 that we essentially spent 18 months trying to find, the,
19 the, the firearm, the pistol that was used, that was in that
20 argument that night and ultimately killed his wife would
21 have been the key piece of evidence. But the last person
22 who had control of that was our client. But he had -- he
23 couldn't produce it or at least or client's family, he or
24 his family, and couldn't or wouldn't produce it.

25 we asked for witnesses that could verify that they had

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by Ms. White

1 seen her with a firearm, they had known that she purchased a
2 firearm, that she carried a firearm, that could have talked
3 about her violent behavior, any of those things, and, and we
4 were never given the first name.

5 So, no, we had nothing that could, that could
6 corroborate the fact that she was the aggressor and that she
7 was the one that introduced the firearm. As a matter of
8 fact, I guess one of the things that I think we did best at
9 that trial was limit the, a lot of the photos that could of
10 come in. There were photographs in the initial police
11 investigation that showed they found a box of .38 ammunition
12 that was partially empty I believe. There was a box of
13 9-millimeter ammunition I believe. There was a box of .45
14 caliber ammunition, all of which are handgun ammunition.
15 There was a 7.62-millimeter or 7.62-millimeter ammunition in
16 the house.

17 There was a photograph of a rifle with a banana clip or
18 a, an elongated magazine, which would of -- I'm not a
19 firearms expert, but my, my supposition was that the
20 7.62-millimeter rifle ammunition would of gone in that
21 firearm.

22 So, there were other things in that house, in and about
23 the home, that would have argued against this story of it
24 being her gun, she being the only one with a firearm, and
25 her being the one that introduced that, introduced it into

David Collins - Direct examination
by Ms. White

1 the fight. So, that was one thing that we were able to at
2 least minimize or keep to at least minimize the damage
3 during trial.

4 Q Okay. Hang on one second for me.

5 (Pause.)

6 Q In regards to your conversations as well and I asked
7 Mr. Brannon, were you able to meet with Mr. Rios generally
8 with an interpreter?

9 A Yes, ma'am, ironically this was also one of the most
10 expensive criminal defense cases for me to try because every
11 time I met with the family or with Mr. Rios, except for some
12 surprise visits, there was always Mrs. Sequora Wall present
13 and her -- she was billed through her service, the Bilingual
14 Secretaries. There were some instances where the family
15 came by unexpectedly or unannounced, and in those cases,
16 Maria, who testified earlier for the, Mr. Rios, his younger
17 sister, she would actually serve as the interpreter during
18 those meetings for us.

19 Q And did you feel comfortable that, during your
20 conversations with the family or Mr. Rios, that he was
21 understanding the concepts or the discussions in regards to
22 either your strategy or the defenses that you could offer?

23 MS. ROSS: And I'd object to any testimony about what
24 my client understood or didn't.

25 THE COURT: Rephrase.

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by Ms. White

1 MS. WHITE: Sure, Your Honor.

2 Q To your understanding or from your experience, did he
3 ever indicate to you that he was having trouble
4 understanding discussions that you had with him?

5 A No, there, there were times when it took a little
6 longer with, with he and his family to explain the process
7 and the procedures because this was, for lack of a better
8 word, foreign to them. But no, we actually spent a great
9 deal of time with he and the family explaining the process,
10 what would take place, what could take place, and there was
11 never any indication from he or his family that we ended the
12 conversation or went into trial before he understood what
13 was going on.

14 Q In regards to his testifying, Mr. Brannon talked a
15 little bit about your four hour meeting.

16 Do you have any thoughts about the fact of talking with
17 him about whether or not he would testify at trial?

18 A We would have that discussion twice. The first trial
19 was January -- I believe it was January the 7th or
20 8th of that, 2008. That was the one that was mistried
21 early on because of the discovery issues. But we would of
22 had that conversation prior to that trial, and then we would
23 of had that conversation again prior to this one later that,
24 later that spring.

25 So, yes, he -- we did discuss in detail before both of

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1 those trials his option and his right to testify, the pros
2 and cons of that testimony, and what he could expect, and
3 then again my review of the transcript indicates that we
4 broke Wednesday night near the end of the State's case.

5 And, so, we had Wednesday night and Thursday morning
6 before we resumed Court to continue that conversation with
7 Mr. Rios about his decision whether or not to testify. We
8 went into Court on Thursday, had some other housekeeping
9 matters to clean-up, and then, at that point, the issue of
10 Mr. Rios testifying came before the Court. Mr. Brannon I
11 believe was the one who actually informed Judge Couch that
12 Mr. Rios had informed us he did not want to testify, but out
13 of an over abundance of caution, we actually asked Judge
14 Couch if he would go through that colloquy with Mr. Rios
15 there in open Court.

16 So, he actually did that that Thursday of trial. Judge
17 Couch actually went through the rights he would be giving up
18 and, and pros and cons of his testimony. So, yes, there was
19 a discussion with us and then there was a discussion in open
20 Court with Judge Couch.

21 Q And did you and Mr. Brannon have a chance to talk about
22 the jury charges or how you were gonna proceed with that at
23 the close of the State's case -- how -- or did Mr. Brannon
24 handle those solely?

25 A No, we -- that was, that was a joint discussion between

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by Ms. White

1 us. Again, Wednesday night was, was a, a long evening. But
2 we had done the research. We actually, at that point, Mr.
3 Brannon's office was right across the street in the
4 Cleveland Law Range. And, so, during recesses and evening
5 breaks, that's where we would go, and that evening we sat in
6 his conference room and went through, as he, as he
7 indicated, Judge Ross' jury charge book.

8 We did research, pulled cases, excuse me. And, so,
9 that was a discussion we had that evening. Mr. Brannon
10 handled it in the courtroom. But the decisions for what to
11 ask for were a joint decision.

12 MS. WHITE: Okay. One moment, Your Honor.

13 (Pause.)

14 Q In regards to a plea offer, Mr. Rios testified that he,
15 you had informed him that he had or that, I assume, the
16 State had made a ten year offer and from the way he
17 discussed it it sounded like he was referring to the
18 voluntary manslaughter, and I'm not wanting to put words in
19 his mouth, but that's what it sounded like.

20 Do you recall any plea discussions with the State?

21 A There were plea discussions, and with all due respect
22 to our current, current representative, plea negotiations
23 with Mr. Gowdy are kind of like a tap dance or a ballet.
24 Everybody kind of dances around the issue till you figure
25 out where everybody is before there, before there's a firm

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1 offer of any sort.

2 I went back through my notes from that time period.

3 There was an indication from him, during a phone call, that

4 they might consider a plea to voluntary with a

5 recommendation of thirty years with the leave to argue for a

6 lesser sentence. I don't have any notes of my conversation

7 with Mr. Rios. But my recollection is that I then went back

8 to Mr. Rios and said it's not a firm offer, this is what

9 they're considering bringing to us, what kind of, what would

10 your response be, what would you be willing to do if a plea

11 negotiation is available. Mr. Rios' response was that he

12 would be willing to do something that had a cap of ten

13 years. But -- so, at that point we were twenty years apart.

14 The State wanted thirty. Mr. Rios wanted twenty. Went

15 back and forth with Mr. Gowdy a few more times, but there

16 was no budging from either side. And, so, at that point

17 plea negotiations broke down, and it was at that point that

18 I contacted Mr. Brannon and said, you know, I need your,

19 need your help, it's gonna be -- if you don't help me it's

20 gonna be two on one, and Doug was more than happy to help

21 out.

22 Q And, so, to clarify, the State was willing to

23 potentially offer thirty, and you said Mr. Rios wanted a cap

24 of ten?

25 A That is correct.

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1 Q Okay. And, so, at that point you felt the gap was
2 pretty wide?

3 A It was, it was, it was twenty years apart and nobody
4 was moving at that point.

5 Q Okay.

6 okay. I think that's all I have at this time, Your
7 Honor.

8 MS. ROSS: All right. May it please the Court?

9 CROSS-EXAMINATION

10 BY MS. ROSS:

11 Q Mr. Collins, okay, so you were retained on the case---

12 A That---

13 Q ---by the family?

14 A That is correct, yes, ma'am.

15 Q And you don't have a written plea offer?

16 This was just something, like you said, sort of a tap
17 dance you felt like?

18 A Right, it was just, it was just a little dance around
19 that, that happens on most cases and we never got to a firm
20 offer.

21 Q All right. And the first trial, my understanding from
22 Mr. Brannon was it was very short, that you never get to the
23 point of whether he was gonna testify or not because it was
24 a mistrial pretty early on?

25 A It was mistried. But I mean it, it would be

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1 irresponsible for us not to have discussed that with him
2 prior to coming to Court. I mean we -- when, when we start
3 a trial, Mr. Brannon and I work with a client to the point
4 where if we don't get those opportunities for long
5 discussions during the trial or things go much quicker than
6 expected, we have to be prepared from beginning to end and
7 we can fine tune it through it. But, yeah, we had to have
8 this conversation before, before we picked the first juror.

9 Q All right. So, you'd already -- did you have your
10 Tarascan interpreter there at that point?

11 A No.

12 Q Tarascan?

13 A And I -- there, there may need to be some clarification
14 on whether it's Tarascan or P-urhepechas. I think you refer
15 to it -- you'll see it as both in the transcript.

16 Q All right.

17 A Our understanding, what, what was conveyed to us was
18 that this was a dialect of Spanish. It was a Spanish
19 dialect from a, an area I believe near Guadalajara is what
20 the family told us. But it was a relatively small
21 indigenous group that spoke this language.

22 We hadn't or not we, but the Clerk of Court had an
23 extremely difficult time, in January, finding somebody to
24 come for trial, and then I believe there was something that
25 happened with that translator. Number one, nobody was happy

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1 with him because he had only been in the country three
2 months, and he didn't understand the, the system. But for
3 some reason we then -- the second go around we had a second
4 or a different translator for Tarascan.

5 Q This is kind of off, but did you call the Mexican
6 consulate by any chance?

7 A No, I did not. We actually, during the course of it, I
8 had two Spanish interpreters that we used for various
9 purposes, and we had their organization attempt to locate
10 somebody because of their contacts in that Spanish speaking
11 community, and we were never able -- no one was ever able to
12 find anyone of, that could speak Tarascan or P'urhepechas.

13 Q Did anyone -- so, you didn't contact the Mexican
14 consulate?

15 A And we didn't -- you know -- for 18 months, we
16 didn't -- number one, it would of been impractical to have
17 addressed.

18 Q Okay. I'm just asking the question---

19 A Okay.

20 Q ---and just another thing, there's a guy, Steven
21 Malone, who they often recommend out of Florida who's an
22 expert in Tarascan defense.

23 Did anyone tell you to contact him---

24 A No, ma'am.

25 Q ---or did you get there?

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1 A No, no, and if I may finish my, my previous thought.

2 Q Sure.

3 A Because it's such a limited number of people that speak
4 it, and a limited number of people in this country who speak
5 that language or could of served as an interpreter, it would
6 of been impractical for us to have one over this 18 month

7 ~~period for every meeting, number one. The expense would of~~
8 ~~been prohibitive, number two, and, number three, we didn't~~
9 have any language problems using a Spanish interpreter for
10 18 months.

11 I mean there was, there was no language barrier -- if
12 there were particular issues that needed, that came up that
13 needed something with that dialect, Maria was able to step
14 in and help, and help if there was any, any questions.

15 But---

16 Q But---

17 A ---that never came up.

18 Q If you had one -- I guess this is off, but have you
19 ever tried to decide competency to do a will for someone
20 like an old man to decide whether they're competent or not,
21 and they often will act competent when they're actually not?

22 Have you ever experienced anything like that?

23 MS. WHITE: Your Honor, I object to relevancy in this
24 situation.

25 MS. ROSS: Well, I object to him testifying to what my

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1 client understands or doesn't.

2 THE COURT: All right. Sustained and sustained then.

3 Q Just moving on, I guess despite, despite y'all going
4 through Judge Anderson's, all his, I guess his file and his
5 disk on, on jury instructions, did you ever hand up a
6 written request for jury instructions to the judge during
7 this trial?

8 A I do not recollect if we submitted written jury
9 instructions or not.

10 Q Did---

11 A I -- going back through the transcript, it seems to --
12 I seemed to remember a reference by Judge Couch to having
13 multiple versions of at least one, one requested charge and
14 he was gonna pick between them. So that -- I assume that we
15 had, but I don't have the Court's file and to, to know if we
16 did or not.

17 Q And I believe the judge does have the clerk's, from the
18 Court's file on this because the Clerk of Court of the
19 package---

20 MS. WHITE: It's the package from what we got in the
21 Clerk's Office, but I don't believe we had any -- we don't
22 get -- they don't include everything that was submitted to
23 the judge. So, I don't---

24 Q Okay. Well, would it surprise you if I've reviewed
25 everything submitted in the Clerk's Office and there were no

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by Ms. Ross

1 written, defense written request for jury instructions in
2 that file?

3 A It, it -- that is completely possible. Let's, let's
4 put it that way.

5 Q All right. Now, I'm just going down to that there were
6 a number of, I'm just reviewing the transcript, a number of
7 times where Trey Gowdy would redirect and question, I think
8 out of 14 witnesses, ten he engaged in re, redirection.

9 Most of these I think were Brannon's.

10 But on Page 185 did you would object to his redirect
11 question at that point I think?

12 I'm sorry. That was with, that was with solicitor --
13 all right. And I think that was like one, Line 1, 2.

14 Sorry. It was 184 starting at Line 17, and then going onto
15 185.

16 Did you, did you object to the redirect at that point?

17 MS. WHITE: I think that was Doug's questioning.

18 A That was actually Mr.---

19 Q I, I apologize then.

20 A ---Brannon, but I can. If you'll give me just a
21 moment.

22 Q Was there an objection recorded on the, on the
23 transcript or you can, you can?

24 A Then -- that was Mr. Brannon, that was Mr. Brannon's
25 witness.

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by MS. ROSS

1 Q Okay. I apologize.

2 A But no, there's -- it was a very short redirect, and it
3 appeared that it was a direct follow-up to a question from
4 Mr. Brannon. So, I don't know that there would of been a
5 basis for one. But had there been a basis, no, one was not
6 made.

7 Q Okay. And I think this was yours on Page 312, Line 10.
8 I think and you did object, correct, on Line 19.

9 A Yes, ma'am, that's -- according to the transcript, I'd
10 objected that he had, excuse me, that he had gone beyond the
11 scope of my cross-examination.

12 Q And then it continued to question. I guess that was,
13 that was---

14 A Well, and the Court, the Court overruled my objection
15 and allowed him to continue, and, again, I, I think I made
16 at least one other objection during that period and, and
17 lost again. So --.

18 Q And then on Page 355 there was a, at Line 4, another
19 redirect, and I don't believe you objected to that one. It
20 was, in fact, yours, and I think it might of been Mr.
21 Brannon's as well. So, you can disregard that one, and I'll
22 just move on.

