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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable D. Craig Brown, Circuit Court Judge
Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No.: 2023-000885

Johnnie Walker Gaskins,

Petitioner,

vs.

State of South Carolina,

Respondent.

APPENDIX
VOLUME III of IV

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1 MR. MEADORS: That's all we have, thank you.

2 THE COURT: Mr. McCulloch.

3 MR. MCCULLOCH: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MR. MCCULLOCH:

6 Q Investigator Isenhoward, on the night that you got
7 this call about 1 in the morning, did you know where
8 the 360 Club was?

9 A Did I know where it was?

10 Q Yeah.

11 A Yes.

12 Q I mean, you know of the club?

13 A I mean, I had never been there before on any kind of
14 calls but I knew about where it was at, yes.

15 Q Did you know that they had people who pat you down
16 at the front door to check for guns?

17 A I didn't know. I don't know that.

18 Q Well, when you got there, the scene for the jury was
19 what, a lot of confusion?

20 A Yes, sir. There was a number of people moving
21 about.

22 Q Cars and people going every direction?

23 A Yes, emergency vehicles filing in.

24 Q And you were not the first officer. There were
25 several other police officers there from your

1 department?

2 A Yes and others.

3 Q E M S you said. The parking lot, would you say, is
4 not very well lit?

5 A There's light in the parking lot.

6 Q Okay. Is it well lit then, in your opinion?

7 A I mean, it's not daylight but, I mean, there's
8 lighting in the parking lot, yes.

9 Q Were there still cars parked in the parking lot?

10 A Yes.

11 Q Rows of cars?

12 A Yes, it -- there were cars in the parking lot. I
13 don't recall how many.

14 Q So as you got out of your vehicle, you, I think you
15 testified, made your way in to this club, not sure
16 whether maybe the shooter was still there?

17 A Yeah, I wasn't sure in a -- you get information
18 while you're in route but you're not positive about
19 the reliability so you take all the precautions you
20 need to.

21 Q Part of the information was shots fired inside?

22 A At that club.

23 Q Now, even with all OF that confusion, you were able
24 to notice shell casings in the parking lot as you
25 walked in with your gun drawn and -- is that right?

- 1 A Yes, sir.
- 2 Q And so you got inside and walked the perimeter or
- 3 walked the interior and the first people you talked
- 4 to upon arriving were who?
- 5 A Other officers, other deputies.
- 6 Q And somebody directed you to Mr. Williams, is that
- 7 right, Sydney Williams?
- 8 A Yes. Yes.
- 9 Q Where was he when you got there, when you were, you
- 10 know, taken to him or he was brought to you?
- 11 A He was brought to me. It was in -- I believe that
- 12 Deputy Owens had him.
- 13 Q And he was still in handcuffs?
- 14 A I don't recall.
- 15 Q And you learned from Deputy Owens that he had been
- 16 seized and cuffed by the security guard?
- 17 A Yes.
- 18 Q Mr. Williams seemed frightened?
- 19 A Yeah, I mean, there had just been a shooting at the
- 20 club.
- 21 Q And he was handcuffed?
- 22 A I don't recall if he was handcuffed at that time.
- 23 He had been handcuffed by security.
- 24 Q You know whether security was angry when they cuffed
- 25 him?

1 A I'm not sure.

2 Q You know whether they threatened him?

3 A I didn't get -- I didn't receive any information
4 that he had been threatened.

5 Q But you did receive information from him that he
6 identified for you the person who he said had been
7 the shooter?

8 A Yes.

9 Q As Mr. Gaskins?

10 A Yes.

11 Q And he told that Mr. Gaskins was a good friend of
12 his?

13 A Well, I don't know if he used those words. They
14 were that he knew him and he was friends with him.

15 Q Okay. I'm sorry, I apologize. I thought those were
16 your words earlier, but friend with him. So
17 certainly at that point you -- you took the cuffs
18 off of him, right? Or were the cuffs on or off at
19 this point, that you were talking ---

20 A Like I said, he came to the Sheriff's office with
21 me. He wasn't in handcuffs when I had him.

22 Q So from your conversation there, you put him in the
23 car and took him to the Sheriff's Department?

24 A Yes.

25 Q All right. Well, on the way did you say, how about

1 show me where Johnnie Gaskins stays?

2 A No, sir.

3 Q Well, why not, they're friends, maybe good friends?

4 A Yes, sir. Well, first and foremost, I have to talk
5 to him. I have to determine the reliability of what
6 he's telling me, you know. If it doesn't match up
7 with everything that we learned from the rest of the
8 scene, with the rest of the witnesses, before I go
9 out and approach someone based on information. Now
10 once I did talk to him once he was at the Sheriff's
11 office and he gave me a sworn statement, and that
12 statement matched the same thing the other witnesses
13 were saying, then I go out and I approach somebody
14 and confront them.

15 Q Now, the other witnesses were the employees that you
16 had put in a segregated area in the back of the
17 club?

18 A Some of those, some of them were.

19 Q Well, so you got to the Sheriff's Department, I
20 mean, apprehending the suspect that at that point
21 had been identified, was not like the most important
22 thing to do at that point?

23 A Well, in order to apprehend him, you have to have
24 probable cause. So I'm trying to establish that.

25 Q All right. And as soon as you compared Sydney's

1 version of events with whatever else you compared it
2 with, is that when you threw him in the car -- put
3 him in the car and drove right to where he would
4 have known -- presumably would have known Mr.
5 Gaskins lived or stayed?

6 A No, sir. I -- I had information based upon my own
7 records where he stayed.

8 Q Where you checked the driver's license info and got
9 an address?

10 A Among other things, yes.

11 Q Did -- you talked with several other people at the
12 club that night?

13 A Yes, sir, I did.

14 Q The -- Mr. Davis, Lamont Davis, I think in the
15 information provided to us, he told you that the
16 person who had done the shooting had a goatee?

17 A He may have, I don't recall every detail of the
18 statement but I can ---

19 Q Well, if you could take my word for it. The --
20 there was another witness who told you that the
21 shooter had braids or cornrows, do you remember
22 that?

23 A It's possible, rolls of some sort.

24 Q I mean, you've been in the courtroom the entire
25 trial?

- 1 A Yes, sir.
- 2 Q The -- you did obtain a driver's license photograph
- 3 of Mr. Gaskins that night or the next morning,
- 4 didn't you?
- 5 A Yes.
- 6 Q And that was the same driver's license that -- based
- 7 on the records, this record, 149, State's Exhibit
- 8 149, that document established that Mr. Gaskins had
- 9 gotten a new license on January 24th, is that right?
- 10 A January 24th, yes.
- 11 Q 24th?
- 12 A Yes, sir.
- 13 Q So about, well, 24 to February 5th. I'm not very
- 14 good at math, that's why I'm a lawyer. But how many
- 15 days is that roughly?
- 16 A A couple of weeks.
- 17 Q And that photograph of him, the one you got, showed
- 18 him to have hair about like your hair, didn't it?
- 19 A It did. I'm not -- I'm not sure when that
- 20 photograph was taken, if they renewed the photograph
- 21 on that picture.
- 22 Q You don't know whether when you have your new
- 23 license done that they retake the photo?
- 24 A Well, you don't have to have your photo taken.
- 25 Q Well, when arrangements were made for Mr. Gaskins to

- 1 come and see you ---
- 2 A Yes, sir.
- 3 Q --- to be charged, he looked more like you than he
- 4 does today, didn't he, hair-wise?
- 5 A His hair certainly wasn't as long as it is now.
- 6 Q Didn't have cornrows, didn't have braids, did it?
- 7 A I don't think so.
- 8 Q But all the lineups are of braided individuals,
- 9 right, State's 20?
- 10 A Yes, sir.
- 11 Q State's Exhibit 5?
- 12 A Yes, sir.
- 13 Q State's Exhibit 17?
- 14 A Yes, sir.
- 15 Q State's Exhibit 21?
- 16 A Yes, sir.
- 17 Q Six?
- 18 A Yes.
- 19 Q Eight?
- 20 A Yes.
- 21 Q 10?
- 22 A Yes.
- 23 Q You were not aware of Mr. Christopher Lyles that
- 24 night of your investigation, were you, the night of
- 25 the 5th?

1 A No, I wasn't sure who he was.

2 Q And you learned after the 5th that he in fact had
3 been in the bar and been thrown out of the bar?

4 A Yes, sir.

5 Q And you learned that he was found later on the 5th
6 after the shooting with a handcuff on one arm and a
7 gun in his car?

8 A Yes, sir.

9 Q And did you -- you talked with Mr. Lyles?

10 A Yes, sir, I did.

11 Q Did you determine whether -- determine whether he
12 owned any other guns? When I say other, I mean
13 other than the pistol, one of these, which is either
14 47 or 50, I'm sorry.

15 A The one in your right hand.

16 Q 50?

17 A Yes.

18 Q Did you determine whether he owned any other guns?

19 A No, sir, we did not.

20 Q Was Mr. Lyles, since he was apprehended early
21 morning hours of February 5th after the shooting,
22 was he G S R, gunshot residue tested?

23 A No, sir. Again, I didn't know who he was at that
24 point in time. I believe his arrest was for D U I so
25 it's not standard procedure.

1 Q Was he ever put in one of these other photo lineups?

2 A It was -- it was clear from all the witnesses that
3 he was not the person involved in the shooting based
4 on their statements.

5 Q Well, it was clear to you. Your investigation
6 focused on one person, right?

7 A My investigation focused on the crime and anybody
8 who could have committed it and the information that
9 we received pointing towards Mr. Gaskins.

10 Q The -- in securing the scene, did you -- did you ask
11 your officers to make certain that they had
12 collected all the firearms from all the security
13 guards?

14 A No, sir. Obviously, during the investigation we
15 learned that one of the security guards had fired
16 his weapon. We did collect that firearm. None of
17 the witnesses, no one else there present at the
18 scene indicated that any of the other officers had
19 fired their gun. So there was no reason for me to
20 collect their firearms.

21 Q So you just took the off -- the security officer's
22 word for it?

23 A No. There were civilian witnesses there.

24 Q Did you determine how many security guards had guns?

25 A I believe -- I don't recall an exact number to give

1 you right now.

2 Q Mr. Palmer, I think he told you or told an officer

3 ---

4 A Yes.

5 Q --- that he had a gun?

6 A Yes, sir, he did.

7 Q Nobody tested that?

8 A I did not test it.

9 Q Now, at some point after this, you were provided
10 with the information that Mr. Meadors asked you
11 about a moment ago about the Perry -- where is
12 Perry?

13 A Apparently it's in Aiken County. I've never been
14 there.

15 Q Perry Police Department called your department to
16 report that they had two fellows named Dixon and
17 Vancito Watkins who had a 40 caliber Fabrique
18 Nationale gun that they had gotten from their cousin
19 at 360?

20 A Bear with me, let me review my notes specifically.

21 Q I think that's on page eight of nine on your
22 investigative report, 2/16/07.

23 A Okay. Yes, sir.

24 Q All right. Did you ever go see Mr. Dixon and Mr.
25 Watkins to talk to them about it?

1 A Again, based on the investigation, there were no
2 witnesses or no indications that either one of these
3 men were present at Club 360 during the shooting.
4 The firearm itself was collected, tested, proved not
5 to be involved with the shooting. So, no, we didn't
6 go any further with that.

7 Q But you never -- but, I mean, the answer to my
8 question is, no, I didn't talk to Ryan Dixon or Mr.
9 Watkins, the two people in possession of this gun?

10 A I just answered your question, sir.

11 Q You did not talk to them?

12 A No.

13 Q You didn't talk with the cousin that they told the
14 Perry Police they got the gun from?

15 A No.

16 Q And you were here when Mr. Collins testified that he
17 really couldn't eliminate that weapon as having
18 fired some of these bullets?

19 A That's not what I took from the testimony.

20 Q Now, you were also present at the -- well, let's
21 see, first, you -- you learned from someone, not Mr.
22 Williams, to go to Lyndhurst Drive where Mr. Gaskins
23 lived with his parents?

24 A Yes, sir.

25 Q And then from there you went to [REDACTED] (sic) [REDACTED]

1 ██████ as I think you testified?

2 A Yes, sir.

3 Q And ---

4 A I believe it's █████.

5 Q I'm sorry?

6 A ██████

7 Q Is it █████? I apologize. And when you got there, you
8 found, I think you testified, Ms. Peak had the keys
9 to the car?

10 A Yes.

11 Q Officers were all ready at the scene when you
12 arrived?

13 A They were not -- they had not made contact with
14 anyone. They were nearby watching the vehicle so
15 that it didn't leave.

16 Q The automobile once -- once it was seized and
17 searched, you found or your technicians, your crime
18 scene experts, found evidence of blood in the
19 interior of the vehicle, is that right?

20 A I don't know. I didn't conduct any test on any of
21 the stains. I know that there was a napkin of some
22 sort that appeared to have some blood in it.

23 Q Well, like night follows the day, blood usually
24 means somebody had an injury, doesn't it?

25 A Not necessarily.

1 Q Well, when Mr. Gaskins came to see you to speak with
2 you about this, he didn't have any injury, did he?

3 A No, I didn't observe any injuries to him.

4 Q And these -- any idea why the bloody tissue was not
5 sent for D N A analysis for matching to whoever it
6 might belong to?

7 A What I observed did not appear to be as a result of
8 some kind of traumatic injury. It was -- looked
9 like a tissue with a little spot of blood on it. It
10 wasn't consistent with any kind of violent wounds or
11 anything like that.

12 Q And again, would it be consistent with perhaps a
13 ricochet or something? You're certainly not a
14 doctor, I know ---

15 A No, sir, I am not.

16 Q The -- in and about the car -- the vehicle itself,
17 you would agree that the windows all the way around
18 are tinted?

19 A They are tinted.

20 Q Did you determine whether they are tinted to a legal
21 extent or to an illegal extent?

22 A I did not conduct any test to determine that.

23 Q Well you would agree with me that standing outside
24 and trying to look in through those windows is
25 pretty darn hard, isn't it?

1 A If they're up.

2 Q Even in the daytime?

3 A If the windows are up, yes.

4 Q Do you know whether the back windows go all the way
5 down or do they only go half way down?

6 A I'm not sure. I'm not sure, sir.

7 Q Several witnesses told you that the best opportunity
8 to see who was shooting from the automobile was
9 obscured in part by windows in the back of that
10 automobile?

11 A (Affirmative response.)

12 Q Now, you testified that the murder weapon was never
13 found?

14 A Yes, sir.

15 Q Well, is it possible you had the murder weapon and
16 in the 40 caliber FN and returned it?

17 A Based on our ---

18 Q To the Perry Police Department -- I'm sorry.

19 A Based on our tests, it was not consistent with the
20 evidence we had at the scene.

21 Q All right.

22 MR. MCCULLOCH: That's all I have, thank you.

23 THE COURT: Anything on redirect?

24 MR. MEADORS: Just briefly.

25 REDIRECT EXAMINATION

1 BY MR. MEADORS:

2 Q Mr. McCulloch asked you about when you arrived,
3 about some markings or shell casings. When you
4 arrived, were they already marked?

5 A They were there. I'm not sure if they were marked
6 but, you know, part of my job is to pay attention
7 and look for things like that.

8 Q And did you acquire during the course of your
9 investigation how long the Impala had been at ■
10 ■?

11 A It had made it there sometime in the morning.

12 MR. MEADORS: Can we approach?

13 THE COURT: Yes, sir.

14 (WHEREUPON, a bench conference was held off
15 the record, in the presence of the jury, but out
16 of the hearing of the jury.)

17 Q Do you have in your file with the Defendant's
18 driver's license photo?

19 MR. MEADORS: Beg the Court's indulgence.

20 THE COURT: No, take your time.

21 (Pause.)

22 A It looks like the driver's license photo from
23 Mr. Gaskins was here. I have a portion of it, I
24 don't have the photograph.

25 MR. MEADORS: Your Honor, it's coming. Beg the

1 Court's indulgence.

2 THE COURT: Yes, sir.

3 (Pause.)

4 MR. MEADORS: Should be here momentarily. I
5 apologize.

6 THE COURT: What does that mean, momentarily?

7 MR. MEADORS: Sir?

8 THE COURT: What does that mean?

9 THE COURT: What does that mean?

10 (Pause.)

11 THE COURT: We're waiting on something to arrive
12 momentarily, members of the jury. Is that five minutes,
13 10 minutes?

14 MR. MEADORS: Should be here any second.

15 THE COURT: I get my watch back today.

16 (Pause.)

17 MR. MEADORS: The State's ready. Thank you.

18 THE COURT: You showed it to Mr. McCulloch?

19 MR. MEADORS: Sure, Your Honor.

20 (Pause.)

21 MR. MEADORS: Subject to some redactions.

22 THE COURT: Why don't we introduce it and you
23 can redact it later.

24 MR. MEADORS: There's some redaction that needs
25 to be done and ---

1 THE COURT: Introduce it and we'll redact it.
2 Don't publish it.

3 REDIRECT EXAMINATION

4 CONTINUES BY MR. MEADORS:

5 Q Now, Mr. McCulloch was asking you about the photo
6 lineup. When the photo lineup was put together, you
7 didn't have a picture of the South Carolina driver's
8 license photo, did you?

9 A No, sir.

10 Q So you weren't able to use that then, were you?

11 A That's right.

12 Q Now I'm showing you what's marked State's 152 and
13 State's 151. Do you recognize these?

14 A Yes, I do.

15 Q You recognize both of them?

16 A Yes, sir.

17 Q And what is that?

18 A Additional photographs of Mr. Gaskins.

19 Q And is this 152, subject to redaction, a picture of
20 -- can you tell when that was taken, if you will?

21 A I can't say specifically when the photograph was
22 taken. I can just say that the license was issued
23 -- and again, it just depends on how it happens at
24 the D M V.

25 Q And 151, can you -- when was that taken?

1 A I have no idea.

2 Q Would that be consistent with his booking picture,
3 or do you know?

4 A It could be, yes.

5 MR. MEADORS: State's 151 and 152, I believe
6 without objection.

7 THE COURT: Subject to ---

8 MR. MCCULLOCH: Subject to.

9 (Whereupon, State's Exhibit Number 151, Booking
10 Photograph of the Defendant, was admitted into
11 evidence.)

12 (Whereupon, State's Exhibit Number 152, Driving
13 Record of the Defendant, was admitted into
14 evidence.)

15 THE COURT: Anything on recross?

16 RECROSS-EXAMINATION

17 BY MR. MCCULLOCH:

18 Q The two photographs of Mr. Gaskins that you've just
19 seen, State's 152 which is a 10 year driving record.

20 A Yes, sir.

21 Q That's the way he looked when he came to the
22 Sheriff's Department to talk to you about this -- to
23 turn himself in about this incident?

24 A His hair was longer than that. It's not saying it
25 was in rolls or anything but a little longer than

1 that.

2 Q So if it was longer than that ---

3 A A little bit, yes.

4 Q And yet State's 151 is the way he looked when he
5 walked into the Sheriff's Department?

6 A Yes, sir.

7 Q And to you there's a difference?

8 A Yes, sir.

9 Q Okay.

10 MR. MCCULLOCH: That's it, Your Honor, thanks.

11 THE COURT: Anything further.

12 MR. MEADORS: That will do it.

13 THE COURT: You may step down, sir.

14 (The witness leaves the witness stand.)

15 MR. MEADORS: Beg the Court's indulgence.

16 THE COURT: Yes, sir.

17 (Pause.)

18 MS. MCDUFFIE: Your Honor, at this time the
19 State of South Carolina rests.

20 THE COURT: All right. Thank you, ma'am.

21 Members of the jury, we've come to the point in
22 this trial where I need to take up a matter of law with
23 the attorneys involved. And once again, the only way
24 that I can do that is in your absence.

25 I'm going to send you to the jury room briefly.

1 May bring you out, may send you home, I haven't decided
2 yet. Just don't talk about the case. I'll let you know
3 momentarily.

4 (The jury retires from the courtroom at
5 approximately 3:50 p.m.)

6 THE COURT: Y'all sure, anything further at all?

7 MS. MCDUFFIE: Yes, Your Honor.

8 THE COURT: You sure, yes or no? Yes, there is
9 nothing further?

10 MS. MCDUFFIE: There is nothing further, Your
11 Honor.

12 THE COURT: All right, thank you. You want to
13 make your motions now, Mr. McCulloch?

14 MR. MCCULLOCH: Yes, Your Honor.

15 THE COURT: All right, go ahead.

16 MR. MCCULLOCH: Your Honor, I would renew the
17 previous motions including the motion for a mistrial
18 which was denied. I respect the determination of the
19 Court to strike the testimony and to instruct them.

20 I would move for a directed verdict on the basis
21 of the insufficiency of the evidence. I will not recount
22 it. The Court has heard it and I would respect your
23 ruling.

24 THE COURT: All right. Well, I think enough
25 evidence is in to make it a jury question. And I think

1 12 people from Richland County should resolve this
2 matter.

3 Anything further?

4 (No response.)

5 THE COURT: And as to all previous motions,
6 they're renewed with the same ruling, just in case we
7 missed something.

8 Does the -- Mr. Gaskins intend to present any
9 evidence?

10 MR. MCCULLOCH: Your Honor, at this time I think
11 it would be appropriate for you to have that ---

12 THE COURT: Okay.

13 MR. MCCULLOCH: --- colloquy with him. It is my
14 understanding that Mr. Gaskins does not intend ---

15 THE COURT: Okay, that's fine. Yeah, stand up
16 Mr. Gaskins. Would you raise your right hand.

17 (The Defendant was first duly sworn.)

18 THE COURT: Now, I'm going to read you -- we'll
19 it's about a page and a half of questions and
20 explanations. I ask that you listen carefully, okay. At
21 any time, I'll repeat it for you but I think even what
22 I'm going to read to you says I'll repeat it to you.

23 So you're Johnnie Gaskins. Now, Mr. Gaskins, at
24 this time I'm going to explain to you certain of your
25 rights. If you do not understand anything I say, please

1 let me know. If you want me to explain anything to you
2 in more detail, please let me know.

3 Do you understand so far?

4 THE DEFENDANT: Yes.

5 THE COURT: All right. Now, we have reached a
6 stage of the trial where you may present evidence or you
7 may present a defense. You have the right to claim the
8 protections given to you by the Fifth Amendment to the
9 Constitution of the United States. This Amendment states
10 in part, no person shall be compelled in any criminal
11 case to be a witness against himself.

12 You understand that, don't you?

13 THE DEFENDANT: Yeah.

14 THE COURT: This means that is you cannot be
15 required to testify in this case. You have the right to
16 testify on your own behalf; however, no one can make you
17 testify. This is a personal right and no one can waive
18 this right except you.

19 You understand that, don't you, sir?

20 THE DEFENDANT: Yes.

21 THE COURT: If you decide to testify, you will
22 be subject to the same rules that govern other witnesses
23 and you may be examined and cross-examined on any
24 relevant issue in this case. In addition, if you have
25 any convictions involving dishonesty or false statement

1 or crimes punishable by imprisonment for more than one
2 year, and this Court determines that the probative value
3 of admitting this evidence outweighs the prejudicial
4 effect to you, the Solicitor will be able to introduce
5 your record to attack your credibility.

6 Do you understand that, sir?

7 THE DEFENDANT: Yes.

8 THE COURT: All right. If you decide to
9 testify, Mr. Gaskins, this decision on your part must be
10 freely, voluntarily and intelligently made, with
11 knowledge of the protections given to you by the Fifth
12 Amendment and the consequences of your decision to
13 testify. If you decide not to testify, I will instruct
14 the jurors that they cannot give the fact that you did
15 not testify any consideration whatsoever and that there
16 is to be -- there is to be absolutely no prejudice to you
17 because you did not testify.

18 It is left entirely up to you whether or not to
19 testify. You may talk with your attorneys, Mr. McCulloch
20 and Ms. Schillaci -- Schillaci, your family and friends
21 or anyone else. But the final decision will be left
22 entirely up to you, Mr. Gaskins.

23 Do you understand what I've explained to you so
24 far?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: All right. Do you have any
2 questions about what I have explained to you?

3 THE DEFENDANT: No, sir.

4 THE COURT: All right. Have you discussed it
5 with your lawyers whether you should testify or not? You
6 have discussed this, have you not?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: All right. Do you wish to talk to
9 your lawyers anymore at this time?

10 THE DEFENDANT: No, sir.

11 THE COURT: All right. Do you wish to testify?

12 THE DEFENDANT: No, sir.

13 THE COURT: All right. Thank you, Mr. Gaskins.
14 You may take your seat, sir.

15 (Complied.)

16 MR. MCCULLOCH: Your Honor, may we approach?

17 THE COURT: Yes.

18 (WHEREUPON, a bench conference was held off
19 the record.)

20 THE COURT: There's a matter I need to take up
21 and the only way I can do that is in the absence of
22 everybody here except for Mr. McCulloch, Ms. Schillaci
23 and Mr. Gaskins.

24 MR. MCCULLOCH: That's correct, Your Honor.

25 THE COURT: Everybody else needs to leave the

1 courtroom, except for security.

2 MR. MCCULLOCH: Security and the court reporter.

3 THE COURT: And the court reporter.

4 MR. MEADORS: Your Honor, we won't go far. Are
5 we going to meet after that to go over charges?

6 THE COURT: Beg your pardon?

7 MR. MEADORS: You want us to hang around to go
8 over the charges?

9 THE COURT: Oh, yeah, yeah, yeah, sure.

10 MR. MCCULLOCH: It will only take two minutes,
11 Your Honor, and ---

12 THE COURT: I just need to take up this ex parte
13 matter with Mr. McCulloch and his client.

14 MR. MEADORS: One second with the family, Your
15 Honor.

16 THE COURT: All right. Don't go too far we'll
17 bring you right back in.

18 (The courtroom was cleared as instructed by the
19 Court.)

20 THE COURT: Let the record reflect that Court
21 has been cleared of everything except my law clerk, Megan
22 Walker, Crystal Roach, the -- Crystal, what's your real
23 name now?

24 COURT REPORTER: Holmes.

25 THE COURT: Holmes, her married name, court

1 reporter, Joe and J.R., the security, along with Mr.
2 McCulloch, Mr. Gaskins, Ms. Schillaci and Ms. McLeod?

3 Okay. All right. Are we all safe and ready
4 then?

5 MR. MCCULLOCH: Yes, sir.

6 THE COURT: Yes, sir.

7 MR. MCCULLOCH: And, Your Honor, I apologize for

8 ---

9 THE COURT: No, that's all right.

10 MR. MCCULLOCH: But from the inception of work
11 with Mr. Gaskins and during the trial and throughout this
12 trial, we have talked about various trial strategies. I
13 want to make certain that there is a record that Mr.
14 Gaskins has declined to -- he had indicated to me he does
15 not wish any effort be made in trying to have this Court
16 instruct on voluntary manslaughter. And while there's
17 not a great deal of evidence in that regard, it is one of
18 the things that strategically I perhaps might have sought
19 to do but he has instructed me it is not his desire for
20 me to ask for an instruction of that type and I want to
21 make certain that that is still his desire.

22 THE COURT: So his desire is for you not to
23 request -- I don't know whether you would get it anyway
24 based on the facts of this case ---

25 MR. MCCULLOCH: I understand.

1 THE COURT: --- a charge of involuntary
2 manslaughter.

3 Now, Mr. Gaskins, I need to tell you this, sir.
4 It's not what Mr. McCulloch asks for or what you want or
5 what the Solicitor asks for, it's what I have an
6 obligation as a Judge, looking through the entire body of
7 evidence, what I think should be charged. I understand
8 this request but if there's anything in the record, as I
9 reflect back on it -- we will have a charge conference.
10 That consists of Mr. McCulloch and Ms. Schillaci and the
11 Solicitors and myself. If I feel as the Judge, there's
12 anything in there that entitles a charge on voluntary
13 manslaughter, in spite of his request or the Solicitors'
14 request, I'm obligated to give that. I don't know
15 whether there is or not. I haven't thought that far
16 about this now. But I've got to inform you of that. It
17 is not what Mr. McCulloch asks for, it's not what the
18 Solicitors ask for, it's what I think should be charged.

19 I would agree to this, it's a close call. And
20 I'm not sure under the facts of this case you would even
21 be entitled to it but I've yet to make that decision.
22 But that decision is my decision and mine alone. Mr.
23 McCulloch can request, the Solicitor can request, but it
24 ultimately falls on me and that's what our Supreme Court
25 has said.

1 There's been times when the -- the State or the
2 Defense, for whatever tactical reason will say, I don't
3 want this. And our Supreme Court has said, I don't care
4 what they ask for, it's what you feel you're obligated to
5 give as the trial judge.

6 So, that sort of sums it up, what Mr. McCulloch
7 is trying to say. But my obligation goes beyond what you
8 want and what they want. It's me as a judge, what I
9 think should be given. And that's the sort of rules I've
10 got to operate by. And I can't tell you at this point in
11 time what I'm going to do. But I need let -- I need to
12 let you know ahead of time that it's not that -- it's not
13 just because you don't want it. If I feel there's
14 something in there that entitles you to it or there's a
15 factual issue or an inference that creates the
16 responsibility on my part to charge that, I've got to
17 charge it over your lawyer's objection.

18 So, we haven't got to that point yet, but if I
19 decide to charge it, it would be because it's me as the
20 judge, taking everything into consideration, being as
21 fair as I can to you as well as to the State, feel that
22 there's something in the record that -- that entitles you
23 to or requires me to charge that, whether you like it or
24 not or whether the State likes it or not. My best guess
25 is, they ain't gonna want it either but I don't know.

1 MR. MCCULLOCH: I appreciate that. My only
2 purpose in clearing the courtroom and having this confer
3 with you is to confirm with Mr. Gaskins that still is his
4 ---

5 THE COURT: Yeah okay.

6 MR. MCCULLOCH: --- with that I will not press
7 for and that I would oppose that if it became an issue.

8 THE COURT: It's -- it's Mr. Gaskins' request
9 and your request through Mr. Gaskins that I not charge
10 voluntary manslaughter?

11 MR. MCCULLOCH: Is that correct?

12 THE DEFENDANT: Say that again, now.

13 MR. MCCULLOCH: You don't want involuntary
14 manslaughter ---

15 THE DEFENDANT: Oh, no. Yes, sir. Yes, sir.

16 THE COURT: Okay, that's what I mean. And, like
17 I said, once again, I'm repeating myself but I don't mind
18 doing it. It's not what you ask for, it's not what the
19 State asks for, it's what I suggest -- think, based on
20 everything I've heard you're entitled to.

21 And so that's how I've got to -- that's the
22 ultimate decision I have to make.

23 MR. MCCULLOCH: Yes, sir.

24 THE COURT: But I appreciate your position. I
25 will certainly take it into account. But it has nothing

1 to do with the evidence and how I view it.

2 All right. Are we good then?

3 MR. MCCULLOCH: Yes, sir.

4 THE COURT: Let everybody back in. Just relax.
5 I think in this case, I'll bring the jury back out and
6 send them home. And of course, like I told you with the
7 colloquy, I've got to charge them that your failure to
8 take the stand is a long thing about the Fifth Amendment
9 that we'll go through. I'll charge the law on that

10 MR. MCCULLOCH: Can we see that, Your Honor. I
11 have -- let's wait until they get back.

12 THE COURT: Yeah. I didn't have to say that
13 but, you know. But I've already said that with the
14 colloquy, if you don't take the stand then I've got to
15 tell them they can't hold it against you.

16 MR. MCCULLOCH: There are just word choices that
17 I ---

18 THE COURT: Oh, we're going to go through the
19 charges. And we're going to sit down. We've got a large
20 charge conference. And I'll make y'all a copy of the
21 charges, if you want me to.

22 MR. MCCULLOCH: As soon as Meadors gets in here
23 ---

24 THE COURT: That's fine. I'm going to repeat
25 the same thing to him and Ms. Schillaci -- Schillaci --

1 Schillaci.

2 (Pause.)

3 THE COURT: Yes, sir.

4 MR. MCCULLOCH: Your Honor, I presume you'd like
5 for me to rest in front of the jury?

6 THE COURT: Yeah, you can.

7 MR. MCCULLOCH: My only request is to hold off
8 on any instruction to them about his determination not to
9 offer any defense ---

10 THE COURT: I'm just going to say it appears
11 that we've heard all the evidence we shall receive.
12 We'll come back in the morning, something may change
13 overnight.

14 MR. MEADORS: Your Honor, I think he said --
15 we'd ask that he'd rest tonight. I think he's willing to
16 do that, say the Defense rests.

17 THE COURT: But still, you know, if they change
18 their mind overnight, I've still got to let them do
19 something, so. It appears ---

20 MR. MCCULLOCH: That's fine.

21 THE COURT: --- is the best word. Bring the
22 jury in, Mr. Crumpton. Because, I mean, certain cases
23 say, if you change, the State changes its mind overnight,
24 I -- it's within my discretion to let you open up again.

25 MR. MEADORS: Yes, sir.

1 THE COURT: I hope there's nothing further to be
2 added to the record. If there is, well, I'll be happy to
3 receive it. Otherwise -- I told the jury, suggested to
4 them to be in at 10:00 in the morning. I told them y'all
5 would probably argue between 45 minutes and an hour a
6 piece, give or take a little bit. I think my charge will
7 probably take about 30 minutes. I'm going to order them
8 lunch.

9 (Pause.)

10 (The jury returned to the courtroom at
11 approximately 4:10 p.m.)

12 THE BAILIFF: The jury's present, Your Honor.

13 THE COURT: Thank you, sir. Welcome back Madam
14 Forelady and members of the jury.

15 Mr. McCulloch, you may proceed, sir.

16 MR. MCCULLOCH: Your Honor ---

17 THE COURT: It appears -- you want me to talk?

18 MR. MCCULLOCH: You may, Your Honor. I think --
19 I think at this juncture we were going to take the
20 afternoon adjournment.

21 THE COURT: Yeah, yeah. Members of the jury,
22 it's a possibility, it appears to be at this time, that
23 you may have heard all the evidence you shall receive in
24 this case. There's always a possibility that it could
25 change overnight, but it's not likely.

1 So, I've got to caution you extremely, I would
2 say, be on your best guard. Now is the time certainly
3 not to begin any preliminary talks and discussions in any
4 way, shape or form about this case. I go back to the
5 very begin when I reminded you, please wait until the
6 very end. Have an open mind. Hear from everything -- or
7 hear everything you should hear, the arguments of the
8 lawyers, my charge to you or explain the law that applies
9 in this case before you begin any preliminary discussions
10 about this or anything else.

11 So open mind, wait until you hear everything
12 especially my instructions at the end. That's the time
13 to begin to think about this case. Until then, please
14 have an open mind.

15 With that in mind, I'm going to send you home
16 and ask that you be back here at 10:00 in the morning.
17 And the court reporter wanted me to try get y'all to
18 order lunch tomorrow from Lizard's Thicket. I don't know
19 about that. I'll let y'all think about it yourselves
20 overnight.

21 But on behalf of everybody in this trial, I
22 appreciate your courtesy and attention. I wish you a
23 pleasant evening's rest and be back in the jury room
24 tomorrow morning at 10:00 a.m.

25 Thank you all so very much, ladies and

1 gentlemen.

2 (The jury retires from the courtroom at
3 approximately 4:11 p.m.)

4 THE COURT: Anything further this afternoon?

5 MR. MEADORS: Just our discussions if we need to
6 about tomorrow, other than that.

7 MR. MCCULLOCH: Your Honor, I don't know whether
8 you wanted to do the charges?

9 THE COURT: Yes, chambers. Come on. We'll go
10 over them in chambers and we'll put it on the record and
11 what y'all don't like, you object to.

12 MR. MCCULLOCH: Thank you.

13 THE COURT: Hopefully it won't take long.

14 (The Court as in recess.)

15 TUESDAY, OCTOBER 27, 2009:

16 MR. MCCULLOCH: Judge, before he comes in, can
17 we address one issue on the charges?

18 THE COURT: Yes, sir.

19 MR. MCCULLOCH: I mean ---

20 MR. MEADORS: Judge, just two seconds. I'm
21 trying to find one photo, I'm sorry.

22 THE COURT: All right. Take your time, take
23 your time.

24 (Pause.)

25 COURT: Yes, sir.

1 MR. MCCULLOCH: She's going to be looking
2 through the photos while we're talking.

3 THE COURT: What now?

4 MR. MCCULLOCH: She's -- don't mind her, she's
5 going to be looking through photos while we're talking.

6 THE COURT: Yes, sir.

7 MR. MCCULLOCH: May it please the Court. Your
8 Honor, with respect to the Charge 31-7 that speaks to the
9 Belcher issues, the State versus Belcher, which is that
10 charge, and the language appears on the second page of
11 31-7, Ervin's Book ---

12 THE COURT: What paragraph?

13 MR. MCCULLOCH: It's on page 243 beginning with
14 -- well, it would be the third complete paragraph down.

15 THE COURT: What, malice may be implied?

16 MR. MCCULLOCH: Furthermore ---

17 THE COURT: Furthermore, okay. Go ahead.

18 MR. MCCULLOCH: Your Honor, it would be our
19 position that there is some evidence in the record that
20 meets the standard of Belcher that would then operate
21 against ---

22 THE COURT: I'm a simple person. Tell me what
23 you want and I'll be glad to give it to you.

24 MR. MCCULLOCH: Your Honor, the Belcher case
25 says that ---

1 THE COURT: No, tell me what you want taken out
2 of this particular charge is what I am saying.

3 MR. MCCULLOCH: Well, Your Honor, what we want
4 is that paragraph ---

5 THE COURT: What, furthermore, you want that
6 paragraph out?

7 MR. MCCULLOCH: Yes, sir.

8 THE COURT: Anything else you want?

9 MR. MCCULLOCH: No, sir.

10 THE COURT: How about you, you have a position
11 on that, Mr. Meadors? Take your time.

12 MS. MCDUFFIE: You can cite us exactly what
13 paragraph he's speaking of?

14 THE COURT: Page 243 from Ervin, 31-7,
15 furthermore even where there is an absence of a specific
16 fixed intent -- that's the language that ---

17 MR. MCCULLOCH: And, Your Honor, their confusion
18 is that was not one of the ones copied ---

19 THE COURT: Okay, that's fine.

20 MR. MCCULLOCH: --- that was brought to their
21 attention ---

22 THE COURT: All right. If y'all have a shorter
23 definition of it, I'll be happy to give that. It doesn't
24 matter to me. I thought I needed to read it in there
25 following murder. Or if you want, I can just read the

1 one from the assault and battery with intent to kill and
2 leave that out entirely. It doesn't matter to me.

3 MS. MCDUFFIE: We have no position on it, Your
4 Honor. We leave it up to you.

5 THE COURT: Okay. I'll leave it out. I don't
6 think it's going to make a difference.

7 MR. MCCULLOCH: Thank you.

8 THE COURT: All right. Anything further then?
9 We're all on the same page, then?

10 MR. MCCULLOCH: Yes, sir.

11 THE COURT: I mean it's a long definition of
12 malice but I think I'm almost compelled to read it.

13 MR. MCCULLOCH: And I assume -- I mean, we
14 didn't talk about this but direct and circumstantial
15 evidence, all those?

16 THE COURT: Yeah, it's just a little short one.
17 You know, the witness sees, they don't see. I'm not
18 going with the footprints in the snow or anything. But
19 it's very short. And I don't think -- and really y'all
20 are going to argue these principles more so than my
21 telling them what they are.

22 All right, Ms. Schillaci, take your time. Are
23 you about finished?

24 MS. SCHILLACI: Need 15 seconds.

25 MR. MEADORS: She's -- I don't know, she's

1 moving our stuff around, Judge.

2 MS. SCHILLACI: Am I? It's right here.

3 MR. MEADORS: No.

4 THE COURT: Now -- and I think I've covered
5 everything with the proposed charges. As y'all argue,
6 I'll read them. If I miss something I'll just add it
7 when I give the charge. I'll give you a chance to except
8 and I'll bring them back in if I have to.

9 MR. MEADORS: Thank you, sir.

10 THE COURT: Why didn't you follow in your
11 father's footsteps and be a preacher.

12 MR. MEADORS: God bless me, I don't know.

13 THE COURT: All right, good luck to everybody.
14 Are we all ready now?

15 MR. MEADORS: The State's ready.

16 THE COURT: All right. Mr. Martin, you may
17 bring the jury in, sir.

18 (The jury returned to the courtroom at 10:24
19 a.m.)

20 THE BAILIFF: The jury's all present, Your
21 Honor.

22 THE COURT: Thank you, Mr. Martin.

23 THE COURT: Madam Forelady, members of the jury,
24 welcome back. We're now at the stage of this trial when
25 you will hear the closing or final arguments. And I will

1 tell you that Mr. Gaskins has decided not to present any
2 evidence. That's his Constitutional right under our
3 Fifth Amendment to the United States Constitution. I
4 will explain and charge you on his failure to take the
5 stand or present any evidence. You can't hold that
6 against him but I'll give you more detailed instructions
7 on that principle, fundamental principle of American
8 jurisprudence momentarily.

9 Because of that situation, we will first hear --
10 although the State has the burden of proof, we will first
11 hear from the State, from Ms. McDuffie, that will explain
12 the law, they're allowed to under our rules, that applies
13 to this case, followed by Mr. Meadors who will try to
14 persuade you to agree with the State's version of the
15 facts. And then Mr. McCulloch will follow Mr. Meadors.
16 The Defendant, Mr. Gaskins, is entitled to the last
17 arguments under the way this case has unfolded.

18 So, I would invite your keen and close attention
19 to the final arguments on behalf of the State, from Ms.
20 McDuffie and Mr. Meadors, and on behalf of the Mr.
21 Gaskins from Mr. McCulloch.

22 So, Ms. McDuffie, you may proceed.

23 MS. MCDUFFIE: Thank you, Your Honor. May it
24 please the Court.

25 CLOSING ARGUMENT ON BEHALF OF THE STATE

1 BY MS. MCDUFFIE:

2 Madam Forelady, ladies and gentlemen of the
3 jury, on behalf of the victims, Deirdre Houston, Lamont
4 Davis, Quinten Harris and the families of the decedents,
5 Shannavia Williams and John Adams, and on behalf of
6 myself and Deputy Solicitor John Meadors and the State of
7 South Carolina, we would like to say thank you. Thank
8 you for your service this week. You have been a
9 tremendously attentive jury and we appreciate your
10 service and your sacrifice. We know that there are a
11 million other places you would rather be than doing jury
12 service. But we do want to say thank you and we
13 appreciate your service.

14 I'd also like to take a moment to apologize on
15 behalf of myself and Mr. Meadors, if we have done
16 anything that upset you, we do apologize and that was not
17 our intent. During trials like this, things get heated
18 in the courtroom sometimes and due to the nature of the
19 charges they tend to bring up graphic information.

20 But we all have a job to do. We as the State of
21 South Carolina are administers of justice. It is our job
22 to prove the Defendant guilty beyond a reasonable doubt.
23 And it's Defense counsel's job to represent their client.
24 It is the Judge's job to be the judge of the law and it's
25 your job, ladies and gentlemen, to return a verdict based

1 on two things, the evidence and the law, not on
2 assertions, not on fiction, but on the evidence and the
3 law.

4 Now, I'm going to take just a few moments and
5 explain to you the law that we believe applies in this
6 case. And then Mr. Meadors will deliver the closing
7 arguments for the State followed by Mr. McCulloch for the
8 Defense. If I say anything that contradicts what Judge
9 Manning charges you later, please take the law as Judge
10 Manning gives it, not the law as according to Joanna
11 McDuffie.

12 Ladies and gentlemen, as a result of Johnnie
13 Gaskins' actions on February the 5th of 2007, he is
14 charged with two counts of murder, three counts of
15 assault and battery with intent to kill and one count of
16 use of a weapon during the commission of a violent crime.

17 Under South Carolina law, murder is defined as
18 the unlawful killing of another with malice aforethought,
19 and malice can be expressed or implied. Malice is a
20 legal term of art. What malice means is an ill will, a
21 hatred. Malice in its legal sense does not necessarily
22 import ill will towards the individual injured but
23 signifies rather a general malignant recklessness of the
24 lives and safety of others or a condition of the mind
25 which shows a heart devoid of social duty and fatally

1 bent on mischief. Malice is the wrongful intent to
2 injure another person. It indicates a wicked or depraved
3 spirit intent on doing wrong. It is the doing of a
4 wrongful act intentionally and without just cause or
5 excuse.

6 Malice can be expressed. An example of
7 expressed malice would be if someone said, I'm going to
8 kill you and then pulls the trigger. Or, ladies and
9 gentlemen, I submit to you as in this case, when the
10 Defendant said, I'll show you gangsta, got in his car
11 shot up the front of Club 360.

12 Or, ladies and gentlemen, malice may be implied.
13 Implied malice is when circumstances demonstrate a wanton
14 or reckless disregard for human life or a reasonably
15 prudent man would have known that according to common
16 experience there was a plain and strong likelihood that
17 grievous bodily injury would follow the contemplated act.

18 Ladies and gentlemen, I submit to you that when
19 that -- when Johnny Gaskins got into his car with a
20 loaded 40 caliber weapon and opened fire, that was
21 malice.

22 Aforethought. In South Carolina, we do not need
23 premeditation. You don't have to sit there and lie in
24 wait or plan something out for months. As long as that
25 malice exists at the time you pull the trigger, that's

1 all it takes. And ladies and gentlemen, I submit to you
2 that we have proven beyond a reasonable doubt that that
3 is what happened in this case.

4 The Defendant is also charged with three counts
5 of assault and battery with intent to kill. Assault and
6 battery with intent to kill is an unlawful act of violent
7 injury to the person of another with malice aforethought,
8 the same malice that we just talked about.

9 Ladies and gentlemen, when he pulled that
10 trigger again and again and again, striking Deirdre
11 Houston, Lamont Davis and Quinten Harris, he committed
12 assault and battery with intent to kill. When he shot
13 those three people, ladies and gentlemen, I submit to
14 you, that is assault and battery with intent to kill.

15 Now the Judge has talked to you and you've heard
16 testimony that the Defendant was intoxicated when this
17 incident occurred. Ladies and gentlemen, in South
18 Carolina, voluntary intoxication is not, it is never a
19 defense to a crime. It is never an excuse or a defense
20 to a crime. A person who voluntarily renders himself
21 intoxicated is no less responsible for his acts while in
22 such a condition. If a person voluntarily drinks
23 intoxicating liquors or takes drugs and becomes
24 intoxicated and while in that condition commits an act
25 which would be a crime if it had been committed by a

1 sober person, the fact of drunkenness or intoxication
2 would not relieve the intoxicated person from
3 responsibility.

4 We as the State of South Carolina also have the
5 burden of proving criminal intent. And we are not able,
6 ladies and gentlemen, to open up a person's head, dissect
7 their brain and show you what they're thinking. Whether
8 -- rather we have to prove intent and we prove intent
9 through the evidence. We prove intent through the acts
10 of the Defendant, both before, during and after the
11 assault.

12 Ladies and gentlemen, a specific intent to kill
13 is not a necessary element of assault and battery with
14 intent to kill or murder. Only a general intent to kill
15 is necessary to support those charges. The intent to
16 kill can be demonstrated by acts and conducts of the
17 accused and other circumstances from which you may
18 naturally and reasonable infer intent. Intent may be
19 proved with the evidence of the character of the means or
20 instrument used.

21 The intent to kill may be inferred from the
22 character of the assault, the use of a dangerous or
23 deadly weapon in a manner reasonably calculated to cause
24 a death or great bodily injury. The manner in which the
25 instrument was used, the purpose to be accomplished and

1 resulting injuries may also prove intent.

2 Intent may be inferred when it's demonstrated
3 the accused voluntarily and willfully committed the act
4 the natural tendency of which is to destroy another's
5 life. Each and every time he pulled that trigger, ladies
6 and gentlemen.

7 Ladies and gentlemen, there are two types of
8 evidence in this case and in any case, direct and
9 circumstantial.

10 Direct evidence is the testimony of a person who
11 asserts or claims to have an actual knowledge of a fact
12 such as an eyewitness. Direct evidence is things that
13 that person saw, that they touched, that they heard, that
14 they smelled, that they tasted.

15 Circumstantial evidence is proof of a chain of
16 facts and circumstances indicating the existence of a
17 fact. The law makes absolutely no distinction between
18 the weight or the value to be given to either direct or
19 circumstantial evidence, nor is a greater degree of
20 certainty required of circumstantial evidence than of
21 direct evidence.

22 Ladies and gentlemen, an example of
23 circumstantial evidence is when Epsil Palmer walked the
24 Defendant to his car, he sees the Defendant beside the
25 car with Sydney Williams. He then looks over and sees

1 that that car is no longer in a parking place, that shots
2 are being fired from that car. Now he doesn't see the
3 Defendant pulling the trigger but, ladies and gentlemen,
4 he knows it's him because circumstantial evidence would
5 allow him to make those same things that we do in our
6 everyday life, those same inferences, those same
7 assumptions, to lead to the natural and probable results.

8 We as the State of South Carolina also have the
9 burden of proof in this case as we do in every criminal
10 prosecution. We have to prove that the Defendant
11 committed the crimes charged with proof beyond a
12 reasonable doubt.

13 Ladies and gentlemen, proof beyond a reasonable
14 doubt is proof that leaves you firmly convinced of the
15 Defendant's guilt. It is not absolute certainty of guilt
16 and we are not required to produce proof that overcomes
17 every possible doubt.

18 If at the end of this case, based on your
19 consideration of the evidence, you are firmly convinced
20 of the Defendant's guilt, then you must find him guilty.
21 If, however, on the other hand, you think there's a real
22 possibility that he is not guilty, you must give him the
23 benefit of the doubt and find him not guilty.

24 Ladies and gentlemen, one of your most important
25 jobs, in my opinion probably your most important job as

1 jurors, is that you alone determine the credibility or
2 believability of witnesses. And, ladies and gentlemen,
3 all we ask you to do is use your commonsense. Use your
4 commonsense and determine the credibility and
5 believability of the witnesses that were on this witness
6 stand.

7 Here are some factors that you can use in
8 determining the credibility of the witnesses. Their
9 demeanor on the witness stand, was the witness forthright
10 or hesitant? Ladies and gentlemen, think back to Deirdre
11 Houston, Lamont Davis, Quinten Harris as they relived the
12 horror that was inflicted upon them by Johnnie Gaskins.
13 Think back to their demeanor as they were describing how
14 they were shot. Were they forthright or hesitant? Think
15 back to Epsil Palmer, to Lindburgh Porterfield and to the
16 officers of the Richland County Sheriff's Department.

17 Was the testimony of the witness consistent? Is
18 the story you heard on the stand the first time that the
19 story has ever been told or had they told it to other
20 people in the past, ladies and gentlemen.

21 Was the testimony of the witness corroborated?
22 For example, ladies and gentlemen, you had multiple
23 witnesses saying the shots came from the Defendant's car.
24 Then you also heard from law enforcement officers about
25 how the shell casings at the scene matched the shell

1 casing in the Defendant's car. Was that testimony
2 corroborated? I submit to you it was, ladies and
3 gentlemen.

4 And finally, did the witnesses have a reason to
5 be biased or prejudiced? Ladies and gentlemen, what did
6 these witness have to gain by pointing the finger at
7 Johnnie Gaskins? We ask you to ask yourself that
8 question. Did they have any reason to be biased or
9 prejudiced against him? Did they even know him, most of
10 these witnesses? And did law enforcement have any reason
11 to be biased or prejudiced against Johnnie Gaskins? We
12 submit to you, ladies and gentlemen, they did not.

13 Now, ladies and gentlemen, you have heard all
14 the evidence in this case. And that evidence came from
15 the testimony of the witnesses on the witness stand and
16 from the physical exhibits introduced as evidence during
17 this trial. What's not evidence, ladies and gentlemen,
18 are our questions, our opening statements and our closing
19 arguments. That is not evidence, ladies and gentlemen.
20 Neither is assertions, innuendo or just plain old wishful
21 thinking.

22 Ladies and gentlemen, we ask you, as you took an
23 oath, to render a verdict based on the evidence, not on
24 fiction, not on assertions, not conjecture but on the
25 evidence, and apply the law to the evidence and return a

1 verdict of guilty against the Defendant for two counts of
2 murder, three counts of assault and battery with intent
3 to kill and one count of use of a firearm during a
4 violent crime.

5 Thank you.

6 THE COURT: All right, Mr. Meadors.

7 MR. MEADORS: If it pleases the Court.

8 THE COURT: Yes, sir.

9 CLOSING ARGUMENT ON BEHALF OF THE STATE

10 BY MR. MEADORS:

11 Ms. McDuffie, Mr. McCulloch, Ms. Schillaci. I'm
12 cold, I'm cold. The words John Adams told Deputy Norman
13 Fisher outside 360 in the early morning hours of February
14 5th, 2007. I'm cold. And Deputy Fisher then got some
15 blankets to cover the body of John Adams to keep him
16 warm. Will you take my boots off? And Deputy Fisher
17 took his boots off. And since I heard that, whatever day
18 it was, it's etched in my brain and I ask it to be etched
19 in your brain, now, in the jury room and forever,
20 forever.

21 Law enforcement officer, caring, consoled him,
22 taking care of a victim. You know, law enforcement gets
23 bad press sometimes. You saw that man. He cared about
24 John Adams. He wanted to comfort him. So many people
25 attack law enforcement. Ah, they do this, ah, they do

1 that. They're not perfect. Ah, they're playing
2 ambulance. Keep that in your brain.

3 Ms. McDuffie and I have tried numerous murder
4 cases the last few years. And I kind of think of them as
5 a play. It's far from a play. This is as serious as you
6 can be. But using that as an illustration, we opened up
7 this, this event, this tragedy, with the first scene
8 inside Club 360 at the bar. And one of the first words
9 from the first character that we hear from that was
10 brought to y'all's attention, give me a fucking Hennesy.
11 Giving me a fucking Hennesy, bitch. That kind of sets
12 the scene and the tone and the anger of Johnnie Walker
13 Gaskins.

14 You heard Erin and can't you picture it? I'm
15 not going to say whether or not I've been to many bars
16 but can't you picture a witness coming up and saying,
17 babe, has somebody -- have I not taken care of you? And
18 she said, I didn't know if she's already -- somebody had
19 already taken an order or not. But she looks at him and
20 she sees him sweating, describes his demeanor. I think
21 you need a menu. I think you've had too much to drink.
22 Give me fucking Hennesy as he throws the money. He's
23 angry. He's going to decide. He's going to be in
24 control of what happens.

25 And then he goes behind the bar, heads back

1 behind the bar. Mr. Tabor's diagram, it's a little off
2 as one of the witnesses said but it's pretty dadgum
3 accurate. Goes behind the bar. Tamera sees that,
4 Barnett. Corroborates the anger, the emotion, the
5 unheavenly expletives, the cussing.

6 What happens next? Q, Quinten Harris, comes.
7 You can't go behind the bar. You can't treat people like
8 that, starts escorting him out the club. At some point,
9 Lamont Davis comes up. I think he initially says, I
10 can't hear, the music's going on. But then Q tells him
11 what happened. They escort him outside 360.

12 It continues. They go outside 360. Who's out
13 there? Well, you've got John Adams known as Wolf. You've
14 got Epsil Palmer. Epsil Palmer is out front. Q's out
15 front. Lamont Davis is out front. And now they've taken
16 him out, Lamont and Q. They go out front. They go
17 outside of the -- outside of the club. And do you
18 remember what Epsil told you, what they said? Remember
19 what he said? Y'all all dressed in black. That's what
20 identifies the Defendant later. Y'all dressed in black,
21 you think you gangsta? I'll show you gangsta. I'll show
22 gangsta, he sure did.

23 And he's out there, he's handcuffed. Epsil
24 helps them handcuff him. Think he's going to Alvin S.
25 Glenn. Wish he had. But it's his fault. This is his

1 fault.

2 Epsil goes back to his position inside. At this
3 point somebody comes along, a friend of Gaskins. Y'all
4 know who it is now, it's Sydney Williams. Sydney comes
5 along, talks to Lamont Davis. Let me take him home.
6 Let me take him home. He's drunk, let me take him home.
7 Lamont Davis let me take him home. Let me take him home

8 The cuffs are taken off, he walks out in the
9 parking lot. Q goes back to the front and then goes back
10 inside to get somebody else. Epsil, before -- once he
11 realizes they're going to be let go, what does he say?
12 Get his ID, at least get his name so he can't come back
13 in here. They get his ID. That get the first name
14 Johnnie, Johnnie.

15 They go back inside. Epsil is watching them
16 walk off, watching the Defendant walk off, watching him
17 walk off with Sydney Williams.

18 At this point, Q goes back inside, another
19 patron is becoming unruly. They're bringing him out. We
20 all know who that is. I wish you could say it back to
21 me. It's Christopher Lyles who we brought in here to
22 you. He's bringing Christopher out.

23 At this point, Epsil's outside -- and I'm going
24 to get into this a little bit later, but he sees the
25 Defendant Johnnie and he goes out to him in the parking

1 lot, sees him jumping up and down. Remember when Epsil
2 said that? He said, you got a problem? The Defendant
3 says, oh, no, I'm just looking for my car. He sees him
4 put the key in a dark Impala, jiggling and then right
5 there.

6 And then he turns to walk back, Epsil does --
7 we'll show you that tape in just a minute. When he goes
8 back, Epsil kind of turns, kind of instinct, something's
9 not right. He was right.

10 He gets back to the front door. Lamont has come
11 out with Christophe Lyles -- excuse me, Q has come out
12 with Christopher Lyles. Lamont Davis is helping there.
13 There's a little struggle at the front with Mr. Lyles.
14 That's the opportunity the Defendant takes, when he sees
15 the security, the bouncers, distracted, distracted, when
16 they're vulnerable, and that's when he comes out, opens
17 fire in front of 360, fires into the club and takes off.

18 Q says that's him, Lamont Davis says that's him.
19 Epsil said, well, it's the same car that I saw him going
20 to. The guy we just threw out of the club, he went to
21 that car. Did I see him shooting, no, but I saw that car
22 and that car came here and that same car shot. That's
23 what Ms. McDuffie's told you and the Judge will tell you,
24 circumstantial evidence is just as strong as direct
25 evidence. That's what the law says and it's pure.

1 That's the first scene, isn't it. And Sydney
2 said, it was Johnnie Gaskins, it was him.

3 Let's go to scene two now. Let's go to scene
4 two. We're inside the club. I think y'all know that
5 Shannavia, Shawna, Shanelle and Deirdre Houston were all
6 at the club. Everybody except Shannavia got there early.
7 Shannavia didn't even get off work till late. They went
8 and got her from Essex Park Apartments. She didn't even
9 get there until about 12:00. Little did she know when
10 she left her apartment she was a dead woman walking.
11 Shannavia shouldn't be dead. John Adams shouldn't be
12 dead.

13 They take her back to the club. The game's
14 over. It's still a crowd. They decide they're going to
15 go to I think Rockaways on Two Notch Road. They're
16 gathering their things. They're getting ready to go.
17 Shannavia, according to Deirdre, is at this front area
18 (indicating), I think. Spills her drink. Tells you a
19 little bit about Shannavia, doesn't it? I'm going to go
20 clean it up. Doesn't that tell you something about her?

21 She goes, she gets it, she goes to clean it up.
22 Goes to get something from the little mini-bar, starts
23 walking back, walking back toward the front, the same
24 front from where the shots were fired from. Deirdre says
25 she's watching her, she's watching her. And then she

1 feels a stinging. She's just kind of numb. Get's hit in
2 her ear. She can't hear out of that ear anymore. You
3 saw her testify, I can't hear. But for the grace of God,
4 she is here. That hat and perhaps her hair helped her
5 from dying.

6 She gets the shot. She falls down. And y'all
7 saw and heard and perhaps felt her testimony when she
8 said, I fell down and I started crawling, I started
9 crawling. Shots being fired, crawling, crawling into the
10 pool room. Got up on the pool table, there's blood
11 there. Thinks she hears more shots, down, she's
12 crawling, she's crawling and finally is dragging back to
13 the restroom. You want to talk D N A. I'm sure nobody
14 will argue this, D N A of that blood in there, I'll give
15 you D N A. What did Deidre say about this blood right
16 here (indicating)? That's my blood. That's my blood.
17 That's the best D N A you can get. Deirdre negates
18 anything else, that's D N A (indicating). Argue who's
19 blood? That's her blood. That's my blood. I was
20 crawling and dragging back there.

21 You know, Johnnie Gaskins? I don't even know
22 him. Got any bad blood? No. Malice, meanness or
23 wantonness, recklessness. Didn't care who he hit in
24 there. Mad at these guys for kicking him out. He didn't
25 care where that bullet went. Shannavia should still be

1 here. She ought to be able to hear.

2 John Adams is hit. Still in scene two. Shots
3 have been fired. And he's talking to Porterfield, Mr.
4 Porterfield, head of the bar. What does he say to him?
5 Said, man, you hit? I'm hit. Go check on the ladies.
6 You sure? Go check on the ladies. Corporal Fisher,
7 Norman Fisher's still there. How are the ladies? How
8 are the ladies? Corporal Fisher says, they're fine.
9 Corporal Fisher actually goes in and realized that Ms.
10 Williams isn't going to make it. You tell me he doesn't
11 care? What does he tell John Adams about that? He
12 doesn't tell him. He said, I didn't want to upset him.
13 I didn't want him to leave this world knowing that
14 somebody had died. John Adams is a hero ---

15 MR. MCCULLOCH: Your Honor, I hate the interrupt
16 but I object. All of this is calculate ---

17 THE COURT: Y'all approach.

18 (WHEREUPON, a bench conference was held off
19 the record, in the presence of the jury, but out
20 of the hearing of the jury.)

21 THE COURT: You may continue.

22 MR. MEADORS: That's the real John Adams. That's
23 the real John Adams, take care of somebody else first,
24 the real John Adams. Lamont Davis is hit in the back.
25 Q's hit in the hand and in the back. Deirdre in the

1 head. Ms. Williams, Shannavia, in the head and Adams.

2 Scene three. I'm not going to be as long as I
3 have in some closings. Scene three, law enforcement
4 arrives. Law enforcement arrives, a chaotic scene.
5 Isenhoward, has been at another scene, called to this
6 scene. It's his case. After 1:00, the shots are fired.
7 They start investigating.

8 Well, what do they find out? Well, they find out
9 right off the bat it was somebody they had just kicked
10 out that shot them. Somebody just got out -- kicked out
11 into a dark Impala, dark car, blue car. Well, we checked
12 his ID, his name was Johnnie. Porterfield said, well,
13 there was a fellow in here named Black earlier that he
14 got kicked out. I know him by name and sight. I know
15 him by name and sight. His phone I found earlier. I
16 thought, parking lot, testimony, he came out, was inside.
17 I'm sitting here, folks called, they called for somebody
18 named Black.

19 Amaro was there, hears this. He gives the phone
20 to Amaro. Y'all remember Amaro, been around forever.
21 Somebody says -- Porterfield says, hey, you got that
22 phone? Yeah, that was it. His phone's there. D N A
23 shows up on it later. Somebody named John, we've got a
24 phone there. People are calling for somebody named
25 Black. Have you got my phone there?

1 At 2:30 -- oh, by the way, Epsil tells them, I
2 stopped the guy that went to the car with him. And on
3 this video in a minute, watch and see if you can see --
4 see if you can see when he puts the handcuffs on him.

5 I've got him. Investigator Isenhoward gets Sydney
6 Williams and takes him down to the Sheriff's Department.

7 Now, folks, what does Sydney Williams tell
8 Investigator Isenhoward? I come outside, I see that
9 they've got him. I know him, he's drunk, I want to help
10 you. I want to take him home. Walks him to his car.
11 Epsil does come over. But what does Sydney Williams tell
12 them. He says, look, man, he's sitting there, he says,
13 I'm gonna to do this, I'm gonna to do that. They trying
14 to play me. They trying to play me, I'm gonna to do
15 this, I'm gonna do that. Well, I'll tell you what,
16 folks, I'll tell you what. Felt like being played, fuck
17 that, fuck that. I'm gonna do this, I'm gonna do that.
18 Did he not want to say what it was to y'all? Had a
19 little friendship over here, no question about it. I'm
20 going to get to that in a second. I'll tell you what, it
21 was so bad, what did Sydney say to him? What did Sydney
22 say in response to that? Man, don't do that, my baby
23 mamma's in there. What do you think he said to him?

24 MR. MCCULLOCH: Your Honor, can we approach?

25 THE COURT: Sure.

1 (WHEREUPON, a bench conference was held off
2 the record, in the presence of the jury, but out
3 of the hearing of the jury.)

4 THE COURT: You may continue.

5 MR. MEADORS: Man, don't do that, my baby
6 mamma's in there. And now the real Johnnie Walker
7 Gaskins, what does he tell him? Said fuck that. Fuck
8 that. And he did. He drove up, I'll show you gangsta,
9 and he opened fire into the 360.

10 And on 2:30, these folks right here from the
11 Sheriff's Department had a name, a last name, from a
12 friend who told them that night, read into evidence. He
13 got in his car, I started walking back toward the club.
14 Johnnie pulled out fast, stopped in front of the door to
15 the club and started shooting from inside the car. He
16 shot several times and drove off. Reasonable doubt?
17 There's no reasonable doubt in this case.

18 He gets in here in this trial. Obviously he was
19 under subpoena. Testified he didn't want to be here but
20 knew he needed to be, had to be here. And he says,
21 everything -- y'all remember -- y'all remember what was
22 said. It's up to y'all's ears what you hear. I heard
23 him say, my baby mamma, don't do that. I heard him say
24 that. What y'all heard is what happens.

25 He gets in here and says, well, yeah, we were

1 there. Yeah, he said this stuff to me. The car went
2 right in front of the door, the shots came from the car.
3 Maybe he didn't want to say that final bit in here in
4 front of him and his family. But his testimony, his
5 statement, he really showed you both. He's a good
6 example. I mean, he's now on direct evidence, I saw him
7 shot. I saw him. Here's this, well, the car went --
8 right there, the same car he was in went right there and
9 the shot came from there. Circumstantial evidence.
10 Either one of them is the same but is there any doubt
11 he's telling the truth? Is there any doubt?

12 Got him identified at 2:30, Lamont Davis. The
13 words already gone out. They've already gathered it was
14 the guy we kicked out of the bar. What do they do next
15 in their investigation?

16 7 or 8:00 that morning Lamont Davis is out of
17 the hospital, gives a statement, says, yeah, yeah, it was
18 the guy we brought out. I saw his face. I saw his face.
19 This is what happened. I am 10 to 12 feet from him when
20 the car comes back. That's his face. I saw -- he says he
21 saw it when the lineup was coming off the machine.
22 That's him. That's the guy that was shooting at us. Any
23 doubt in your mind? No doubt in my mind. Is he in
24 Court. That's him in Court (indicating). That's him.
25 A friend identified. Lamont Davis identified.

1 Got the name John in there. He's inside the bar, Mr.
2 Porterfield knows him by name and sight. Tamera and Erin
3 picked him out of a photo lineup. That's the guy that
4 was cussing us out and angry. Does it all fit, does it
5 change, he started it?

6 And then they talked to Q. Y'all remember 'big
7 old Q, went out there. What does Q tell us? You know,
8 during -- the Judge will instruct you, identification,
9 you look and you'll use your commonsense and everything,
10 folks, that's all we've got and y'all got it. Y'all been
11 paying attention.

12 What does Q -- the Judge will tell you, you
13 consider the opportunity a witness had, the lighting, how
14 close they were with them, anything obstructing their
15 view? What does Q tell y'all? I said, Q, how close were
16 you to him? Could you see him? Yeah. Anything blocking
17 your view? No. He got up and breathed on me. I could
18 feel his breath. That's how close I was. I could feel
19 his breath. Were you looking at him? Yeah.

20 And when he came back, was that the same fellow
21 that shot at the car? Yes, he says he was around 8 feet,
22 the front of the door. The intended targets who had
23 kicked him out. That's him. He told y'all that, picked
24 him -- picked him out in Court for you (indicating).

25 Epsil told you what to say -- I think we've got

1 this. I won't take but a second. Epsil

2 Beg the Court's indulgence.

3 THE COURT: Yes, sir.

4 MR. MEADORS: Beg the ladies' and gentlemen's
5 indulgence.

6 (Pause.)

7 MR. MEADORS: Before we start that -- I've got
8 too many boards. But on the way out, and I won't say the
9 F-word again. When he says to Lamont and those, do you
10 want me to leave? I'll F-ing leave, his demeanor, his
11 attitude. You think y'all gangsta, I'll show y'all
12 gangsta.

13 Norman Fisher not only comforted Adams, he
14 worked the area. He knew there might video next door and
15 he went next door and got the video.

16 (Video was started.)

17 MR. MEADORS: Epsil said, that's him, after he's
18 gone over there and asked, what's the problem?

19 Look at him turn around, instinct, something's
20 not right.

21 Lamont Davis says, he was talking to John Adams
22 about his brother playing football around this time.
23 Y'all remember that?

