

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Georgetown County
Steven H. John, Circuit Court Judge

RONALD COHEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-212923

APPENDIX

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South Carolina Commission on Indigent
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VOL II OF II

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S.C. Supreme Court

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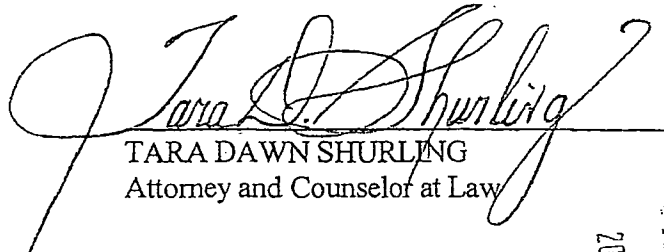
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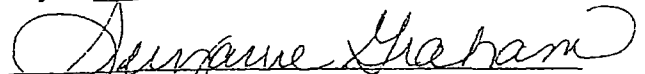
STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

VERIFICATION

I, Tara Dawn Shurling, *retained* counsel for the Applicant, 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.


TARA DAWN SHURLING
Attorney and Counselor at Law

SWORN to and subscribed before me this 4th
day of October 2010.


Notary Public for South Carolina
My Commission Expires: 3/12/2013

FILED
GEORGETOWN COUNTY, SC
2010 OCT -8 PM 2:31
ALMA Y. WHITE
CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Ronald Cohens, # 316306,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2010-CP-22-01592

RETURN

Respondent, making its Return to the Application for post-conviction relief filed October 8, 2010, by the Applicant's counsel, Tara Dawn Shurling, Esquire, would respectfully show this Court:

I. – Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to convictions from Georgetown County. The Applicant was indicted in April 2006 for assault and battery with intent to kill ("ABWIK") (2006-GS-22-354) and failure to stop for a blue light (2006-GS-22-355). Charles D. Barr, Esquire, represented the Applicant on the charges. On June 27-30, 2006, the Applicant was tried before the Honorable J. Michael Baxley. The jury found the Applicant guilty of both offenses, and Judge Baxley sentenced him to twelve (12) years for ABWIK and three (3) years, concurrent, for failure to stop for a blue light. A notice of appeal was timely filed, and an appeal was perfected on the Applicant's behalf by Kathrine H. Hudgins, Esquire. After the Final Briefs were filed, Tara Dawn Shurling, Esquire, took over the representation of the Applicant. The South Carolina Court of Appeals affirmed the convictions in an Unpublished Opinion on February 9, 2009 (2009-UP-064). The Court of Appeals denied the Applicant's Petition for Rehearing on April 6, 2009. The South Carolina

Supreme Court denied the Applicant's Petition for a Writ of Certiorari on April 8, 2010, and the case was remitted to the circuit court on April 12, 2010.

Incorporated herein by reference are the records of the Georgetown County Clerk of Court regarding the convictions; the trial transcript, and the appeal records. The Applicant's records from the Department of Corrections will be forwarded upon receipt. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II. – Allegations and Relief Sought

In his Application, Mr. Cohens alleges that his custody is unlawful for the following reasons:

- (1) Ineffective assistance of counsel:
 - a. Trial counsel failed to be punctual during trial, resulting in a late cross-examination of the victim and damaging his effectiveness as an advocate by making a negative impression on the jury;
 - b. Trial counsel failed to adequately preserve for appellate review his objection to being required to apologize to the jury for being late to court during trial;
 - c. Trial counsel was ineffective for failing to request a mistrial after the judge required him to apologize to the jury in a manner that irreparably damaged his effectiveness as an advocate for the balance of the trial; and
- (2) The judgment and sentence against the Applicant were entered in violation of his right to due process of law and effective assistance of counsel.

III.

In a post-conviction relief action, the applicant bears the burden of proving his allegations by a preponderance of the evidence. Stalk v. State, 375 S.C. 289, 297, 652 S.E.2d 402, 405 (Ct. App. 2007) (citations omitted); Rule 71.1(e), SCRPC. "Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that 'counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.'" Dalton v. State, 654 S.E.2d 870, 873 (Ct. App. 2007) (citing Strickland v. Washington, 466 U.S. 668, 669 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id.

A two-pronged test is used to evaluate allegations of ineffective assistance of counsel. Dalton v. State, 654 S.E.2d 870, 873 (Ct. App. 2007). "In order to prove that counsel was ineffective, a PCR applicant must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 527-28 (2007) (citations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Id. (citations omitted). "Furthermore, when a defendant's conviction is challenged, 'the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. Id. (citations omitted). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Id. (citations omitted). The applicant must overcome this strong presumption in order to obtain relief. Stalk, supra (citation omitted).

Respondent submits that the Applicant will be unable to prove his allegations of ineffective assistance of trial counsel. However, because the allegations may raise questions of fact that the record does not conclusively refute, Respondent requests an evidentiary hearing to fully resolve the ineffective assistance of counsel issues. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation, claim, or statement contained within the Application not expressly admitted, qualified, or explained is DENIED.

V.

WHEREFORE, having made its Return, the Respondent requests that an evidentiary hearing held at the next available term of PCR court.

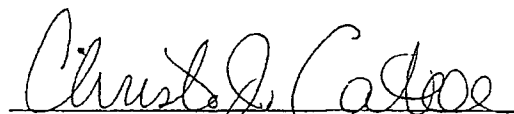
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

CHRISTINA J. CATOE
Assistant Attorney General



ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

November 8, 2010

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Ronald Cohens, # 316306,)

2010-CP-22-01592

Applicant,)

v.)