23 Now -- so, you did the opening. You stated in direct
24 earlier that, that you never specifically argued
25 self-defense in the opening, and I would just refer you to

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1 the bottom of Page 163, Line 21, and it states in the living
2 rooms she attacks him. She pulls his hair, scratches his
3 neck, yanks off his medallion.

4 This, this takes place in the living room, and then
5 going on to Page 164, talks more about the fight escalating
6 and escalating, and Line 16 Santiago was afraid his wife,
7 who's already been mad at him, who's been yelling at him,
8 who's already attacked him and pulled his hair, scratched
9 him, yanked his necklace off, she's tried to hit him with a
10 dumb bell, she's pushed him down. Santiago's not afraid for
11 his life. But also afraid for his mother, who's in the
12 home, his two younger siblings, his brother, his sister, who
13 are also there.

14 Now, in that, while you don't say the words
15 self-defense, wouldn't you argue that there is some -- I
16 mean wouldn't you agree that there is some presentation of a
17 self-defense argument in that opening?

18 A Yeah, well, I would. I mean in that there is, there's
19 a description of a fight and that's no doubt -- part of the
20 reason we put it---

21 Q well, I just -- could the jury---

22 A May I finish, ma'am, please?

23 Q Okay.

24 A Okay. You read through two pages of the opening.

25 Q Uh-huh. (Affirmative).

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by Ms. Ross

1 A You got the fight. But you missed the most important
2 part, which is on Page 165.

3 Q All right.

4 A They struggle over the gun and Eliza dies. Eliza gets
5 shot in the face and Eliza falls to the floor dead. That's
6 the information, that's the most information we ever got
7 about what happened in that room from Mr. Rios. That's as
8 far as we could push it.

9 Mr. Rios never acknowledged that he did the shooting,
10 and my understanding, at least at that point in time, and
11 what the judge ruled on us during jury arguments was that
12 for there to be self-defense, there had to be an
13 acknowledged shooting. It's -- it was -- we had an accident
14 case because that's all the information Mr. Rios ever gave
15 us, and that's what I argued. There was a fight, it got out
16 of hand, and the gun goes off.

17 Q All right. Now, could the jury have interpreted from
18 that that there was a self-defense argument made there?

19 A I sure hope they could have. But I couldn't say that.

20 Q Okay.

21 A And on Page 3, 432, Line 5.

22 A I'm sorry.

23 Which page, 342?

24 Q 432, Line 5. Part of the statement, she had her finger
25 on the trigger and I had my hand on the barrel. So, both

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1 hands were on the gun according to that statement.

2 A Correct.

3 Q All right. And then 354, Line 16. My recollection in
4 doing this was that he said she had the gun and he fought
5 her over the gun and he had his hands on it. He got it
6 turned towards her. The gun got, went off.

7 A what page are you on?

8 Q That's 354, Line 14 through 18. The gun went off and
9 she fired.

10 A Right.

11 Q All right. And those two -- and those were essentially
12 places in the record where bits of Santiago's statement came
13 before the jury?

14 A Again, yes, she introduces the gun into the fight and
15 it goes off.

16 Q Now, as far as just switching bases, as far as the she
17 shot herself, she didn't shoot herself, wasn't part of this
18 defense that, the idea that, in the Catholic faith, it's a
19 sin to commit suicide and that that was the belief of
20 Santiago when he is avoiding telling, when he's telling the
21 story of the two other men doing this?

22 A We researched that. As a matter of fact, I think Mr.
23 Brannon, at one point, actually interviewed a Catholic
24 priest, but I believe the one opportunity that Mr. Brannon
25 had to bring that up during trial, that evidence was

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by Ms. Ross

1 actually excluded and that -- I -- forgive me. I don't know
2 where, but it may of even been in his closing argument that
3 he got objected to and sustained for mentioning something
4 that wasn't in evidence.

5 Q Did y'all have a priest on, on standby for the defense
6 case as a witness?

7 Was he -- was the priest on the witness list?

8 A We had talked to the priest about coming to testify.
9 But after Mr. Brannon's interview with him, we decided that
10 was not somebody that we wanted in the courtroom, and I --
11 for -- I do not remember the specific reason why, but we
12 elected, after those conversations with the priest, not to
13 call him as a witness.

14 Q All right. Now -- and that, and that just goes to the
15 stories. It goes to talk about the shooting, the moving,
16 moving target.

17 But the reason for the priest, that, that was initially
18 an explanation of why a story was made up and it was just
19 the, the feeling that the family didn't want it to look like
20 there was a suicide---

21 A That, that was one---

22 Q ---and him hiding the gun and all that?

23 A That was one of the expectations that Mr. Rios gave
24 for---

25 Q Y'all talked about---

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by Ms. Ross

1 A If memory serves me correctly, that, that would of been
2 one of the reasons he gave for why he made up the story,
3 yes, ma'am.

4 Q Okay.

5 A But the -- again, the downside to that was if you bring
6 in a Catholic priest and try to make the wife look like a
7 devout Catholic, that makes it a whole lot more difficult to
8 believe the struggle story.

9 Q And I understand that, that's, that's true, and I
10 just -- as far as -- that was the reasoning that y'all had
11 been told why these stories were like they were and why they
12 had changed?

13 A Yeah, I had also been told by Mr. Rios that one of the
14 reasons for his story was that he thought his wife was
15 alive, that she was not dead at the time of the 9-1-1 call,
16 and he didn't want her to get in trouble for having had this
17 firearm in the house.

18 Q Okay.

19 A And, so, he was trying one story. The other story was
20 he was trying to protect her. One was that he didn't want
21 the, the suicide to be made public. And, so, there were
22 various reasons for why that, that nine, that three masked
23 men story was out there.

24 Q And just as, as far as the statements, were y'all
25 considering any testimony about why no videos were made, why

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by Ms. Ross

1 statements aren't taken in Spanish and signed, and just a
2 general attack on the way the State didn't call again the
3 consulate for an interpreter and all that as far as the way
4 the police initially investigated the case and got the
5 statements and I guess I mean this for the Jackson v. Denno
6 hearing pretrial?

7 A. I don't remember if those, those particular issues were
8 raised, the lack of recording. I know it's one of those
9 things that's, that we, we've argued before. It's not
10 something we always argue, but there are times when that is
11 been appropriate that -- so, so, it would of been an
12 available avenue. I don't know if -- I don't remember if we
13 pursued it or not at the Jackson v. Denno. It -- if it's
14 not in the transcript, then we didn't do it.

15 But it -- yeah, it's a, admittedly, it's a viable
16 tactic. In this particular case, the language issue was,
17 was front and foremost and we had several witnesses who were
18 in and out of the room. I think it was more an issue of
19 understanding -- it's more of a question of whether or not
20 he understood. Not what was actually said or written. So,
21 that may of explained it, but I don't know why.

22 Q. All right. And, and one last thing.

23 Did you ever get anything in discovery just to any kind
24 of notes of a statement in Spanish, and I guess what I'm
25 talking about is obviously an English, a translation was

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by Ms. Ross

1 presented to you of his statement, and, in fact, a number of
2 them that he supposedly signed.

3 But were there any police notes or anything so that you
4 could look into the interpreter, you know, see what was
5 originally written down to get to that statement?

6 A Not -- the only Spanish document I remember seeing were
7 the bail forms, and I, I don't remember actually seeing a, a
8 statement written in Spanish, and, now that you mention it,
9 I don't know if we had a recording of that interview session
10 or not. I, I, I -- right off the top of my head I don't
11 remember. But no, I do not recollect a Spanish statement.
12 I do not remember if there was a recording of that interview
13 or not.

14 Q And I think you provided your file?

15 A No, you probably have the solicitor's file.

16 Q Oh, okay.

17 A Yeah, you have the solicitor's file. Not the, not the
18 defense files.

19 Q Okay. And that wouldn't have put -- if that doesn't
20 contain a recording, maybe there's no recording there or do
21 you---

22 A Probably not. I know there are some CD's in my trial
23 file. But my guess is that that's the 9-1-1 and the
24 enhanced 9-1-1. So, I don't, I don't know of a recording of
25 the interview, no.

David Collins - Cross-examination
by MS. ROSS

1 Q And just one sort of last thing off -- so, no
2 instruction was given for self-defense as it turned out?

3 If there had been, y'all recognized y'all would of had
4 a right to request that the State disprove self-defense at
5 that time?

6 A It would of -- unlike Mr. Brannon, I don't have the
7 four elements memorized.

8 Q Oh, okay.

9 A And, so, exactly how that would have changed the tenor
10 without going and doing some research I, I do not know.

11 MS. ROSS: Okay. I've got no further questions.

12 THE COURT: Redirect?

13 MS. WHITE: Just briefly, Your Honor.

14 REDIRECT EXAMINATION

15 BY MS. WHITE:

16 Q In regards to the, the testimony, you said that the
17 most important thing in your opening was the struggle over
18 the gun versus the argument and how that started, and, and I
19 know we went through and pointed out a few places where the
20 testimony was that he had maybe his hand on the barrel while
21 the victim had her hand on the trigger of the gun.

22 Were gunshot residue tests done in this matter?

23 A Yes, ma'am, they were actually gunshot residue tests
24 done on both Mr. Santiago Rios and on the wife. Both of
25 which were negative for any gunshot residue.

David Collins - Redirect examination
by Ms. White

1 Q And the testimony was done about how long you can do
2 gunshot residue tests on either a living person versus a
3 deceased person?

4 A It's my recollection. I do remember that -- I guess
5 the one thing that sticks in my mind from that expert was
6 their explanation that Mr. Rios, while he was alive, would
7 of had the ability to wash his hands and take other steps to
8 remove the gunshot residue where as his wife, who was
9 deceased at that point, would not of had that, that same
10 opportunity.

11 Q Okay. And, so, no gunshot residue on, on either hands
12 in that situation?

13 A No, ma'am.

14 Q The Catholic -- I wanted to point out, you had
15 mentioned, you thought, at one point Mr. Brannon had raised
16 the issue of the Catholic religion and a, and a sin, suicide
17 being a sin. If you'll note Page 426.

18 Is this the point at which you were referring?

19 I believe it was the cross-examination of Deputy Diaz.
20 Mr. Brannon was leading to a question regarding trying to
21 get Mr. Diaz to discuss the Catholic religion in regards to
22 the shrine I believe that was displayed on the inside of the
23 home as you entered.

24 Is that the, the point at which you were referring?

25 A That must of been it. That's cross-examination of, of

David Collins - Redirect examination
by Ms. White

1 Deputy Angel Diaz and it appears that Mr. Brannon wanted to
2 talk about the Catholic religion and how suicide was viewed
3 within that community or within that faith, and I think,
4 flipping over a few pages, the Court basically told us that
5 while there were photographs of a, of some things that
6 indicated, that seemed to be a Catholic shrine or altar at
7 the house that there was nothing else that would of given
8 the Court the ability to, to go forward.

9 MS. WHITE: Okay. That's all the questions I have at
10 this time, Your Honor.

11 THE COURT: Any recross?

12 MS. ROSS: No, Your Honor.

13 THE COURT: Thank you, sir. You may step down.

14 MS. WHITE: Your Honor, the State has no other
15 witnesses.

16 THE COURT: You wish to be excused?

17 WITNESS: Your Honor, I will actually stay for a few
18 moments.

19 THE COURT: Okay. All right. Any re, reply?

20 MS. ROSS: No, Your Honor. I just ask that if, if you
21 feel that the, some opinion from the Milliken employee
22 regarding this Robert Reeder issue of whether employees were
23 helping each other out to interpret to keep their jobs at
24 Milliken, in, in English, if you would like that, I would
25 again request that the record be kept open for that if you

1 feel it would --.

2 THE COURT: well, I don't know what the witness will
3 say. So, I don't know whether it will be helpful or, or
4 not.

5 MS. ROSS: Okay. The only time---

6 THE COURT: I don't know.

7 MS. ROSS: The only witness I would represent, if, if I
8 can find, Alfonzo or Lettie to say that during the 40 hours
9 of education where they have to sit in and do their
10 education before they can go to work, they were helping my
11 client out in interpreting English for him.

12 THE COURT: well, why don't, why don't you use your
13 reasonable efforts to try to locate them, and then if they
14 produce information you want me to, to know, contact the
15 State and see if y'all can decide how you want me to receive
16 it. I'm not inclined just to leave the record open, open
17 because I'd like to move forward with, you know, ruling as
18 fast as I can. I do have some other things in front of
19 this. So, it would not be this week most likely.

20 MS. ROSS: Well, I'd ask you just to consider this week
21 cause if I can't get anything---

22 THE COURT: Okay.

23 MS. ROSS: ---it's just being a matter of the past
24 couple of days not being able to.

25 THE COURT: All right. If you can just let me -- if

1 it, if it does look like it's gonna pan something out for
2 you and you need some more time, just get back in touch with
3 me and then I'll delay ruling.

4 MS. ROSS: All right.

5 THE COURT: Now, anything else?

6 MS. ROSS: You know, just, just briefly in final
7 closing, I've written most everything down, but the problem
8 is if an objection's not preserved on the record, it can't
9 be reviewed on appeal, and what happened here is there was
10 no objection to the charge as given on Page 668. I think
11 there's some problems and there's been debate that started
12 happening about whether self-defense applied here.

13 I think it clearly did. Clearly, when two people have
14 their hands both on the gun and they're struggling and
15 fighting over a gun, self-defense can play a part as can
16 involuntary manslaughter, and we've got Tisdale v. State to
17 say so, and then also the State v. Light. And while this
18 opinion didn't come out till a few months later, it's based
19 on the clear law that was already there, and I listed some
20 of it about self-defense and arguments.

21 The law, as I was trying to demonstrate, the law is not
22 that if, if you say oh, get out of here, someone can go get
23 a gun and, and shoot you because you started the altercation
24 arguably. These are -- there's some common sense to
25 self-defense, and I think here there's just no question that

1 a self-defense and involuntary manslaughter instruction were
2 merited in the case.

3 THE COURT: And I did notice I believe that the Court
4 of Appeals had said, actually in their opinion, said because
5 they didn't preserve it we're not going to address it.

6 MS. ROSS: Exactly. And if they could of---

7 THE COURT: Yeah.

8 MS. ROSS: ---and I mean there are these two opinions
9 that just happened right afterwards that would of, you know,
10 they could of addressed it. I feel pretty certain they
11 would of given relief. So, that, and the other things that
12 I put in, in my outline, I would just rest on that.

13 THE COURT: Okay.

14 MS. WHITE: Your Honor, we, we would argue obviously,
15 in PCR, there's a burden upon the applicant to prove their
16 case and to prove that not only was the counsel deficient,
17 but that because of that alleged deficiency that they were
18 prejudiced.