24 There's a struggle at the door. We know that's
25 Lyles now, don't we, the evidence shows.

1 Johnnie Gaskins pulls out (indicating) in the
2 Chevrolet Impala, opens fire. Look at the people fall
3 out (indicating).

4 Epsil said he goes to get Sydney Williams.

5 Epsil says they got Sydney Williams here
6 (indicating). That's when he has him and putting him in
7 handcuffs right there, Sydney Williams, bringing him back
8 and holding him for the investigators because he saw him
9 go to the car with the person that got put out, the same
10 car that he saw come down and fire into the club.

11 (Video is stopped.)

12 MR. MEADORS: The other views in here if you
13 want to look at it when you go back to your jury room.
14 Thank you, Ms. McDuffie.

15 What did Lamont tell you? I not only saw his
16 face, I was looking at his face. Did you see his hair?
17 Yeah, he had his hair cut, it was a short haircut,
18 trimmed goatee. Here are his pictures from around the
19 time. We put them into evidence, on his driving picture
20 and that picture, consistent with what Lamont said.

21 Credibility, believability, as Ms. McDuffie
22 said, what do they have to gain or lose by their
23 testimony? They didn't know Johnnie Gaskins. Epsil
24 Palmer said, I saw his face, I'm not sure if he had hair
25 or not but I saw his face. Picked him out of a photo

1 lineup. Came in here and showed y'all who it was.
2 They've got him identified by 2:30 and 7:00 Lamont Davis.
3 The folks inside the bar said it was Johnnie Gaskins. No
4 doubt he was inside the bar.

5 What happens next? Information comes through --
6 well, they first go to where he's regist -- where his
7 license they've got at Lyndhurst in Lexington. Don't
8 find him there. Then information comes in that the car
9 is at [REDACTED]. They go to [REDACTED]. Initially
10 they go in, [REDACTED] with consent, and they get a
11 jacket that everyone has described him in with fur on it.
12 A fairly distinctive jacket. I was going to put it on
13 but I'm running out of time. Yeah, this is the jacket.

14 They revoked consent, they get a search warrant.
15 They say there's surveillance cameras in there. Somebody
16 might have been able to see them coming.

17 The car's there. They impound the car. They
18 make sure it's secure and they take it to the Sheriff's
19 Department. And what happens with the car, ladies and
20 gentlemen? They check it. They do D N A on it. I'm no
21 scientist. I don't understand it all. I know how to
22 offer it and explain it. I can just tell you this much,
23 Johnnie Gaskins' D N A was on the steering wheel,
24 exterior, interior door handles, gearshift, and it is
25 definitely on that phone. Major and minor mixtures,

1 Johnnie Gaskins was in that car. His D N A's there.

2 Gunshot residue. Gunshot residue - gunshot
3 residue inside that car was consistent with somebody
4 firing a gun. You heard the professional on there.
5 Overwhelming when you consider everything. The
6 witnesses, they see him firing. You know, Lamont, go
7 look at some of these pictures, got him leaning back
8 firing like this (indicating). Q's got him firing like
9 this (indicating), sitting back. You heard Collins say,
10 they're gonna go that way.

11 I hope you won't argue this, I don't know. Go
12 ahead and look at one of these photos -- excuse me --
13 129, looks like an indention up there. A gun's fired,
14 shells go out. He says, defy gravity? Defies
15 commonsense some would be in there. Shooting like this,
16 going off to the right ---

17 MR. MCCULLOCH: Your Honor, I really have to --
18 I object. That's ---

19 THE COURT: Y'all approach. No run-on
20 objections. Y'all approach, please.

21 (WHEREUPON, a bench conference was held off
22 the record, in the presence of the jury, but out
23 of the hearing of the jury.)

24 THE COURT: All right.

25 MR. MEADORS: Q testified firing like that.

1 Y'all remember it. It's your memory that counts. This
2 way and they go right, this way and go right
3 (indicating). They go right. Where are the other shell
4 casings? Were they picked up and put out? I don't know.
5 They say that at least seven may have been fired. Three
6 were outside, one was inside the car.

7 How did it get back in that pocket? From the
8 gun or else Johnnie Gaskins put it there. Somehow
9 through his questions Mr. McCulloch may be implying that
10 law enforcement put that there? I hope not. I hope you
11 will dismiss that as soon as it comes to your mind. You
12 see these guys on this stand (indicating) testifying.
13 They will risk their career planting something for
14 Johnnie Gaskins they don't even know? Thank goodness the
15 shell casing got down in there. It went in there.
16 Either he put it in there, it went in. It matched the
17 three shell casings that were found in the parking lot of
18 360, five from the same gun.

19 We bring the 380 from Davis in here. We bring
20 the 380 from Christopher Lyles just so nobody can argue
21 it could have been Mr. Lyles. Christopher Lyles is down
22 on the floor when the shots are fired. I don't think
23 there will be any arguments about that, that he fired.
24 Double hearsay is somebody that might have been in the
25 club from Perry with a 40. We get the 40, submit it,

1 those shell casings weren't fired by that 40. Those are
2 smokescreens. I don't know if Mr. McCulloch will argue
3 those are not, but smokescreens trying to take you away.
4 Stay focused on the front of 360. Stay focused on that
5 Impala. That's what this case is about.

6 His personal effects in the back of this car.
7 His D M V information in the car. His D N A, he was in
8 the car. Rosalyn Sykes, yeah, I let him have the car.
9 The car came back and testimony came out through
10 Investigator Isenhoward, that car came back sometime
11 early that morning. It came out through testimony. It
12 had come from 360. Is there any doubt about it.

13 Pictures were taken of this when it was there
14 and then when it wasn't. That's no games playing by the
15 police. That's what they do, take pictures, get
16 evidence, remove stuff, take pictures.

17 The car consistent with firing the gun. What
18 else could it be consistent with? Well, Christmas
19 lights. It's not Christmas. Smelting, that's something
20 you do with compounds of metals. I don't believe Mr.
21 Gaskins was smelting in there this day. Brake pads, I
22 don't believe he was changing brake pads. Fishing, other
23 things it could have been consistent with. It's
24 consistent with firing the gun inside a car, ladies and
25 gentlemen.

1 Three in the parking lot matched the one in his
2 car, fired by the same gun. Sydney Williams, Lamont
3 Davis, Quinten, Epsil.

4 My mom has always taught me to be thankful, so I
5 want to thank Ms. McDuffie on behalf of the State, Mr.
6 Isenhoward with the Sheriff's Department, Ace. And I
7 want to thank y'all.

8 You know, the whole issue is malice. If you
9 want to feel malice, go back and touch this, touch it
10 (indicating). It came out of Shannavia. That's malice.
11 Didn't even know Shannavia. And evilness, a wickedness,
12 a meanness you show to one person or another. It can be
13 direct or it can be expressed. I'll show you gangsta.
14 F-that, I don't care if your baby mamma's in there. It
15 can be inferred from the use of a deadly weapon, infer
16 it. You can infer it in this case. There's nothing else
17 to infer.

18 Beyond a reasonable doubt? Yes, ma'am, yes sir.
19 We believe it to be true, maybe beyond all doubt but
20 that's not our burden. You can doubt anything if you
21 want to. But sometimes I've realized over my career that
22 sometimes questions are just questions. You can't answer
23 everything. If that was our burden, close the courthouse
24 down. We tried to submit everything we could.

25 There is a -- I didn't get to go over this.

1 This is a wallet. She had \$54 dollars left, Shannavia,
2 didn't even get to spend the 80 she got out of the ATM.
3 That's what she leaves you there.

4 One of our great, great themes or legal concepts
5 is the presumption of innocence. The Defendant is
6 presumed innocent unless and until the State proves him
7 guilty beyond a reasonable doubt. Once you go in that
8 jury room, you will start that process we believe of
9 taking that cloak, that robe of innocence off of him. We
10 believe we've proved that beyond a reasonable doubt.

11 As you do that, as you take the cloak off, I'm
12 going to ask you to tear a little -- tear half of it off
13 for John Adams, to warm him with the verdict of guilty of
14 murder. Take some of that off too, that cloak that the
15 evidence has stripped off Johnnie Walker Gaskins and give
16 some of it to Shannavia, warm her. Take a little bit off
17 for -- take a little bit of that robe that the evidence
18 has taken off, give it to Q. Give Lamont some for his
19 back injuries, ladies and gentlemen. And for that final
20 piece of cloth that the evidence has taken off, of that
21 cloak, we want to make a little blanket for Deirdre to
22 keep her warm.

23 Because the evidence has proved respectfully,
24 that on February the 5th, 2007, Johnnie Walker Gaskins
25 got angry, got mad, took the opportunity to shoot back at

1 the folks that had kicked him out, just happened to take
2 a couple more with him. And the verdict, we respectfully
3 submit, should be guilty.

4 Thank you.

5 THE COURT: Now, members of the jury, I've
6 concluded to give you a short break. The reason is,
7 you've heard about an hour for argument, I'm not sure how
8 long Mr. McCulloch will go but my guess will be 40
9 minutes or so, somewhere in that nature, and my charge is
10 going to take about 30 minutes.

11 So I can continue but when we get to the end of
12 everything, it would be time for you to take a break, so
13 I'm going to give you one now. Just don't talk about the
14 case. I'll give you a chance to refresh yourselves and
15 I'll bring you back out shortly, okay.

16 You can let me know when you're ready but I'll
17 give you 10 minutes or so, okay, time to refresh
18 yourselves.

19 Once again, please don't discuss the case.

20 (The jury retires from the courtroom at
21 approximately 11:18 a.m.)

22 THE COURT: Now, both sides, I hope you don't
23 mind doing that but I think that's logically a good thing
24 to do. We'll be a ease for about 10 minutes and then
25 we'll come back, we'll hear your argument, Mr. McCulloch.

1 (The Court was in recess.)

2 THE COURT: I've been informed that the jury is
3 ready. Are we all ready? Got everything in order, Mr.
4 McCulloch?

5 MR. MCCULLOCH: Your Honor, if I can just put on
6 the record my objections.

7 THE COURT: Let's do it after your argument.
8 We'll clean everything up. I don't want to do it now.

9 MR. MCCULLOCH: That's fine.

10 THE COURT: All right.

11 MR. MCCULLOCH: Ready.

12 THE COURT: There was three different ones. I
13 made notes on them.

14 MR. MCCULLOCH: We're ready.

15 THE COURT: All right, bring the jury in.

16 (The jury returned to the courtroom at
17 approximately 1:30 a.m.)

18 THE BAILIFF: The jury's all present, Your
19 Honor.

20 THE COURT: All right. Welcome back, Madam
21 Forelady and members of the jury. Once again, thank you
22 for your patience.

23 Mr. McCulloch, you may proceed, sir.

24 MR. MCCULLOCH: Thank you, Your Honor.

25 THE COURT: Yes, sir.

1 CLOSING ARGUMENT ON BEHALF OF THE DEFENSE

2 BY MR. MCCULLOCH:

3 It's been a long week and another week. As the
4 prosecution, I would like to also thank you. You've been
5 very patient with us. Oftentimes, it's hard to be
6 patient with lawyers and it's hard to be patient with the
7 system. But you have been all of that and more, more
8 than we can expect. So on Mr. Gaskins' behalf, I want to
9 thank you for the attention you've paid, patience you've
10 shown and the attentiveness, commonsense and attention to
11 detail that you're going to begin to show in just a few
12 minutes when you go back to the jury room.

13 It has been a long week. You've received a lot
14 of evidence. One of the -- and I will tell you that I
15 will be here before you for some minutes. I probably
16 want indulge in theater. The Judge will tell you
17 ultimately in his instructions that a trial is a crucible
18 of the truth and therefore it imposes upon you a duty to
19 be calm, composed and to reflect very carefully and
20 unemotionally. Sometimes that's hard. That's your duty.

21 We've learned some hard lessons over the last
22 several hundred years in this country about some hard
23 truths about justice, how we go about that business of
24 getting to justice, to getting to the truth. Two of the
25 things that Ms. Schillaci and the prosecution mentioned

1 that I want to just touch on and I'll come back to it
2 briefly, and most importantly, the Judge will charge you
3 at the end of this -- this argument -- and that's what
4 this is. I'm an advocate, this is an argument.

5 The Judge will tell you about several things
6 that you need to take into consideration. He will tell
7 you you've heard facts, he will then tell you, I, as the
8 Judge, am going to give you the law. I'm going to give
9 you those -- that toolbox of the rules that we all play
10 by in this courtroom. And two of the most critical
11 things he's going to tell you about are the presumption
12 of innocence and the burden of proof. And you've heard
13 us talk about that.

14 You know, in the 16th and 17th century, we had a
15 very different system. We had the presumption of guilt.
16 We had a system that included things like truth by
17 ordeal. One of the things I loved as a student of
18 history is the old custom back in the Salem witch trials,
19 if any of you are students of that period, used to have
20 that quaint thing called the dunking chair where we put
21 the accused in a chair and we stuck them down under the
22 water. And if they drowned, they were innocent. Didn't
23 do them a hell of a lot of good. But if they survived, I
24 guess if they were able to hold their breath long enough,
25 they were then taken out of the dunking chair and

1 proclaimed to be guilty as a witch. Then they just
2 burned them at the stake.

3 For those hard truths, we have a system today
4 that operates in the reverse. And that's what that
5 presumption of innocence and the burden of proof are all
6 about. The law recognizes, as I'm sure you do, that the
7 prosecution, when it makes an accusation, criminal
8 accusation, the law recognizes that mistakes can be made
9 and that's why it gives to you the responsibility of
10 making the decision, not suspicious police, not
11 prosecutors who have already decided, but you, the open
12 book, the fair commonsensical jury.

13 And what the law says is that nobody has to
14 prove anything as an accused person. And the reason for
15 that is the law recognizes something very basic. There
16 are situations in which a person cannot prove their
17 innocence. The law also recognizes that the system we
18 have, the police, the prosecutors, government, the
19 accuser, has all the king's horses and all the king's
20 men. They have all of the scientific tools. They have,
21 as we've seen in this trial, the fingerprinting and
22 ballistics, gunshot residue testing. They have video
23 cameras. I will footnote that it strikes me that -- as
24 it may have you, that we have the ability to send people
25 to the moon, to take pictures from the earth that show

1 rocks and pebbles on the moon yet we cannot enhance a
2 three minute video enough to be able to make anything out
3 of it. We'll come back to that.

4 The -- this presumption of innocence and burden
5 of proof are so critically important because they -- they
6 are there for the protection of the innocent as well as
7 the guilty.

8 So I'm going to start in this case at a place, I
9 guess, where the prosecution ended, with Mr. Isenhoward,
10 the investigator, who told you about arriving at the
11 scene of this terrible tragedy, arriving to a chaotic
12 confused scene with people running, fleeing in every
13 direction. And as he told you, he -- he began his
14 investigation with the other officers on the scene by
15 speaking with Sydney Williams. Sydney Williams, the
16 fellow who testified here, who was handcuffed based on
17 the witnesses we've heard from and somewhere there's a --
18 unless it's disappeared now. But there was a long list
19 of witnesses presented by the State.

20 Sydney testified that -- that he had been
21 handcuffed after the shooting. Maybe he was threatened
22 by the -- you can well imagine the people there might
23 have resembled somewhat of a lynch mob, upset, rightfully
24 so, looking for someone who did this, if not someone to
25 blame. And as Sydney told you, he walked John Gaskins

1 out and then he walked back into the club. And as he got
2 back to the club, the shooting started.

3 Now, one of the things that lawyers ask you to
4 do is to remember all of the evidence and I ask you to do
5 that as every lawyer ever has in any courtroom. Because
6 the witnesses testify that it was 20 minutes from the
7 time that John Gaskins was put out of the club until the
8 shooting. Not three minutes as this video shows which
9 obviously is missing parts and I think even the officer
10 who seized it, was that Investigator Fisher, Deputy
11 Fisher, I think he said that there were -- this was not
12 all the video.

13 But Sydney testified that, yeah, he knew Johnnie
14 Gaskins and was a friend. I don't know whether he said
15 good friend or a friend, but a friend. There are 12 of
16 you. Your memories were focused on that witness stand so
17 your memories are going to be the best collective recall.
18 But Sydney said, yeah, he's a good friend of mine and
19 oddly, Investigator Isenhoward didn't ask, take me to
20 him. Could be that because there were other suspects,
21 other people who had been thrown out, as you heard. You
22 didn't hear much about it.

23 Certainly you heard that there were lots of
24 people with guns, some security, some shooting their
25 guns. And you heard, as I'll come back to, some other

1 people testified about the fact that there were other
2 guns at the club. As Epsil tells you, Epsil Palmer,
3 well, I'm the pat down man at the front door. And it's a
4 shame in our day and time guns are so easily attainable.
5 I've got some at home but they are on the street and they
6 are in pockets. And everybody has concealed weapons
7 permits. They are, I guess, as they say on the nightly
8 news, ubiquitous to a fault.

9 The witnesses were bull-pinned. I think you
10 heard -- that's my word but the employee witnesses were
11 herded either to a backroom or some of them, I think as
12 Erin Hellman, I think her name was, went home, went to a
13 house nearby.

14 And, ladies and gentlemen, I would suggest to
15 you that's where the whisper campaign began, Johnnie
16 Gaskins, Johnnie Gaskins. That's when the investigation
17 focused on Johnnie Gaskins to the conclusion of
18 commonsense, to the exclusion of other candidates, shall
19 I call them.

20 A number of witnesses have been on that witness
21 stand during the trial, some inside the club who said
22 John Gaskins was there and it certainly appears that he
23 was, since his phone was found, lost earlier in the
24 evening. And that phone is offered to you as significant
25 evidence by the prosecution of his presence. Well, I

1 would suggest to you that it's significant evidence of
2 something else, if you really think about it. Mr.
3 Porterfield, the fellow saw Gaskins there, knew him, saw
4 him walked out of the bar, didn't see the shooting but
5 was there when the shooting happened, who is the fellow
6 who testified that he found the telephone earlier in the
7 evening. And I think he was the one who testified that
8 he received phone calls on it, one he believed from the
9 owner, Mr. Gaskins, in which that person said, I want to
10 come get my cell phone.

11 Now, I ask you, ladies and gentlemen, what does
12 commonsense tell you? Now, I understand that when you
13 watch -- read Agatha Christie and watch -- gosh, I can't
14 think of the lady who was the great TV detective, Angela
15 Lansbury. You know, the person who commits a crime
16 always returns to the scene. If I were John Gaskins,
17 called for his phone, learned where it was and say, I
18 want to come get it, which I think was the testimony
19 here, if he has just driven away from this shooting, why
20 does go back -- why does he want to go back for his cell
21 phone?

22 The -- the security guards -- there really were
23 several people in these photo lineups that -- and these
24 lineups, a number of them, become important for a couple
25 of reasons. Only two or three of these people testified

1 that they got a view, got a look at the person shooting.
2 Nobody testified they saw Mr. Gaskins get in the car from
3 which the shots were fired. And if you pay attention to
4 the video, which has got some pretty big holes in it,
5 you'll see lots of people walking around, some cars
6 moving around, and we can't say what would be in the
7 missing parts, since it's been lost forever because it
8 was not secured at the time of the shooting.

9 What these -- what the testimony tells you about
10 the identifications after made in some cases several days
11 after this, even after Mr. Gaskins' photograph had been
12 in the news as the suspect, the -- these identifications
13 were based on the situation that I asked you to remember.
14 One witness testified -- let's see, I think we're
15 speaking specifically of Mr. Harris and Mr. Davis who
16 were the two were nearest the front door.

17 And you will recall between the two of them --
18 and I won't try to attribute to either specifically, but
19 you'll recall that one of them testified, that what I saw
20 was this much of the face (indicating), from a distance
21 of the witness stand to somewhere out here, as shots were
22 being fired. And the other testified that, I saw
23 something similar though we were struggling with a guy
24 and on the ground. And the testimony was from Mr.
25 Isenhoward that all the windows in this vehicle are

1 tinted. And one person testified that the person was
2 reclining in the chair of the seat with the seat back as
3 far back as it would go. And this is one of the
4 photographs you'll have, Exhibit 115 (indicating), which
5 shows a seat back, way back. Now I don't think anybody
6 testified that this was the position of the seating when
7 the vehicle was located by police, you have only a
8 photograph.

9 These witnesses had a fleeting opportunity under
10 the worst circumstances, night, occupied with a struggle
11 apparently, from the ground or in the midst of falling to
12 the ground, scant seconds to make an identification, yet
13 they have no difficulty in making an identification of
14 Johnnie Gaskins.

15 And what is most interesting, if you pause to
16 reflect about these identifications, is the fact that one
17 of the witnesses said the person had a goatee. Another
18 witness said, I think, and I stand to be corrected by
19 your collective memory, that the shooter had braids or
20 cornrows or certainly hair that was not what could be
21 called, I guess, tight.

22 You do have in the record the testimony and two
23 exhibits, 152 and 151, which is the driver license
24 photograph of Mr. Gaskins which I think the witness, Mr.
25 Isenhoward, testified that he looked like that.

1 Certainly, the other photograph of Mr. Gaskins when he
2 came to the police department and learned he was as
3 suspect.

4 Now, this is the person that Mr. Gaskins was on
5 February the 5th. Yet, what was shown to all of these
6 folks were these lineup photographs of the fellow with, I
7 guess you call them braids. I guess if they were longer
8 they'd be dreadlocks. But I haven't had hair long enough
9 to do this since college. But this is the identification
10 platform, the identification vehicle that you're asked to
11 rely upon.

12 You heard the testimony of Mr. Christopher Lyles
13 that was arrested later that night, I think the testimony
14 was, for drunk driving and was found to have at least one
15 of these two guns on him, with him, and I think the
16 testimony was he had handcuffs on him from the problem he
17 had at 360 earlier.

18 Now, Mr. Lyles, as you may recall looked
19 remarkably like he should have been in that lineup, only
20 Mr. Lyles was never put in a lineup. Mr. Lyles, even
21 though he was apprehended that night had a connection to
22 these events, was never asked to submit to a gunshot
23 residue test. You can't know whether Mr. Lyles' vehicle
24 was searched because we don't know anything about the
25 circumstances of that other than what was testified to

1 here. So we can't know what other guns he owns or
2 whether there were other weapons in his vehicle,
3 whoever's vehicle he was in when he was apprehended later
4 that evening. We only know that the investigation really
5 did not pursue him or even include him among the range of
6 suspects. We do know that Mr. Lyles conveniently has
7 amnesia. He couldn't tell you what he was up to, where
8 he was or what he did. No memory whatsoever of that
9 evening, but he was there and something happened.

10 You know, we talk among lawyers about
11 investigative tunnel vision. It is something that occurs
12 when you make up your mind or have a predisposition when
13 things begin to work out in a specific direction. And
14 that's why you are here. Mr. Lyles could have been put
15 in one of these lineups. Heck, he could have been used
16 just because he certainly resembled the other five
17 photographs that he would have been in there with. That
18 wasn't done.

19 There are other things that you heard in
20 testimony that are somewhat confusing. You heard one
21 witness say there were two sets of gunfire. You heard a
22 lot of expert testimony and we're going to work our way
23 through that. The science, all the king's horses and all
24 the king's men stuff, that's what our dollars are used
25 for, to equip law enforcement with the best tools that

1 money can buy, the best tools that science can invent and
2 envision so that you can be sure beyond a reasonable
3 doubt.

4 You know, you saw a diagram fleetingly. This
5 nice diagram, I think it was testified that this was
6 created by Mr. Tabor who is sitting over there, works for
7 the Solicitor's Office, who was not at the scene of the
8 crime. He just happens to have been excelled in high
9 school in mechanical drawing.

10 The diagram done by the police that night by the
11 crime reconstruction team you don't have. You saw it
12 fleetingly. You've got other scientific evidence.
13 You've got these labs. You would wonder -- I think the
14 question was asked, why not put this photograph
15 (indicating) of Mr. Gaskins, this Exhibit 152, the
16 driver's license photo, why not put that in there, if
17 you're trying to get the guy that was at the club that
18 did the shooting. I think the testimony was, we couldn't
19 get that photograph, from the investigating officer.
20 Well, what do you think, can the police get a photograph?
21 And why not? Other than the fact that the shooter --
22 that a witness had said the shooter had braids so we went
23 with the braids (indicating).

24 The video. Again, we can put a man on the moon
25 but what you're given is a three minute video, incomplete

1 three minute video. And if you could tell much from
2 that, and I hope you could, your eyesight is much better
3 than mine. But it certainly doesn't represent a 20
4 minute period from the time that Mr. Gaskins was thrown
5 out until the shooting occurred and see other cars moving
6 around, and I would submit to you, plenty of time for Mr.
7 Gaskins to drive away.

8 Now you also heard from a ballistics expert, Mr.
9 Collins, a very nice fellow. Mr. Collins can only do
10 what he's given, like all these experts. Mr. Collins,
11 you know, very confusing testimony, very confusing. Mr.
12 Collins testified that he examined some shells from the
13 parking lot and he later examined the shell that he was
14 told came out of a seat back in a vehicle that Mr.
15 Gaskins had access to. And he testified that those
16 appeared in his eye to be very similar if not exact.

17 He also testified that based on his efforts in
18 three separate revisits to this case and the evidence in
19 it, bullets removed from walls, the -- there was a
20 projectile in the parking lot. A projectile is just
21 another way of saying -- well, I don't have that picture.
22 I would take me too long to find it. Among the 40 or 50
23 photographs we've got, there was a photograph of a bullet
24 that has been fired and the bullet was sitting in the
25 parking lot. And I don't know what that means. We don't

1 know exactly where it was but we know there was also an
2 unfired 45 caliber shell there.

3 We know from Mr. Collins that there were several
4 guns provided to him that were analyzed and could not
5 have fired the shells -- these shells, shell casings.
6 And you also heard him testimony that he was given the
7 information about a 40 caliber, what I call the FN gun.
8 And again, that's for Fabrique Nationale. You know, we
9 didn't ask if any of you worked there but that would be
10 okay because if you do, you know. They are a French
11 manufacturers that make different kinds of weapons, some
12 for the military, some for private use. This in
13 particular was a 40 caliber, much like the shell --
14 shells that were found in the parking lot. But
15 interestingly, even though the police in Perry, South
16 Carolina thought enough, when they discovered these and
17 that this weapon might have a relationship to this crime,
18 they were at least impressed enough with that possibility
19 to take it away from these two fellows, Davis (sic) and
20 Cancinto (sic), I think it was, to send it to Columbia.
21 And then the investigation -- and thought enough to send
22 it to Mr. Collins to have him look at it. Nobody was
23 interested enough to go talk to those folks who got it
24 from their cousin who was at 360. Nobody thought enough
25 to do that. And why is that?

1 And as Mr. Collins testified, the bullets, some
2 of those bullets, I think some he couldn't -- couldn't
3 figure out enough to do this or that, but some of them he
4 determined could very well have been fired from that
5 weapon. And what does that mean? And isn't it the duty
6 of the accuser to help you with those things that may
7 cause you some hesitation? But in the grand scheme of
8 things, the grand scheme of things, the things that need
9 to be resolved in your mind so that you can get on with
10 the job of reaching a verdict, reaching a decision beyond
11 a reasonable doubt?

12 The fingerprints, more expert testimony. You
13 don't have much in the way of fingerprints so apparently
14 that science isn't terribly helpful. But we know this,
15 if Mr. Gaskins determined that he wanted to save the
16 shell and stick it in that seat back for some reason,
17 maybe a souvenir, it certainly didn't have his
18 fingerprints on it.

19 You had D N A evidence. We're going to work our
20 way through science and we're getting close, then I do my
21 sitting down. The D N A evidence, what did you hear
22 there? Well, you heard that Mr. Gaskins' D N A, maybe
23 skin sheathing, and it's that's simple. It's not all
24 about saliva. You heard that his D N A was located in
25 this car that belonged to Ms. Sykes, the woman that he

1 dated for some time. So there's nothing really
2 surprising about that.

3 Now you heard that his D N A was on his cell
4 phone. Nothing terribly surprising about that.

5 But you didn't hear that his D N A was on the
6 shell casings which presumably had to be loaded by
7 somebody into the gun that fired them. So the D N A
8 really becomes of not much consequence.

9 You heard the D N A expert express, I think some
10 surprise, that there was some evidence of blood found in
11 the vehicle, State's 127, 121, 140, the bloody tissue and
12 what appears to be, as one witness said, some blood on
13 the steering wheel perhaps. And you heard the D N A
14 expert express some surprise that, gee, nobody bothered
15 to tell me about that because we certainly could have
16 analyzed that. And I don't know what that means.

17 You heard a witness testify that generally when
18 you find blood you find an injury. And we certainly know
19 as the -- as the investigators testified, or at least Mr.
20 Isenhoward, that when Mr. Gaskins came to the police
21 department, he had no injury at all. What does that
22 mean? Well, what does it mean if there was absolutely no
23 pursuit, no interest in blood in the vehicle?

24 Also, ladies and gentlemen, I should note this
25 jacket which we're going to talk a little bit more about,

1 there's no blood on it either because certainly if there
2 was blood on it, you'd have heard about it.

3 But the next science that we heard about was
4 gunshot residue, that theory that when a gun is fired
5 that it emits, it spews out a flume of -- of gunpowder
6 and stuff, hundreds of particles and elements. And you
7 heard Ms. Schillaci question that gentleman about it.

8 The bottom line of that was that he said that he
9 found a particle or something in the car that was
10 consistent with. And you heard Mr. Meadors in his
11 argument to you kind of make light of -- of the other
12 explanations of how that particle might have gotten
13 there, fishing tackle and so forth. Well, Mr. Meadors
14 didn't mention the most important way that something, a
15 particle could get there. And -- but you heard us ask
16 the question of this gunshot expert, what about a police
17 officer with a gun who crawls around in a car? Maybe
18 he's been to the firing range. Could that leave a little
19 residual particle? Then he said, of course it could.

20 But you also heard the question asked, if a
21 person has sat in a vehicle and fired a weapon, not once,
22 not twice, but according to what the prosecution would
23 have you believe, a number of times from that vehicle,
24 from the -- from the -- out the front window as the
25 witnesses said, wouldn't there be real gunshot residue,

1 not a particle? Wouldn't there be?

2 Now, you heard questions asked about this jacket
3 which Mr. Gaskins, the testimony is, that he was wearing
4 this jacket. And when asked, the gunshot residue guy
5 said, well, you know, the gunshot residue wouldn't stick
6 to this because it's too slick. Well, there are a couple
7 of things that aren't slick about this jacket. I don't
8 know what fur -- what capacity fur has to capture gunshot
9 residue but, ladies and gentlemen, some of you may have
10 found it interesting that there was no gunshot residue on
11 the two pieces of this jacket that would be most likely,
12 one more likely than the other. Because of course,
13 whoever did this shooting had to have a gun in one hand
14 or the other stuck through the sleeve of this jacket
15 right next to the kind of fabric that is most likely,
16 according to the gunshot residue expert, most likely to
17 capture this. And yet, it's not there.

18 The evidence, the fact -- those facts, I suggest
19 to you, are critically important in your determination as
20 to whether the State has proven its case, because they do
21 not square-up with the theory that was born when Sydney
22 Williams said what he said, for whatever reason he said
23 it, whether it was over a girl or whatever, Mr. Williams
24 started this thing.

25 The -- you've got a lot of exhibits, a lot of

1 evidence. And, you know, the Judge may tell you -- I
2 don't know if this is in standard charge, but he may not
3 tell you it's not about the number of witnesses, it's not
4 about the weight of the evidence in the sense of whether
5 somebody's evidence weighs five pounds. I mean, the State
6 has done what they do with a case that is flawed.
7 They've produced lots of witnesses, they've produced lots
8 of evidence, things that just absolutely don't have any
9 evidentiary value. And I'll get to that.

10 One thing you heard about -- I guess this was
11 from the crime reconstruction people, there were three of
12 them that examined the vehicle, and the ballistics guy.
13 Those three experts who went and examined this automobile
14 couldn't really remember who got there first and who did
15 what first and when the photographs were taken and all
16 that. But they say that they found a shell casing in
17 that vehicle. And you've got some photographs and I
18 will, you know, ask you to take a look at those
19 photographs.

20 Now, this casing, there's even a photograph
21 somewhere here -- here it is. 130, that nobody knew who
22 that was making the discovery of the magic shell casing.
23 And I call it the magic shell casing because the question
24 was asked, how did it get there? For those of you who
25 fly, you may have experienced the inconvenience of a seat

1 back pocket. Have you ever struggled trying to get a
2 magazine in it, much less a shell casing being ejected
3 from a firearm being fired in the front seat, out of a
4 window, ejecting the shells as, I think it was the
5 ballistics expert testified, in a forward motion. You
6 may remember me sitting in the chair, which would be
7 towards the windshield, not towards the back. And
8 finding its way, despite gravity, into a seat back pocket
9 in a seat, as 110 shows, that is leaning back as well.

10 Now, I am not going to speculate on how that got
11 there. But I am going to suggest that you should
12 consider that, the difficulty of it getting there and
13 whether that squares with your finding him guilty or
14 whether that gives you some hesitation to act.

15 There is a lot of evidence, a lot of exhibits
16 and a lot of stuff. And a lot of it just doesn't have
17 any evidentiary value but it's what the State does.
18 They've given you very graphic testimony because this is
19 a terrible tragedy. And with all due respect to the
20 families of the victims and the victims, some of who are
21 here today, those photographs didn't have much
22 evidentiary value, somewhat like the wallet which doesn't
23 have much evidentiary value except to remind you that
24 this is a tragedy. And I am certainly not here to
25 diminish the tragedy. What I am here to do is to remind

1 you, as the Judge will, that that's not a consideration
2 for you. That your consideration has to be -- unlike
3 those photographs, it has to be bloodless, it has to be
4 based on the facts.

5 Ladies and gentlemen, the Judge now in just a
6 moment or two -- I'm going to sit down and shutup. I have
7 had my say and I appreciate your hanging in there with
8 me. It has been I guess a trial longer than usual.

9 I want you to remember that presumption of
10 innocence and that burden of proof. And as Ms. Schillaci
11 attempted to do, and I think did very well in her opening
12 remarks to you, she said, ladies and gentlemen, the --
13 this concept, this presumption of innocence, you know,
14 it's an intangible thing, it's a will o' a wisp as a
15 concept.

16 And she suggested to you that a way to think
17 about it, a way to kind of give it shape and form and
18 crystallize it in your minds is to recognize that when
19 you walk back into the jury room, there's a billboard --
20 a billboard, a chalkboard. And on that chalkboard, in
21 your mind's eye, should be written not guilty because,
22 ladies and gentlemen, that's what the Judge will tell you
23 the law imposes upon you. Unlike that dunking business,
24 it imposes upon you a verdict that is already written
25 that is not guilty. And until you can find in your

1 collective minds, first individually and then
2 collectively as a jury, as a group, that guilt is proven
3 beyond a reasonable doubt, that not guilty verdict must
4 stand. And until that chalkboard is cleansed of any part
5 or particle, a letter, a speck of that not guilty that is
6 equivalent to a reasonable doubt -- and the Judge will
7 tell you a reasonable doubt is a doubt that would cause a
8 reasonable person to hesitate to act. And I would
9 suggest to you, there is a great deal of information here
10 that we believe will call you -- cause you to hesitate to
11 act.

12 As you may have noticed, my name is McCulloch.
13 And so I've got a kilt at home and every now and then we
14 get duded up. But one of the interesting things I've had
15 occasion to do is to travel back to Scotland to look at
16 their judicial system. And they have an interesting
17 system there. The Judge will charge you in just a minute
18 that he's going to give you a verdict form and that
19 verdict form is going to say, not guilty or guilty. Your
20 verdict must be one or the other on each of these
21 accusations.

22 But in Scotland we have a different form ---

23 MR. MEADORS: Your Honor, I would object. This
24 isn't Scotland. I've seen this argument before, we have
25 our burden, our own instructions. Object to any law in

1 Scotland.

2 THE COURT: This is final argument -- continue,
3 Mr. McCulloch.

4 MR. MCCULLOCH: Thank you. I'll be brief.

5 In Scotland they have three forms of verdict.
6 They have not guilty, they have guilty and they have not
7 proven. And in these Unites States, not proven is kind
8 of subsumed, it's included in a not guilty verdict.

9 And, ladies and gentlemen, as I sit down, I want
10 to thank you one more time and I ask you to reach a
11 verdict of unproven, that is, not guilty.

12 Thank you so much.

13 THE COURT: There's a note, Mr. McCulloch, is
14 it?

15 (Pause.)

16 MR. MCCULLOCH: Thank you, Your Honor. Thank
17 you, ladies and gentlemen. I've taken my time.

18 THE COURT: All right.

19 CHARGE BY THE COURT:

20 Now, Madam Forelady and members of the jury, the
21 State of South Carolina charged the Defendant Johnnie
22 Gaskins with two counts of murder, three counts of
23 assault and battery with intent to kill and one count of
24 possession of a firearm during the commission of a
25 violent crime. And I've read the indictments to y'all.

1 I shall not repeat the allegations contained therein.

2 Now, to these indictments, the Defendant has
3 entered a plea of not guilty which places upon the State
4 the burden of proving the Defendant guilty. A person
5 charged with committing a criminal offense in South
6 Carolina is never required to prove himself innocent. I
7 charge you that is a vital important rule of law of
8 evidence that the Defendant in a criminal trial, no
9 matter how great or serious may be the offenses with
10 which he is charged, must always be presumed innocent
11 until his guilt has been proven beyond a reasonable
12 doubt.

13 This presumption of innocence remains with the
14 Defendant at all times, from the moment of his appearance
15 in this court, throughout the trial and until the jury
16 has, upon the testimony and evidence presented, reached a
17 verdict of guilty beyond a reasonable doubt.

18 For it is the solemn duty of the jury, if not
19 clearly convinced of his guilty beyond a reasonable doubt
20 to the contrary, to acquit the Defendant. So the burden
21 of proof is upon the State to establish by evidence to
22 your satisfaction the guilt, beyond a reasonable doubt,
23 of the Defendant here on trial for the crimes of two
24 counts of murder, three counts of assault and battery
25 with intent to kill and one count of possession of a

1 firearm during the commission of a violent crime.

2 Now, what is reasonable doubt, members of the
3 jury? A reasonable doubt is the kind of doubt that would
4 cause a reasonable person to hesitate to act. If you
5 have such a doubt as to the guilt of the Defendant, then
6 he would be entitled to a verdict of not guilty. Reasonable
7 doubt may arise from evidence which is in the case or
8 from the absence or lack of evidence in the case. You
9 alone must make the determination of whether or not
10 reasonable doubt exists as to the guilt or innocence of
11 the Defendant.

12 The State has the burden of proving the
13 Defendant guilty beyond a reasonable doubt. Some of you
14 may have served as jurors in civil cases where you were
15 told that it was only necessary to prove that a fact is
16 more likely than not true. In criminal cases, the
17 State's proof must be more powerful than that. It must
18 be beyond a reasonable doubt.

19 Proof beyond a reasonable doubt is proof that
20 leaves you firmly convinced of the Defendant's guilt.
21 There are very few things in this world that we know with
22 absolute certainty. And in criminal cases, the law does
23 not require proof that overcomes every possible doubt.
24 If, based on your consideration of the evidence, you are
25 firmly convinced that the Defendant is guilty of the

1 crimes charged, you must find him guilty.

2 If, on the other hand, you think there is a real
3 possibility that he is not guilty you must find him not
4 guilty. A criminal Defendant is never -- a criminal
5 Defendant is presumed to be innocent until his guilt is
6 proved beyond a reasonable doubt.

7 A verdict of guilty can be based upon
8 circumstantial evidence, members of the jury, as safely
9 as upon direct evidence, provided the circumstantial
10 evidence relied upon to prove guilt measures up to these
11 requirements of the law that I've just stated to you.

12 There are two type of evidence which are
13 generally presented during a trial, direct evidence and
14 circumstantial evidence. Direct evidence is the
15 testimony of a person who asserts or claims to have
16 actual knowledge of a fact, such as an eyewitness.
17 Circumstantial evidence is proof of a chain of facts and
18 circumstances indicating the existence of a fact. The law
19 makes absolutely no distinction between the weight or
20 value to be given either direct or circumstantial
21 evidence.

22 Nor is a greater degree of certainty required of
23 circumstantial evidence than of direct evidence. You
24 should weigh all the evidence in the case. After weighing
25 all the evidence, if you are not convinced of the guilt

1 of the Defendant beyond a reasonable doubt, you must find
2 the Defendant not guilty.

3 Now, Madam Forelady and members of the jury,
4 under the Constitution and laws of South Carolina, you
5 are the finders of the facts in this case. I do not have
6 the right to pass upon the facts or even to express any
7 opinion I might have as to them, nor may I intimate in
8 any way what I may think about the guilt or innocence of
9 the Defendant.

10 You are also the judges, the sole judges, of the
11 credibility, the believability of the witnesses who have
12 testified in this case. In passing upon their
13 credibility, you may take into consideration many things,
14 such as the demeanor or manner of testifying, whether the
15 witness had a reason to be biased or prejudiced, whether
16 a witness's testimony was contradicted on the one hand or
17 supported and corroborated on the other hand. You
18 certainly do not determine this credibility or
19 believability by counting the number of witnesses for
20 either side. You may believe a small portion of a
21 witness's testimony and disregard the larger, or vice
22 versa. You may believe one witness against many or many
23 against one.

24 You have heard the testimony of a witness who
25 has special knowledge -- several, these were expert

1 witnesses. You have heard the testimony of a witness who
2 has special knowledge, skill, experience, training or
3 education in a particular profession or occupation who
4 has given his opinion or her opinion as an expert witness
5 as to matters in which they are skilled -- or he is
6 skilled. In determining the weight to be given such
7 opinion, you should consider the qualifications and
8 credibility of the expert and the reason given for his
9 opinion. You are not bound by such opinion. Give it the
10 weight, if any, to which you deem it is entitled.

11 All these things you will consider, bearing in
12 mind that you should give the Defendant the benefit of
13 every reasonable doubt.

14 Now, in this case, Johnnie Gaskins, the
15 Defendant, has offered no testimony in his behalf. This
16 is his prerogative and it is not a circumstance that you
17 can take into consideration or even allow to enter into
18 your discussion in the jury room. Under the Constitution
19 of South Carolina and under the Constitution of the
20 United States, he has a right to remain silent. The
21 burden of proof is upon the State of South Carolina to
22 establish his guilt to your satisfaction as jurors by
23 legal evidence beyond a reasonable doubt.

24 The fact that a Defendant in the trial of a
25 criminal case did not testify in his own behalf is not a

1 factor to be considered by you in any way in your
2 deliberations and your consideration on the question of
3 guilt or the innocence of the accused. It must not be
4 considered by you in any manner whatsoever against the
5 Defendant or mitigate against him in any respect
6 whatsoever.

7 A Defendant has the Constitutional right to
8 remain silent and the assertion of such Constitutional
9 right cannot and must not be considered by you in your
10 deliberation. Under your oath, then you are to reach no
11 inference and draw no conclusion whatsoever from the fact
12 that a Defendant in this case -- that the Defendant in
13 this case did not testify. The fact that a Defendant did
14 not testify should not even be discussed in the jury
15 room. The burden of proof, as I have stated to you, is
16 upon the State. It is not incumbent upon the accused to
17 prove his innocence. The burden of proof remains upon
18 the State to prove guilt beyond a reasonable doubt. The
19 fact that a Defendant exercised his Constitutional right
20 to remain silent is not a factor to be considered by you
21 in determining the guilt or innocence of the Defendant.

22 Now, by the same Constitution and law which
23 makes you the finders of the facts and the evidence, as I
24 have discussed with you, I am as the Judge made the sole
25 and only instructor in the law. You must accept as

1 correct the law which I charge and apply it to the
2 evidence as you find it and reach your verdict.

3 And finally I charge you in this regard, that
4 you, or for that matter I, should not be concerned about
5 what the law ought to be, members of the jury, but rather
6 what I charge the law to be.

7 Now, we have two counts of murder, like I said,
8 three counts of assault and battery with intent to kill
9 and possession of a firearm during the commission of a
10 violent crime. I need to define these, the laws for you.

11 What is murder? Murder may be defined as the
12 willful felonious killing of human being by a human being
13 with malice aforethought, that malice being either
14 expressed or implied.

15 Now, South Carolina Code Section 16-3-10 of the
16 South Carolina Code of Laws defines murder as the killing
17 of any person with malice aforethought, either expressed
18 or implied. In order to convict a person of murder, the
19 State must prove, not only -- the State must not only
20 prove the killing of the victim by the Defendant, it must
21 also prove criminal intent and that the killing was done
22 with malice aforethought. All these facts must be proved
23 beyond a reasonable doubt. In other words, there must be
24 a combination of a previous evil intent and an infliction
25 of an injury calculated and intended to produce death.

1 Now, what is malice aforethought? Malice --
2 what is malice, more simply. Malice indicates a formed
3 purpose and desire to do a wrongful act under
4 circumstances that exclude any legal right to do it.
5 Malice is a term of art that imparts wickedness and
6 excludes a just cause or excuse. It is something that
7 springs from wickedness, from depravity, from a depraved
8 spirit, from a spirit bent on mischief at the time, and
9 from not then having a regard for the social obligations
10 or the obligations which rest upon mankind.

11 The word expressed and implied do not mean two
12 different types of malice. Rather, the terms signifying
13 the way in which malice may be proved. Expressed malice
14 is where a person, by word of mouth, express hatred or
15 ill will for another or where the State proves beyond a
16 reasonable doubt that the Defendant was making
17 preparation before the event to accomplish the event.

18 The jury may also conclude by deductive
19 reasoning that under certain circumstances, malice may
20 arise even though there is no expressed or direct
21 evidence of an intent to kill.

22 Malice may be implied or inferred if it is
23 proved beyond a reasonable doubt that there was a
24 willful, deliberate and intentional doing of an unlawful
25 act without just cause or excuse. The proof of this fact

1 however, is merely a piece of the evidence from which the
2 inference or implication of malice may arise. In other
3 words, the inference would be simply an evidentiary fact
4 to be taken into consideration by you, the jury, along
5 with other evidence in the case and you may give it such
6 weight as you determine it should receive.

7 If facts are proved beyond a reasonable doubt
8 sufficient to raise an inference of malice to your
9 satisfaction, this inference would be simply an
10 evidentiary fact to be taken into consideration by you,
11 the jury, along with other evidence in the case and you
12 may give it such weight as you find it should receive.
13 You are jurors -- you as jurors are free to accept or
14 reject this permissive inference depending on your view
15 of the facts.

16 In other words, if such conduct results directly
17 in the death of another, and if such conduct was so
18 culpable and inexcusable, so aggravated and grossly
19 reckless as to show an active intentional disregard of
20 the consequences of human life, thus denoting a malignant
21 spirit, a heart devoid of social duty and fatally bent on
22 mischief, an implication of malice may arise.

23 Furthermore, it is not just carelessness, not
24 mere recklessness or passive indifference to the safety
25 of others. This conduct, when it shows a deliberate and

1 intentional design to use -- to so use or employ or
2 handle a deadly weapon or dangerous instrumentality so as
3 to endanger the life of another or of others without just
4 cause or excuse, may be sufficient to raise the -- this
5 implication.

6 However, it is for you, the jury, to decide
7 beyond a reasonable doubt whether upon all the facts and
8 circumstances of this case, the Defendant's alleged use
9 of a deadly weapon demonstrated such an intentional
10 disregard for human life that malice may be implied or
11 inferred from the use of a deadly weapon. And it is for
12 you, the jury, to decide what weight, if any, should be
13 given to this fact. And of course, a gun is a deadly
14 weapon. Just throw that in there.

15 Further, there must be malice aforethought which
16 means that the malice must have been conceived in the
17 mind of the Defendant prior to the fact producing the
18 fatal result. However, the law does not require that the
19 malice must exist for any appreciable length of time
20 before the commission of the act. Malice is a word
21 suggesting wickedness, hatred and a determination to do
22 what one knows to be wrong without just cause or excuse
23 or legal provocation. Malice need not be in the mind of
24 the one doing the killing any particular length of time
25 before the act of killing in order to render the killing

1 murder. It is -- if it is present in the mind of the one
2 doing the killing any length of time before the act, then
3 its presence would be sufficient to render the killing
4 murder.

5 Malice is said to be expressed where there is a
6 -- where there manifested a violent deliberate intention
7 unlawfully to take away the life of another human being.
8 Malice is implied where one intentionally and
9 deliberately does an unlawful act which he or she then
10 knows to be wrong and in violation of his duty to another
11 and where no excuse or legal provocation appears. And
12 when the circumstances attending a killing show an -- an
13 abandoned heart, a malignant heart fatally bent on
14 mischief.

15 If the evidence should show under what
16 circumstances a shot was fired or blow delivered which
17 took the life of another, then you the jury would have to
18 determine whether under such circumstances the act was
19 malicious.

20 Now, members of the jury, there is murder with
21 malice and I've explained that to you. Another charge is
22 assault and battery with intent to kill.

23 Assault and battery with intent to kill is an
24 unlawful act of violent -- of a violent nature to the
25 persons of another with malice aforethought, as I defined

1 that to you in connection with murder, either expressed
2 or implied. Thus, assault and battery with intent to
3 kill contained all of the elements of murder except the
4 actual death of the person assaulted and there must be
5 not simply intent to kill, for it may be present in any
6 case of manslaughter, but intent to kill accompanied with
7 malice aforethought. The same distinction element
8 between murder and manslaughter.

9 The intent to kill is the gist of the offense
10 of assault and battery with intent to kill and it must
11 also be present. So before the accused can be convicted
12 of this charge, you must be satisfied beyond a reasonable
13 doubt from the evidence that if the party assaulted had
14 died as a result of the injury, the Defendant would have
15 been guilty of murder.

16 Now, what is possession of a firearm during the
17 commission of a violent crime? That's in Section 16-23-
18 490 of our Code of Laws. And it makes it illegal to
19 possess a firearm during the commission of a violent
20 crime.

21 Now 16-1-60 provides that a violent crime
22 includes the offenses of murder and assault and battery
23 with intent to kill. For you to find the Defendant
24 guilty of this separate statutory offense of possessing a
25 firearm during a violent crime, you must first find the

1 Defendant guilty of murder or assault and battery with
2 intent to kill. If you find the Defendant guilty of
3 murder or assault and battery with intent to kill, then
4 you must determine whether the State has proved beyond a
5 reasonable doubt that the Defendant was in possession of
6 a firearm.

7 As used in Section 16-23-490 of the South
8 Carolina Code of Laws, a firearm is defined as any
9 machine gun, automatic rifle, revolver, pistol or any
10 weapon which will or is designed to or may be readily
11 converted to expel a projectile.

12 Now, I further charge you, members of the jury,
13 that voluntary intoxication where it has not produced
14 permanent insanity is never an excuse or a defense to a
15 crime, regardless of whether the crime is one involving
16 general or specific intent. A person who voluntarily
17 renders himself intoxicated is no less responsible for
18 his acts while in such a condition. If one voluntarily
19 drinks intoxicating liquors, wine or beer, or is under
20 the influence of drugs and becomes intoxicated to
21 whatever degree, and if while in that condition the
22 person commits an act that would be a crime if it had
23 been committed by a sober person, the fact of drunkenness
24 would not relieve the intoxicated person from
25 responsibility.

1 I further charge you, members of the jury, that
2 there is was a witness in this case that had a prior
3 record. A person who has a past criminal record is
4 competent to testify during a trial. A past record does
5 not affect the ability of that witness to testify. Their
6 past record may only be considered by you, if at all, in
7 determining the -- in determining the witness's
8 believability. Remember, you are the sole judges of the
9 facts in the case and of the believability of any and all
10 of the witnesses.

11 Now, Madam Forelady and members of the jury, I
12 further charge you that a verdict in this case cannot be
13 based upon sympathy, passion, prejudice or emotion or any
14 other consideration not found in the evidence.

15 Now, Madam Forelady and members of the jury,
16 whatever your verdict in this case, it must be unanimous.
17 That means all 12 of you must agree. And I, somewhat for
18 your convenience, prepared six verdict forms. And I'll
19 go through each every one of them with you.

20 The first I hold in my hand is -- says, State of
21 South Carolina, Plaintiff versus Johnnie Gaskins,
22 Defendant, In the Court of General Sessions for the Fifth
23 Judicial Circuit. And it says, Verdict as to John Adams.
24 And there's two possible verdicts in this case. And I
25 had to list one before the other so take no special note

1 of the one that comes first or second. And it says, we,
2 the jury, unanimously find the Defendant Johnnie Gaskins
3 guilty of murder or not guilty. And you will sign your
4 name above the line that says Foreperson and date it.
5 That will conclude your work on that particular matter.

6 And the second verdict form some is the same as
7 I mentioned but this is as to Shannavia Williams. And,
8 we, the jury, unanimously find the Defendant Johnnie
9 Gaskins guilty of murder or not guilty.

10 And then we move to the third verdict form and
11 this is as to Quinten Harris and this is for assault and
12 battery with intent to kill. We, the jury, unanimously
13 find the Defendant Johnnie Gaskins guilty of assault and
14 battery with intent to kill or not guilty.

15 And fourthly, this is as to Deirdre Houston.
16 We, the jury, unanimously find the Defendant Johnnie
17 Gaskins guilty of assault and battery with intent to kill
18 or not guilty.

19 And fifthly, as to Lamont Davis. We, the jury,
20 unanimously find the Defendant Johnnie Gaskins guilty of
21 assault and battery with intent to kill or not guilty.

22 And finally on the sixth indictment or charge,
23 we, the jury, unanimously find the Defendant Johnnie
24 Gaskins guilty of use of a firearm during the commission
25 of a violent crime or not guilty.

1 Once again, members of the jury, your verdict
2 must be unanimous, all 12 of you must agree and you must
3 be convinced beyond a reasonable doubt of his guilt, as
4 to all six charges.

5 Now, I need to send you back into the jury room
6 and caution you once again, don't begin discussing this
7 case until you receive the signal to do so. Your signal
8 will be when the Bailiffs, they will bring these six
9 verdict forms along with all the evidence that's been
10 introduced in this trial. And all the evidence that has
11 been introduced, that is all the exhibits, you shall
12 receive. There were a couple of exhibits marked for
13 identification, they're not in evidence so you won't get
14 those. There may be a couple of exhibits don't go back.
15 I can't think of them off the top of my head but if you
16 have a question about it, I will explain it to you this
17 way. It's not in evidence if they were marked for ID.
18 There were a couple of pictures, some other items.

19 So everything that's in evidence you should
20 receive along with this verdict form (sic), Madam
21 Forelady and members of the jury. That will signal the
22 time for you to begin your deliberations. Until then,
23 please don't talk about this case. There's a possibility
24 I might have to bring you back out here and explain some
25 more to you.

1 So, relax, sit down and we'll get you this very
2 shortly. Once you've reached a decision, Madam Forelady,
3 I would appreciate it if you would knock on the door to
4 alert the Bailiffs that you have reached a conclusion in
5 this case and we'll be happy to receive your verdict.

6 Thank you all so very much. Please retire to
7 the jury room. But once again, do not discuss this case
8 until you receive the signal to do so.

9 (The jury retires from the courtroom at
10 approximately 12:35 p.m.)

11 THE COURT: Is everything here?

12 THE CLERK: Yes, sir.

13 THE COURT: All right. Any exceptions or
14 additions from the State?

15 MR. MEADORS: None.

16 THE COURT: From the Defense?

17 MR. MCCULLOCH: No, Your Honor.

18 THE COURT: All right. Let me do this. Check
19 all the exhibits because there's a bunch of them, y'all
20 together. Make sure everything is in that should be in.
21 There's about four or five items that were marked for ID.
22 Let's make sure they don't go back. And then we'll
23 exhale and then we'll take -- we'll take up your motions
24 on the record, let you make your motions, make the
25 directed verdict and everything else. But let's make

1 sure we get it to the jury first.

2 And, Mr. Martin, once you give everything to the
3 Forelady, bring the two -- as you always do, leave them
4 out, bring them -- don't let them be in the jury room
5 when they start deliberations.

6 (Pause.)

7 (The Exhibits and Verdict Forms were delivered
8 to the jury to begin deliberations at approximately
9 12:45 p.m.)

10 (The Alternate Jurors were dismissed.)

11 (Whereupon, the Court was in recess awaiting
12 a verdict.)

13 THE COURT: They want to see the video again.
14 So, you want to the make the arrangements to go ahead and
15 get it back there to them? Is there any secret code of
16 something they need?

17 MR. MEADORS: You're gonna send it back, is that
18 what you're saying, Judge?

19 THE COURT: I beg your pardon?

20 MR. MEADORS: Make arrangements to send it back?

21 THE COURT: I'm going to send it back, I mean.
22 I think everybody's computer literate except for me, so.

23 MS. MCDUFFIE: Your Honor, they just need to
24 keep it plugged in for the battery?

25 THE COURT: What now?

1 MS. MCDUFFIE: They just need to keep it plugged
2 up because the battery's not great.

3 THE COURT: Well, she can tell them that. Mr.
4 Bowen is out there, the Bailiff. And we have told
5 somebody to go stand there to make sure nothing happens.

6 (Pause.)

7 THE COURT: Mr. McCulloch, you need to renew all
8 your motions?

9 MR. MCCULLOCH: Yes, sir.

10 THE COURT: What ---

11 MR. MCCULLOCH: The same motion that we made at
12 the conclusion of the State's case, we would now renew at
13 the conclusion of the Defense case when we rested. I
14 outlined those before, Your Honor. I will not outline
15 them again.

16 THE COURT: That's fine. I think you're
17 protected, after their case, I think you've done it
18 twice. If you haven't, let the record reflect he made
19 all the appropriate motions at the appropriate time and
20 the same decisions apply that I've made earlier, that is
21 the rulings.

22 And now we need to revisit your three
23 objections, I do believe.

24 Go ahead.

25 MR. MCCULLOCH: With some ---

1 THE COURT: The first one was, I think, the
2 witness, Mr. Meadors was saying a witness said something
3 that -- I can't remember.

4 MR. MCCULLOCH: Your Honor, there are actually
5 three objections.

6 THE COURT: Yes.

7 MR. MCCULLOCH: The first was based upon an
8 improper appeal to the jury's sympathy ---

9 THE COURT: Oh, passion, prejudice and emotion.

10 MR. MCCULLOCH: And it revolved around -- his
11 argument began poignantly with the statement of the --
12 one of the victims who ---

13 THE COURT: John Adams.

14 MR. MCCULLOCH: --- I am cold. And of course my
15 objection was not to that. I didn't object -- that was
16 to the opening -- or closing argument. It was
17 subsequently with some repetition, there were other
18 references to non-evidentiary value type comments that
19 seemed to be calculated to appeal to the sympathy of the
20 jury. I made the objection, I believe, at the sidebar we
21 discussed that. And subsequently believing my objection
22 to be reserved, I did not thereafter object ---

23 THE COURT: And I think my ruling from the bench
24 at the sidebar was, I don't think his comments exceeded
25 fair comment, the bounds of fairness or something like

1 that.

2 MR. MCCULLOCH: And, Your Honor, the second
3 objection was as to -- well, the second and third
4 objections were objections argument made by the Solicitor
5 which attributed statements to witnesses that I do not
6 believe were in the record, one of them specifically was
7 a statement to the jury made by the Solicitor that Sydney
8 Williams testified, which I don't believe he did, to the
9 statement that he was told by the -- Mr. Gaskins, don't
10 do that, my mamma's baby's (sic) in there.

11 THE COURT: Oh, your notes, yeah.

12 MR. MCCULLOCH: I do think that the witness, Mr.
13 Williams, testified my mamma's baby's (sic) in there but
14 I don't believe Mr. Williams' testimony included, don't
15 do that, which is a direct reference to and an obvious
16 suggestion he was about to do harm, which I don't think
17 is in the record. So my objection was the argument of
18 things not in the record there.

19 And the second the argument was the fact that
20 the Solicitor exhibited to the jury the gangsta style
21 shooting of the firearm -- the pistol sideways which, of
22 course, nobody ever did say about it that way, rather
23 than the vertical method which I don't ---

24 THE COURT: You don't know who Kaiser Soze is
25 then do you?

1 MR. MCCULLOCH: I do know Kaiser. But he is
2 just ---

3 THE COURT: Verbal Kent actually.

4 MR. MCCULLOCH: --- one of The Usual Suspects.

5 THE COURT: All right.

6 MR. MCCULLOCH: But I don't believe -- and the
7 Solicitor attributed that method of firing to a witness
8 though I don't recall any witness who testified to that
9 fact.

10 THE COURT: No ---

11 MR. MCCULLOCH: To any firing of a weapon in
12 that manner.

13 THE COURT: All right, Mr. Meadors, anything you
14 want to add, sir?

15 MR. MEADORS: Pleasing Your Honor. Obviously
16 all of my argument we think was from the evidence and the
17 reasonable inferences. First of all, the comment about
18 -- my argument about, don't do that, my baby's mamma's in
19 there, I wrote it down, my able co-counsel wrote it down
20 and we clearly think that was in there.

21 THE COURT: Okay.

22 MR. MEADORS: Which would show malice and -- so
23 we respectfully disagree. I think I heard that.

24 Quinten Harris actually was on the stand shows
25 his hand like that (indicating), said it was like that

1 way. So I think the record will reflect that and the
2 jurors will remember what they remember. Obviously I
3 wouldn't argue something that we didn't think was in the
4 record, so I do think it was there.

5 MR. MEADORS: As far as appealing to the
6 passions or prejudice, Your Honor, the first witness,
7 that came into evidence to show the credibility, the
8 believability. The officer, he was there, he cared. I
9 thought that was a fair argument.

10 I would say, I didn't object but started to when
11 Mr. McCulloch was arguing that you got a glimpse of a
12 piece of evidence of something that was just marked for
13 ID for the record. They shouldn't have got a glimpse of
14 it or it should have been into evidence. That's that
15 little diagram he did.

16 THE COURT: I remember.

17 MR. MEADORS: For the record that was improper
18 but I didn't object. That's all I have.

19 THE COURT: That's very gracious of you,
20 Solicitor.

21 MR. MEADORS: Thank you.

22 THE COURT: Once again, I think everybody's
23 position is noted for the record. I don't think anything
24 was said, that I can recall hearing, that exceeded fair
25 comment.

1 Thank you all so very much.

2 (Pause.).

3 THE COURT: This is a very tough case for
4 everybody involved. I appreciate the courtesy, dignity
5 and respect that everybody showed for each other and I
6 don't know, there's no easy way to do something like this
7 regardless of what the verdict might be. But I
8 appreciate participating in the resolution of this matter
9 with everybody involved, including Ms. Schillaci.

10 MR. MEADORS: Thank you, Your Honor.

11 MR. MCCULLOCH: Thank you, Your Honor.

12 (Whereupon, the Court was in recess awaiting
13 a verdict.)

14 THE COURT: We have a note. Y'all are gonna
15 like this one. This note is in regard to Exhibit Number
16 58, State's Exhibit Number 58.

17 It reads, is this the club owner's car,
18 question? I am a member of the same fraternity. I
19 noticed the license plate. Would this affect the trial
20 in any way, or my being a part of this jury?

21 Apparently, according to my law clerk, this is a
22 ---

23 MR. MCCULLOCH: We don't have the Defendant.

24 THE COURT: Okay, I'm sorry. That's okay, I can
25 rewind.

1 (Pause.)

2 THE COURT: And put on your jacket, Mr.
3 McCulloch, come on. You can leave it off.

4 (Pause.)

5 THE COURT: Ready, Mr. Gaskins? We have a note
6 from the jury. It's in regard to State's Exhibit Number
7 60 -- I'm sorry, 58. And it's a license plate from an
8 SUV. Y'all take a look at that.

9 Now, this is the question, once again. Is this
10 the club owner's car? I am a member of the same
11 fraternity. I noticed the license plate, number 208.
12 Would this affect the trial in any way, or my being a
13 part of this jury?

14 And apparently, according to my law clerk,
15 that's the sign for a Kappa, he's a Kappa, fraternity.

16 MR. MEADORS: The license plate itself?

17 THE COURT: No, no ---

18 LAW CLERK: There is a shield to the left of the
19 first letter for Kappa Alpha Psi, they're fraternity
20 brothers.

21 THE COURT: It's a unique question.

22 (Pause.)

23 THE COURT: Now see, if he had been Q
24 (phonetic), he never would have asked this question.

25 (Laughter.)

1 THE COURT: I would suggest to both sides, I
2 simply answer this by saying, no, and let it go. But
3 I'll entertain anything y'all want me to do.

4 MR. MEADORS: As I have said all week, I trust
5 your judgment.

6 THE COURT: Well, that's not necessarily a good
7 thing.

8 MR. MCCULLOCH: I guess, Judge, my sense would
9 be that if this fraternal relationship would make that
10 witness more credible, we don't know ---

11 THE COURT: This is a juror not the witness.

12 MR. MCCULLOCH: I understand.

13 THE COURT: Yeah.

14 MR. MCCULLOCH: But the juror is asking, does
15 the fact that he is in the fraternal order with the
16 person who is the owner, Mr. -- I guess he's talking
17 about Mr. Porterfield, would that affect his receipt of
18 his testimony, make it more ---

19 THE COURT: I will read the question again. Is
20 this the club owner's car. I'm a member of the same
21 fraternity. I noticed the license plate. Would this
22 affect the trial in any way? The answer is, no, clearly
23 so far. Or my being a part of this jury? I think the
24 answer is clearly, no. I can bring him out or I can ask
25 him, would this affect your ability to be a fair and

1 impartial juror, if y'all want me to, or if you want me
2 to. Talk to your client about it. I -- what I can do is
3 I can bring all of them out and read this question and
4 answer in front of everybody, if y'all want me to.
5 Either way, I don't think it amounts to a hill of beans.

6 MR. MCCULLOCH: Well, Your Honor, if your
7 response is that, not, that is not ---

8 THE COURT: Bring the jury out, please. Tell
9 them to stop deliberating, bring them out.

10 It's nothing personal with Mr. McCulloch but if
11 we've got to go through all of that, I'll just bring them
12 out and we can eyeball them and make it easier for
13 everybody. It will take longer to listen to your
14 argument, we'll just bring them out.

15 MR. MCCULLOCH: Well, I think you understand my
16 concern.

17 THE COURT: Oh, of course I do, Joe, that's why
18 I'm doing it.

19 (The jury returns to the courtroom at
20 approximately 2:26 p.m.)

21 THE BAILIFF: The jury's all present, Your
22 Honor.

23 THE COURT: I got a question in regards to
24 State's Exhibit Number 58. That means y'all are really
25 paying attention. But the question, I've got to read it

1 again for the record. I read it for to the lawyers and
2 everybody else involved.

3 Is this the club owner's car? I don't know
4 whether it is or not. I'm a member of the same
5 fraternity. I noticed the license plate. Juror number
6 208. Would this affect the trial in any way or me being
7 a part of this jury?

8 Ladies and gentlemen, members of the jury, the
9 bottom line is this, would anything that you know or
10 experience or gone through during the course of this
11 trial, affect your ability to be a fair and impartial
12 juror? And specifically ask you the question, juror
13 number 208, unless it affects you, it doesn't affect
14 anything else. And I don't know who 208 is.

15 So if this will affect your ability to being in
16 the same fraternity of somebody who has a car parked at
17 Club 360, would affect your ability to a fair juror, then
18 you need to let me know, you can write me a separate
19 note. If it doesn't, then you need to resume your
20 deliberations when I give you the signal to do so.

21 But for the life of me, I don't see how it has
22 anything to do with whether or not the State has proven
23 beyond a reasonable doubt that Mr. Gaskins is guilty as
24 charged.

25 So with those instructions, with that

1 observation, I'm going to send you back to the jury room,
2 ask that you not resume your deliberations until I have a
3 chance to talk -- what I just said to you about to the
4 lawyers, okay.

5 Thank you very much.

6 (The jury retires from the courtroom at
7 approximately 2:28 p.m.)

8 THE COURT: Any exceptions or additions to
9 those remarks or observations made for the benefit of the
10 juror and the jury based on that question? Anything from
11 the State?

12 MR. MEADORS: Nothing from the State.

13 THE COURT: Mr. McCulloch?

14 MR. MCCULLOCH: The Defense is well satisfied.

15 THE COURT: All right. Well, let me give them
16 five minutes to see whether or not he writes a note.
17 Then I'll tell them to resume their deliberations.

18 You want to mark this, please, ma'am.

19 (Whereupon, Number 10, Juror Note, was marked
20 for identification.)

21 THE COURT: All right, Mr. Martin, ask does he
22 have a question. If not, give them the exhibit and tell
23 them to resume their deliberations.

24 THE BAILIFF: All right.

25 (Whereupon, the Court was in recess awaiting

1 a verdict.)

2 THE COURT: Before Mr. Gaskins gets back out
3 here, I have no idea what the verdict is but I need to
4 issue a warning to everybody here, on both sides of this
5 issue. You need to contain your emotions, no outburst.
6 And that's the way it needs to be.

7 (Pause.)

8 THE COURT: All right, is everybody ready.

9 MR. MEADORS: The State's ready.

10 THE COURT: All right, you may invite the jury
11 back in, Mr. Martin.

12 (The jury returned to the courtroom at
13 approximately 3:00 p.m.)