CERTIFICATE OF SERVICE BY MAIL

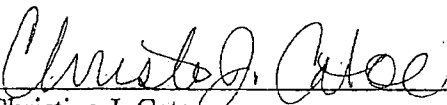
State of South Carolina,)

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 State's **RETURN** in the above-captioned matter on the following person(s) by depositing in the United States mail, postage prepaid:

**Tara Dawn Shurling, Esquire
Law Office of Tara Dawn Shurling, PA
3614 Landmark Dr., Ste. D
Columbia, SC 29204**

DATED this 8th day of November, 2010.


Christina J. Catoe
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

RONALD COHENS, #316306)
 Applicant,)
)
 v.)
)
 THE STATE OF SOUTH CAROLINA,)
 Respondent.)
 _____)

2010-CP-22-1592

**AMENDED APPLICATION FOR
 POST-CONVICTION RELIEF**

The Post-Conviction Relief Application previously filed on October 31, 2006 under docket number 2010-CP-22-1592 is hereby amended to include the following additional allegations:

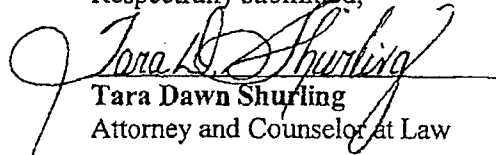
1. Trial Counsel was ineffective in failing to object to the lower court not allowing him to go forward with cross-examination of the victim where he arrived in court before the direct examination of the next State witness began.
2. Trial Counsel was ineffective for failing to object to jury instructions for the offense of assault and battery with intent to kill which failed to clearly advise the jury that they could not find the Applicant guilty of that offense unless they found that he acted with the intent to kill the victim.
3. Trial Counsel was ineffective for neglecting to request a jury instruction on the law of proximate causation were under the evidence presented at trial there was some evidence from which the jury could have found that his actions did not cause the wreck involved in this case.
4. Trial Counsel was ineffective for failing to appear in Court in a timely manner in that Counsel was absent when the second day of the Applicant's trial convened.
5. Trial Counsel was ineffective for failing to ascertain what remarks the Court had made to the jury concerning his absence from the Courtroom when the trial convened on the second day of the Applicant's trial.
6. Trial Counsel was ineffective for failing to object on the record when the trial judge admonished him, in the presence of the jury, concerning his tardiness for Court on day two of the Applicant's trial.
7. Trial Counsel was ineffective for failing to make a motion for a mistrial following an exchange with the trial judge which tended to damage defense counsel's image in the eyes of the jury, and thereby violated his right to effective assistance of counsel in his defense.

10/1

8. Trial Counsel was ineffective for neglecting to request a curative charge after remarks from the bench damaged trial counsel's image and effectiveness as an advocate in the eyes of the Applicant's jury.
9. Trial Counsel was ineffective for failing to object, on the record, to being required to apologize to the jury before cross-examination of the victim.
10. Trial Counsel was ineffective for neglecting to object to the State playing State's Exhibit No. 79, an audio tape of the 911 call in the case, during its closing argument where the publication of the tape was cumulative to evidence previously introduced during the State's case in chief, and unduly emphasized the evidence in question thereby prejudicing the Applicant.
11. Trial Counsel was ineffective for neglecting to advise the client of his right to present character witnesses as part of his defense at trial.
12. Trial Counsel was ineffective for failing to call character witnesses at trial to present to the jury testimony concerning the Applicant's reputation for veracity in the community.

The Applicant has no further amendments at this time. For the reasons set forth herein, as well as those set forth in his original application, the Applicant asserts that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, was violated in the trial court. Copies of these amendments have been served on opposing counsel, Salley W. Elliot, Assistant Deputy Attorney General, and Trial Counsel for the Applicant, Charles D. Barr, Esquire.

Respectfully submitted,


Tara Dawn Shurling
Attorney and Counselor at Law

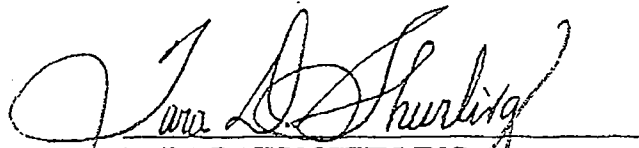
3614 Landmark Dr., Ste. A
Columbia, SC 29204
803-738-8622
803-738-1600 (Fax)

ATTORNEY FOR APPLICANT.

This 25th day of April, 2012.
Columbia, SC

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	
 RONALD COHENS, #316306	)	2010-CP-22-1592
Applicant,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
THE STATE OF SOUTH CAROLINA,	)	
Respondent.	)	
_____	)	

The undersigned attorney hereby certifies that one copy of the Applicant's Amendment to Application for Post-Conviction Relief in the above-entitled cause has been served upon, Charles D. Barr, Esquire, Trial Counsel, by E-mail on the 25th day of April, 2012.

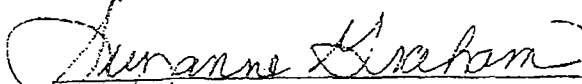

TARA DAWN SHURLING
 Attorney and Counselor at Law

3614 Landmark Drive, Suite A
 Columbia, S.C. 29204
 (803) 738-8622
 (803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 25th day of

April, 2012.