19 Specifically, in the matters of -- in particular the
20 issues of, for example, the jury charge, they've got to be
21 able to prove that not only was that jury charge or the
22 failure to object deficient, but that the Court of Appeals
23 would actually most likely have ruled in their favor on that
24 issue.

25 Although this State v. Light was ultimately reversed

1 several months after, I would argue that the facts in that
2 case are actually distinguished from this matter. If you
3 look at the facts in Light, the actual -- the litigant in
4 that case actually took the gun out of a person's hand and
5 literally pulled the trigger himself.

6 In this matter, Mr. Rios, the applicant, never admits
7 actually pulling the trigger. In fact, the opposite. He,
8 he, in the majority of the time, if not 100 percent of the
9 time, intends or indicates that the victim in this case had
10 her hand on the trigger.

11 THE COURT: Can I ask you a question about that?

12 MS. WHITE: Yes, sir.

13 THE COURT: I, I notice that when you were asking the
14 questions in that the Judge's comments on excluding
15 self-defense was that well, you know, he had to have shot
16 the gun, but he got convicted of murder.

17 So, I mean wouldn't it be that the jury inferred then
18 that he actually touched the gun because they convicted him
19 of murder?

20 MS. WHITE: Well, and I think that -- I think,
21 unfortunately, it was an issue of credibility in that, in
22 that they actually did not believe the claim. I think they
23 thought that his claim that his, the victim in this case had
24 the gun in her hand and that had her finger on the trigger
25 and the struggle over the gun led to her own essential

1 shooting of herself was a lie. I think that's what the jury
2 showed is that his credibility or the credibility of his
3 story unfortunately, as good as a job I would submit in my
4 position as I am now as Mr. Brannon and Mr. Collins may of
5 done, it was not good enough for the jury to believe.

6 THE COURT: But that's the question of fact for the
7 jury, and so---

8 MS. WHITE: Correct.

9 THE COURT: So, a fact that they, they had to infer to
10 convict him of murder was the fact, was that he actually
11 shot the gun. And, so, that's the same fact that the trial
12 judge excluded, if I understand the record correctly,
13 excluded the charge of self-defense because he was never
14 claiming that he had, that he actually shot the gun.

15 MS. WHITE: Right.

16 THE COURT: So, that seems like that that's a---

17 MS. WHITE: A little bit of a conflict.

18 THE COURT: Yeah, a little bit in conflict for
19 excluding self-defense, but going -- but yet allowing him to
20 be convicted of murder. But anyway, that -- I'm just
21 struggling with that.

22 MS. WHITE: Right.

23 THE COURT: I will---

24 MS. WHITE: And I think that is kind of the, the
25 involuntary and voluntary, that's kind of the situation.

1 The fact that when you look at whether or not it was a, an
2 act of passion versus a reckless, you know, his, his denial
3 of ever actually having the gun kind of leads to, you know,
4 the issue with well, how can he claim that it was a reckless
5 shooting that he did or how he can claim it was in an act of
6 passion if he did it if he never actually admits to having a
7 gun. You know, whereas in the voluntary struggle, act of
8 passion, the middle of a, of a fight, more understandable
9 than, you know, the other.

10 I don't -- I think that is a, an issue. I think that
11 it was raised. Unfortunately, Mr. Brannon, in this case,
12 was attempting I think to be a gentleman, and, you know,
13 raised it, argued it pretty vigorously, and in his mind, I
14 think, raised it sufficiently and unfortunately the judge
15 continued to deny it, and he accepted what he thought he
16 could get from the judge hoping that that was gonna be
17 sufficient in the case.

18 In the other matters, obviously we would submit that
19 there's obviously overwhelming evidence we would say in this
20 case and the matter of the fact that two people entered the,
21 the room with one gun in the room. Whether or not an
22 objection was made to a, a matter that was outside the
23 cross-examination in one situation or whether or not a
24 objection was made to a comment in the matter with such a
25 lengthy trial is not sufficient to establish enough

1 prejudice to remand this back for a new trial in this
2 situation, Your Honor, and we would establish that or we
3 would submit that Mr. Collins and Mr. Brannon did ample
4 legal research, spent an inordinate amount of time preparing
5 for this, discussing with their client, preparing him for
6 trial, and working to protect his interest and his rights in
7 this case, and arguing, as best they could, with the facts
8 that were presented. But also with the information given to
9 them by their client.

10 Unfortunately they could only deal with what they're
11 given, and they, they had to rely on the information, with
12 what they were presented with by their client, and I believe
13 that they did the best they could, and that they were not
14 deficient in this regard and, therefore, did not suffer, he
15 did not suffer any prejudice.

16 MS. ROSS: Judge, may I reply just briefly?

17 THE COURT: Briefly, yes.

18 MS. ROSS: I did hand up that Tisdale v. State case,
19 and I think that's with the materials. That was a PCR that
20 relief wasn't granted and it was reversed. I point out that
21 it's specific to us on the involuntary issue, but it's also
22 interesting that, in that case, it looks apparent from the
23 case itself that a, a self-defense charge was given and this
24 was a similar arguing on the gun, you know, fighting over
25 the gun case.

1 I've got another copy if I -- it was just in the
2 clipping that I gave you with the outline, and then I did --
3 I do believe I have a number of instances where the
4 testimony was that both had their hands on the gun. It was
5 not -- the State v. Light issue seemed to be off topic to me
6 because that was a situation where the defendant just took
7 the gun away from the victim so the victim was no longer a
8 scary person with the gun. He was disarmed and then shot
9 him, and that was -- that's such a different scenario from
10 the arguing over the gun.

11 I wrote on this, but not much. I just wrote
12 involuntary and self-defense on the top, and then otherwise
13 I'd let the record speak for itself.

14 THE COURT: All right. There's been discussion of a
15 9-1-1 tape. But I -- I'm not being provided a copy of the
16 9-1-1 tape?

17 MS. WHITE: Your Honor, it was transcribed in the
18 transcript. They actually had someone go through I think
19 and do a, a kind of line-by-line trans -- kind of oral
20 transcription I guess is the way, the best way to put it in
21 the transcript of the trial. Starting page -- let's see if
22 I can find it for you.

23 They did that with -- if you'll see page -- I think it
24 was about Page 190, 192. They kind of went through some
25 translations where they had I think the, both the Spanish

1 and the Tarascan interpreter. Maybe one---

2 MS. ROSS: Yeah, it's in the record.

3 MS. WHITE: Yeah.

4 MS. ROSS: And then the tape was put into evidence and,
5 again, it's not at the Clerk of Court's Office. It's with
6 the Court of Appeals or whatever it's part---

7 MS. WHITE: Yes.

8 MS. ROSS: It's part of this package that was sent off.

9 MS. WHITE: When I talked to the lady at the Court of
10 Appeals, like I said Friday, apparently there is some issue
11 with whether or not the exhibits that were turned over to
12 the Court of Appeals for the appeal have been returned to
13 the Clerk's Office. Mr. Davis just turned one up. I
14 don't---

15 THE COURT: All right.

16 MS. WHITE: We had -- if you need it we can certainly
17 try to find the actual one that was entered into, as an
18 exhibit. I think, you know, it was a, it does kind of go
19 supposedly line-by-line to the -- because it is kind of a
20 mesh of voices. There were about five voices, four or five
21 voices on it. He may have -- I don't know if this is his
22 only copy.

23 THE COURT: All right. Okay.

24 MS. WHITE: And while I'm here, obviously I'll be here
25 all week, so, I can go meet with the Clerk's Office and see

1 if they can dig around and find them.

2 THE COURT: If---

3 MS. WHITE: If you need it.

4 THE COURT: With it being that the applicant wishes to
5 raise an issue of his proficiency or lack of proficiency in
6 English, it seems like a trans, a written translation
7 doesn't meet the applicant's purpose.

8 Does that make any sense?

9 MS. ROSS: Yes, it does, and the, the written
10 translation goes into -- one of them goes into what parts
11 are in which language and all. It will go line-by-line like
12 English, English, Tarascan kin, P'urhepechas, and then --
13 but---

14 MS. WHITE: Short---

15 MS. ROSS: If, if you would like me to try to provide
16 the Court with that I would be happy to.

17 THE COURT: You're -- it's---

18 MS. ROSS: I just don't know how to get it. I'll try.

19 THE COURT: I'll leave that up to y'all.

20 MS. ROSS: Okay.

21 MS. WHITE: Your Honor, we can -- I think David says
22 this is another copy. He has multiple copies. So, we can
23 play this as we close to make sure this is a copy and then
24 we'll bring it up to you---

25 THE COURT: Okay.

1 MS. WHITE: ---to make sure this is---

2 THE COURT: All right. Anything else before I step
3 down?

4 MS. ROSS: Nothing.

5 MS. WHITE: Nothing from the State.

6 MS. ROSS: Nothing from us.

7 THE COURT: All right. Thank you very much.

8 MS. WHITE: Thank you, Your Honor.

9

10 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 19th day of September, 2011, as reported by Pamela Faucette and transcribed by myself.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

December 27th, 2012



PAMELA E. GREEN, Court Reporter

I. 17-27-70 Return not filed w/in 30 days, Summary Judgment for defense 9/27/10 & 4/26/11

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. P. 615, L. 21 BLUNDERED CHARGE REQUEST - SEE Ct. App. Opinion

1. LOST INVOLUNTARY (the unintentional killing of another without malice, but while engaged in a legal activity not naturally tending to cause death of OBI; or the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others St. v. Chatman, 519 S.2d 100 (1992)).

2. WITHDREW VOLUNTARY THEN BLUNDERED P. 607, L. 4-6;

3. THEN ABANDONED INVOLUNTARY P. 611, L. 22-25

4. LOST SELF-DEFENSE - DID NOT DEFINE SELF-DEFENSE P. 612-615

NOTE P. 288 Isabel Rios says Defendant did not push first- Eliza did ; p. 314, L. 13

P. 418, L. 14-20 d. statement I was defending myself, it was in self-defense

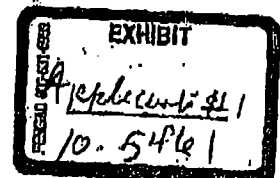
p. 614, L. 22 Brannon said has no evidence she pushed first

THEN ABANDONED SELF-DEFENSE p. 615, L. 21 when theory presented in opening. 164, L. 22

5. DID NOT OBJECT TO THE CHARGE AS GIVEN P. 668

See St. v. Santiago Rios, a/k/a Santiago Pasquel, Op. # 3710 filed July 14, 2010

self-defense: 1) the defendant must be without fault in bringing on the difficulty; 2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; 3) if his defense is based upon his belief of imminent danger, a reasonably prudent person of ordinary firmness and courage would have entertained the same belief; if the defendant actually was in imminent danger, the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow to save himself from serious bodily harm, or losing his own life; and 4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. Goodson, 312 S.C. at 280, 440 S.E.2d at 372 (quoting State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984)).



(State v. Burris, 334 S.C. 256, 513 S.E.2d 104 S.C., 1999. It is well-settled the law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given. The trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. See State v. Hill, 315 S.C. 260, 433 S.E.2d 848 (1993).

If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible "417 error." State v. Muller, 282 S.C. 10, 316 S.E.2d 409 (1984).

"When self-defense is properly submitted to the jury, the defendant is entitled to a charge, if requested, that the State has the burden of disproving self-defense by proof beyond a reasonable doubt." Burkhart, 350 S.C. at 261, 565 S.E.2d at 303.

Because we hold that the trial judge erred in charging the jury only the Davis charge without considering the facts and circumstances of the case, we do not need to address Fuller's remaining exceptions. State v. Fuller, 377 S.E.2d 328, 297 S.C. 440 S.C., 1989

B. PRESENTED NO DEFENSE YET LOST FINAL CLOSING

1. SENT AWAY PRIEST W. AND OTHER DEFENSE W.S RE CULTURAL DIFFERENCES TO EXPLAIN STORY OF BREAK IN
2. BLEW FINAL CLOSING WITH ONE PHOTO p. 449 l. 18
3. NO INSTRUCTION THAT MAY LOSE SELF-DEFENSE IF DID NOT TESTIFY - NO RULING OR REQUEST ON INSTRUCTION PRIOR TO WAIVING DEFENSE P. 601-604, P. 418, L. 20

C. FAILED TO object to Robert Reader from Milliken re: training in English, no ability to cross examine, last minute witness p. 36 l.4; 109 l.12; p. 316-323 l. 10- R 403 SCRE, BRADY

1. he taught a safety class, Rios had to pass to keep job 329 L. 17
2. employment records don't show safety tests,

D. NO OBJECTION TO MISDEFINED AFORETHOUGHT IN OPENING P. 156-3
AFORETHOUGHT DOES MEAN PREMEDITATION IN WEST'S

E. FAILURE TO OBJECT

1. IMPROPER REDIRECT obj. but continued grandstanding P. 185, P. 312-10
2. IMPROPER OBJECTION P. 222-10, p. 180 l. 18
3. LEADING P. 404; 414; 434 l. 19; 435-20, 436-2 "acute language failure"
4. VOUCHING/BOLSTERING P. 243-17, "I BELIEVED THE CHILDREN"
US v. Carroll 26 F2d 1380 (6th 1994) – pros asserts own belief or knowledge
5. STATEMENT P. 374-25 P. 414 l. 21

F. FAILED TO COMMUNICATE PLEA OFFER

G. NO VINDICATE REQUEST "FOREIGN NATIONALS ARE ENTITLED TO THE SAME RIGHTS TO A FAIR TRIAL AS ANY OTHER PERSON. DO YOU FEEL YOU CAN BE FAIR TO BOTH SIDES IN CIVIL OR CRIMINAL CASES INVOLVING A FOREIGN NATIONAL?" PP. 37-53 NO QUESTION WHETHER CAN BE IMPARTIAL TO FOREIGN NATIONALS (Lexington questionnaires show 25% could not be impartial)

1. ONLY USED 2 STRIKES

H. NO JURY INSTRUCTION REQUESTED

1. P. 645 L4 ON RIGHT TO INTERPRETER WOEFULLY WEAK

☒ CERTIFIED INTERPRETER??

Tisdale v. State, 378 S.C. 122, 662 S.E.2d 410, S.C., 2008.

Background: Defendant convicted of murder filed application for postconviction relief. The Circuit Court, Berkeley County, Roger M. Young, Sr., J., denied application.

Holdings: On defendant's application for certiorari, the Supreme Court, Moore, J., held that:

(1) evidence warranted instruction for involuntary manslaughter as lesser included offense of murder, and

(2) evidence warranted instruction for accident.

Reversed.

**411 Appellate Defender Robert M. Pachak, of South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Matthew J. Friedman, all of Columbia, for respondent.

Justice MOORE.

*123 Petitioner was convicted of murder and sentenced to life without parole. His direct appeal was dismissed after an Anders review.^(FN) Petitioner then filed this application for post-conviction relief (PCR) claiming counsel were ineffective for failing to request a charge on accident or involuntary manslaughter. PCR was denied. We reverse.