14 THE BAILIFF: The jury's all present, Your
15 Honor.

16 THE COURT: All right. Thank you, sir. Ms.
17 Falcone.

18 THE CLERK: Madam Forelady, has the jury reached
19 a verdict?

20 FORELADY: Yes, we have.

21 THE CLERK: Please hand it to the Bailiff.

22 (Complied.)

23 THE COURT: All right, you may publish the
24 verdict, Ms. Falcone.

25 THE CLERK: Yes, sir.

1 VERDICT OF THE JURY:

2 Indictment number 2007-GS-40-1629, The State of
3 South Carolina versus Johnnie Gaskins as to Quinten
4 Harris. We, the jury, unanimously find the Defendant
5 Johnnie Gaskins guilty of assault and battery with intent
6 to kill.

7 Indictment number 2007-GS-40-1632, The State of
8 South Carolina versus Johnnie Gaskins as to Deirdre
9 Houston. We, the jury, unanimously find the Defendant
10 Johnnie Gaskins guilty of assault and battery with intent
11 to kill.

12 Indictment number 2007-GS-40-1631, The State of
13 South Carolina versus Johnnie Gaskins as to Lamont Davis.
14 We, the jury, unanimously find the Defendant Johnnie
15 Gaskins guilty of assault and battery with intent to
16 kill.

17 Indictment number 2007-GS-40-1626, The State of
18 South Carolina versus Johnnie Gaskins as to Shannavia
19 Williams. We, the jury, unanimously find the Defendant
20 Johnnie Gaskins guilty of murder.

21 Indictment number 2007-GS-40-3948, The State of
22 South Carolina versus Johnnie Gaskins as to John Adams.
23 We, the jury, unanimously find the Defendant Johnnie
24 Gaskins guilty of murder.

25 Indictment number 2007-GS-40-1627, The State of

1 South Carolina versus Johnnie Gaskins. We, the jury,
2 unanimously find the Defendant Johnnie Gaskins guilty of
3 use of a firearm during commission of a violent crime.

4 Madam Forelady, was this your verdict and the
5 verdict of entire jury?

6 FORELADY: Yes, ma'am.

7 THE CLERK: Thank you.

8 THE COURT: Anything further from the State from
9 this jury?

10 MR. MEADORS: No, sir. Thank you, Your Honor.

11 THE COURT: Mr. McCulloch.

12 MR. MCCULLOCH: Your Honor, we'd like the jury
13 polled.

14 THE COURT: All right, sir.

15 THE CLERK: Madam Forelady and ladies and
16 gentlemen of the jury, I'm going to ask you two questions
17 relating to your verdict. Please answer yes or no to
18 each question as I call out your number.

19 Number 49, were these your verdicts?

20 JUROR: Yes, ma'am.

21 THE CLERK: Are they still your verdicts?

22 JUROR: Yes, ma'am.

23 THE CLERK: Number 129, were these your
24 verdicts?

25 JUROR: Yes.

1 THE CLERK: Are they still your verdicts?

2 JUROR: Yes.

3 THE CLERK: Number 258, were these your
4 verdicts?

5 JUROR: Yes.

6 THE CLERK: Are they still your verdicts?

7 JUROR: Yes.

8 THE CLERK: Number 208, were these your
9 verdicts?

10 JUROR: Yes.

11 THE CLERK: Are they still your verdicts?

12 JUROR: Yes.

13 THE CLERK: Number 21, were these your verdicts?

14 JUROR: Yes.

15 THE CLERK: Are they still your verdicts?

16 JUROR: Yes.

17 THE CLERK: Number 223, were these your
18 verdicts?

19 JUROR: Yes.

20 THE CLERK: Are they still your verdicts?

21 JUROR: Yes.

22 THE CLERK: Number 275, were these your
23 verdicts?

24 JUROR: Yes.

25 THE CLERK: Are they still your verdicts?

1 JUROR: Yes.

2 THE CLERK: Number 256, were these your
3 verdicts?

4 JUROR: Yes.

5 THE CLERK: Are they still your verdicts?

6 JUROR: Yes.

7 THE CLERK: Number 209, were these your
8 verdicts?

9 JUROR: Yes.

10 THE CLERK: Are they still your verdicts?

11 JUROR: Yes.

12 THE CLERK: Number 248, were these your
13 verdicts?

14 JUROR: Yes.

15 THE CLERK: Are they still your verdicts?

16 JUROR: Yes.

17 THE CLERK: Number 23, were these your verdicts?

18 JUROR: Yes.

19 THE CLERK: Are they still your verdicts?

20 JUROR: Yes.

21 THE CLERK: Number 182, were these your
22 verdicts?

23 JUROR: Yes.

24 THE CLERK: Are they still your verdicts?

25 JUROR: Yes.

1 THE CLERK: The jury's been polled, Your Honor.

2 THE COURT: Anything further from the jury on
3 behalf of Mr. Gaskins?

4 MR. MCCULLOCH: Your Honor, we would thank the
5 jury for their efforts.

6 THE COURT: Madam Forelady and members of the
7 jury, this was a very long and difficult trial. I want
8 to emphasize to you all that you were picked randomly.
9 You had nothing to do with this. You acted very
10 conscientiously. You were very patient. I've never seen
11 a question from a juror asking about whether or not being
12 a member of the same fraternity might affect anything in
13 the trial. That shows the attention to the detail that
14 you all showed, that is individually as well as
15 collectively as a juror.

16 Nobody can argue with your verdict. I will tell
17 you this and I don't usually say that much after
18 verdicts, that you did the right thing. You did the only
19 thing that was possible in this case under the law and
20 the evidence. I know you go away with some sadness
21 because of the tragedy that you had to witness through
22 this trial. But you need to feel good about your efforts
23 and the results that you reached. And be grateful that
24 we live in a place that the presumption of innocence is
25 important, you listened to everything I said, you

1 listened to everything that the prosecution said, you
2 listened to everything the Defendant had to offer. And
3 you made the right decision. So I don't want you to have
4 any lingering doubts or feelings that you did something
5 wrong in some kind of a way, you were placed in an
6 awkward position.

7 Without good people like you, there's no way for
8 this system to work. And thank God that we have people
9 like you all from Richland County to resolve these tough
10 and difficult issues. I mean, we have two people that
11 were killed and three that were others that could have
12 been killed.

13 Now, know it wasn't an easy thing for you to
14 listen to all this evidence, I know it wasn't an easy
15 thing to sit back in that jury room and to go over
16 everything. I've been a member of a jury myself and you
17 can read about trials in the paper or you can hear about
18 them on the radio and see them on TV. But until you sit
19 back there and have to sit in judgment of your fellow
20 citizens, no one else realizes until you've been through
21 it yourself how difficult it is.

22 So I commend you on your patriotic service. I
23 wish you all the very best.

24 Now, this ends your participation in this matter
25 but if you want to stay around and witness the sentencing

1 of Mr. Gaskins, you're invited to do so. I've written
2 each of you a personal letter letting you know how I feel
3 about your efforts and your service.

4 So God bless you and I appreciate everything
5 you've done. You're free to go back to the jury room and
6 to leave at this time if you are so inclined. You're free
7 to stay also if you're so inclined. It's up to you all.

8 (The jury retires from the courtroom at
9 approximately 3:07 p.m.)

10 THE COURT: And to Mr. McCulloch and to Mr.
11 Schillaci and Mr. Meadors and Ms. McDuffie, having been
12 where you all sit, and I've sat at both tables during the
13 course of my career as a lawyer and everything else, it
14 was a difficult case for everybody involved. I do,
15 however, believe the right result was reached, the only
16 result possible under the law and the evidence.

17 And I commend Mr. McCulloch, who I've known
18 since we both were teenagers, for the job he did. He
19 couldn't have done much better under any circumstances.
20 I sort of crudely made the remark that if you dug up
21 Johnny Cochran and Daniel Webster, the result would have
22 been the same and I do feel that way. It has nothing to
23 do with -- I don't know Mr. Gaskins or his family. I
24 noticed that they've been here every week (sic) and every
25 parent should love a child the way that y'all have

1 exhibited the affection that you have for your son.

2 And I've watched the victims and their friends
3 the whole week and I can commend you for the faithfulness
4 and loyalty that you showed to your fallen comrades.

5 So with those words in mind, I don't have much
6 to say after that, but I will be happy to hear any
7 further presentation on behalf of the State or Mr.
8 Gaskins.

9 Solicitor.

10 MR. MEADORS: Beg the Court's indulgence. Just
11 give us a minute, Your Honor.

12 THE COURT: All right. Yes, sir.

13 (Pause.)

14 THE COURT: Solicitor, Mr. Meadors, you ready to
15 proceed, sir?

16 MR. MEADORS: Your Honor, thank you for your
17 patience. And for the record too, I would like to just
18 thank the jury for their verdict.

19 Judge, John Adams' mamma is here, Ms. Deb
20 Montgomery (phonetic) and she would like to respectfully
21 address Your Honor.

22 THE COURT: All right, Ms. Adams, I would be
23 happy to hear from you, ma'am.

24 MS. ADAMS: My name is Deborah Adams. To the
25 officers of the Court, Judge Manning, families of the

1 victims, both living and dead, to Johnnie Walker Gaskins,
2 his family present and other interested parties, I am the
3 mother of John Adams.

4 I've long thought about what I would say to you
5 and to the Court, Mr. Gaskins, given a chance. No words
6 can express how my role was changed on February 14th
7 (sic) of 2007. You have no idea of the consequences and
8 the toll that your actions has taken on my family. You
9 see I was awoken by a phone call in the middle of the
10 night by my son's fiancé telling me that he had been
11 shot. It was only after being called by the hospital
12 that I knew my child was dead.

13 The only recourse for me was to drive to
14 Columbia, over 200 miles, to try to maintain some
15 semblance of my sanity and be strong for my family

16 At the age of 29, still yet a another man, my
17 child, died. John or J.D. as I called him, could light a
18 room with his very presence. He was a gentle giant that
19 loved his family very much. Immediately I thought about
20 his two children, a boy and a girl, from a previous
21 marriage that would no longer feel their father's touch.
22 They would no longer hear his laughter. They would never
23 hear their father tell them that he loved them again.

24 I thought about Ms. Tanya Wilson, his fiancé,
25 who was pregnant at the time with his unborn child. I

1 knew his son would never know his father's love. He
2 would never see his face. It would just be another
3 statistic, a young black man growing up without a father,
4 not because his father didn't want him, not because his
5 father didn't love him, but because his father had been
6 cut down by a bullet.

7 As we sat in the waiting room, as I listened to
8 that doctor tell me how he tried so hard to save his life
9 but there was nothing he could do, many thoughts went
10 through my head, some good and some bad. You see, Mr.
11 Gaskins, you broke my heart. You stole a part of myself.
12 A part of me died that day with my child.

13 But the effects that it had on my family, it
14 didn't stop there. You see, John has a brother and
15 sister. At that time, his sister was 19 and in college
16 at Francis Marion. She was a math major with intentions
17 of transferring to Georgia Tech or to Clemson to get a
18 degree in architecture. She was on the Dean's List. You
19 noticed I said she was. You see, she wasn't able to
20 handle the untimely death of her brother. She wasn't able
21 to continue to go to school. Instead, she's been in and
22 out of the hospital battling for her on sanity, to come
23 to terms with this most evil deed. She was in the
24 hospital right after over four times. She remains
25 constant in a doctor's care and on medication that she

1 will take from now until the end of her days. What you
2 see now is not like what she was. She was vibrant petit
3 young lady that was full of life.

4 You see, your actions too have changed her
5 world. Through no fault of her own, now, instead of
6 embarking on her career, she's faced with numerous doctor
7 bills, hospital bills, unpaid student loans. And the sad
8 thing about it is, through your actions she'll probably
9 never reach her fullest potential.

10 As I sat in the courtroom and listened to the
11 witnesses' accounts of my son's last moment, I cried but
12 yet I needed to hear so that I could get closure. I know
13 he's in the better place but still...

14 You see sometimes, bad things do happen to good
15 people. It's times like these that test your faith. But
16 it still doesn't make it any easier.

17 At your bond hearing, I stood in front of the
18 Judge, I asked him, I implored him to deny your bond so
19 that no other mother would ever be in the position that I
20 am now. And today, I'm asking for justice because even
21 though you have hurt me, you've hurt my family and you've
22 hurt countless others, I won't give into hatred. I won't
23 lose my mortal soul by hating you.

24 So with that mind, I forgive you. I forgive you
25 for killing my son.

1 And to Mrs. Gaskins, you stopped me that day
2 after the bond hearing, you told me how sorry you were
3 for what your son had done. I wasn't ready at that time
4 to accept your condolences and your apologies but I
5 accept them now because, you see, nobody is a winner
6 here, nobody.

7 THE COURT: All right. Thank you, Ms. Adams.

8 MR. MEADORS: Judge, there's a brief follow-up
9 before we get to Shannavia's mom.

10 Very few times in my 23 years, Corporal Fisher
11 who I addressed in my closing, wrote a page -- a page
12 long letter after this incident outlining to John's mamma
13 about E M S coming and him asking John if he minded if E
14 M S took care of the ladies. He actually sent this
15 letter to his mom. And I've never seen it before. I
16 just wanted the record to reflect that.

17 Next, Your Honor, Shannavia's mom, Ms. Valerie
18 (phonetic) Williams wants to address ---

19 THE COURT: Ms. Williams, is it?

20 MS. WILLIAMS: Yes. You know, I spent half of
21 my life in the army. I've been away from Shannavia for a
22 long time. And then finally I moved here to South
23 Carolina and I begged her to move here to spend the rest
24 of her life with me. And two weeks before she died, she
25 decided to move in with me. And the day before she went

1 to the 360 Sports Bar, I had to take my son to Atlanta,
2 Georgia for an appointment for special eye exam. That
3 was the last day I kissed her and told her I loved her.

4 And while I was down there in Atlanta, Georgia,
5 I had been calling and calling knowing something was
6 wrong and when I heard she got shot in the head, they
7 didn't want to tell me she was dead because I had to
8 drive 300 miles back. When I got -- when I arrived back,
9 I thought she was going to get up and give me a hug.
10 Instead I saw her face and I knew she was already dead.
11 It was the most horrible look ever. Nobody prepared me
12 for the pain I was going to see.

13 My son is now 20 years old and he's going
14 through therapy. My family is messed up. We all go to
15 therapy. He moved to New York away from me because he
16 couldn't living here. My grandmother was ready to die
17 because she can't see Shannavia no more.

18 And what's so sad about it, no one's ever said
19 they were sorry to me about my daughter. I just don't
20 understand. All I have to say is that God is in charge.
21 I'll just leave it at that.

22 THE COURT: All right. Thank you, Ms. Williams.

23 MR. MEADORS: Your Honor, for the record, I
24 would just like that thank both of these mothers for
25 their patience with me and Solicitor Giese's office. Of

1 course, there's so many of these and we got to it as
2 quick as we could. I just want to thank them for their
3 patience.

4 THE COURT: All right.

5 MR. MEADORS: Tanya Wilson is next, Your Honor.

6 MS. WILSON: Hi, Your Honor, my name is Tanya
7 Wilson.

8 MR. MEADORS: This is John's fiancé, Your Honor.

9 THE COURT: Okay. You said Wilkins?

10 MS. WILSON: Wilson.

11 THE COURT: Wilson, yes, ma'am.

12 MS. WILSON: It's been two and half years, two
13 and half years of my wondering why somebody could have
14 done this. I was five and half months pregnant, I was
15 admitted that night. I did not know that anybody could
16 be that evil to do something to two people that did not
17 do anything.

18 Mr. Gaskins, I have never met you until I came
19 to court. So many people have asked me how could I have
20 been so strong over the whole 2007. Losing Johnny was
21 the worst. Having my son was the best time of my life
22 but his father is not there to see it, a little boy that
23 looks just like his father. The second tragedy was my
24 sister being murdered. Having to -- the hardest thing
25 for me to lose two people so close. I had hatred in my

1 heart for you. I still did but people have said I need
2 to let you go. So I no longer hate you. I actually feel
3 sorry for you and your family. I wish that night could
4 be erased from everybody's mind but I know that it can't.

5 The only thing I can say is that I no longer
6 hate you. And I do want to say that I'm sorry that
7 you've had to go through this trial with us. And I wish
8 that the outcome could have been different and it wasn't
9 you and that it could have been somebody else so you
10 wouldn't have to be away from your family the same way
11 that John and Shannavia is away from us.

12 Thank you.

13 THE COURT: Thank you, Ms. Wilson.

14 MR. MEADORS: Your Honor, heard from Deirdre
15 during the trial. She's got a few remarks.

16 THE COURT: Yes, Ms. Houston.

17 MS. HOUSTON: I just want to say to the Court
18 that everything that happened, there's a lot of people
19 that have been hurt in the process including you and your
20 family, Mr. Gaskins, and I wish we all didn't have to go
21 through this but it happened. But I wish the best for
22 everybody and I hope that everybody will move on with
23 their lives -- that's it.

24 THE COURT: Thank you, Ms. Houston.

25 MR. MEADORS: Your Honor, as far -- you know,

1 it's tough enough when you've got one victim but all
2 these victims, I appreciate your giving us time to go
3 through it.

4 As far as the final two victims, Your Honor, Q
5 is here. I'm going to speak on his behalf.

6 THE COURT: All right, sir.

7 MR. MEADORS: Obviously, he just puts this in
8 your hands, Your Honor. And he thanks Your Honor for the
9 trial that you gave everybody. That's what he wanted me
10 to address the Court on.

11 Lamont Davis, for the record, couldn't be here
12 as Your Honor knows ---

13 THE COURT: His mother was ill, I think it was.

14 MR. MEADORS: Very ill and he headed back right
15 after his testimony. Obviously, you saw his emotion and
16 how he felt about this trial, Judge.

17 Judge, I have a few closing comments but with
18 that I think Ms. McDuffie has his prior record.

19 THE COURT: Yes, ma'am.

20 MS. MCDUFFIE: Your Honor, the Defendant's prior
21 record is a 1999 failure to stop for a blue light, three
22 years suspended, and a trespassing. 2001, unlawful
23 carrying of weapon. Your Honor, that charge stems from a
24 shooting where this Defendant shot into the Kamikaze
25 Night Club on Garners Ferry Road. Luckily, no one was

1 injured, Your Honor, but that charge does stem from a
2 prior nightclub shooting that this Defendant committed.

3 2002, PWID, five years suspended upon three
4 years probation. And PWID cocaine, 12 years suspended.
5 2002 ABHAN, 42 months suspended with two years probation.
6 2004, simple assault. 2006 PWID, five years suspended to
7 18 months probation.

8 Your Honor, the Defendant was on probation when
9 these offenses were committed.

10 THE COURT: All right. Thank you, Ms. McDuffie.

11 MR. MEADORS: Your Honor, in closing, as I
12 always do, I want to thank Isenhoward, Mr. Tabor, Ace,
13 Ms. Outen. Law enforcement did an outstanding job in
14 this case to find a suspect, getting the evidence,
15 getting the witnesses, and I do want to commend them for
16 that. And finally Ms. McDuffie for her hard work in this
17 case.

18 That's all we have. Thank you, Judge.

19 THE COURT: All right. Thank you, Mr. Meadors.
20 Ms. McCulloch.

21 MR. MCCULLOCH: Would you like us up here, Your
22 Honor?

23 THE COURT: Yes, sir. That will be appropriate.

24 MR. MCCULLOCH: Your Honor, it has been a very
25 difficult and emotional week. I don't have much to say.

1 I -- we were aware of the 2000 -- 2001, shooting
2 incident. Mr. Gaskins tells me that he was there,
3 present aiding and abetting but did not fire these shots
4 into the parking lot. So there are the similarities
5 there. He has had some difficulty with drugs as his
6 prior record indicates.

7 All I would say to this Court is he is 28 years
8 old today. Your Honor gets -- has the unfortunate
9 responsibility for imposing sentences on young people
10 with some frequency and it's a burden for you, his crime,
11 these crimes, and the loss of life and the injuries and
12 tragedy that has affected so many lives.

13 And I ask only that the Court measure the
14 underlying facts of the incident, which are a crime born
15 not of planning, not of design, not of being predatory
16 but rather a combination of alcohol and anger that
17 coalesced over a few moments and resulted in actions that
18 changed so many lives in so many terrible ways.

19 The -- I would ask the Court to consider life in
20 the possible sentence -- and, of course as you certainly
21 are aware, Your Honor, you have the ability to sentence
22 from 30 years to life, concurrent or consecutively. I
23 would ask the Court to consider that life should be, and
24 is generally, reserved for the planners and designers of
25 crimes for evil. I would submit to the Court that this

1 is a crime of impulse and the acts are evil but not
2 necessarily the person is evil. Mr. Gaskins has done
3 terrible things. He recognizes that. He is prepared to
4 accept his punishment.

5 I ask the Court humbly to consider that if he
6 were to receive the 30 years sentence, the least
7 available under those statutes, that he would be right at
8 60 years old, if he were released at that time and if he
9 survived to that age.

10 I have nothing else to add, Your Honor, I don't
11 think?

12 We do have his family here today, as you've even
13 heard from the victims. They're most regretfully about
14 these circumstances. His mother and father are here. I
15 do not know if they want to say anything. I think
16 they're, like everyone in this courtroom, pretty
17 emotionally rung out.

18 (Pause.)

19 MS. GASKINS: I'm Delores Gaskins, Johnnie's
20 mother. I want to say to the family of the victims that
21 it wasn't just them that suffered this past two and a
22 half years. My husband and I did too, every moment. I
23 did apologize to Mrs. Adam for the loss of her son. But
24 I did not say that my son did it because I wasn't
25 convinced that he did and I still am not convinced that

1 my son did all of this but I have to go with what the
2 jury decided.

3 But I do want to apologize to the family and I
4 feel their pain. And I hope and I pray that you don't
5 take my son entirely away from me.

6 That's all I have to say.

7 THE COURT: Thank you, Mrs. Gaskins.

8 MR. MCCULLOCH: Thank you, Your Honor.

9 THE COURT: Anything further?

10 MR. MCCULLOCH: I think there's nothing further,
11 Your Honor.

12 THE DEFENDANT: Yes, I would like to apologize
13 to all the families involved. I just want to tell y'all
14 I'm sorry for your loss.

15 Thank you.

16 THE COURT: All right.

17 MR. MCCULLOCH: Thank you.

18 THE COURT: Very well. I will note just for the
19 record, I made some comments earlier when the jury was
20 back in the room, that it's a tragedy for everybody
21 involved. These are always salvage operations, there's
22 no winners, there's no losers. I guess we all suffer. A
23 little bit of humanity has been lost as the result of
24 what happened back at the 360 Club back on Super Bowl
25 night, this trial.

1 I can commend you, Mr. McCulloch, you and Ms.
2 Schillaci for the job you did representing Mr. Gaskins
3 enough. Nor can I exceed praise for the good job that
4 Mr. Meadors and Ms. McDuffie did on behalf of the people
5 of South Carolina. And first and foremost, I will always
6 be indebted to this jury, for each and everyone who
7 remains here this afternoon, for the difficult job they
8 had in sorting out this senseless tragedy.

9 I can understand the positions of Mr. and Mrs.
10 Gaskins, what your son has been convicted of and, of
11 course, all of the victims, as I look back at them.

12 And so my thanks and praise goes to the jury
13 first and foremost. I've sat on a jury, I think I told
14 them, a long time ago and I don't care how long you
15 practice law, whatever it is you do, how long you've been
16 in law enforcement or whatever it is you do, you don't
17 know how difficult it is sitting in judgment of your
18 fellow citizens until you're back there in that room.

19 So a sentence in this case has to reflect the
20 severity of what happened, the senselessness of what
21 happened, and at the same time it's got to be tempered
22 with some manner of just and fair play. Now, any other
23 judge in any other place at any other time in the history
24 of this country might give Mr. Gaskins something
25 different than I'm about to impose. But this is what I

1 think is fair, not so much to punish Mr. Gaskins but
2 sometimes there's a message that needs to be sent to the
3 community and this is what I think is an appropriate
4 sentence under circumstances that we all have endured.

5 SENTENCE OF THE COURT:

6 On indictment number 2008-1626, that's an
7 indictment for murder involving the death of Shannavia
8 Williams. On indictment number 2008-3948, that's for
9 murder involving the death of Mr. John Adams. The
10 sentence is life. Two lives have been lost. I run those
11 concurrent, Mr. Gaskins, because you only have one life,
12 sir.

13 On indictments number 2008-1631, assault and
14 battery with intent to kill as it relates to Lamont
15 Davis, 2008-1632, assault and battery with intent to kill
16 as it relates to Ms. Deirdre Houston, 2008-1629, assault
17 and battery with intent to kill as it relates to Mr.
18 Quinten Adams -- Harris, I'm sorry, Quinten Harris.

19 And finally as to indictment number 2008-1627,
20 that's the use of a firearm.

21 So on the three assault and batteries with
22 intent to kill, I impose a sentence of 20 years. And
23 this has nothing to do with you personally, Mr. Gaskins.
24 Like I said, sometimes, and I rarely do this, but
25 sometimes a message needs to be sent.

1 I will run these sentences consecutive to the
2 life sentence that you have as well as the use of a
3 firearm during the commission of a crime, that's
4 consecutive.

5 So I'm giving you life plus 65 years. It's
6 nothing personal but in a senseless tragedy such as this,
7 sometimes a judge, as myself, has to reflect what he
8 believes to be the standards and values of this
9 community. That's what I've tried to do. It has nothing
10 personal to do with you as the Defendant or any
11 particular victim, but sometimes that's what needs to be
12 done. That's why I think it's fair and appropriate.

13 I thank everybody for their participation in
14 this matter and this has concluded these proceedings.

15 Thank you all so very much.

16 (Whereupon, Court's Exhibit Number 11, Juror
17 Note, was marked for identification.)

18 (Whereupon, State's Exhibit Number 140,
19 Photograph of Blood on Gearshift, was marked for
20 identification during the trial.)

21 (Whereupon, State's Exhibit Number 142,
22 Photograph of Jacket from Vehicle, was marked
23 for identification during the trial.)

24 ----- END OF TRANSCRIPT OF RECORD -----
25

1 CERTIFICATE OF REPORTER

2

3 STATE OF SOUTH CAROLINA)

4 COUNTY OF RICHLAND)

5

6 I, Crystal Holmes, Official Court Reporter for
7 the Fifth Judicial Circuit of the State of South
8 Carolina, do hereby certify that the foregoing is a
9 true, accurate and Complete Transcript of Record of
10 the proceedings had and evidence introduced in the
11 trial of the captioned case, relative to appeal, in
12 the Court of General Sessions for Richland County,
13 South Carolina, on the 19th, 20th, 21st, 23rd, 26th
14 and 27th days of October, 2009.

15 I do further certify that I am neither of kin,
16 counsel nor interest to any party hereto.

17

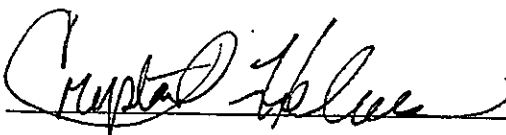
18

September 6, 2010

19

20

21


Crystal Holmes, Court Reporter

22

23

24

25

WITNESSES

(S) Isenhoward - RCSD ✓

ARREST WARRANT NUMBER,

J555981

ACTION OF GRAND JURY

TRUE BILL

SEP 18 2009

Foreperson of Grand Jury

Date:

VERDICT

Foreperson of Petit Jury
Date:

AMENDED
DOCKET NO. 2008-GS-40-1632

The State of South Carolina
County of Richland

COURT OF GENERAL SESSIONS

July TERM 2008

52

THE STATE
vs.

Johnnie Gaskins

Indictment for

ASSAULT AND BATTERY
WITH INTENT TO KILL

SC Code: 16-3-620
CDR Code: 0014
Class FEL-C(V)

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on July 16, 2008, the Grand Jurors of Richland County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL

That Johnnie Gaskins did in Richland County on or about February 5, 2007, with malice aforethought commit an assault and battery upon one Deirda Houston, with intent to kill the said victim. All in violation of §16-03-620 of the Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

W. B. Giese
Warren B. Giese, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Richland
STATEAKA: Johnnie GaskinsRace: BSex: M

Age: _____

DOB: _____

SS#: _____

Address: _____

City, State, Zip: _____

DL# _____

SID# _____

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: ABNWKIn violation of 16-3-620of the S.C. Code of Laws, bearing CDR Code # 0014☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45
(CSC w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State. (defendant initial)

ATTEST:

DANNA McDOFFIE

Solicitor

77063

SC Bar #

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ yearsand/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: 2008-GS-40-1629, 1631, 1627, 3948, 1626☐ 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: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP _____

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐☐ set by SCDPPPS _____

Attend Voc. Rehab. or Job Corp. _____

Recipient: _____

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: _____

\$25 \$

*Fine:

\$14-1-206 (Assessments 107.5%) \$ _____

\$14-1-211(A)(1) (Conv. Surcharge) \$100 \$ _____

\$14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

\$56-5-2995 (DUI Assessment) \$12 \$ _____

\$56-1-289 (DUI Breath Test) \$500 \$ _____

\$35.13 (Public Def/Prob) \$25 \$ _____

\$73.3, 1B TP (Law Enforce. Funding) \$25 \$ _____

\$33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

\$50-21-114 (BUI Breath Test Fee) \$50 \$ _____

\$55-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ _____

\$90.11 TP (SCCJA Surcharge) \$5 \$ _____

TOTAL \$ _____

Heanette W. McBridge, PF
Clerk of Court/Deputy ClerkCourt Reporter: CheneyPRESIDING JUDGE: [Signature]Judge Code: 2061Sentence Date: 10-27-09

WITNESSES

✓ KEVIN ISENHOWARD, RCSD

DOCKET NO. 2008-GS-40-1631

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

JULY TERM 2008

52

THE STATE
vs.

ARREST WARRANT NUMBER

J555980

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

JUN 18 2008

VERDICT

Indictment for

ASSAULT AND BATTERY
WITH INTENT TO KILL

SC Code: 16-3-620
CDR Code: 014
Class FEL-C(V)

Foreperson of Petit Jury

Date:

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

JOHNNIE GASKINS

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

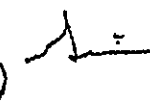
INDICTMENT

At a Court of General Sessions, convened on July 16, 2008 the Grand Jurors of Richland County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL

That Johnnie Gaskins did in Richland County on or about February 5, 2007, with malice aforethought commit an assault and battery upon one Lamont Davis, with intent to kill the said victim. All in violation of §16-03-620, *Code of Laws of South Carolina*, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

W. Bang 

Warren B. Giese, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Richland

STATE

AKA:

Race: BSex: M

Age: _____

DOB: _____

SS#: _____

Address: _____

City, State, Zip: _____

DL# _____

SID# _____

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: ABWIKin violation of 16-3620 of the S.C. Code of Laws, bearing CDR Code # 0014☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ \$17-25-45
(CSC w/minor 1st or Lowd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant initial)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Janna McDuffie

Solicitor

77063

SC Bar #

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 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: 2008-GS-40-1627, 3948, 1626, 1632, 1629
☐ 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: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

PTUP _____

Total: \$ _____ plus 20% fee: _____ \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐☐ set by SCDPPPS _____

Attend Voc. Rehab. or Job Corp. _____

Recipient: _____

May serve W/E beginning _____

Substance Abuse Counseling ☐

*Fine:

\$14-1-206 (Assessments 107.5%)	\$ _____
\$14-1-211(A)(1) (Conv. Surcharge)	\$100 \$ _____
\$14-1-211(A)(2) (DUI Surcharge)	\$100 \$ _____
\$56-5-2995 (DUI Assessment)	\$12 \$ _____
\$56-1-289 (DUI Breath Test)	\$500 \$ _____
\$35.13 (Public Def/Prob)	\$25 \$ _____
\$73.3, 1B TP (Law Enforce. Funding)	\$25 \$ _____
\$33.7, 1B TP (Drug Court Surcharge)	\$100 \$ _____
\$50-21-114 (BUI Breath Test Fee)	\$50 \$ _____
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea \$ _____
3% to County (if paid in installments)	\$ _____
\$90.11 TP (SCCA Surcharge)	\$5 \$ _____
TOTAL	\$ _____

Random Drug/Alcohol Testing ☐

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____

Beginning _____

\$ _____

paid to Public Defender Fund

Other: _____

\$25 \$ _____

☐ Appointed PD or appointed other counsel, §35-13 TP☐ Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE _____

Judge Code: 2061Sentence Date: 10-27-09Court Reporter: C. Holmer

Clerk of Court/Deputy Clerk

WITNESSES

✓ KEVIN ISENHOWARD, RCSD

DOCKET NO: 2008-GS-40-1629

The State of South Carolina

County of Richland

Defendant

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

I hereby appear in my own proper person and plead guilty to the within indictment or to

COURT OF GENERAL SESSIONS

JULY TERM 2008

52

ARREST WARRANT NUMBER

J555979

THE STATE
vs.

ACTION OF GRAND JURY

TRUE BILL

JOHNNIE GASKINS

Foreperson of Grand Jury
Date: JUL 18 2008

VERDICT

Indictment for

ASSAULT AND BATTERY
WITH INTENT TO KILLSC Code: 16-3-520
CDR Code: 014
Class FEL-C(V)Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND }

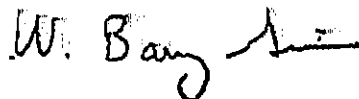
INDICTMENT

At a Court of General Sessions, convened on July 16, 2008 the Grand Jurors of Richland County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL

That Johnnie Gaskins did in Richland County on or about February 5, 2007, with malice aforethought commit an assault and battery upon one Quinton Harris, with intent to kill the said victim. All in violation of §16-03-620, *Code of Laws of South Carolina*, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Warren B. Giese, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Richland
STATE

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 08 -GS- 40-1629vs.
Johnnie GaskinsAW#: J555979

AKA: _____

Date of Offense: 12-5-07Race: B Sex: M Age: _____S.C. Code §: 16-3-620

DOB: _____ SS#: _____

CDR Code #: 0014

Address: _____

City, State, Zip: _____

DL# _____ SID# _____

SENTENCE SHEET

In disposition of the said Indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: ABNITLIn violation of § 16-3-620 of the S.C. Code of Laws, bearing CDR Code # 0014☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45
(CSC w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury, _____ (defendant Initial)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Joanna McDuffie
Solicitor77063
SC Bar #

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 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: 2008-65-40-1631, 1627, 3948, 1626, 1632
☐ 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: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP _____

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐☐ set by SCDPPPS _____

Attend Voc. Rehab. or Job Corp. _____

Recipient: _____

May serve WE 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: _____

\$25

*Fine:

§14-1-206 (Assessments 107.5%)	\$ _____
§14-1-211(A)(1) (Conv. Surcharge)	\$100 \$ _____
§14-1-211(A)(2) (DUI Surcharge)	\$100 \$ _____
§56-5-2995 (DUI Assessment)	\$12 \$ _____
§56-1-289 (DUI Breath Test)	\$500 \$ _____
§35.13 (Public Def/Prob)	\$25 \$ _____
§73.3, 1B TP (Law Enforce. Funding)	\$25 \$ _____
§33.7, 1B TP (Drug Court Surcharge)	\$100 \$ _____
§50-21-114 (BUI Breath Test Fee)	\$50 \$ _____
§56-5-2942(J) (Vehicle Assessment)	\$40/ea \$ _____
3% to County (if paid in installments)	\$ _____
§90.11 TP (SCCJA Surcharge)	\$5 \$ _____
TOTAL	\$ _____

Court Reporter: C. H. Hines

Clerk of Court Deputy Clerk

Judge Code: 2061Sentence Date: 10-27-09PRESIDING JUDGE [Signature]

WITNESSES

(S) INV KEVIN ISENHOWARD RCSD

DOCKET NO. 2008-GS-40-1627 - AMENDED

The State of South Carolina
County of Richland

AMENDED

COURT OF GENERAL SESSIONS

JULY TERM 2008

52

ARREST WARRANT NUMBER

J565978

THE STATE
vs.

ACTION OF GRAND JURY

TRUE BILL

AUG 13 2009

For person of Grand Jury
Date:

VERDICT

For person of Petit Jury
Date:

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

JOHN WALKER GASKINS AKA
JOHNINJE WALKER GASKINS

Indictment for

Use of Firearm During Commission of
a Violent Crime
SC Code: 16-23-490
CDR Code: 0549
Class F FELONY

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

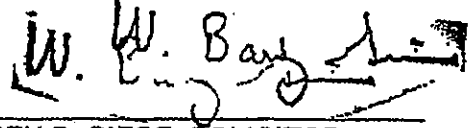
INDICTMENT

At a Court of General Sessions, convened on July 16, 2008 the Grand Jurors of Richland County present upon their oath:

Use of Firearm During Commission of a Violent Crime

That JOHN WALKER GASKINS AKA JOHNNIE WALKER GASKINS did in Richland County on or about February 5, 2007, possess or visibly display a firearm during the commission or attempted commission of a violent crime, to wit: Murder and/or Assault and Battery with Intent to Kill. All in violation of §16-23-490, *Code of Laws of South Carolina*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



WARREN B. GIESE, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Richland
STATE

AKA:

Race: BSex: M

Age: _____

DOB: _____

SS#: _____

Address: _____

City, State, Zip: _____

DL# _____

SID# _____

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Use of a firearm during commission of a Violent Crimein violation of § 16-23-490 of the S.C. Code of Laws, bearing CDR Code # 0549☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45(OSC w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant initial)The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Donna McDoyle 77047

Solicitor

SC Bar # _____

Defendant

Attorney for Defendant

SC Bar # _____

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 5 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: 08640-3948, 11626, 11632, 11629, 11631☐ 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: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered ☐ PTUP _____

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐☐ set by SCDPPPS _____

Attend Voc. Rehab. or Job Corp. _____

Recipient: _____

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: _____

\$25 \$

☐ Appointed PD or appointed other counsel, \$35.13 TP☐ Requires \$500 be paid to Clerk during probationPRESIDING JUDGE: [Signature]Judge Code: 2061Sentence Date: 10-27-09

*Fine:

\$14-1-208 (Assessments 107.5%)	\$ _____
\$14-1-211(A)(1) (Conv. Surcharge)	\$100 \$ _____
\$14-1-211(A)(2) (DUI Surcharge)	\$100 \$ _____
\$56-5-2895 (DUI Assessment)	\$12 \$ _____
\$56-1-289 (DUI Breath Test)	\$500 \$ _____
\$35.13 (Public Def/Prob)	\$25 \$ _____
\$73.3, 1B TP (Law Enforce. Funding)	\$25 \$ _____
\$33.7, 1B TP (Drug Court Surcharge)	\$100 \$ _____
\$50-21-114 (DUI Breath Test Fee)	\$50 \$ _____
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea \$ _____
3% to County (if paid in installments)	\$ _____
\$90.11 TP (SCCJA Surcharge)	\$5 \$ _____
TOTAL	\$ _____

Clerk of Court/Deputy Clerk

Court Reporter: [Signature]

DOCKET NO. 2008-GS-40-1626

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

JULY TERM 2008

52

THE STATE
vs.

JOHNNIE GASKINS

Indictment for

MURDER

SC Code: 16-3-10
CDR Code: 0116
Class FEL/EXM(V)

WITNESSES

✓ KEVIN ISENHOWARD, RCSD

ARREST WARRANT NUMBER

J555977

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: JUL 18 2008

VERDICT

Foreperson of Petit Jury
Date:

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on July 16, 2008, the Grand Jurors of Richland County present upon their oath:

MURDER

That JOHNNIE GASKINS did in Richland County on or about February 5, 2007, feloniously, willfully and with malice aforethought, kill one Shannavia Williams by means of a firearm and that the said victim died as a proximate result thereof. All in violation of SC Code of Laws § 16-3-10.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

W. B. Giese

Warren B. Giese, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Richland
STATEAKA: Johnnie GaskinsRace: BSex: M

Age: _____

DOB: _____

SS#: _____

Address: _____

City, State, Zip: _____

DL# _____

SID# _____

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Murderin violation of § 16-3-10of the S.C. Code of Laws, bearing CDR Code # 0116☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45
(CSC w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant initial)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

J. Meador
Solicitor10429
SC Bar #

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of Life 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: 2008-GS-40-3948
☐ 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: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP _____

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 \$ _____
§14-1-211(A)(2) (DUI Surcharge)	\$100 \$ _____
§56-5-2995 (DUI Assessment)	\$12 \$ _____
§56-1-289 (DUI Breath Test)	\$500 \$ _____
§35.13 (Public Def/Prob)	\$25 \$ _____
§73.3, 1B TP (Law Enforce. Funding)	\$25 \$ _____
§33.7, 1B TP (Drug Court Surcharge)	\$100 \$ _____
§50-21-114(BUI Breath Test Fee)	\$50 \$ _____
§56-5-2942(J) (Vehicle Assessment)	\$40/ea \$ _____
3% to County (if paid in installments)	\$ _____
§90.11 TP (SCCJA Surcharge)	\$5 \$ _____
TOTAL	\$ _____

Court Reporter: E. Holmes

Clerk of Court/Deputy Clerk

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 08 -GS- 40-1626A/W#: J555977Date of Offense: 2-5-07S.C. Code §: 16-3-10CDR Code #: 0116

SENTENCE SHEET

_____ 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: _____

\$25 \$

☐ Appointed PD or appointed other counsel, \$35.13 TP☐ Requires \$500 be paid to Clerk during probation.PRESIDING JUDGE: [Signature]Judge Code: 2061Sentence Date: 10-27-09

DOCKET NO. 2008-GS-40-3948

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

JULY TERM 2008

52

THE STATE
vs.

JOHNNIE GASKINS

Indictment for

MURDER

SC Code: 16-3-10
CDR Code: 0116
Class FEL/EXM(V)

WITNESSES

/ KEVIN ISENHOWARD, RCSD

ARREST WARRANT NUMBER

J555933

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: JUL 18 2008

VERDICT

Foreperson of Petit Jury
Date:

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

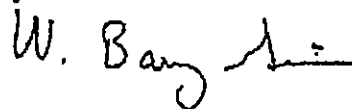
INDICTMENT

At a Court of General Sessions, convened on July 16, 2008, the Grand Jurors of Richland County present upon their oath:

MURDER

That JOHNNIE GASKINS did in Richland County on or about February 5, 2007, feloniously, willfully and with malice aforethought, kill one John Adams by means of a firearm and that the said victim died as a proximate result thereof. All in violation of SC Code of Laws § 16-3-10.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



Warren B. Giese, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Richland
STATE

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 08 -GS- 40-3948AKA: Johnnie GaskinsA/W#: J555933Race: BSex: M

Age: _____

Date of Offense: 2-5-07

DOB: _____

SS#: _____

S.C. Code §: 16-3-10

Address: _____

CDR Code #: 0116

City, State, Zip: _____

DL# _____

SID# _____

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: MurderIn violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0116☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45
(CSC w/minor 1st or Lowd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant initial)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

J. Meadows
Solicitor10429
SC Bar #

Defendant

Attorney for Defendant

SC Bar #

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of Life 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: 2008-GS-40-3948
☐ 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: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP _____

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

Obtain GED ☐☐ set by SCDPPPS _____

Attend Voc. Rehab. or Job Corp. _____

Recipient: _____

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: _____

\$25 \$

*Fine:

§14-1-206 (Assessments 107.5%) \$ _____

§14-1-211(A)(1) (Conv. Surcharge) \$100 \$ _____

§14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

§56-5-2995 (DUI Assessment) \$12 \$ _____

§56-1-289 (DUI Breath Test) \$500 \$ _____

§35-13 (Public Def/Prob) \$25 \$ _____

§73.3, 1B TP (Law Enforce. Funding) \$25 \$ _____

§33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

§50-21-114(BUI Breath Test Fee) \$50 \$ _____

§56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

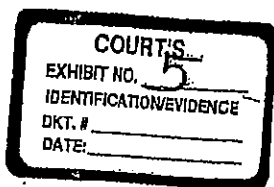
3% to County (if paid in installments) \$ _____

§90.11 TP (SCCA Surcharge) \$5 \$ _____

TOTAL \$ _____

Clerk of Court Deputy Clerk

Court Reporter: C. HolmesJudge Code: 2061Sentence Date: 10-27-09



581

State's Photo Exhibit List

I	22	Close up
I	23	Far shot showing where location (probative to location)
	44	Ladies room
S	43	Blood on bathroom floor
S	42	Close up of blood on bathroom floor
R*	41	Close up rear of pool table
R*	40	Far shot est. location same blood
Q*	39	Essentially same shot of area
Q*	38	From slightly different angles
P*	37	Far shot blood drops behind pool table
P*	36	Close up of blood drops behind pool table
O	35	Blood on pool table
N	34	Blood and pool cue - just closer
N	33	Shot of same view/angle
	32	Blood splatters/different side of pool table
	31	Close up blood splatters (shows N and O)
M	30	Close up of blood to rear of pool table - can't see where on photo
L	29	Close up blood smears/can't tell where except from Richards report - separation wall to rear pool table
KLM	28	Shows blood smears and splatters
K	27	Pool cue and blood- different angle of K
K	26	Close up of blood drops (can't tell where)
J&K	25	Far shot blood by pool table
J	24	Close up
G	45	Blood on pavement (outside front entrance).
H	46	Blood on front door handle

* As per Richards, this is the same area

McCulloch's State
Photo List Summary
Court 5 581

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND

S.S.

DATE: 02/05/07

TIME: 0215

582

Personally appeared before me, this date, an officer duly and legally authorized to administer oaths in the above-named county and state foresaid, comes one Lindburgh Poterfield III

29033

(Phone Day)

(Phone Night)

Who makes the following statement under oath to wit:

It was around 12:25 AM Feb. 5th 2007, & I was at my club Sports Grill 360 826 Bush River Rd Columbia, SC in Richland County.

One of my bar managers - ~~Erine~~ Erine, was working the bar & heard my security guard - by the name of New York, who's around 31 or 32 years, asked a patron a Black male, around 5'06", 5'07", & weighed about 170-175 lbs and was wearing a Bombers jacket & fur-lined around the hood to leave. A second Security who also started tonight I don't know his name at this time, along with my staff member by the name of the name of "Wolf" escorted the patron out of the club, to the parking lot.

This statement was made in the presence of S/SGT Tom Arnold of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS _____ DAY OF _____ 20____

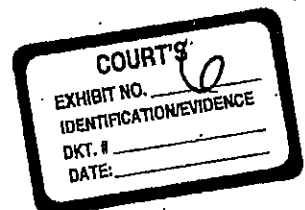
SIGNED: Lindburgh Poterfield III

WITNESS: _____

WITNESS: _____

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES _____

Page 1 of 3 Pages.



Lindburgh Poterfeld #1
(CONTINUED)

DATE: 02/05/07

TIME: 0215

583

I followed them to the front door & I saw them escorted the patron to his car. I walked back into the ~~club~~ Sport grill.

About twenty minutes later & I heard some gunshot & people were running everywhere. I ran to the front door & tried to assist a girl who lying on the floor by the pool table & two other girls trying to help the girl, along with a second girl who had been shot. My staff member 'Ivett' was on the ground in front of the door & he had been shot on his left side. The security Guard 'New York' had also been shot & he was walking around.

I also had found a Verizon phone [REDACTED] around a hour before the shooting in the parking lot. I gave it to the DIT - Gitlow who held it for about 45 minutes. The guy never come & get it according to the DIT.

This statement was made in the presence of S/SGT Tom Amaro
of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS ____ DAY OF ____ 20__.

SIGNED: Lindburgh Poterfeld #1
WITNESS: _____
WITNESS: _____

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES _____

Page 3 of 3 Pages.

RCSDI-12

DATE: 03/05/07 TIME: 0215

phone

I was going to put the Verizon into my office & return it to the owner.

I kept receiving phone calls on the Verizon cell phone from woman asking for Black & was ^{he} at the place where you shooting at 360? TIF [REDACTED]

I got a call from a guy who asked could he come and get the phone? Dosey [REDACTED] came up on the phone

I also received a call from another woman - asking me where I was. Her name on the Verizon phone came up -

Kim C [REDACTED]

I pretended to be "Black" in order to get information from the callers -

This statement was made in the presence of S/SGT Tom Anderson
of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth, and nothing but the truth, so help me God.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS ____ DAY OF ____ 20__.

SIGNED: [Signature]

WITNESS: _____

WITNESS: _____

NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES _____

COURT'S
EXHIBIT NO. 4
IDENTIFICATION/EVIDENCE
DKT. # _____
DATE: _____

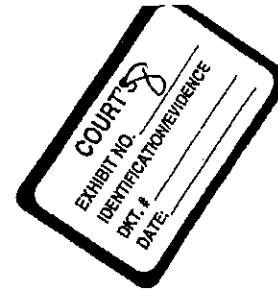
Request for Instruction

Graded

① Instruct you to disregard that portion of Mr. Porterfield's testimony that made reference to any thing attributed to Mr. Adams, a victim.

② Instruct you further to disregard the testimony of Mr. Porterfield that made reference to a statement made by an unknown person on ~~the~~ a telephone call received on the phone in evidence

Statement



586

State of South Carolina)
) S.S.
County of Richland)

Personally appeared before me this 5th day of February, 2007, at 0230 hours, an officer duly and legally authorized to administer oaths in the above named county and state aforesaid, comes one Sidney Patrell Williams of [REDACTED] 29063. Daytime telephone number [REDACTED] Nighttime telephone number.

Who makes the following statement under oath to wit:

Q: K. Isenhoward

R: Sidney Williams

Q: What happened at 826 Bush River Road tonight?

R: I went to club 360 with my girlfriend, Kimberly Jeter. We go there just after the Super Bowl ended. We had a couple of drinks. We saw Johnny Gaskins "Black". We spoke to him a while and went on talking to other people. A while later, I saw Johnny arguing with this guy. The security guards threw the guy he was arguing with out of the club. Me and my girl continued on enjoying ourselves. A little while later, it was about 12:45, I saw three security guards taking Johnny out of the club. They were by the door. It looked like it was getting physical they were arguing. Johnny was talking shit. I walked over to them and asked them what was going on. The security guard was telling him that he was about to lock him up for disorderly conduct. I pleaded with them not to lock him up. I told them that he was just drunk. I kept asking them not to lock him up. I heard one of the security guards tell someone to get Richland County out there. A girl named Diane came outside and told Johnny to shut up. Johnny was telling the security guard, "Ya'll gangsta". Just talking noise. The security guard said that he already gave him a chance and that he was going to jail. I saw that Johnny was in handcuffs. The guard told Johnny to sit down beside the black car. Johnny said, "Come on why you doing me like this, you know me". The officer said, "because you talking to me like I'm from your hood, I'm not from your hood, your being disrespectful". Johnny told him that he was sorry. The officer said, "O.K., I'm going to let you go. You are to get in your car and go home right now". I told the officer that I appreciated that. The officer said, "Make sure he goes straight to his car, don't turn around and just go home". They took him out of handcuffs and watched him as he stumbled through the parking lot. I was trying to get him to his car. He couldn't find his car because he was so drunk. He found the car but was putting the wrong set of keys in the car. He went to a car beside it and went back to his car. He drives a blue Impala and the car parked next to it was a black one. He went back to his car and found the right set of keys. He got in his car. I started walking back toward the club. Johnny pulled out fast stopped in front of the door to the club and started shooting from inside the car. He shot several times and drove off. I was walking back and the security guard started shooting back. I hit the ground. After they stopped shooting, I got up and starting walking back in the club. That's when one of the security guards who was dealing with us started

This statement was made in the presence of Inv. Kevin Isenhoward of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me
this 5th day of February, 2007.

Signed: _____

Witness: _____

Witness: _____


Notary Public for South Carolina
My commission expires 10/08/2014.

questioning me and put me in handcuffs. He told me that I better tell his name because he knew that I know him. That was that. I went inside and waited with them. I saw Malik the owner and explained it to him. Malik told me to tell that guys name and that I would be ok.

R: No just my girl Kim. We just saw him there.

R: For about a year or so. My girlfriend knew him first and I kind of met him through her. He lives out there where she does.

R: No, I don't drink or do drugs. I have seizures.

R: No. There wasn't anyone outside but me, Johnny, and the security guards. The girl that was out there left and went home before the shooting.

R: No. They were doing their jobs.

R: Yes.

R: Yes. It was a while ago. He got arrested for having it.

R: No, not until he started shooting.

R: It was like a 2001-2002 Chevy Impala. It was blue I think it may have been black. It was one of the newer small Impalas.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Signed:

Witness:

Page 2

State of South Carolina)

) S.S.
County of Richland)

Q: Did Johnny have anyone with him when he left?

R: No. It was just him in the car.

Q: Do you have anything else to add to your statement?

R: No.

End of Statement 02/05/07 @ 0327hrs*****

This statement was made in the presence of Inv. Kevin Isenhoward of the Richland County Sheriff's Department.

I make this statement of my own free will and accord, without reward or intimidation. All of the above is the truth, the whole truth and nothing but the truth.

Sworn to and subscribed before me
this 5th day of February, 2007.

Signed: 

Witness: _____

Witness: _____


Notary Public for South Carolina
My commission expires 10/08/2014.

589

BOOK 226 PAGE 831

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF GENERAL SESSIONS

The State of South Carolina)

ORDER

-v-)

WARRANT # - J555977, 78, 79, 80, &
J555933

Johnnie Gaskins,)

Defendant.)

JEANETTE W. McBRIDE
C.C. & G.S.

2010 JAN 26 AM 9:52

RICHLAND COUNTY
FILED

On October 27, 2009, the Defendant was convicted of Murder (2 counts), ABWIK (3 counts), and Use of a Firearm During the Commission of a Violent Crime at the completion of a six day jury trial. The Defendant was sentenced to two Life sentences to run concurrently on the each Murder charge, Twenty (20) years on each ABWIK charge and Five (5) years on Use of a Firearm during the Commission of a Violent Crime each to run consecutive to the life sentence; resulting in a sentence of Life plus sixty-five years.

On October 29, 2009, the Defendant through his attorneys Joseph McCulloch and Kathy Schillaci, moved before this Court for a New Trial and Preservation of Evidence on the above listed charges.

After careful review of Defendants motions and the evidence presented in the trial of this case the Court declines to grant a New Trial in this matter based on the overwhelming evidence presented by the State and for the reasons stated on the record during the trial. The Court does find that Preservation of Evidence is appropriate in this case.

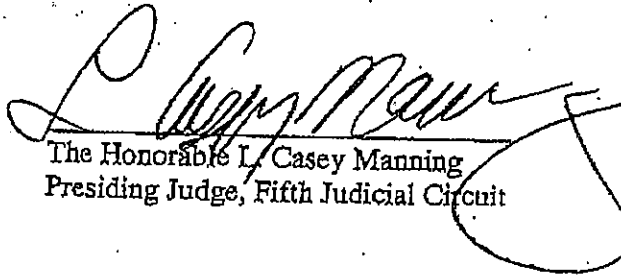
NOW THEREFORE, IT IS ORDERED that Defendant's motion for a New Trial is hereby DENIED and Defendant's Motion for Preservation of Evidence is GRANTED.

590

BOOK 226 PAGE 832

AND IT IS SO ORDERED.

Columbia, South Carolina
January 26, 2010


The Honorable L. Casey Manning
Presiding Judge, Fifth Judicial Circuit

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

L. Casey Manning, Circuit Court Judge

Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632

THE STATE,

RESPONDENT,

v.

JOHNNIE WALKER GASKINS,

APPELLANT.

FINAL BRIEF OF APPELLANT

TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, SC 29204
(803) 738-8622
(803) 738-1600 FAX
tdslaw@bellsouth.net

ATTORNEY FOR APPELLANT.

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STATEMENT OF THE ISSUES ON APPEAL

I.

Whether the Lower Court erred in admitting crime scene photos of blood splatters and blood pooling, which were duplicative and admitted for the purpose of inflaming the passions of the jury?

II.

Whether the lower court erred in denying the Appellant's motion for a mistrial, based on the admission of improper and highly prejudicial hearsay testimony, in the form of a dying declaration and a statement from an anonymous telephone caller?

III.

Whether the Appellant's right to due process of law was violated by the trial judge's improper and heated response to defense counsel's objection?

STATEMENT OF THE CASE

The Richland County Grand Jury indicted the Appellant for two counts of Murder (2008-GS-40-3948, 2008-GS-40-1626), three counts of Assault and Battery with Intent to Kill ("ABWIK") (2008-GS-40-1629, 2008-GS-40-1631, 2008-GS-40-1632), and one count of Possession of a Weapon during the commission of a violent crime (2008-GS-40-1627). On October 19, 2009, the Appellant proceeded to trial by jury where he was convicted of all charges. The Honorable L. Casey Manning, presiding circuit judge, sentenced the Appellant to two terms of life imprisonment on the Murder charges, to be served concurrently, and consecutive sentences of twenty years on each of the three ABWIK charges, and five years on the weapon charge.

Notice of Appeal was timely served and filed. This appeal follows.

STATEMENT OF THE FACTS

On February 5th, 2007, Club 360 located at 826 Bush River Road in Columbia, South Carolina was having a Super Bowl Party that began late in the afternoon and continued after midnight. ROA at p. 34, l. 21-p. 36, l. 11; p. 46, ll. 8-16; p. 89, ll. 8-11. Around 12:30 a.m., staff members of Club 360 claim that the Appellant was escorted out of the Club for unruly behavior. ROA at p. 41, ll. 20-24; p. 43, ll. 12-19; p. 90, l. 21-p. 91, l. 6. A friend of Appellant's, Sydney Williams, testified that he was present and spoke with the security staff to obtain the Appellant's release. ROA at p. 219, ll. 15-25; p. 92, ll. 13-24. Almost immediately after the Appellant was escorted out the door, another unruly patron, Christopher Lyles, was forcibly removed. ROA at p. 93, ll. 18-23; p. 126, l. 18-p. 127, l. 7; p. 208, l. 16-p. 209, l. 8.

At approximately 1:00 a.m. in the morning, while security staff members were standing around the entrance to the club, someone began firing a weapon towards the front door. ROA at p. 43, l. 18-p. 44, l. 1. One of the contract security staff, Lamont Davis, testified that the suspect had pulled around the front of the Club in a vehicle and had fired multiple shots out of the window before driving away. ROA at p. 94, ll. 7-25. Davis stated that he fired four shots at the retreating vehicle from his .38 caliber revolver. ROA at p. 98, ll. 7-11. When the shooting ended, one of the bar patrons, Shannavia Williams, was dead and a member of the security staff, John Adams, was mortally wounded. ROA at p. 45, ll. 1-14; p. 434, ll. 4-13; p. 439, l. 20-p. 440, l. 4. Two other members of the security staff, Lamont Davis and Quentin Harris, were wounded in the shooting and another Club patron, Deirdre Houston, was wounded from a gunshot to the face. ROA at p. 95, ll. 17-23; p. 157, ll. 20-25; p. 295, ll. 8-14. A mobile phone allegedly belonging to Appellant was found by the Club owner, Lindburgh Porterfield, inside the Club at some point prior to the shooting, and was turned over to the Richland County Sheriff's Department in the

ensuing investigation. ROA at p. 174, ll. 2-22; p. 180, l. 16-p. 181, l. 17; p. 172, ll. 12-23. A vehicle belonging to the mother of Appellant's girlfriend was searched in connection with the shooting. ROA at p. 525, l. 5-p. 527, l. 23. The murder weapon was never recovered, but a weapon matching the caliber of shell casings recovered from the scene, belonging to two Club patrons, was turned into the police and subsequently excluded as unrelated. ROA at p. 535, ll. 5-9; p. 466, ll. 3-10; p. 472, l. 5-p. 473, l. 3; p. 479, l. 23-p. 480, l. 1.

ARGUMENT

- I. The lower court erred in admitting cumulative and gruesome crime scene photographs of blood splatters and blood pooling that were submitted solely for the purpose of inflaming the passions of the jury and were of negligible probative value.

A. Factual Background

During this trial, the State sought to introduce numerous photographs of the Club's interior showing blood in the form of smears and splatters and pooling. ROA at p. 83, ll. 5-12; Court's Exhibit # 5: State's Photo Exhibit List. The photographs appeared to be taken in groups with distance shots that established the position of each bloodstain and then close-up shots of the blood. ROA at p. 85, ll. 15-21. Some of the photographs contained numerical markers near the blood stains. The State argued that the photographs were going to corroborate the testimony of Investigator Richards, whose report on blood analysis had been provided to the defense. ROA at p. 83, ll. 5-12. The State asserted that the photographs displayed the location and movement of at least one victim, who could identify her own trail of blood in testimony. ROA at p. 83, l. 21-p. 84, l. 7. The Appellant objected to these photographs on the grounds that they were gruesome and prejudicial, as well as duplicative and lacking in probative value. ROA at p. 82, l. 5-p. 83, l. 2; p. 85, l. 15-p. 86, l. 5; p. 86, l. 19-p. 88, l. 3. The judge denied the motion to exclude and found that the probative value of demonstrating where and how the victims were shot outweighed the prejudicial consequences of the evidence's introduction. Specifically, the judge stated:

I think it might be a close call but I do not believe the prejudice outweighs the probative value. Inasmuch as the jury already knows that two people were killed, three were shot, and at least at this point in time, I think I'll give the State an opportunity to connect the locations where the victims were shot, who was shot, where they were shot, that sort of thing. And at this point in time, Mr. McCulloch, it may be a close call but I think your objection is a little bit premature. If later on something evolves that I think

prejudice does outweigh the probative value, I don't make that assessment at this time, I'll revisit it.

ROA at p. 88, ll. 14-25.

The Appellant renewed his objection to the introduction of the contested photographs during the testimony of Deirdre Houston, one of the shooting victims. ROA at p. 285, ll. 5-14. The judge had the witness briefly provide in-camera testimony regarding the photographs. Houston generally described her location in the bar when she was struck and her movement in the immediate aftermath of the shooting. ROA at p. 286, l. 11-p. 289, l. 4. In an attempt to spare the witness, the Appellant conceded that a proper foundation had been laid for the introduction of the photos, based on the victim's testimony. ROA at p. 287, l. 21-p. 288, l. 5. The Court denied the Appellant's renewed motion to exclude the photographs. ROA at p. 289, l. 8-p. 290, l. 12. Some of these contested photos were admitted into evidence during the testimony of Houston, the remaining photos were admitted during the testimony of Investigator Richards. ROA at pp. 289-290; pp. 345-347; State's Exhibits #22-46.

B. Discussion

The Appellant contends that while some testimony regarding the location of victims or the extent of bloodshed may have been relevant in this case, the extent to which the photographic evidence was presented by the State became both cumulative and prejudicial to the Appellant. Furthermore, the Appellant contends that the prejudicial impact of this evidence was augmented by the chilling testimony of victim Deirdre Houston. Houston testified that she was crawling along the floor after being shot in the face and identifies her own bloody path from the pool tables to the bathroom in several of the afore-mentioned photos. The close-up photos of blood smears were prejudicial in and of themselves, even without a victim identifying the pathway of

blood in the photos as originating from her own body. The extent of prejudice to the Appellant resulting from the judge's denial of the motion to exclude more than outweighed the minimal probative value of the cumulative photographs. Consequently, the Appellant argues that he is entitled to a new trial.

Evidence of the extent of a victim's injury is relevant in prosecutions for assault and battery with intent to kill and assault and battery of a high and aggravated nature. State v. Owens, 224 S.C. 533, 535, 80 S.E.2d 113, 114 (1954); see also State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976). Furthermore, all relevant evidence is admissible. Rule 402, SCRE. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice. Rule 403, SCRE.

In State v. Franklin, our Supreme Court held that prejudicial photos of a crime scene and body, that would otherwise be inadmissible, were properly admitted where they demonstrated the aggravated circumstances that attended the crime; in that case, the defendant's brutal torture of the victim. State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995). The State v. Powers decision revisited Franklin and the Court clarified that aggravating circumstances are not necessary to admit gruesome and prejudicial photographs, as long as the evidence demonstrates the circumstance of the crime and the character of the defendant or else depicts the victim's body in the condition in which it was left. State v. Powers, 331 S.C. 37, 47, 501 S.E.2d 116, 121 (1998).

The Appellant agrees, as trial counsel did below, that *some* of the photographs introduced by the State regarding the locations of shooting victims were arguably relevant. ROA. at p. 87, ll. 16-21. However, once that evidence had been admitted, any further evidence detailing the extent of bloodshed became cumulative, rendering the probative value of the additional testimony

minimal. The Appellant would further assert that any probative value the photos had in demonstrating the circumstance of the crime or the defendant's character was very minimal, since the primary issue in this case was the identification of the shooter. The extent or manner of the injuries incurred and the movements of victim Houston were otherwise established through photographs taken from a distance of the Club's interior, testimony of the victims and the forensic pathologist and the cap of Deirdre Houston entered in evidence.¹ There was no clear item in dispute regarding either of these issues.

This highly inflammatory evidence was designed to inflame the jury and distract them from the operative question which *was not* how the victims were injured or even where they were located during and after the shooting. The true operative question was whether the State's theory of the shooting could establish, beyond a reasonable doubt, that Appellant was the shooter. These inflammatory photographs should therefore have been excluded from evidence in the State's case in chief. The defense team did not put forth any evidence to contradict the manner of victim's injuries or the victims' locations throughout the Club; the issues cited by the State in its defense of the photographs' relevancy. Had the defense done so in its case, the State could have possibly justified the introduction of additional photographic evidence on Reply.

"There can be no justice in a trial by jurors inflamed by passion..." Groppi v. Wisconsin, 400 U.S. 505, 511 (1971) (footnote 12) (quoting Crocker v. Justices of Superior Court, 208 Mass. 162, 179, 94 N.E. 369, 377-378 (1911)). By permitting the State to present unnecessarily cumulative photographic evidence of the bloodshed at the crime scene, the trial court impermissibly and undeniably prejudiced the Appellant. The cumulative close-up photographs served *no* purpose except to exacerbate the jury's reaction to the victim and

¹ The Appellant would note that the State introduced a cap worn by shooting victim Deirdre Houston, which was found with a bullet fragment attached to its fabric. ROA p. 296, ll. 9-16; p. 399, l. 1-p. 400, l. 8.

eyewitness testimony. There was no testimony suggesting that the contour of any of the blood evidence provided any forensic information of relevance in this case. If there had been, the State might have a stronger basis for their position that the jury for some reason needed a close-up view of the blood in some location(s). Accordingly, the Appellant is entitled to a new trial.

- II. The lower court erred in denying the Appellant's motion for a mistrial following improper hearsay testimony concerning an alleged dying declaration, that had not been previously disclosed to the defense, and an alleged statement made by an anonymous caller on Appellant's mobile phone.

A. Factual Background

During his direct examination, the Club owner, Porterfield, set forth his limited acquaintance with the Appellant and described the circumstances of Appellant's departure from the Club on the evening in question. ROA at p. 172, l. 12-p. 173, l. 21. Porterfield testified that, after the shooting, he was communicating with one of the victims, John Adams, before he died. The State asked Porterfield, "What did he [Adams] say?" Porterfield replied, "*He [Adams] was like the guy that we put out, shot me, was shooting.*" ROA at p. 177, ll. 20-22. At this moment, the Defense Counsel began to object and was interrupted by the judge, who identified the statement as an exception to the general rule on hearsay. Defense Counsel then asked to approach and a conversation was had, off the record, before direct examination continued. ROA at p. 177, l. 23-p. 178, l. 5. The statement was not repeated.

Minutes later in the direct examination, Porterfield began speaking about the mobile phone, allegedly belonging to Appellant, which he found in the Club earlier that night. He said that the phone began to ring when the investigators arrived, and that he answered it. At that point in time, Defense Counsel objected and the following statements were made on the record:

Mr. McCulloch: And, Your Honor, of course we're going to object to anything that would not be proper—

The Court: What's your objection right now?

Mr. McCulloch: My objection is to hearsay.

The Court: It's anticipatory, is that correct?

Mr. McCulloch: It is anticipatory, Your Honor.

The Court: All right. Let's cross that river when we get to it. Right now, I'll note it but nothing has happened yet.

Mr. Meadors: We're not offering this for the truth of the matter asserted—

The Court: All right.

Mr. Meadors: Oh.

When you get a phone call, you answer it?

[Witness]: Yeah, I got two phone—two phone calls from two ladies.

[Mr. Meadors]: All right. What—who if anyone—what did the phone call say?

[Witness]: Well, as soon as I answered the phone, I was trying to disguise my voice because it wasn't my phone. I didn't know who it was. I was like, hello. And they was like, *Blackie (phonetic)*, was that you out there shooting? I then, I was like, what, you know.

[Mr. Meadors]: Did someone say the name Black?

[Witness]: Yeah.

[Mr. Meadors]: Was it male or female?

Mr. McCulloch: Your Honor, may we approach?

ROA at p. 180, l. 16-p. 181, l. 17. Earlier in his testimony, Porterfield had stated that he knew the Appellant prior to the shooting and that the Appellant was known to him as "Black." ROA at p. 172, ll. 12-23.