 (L.S.)
 Notary Public for South Carolina
 My Commission Expires: 3/12/2013

STATE OF SOUTH CAROLINA)

COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

RONALD COHENS, #316306)

Applicant,)

2010-CP-22-1592

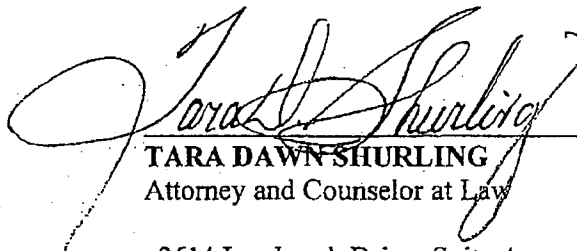
v.)

CERTIFICATE OF SERVICE

THE STATE OF SOUTH CAROLINA,)

Respondent.)

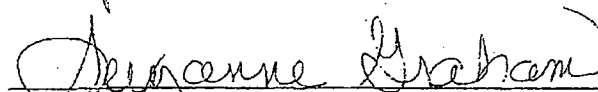
The undersigned attorney hereby certifies that one copy of the Applicant's Amendment to Application for Post-Conviction Relief in the above-entitled cause has been served upon, Salley W. Elliott, Deputy Assistant Attorney General by E-mail on the 25th day of April, 2012.



TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 25th day ofApril, 2012.


(L.S.)

Notary Public for South Carolina

My Commission Expires: 3/12/2013

DIXIE COX EUBANK
OFFICIAL REPORTER

I N D E X
(PW) PLAINTIFF WITNESS
(DW) DEFENSE WITNESS

WITNESSES:	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
CHARLES DAVID BARR (PW)				
MS. SHURLING	14		74	
MS. ELLIOTT		47		84
RONALD COHENS (PW)				
MS. SHURLING	86		101	
MS. ELLIOTT		98		
THE COURT:		99		
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E X H I B I T S

(PLAINTIFF=P)
(DEFENSE=D)
(COURT=C)

(No Exhibits Marked)

1 **THE COURT:** All right, this is 2010-CP-22-1592, the
2 post conviction relief application of Ronald Cohens versus
3 State of South Carolina.

4 All right, Madam Attorney General, would you like to
5 put the procedural history on the record at this point in
6 time?

7 **MS. ELLIOTT:** Yes sir. Thank you.

8 Ronald Cohens was indicted in April of 2006 for
9 failure to stop for a blue light or siren ---

10 **MS. SHURLING:** Your Honor, I'm so sorry, but I just
11 realized my client hasn't been brought in yet.

12 **THE COURT:** Oh, I thought he was already out here.
13 I thought you had been talking to him. I'm sorry.

14 **MS. SHURLING:** No sir, Your Honor.

15 **THE COURT:** All right. Let's stop then.

16 (Pause.)

17 (Mr. Cohens enters the courtroom.)

18 **THE COURT:** All right. Again, this is 2010-CP-22-
19 1592, and it is the post conviction relief application of
20 Ronald Cohens versus the State of South Carolina.

21 Madam Attorney General, would you like to put the
22 procedural history on the record, please Ma'am.

23 **MS. ELLIOTT:** Yes, Your Honor. Thank you.

24 Ronald Cohens was indicted in April of 2006 for
25 failure to stop for a blue light and assault and battery

1 with intent to kill. He proceeded to trial before Judge
2 Baxley in June of 2006, June 27th through June 30th to be
3 exact, 2006. He was found guilty as charged and was
4 sentenced by Judge Baxley to twelve years for assault and
5 battery with intent to kill and three years concurrent for
6 failure to stop for a blue light.

7 Mr. Cohens appealed. After a full briefing by the
8 South Carolina Office of Appellate Defense on behalf of Mr.
9 Cohens and the State, the South Carolina Court of Appeals
10 affirmed the convictions and sentences.

11 Thereafter, Ms. Shurling assumed represen- --
12 appellate representation of Mr. Cohens, filed a petition for
13 rehearing, which was denied in April of 2009, and a petition
14 for writ of certiorari to the South Carolina Supreme Court,
15 which was denied in April of 2010.

16 Mr. Cohens timely filed an application for post
17 conviction relief asserting three ineffective assistance of
18 counsel claims. Counsel for Mr. Cohens submitted an amended
19 application Tuesday evening adding a few more allegations,
20 and for the Court's record or for the record, the State is
21 going to object to -- and I believe I put a copy of that
22 amended application on -- with the Judge's packet, Your
23 Honor, on top, but allegations 11 and 12, those were the
24 allegations that were sent by e-mail Tuesday evening and
25 they might not be the same allegations that have been filed

1 today.

2 I'm not sure, but anyway, there are two allegations
3 respecting ineffective assistance of counsel for failure to
4 present character witnesses as a part of the defense and
5 present character witnesses as to the applicant's reputation
6 for veracity in the community. We are opposing those
7 amendments, or actually I believe Counsel and I have agreed
8 because of the late notice of that, I believe I can cross-
9 examine any witnesses that are offered for that purpose as
10 to specific conduct or acts of the Defendant.

11 And I have not had an opportunity to investigate
12 those matters for cross-examination of the witness or
13 presentation of that evidence to the Court, but Counsel and
14 I have discussed it and we will with Your Honor's permission
15 allow the State to address that if I need to at the end of
16 this hearing to provide the Court with any additional
17 information that I might be able to find on those issues.