FN1. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

*124 FACTS

The victim in this case was Lavelle Anderson (Victim). His decomposing nude body was found in a ditch in Berkeley County on October 2, 2000. He had been shot twice in the head.

Petitioner and his co-defendant, Anthony Dawson, were charged with murdering Victim on September 27 and disposing of the body. The State's theory of the case was that Victim's murder was revenge for the killing of petitioner's brother in a drive-by shooting a few days earlier.

At trial, Dawson testified for the State. He stated that after the wake for petitioner's brother, he and petitioner picked up Victim in a borrowed car. Dawson was reclined in the backseat because he had a headache, so Victim got in the front seat. As they drove down the interstate, Dawson heard petitioner and Victim talking but could not hear their words until their voices became raised. Victim began yelling and called petitioner a "bitch." Victim then punched petitioner in the face. Petitioner pinned Victim against the passenger side of the car and was pulling the car onto the shoulder of the road when Victim pulled a gun and shot at petitioner. Petitioner and Victim fought over the gun and one or two shots were fired.

Dawson stated he did not know who had the gun when the shots were fired, but he saw the gun in petitioner's hand after the shooting. Petitioner and Dawson put Victim's body in the trunk of the car and drove to a friend's house for help disposing of the body.

*412 Petitioner testified he picked up Victim because Victim had called him asking for a favor. After Victim was in the car and stated where he wanted to go, petitioner did not want to do it. Victim then began yelling and punched petitioner in the face. When petitioner saw Victim pull a gun, they struggled over the weapon. The gun went off while it was still in Victim's hand and then Victim was still. On cross-examination, the solicitor asked: "Your testimony is that that gun was never in your hand?" Petitioner answered: "It was never in my hand until he was just motionless."

During closing, the solicitor argued:

~~They want you to believe that this was an accident. It is not self-defense. It is not voluntary manslaughter. And it *125 is not involuntary manslaughter. They want you to believe that it was an accident and it is not murder. No evidence supports that it was anything other than an intentional act.~~

The trial judge charged voluntary manslaughter as a lesser offense and self-defense. On PCR, petitioner claimed counsel were ineffective for failing to request charges on accident and involuntary manslaughter.

At the PCR hearing, Counsel Brown testified he was surprised by petitioner's testimony that the gun was in Victim's hand and not petitioner's when it fired. It did not occur to counsel to request a charge on accident or involuntary manslaughter. Co-counsel confirmed that there was no discussion of accident or involuntary manslaughter.

The PCR judge found the fact that Victim was shot twice "in the back of the head" ^{FN2} was completely inconsistent with either accident or involuntary manslaughter and therefore counsel were not ineffective in failing to request these charges.

FN2. A pathologist testified at trial that the bullet wounds were to the left side of the head slightly behind the ear.

ISSUE

Were counsel ineffective for failing to request charges on accident and/or involuntary manslaughter?

DISCUSSION

Involuntary manslaughter is a lesser included offense of murder only if there is evidence the killing was unintentional. State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996).^{FN3} Evidence of a struggle between the defendant and the victim over a weapon supports submission of an involuntary manslaughter charge. Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991). Here, there is evidence of a struggle over *126 the gun. The fact that Victim's wounds may have been inconsistent with petitioner's testimony that the gun fired while in Victim's hand is not overwhelming evidence that petitioner intentionally killed Victim.

FN3. Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others. State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006).

Without citation of authority, the State argues that because the jury rejected petitioner's claim of self-defense and found him guilty of murder, the jury must have found malice and therefore petitioner cannot show prejudice from the failure to submit involuntary manslaughter.^{FN4} We disagree. The State's argument essentially suggests that if a defendant is found guilty of the greater offense, he can never challenge the failure to submit a lesser offense because the jury must have found all the elements of the greater. To the contrary, the relevant test is whether there is *any* evidence that the defendant committed the lesser rather than the greater offense. Casey v. State, supra. Here, the evidence of a struggle for the gun supports submission of a charge of involuntary manslaughter.

FN4. We rejected this analysis in the context of murder and *voluntary* manslaughter. State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993).

Further, evidence of an accidental discharge of a gun will support a charge of accident where the defendant lawfully arms himself in self-defense. **413 State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999); see also State v. Cameron, 137 S.C. 371, 135 S.E. 364 (1926) (approving charge of accident where gun accidentally discharged during struggle). Here, the evidence indicates Victim was the aggressor by punching petitioner in the face and then shooting at him. This evidence, along with evidence the gun discharged accidentally, supports a charge of accident.

The denial of PCR is **REVERSED**.

TOAL, C.J., WALLER, PLEICONES and BEATTY, JJ., concur.

State v. Light, 378 S.C. 641, 664 S.E.2d 465 S.C., 2008.

Background: Defendant was convicted in a jury trial in the Circuit Court, Lexington County, Marc H. Westbrook, J., of murder and grand larceny. Defendant appealed. The Court of Appeals, 363 S.C. 325, 610 S.E.2d 504, affirmed.

Holdings: The Supreme Court, Moore, J., held that:

(1) defendant was entitled to a charge on involuntary manslaughter, and

(2) defendant was entitled to a charge on self-defense.

Reversed.

Toal, C.J., dissented and filed opinion.

****466 Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek, of the South Carolina Commission on Indigent Defense, of Columbia, for petitioner.**

Attorney General Henry D. McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelonka, of Columbia; and Solicitor Donald V. Myers, of Lexington, for respondent.

Justice MOORE.

*643 Petitioner was convicted of murder and grand larceny. He was sentenced to imprisonment terms of thirty years for murder and five years for grand larceny. The Court of Appeals affirmed. State v. Light, 363 S.C. 325, 610 S.E.2d 504 (Ct.App.2005). We now reverse.

*644 FACTS

Petitioner was arrested during a traffic stop in Texas. During the course of the arrest, Texas authorities discovered petitioner's girlfriend, Priscilla Davis (Davis), was missing, and questioned petitioner about her disappearance. Petitioner admitting killing Davis. In his statement, petitioner told Texas authorities that he emerged from the bathroom in his home to find Davis holding a long strand of brown hair and his .22 rifle.FN1 Davis accused petitioner of having another woman in the house, which petitioner denied. He stated in a recorded statement:

FN1. Petitioner always kept this rifle loaded.

She went to acting a fool and called me a liar. And the only thing I could think of, I was—I tried to distract her. I remember swinging my left arm, I think it was, to get the rifle out of her hand. When I did, all I can tell you, it went off. Honestly, I didn't even think it hit her.

Then she fell. I thought it might have just grazed her in the shoulder. So I ran out the back door to go get help because I don't have a telephone. I ran back to her and she wasn't breathing, and I just panicked. I didn't think nobody would believe me. So the only thing I did, I just put her in the trunk of the car, and I just took off. I just drove and kept driving.

The Texas Ranger who interviewed petitioner testified petitioner did not claim that Davis pointed the rifle at him or that she threatened to shoot him. He also testified petitioner later altered his story, admitting he took the rifle from Davis before it was fired. The Ranger testified petitioner told him "the rifle was in my hand when it went off, I will not deny that, I took it from her. It was either her or me. I could have run, like I told them; but I didn't really think about it." In his statement, petitioner stated they were standing face to face when the shooting occurred.

The State presented evidence from a firearms expert, who testified there was no gunshot residue around the entrance wound in **467 Davis' chest. FN2 The expert testified he believed the *645 shot was consistent with a distant shot of about thirty to fifty inches. The State's pathologist testified the angle of the bullet wound through Davis' body made it likely Davis was sitting or kneeling when shot. He testified the wound was consistent with a purposeful shooting and inconsistent with an accidental shooting.

FN2. Petitioner disposed of Davis' body in Alabama on his way to Texas. He led police to her body after he admitted his involvement in Davis' death.

After the State finished its case in chief, the State argued petitioner was not entitled to a self-defense charge because there was no evidence petitioner was in danger of losing his life or of sustaining serious bodily injury. Petitioner argued that, at the time of the shooting, he was still "under the influence of the initial aggressive act he contends was committed by the victim." The trial judge delayed his ruling until after petitioner presented his case.

At trial, petitioner testified Davis had been acting jealous and following him for several weeks before the incident. Petitioner made this same claim in his earlier statement to police. He testified she told him that if she ever caught him with another woman, "it's going to be messy." Petitioner testified the morning of the incident FN3 he left to get breakfast for Davis. After returning, he came out of the bathroom and found her holding a long brown hair FN4 and his .22 rifle, stating she believed petitioner had another woman in the house. He testified:

FN3. The night before, petitioner and Davis had been at a bar until approximately 3:30 a.m. There was testimony they were not arguing or fighting and were dancing to slow songs. There was also testimony that, when Davis and petitioner left, petitioner had Davis, who was crying, by the arm.

FN4. The brown hair and the lubricant bottle that the hair was allegedly found on were not recovered when petitioner's house was processed for evidence.

She was pointing [the gun] at me and screaming and hollering and accusing me as usual. I asked her, "What the heck is wrong with you, you know? There has ... not been another woman in this house."

She just kept on and on, screaming and screaming at me. I was afraid she was going to shoot me. So during the screaming--and my living room is very small. Y'all have *646 seen that. Between the two couches is where this happened.

The only thing I remember, I did try—I took my left hand to knock it away, try to push it away from me. Than [sic] after I jerked it away from her, I did stumble back several feet, you know, after jerking it. The weapon discharged but it was not intentionally [sic].

Q. Was that in your hands?

A. It was in my hands. I do not deny that.

Q. And you pulled the trigger?

A. Not intentionally but I had to.

[Solicitor] Swarat: I'm sorry, I couldn't hear that. "I did not intentionally but I had to." Was that what he said?

[Petitioner]: I said I didn't intentionally pull the trigger.

[Counsel for petitioner]: He had to have pulled the trigger, I think is what he said.

Q. No one else pulled the trigger?

A. There was nobody else holding the gun. I mean, let's be logical. It was just me and her there. But after I jerked the weapon out of her hand it [fired]....

At trial, petitioner testified he and Davis were not standing face to face. He stated, "when you are arguing like that ... There is a lot of movement going on ... she was crouched down."

Petitioner further stated, "After we fought over the rifle, jerked it away from her, still screaming and hollering at each other, I think she stopped—scooted down some, ... The rifle did go off in our argument."

Following the conclusion of the trial, the trial judge denied petitioner's request to charge self-defense. Petitioner also requested a charge on involuntary manslaughter. Petitioner argued that if the jury believed petitioner wrestled the rifle away from Davis and subsequently wielded it in a reckless fashion, there would be a sufficient basis for charging involuntary manslaughter. The trial **468 judge refused, stating he did not see any indication of recklessness in petitioner's actions. The trial judge charged the jury on murder, voluntary manslaughter, and accident. The jury found petitioner guilty of murder.

*647 ISSUES

I. Did the trial court err by denying petitioner's request for a jury instruction on involuntary manslaughter?

II. Did the trial court err by finding petitioner was not entitled to a jury instruction on self-defense?

DISCUSSION

1. Involuntary manslaughter

The Court of Appeals found the trial court properly refused to charge involuntary manslaughter. The court stated there was no evidence petitioner handled the gun with reckless disregard for the safety of others.FN5 See State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006) (involuntary manslaughter is the

unintentional killing of another without malice and while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others).

FN5. The Court of Appeals noted petitioner argued in his statement of issues that the gun discharged while petitioner and Davis were struggling over the gun and that, as a result, it was "a classic case of involuntary manslaughter." The court held an involuntary manslaughter charge would have been warranted if there was evidence the gun discharged while petitioner and Davis were struggling over it. However, the court noted petitioner failed to argue the gun discharged during the course of the struggle in his brief; therefore, it held petitioner abandoned the issue on appeal. We disagree that petitioner abandoned his argument. Throughout his brief, petitioner discussed the struggle for the gun.

Petitioner argues the Court of Appeals erred by finding he was not entitled to an involuntary manslaughter instruction. He relies on the cases of *State v. Burriess*, 334 S.C. 256, 513 S.E.2d 104 (1999), and *State v. Crosby*, 355 S.C. 47, 584 S.E.2d 110 (2003), for support.

In *State v. Burriess*, 334 S.C. 256, 513 S.E.2d 104 (1999), Burriess was attacked by the victim and another man. After being pushed to the ground, Burriess drew a gun from his pocket and fired twice into the ground, causing both assailants to back away. As Burriess was attempting to get off the ground, one of the assailants advanced towards Burriess, who was separated from his gun. Burriess grabbed the gun and it *648 accidentally fired, killing one of the assailants. We held Burriess was entitled to a charge on involuntary manslaughter because the evidence supported a finding that he was lawfully armed in self-defense at the time the fatal shot occurred and there was evidence he handled the loaded gun in a negligent manner.

In *State v. Crosby*, 355 S.C. 47, 584 S.E.2d 110 (2003), Crosby claimed he was trying to break up a fight between three women, one of whom was the victim's girlfriend. Crosby claimed the victim told him not to put his hands on his girlfriend and then charged at Crosby with his hands behind his back. Crosby then pulled a gun out of his pocket and closed his eyes and pulled the trigger. Crosby claimed he did not realize he had pulled the trigger. We held Crosby was entitled to an involuntary manslaughter charge because there was ample evidence from which the jury could have inferred Crosby did not intentionally discharge the weapon.

[1]. Although petitioner had inconsistent stories, we find he was entitled to a charge on involuntary manslaughter. The Court of Appeals distinguished Burriess and Crosby by finding that, although petitioner's statements support a finding he was lawfully armed in self-defense at the time of the shooting, there is no evidence of recklessness as required to warrant an involuntary manslaughter charge. The Court of Appeals correctly found petitioner was lawfully armed in self-defense FN6 at the time of the shooting because, **469 according to his testimony, petitioner took the loaded gun from Davis who was threatening him with it. There was also evidence petitioner recklessly handled the gun because, according to his testimony, it fired almost immediately after he took possession of it. As specifically stated in Burriess, the negligent handling of a loaded gun will support a finding of involuntary manslaughter. See also *State v. White*, 253 S.C. 475, 171 S.E.2d 712, cert. denied, 396 U.S. 987, 90 S.Ct. 482, 24 L.Ed.2d 451 (1969) (same). Further, *649 the fact petitioner and Davis were struggling over the weapon is sufficient evidence to support an involuntary manslaughter charge to the jury. *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991) (evidence of a struggle between a defendant and a victim over a weapon is sufficient for submission of an involuntary manslaughter instruction to the jury). Accordingly, there was evidence to support a charge of involuntary manslaughter and, therefore, the trial court should have so charged the jury. See *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006) (if there is any evidence warranting a charge on involuntary manslaughter, then the charge must be given); *State v. Hill*, 315

S.C. 260, 433 S.E.2d 848 (1993) (trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence).