When the bench conference began, the Appellant almost immediately moved for a mistrial on the ground that there were cumulative surprises in the evidence elicited by the State. In addition to an earlier in-camera identification of the suspect which had not been provided to the defense,² there was Porterfield's previously undisclosed testimony regarding a dying declaration and a speculative statement amounting to inadmissible hearsay from an anonymous caller. ROA at p. 182, l. 19- p. 183, l. 15; p. 187, l. 7- p. 188, l. 8. Appellant's defense counsel

² During an in-camera examination of intended State witness Roger Glover, Glover stated that he had identified the Appellant as the shooter on the night in question. Defense Counsel argued that this information was not contained in the material given to the defense, and the State did not ultimately call Glover as a witness. ROA at p. 61-81.

further argued that a failure on the part of the State to disclose this information had created numerous Brady³ and Rule 5 violations.

The State responded that the first alleged violation, the witness identification, was not prejudicial as the witness had not testified in front of the jury. ROA at p. 184, l. 17-25. Regarding the second violation, the dying declaration, the State maintained that they had no prior knowledge of the conversation between Porterfield and Adams. ROA at p. 185, ll. 4-17. Addressing the final violation that was asserted by the Appellant, the State claimed that the speculative question⁴ from the anonymous caller was described, somewhat poorly, in a discovery statement provided to the defense. ROA at p. 185, l. 21-p. 186, l. 5. This claim is dubious, from the record, as the State asserts that the actual language of the written statement was, "I kept receiving phone calls on the Verizon cell phone from women asking for Black, and he was at the place where you shooting at, 360." ROA at p. 185, l. 25-p. 186, l. 2. The State further asserted that this is essentially the same as the witness' testimony. In the argument for the mistrial, the Appellant pointed out the obvious inconsistency between the written statement and the witness testimony and reiterated that the testimony was in the form of inadmissible hearsay. ROA p. 187, l. 22-p. 188, l. 8.

The defense clearly stated that it was requesting a mistrial, and in the event that motion was denied, it sought a curative instruction to the jury. ROA at p. 188, ll. 4-8. The judge denied the mistrial motion and ultimately issued a curative statement requiring that the jury disregard the portion of Porterfield's testimony that referenced Adam's dying statement, as well as the testimony that referenced a statement from an anonymous caller on a cell phone. ROA at p. 189, ll. 12-16; p. 197, ll. 6-24.

³ Brady v. Maryland, 373 U.S. 83 (1963).

⁴ "...Blackie (phonetic), was that you out there shooting?" ROA at p. 181, ll. 12-13.

The Appellant renewed his motion for a mistrial at the conclusion of the State's case, while he also noted that he respected the determination of the Court to strike the testimony and instruct the jurors. ROA at p. 556, l. 16-p. 557, l. 7. The Appellant renewed the motion for a mistrial again when the jury retired to begin deliberation, and his renewed motion was once again denied. ROA at p. 562, ll. 7-21.

B. Discussion

The decision to grant or deny a motion for a mistrial is a matter within the discretion of the trial judge. State v. Culbreath, 377 S.C. 326, 331, 659 S.E.2d 268, 271 (Ct. App. 2008). On appeal, the lower court's decision will not be disturbed absent an abuse of discretion. Id. It is only in cases where there is an abuse of discretion and resulting prejudice to the criminal defendant where this Court will reverse the lower court's decision to deny a mistrial motion. Id. A trial judge may not grant a mistrial, absent a manifest necessity or where it serves the ends of public justice. State v. Brown, 389 S.C. 84, 94, 697 S.E.2d 622, 627-28 (Ct. App. 2010). A defendant must demonstrate error and prejudice in order to justify a mistrial. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). "An instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission unless...it is probable that notwithstanding such instruction or withdrawal the accused was prejudiced." State v. Simpson, 325 S.C. 37, 43, 479 S.E.2d 57, 60 (1996).

"Hearsay" is defined as a statement, other than one made by the declarant while testifying at trial or the hearing, offered into evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Unless a hearsay statement falls within one of numerous exceptions, it is inadmissible. Rule 802, SCRE. A dying declaration is excluded from the general prohibition on hearsay where the declarant believed that death was imminent and the statement was addressing

the cause or circumstances of the death. Rule 804(b)(2), SCRE. In the instant case the defense had no notice that this dying declaration existed or that it might be introduced at trial, and due to the obvious discovery deficiency, the State did not seek to have the statement admitted under one of the hearsay exceptions. Under the sharing requirements imposed by Rule 5, South Carolina Rules of Criminal Procedure, the State had a duty to disclose evidence material to the preparation of a defense prior to the trial. Rule 5, SCRCrimP.

The speculative question from the anonymous caller was inadmissible hearsay in that it was uttered by someone other than the declarant, State witness Porterfield. The statement was also offered to prove the truth of the matter asserted, that someone questioned whether the Appellant was the shooter at that location. The statement was incredibly prejudicial in its implication that someone close to the Appellant, would know about the shooting almost as quickly as the authorities, and would have reason to believe that he was involved. The speculative phone call and the statement attributed to one of the deceased victims violated the hearsay rules and the defendant's right to confront adverse witnesses under the Confrontation Clause. U.S. Const. Amend. VI. Despite the fact that the jury was instructed to disregard the testimony in question, it would have been impossible for them to completely forget the damaging statements they had already heard. As is often said, "You cannot unring a bell."

In State v. Johnson, our Supreme Court held that the lower court erred in denying Johnson's mistrial motion where a redacted co-defendant's statement, taken in conjunction with the inference created by a witness' careless remark, erroneously implied that a co-defendant had implicated Johnson in the crime charged. State v. Johnson, 390 S.C. 600, 607, 703 S.E.2d 217, 220 (2010). The Court found that the inference violated Johnson's Confrontation Clause rights and the violation could not be remedied by an instruction limiting the jury's consideration of the

redacted terms in the co-defendant's statement. *Id.* The jury in Appellant's case heard not one, but two, highly prejudicial statements that violated discovery provisions and constituted impermissible hearsay. Both statements go to the issue of the identification of the shooter, and both infer that the Appellant was that person.

The Appellant's central defense, as summarized in his closing arguments, was that the State could not demonstrate, beyond a reasonable doubt, that he was the shooter. In this case, there were a number of questions regarding the identity of the shooter because the murder weapon was never recovered and the shooting, itself, occurred in the confusion following two, almost simultaneous, disruptions involving allegedly unruly patrons. Additionally, law enforcement had briefly examined, and excluded, another gun that matched the caliber of the murder weapon, and, coincidentally, belonged to two other patrons of that Club. The reason that these statements are so highly prejudicial and so memorable to the jury is that they suggest that one of the dying victims and an acquaintance of Appellant believed that the Appellant was the shooter.⁵ The jury certainly recognized the possibility that the security staff and Club employees were distracted when the shooting began, but these improper statements strengthened the inferences being drawn from witness testimony indicating that the Appellant was the shooter. For these reasons, the Appellant is entitled to a new trial.

III. The trial judge erred in his abrupt and improper response to defense counsel's objection, thereby violating the Appellant's right to due process of law.

A. Factual Background

⁵ At first blush, it might seem that the dying declaration was not prejudicial to the Appellant since there was evidence that the Club had to deal with another unruly patron, Christopher Lyles, and the declaration could be argued to refer to either the Appellant or the other patron dealt with by security that night. A close review of the testimony, however, reveals that Lyles *had not been fully ejected from the Club*, when the shooting began. ROA at p. 126, l. 22-p. 128, l. 9. Therefore, the declaration was prejudicial to the Appellant, who was the only patron the State claimed was actually "put out" of the Club.

During the redirect examination of State witness, Sydney Williams, the Appellant objected three times to leading or improper questions by the State. ROA at p. 240, l. 6-p. 241, l. 23. The Court finally instructed the State to, "Do it with the magic words so there won't be any longer any objections." He assured the State that they would have a chance to "amplify" the testimony later in the examination. ROA at p. 242, ll. 1-3. Almost immediately thereafter, the State interrupted its own witness when he was reading a requested portion of his statement. The Appellant began to object, and the judge yelled, "Stop. Go to the jury room, ladies and gentlemen. Don't talk about this case." ROA at p. 242, ll. 7-17. The harsh or angry tenor of the judge's comment to the defense and abrupt instruction to the jury is apparent from the record, as the judge felt it necessary to address the matter in the jury room, as well as on the record. After the Court returned from a brief recess, but before the jury returned, the judge said:

Emphatically, I walked into the jury room and in essence what I said is like, you know, it's important matters and people intend to get up on their heels—high heels a little bit and sometimes it's my job to kind of bring you down a little bit. But I wasn't angry or mad.

Somebody said, well, you scared me. I said, that's all right, so. It's easy for us but, you know, a little bit difficult for them. So I told them, relax, and I'll say the same thing when they come out for the benefit of everybody.

ROA at p. 244, ll. 4-15. When the jury returned to the courtroom, the Court instructed them as follows:

...And, members of the jury, I stuck my head in the door and sort of reminded y'all that this as [*sic*] an adversarial proceeding and both sides tend to get up on their high heels a little bit sometimes and it's my job to sort of control the civility in the courtroom. *If I yell, it's nothing personal. I'm not mad at anybody* but it's my job to sort of keep us on an even keel.

And that's all the latest example was. It has nothing to do with the merits of the case, nothing to do with whether or not objection you should hold against anybody or how I react. And my interest, I

have no interest. Just to try to keep us at an even keel and make sure everybody receives a fair trial.

ROA at p. 245, ll. 2-15. With this statement, the redirect examination continued.

B. Discussion

"No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV. In the language of the Supreme Court of the United States, "Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Smith v. Phillips, 455 U.S. 209, 217 (1982).

There is such importance attached to the appearance of impartiality from a trial judge, that the South Carolina Code of Judicial Conduct sets forth specific guidelines for judicial behavior. Canon 3 of Rule 501, SCRAP. Section B(4) of that Canon states that, "a judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control." Canon 3 of Rule 501, SCRAP. "It is well settled that a trial judge must act with absolute impartiality in the performance of judicial duties." State v. Cooper, 334 S.C. 540, 546, 514 S.E.2d 584, 587 (1999); See State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994). As a general rule, there is no prejudice to a defendant, if hostile comments of a judge are made outside the presence of the jury. Cooper, 334 S.C. at 546, 514 S.E.2d at 587. In Cooper, the Supreme Court of South Carolina did not find reversible error in a trial judge's remarks that consisted of routine rulings against defense counsel. Id. None of the challenged communications in that case, however, involved personal or improper comments directed toward defense counsel, and they did not impugn defense counsel's credibility or "diminish him in the eyes of the jury." Id. at 546-47, 587-88.

In the current case, the Judge yelled at defense counsel, after a series of defense objections, and abruptly halted the proceedings. Defense counsel, understandably, did not object to the Judge's harsh remark in front of the jury or to the curative instruction that followed the recess. Case law suggests that a failure to object may be excused when the tone and tenor of the trial judge's comments make it clear that any objection would have been futile. Pace, 316 S.C. at 74, 447 S.E.2d at 187. This is especially true in the Appellant's case, where the Judge's improper remark was an angry response to Defense Counsel's continuing objections. In Pace, the Judge's comments were of a gentler, albeit inappropriate, nature and were not rebuking counsel for objecting. Id., at 73, 186-87.

The jury certainly understood that the anger behind the Judge's response was directed at Appellant's counsel, since his objection had prompted the abrupt interruption. While the Court's words were apparently brief, the delivery of the interrupting remarks was harsh enough to have "scared" one of the jurors. Even the judge, himself, felt that his remarks were prejudicial enough to warrant him entering the jury room to make off-the-record comments and subsequently to issue a formal instruction concerning the incident. At a minimum, the Court's treatment of defense counsel diminished his standing in the eyes of the jury. Although we do not have the benefit of a transcript of the judge's remarks to this jury in the jury room,⁶ based on his own recollection of those comments on the record there is a great danger that the jury understood them to mean that the Court felt the need to bring defense counsel down a notch.

The Appellant notes that the Court's subsequent charge to the jury appears to have been intended to mitigate the Court's earlier focus on defense counsel. The unavoidable truth,

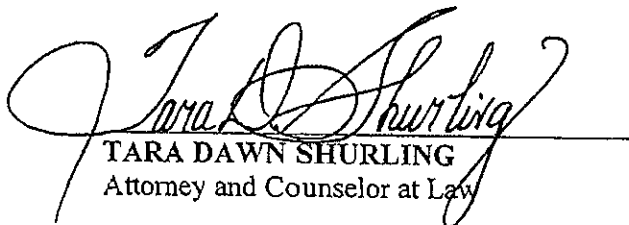
⁶ The Appellant would point out that in the recent decision, Bailey v. State, the Supreme Court of South Carolina took the opportunity to "caution the bench" against off-the-record commentary to jury members. Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011) (footnote 5). In Bailey, the record did not indicate if attorneys were present during the communication. In the instant case, the Judge's own comments indicate that the attorneys were not present when the Judge entered the jury room.

however, is that the jury was likely to take particular note of the remarks the Judge saw fit to enter the jury room to make after stopping this trial in the middle of a witness's testimony. The Court cut defense counsel off, and dismissed the jury abruptly without explanation. Not only was the Appellant prejudiced by the jury's diminished perception of defense counsel, but he was further prejudiced by the difficult dilemma that his counsel inevitably faced: whether to reinforce the previous objection and make a new objection to an angry judge's remark or to smooth ruffled feathers in an attempt to ensure that things would go more smoothly. Defense counsel chose the latter, and the proceedings continued in a calmer manner. Inasmuch as the judge's reaction was improper and the Appellant was prejudiced, the Appellant is entitled to a new trial.

CONCLUSION

The Appellant's conviction and sentence should be reversed, and this case should be remanded for a new trial.

Respectfully submitted,


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This 17th day of May, 2012.

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Richland County
L. Casey Manning, Circuit Court Judge**

THE STATE,

Respondent,

V.

JOHNNIE WALKER GASKINS,

Appellant

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I.

Whether the lower court erred in admitting crime scene photos of blood splatters and blood pooling, which were duplicative and admitted for the purpose of inflaming the passions of the jury?

II.

Whether the lower court erred in denying the Appellant's motion for a mistrial, based on the admission of improper and highly prejudicial hearsay testimony, in the form of a dying declaration and a statement from an anonymous telephone caller?

III.

Whether the Appellant's right to due process of law was violated by the trial judge's improper and heated response to defense counsel's objection?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Johnnie Gaskins, was indicted at the Court of General Sessions for Richland County at the July 18, 2008 term for two counts of murder, involving the February 5, 2007 deaths of John Adams (2008-GS-40-3948) and Shannavia Williams (2008-GS-40-1626). ROA 575-580. Gaskins was also indicted for three (3) separate counts of assault and battery with intent to kill concerning as victims Deirdre Houston (2008-GS-40-1632), Quinton Harris (2008-GS-40-1629) and Lamont Davis (2008-GS-40-1631). ROA 573-574. He was further charged with possession of a weapon during the commission of a violent crime. 2008-GS-40-1627. ROA 572-574.

On October 19, 2009, the Appellant entered a not guilty plea and the matters were tried before the Honorable L. Casey Manning, Presiding Judge. The Appellant was present and represented by Joseph M. McCulloch, Jr. and Kathy R. Schillaci of the Richland County Bar. The prosecution was handled by then Deputy Solicitor John P. Meadors and Assistant Solicitor Joanna A. McDuffie of the Fifth Circuit Solicitor's Office. The Appellant was convicted on October 27, 2009 on all six indictments. Tr. p. 1062, l. 1 - p. 1066, l. 5. Judge Manning sentenced the Appellant to two terms of life imprisonment for murder, concurrent, and an aggregate 65 years for the remaining charges of 20 years each consecutive on assault and battery with intent to kill, three separate counts, and 5 years consecutive on weapons charge, all consecutive to the life sentences. Tr. p. 1083, l. 6 - p. 1084, l. 4. ROA 565, 568, 571, 574, 577, 580.

The Appellant made a timely motion for a new trial. On January 26, 2010, Judge Manning denied the motion for a new trial and granted the Appellant's motion for preservation of

the evidence. ROA 589-590 (January 26, 2010 Order).

Counsel for the Appellant filed a timely notice of appeal which was served upon the Solicitor by mail on January 28, 2010. This briefing follows.

STATE'S VERSION OF THE FACTS

On February 5, 2007, Johnnie Gaskins was removed from the Super Bowl party at the Club 360 for unruly behavior. ROA 41, l. 20-24; p. 43, l. 12-19; p. 90, l. 21-p. 91, l. 6. According to bar manager Erin Hellman, Gaskins had demanded service: "give me a f—ing Hennessy (cognac). When he offered him a menu, he retorted again "give me a f—ing Hennessy bitch," and threw money at her. Gaskins then approached aggressively toward her behind the bar. ROA 38, 41. At that point security for the club came and took him out the front door of the club. ROA 41, Tr.p. 281. Hellman described Gaskins as being very sweaty and unsteady on his feet, with a difficult time in keeping his head up. ROA 42. She identified Gaskins in court (and in a photographic line-up) as the unruly person. Around 20 minutes later, she heard shots being fired. ROA 43-44.

Prior to the shooting, Shannavia Williams arrived at the Club 360 around midnight. After staying for a while, she decided to leave to go to another club with her friends. Before leaving, she sits her drink down, but spills it. ROA 281-282, Tr.p. 580-581. She leaves her friend, Deirdre Houston there and goes to get something to clean the drink. Two other friends, Shanna Williams and Shanelle Whack are in the back of the bar.

Quinton Harris and Lamont Davis with security had taken Gaskins outside and handcuffs him. Gaskins states that the security think they're gangsta, "I'll show them gangsta." ROA 254-255, Tr.p. 553-554. A friend of Gaskins, Sydney Williams approaches them and talks

them out of calling the police concerning Gaskins. ROA 92, l. 13-24; p. 219, l. 15-25. The handcuffs are removed and he is allowed to return to his car.

Gaskins is still angry as he walks back toward the car he came in - a Chevy Impala. Another security guard, Epsil Freeman remains concerned about Gaskins because he is still acting rowdy at the car. Palmer goes and talks to Gaskins and tells him to leave. ROA 256-257, 267-268. Subsequently, he is seen getting in the car by himself. ROA 224, Tr.p. 508, l. 5-10.

Harris and Davis return to inside the club to remove another patron, Christopher Lyles. ROA 93, 126 -127, 208-209; Tr.p. 355, l. 18-23; 408, l. 18-p. 409, l.7; p. 492, l. 16 - p. 493, l. 8. As they are doing that, Gaskins has returned to his car.

When Harris and Davis bring another rowdy patron Christopher Lyles outside. At that time, Gaskins has gotten in his Impala and drives to the front of Club 360 and opens fire. ROA 289. Harris while tussling with Lyles, looked up and saw Gaskins, who he had taken out, firing from the Impala. Independent witnesses identify Gaskins as either being the shooter or the person who went to the Impala where the shooting was coming from. ROA 94, 97 (victim Lamont Davis identifies Gaskins as the individual he saw shooting from the car); ROA 149 (victim Quinton Harris identifies Gaskins as the person he saw in the car with the gun); ROA 222, 247 (Sydney Williams identifies Gaskins as getting in the car which stopped in front of club when shooting started); ROA 272 (Epsil Palmer identifies Gaskins as person who entered vehicle and that he saw flashes coming from vehicle although it was too far at the time to see the actual shooter).

Security guard John Adams is hit and subsequently dies. ROA 434, Tr.p. 606-607, 790. Inside the bar, Deirdre Houston is shot while she was standing waiting for Shannavia Williams to return to clean up the spill. ROA 282-284. Shannavia Williams is returning to clean up the spill

and is shot in the head, resulting in her death. ROA 440. Security guard Lamont Davis is also shot. ROA 94-96; Tr.p. 356-358. Quintin Harris is also shot on his knuckle, but avoids other bullets in his direction. ROA 156-157; Tr.p. 438-439.

At that point the Chevy Impala with tinted windows leaves the scene. Calls are being made to 911. The acquaintance of Gaskins, Sydney Williams, is handcuffed by security because they believe he knows something about the shooter. ROA 230; Tr.p. 514.

The owner of the club, Lindburgh Porterfield recovers a cell phone in the parking lot. ROA 174; Tr.p. 458. This is later turned over to the Sheriff's Department. ROA 174, 180-181; Tr.p. 458, 464-465.

The Chevy Impala is ultimately found. ROA 421-424; Tr.p. 749-752. Inside the vehicle, the police locate documents with Gaskins name and gunshot residue and trace evidence linking Gaskins DNA to the vehicle. ROA 443-446, 492-493; Tr.p. 808-811, p. 889-895. In addition a shell casing is found inside the vehicle. Forensic testing of the shell casing in the Impala is linked to 40 caliber shell casings found in the club's parking lot as being fired from the same weapon. ROA 454-455, 459; Tr.p. 847-848, 852.

ARGUMENTS

- I. **The trial court did not abuse its discretion in the admission of a series of photographs from the crime scene which showed blood where they had probative value in a case where the photographs were not unduly prejudicial or inflammatory. Further, it appears at the time of the introduction of the "close-up" photographs the Appellant had abandoned the earlier objection.**

During the trial, the prosecution introduced a series of crime scene photographs inside the Club 360 which also showed the various locations of blood at the crime scene. This evidence was used by law enforcement and a surviving victim, Deirdre Houston, to establish the location of the victim during and subsequent to the assault as she sought sanctuary from the assault. Although blood was present in the photographs, the challenged photographs do not show any bloody corpses or autopsy material, rather it shows the crime scene and specifically used by witnesses to help the jury to visualize the crime scene and understand the testimony of Ms. Houston. A review of the photographs suggest their relevance and although blood is present, a reasonable viewer would conclude that they are singularly or as a group not particularly gruesome or inflammatory. Judge Manning did not abuse his discretion in allowing the admission of the evidence.

Furthermore, the original objections to the crime scene photographs were limited to close-up photographs of blood as being duplicative of initially unobjected distance photographs. However, when the close-up photographs were introduced through Sgt. Richards, the Appellant's defense counsel abandoned the original objections and they were introduced specifically without objection. ROA 345; Tr.p. 662, l. 12-18. ["without objection"]. [**Exhibit 22, 23, 24, 26, 27, 29, 30, 31, 33, 34, 35, 36, 37, 41, 42, 44, 45, 46**]. Therefore the issue presented in this argument was

abandoned at trial and is not preserved for this Court's review.

Standard of Review

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct.App. 2001); State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct.App. 2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct.App. 2003).

All relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); Rule 402, SCRE. Under Rule 401, SCRE, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct.App. 2002); see also Rule 401, SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."); In the Matter of the Care and Treatment of Corley, 353 S.C. 451, 577 S.E.2d 451 (2003) (evidence is relevant if it tends to establish or make more or less probable the matter in controversy).

“ ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” See Rule 401, SCRE. However, relevant evidence may be

excluded when its probative value is “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....” Rule 403, SCRE. “Evidence is unfairly prejudicial in the context of Rule 403, if the evidence has an undue tendency to suggest a decision on an improper basis, such as an emotional one.” S.C. Dep’t of Soc. Servs. v. Lisa C., 380 S.C. 406, 417, 669 S.E.2d 647, 653 (Ct.App. 2008); State v. Spears, 393 S.C. 466, 479, 713 S.E.2d 324, 331 (Ct.App. 2011).

The determination of the admissibility of photographs is similarly a matter addressed to the sound discretion of the trial court. State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980). Photographs are properly excluded if they are entirely without relevance or are not substantially necessary to show material facts or conditions. State v. Nathari, 303 S.C. 188, 268 S.E.2d 597 (S.C. App. 1990); State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940). If the photographs serve to corroborate testimony, it is not an abuse of discretion to admit them. State v. Crosby, 348 S.C. 387, 559 S.E.2d 352 (S.C. App. 2001), rev’d on other grounds, 355 S.C. 47, 584 S.E.2d 110 (2003); State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996); State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986).

However, photographs calculated to “arouse the sympathy or prejudice of the jury, should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions.” State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). See *Annotation, Admissibility of Photographs of Corpse in Prosecution for homicide or civil action for causing death*, 73 A.L.R. 2d 769 (1960). Compare, State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986) (photographs of autopsy of victim with significant amount of blood and no material purpose was improperly admitted). In Patrick, the Court noted that the color photograph of the victim on the autopsy

table was extremely graphic and did not show the crime scene.

In State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995), the Court held properly admissible photographs and video of a crime scene which showed the victim's nude body lying in the living room floor with her face and body visibly swollen from the beating and other photographs showed blood smeared on the walls and floor. The Court found the photographs relevant to establish the crime scene.

In State v. Campbell, 259 S.C. 339, 191 S.E.2d 770 (1972), the Court found no error in the introduction of photographs of the crime scene where the photographs "served the purpose of helping the jury visualize the scene involved." Accord, State v. Stallings, 253 S.C. 451, 171 S.E.2d 588 (1969) (no error in admission of bloody clothing and photograph of rape victim's face). Also State v. Lynch, 375 S.C. 628, 634 S.E.2d 292 (S.C. App. 2007) (video of riot scene and negotiations showing bloody rag in defendant's cell not reversible where testimony was that Lynch had stabbed victim); State v. King, 222 S.C. 108, 71 S.E.2d 792 (1952) (admission of photo showing blood in room where assault occurred).

It has been stated that although presence of blood on a photograph of a victim is unpleasant, it is not, in and of itself, inflammatory so as to preclude admission of the photographs. Commonwealth v. Spell, 28 A.3d 1274 (Pa. 2011). The claim that the presence of blood is inflammatory, that result is not made out by the mere depiction of blood. "Murder evidence is not often agreeable, but sanguinity does not equal inadmissibility.

Relevancy, not necessity, is the test for admissibility of photographs into evidence. Welch v. State, 992 So.2d 206, 216 (Fla. 2008); State v. Jordan, 323 S.W.3d 1 (Tenn. 2010) (photograph of puddle of blood on floor and victim's arm was relevant and "not particularly

gruesome or inflammatory”); State v. Warledo, 285 Kan. 927, 190 P.3d 937 (2008)(blood splatter photographs relevant and admissible and gruesome nature of photograph not so extreme that it compels the conclusion that it was admitted solely to cause undue prejudice).

How the Issue Was Raised And Abandoned Below

The issue before this Court concerns the introduction of a series of photographs from the multiple victim crime scene at Club 360 which showed the location of blood. See Exhibits 22-43, 45-46. A review of the photographs reveal two categories of photographs. Some photographs were distant shots which revealed context to the specific location of the blood marked with identifying tags. Exhibit 22(I), 25 (J, K), 27 (K), 28 (K, L, M), 32 (N, O), 33 (N), 34 (N, O, P), 37 (P), 38 (Q), 39 (Q, R), 40 (R), 43 (S). The remainder of this group of photographs showed a close-up of the particular blood stain or splatter. Exhibit 23(I), 24 (J), 26 (K), 29 (L), 30 (M), 31 (stains depicted in 32), 35 (O), 36 (P), 41 (R), 42 (S), 45 (G), 46 (H). See also Court Exhibit #5, State’s Photo Exhibit List (description of each photograph). ROA 581. It is with this second group of photographs that Appellant had his initial, but later abandoned objection.

During the trial, defense counsel McCulloch, while recognizing the liberal rule concerning the introduction of photographs within the Court’s discretion, made an objection to the proposed photographs arguing that they were “duplicitous.” Counsel McCulloch specifically stated that : “I do not object to them on the grounds that they show blood because this is obviously a case that involves blood.. . .But that fact is that these photographs duplicate each other and there is no point in that.” ROA 81-82; Tr.p. 322-323. Counsel McCulloch also argued that the photos contained markers and close-ups and he questioned the relevance of showing

where the blood was.

The prosecution, through Assistant Solicitor McDuffie stated that markers in the photos were placed there by crime scene investigator Sgt. Stan Richards. She stated that he had provided a report detailing what each one of the markers represented in terms of a blood pattern analysis, such as whether it was transferred, pooled, drops, and smears which the defense has. ROA 83, l. 5-12. The prosecution stated that the photographs were not duplicative and had been narrowed down. She declared that there was a photograph of each marker from a shot to orient it in the club and then a close-up shot. She stated that the prosecution had tried very hard not to duplicate and had viewed tons of photos. She stated that the matters would be presented through Investigator Richards and through the victim who can orient herself in the club through the path she followed after being shot. ROA 83; Tr.p. 324, l. 13-25.

Deputy Solicitor Meadors stated that they considered showing the photographs without the cards, but thought that it was important to show the jury through victim Houston that this was the route she went using the blood. He stated that multiple sets were eliminated by use of these photographs which include the markers. ROA 84; Tr.p. 325.

The prosecution declared that these would be the only photos of blood in the interior that they intended to use. She stated that there are some bullet holes in the interior that would be used that show the floor in the distance. However, she stated that none of the other photographs will have blood as a focus of the photographs.

At that point counsel McCulloch asked the court to take it into consideration overnight where McCulloch stated that he would ever withdraw his motion or make it more specific, after he reviews Investigator Richards report. ROA 85; Tr.p. 326, l. 2-8. Judge Manning noted that it

was kind of hard to keep blood out of a situation where two people were killed and three are shot. ROA 85; Tr.p. 326, l. 17-19.

The next day, counsel McCulloch stated that he had provide the clerk with an itemization of his groupings of the proposed evidence as a close-up shot of blood splatters, blood skids, and blood residue and then he established a further back shot from the close-up showing where the bar is. He stated that he was aware that case law gives discretion to the court. He stated that his "only objection is that the photographs are duplicative and there's no real evidentiary value to a close-up shot of the blood." ROA 85; Tr.p. 328, l. 15-25. He stated that it would be apparent to the jury that this is a heinous crime with lots of injuries and deceased people. He stated that it would serve no real purpose in duplicating photographs with the close-up shots. ROA 86; Tr. p. 329, l. 4-5.

He restated that he had reviewed the photographs proffered by the prosecution the previous night. He stated that he had provided the state his rendition of the photographs.¹ Counsel opined that most of the photographs can be grouped in pairs. He stated that they showed a close-up of a blood splatter or a blood skid or just a close-up of blood. He then described that there was a photograph that showed an "establishing shot" taken at a distance that shows in the club where the bloodstain was. ROA 87; Tr.p. 330, l. 1-6. He stated that in its discretion, the court can allow evidence that has some relevance, but that it should not be duplicative or cumulative. He then stated that "our objection is simply that there was no real purpose in having the close-up of blood. ROA 87; Tr.p. 330, l. 7-14.

¹This listing was made Court Exhibit 5 and is included in this record. See Tr.p. 332, l. 11-17. See ROA p. 581.(Court Exhibit 5).

Counsel McCulloch continued that the relevant and pertinent value of the "establishing shots" to show blood on the pool table, but not showing a close up or a tile with blood on it is other than to inflame the jury and increase the sympathy level. ROA 87; Tr.p. 330, l. 15-21.

Judge Manning then declared:

I don't know where the particular individuals that were shot or wounded, where it happened, how it happened, what location they were in. I think at least you look at the location of pools of blood, I would be like, for example somebody was shot against the wall you've got splattering and the bedroom or something like that will show where the victim was when they were wounded or shot.

I think it might be a close call, but I do not believe the prejudice outweighs the probative value, Inasmuch as the jury already knows that two people were killed, three were shot, and at least at this point in time, I think I'll give the state the opportunity to connect the locations where the victims were shot, who was shot, where they were shot, that sort of thing.

And at this point of time, Mr. McCulloch, it may be a close call but I think your objection is premature, If later something evolves that I think prejudice does outweigh the probative value, I don't make that assessment at this time, I'll revisit it. But for right now, I think it does have more probative value than prejudice to the defendant at this point in time.

ROA 88; Tr.p. 331, l.1-332, l. 2.

Testimony of Deirdre Houston.

Ms. Houston testified that on February 4, 2007 she went to the Club 360 where she met up with Shannavia Williams, Shanelle Whack, and Shawna Williams. ROA 279; Tr.p. 578. After playing pool for a while they got ready to leave to go to the Club Rockaway on Two Notch Road. ROA 281; Tr.p. 580. When she was waiting to get her jacket from Wolf (John Adams) before they left, Shawna walked away to get some napkins after a drink was spilled on a bannister. When Shawna walked off, Deirdre stated that she felt something hot hit her in side of her face and felt a ringing in her ear. She described touching her face and seeing blood and then heard a

“boom” and she hit the floor and Shawna never made it back to her. ROA 282; Tr.p. 581, l. 4-23. Deirdre described that she got on the floor and crawled around with her head down, with a lot of blood in her eyes so she had difficulty seeing. She stated that she was crawling trying to get out of the way and felt some doors and trying to get to the pool tables when the shooting stopped. ROA 283; Tr.p. 582. She stated that she pulled herself up on the pool table and begged for someone to help her. At that point she described that the shooting started again and someone pulled her down and dragged her into the bathroom. She stated that she got a glimpse of herself in the mirror, but she could hear everything around her (including people screaming), but could not see or move. ROA 283; Tr.p. 582, l. 10-20. She stated that she hit the cold air with her eyes closed. She stated she woke up two days later in the hospital and learned that Shannavia was dead. ROA 283; Tr.p. 582, l. 21-25.

The In Camera Proceeding Related to the Photographs.

Subsequently, the trial court indicated that counsel McCulloch renewed the objection prior to the testimony of victim Deirdre Houston. ROA 285; Tr.p. 584. Judge Manning stated that he wanted the witness to do a dry run of her testimony outside of the jury's presence to see how she reacts when the witness identifies certain locations where she was and how she crawled to the bathroom. ROA 285; Tr.p. 584, l. 5-14. Counsel McCulloch stated that his interest was only whether she could authenticate the photographs, but not to punish her. ROA 285; Tr.p. 584, l. 16-19. Ms. Houston then in an in camera proceeding previewed her testimony identifying State Exhibit 15 as a diagram of Club 360, her testimony about feeling the sting of the bullet, crawling through the club to the bathroom and then identified State Exhibit 25. ROA 286-287; Tr.p. 595-586. At that point counsel McCulloch conceded that there was a proper foundation. ROA 287;

Tr.p. 586, l. 16-25. The witness confirmed and recognized State 32 as her blood, State Exhibit 38 as her blood, and State Exhibit 40 and State Exhibit 43 as relating to her testimony. ROA 288-89; Tr.p. 587-588. Allegedly over the earlier objection, the establishing photographs of State Exhibits 25 (photograph of pool table), 28 (photograph of K,L,M), 32 (photograph of pool tables and blood), 38 (distant photograph of Q), 39 (distant photograph of Q and R), 40 (distant photograph of R), and 43 (distant photograph of S in restroom) were admitted. ROA 289-90; Tr.p. 588-589. However, none of the so-called "close-up" photographs were introduced at this time or during the testimony of Ms. Houston which were the basis of the defense's original objections.

The Continued Testimony Before the Jury by Ms. Houston.

The prosecution then used the admitted "establishing" photographs to assist Ms. Houston in describing her path through the Club 360. ROA 291; Tr.p. 593. Referring to the photographs, she indicated where she was standing by the front door, where she crawled, where she touched the doors, the kitchen, her path toward the pool tables, and where she indicated where she was when she pulled herself up on the pool table after the shooting initially stopped. ROA 291; Tr.p. 593, l. 19-25. She indicated where she was then pulled back down and the entrance that took her back to the bathroom. ROA 292; Tr.p. 594. She then identified Exhibit 25 as the pool table where she was standing when she initially got hit. Exhibit 28 as the area where there were benches and booths and that she crawled "from here to here" using the exhibits. ROA 293; Tr.p. 595. As to Exhibit 32, she stated that it depicted farther along by the pool table that she pulled herself up and indicated that the blood was her blood. ROA 294; Tr.p. 596. Exhibit 38 was described by her as revealing her blood, showing an area near the bathroom. ROA 294; Tr.p. 596, l. 11-20. As to

Exhibit 39, she described it as the corner that you turn in the hallway before you get to the ladies restroom. ROA 294; Tr.p. 596, l. 17-20. As to Exhibit 40, it was described as the entrance inside the ladies restroom and Exhibit 43 was inside the ladies restroom in front of the mirror and sink, and identified the blood shown as her blood. ROA 294-295; Tr.p. 596, l. 17- p. 597, l. 4.

Houston next described that when she was hit, she first did not realize that she was hit until people started screaming that she was hit in the head, but that she was actually hit in the right ear. ROA 295; Tr.p. 597, l. 8-14. Houston confirmed that after she hit the cold air, she did not remember anything, thinking she was on a stretcher other than seeing blinking lights and hearing screaming. She stated as a result of the shooting that she is deaf in one ear and had nerve damage on the right side of her face. ROA 296; Tr.p. 598, l. 1-13. The toboggan hat that she was wearing that night was introduced into evidence without objection as State Exhibit 52. ROA 296; Tr.p. 598, l. 9-16. Houston stated that she did not know the Appellant, did not recall seeing him before and had no bad blood with him. ROA 297; Tr.p. 599, l. 5-10. The defense had no questions of the witness.

Testimony of Crime Scene Investigator Sgt. Stan Richards.

The photographic evidence was also used during the testimony of Sgt. Stanley Richards of the Richland County Sheriff's Department. He testified as an expert in crime scene to include blood pattern analysis, shooting reconstruction and footwear examination and comparison without objection. ROA 300-01, 305; Tr.p. 617-618, 622. He described being called to the Club 360 on February 5, 2007. ROA 306; Tr.p. 623. In the initial portion of his testimony, he described the Club 360 crime scene, including the location of impact points in the walls, trajectory patterns. He described his arrival at the scene and entry into the business where he

looked at a lot of possible blood , including stains on the floor to the left of the pool tables, all the way from the front to the back and that the stains on the floor were multi-directional. ROA 307; Tr.p. 624.

The Admission "Without Objection" of the Close-Up Photographs.

Later in his testimony, Sgt. Richards testified that on February 5, 2007, he looked at blood stains throughout the club. ROA 345; Tr.p. 662, l. 1-11. He referred to Exhibits 22 to 46 as photographs that related to his testimony. ROA 345; Tr.p. 662, l. 10-11. **These exhibits were re-introduced "without objection."** [Exhibit 22, 23, 24, 26, 27, 29, 30, 31, 33, 34, 35, 36, 37, 41, 42, 44, 45, 46]. ROA 345; Tr.p. 662, l. 12-18. ["without objection].

The Use of the Photographs by Sgt. Richards to Describe The Scene

Sgt. Richards described to the jury that they were going to see a whole lot of smears. He stated that there were all kinds of directions in the stains and a lot of transfer stains. ROA 348; Tr.p. 665, l. 16-25. In State Exhibit 22, he pointed out the footwear pattern and the transfer of the blood from underneath the shoe. ROA 349; Tr.p. 666, l. 7-25. He pointed out this print was identified as "I." ROA 350; Tr.p. 667, L. 17.

Sgt. Richards next used Exhibit 24 and 25 to described the location of item "J." He described its location as coming through the entrance seeing the pool table with J and K running along the back side of the pool table. ROA 350; Tr.p. 667, l. 20-25. Exhibit 24 , ROA __, Exhibit 25, ROA __. He pointed out another entrance around the backside . He stated that item J showed the pooling of blood. Where there had been bloodletting at that point. He described the various directions of the smears in Exhibit 24 and also showing the imprint of a heel. ROA 351; Tr.p. 668, l. 3-20.

As to Exhibit 26, he described it as another picture of K showing the blood trail of a 90 degree drop to the floor and shows motion in a direction. ROA 352; Tr.p. 669, l. 1-6. ROA _ (State Exhibit 26).

State Exhibit 27 showed item K which reflects a better shot of the linear blood trail going in an indicated direction. He stated that it also showed swipes and blood smears coming in indicated directions. He described that the photo indicated a lot of blood, then lessening of the blood , and the feathering of the blood going in different indicated directions. He stated this showed that individuals or items that were being drug across in lateral motions on the floor going in both directions. ROA 352; Tr.p. 669, l. 8-19. State 28 was described as showing item L on the backside of the left side of the club coming around the center portion of the prior discuss of item K. He stated that you continue to see the smears on the floor , with a little bit of blood dripping and some stopping of motion at certain points where there is a little more blood, but directionality shown toward the bathroom. ROA 352-353; Tr.p. 669-670.

He stated that Exhibit 30 showed item M (which was indicated in the back of Exhibit 28 turning toward the wall near the pool tables). He stated that item M was a large quantity of blood pooling and suggested someone that was stationary for a period of time because secondary splatter is all around item M. ROA 353; Tr.p. 670, l. 17-25. Exhibit 30 also revealed a shoe impression. He stated that this photo was another general shot showing the directionality of where the blood was. ROA 353-354; Tr.p. 670-671, l. 4.

He stated that State 31 was a continuation of the backside of the area between the pool tables which showed another footwear impression though faded but showing its direction. ROA 354; Tr.p. 671, l. 11-15.

Sgt. Richards stated Exhibit 32 showed (in a distance) item N and reflected coming around the third section in the back area against the wall and between the pool tables, with the blood pooling, the stopping of motion at certain points and the dripping and smearing on the floor showing direction. He described the larger amounts of pooling as being caused by either someone in a different direction or the heart pumping harder and blood coming out and being in the spot longer. ROA 355; Tr.p. 672, l. 1-9. He pointed out in the third section footwear impressions coming the same way as going around the pool tables with the drops and swipes. ROA 355; Tr.p. 672, l. 10-19.

As to Exhibit 34, he stated it showed a larger overview of the same are going between the pool tables with item O marked on top of the (left) pool table and pooling on top of the pool table which indicates a wipe and blood dripping on top of the pool table. ROA 355- 56; Tr.p. 672-673. He stated that it suggests that someone stopped in the area for a period of time where there was bleeding and then blood pooling on the floor. ROA 356; Tr.p. 673, l. 1-11.

State Exhibit 35 was described by Sgt. Richards as being a closer view of item O on the top of the pool table which shows the drips and smaller drops which hit the top of the pool table . He stated that it had begun to dry by the time the photo was taken. ROA 356; Tr.p. 673.

He stated that Exhibit 36 showed item P was a bigger view of the drops from the pool table to the floor. ROA 357; Tr.p. 674, l. 3-8. State Exhibit 37 showed (more distant) of item P and the blood going around the backside of the second pool table back toward the entrance to the restroom areas. ROA 357; Tr.p. 674, l. 3-13.

Item Q was shown in State Exhibit 38 as it goes around the corner showing the blood drops , but not much pooling going towards the restroom area. ROA 357; Tr.p. 674, l. 14-21. Sgt.

Richards stated that State Exhibit 39 showed a better view of item Q around the corner going toward the restroom area, with a back and forth motion possibly opening the door 9and showing item R in the upper portion). ROA 357; Tr.p. 674, l. 23- p. 676, l. 2.

He described State Exhibit 40 as an overview of the back and forth motion, with footwear impressions smeared going toward an indicated direction, which showed a smear on the wall consistent with a person wiping their hand on the wall trying to find their way toward the restroom (showing a different view of item R). ROA 358; Tr.p. 675, l. 9-16.

As to state exhibit 41, he described it as a larger view (closer) view of what was found at the entrance to the restroom at the end of the blood letting smears (showing close - up of item R at the tile break). ROA 358; Tr.p. 675, l. 18-22. Concerning State Exhibit 42, he described it as showing item S (close-up) going into the restroom area. He then referred to State Exhibit 43 to explain the location of item S inside the restroom area where a lot of blood letting is shown and indicates through the use of the photograph the blood into blood, a lot of smearing , moving around directionality and blood drops . It shows a paper towel or cloth, that he suggests was someone trying to stop the bleeding. ROA 359; Tr.p. 676, l. 5-16.

At that point, Sgt. Richards returned to his seat and through the use of State Exhibit 15 sketched the pattern that he had described to the jury. ROA 359-360; Tr.p. 676, l. 17- p. 677, l. 2.

ANALYSIS

I. The Admissibility of the "Close-up" Photograph Issue Is Barred From Review because the Evidence Was Ultimately Entered Without Objection.

A review of the brief before this Court reveals a lack of specificity concerning what particular photographs the Appellant is presently seeking for this Court to review. The problem

with the Appellant's over broad assertion in this appeal most probably arises from the fact that the defense counsel's initial objection were not to the "establishing" (distant) photographs, but only the "close-up" photographs as being duplicative. ROA 87; Tr.p. 330. The particular photographs that these objections concerned were never identified by the defense with any specificity. However, when the actual "close-up" photographs were introduced in evidence during the testimony of Sgt. Richards, the defense declared the introduction was "without objection." [Exhibit 22, 23, 24, 26, 27, 29, 30, 31, 33, 34, 35, 36, 37, 41, 42, 44, 45, 46]. ROA 345; Tr.p. 662, l. 12-18. ["without objection"].² This issue as argued in this appeal is not preserved for this Court's review.

First, Judge Manning's pre-trial ruling on the close-up photographs was in a motion *in limine*. ROA 88; Tr.p. 331, l. 14-25. Generally, a motion *in limine* seeks a pretrial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial. A ruling *in limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review. See State v. Abraham, 395 S.C. 645, 720 S.E.2d 491, 494 (Ct. App. 2011) citing State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999) ("[A] motion in limine seeks a pretrial evidentiary ruling to prevent the

²The so-called "close-up" photographs are State Exhibit 24, 26, 29, 30, 31, 35, 36, 41, 42. The defense team distinguished the particular photographs in his groupings in Court Exhibit 5. ROA 581. In those grouping, he described "far shots" as Exhibits 23, 25, 37, 38, 39, 40. He does not describe as either "close-up" or "far shot" the following: 27, 28, 32, 33, 34, 35, 38, 39, 43, 44, 45, 46, however a review of those photographs are consistent with the manner of the photographs described as "far shots" by having an area overview as opposed to a closer view of a marker. It would be apparent that these latter photographs would be included with his "far shot" designation as "establishing photographs" and were not subjects of his initial objection.

disclosure of potentially prejudicial matter to the jury. A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial. A ruling *in limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review.""); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004) (making a motion *in limine* to exclude evidence at beginning of trial does not preserve issue for review because motion *in limine* is not a final determination; therefore, moving party must make contemporaneous objection when evidence introduced).

Second, when the so called "close-up" photographs were introduced at trial, the Appellant expressly stated that they had no objection to the introduction. See State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (holding a defendant who expressly consented to the admission of evidence at trial waived any right to raise the issue of admissibility on appeal). The issue was not preserved for this appeal. The Appellant abandoned the original objection during the trial when the defense allowed the admission of the "close-up" photographs without objection. ROA 345; Tr.p. 662.

2. The Admissions of the Crime Scene Photographs Were Relevant And the Prejudicial Effect Did Not Substantially Outweigh The Probative Value To Require Exclusion.

The Appellant does not specify any particular photographs that it is challenging in the appeal. To the contrary, his argument combines the mention with a series of photographs which the Appellant had no objection (ROA 87; Tr.p. 330) with photographs that he ultimately had no objection . ROA 345; Tr. p. 662. In the *Initial Brief of Appellant*, he simply makes a broad reference to State Exhibits 22-46 and the fact that they were introduced either through the testimony of victim Houston or Sgt. Richards. *Initial Brief of Appellant*, p. 9.

Assuming *arguendo* that the merits of the admission of certain unspecified exhibits can

be addressed, certain salient factors must be taken into account. First, the jury was aware that this was a horrific shooting involving two deaths and three other persons being wounded by shootings. Second, the crime scene photographs from inside the Club 360 (State Exhibits 22-43) were only a part of 150 exhibits introduced at that trial which included a plethora of other unchallenged exhibits which consisted of numerous photographs of bullet shells and holes in numerous locations at the Club 360, projectiles and cartridges from the scene, and autopsy photographs of two of the victims (which also entered without objection). See ROA 437-438; Tr.p. 793-794. Further, the breadth of the trial extended over a series of days from October 19 through October 27, 2009 and included 22 witnesses on behalf of the State.

As Judge Manning recognized at the hearing on the motion *in limine*, as well as defense counsel McCulloch, the existence of blood was a part of this crime and could not be divorced from the relevant evidence. At the outset, counsel McCulloch did not seek to exclude all photographs that showed the existence of blood at the crime scene, but only the "close-up" shots, suggesting the duplication was not necessary. However, as revealed in the testimony of surviving victim Houston, the photographs showed a probative purpose in corroborating her version of the shooting by substantially reflecting her location when shot and her path ultimately into the restroom to avoid further confrontation while the assault upon Club 360 continued. The testimony of Sgt. Richards gave meaning to the photographs by developing what the path of the smears actually showed enhancing the jury's understanding of victim Houston's blinded attempt at seeking sanctuary and safety.

While the photographs showed blood, in today's world of CSI and Law and Order shows and awareness, the photographs were not particularly gruesome and were relatively benign. This assessment is particularly evident where the surviving victim was present before the jury to

testify about the assault and the defense acknowledged that a series of photographs showing similar material was admissible. The Appellant, obviously recognizing that fact abandoned the objection prior to the admission of the close-up shots with Investigator Richards who presented the photographs in a matter of fact manner explaining how they supported and corroborated the victim's testimony about her path, stops, attempt to stand and return to the crawling during the continuing assaults.

In his brief on appeal, the Appellant concedes that evidence regarding the location of the victims and extent of the bloodshed was relevant, [*Initial Brief of Appellant*, p. 9, 10] but suggests claims that the close-up photographs were prejudicial, yet these photographs were not objected to when they were introduced. The Appellant suggests on appeal that the volume of the particular exhibits was cumulative and therefore prejudicial. However, Sgt. Richards used the photographs to educate the jury concerning how the manner of the stains corroborated victim Houston's testimony about her actions at the time of the assault.

Respondent submits that the evidence was not used to arouse the sympathy or prejudice the jury. The Appellant acknowledged that some of the photographs showing the blood were relevant and probative. The use of the particular "close-up" photographs which allowed Sgt. Richards to describe the in better detail the direction of the victim than the distant photographs which also reveal blood, though in a manner cumulative, had additional probative value. A review of the photographs in light of the testimony - limited the prejudicial effect that Appellant suggests existed. Simply put, a viewing of the photographs in context with the testimony show that the close-up photographs are not unduly prejudicial or inflammatory.

The exception must be denied for these reasons.

II. Where the trial court instructed the jury to disregard evidence concerning an unexpected assertion in a dying declaration of one of the victims and an interrogative from a unknown caller to the Appellant's cell phone, the trial court did not abuse his discretion in denying the motion for a mistrial.

The cautious trial judge chose to use his discretion to exclude consideration by the jury of arguably admissible evidence concerning a dying declaration by victim John Adams and a question asked by an unidentified caller to the Appellant's cell phone asking whether Black was the shooter. In issuing a curative instruction, propounded by the defense counsel, to disregard the evidence, the trial judge properly applied the precedent of this Court. Assuming that the defense did not abandon its motion for mistrial when counsel declared he waived the objection (ROA 195; Tr.p. 479), the trial judge did not abuse his discretion in denying the mistrial motion where the incidents were not so grievous that prejudicial effect could not be removed in any other way.

STANDARD OF REVIEW

"The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion." State v. Spears, 393 S.C. 466, 485-486, 713 S.E.2d 324, 334 - 335 (Ct. App. 2011); State v. Kelly, 372 S.C. 167, 170, 641 S.E.2d 468, 470 (Ct.App. 2007). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial." State v. Stanley, 365 S.C. 24, 34, 615 S.E.2d 455, 460 (Ct.App. 2005). See also State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (finding mistrial should not be granted unless absolutely necessary; to receive mistrial, defendant must show error and resulting prejudice). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d

471, 472 (1983).

“Whether a mistrial is manifestly necessary is a fact specific inquiry.” State v. Rowlands, 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct.App.2000). “The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way.” State v. Goodwin, 384 S.C. 588, 605, 683 S.E.2d 500, 509 (Ct.App.2009).

“An instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission unless ... it is probable that notwithstanding such instruction or withdrawal the accused was prejudiced.” State v. Simpson, 325 S.C. 37, 43, 479 S.E.2d 57, 60 (1996). “Error is harmless when it could not reasonably have affected the result of the trial.” State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990).

HOW THE ISSUE WAS RAISED IN THE APPEAL

The Appellant asserts that a mistrial should have been declared based upon two occurrences during the testimony of Club 360 owner, Lindburgh Porterfield. However, upon review of the cited references, neither situation required a mistrial.

During the examination of Porterfield, he described the circumstances at his club at the Super Bowl party on February 4, 2007. ROA 169-173; Tr.p. 453-457. He stated that he had hired additional bouncers from Elite Security to assist with the particular party because they were able to carry weapons, unlike his own employees. ROA 171; Tr.p. 455. He stated it was their job to handle situations, which could include escorting someone to the door or handcuffing someone if they gave any problems. ROA 172; Tr.p. 456, l. 5-11.

Porterfield testified that he knew Johnnie Gaskins as “Black” at the time of the incident.

ROA 172; Tr.p. 456, l. 12-23. He stated that Black was at his club that day arriving early. He stated at some point, Gaskins was taken out of the club. ROA 173-174; Tr.p. 457-458. He stated that about 20 minutes after Gaskins was removed from the bar, Porterfield heard shots fired. He stated that he went to the front of his bar at the time where he saw the glass had been shot out of the front of his building and he saw bodies and people on the floor and trying to get out. ROA 176-177; Tr.p. 460-461. When he got to the front, he saw John Adams - one of his bouncers who he identified as Wolf - and told him that he would be all right because he was talking to him the whole time. ROA 177; Tr.p. 461, l. 10-12. He stated that Adams had been shot and that he was the first person the Porterfield had seen. The following occurred:

Q. What did he say?

A. He was like, the guy that we put out, shot me, was shooting.

Mr. McCulloch: Your Honor, I - - -

THE COURT: It's an exception to the hearsay - - go ahead.

Mr. McCulloch: May we approach? ..

ROA 177-178; Tr.p. 461, l. 20 - p. 462, l. 5. At that time, there was a bench conference. ROA 178; Tr.p. 462, l. 2-5. Porterfield continued to testify about wanting to drive victim Adams to the hospital, but he instead stayed and tried to calm people down.

Porterfield later testified about recovering a cell phone that he located on the floor of the club. ROA 174, l. 4- p. 175, l. 18, p. 180, l. 9-11. He stated that the cell phone started to ring and he answered it. ROA 180; Tr.p. 464, l. 12-13. The defense objected at that time asserting "hearsay." The prosecution responded that they were not offering the matter for the truth of the matter asserted. ROA 180-181; Tr.p. 464-465.

Porterfield then stated that he received two telephone calls from two ladies on the cell phone. He stated that he attempted to disguise his voice because it was not his phone and said:

A. . . "Hello. And they was like, Blackie, was that you out there shooting? I then , I was like you know.

Q. Did someone say the name Black?

A. Yeah.

Q. Was it male or female?

Mr. McCulloch : Your honor may we approach.

A. Female....

ROA 181; Tr.p. 465, l. 7-18. At that point another bench conference was held which led to an in camera discussion out of the jury's presence.

Defense counsel McCulloch made initially made a motion for a mistrial asserting cumulative surprises. The defense initially claimed that during the in camera testimony of Roger Glover, he testified to an identification of the Appellant that had not been provided in discovery where the defense had been advised that his identification was only of "a person in the bar ." See ROA 61-81; Tr.p. 295-315. ³The defense also assented that they were surprised by the dying declaration testimony of Porterfield that had been provided. Lastly, the defense asserted that the

³In the *in camera* proceedings, Glover testified that he had seen Gaskins in the bar area that night. ROA 66-67; Tr.p. 300-301. He then stated that he had seen him riding around that night. ROA 67. Then, he declared that he saw him in the car when the shooting was going on. ROA 70; Tr.p. 304. On cross-examination, Glover stated that he had told the police that night that he had seen the shooter, but that the police did not write it down in his statement or during the line-up. ROA 72, 77-78; Tr.p. 306, 311-312. Deputy Solicitor Meadors noted that although he had talked previously with Mr. Glover, at that hearing was the first time he had heard of the identification of the shooter. Tr.p. 319, l. 1-6. When the defense asserted that it was incompetent testimony, Judge Manning stated that it was a jury issue for weight and credibility. Tr.p. 320.

testimony from the cell phone caller though allegedly being only offered not for the truth had evidentiary value for the truth asserted. He disagreed that this information was provided in Porterfield's statement. He stated the motion for mistrial was because these were violations under Brady v. Maryland, 373 U.S. 83 (1963) and Rule 5 of the S.C. Rules of Criminal Procedure. ROA 183-184; Tr.p. 467-468.

In response, Deputy Solicitor Meadors stated that concerning Mr. Glover's in camera testimony that he was unaware as well and that he had not testified about the identification in front of the jury. As to the dying declaration by John Adams to Porterfield, the prosecutor stated that he had anticipated the testimony to instead be : "I'm dying, Dog, I'm dying" rather than the response made which was the first time that the prosecutor had heard it. ROA 185; Tr.p. 469, l. 4-19. Concerning the cell phone answer, Deputy Solicitor Meadors took issue concerning the matter stating that it was essentially disclosed in the discovery on page 3 of the statement where Porterfield had stated that he "kept receiving phone calls on the Verizon cell phone from women asking for Black and was he was at the place where you shooting at 360." ROA 185-186; Tr.p. 469, l. 21- p. 470, l. 5. See Court Exhibit 6, p. 2 (Statement of Lindburgh Porterfield, 02/05/2007 [actually page 3 in order of statement]). ROA 582-84. The state relied upon Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002)⁴ to assert that information that a friend heard from rumor was not

⁴In Rhodes, the Court held that the testimony admitted in this case about Thompson hearing petitioner was the shooter did not constitute hearsay:

The rule against hearsay prohibits the admission of an out-of-court statement to prove the truth of the matter asserted. E.g., Dawkins v. State, 346 S.C. 151, 551 S.E.2d 260 (2001). Here, it was repeatedly made clear during trial that the information Thompson had heard was "from the street," i.e., a "rumor." It was not offered to prove that petitioner had committed the crimes, but rather to explain Cook's identification of petitioner in the yearbook. This in turn led to petitioner's

offered for its truth, but to explain one victim's identification.

Counsel McCulloch responded: "my motion is for a mistrial or for an instruction and a redaction from the jury's memory that - - - Mr. Porterfield not be allowed to testify what people say on the phone, at least in this instance." The defense accepted that the prosecution did not know that the other evidence was going to come out. However, he asserted that the state had a duty of diligence to learn this information and make it available, asserting that Glover may have told police about his identification, suggesting a problematic pattern. The defense also disagreed that Porterfield's statement was close enough. He also contended that it did not fall within the realm of admissible hearsay. He then asked for a mistrial and if not granted, would ask for an instruction to disregard. ROA 188; Tr.p. 472, l. 4-8.

Judge Manning denied the motion for a mistrial, but agreed to tell the jury to disregard the challenged remarks. He stated that he did "not think anything had risen to the level of some sort of egregious constitutional deprivation against Mr. Gaskins." ROA 188-89; Tr.p. 472-473.

After a break, the Court noted that the cell phone statement about a female asking for Black was innocuous, but that he had told the defense he was giving the instruction anyway, over the State's objection. ROA 193; Tr.p. 477, l. 4-20. After a discussion on the proposed curative jury instructions, the Court noted that the objection was based upon Brady and Rule 5. However, the defense stated that the objection was based upon the cumulative failure of diligence and that he did not think it was admissible hearsay. At that point, the defense stated: "I respect your ruling

apprehension and the subsequent identification of him by both victims via the photographic line-up.

Rhodes v. State, 349 S.C. 25, 31, 561 S.E.2d 606, 609 (2002).

as to a mistrial - - **I waive that objection** and I appreciate the instructions which I have prepared.

..” ROA 195, l. 7-19; Tr.p. 479, l. 7-19. (emphasis added). ⁵

When the jury returned, they were given the following curative instruction by Judge Manning:

... I instruct you to disregard that portion of Mr. Porterfield’s testimony that made reference to any statements that were attributable to Mr. Adams. Mr. Adams is the gentleman that was a victim and is now deceased.

I further instruct you to further disregard the testimony of Mr. Porterfield that was made in reference to statements made by an unknown person and a telephone call received on the phone that’s been admitted into evidence.

Y’all understand what I just said?

JURORS: (Affirmative response).

And when I tell you to disregard it, what you must do is erase it from your mind and when you go back to the jury room finally at the end of this trial to deliberate, you cannot let these two things enter your discussions at all. It would be unfair for you to do so.

ROA 197; Tr.p. 481, l. 6-24. ⁶

The record reflects that at the end of the State’s case, the defense stated that it was renewing the previous motions including the motion for mistrial that was denied and that “I respect the determination of the Court to strike the testimony and to instruct them.” ROA 556;

⁵ Respondent submits that Appellant abandoned his request for mistrial at this point. See State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (holding a defendant who expressly consented to the admission of evidence at trial waived any right to raise the issue of admissibility on appeal). The issue should be barred as not preserved. However, Respondent concedes that Appellant generally asserted a request for a mistrial at the close of the case. Tr.p. 957, 1050.

⁶These instructions were consistent with the proffered instructions prepared by defense counsel McCulloch. ROA 194; Tr.p. 478, l. 1-10. Court Exhibit 7. ROA 585 .

Tr.p. 957, l. 16-19. The motions were renewed generally at the conclusion and denied. ROA 562;
Tr.p. 1050, l. 11-21.

ARGUMENT BEFORE THIS COURT

A. *Dying Declaration Issue.*

In the argument before this Court, the Appellant complains that it had no notice that the dying declaration existed or might be introduced at trial. He asserted that this was a discovery deficiency under Rule 5 and asserts that it should have been discovered by the State and revealed prior to trial under Rule 5. He claims that under Rule 5, the State had the duty to disclose evidence material to the preparation of the defense. *Initial Brief of Appellant*, p. 16, ¶ 1. However, a review Rule 5 imposes no requirement for disclosure of or creation of witness statements prior to trial, other than the statements of the defendant (not the victim). In pertinent part, Rule 5(a)(2)

- 2). Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case, or of statements made by prosecution witnesses or prospective prosecution witnesses provided that after a prosecution witness has testified on direct examination, the court shall, on motion of the defendant, order the prosecution to produce any statement of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified; and provided further that the court may upon a sufficient showing require the production of any statement of any prospective witness prior to the time such witness testifies.

Contrary to the claim of the defense, there was no requirement to create a document where one did not exist concerning the dying declaration made by John Adams to Porterfield. This is not a case of having the existence of a document not being turned over to the defense. There was no

document in existence. As the prosecution declared as to the dying declaration by John Adams to Porterfield, the prosecutor stated that he had anticipated the testimony to instead be : "I'm dying, Dog, I'm dying" rather than the response made which was the first time that the prosecutor had heard it. ROA 185; Tr.p. 469, l. 4-19. This was not a violation of Rule 5. This was not a case where there was a written document in the possession of the prosecution that revealed the existence of this part of the dying declaration by John Adams to Porterfield. If that had existed, the question before this Court may be different. Compare State v Patterson, 290 S.C. 523, 351 S.E.2d 853 (1986) (former Criminal Practice Rule 8 was not violated, even though the defendant's counsel was not informed until the morning of jury selection of the state's tape of an interview with a witness which had been made within 48 hours of the shooting, where defense counsel was permitted to listen to the tape before the witness took the stand for direct examination, the trial judge allowed defense counsel to delay cross examination until the next day, and, thereafter, defense introduced the tape into evidence and played it for the jury, thus bringing to the jury's attention discrepancies between the witnesses' testimony and that appearing on the tape); State v South, 285 S.C. 529, 331 S.E.2d. 775 91985) (admission into evidence of the statement of a witness, despite the state's failure to produce a tape recording of the witness's statement in addition to the written statement, was harmless error beyond a reasonable doubt since the defendant received the substantial equivalent in the written statement).

However, plainly the unexpected statement made by John Adams to Porterfield was admissible as a dying declaration under South Carolina Rules of Evidence, Rule 804(b)(2). The state purported to have information revealed to the defense that Adams had indicated to Porterfield that he was dying and the statement clearly addressed the cause of his death. Tr.p.

469. Accord State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). In addition, the statement was likely also admissible as an excited utterance exception to the hearsay rule under SCRE Rule 803(2). McHoney.

Nevertheless, the resolution of the issue of the admissibility is moot because evidence was directed to be excluded by a cautious judge.⁷

B. The Cell Phone Caller.

The Appellant asserts in the appeal that the testimony by Porterfield that an unidentified female called the Appellant's cell phone which was answered by Porterfield and reported to him "Hello. And they was like, Blackie, was that you out there shooting?" The defense urged that it was a discovery violation, even though they had been in possession of Porterfield's statement that stated he "kept receiving phone calls on the Verizon cell phone from women asking for Black and was he was at the place where you shooting at 360." ROA 185-186; Tr.p. 469, l. 21- p. 470, l. 5. See Court Exhibit 6, p. 2 (Statement of Lindburgh Porterfield, 02/05/2007 [actually page 3 in order of statement]). ROA 584. Respondent submits that Rule 5 was satisfied by the disclosure of Court Exhibit 6 to the defense prior to the trial. The differences between the written statement and oral testimony would have been properly subject to cross-examination and impeachment concerning whatever inconsistencies he claims - but not necessarily exclusion.

⁷Interestingly, the Appellant, in brief, asserts that the dying declaration may not be prejudicial to Appellant because another patron, Christopher Lyles was also ejected from the club and could have referred to Lyles or any other patron ejected that night. *Initial Brief of Appellant*, p. 17, n. 5. However, he notes that at the time of the shooting Lyles had not been fully ejected from the club when the shooting began. ROA 126-128; Tr.p. 408-410. However, in the defense closing, counsel McCulloch indicated that Lyles had been arrested later that night for drunk driving and had weapons on him and should have been placed in the line up but was never placed in one, never asked to submit to a gunshot residue test and only knew that the investigation did not pursue him. ROA 559-560; Tr.p. 1018-1019.

The Appellant also urges that this evidence was hearsay because it was going to the truth of the matter asserted - claiming that it was an assertion that Appellant was the shooter at Club 360. However, at the outset, the prosecution urged that it was not being introduced for the truth of the matter asserted. ROA 180; Tr.p. 464, l. 25-1. However, a close reading of the testimony shows the declarant telephone caller is asking a question on whether Black was the shooter - not a declarative statement that Black was the shooter.

Under SCRE 801, it is not an "assertion" by the declarant, but an "interrogative. A question is not a declarative statement of hearsay. Plainly, it could not go to the truth of the matter asserted because the question does not assert any matter, only seeks to elicit a response affirming or denying. See Edward J. Imwinkelried, Paul C. Giannelli, Francis A. Gilligan & Frederic I. Lederer, *Courtroom Criminal Evidence* 1003 (3d ed. 1998) ("Because most assertive statements are declarative sentences, many trial judges use a rule of thumb that imperative, interrogative, and exclamatory sentences are not hearsay."; the authors would not follow this rule of thumb in all situations); Olin Guy Wellborn III, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 Tex. L. Rev. 49, 71-73 (1982) (suggesting that this is at least a plausible, and perhaps the most plausible, interpretation of the word "assertion" in Rule 801(c)); United States v. Thomas, 453 F.3d 838, 844-45 (7th Cir. 2006) (defendant asked police officer who had just arrived on scene of shooting whether officer was responding to defendant's call; court found that question was not hearsay because it was not statement but a question, but excluding it was harmless error).

McCormick on Evidence addresses the issue of whether questions are hearsay:

n. 7. For example, many courts take the position that a question cannot be hearsay

because it is not an assertion. See, e.g., United States v. Oguns, 921 F.2d 442, 448 -49 (2d Cir.1990); United States v. Lewis, 902 F.2d 1176, 1179 (5th Cir.1990); Bolen v. Paragon Plastics, Inc., 754 F.Supp. 221, 225 (D.Mass.1990). See also United States v. Bailey, 270 F.3d 83, 87 (1st Cir.2001) (holding telephone call which summoned recipient to rendezvous point but did not by content identify the recipient, was a direction and was not hearsay); United States v. Murphy, 193 F.3d 1, 5-6 (1st Cir.1999) (recognizing as nonhearsay instructions to use false warrant applications and to withhold information about seizures of cash because they were simply directions as to method of operation that were not statements of fact); United States v. Bellomo, 176 F.3d 580, 586 (2d Cir.1999) ("Statements offered as evidence of commands or threats or rules directed to the witness, rather than for the truth of the matter asserted therein, are not hearsay."). Frequently, questions should not be considered hearsay because the dangers of insincerity are sufficiently diminished when an assertion is not intended. See United States v. Long, 905 F.2d 1572, 1580 (D.C.Cir.1990); United States v. Jackson, 88 F.3d 845, 848 (10th Cir.1996); Kolb v. State, 930 P.2d 1238, 1245-46 (Wyo.1996). However, the result should not be automatic from the form of the words. Ex parte Hunt, 744 So.2d 851, 856-58 (Ala.1999) (reviewing split of authorities on whether questions are ever hearsay, deciding that a categorical answer cannot be given but instead the issue must be decided by nature of the question, facts sought to be proved, and circumstances, and concluding that the question at issue was not hearsay since it made no express or implied assertion); Powell v. State, 714 N.E.2d 624, 627 (Ind.1999) (concluding that while some questions are properly not considered hearsay because they contain no assertions of fact, others, including the one in the case, intend to assert a fact and are therefore considered hearsay); Lampitok v. State, 817 N.E.2d 630, 640 (Ind.App.2004) (reaching same conclusion as to commands); United States v. Summers, 414 F.3d 1287, 1299-1300 (10th Cir.2005) (concluding that defendant's statement to the police upon arrest, "[h]ow did you guys find us so fast?," was intended as an assertion and therefore hearsay).