18 Counsel advises me this morning that she is also
19 amending the application to assert ineffective assistance of
20 counsel respecting a closing argument -- closing ---

21 MS. SHURLING: Opening.

22 MS. ELLIOTT: The opening argument by Counsel, and
23 also ---

24 MS. SHURLING: Failure to request a jury charge on
25 accident ---

1 **MS. ELLIOTT:** Failure to request a jury charge on
2 accident. The State opposes those amendments because we did
3 not have notice of those, but we will leave that to Your
4 Honor's discretion.

5 **THE COURT:** All right.

6 **MS. SHURLING:** Your Honor, ---

7 **THE COURT:** Just hold on a second.

8 I've got here this amended application for post
9 conviction relief that's filed today with the Clerk of
10 Court's Office at 9:34 and dated yesterday, all right, and
11 it has eleven grounds on it.

12 The first question is, Ms. Shurling, are those the
13 eleven grounds that Mr. Cohens wants to proceed on regarding
14 his post conviction relief in this matter, those eleven
15 grounds?

16 **MS. SHURLING:** Your Honor, those -- those eleven,
17 plus the two that Ms. Elliott addressed this morning. Your
18 Honor, ---

19 **THE COURT:** Where are those two?

20 **MS. SHURLING:** Those two are not in writing, Your
21 Honor. In preparing this case yesterday and last evening, I
22 noticed for the first time what I felt was an inflammatory
23 opening argument. I apologize. I initially thought it was
24 in the closing. It's in the opening, and I propose to
25 question trial counsel about that.

1 That would be a very specific legal issue, Your
2 Honor, and given the fact that I'm bringing it up at this
3 late date, I certainly would think it appropriate for the
4 State to have the opportunity to submit a memo or whatever
5 the Court would feel allowable on that issue.

6 **THE COURT:** Well, the problem I've got is, number
7 one, I don't have post conviction relief Court again the
8 rest of this year. There's only one other term this year
9 that I understand -- there might be more than one, but
10 anyway, I don't have them, all right?

11 If you're bringing something up at this late date
12 that it's not even in the application that you filed with
13 the Clerk of Court this morning right prior to this hearing
14 starting, it's not even in there, so obviously the State
15 doesn't have a bit of notice about this. It's had zero
16 opportunity to investigate the matter, to talk to their
17 witness about this, to make any presentation to the Court
18 about it.

19 You know, the problem I've got, and what I
20 mentioned, I don't have post conviction relief court again
21 is at best what I can do is proceed on potentially, and I'm
22 not sure -- I was going to go into these eleven grounds and
23 see if the State had any objection to these eleven grounds,
24 but assuming they don't, I hear all of these eleven grounds,
25 then we have to continue the hearing for some other time in

1 the future, and I'm sorry, I don't know when that would be
2 with my schedule, so it could be months. It could be next
3 year. I don't know how long it's going to be before I can
4 reconvene the hearing because you've given the State zero,
5 not an inkling of opportunity to address those issues.
6 That's the problem I've got. Do you want ---

7 **MS. SHURLING:** May I respond, Your Honor?

8 **THE COURT:** No Ma'am. Just answer my question. Do
9 you want to proceed with those two grounds?

10 **MS. SHURLING:** I would like to proffer those
11 grounds, Your Honor, and then ---

12 **THE COURT:** No Ma'am. We're not even going to
13 address them because you haven't given the State an
14 opportunity to investigate them whatsoever. We're not going
15 to address them in this hearing whatsoever. The best that I
16 will do is when we have gone through all those grounds, we
17 will continue the hearing to some day in the future,
18 whenever that might be, but we will not address those two
19 issues in any way.

20 You won't question the witness about it. You won't
21 bring them up because you haven't given the opportunity -- I
22 don't even know what they are. You're telling me, but I
23 don't even have them in writing, so I don't really know what
24 they are, and according to the rules, they're not proper
25 because they're not in writing. They're not filed, and

1 nobody knows exactly what they are.

2 MS. SHURLING: I understand, Your Honor.

3 THE COURT: All right, so let me -- I'll get back
4 to you in just one second.

5 Madam Attorney General, you've got the amended
6 application that was filed this morning that has grounds 1
7 through 11. Have you got a copy of that?

8 MS. ELLIOTT: Yes, Your Honor.

9 THE COURT: All right. Let's start off with the
10 first one. Do you have notice of that? Are you prepared to
11 address number 1?

12 MS. ELLIOTT: Yes, Your Honor.

13 THE COURT: Prepared to address number 2?

14 MS. ELLIOTT: Yes, Your Honor.

15 THE COURT: Number 3?

16 MS. ELLIOTT: Yes, Your Honor.

17 THE COURT: Number 4?

18 MS. ELLIOTT: Yes, Your Honor.

19 THE COURT: Number 5?

20 MS. ELLIOTT: Yes, Your Honor.

21 THE COURT: Number 6?

22 MS. ELLIOTT: Yes, Your Honor.

23 THE COURT: Number 7?

24 MS. ELLIOTT: Yes, Your Honor.

25 THE COURT: Number 8?

1 MS. ELLIOTT: Yes, Your Honor.

2 THE COURT: Number 9?

3 MS. ELLIOTT: Yes, Your Honor.

4 THE COURT: Number 10?

5 MS. ELLIOTT: 10 and 11 are the two I mentioned
6 earlier that I got notice of ---

7 THE COURT: That's about the character witness?

8 MS. ELLIOTT: --- Tuesday evening. Yes, and that's
9 the -- I don't -- I can -- I can go forward, but I haven't
10 had a chance to do any investigation about Mr. Cohens to see
11 if there are matters that I can cross-examine these
12 character witnesses about, specific instances of conduct
13 which I understand is permitted under the rule, that I can
14 try to question character witnesses about their knowledge.