FN6. The Burriss court noted that there is a difference between being lawfully armed in self-defense and acting in self-defense. Burriss, 334 S.C. at 265, n. 10, 513 S.E.2d at 109, n. 10. At this point in the analysis, we are concerned only with whether petitioner had a right to be armed for purposes of determining whether he was engaged in a lawful act, i.e. was lawfully armed, and not whether he actually acted in self-defense when the shooting occurred.

II. Self-defense

The Court of Appeals noted that petitioner testified he had disarmed Davis and had taken possession of the rifle when the shot was fired. Under those facts, the court held Davis no longer posed any threat to petitioner and he could not have reasonably believed she did. The court held the evidence demonstrated petitioner did not have the right to use deadly force in self-defense and the trial judge correctly refused to charge the jury on self-defense.

[2] [3] [4] A self-defense charge is not required unless it is supported by the evidence. *State v. Goodson*, 312 S.C. 278, 440 S.E.2d 370 (1994). To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, the defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger. *650 *State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007). If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error. *Id.*

[5] We find petitioner was entitled to a self-defense charge. In a statement to police, petitioner indicated he took the gun from Davis and that it was "either her or me." This statement indicates he believed he was in imminent danger of losing his life. Also, petitioner testified that in the preceding weeks, Davis had been acting jealous, following him, and had told him that if she ever caught him with another woman it was "going to be messy." This evidence suggested that petitioner was reasonable in his belief that it was either Davis' or his life at stake when the struggle for the gun began. Accordingly, the trial court erred by failing to charge self-defense given there was evidence to support the charge. See *State v. Burkhardt*, 350 S.C. 252, 565 S.E.2d 298 (2002) (if there is any evidence in the record to support self-defense, the issue should be submitted to the jury).

[6] A past holding of this Court seems to indicate that, where a defendant is claiming self-defense, as petitioner is here, involuntary manslaughter may not be charged. In **470 *State v. Pickens*, 320 S.C. 528, 466 S.E.2d 364 (1996), FN7 we held that where a defendant admits he intentionally shot his gun, but that he did so while acting lawfully but recklessly in defending himself, he is not entitled to a charge of involuntary manslaughter. However, a self-defense charge and an involuntary manslaughter charge are not mutually exclusive, as long as there is any evidence to support both charges. See *State v. Crosby*, 355 S.C. 47, 584 S.E.2d 110 (2003) (improper to hold that any evidence of an intentional shooting negates evidence from which any other inference may be drawn); *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991) (error by trial court in not

charging involuntary manslaughter, even though the trial court charged murder, voluntary manslaughter, accident, and self-defense); *651 *State v. Turbeville*, 275 S.C. 534, 273 S.E.2d 764 (1981) (defendant charged with involuntary manslaughter was not entitled to self-defense charge because there was no testimony concerning self-defense in the trial record; indicating the charge would be appropriate if there was testimony concerning self-defense). When there is a factual issue as to whether the shooting was committed intentionally in self-defense or was committed unintentionally, then the defendant is entitled to both charges as there is "any evidence" to support each charge. When there is evidence of both, as in this case, we find the jury is entitled to resolve the question of how the shooting actually occurred.

FN7. In *Pickens*, *Pickens* and a co-defendant began shooting in self-defense when a group of ten to twelve people rushed them outside of a Waffle House.

CONCLUSION

We find that, under the particular facts of this case, petitioner was entitled to the charges of self-defense and involuntary manslaughter. Accordingly, the decision of the Court of Appeals is

REVERSED.

WALLER, PLEICONES and BEATTY, JJ., concur.

TOAL, C.J., dissenting in a separate opinion.

Chief Justice TOAL.

I respectfully dissent. I would affirm the conviction and hold that the trial court properly refused to charge both involuntary manslaughter and self-defense.

The majority finds that Petitioner was entitled to an involuntary manslaughter charge because there was evidence that Petitioner recklessly handled the gun and that Petitioner and the victim struggled over the gun. In my opinion, the evidence does not support these findings. According to Petitioner's own testimony, the gun discharged after he retrieved it from the victim, while the gun was in his possession, and as he stumbled backwards. In my view, this testimony is not evidence that Petitioner recklessly handled the gun or that the gun fired during the struggle. Compare *State v. White*, 253 S.C. 475, 171 S.E.2d 712 (1969) (holding that the defendant's testimony regarding the shooting provided sufficient evidence to warrant an inference that the victim's death was caused by the negligent handling of a loaded pistol); *652 *Tisdale v. State*, 378 S.C. 122, 662 S.E.2d 410 (2008) (Shearouse Adv. Sh. No. 22 at 21) (finding that the defendant's testimony that the gun discharged while he and the victim struggled over the gun supported an involuntary manslaughter charge). Rather, I believe that this testimony presents a standard example of accident, on which the trial court properly instructed the jury. See *State v. Burris*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (holding that a defendant is entitled to a charge on accident where there is evidence that he armed himself in self-defense but the shooting occurs accidentally); *State v. Goodson*, 312 S.C. 278, 280 440 S.E.2d 370, 372 (1994) (recognizing that for a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, that the defendant was acting lawfully, and that due care was exercised in the handling of the weapon). FN8 Accordingly, I would hold that there is **471 no evidence to support an involuntary manslaughter charge.

FN8. I agree with the majority insofar as I believe that Petitioner had the right to take the weapon away from the victim.

In my opinion, the majority also errs in holding that Petitioner was entitled to a self-defense charge. Even assuming that Petitioner reasonably believed that he was in imminent danger when the victim first confronted him with the gun due to the victim's previous threats, Petitioner testified that he "jerked" the gun away from the victim, the victim was "crouched down" when she was shot, and that he did not intentionally pull the trigger. Thus, in my view, Petitioner was neither in imminent danger nor did he believe he was in imminent danger at the time he shot the victim. I would therefore hold that the trial court properly refused to charge self-defense. See *State v. Bruno*, 322 S.C. 534, 536, 473 S.E.2d 450, 452 (1996) (holding that the defendant was not entitled to a self-defense charge where he presented no evidence that he believed that he was in imminent danger when he shot the victim).

While I agree with the majority that a self-defense charge and involuntary manslaughter charge are not necessarily mutually exclusive, there must be some evidence in the record to support the charges, and in my opinion, no evidence in the record supports either charge in this case. For these reasons, *653 I would hold that the trial court properly refused to give an involuntary manslaughter charge and a self-defense charge.

SOUTH CAROLINA LAW ENFORCEMENT DIVISION

FORENSIC SERVICES LABORATORY REPORT

MARK SANFORD
Governor



MARK A. KEEL
Interim Chief

Detective William Gary
Spartanburg County Sheriff's Office
PO Box 771
Spartanburg, SC 29304-0771

DNA ANALYSIS
March 21, 2008
SLED LAB: L06-16464
Your Case No: 2006111372
Incident Date: 11/23/2006
(V) Bliza Hernandez
(S) Santiago Pasquel

This is an official report of the South Carolina Law Enforcement Division Forensic Services Laboratory and is to be used in connection with an official criminal investigation. These examinations were conducted under your assurance that no previous examinations of person(s) or evidence submitted in this case have been or will be conducted by any other laboratory or agency.

Mark A. Keel, Interim Chief
South Carolina Law Enforcement Division

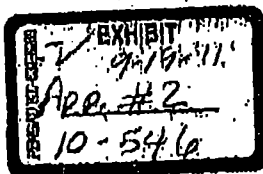
Missing #'s

SEROLOGY ANALYSIS

Items Submitted:

Results of Examinations:

2	Hair from floor in living room	2	See DNA analysis. Δ
3	Hair from couch in living room	3	No hair suitable for PCR STR DNA analysis. $\neq$
4	Swab from bedroom floor	4	Blood indicated. See DNA analysis. AV
5	Hair from bedroom floor	5	See DNA analysis. Δ
6	Swab from bedroom floor	6	Blood indicated. See DNA analysis. AV
7	Swab from bedroom floor	7	Blood indicated. See DNA analysis. (2x) AV & Δ
8	Swab from bedroom floor	8	Blood indicated. See DNA analysis. (2x) AV & Δ



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March 21, 2008

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Items Submitted:

Results of Examinations:

9	Swabbing from projectile on bedroom floor	9	See DNA analysis. <i>2 AV</i>
11	Buccal swab - Santiago Pasquel	11	See DNA analysis. <i>Control A</i>
12	Fingernail scrapings - Santiago Pasquel	12	Nothing of apparent serological evidentiary value found. <i>≠</i>
15	Fingernail scrapings - Eliza Hernandez	15	Nothing of apparent serological evidentiary value found. <i>≠</i>
16	Swab from Eliza Hernandez	16	See DNA analysis. <i>Control AV</i>

DNA ANALYSIS

ITEMS ANALYZED:

11	Buccal swab - Santiago Pasquel
16	Swab from Eliza Hernandez
2	Hair from floor in living room
4	Swab from bedroom floor
5	Hair from bedroom floor
6	Swab from bedroom floor
7	Swab from bedroom floor
8	Swab from bedroom floor
9	Swab from projectile on bedroom floor

EXAMINATIONS

DNA analysis was performed on the items above. The results of Short Tandem Repeat (STR) PCR DNA analysis are shown in Table 1.

RESULTS

The DNA profile developed from item 2 matches Santiago Pasquel. The probability of randomly selecting an unrelated individual from the population having a DNA profile matching this profile is approximately 1 in 240 quadrillion.

The DNA profile developed from items 4 and 6 matches Eliza Hernandez. The probability of randomly selecting an unrelated individual from the population having a DNA profile matching this profile is approximately 1 in 490 million.



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The DNA profiles developed from items 7 and 8 are mixtures of at least two individuals. The DNA profile of the major contributor to these mixtures also matches Eliza Hernandez. Santiago Pasquel cannot be excluded as a possible minor contributor to these mixtures.

Santiago Pasquel cannot be excluded as a possible contributor to the partial DNA profile developed from item 5. Eliza Hernandez can be excluded.

Eliza Hernandez cannot be excluded as a possible contributor to the partial DNA profile developed from item 9. Santiago Pasquel can be excluded.

Note: Any remaining evidence and/or packaging will be returned to the requesting agency.

Matthew G. Fitts

Matthew G. Fitts, Ph.D.
Forensic Scientist

cc: Spartanburg County Solicitor's Office



P.O. Box 21398, Columbia, South Carolina 29221-1398 Phone (803) 896-7300 Fax (803) 896-7351

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SLED LAB No. L06-16464
March 21, 2008

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Table 1 - Identifier

Items	D1S1179	D1S119	D1S120	CSE1FO	D1S133	T801	D1S137	D1S139	D1S138	D1S143	+NA	1FOX	D1S151	DSS13	FGA	Acce- -room
11 Santiago Pasquid	10,14	29,31,2	12	11,13	15	6	9,17	10,12	19,21	14,15,2	15,19	8,11	17,18	7	21,26	XY
16 Elba Hernandez	14,15	30,34,2	11	11,12	16	7	9,13	10,11	18,19	15	17,18	8,11	14,17	11,13	22,24	X
2 Hair - living room floor	10,14	29,31,2	12	11,13	15	6	9,17	10,12	19,21	14,16,2	15,19	8,11	17,18	7	21,26	XY
4 Swab - bedroom floor	14,15	30,34,2	11	11,12	16	7	9,13	10,11	18,19	15	17,18	8,11	14,17	11,13	22,24	X
5 Hair - bedroom floor	(10),14	-	-	-	15	6	(9)	-	-	(14)	(19)	(8),11	-	(7)	-	X
6 Swab - bedroom floor	14,15	30,34,2	11	(11),12	16	7	9,13	10,11	18,19	15	17,18	8,11	14,17	11,13	22,24	X
7 Swab - bedroom floor	14,15	30,34,2	11	11,12	(15),16	7	9,13	10,11	18,19	(14),15 (16,2)	17,18	8,11	14,17	(7) 11,13	22,24	X
8 Swab - bedroom floor	14,15	30,34,2	11	11,(12)	15,16	(6),7	9,13	10,11	18,19	14,15	17,18	8,11	14,17	11,13	22,24	X
9 Projectile	(14),15	(30)	-	(11),12	15	7	(9),13	-	-	(14),15	-	(8)	-	(11),13	-	(X)

() = slides between 75 and 149 rfs

- = no results

Bold = major contributor



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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

COUNTY OF SPARTANBURG

Santiago Rios, #277417,

2010-CP-42-5461

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 13, 2010. The Respondent made its Return on or about April 27, 2011. An evidentiary hearing into the matter was convened on September 19, 2011, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Susannah C. Ross, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Also testifying on Applicant's behalf were his sister Maria Rios, and the Interpreter who was present for the PCR hearing Damarie Rivera. Testifying for the State were N. Douglas Brannon, Esquire, and David M. Collins, Esquire. This Court also had before it a copy of the records of the Spartanburg County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, the Return, and the trial transcript. PCR Counsel for Applicant also provided the Court with a document which detailed the Applicant's arguments. (App. Ex. #1)

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SPARTANBURG COUNTY
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PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Applicant was indicted at the January 2008 term of the Spartanburg County Grand Jury for murder (08-GS-42-0170). David M. Collins, Esquire, and N. Douglas Brannon, Esquire, represented the Applicant.

On May 1, 2008, the Applicant was convicted of this charge by a jury. The Honorable Roger L. Couch sentenced him to confinement for a period of thirty (30) years.

A timely Notice of Appeal was filed on Applicant's behalf by Ricky K. Harris, Esquire, and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Rios, Op. No. 4710 (filed July 14, 2010). The Remittitur was returned on July 30, 2010.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully the following reasons:

1. Ineffective assistance of trial counsel, in that;
 - a. Counsel failed to request a polygraph test for Applicant,
 - b. Counsel failed to interview or call any character witnesses,
 - c. Counsel failed to prepare or present a defense,
 - d. Counsel failed to ask for a jury charge of accidental death, involuntary manslaughter, or voluntary manslaughter,
 - e. Counsel failed to investigate the voice of Applicant versus voice in background on 911 tape,
 - f. Counsel failed to argue third party guilt.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the

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opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability

sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

This Court finds that the Applicant has failed to meet his burden of proof as to the allegations that Counsel was ineffective in this matter. Applicant's first allegation was that Counsel was ineffective for not ensuring that the Applicant was provided with proper interpretation during trial. This Court would first note that Counsel ensured that interpreters for both Spanish and Tagalog, Applicant's spoken dialect, were available for the trial. Applicant testified that at trial he only understood about 20% English and was easily confused by many of the questions. Applicant testified that the attorneys and witnesses were going too fast for the interpreters at trial and so the Applicant felt that he missed things that were said. His sister testified that their dialect was different from traditional Spanish. This Court is convinced that the Applicant knows very little English based on the 911 tape. It is clear that the Applicant understands some English, but would need the services of a court interpreter during a court proceeding both to speak and understand what is being said in the courtroom. However, testified to by Mr. Brannon and Mr. Collins, during meetings with Counsel, a certified interpreter was always present to translate from English to Spanish and often the Applicant's sister would translate if there were unplanned meetings. Brannon testified that before and during the trial, the Applicant indicated that he could read and write in Spanish, but could not read or write in English. However, Brannon also testified that after the trial, Applicant's family informed him that the Applicant could speak and understand English. Counsel both testified that Applicant never indicated that he had trouble understanding any information prior to trial and when he expressed concern about the speed of witnesses or attorneys during the trial, they requested the court instruct them to slow down. This Court finds the testimony of Counsel very credible and

based on the information presented to this Court; this Court cannot conclude that the interpreting services provided during the Applicant's trial deprived the Applicant of a fair trial. Therefore, this claim is denied and dismissed.