McCormick on Evidence, (6th Ed. 2009), § 246, n. 7.

Nevertheless, the cautious trial judge entered an instruction excluding consideration of the evidence, thereby mooting this issue.

1. The Curative Instruction To Disregard the Particular Testimony Removes Any Reversible Error.

A mistrial is not required where the trial judge gave plain instructions to disregard the challenged testimony from Porterfield attributable to either victim Adams or the cell phone

caller. ROA 197; Tr.p. 481, l. 6-24. The curative instructions were fashioned by defense counsel.⁸ It is well known “[a] curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.” State v. Harris, 382 S.C. 107, 119-120, 674 S.E.2d 532, 538 - 539 (Ct. App. 2009); State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct.App. 2005). In the present case, the trial court's curative instruction explained to the jury they were not allowed to consider the question by the cell phone caller or Mr. Adams statement to Porterfield in their deliberations. The trial court specifically instructed the jury to disregard the evidence. Thus, any alleged error was cured.

The Appellant argues that there was a residual effect because he feels that the Adams comment could only have referred to Appellant because another possibility of Christopher Lyles had not been ejected at the time. Porterfield had testified that he understood only two people had been “thrown out” that night. ROA 205; Tr.p. 489, l. 4-6. Lyles testified that he had been ejected from the bar that night. ROA 208-09; Tr.p. 492, l. 9- p. 493, l. 8. He recalled that his girlfriend took him his mother’s house. ROA 209; Tr.p. 493. Lyles stated that he subsequently got into another vehicle and got stopped for DUI. ROA 210; Tr.p. 494, l. 17-24. He admitted that he had a gun in that car, but denied the gun was anywhere near the Club 360. ROA 211; Tr.p. 495, l. 1-25.

⁸ This Court may well find that this argument is not preserved for appellate review because Gaskins created the instructions and accepted the trial court's ruling and did not contemporaneously object to the sufficiency of the curative charge. ROA 195; Tr.p. 479. See State v. Parris, 387 S.C. 460, 464, 692 S.E.2d 207, 209 (Ct. App. 2010); State v. Jones, 325 S.C. 310, 316, 479 S.E.2d 517, 520 (Ct.App.1996) (holding a curative instruction is usually deemed to cure an alleged error; no issue is preserved for appellate review if the complaining party accepts the trial court's ruling and does not contemporaneously object to the sufficiency of the curative charge).

However, there was a series of independent witnesses who identified Gaskins as either being the shooter or the person who went to the Impala where the shooting was coming from. ROA 94, 97; Tr.p. 356, 359 (victim Lamont Davis identifies Gaskins as the individual he saw shooting from the car); ROA 149; Tr.p. 431 (victim Quinton Harris identifies Gaskins as the person he saw in the car with the gun); ROA 220, 247; Tr.p. 506, 531 (Sydney Williams identifies Gaskins as getting in the car which stopped in front of club when shooting started); ROA 272; Tr.p. 571 (Epsil Palmer identifies Gaskins as person who entered vehicle and that he saw flashes coming from vehicle although it was too far at the time to see the actual shooter). Thus, the excluded dying declaration would only have been cumulative to the evidence presented.

As noted above, a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. Stanley, 365 at 33-34, 615 S.E.2d at 460. Under the facts presented, Appellant is unable to show prejudice in light of the fact the record of identifications by similarly situated witnesses other than victim John Adams.

The argument otherwise is without merit.

III. A new trial is not warranted where the trial judge gave a cautionary instruction to the jury after a series of exchanges between counsel for the prosecution and defense concerning the form of questions on re-direct required the Court to intervene to maintain civility between counsel in the courtroom. The Appellant's contention that defense counsel ability to represent the Appellant in the eyes of the jury was undermined in not supported by the record where both the state and defense were admonished to relax.

In his final argument, the Appellant contends that a mid-trial exchange between both counsel and the trial court during a re-direct examination of witness Sydney Williams about a prior statement requires a new trial. Although the trial judge addressed the tension arising between counsel on the exchange of questions and objections, the judicial comments did not undermine either counsel. Further, the trial judge's reasonable cautionary instruction given to the jury eliminated the concerns about any loss of credibility with the jury of counsel. The assertion must be denied.

HOW THE MATTER OCCURRED IN THE LOWER COURT

In the issue before the Court, the Appellant for the first time claims that the trial judge's actions allegedly toward defense counsel require a new trial. The jaundiced reading of the record ignores certain facts which defeat his claim. A review of the precise language, rather than characterizations is important to understand what occurred and what did not occur. As shown herein, the defense counsel never suggested that the response of the trial judge demanded a new trial or partiality against his client.

During the re-direct testimony of state witness Sydney Williams by Deputy Solicitor Meadors an issue arose concerning his earlier written statement and its variance from his trial testimony. ROA 238-240; Tr.p. 522-524. At one point the questioning became the subject of a

series of objections from defense counsel:

Q. Now, Mr. Williams, did you see a gun?

A. I ain't seen no gun that night, I didn't see the gun that night.

Q. Mr. McCulloch asked you about your statement. Did you put in your statement previously that - - -

MR. McCULLOCH: Objection, your Honor. That's not proper, that 's leading, did you put in your statement, whatever - -

Q. What if anything did you put in your statement?

MR. McCULLOCH: Classic leading - - -

THE COURT : **Stop, both of you, relax.** Back up a little bit. Dissect the question if you have to.

ROA 240; Tr.p. 524, l. 4-14. After having the witness review the statement, the following inquiry was

made:

Q. On February 5th, 2007, did you tell Investigator Isenhoward - - -

MR. McCULLOCH: Yes, your Honor again - - -

THE COURT: All right.

MR. McCULLOCH: Improper cross-examination - - -

THE COURT: All right. No run on arguments. Objection - - specifically what the objection is and I'll rule on it. But don't argue when you object. What did he say on such and such date.

MR. MEADORS: Under [Rule] 609, I thought that was the proper way to address it.

[ROA 242] THE COURT: Do it with the magic words so there won't be any longer any objections. Relax. I'll give you a chance to amplify later on. Continue.

Q. What if anything did you mention to Investigator Isenhoward about whether or not you saw the defendant with a gun, on page one?

A. On page one? I said, when he went - - he went back - -I mean, he went to his car, to a car beside his. He drives a blue car. He got in it. I started walking back toward the club - -

Q. No, no, no you skipped - - you skipped - -

MR. McCULLOCH : Your honor, let's let him read - - -

THE COURT: Stop. Go to the jury room ladies and gentlemen. Don't talk about this case. . . .

[Jury retires]
[OUT OF JURY'S PRESENCE]

THE COURT: **Both of you relax.** No run on objections. Objection, basis, that's the way to do it, Mr. McCulloch. Don't argue your objection - -

MR. McCULLOCH: All right.

THE COURT: **You relax.** Let me finish. Just specify what it is. I know this is all tedious for all of us. **Now lets's calm down a little bit and do it the right way.** Go ahead and place your objection on the [527] record.

MR. McCULLOCH: My objection was starting with the leading nature of the question. But now, asking him to look over his statement, then the Solicitor would like -to read to him the part of the statement he wants to say, oh yes, I remember that . That's not proper.

This is re-direct. It is outside the scope of proper re-direct, secondly.

Thirdly, under 613, this is a prior statement of the witness that he himself now wants to impeach him because his answers on the stand, in his questions, are different than what the Solicitor would like him to have testified with the statement.

THE COURT : All right. Anything further?

MR. McCULLOCH: That's it.

THE COURT: All right. I disagree. You can impeach with your own witness, I

think under the rules this day and time.

MR. MEADORS: [Rule]610.

THE COURT: It used to be the old rule but he can, for the sake of convenience, saving time, he can point , would you please read line 1 on page 2 of your statement or something.

Let's take a little break. **And y'all got to learn to be nice to each other, okay.** Let's take a break. It's tedious. I'll give you a chance to refresh yourselves. We'll come back and resume.

ROA 241-244; Tr.p. 525, l. 14- p. 528, l. 2.

During the recess, Judge Manning reported that he spoke with the jurors in the following manner to counsel:

THE COURT: Emphatically, I walked into the jury room and in essence what I said is like, you know, it's important matters and people intend to get up on their heels --high heels a little bit and sometimes it's my job to kind of bring you down a little bit. But I wasn't angry or mad.

Somebody said, well, you scared me. I said, that's all right, so. It's easy for us but, you know, a little bit difficult for them. So I told them, relax, and I'll say the same thing when they come out for the benefit of everybody.

MR. McCULLOCH: Tell them it was theater.

THE COURT: Beg your pardon?

MR. McCULLOCH: Tell them it was theater -- theater.

THE COURT: No, no no...

ROA 244; Tr.p. 528, l. 5- 19.

The jury then returned to the courtroom. Judge Manning then addressed his earlier comments:

THE COURT: ...I stuck my head in the door and sort of reminded y'all that this is an adversarial proceeding and both sides tend to get up on their

high heels a little bit sometimes and it's my job to sort of control the civility in the courtroom. If I yell, it's nothing personal. I'm not mad at anybody but it's my job to sort of keep us at even keel.

And that's all the latest example was. It has nothing to do with the merits of this case, nothing to do with whether or not objection you should hold against anybody or how I react. And my interest, I have no interest. Just to try to keep us at an even keel and make sure everybody receives a fair trial.

With that in mind, I will invite Mr. Meadors to continue...

ROA 245; Tr.p. 529, l. 2-20. The remainder of the examination was without similar problems by counsel.

A review of the record reveals no motion for mistrial as a result of the judge's comments by either the State or the defense.

ANALYSIS

The Appellant contends that the remarks of the judge during the examination were harsh and angry and directed at defense counsel. He now suggests the failure of the defense counsel to object to the comments made during the examination or the curative instruction given by the court does not prevent this Court from considering the issue on appeal because any objection would have been futile, relying upon State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994). He contends that because this was an "angry response" by the trial judge to defense counsel McCulloch's continuing objections to the examination of the witness by the prosecution. He contends that these brief comments by Judge Manning diminished counsel's standing before the jury. Respondent submits that the comments although strong were not an reasonable reaction to defense counsel's objections.

The Appellant ignores that the comments were directed to the prosecution, as well as the defense. See ROA 240; Tr.p. 524, l. 13-14 (" **Stop, both of you, relax.** Back up a little bit.

Dissect the question if you have to"). Judge Manning was also directing comments toward Deputy Solicitor Meadors when he told him to "relax" and directed that he ask "what did he say back on such and such date" and to use magic words so that there won't be objections. ROA 241-242; Tr.p. 525-526. Plainly, he was also putting the problem at the feet of the prosecution in the manner he was asking questions. After the jury had retired, the judge also admonished for "both of you relax" and to "calm down." ROA 242; Tr.p. 526.

An alleged improper remark by a trial judge must be considered in context when determining whether it indicates sufficient bias or prejudice to require his or her disqualification. Shaw v. State, 276 S.C. 190, 277 S.E.2d 140 (1981). The Supreme Court has held a defendant is entitled to a mistrial where arguments by the trial judge indicate a lack of neutrality and cannot be cured by instruction, as where the defendant's testimony is referred to as "lies." State v. Kennedy, 272 S.C. 231, 250 S.E.2d 338 (1978). Likewise, any intimation by a judge, in the presence of the jury, that a particular witness has committed perjury is reversible error. Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992) (Supreme Court refused to apply the rule where a trial judge merely reminded a witness he was under oath and subject to perjury). The Appellant relies upon State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994). However, Pace, is readily distinguishable where the judge's references to defense counsel, in the presence of the jury, as a "pretty girl" and "nice girl" was error, and deprived the defendant of a fair trial and constituted reversible error. The Court stated in Pace that "[t]he trial judge must act with absolute impartiality in the performance of judicial duties. Canon 3 of Rule 501, SCACR. Reference by a trial judge to an attorney's age, gender, or competence are improper and constitute reversible error upon a showing of prejudice to the defendant."

The Code of Judicial Conduct, Rule 501, SCACR, sets forth the basic rules for the conduct and demeanor of judges. A judge should observe “high standards of conduct” in order to preserve the integrity and independence of, and public confidence in, the judiciary. Canons 1 and 2(A), Rule 501, SCACR. With respect to adjudicative responsibilities, a judge should:

- (1) be faithful to the law and maintain professional competence in it;
- (2) **maintain order and decorum in judicial proceedings;**
- (3) **be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others;** and should require similar conduct of lawyers, court staff, court officials, and others subject to judicial direction and control;
- (4) afford a full hearing to parties and their lawyers, and should avoid ex parte communications except as authorized by law;
- (5) promptly dispose of the court's business; and
- (6) abstain from public comment about any pending or impending court proceeding, and require similar abstention from court personnel subject to judicial direction and control.

Canon 3(B)(1) to (6), Rule 501, SCACR (emphasis added); see also Preamble to and Part 1 of Rule 502, SCACR (“Judicial Discipline and Standards”).

A recent annotation, *Justification and Correction of Remarks or Acts of State Trial Judge Criticizing, Rebuking, or Punishing Defense Counsel in Criminal Case as Otherwise Requiring New Trial or Reversal*, 54 A.L.R.6th 429 (2010), addresses a plethora of situations where new trials were not required when judges commented about counsel. A reading of the numerous situations addressed in the article suggests that these matters are reviewed on a case by

case basis. Most importantly though, it is evident that the comments by the court to both counsel was the type of comment that would suggest impartiality on the judge's part nor diminish either counsel uniquely in the eyes of the jury.

A review of cases where the Supreme Court has addressed judicial comments show this situation was innocuous. In State v. Simmons, 267 S.C. 479, 229 S.E.2d 597 (1976), the Court found reversible error where the trial judge threatened defense counsel with a jail sentence, immediately after which counsel proceeded no further with the arguments. The Court concluded that the remarks tended to impugn the credibility of defense counsel. In State v. DeBerry, 250 S.C. 314, 157 S.E.2d 637 (1967), the Court concluded the trial judge's admonition to defense counsel to be brief and stop wasting court's time was not abuse of discretion nor prejudicial to the rights of defendant. Similarly in Graves v. State, 309 S.C. 307, 422 S.E.2d 125 (1992), the Court found there is generally no prejudice when the trial court's hostile comments are made outside the jury's presence.

In State v. Cooper, 334 S.C. 540, 546-547, 514 S.E.2d 584, 587-588 (1999), the Court found no reversible error where the trial judge's comments and rulings were routine and none of the exchanges involved any improper, personal comment about defense counsel, nor did the comments tend to impugn counsel's credibility or diminish him in the eyes of the jury. The Court concluded Many of the comments were innocuous or merely explanatory of the trial court's ruling and were therefore permissible. See State v. Mishoe, 198 S.C. 215, 17 S.E.2d 142 (1941) (holding that remarks made by the judge in the course of a trial need not be confined in such narrow limits as to prevent him from stating his reasons for his rulings).

Importantly, the trial judge's cautionary instructions to the jury removed any impression

by the jurors that the trial judge was trying to diminish either counsel in the eyes of the jury. Judge Manning expressly imputed his own demeanor as an attempt to control civility in the courtroom. Although Appellant wants to suggest that the actions in front of the jury were one sided, the Appellant ignores that his comments were a two edge sword against both counsel getting a little frustrated during this brief portion in the middle of a lengthy trial. Although a juror reported that the juror was scared by the judge's action, it appears that the curative instruction dissipated the concern. It is also evident that both counsel subsequent to the brief admonishment toward both learned "to be nice to each other." A new trial is not warranted.

CONCLUSION

For all the foregoing reasons, the judgment of convictions must be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

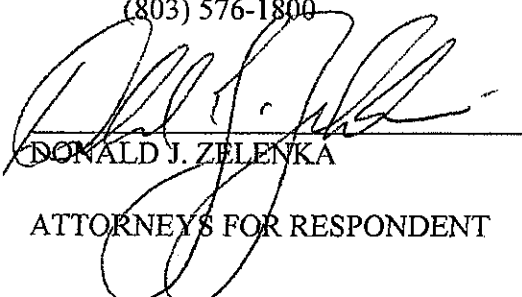
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DONALD J. ZELENKA

ATTORNEYS FOR RESPONDENT

May 25, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
L. Casey Manning, Circuit Court Judge

THE STATE,

Respondent,

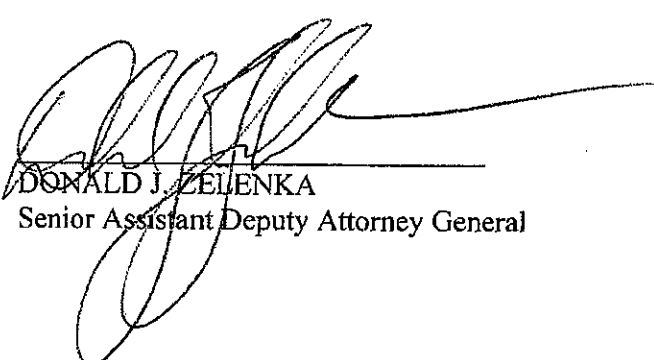
V.

JOHNNIE WALKER GASKINS,

Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled “Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.”



DONALD J. ZELENKA

Senior Assistant Deputy Attorney General

May 25, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
L. Casey Manning, Circuit Court Judge

THE STATE,

Respondent,

V.

JOHNNIE WALKER GASKINS,

Appellant

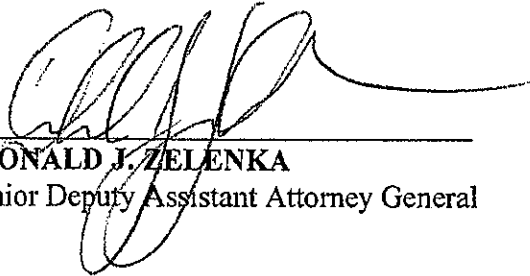
CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Tara Dawn Shurling, Esquire
3614 Landmark Drive, Suite A
Columbia, South Carolina 29204

I further certify that all parties required by Rule to be served have been served.

This 25th day of May, 2012.



DONALD J. ZELENA
Senior Deputy Assistant Attorney General

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Johnnie Gaskins, Appellant.

Appellate Case No. 2010-151386

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Unpublished Opinion No. 2013-UP-304
Heard January 8, 2013 – Filed July 3, 2013

AFFIRMED

Tara Dawn Shurling, of Law Offices of Tara Dawn
Shurling, PA, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, and Assistant
Deputy Attorney General Donald J. Zelenka, all of
Columbia, for Respondent.

PER CURIAM: Appellant, Johnnie Walker Gaskins, was tried for and convicted
of two counts of murder, three counts of assault and battery with intent to kill
(ABWIK), and one count of use of a firearm during the commission of a violent

crime in connection with a shooting spree at 360 Sports Bar & Grill. Gaskins appeals, asserting (1) the trial court erred in admitting crime scene photographs of blood splatter and pooling, which were duplicative and admitted for the purpose of inflaming the passions of the jury, (2) the trial court erred in denying Gaskins' motion for a mistrial based upon the admission of improper and highly prejudicial hearsay testimony in the form of a dying declaration and a statement from an anonymous telephone caller, and (3) Gaskins' right to due process was violated by the trial court's improper and heated response to defense counsel's objection. We affirm.

1. Gaskins first argues the trial court erred in admitting cumulative and gruesome crime scene photographs of blood splatters and blood pooling that were submitted solely for the purpose of inflaming the passions of the jury and were of negligible probative value. He contends, while some testimony regarding the location of victims or the extent of bloodshed may have been relevant in this case, the extent to which the photographic evidence was presented by the State was both cumulative and prejudicial to him.

A trial court has considerable latitude in ruling on the admissibility of evidence, and its ruling will not be disturbed on appeal absent a showing of probable prejudice. *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). The relevance, materiality and admissibility of photographic evidence are matters within the sound discretion of the trial judge. *Id.* "A test to determine whether the trial court abused its discretion is whether the photographic evidence serves to corroborate the testimony of witnesses offered at trial." *State v. Jarrell*, 350 S.C. 90, 106, 564 S.E.2d 362, 371 (Ct. App. 2002). It is not an abuse of discretion to admit photographs which serve to corroborate testimony. *State v. Tucker*, 324 S.C. 155, 167, 478 S.E.2d 260, 266 (1996). However, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). "To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Kelley*, 319 S.C. at 178, 460 S.E.2d at 370-71 (quoting *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

Here, the photographic evidence was probative inasmuch as it aided the jury by showing the actions of one of the victims during the shooting, as was corroborated by the expert through the photos. Additionally, a review of these photos reveals nothing more than a generic crime scene of blood, with no bodies present. We are

not convinced that, even if wrongly admitted, there was an undue tendency of the photographs to suggest a decision on an improper basis. Further, given the overwhelming evidence of Gaskins' guilt, we do not believe the photographs were of such a nature as to influence the jury's verdict. *See State v. Green*, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012) ("Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict."); *State v. Byers*, 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011) (quoting *State v. Reeves*, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990) (alteration in original)) ("A harmless error analysis is contextual and specific to the circumstances of the case: 'No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.'"); *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result."); *State v. Baccus*, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006) ("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, [the appellate court] will not set aside a conviction for insubstantial errors not affecting the result.").

2. Gaskins next contends the trial court erred in denying his motion for a mistrial following the admission of improper hearsay testimony from witness Porterfield concerning an alleged dying declaration that had not been previously disclosed to the defense, as well as testimony from Porterfield regarding an alleged statement made by an anonymous caller on Gaskins' mobile phone. Even if we were to assume the admission of this testimony by Porterfield was improper, we find no reversible error in the trial court's denial of Gaskins' motion for a mistrial based on the alleged improper testimony.

The decision to grant or deny a motion for a mistrial is a matter within the sound discretion of the trial judge, whose decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. *State v. Council*, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). "The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way." *State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). A mistrial should be granted only when absolutely necessary, and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000).

We find the trial court's explicit instruction cured any possible error and that the prejudicial effect was minimal, such that a mistrial would not have been warranted. *See Herring*, 387 S.C. at 216, 692 S.E.2d at 498 (noting a curative instruction to disregard the testimony is usually deemed to cure any alleged error); *State v. Moyd*, 321 S.C. 256, 263, 468 S.E.2d 7, 11 (Ct. App. 1996) (holding a trial court should exhaust other available methods to cure prejudice before aborting a trial, and where the prejudicial effect is minimal, a mistrial need not be granted in every case where incompetent evidence is received and later stricken and a curative instruction is given). Additionally, given the overwhelming evidence of Gaskins' guilt, we believe the testimony complained of by Gaskins could not reasonably have affected the result of the trial. *Baccus*, 367 S.C. at 55, 625 S.E.2d at 223 ("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, [the appellate court] will not set aside a conviction for insubstantial errors not affecting the result.").

3. Gaskins lastly contends the trial judge erred in yelling at defense counsel and abruptly halting the proceedings after a series of defense objections, thereby violating the Appellant's right to due process of law. He contends a trial judge must be patient, dignified and courteous to lawyers, and must act with absolute impartiality in the performance of judicial duties. Gaskins argues his failure to object to the situation at the time should be excused, as the tone and tenor of the trial judge's comments made it clear any objection would be futile, especially where the judge's improper remark was an angry response to defense counsel's continuing objections. Gaskins maintains, though the judge's words were brief, the delivery of the remarks was harsh enough to have scared one of the jurors, and the judge himself felt the remarks were prejudicial enough to warrant him entering the jury room to make comments and then issue a formal instruction to the jurors in the courtroom on the matter. Gaskins asserts the trial judge's treatment of defense counsel diminished him in the eyes of the jury, and because the trial judge's reaction was prejudicially improper, he is entitled to a new trial.

We first note that trial counsel raised no objection and made no argument to the trial court asserting the trial judge had made remarks directed at trial counsel which diminished counsel in the eyes of the jury. Thus, the issue may not be properly preserved for review. *See State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (noting, in order to properly preserve an issue for appellate review, there must be a contemporaneous objection that is ruled upon by the trial court, and if a party fails to properly object, he is procedurally barred from raising the issue on appeal). Gaskins contends, however, that such a failure may be excused because the tone and tenor of the judge indicated any objection would be futile.

See State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (holding, where the tone and tenor of the trial judge's remarks concerning defense counsel's gender and conduct were such that any objection would have been futile, defense counsel's failure to raise an objection did not amount to waiver of the issue of the propriety of the judge's comments concerning defense counsel).

We find no reversible error. A review of the record reveals the remarks made by the trial court in front of the jury during the exchange of questions and objections were directed at both the solicitor and defense counsel. While some were clearly directed at defense counsel, others were directed at both defense counsel and the solicitor, and yet another was directed at the solicitor alone. Accordingly, we do not believe the trial judge displayed partiality, bias or prejudice in the performance of his duties. Further, we do not believe his remarks undermined defense counsel's ability to effectively represent Gaskins. Thus, we find the remarks made by the trial judge, though maybe strong, were not directed as a whole at either side. Further, we find any prejudice from the fairly innocuous remarks was cured by the trial judge's instruction to the jury. Additionally, even assuming it was not necessary for trial counsel to raise an objection to the trial judge's comments to preserve the matter for review, we note that, not only did trial counsel fail to voice any concern, he apparently jokingly told the trial judge he should simply inform the jury that "it was theater." Such does not set the stage for the overly harsh treatment of trial counsel that Gaskins alleges on appeal. *See Graves v. State*, 309 S.C. 307, 312, 422 S.E.2d 125, 128 (1992) (holding, although the trial judge should have refrained from cautioning the witness regarding perjury in the presence of the jury, the trial judge's comments did not amount to prejudice which denied petitioner an impartial jury or violated his due process rights). *See also State v. Cooper*, 334 S.C. 540, 546-47, 514 S.E.2d 584, 587-88 (1999) (finding no prejudice from the trial judge's comments and rulings that were routine, noting none of the exchanges involved any improper, personal comment about defense counsel, nor tended to impugn counsel's credibility or diminish him in the eyes of the jury, many of the comments were innocuous or merely explanatory of the trial court's ruling, and some of the comments were made outside the presence of the jury, and therefore, could not affect the verdict).

For the foregoing reasons, Gaskins' convictions are

AFFIRMED.

HUFF, THOMAS and GEATHERS, JJ., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appellate Case No. 2010-151386

The State,

Respondent,

v.

Johnnie Walker Gaskins,

Appellant.

Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632

PETITION FOR REHEARING

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ATTORNEY FOR APPELLANT.

NOW COMES the Appellant in the above-captioned action, acting by and through undersigned counsel, seeking rehearing on this Court's unpublished opinion in this matter. *State v. Johnnie Gaskins, Opinion No. 2013-UP-304 (S.C. Ct. App. Filed July 3, 2013)*. Pursuant to *Rules 221(a) and 219, SCACR*, the Appellant petitions for rehearing on the ground that certain issues of material fact or law have either been overlooked or misapprehended by the Court in the opinion in question. In support of this position, the Appellant would show unto this Honorable Court the following:

Issue 1.

The Appellant would respectfully submit that the opinion of this Court either overlooks or misapprehends a significant factual question with regard to the lower court's error in admitting bloody crime scene photographs. Specifically, this Court's opinion indicates that the photographs in question were probative in that they showed, "the actions of one of the victims during the shooting" as corroborated by the State's expert through the photographs in question. This portion of the Court's decision overlooks or misapprehends two significant factors.

First, the shots fired in this case were made from the window of a car that had pulled up in front of the club where this incident took place. A witness from the security staff of the club testified to the fact that the shooter pulled up and fired multiple shots out of the window of the car before driving away. ROA at p. 94, ll.7-11. Witnesses described the shooter as firing shots from outside towards the front door. ROA at p. 43, l.18 – p. 44, l. 1. Thus, how the victims responded to the shots was not directly relevant to the operative question of who fired them. Although the photographs did not depict bodies, they were extremely bloody and gruesome. Where they had no probative value on the

operative issue before the jury for decision, their potential for appealing to the passions and emotions of the jury clearly outweighed any evidentiary value they had and therefore, the Appellant respectfully submits, they should have been excluded from evidence.

Secondly, the photographs in question were clearly cumulative to others introduced without objection from the Appellant. ROA at p. 87, ll.16 – 21. Assuming, *arguendo*, that the photographs of the interior of the club had any logical relevance to the issues before the lower court, other photographs admitted without objection addressed the issues demonstrated through this photographic evidence. Therefore, the inclusion in evidence of the particularly graphic photos introduced over the objection of the Appellant constituted reversible error where the evidence in question served no purpose except to inflame the passions as prejudices of the jury.

As argued by the Appellant in his Brief, "*There can be no justice in a trial by jurors inflamed by passion...*" *Gropi v. Wisconsin*, 400 U.S. 505, 511 (1971) (footnote 12) (quoting *Crocker v. Justices of Superior Court*, 208 Mass. 162, 179, 94 N.E. 369, 377-378 (1911)). The Appellant respectfully submits that by permitting the State to present unnecessary and cumulative photographic evidence of the bloodshed at the crime scene, the trial court impermissibly prejudiced the Appellant. The cumulative close-up photographs at issue served *no purpose* except to exacerbate the jury's reaction to the victim and eyewitness testimony.

For all the reasons set forth above, the Appellant respectfully requests that this Honorable Court grant rehearing on this issue.

Issue 2

The Appellant respectfully seeks rehearing on the question of whether the lower court erred in denying the Appellant's motion for a mistrial following improper hearsay testimony concerning an alleged dying declaration, that had not been previously disclosed to the defense, and an alleged statement made by an anonymous caller on Appellant's mobile phone, which arguably had also not been adequately disclosed to the defense prior to trial. The Appellant acknowledges that the grant of a mistrial is a severe remedy and that the judgments of the trial judge will seldom be disturbed in the exercise of his discretion concerning a Motion for a Mistrial. On the facts of this case however, the Appellant respectfully urges this Court to rehear this issue in the face of evidence that the testimony in question irreparably damaged the Appellant's ability to receive a fair trial and therefore, that the trial court abused its discretion in refusing to grant a mistrial in order to preserve the Appellant's rights to due process of law.

During his direct examination, the Club owner, Porterfield, set forth his limited acquaintance with the Appellant and described the circumstances of Appellant's departure from the Club on the evening in question. ROA at p. 172, l. 12-p. 173, l. 21. Porterfield testified that, after the shooting, he was communicating with one of the victims, John Adams, before he died. The State asked Porterfield, "What did he [Adams] say?" Porterfield replied, "*He [Adams] was like the guy that we put out, shot me, was shooting.*" ROA at p. 177, ll. 20-22. At this moment, the Defense Counsel began to object and was interrupted by the judge, who identified the statement as an exception to the general rule on hearsay. Defense Counsel then asked to approach and a conversation was had, off the record, before direct examination continued. ROA at p. 177, l. 23-p. 178, l. 5. The statement was not repeated. As noted in the Brief of Appellant, at first blush, it might seem that the dying declaration was not prejudicial to the Appellant since

there was evidence that the Club had to deal with another unruly patron, Christopher Lyles, and the declaration could be argued to refer to either the Appellant or the other patron dealt with by security that night. A close review of the testimony, however, reveals that Lyles *had not been fully ejected from the Club*, when the shooting began. ROA at p. 126, l. 22-p. 128, l. 9. Therefore, the Appellant submits that this declaration was prejudicial to the Appellant, where he was the only patron the State claimed was actually "*put out*" of the Club.

Minutes later in the direct examination, Porterfield began speaking about the mobile phone, allegedly belonging to Appellant, which he found in the Club earlier that night. He said that the phone began to ring when the investigators arrived, and that he answered it. At that point in time, Defense Counsel objected and the following statements were made on the record:

Mr. McCulloch: And, Your Honor, of course we're going to object to anything that would not be proper—

The Court: What's your objection right now?

Mr. McCulloch: My objection is to hearsay.

The Court: It's anticipatory, is that correct?

Mr. McCulloch: It is anticipatory, Your Honor.

The Court: All right. Let's cross that river when we get to it. Right now, I'll note it but nothing has happened yet.

Mr. Meadors: We're not offering this for the truth of the matter asserted—

The Court: All right.

Mr. Meadors: Oh.

When you get a phone call, you answer it?

[Witness]: Yeah, I got two phone—two phone calls from two ladies.

[Mr. Meadors]: All right. What—who if anyone—what did the phone call say?

[Witness]: Well, as soon as I answered the phone, I was trying to disguise my voice because it wasn't my phone. I didn't know who it was. I was like, hello. And they was like, *Blackie (phonetic), was that you out there shooting?* I then, I was like, what, you know.

[Mr. Meadors]: Did someone say the name Black?

[Witness]: Yeah.

[Mr. Meadors]: Was it male or female?
Mr. McCulloch: Your Honor, may we approach?

ROA at p. 180, l. 16-p. 181, l. 17. (Emphasis added). Earlier in his testimony, Porterfield had stated that he knew the Appellant prior to the shooting and that the Appellant was known to him as "**Black.**" ROA at p. 172, ll. 12-23. Thus, the testimony in dispute would clearly have been taken by the jury to imply that someone close enough to the Appellant to have his personal cell phone number believed him capable of this shooting.

The Appellant asks that his Honorable Court grant rehearing on this crucial issue where the jury in Appellant's case heard not one, but two, highly prejudicial statements that violated discovery provisions and constituted impermissible hearsay. Both statements go to the issue of the identification of the shooter, and both invited the jury to infer that the Appellant was that person.

The Appellant's central defense was that the State could not demonstrate, beyond a reasonable doubt, that he was the shooter. As noted in the Brief of Appellant, there were a number of questions regarding the identity of the shooter because the murder weapon was never recovered and the shooting, itself, occurred in the confusion following two, almost simultaneous, disruptions involving allegedly unruly patrons. Additionally, law enforcement had briefly examined, and excluded, another gun that matched the caliber of the murder weapon, and, coincidentally, belonged to two other patrons of that Club. The reason that these statements are so highly prejudicial, and so memorable to the jury, is that they suggest that one of the dying victims and an acquaintance of Appellant believed that the Appellant was the shooter. Given the evidence introduced in this case, the jury most certainly would have recognized the possibility that the security staff and Club employees were distracted when the shooting began, however the introduction of

these improper statements strengthened the likelihood that the jury would resolve any doubts they had concerning the identity of the shooter in favor of a finding of guilt based on inferences drawn from this witness's testimony. The Appellant would respectfully submit that, absent the objectionable testimony in question, the evidence against the Appellant was far from conclusive. Once heard, this testimony irreparably damaged the Appellant's ability to receive a fair trial. The Appellant respectfully submits that the nature of the testimony in issue was such that the prejudice to the Appellant could not be cured by instruction. For all the reasons set forth herein, the Appellant respectfully asks this Court to rehear his position that the lower court abused its discretion in denying the Appellant's Motion for a Mistrial. He asks that this Court reconsider his position that the introduction of the evidence in question now requires that he be granted a new trial.

Issue III

The Appellant also asks that this Court grant rehearing on his allegation that the trial judge's abrupt and improper response to an objection made by defense counsel violating the Appellant's right to due process of law. The Appellant would respectfully submit that the decision of this Honorable Court indicates that the Court may have misapprehended the record below on this important issue. This Court found that the remarks of the trial judge, on a whole, were not directed to either side.

The record below clearly demonstrates that just as defense counsel began to raise an objection, the judge yelled, "*Stop. Go to the jury room, ladies and gentlemen. Don't talk about this case.*" ROA at p. 242, ll. 7-17. The harsh or angry tone of the judge's comment to the defense and abrupt instruction to the jury is apparent from the record, as

the judge felt it necessary to address the matter *in the jury room*, as well as on the record.

After the Court returned from a brief recess, but before the jury returned, the judge said:

Emphatically, I walked into the jury room and in essence what I said is like, you know, it's important matters and people intend to get up on their heels—high heels a little bit and sometimes it's my job to kind of bring you down a little bit. But I wasn't angry or mad. *Somebody said, well, you scared me.* I said, that's all right, so. It's easy for us but, you know, a little bit difficult for them. So I told them, relax, and I'll say the same thing when they come out for the benefit of everybody.

ROA at p. 244, ll. 4-15. (Emphasis added)

The Appellant would respectfully submit that the tone of the Court's remarks is evidenced not only by the trial judge's decision to enter the jury room to address the incident, but also by his admission on the record that one of the jurors actually informed the judge that he had *scared* them. It is clear from the record that the outburst from the bench was prompted by the objection being made by defense counsel. The Appellant respectfully submits that the record therefore establishes that the initial remarks from the bench just before the recess, and the comments made to the jury *in the jury room*, were not addressed to both sides as is found by the decision issued in this case. The Appellant would submit that this Honorable Court may have misapprehended the record concerning the remarks of the trial court to this jury. The language referenced above documents what the trial judge told the parties he had said to the jury when he entered the jury room during the recess. When the jury returned to the courtroom, the Court instructed them as follows:

...And, members of the jury, I stuck my head in the door and sort of reminded y'all that this as *[sic]* an adversarial proceeding and both sides tend to get up on their high heels a little bit sometimes and it's my job to sort of control the

civility in the courtroom. *If I yell, it's nothing personal. I'm not mad at anybody* but it's my job to sort of keep us on an even keel. And that's all the latest example was. It has nothing to do with the merits of the case, nothing to do with whether or not objection you should hold against anybody or how I react. And my interest, I have no interest. Just to try to keep us at an even keel and make sure everybody receives a fair trial.

ROA at p. 245, ll. 2-15.

Thus, while the *curative charge* issued by the trial judge references both sides, the initial outburst itself, as well as the remarks the trial judge admitted making to the jury in the jury room, were obviously directed at defense counsel.

Likewise, the Appellant would respectfully submit that the decision in this case places undue significance on the responsive remarks of the defense counsel that the judge should just tell the jury, "*it was theater.*" The Appellant would respectfully submit that where defense counsel had been spoken to in a manner which was likely to prejudice the Appellant by diminishing the jury's perception of his lawyer, defense counsel was forced to choose between making a new objection to an already angry judge's remarks, or to smooth ruffled feathers in an attempt to ensure that things would go more smoothly for the remainder of the trial. Defense counsel chose the latter, and the proceedings continued in a calmer manner. The Appellant would urge this Honorable Court to reconsider its finding that this comment, made by defense counsel in an effort to make the best out of a bad situation, evidences the fact that defense counsel was not dealt with in an overly harsh manner. The Appellant has submitted that the failure of defense counsel to make an objection relating to this incident should be excused where the tone and tenor of the trial judge's comments made it clear that any objection would have been futile. *State v. Pace*, 316 S.C.71, 74, 447 S.E.2d 186,187 (1994). He would now

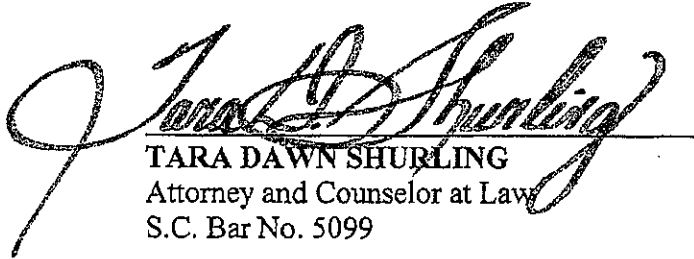
respectfully ask this Honorable Court to recognize that a responsive remark made by defense counsel in an effort to clear the air with the judge he still had to deal with for the remainder of his client's murder trial should not be viewed as conclusive evidence that the incident was not taken very seriously by defense counsel

The opinion of this Court states that the Appellant "*contends that a trial judge must be patient, dignified and courteous to lawyers, and must act with absolute impartiality in the performance of judicial duties.*" With all due respect, the Appellant would ask this Court to recognize that it is the South Carolina Code of Judicial Conduct which sets that standard for judicial behavior. *Canon 3 of Rule 501, SCRAP*. Section B(4) of that Canon states that, "*a judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.*" *Canons 3 of Rule 501, Section B(3), SCRAP*. Likewise, it is well established in precedents from our Supreme Court "*that a trial judge must act with absolute impartiality in the performance of judicial duties.*" State v. Cooper, 334 S.C. 540, 546, 514 S.E.2d 584, 587 (1999); State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994). . The Appellant respectfully asks for this Court to grant rehearing on this important issue. Inasmuch as the judge's reaction was improper and the Appellant was prejudiced, the Appellant asks this Honorable Court to reconsider his prayer for a new trial.

CONCLUSION

WHEREFORE, having set forth his grounds above, the Appellant, Johnnie Walker Gaskins, asks that this Court rehear his direct appeal and grant him a new trial.

Respectfully submitted,


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ATTORNEY FOR APPELLANT

This 18th day of July, 2013.

STATE OF SOUTH CAROLINA

In The Court of Appeals

The State, Respondent,

v.

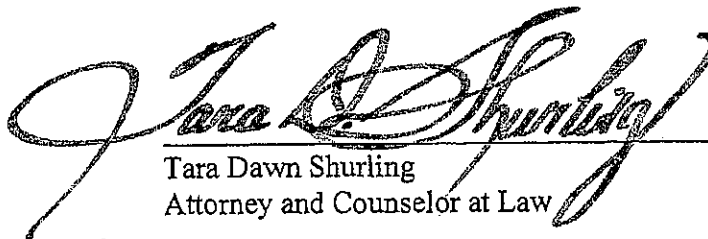
Johnnie Walker Gaskins, Appellant.

Appellate Case No. 2010-151386

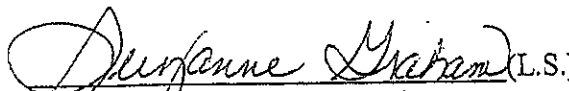
Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Appellant's Petition for Rehearing in the above-entitled case have been served upon opposing counsel, Donald J. Zelenka, Assistant Deputy Attorney General, P O Box 11549, Columbia, SC 29211, by depositing in the U.S. Mail, postage prepaid, postage prepaid, this 18th day of July, 2013.


Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE me this 18th day
of July, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/2023

The South Carolina Court of Appeals

The State, Respondent,

v.

Johnnie Gaskins, Appellant.

Appellate Case No. 2010-151386

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Hoff

J.

Paul W. Thomas

J.

John D. Deaton

J.

Columbia, South Carolina

cc:

Donald J. Zelenka
Tara Dawn Shurling
L. Casey Manning

FILED

6 August 2013

**IN THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632**

Appellate Case No. 2013-001904

The State,

Respondent,

v.

Johnnie Walker Gaskins,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER.

CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies, pursuant to Rule 242(d)(1), SCACR, that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on August 6, 2013.

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QUESTIONS PRESENTED

I.

Did the Court of Appeals improperly conclude that the Trial Court correctly ruled on the issue of the admissibility of crime scene photographs depicting blood splatters and blood pooling, which were duplicative and admitted for the purpose of inflaming the passions of the jury?

II.

Did the Court of Appeals err in finding that the Trial Court did not abuse its discretion in denying the Petitioner's motion for a mistrial, based on the admission of improper and highly prejudicial hearsay testimony, in the form of a dying declaration and a statement from an anonymous telephone caller?

III.

Did the Court of Appeals err in failing to recognize that Petitioner's right to due process of law was violated by the trial judge's improper and heated response to an objection made by defense counsel and in concluding that the remarks of the trial judge, on a whole, were not directed to either side ?

STATEMENT OF THE CASE

The Petitioner was indicted in July 2008 by the Richland County Grand Jury for two counts of Murder (2008-GS-40-3948, 2008-GS-40-1626), three counts of Assault and Battery with Intent to Kill ("ABWIK") (2008-GS-40-1629, 2008-GS-40-1631, 2008-GS-40-1632), and one count of Possession of a Weapon during the commission of a violent crime (2008-GS-40-1627). On October 19, 2009, the Petitioner proceeded to trial by jury where he was convicted of all charges. The Honorable L. Casey Manning, presiding circuit judge, sentenced the Petitioner to two terms of life imprisonment on the Murder charges, to be served concurrently, and consecutive sentences of twenty years on each of the three ABWIK charges, and five years on the weapon charge.

The Petitioner timely filed a Notice of Appeal. On July 3, 2013, the South Carolina Court of Appeals filed an unpublished opinion affirming the Petitioner's convictions and sentences. See State v. Johnnie Gaskins, Op. No. 13-UP-304 (S.C. Ct. App. filed July 3, 2013). On July 18, 2013, the Petitioner timely filed a Petition for Rehearing. That Petition was denied by written order on August 6, 2013.

The Petitioner now seeks a writ of certiorari to the South Carolina Court of Appeals

STATEMENT OF FACTS

On February 5th, 2007, Club 360 located at 826 Bush River Road in Columbia, South Carolina was having a Super Bowl Party that began late in the afternoon and continued after midnight. ROA at p. 34, l. 21-p. 36, l. 11; p. 46, ll. 8-16; p. 89, ll. 8-11. Around 12:30 a.m., staff members of Club 360 claim that the Petitioner was escorted out of the Club for unruly behavior. ROA at p. 41, ll. 20-24; p. 43, ll. 12-19; p. 90, l. 21-p. 91, l. 6. A friend of Petitioner's, Sydney Williams, testified that he was present and spoke with the security staff to obtain the Petitioner's release. ROA at p. 219, ll. 15-25; p. 92, ll. 13-24. Almost immediately after the Petitioner was escorted out the door, another unruly patron, Christopher Lyles, was forcibly removed. ROA at p. 93, ll. 18-23; p. 126, l. 18-p. 127, l. 7; p. 208, l. 16-p. 209, l. 8.

At approximately 1:00 a.m. in the morning, while security staff members were standing around the entrance to the club, someone began firing a weapon towards the front door. ROA at p. 43, l. 18-p. 44, l. 1. One of the contract security staff, Lamont Davis, testified that the suspect had pulled around the front of the Club in a vehicle and had fired multiple shots out of the window before driving away. ROA at p. 94, ll. 7-25. Davis stated that he fired four shots at the retreating vehicle from his .38 caliber revolver. ROA at p. 98, ll. 7-11. When the shooting ended, one of the bar patrons, Shannavia Williams, was dead and a member of the security staff, John Adams, was mortally wounded. ROA at p. 45, ll. 1-14; p. 434, ll. 4-13; p. 439, l. 20-p. 440, l. 4. Two other members of the security staff, Lamont Davis and Quentin Harris, were wounded in the shooting and another Club patron, Deirdre Houston, was wounded from a gunshot to the face. ROA at p. 95, ll. 17-23; p. 157, ll. 20-25; p. 295, ll. 8-14. A mobile phone allegedly belonging to Petitioner was found by the Club owner, Lindburgh Porterfield, inside the Club at some point

prior to the shooting, and was turned over to the Richland County Sheriff's Department in the ensuing investigation. ROA at p. 174, ll. 2-22; p. 180, l. 16-p. 181, l. 17; p. 172, ll. 12-23. A vehicle belonging to the mother of Petitioner's girlfriend was searched in connection with the shooting. ROA at p. 525, l. 5-p. 527, l. 23. The murder weapon was never recovered, but a weapon matching the caliber of shell casings recovered from the scene, belonging to two Club patrons, was turned into the police and subsequently excluded as unrelated. ROA at p. 535, ll. 5-9; p. 466, ll. 3-10; p. 472, l. 5-p. 473, l. 3; p. 479, l. 23-p. 480, l. 1.

ARGUMENT

I.

The Court of Appeals improperly concluded that the Trial Court correctly ruled on the issue of the admissibility of crime scene photographs depicting blood splatters and blood pooling, which were duplicative and admitted for the purpose of inflaming the passions of the jury.

A. How the Issue Arose Below

During the Petitioner's trial, the State sought to introduce numerous photographs of the Club's interior showing blood in the form of smears and splatters and pooling. ROA at p. 83, ll. 5-12; Court's Exhibit # 5: State's Photo Exhibit List. The photographs appeared to be taken in groups with distance shots that established the position of each bloodstain and then close-up shots of the blood. ROA at p. 85, ll. 15-21. Some of the photographs contained numerical markers near the blood stains. The State argued that the photographs were going to corroborate the testimony of Investigator Richards, whose report on blood analysis had been provided to the defense. ROA at p. 83, ll. 5-12. The State asserted that the photographs displayed the location and movement of at least one victim, who could identify her own trail of blood in testimony.

ROA at p. 83, l. 21-p. 84, l. 7. The Petitioner objected to these photographs on the grounds that they were gruesome and prejudicial, as well as duplicative and lacking in probative value. ROA at p. 82, l. 5-p. 83, l. 2; p. 85, l. 15-p. 86, l. 5; p. 86, l. 19-p. 88, l. 3. The judge denied the motion to exclude and found that the probative value of demonstrating where and how the victims were shot outweighed the prejudicial consequences of the evidence's introduction. Specifically, the judge stated:

I think it might be a close call but I do not believe the prejudice outweighs the probative value. Inasmuch as the jury already knows that two people were killed, three were shot, and at least at this point in time, I think I'll give the State an opportunity to connect the locations where the victims were shot, who was shot, where they were shot, that sort of thing. And at this point in time, Mr. McCulloch, it may be a close call but I think your objection is a little bit premature. If later on something evolves that I think prejudice does outweigh the probative value, I don't make that assessment at this time, I'll revisit it.

ROA at p. 88, ll. 14-25.

The Petitioner renewed his objection to the introduction of the contested photographs during the testimony of Deirdre Houston, one of the shooting victims. ROA at p. 285, ll. 5-14. The judge had the witness briefly provide in-camera testimony regarding the photographs. Houston generally described her location in the bar when she was struck and her movement in the immediate aftermath of the shooting. ROA at p. 286, l. 11-p. 289, l. 4. In an attempt to spare the witness, the Petitioner conceded that a proper foundation had been laid for the introduction of the photos, based on the victim's testimony. ROA at p. 287, l. 21-p. 288, l. 5. The Court denied the Petitioner's renewed motion to exclude the photographs. ROA at p. 289, l. 8-p. 290, l. 12. Some of these contested photos were admitted into evidence during the testimony of Houston,

the remaining photos were admitted during the testimony of Investigator Richards. ROA at pp. 289-290; pp. 345-347; State's Exhibits #22-46.

B. Argument on direct appeal to the South Carolina Court of Appeals.

In his appeal to the Court of Appeals, the Petitioner contended that while some testimony regarding the location of victims or the extent of bloodshed may have been relevant in this case, the extent to which the photographic evidence was presented by the State became both cumulative and prejudicial to the Petitioner. Furthermore, he argued that the prejudicial impact of this evidence was augmented by the chilling testimony of victim Deirdre Houston. Houston testified that she was crawling along the floor after being shot in the face and identifies her own bloody path from the pool tables to the bathroom in several of the afore-mentioned photos. The close-up photos of blood smears were prejudicial in and of themselves, even without a victim identifying the pathway of blood in the photos as originating from her own body. The Petitioner asserted that the extent of prejudice to the Petitioner resulting from the judge's denial of the motion to exclude more than outweighed the minimal probative value of the cumulative photographs. Consequently, the Petitioner argues that he is entitled to a new trial.

Evidence of the extent of a victim's injury is relevant in prosecutions for assault and battery with intent to kill and assault and battery of a high and aggravated nature. State v. Owens, 224 S.C. 533, 535, 80 S.E.2d 113, 114 (1954); see also State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976). Furthermore, all relevant evidence is admissible. Rule 402, SCRE. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice. Rule 403, SCRE.

In State v. Franklin, our Supreme Court held that prejudicial photos of a crime scene and body, that would otherwise be inadmissible, were properly admitted where they demonstrated the aggravated circumstances that attended the crime; in that case, the defendant's brutal torture of the victim. State v. Franklin, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995). The State v. Powers decision revisited Franklin and the Court clarified that aggravating circumstances are not necessary to admit gruesome and prejudicial photographs, as long as the evidence demonstrates the circumstance of the crime and the character of the defendant or else depicts the victim's body in the condition in which it was left. State v. Powers, 331 S.C. 37, 47, 501 S.E.2d 116, 121 (1998).

The Petitioner agrees, as trial counsel did below, that *some* of the photographs introduced by the State regarding the locations of shooting victims were arguably relevant. ROA. at p. 87, ll. 16-21. However, once that evidence had been admitted, any further evidence detailing the extent of bloodshed became cumulative, rendering the probative value of the additional testimony minimal. The Petitioner would further assert that any probative value the photos had in demonstrating the circumstance of the crime or the defendant's character was very minimal, since the primary issue in this case was the identification of the shooter. The extent or manner of the injuries incurred and the movements of victim Houston were otherwise established through photographs taken from a distance of the Club's interior, testimony of the victims and the forensic pathologist and the cap of Deirdre Houston entered in evidence.¹ There was no clear item in dispute regarding either of these issues.

¹ The Petitioner would note that the State introduced a cap worn by shooting victim Deirdre Houston, which was found with a bullet fragment attached to its fabric. ROA p. 296, ll. 9-16; p. 399, l. 1-p. 400, l. 8.

This highly inflammatory evidence was designed to inflame the jury and distract them from the operative question which *was not* how the victims were injured or even where they were located during and after the shooting. The true operative question was whether the State's theory of the shooting could establish, beyond a reasonable doubt, that Petitioner was the shooter. These inflammatory photographs should therefore have been excluded from evidence in the State's case in chief. The defense team did not put forth any evidence to contradict the manner of victim's injuries or the victims' locations throughout the Club; the issues cited by the State in its defense of the photographs' relevancy. Had the defense done so in its case, the State could have possibly justified the introduction of additional photographic evidence on Reply. "There can be no justice in a trial by jurors inflamed by passion..." Groppi v. Wisconsin, 400 U.S. 505, 511 (1971) (footnote 12) (quoting Crocker v. Justices of Superior Court, 208 Mass. 162, 179, 94 N.E. 369, 377-378 (1911)).

By permitting the State to present unnecessarily cumulative photographic evidence of the bloodshed at the crime scene, the trial court impermissibly and undeniably prejudiced the Petitioner. The cumulative close-up photographs served *no* purpose except to exacerbate the jury's reaction to the victim and eyewitness testimony. There was no testimony suggesting that the contour of any of the blood evidence provided any forensic information of relevance in this case. If there had been, the State might have a stronger basis for their position that the jury for some reason needed a close-up view of the blood in some location(s).

As the Petitioner respectfully argued in his Petition for Rehearing, the opinion of the Court of Appeals either overlooked or misapprehended a significant factual question with regard to the lower court's error in admitting bloody crime scene photographs. Specifically, the decision of the Court of Appeals found that the photographs in question were probative in that

they showed, "the actions of one of the victims during the shooting" as corroborated by the State's expert through the photographs in question. App. p. 4. This portion of the decision of the Court of Appeals failed to take into account two significant factors.

First, the shots fired in this case were made from the window of a car that had pulled up in front of the club where this incident took place. A witness from the security staff of the club testified to the fact that the shooter pulled up and fired multiple shots out of the window of the car before driving away. ROA at p. 94, ll.7-11. Witnesses described the shooter as firing shots from outside towards the front door. ROA at p. 43, l.18 – p. 44, l. 1. Thus, how the victims responded to the shots was not directly relevant to the operative question of who fired them. Although the photographs did not depict bodies, they were extremely bloody and gruesome. Where they had no probative value on the operative issue before the jury for decision, their potential for appealing to the passions and emotions of the jury clearly outweighed any evidentiary value they had and therefore, the Petitioner respectfully submits, they should have been excluded from evidence.

Secondly, the photographs in question were clearly cumulative to others introduced without objection from the Petitioner. ROA at p. 87, ll.16 – 21. Assuming, *arguendo*, that the photographs of the interior of the club had any logical relevance to the issues before the lower court, other photographs admitted without objection addressed the issues demonstrated through this photographic evidence. Therefore, the inclusion in evidence of the particularly graphic photos introduced over the objection of the Petitioner constituted reversible error where the evidence in question served no purpose except to inflame the passions as prejudices of the jury.

As argued by the Petitioner in his Brief, *"There can be no justice in a trial by jurors inflamed by passion..." Groppi v. Wisconsin, 400 U.S. 505, 511 (1971) (footnote 12) (quoting Crocker v. Justices of Superior Court, 208 Mass. 162, 179, 94 N.E. 369, 377-378 (1911))*. The Petitioner respectfully submits that by permitting the State to present unnecessary and cumulative photographic evidence of the bloodshed at the crime scene, the trial court impermissibly prejudiced the Petitioner. The cumulative close-up photographs at issue served *no purpose* except to exacerbate the jury's reaction to the victim and eyewitness testimony.

C. Argument for Reversal

The Petitioner now respectfully asserts that the Court of Appeals erred in finding that this prejudicial evidence had probative value sufficient to outweigh its obvious potential for inflaming the passions and prejudices of the Petitioner's jury. Accordingly, the Petitioner argues that he should be granted a new trial.

II.

The lower court erred in denying the Petitioner's motion for a mistrial following improper hearsay testimony concerning an alleged dying declaration, that had not been previously disclosed to the defense, and an alleged statement made by an anonymous caller on Petitioner's mobile phone.

A. How the issue developed at trial.

During his direct examination, the Club owner, Porterfield, set forth his limited acquaintance with the Petitioner and described the circumstances of Petitioner's departure from the Club on the evening in question. ROA at p. 172, l. 12-p. 173, l. 21. Porterfield testified that, after the shooting, he was communicating with one of the victims, John Adams, before he died.

The State asked Porterfield, "What did he [Adams] say?" Porterfield replied, "*He [Adams] was like the guy that we put out, shot me, was shooting.*" ROA at p. 177, ll. 20-22. At this moment, the Defense Counsel began to object and was interrupted by the judge, who identified the statement as an exception to the general rule on hearsay. Defense Counsel then asked to approach and a conversation was had, off the record, before direct examination continued. ROA at p. 177, l. 23-p. 178, l. 5. The statement was not repeated.

Minutes later in the direct examination, Porterfield began speaking about the mobile phone, allegedly belonging to Petitioner, which he found in the Club earlier that night. He said that the phone began to ring when the investigators arrived, and that he answered it. At that point in time, Defense Counsel objected and the following statements were made on the record:

Mr. McCulloch: And, Your Honor, of course we're going to object to anything that would not be proper—

The Court: What's your objection right now?

Mr. McCulloch: My objection is to hearsay.

The Court: It's anticipatory, is that correct?

Mr. McCulloch: It is anticipatory, Your Honor.

The Court: All right. Let's cross that river when we get to it. Right now, I'll note it but nothing has happened yet.

Mr. Meadors: We're not offering this for the truth of the matter asserted—

The Court: All right.

Mr. Meadors: Oh.

When you get a phone call, you answer it?

[Witness]: Yeah, I got two phone—two phone calls from two ladies.

[Mr. Meadors]: All right. What—who if anyone—what did the phone call say?

[Witness]: Well, as soon as I answered the phone, I was trying to disguise my voice because it wasn't my phone. I didn't know who it was. I was like, hello. And they was like, *Blackie (phonetic)*, was that you out there shooting? I then, I was like, what, you know.

[Mr. Meadors]: Did someone say the name Black?

[Witness]: Yeah.

[Mr. Meadors]: Was it male or female?

Mr. McCulloch: Your Honor, may we approach?

ROA at p. 180, l. 16-p. 181, l. 17. Earlier in his testimony, Porterfield had stated that he knew the Petitioner prior to the shooting and that the Petitioner was known to him as "Black." ROA at p. 172, ll. 12-23.

When the bench conference began, the Petitioner almost immediately moved for a mistrial on the ground that there were cumulative surprises in the evidence elicited by the State. In addition to an earlier in-camera identification of the suspect which had not been provided to the defense,² there was Porterfield's previously undisclosed testimony regarding a dying declaration and a speculative statement amounting to inadmissible hearsay from an anonymous caller. ROA at p. 182, l. 19- p. 183, l. 15; p. 187, l. 7- p. 188, l. 8. Petitioner's defense counsel further argued that a failure on the part of the State to disclose this information had created numerous Brady³ and Rule 5 violations.

The State responded that the first alleged violation, the witness identification, was not prejudicial as the witness had not testified in front of the jury. ROA at p. 184, l. 17-25. Regarding the second violation, the dying declaration, the State maintained that they had no prior

² During an in-camera examination of intended State witness Roger Glover, Glover stated that he had identified the Petitioner as the shooter on the night in question. Defense Counsel argued that this information was not contained in the material given to the defense, and the State did not ultimately call Glover as a witness. ROA at p. 61-81.

³ Brady v. Maryland, 373 U.S. 83 (1963).

knowledge of the conversation between Porterfield and Adams. ROA at p. 185, ll. 4-17. Addressing the final violation that was asserted by the Petitioner, the State claimed that the speculative question⁴ from the anonymous caller was described, somewhat poorly, in a discovery statement provided to the defense. ROA at p. 185, l. 21-p. 186, l. 5. This claim is dubious, from the record, as the State asserts that the actual language of the written statement was, "I kept receiving phone calls on the Verizon cell phone from women asking for Black, and he was at the place where you shooting at, 360." ROA at p. 185, l. 25-p. 186, l. 2. The State further asserted that this is essentially the same as the witness' testimony. In the argument for the mistrial, the Petitioner pointed out the obvious inconsistency between the written statement and the witness testimony and reiterated that the testimony was in the form of inadmissible hearsay. ROA p. 187, l. 22-p. 188, l. 8.

The defense clearly stated that it was requesting a mistrial, and in the event that motion was denied, it sought a curative instruction to the jury. ROA at p. 188, ll. 4-8. The judge denied the mistrial motion and ultimately issued a curative statement requiring that the jury disregard the portion of Porterfield's testimony that referenced Adam's dying statement, as well as the testimony that referenced a statement from an anonymous caller on a cell phone. ROA at p. 189, ll. 12-16; p. 197, ll. 6-24.

The Petitioner renewed his motion for a mistrial at the conclusion of the State's case, while he also noted that he respected the determination of the Court to strike the testimony and instruct the jurors. ROA at p. 556, l. 16-p. 557, l. 7. The Petitioner renewed the motion for a mistrial again when the jury retired to begin deliberation, and his renewed motion was once again denied. ROA at p. 562, ll. 7-21.

⁴ "...Blackie (phonetic), was that you out there shooting?" ROA at p. 181, ll. 12-13.

B. Argument on direct appeal to the South Carolina Court of Appeals.

On appeal the Petitioner recognized that the decision to grant or deny a motion for a mistrial is a matter within the discretion of the trial judge. State v. Culbreath, 377 S.C. 326, 331, 659 S.E.2d 268, 271 (Ct. App. 2008). The Petitioner recognized that the lower court's decision on such a motion will not ordinarily be disturbed absent an abuse of discretion. Id. It is only in cases where there is an abuse of discretion and resulting prejudice to the criminal defendant where this Court will reverse the lower court's decision to deny a mistrial motion. Id. A trial judge may not grant a mistrial, absent a manifest necessity or where it serves the ends of public justice. State v. Brown, 389 S.C. 84, 94, 697 S.E.2d 622, 627-28 (Ct. App. 2010). A defendant must demonstrate error and prejudice in order to justify a mistrial. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). "An instruction to disregard incompetent evidence usually is deemed to have cured the error in its admission unless...it is probable that notwithstanding such instruction or withdrawal the accused was prejudiced." State v. Simpson, 325 S.C. 37, 43, 479 S.E.2d 57, 60 (1996).

"Hearsay" is defined as a statement, other than one made by the declarant while testifying at trial or the hearing, offered into evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Unless a hearsay statement falls within one of numerous exceptions, it is inadmissible. Rule 802, SCRE. A dying declaration is excluded from the general prohibition on hearsay where the declarant believed that death was imminent and the statement was addressing the cause or circumstances of the death. Rule 804(b)(2), SCRE. In the instant case the defense had no notice that this dying declaration existed or that it might be introduced at trial, and due to the obvious discovery deficiency, the State did not seek to have the statement admitted under one of the hearsay exceptions. Under the sharing requirements imposed by Rule 5, South Carolina

Rules of Criminal Procedure, the State had a duty to disclose evidence material to the preparation of a defense prior to the trial. Rule 5, SCRCrimP.

The speculative question from the anonymous caller was inadmissible hearsay in that it was uttered by someone other than the declarant, State witness Porterfield. The statement was also offered to prove the truth of the matter asserted, that someone questioned whether the Petitioner was the shooter at that location. The statement was incredibly prejudicial in its implication that someone close to the Petitioner, would know about the shooting almost as quickly as the authorities, and would have reason to believe that he was involved. The speculative phone call and the statement attributed to one of the deceased victims violated the hearsay rules and the defendant's right to confront adverse witnesses under the Confrontation Clause. U.S. Const. Amend. VI. Despite the fact that the jury was instructed to disregard the testimony in question, it would have been impossible for them to completely forget the damaging statements they had already heard. As is often said, "You cannot unring a bell."

In State v. Johnson, this Honorable Court held that the lower court erred in denying Johnson's mistrial motion where a redacted co-defendant's statement, taken in conjunction with the inference created by a witness' careless remark, erroneously implied that a co-defendant had implicated Johnson in the crime charged. State v. Johnson, 390 S.C. 600, 607, 703 S.E.2d 217, 220 (2010). The Court found that the inference violated Johnson's Confrontation Clause rights and the violation could not be remedied by an instruction limiting the jury's consideration of the redacted terms in the co-defendant's statement. Id. The jury in Petitioner's case heard not one, but two, highly prejudicial statements that violated discovery provisions and constituted impermissible hearsay. Both statements go to the issue of the identification of the shooter, and both infer that the Petitioner was that person.

The Petitioner's central defense, as summarized in his closing arguments, was that the State could not demonstrate, beyond a reasonable doubt, that he was the shooter. In this case, there were a number of questions regarding the identity of the shooter because the murder weapon was never recovered and the shooting, itself, occurred in the confusion following two, almost simultaneous, disruptions involving allegedly unruly patrons. Additionally, law enforcement had briefly examined, and excluded, another gun that matched the caliber of the murder weapon, and, coincidentally, belonged to two other patrons of that Club. The reason that these statements are so highly prejudicial and so memorable to the jury is that they suggest that one of the dying victims and an acquaintance of Petitioner believed that the Petitioner was the shooter.⁵ The jury certainly recognized the possibility that the security staff and Club employees were distracted when the shooting began, but these improper statements strengthened the inferences being drawn from witness testimony indicating that the Petitioner was the shooter. For these reasons, the Petitioner argued that he was entitled to a new trial.

C. Argument for Reversal.

The Court of Appeals found that the effect of this testimony was minimal and that the explicit instruction given by the Trial Court cured any possible error. In so ruling, the Court of Appeals concluded that the Trial Court correctly ruled that a mistrial was not warranted on the facts of the Petitioner's case. In addition, the Court found that the evidence against the Petitioner was overwhelming and that for that reason the testimony at issue could not reasonably have affected the outcome of the Petitioner's trial. App. p. 5.

⁵ At first blush, it might seem that the dying declaration was not prejudicial to the Petitioner since there was evidence that the Club had to deal with another unruly patron, Christopher Lyles, and the declaration could be argued to refer to either the Petitioner or the other patron dealt with by security that night. A close review of the testimony, however, reveals that Lyles *had not been fully ejected from the Club*, when the shooting began. ROA at p. 126, l. 22-p. 128, l. 9. Therefore, the declaration was prejudicial to the Petitioner, who was the only patron the State claimed was actually "put out" of the Club.

In his Petition for Rehearing the Petitioner asked the Court of Appeals to rehear this issue where the jury in Petitioner's case heard not one, but two, highly prejudicial statements that violated discovery provisions and constituted impermissible hearsay. He respectfully argued that both statements went to the issue of the identification of the shooter, and both invited the jury to infer that the Petitioner was that person. App. p. 13. The Petitioner also asserted that, contrary to the findings of the Court of Appeals, the nature of the testimony in dispute was such that the resultant prejudice could not be cured by the instructions issued by Trial Court in response to this evidence. The Petitioner argued that the State's case against him was far from conclusive. App. p. 14. The Petitioner now urges this Court to reverse the decision of the Court of Appeals and grant him a new trial.

III.

The Court of Appeals erred in failing to recognize that Petitioner's right to due process of law was violated by the trial judge's improper and heated response to an objection made by defense counsel and in concluding that the remarks of the trial judge, on a whole, were not directed to either side.

A. Factual Background

During the redirect examination of State witness, Sydney Williams, the Petitioner objected three times to leading or improper questions by the State. ROA at p. 240, l. 6-p. 241, l. 23. The Court finally instructed the State to, "Do it with the magic words so there won't be any longer any objections." He assured the State that they would have a chance to "amplify" the testimony later in the examination. ROA at p. 242, ll. 1-3. Almost immediately thereafter, the State interrupted its own witness when he was reading a requested portion of his statement. The Petitioner began to object, and the judge yelled, "Stop. Go to the jury room, ladies and

gentlemen. Don't talk about this case." ROA at p. 242, ll. 7-17. The harsh or angry tenor of the judge's comment to the defense and abrupt instruction to the jury is apparent from the record, as the judge felt it necessary to address the matter in the jury room, as well as on the record. After the Court returned from a brief recess, but before the jury returned, the judge said:

Emphatically, I walked into the jury room and in essence what I said is like, you know, it's important matters and people intend to get up on their heels—high heels a little bit and sometimes it's my job to kind of bring you down a little bit. But I wasn't angry or mad.