15 THE COURT: And have you had an opportunity to talk
16 to Mr. Barr about this, who was the trial counsel?

17 MS. ELLIOTT: Not until this morning very briefly.

18 THE COURT: All right, so what we're going to do is
19 tomorrow, Ms. Shurling, you will file with the Clerk of
20 Court -- you can -- well, you can -- you can put it in the
21 mail tomorrow to the Clerk of Court, but you will e-mail it
22 to my law clerk. You will e-mail it to Madam Attorney
23 General, ---

24 MS. SHURLING: Yes sir.

25 THE COURT: --- an amended application that sets

1 forth in addition to 10 and 11 whatever else the new ground
2 is regarding the inflammatory opening argument, or whatever
3 it is, okay? You will file that. You will send it off for
4 filing to the Clerk of Court tomorrow, e-mail it at the same
5 time, tomorrow, ---

6 **MS. SHURLING:** Yes, Your Honor.

7 **THE COURT:** --- to everybody, okay?

8 What we're going to deal with today is we're going
9 to deal -- have a hearing on 1 through 9. We're going to
10 have a hearing on 1 through 9 that you have filed this
11 morning and the State has notice of, is prepared to address
12 and argue about. 10 and 11, and I guess number 12 that's
13 going to be coming about the inflammatory opening argument,
14 I will find some time in the future -- I don't know when
15 that's going to be. I can't tell you when that's going to
16 be, and I'll just be frank with you, it could be many, many,
17 many months from now, ---

18 **MS. SHURLING:** I understand.

19 **THE COURT:** --- okay, but we will reconvene the
20 hearing and we'll have a hearing on those additional
21 grounds, all right?

22 **MS. SHURLING:** I thank the Court for the
23 opportunity.

24 **THE COURT:** So let's -- let's proceed then with the
25 -- I'm sorry. Is there anything else on the procedural

1 history?

2 MS. ELLIOTT: No, Your Honor.

3 THE COURT: All right, very good.

4 All right, let's get started then with the amended
5 application grounds 1 through 9 then, please.

6 MS. SHURLING: Thank you, Your Honor. Before we
7 proceed, unless the Court thinks that I am totally unfairly
8 sandbagging the State, I believe that Ms. Elliott will
9 acknowledge that the majority of these grounds were given to
10 her in substance before the actual typed amended application
11 was served on her on Tuesday.

12 We had discussed the gist, the substance of most of
13 these, she was given notice of sometime last week, which
14 it's neither here nor there, Your Honor, except I just don't
15 want the Court to think that she just got them.

16 THE COURT: All right. Yes Ma'am. All right, very
17 good.

18 MS. ELLIOTT: Now, I did just get the defense of
19 accident and the opening argument issue.

20 THE COURT: Again, I appreciate it. I'm not
21 holding that against anybody. We're not dealing with them
22 now. We'll deal with it sometime in the future, whenever
23 that is, okay? Let's just deal with what we've got now and
24 let's get on with why we're here, okay?

25 MS. SHURLING: Thank you, Your Honor.

1 **THE COURT:** Go ahead.

2 **MS. SHURLING:** The applicant has generally alleged
3 that his right to effective assistance of counsel is
4 guaranteed by the Sixth and Fourteenth Amendments to the
5 United States Constitution, as well as Article I, Section 14
6 of our own State Constitution, was violated prior to and
7 during his trial.

8 He has set forth the -- with specificity the
9 allegations of errors and omissions that are required by the
10 Strickland vs. Washington case and the South Carolina
11 progeny that followed that rule that counsel is required in
12 order to meet the Sixth Amendment standard to provide
13 reasonable professional assistance of counsel.

14 At this time, the applicant would call as his first
15 witness his defense attorney, Mr. Charles David Barr.

16 **THE COURT:** All right, Mr. Barr, would you come
17 around to be sworn, sir, please.

18 **CHARLES DAVID BARR,** being first duly
19 sworn, testifies as follows:

20 **THE CLERK:** State your name for the record, please.

21 **MR. BARR:** Charles David Barr.

22 **THE COURT:** All right, sir. Please come around and
23 have a seat. Thank you very much, and when you get
24 situated, if you could be situated as close as you can to
25 the microphone, please, all right? Thank you.

CHARLES DAVID BARR - DIRECT BY SHURLING

1 Go ahead, Ms. Shurling.

2 **DIRECT-EXAMINATION BY MS. SHURLING:**

3 Q. Good morning, Mr. Barr.

4 A. How do you do.

5 Q. Just fine, sir.

6 At the time you represented Ronald Cohens back in
7 2006, approximately how long had you been practicing law?

8 A. As of today, I've been practicing law approximately
9 thirty-two years.

10 Q. And do you recall how long you represented Mr. Cohens
11 before the trial of this case began in June of '06?

12 A. No Ma'am.

13 Q. Could you estimate whether it was a matter of weeks
14 or months?

15 A. I have no idea how long it was.

16 Q. And I think it's fair to say that you had probably
17 every attorney's worse nightmare happen during the trial.
18 The morning of the second day of trial, you had occasion to
19 be late for Court, ---

20 A. Yes Ma'am.

21 Q. --- is that fair to say?

22 A. That's fair to say.

23 Q. And the record reflects at some point that you
24 referenced being fifteen minutes late for Court. Is -- is
25 -- was that an accurate estimate of about how late you were?