Applicant alleged that Counsel was ineffective for failing to present sufficient evidence of self-defense and failed to present a third party guilt defense. Counsel both testified that they never considered presenting a third party guilt defense since Applicant's story that someone else was involved in the shooting had already been shown to be false and not supported by any evidence or witness testimony. Applicant testified that his statement claimed that he shot the victim in self-defense. Collins testified that the issue of self-defense was raised in the story because of the altercation, but the Applicant had never actually acknowledged that he did the shooting. Brannon also testified that there was sufficient evidence in the record regarding the physical altercation and struggle between the Applicant and the victim. Brannon testified that he was most concerned with getting the evidence of and jury charge for accident in because the Applicant had never said that the shooting was in self-defense. This Court finds the testimony of both Brannon and Collins to be very credible, while the testimony of the Applicant regarding his claims and stories of the events of that night lacks credibility.

Applicant also alleged that Counsel was ineffective for failing to request the jury charges of accidental death, voluntary manslaughter, and involuntary manslaughter. This Court first finds that the record directly refutes Applicant's claims in so much as the jury was charged with the charges for murder, voluntary manslaughter, and accident. Additionally, Brannon testified and the record reflects that Brannon requested that the court charge the jury with accident, voluntary manslaughter, involuntary manslaughter, and self-defense. In regards to the requests for jury charges, Counsel acknowledged that the trial record contained evidence that he may

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M. HOPE L. A. HELEY

have failed to articulate to the trial judge when he was originally arguing for a self-defense jury charge, specifically as it relates to who pushed first in the argument that evening. Based on this Court's review of this testimony, there is a high probability an appellate court would have found that the trial judge should have charged self-defense. However, although there appeared to be evidence in the record that would reach the legal requirement to charge self-defense, it does not appear to this Court that sufficient evidence of self-defense was presented for this Court to conclude that a different outcome in the trial was likely or probable. Furthermore, it is clear that the lack of credibility of the Applicant, as a result of the Applicant's various stories as to the events that evening harmed the outcome of the trial.

The Applicant also testified that he was told by Counsel that he should not testify at trial because it was going well for him, but he was not informed that the jury could not consider self-defense if he did not testify. Brannon testified that he met with the Applicant about his testifying and the original plan was for him to testify, until it became clear that the State would focus on the original false story that Applicant gave to police and the discrepancies in his stories. Collins testified that he recalled meeting with the Applicant each time (the first and second present trial) about his right to testify. Collins testified that he met with the Applicant the night prior to the day and morning of the day that Applicant would have testified and it was the Applicant's decision to not testify. This Court finds that the Applicant has failed to meet his burden of proof as to this claim. The Applicant has failed to present any additional testimony or evidence or show that the outcome of the trial is likely to have changed had he testified at trial. Therefore, this claim is denied and dismissed.

This Court also finds that the both Counsel were very well prepared for the case and it is clear from the record and testimony presented during the PCR hearing that Counsel both worked

5
 diligently in representing the Applicant. Counsel researched and were both prepared to cross examine each State's witness extensively in attempts to attack credibility and reliability. Counsel was successful in keeping out evidence of other weapons at the Applicant's home, as well as fighting vigorously for the suppression of the Applicant's previous statements to police.

The Applicant failed to present any testimony or evidence to support his claims that Counsel was ineffective for failing to request a polygraph test for Applicant or investigate the voice of Applicant versus the voice on the 911 tape. Therefore, this Court finds that he has failed to meet his burden of proof as to these claims and they are denied and dismissed.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, the Applicant's testimony is not credible, while also finding Counsels' testimony is very credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in their representation, and that Counsels' conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test - that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in their representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland - that he was prejudiced by Counsels' performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

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 M. J. ROPEBLA
 SECURITY

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions Applicant that he must file and serve a notice of appeal within thirty days from the date of this order of denial of relief or judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 17th day of January, 2012.

J. Mark Hayes II
Presiding Judge

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SPARTANBURG COUNTY
2012 JAN 18 PM 2:06
M. HOPE BLACKLEY

FORM 4

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL
CASECOUNTY OF Spartanburg
IN THE COURT OF COMMON PLEAS

CASE NO. 2010-CP-42-5461

Rios Santiago aka Santiago Rios

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:**JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.**DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.**ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other**ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other**DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE)**BOX):☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULES IN THIS APPEAL.

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CLERK OF COURT
SPARTANBURG COUNTY
2011 OCT-6 AM 11:26
M. HOE-BALEY

This is a post-conviction relief matter.

Part of the applicant's present case involves a claim that his lawyers were ineffective by not assuring he had proper interpretation during the trial. The Court is convinced that the applicant knows very little English. The court listened to the 911 tape several times. His English was very limited. He clearly understands some English but it is equally clear that he would need the services of an interpreter during a court proceeding both to speak and also to understand what is being said to him and about him. Based on what was presented to this Court, this Court cannot conclude that the interpreting services provided during the trial deprived him of a fair trial.

The issues presented by the applicant involve the failure to preserve the record for appellate review of the issue for failure to charge self-defense. Trial counsel acknowledged that the trial record did contain evidence which he did not articulate (who pushed first) of self-defense to the trial judge when in fact that evidence was in the record. Based on this Court's review of this testimony, there is a high probability an appellate court would have found that the trial judge should have charged self-defense.

However, a review of the case indicates that the evidence presented at trial suggests the killing of Mrs. Rios was a either murder or an accident, both of which were charged by the judge. While there is evidence which may reach the legal requirement to charge self-defense, it does not appear to this Court that sufficient evidence of self-defense was presented for this Court to conclude a different outcome in the trial was likely or probable. Also, the credibility, or lack thereof, of the applicant's stories greatly affected the outcome of the trial.

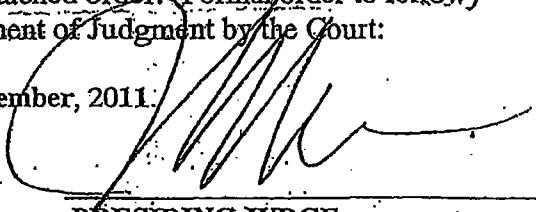
The trial attorneys seem very well prepared for the case and it is obvious from the record and testimony presented during the PCR hearing work diligently representing the applicant.

The Attorney General is requested to prepare a formal order fully addressing the issues in the PCR application. Once signed and filed the formal order will be the final order of the court.

IT IS ORDERED AND ADJUDGED:

- ☒ See attached order. (Formal order to follow).
☐ Statement of Judgment by the Court:

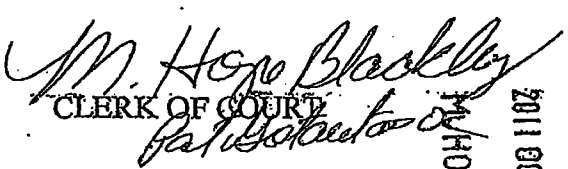
Dated at Spartanburg, South Carolina, this 29 day of September, 2011.


PRESIDING JUDGE

This judgment was entered on the 6th day of Oct, 20 11, and a copy mailed first class this 6th day of Oct, 20 11 to attorneys of record or to parties (when appearing pro se) as follows:

Susannah Ross
 Ross & Enderlin, PA
 330 East Coffee Street
 Greenville, SC 29601
ATTORNEY(S) FOR PLAINTIFF

Suzanne White
 Office of the Attorney General
 P.O. Box 11549
 Columbia, SC 29211
ATTORNEY(S) FOR DEFENDANT


CLERK OF COURT

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2011 OCT -6 AM 3:26
 M. HOPE BLACKLEY

SANTIAGO RIOS,
APPLICANT,

VS.

STATE OF SOUTH CAROLINA, .
RESPONDENT.

IN THE COURT OF COMMON PLEAS
CASE NO. 2010-CP-42-5461

MOTION TO ALTER OR ~~AMEND~~
THE JUDGMENT

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SPARTANBURG COUNTY
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N HOPE BLACKLEY

Pursuant to Rule 59(e), SCRCP, Applicant hereby moves to alter or amend the judgment of this Court filed on January 18, 2012, and received by Applicant's counsel on January 24, 2012.

The Order of Dismissal failed to rule on the allegations of ineffective assistance of counsel due to failure to secure final closing by entering a photograph into evidence (Trial R. p. 449, l.20) as well as numerous failures to make objections during the trial (Trial R. p. 185; p. 312, l. 10; p. 222, l. 10; p. 180, l. 18; p. 436, l. 2; p.243, l. 17; 374, l. 25). Furthermore, the ruling fails to properly apply the Strickland analysis to the issue of trial counsel's failure to properly request a self-defense charge. At the PCR hearing, trial counsel admitted that there was evidence of self-defense in the record that he did not articulate to the trial judge. (Trial R. p.228, 314, l. 13; p. 418, l. 14; p. 614, l. 22) The Court found a high probability an appellate court would have found that the judge should have charged self-defense. It does not follow, then, that counsel was effective despite failing to request a charge of self-defense or the sequential charge that the state must disprove self-defense after giving no strategic basis for failing to do so. Furthermore, a

self-defense charge could have changed the jury's verdict. There was evidence of self-defense in the record including a tuft of the Applicant's hair on the floor, his own statement to police, and the testimony of Isbel Rios. Thus, the harmless error analysis to the failure to charge self-defense is improper in this case, and the Order should be amended to grant Mr. Rios' Application for Post-Conviction Relief.

Respectfully submitted,



Susannah Ross
Attorney for the Applicant
333 E. Coffee Street,
Greenville, SC 29601
(864) 242-0029

Greenville, South Carolina
This 1 day of Feb, 2012.

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2012 FEB - 1 PM 2:33
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Santiago Rios, #277417,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2010-CP-42-5461

RETURN TO APPLICANT'S
MOTION TO ALTER OR AMEND
ORDER DENYING PCR

FILED IN COURT
CLERK OF COURT
10/10/12

This matter comes before the Court by way of the Applicant's Motion pursuant to Rule 59(e), SCRPC, in which he asks the Court to alter or amend its Order dismissing his Application for post-conviction relief (PCR). The Respondent (the State) would submit the following:

The Respondent submits that the Order of Dismissal of the Honorable J. Mark Hayes II, dated January 17, 2012, contains the findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003), and Rule 52(a) SCRPC. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). As to the Applicant's claims that there were issues raised but not ruled upon in the Order of Dismissal, Respondent would note that Applicant raised six specific issues in the application, and those issues are denoted in the Order on page two of eight. Applicant appears to be addressing additional issues that were presented predominantly in written argument form provided by his PCR Counsel to this Court at the hearing as an outline of PCR Counsel's argument and not by testimony of the Applicant or raised by amendment to the application:

1. Counsel failed to secure final closing by entering a photograph into evidence.

a. Respondent submits that although this allegation is raised in the Exhibit presented by Applicant's Counsel to the Court, the Applicant presented no

testimonial evidence to support this claim and the allegation was not raised in the application or any subsequent amendment. The only testimony presented regarding this issue was PCR Counsel's question of Trial Counsel as to why the photo was entered into evidence. The Applicant did not allege during his testimony that Trial Counsel was ineffective for this action. Respondent would argue that there was no need for any findings in the Order on this issue.

2. Counsel failed to make numerous objections during trial.

- a. Although PCR Counsel's argument outline lists the Failure to object and lists specific reasons for objections, Respondent submits that there was no testimony evidence presented by Applicant to allege that Counsel was ineffective for failing to object to any statements made during the trial. Respondent submits that Applicant's Counsel followed the record, asked Counsel if they objected to particular questions and they answered yes or no and then Applicant's Counsel moved on. There was no evidence or argument put forth by Applicant as to why Counsel should have objected to these particular statements during the hearing, nor how the failure to object prejudiced Applicant. Respondent would argue that there was no need for any findings in the Order on this issue.

3. The Court's ruling fails to properly apply the Strickland analysis to the issue of Counsel's failure to properly request a self-defense charge.

- a. Respondent submits that the Order of Dismissal properly applies the Strickland analysis to the issue of whether or not Counsel was ineffective for failing to properly request a self-defense charge. First, Respondent notes that in his application, Applicant fails to argue that Counsel was ineffective for properly

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arguing for a self-defense jury charge. Applicant also failed to offer any testimonial evidence to support any claim that Counsel was ineffective for failing to properly request a self-defense jury charge. However, regardless, this Court found that Counsel may have been deficient for failing to articulate sufficiently the evidence presented to support the requested self-defense charge (since this Court found it could have resulted in the appellate court finding a self-defense charge appropriate); however, this Court found that although Counsel may have been deficient, the Applicant failed to prove that the outcome of the trial would have been different even if a self-defense charge were allowed. The Court also found that the lack of the Applicant's credibility because of his other stories regarding the evening harmed the outcome of the trial. Therefore, Respondent submits that there is no need for any amended findings in the Order on this issue.

II.

WHEREFORE, having made its Return to the motion, the State requests that the relief requested in the Motion be denied as to all issues raised.

Respectfully submitted,

ALAN WILSON
Attorney General

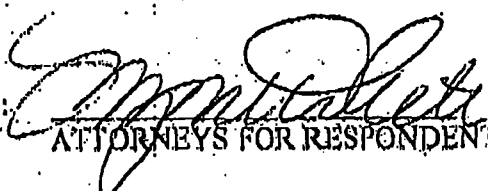
JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

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JAMES H. CLARKE

SUZANNE H. WHITE
Assistant Attorney General

BY:


ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

February 13, 2012.