Somebody said, well, you scared me. I said, that's all right, so. It's easy for us but, you know, a little bit difficult for them. So I told them, relax, and I'll say the same thing when they come out for the benefit of everybody.

ROA at p. 244, ll. 4-15. When the jury returned to the courtroom, the Court instructed them as follows:

...And, members of the jury, I stuck my head in the door and sort of reminded y'all that this as [*sic*] an adversarial proceeding and both sides tend to get up on their high heels a little bit sometimes and it's my job to sort of control the civility in the courtroom. *If I yell, it's nothing personal. I'm not mad at anybody* but it's my job to sort of keep us on an even keel.

And that's all the latest example was. It has nothing to do with the merits of the case, nothing to do with whether or not objection you should hold against anybody or how I react. And my interest, I have no interest. Just to try to keep us at an even keel and make sure everybody receives a fair trial.

ROA at p. 245, ll. 2-15. With this statement, the redirect examination continued.

B. Argument on direct appeal to the South Carolina Court of Appeals.

“No State shall ... deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV. In the language of the Supreme Court of the United States, “Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.” Smith v. Phillips, 455 U.S. 209, 217 (1982).

As argued to the Court of Appeals, there is such importance attached to the appearance of impartiality from a trial judge, that the South Carolina Code of Judicial Conduct sets forth specific guidelines for judicial behavior. Canon 3 of Rule 501, SCRAP. Section B(4) of that Canon states that, “a judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge’s direction and control.” Canon 3 of Rule 501, SCRAP. “It is well settled that a trial judge must act with absolute impartiality in the performance of judicial duties.” State v. Cooper, 334 S.C. 540, 546, 514 S.E.2d 584, 587 (1999); See State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994). As a general rule, there is no prejudice to a defendant, if hostile comments of a judge are made outside the presence of the jury. Cooper, 334 S.C. at 546, 514 S.E.2d at 587. In Cooper, this Honorable Court did not find reversible error in a trial judge’s remarks that consisted of routine rulings against defense counsel. Id. None of the challenged communications in that case, however, involved personal or improper comments directed toward defense counsel, and they did not impugn defense counsel’s credibility or “diminish him in the eyes of the jury.” Id. at 546-47, 587-88.

In the current case, the Judge yelled at defense counsel, after a series of defense objections, and abruptly halted the proceedings. Defense counsel, understandably, did not object to the Judge's harsh remark in front of the jury or to the curative instruction that followed the recess. Case law suggests that a failure to object may be excused when the tone and tenor of the trial judge's comments make it clear that any objection would have been futile. Pace, 316 S.C. at 74, 447 S.E.2d at 187. This is especially true in the Petitioner's case, where the Judge's improper remark was an angry response to Defense Counsel's continuing objections. In Pace, the Judge's comments were of a gentler, albeit inappropriate, nature and were not rebuking counsel for objecting. Id., at 73, 186-87.

The jury certainly understood that the anger behind the Judge's response was directed at Petitioner's counsel, since his objection had prompted the abrupt interruption. While the Court's words were apparently brief, the delivery of the interrupting remarks was harsh enough to have "scared" one of the jurors. Even the judge, himself, felt that his remarks were prejudicial enough to warrant him entering the jury room to make off-the-record comments and subsequently to issue a formal instruction concerning the incident. At a minimum, the Court's treatment of defense counsel diminished his standing in the eyes of the jury. Although we do not have the benefit of a transcript of the judge's remarks to this jury in the jury room,⁶ based on his own recollection of those comments on the record there is a great danger that the jury understood them to mean that the Court felt the need to bring defense counsel down a notch.

⁶ The Petitioner would point out that in the recent decision, Bailey v. State, this Court took the opportunity to "caution the bench" against off-the-record commentary to jury members. Bailey v. State, 392 S.C. 422, 709 S.E.2d 671 (2011) (footnote 5). In Bailey, the record did not indicate if attorneys were present during the communication. In the instant case, the Judge's own comments indicate that the attorneys *were not* present when the Judge entered the jury room.

The Petitioner argued on appeal to the Court of Appeals that the Trial Court's subsequent charge to the jury appears to have been intended to mitigate the Court's earlier focus on defense counsel. The unavoidable truth, however, is that the jury was likely to take particular note of the remarks the Judge saw fit to enter the jury room to make after stopping this trial in the middle of a witness's testimony. The Trial Court cut defense counsel off, and dismissed the jury abruptly without explanation. Not only was the Petitioner prejudiced by the jury's diminished perception of defense counsel, but he was further prejudiced by the difficult dilemma that his counsel inevitably faced: whether to reinforce the previous objection and make a new objection to an angry judge's remark or to smooth ruffled feathers in an attempt to ensure that things would go more smoothly. Defense counsel chose the latter, and the proceedings continued in a calmer manner.

C. Argument for Reversal.

The Court of Appeals found that the remarks of the trial judge, on a whole, were not directed to either side. App.p. 7. As argued by the Petitioner in his Petition for Rehearing, the record before this Honorable Court simply does not support that conclusion. App.p. 14 – 16.

Likewise, the Petitioner would respectfully submit that the decision in this case places undue significance on the responsive remarks of the defense counsel that the judge should just tell the jury, "*it was theater.*" The Petitioner would respectfully submit that where defense counsel had been spoken to in a manner which was likely to prejudice the Petitioner by diminishing the jury's perception of his lawyer, defense counsel was forced to choose between making a new objection to an already angry judge's remarks, or to smooth ruffled feathers in an attempt to ensure that things would go more smoothly for the remainder of the trial. Defense

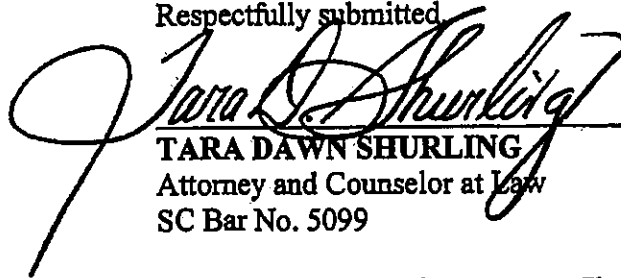
counsel chose the latter, and the proceedings continued in a calmer manner. The Petitioner would urge this Honorable Court to recognize that this remark by Defense Counsel was made in an effort to make the best out of a bad situation and in no way evidences that defense counsel was not dealt with in an overly harsh manner.

Inasmuch as the trial judge's actions were improper and the Petitioner was prejudiced, the Court of Appeals erred in finding that he was not entitled to a new trial based upon this error.

CONCLUSION

Based upon all the arguments presented to the Court of Appeals, and in this Petition, the Petitioner now respectfully prays that the writ might be issued and that he be granted to opportunity to be further heard on these issues.

Respectfully submitted,



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ATTORNEY FOR THE PETITIONER

This 6th day of January, 2014.

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632

Appellate Case No. 2013-001904

The State,

Respondent,

v.

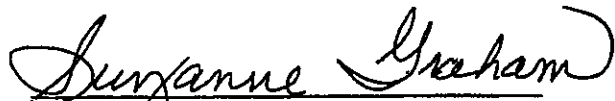
Johnnie Walker Gaskins,

Petitioner.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Appendix in the above matter has been served on opposing counsel this the 6th day of January, 2014, by mailing one (1) copy in a stamped envelope properly addressed to:

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SWORN TO BEFORE me this 6th day
of January, 2014.


NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires Jan. 16, 2017.

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal from Richland County
L. Casey Manning, Circuit Court Judge**

APPELLATE CASE NO. 2013-001904

THE STATE,

Respondent,

V.

JOHNNIE WALKER GASKINS,

Petitioner

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED ON CERTIORARI

I.

Did the Court of Appeals improperly concluded that the Trial Court correctly ruled on the issue of the admissibility of crime scene photographs depicting blood splatters and blood pooling, which were duplicative and admitted for the purpose of inflaming the passions of the jury?

II.

Did the Court of Appeals err in finding the Trial Court did not abuse its discretion in denying the Petitioner's motion for a mistrial, based on the admission of improper and highly prejudicial hearsay testimony, in the form of a dying declaration and a statement from an anonymous telephone caller?

III.

Did the Court of Appeals err in failing to recognize that Petitioner's right to due process of law was violated by the trial judge's improper and heated response to an objection made by defense counsel and concluding that the remarks of the trial judge, on the whole, were not directed to either side?

RESPONDENT'S STATEMENT OF THE CASE

Respondent adopts the Statement of the Case in its Final Brief of Respondent, p. 1-4.

ARGUMENT ON WHY CERTIORARI SHOULD BE DENIED

- I. **The trial court did not abuse its discretion in the admission of a series of photographs from the crime scene which showed blood where they had probative value in a case where the photographs were not unduly prejudicial or inflammatory. Further, it appears at the time of the introduction of the "close-up" photographs the Appellant had abandoned the earlier objection.**

During the trial, the prosecution introduced a series of crime scene photographs inside the Club 360 which also showed the various locations of blood at the crime scene. This evidence was used by law enforcement and a surviving victim, Deirdre Houston, to establish the location of the victim during and subsequent to the assault as she sought sanctuary from the assault. Although blood was present in the photographs, the challenged photographs do not show any bloody corpses or autopsy material. Rather it shows the crime scene and was used by the witnesses to help the jury to visualize the crime scene and understand the testimony of Ms. Houston. A review of the photographs suggest their relevance and although blood is present, a reasonable viewer would conclude that they are singularly or as a group not particularly gruesome or inflammatory. Judge Manning did not abuse his discretion in allowing the admission of the evidence. The Court of Appeals applied the correct standard in denying relief.

Furthermore, the original objections to the crime scene photographs were limited to close-up photographs of blood as being duplicative of initially unobjected distance photographs. However, when the close-up photographs were introduced through Sgt. Richards, the Appellant's defense counsel abandoned the original objections and they were introduced specifically without objection. ROA 345; Tr.p. 662, l. 12-18. ["without objection"]. [Exhibit 22, 23, 24, 26, 27, 29, 30, 31, 33, 34, 35, 36, 37, 41, 42, 44, 45, 46]. Therefore the issue presented in this argument was abandoned at trial and is

not preserved for this Court's review.

The Court of Appeals based its ruling initially finding that the photographs were probative and aided the jury by showing the actions of one of the victims and corroborated an expert. App.p. 4,6.

The Court further stated:

Additionally, a review of these photos reveals nothing more than a generic crime scene of blood, with no bodies present. We are not convinced that, even if wrongly admitted, there was an undue tendency of the photographs to suggest a decision on an improper basis. Further, given the overwhelming evidence of Gaskins' guilt, we do not believe the photographs were of such a nature as to influence the jury's verdict. [citations omitted].

App.p. 4, 6. Respondent submits that certiorari is not warranted.

Standard of Review

In denying relief on this issue, the Court of Appeals applied the correct standard of review. App.p. 6. The determination of the admissibility of photographs is similarly a matter addressed to the sound discretion of the trial court. State v. Goolsby, 275 S.C. 110, 268 S.E.2d 31 (1980). Photographs are properly excluded if they are entirely without relevance or are not substantially necessary to show material facts or conditions. State v. Nathari, 303 S.C. 188, 268 S.E.2d 597 (S.C. App. 1990). If the photographs serve to corroborate testimony, it is not an abuse of discretion to admit them. State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996); State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986). However, photographs calculated to "arouse the sympathy or prejudice of the jury, should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). In State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995), the Court held properly admissible photographs and video of a crime scene which showed the victim's nude body lying in the living room floor with her face and body visibly swollen from the beating and other photographs showed blood smeared on the walls and floor. The Court found the photographs relevant to establish the crime scene. See *Annotation, Admissibility of Photographs of Corpse in*

Prosecution for homicide or civil action for causing death, 73 A.L.R. 2d 769 (1960). Compare, State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986) (photographs of autopsy of victim with significant amount of blood and no material purpose was improperly admitted). In Patrick, the Court noted that the color photograph of the victim on the autopsy table was extremely graphic and did not show the crime scene.

How the Issue Was Raised And Abandoned Below

The issue before this Court concerns the introduction of a series of photographs from the multiple victim crime scene at Club 360 which showed the location of blood. See Exhibits 22-43, 45-46. A review of the photographs reveal two categories of photographs. Some photographs were distant shots which revealed context to the specific location of the blood marked with identifying tags. Exhibit 22(I), 25 (J, K), 27 (K), 28 (K, L, M), 32 (N, O), 33 (N), 34 (N, O, P), 37 (P), 38 (Q), 39 (Q, R), 40 (R), 43 (S). The remainder of this group of photographs showed a close-up of the particular blood stain or splatter. Exhibit 23(I), 24 (J), 26 (K), 29 (L), 30 (M), 31 (stains depicted in 32), 35 (O), 36 (P), 41 (R), 42 (S), 45 (G), 46 (H). See also Court Exhibit #5, State's Photo Exhibit List (description of each photograph). ROA 581. It is with this second group of photographs that Appellant had his initial, but later abandoned objection.

During the trial, defense counsel McCulloch, while recognizing the liberal rule concerning the introduction of photographs within the Court's discretion, made an objection to the proposed photographs arguing that they were "duplicitous." Counsel McCulloch specifically stated that : "I do not object to them on the grounds that they show blood because this is obviously a case that involves blood.. . But that fact is that these photographs duplicate each other and there is no point in that." ROA 81-82; Tr.p. 322-323. Counsel McCulloch also argued that the photos contained markers and close-ups and he questioned the relevance of showing where the blood was.

The prosecution, through Assistant Solicitor McDuffie stated that markers in the photos were placed there by crime scene investigator Sgt. Stan Richards. She stated that he had provided a report detailing what each one of the markers represented in terms of a blood pattern analysis, such as whether it was transferred, pooled, drops, and smears which the defense has. ROA 83, l. 5-12. The prosecution stated that the photographs were not duplicative and had been narrowed down. She declared that there was a photograph of each marker from a shot to orient it in the club and then a close-up shot. She stated that the prosecution had tried very hard not to duplicate and had viewed tons of photos. She stated that the matters would be presented through Investigator Richards and through the victim who can orient herself in the club through the path she followed after being shot. ROA 83; Tr.p. 324, l. 13-25.

Deputy Solicitor Meadors stated that they considered showing the photographs without the cards, but thought that it was important to show the jury through victim Houston that this was the route she went using the blood. He stated that multiple sets were eliminated by use of these photographs which include the markers. ROA 84; Tr.p. 325.

The prosecution declared that these would be the only photos of blood in the interior that they intended to use. She stated that there are some bullet holes in the interior that would be used that show the floor in the distance. However, she stated that none of the other photographs will have blood as a focus of the photographs.

At that point counsel McCulloch asked the court to take it into consideration overnight where McCulloch stated that he would either withdraw his motion or make it more specific, after he reviews Investigator Richards report. ROA 85; Tr.p. 326, l. 2-8. Judge Manning noted that it was kind of hard to keep blood out of a situation where two people were killed and three are shot. ROA 85; Tr.p. 326, l. 17-19.

The next day, counsel McCulloch stated that he had provide the clerk with an itemization of his groupings of the proposed evidence as a close-up shot of blood splatters, blood skids, and blood residue and then he established a further back shot from the close-up showing where the bar is. He stated that he was aware that case law gives discretion to the court. He stated that his "only objection is that the photographs are duplicative and there's no real evidentiary value to a close-up shot of the blood." ROA 85; Tr.p. 328, l. 15-25. He stated that it would be apparent to the jury that this is a heinous crime with lots of injuries and deceased people. He stated that it would serve no real purpose in duplicating photographs with the close-up shots. ROA 86; Tr. p. 329, l. 4-5.

He restated that he had reviewed the photographs proffered by the prosecution the previous night. He stated that he had provided the state his rendition of the photographs.¹ Counsel opined that most of the photographs can be grouped in pairs. He stated that they showed a close-up of a blood splatter or a blood skid or just a close-up of blood. He then described that there was a photograph that showed an "establishing shot" taken at a distance that shows in the club where the bloodstain was. ROA 87; Tr.p. 330, l. 1-6. He stated that in its discretion, the court can allow evidence that has some relevance, but that it should not be duplicative or cumulative. He then stated that "our objection is simply that there was no real purpose in having the close-up of blood. ROA 87; Tr.p. 330, l. 7-14.

Counsel McCulloch continued that the relevant and pertinent value of the "establishing shots" to show blood on the pool table, but not showing a close up or a tile with blood on it is other than to inflame the jury and increase the sympathy level. ROA 87; Tr.p. 330, l. 15-21.

Judge Manning then declared:

I don't know where the particular individuals that were shot or wounded, where it happened, how it happened, what location they were in. I think at least you look at the location of pools of blood, I would be like, for example somebody was shot

¹This listing was made Court Exhibit 5 and is included in this record. See Tr.p. 332, l. 11-17. See ROA p. 581.(Court Exhibit 5).

against the wall you've got splattering and the bedroom or something like that will show where the victim was when they were wounded or shot.

I think it might be a close call, but I do not believe the prejudice outweighs the probative value, Inasmuch as the jury already knows that two people were killed, three were shot, and at least at this point in time, I think I'll give the state the opportunity to connect the locations where the victims were shot, who was shot, where they were shot, that sort of thing.

And at this point of time, Mr. McCulloch, it may be a close call but I think your objection is premature, If later something evolves that I think prejudice does outweigh the probative value, I don't make that assessment at this time, I'll revisit it. But for right now, I think it does have more probative value than prejudice to the defendant at this point in time.

ROA 88; Tr.p. 331, l.1-332, l. 2.

Concerning the use of the evidence, Respondent incorporates by reference its Final Brief of Respondent 12-19.² This portion of the summarized the testimony Deirdre Houston and Crime Scene Investigator Stan Richards.

1. The Admissibility of the "Close-up" Photograph Issue Is Barred From Review because the Evidence Was Ultimately Entered Without Objection.

A review of the petition and briefs before this Court reveals a lack of specificity concerning what particular photographs the Appellant is presently seeking for this Court to review. The problem with the Appellant's over broad assertion in this appeal most probably arises from the fact that the

² *The In Camera Proceeding Related to the Photographs.*

During Deirdre Houston's testimony, the trial court indicated that counsel McCulloch renewed the objection prior to the testimony of victim Deirdre Houston. ROA 285; Tr.p. 584. Judge Manning that he wanted the witness to do a dry run of her testimony outside of the jury's presence to see how she reacts when the witness identifies certain locations where she was and how she crawled to the bathroom. ROA 285; Tr.p. 584, l. 5-14. Counsel McCulloch stated that his interest was only whether she could authenticate the photographs, but not to punish her. ROA 285; Tr.p. 584, l. 16-19. Ms. Houston then in an in camera proceeding previewed her testimony identifying State Exhibit 15 as a diagram of Club 360, her testimony about feeling the sting of the bullet, crawling through the club to the bathroom and then identified State Exhibit 25. ROA 286-287; Tr.p. 595-586. At that point counsel McCulloch conceded that there was a proper foundation. ROA 287; Tr.p. 586, l. 16-25. The witness confirmed and recognized State 32 as her blood, State Exhibit 38 as her blood, and State Exhibit 40 and State Exhibit 43 as relating to her testimony. ROA 288-89; Tr.p. 587-588. Allegedly over the earlier objection, the establishing photographs of State Exhibits 25 (photograph of pool table), 28 (photograph of K,L,M), 32 (photograph of pool tables and blood), 38 (distant photograph of Q), 39 (distant photograph of Q and R), 40 (distant photograph of R), and 43 (distant photograph of S in restroom) were admitted. ROA 289-90; Tr.p. 588-589. However, none of the so-called "close-up" photographs were introduced at this time or during the testimony of Ms. Houston which were the basis of the defense's original objections.

defense counsel's initial objection were not to the "establishing" (distant) photographs, but only the "close-up" photographs as being duplicative. ROA 87; Tr.p. 330. The particular photographs that these objections concerned were never identified by the defense with any specificity. However, when the actual "close-up" photographs were introduced in evidence during the testimony of Sgt. Richards, the defense declared the introduction was "without objection." [Exhibit 22, 23, 24, 26, 27, 29, 30, 31, 33, 34, 35, 36, 37, 41, 42, 44, 45, 46]. ROA 345; Tr.p. 662, l. 12-18. ["without objection"].³ This issue as argued in this appeal is not preserved for this Court's review.

First, Judge Manning's pre-trial ruling on the close-up photographs was in a motion *in limine*. ROA 88; Tr.p. 331, l. 14-25. Generally, a motion *in limine* seeks a pretrial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial. A ruling *in limine* is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013). Second, when the so called "close-up" photographs were subsequently introduced at trial, the Appellant expressly stated that they had no objection to the introduction. See State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (holding a defendant who expressly consented to the admission of evidence at trial waived any right to raise the issue of admissibility on appeal). The issue was not preserved for this appeal. The Appellant abandoned the original objection during the trial when the defense allowed the admission of the "close-up" photographs without objection. ROA 345; Tr.p. 662.

2. The Admissions of the Crime Scene Photographs Were Relevant And the

³The so-called "close-up" photographs are State Exhibit 24, 26, 29, 30, 31, 35, 36, 41, 42. The defense team distinguished the particular photographs in his groupings in Court Exhibit 5. ROA 581. In those grouping, he described "far shots" as Exhibits 23, 25, 37, 38, 39, 40. He does not describe as either "close-up" or "far shot" the following: 27, 28, 32, 33, 34, 35, 38, 39, 43, 44, 45, 46, however a review of those photographs are consistent with the manner of the photographs described as "far shots" by having an area overview as opposed to a closer view of a marker. It would be apparent that these latter photographs would be included with his "far shot" designation as "establishing photographs" and were not subjects of his initial objection.

Prejudicial Effect Did Not Substantially Outweigh The Probative Value To Require Exclusion.

The Appellant does not specify any particular photographs that it is challenging in the appeal. To the contrary, his argument combines the mention with a series of photographs which the Appellant had no objection (ROA 87; Tr.p. 330) with photographs that he ultimately had no objection . ROA 345; Tr. p. 662. In the petition and briefs, he simply makes a broad reference to State Exhibits 22-46 and the fact that they were introduced either through the testimony of victim Houston or Sgt. Richards. *See Petition for Writ of Certiorari*, p. 6-7.

The Court of Appeals reasonably concluded that the admission of the photographs did not influence the jury's verdict due to the overwhelming evidence. App.p. 6. Assuming *arguendo* that the merits of the admission of certain unspecified exhibits can be addressed, certain salient factors must be taken into account. First, the jury was aware that this was a horrific shooting involving two deaths and three other persons being wounded by shootings. Second, the crime scene photographs from inside the Club 360 (State Exhibits 22-43) were only a part of 150 exhibits introduced at that trial which included a plethora of other unchallenged exhibits which consisted of numerous photographs of bullet shells and holes in numerous locations at the Club 360, projectiles and cartridges from the scene, and autopsy photographs of two of the victims (which also entered without objection). See ROA 437-438; Tr.p. 793-794. Further, the breadth of the trial extended over a series of days from October 19 through October 27, 2009 and included 22 witnesses on behalf of the State.

As Judge Manning recognized at the hearing on the motion *in limine*, as well as defense counsel McCulloch, the existence of blood was a part of this crime and could not be divorced from the relevant evidence. At the outset, counsel McCulloch did not seek to exclude all photographs that showed the existence of blood at the crime scene, but only the "close-up" shots, suggesting the duplication was not necessary. However, as revealed in the testimony of surviving victim Houston, the

photographs showed a probative purpose in corroborating her version of the shooting by substantially reflecting her location when shot and her path ultimately into the restroom to avoid further confrontation while the assault upon Club 360 continued. The testimony of Sgt. Richards gave meaning to the photographs by developing what the path of the smears actually showed enhancing the jury's understanding of victim Houston's blinded attempt at seeking sanctuary and safety.

While the photographs showed blood, in today's world of CSI and Law and Order shows and awareness, the photographs were not particularly gruesome and were relatively benign. This assessment is particularly evident where the surviving victim was present before the jury to testify about the assault and the defense acknowledged that a series of photographs showing similar material was admissible. The Appellant, obviously recognizing that fact abandoned the objection prior to the admission of the close-up shots with Investigator Richards who presented the photographs in a matter of fact manner explaining how they supported and corroborated the victim's testimony about her path, stops, attempt to stand and return to the crawling during the continuing assaults.

In his brief on appeal, the Appellant concedes that evidence regarding the location of the victims and extent of the bloodshed was relevant, [*Petition*, p. 8; *Initial Brief of Appellant*, p. 9, 10] but suggests claims that the close-up photographs were prejudicial, yet these photographs were not objected to when they were introduced.

Respondent submits that the evidence was not used to arouse the sympathy or prejudice the jury. The Appellant acknowledged that some of the photographs showing the blood were relevant and probative. The use of the particular "close-up" photographs which allowed Sgt. Richards to describe the in better detail the direction of the victim than the distant photographs which also reveal blood, although cumulative, had additional probative value. A review of the photographs in light of the testimony - limited the prejudicial effect that Appellant suggests existed. Simply put, a viewing of the

photographs in context with the testimony show that the close-up photographs are not unduly prejudicial or inflammatory. Certiorari must be denied for these reasons.

II. Where the trial court instructed the jury to disregard evidence concerning an unexpected assertion in a dying declaration of one of the victims and an interrogative from a unknown caller to the Appellant's cell phone, the trial court did not abuse his discretion in denying the motion for a mistrial.

The cautious trial judge chose to use his discretion to exclude consideration by the jury of arguably admissible evidence concerning a dying declaration by victim John Adams and a question asked by an unidentified caller to the Appellant's cell phone asking whether Black was the shooter. In issuing a curative instruction, *propounded by the defense counsel*, to disregard the evidence, the trial judge properly applied the precedent of this Court. Assuming that the defense did not abandon its motion for mistrial when counsel declared he waived the objection (ROA 195; Tr.p. 479), the trial judge did not abuse his discretion in denying the mistrial motion where the incidents were not so grievous that prejudicial effect could not be removed in any other way. The Court of Appeals noted that even if they assumed that the admission of the telephone call was improper, the Court found no reversible error in the trial court's denial of the mistrial motion. App.p. 6. Alternately, the Court of Appeals found that the trial court's explicit instruction cured any possible error, that the prejudicial effect was minimal, and the mistrial would not be warranted. App.p. 5. Finally the Court of Appeals concluded that the overwhelming evidence of guilt revealed that the evidence complained of "could not reasonably have affected the result of the trial." App.p. 5. Certiorari is not warranted.

The Court of Appeals correctly applied the proper standard of review. App.p. 6. The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion. A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) (finding mistrial should not

be granted unless absolutely necessary; to receive mistrial, defendant must show error and resulting prejudice). "The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice." State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). "Whether a mistrial is manifestly necessary is a fact specific inquiry." State v. Rowlands, 343 S.C. 454, 457, 539 S.E.2d 717, 719 (Ct.App.2000). "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Goodwin, 384 S.C. 588, 605, 683 S.E.2d 500, 509 (Ct.App.2009).

HOW THE ISSUE WAS RAISED IN THE APPEAL

The Appellant asserts that a mistrial should have been declared based upon two occurrences during the testimony of Club 360 owner, Lindburgh Porterfield. However, upon review of the cited references, neither situation required a mistrial.

During the examination of Porterfield, he described the circumstances at his club at the Super Bowl party on February 4, 2007. ROA 169-173; Tr.p. 453-457. He stated that he had hired additional bouncers from Elite Security to assist with the particular party because they were able to carry weapons, unlike his own employees. ROA 171; Tr.p. 455. He stated it was their job to handle situations, which could include escorting someone to the door or handcuffing someone if they gave any problems. ROA 172; Tr.p. 456, l. 5-11.

Porterfield testified that he knew Johnnie Gaskins as "Black" at the time of the incident. ROA 172; Tr.p. 456, l. 12-23. He stated that Black was at his club that day arriving early. He stated at some point, Gaskins was taken out of the club. ROA 173-174; Tr.p. 457-458. He stated that about 20 minutes after Gaskins was removed from the bar, Porterfield heard shots fired. He stated that he went to the front of his bar at the time where he saw the glass had been shot out of the front of his building and he

saw bodies and people on the floor and trying to get out. ROA 176-177; Tr.p. 460-461. When he got to the front, he saw John Adams - one of his bouncers who he identified as Wolf - and told him that he would be all right because he was talking to him the whole time. ROA 177; Tr.p. 461, l. 10-12. He stated that Adams had been shot and that he was the first person the Porterfield had seen. The following occurred:

Q. What did he say?

A. He was like, the guy that we put out, shot me, was shooting.

Mr. McCulloch: Your Honor, I - - -

THE COURT: It's an exception to the hearsay - - go ahead.

Mr. McCulloch: May we approach? ..

ROA 177-178; Tr.p. 461, l. 20 - p. 462, l. 5. At that time, there was a bench conference. ROA 178; Tr.p. 462, l. 2-5. Porterfield continued to testify about wanting to drive victim Adams to the hospital, but he instead stayed and tried to calm people down⁴

4 A. *Dying Declaration Issue.*

In the Final Brief of Respondent, the State submitted that the challenged evidence was admissible as a dying declaration and/or excited utterance concerning the statement of the victim to Lindburgh Porterfield. Final Brief of Respondent, p. 31-33. He also asserted that this was a discovery deficiency under Rule 5 and asserts that the potential testimony from Porterfield should have been discovered by the State and revealed prior to trial under Rule 5. He claims that under Rule 5, the State had the duty to disclose evidence material to the preparation of the defense. *Initial Brief of Appellant*, p. 16, ¶ 1. However, a review Rule 5 imposes no requirement for disclosure of or creation of witness statements prior to trial, other than the statements of the defendant (not the victim). In pertinent part, Rule 5(a)(2).

Contrary to the claim of the defense, there was no requirement to create a document where one did not exist concerning the dying declaration made by John Adams to Porterfield. This is not a case of having the existence of a document not being turned over to the defense. There was no document in existence. As the prosecution declared as to the dying declaration by John Adams to Porterfield, the prosecutor stated that he had anticipated the testimony to instead be: "I'm dying, Dog, I'm dying" rather than the response made which was the first time that the prosecutor had heard it. ROA 185; Tr.p. 469, l. 4-19. This was not a violation of Rule 5. This was not a case where there was a written document in the possession of the prosecution that revealed the existence of this part of the dying declaration by John Adams to Porterfield. If that had existed, the question before this Court may be different. Compare *State v Patterson*, 290 S.C. 523, 351 S.E.2d 853 (1986) (former Criminal Practice Rule 8 was not violated, even though the defendant's counsel was not informed until the morning of jury selection of the state's tape of an interview with a witness which had been made within 48 hours of the shooting, where defense counsel was permitted to listen to the tape before the witness took the stand for direct examination, the trial judge allowed defense counsel to delay cross examination until the next day, and, thereafter, defense introduced the tape into evidence and played it for the jury, thus bringing to the jury's attention discrepancies between the witnesses' testimony and that appearing on the tape).

However, plainly the unexpected statement made by John Adams to Porterfield was admissible as a dying declaration under South Carolina Rules of Evidence, Rule 804(b)(2). The state purported to have information revealed to the

Porterfield later testified about recovering a cell phone that he located on the floor of the club. ROA 174, l. 4- p. 175, l. 18, p. 180, l. 9-11. He stated that the cell phone started to ring and he answered it. ROA 180; Tr.p. 464, l. 12-13. The defense objected at that time asserting "hearsay." The prosecution responded that they were not offering the matter for the truth of the matter asserted. ROA 180-181; Tr.p. 464-465.

Porterfield then stated that he received two telephone calls from two ladies on the cell phone. He stated that he attempted to disguise his voice because it was not his phone and said:

A. . . "Hello. And they was like, Blackie, was that you out there shooting? I then , I was like you know.

Q. Did someone say the name Black?

A. Yeah.

Q. Was it male or female?

Mr. McCulloch : Your honor may we approach.

A. Female....

ROA 181; Tr.p. 465, l. 7-18. ⁵ At that point another bench conference was held which led to an in

defense that Adams had indicated to Porterfield that he was dying and the statement clearly addressed the cause of his death. Tr.p. 469. Accord State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). In addition, the statement was likely also admissible as an excited utterance exception to the hearsay rule under SCRE Rule 803(2). McHoney.

5 *The Cell Phone Caller.*

The Appellant asserts in the appeal that the testimony by Porterfield that an unidentified female called the Appellant's cell phone which was answered by Porterfield and reported to him "Hello. And they was like, Blackie, was that you out there shooting?" The defense urged that it was a discovery violation, even though they had been in possession of Porterfield's statement that stated he "kept receiving phone calls on the Verizon cell phone from women asking for Black and was he was at the place where you shooting at 360." ROA 185-186; Tr.p. 469, l. 21- p. 470, l. 5. See Court Exhibit 6, p. 2 (Statement of Lindburgh Porterfield, 02/05/2007 [actually page 3 in order of statement]). ROA 584. Respondent submits that Rule 5 was satisfied by the disclosure of Court Exhibit 6 to the defense prior to the trial. The differences between the written statement and oral testimony would have been properly subject to cross-examination and impeachment concerning whatever inconsistencies he claims - but not necessarily exclusion.

The Appellant also urges that this evidence was hearsay because it was going to the truth of the matter asserted - claiming that it was an assertion that Appellant was the shooter at Club 360. However, at the outset, the prosecution urged that it was not being introduced for the truth of the matter asserted. ROA 180; Tr.p. 464. l. 25-1. However, a close reading of the testimony shows the declarant telephone caller is asking a question on whether Black was the shooter - not a declarative statement that Black was the shooter. Under SCRE 801, it is not an "assertion" by the declarant, but an "interrogative. A question is not a declarative statement of hearsay. Plainly, it could not go to the truth of the matter asserted because the

camera discussion out of the jury's presence.

Defense counsel McCulloch made initially made a motion for a mistrial asserting cumulative surprises. The defense initially claimed that during the in camera testimony of Roger Glover, he testified to an identification of the Appellant that had not been provided in discovery where the defense had been advised that his identification was only of "a person in the bar ." See ROA 61-81; Tr.p. 295-315.⁶ The defense also assented that they were surprised by the dying declaration testimony of Porterfield that had been provided. Lastly, the defense asserted that the testimony from the cell phone caller though allegedly being only offered not for the truth had evidentiary value for the truth asserted. He disagreed that this information was provided in Porterfield's statement. He stated the motion for mistrial was because these were violations under Brady v. Maryland, 373 U.S. 83 (1963) and Rule 5 of the S.C. Rules of Criminal Procedure. ROA 183-184; Tr.p. 467-468.

In response, Deputy Solicitor Meadors stated that concerning Mr. Glover's in camera testimony that he was unaware as well and that he had not testified about the identification in front of the jury. As to the dying declaration by John Adams to Porterfield, the prosecutor stated that he had anticipated the testimony to instead be : "I'm dying, Dog, I'm dying" rather than the response made which was the first time that the prosecutor had heard it. ROA 185; Tr.p. 469, l. 4-19. Concerning the

question does not assert any matter, only seeks to elicit a response affirming or denying. See Edward J. Imwinkelried, Paul C. Giannelli, Francis A. Gilligan & Frederic I. Lederer, *Courtroom Criminal Evidence* 1003 (3d ed. 1998) ("Because most assertive statements are declarative sentences, many trial judges use a rule of thumb that imperative, interrogative, and exclamatory sentences are not hearsay."; the authors would not follow this rule of thumb in all situations); Olin Guy Wellborn III, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 Tex. L. Rev. 49, 71-73 (1982) (suggesting that this is at least a plausible, and perhaps the most plausible, interpretation of the word "assertion" in Rule 801(c)); United States v. Thomas, 453 F.3d 838, 844-45 (7th Cir. 2006) (defendant asked police officer who had just arrived on scene of shooting whether officer was responding to defendant's call; court found that question was not hearsay because it was not statement but a question, but excluding it was harmless error).

⁶In the *in camera* proceedings, Glover testified that he had seen Gaskins in the bar area that night. ROA 66-67; Tr.p. 300-301. He then stated that he had seen him riding around that night. ROA 67. Then, he declared that he saw him in the car when the shooting was going on. ROA 70; Tr.p. 304. On cross-examination, Glover stated that he had told the police that night that he had seen the shooter, but that the police did not write it down in his statement or during the line-up. ROA 72, 77-78; Tr.p. 306, 311-312. Deputy Solicitor Meadors noted that although he had talked previously with Mr. Glover, at that hearing was the first time he had heard of the identification of the shooter. Tr.p. 319, l. 1-6. When the defense asserted that it was incompetent testimony, Judge Manning stated that it was a jury issue for weight and credibility. Tr.p. 320.

cell phone answer, Deputy Solicitor Meadors took issue concerning the matter stating that it was essentially disclosed in the discovery on page 3 of the statement where Porterfield had stated that he "kept receiving phone calls on the Verizon cell phone from women asking for Black and was he was at the place where you shooting at 360." ROA 185-186; Tr.p. 469, l. 21- p. 470, l. 5. See Court Exhibit 6, p. 2 (Statement of Lindburgh Porterfield, 02/05/2007 [actually page 3 in order of statement]). ROA 582-84. The state relied upon Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002) to assert that information that a friend heard from rumor was not offered for its truth, but to explain one victim's identification.

Counsel McCulloch responded: "my motion is for a mistrial or for an instruction and a redaction from the jury's memory that - - - Mr. Porterfield not be allowed to testify what people say on the phone, at least in this instance." The defense accepted that the prosecution did not know that the other evidence was going to come out. However, he asserted that the state had a duty of diligence to learn this information and make it available, asserting that Glover may have told police about his identification, suggesting a problematic pattern. The defense also disagreed that Porterfield's statement was close enough. He also contended that it did not fall within the realm of admissible hearsay. He then asked for a mistrial and if not granted , would ask for an instruction to disregard. ROA 188; Tr.p. 472, l. 4-8.

Judge Manning denied the motion for a mistrial, but agreed to tell the jury to disregard the challenged remarks. He stated that he did "not think anything had risen to the level of some sort of egregious constitutional deprivation against Mr. Gaskins." ROA 188-89; Tr.p. 472-473.

After a break, the Court noted that the cell phone statement about a female asking for Black was innocuous, but that he had told the defense he was giving the instruction anyway. over the State's objection. ROA 193; Tr.p. 477, l. 4-20. After a discussion on the proposed curative jury instructions,

the Court noted that the objection was based upon Brady and Rule 5. However, the defense stated that the objection was based upon the cumulative failure of diligence and that he did not think it was admissible hearsay. At that point, the defense stated: "I respect your ruling as to a mistrial - - I waive that objection and I appreciate the instructions which I have prepared. ..." ROA 195, l. 7-19; Tr.p. 479, l. 7-19. (emphasis added).⁷

When the jury returned, they were given the following curative instruction by Judge Manning:

... I instruct you to disregard that portion of Mr. Porterfield's testimony that made reference to any statements that were attributable to Mr. Adams. Mr. Adams is the gentleman that was a victim and is now deceased.

I further instruct you to further disregard the testimony of Mr. Porterfield that was made in reference to statements made by an unknown person and a telephone call received on the phone that's been admitted into evidence.

Y'all understand what I just said?

JURORS: (Affirmative response).

And when I tell you to disregard it, what you must do is erase it from your mind and when you go back to the jury room finally at the end of this trial to deliberate, you cannot let these two things enter your discussions at all. It would be unfair for you to do so.

ROA 197; Tr.p. 481, l. 6-24.⁸

The record reflects that at the end of the State's case, the defense stated that it was renewing the previous motions including the motion for mistrial that was denied and that "I respect the determination of the Court to strike the testimony and to instruct them." ROA 556; Tr.p. 957, l. 16-19. The motions were renewed generally at the conclusion and denied. ROA 562; Tr.p. 1050, l. 11-21.

⁷ Respondent submits that Appellant abandoned his request for mistrial at this point. See State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989) (holding a defendant who expressly consented to the admission of evidence at trial waived any right to raise the issue of admissibility on appeal). The issue should be barred as not preserved. However, Respondent concedes that Appellant generally asserted a request for a mistrial at the close of the case. Tr.p. 957, 1050.

⁸ These instructions were consistent with the proffered instructions prepared by defense counsel McCulloch. ROA 194; Tr.p. 478, l. 1-10. Court Exhibit 7. ROA 585.

1. The Curative Instruction To Disregard the Particular Testimony Removes Any Reversible Error.

A mistrial is not required where the trial judge gave plain instructions to disregard the challenged testimony from Porterfield attributable to either victim Adams or the cell phone caller. ROA 197; Tr.p. 481, l. 6-24. The curative instructions were fashioned by defense counsel.⁹ It is well known “[a] curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission.” State v. Harris, 382 S.C. 107, 119-120, 674 S.E.2d 532, 538 - 539 (Ct. App. 2009); State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct.App. 2005). In the present case, the trial court’s curative instruction explained to the jury they were not allowed to consider the question by the cell phone caller or Mr. Adams statement to Porterfield in their deliberations. The trial court specifically instructed the jury to disregard the evidence. Thus, any alleged error was cured.

The Appellant argues that there was a residual effect because he feels that the Adams comment could only have referred to Appellant because another possibility of Christopher Lyles had not been ejected at the time. Porterfield had testified that he understood only two people had been “thrown out” that night. ROA 205; Tr.p. 489, l. 4-6. Lyles testified that he had been ejected from the bar that night. ROA 208-09; Tr.p. 492, l. 9- p. 493, l. 8. He recalled that his girlfriend took him his mother’s house. ROA 209; Tr.p. 493. Lyles stated that he subsequently got into another vehicle and got stopped for DUI. ROA 210; Tr.p. 494, l. 17-24. He admitted that he had a gun in that car, but denied the gun was anywhere near the Club 360. ROA 211; Tr.p. 495, l. 1-25.

⁹ This Court may well find that this argument is not preserved for appellate review because Gaskins created the instructions and accepted the trial court’s ruling and did not contemporaneously object to the sufficiency of the curative charge. ROA 195; Tr.p. 479. See State v. Parris, 387 S.C. 460, 464, 692 S.E.2d 207, 209 (Ct. App. 2010); State v. Jones, 325 S.C. 310, 316, 479 S.E.2d 517, 520 (Ct.App.1996) (holding a curative instruction is usually deemed to cure an alleged error; no issue is preserved for appellate review if the complaining party accepts the trial court’s ruling and does not contemporaneously object to the sufficiency of the curative charge).

However, there was a series of independent witnesses who identified Gaskins as either being the shooter or the person who went to the Impala where the shooting was coming from. ROA 94, 97; Tr.p. 356, 359 (victim Lamont Davis identifies Gaskins as the individual he saw shooting from the car); ROA 149; Tr.p. 431 (victim Quinton Harris identifies Gaskins as the person he saw in the car with the gun); ROA 220, 247; Tr.p. 506, 531 (Sydney Williams identifies Gaskins as getting in the car which stopped in front of club when shooting started); ROA 272; Tr.p. 571 (Epsil Palmer identifies Gaskins as person who entered vehicle and that he saw flashes coming from vehicle although it was too far at the time to see the actual shooter). Thus, the excluded dying declaration would only have been cumulative to the evidence presented. As noted above, a defendant must show both error and resulting prejudice in order to be entitled to a mistrial. Stanley, 365 at 33-34, 615 S.E.2d at 460. Under the facts presented, Appellant is unable to show prejudice in light of the fact the record of identifications by similarly situated witnesses other than victim John Adams. The argument otherwise is without merit.

III. A new trial is not warranted where the trial judge gave a cautionary instruction to the jury after a series of exchanges between counsel for the prosecution and defense concerning the form of questions on re-direct required the Court to intervene to maintain civility between counsel in the courtroom. The Appellant's contention that defense counsel ability to represent the Appellant in the eyes of the jury was undermined is not supported by the record where both the state and defense were admonished to relax.

In his final argument, the Appellant contends that a mid-trial exchange between both counsel and the trial court during a re-direct examination of witness Sydney Williams about a prior statement requires a new trial. Although the trial judge addressed the tension arising between counsel on the exchange of questions and objections, the judicial comments did not undermine either counsel. Further, the trial judge's reasonable cautionary instruction given to the jury eliminated the concerns about any loss of credibility with the jury of counsel. The assertion must be denied.

Certiorari is not warranted where the Court of Appeals initially found the issue was not

preserved for review because there was no objection to the judicial comments and no similar argument was made to the trial judge. App.p. 5. Further, the failure to object was not excused. The Court of Appeals found that the remarks made by the trial judge were directed to both the prosecution and defense. App.p. 7. Additionally, while the Court concluded the remarks were strong, they were not directed as a whole to one side and that any prejudice was cured by Judge Manning's instruction to the jury. Rather than objecting, defense counsel merely asked the judge to advise the jury that it was "theater." The Court of Appeals concluded that "such does not set the stage for the overly harsh treatment of trial counsel that Gaskins alleges on appeal." App.p. 7. There is a factual basis to support these conclusions by the Court of Appeals.

HOW THE MATTER OCCURRED IN THE LOWER COURT

In the issue before the Court of Appeals, the Appellant claimed for the first time that the trial judge's actions allegedly toward defense counsel require a new trial. The jaundiced reading of the record ignores certain facts which defeat his claim. A review of the precise language, rather than characterizations is important to understand what occurred and what did not occur. As shown herein, the defense counsel never suggested that the response of the trial judge demanded a new trial or partiality against his client.

During the re-direct testimony of state witness Sydney Williams by Deputy Solicitor Meadors an issue arose concerning his earlier written statement and its variance from his trial testimony. ROA 238-240; Tr.p. 522-524. At one point the questioning became the subject of a series of objections from defense counsel:

Q. Now, Mr. Williams, did you see a gun?

A. I ain't seen no gun that night, I didn't see the gun that night.

Q. Mr. McCulloch asked you about your statement. Did you put in your statement previously that - - -

MR. McCULLOCH: Objection, your Honor. That's not proper, that 's leading, did you put in your statement, whatever - -

Q. What if anything did you put in your statement?

MR. McCULLOCH: Classic leading - - -

THE COURT : Stop, both of you, relax. Back up a little bit. Dissect the question if you have to.

ROA 240; Tr.p. 524, l. 4-14. After having the witness review the statement, the following inquiry was made:

Q. On February 5th, 2007, did you tell Investigator Isenhoward - - -

MR. McCULLOCH: Yes, your Honor again - - -

THE COURT: All right.

MR. McCULLOCH: Improper cross-examination - - -

THE COURT: All right. No run on arguments. Objection - - specifically what the objection is and I'll rule on it. But don't argue when you object. What did he say on such and such date.

MR. MEADORS: Under [Rule] 609, I thought that was the proper way to address it.

[ROA 242] THE COURT: Do it with the magic words so there won't be any longer any objections. Relax. I'll give you a chance to amplify later on. Continue.

Q. What if anything did you mention to Investigator Isenhoward about whether or not you saw the defendant with a gun, on page one?

A. On page one? I said, when he went - - he went back - -I mean, he went to his car, to a car beside his. He drives a blue car. He got in it. I started walking back toward the club - -

Q. No, no, no you skipped - - you skipped - -

MR. McCULLOCH : Your honor, let's let him read - - -

THE COURT: Stop. Go to the jury room ladies and gentlemen. Don't talk about this

case. . . .

[Jury retires]
[OUT OF JURY'S PRESENCE]

THE COURT: **Both of you relax.** No run on objections. Objection, basis, that's the way to do it, Mr. McCulloch. Don't argue your objection - -

MR. McCULLOCH: All right.

THE COURT: **You relax.** Let me finish. Just specify what it is. I know this is all tedious for all of us. **Now let's calm down a little bit and do it the right way.** Go ahead and place your objection on the [527] record.

MR. McCULLOCH: My objection was starting with the leading nature of the question. But now, asking him to look over his statement, then the Solicitor would like -to read to him the part of the statement he wants to say, oh yes, I remember that . That's not proper.

This is re-direct. It is outside the scope of proper re-direct,secondly.

Thirdly, under 613, this is a prior statement of the witness that he himself now wants to impeach him because his answers on the stand, in his questions, are different than what the Solicitor would like him to have testified with the statement.

THE COURT : All right. Anything further?

MR. McCULLOCH: That's it.

THE COURT: All right. I disagree. You can impeach with your own witness, I think under the rules this day and time.

MR. MEADORS: [Rule] 610.

THE COURT: It used to be the old rule but he can, for the sake of convenience, saving time, he can point , would you please read line 1 on page 2 of your statement or something.

Let's take a little break. **And y'all got to learn to be nice to each other, okay.** Let's take a break. It's tedious. I'll give you a chance to refresh yourselves. We'll come back and resume.

ROA 241-244; Tr.p. 525, l. 14- p. 528, l. 2.

During the recess, Judge Manning reported that he spoke with the jurors in the following manner to counsel:

THE COURT: Emphatically, I walked into the jury room and in essence what I said is like, you know, it's important matters and people intend to get up on their heels --high heels a little bit and sometimes it's my job to kind of bring you down a little bit. But I wasn't angry or mad.

Somebody said, well, you scared me. I said, that's all right, so. It's easy for us but, you know, a little bit difficult for them. So I told them, relax, and I'll say the same thing when they come out for the benefit of everybody.

MR. McCULLOCH: Tell them it was theater.

THE COURT: Beg your pardon?

MR. McCULLOCH: Tell them it was theater -- theater.

THE COURT: No, no no...

ROA 244; Tr.p. 528, l. 5- 19.

The jury then returned to the courtroom. Judge Manning then addressed his earlier comments:

THE COURT: ...I stuck my head in the door and sort of reminded y'all that this is an adversarial proceeding and both sides tend to get up on their high heels a little bit sometimes and it's my job to sort of control the civility in the courtroom. If I yell, it's nothing personal. I'm not mad at anybody but it's my job to sort of keep us at even keel.

And that's all the latest example was. It has nothing to do with the merits of this case, nothing to do with whether or not objection you should hold against anybody or how I react. And my interest, I have no interest. Just to try to keep us at an even keel and make sure everybody receives a fair trial.

With that in mind, I will invite Mr. Meadors to continue...

ROA 245; Tr.p. 529, l. 2-20. The remainder of the examination was without similar problems by counsel.

A review of the record reveals no motion for mistrial as a result of the judge's comments by either the State or the defense.

The Appellant contends that the remarks of the judge during the examination were harsh and angry and directed at defense counsel. He now suggests the failure of the defense counsel to object to the comments made during the examination or the curative instruction given by the court does not

prevent this Court from considering the issue on appeal because any objection would have been futile, relying upon State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994). He contends that because this was an “angry response” by the trial judge to defense counsel McCulloch’s continuing objections to the examination of the witness by the prosecution. He contends that these brief comments by Judge Manning diminished counsel’s standing before the jury. Respondent submits that the comments although strong were not an reasonable reaction to defense counsel’s objections.

The Appellant ignores that the comments were directed to the prosecution, as well as the defense. See ROA 240; Tr.p. 524, l. 13-14 (“ Stop, both of you, relax. Back up a little bit. Dissect the question if you have to”). Judge Manning was also directing comments toward Deputy Solicitor Meadors when he told him to “relax” and directed that he ask “what did he say back on such and such date” and to use magic words so that there won’t be objections. ROA 241-242; Tr.p. 525-526. Plainly, he was also putting the problem at the feet of the prosecution in the manner he was asking questions. After the jury had retired, the judge also admonished for “both of you relax” and to “calm down.” ROA 242; Tr.p. 526.

An alleged improper remark by a trial judge must be considered in context when determining whether it indicates sufficient bias or prejudice to require his or her disqualification. Shaw v. State, 276 S.C. 190, 277 S.E.2d 140 (1981). The Supreme Court has held a defendant is entitled to a mistrial where arguments by the trial judge indicate a lack of neutrality and cannot be cured by instruction, as where the defendant’s testimony is referred to as “lies.” State v. Kennedy, 272 S.C. 231, 250 S.E.2d 338 (1978).

The Appellant relies upon State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994). However, Pace, is readily distinguishable where the judge’s references to defense counsel, in the presence of the jury, as a “pretty girl” and “nice girl” was error, and deprived the defendant of a fair

trial and constituted reversible error. The Court stated in Pace that “[t]he trial judge must act with absolute impartiality in the performance of judicial duties. Canon 3 of Rule 501, SCACR. See The Code of Judicial Conduct, Rule 501 (2), (3). SCACR. [(“2). **maintain order and decorum in judicial proceedings; (3). be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others;** and should require similar conduct of lawyers, court staff, court officials, and others subject to judicial direction and control.”Canon 3(B)(1) to (6), Rule 501, SCACR (emphasis added). See *Justification and Correction of Remarks or Acts of State Trial Judge Criticizing, Rebuking, or Punishing Defense Counsel in Criminal Case as Otherwise Requiring New Trial or Reversal*, 54 A.L.R.6th 429 (2010) (addressing a plethora of situations where new trials were not required when judges commented about counsel). See State v. Simmons, 267 S.C. 479, 229 S.E.2d 597 (1976) (remarks tended to impugn the credibility of defense counsel); State v. DeBerry, 250 S.C. 314, 157 S.E.2d 637 (1967) (remarks to be brief and stop wasting court’s time was not abuse of discretion nor prejudicial to the rights of defendant); State v. Cooper, 334 S.C. 540, 546-547, 514 S.E.2d 584, 587-588 (1999) (no reversible error where the trial judge’s comments and rulings were routine and none of the exchanges involved any improper, personal comment about defense counsel).

Importantly, the trial judge’s cautionary instructions to the jury removed any impression by the jurors that the trial judge was trying to diminish either counsel in the eyes of the jury. Judge Manning expressly imputed his own demeanor as an attempt to control civility in the courtroom. Although Appellant wants to suggest that the actions in front of the jury were one sided, the Appellant ignores that his comments were a two edge sword against both counsel getting a little frustrated during this brief portion in the middle of a lengthy trial. Although a juror reported that the juror was scared by the judge’s action, it appears that the curative instruction dissipated the concern. It is also evident that both counsel subsequent to the brief admonishment toward both learned “to be nice to each other.” A

new trial is not warranted.

CONCLUSION

For all the foregoing reasons, certiorari should be denied and the judgment of convictions must be affirmed.

Respectfully submitted,

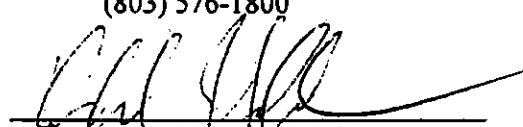
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By:



DONALD J. ZELENKA
ATTORNEYS FOR RESPONDENT

March 7, 2013.

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal from Richland County
L. Casey Manning, Circuit Court Judge**

THE STATE,

Respondent,

V.

JOHNNIE WALKER GASKINS,

Appellant

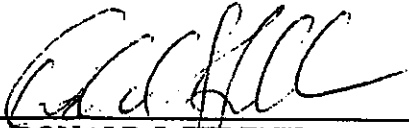
CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Tara Dawn Shurling, Esquire
3614 Landmark Drive, Suite A
Columbia, South Carolina 29204

I further certify that all parties required by Rule to be served have been served.

This 7th day of March, 2014.



DONALD J. ZELENKA
Senior Deputy Assistant Attorney General

**IN THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632**

Appellate Case No. 2013-001904

The State,

Respondent,

v.

Johnnie Walker Gaskins,

Petitioner.

**REPLY TO STATE'S RETURN TO
PETITION FOR A WRIT OF CERTIORARI**

TARA DAWN SHURLING
Attorney and Counselor at Law
S. C. Bar No. 5099

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ATTORNEY FOR PETITIONER.

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ARGUMENTS IN REPLY

ARGUMENT I

The Appellant relies on the Petition for Writ of Certiorari previously filed in this case.

ARGUMENT II

The Appellant relies on the Petition for Writ of Certiorari previously filed in this case.

ARGUMENT III

In response to the Respondent's Return the Petitioner would respectfully ask that the Court note the following.

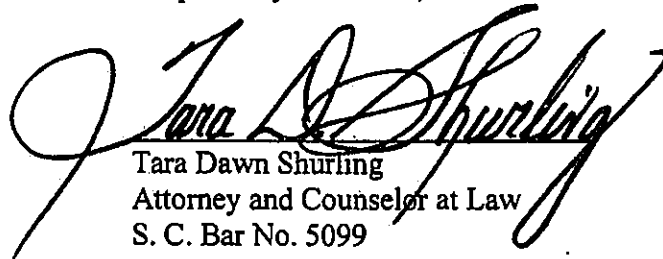
While the Court of Appeals denied relief on this issue, the holding of the Court did not find that the issue was procedurally barred due to a failure to make a contemporaneous objection. Respondent asserts that the Petitioner waived this issue when these photographs were admitted without objection. Return, pg. 1. The Respondent asserts that the Petitioner waived his objection to State's Exhibits 22, 23, 24, 26, 27, 29, 30, 31, 33, 34, 35, 36, 37, 41, 42, 44, 45 and 46 when second chair, Kathy R. Schillaci, stated "no objection" when the State moved to introduce these exhibits. In truth, the record reflects that the trial court recognized State's Exhibits No. 25, 28, 32, 38, 39, 40 and 43 as being admitted, over the objection of the Petitioner, earlier in this trial. ROA p. 289, ll. 5-12. Subsequently, the State offered State's Exhibits 22 to 46 into evidence. While it is accurate that Attorney Schillaci stated "no objection" at the time, the prosecutor then acknowledged that, "[T]here are some that are already in." ROA p. 345, ll. 12-16. Therefore, Petitioner did clearly make a timely objection as to State's Exhibits 25, 28, 32, 38, 39, 40 and 43. Further, it appears that the trial court viewed Petitioner's objections to all

these photographs as duly noted and denied. Further, as previously argued, the Court of Appeals did not decide this issue based on a failure to preserve this issue at trial. Petitioner asserts that the Respondent's position that Petitioner abandoned this issue is without merit.

CONCLUSION

For all these reasons, as well as those set forth in the Petition for Writ of Certiorari, the Petitioner asks that this Honorable Court grant him a new trial.

Respectfully submitted,



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Attorney and Counselor at Law
S. C. Bar No. 5099

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ATTORNEY FOR PETITIONER

This 17th day of April, 2014.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632

Appellate Case No. 2013-001904

The State,

Respondent,

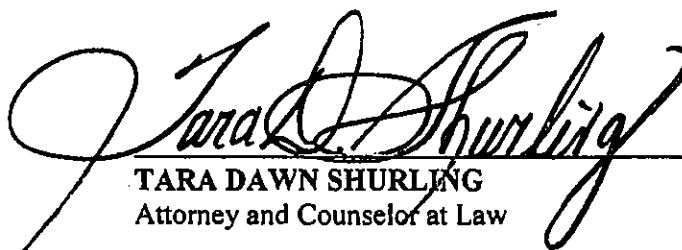
v.

Johnnie Walker Gaskins,

Petitioner.

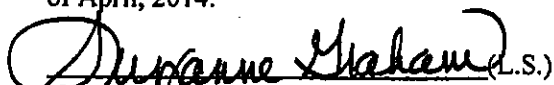
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Reply to Return to Petition for Writ of Certiorari in the above-entitled case has been served upon opposing counsel, Donald J. Zelenka, Assistant Deputy Attorney General, by depositing in the U.S. Mail, postage prepaid, this 17th day of April, 2014.


TARA DAWN SHURLING
Attorney and Counselor at Law

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 17th day
of April, 2014.


Notary Public for South Carolina
My Commission Expires: 2/28/24

**IN THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**Appeal from Richland County
Court of General Sessions**

**L. Casey Manning, Circuit Court Judge
Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632**

Appellate Case No. 2013-001904

The State,

Respondent,

v.

Johnnie Walker Gaskins,

Petitioner.

**APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI**

**HENRY DARGAN MCMASTER
Attorney General**

**TARA DAWN SHURLING
Attorney and Counselor at Law**

**JOHN W. MCINTOSH
Chief Deputy Attorney General**

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**DONALD J. ZELENKA
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ATTORNEYS FOR RESPONDENT.

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The South Carolina Court of Appeals

The State, Respondent,
v.
Johnnie Gaskin, Appellant.

Appellate Case No. 2010-151386

The Honorable L. Casey Manning,
Richland County
Trial Court Case No. 2008GS4001631, 2008GS4001626,
2008GS4001629, 2008GS4001632, 2008GS4003947,
2008GS4001627

ORDER

Pursuant to Rule 210(f) of the South Carolina Appellate Court Rules, it is ordered that the Clerk of Court for Richland County release:

State's Exhibits # 22-46 (photographs)

to be transported to this Court by the South Carolina Attorney General's Office, for consideration in the above referenced matter.

FOR THE COURT

BY V. Clovis Allen, Deputy
CLERK

FILED

6-27-12

Columbia, South Carolina

cc:

Donald J. Zelenka

The Honorable Jeanette McBride

Tara Shurling

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Johnnie Gaskins, Appellant.

Appellate Case No. 2010-151386

Appeal From Richland County
L. Casey Manning, Circuit Court Judge

Unpublished Opinion No. 2013-UP-304
Heard January 8, 2013 – Filed July 3, 2013

AFFIRMED

Tara Dawn Shurling, of Law Offices of Tara Dawn
Shurling, PA, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, and Assistant
Deputy Attorney General Donald J. Zelenka, all of
Columbia, for Respondent.

PER CURIAM: Appellant, Johnnie Walker Gaskins, was tried for and convicted
of two counts of murder, three counts of assault and battery with intent to kill
(ABWIK), and one count of use of a firearm during the commission of a violent

crime in connection with a shooting spree at 360 Sports Bar & Grill. Gaskins appeals, asserting (1) the trial court erred in admitting crime scene photographs of blood splatter and pooling, which were duplicative and admitted for the purpose of inflaming the passions of the jury, (2) the trial court erred in denying Gaskins' motion for a mistrial based upon the admission of improper and highly prejudicial hearsay testimony in the form of a dying declaration and a statement from an anonymous telephone caller, and (3) Gaskins' right to due process was violated by the trial court's improper and heated response to defense counsel's objection. We affirm.

1. Gaskins first argues the trial court erred in admitting cumulative and gruesome crime scene photographs of blood splatters and blood pooling that were submitted solely for the purpose of inflaming the passions of the jury and were of negligible probative value. He contends, while some testimony regarding the location of victims or the extent of bloodshed may have been relevant in this case, the extent to which the photographic evidence was presented by the State was both cumulative and prejudicial to him.

A trial court has considerable latitude in ruling on the admissibility of evidence, and its ruling will not be disturbed on appeal absent a showing of probable prejudice. *State v. Kelley*, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). The relevance, materiality and admissibility of photographic evidence are matters within the sound discretion of the trial judge. *Id.* "A test to determine whether the trial court abused its discretion is whether the photographic evidence serves to corroborate the testimony of witnesses offered at trial." *State v. Jarrell*, 350 S.C. 90, 106, 564 S.E.2d 362, 371 (Ct. App. 2002). It is not an abuse of discretion to admit photographs which serve to corroborate testimony. *State v. Tucker*, 324 S.C. 155, 167, 478 S.E.2d 260, 266 (1996). However, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). "To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *Kelley*, 319 S.C. at 178, 460 S.E.2d at 370-71 (quoting *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

Here, the photographic evidence was probative inasmuch as it aided the jury by showing the actions of one of the victims during the shooting, as was corroborated by the expert through the photos. Additionally, a review of these photos reveals nothing more than a generic crime scene of blood, with no bodies present. We are

We find the trial court's explicit instruction cured any possible error and that the prejudicial effect was minimal, such that a mistrial would not have been warranted. *See Herring*, 387 S.C. at 216, 692 S.E.2d at 498 (noting a curative instruction to disregard the testimony is usually deemed to cure any alleged error); *State v. Moyd*, 321 S.C. 256, 263, 468 S.E.2d 7, 11 (Ct. App. 1996) (holding a trial court should exhaust other available methods to cure prejudice before aborting a trial, and where the prejudicial effect is minimal, a mistrial need not be granted in every case where incompetent evidence is received and later stricken and a curative instruction is given). Additionally, given the overwhelming evidence of Gaskins' guilt, we believe the testimony complained of by Gaskins could not reasonably have affected the result of the trial. *Baccus*, 367 S.C. at 55, 625 S.E.2d at 223 ("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, [the appellate court] will not set aside a conviction for insubstantial errors not affecting the result.").

3. Gaskins lastly contends the trial judge erred in yelling at defense counsel and abruptly halting the proceedings after a series of defense objections, thereby violating the Appellant's right to due process of law. He contends a trial judge must be patient, dignified and courteous to lawyers, and must act with absolute impartiality in the performance of judicial duties. Gaskins argues his failure to object to the situation at the time should be excused, as the tone and tenor of the trial judge's comments made it clear any objection would be futile, especially where the judge's improper remark was an angry response to defense counsel's continuing objections. Gaskins maintains, though the judge's words were brief, the delivery of the remarks was harsh enough to have scared one of the jurors, and the judge himself felt the remarks were prejudicial enough to warrant him entering the jury room to make comments and then issue a formal instruction to the jurors in the courtroom on the matter. Gaskins asserts the trial judge's treatment of defense counsel diminished him in the eyes of the jury, and because the trial judge's reaction was prejudicially improper, he is entitled to a new trial.

We first note that trial counsel raised no objection and made no argument to the trial court asserting the trial judge had made remarks directed at trial counsel which diminished counsel in the eyes of the jury. Thus, the issue may not be properly preserved for review. *See State v. Johnson*, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005) (noting, in order to properly preserve an issue for appellate review, there must be a contemporaneous objection that is ruled upon by the trial court, and if a party fails to properly object, he is procedurally barred from raising the issue on appeal). Gaskins contends, however, that such a failure may be excused because the tone and tenor of the judge indicated any objection would be futile.

not convinced that, even if wrongly admitted, there was an undue tendency of the photographs to suggest a decision on an improper basis. Further, given the overwhelming evidence of Gaskins' guilt, we do not believe the photographs were of such a nature as to influence the jury's verdict. See *State v. Green*, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012) ("Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict."); *State v. Byers*, 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011) (quoting *State v. Reeves*, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990) (alteration in original)) ("A harmless error analysis is contextual and specific to the circumstances of the case: 'No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.'"); *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result."); *State v. Baccus*, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006) ("When guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, [the appellate court] will not set aside a conviction for insubstantial errors not affecting the result.").

2. Gaskins next contends the trial court erred in denying his motion for a mistrial following the admission of improper hearsay testimony from witness Porterfield concerning an alleged dying declaration that had not been previously disclosed to the defense, as well as testimony from Porterfield regarding an alleged statement made by an anonymous caller on Gaskins' mobile phone. Even if we were to assume the admission of this testimony by Porterfield was improper, we find no reversible error in the trial court's denial of Gaskins' motion for a mistrial based on the alleged improper testimony.

The decision to grant or deny a motion for a mistrial is a matter within the sound discretion of the trial judge, whose decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. *State v. Council*, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). "The grant of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that the prejudicial effect can be removed in no other way." *State v. Herring*, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). A mistrial should be granted only when absolutely necessary, and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000).

See State v. Pace, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (holding, where the tone and tenor of the trial judge's remarks concerning defense counsel's gender and conduct were such that any objection would have been futile, defense counsel's failure to raise an objection did not amount to waiver of the issue of the propriety of the judge's comments concerning defense counsel).

We find no reversible error. A review of the record reveals the remarks made by the trial court in front of the jury during the exchange of questions and objections were directed at both the solicitor and defense counsel. While some were clearly directed at defense counsel, others were directed at both defense counsel and the solicitor, and yet another was directed at the solicitor alone. Accordingly, we do not believe the trial judge displayed partiality, bias or prejudice in the performance of his duties. Further, we do not believe his remarks undermined defense counsel's ability to effectively represent Gaskins. Thus, we find the remarks made by the trial judge, though maybe strong, were not directed as a whole at either side. Further, we find any prejudice from the fairly innocuous remarks was cured by the trial judge's instruction to the jury. Additionally, even assuming it was not necessary for trial counsel to raise an objection to the trial judge's comments to preserve the matter for review, we note that, not only did trial counsel fail to voice any concern, he apparently jokingly told the trial judge he should simply inform the jury that "it was theater." Such does not set the stage for the overly harsh treatment of trial counsel that Gaskins alleges on appeal. *See Graves v. State*, 309 S.C. 307, 312, 422 S.E.2d 125, 128 (1992) (holding, although the trial judge should have refrained from cautioning the witness regarding perjury in the presence of the jury, the trial judge's comments did not amount to prejudice which denied petitioner an impartial jury or violated his due process rights). *See also State v. Cooper*, 334 S.C. 540, 546-47, 514 S.E.2d 584, 587-88 (1999) (finding no prejudice from the trial judge's comments and rulings that were routine, noting none of the exchanges involved any improper, personal comment about defense counsel, nor tended to impugn counsel's credibility or diminish him in the eyes of the jury, many of the comments were innocuous or merely explanatory of the trial court's ruling, and some of the comments were made outside the presence of the jury, and therefore, could not affect the verdict).