CHARLES DAVID BARR - DIRECT BY SHURLING

1 A. I think that's probably pretty close to it.

2 Q. Now, when you had convened the -- pardon me,
3 adjourned the night before, the State had just finished its
4 direct-examination of the applicant's ex-wife, who was the
5 victim in this case, is that accurate?

6 A. I believe that's correct.

7 Q. So your opportunity for cross-examination was being
8 interrupted by the overnight recess?

9 A. Yes Ma'am.

10 Q. Okay. And the record reflects that the Court
11 instructed everyone to be back in Court at 9:30 the
12 following morning.

13 A. All right.

14 Q. Okay. When you arrived in Court the next morning,
15 what was going on? Where -- what was taking place?

16 A. I believe the Solicitor was getting ready to call
17 another witness after -- after the victim.

18 Q. Okay. And ---

19 A. I don't -- I don't remember whether they had actually
20 -- he may have actually called them already. I'm not sure.

21 Q. And the witness ---

22 MS. SHURLING: Your Honor, the record will speak
23 for itself.

24 Q. --- that was called after Ms. Cohens was Ronnie
25 Lewis.

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1 A. Right.

2 Q. Does that sound ---

3 A. Sounds like it, uh huh (**indicating positive**).

4 Q. You requested to be heard before Mr. Lewis actually
5 took the stand and had begun to be -- well, let me change
6 that. The record doesn't reflect whether Mr. Lewis had
7 actually taken a seat in the witness box. He had been
8 called, but it's clear that he had not yet been questioned.

9 You requested to be heard on the record and the
10 Presiding Judge said no initially, then took a moment and
11 there was a bench conference at side bar. Do you recall
12 that?

13 A. I believe there was a bench conference after --
14 shortly after I got in the courtroom.

15 **MS. SHURLING:** Your Honor, I am -- we would be
16 looking at the record approximately beginning at 120, Line
17 14, going forward.

18 Q. Can you recall the substance ---

19 **THE COURT:** I'm sorry again, Ma'am. I didn't hear
20 what page it was.

21 **MS. SHURLING:** Yes sir, Your Honor. The next
22 morning they reconvened on the second day at Page 120, Line
23 14.

24 **THE COURT:** All right, very good. Thank you,
25 Ma'am.

CHARLES DAVID BARR - DIRECT BY SHURLING

1 **MS. SHURLING:** Thank you, sir.

2 Q. Can you recall what the -- I'm not asking you to
3 quote His Honor, but -- I'm not asking for you to tell me
4 precisely what Judge Baxley said, but can you remember the
5 substance of that conversation at the bench?

6 A. No Ma'am.

7 Q. Did you, to the best of your recollection, did you
8 ask that the Judge allow you to go forward with your cross-
9 examination with the victim before beginning the testimony
10 of the second witness?

11 A. I don't remember exactly what transpired, but I'm
12 sure that that would have been one thing that I would have
13 wanted to do.

14 Q. And you've been practicing thirty-three years now?

15 A. Yes Ma'am.

16 Q. So you'd been practicing quite a little while even in
17 2006?

18 A. Quite a while.

19 Q. I assume that you are aware that in order for an
20 issue to be preserved for appeal, the issue has to be raised
21 on the record and ruled upon on the record for it to be
22 available for appellate review? You ---

23 A. That's a rule in South Carolina.

24 Q. Okay. If you had a colloquy with Judge Baxley at the
25 bench regarding your desire to go forward with cross-

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1 examining the victim before the State was allowed to proceed
2 with the next witness, that action on your part would not
3 have preserved that issue for appeal, would it?

4 A. Well, it certainly would not have.

5 Q. And do you have any explanation here today for why
6 you would not have put an objection to that on the record?

7 A. Cross-examination was already split, and as far as
8 any appreciable effect that I would have given to cross-
9 examining her at that particular time, cross-examination had
10 already been split. I could call her as my own witness
11 anyhow, so, of course, we were -- at that point during the
12 course of the trial hadn't -- hadn't really given a whole
13 lot of thought to that, but I didn't -- I didn't see a need
14 at that point to -- I didn't think that was so much of an
15 issue.

16 Q. I understand. Let's -- let's go back and re-visit
17 the record. The record will reflect that at the time you
18 entered the courtroom, while Ronnie Lewis had been called,
19 the State had not yet asked even their first question of
20 this witness.

21 A. I don't believe that -- I'm not sure, but I don't
22 believe they had.

23 Q. So is it not true that you had the argument available
24 that there was no prejudice to the State ---

25 A. If I chose to exercise it, I had -- I had that

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1 argument, and I don't know -- as I told you earlier, I don't
2 know as far as the substance of what actually transpired
3 between Matthew Modica and Judge Baxley. I certainly don't
4 remember the details of what -- but I -- under the
5 circumstances if I came to Court late and was not able to
6 cross-examine a witness, I would have asked the Judge to
7 allow me to cross-examine the witness.

8 Q. I understand. Now, when you did come to Court, when
9 you arrived and saw that the trial had begun in your absence
10 or resumed in your absence, did you take steps to ascertain
11 what, if anything, the Judge had said to the jury regarding
12 your absence from the courtroom?

13 A. If I'm not mistaken, the first person I spoke to was
14 Matthew, and I'd been practicing law with Matthew Modica
15 from the time he came to Georgetown. I try almost as many
16 cases in Georgetown as I try in Williamsburg County, and he
17 knows, as well as Dory, that there must have been some
18 reason why I was late, and from -- as far as what I can
19 remember from talking to Matthew, it was not his idea to
20 start.