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ANDERSON COUNTY

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

2010
CASE NO. 2011-CP-42-5461

Santlago Rios, #277417

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT** - This case was tried before a jury and a verdict was rendered. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (CHECK REASON)**: ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other

☐ **ACTION STRICKEN (CHECK REASON)**: ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**:
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

This matter is before the Court on a Motion to Alter or Amend a Prior Ruling. After having reviewed the submissions by the Applicant and the State, the Court requests oral arguments on the following issue:

In a post-conviction relief case, can the finder of fact engage in a weighing of evidence to determine whether an error made at trial (an error which on direct appeal of the underlying criminal case would be deemed reversible) was insufficient to grant the PCR application due to the existence of other evidence supporting the Applicant's guilt.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

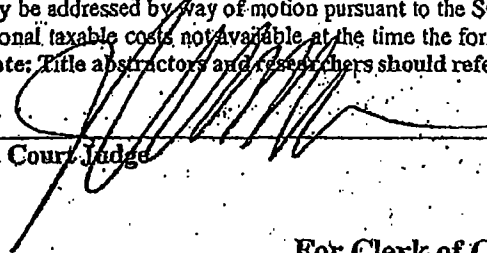
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
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		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

Judge Code

2/22/12

Date

For Clerk of Court Office Use Only

This judgment was entered on the 23rd day of Feb., 2012 and a copy mailed first class or placed in the appropriate attorney's box on this 23rd day of Feb., 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Susannah Ross
Ross & Enderlin, PA
330 E. Coffee Street
Greenville, SC 29601

Suzanne White
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter:

M. Hope Blackley
CLERK OF COURT

Natalie Bishop DC

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CLERK OF COURT
SPARTANBURG COUNTY
2012 FEB 23 AM 10:53
M. HOPE BLACKLEY

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF COMMON PLEAS
3
4 Santiago Rios,)
5 Applicant,) TRANSCRIPT OF RECORD
6 -vs-) 2010-CP-42-5461
7 The State,)
8 Respondent.) June 14, 2012
9 Spartanburg, South Carolina
10

11 B E F O R E:

12 HONORABLE J. MARK HAYES, II, JUDGE
13
14

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

16 SUSANNAH CONYERS ROSS, ESQUIRE
17 Attorney for the Applicant

18 SUZANNE H. WHITE, ESQUIRE
19 Attorney for the Respondent
20
21
22

23 Margaret A. Woods
24 Circuit Court Reporter
25

ORIGINAL

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Pleadings

3

Certificate of reporter

19

NO EXHIBITS INTRODUCED

1 THE COURT: Alright, I believe that we are here on the
2 matter of Rios vs. State of South Carolina. This is a motion
3 for reconsideration that has been filed by the Applicant, be
4 more than happy to hear from you.

5 MS. ROSS: Thank, Your Honor, may it please the Court.
6 have attempted to prepare a response to to the question you've
7 presented of in a post-conviction relief case can the finder
8 of fact engage in the weighing of evi -- evidence to determin
9 whether an error was made at trial, parenthesis, an error
10 which on direct appeal of the underlying criminal case would
11 be deemed reversible, end of parenthesis, was insufficient to
12 grant the PCR application due to the existence of other
13 evidence supporting the Applicant's guilt. The way I saw tha
14 question and and read your order was it was taking *Strickland*
15 and finding that while an error may have been made in not
16 requesting the self-defense charge, that and and the Court of
17 Appeals would have in fact likely reversed if that charge had
18 not been given by the judge if it had been requested but then
19 it goes on to apply sort of a harmless error analysis to that
20 Now I wish I coulda found the magic bullet, and I did burn th
21 midnight oil as I often do on Westlaw trying to find that
22 magic case that would answer the question, while I found many
23 that were around that issue, I found nothing that specificall
24 addresses that so I'm just going back to sort of a but for
25 analysis. I will start with the fact going to *State v. Muller*

1 where in in the cases like that and I ran a number of cases
2 from the headnotes and that is 316 South East second 409, it's
3 a 1984 case and basically it says, Any evidence of
4 self-defense in the record, in the trial record, would entitle
5 a defendant to an instruction on self-defense and in my 59(e)
6 motion I go on to say and the instruction that the the
7 defendant doesn't have the burden of prove -- disproving
8 self-defense or the State has that burden so with all those
9 cases were the instruction's not given, the Court of Appeals
10 then just reverses and sends it back down for a new trial. In
11 those cases they do not apply harmless error analysis, they do
12 not say, But we think since there was other other evidence of
13 guilt the jury woulda found guilt so so based on that I would
14 just put forward a but for analysis that but for Mr. Rios's
15 trial attorneys requesting a jury charge on self-defense, his
16 case was not reversed and he doesn't get a new trial and
17 because of that he would have gotten a a new trial if they had
18 in fact requested that and and so he shouldn't be -- other
19 people, if if his attorneys had asked for that jury
20 instruction and the judge denied it, their cases would have
21 been back in front of a trial, in front of a jury and we state
22 that it would be a jury issue to determine whether evidence
23 pre -- presented at trial supported self-defense and that's
24 all my oral argument. I would resubmit if you don't have it
25 just the actual motion to alter or amend where I set forward

1 that ---

2 MS. WHITE: Think ---

3 MS. ROSS: --- argument.

4 MS. WHITE: --- Your Honor, there should be a packet,
5 perhaps is it in that -- is it not in the packet?

6 THE COURT: In the, in the package is the, is the order
7 of dismissal, the motion to alter or amend the judgment and
8 then the returned Applicant's motion to alter or amend the
9 order denying PCR then I have the clerk a court's file.

10 MS. WHITE: Okay.

11 MS. ROSS: Okay. So that alter or amend I just simply
12 point out that there there was evidence of self-defense: the
13 tuft of Applicant's hair on the floor, his hair had been
14 pulled out during the altercation in the living room, his own
15 statement to the police said said it was self-defense and then
16 at the the PCR hearing we presented testimony of Isabel Rios
17 of self-defense, so while I I wish I had had more in in the
18 form of case law, I would just argue that but for if if his
19 trial attorneys had requested that charge, he'd be in a
20 position where he could get a new trial and I'd argue that the
21 harmless error analysis is improperly placed in this function,
22 he would, Mr. Rios is entitled to a new trial based on the
23 error to let jurors be the the finders of fact regarding the
24 self-defense issue.

25 THE COURT: Well let me ask you this: Did, in your

1 research did you find or did you look for those situations
2 where the appellate courts had said that they will not engage
3 in a harmless error analysis on certain issues? I'm thinking
4 of the United States Supreme Court, you know, when they re --
5 told the South Carolina courts that said that, and I forget
6 what it was in, I I think it was in the cases where where the
7 South Carolina Supreme Court had been and it, and it, and it
8 might be in self-defense cases where prior to the United
9 States Supreme Court's ruling the South Carolina Supreme Court
10 was engaging in a a weigh of the evidence and were saying,
11 Well there is such massive amounts of evidence that proves the
12 guilt that failure of the lower court to charge, it might be
13 self-defense, it -- I just cannot remember the particular,
14 failure for the Court to to for a trial court to charge
15 self-defense, that that was, that was simply a harmless error
16 because the evidence of guilt is so overwhelming and then the
17 United States Supreme Court said, No, you can't do that type
18 of analysis.

19 MS. ROSS: Right.

20 THE COURT: What -- were there other areas besides the
21 the self-defense area where the courts that maybe the United
22 States Supreme Court or the South Carolina Supreme Court has
23 said don't engage in that harmless error analysis?

24 MS. ROSS: I did not see that and I was limiting my
25 research and I probly shouldn't but I did to to jury

1 instructions, failure to give jury instructions and ---

2 THE COURT: Um-hum.

3 MS. ROSS: --- giving jury instructions so I did not fir
4 anything that that went to that level and one thing that I
5 sort of compared it to was was some some Texas case law where
6 there was DNA evidence of innocence ---

7 THE COURT: Um-hum.

8 MS. ROSS: --- and the Texas Court of Appeals said, Well
9 someone else could've, you know, ha -- left that DNA after he
10 committed the crime and they engaged in sort of a harmless
11 error in that analysis and the Supreme Court said no there.
12 Here I think it's a little different because the jury
13 instruction itself, the failure to get that jury instruction,
14 created a situation where where the jury was denied their rol
15 as finders of fact and there were cases out there where if
16 someone was given the a bad manslaughter charge, the jury was
17 denied the a -- the ability to make a decision based on law a
18 it stood and in that no harmless error analysis was given and
19 in all the -- and I can just, you know, in in a lot of the
20 headnotes, I just researched the headnotes for harmless or
21 reversible error, failure to give instructions and
22 instructions on particular points and all these cases
23 reversed and it's 110 keynote 1173.2. I will say there was a
24 case, so none of those ever got into, mentioned harmless error
25 except one of the keynotes, the last one that I saw *State v.*

1 Stuckey from 1900 did did do a harmless error analysis but it
2 was quite old, all the rest just said if the jury wasn't given
3 the opportunity to be the finder of fact based on the law as
4 it stood, they get a new chance and Mr. Rios or has been
5 denied that second bite of the apple because of error of his
6 trial attorney so but for their error, the outcome would have
7 most certainly been different in that he would have had a
8 second trial.

9 THE COURT: Okay.

10 MS. WHITE: Your Honor, I think the State submits that in
11 this situation obviously, you know, in your question as to
12 whether or not you can -- I kinda took the first part or your
13 question in the Form 4 as a question initially of whether or
14 not as the PCR judge you can in -- involve, you know, kind of
15 a finding of fact and I think that's exactly what your role is
16 in the situation, obviously you're here to judge the facts
17 presented, the credibility of the witnesses, you know, there's
18 findings of overwhelming evidence. In PCR a great deal as to
19 whether or not someone is prejudiced by any deficiency there
20 is a finding of overwhelming evidence a lot of times in the
21 circuit court level. I know that Ms. Ross said, you know, in
22 particular regarding self-defense charges there might not be
23 case law regarding harmless error analysis but there also is
24 harmless error analysis in other instructions. I note that in
25 State v. Kerr, I guess K-E-R-R, 330 SC 132, it's a DUI case

1 and they talk about applying harmless error analysis to an
2 erroneous jury instruction. There's also the case of in a
3 civil case, a fo -- well actually it was a a criminal, a
4 forgery case failing to give a jury charge was harmful so I
5 think there is and can be by the Court of Appeals analysis of
6 the facts, I think that's exactly what they look at is whethe
7 or not the error is harmless in this situation. I think in i
8 this situation, however slight, there might have been,
9 according to Mr. Brannon, enough which was why he did argue
10 self-defense initially, obviously as it continued to go on an
11 on and it was not going his way, he he he I guess abandoned
12 that is the term that the Applicant used, however the State
13 would also argue in the alternative that there was not
14 sufficient or that, excuse me, that he was not deficient
15 because he argued for that instruction but also said he argue
16 primarily on his issue of accident because of the way the
17 testimony and the Applicant's main argument that there was a
18 struggle over the gun and his never acknowledging that he
19 actually shot the gun which generally in self-defense it's a
20 requirement, you know, you have shot someone and you assert
21 self-defense as the reason you shot them because you were in
22 eminent fear and harm for your life. Applicant in this cay -
23 case never acknowledged or admitted that he shot the weapon
24 and said instead he only said there had been fights earlier,
25 there had been an argument about the food earlier, he followe

1 his wife into the bedroom and there was a s -- you know, en --
2 ensuing struggle over the gun and I think Mr. Brannon and
3 Mr. Collins argued intensely or Mr. Brandon primarily for
4 accident in that case as the primary defense. Although they
5 had initially started as self-defense they said that was not
6 their their their defense ultimately so I think in alternative
7 Mr. Brannon could be found not deficient because of the focus
8 on the accident and the other charges which he was able to get
9 from the circuit court but I'll and, you know, back to the
10 first argument, I do think there are cases that find that
11 there are based on civil and criminal charges where they look
12 at jury instructions at the Court of Appeals or the Supreme
13 Court and find harmless error so I think that is an option
14 that could be found if you do still find that Mr. Brannon was
15 deficient in failing to follow through on his self-defense
16 argument that based on the overwhelming evidence and the
17 issues having to do with credibility and and a variety of
18 things and a the accident charge and so on that there was
19 actually the Court would have probably found harmless error.

20 THE COURT: And that was *State vs. Kerr*, was that a --
21 that I wrote it down 330 Southeast 132, was it Southeast
22 second?

23 MS. WHITE: It was South Carolina is SC, yes, sir.

24 THE COURT: SC, I'm sorry.

25 MS. WHITE: That's a 1998 case.

1 THE COURT: Alright.

2 MS. WHITE: *The State v. Lee-Grigg* ---

3 THE COURT: L-E-E?

4 MS. WHITE: L-E-E-R-I-G-G is 374 SC 388, that was
5 actually a forgery charge and they found that the Court, you
6 know, although h -- it erred in failing to give the jury
7 charge on having to do with evidence of good character in
8 prosecution; that that was a harmful failure by the Court to
9 fail to give that jury charge.

10 THE COURT: Okay.

11 MS. WHITE: Excuse me (coughed).

12 THE COURT: Alright.

13 MS. ROSS: May I reply just briefly?

14 THE COURT: Yes, ma'am.

15 MS. ROSS: Just goin' back to my motion to alter or
16 amend, I did cite the parts in the record and and I was wrong
17 I I believe Isabel Rios I said that it -- the testimony was in
18 the PCR hearing but she actually testified at the trial so in
19 the trial she says, the victim, she pushed my son, my son was
20 asking her for food, I don't know why she got mad and why she
21 pushed her so that's a part in the trial with self-defense
22 just going back to that. On Page 418, and this is in my
23 motion as well, on Line 14 the defendant's own statement was,
24 We struggled, I was defending myself. Those were his
25 statements. I believe that's a statement of self-defense and

1 that was his statement was read in the record to that jury.
2 Then there were also more articulations of self-defense in the
3 record on Page 418, Line 14 that I refer to and 614, Line 22
4 and with all that in the record, the the attorneys did not
5 request self-defense and and they admitted that at the PCR
6 hearing that that they didn't request it and maybe should have
7 so just going to that specific issue I think that first prong
8 of *Strickland* is met in that case.

9 Now just to clarify, I did find there was lots a case law
10 about the wrong instruction being given like you gave part of
11 the self-defense but then didn't give the second part of
12 self-defense and that there are cases like that where the
13 harmless error analysis is applied but there are no cases that
14 I saw where the Court of Appeals or Supreme Court applied the
15 harmless error analysis where the the the instruction just was
16 not given, an instruction that would have applied was not
17 given and and that's where we are here, we're going back and
18 saying, Well there was other evidence of guilt is not enough,
19 there was evidence of self-defense that that jury, his jury
20 heard at trial and they were not given an opportunity to make
21 a factual finding based on that because that jury instruction
22 was not given to them. So again, I'd go back on the
23 *Strickland* analysis, the second prong is but for the trial
24 attorney's lack of action or or bad actions, the outcome of
25 the trial would have been different, it certainly would have

1 been different in that the Court of Appeals would reverse and
2 he would have had a new trial.

3 Now as far as whether the jury would've gone differently
4 that's a, we don't know but there certainly was evidence of
5 self-defense in that original record.