For the foregoing reasons, Gaskins' convictions are

AFFIRMED.

HUFF, THOMAS and GEATHERS, JJ., concur.

8

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appellate Case No. 2010-151386

The State,

Respondent,

v.

Johnnie Walker Gaskins,

Appellant.

**Appeal from Richland County
L. Casey Manning, Circuit Court Judge
Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632**

RECEIVED

JUL 18 2013

PETITION FOR REHEARING

SC Court of Appeals

**TARA DAWN SHURLING
Attorney and Counselor at Law
S.C. Bar No. 5099**

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ATTORNEY FOR APPELLANT.

NOW COMES the Appellant in the above-captioned action, acting by and through undersigned counsel, seeking rehearing on this Court's unpublished opinion in this matter. *State v. Johnnie Gaskins, Opinion No. 2013-UP-304 (S.C. Ct. App. Filed July 3, 2013)*. Pursuant to *Rules 221(a) and 219, SCACR*, the Appellant petitions for rehearing on the ground that certain issues of material fact or law have either been overlooked or misapprehended by the Court in the opinion in question. In support of this position, the Appellant would show unto this Honorable Court the following:

Issue 1.

The Appellant would respectfully submit that the opinion of this Court either overlooks or misapprehends a significant factual question with regard to the lower court's error in admitting bloody crime scene photographs. Specifically, this Court's opinion indicates that the photographs in question were probative in that they showed, "the actions of one of the victims during the shooting" as corroborated by the State's expert through the photographs in question. This portion of the Court's decision overlooks or misapprehends two significant factors.

First, the shots fired in this case were made from the window of a car that had pulled up in front of the club where this incident took place. A witness from the security staff of the club testified to the fact that the shooter pulled up and fired multiple shots out of the window of the car before driving away. ROA at p. 94, ll.7-11. Witnesses described the shooter as firing shots from outside towards the front door. ROA at p. 43, l.18 - p. 44, l. 1. Thus, how the victims responded to the shots was not directly relevant to the operative question of who fired them. Although the photographs did not depict bodies, they were extremely bloody and gruesome. Where they had no probative value on the

operative issue before the jury for decision, their potential for appealing to the passions and emotions of the jury clearly outweighed any evidentiary value they had and therefore, the Appellant respectfully submits, they should have been excluded from evidence.

Secondly, the photographs in question were clearly cumulative to others introduced without objection from the Appellant. ROA at p. 87, ll.16 – 21. Assuming, *arguendo*, that the photographs of the interior of the club had any logical relevance to the issues before the lower court, other photographs admitted without objection addressed the issues demonstrated through this photographic evidence. Therefore, the inclusion in evidence of the particularly graphic photos introduced over the objection of the Appellant constituted reversible error where the evidence in question served no purpose except to inflame the passions as prejudices of the jury.

As argued by the Appellant in his Brief, "*There can be no justice in a trial by jurors inflamed by passion...*" *Groppi v. Wisconsin*, 400 U.S. 505, 511 (1971) (footnote 12) (quoting *Crocker v. Justices of Superior Court*, 208 Mass. 162, 179, 94 N.E. 369, 377-378 (1911)). The Appellant respectfully submits that by permitting the State to present unnecessary and cumulative photographic evidence of the bloodshed at the crime scene, the trial court impermissibly prejudiced the Appellant. The cumulative close-up photographs at issue served *no purpose* except to exacerbate the jury's reaction to the victim and eyewitness testimony.

For all the reasons set forth above, the Appellant respectfully requests that this Honorable Court grant rehearing on this issue.

Issue 2

The Appellant respectfully seeks rehearing on the question of whether the lower court erred in denying the Appellant's motion for a mistrial following improper hearsay testimony concerning an alleged dying declaration, that had not been previously disclosed to the defense, and an alleged statement made by an anonymous caller on Appellant's mobile phone, which arguably had also not been adequately disclosed to the defense prior to trial. The Appellant acknowledges that the grant of a mistrial is a severe remedy and that the judgments of the trial judge will seldom be disturbed in the exercise of his discretion concerning a Motion for a Mistrial. On the facts of this case however, the Appellant respectfully urges this Court to rehear this issue in the face of evidence that the testimony in question irreparably damaged the Appellant's ability to receive a fair trial and therefore, that the trial court abused its discretion in refusing to grant a mistrial in order to preserve the Appellant's rights to due process of law.

During his direct examination, the Club owner, Porterfield, set forth his limited acquaintance with the Appellant and described the circumstances of Appellant's departure from the Club on the evening in question. ROA at p. 172, l. 12-p. 173, l. 21. Porterfield testified that, after the shooting, he was communicating with one of the victims, John Adams, before he died. The State asked Porterfield, "What did he [Adams] say?" Porterfield replied, "*He [Adams] was like the guy that we put out, shot me, was shooting.*" ROA at p. 177, ll. 20-22. At this moment, the Defense Counsel began to object and was interrupted by the judge, who identified the statement as an exception to the general rule on hearsay. Defense Counsel then asked to approach and a conversation was had, off the record, before direct examination continued. ROA at p. 177, l. 23-p. 178, l. 5. The statement was not repeated. As noted in the Brief of Appellant, at first blush, it might seem that the dying declaration was not prejudicial to the Appellant since

there was evidence that the Club had to deal with another unruly patron, Christopher Lyles, and the declaration could be argued to refer to either the Appellant or the other patron dealt with by security that night. A close review of the testimony, however, reveals that Lyles *had not been fully ejected from the Club*, when the shooting began. ROA at p. 126, l. 22-p. 128, l. 9. Therefore, the Appellant submits that this declaration was prejudicial to the Appellant, where he was the only patron the State claimed was actually "*put out*" of the Club.

Minutes later in the direct examination, Porterfield began speaking about the mobile phone, allegedly belonging to Appellant, which he found in the Club earlier that night. He said that the phone began to ring when the investigators arrived, and that he answered it. At that point in time, Defense Counsel objected and the following statements were made on the record:

Mr. McCulloch: And, Your Honor, of course we're going to object to anything that would not be proper—

The Court: What's your objection right now?

Mr. McCulloch: My objection is to hearsay.

The Court: It's anticipatory, is that correct?

Mr. McCulloch: It is anticipatory, Your Honor.

The Court: All right. Let's cross that river when we get to it. Right now, I'll note it but nothing has happened yet.

Mr. Meadors: We're not offering this for the truth of the matter asserted—

The Court: All right.

Mr. Meadors: Oh.

When you get a phone call, you answer it?

[Witness]: Yeah, I got two phone—two phone calls from two ladies.

[Mr. Meadors]: All right. What—who if anyone—what did the phone call say?

[Witness]: Well, as soon as I answered the phone, I was trying to disguise my voice because it wasn't my phone. I didn't know who it was. I was like, hello. And they was like, *Blackie (phonetic), was that you out there shooting?* I then, I was like, what, you know.

[Mr. Meadors]: Did someone say the name Black?

[Witness]: Yeah.

[Mr. Meadors]: Was it male or female?

Mr. McCulloch: Your Honor, may we approach?

ROA at p. 180, l. 16-p. 181, l. 17. (Emphasis added). Earlier in his testimony, Porterfield had stated that he knew the Appellant prior to the shooting and that the Appellant was known to him as "*Black.*" ROA at p. 172, ll. 12-23. Thus, the testimony in dispute would clearly have been taken by the jury to imply that someone close enough to the Appellant to have his personal cell phone number believed him capable of this shooting.

The Appellant asks that his Honorable Court grant rehearing on this crucial issue where the jury in Appellant's case heard not one, but two, highly prejudicial statements that violated discovery provisions and constituted impermissible hearsay. Both statements go to the issue of the identification of the shooter, and both invited the jury to infer that the Appellant was that person.

The Appellant's central defense was that the State could not demonstrate, beyond a reasonable doubt, that he was the shooter. As noted in the Brief of Appellant, there were a number of questions regarding the identity of the shooter because the murder... weapon was never recovered and the shooting, itself, occurred in the confusion following two, almost simultaneous, disruptions involving allegedly unruly patrons. Additionally, law enforcement had briefly examined, and excluded, another gun that matched the caliber of the murder weapon, and, coincidentally, belonged to two other patrons of that Club. The reason that these statements are so highly prejudicial, and so memorable to the jury, is that they suggest that one of the dying victims and an acquaintance of Appellant believed that the Appellant was the shooter. Given the evidence introduced in this case, the jury most certainly would have recognized the possibility that the security staff and Club employees were distracted when the shooting began, however the introduction of

these improper statements strengthened the likelihood that the jury would resolve any doubts they had concerning the identity of the shooter in favor of a finding of guilt based on inferences drawn from this witness's testimony. The Appellant would respectfully submit that, absent the objectionable testimony in question, the evidence against the Appellant was far from conclusive. Once heard, this testimony irreparably damaged the Appellant's ability to receive a fair trial. The Appellant respectfully submits that the nature of the testimony in issue was such that the prejudice to the Appellant could not be cured by instruction. For all the reasons set forth herein, the Appellant respectfully asks this Court to rehear his position that the lower court abused its discretion in denying the Appellant's Motion for a Mistrial. He asks that this Court reconsider his position that the introduction of the evidence in question now requires that he be granted a new trial.

Issue III

The Appellant also asks that this Court grant rehearing on his allegation that the trial judge's abrupt and improper response to an objection made by defense counsel violating the Appellant's right to due process of law. The Appellant would respectfully submit that the decision of this Honorable Court indicates that the Court may have misapprehended the record below on this important issue. This Court found that the remarks of the trial judge, on a whole, were not directed to either side.

The record below clearly demonstrates that just as defense counsel began to raise an objection, the judge yelled, *"Stop. Go to the jury room, ladies and gentlemen. Don't talk about this case."* ROA at p. 242, ll. 7-17. The harsh or angry tone of the judge's comment to the defense and abrupt instruction to the jury is apparent from the record, as

the judge felt it necessary to address the matter *in the jury room*, as well as on the record.

After the Court returned from a brief recess, but before the jury returned, the judge said:

Emphatically, I walked into the jury room and in essence what I said is like, you know, it's important matters and people intend to get up on their heels—high heels a little bit and sometimes it's my job to kind of bring you down a little bit. But I wasn't angry or mad. *Somebody said, well, you scared me.* I said, that's all right, so. It's easy for us but, you know, a little bit difficult for them. So I told them, relax, and I'll say the same thing when they come out for the benefit of everybody.

ROA at p. 244, ll. 4-15. (Emphasis added)

The Appellant would respectfully submit that the tone of the Court's remarks is evidenced not only by the trial judge's decision to enter the jury room to address the incident, but also by his admission on the record that one of the jurors actually informed the judge that he had *scared* them. It is clear from the record that the outburst from the bench was prompted by the objection being made by defense counsel. The Appellant respectfully submits that the record therefore establishes that the initial remarks from the bench just before the recess, and the comments made to the jury *in the jury room*, were not addressed to both sides as is found by the decision issued in this case. The Appellant would submit that this Honorable Court may have misapprehended the record concerning the remarks of the trial court to this jury. The language referenced above documents what the trial judge told the parties he had said to the jury when he entered the jury room during the recess. When the jury returned to the courtroom, the Court instructed them as follows:

...And, members of the jury, I stuck my head in the door and sort of reminded y'all that this as [*sic*] an adversarial proceeding and both sides tend to get up on their high heels a little bit sometimes and it's my job to sort of control the

civility in the courtroom. *If I yell, it's nothing personal. I'm not mad at anybody* but it's my job to sort of keep us on an even keel. And that's all the latest example was. It has nothing to do with the merits of the case, nothing to do with whether or not objection you should hold against anybody or how I react. And my interest, I have no interest. Just to try to keep us at an even keel and make sure everybody receives a fair trial.

ROA at p. 245, ll. 2-15.

Thus, while the *curative charge* issued by the trial judge references both sides, the initial outburst itself, as well as the remarks the trial judge admitted making to the jury in the jury room, were obviously directed at defense counsel.

Likewise, the Appellant would respectfully submit that the decision in this case places undue significance on the responsive remarks of the defense counsel that the judge should just tell the jury, "*it was theater.*" The Appellant would respectfully submit that where defense counsel had been spoken to in a manner which was likely to prejudice the Appellant by diminishing the jury's perception of his lawyer, defense counsel was forced to choose between making a new objection to an already angry judge's remarks, or to smooth ruffled feathers in an attempt to ensure that things would go more smoothly for the remainder of the trial. Defense counsel chose the latter, and the proceedings continued in a calmer manner. The Appellant would urge this Honorable Court to reconsider its finding that this comment, made by defense counsel in an effort to make the best out of a bad situation, evidences the fact that defense counsel was not dealt with in an overly harsh manner. The Appellant has submitted that the failure of defense counsel to make an objection relating to this incident should be excused where the tone and tenor of the trial judge's comments made it clear that any objection would have been futile. *State v. Pace*, 316 S.C.71, 74, 447 S.E.2d 186,187 (1994). He would now

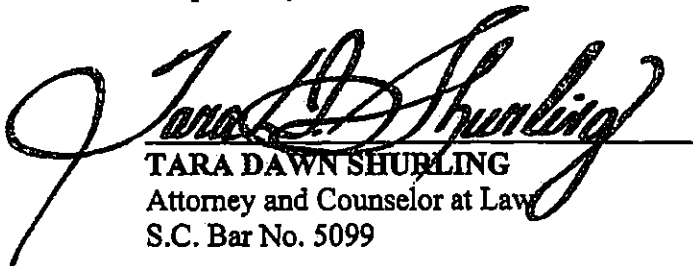
respectfully ask this Honorable Court to recognize that a responsive remark made by defense counsel in an effort to clear the air with the judge he still had to deal with for the remainder of his client's murder trial should not be viewed as conclusive evidence that the incident was not taken very seriously by defense counsel

The opinion of this Court states that the Appellant *"contends that a trial judge must be patient, dignified and courteous to lawyers, and must act with absolute impartiality in the performance of judicial duties."* With all due respect, the Appellant would ask this Court to recognize that it is the South Carolina Code of Judicial Conduct which sets that standard for judicial behavior. *Canon 3 of Rule 501, SCRAP*. Section B(4) of that Canon states that, *"a judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control."* *Canons 3 of Rule 501, Section B(3), SCRAP*. Likewise, it is well established in precedents from our Supreme Court *"that a trial judge must act with absolute impartiality in the performance of judicial duties."* *State v. Cooper*, 334 S.C. 540, 546, 514 S.E.2d 584, 587 (1999); *State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (1994). . The Appellant respectfully asks for this Court to grant rehearing on this important issue. Inasmuch as the judge's reaction was improper and the Appellant was prejudiced, the Appellant asks this Honorable Court to reconsider his prayer for a new trial.

CONCLUSION

WHEREFORE, having set forth his grounds above, the Appellant, Johnnie Walker Gaskins, asks that this Court rehear his direct appeal and grant him a new trial.

Respectfully submitted,


TARA DAWN SHURLING
Attorney and Counselor at Law
S.C. Bar No. 5099

3614 Landmark Drive, Suite A
Columbia, S.C. 29204
803-738-8622
803-738-1600 Fax
E-mail: tdslaw@shurlinglaw.com

ATTORNEY FOR APPELLANT

This 18th day of July, 2013.

STATE OF SOUTH CAROLINA

In The Court of Appeals

The State, Respondent,

v.

Johnnie Walker Gaskins, Appellant.

Appellate Case No. 2010-151386

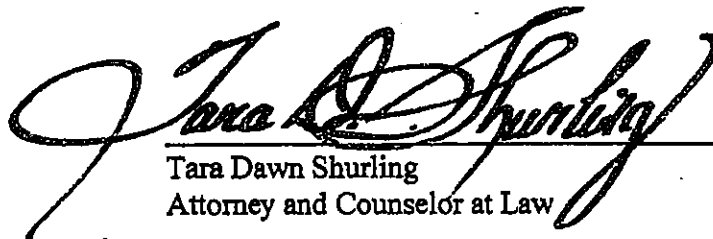
Appeal from Richland County

L. Casey Manning, Circuit Court Judge

Case Nos. 08-GS-40-03948; 08-GS-40-01626; 1627, 1629, 1631, 1632

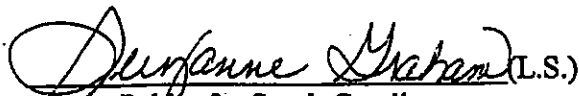
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Appellant's Petition for Rehearing in the above-entitled case have been served upon opposing counsel, Donald J. Zelenka, Assistant Deputy Attorney General, P O Box 11549, Columbia, SC 29211, by depositing in the U.S. Mail, postage prepaid, postage prepaid, this 18th day of July, 2013.



Tara Dawn Shurling
Attorney and Counselor at Law

SWORN TO BEFORE me this 18th day
of July, 2013.



Doreanne Graham (L.S.)
Notary Public for South Carolina
My Commission Expires: 2/28/2023

RECEIVED
JUL 18 2013
SC Court of Appeals

The South Carolina Court of Appeals

The State, Respondent,

v.

Johnnie Gaskins, Appellant.

Appellate Case No. 2010-151386

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas C. Hoff

J.

Paul W. Thomas

J.

John D. Deaton

J.

Columbia, South Carolina

cc:

Donald J. Zelenka
Tara Dawn Shurling
L. Casey Manning

FILED

6 August 2013

The Supreme Court of South Carolina

The State, Respondent,

v.

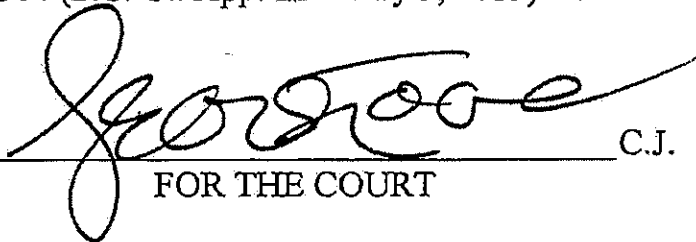
Johnnie Walker Gaskins, Petitioner.

Appellate Case No. 2013-001904

Lower Case Nos. 2008-GS-40-01626, 2008-GS-40-01627, 2008-GS-40-01629, 2008-GS-40-01631, 2008-GS-40-01632, 2008-GS-40-03947.

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' decision in *State v. Gaskins*, Op. No. 2013-UP-304 (S.C. Ct. App. filed July 3, 2013). The petition is denied.


C.J.
FOR THE COURT

Columbia, South Carolina

August 6, 2014.

cc:

The Honorable Jenny Abbott Kitchings

The Honorable Jeanette W. McBride

~~Donald J. Zelenka, Esquire~~

Tara Dawn Shurling, Esquire



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

August 15, 2014

The Honorable Jeanette W. McBride
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: The State v. Gaskins, Johnnie
Lower Court Case No. 2008GS4001631, 2008GS4001626,
2008GS4001629, 2008GS4001632, 2008GS4003947, 2008GS4001627
Appellate Case No. 2010-151386

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen

DEPUTY CLERK

Enclosure

cc: Donald J. Zelenka, Esquire
Tara Dawn Shurling, Esquire

ATTORNEY GENERAL'S OFFICE

RECEIVED

8-15-14

ADMINISTRATIVE INSTRUCTIONS

FILE OPEN END

HAVE COPIES MADE

ROUTE TO

ORDER TRANSCRIPT

PEN RECORDS CLERK RECORDS

OTHER

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

JOHNNY WALKER GASKINS, #313590,
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

APPLICATION FOR
POST-CONVICTION RELIEFRICHLAND COUNTY
FILED
2015 MAR 27 AM 10:37
JENNIFER W. MCBRIDE
C.P. & G.S.**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 Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210
2. Name and location of Court which imposed sentence Richland County Court of General Sessions, 2020 Hampton Street, Columbia, SC 29201
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2008-GS-40-1632, 2008-GS-40-1631, 2008-GS-40-1629, (assault and battery with intent to kill)
 - (b) 2008-GS-40-3948, 2008-GS-40-1626 (murder)
 - (c) 2008-GS-40-1627 (possession of weapon during commission of violent crime)

5. The date upon which sentence was imposed and the terms of the sentence:
- (a) October 19, 2009: 20 years consecutive,
 - (b) 2 Life sentences, concurrent,
 - (c) 5 years
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
 - (b) after a plea of not guilty 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. South Carolina Supreme Court
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. Convictions affirmed.
 - ii. Certiorari denied.
 - iii. _____
 - (c) the date of each such result:
 - i. January 8, 2013
 - ii. August 6, 2014
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. Unpub. Op. No. 2013-UP-304
 - 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:
- (a) Ineffective assistance of trial counsel.
- (b) Ineffective assistance of appellate counsel.
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Failure to properly prepare Applicant prior to trial.
- (b) Failure to call witnesses and utilize evidence.
- (c) Failure to raise all meritorious issues on appeal.
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? No.
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No.
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No.
- (d) any other petitions, motions or applications in this or any other Court? No.
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- 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. _____
- 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) PCR is the proper forum.

- (b) _____
(c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
 - (b) your trial, if any? Yes.
 - (c) your sentencing? Yes.
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes.
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Joseph McCulloch, PO Box 11623, Columbia, SC 29211
 - ii. Tara Shurling, 3614 Landmark Drive, Suite A, Columbia, SC 29204
 - iii. _____
 - (b) the proceedings at which each such attorney represented you:
 - i. Trial & sentencing.
 - ii. Direct appeal.
 - iii. _____
19. State clearly the relief you seek in filing this application:
A new trial.
20. Are you now under sentence from any other court that you have not challenged?
No.

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

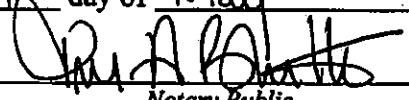
I, Johnny Walker Gaskins, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (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.



Applicant

SWORN or affirmed to and subscribed before me this
21 day of May, 2015.



Notary Public

My Commission Expires: 4/12/2016

STATE OF SOUTH CAROLINA)

County of Richland)

VERIFICATION

I, Johnny Walker Gaskins, 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.

Johnny Walker Gaskins

SWORN to and subscribed before me this 21
day of May, 2015.

[Signature] (L.S.)
Notary Public

My Commission Expires: 4/12/2016

RICHLAND COUNTY
FILED
2015 MAY 27 AM 10:37
JEANNETTE W. MCBRIDE
C.C.P. & G.S.



LAW OFFICE OF TRICIA A. BLANCHETTE

May 26, 2015

Richland County Clerk of Court
P.O. Box 2766
Columbia, SC 29202

Dear Clerk:

I have enclosed an original and one copy of an Application for Post-Conviction Relief. Please note that we are filing this application as a courtesy to Mr. Gaskins. Thank you for your assistance with this matter.

Yours truly,



Tricia A. Blanchette
Attorney at Law

cc: Johnny Gaskins

PO Box 12725 | Columbia SC 29211

p: 803.988.0008 | e: blanchettelaw@gmail.com

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Johnny Gaskins, #313590.

Applicant.

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

2015-CP-40-03169

RETURN

Respondent, making its Return to the Application for Post-Conviction Relief (PCR) filed May 27, 2015, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Applicant was indicted at the July 2009 term of the Court of General Sessions for Richland County for two counts of Murder (2008-GS-40-1626; -3948), three counts of Assault and Battery with Intent to Kill (ABWIK) (2008-GS-40-1629; -1631; -1632), and Use of a Firearm during the Commission of a Violent Crime (2008-GS-40-1627). Applicant was represented by Joseph McCulloch, Esq. Applicant proceeded to trial on October 27, 2009. He was convicted as indicted. The Honorable L. Casey Manning sentenced Applicant to confinement for life for each count of Murder, twenty years for each count of ABWIK, and five years for the Use of a Firearm during the Commission of a Violent Crime. The two life sentences were to be served concurrently, with the remaining sentences to be served consecutively.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Tara Shurling, Esq. Following the submission of briefs by both sides, the South Carolina

Court of Appeals affirmed Applicant's conviction. State v. Gaskins, No. 2013-UP-304 (S.C. Ct. App filed July 3, 2013). Applicant filed a Petition for Rehearing on July 18, 2013. By Order dated August 6, 2013, the Court of Appeals denied the Petition. Applicant then filed a Petition for Writ of Certiorari on January 6, 2014. This, too, was denied on August 6, 2014. The Remittitur was issued on August 15, 2014.

Attached herewith and incorporated herein by reference are the records of the Richland County Clerk of Court regarding the subject conviction(s), the transcript from Applicant's trial hearing, Applicant's records for the Department of Corrections, and Applicant's appellate records. Respondent reserves the right to amend its return upon the receipt of other relevant records.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance Counsel, in that:
 - a. Counsel "fail[ed] to properly prepare Applicant prior to trial",
 - b. Counsel "fail[ed] to call witnesses and utilized evidence", and;
2. Ineffective Assistance of Appellate Counsel, in that;
 - a. Counsel "fail[ed] to raise all meritorious claims on appeal."

III.

Applicant's first claim is an allegation of ineffective assistance of trial counsel. Respondent contends that Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied 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, 334 S.E.2d 813.

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, 80 L.Ed.2d 674. 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, 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. 386 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.

Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The allegation that appellate counsel was ineffective is also without merit. Respondent contends that Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. *Id.* Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. *Id.* Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. *Id.*

Respondent submits that Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that

cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of trial and appellate counsels. As to all other allegations, Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

Applicant must specify any claims he intends to raise at the PCR trial. Any claims not *specifically* laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing. S.C. Code § 17-27-10 et seq; SCRCP 71.1. All claims should be made well in advance of the PCR hearing. If Applicant has an attorney appointed, the attorney, and not the inmate, is the only one authorized to file amendments. SCRCP Rule 11. Filings by inmates will not be considered at the PCR hearing.

VII.

Each and every allegation contained within the application not either expressly admitted, qualified or explained is hereby denied.

(signatures on following page)

VIII.

WHEREFORE, having made its Return, Respondent requests that a hearing be held solely on the claims of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General

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By: 
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9/30, 2015

STATE OF SOUTH CAROLINA
COUNT OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

JOHNNY WALKER GASKINS, #313590

2015-CP-40-003169

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

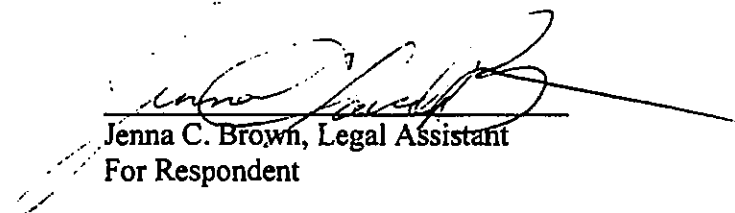
STATE OF SOUTH CAROLINA,

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

David K. Allen
The Allen Law Firm
PO Box 3241
West Columbia, SC 29171

DATED this 30th day of September, 2015


Jenna C. Brown, Legal Assistant
For Respondent

1 State of South Carolina
2 County of Richland

Court of Common Pleas

3
4
5 Johnny Gaskins)
6 Applicant,)
7 v.)
8 State of South Carolina)
9 Respondent.)

Transcript of Record
2015-CP-40-01369

10
11 July 18, 2017
Columbia, South Carolina

12
13 B E F O R E:

14 The Honorable G. Thomas Cooper, Judge.
15

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

17 Aimee Zmroczek, Esquire
Attorney for the Applicant

18 Jessica Kinard, Assistant Attorney General
19 Attorney for the Respondent
20
21
22
23

24 Bethanie K. Creppon
25 Circuit Court Reporter

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P R O C E E D I N G S

* * *

THE COURT: Is the State ready to proceed?

MS. KINARD: Yes, Your Honor. Thank you.

THE COURT: Applicant ready to proceed?

MS. ZMROCZEK: Yes, Your Honor. Thank you.

THE COURT: All right.

You may proceed, Ms. Kinard.

MS. KINARD: Thank you, Your Honor. May it please the Court? This the matter of Johnny Walker Gaskins vs. The State of South Carolina. It's Case No. 2015-CP-40-03169. We're before the Court on an application for postconviction relief that was filed May 27th, 2015.

Mr. Gaskins is presently incarcerated with the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court's orders of commitment. He was indicted at the July 2008 term of the Richland County grand jury for two counts of murder, three counts of assault and battery with intent to kill, and one count of use of a firearm during the commission of a violent crime.

He was represented at trial by Joe McCulloch and Katherine Schillaci. On April 13th, 2015, Mr. Gaskins proceeded to trial before the Honorable

1 L. Casey Manning. He was found guilty on all
2 charges as indicted. Judge Manning sentenced him to
3 incarceration for life for both counts of murder,
4 which were set to run concurrently. He was also
5 sentenced to consecutive 20-year sentences for each
6 count of assault and battery with intent to kill, as
7 well as five years for use of a firearm during the
8 commission of a violent crime.

9 He filed a timely notice of appeal, which was
10 perfected by Tara Dawn Shurling. The South Carolina
11 Court of Appeals affirmed his conviction and
12 sentence. He filed a writ of certiorari to the
13 South Carolina Supreme Court, which the Court
14 subsequently denied. The remittitur was returned
15 August 14th, 2015.

16 The State is present and ready to proceed;
17 however, we do have a motion before the Court. And
18 it's my understanding as well that Mr. Gaskins is
19 present, ready to proceed, represented by Aimee
20 Zmroczek.

21 THE COURT: All right. I have the Applicant's
22 application for postconviction relief.

23 Ms. Zmroczek, are there any amendments to the
24 original application?

25 MS. ZMROCZEK: There are, Your Honor. They

1 aren't amendments so much as clarifications, Your
2 Honor, which I e-mailed to the State. But, Your
3 Honor, I did make a specific nine kind of issue list
4 for the trial attorney and four-issue list for the
5 appellate attorney. And, like I said, it's nothing
6 new; it's just -- it narrowed down because the
7 allegations were somewhat broad.

8 THE COURT: All right.

9 Ms. Kinard, you've received these -- this
10 document from Ms. Zmroczek?

11 MS. KINARD: Yes, sir, Your Honor, I did, about
12 7:00 this morning.

13 THE COURT: So you've reviewed it?

14 MS. KINARD: Yes, sir, I have.

15 THE COURT: Any objection to proceeding in
16 light of this?

17 MS. KINARD: Yes, I do, Your Honor. I filed an
18 amended return and motion for more definite
19 statement on June 21st, which was approximately a
20 month ago at this point. And I did not receive
21 these amendments until this morning.

22 I understand Ms. Zmroczek is explaining some
23 clarification of the more vague issues that were
24 pled originally; however, it is our policy, as an
25 office, to prevent late amendments to object and ask

1 for a continuance under Rule 15.

2 There was adequate notice, both in letters
3 presented with the motion for more definite
4 statement, as well as on the roster itself, stating
5 that amendments would be freely granted, as far as
6 the State's concerned, up until about ten days ago.
7 And, as you're aware, I did not receive these until
8 this morning.

9 THE COURT: Well, I have reviewed them myself.
10 They seem to be somewhat general in nature. And if
11 you're fully familiar with the file, I think, based
12 on that knowledge, I'm going to deny your motion and
13 proceed here today with this hearing.

14 Ms. Zmroczek?

15 MS. ZMROCZEK: Thank you, Your Honor. We would
16 call Joe McCulloch.

17 THE COURT: I would caution you, Mr. Zmroczek,
18 I know you do a lot of these. Not always will the
19 Court be so generous in allowing late amendments.

20 MS. ZMROCZEK: I appreciate the latitude, Your
21 Honor. And I do apologize. I was in trial, and it
22 was completely my fault. So I have been speaking
23 with the trial attorney though, so I think he should
24 probably be aware of some of the issues that we were
25 discussing.

1 THE COURT: Come around, Mr. McCulloch.

2

3 JOSEPH MCCULLOCH

4 being first duly sworn, testified as follows:

5 THE WITNESS: I do.

6 DIRECT EXAMINATION

7 BY MS. ZMROCZEK:

8 Q. Good morning, Mr. McCulloch. Will you tell the
9 Court how long you've been practicing and what's
10 your major focus of practice?

11 A. Forty years. My major focus today is about 50
12 percent criminal and 50 percent civil work.

13 Q. And at the time -- obviously, you're familiar
14 with Mr. Gaskins. How did you come to represent
15 Mr. Gaskins?

16 A. You know, I don't recall whether I was
17 appointed or whether I was retained. It doesn't
18 make a difference to me in my representation of
19 people. But I honestly didn't go back to the file
20 to that point, so I don't recall.

21 Q. Was it fairly soon after this incident took
22 place in October of -- excuse me. In February of
23 2007, do you recall how much --

24 A. No. But I would have guessed months; not many
25 months after the incident.

1 Q. Okay. So just a few months after the incident,
2 you would be involved?

3 A. That would be my guess.

4 Q. And how much discovery did you receive in this
5 case?

6 A. Hundreds of pages.

7 Q. Did you receive some of the discovery late or
8 not at all, as I believe you referenced in the
9 transcript?

10 A. Well, my general experience, as I'm not always
11 involved in criminal cases, is that these things
12 tend -- discovery tends to come initially in lump
13 and then dollops, I guess I would call it, over a
14 period of time, sometimes just before the trial,
15 which lawyers don't like, defense lawyers don't
16 like. But it's just the way this business operates.

17 Q. And --

18 A. And I don't recall specifically what you're
19 referencing. So if you can help me out there --

20 Q. I absolutely will. Do you have a copy of the
21 transcript up there?

22 A. I think I do.

23 Although -- do you have my copy, Ms. Shurling?
24 I believe Ms. Shurling has my copy.

25 MS. ZMROCZEK: She made that fact directly on

1 appeal. So I will -- what I'll do is I'll just
2 leave mine up there for you.

3 THE WITNESS: I think that would be all I have
4 or would have reviewed.

5 MS. ZMROCZEK: And I'll just leave these up
6 here.

7 THE COURT: All right.

8 MS. ZMROCZEK: In case you need to refer to
9 them, Judge. And they're 1, 2, 3, 4, in
10 chronological order.

11 BY MS. ZMROCZEK:

12 Q. Okay. What do you recall the evidence being in
13 this case against Mr. Gaskins?

14 A. In general terms, I recall there were close to
15 half a dozen witnesses who were able to identify
16 him, either because they knew him. I recall at
17 least one witness knew him from high school and
18 identified him as being in the club.

19 Several witnesses identified him, based on
20 photographic line-ups; several witnesses were able
21 to describe his clothing; several of those witnesses
22 watched him be taken into custody by security,
23 escorted out; several witnesses identified him and
24 watched him walk out -- at least one witness watched
25 him walk to his automobile with the gentleman named

1 Williams, I think; and several witnesses identified
2 him as the shooter, based upon the brief
3 opportunity, as they're dodging bullets, from their
4 vantage point in front of the club, stationary,
5 standing as the car pulled up and the shots were
6 fired.

7 So there were a number of witnesses that placed
8 him at the club, a number of witnesses who were able
9 to identify him. And these witnesses, none of whom
10 indicated any basis for a self-defense or a
11 provocation defense.

12 There was also the evidence that a number of
13 shell casings were found in the pavement in
14 approximately the area where the automobile stopped
15 and shots were fired from within the automobile. A
16 similar shell casing in the same caliber was found
17 in his automobile later on in, I guess, a backseat
18 pocket, as I recall.

19 There were -- let's see -- well, that's a bad
20 start for the defense of a case. There were -- I
21 mean, in terms of evidence, there were lots of
22 photographs, the usual repertoire of gory
23 photographs to inflame the jury. And I think that's
24 generally the evidence. I certainly could go back
25 through and be more specific.

1 Q. And what sort of investigation did you do in
2 preparation for defending this case?

3 A. Well, we talked with our client and asked his
4 whereabouts to determine whether or not there was an
5 alibi defense. There was no an alibi defense
6 available.

7 We talked with him about the possibility of a
8 self-defense defense. And we, of course, examined
9 the discovery carefully. We made efforts to contact
10 a number of witnesses, some of whom provide of
11 names -- provided in the discovery, and some
12 provided by Mr. Gaskins.

13 We were able to talk to some of those people,
14 which did not provide us with any valid information
15 or valuable information that could be used in the
16 defense. Several of those people declined to talk
17 with us, wouldn't meet with us. Mr. Williams, I
18 think, was one of those people.

19 Q. What eventually did you -- did you discuss as a
20 defense strategy? What was your strategy for
21 defending the case, once it came to trial?

22 A. Well, we went and met with Mr. Gaskins. And I
23 think your investigator probably copied much of the
24 file. In doing so, he would have found several
25 memos in which we met with Mr. Gaskins and discussed

1 the fact that -- in going through the checklist of
2 potential defenses, which I did with Mr. Gaskins, as
3 I do in all cases of this type, we discussed alibi.
4 There was no evidence, no ability, and no witnesses
5 that were offered up by Mr. Gaskins to place him
6 somewhere other than the scene of the shooting.

7 There was a -- his cell phone was found just
8 inside the club, as I recall, so that's another
9 unfortunate piece of evidence placing him at the
10 scene.

11 He talked about self-defense. There was no
12 real evidence of any basis for self-defense. We
13 attempted to find two people arrested in North
14 Carolina, as I recall, who had a -- were arrested
15 for something that originated from Columbia; there
16 was a gun of possibly a similar caliber to that used
17 in this event. There was no real evidence that
18 allowed us to employ a self-defense there. The
19 third-party defense cases were not helpful in that
20 regard.

21 I talked with him about insanity as a defense,
22 explaining that there's no temporary insanity. If
23 you become so angry that you lose the ability to
24 contain yourself, that's not a defense under South
25 Carolina law. So, ultimately, we talked about the

1 plea offer, which was, I think, 30 years, which was
2 not appetizing and wouldn't be to most people.

3 We concluded that, after discussion, it was
4 going to be very difficult for Mr. Gaskins to
5 testify because his criminal record would come into
6 play. He told us he didn't really remember the
7 incident anyway.

8 Ultimately, my conclusion was that this was a
9 case that had to be tried because there was really
10 no viable alternative, in terms of the plea. And
11 it's what we call the hope-for-the-best defense;
12 that is, that you put the State to the test of
13 proving guilt, and you argue issues during the trial
14 in an attempt to raise some reasonable doubt, though
15 that seemed to be a bleak process, which is what we
16 explained to Mr. Gaskins to begin with.

17 So this was a case that involved witnesses that
18 knew him, witnesses that saw him, witnesses that
19 placed, him not only in the club, being escorted out
20 of the club, in the car, firing the gun, driving
21 away. So it was a case that, from start to finish,
22 we, best scenario, could only hope that witnesses
23 changed their testimony from those given in the
24 statements they gave or in whatever extent to which
25 we were able to talk with them.

1 We could only hope that some would change their
2 stories, not show up at trial; the police could lose
3 the evidence or, otherwise, ham-handedly not be able
4 to produce chains of custody and so forth. An,
5 ultimately, you kind of hope that maybe there's a
6 power outage or an earthquake. But there was no
7 real defense in this case, and Mr. Gaskins was told
8 that.

9 Q. All right. And I want to talk about the
10 statements for a moment. So, by way of background,
11 it was the evening of the Super Bowl; is that what
12 you recall?

13 A. Yes.

14 Q. And so this club was having a Super Bowl party?

15 A. Big party.

16 Q. And when you say big, do you recall
17 approximately how many people?

18 A. I recall that I reviewed some of the transcript
19 and I cross-examined a number of witnesses who were
20 produced by the State, presented by the State, on
21 the question of whether the club was overloaded,
22 whether there were more people in the club than
23 should be allowed. And I -- you know, one estimate
24 was a couple of hundred, so it ranged from a hundred
25 to a couple of hundred. But, clearly, overcrowded,

1 lots of people.

2 Q. Okay. So at least a hundred?

3 A. That's -- well, you know, I don't know who was
4 counting. But I think the consensus of the
5 witnesses, each of them said a hundred or a couple
6 of hundred. So yeah.

7 Q. Okay. And they took -- they, the police -- so
8 this incident, do you recall what time it occurred?

9 A. I don't.

10 Q. Okay.

11 A. After midnight, I think.

12 Q. So early, early in the morning of February 5th?

13 A. Yeah. I don't really recall what time.

14 Q. Okay. And did you -- my investigator came and
15 went through your complete -- you had two boxes of
16 discovery and file information, correct?

17 A. I -- yeah. I don't know how many boxes. But I
18 know we put all that information on a conference
19 room table, and I think your investigator was there
20 yesterday or the day before. But that file has been
21 gone through by several lawyers who are your
22 successors in this PCR. So it's been exhaustively
23 reviewed.

24 Q. Certainly. And, just for the Court's -- there
25 were several attorneys prior to me --

1 A. Right.

2 Q. -- that were maybe going to handle the PCR, but
3 ended up with me.

4 Do you recall -- do you have any note of
5 receiving any 911 calls, the actual calls?

6 A. I don't recall. It wouldn't surprise me if we
7 did. Normally, in these cases, we are provided a
8 911 tape, but I honestly do not recall whether such
9 was provided to us.

10 Q. If you had had that, would that have been the
11 file that you let the investigator look at?

12 A. Should have been.

13 Q. Okay. As well as any CAD reports, the --

14 A. Did you say CAD? The underlying computer?

15 Q. Yes.

16 A. This was 2007. I'm not sure that CAD had been
17 invented at that point. We may have -- at that
18 point in history, the 911 dispatchers may have been
19 using paper logs, but I just don't recall --

20 Q. Okay.

21 A. -- whether we received that and in what form
22 they came.

23 Q. And there were several witnesses that gave
24 statements that -- within a few hours of that
25 incident.

1 A. Yes.

2 Q. Do you recall those?

3 A. Not who. But I do recall, from review of the
4 transcript, that part of the cross-examination of at
5 least one of the witnesses who gave a statement was
6 to the effect that they'd been at this huge
7 function; that they had not slept from the time of
8 the shooting until the time that their statement was
9 taken. So, yeah, I do recall people that gave
10 statements within hours of the incident.

11 Q. And you reviewed those statements in
12 preparation for trial, right?

13 A. Yes.

14 Q. Okay. And did you bring any of those with you
15 or would it help if I just handed them up to you?

16 A. Oh, hand them up.

17 Q. Okay.

18 A. I didn't bring the entire file, because your
19 office has been through it.

20 (Applicant's Exhibit Nos. 1 and 2 marked for
21 identification.)

22 Q. I'm handing you Applicant's 1 and 2 and ask if
23 those look familiar.

24 A. Applicant's Exhibit 1 is a statement of Sydney
25 Williams, which does look familiar to me; second

1 Applicant exhibit is Lamont Davis, both of which are
2 known to me as witnesses. And so, I'm assuming,
3 these are authentic copies of statements.

4 MS. ZMROCZEK: And, Your Honor, at this time,
5 we'd move Applicant's 1 and 2 into evidence.

6 MS. KINARD: The State would just like to note
7 for the record that I've not been provided with
8 these prior to today.

9 THE COURT: Have you seen them?

10 MS. KINARD: I have just glanced at them.
11 She's shown them to me. I have not reviewed their
12 content.

13 THE COURT: You don't have copies?

14 MS. KINARD: No, sir.

15 MS. ZMROCZEK: I can provide her copies, Your
16 Honor. But they've had access to the file. I mean,
17 it's nothing I've generated, it's just his file.

18 THE COURT: All right. Overruled.

19 MS. KINARD: Thank you, Your Honor.

20 BY MS. ZMROCZEK:

21 Q. Those two statements, what date and time do
22 they indicate? Do those indicate they were -- when
23 do they indicate they were taken?

24 A. Applicant 1, which is the statement of
25 Mr. Williams, was taken February 5th the 2007, at

1 230 hours, but it doesn't tell me a.m. or p.m.

2 Q. So this would be shortly after?

3 A. Well, if it is -- it says: Personally appeared
4 before me this 5th day of February, 2007, at 230
5 hours. I don't know whether -- again, my assumption
6 is probably 2:30 a.m., but I can't tell from this
7 document whether that's the case.

8 Then it says: Statement ends at 327 hours.
9 So, you know, whether that's the early morning hours
10 or the afternoon, I can't say. But my assumption
11 would be the early morning hours because
12 Mr. Williams was one of the significant witnesses
13 against Mr. Gaskins in the case.

14 Q. And the reason that -- you've reviewed these
15 motions -- you reviewed this discovery was,
16 obviously, so you could use it cross-examine them
17 when they testified; is that correct?

18 A. Well, ultimately, that's the reason. You
19 originally review these to seek the mosaic of
20 evidence that the State is capable of producing.

21 Q. And in reviewing all of the evidence, did you
22 ultimately file some pretrial motions to keep out
23 some of the evidence?

24 A. Well, I'm sure we did. And I'm sure that the
25 transcript of record will reflect that. But I don't

1 recall what motions, but you can certainly can
2 remind me.

3 Q. And if you'll refer to Notebook 1. And it
4 should be tabbed for you. If you'll turn to page
5 30.

6 MS. ZMROCZEK: And, Your Honor, were you
7 provided with the entire transcript or just the
8 record on appeal?

9 MS. KINARD: You should have both, Your Honor.

10 THE COURT: I've got the entire transcript.

11 MS. ZMROCZEK: Okay. Because I was provided
12 both, but I'll be exclusively relying on the page
13 numbers for the entire transcript.

14 THE COURT: All right.

15 MS. ZMROCZEK: Thank you.

16 THE WITNESS: All right.

17 BY MS. ZMROCZEK:

18 Q. Do you recall requesting a motion to continue?

19 A. I don't recall it, but I see that I did.

20 Q. And why does it indicate that you --

21 A. Well, it indicates that shortly before the
22 trial, meaning several days, a witness was
23 re-interviewed. That would be -- according to the
24 transcript, this witness was Roselyn Renee Sykes. I
25 think that she was the lady who had loaned her

1 vehicle to Mr. Gaskins for his use that evening,
2 which was the vehicle the police alleged was
3 involved, was his platform for the shooting, and
4 that she had been re-interviewed and said that she
5 had received a phone call in which he confessed.

6 And the transcript says we filed a motion to
7 continue the case and allow us to obtain phone
8 records. Solicitor's Office has now indicated to us
9 they will not seek to introduce, I'll call it a
10 confession, through that witness.

11 So Mr. Meadors says: We certainly agree that
12 we will not bring that out in direct and we'll
13 instruct her not to say that. If Mr. McCaw opens
14 the door, then we can't control that.

15 Q. So you knew that Mr. Gaskins -- or that a
16 phone, probably connected to Mr. Gaskins, had been
17 collected from the scene, correct?

18 A. I did know that what, apparently, had been
19 determined to be his cell phone was found at the
20 scene after the shooting.

21 Q. Did you ever get any phone records when you
22 learned about -- did you learn about that early on
23 in the case?

24 A. I'm sure that I learned that when the discovery
25 was produced by the State; probably the original

1 batch of discovery, but I don't recall. I assume
2 that would be early in the process.

3 Q. How do you typically review the physical
4 evidence before a trial? Do you go to the evidence
5 room or what is your process to review the actual
6 physical evidence?

7 A. Well, it depends on what the evidence is. If
8 they're photographs, we receive that in discovery in
9 full and we review them in our office and print
10 those photographs out. And then we review them with
11 our the client.

12 In terms of other types of evidence in this
13 case, the weapon was never found, but shell casings,
14 I think, were obviously found. I don't recall
15 whether we actually went to the evidence room at the
16 Sheriff's Department and looked at the shells, but I
17 do know that we had conversations with an expert
18 about the issue of shell casings and that became not
19 something that we made a big deal out of.

20 Other evidence, you know, I do not think that
21 we looked at the cell phone records because they
22 really weren't an issue. The fact that his phone
23 was there was bad enough. And at the point that we
24 became involved in this case, we wouldn't have been
25 able, by any legal method like subpoena; we would

1 not have been able to replicate the conversations or
2 text messaging, if such is -- in 2007, I don't know
3 whether we invented texts back then.

4 Q. And did you hire anyone to do a manual
5 extraction or a visual extraction of the phone?

6 A. No. I'm going to have to say that we gave the
7 telephone, other than the fact of its discovery on
8 the premises, we -- the contents of the phone were
9 not something we examined.

10 Q. Okay. And then you also filed, focusing on
11 page 32, a motion to suppress evidence. Basically,
12 you were challenging the search warrant. Do you
13 recall what issues you found with the search
14 warrant?

15 A. No, but I can re-educate myself in a moment.

16 Q. And there were three search warrants, I
17 believe; one on Mr. Gaskins' residence on his
18 driver's license; is that correct?

19 A. It appears that there was a search warrant
20 execution on , which, I presume, to be
21 an address associated with Mr. Gaskins, and a
22 subsequent search of an automobile pursuant to the
23 search warrant.

24 Q. And previously there was also a search at his
25 initial residence?

1 A. There was also a search of a Lyndhurst Drive
2 address where Mr. Gaskins lived from time to time
3 with his parents. That's on page 33 of the
4 transcript.

5 Q. And I believe that you and the solicitor had
6 entered into an agreement on what would be allowed
7 to be introduced from the home search warrants, but
8 that you were really challenging the search warrant
9 of the car. Is that an accurate reflection?

10 A. Well, according to page 33, Ms. McDuffy with
11 the Solicitor's Office concedes or says that the
12 State will not introduce any evidence from the
13 parents' house. And that would have come as a
14 result of my conversation with the Solicitor's
15 Office.

16 Q. And if you turn to page 37 where, I believe,
17 you had a pretrial hearing where Investigator
18 Eisenhower testified --

19 A. Okay. I see that Mr. Eisenhower testified.
20 And this was an out-of-the-presence-of-the-jury
21 pretrial -- I guess it's a challenge to that search
22 warrant or a motion in limine perhaps.

23 Q. So you filed a motion to keep out evidence that
24 was found in the vehicle as well as challenged the
25 search of the address, correct?

1 A. That would appear to be the case. The issue
2 was the discovery of a dark-colored jacket which
3 had -- with fur that was discovered in whatever
4 address this was. And that general description or a
5 general description was given of that type of coat,
6 dark with fur, had been given by some witnesses.
7 Other witnesses talked about a jacket with some type
8 of beer related logo, I think. And I'm recalling
9 that from the depositions.

10 But several witnesses, with clarity, said that
11 the shooter, if not then identifying in addition to
12 that, Mr. Gaskins, said that that type of clothing
13 was worn and that was the importance of that. The
14 search about the vehicle was, of course, pertinent
15 because, within the vehicle during this search, the
16 police discovered a shell casing in an odd place.
17 The shell casing, according to the State's expert,
18 matched the shell casings found on the parking lot
19 on the pavement in the area of where the shooting
20 actually occurred.

21 Q. And when you're talking about -- and,
22 obviously, you're familiar challenging search
23 warrants; is that correct?

24 A. I've done it once or twice.

25 Q. And on page 39, I believe that you were

1 questioning Investigator Eisenhower about an
2 anonymous call that he had received about a vehicle.
3 And there was some dispute as to where that vehicle
4 had been seen; whether it had been on Darlington
5 Street or actually . Do you recall
6 that?

7 A. Well, I see that I questioned him about
8 receiving information regarding the car, and
9 Eisenhower testified it was an anonymous call about
10 the vehicle being at 52 River Court [sic].

11 Q. And I believe that he, Eisenhower, said they
12 had initially received consent to search the 52
13 Riverview address; is that correct?

14 A. I don't recall. But --

15 Q. Okay. We'll come back to this.

16 A. That may be the case.

17 Q. Okay.

18 You were challenging the search warrants. One
19 of the things that it appears you were challenging
20 on is because that anonymous call, there was some
21 question as to whether it was on Darlington Street
22 or -- it seemed to appear beginning on page 37 and
23 then continuing to 39 and then all the way to 46
24 that you were concerned about this anonymous call
25 and the validity of that information.

1 A. If you say so and if transcript supports it,
2 because I don't recall that. I can say, in general
3 terms, that I'm always concerned if a search
4 warrant, to any extent, depends upon anonymous
5 information because, of course, you can't test the
6 credibility of anonymous information.

7 But I don't recall not having an opportunity --
8 well, not being advised until now of this issue
9 without reviewing the transcript. My concluding
10 argument to Judge Manning might remind me exactly
11 what I was arguing and why.

12 But I did notice on page 44, I think, if you go
13 back to the previous issue, that there was some type
14 of consent to search at the physical location rather
15 than the automobile.

16 Q. Right. The physical location rather than the
17 vehicle?

18 A. I haven't reviewed all this, so I can't say
19 whether there was a similar consent. I just see
20 that somewhere in the page 42 to 44, I see that
21 there's a colloquy that revealed or reminds me that
22 there was some type of consent about a residence.
23 And I don't know whether it was Lyndhurst or the
24 residence. When i say residence, physical location.

25 Q. And then again on page 46, you were, I believe,

1 again questioning Eisenhower about the tip that had
2 been received and the actual location of the
3 vehicle.

4 A. Okay. I see Eisenhower's testimony on page 44,
5 a 911 tip saying Gaskins and the vehicle were seen
6 52 Riverview Court. They went there and there was a
7 late-model Chevy parked in the driveway which,
8 apparently matched, to some extent, maybe just make,
9 perhaps model, perhaps year. The police had
10 information from Lemont Davis, among others, that it
11 says Gaskins got into a late-model blue-ish Chevy
12 Impala.

13 Q. Okay. And I believe Mr. Davis' statement is
14 Appellant's 2.

15 A. Yes.

16 Q. And if you'll just review that. Do you see
17 where he says a blue Chevy Impala in his statement?

18 A. I see we're both standing in front of the
19 double doors. This is from Applicant Exhibit 2,
20 Lamont Davis' statement: That's when I noticed the
21 guy put out driving a blue Chevy Impala passed the
22 door, moving across from the club; he was leaning
23 back in the seat, looking out of a back window out,
24 and had a gun pointing out the driver's window.
25 Yeah.

1 Q. Okay. So that was based on Mr. Davis'
2 statement. And I believe there was a video of
3 the --

4 A. When you say "that," do you mean the statement
5 or the search warrant?

6 Q. The search warrant.

7 A. Okay. Well, clearly it was based in part
8 because of Davis' reference. My best recollection
9 is that there were others, perhaps Mr. Williams, who
10 also had given information about the type of vehicle
11 that was -- from which the shots were fired. So I
12 can't say what the search warrant was based upon
13 but, clearly, in part based upon Davis.

14 Q. And if you'll turn to page 51.

15 A. All right.

16 Q. I believe you straight-out asked Investigator
17 Eisenhower, you know, what they relied upon to
18 connect this blue Chevy Impala to the crime scene.

19 A. Yep. Now this, I assume, the out of
20 presence --

21 Q. This is still. Yes.

22 A. I'm looking at page 51.

23 Q. And he says that from the video camera, he was
24 able to determine the make and model of the vehicle;
25 is that correct?

1 A. He says they were -- he says -- I asked him:
2 You were able to determine the model of the vehicle
3 from the video? Yes, like vehicle similar to what
4 was being described.

5 Q. And you've seen that video?

6 A. A decade ago, I have.

7 Q. Okay. Is it -- its your recollection of it
8 that it is clear?

9 A. No.

10 Q. Okay.

11 A. Clear -- well, let's clarify what clear means.
12 If you're asking me was it clear from my viewing of
13 the video, if someone could look at that and
14 announce what Mr. Eisenhower said, I would say
15 sketchy at best.

16 Q. And we'll come back to the video in a little
17 bit. And then, I believe, on page 52, he again says
18 that he was able to determine the vehicle from the
19 video as well as the anonymous 911 tip?

20 A. Correct.

21 Q. And were you ever able to find out who this 911
22 tip came from?

23 A. Not to my recollection.

24 Q. Did you ever receive a copy of any notes from
25 the tip or anything?

1 A. No -- well, not to my knowledge.

2 Q. So do you have any way of knowing whether that
3 was a reliable?

4 A. I have no way of knowing whether they even
5 received a 911 tip. But my general recollection of
6 this motion is if the 911 tip was only one piece of
7 information within the possession of the Sheriff's
8 Department when they sought the warrant and received
9 it.

10 Q. And it appears from the arguments that he was
11 making that some of it may have come from witness
12 statements although those witness statements were
13 after the search?

14 A. Well, I don't know when the search was
15 conducted. Based on Exhibits 1 and 2 -- well, I
16 know and recall that a number of witnesses who were
17 bull-pinned after the shooting were spoken with. So
18 I don't know what the search warrant was based upon
19 today.

20 Q. Okay. And they actually made the search
21 warrant a part of the record; is that correct?

22 A. I assume so.

23 Q. Okay. I'll hand you Applicant's Exhibit 3 and
24 ask if you recognize that document?

25 A. Yes.

1 Q. Was that the search warrant that they made?

2 A. I assume Exhibit 3 -- Applicant's Exhibit 3 is
3 the search warrant that results in the, let's see,
4 search of a Chevy Impala.

5 Q. And if you --

6 A. Or, I guess, the documents, the description of
7 the premises to be searched is this 2005 Chevy
8 Impala, tag number specific and VIN specific.

9 MS. ZMROCZEK: And at this time, Your Honor,
10 I'd move Applicant's 3 into evidence.

11 MS. KINARD: Same objection as earlier, Your
12 Honor. I have not seen this before today, but I
13 understand it was part of an underlying file.

14 THE COURT: Overruled.

15 Go ahead.

16 BY MS. ZMROCZEK:

17 Q. And if you'll turn to the front page, when was
18 that search warrant dated?

19 A. February 5.

20 Q. And that was the same date of the incident,
21 correct?

22 A. I think so. And I notice in the transcript at
23 page 52 that -- I believe that I'm -- well, I don't
24 know whether that relates to this search warrant.

25 Something about judge's signature at 10/10. I don't

1 see -- on the 5th, that seems to relate to
2 Lyndhurst's search warrant.

3 Q. Okay.

4 A. So I may be confusing search warrants.

5 Q. So they went to Lyndhurst and then got the
6 anonymous tip to go to the 52 Riverview; do you
7 recall that?

8 A. I do not recall that.

9 Q. Okay.

10 A. Wouldn't argue with that proposition.

11 Q. All right. And if you'll turn to page 53, that
12 may refresh your recollection about kind of the
13 timeline of the search warrants.

14 A. Okay. I've reviewed page 53 and part of 54.

15 Q. Correct.

16 A. It's my interrogation -- and I assume we're
17 still interrogating Mr. Eisenhower on the question
18 or the fact that a tipster stated the vehicle and
19 person were all in the shooting. Now, the officer's
20 notes, which he was reviewing at the time, his notes
21 said: The tipster stated the vehicle and person
22 involved in the shooting was at 52 Riverview Court.
23 So, I mean, that's what the transcript indicates.

24 Q. And I believe at the bottom of page 53 you said
25 that you questioned him about the anonymous caller

1 stating that the blue Impala was actually located at
2 the end of Darlington?

3 A. Correct.

4 Q. Okay.

5 A. No reference to the specific address, is what
6 the testimony was on page 54.

7 Q. And regardless of that, they ended up towing
8 the vehicle that evening; is that correct?

9 A. I don't recall how the vehicle was moved.

10 Q. Okay. And moving forward to page 67 where I
11 believe you had still -- you had first argued the
12 search warrant of the home at and then
13 went on to argue the search warrant of the car.

14 But on page 67, I believe that there's question
15 about -- or what they were stating was that the
16 investigator was trying to corroborate what the
17 tipster said.

18 A. That is what Solicitor McDuffy indicates in her
19 argument to the Court.

20 Q. That was her argument, that they were trying to
21 corroborate what the tipster said. Did that raise a
22 flag for you as far as the purpose of a search
23 warrant? In your experience, is the purpose of a
24 search warrant to corroborate what a tipster said or
25 should it be based on a reliable source?

1 A. Well, typically, in order to -- the importance
2 of corroborating anonymous information or known
3 source information, that corroboration occurs prior
4 to the issuance of the search warrant and the search
5 warrant is based upon the corroboration by this
6 source witness of information that would support the
7 issuance of the search warrant.

8 Q. So you would obviously prefer that they had
9 this information prior to executing the search
10 warrant to test the reliability?

11 A. Yeah. I mean, it's -- there was other
12 information in support of their ability to secure
13 this vehicle. So they had information, to my best
14 recollection, prior to the issuance of any search
15 warrants, that they were looking for a particular
16 kind of vehicle in the possession of Mr. Gaskins.

17 I don't recall when the owner of the vehicle,
18 Renee something or another, it seems to me, gave a
19 statement at some point later confirming that the
20 vehicle was in the possession of Mr. Gaskins the
21 night of the incident. I don't think that was known
22 to the police during this process.

23 Q. Right. That was later.

24 And if you'll turn to page, I believe -- well,
25 71 and 72 is just the language of the search warrant

1 because I believe they called Sergeant Ellis who
2 actually executed the search warrant on the car.

3 And then if you'll look on page 73, what did
4 Sergeant Ellis testify to as to the location of the
5 blue impala?

6 A. All right. Can you ask me the question again?

7 Q. Certainly. Did Sergeant Ellis -- the sergeant
8 who swore out the warrant for the Impala, did he
9 indicate which street the tipster had said the
10 vehicle was located on?

11 A. On page 73, his testimony was the dispatcher
12 received a tip from caller who stated blue Impala
13 and the subject of the shooting last night was
14 parked at the dead-end of Darlington. This
15 information has not yet been released to the media,
16 so investigators believed the tip to be very
17 reliable.

18 I can continue reading. But patrol units
19 arrived in the area located at
20 which is almost at the corner of Riverview Court and
21 Darlington.

22 Q. And then I believe that you continued to
23 question or you began to cross-examine Investigator
24 Ellis, and I'm referring to page 76, about what
25 information he had because he's the one who swore

1 out the warrant for the vehicle. And on page 76, I
2 believe you asked -- all he told you was that there
3 was a dark colored -- all he had known at that time
4 was somebody had said it was a dark colored car; is
5 that correct?

6 A. I don't recall. If you could point me to that
7 part of the transcript. I don't recall.

8 Q. Okay. Did I tell you page 76? Sorry.

9 A. 76?

10 Q. Oh, yeah. Sorry.

11 A. All right. So I am cross-examining someone --
12 the affiant on the search warrant. They had the
13 information that Gaskins was seen in and around and
14 getting in a blue Impala -- or a dark colored
15 Impala, blue impala. Mr. Davis then was described
16 in the affidavit as saying he found this -- that the
17 guy found in the car as being involved in the
18 shooting.

19 And the next page of the affidavit indicates
20 that a tip was received by a caller who stated the
21 blue impala that did the shooting was parked at the
22 end of Darlington, correct?

23 Answer: Correct.

24 So the tip from the caller as you have asserted
25 in your sworn affidavit was nonspecific as to the

1 the address, only the end of Darlington.

2 Q. And the vehicle, you would agree with me, you
3 said that there was a shell casing located in the
4 back pocket, like the passenger's side back seat
5 pocket; is that correct?

6 A. Ultimately discovered, yes.

7 Q. Ultimately discovered because of them securing
8 this -- the vehicle?

9 A. Correct. If you mean as a consequence of the
10 issuance of the search warrant, did they discover
11 the shell casing that matched shell casings in the
12 pavement in and around the area of the shooting,
13 yes.

14 Q. Okay. And then I'll come back to the car in a
15 bit. I want to talk -- you had several, several
16 Neil v. Biggers hearings. Do you recall those?

17 A. Nope.

18 Q. Okay. Do you recall several people picking
19 Mr. Gaskins out of different lineups?

20 A. Yes.

21 Q. And some of those people were just picking him
22 out because they knew him, and some of them were
23 picking him out because they said that he was maybe
24 rude to the bartender?

25 A. The bartender, as I recall, had an encounter

1 with him that resulted in Mr. Gaskins being taken
2 into custody by security. I recall and reviewed
3 last night a Biggers hearing -- I think it was a
4 Biggers hearing -- and my questioning to her and
5 challenge to her about her opportunity to see him,
6 whether his face was obscured by the hoodie that he,
7 apparently, or someone had on that she subsequently
8 identified as Gaskins, she watched him being taken
9 into custody, watched him being escorted out and,
10 shortly thereafter, she heard gunshots.

11 Q. And then there were other -- you had several
12 Neil v. Biggers hearings. And I believe Mr. Davis
13 was able to identify Mr. Gaskins from a lineup?

14 A. I think Mr. Davis, if I recall correctly,
15 identified him not only as the person who he
16 escorted out of the club, but he identified him as
17 the person who was driving the vehicle and fired the
18 shots. And I think Davis is the one who fired back
19 at the car, but never hit anything and, fortunately,
20 didn't hit anybody else, apparently.

21 Q. And Mr. Davis was actually hit in the back; is
22 that correct?

23 A. I think Mr. Davis was wounded. I don't recall
24 the nature of his injury. I think he was shot.

25 Q. Okay. And do you recall the -- when you met

1 Mr. Gaskins, did he have dreads?

2 A. You know, I don't recall. I think that the
3 dreads were an issue. There were some witnesses who
4 testified I think the assailant did or did not. I
5 don't recall how Mr. Gaskins appeared. I recall we
6 got -- or we either got or received maybe a driver's
7 license photograph.

8 That issue of hair was, in my best
9 recollection, an issue, but a fairly nominal issue
10 since the assailant had a hood obscuring, to some
11 extent, his hair. So...

12 Q. And, in fact, the pictures and the search
13 warrants had people with dreads; is that correct?
14 Is that what you recall?

15 A. In the photo lineups?

16 Q. Right. Correct.

17 A. I think that's correct.

18 Q. And it seems that -- and if I'm characterizing
19 the evidence and you recall it differently -- but it
20 seems like a lot of people were able to identify the
21 clothing, especially this fur-lined hooded jacket.

22 A. More than one person identified the hoodie of
23 dark color. Again, my recollection, vague, though
24 it is, is that at least one person talked about a
25 Budweiser jacket or something. But that was never

1 located, to my recollection.

2 And the black hoodie -- I'm calling it black,
3 but a dark colored hoodie was located at one of
4 these residences that were searched.

5 Q. And do you recall any specific physical
6 characteristics of Mr. Gaskins that went into that
7 photo lineup?

8 A. No.

9 Q. Okay. Was that why you were challenging all of
10 these identifications?

11 A. Well, I think I'm challenging lineups because I
12 never know whether a police officer shows a photo
13 lineup and points the guy out. So, in general
14 terms, I think it's necessary to have a Biggers
15 hearing to eliminate the possibility of
16 suggestibility and to challenge the validity of the
17 process.

18 But I don't recall the extent that physical
19 characteristics were an important part of that. But
20 if it is correct that everyone in the photo lineup
21 had dreads and perhaps our theory was that Gaskins
22 did not have dreads at the time of the shooting, the
23 fact that everybody had dreads in the lineup
24 eliminates the four-nones-and-a-duck problem that
25 lawyers refer to in lineups that are suggestive. It

1 would have been quite a different thing if the only
2 person in the lineup had dreads and that was
3 Mr. Gaskins.

4 Q. And do you recall if there was anyone else
5 arrested or removed from the bar that evening in
6 addition to Mr. Gaskins?

7 A. Arrested or removed? My vague recollection is
8 that Mr. Williams, who was essential in the chain of
9 events, was taken into custody; whether he was held,
10 arrested, and detained, whatever, he was known to
11 have approached, I think, Mr. Davis and perhaps the
12 other security guard as they escorted Mr. Gaskins
13 out of the club after the encounter with the
14 bartender. Mr. Williams, I think, is the gentleman
15 who interceded and persuaded them to take the cuffs
16 off and that he would get him home safe.

17 Q. And you recall Christopher Lyles also being
18 ejected from the bar that evening?

19 A. I don't.

20 Q. Okay. And we'll come back to that.

21 I want to talk a few minutes about the video.
22 Tell the Court what you recall -- when did you
23 receive this video? How did you receive it? What
24 kind of information or investigation did you do
25 regarding the video?

1 A. I don't recall when I would have received. We
2 would have received it from the Solicitor's Office
3 as part of discovery. My notes that I did review
4 reflect that we attempted to show it, on one
5 occasion, to Mr. Gaskins, and couldn't get the darn
6 thing to run -- to work.

7 Ultimately, we did watch it with him. We
8 obviously watched it several times. I don't recall
9 whether it was color or black-and-white. I recall
10 it was a video that was derived from an exterior
11 security camera from a business next door, I think,
12 and it was not of great quality.

13 Its importance to the State was that it at
14 least reflected several people exiting the club, and
15 then two people walking to a vehicle which was
16 parked, that vehicle, then the other individual
17 walking back towards the club or all the way into
18 the club, and the vehicle then backed out of the
19 parking space, pulled around to the front of the
20 club.

21 The State contended that there were -- that
22 they could see sparks or gunshots. I challenged
23 that, as I recall. But at least the problem with
24 the video was they were fundamentally corroborated
25 or was corroborated by witness accounts that what

1 happened was, Mr. Gaskins was walked out in
2 handcuffs to the front of the club, Mr. Williams
3 interceded -- he was released from their custody --
4 that he and Williams walked to the vehicle; that
5 Mr. Gaskins got in the vehicle alone, Mr. Williams
6 walked back towards the club, and the car came
7 around and a shooting ensued.