21 In fact, I believe he tried as best he could to -- to
22 not get started until somebody find out why I was not there
23 at that particular time, but Judge Baxley, from what I
24 understood, said let's go.

25 Q. I understand. And knowing Mr. Modica, I would agree

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1 that he would be a gentleman about such a thing, but if I
2 can get you to look at Page 121 of the transcript, do you
3 have a copy, sir?

4 A. Yes Ma'am.

5 Q. If you would look at the top, Line 1 through about 4.

6 A. 121, Line what?

7 Q. 1 through 4.

8 A. All right.

9 Q. Specifically 2 through 4 where the Court says and is
10 there cross-examination of Ms. Cohens? Mr. Barr is not
11 present and, therefore, it appears at this time there is
12 not. Please call your next witness. Do you see that?

13 A. Yes, uh huh (**indicating positive**).

14 Q. If you had known that that was the manner in which
15 your absence had been dealt with, with the jury, would you
16 have made an objection on the record and requested a
17 curative charge?

18 A. No Ma'am.

19 Q. Can you tell me why not?

20 A. Well, I don't think that -- a curative charge to cure
21 what?

22 Q. Well, I'll move on to something else, but I'll let
23 the record speak for itself on that, but ---

24 A. Well, I mean, I want to make sure what was -- what
25 would I have been asking the Judge to cure?

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1 **THE COURT:** I will take that as the answer of the
2 witness.

3 **MS. SHURLING:** Thank you, Your Honor.

4 **THE COURT:** You may proceed with your next
5 question.

6 **Q.** When you were preparing for the second day of court,
7 when did you decide you needed this Family Court transcript
8 for Court that day, the evening before or that morning?

9 **A.** I think sometime that morning.

10 **Q.** And what time does the courthouse open in Georgetown,
11 8:30 like most places?

12 **A.** I'm -- I don't -- I'm not sure. Usually -- I usually
13 get here around nine -- nine or nine o'clock, or nine -- or
14 nine-thirty.

15 **Q.** And, in fact, the record reflects that Judge Baxley,
16 though he told the jury to be there at 9:30, that he was
17 there early because he had told the lawyers that he was
18 going to address some motion issues with you before you got
19 started with the jury, correct?

20 **A.** I don't know.

21 **Q.** Well, if the record reflects Judge Baxley saying
22 that, you don't dispute it?

23 **A.** If the record says that, then certainly it did.

24 **Q.** When you went by -- what time does your office open?

25 **A.** 8:30 in the morning.

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1 Q. And how far is your office from the Georgetown
2 Courthouse?

3 A. An hour..

4 Q. An hour?

5 A. Maybe an hour and ten minutes, something like that.

6 Q. Did you have a cell phone in 2006?

7 A. I doubt it. I don't -- I don't remember having a
8 cell phone then. My office is not -- I mean, I don't -- I
9 live in Greeleyville. My office is in Kingstree. That
10 morning I came from Greeleyville.

11 Q. And when you went by your office to retrieve this
12 transcript that you thought you might need, did you leave
13 instructions for anyone on your staff to call the Court and
14 tell them there was a possibility you would be a few minutes
15 late?

16 A. I don't think there -- I don't think there would have
17 been anybody there at that time of the morning.

18 Q. Well, did you leave your secretary or your paralegal
19 a note to call at 8:30 when they came in?

20 A. I -- I know I didn't leave a -- leave a note. I was
21 hoping that I would get here on time.

22 Q. Did you contact your client, Mr. Cohens, or anyone in
23 his family that you knew would be attending trial and let
24 them know there was a possibility you might be a few minutes
25 late for court?

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1 A. I hadn't -- I don't recall even having any way of
2 contacting them. As I said, I don't remember whether I had
3 a cell phone even at that time, but I -- in terms of
4 answering you, I did not contact them.

5 Q. And once it became apparent that you were not going
6 to be at the courthouse in the courtroom at nine o'clock
7 when His Honor had planned to address pre-trial motion
8 matters, ---

9 A. I -- I -- first of all, my intent was not to get here
10 at -- my understanding was, and you mentioned the pre-trial
11 matters, I'm not sure -- I'm not sure what pre-trial matters
12 you're talking about, but I think 9:30 was probably when I
13 was trying to get back to court.

14 Now, if the Judge said something about the pre-trial
15 matters, but -- but as far as the specifics of what we were
16 doing or whether or not we were going to have motions, have
17 a conference at chambers, I just don't remember whether or
18 not we were supposed to or not. I know we were supposed to
19 start court back at 9:30.

20 Q. Well, even taking the 9:30 mark, once it became
21 apparent that you were not going to be seated at counsel
22 table and ready to begin at 9:30, did you pull over at a gas
23 station or any ---

24 A. No, no, Ms. Shurling. I figured that that Judge
25 would have probably made some inquiry and that there would

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1 have been a conference, and as usual, is everybody here?

2 Well, the Defense counsel is not here. Anybody know why he
3 is not here?

4 When I got here, there was actually -- no testimony
5 had actually been given, and I say fifteen minutes late. I
6 don't know -- I don't remember exactly how long it is, but
7 no, I didn't call anybody. I tried to get here as fast as I
8 could, but I didn't call a soul, and I don't know that, as I
9 said, that I even had a cell phone or -- certainly I wasn't
10 going to stop at a pay phone and try to call. I don't even
11 remember having anybody's telephone number to call.