6 THE COURT: I mean, I -- the the reason that I went, one
7 of the reasons why I went to the point of finding that the
8 Applicant's attorney was deficient is that, I don't remember
9 remember it, remember the exact question that Judge Cole
10 phrased to him, but Judge Cole phrased, uh, formed the
11 question as to what was in the record of the trial ---

12 MS. ROSS: Right.

13 THE COURT: --- related to self-defense and the
14 attorney's response was, I mean, he didn't argue what the
15 evidence was and so that that that's why I feel like he was
16 deficient, I think even during t -- when he testified that
17 during the PCR hearing one of you in questioning him one of
18 his responses was, Well, yeah, I was deficient or he made that
19 typa response. Okay ---

20 MS. ROSS: Yes.

21 THE COURT: --- well listen, thank ya'll ---

22 MS. WHITE: Your ---

23 THE COURT: Um-hum.

24 MS. WHITE: --- if I can just one final comment. I just
25 wanted to point out that I know that Ms. Ross said that he

1 failed to ask for self-defense, on Page 605 obviously
2 Mr. Brannon did ask for self-defense. As you said his
3 argument was and on 607 after Mr. Gowdy speaks he said, We're
4 entitled to self-defense if there's any evidence that causes a
5 jury to believe that he was acting and, Your Honor, in his
6 statement he said it was self-defense, that was his initial
7 argument and whether or not he actually argued the tuft of
8 hair himself, the judge was aware of that. If you continue to
9 look after he argues and after Mr. Gowdy argues, the Court
10 actually acknowledges that it was aware of the evidence of
11 parts of the hair that were found in the other room indicating
12 a type of struggle, perhaps a provocation, something that
13 might have caused him to fly hot in the sudden and heat of
14 passion, the Court was aware of that evidence, it was already
15 presented to the Court, he understood that, he looked at the
16 fe -- physical altercation, 610 the Court even says again
17 there was a physical altercation but he says there's a lotta
18 cases it's, you know, under his statement he shoved her first.
19 Defending yourself, you know, whether or not that's legal
20 provocation or something, there was shouting, they go on and
21 on to kind of talk about that, Mr. Brannon just kind of says,
22 Yes, Your Honor, I defer -- defer to the Court but then the --
23 and then he continues to argue into whether or not they need,
24 you know, involuntary manslaughter. The Court actually says
25 just because the defendant characterized this as self-defense

1 that's not gonna bind me to saying that it's a self-defense
2 case, you know, a self-serving statement by the defendant's
3 not sufficient evidence to cause them to give a self-defense
4 charge. The Court, you know, continued to go on to say that
5 there's a fight goin' on in the house, altercation, there's
6 hair on the floor, ended in the bedroom and at that point, you
7 know, I think it's clear that the evidence had been presented
8 to the Court whether Mr. Brannon spoke it at his jury charge
9 request, there was so much discussion back and forth I don't
10 think he needs to repeat ---

11 THE COURT: Well ---

12 MS. WHITE: --- that.

13 THE COURT: --- I appreciate that from the State but he
14 did not get a self-defense charge.

15 MS. WHITE: Right, but I guess my argument, let me, I
16 guess I'll just finish my argument was that it's clear the
17 Court would not even, if he continued and objected, the Court
18 did not think there was sufficient evidence so I don't ---

19 THE COURT: Then why did it not get raised on appeal?

20 MS. WHITE: He -- they said he abandoned it but I'm
21 sayin' at ---

22 THE COURT: And whose job is it to be sure that those
23 issues are not abandoned?

24 MS. WHITE: It's the attorney's.

25 THE COURT: Okay.

1 MS. WHITE: Yes, okay. Thank Your Honor.

2 THE COURT: There was clearly, there was sufficient
3 evidence in presented to the trial court that that charge
4 should have been given.

5 MS. WHITE: Okay.

6 THE COURT: Alright, so my question and what I'm
7 searching for is that when there is such a clear error and
8 that issue was not preserved by the attorney through whatever,
9 whether he didn't make the right arguments or it was abandoned
10 or it wasn't presented, can I then engage or am I bound to, do
11 I have to engage in a weighing of the evidence for a PCR case
12 that allows me to take a look and say, Oh, well there's just
13 so much evidence out there of guilt, I I'm going to ignore the
14 fact that there was, that there was that evidence that was in
15 the record that justified and actually mandated that charge of
16 self-defense when the United States Supreme Court has said and
17 told South Carolina courts, You cannot make a determination on
18 appeal and and and and engage in that weighing of the
19 evidence. If there is that evidence that justifies that
20 charge of self-defense, you have to give it, that is not, that
21 cannot be a harmless error. United States Supreme Court I
22 believe has spoken quite clearly, that is not harmless error
23 regardless of how much evidence of guilt that is in that
24 record so I'm at that stage so I'll ---

25 MS. ROSS: And, Judge, I ---

1 THE COURT: --- take a look at ---

2 MS. ROSS: --- apologize that I can't help. I I called
3 Kat Hudgins with the Court of Appeals yesterday and
4 discussed ---

5 THE COURT: Um-hum.

6 MS. ROSS: --- her recent case of *Walker v. State* which
7 was a slightly different issue so I didn't bring it up which
8 is up for assert. Her response was that and and that
9 *Strickland* requires a reasonable probability standard, not a
10 harmless error analysis, that was what she, that that was her
11 quote. I did not find that wonderfully helpful but she is
12 very experienced in this issue. She could not give me a case
13 and I couldn't find one that directly addressed if a jury
14 instruction that is mandated is not given can you go on to
15 require harmless error analysis. This to me I think you can'
16 because we're bringing up a due process violation. Mr. Rios
17 was denied due process of having his jury hear, you know,
18 consider self-defense because that judge did not give that
19 instruction so that's the position I, that I would put forward
20 here but I could not find a particular case that said that
21 that's impossible, all I could give is the key cite that I
22 presented to you.

23 THE COURT: Okay, well I'll take a look at it.

24 MS. ROSS: Okay.

25 MS. WHITE: Thank Your Honor.

1 THE COURT: Thank ya'll.

2 MS. WHITE: Oh, oh, -- okay, that's all.

3 THE COURT: Anything else?

4 MS. WHITE: No.

5 THE COURT: Alright. Sir, just stay in touch with your
6 lawyer.

7 MS. ROSS: Thank you, Judge.

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CERTIFICATE OF REPORTER

I, Margaret A. Woods, Court Reporter in and for the State of South Carolina at Large, hereby certify that I reported the preceding case on June 14, 2012 at the time and place heretofore set forth; and that the foregoing pages numbered from 3 through 18, inclusive, constitute a true and accurate transcription of my stenographic notes of the said proceeding.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

February 22, 2013

Margaret A. Woods

Margaret A. Woods, Court Reporter

in and for the State of South Carolina at Large.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010-CP-42-5461

Santiago-Rios

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried or heard and a decision rendered.
- ☒ **DECISION BY THE COURT.** This action came before the court for a trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

This matter came before the Court on a Motion for Reconsideration on a denial of a post-conviction application. The record in this case is clear that trial counsel was deficient in regards to the issue of self-defense. This Court can independently make such a finding based on the record of the proceeding which was conducted before it, but also can make such a finding based on the argument that was made by the State in its Brief to the Court of Appeals. In its brief, the State's position was that trial counsel "abandoned" the issue of self-defense at the trial level. The Court of Appeals agreed and ruled that trial counsel abandoned the issue by finding that he did not have a meaningful opportunity to present a complete defense when he was not allowed to have his self-defense presented to the jury.

In reviewing the record, this Court can conclude that but for trial counsel abandoning the issue of self-defense, the issue would have been addressed by the appellate court. And based on a review of the present record and the decisional authorities in South Carolina (for example *State v. Jackson* and *State v. Muller*) there is evidence in the record which supports the self-defense charge and, therefore, the very reasonable probability that the appellate court would have reversed the trial court and granted a new trial. Thus, but for the professionally deficient representation by trial counsel, the applicant's conviction would have been reversed and a new trial granted.

The issue at this juncture involves the second prong of the PCR/Strickland analysis (reasonable probability of a different outcome) at the trial level. With this Court's belief that trial counsel was deficient in abandoning the issue of self-defense and that if the issue had been preserved for appellate review there exist a reasonable probability of reversal, this Court sought guidance from the attorneys as to the application of the PCR/Strickland standard in such situations.

COMPUTER(S)

FILED
CLERK OF COURT
SPARTANBURG COUNTY
JUL 13 AM 8:43
HOLE PUNCH

The Court appreciates the research efforts of the attorneys. The Court's concern arises from the United Supreme Court's analysis in *Holmes v. South Carolina*. *Holmes* is a case which postdates the cases offered by the attorneys. Even though *Holmes* is a case that addresses third party guilt, its discussion and analysis of the logic of weighing evidence that bears upon the right of an accused to have a constitutionally meaningful trial is challenging when the PCR/*Strickland* decisional authorities do not require the same approach.

Nevertheless, applying the PCR/*Strickland* analysis and disregarding *Holmes*, the Court cannot find that applicant has met his burden of proof. This Court cannot rule that to a reasonable probability the outcome would have been different.

The Attorney General is requested to prepare an order denying the Motion for Reconsideration consistent with this form 4. The formal order once signed will be the final order of the Court.

The Court appreciates the quality of legal work presented by both counsel.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the 3 day of July, 2012 and a copy mailed first class or placed in the appropriate attorney's box on this 3 day of July, 2012 to attorneys of record or

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Santiago Rios, #277417,

Applicant,

vs.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

2010-CP-42-5461

ORDER

This matter comes before the Court by way of Applicant's Motion to Alter or Amend. The Respondent made its Return to this response on February 13, 2012. Oral arguments on the matter were heard on June 14, 2012, at the Spartanburg County Courthouse. The Applicant was present at the arguments.

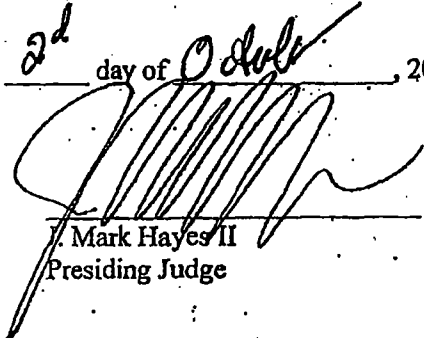
As to the first two arguments raised by the Applicant in the Motion, this Court finds that allegations regarding Counsel's failure to make specific objections or secure final closing by the introduction of a photograph were presented in written form at the hearing as an outline of a Counsel's argument and not by any testimony of the Applicant or raised by amendment to the application. As to those allegations, the Order contains the findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003), and Rule 52(a) SCRCP. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

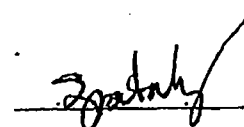
Regarding the allegation that Counsel was ineffective for failing to properly preserve the request for a self-defense charge, this Court, although finding clear deficient performance by Counsel in regards to the abandonment of the request to charge self-defense and the resulting lack of preservation of that particular argument for appellate review, cannot find the requisite prejudice required in a Strickland v. Washington analysis. Even a professionally unreasonable

error by counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984) (citing United States v. Morrison, 449 U.S. 361, 364-365, 101 S.Ct. 665, 667-668, 66 L.Ed.2d 564 (1981)).

Therefore, this Court cannot rule to a reasonable degree of probability that the outcome of the Applicant's trial would have been different had Counsel not abandoned the self-defense charge or had the self-defense charge been provided to the jury. Based upon careful reconsideration of all the evidence presented in this case and upon full consideration of Applicant's Motion, Respondent's response, and oral arguments presented to the Court, this Court is not persuaded to alter or amend the judgment.

AND IT IS SO ORDERED this 2^d day of October, 2012.


 Mark Hayes II
 Presiding Judge

 South Carolina

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2012 OCT -4 PM 4:14
 M. HOPE BLACKLEY

ARTANBURG SHERIFF'S OFFICE

The State of South Carolina

County of Spartanburg

TREY GOWDY, SOLICITOR

COURT OF GENERAL SESSIONS

JAN 07 2008

TERM

ARREST WARRANT NUMBER

REPORT ENTERED

CARD FILLED

83446

DUPLICATE

CHECKED WARRANTS

CHECKED NATURE

ACTION OF GRAND JURY

ASSESSMENT AND

AND MADE

TRAFFIC VIOLATIONS CODE

Foreperson of Grand Jury

Date:

VERDICT

Guilty

Foreperson of Petit Jury

Date: 5/1/08

THE STATE
vs.

SANTIAGO PASCUAL RIOS

Indictment for

MURDER

SC Code 16-03-0010, 0020

CDR Code 116

Class FEL-EXM

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on JAN. 04 2008, the
Grand Jurors of Spartanburg County present upon their oath:

MURDER

That SANTIAGO PASCUAL RIOS did in Spartanburg County on or about
NOVEMBER 23, 2006, feloniously, wilfully, and with malice aforethought cause the
death of one ELIZA HERNANDEZ by shooting her with a gun, and that the victim died
as a proximate result thereof, all in violation of §16-3-0010, 0020, *The South Carolina
Code of Laws*, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such
case made and provided.

Cindy Crick
ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Spartanburg
STATE SpartanburgINDICTMENT/CASE #: 08-GS-42-0170
AW#: K183446
Date of Offense: 11/23/06
S.C. Code §: 16-3-10, 20
CDR Code #: 0116AKA: Santiago Pasqual
Race: H Sex: M Age: 24
DOB: 6-25-83 SS#: _____
Address: _____
City, State, Zip: Spartanburg, SC 29301
DL#: _____ SID#: _____

SENTENCE SHEET

In disposition of the said Indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: MurderIn violation of § 16-3-10, 20 of the S.C. Code of Laws, bearing CDR Code # 0116☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS (CSC w/minor 1st or Lewd Act) ☐ §17-25-45The charge is ☒ Felony Indictment ☐ Felony Included Offense ☐ Defendant Waives Presentment to Grand Jury (Defendant Initials)
The plea is ☐ Without Negotiations or Recommendation ☐ Negotiated Sentence ☐ Recommendation by the State

ATTEST

Cindy Crick
SolicitorSantiago Pasqual Pas
Defendant[Signature]
Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 2 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS

Recipient: _____

Fine: _____

\$14-1-206 (Assessments 107.5%)	\$	
\$14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
\$14-1-211(A)(2) (DUI Surcharge)	\$100	\$ 100.00
\$56-5-2995 (DUI Assessment)	\$12	\$ 12.00
\$35.13 (Public Def/Prob)	\$500	\$ 500.00
\$73.3, 1B TP (Law Enforce. Funding)	\$25	\$ 25.00
\$33.7, 1B TP (Drug Court Surcharge)	\$100	\$ 100.00
\$50-21-114 (BUI Breath Test Fee)	\$50	\$ 50.00
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$ 40.00
3% to County (if paid in installments)		\$ 12.75
TOTAL		\$ 1,228.75

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: 21-1-3-15Sentence Date: 5/1/08Court Reporter: Ram [Signature]Clerk of Court/Deputy Clerk: [Signature]