8 So that was the significance of the video. But
9 there were plenty of witnesses that gave the same
10 accounting.

11 Q. And what, if anything, did you do to challenge
12 or to verify the accuracy or the validity of this
13 video?

14 A. We did not retain an expert and did not -- I
15 had really no basis to believe or suspect it was
16 altered. It was of poor quality, as most security
17 cameras in 2007 were. The quality now is HD and
18 much better.

19 I seem to recall that the video was of the type
20 that it was common at that time, which is that the
21 camera -- it's a little bit like a turn of the
22 century film, choppy every three seconds, maybe,
23 it's taking a photograph, and so it's not at the
24 standard smooth operation.

25 That was not surprising to me. That was fairly

1 contemporary and usual. But I did not -- I don't
2 recall today that there was anything about that
3 video that suggested alteration or suggested that it
4 would be necessary to have it examined by an expert
5 for NASA or anywhere to determine if it was fully
6 complete.

7 We showed it to Mr. Gaskins. I, you know,
8 don't specifically recall his comments about it.

9 Q. And you would agree with me that throughout the
10 trial, several of the lay witnesses as well as, I
11 believe, some of the investigators, were pointing
12 out different things that they were viewing that
13 were happening on the video; is that correct?

14 A. I don't recall that. But it's not uncommon for
15 the State to show a video and ask the witness if
16 they can authenticate some event or action that
17 occurs on the video. But I don't recall that.

18 Q. Okay. And if you will -- and I believe this
19 may be in Book No. 3.

20 A. All right.

21 Q. Around page 602. Am I in the right notebook?

22 A. I'm at 602.

23 Q. Okay. Good. So do you recall how the video
24 was collected?

25 A. No, I don't.

1 Q. And beginning at page 602, is that

2 Investigator -- or I guess he's an investigator,

3 Norman Fisher?

4 A. State calls Corporal Fisher, Norman Fisher, Jr.

5 Q. All right. And I believe, actually, in your

6 closing statement, you referred to this video quite

7 often as it -- and if you need to look at it, it's

8 on page -- it's in the fourth notebook, beginning at

9 page 1,012 -- that you had concerns that the whole

10 video wasn't produced or saved.

11 A. I'm at 1,012. Let's see. The only reference I

12 see on 1,012 is -- well, let me go back to 1,011.

13 Q. Oh, is it 1,011?

14 A. Okay. So I'm arguing expansively that we've

15 seen the evidence in this case, fingerprinting,

16 ballistics, gunshot residue testing. They have

17 video cameras, but I have a footnote that it strikes

18 me that if somebody had viewed it, we have the

19 ability to send people to the moon and take pictures

20 from the earth that show rocks and pebbles on the

21 moon, yet we can't enhance a three-minute video

22 enough to be able to make anything out of it.

23 So, yes, I did argue. Whether there was

24 additional argument, I don't know.

25 Q. Okay. And you refer to it as a three-minute

1 video?

2 A. Yeah.

3 Q. And you would agree with me that from the time
4 that Mr. Gaskins was escorted out of the bar to all
5 the different details, that that was longer than
6 three minutes; is that correct? You weren't
7 provided, like, a complete timeframe of video, were
8 you?

9 A. I don't know what that means. I assumed I was
10 provided whatever video came off of the security
11 camera.

12 Q. Okay.

13 A. So the only video that we received, I think it
14 began at about the time people when people emerged,
15 and it ended at about the time the shooting
16 occurred. Now, whether it was exactly three
17 minutes -- I think I recall notes that I saw last
18 night that it was 2 minutes and 27 seconds or
19 something to that effect. But, you know. So I was
20 probably arguing about three minutes.

21 Q. Right.

22 And, obviously, you would have preferred to
23 have -- and I believe you even questioned the
24 investigators about having the entire video for you
25 to pick and choose what scenes were appropriate or

1 what scenes were relevant, but they only provided
2 you a little sliver of it; is that correct?

3 A. I don't recall that.

4 Q. Okay.

5 A. That well could be the case.

6 I think -- I would have to say that on the
7 subject of the video, we did not hire an expert to
8 enhance, because my concern, based on all of the
9 witnesses and all of the other evidence, is
10 enhancing it would not have benefitted Mr. Gaskins.

11 Q. Okay. Now, you would agree that on page -- and
12 this is in the fourth notebook again -- on page
13 1,049, the jury, after they -- when they were
14 deliberating, even actually asked to see the video
15 again.

16 A. Yep. And I don't recall that, but I would
17 assume they did. It was another piece of evidence.

18 Q. Okay.

19 A. And as you say, in the closing argument, I
20 attempted to stink it up a little bit with the jury
21 that the State had failed to enhance and blame all
22 that on the State. My reflection is -- my judgment
23 was that that would not be a positive effort, if it
24 could even be done.

25 Q. Okay. I want to -- I believe we covered the

1 phone. That wasn't admitted.

2 Okay. I want to talk a little bit about kind
3 of the temperature of the trial. Do you remember
4 what the adversarial climate was in the courtroom?

5 A. Well, it's an ugly murder trial. The
6 Solicitor's Office is doing what they do,
7 adversarial. I think that in every criminal trial,
8 a good lawyer takes the measure with the jury and
9 determines the level of aggressiveness that they
10 theatrically demonstrate in terms of, Your Honor,
11 they know better than that, you know, those sorts of
12 things.

13 And so was it adversarial? Probably. Every
14 trial I participate in is adversarial, civil and
15 criminal. But those are degrees that we carefully
16 measure to determine what is going to play best with
17 the specific jury you've got in the box.

18 Q. And in as many trials as you've done, how many
19 times do you recall the judge going into the jury
20 room and talking to them about the adversarial
21 process during middle of the trial?

22 A. Number one, I wasn't able to find if that
23 occurred in this trial, so I'd like to be pointed at
24 that.

25 But how many times has that occurred? I've had

1 judges do a whole manner of things during the trial
2 and during the jury deliberation, speaking to the
3 jury.

4 Q. Right. During the trial?

5 A. Yes. I've had that occur. I'd have to say
6 that it's not my favorite thing.

7 Q. And I'm looking for the page number for you.

8 A. Thanks.

9 Q. I believe on page 572, so that would be in
10 Notebook No. 3 again. Sorry, this transcript was so
11 big, I had to break it down.

12 A. Okay. Let's see.

13 THE COURT: You said 572?

14 MS. ZMROCZEK: Yes, Your Honor.

15 BY MS. ZMROCZEK:

16 Q. That may have been where it is.

17 A. 572. Okay. I can see we finished with one
18 witness, the State calls Roselyn Bradley Sykes, a
19 bench conference out of the hearing of the jury, and
20 then at the beginning of that, Ms. Bradley's
21 testimony. So is there a different page?

22 Q. Yeah, it is. Let's see. On the record on
23 appeal, it was page 244, so it might be earlier than
24 that.

25 A. All right. Let's see. I don't have the record

1 on appeal. Ms. Shurling has my copy of the record
2 on appeal.

3 MS. SHURLING: It's page 528 of the transcript.

4 MS. ZMROCZEK: Is it 528 on the original
5 transcript?

6 MS. SHURLING: Yes.

7 THE WITNESS: All right. There's another piece
8 of this, because this one ends at 498 -- well, wait
9 a minute. Are we looking at the big number or the
10 little number?

11 BY MS. ZMROCZEK:

12 Q. Oh, it is. It's 528. If you'll look in the
13 actual -- I'll take the red one back so we're not
14 confusing you. But if you'll look at page 528 in
15 the regular record.

16 A. Okay. All right.

17 Q. Does that refresh your recollection?

18 A. Not much. But --

19 Q. I believe on page 527, the judge instructs
20 y'all that you're going to have to learn to be nice
21 to each other.

22 A. I see something like that. I'm -- I'm scolded
23 on 526 about: You relax and let me finish. It
24 appears I interrupted the judge. And I don't know
25 who I'm arguing with from the Solicitor's Office,

1 but I'm objecting to the propriety of the solicitor
2 reading parts of the statement to him rather than
3 providing the statement to refresh, as the rules
4 require.

5 Q. And at that point, does the judge indicate that
6 he had to raise his voice and then went into the
7 jury room?

8 A. You know, I dimly recall that the judge raised
9 his voice because he was not happy with the level of
10 argument between the parties -- that would be the
11 solicitor and myself -- and the transcript says:
12 Let's take a little break. Y'all learn to be nice
13 to each other. Let's take a break. It's tedious.
14 I'll give you a chance to refresh yourself. We'll
15 come back and resume.

16 And I see that I was arguing with Mr. Meadors
17 who had been, frankly, aggravated during much of the
18 trial.

19 Q. Do you recall why you didn't preserve any
20 objections or make any objections to the judge maybe
21 having a chilling effect on your ability to argue?

22 A. I did not object, as per the transcript. The
23 judge indicated what he said and it was my judgment
24 at the moment that what he said was not an aggravant
25 to the jury, based upon what he said he said.

1 Now, I suppose I could have objected, but the
2 Court put on record what he said. So I'm not going
3 to be able to do any better than that, had I
4 objected. But the Court says: I walked into the
5 jury room and, in essence, what I said was like it's
6 important matters and people intend to get up on
7 their heels -- high heels a little bit, and
8 sometimes it's my job to kind of bring you down a
9 little bit. But I wasn't angry or mad.

10 Now, my best recollection is that the Court
11 evidently found it important to tell the jury, don't
12 be upset because things got heated in there; it's my
13 job to bring it down.

14 From my standpoint, if that's all he said,
15 that's not prejudicial to Mr. Gaskins' interest and
16 not prejudicial to the State. Now, had he gone in
17 and reported back that he went in and made comments
18 about my argument in a way that telegraphed to the
19 jury or explicitly communicated to the jury
20 negativity to the jury about Mr. Gaskins' defense, I
21 would have objected.

22 But this being rather bland and not prejudicial
23 to either side, to me, there was no point in
24 objecting.

25 Q. Okay. But you'd agree there was no court

1 reporter there, so we're not sure what was said?

2 A. Correct.

3 Q. Okay.

4 A. No court reporter in the jury room.

5 Q. In the jury room.

6 A. That is correct.

7 Q. Okay. Okay.

8 A. But let me say, had I objected, all the -- I
9 would have asked the judge to put on the record what
10 he said and the judge kindly put on the record what
11 he said.

12 Q. Right.

13 If you will, turn to page 924. And I believe
14 that's in the fourth notebook.

15 A. All right.

16 Q. And I promise I'm getting towards the end.

17 A. It's fine.

18 Q. 924?

19 A. Yep.

20 Q. Did you recall receiving a jury note before the
21 trial had ended?

22 A. No. But I'm looking at page 924.

23 Q. And it indicates that a juror had actually sent
24 a note asking about some testimony; is that correct?

25 A. The question from the jury is: What did

1 Mr. Gaskins say to Sydney Williams?

2 In his testimony, as we have stated,
3 Mr. Williams stated Mr. Gaskins said he'd do this
4 and this while they were standing by the car.

5 I would like to know what is this and this.

6 Q. Did you have any concerns that the jury were
7 sending out questions before the trial was even over
8 about the facts of the case?

9 A. Yes. I mean, to the extent that the jury is
10 always told repeatedly during the trial of the case
11 that they are not to discuss the evidence among
12 themselves and they're not to make final judgments.

13 But it is -- I've had jurors in the middle of a
14 trial raise their hand and ask the judge if they
15 could have somebody repeat the question or get a
16 better answer, and the judge, at that point, does,
17 essentially, what this judge did, which is explain
18 to the jury, as per the transcript on page 925, wait
19 until all of the testimony is in, don't worry about
20 questions.

21 Q. Did you feel, at that point, the need -- or did
22 you feel any concern that maybe they were starting
23 to deliberate before having all of information?

24 A. Well, that wasn't the nature of the question.
25 It's not -- in fact, as read in court to us, the

1 lawyers, it is from a juror saying, I would like to
2 know what is this and this, Juror No. 21. It was
3 not from the foreman saying that the jury, as a
4 whole, or more than one person had a question. So I
5 didn't have information before that they were
6 deliberating and I did not make a motion to poll the
7 jury or to, in my view, the instruction as,
8 apparently, was given to the jury by the judge here
9 was sufficient.

10 Q. Okay. And about the -- I want to ask you
11 briefly about the -- I want to ask you briefly about
12 the -- you didn't put up a case; is that correct?

13 A. I did not.

14 Q. What was your reason for not putting up a case?

15 A. Well, in my discussions with Mr. Gaskins, he
16 generally said he didn't recall the incident. I
17 explain to Mr. Gaskins in review of his criminal
18 record and said if you take the witness stand and
19 give a defense, I'm not sure what you'll be able to
20 tell the jury other than I don't remember, and then
21 you'll be questioned about your prior criminal
22 history, which likely would come in to impeach the
23 credibility of his testimony to the jury that he
24 didn't remember what happened. So it seemed to be
25 logical, and Mr. Gaskins agreed at the time, that

1 his testifying would not be of any value.

2 Secondly, Mr. Gaskins was not able to provide
3 the name of any witness who would provide an alibi
4 or any testimony that would support any other
5 conceivable defense including self-defense,
6 voluntary manslaughter, to establish a legal
7 provocation or, you know, any defense, so we had no
8 witnesses.

9 And the final judgment was, if we did not put
10 any evidence up, we secured the valuable right of
11 final -- of fine and final argument.

12 Q. And I want to ask you about -- do you recall --
13 and if you'll turn to page 459.

14 A. Is that going to be in volume 3?

15 Q. Yes.

16 A. 459. Nope. It must be volume 2. All right.

17 Q. There was -- obviously, we talked about the
18 phone previously. And Mr. Porterfield -- this was,
19 I believe, during his testimony. He was the --
20 actually the owner of the bar and the person who
21 found the phone. Is that what you recall?

22 A. Seems to be the case from the transcript.

23 Q. And there was some question whether or not he
24 found it inside the bar or outside the bar; is that
25 correct?

1 A. I guess that is true.

2 Q. And there was also, I believe, as beginning on
3 page 459, maybe Mr. Porterfield starts to testify
4 that somebody called that phone. And he made a
5 statement that this person who had called the phone
6 had said something like Mr. Gaskins or Black, I
7 guess, was his nickname, had shot up the club. And
8 I'll let you read those couple of pages beginning at
9 page 459.

10 A. And your question is specific to the phone
11 ringing and being answered?

12 Q. Right. The phone ringing and what was relayed
13 from that.

14 A. I'm looking. Well, I see, beginning on page
15 464, 465, that -- I see that we begin a series of
16 questions. This was during cross-examination, I
17 suppose: You testified earlier you found the phone.
18 About the time when they got there, the phone
19 started ringing. The phone started ringing. Did
20 you answer it?

21 Yes, sir.

22 All right.

23 Well, maybe I'm not cross. Maybe this is
24 direct.

25 But I then immediately object on the grounds of

1 hearsay, stating to the judge. It's anticipatory,
2 is that correct, the judge says.

3 Yes, Your Honor.

4 All right. Let's cross that river when we get
5 to it. I'll note it, but nothing has happened.

6 Mr. Meadors indicates that he's not offering
7 the substance of that conversation for the truth of
8 the matter asserted. And I was certainly prepared
9 to call that bunk.

10 Mr. Meadors then questioned about: Did you
11 answer it?

12 Yeah. I got two phone -- two phone calls from
13 two ladies.

14 What did the phone calls say?

15 As soon as I answered the phone, I was trying
16 to disguise my voice.

17 Once again, I intervened. I say: May we
18 approach?

19 The Court instructs the witness to stop before
20 he's allowed to say whatever he was going to say.
21 The jury is sent out.

22 Q. And I guess I'm getting to page 466 where you
23 start talking about the -- you make a motion for a
24 mistrial based on what you what you entitled
25 cumulative surprises.

1 A. Yes, and I see that.

2 Q. All right.

3 A. And then I outlined them, apparently.

4 Q. Right. And you outlined those. Is it fair to
5 say that -- and I believe in outlining your argument
6 that the information that you were provided maybe
7 somehow changed once he got on the witness stand.
8 And that was to your surprise?

9 A. Correct.

10 Q. And the judge did not -- you moved for a
11 mistrial, and the judge didn't grant it. But you
12 did ask for a curative instruction. Do you recall
13 if you asked for that to be stricken from the
14 record?

15 A. The testimony?

16 Q. Right.

17 A. I did not, unless it's in the transcript. I
18 don't recall. I don't.

19 Q. All right. And --

20 A. And perhaps did not.

21 THE COURT: Ms. Zmroczek, are we at a point we
22 can take a break?

23 MS. ZMROCZEK: Absolutely.

24 THE COURT: All right. We'll take a ten-minute
25 break and then continue.

1 MS. ZMROCZEK: I'm almost finished too, I
2 promise.

3 THE COURT: That's okay.

4 (Brief recess.)

5 THE COURT: Okay. You may continue.

6 MS. ZMROCZEK: Thank you, Your Honor.

7 THE WITNESS: Ms. Zmroczek, may I -- having had
8 an opportunity over the break, may I amend my most
9 recent previous answer?

10 THE COURT: Yes, sir. Go ahead.

11 THE WITNESS: I think you asked me if I had
12 moved for a mistrial and/or an instruction. And I'm
13 now refreshed that on page 470 and page 472, my
14 motion -- I tell Your Honor my motion is for a
15 mistrial or an instruction and a redaction from the
16 jury's memory relevant to Mr. Porterfield's
17 testimony. And then there's some further colloquy.

18 And then on page 472, Your Honor -- after the
19 judge told me he is not going to grant a mistrial, I
20 say: Your Honor, I would prefer if you would
21 instruct the jury to disregard the statement
22 attributed to -- it says contributed, but it's
23 attributed -- Mr. Adams -- the victim, Mr. Adams,
24 testified to by Mr. Porterfield.

25 All right.

1 And I say then, rather than reiterate it, I
2 would ask for Mr. Porterfield not to be allowed to
3 testify about the conversation, blah, blah, blah.

4 So my request was, knowing that no mistrial
5 would be granted was for the Court to instruct the
6 jury in a delicate way that didn't include
7 completely reiterating the very testimony that I
8 want struck.

9 And that's always a challenge for a judge and a
10 challenge for the defense because a jury
11 instruction, for me, is a way of imprinting the very
12 objectionable testimony. It imprints it in the
13 jury's mind if it is too specific. So it's a
14 challenge. But at least the motion was made.

15 Q. And a curative instruction was given, correct?
16 That's what you recall? A delicate, somewhat?

17 A. In a fashion.

18 Q. I want to talk to you just about two more
19 things. One of them is -- so you had a -- and I
20 think you have your notes up there.

21 You made a list of good evidence, right, of
22 things that you considered positives or things that
23 you could work with in Mr. Gaskins' case; is that
24 correct?

25 A. We did several charts. If you have the

1 specific thing you're talking about, that would be
2 helpful. But, I mean, typically, when I have a
3 case -- almost every case, we do a series of things
4 as a matter of custom and practice. And one of them
5 is to do a witness or evidence list, and the pros
6 and cons and points of attack.

7 And for each and every witness that we
8 anticipate being called, we had a notebook that was
9 sectioned off that had their statements, their
10 multiple statements, and then kind of an evaluation
11 of whether there was any fertile ground for
12 challenge.

13 Q. All right. And do you have your list or would
14 it refresh your recollection to see your list?

15 A. I've done it.

16 Q. Okay.

17 A. We did several of these. This is -- okay.
18 Well, this is -- it is my handwriting. Okay. Let
19 me take a look. Okay.

20 Q. So even without an expert or any kind of video
21 or phone stuff, you still had some things that you
22 could work with, right? And I'll let you just keep
23 that up there so that I don't have to keep asking
24 you.

25 What were some of the things that you

1 considered that you could work with or that would
2 present evidence?

3 A. Apparently, a gunshot residue effort was made
4 by the Sheriff's Department of the blue Impala. And
5 it was negative.

6 Q. There was none, right?

7 A. I mean, my notes say that GSR, gunshot residue
8 exam, was negative.

9 Q. And the implication was or the allegation was
10 is that a gun was shot out of the vehicle of the
11 car, correct?

12 A. Correct.

13 Q. And it was supposedly done by Mr. Gaskins in
14 the jacket that he was wearing that everybody
15 identified, right?

16 A. Correct.

17 Q. And there was no gunshot residue found on
18 either one of those?

19 A. Well, I think it is correct that the jacket was
20 never examined for GSR. The automobile was; it was
21 negative.

22 My experience with gunshot residue is it's
23 almost a worthless testing process and really
24 renders up a kind of ambiguous evidence in some
25 percentage. I don't recall the stats. But,

1 percentage-wise, statistically, known GSR, known
2 events where you -- where it is a fact that a person
3 shot a gun, whether it's in a house or in a car,
4 that there's not going to be any -- there may not be
5 GSR. I don't know if it's 50/50 or 60/40. But it's
6 kind of a worthless test, in my view. It doesn't
7 really necessarily reveal anything and --

8 Q. And you did a lot of research on that too?

9 A. Well, I think we looked at it hard. But even
10 the people I spoke with -- and I don't remember if
11 it's during this trial or since that time. I do
12 work with The Innocence Project. GSR is now in --
13 subjective to a lot of scrutiny and it really is a
14 worthless test.

15 Q. Even more so recently than --

16 A. So I guess what I'm saying is, while the
17 negative the GSR on the vehicle -- and I don't know
18 whether I -- I assume I mentioned that during the
19 trial and challenged to the extent it could be
20 challenged, that did not, in and of itself, lend
21 itself to the securing of an expert, simply because
22 an expert would say, eh, 60/40, we find it, and it
23 would take away our right to closing argument and
24 final argument.

25 So the deliberation about whether to present

1 any witness, expert or otherwise, we had a deficit
2 of opportunities there, and it would have had to be
3 a very, very important piece of information to offer
4 the jury through our witness, knowing we give up
5 final argument.

6 Now, as to the jacket, if that's part of your
7 question, I think it was --

8 Q. Right.

9 A. -- I don't think that the State examined the
10 jacket. I don't believe -- I know that we did not.
11 And we did not for two reasons: The likelihood that
12 it had been washed and, therefore, cleansed of any
13 detectable GSR might have been the case and that
14 certainly would be raised by the prosecution as well
15 as the frailty of the evidence because, in that
16 situation where the defense offers testimony, the
17 State is going to challenge it, using the same stuff
18 that I would use in challenging it.

19 But, also, it was my concern that the jacket
20 would reveal GSR. And in order to test it, we'd
21 have to have the consent of the State and that would
22 then lead to, perhaps, the Court requiring us to
23 reveal the results of our GSR. So all of those
24 judgments were made, so there was not any request
25 from me for GSR testing.

1 Q. All right. And beginning on page 695, were you
2 familiar with Stan Richards and his role in this
3 case? Was he the crime scene analyst?

4 A. I don't recall.

5 Q. It's in number 3.

6 A. What's the page, 6- what?

7 Q. Well, it starts on 617.

8 A. Okay.

9 Q. And does that refresh that he was the crime
10 scene, kind of, expert, I guess?

11 A. State offers Investigator Stan Richards as an
12 expert in crime scene, including blood pattern
13 analysis, shooting reconstruction, and footwear exam
14 and comparison.

15 Q. And did -- and I guess he also -- and
16 skipping -- and then I was skipping ahead to 695.
17 He was also offered as an expert in trajectory
18 analysis?

19 A. Well, he was offered as a crime scene expert
20 and rather all-purpose. I don't see trajectory
21 specifically, but it would not surprise me if --
22 well, I don't see that. If you could point me to
23 that specific issue, I see that -- oh, wait a
24 minute.

25 Q. Okay. And he --

1 A. And I guess that page 694 is -- and on 695, I
2 take it this is my cross-examination.

3 Question: And all this business about
4 trajectory, some of that really is unscientific,
5 isn't it?

6 Trajectory, question, was the answer. So, you
7 know, so there's some discussion about that and
8 reference to the JFK assassination and we've been
9 trying to figure out trajectory for decades.

10 Q. And do you recall when they did a search of the
11 vehicle that they found a tissue with some --
12 something that was indicated a field test positive
13 for blood?

14 A. Yes.

15 Q. And that's not something that they ever tested
16 or that you ever tested, right?

17 A. Correct.

18 Q. And did you go back and later take pictures of
19 the vehicle and find different perhaps --

20 A. Stains?

21 Q. Yeah, stains.

22 A. Yes.

23 Q. Okay. Explain to the -- how did that come
24 about?

25 A. Well, that, if you're -- let me start with the

1 bloody tissue. I'm perhaps anticipating. But the
2 value judgment was made by me that we would not seek
3 testing of a bloody tissue. My notes reflect and
4 the notes you've had access to perhaps indicate that
5 Mr. Gaskins, at some point, told me that the bloody
6 tissue was likely that belonging to Mr. Williams
7 because they had been doing cocaine and Mr. Williams
8 developed a nosebleed.

9 But looking at the fact of the tissue that
10 probably was bloody would only have revealed that
11 there was a bloody tissue in the car. It didn't
12 seem to have any evidentiary value and the State, to
13 my recollection, didn't make a big deal out of it.
14 Had they, we would have approached it differently.

15 The stains in the car, I don't recall today why
16 we went back and photographed. But I do recall the
17 file contains a letter to Mr. Gaskins posttrial
18 explaining why -- well, discussing the issue of the
19 stains. And I read that last night and was reminded
20 that my evaluation of that, photographs we took
21 showed some type of stain that could have been
22 blood, could have been chocolate, could have been
23 coffee it was on the passenger's side of the vehicle
24 and did not really match the crime scene photographs
25 taken right after the shooting.

1 Q. And did that concern you that there was some
2 sort of stain on a seat that wasn't there when they
3 initially photographed the car?

4 A. It did not concern me because the vehicle had
5 been sitting, as I recall, in some impound lot. And
6 cars that sit two years on impound for two years --
7 and it would have been two years after the incident
8 that we discovered these stains, I couldn't conjure
9 up any particular relevance to that.

10 So, no mit didn't concern me much. But, you
11 know, we had our photographs and we looked at the
12 photographs that the State took. My best
13 recollection, though I can't honestly swear to it,
14 was that we had similar areas photographed and two
15 years after the incident, we now have some type of
16 stain. It could have been leaky roof; could have
17 somebody crawling around in the car when they
18 weren't supposed to removing things like the radio.
19 There's no explanation for that. But I couldn't
20 figure out how that would have been helpful in trial
21 and --

22 Q. And not worth losing last argument?

23 A. Pardon?

24 Q. And not worth losing last argument?

25 A. Well, again, yeah. It's just the fact -- even

1 if those stains had been present in the seat at the
2 time of the photographs being taken by the State, I
3 don't know what you'd make of those. You can't date
4 stains. Had it been blood, it would have been
5 unexplained blood. It might be explained -- and I
6 know that somewhere in this case the discussion that
7 maybe there was a passenger in the automobile who
8 was wounded.

9 The problem with that theory was that there was
10 no such person that I could identify or Mr. Gaskins
11 could suggest, and all of the witnesses, or at least
12 the number of witnesses that testified about the
13 vehicle, about Mr. Gaskins getting in, and about the
14 shooting, nobody said there were two people in the
15 car.

16 So a phantom passenger wounded who fired the
17 shots was not really a feasible theory to go forward
18 with.

19 Q. I want to, lastly, move to the jury -- well,
20 almost lastly -- the jury instructions. So this was
21 right -- and I know that you're familiar with some
22 criminal defense attorneys and their discussions
23 about inferences in Belcher, and I know that you
24 participated in that; is that correct? You keep up
25 on the up to date --

1 A. Well, I do the best I can.

2 Q. And, in fact, I'm looking on page 972, which I,
3 believe, is the fourth notebook, you reference
4 Belcher. And Belcher had just come out?

5 A. Well, I applaud myself for actually having read
6 the advances.

7 Q. Shocking to me how many people don't really
8 know that case.

9 But you felt like -- and what you were arguing
10 on page 972 was that there was some evidence that
11 would tend to allow you to invoke Belcher, which
12 meant that the State couldn't argue malice could be
13 strictly inferred from the use of a gun?

14 A. That's what the transcript suggests that I did.

15 Q. And the judge even says: I'll do whatever you
16 want. Is that --

17 A. The judge says: Tell me what you want, and
18 I'll be glad to give it to you.

19 Q. Okay.

20 A. Which, in Judge Manning's instance, doesn't
21 necessarily mean he's going to do exactly what I
22 wanted him to do, but he was going to do something.
23 He was willing to hear me out.

24 Q. And then I believe that this -- so did you have
25 an off the -- did you submit any written proposed

1 jury instructions or how did you come about jury
2 instructions?

3 A. I don't recall in this case specifically.
4 Generally, we do submit to the Court jury
5 instructions that are desirable. I assume that's
6 part of the record. But I don't recall.

7 Q. Is there a reason that you did not ask for a
8 jury charge on multiple charges?

9 A. A jury instructions on multiple charges? Well,
10 I'm not sure what that means, but -- so you'll have
11 to be more specific.

12 Q. Are you familiar that there's a jury charge
13 that says that the indictments allege several
14 different offenses and that they have to be
15 considered separately?

16 A. Oh, yeah. And I don't know whether the judge
17 gave such an instruction or not. That comes right
18 out of the judge's instruction book, I think.

19 Q. Okay.

20 A. So I'm assuming such a similar charge was
21 given. But I would not have submitted that because
22 that's pretty boilerplate in the world --

23 Q. And if it wasn't in this case, you don't know
24 why you wouldn't --

25 A. I don't recall whether it was given or not, and

1 I don't know -- if it was not, I would hope that I
2 would have asked for that just for symmetry
3 purposes. But I don't know.

4 Q. And I believe that --

5 MS. ZMROCZEK: Your Honor, the jury charges
6 actually begin on -- and for your information,
7 Judge, begin on --

8 THE WITNESS: 1031.

9 MS. ZMROCZEK: Yes.

10 BY MS. ZMROCZEK:

11 Q. And I went through this. And I certainly
12 welcome you to as well. But I did not see a jury
13 charge on intent. Would there be a reason that that
14 was not requested?

15 A. None that I would be aware of.

16 Q. Okay. You had made some arguments in
17 cross-examination and in your closing as well about
18 some missing evidence. Like you said they didn't
19 provide the whole video or they didn't -- as you
20 said, some new evidence started popping up during
21 the trial. Were you familiar with spoliation or
22 some sort of quality of evidence or quality of
23 investigation charge at that time?

24 A. Well, I'm familiar with the concept of
25 spoliation, which is typically an intentional

1 destruction of evidence. So, yeah, I'm familiar
2 with the concept.

3 Q. And especially with regards to the video, is
4 there a reason that you wouldn't have asked for it
5 during that --

6 A. Is there a reason I wouldn't have asked for a
7 specific charge?

8 Q. A specific charge regarding --

9 A. Well, yeah, there is a specific reason why I
10 didn't ask for a specific charge, and that is that
11 judges, typically, will decline to give a charge on
12 the facts. So, you know, you can't ask the Court
13 and expect the Court to give an instruction that is
14 specific to the absence of a piece of evidence or
15 the insufficiency of a specific piece of evidence.

16 Q. And throughout -- I know you kind of
17 discussed --

18 A. But, let me say, I would suspect I made those
19 arguments in the closing, but I haven't reviewed it.

20 Q. Okay. And Mr. Lyles, who, I believe, his
21 testimony -- just to refresh -- where is it?

22 Around 485 -- 485-ish or soon after, there's --
23 and maybe a little bit ahead of that, I believe
24 that's the testimony of Christopher Lyles. And that
25 was someone who was also ejected out of the bar that

1 evening?

2 A. I don't recall. But if you can tell me --
3 let's see. 483 and -4 and -5 are the testimony of
4 Mr. Porterfield.

5 Q. Okay. So the witness right after
6 Mr. Porterfield. Sorry.

7 A. Let me get to that.

8 Q. Yeah. 490. I'm sorry.

9 A. Let's see. Cross-exam. Okay.

10 Q. 490.

11 A. Okay. That's Mr. Lyles.

12 All right. Mr. Lyles appears to have been
13 similarly handcuffed and escorted out of the bar
14 because he was intoxicated.

15 Q. And was later stopped for a DUI and had a gun
16 on him. Do you recall that?

17 A. I see in this testimony he says -- he was asked
18 if you had a gun while you were at 360. His answer
19 was no; denied shooting a gun; says he rode with his
20 girlfriend and he got stopped by police; DUI in my
21 mother's car, and he had a gun at that point.

22 Q. So you would agree that there would -- at least
23 could be some evidence, a scintilla of evidence,
24 that there could have been a third-party guilt
25 charge?

1 A. I would agree that there was a guy who was in
2 the club the same night who says he didn't have a
3 gun, but was escorted out under circumstances
4 similar to the circumstances testified to by
5 witnesses about Mr. Gaskins. And I recall at least
6 one witness did testify that someone else was
7 escorted out. But, you know...

8 Q. And then it appears that the judge, although in
9 your discussion of Belcher said he would be open to
10 listening, it appears that he went ahead and charged
11 the malice could be inferred from the use of a gun
12 anyway.

13 A. Correct. That's correct.

14 Q. Is there a reason that you did not preserve
15 that objection?

16 A. I don't know whether it was determined on
17 appeal that it was not preserved. So I'd have to
18 leave that to the record or to Ms. Shurling who, I'm
19 sure, will have an opinion in that regard.

20 But I don't recall whether it was properly
21 preserved. It was certainly raised in a fashion
22 that I would suggest would probably be accepted as
23 preservation, but I don't know.

24 Q. And then on -- the State does their closing on
25 the law and then closing on the facts. And I

1 believe numerous times you had approached -- do you
2 have a habit of not objecting during closings or --
3 obviously, later on, and I'm referring to page 1,051
4 where it looks like you go back to put on the record
5 some of the things that you were objecting to or
6 that you had attempted to object to at the bench
7 during closing.

8 A. Ask me your question again.

9 Q. Yes. So on page 1,051, or near 1,051, is that
10 when you went and put that on the record?

11 A. Yes. I see -- so I renewed previous motions.
12 We need to revisit your three objections.

13 Q. And so those three objections -- you didn't
14 make contemporaneous objections during the closing,
15 but you went up to the bench and had discussions; do
16 you recall that?

17 A. No, I don't. But if the record reflects that I
18 asked to approach, which is perhaps what I did, and
19 then went to bench and made the objections or
20 cautioned the prosecution in some fashion.

21 Stylistically, I do object during closing
22 arguments, if I think that that is strategically
23 appropriate. Some people, in their closing
24 argument, when interrupted by an objection,
25 completely lose it; they can't regain their footing.

1 If my opponent has that problem, I might very well.

2 If I think the objection will have an effect
3 that is helpful to my client, have an effect on the
4 jury, that is, I make it. Sometimes I ask to
5 approach and preserve the objection in that fashion
6 or indicate that I have an objection on some basis.
7 Generally, the judges tell me to go sit down, and we
8 then put the basis of the objection in full on the
9 record, as apparently was done here.

10 Q. And that's what you did in this case?

11 A. I assume.

12 Q. Okay.

13 A. I haven't read it all, but it appears that
14 that's what I did.

15 Q. And if you'll just read through it quickly. It
16 appears that several times during the factual
17 closing, Solicitor Meadors was trying to inflame the
18 passions of the jury, talking about victim's last
19 words. And it appears that you made that argument
20 up at the bench about you felt like -- that some of
21 his comments were trying to inflame the passions of
22 the jury.

23 A. I would be amazed in a murder case if the State
24 didn't try do that --

25 Q. Right.

1 A. -- and try to do it at every turn. I would be
2 surprised if I did not -- given the tenor of the
3 trial, I probably -- prior to the State's closing,
4 probably made a motion in limine and admonished
5 the -- well, not to inflame the jury with improper
6 references and so forth. I can't say I did that. I
7 do that frequently.

8 Here I do see, on page 1,051, I'm complaining
9 and preserving an objection about repetition,
10 references to non-evidentiary value-type comments
11 that were calculated to appeal to the sympathy of
12 the jury. I made the objection, I believe, at
13 sidebar. We discussed that subsequently, believing
14 my objection would be reserved. I did not
15 thereafter object, which is consistent with the
16 rules of procedure.

17 Q. Okay. And, in fact, I think you said in
18 addition he also mischaracterized some of the
19 testimony?

20 A. It would not surprise me.

21 Q. And does that appear to be another objection
22 that you later preserved?

23 A. It appears to be.

24 I also objected to the gangster-style shooting
25 of the firearm; pistol sideways which, of course,

1 nobody ever said that that occurred. And the Court
2 asked me who Keyser Soze is. But I'm not sure how
3 Keyser Soze and The Usual Suspects got involved in
4 the case. But there were several objections about
5 the argument by the Solicitor's Office, yes.

6 Q. Okay. And I believe those are all the
7 questions I have. Thank you.

8 THE COURT: Ms. Kinard?

9 MS. KINARD: Thank you, Your Honor.

10 CROSS-EXAMINATION

11 BY MS. KINARD:

12 Q. Mr. McCulloch, you've been up there quite a
13 while, so I just want to ask a few fundamental
14 questions about your representation of Mr. Gaskins.
15 You stated earlier you don't recall whether your
16 were appointed or retained. But could you describe
17 for me, please, some of the meetings that you had
18 with Mr. Gaskins; how they usually went, how long
19 was spent together, where they were, things like
20 that?

21 A. No, I really can't. I know that my file is
22 replete with memos to file generally dictated by
23 Kathy Schillaci who works as a lawyer in my office.
24 Typically in cases of this severity with clients who
25 are incarcerated and, therefore, don't have the

1 freedom to come to my office, we go with a high
2 degree of frequency to review the evidence to make
3 sure that the client has an opportunity to read
4 statements and have them read to them, because not
5 all of our clients are terribly literate. We did
6 that in this case. We reviewed all of the
7 discovery. We had an abortive attempt, as
8 testified, in the showing of the security --
9 exterior security video. We finally got it to work.

10 Notes reflect that Mr. Gaskins saw that, so we
11 met with him as frequently as I deemed necessary.
12 So can I say was it five times? Ten times? I can't
13 say.

14 Q. And during those meetings, did you discuss with
15 him all of his indictments and the nature of the
16 charges he faced?

17 A. Yes.

18 Q. And he understood all of his constitutional
19 rights?

20 A. Yes.

21 Q. And he understood the plea offer, as you
22 described earlier, of 30 years?

23 A. Based on the memo in the file that reflects
24 that we discussed that very thing with him, he
25 indicated, I think, that he would have pled to an

1 offer of 15 or 10 years.

2 I explained to him, with the circumstances as
3 they were in this case, that that was beyond the
4 realm of possibility; that there would be no such
5 offer by the State. The best was, I think, 30 years
6 concurrent, perhaps, or maybe we were allowed to
7 pick the judge and to pitch the judge that received
8 the plea on concurrent time.

9 But I think my suggestion to him, based on my
10 experience, was, given the nature of these offenses,
11 that he could expect to get at least 30 years, if
12 not life, if he went to trial.

13 Q. I believe you testified that you discussed that
14 thoroughly as well as any possible defenses. And
15 you ended up with the hope-for-the-best defense?

16 A. I think that there is a memo -- or I know
17 there's a memo in which we went methodically through
18 the defenses in the case. And I suspect I did that
19 twice; first, when I first met Mr. Gaskins in jail.
20 Typically, in that getting-to-know-you meeting,
21 before we have the benefit of the State's evidence,
22 we talk about possible defenses, because I want to
23 get on the trail of alibi witnesses or other
24 significant witnesses as soon as possible to prevent
25 their loss of memory.

1 And in this instance, we didn't have such
2 information for Mr. Gaskins. I know we had the
3 conversation about possible defenses, once we had
4 reviewed all of the discovery with him. So, yeah.
5 That's a long yes.

6 Q. And to make sure I understood, I believe you
7 testified before that Mr. Gaskins could not provide
8 you any witnesses on his own behalf?

9 A. I don't recall whether he did. It seems to me
10 that he may have suggested that we talk to somebody
11 and we were never able to find them. But, you know,
12 I can't honestly remember that.

13 Q. Did you develop an opinion regarding the
14 State's ability to prove Mr. Gaskins' guilt beyond a
15 reasonable doubt?

16 A. Well, barring a hurricane or an earthquake, I
17 felt that at the end of this trial, the evidence was
18 rather overwhelming and that the most a lawyer could
19 do was appear and chip away at each individual
20 witness and argue that because of that erosion, if
21 it was effective, if witnesses changed their
22 statements, if witnesses didn't appear, if witnesses
23 deviated from their statement in a way helpful to
24 the defendant, that perhaps the argument from the
25 State failed with its burden of proof would be

1 effective. And there is always the possibility of a
2 juror among the 12 who simply says, for whatever
3 reason, says, I'm not voting for guilty. So you
4 always, as a defense lawyer, are aware that an
5 abhorrent juror may save the day which would result
6 in a mistrial which could sometimes lead to a
7 negotiated resolution. None of that occurred in
8 this case.

9 Q. Yes.

10 Do you believe that Mr. Gaskins understood all
11 of the conversations that you had with him?

12 A. Yes.

13 Q. Was he able to participate in those
14 conversations and ask thoughtful questions regarding
15 trial strategies, procedures, anything like that?

16 A. Yes.

17 Q. Was it ultimately his decision to go to trial?

18 A. Yes.

19 Q. And he was cooperative in the presentation of
20 the case and all of your conversations?

21 A. Yes.

22 Q. Did you discuss the right to appeal with
23 Mr. Gaskins?

24 A. Yes. I believe that we filed a notice of
25 intention to appeal and passed his case then by a

1 letter to the appellate defense -- Office of
2 Indigent Defense, I guess they call it. And we
3 discussed, personally and by letter, his appellate
4 right and that it was preserved. And there is a
5 letter to that effect in the file.

6 Q. And I don't want to go into too much detail on
7 most of the specific issues that Ms. Zmroczek
8 questioned you about; however, I do want to touch
9 briefly on the warrant issues to make sure I
10 understood your testimony.

11 Regarding the Riverview Court house and the
12 car, was it your understanding that there was
13 consent obtained from the owner of both of those to
14 search?

15 A. I do not have a specific recollection in
16 detail. While I was reviewing pages hurriedly in
17 the midst of the examination, I think I saw that
18 there was consent by a resident of the house that,
19 at some point, may have been withdrawn. But I don't
20 know if that's the same situation. So I guess my
21 answer is I don't have a recollection.

22 Q. Thank you.

23 To rephrase that question somewhat, do you
24 recall there being several different bases or
25 indications of probable cause that were presented by

1 the affiants to obtain the warrants?

2 A. Well, I recall, yes, that there were multiple
3 bases which included all of the witnesses, as well
4 as, I think, the video as corroborative evidence of
5 witness statements was utilized. But that's my best
6 recollection, but not specific.

7 Q. I don't believe I have any further questions,
8 unless there is anything you'd like the Court to
9 know about your representation of Mr. Gaskins.

10 A. I'm open to questions from the Court.

11 THE COURT: I don't have any questions.

12 MS. KINARD: Nothing further. Thank you.

13 THE COURT: Redirect?

14 MS. ZMROCZEK: Nothing further, Your Honor.

15 THE COURT: All right.

16 You may come down.

17 THE WITNESS: Your Honor, if I may, I was --
18 part of my testimony related to these handwritten
19 notes. I don't think they were made part of the
20 record. I didn't know whether you intended to do
21 that or not.

22 No?

23 MS. ZMROCZEK: Those were just for your
24 recollection.

25 THE WITNESS: Okay. I.

1 I'll give all of this back to you. Thank you,
2 Your Honor.

3 THE COURT: May this witness be excused?

4 MS. ZMROCZEK: No objection, Your Honor.

5 MS. KINARD: No objection.

6 THE COURT: You're excused.

7 Next witness.

8 MS. ZMROCZEK: Your Honor, the next witness we
9 have would be Christopher Watkins. And I spoke to
10 Ms. Kinard at the break about this. He is -- so
11 there were several attorneys that were before me,
12 either appointed or attempted to be retained. So
13 Mr. Watkins was actually hired by one of the
14 previous attorneys and has done work on the video
15 aspect of it.

16 I provided that to Ms. Kinard. Obviously, she
17 hasn't had a chance to go over it. What I was
18 suggesting to her -- obviously, it's up to the
19 Court -- would -- in order to be fair to the State,
20 because I still think I have to present what he
21 found with regards to the video, but maybe that I
22 could leave the record open so that she could review
23 his information.

24 We could come back one day this week when she's
25 had an opportunity to do that which, I think, would

1 be more fair to the State. So I guess that's kind
2 of where we are right now.

3 THE COURT: What's his name?

4 MS. ZMROCZEK: His name is Christopher Watkins.

5 THE COURT: He's an attorney?

6 MS. ZMROCZEK: No. He's an investigator, Your
7 Honor.

8 THE COURT: Oh. And he's reviewed the
9 videotape?

10 MS. ZMROCZEK: Yes, sir.

11 THE COURT: Was he involved in the trial?

12 MS. ZMROCZEK: He was not.

13 THE COURT: This is new evidence, independent
14 evidence?

15 MS. ZMROCZEK: Correct. But it -- new just an
16 expert opinion on evidence that was already in. So
17 he didn't generate the new evidence, he just
18 examined the evidence --

19 THE COURT: All right.

20 MS. ZMROCZEK: -- from an expert position.

21 THE COURT: What's the State's position?

22 MS. KINARD: Your Honor, the State would
23 object. I believe this is, as I stated before, a
24 late amendment; it's late information. This is new
25 testimony that has not been presented to the State

1 before a couple hours ago.

2 Regarding the possibility of reviewing it and
3 coming back later this week, I will defer to the
4 Court's judgment on that; however, I believe that --
5 you know, I would be missing the opportunity to
6 consult an expert or individuals of my own regarding
7 this information.

8 And I believe this a late amendment,
9 essentially, and brand new information that would
10 take me longer than a few days while I'm in court in
11 front of Your Honor to review and analyze as
12 necessary.

13 THE COURT: I still don't understand what he --
14 assuming he reviewed the videotape, what --

15 MS. ZMROCZEK: What -- oh, sorry.

16 THE COURT: What is the substance of what he --

17 MS. ZMROCZEK: The substance of what he --

18 THE COURT: What do you propose to offer
19 through this witness?

20 MS. ZMROCZEK: What I propose to offer, Your
21 Honor, is that he -- what he will testify to is that
22 the video was altered; that the video was not
23 presented to the defense in the way that it was
24 received. There is only one camera that can show
25 kind of the scene, and it's really a awful view.

1 But then they altered it and zoomed it in and
2 colored it and changed -- and --

3 THE COURT: When it was offered for the jury?

4 MS. ZMROCZEK: Correct. And Mr. -- and I had
5 asked Mr. McCulloch about this, actually previously
6 and today, about why you didn't have anybody, you
7 know, look at it. Obviously, when you read the
8 transcript, you'll see that he argued it -- not only
9 with --

10 THE COURT: Argued what?

11 MS. ZMROCZEK: He argued that the video wasn't
12 complete and that it was difficult to see. What he
13 didn't realize, and what I still don't think he
14 realizes, Your Honor, is that it was altered. It
15 was not original evidence.

16 THE COURT: Altered in what manner? To show
17 what? And this is an exterior camera?

18 MS. ZMROCZEK: And now we're getting way out of
19 my --

20 THE COURT: All right. Well, I mean, does it
21 show people that weren't there or was it showing
22 something took place at a different time?

23 MS. ZMROCZEK: There's a timing issue. There's
24 -- as he testified, there's three minutes of
25 video --

1 THE COURT: Was there no explanation to the
2 jury when the State offered it?

3 MS. ZMROCZEK: Right. No explanation as to
4 why -- in fact, he did question -- he did question
5 the investigator who procured the tape: Well, what
6 happened to the rest of it? And he said: Well, we
7 just didn't save that.

8 THE COURT: Well, did the testifying officer
9 indicate that the State had altered the video or in
10 somehow -- you know, it's not uncommon for -- you
11 got six video cameras in the convenience store -- to
12 splice them together to try to show a continuous
13 course of action. That's a fairly normal procedure.

14 Is that the kind of thing that you're talking
15 about? I mean, the fact that it's altered, period,
16 doesn't tell me a whole lot.

17 MS. ZMROCZEK: Well, what it does -- how it's
18 altered, Your Honor -- and he can do a much better
19 explanation --

20 THE COURT: Is it going to change the evidence?

21 MS. ZMROCZEK: It absolutely changes it. The
22 video stops and starts. So it's -- it makes things
23 look like people are going places when they're not
24 going places when there's increments of time that
25 are just miss ing.

1 Also, the original video is in black-and-white,
2 but then they color it. And the reason that this is
3 so important is, as you've heard, a lot of the
4 search warrant testimony was, oh, well, you know,
5 they relied on the video to identify this blue car.

6 Your Honor, first of all, the video is
7 black-and-white, until they altered it to add color.
8 And you still cannot see what kind of color it is.
9 But, not only that; they manipulated the actual view
10 of what the camera was, so they cut out pieces and
11 maybe tried to zoom in and tried to focus on things.

12 But what it shows, Your Honor, is that it's not
13 an accurate reflection of what was received or
14 recorded. And this video becomes so important
15 because it's so hard to see, and people are
16 testifying they can point out, you know, different
17 movements, which tends to corroborate their story.
18 But that's not what the video shows at all. And
19 that's what an expert --

20 THE COURT: When did you learn this?

21 MS. ZMROCZEK: I got the final report last
22 night. And that's why I, you know, turned it over
23 as soon as it was complete. But, you know,
24 obviously this is --

25 THE COURT: Here's what we'll do: How long is

1 it?

2 MS. ZMROCZEK: How long would his testimony be?

3 THE COURT: How long is the videotape?

4 MS. ZMROCZEK: Oh, the video is, like, three
5 minutes. But, I mean, what he actually -- what he's
6 done, Your Honor, is just taken the video and
7 shown -- where he's highlighted where the
8 inconsistencies and the edits and the changes are.
9 So I think it's a total of maybe five minutes.

10 It's not a lot of -- but he also has maps, Your
11 Honor, of the trajectory of what the camera should
12 show and pictures and things like that, that we
13 provided to them, but, obviously, late, and I
14 understand that.

15 THE COURT: All right. Well, I'm going to
16 sustain the State's objection at this time. At the
17 conclusion of this presentation and your other
18 witnesses, I'll review it in-camera and see if I can
19 understand what you're trying to say. And I'll view
20 it with the attorneys, let's put it that way.

21 And if Ms. Kinard feels that she needs to
22 continue her objection based on lateness, to begin
23 with, and -- is that the only objection? I'm not
24 even sure we can qualify this person as an expert,
25 you know. So it looks like it's subject to maybe

1 one or more objections. But we'll discuss it.

2 Do you have any way to play it?

3 MS. ZMROCZEK: Do I have what?

4 THE COURT: Any way to play it.

5 MS. ZMROCZEK: I have a computer and a -- I
6 have ability to play it, yes.

7 THE COURT: All right. Well, call your next
8 witness. Not this -- not Mr. --

9 MS. ZMROCZEK: Not Mr. Watkins, certainly.

10 THE COURT: Just keep him on hold.

11 MS. ZMROCZEK: Your Honor, we'd call Ms. Tara
12 Dawn Shurling.

13 TARA DAWN SHURLING

14 being first duly sworn, testified as follows:

15 THE WITNESS: I do.

16 THE CLERK: Thank you. You may have a seat.

17 DIRECT EXAMINATION

18 BY ZMROCZEK:

19 Q. Ms. Shurling, please explain to the Court how
20 long you've been an attorney. What kind of work do
21 you do?

22 A. I've been an attorney for 38 years. I was
23 appellate defense for 15 and a half years before
24 going into private practice in June of '94.

25 At appellate defense, my practice was divided

1 roughly equally between direct appeals and appeals
2 from postconviction relief denials. When I went
3 into private practice, I ended up doing a lot of the
4 same but, also, I found that in private practice,
5 when I won a case, people have a tendency to want to
6 stick with the person who won for them, so I ended
7 up diversifying and doing a little bit of trial
8 work. But -- and I've done a little bit of civil,
9 not much. I'd say, to this day, at least 70 percent
10 of my practice is criminal appellate. Probably over
11 the remaining 30 percent, no more than 10 percent of
12 that is civil and the rest would be general sessions
13 work.

14 Q. And how did you get involved in this case?

15 A. I was retained.

16 Q. Okay. And what were you -- what was the
17 nature -- what were you retained for?

18 A. Initially, for the -- well, for the direct
19 appeal, which, of course, initially, I've been in
20 the South Carolina Court of Appeals, and because I
21 thought there was a basis to do so, I filed a
22 petition for rehearing in the court of appeals and,
23 following that, filed a petition for writ of
24 certiorari to the court of appeals in the supreme
25 court of South Carolina.

1 Q. And how -- when you file an appeal for trial,
2 what's the process that you go through? How do ou
3 identify your issues?

4 A. I like, generally, to read the transcript
5 through once, like one would read a novel; just to
6 read it. And then I go back through it again and I
7 read it, taking notes, and flagging places where
8 there were objections that were made, that were
9 actually presented thoroughly; proper arguments were
10 made, and rulings obtained.

11 You'd be surprised how many times a lawyer will
12 argue any issue, make an objection, argue grounds,
13 and the judge will say, I'm going to think about
14 that one; when this comes up during the trial,
15 remind me and I'll make a ruling at that time. And
16 there was never a ruling had on the record.

17 But I make -- I flag those items and then go
18 back and, generally, on a third run, do notes
19 concerning what occurred during the trial in terms
20 of pretrial motions and so forth and a scant outline
21 with the hotspots from all the witness' testimony
22 and paying special attention, of course, to
23 objections that were made.

24 I also make note of any jury instructions that
25 were requested and denied on the record, if there's

1 an actual ruling on the record; I make notes of
2 objections, of course, and to opening and closing
3 arguments, objections to jury instructions that were
4 given. And that's about it, because in South
5 Carolina, at least since about ten years into my
6 practice anyway, South Carolina has adhered strictly
7 to the contemporaneous objection rule, even in
8 capital cases.

9 So if it isn't objected to, properly argued and
10 ruled upon, it -- you certainly can argue it on
11 appeal, but can't win on it, unless it's properly
12 preserved.

13 Q. And then do you see -- picking up on that, did
14 you -- were there issues that were not
15 contemporaneously objected to in this case?

16 A. The only one -- and there may have been others.
17 I should tell you that I attempted to pull my
18 original file in this case. And it's very, very
19 unusual for my staff -- they're very good and very
20 organized -- for them not to be able to go to my
21 closed storage and pull a file. But they couldn't
22 put their hands on this one.

23 A good bit of my work is on the -- was on the
24 computer. And I was able to pull up some of my
25 notes that were typed and some other material,

1 thankfully. But I wasn't able to find my actual
2 file. And I'm positive it has not been lost; it's
3 probably been put back in the -- this case has been
4 continued quite a few times. And my fear is that
5 everyone appointed was told by my staff -- it's
6 routine policy in my office, when I'm subpoenaed for
7 a case, that they get the old file out, but they
8 also put it back. And so I'm afraid that it's been
9 misfiled in the wrong closed file box. I wasn't
10 able to locate it.

11 Q. Okay. But you were able to find your brief.
12 You reviewed your brief on the -- you briefed three
13 issues in this case; is that correct?

14 A. Yes. And let me back up; I do have my train of
15 thought back. You asked me if I observed issues that
16 had not been preserved. There may very well have
17 been others, even multiple others, that just aren't
18 coming to mind at the moment.

19 The one issue on -- what was item 3 in my brief
20 dealt with the issue concerning the comments made by
21 defense counsel by the trial judge; happens to be a
22 trial judge that all of us think -- at least I'll
23 speak for myself, think very highly of. But that
24 was a concern to me.

25 And when I did the research, I saw that there

1 was case law that would make this one of the very,
2 very few issues that you can raise without a formal
3 objection on the record because of t the nature of
4 the issue. The same was not true with regard to the
5 question of whether or not it was improper for the
6 Judge to go in the jury room.

7 There is a case, and it's cited in my brief,
8 that says there have been comments made to defense
9 counsel that, both in substance and tone are
10 problematic, that the Court will, depending on
11 circumstances, review that, regardless of the
12 absence of a contemporaneous objection.

13 With regard to the Judge actually putting on
14 the record that he had stepped into the jury room, I
15 saw nothing that would allow me to brief that
16 without contemporaneous objection.

17 Now, I referenced that as part and parcel of
18 the argument on item 3 and tried to piggyback it, if
19 you will. But that was something that I would have
20 wished that trial counsel had politely and
21 respectfully put on the record an objection to the
22 Judge having done -- however well intentioned, that
23 respectfully object to that occurring. And that was
24 not done. So that's what kept me from briefing that
25 as a separate issue.

1 Q. And, in fact, the Court noted in its opinion
2 that it was not preserved; is that correct?

3 A. It did.

4 Q. And then that -- you said you go through jury
5 charges. Did you go through the jury charges in
6 this -- did you notice that there were deficiencies
7 in the jury charge in this case?

8 A. Let me back up for a -- may I back up just a
9 second?

10 Q. Absolutely.

11 A. The Court of Appeals did not find that the
12 issue with regard to the comments made to defense
13 counsel was procedurally barred. They noted that
14 the respondent had argued that it was not adequately
15 preserved, then they proceeded to decide the case
16 based on the merits while, at the same time,
17 shifting gears and going back and making note of the
18 fact that not only did defense counsel not object,
19 but that he had joked around with the Judge about it
20 being theater in a manner that suggested that
21 although they ruled on the merits, they were at
22 least paying attention to what had gone on with
23 regard to how the lawyer responded to it.

24 So it would not be accurate to say that the
25 Court kicked the issue out for lack of issue

1 preservation, because they did address the merits.

2 Q. Okay. And now moving on to the jury charges.

3 A. Yes.

4 Q. Did you notice that there were jury -- did you
5 notice that there were jury charges that were not
6 requested?

7 A. I'm sure -- I have no current recollection of
8 that. I can tell you that it is my habit to dissect
9 jury instructions very, very carefully. There are
10 several places in a jury trial that are ripe with
11 opportunity when it comes to a direct appeal.

12 What I consider to be an interesting and almost
13 disproportionate number of reversals on direct
14 appeal come from improper statements made on closing
15 arguments and improper jury instructions. So those
16 are two areas that I pay a lot of attention to.

17 So I know that I would have gone through it
18 very, very carefully. And sometimes, you know,
19 it'll -- I will say, gosh, on the facts of this
20 case, I think I would have also asked for something
21 else. And there aren't any that specifically pop
22 into my mind, except when you were having the
23 discussion earlier, I did note that trial counsel
24 did not renew his objection to the Belcher issue
25 when given the opportunity after the -- as is

1 statutorily required.

2 After the instructions were given and counsel
3 was given the opportunity to make an objection, I do
4 not believe he renewed his objection to the Belcher
5 charge.

6 Q. And did you have an opportunity to -- did you
7 see an intent charge given?

8 A. I'm sorry. What?

9 Q. Did you see an intent charge that was given?

10 A. Again, not that I recall. Of course, you know,
11 there is always an interesting quandary in South
12 Carolina law because intent to kill is not an
13 element of murder.

14 Q. Right.

15 A. So the failure to address intent would not
16 leave the jury without appropriate instruction with
17 regard to an element of murder because, ironically,
18 it's not an element in South Carolina.

19 But as to having an independent recollection of
20 noticing that, it's something I feel certain I would
21 have preserved, but I don't have an independent
22 memory of.

23 Q. And he was also charged with assault and
24 battery with intent to kill.

25 A. Correct.

1 Q. Okay. So you'd agree that there was at least
2 an intent for the requirement of those?

3 A. Well, actually, assault and battery with intent
4 to kill, ironically, doesn't require intent to kill
5 either, which I've always found particularly ironic.

6 Q. And when reading through, did you -- were you
7 familiar with the Belcher charge at that time? I
8 know it was relatively -- a relatively new decision.

9 A. I would like to tell you I was. It was very,
10 very new at the time.

11 Are you asking if I was familiar with it at the
12 time that this case was tried or at the time I was
13 reviewing it?

14 Q. By the time you were reviewing it.

15 A. Oh, by the time I was involved in the case, I
16 would have been intimately familiar with Belcher.

17 Q. Okay.

18 A. Everybody and their brother was calling me
19 about that issue. So...

20 Q. And I want to talk about -- you obviously read
21 through the pretrial motions, and you saw that there
22 was an issue that the trial attorney was attempting
23 to raise regarding the search warrant --

24 A. Yes.

25 Q. -- and the vehicle. Is there a reason you did

1 not brief or pursue that?

2 A. Yes.

3 Q. And what is that?

4 A. You want the long explanation? There were
5 several problems: One is that when law enforcement
6 evidently got the tip, went to this address,
7 identified themselves, and were, at least initially,
8 according to the testimony, given consent to search
9 the premises by someone who was there at the time.

10 It was subsequently found out that the girl
11 that was there was the niece of the actual
12 homeowner. But when they got there, the young
13 woman, whose last name was Peak or something like
14 that, I recall, gave them consent to search the
15 premises.

16 The officer's testimony indicated that when
17 they walked in and were given consent to search,
18 when they looked around, one of the first things
19 they saw was this clothing out in plain view. And,
20 based on the clothing and it generally matching the
21 description of eyewitnesses at the scene, they then
22 asked about whether anyone was in the attic, because
23 they had noticed some attic stairs that were pulled
24 down.

25 And when they asked about that, the young woman

1 who had given consent to search, revoked it. Now,
2 that, in and of itself, might have created a good
3 Fourth Amendment issue. But, during the same time
4 period, they had take the extra measure of calling
5 the actual owner of the house. Now, she's referred
6 to in the affidavit and the search warrant as
7 Mrs. Bradley. But if you look to her testimony in
8 the trial transcript, it's Bradley Sykes. And she
9 was, in fact, referenced by the niece, according to
10 the language of the search warrant on the car, as
11 the girlfriend of my client.

12 So getting back to the chronology, they go in;
13 they get consent from this young lady, decide, as an
14 extra precautionary matter, they're going to call
15 the homeowner. The homeowner gives consent to
16 search. While the niece eventually, after being
17 asked about whether somebody was in the attic,
18 withdrew her consent. There was no evidence that
19 the homeowner had. And so they had standing
20 permission from the homeowner at the time to search
21 the premises.

22 However, in an extra, and I must say sort of
23 unusually exercise of caution, they didn't search
24 the car in the driveway. Now, as you know, I could
25 start now and spend a month researching cases that

1 argue whether or not a car is part and parcel of the
2 search warrant for a piece of property.

3 But they took -- again, being extremely
4 cautious -- I guess it was murder case and they were
5 trying to be careful -- they impounded the vehicle.
6 But they did not search it until they went back on
7 the 6th and got a search warrant for the vehicle.

8 Now, that search warrant, if you look at it,
9 refers to them having information that the suspect
10 drove a blue Impala. And it also references -- hold
11 on; a moment's indulgence.

12 It references the fact that when they had
13 initially searched the residence, that the niece and
14 Rena, Lacy Peek -- what do you know, I remembered
15 her name -- had indicated that she knew her aunt's
16 boyfriend to go by the name Black. And they, of
17 course, have witnesses that referenced the
18 individual being involved in this shooting as being
19 named Black.

20 Q. And --

21 A. So they had -- what they had when they went and
22 originally searched, what they went back and got a
23 search warrant for the residence after consent was
24 revoked, and then what they had when they got the
25 search warrant for the car are three separate lines

1 of inquiry.

2 They had a tipster; it's true. But when they
3 went to the location and ascertained that a car
4 matching the description was there, they
5 corroborated a crucial piece of that tip. And I've
6 heard much discussion about them not having concrete
7 information about it being a blue Impala. If you
8 look, unfortunately for my client, I didn't -- you
9 know, wish this was not so -- but Sidney Patrel
10 Williams, who was the gentlemen who was at least
11 claiming to have been my client's friend, gave a
12 statement at 2:30 in the morning on February 5th,
13 which is the wee hours of the morning immediately
14 after this shooting.

15 And in his statement, which was marked at trial
16 as Court's Exhibit 8, he said that Johnny was -- I'm
17 looking for the line; I apologize; one moment -- he
18 drives a blue Impala. So as of 2:30 in the morning
19 before they got the search warrant for the vehicle,
20 they did have a witness statement from a known
21 friend of the suspect that said he was driving a
22 blue impala.

23 Q. And you would agree that the search warrant
24 also references that they were able to corroborate
25 that with the video as well?

1 A. I do recall that.

2 Q. And have you seen the video?

3 A. I don't remember.

4 Q. Okay.

5 A. I honestly don't. I'm sorry.

6 Q. That's okay.

7 A. There wasn't an objection preserved with
8 reference to the video, so I may not have gone and
9 gotten it. But I'm also a curious cat, so I may
10 have, but I don't remember.

11 Q. Okay. And there were several different Biggers
12 hearings; is that --

13 A. May I back up for just a moment?

14 Q. Absolutely.

15 A. You were asking me the basis for my decision
16 about briefing the search warrant issue. The other
17 problem that I find somewhat amazing no one raised
18 was the question of whether or not my client had
19 standing to object under the Fourth Amendment to
20 begin with. And, unfortunately, there's an old case
21 out there that's mine, the State versus Charlton
22 Davis.

23 Essentially, the rule is when a defense lawyer
24 objects and articulates his grounds, he better get
25 it right. If he objects, he better say exactly the

1 right ground for the objections, if you hope to
2 prevail in a subsequent appeal.

3 The lesson learned from the Charlton Davis case
4 is, if the defense objects to something and the
5 State retorts with a reason why they think that
6 objection is not meritorious and they give the wrong
7 reason, they will still win if the Court finds that
8 there was an additional sustaining basis for
9 overruling the objection that was not articulated by
10 the defense attorney.

11 What the evidence in this case showed was that
12 the -- A, they had consent to search the property
13 from the girlfriend; that by the time they went back
14 on the 6th to get a separate warrant for the
15 vehicle, they knew that similar clothing had been
16 found. I doubt any testing had been done by then,
17 and it sounds like it never was.

18 But the clothing had been discovered and they
19 had ascertained from the niece that the owner of the
20 home was the girlfriend of a gentlemen named Black,
21 can which was a nickname used by witnesses in this
22 case. They also knew at that point that the car was
23 not in the name of my client.

24 Now, the testimony at trial was that the
25 girlfriend -- she testified, by the way -- that she

1 had left and gone to the Super Bowl -- pardon me.
2 I'm taking antihistamines -- that she had left the
3 car with her boyfriend, my client; however, if he'd
4 been caught in the car and she had supported him
5 with argument that she had loaned him the vehicle
6 and was lawfully in possession of it as someone who
7 had been loaned the vehicle. I think you still
8 could have propped up that Fourth Amendment
9 argument.

10 But by the car having been driven back and
11 placed back at her had home, then there obviously
12 would be a very valid argument that the car didn't
13 belong to him, and that once he had returned it to
14 Ms. Sykes' residence, he no longer had any
15 expectation of privacy. So I thought there were
16 standing problems with the Fourth Amendment argument
17 as well.

18 Q. And you would agree that the vehicle was
19 seized, even though it wasn't searched on this case?

20 A. Pardon?

21 Q. You would agree the vehicle was seized, but not
22 searched --

23 A. It was seized. And then they went back on the
24 6th and got the search warrant. And that's what
25 made the Fourth Amendment argument more problematic

1 than it would have otherwise been because, based on
2 their observations and talking to the niece and what
3 they found at the house when they -- they initially
4 went in without a warrant, but they got consent.
5 And while operating under consent, they found the
6 clothing. Then consent was withdrawn.

7 They went back and got a search warrant and
8 came back. Somewhere in there -- it isn't clear
9 from the testimony -- they have a conversation with
10 this young woman in when she acknowledges that the
11 aunt that they have already called and got consent
12 to search from, that her boyfriend is a gentleman
13 named Black, which gave them an additional little
14 piece of corroboration when compared with the
15 witness statements they had taken from various
16 eyewitnesses at the scene.

17 Q. You also briefed the issue -- you briefed the
18 issue about the anonymous call, but you didn't brief
19 it with regards to the search warrant. Why did you
20 choose to brief it with regards to issue two?

21 A. Well, I'm trying to remember --

22 THE WITNESS: May I have a moment's indulgence,
23 Your Honor?

24 THE COURT: Yes.

25 THE WITNESS: The statement of issues on

1 appeal, issue two concerns the improper and highly
2 preductal hearsay testimony in the form of the dying
3 declaration and a statement from an anonymous
4 telephone caller. That anonymous telephone caller,
5 that was a different -- that was not the same thing
6 as the tip.

7 Q. So that was the call to the phone?

8 A. Correct.

9 Q. Okay.

10 A. And there was no indication whether they -- you
11 know, the call to the phone is separate and apart
12 from the tip issue. The search warrant,
13 unfortunately, had all these problems I've already
14 outlined with regard to the dying declaration and
15 the phone call.

16 Those, to my mind, were serious hearsay
17 problems that I did brief and felt strongly enough
18 about that I tried to take it to the Supreme
19 Court -- well, I did take it, but they didn't grant
20 cert.

21 Q. And did you see anywhere in the trial testimony
22 where that testimony was asked to be stricken from
23 the record and/or a charge about testimony that had
24 been stricken from the record?

25 A. Which testimony are you talking about?