12 MS. SHURLING: Your Honor, ---

13 THE COURT: Yes Ma'am.

14 MS. SHURLING: --- I would note for the record at
15 this juncture on Page 148, Lines 12 going on down to about
16 Line 18 is where the Presiding Trial Judge states for the
17 record that he had told Counsel he would come in this
18 morning to resolve the issue of whether or not evidence
19 could be admitted by consent or not, and that the Judge had
20 been there at nine o'clock for that purpose.

21 THE COURT: All right. Thank you.

22 Q. So, if as the record reflects Judge Baxley was
23 anticipating there being some business ---

24 A. What -- what page you say you're on now?

25 Q. 148, Line 12 through 18 roughly.

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1 A. Yes Ma'am.

2 Q. If, as the record seems to reflect, Judge Baxley was
3 anticipating dealing with matters with the attorneys at 9:00
4 and that would mean that you were approximately forty-five
5 minutes ---

6 A. No Ma'am. If you look at Line -- starting with --
7 with, I believe -- think with Page 147 on to Page 148, I
8 indicated to Judge Baxley that I -- that I had asked him not
9 to punish my client for my bad judgment on my part, that --
10 and that I certainly asked him to permit me the fifteen
11 minutes that -- that I held things up. Now, my
12 understanding at that time was that -- that it was about
13 fifteen minutes. Now, whatever Judge Baxley may have -- I
14 mean, I don't -- I don't know about that. That's ---

15 Q. I understand.

16 A. Yes Ma'am.

17 Q. Once -- well, let me back up for a minute. You --
18 you testified a few minutes ago that -- that -- and I'm
19 paraphrasing, but you felt there was no harm, no foul,
20 because no testimony had actually been taken in your
21 absence, and worse -- if worse had come to worse, you could
22 have called Ms. Cohens as your own witness, is that correct?

23 A. Well, I think -- I think -- I think they had
24 concluded her Direct testimony when we left the first day.

25 Q. Yes sir. And I believe that you argued at trial that

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1 you should not be required to call Ms. Cohens as a Defense
2 witness and potentially forfeit -- should you have decided
3 not to put up evidence for last argument since what was
4 missing was the Cross?

5 A. Well, I mean, I don't -- that argument was made to
6 the jury at trial?

7 Q. It was made to the Judge.

8 A. Oh.

9 Q. Do you recall that?

10 A. No Ma'am, I sure don't, but if it's in the record,
11 I'm sure I did.

12 Q. And once it was resolved that the Judge was going to
13 allow Ms. Cohens to be re-called and you'd have the
14 opportunity for Cross, Judge Baxley required that you
15 apologize to the jury before engaging in cross-examination
16 of the victim, do you recall that?

17 A. Yes Ma'am, I believe I do.

18 Q. And the record will reflect that you in turn asked
19 that you be allowed to apologize during your closing
20 argument or your closing statement to the jury, not prior to
21 questioning her on cross-examination, do you recall that?

22 A. Yes.

23 Q. Did you consider putting a precise objection on the
24 record to your being required to apologize to the jury
25 immediately preceding cross-examination?

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1 A. No Ma'am.

2 Q. Did you consider, Mr. Cohens, asking for ---

3 A. Mr. Barr.

4 Q. Pardon me, Mr. Barr. I apologize. Mr. Barr, did you
5 consider asking for a curative charge that would have
6 advised the jury -- and I'll backtrack for a second and say
7 that in speaking to the bench, you rather eloquently
8 indicate that you didn't want to see your client punished
9 for something you did, bad judgment on my part, so I would
10 certainly ask the Court to permit me the fifteen minutes
11 that I held things up and allow me to cross-examine the
12 victim.

13 THE COURT: Your Honor, I'm looking at the bottom
14 of Page 147, going over to the top of 148.

15 Q. My question is did you consider asking for a curative
16 charge that would have informed the jury that they were not
17 to in any way draw any negative inferences with regard to
18 your client based on the fact that you had been late for
19 court?

20 A. Quite frankly, I wanted the issue gone. I don't
21 think that that's what -- I don't think it would have made a
22 whole lot of difference to the jury and -- other than draw
23 their attention to it.

24 Q. Have you had an opportunity preparing for this case
25 today to look at the appellate decision that was issued by

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1 the Court of Appeals in this case?

2 A. No Ma'am, I don't -- I don't think I -- I don't think
3 I have.

4 Q. Are you aware, Mr. Barr, that the Court of Appeals
5 found that one of the two issues argued on direct appeal was
6 not adequately preserved for appellate review?

7 A. Is that the two-page Opinion that the Court issued?

8 Q. It is indeed.

9 MS. SHURLING: Your Honor, I ---

10 A. Yeah, I'm aware of it, uh huh (**indicating positive**).

11 Q. Mr. Barr, I am real guilty of doing this myself, so
12 I'm not throwing stones, ---

13 A. Yes Ma'am.

14 Q. --- but we are both making life hard for this lady
15 with the mask on. I will try my best not to talk over you,
16 and I would appreciate you doing the same.

17 You are familiar with the Court of Appeals ---

18 A. I know the -- I know the decision you're talking
19 about. I read it.

20 Q. Okay. And you are familiar then with the Court
21 citing State vs. Johnson for the proposition that a party is
22 procedurally barred from raising an issue on appeal if it
23 was not properly objected to at trial?

24 A. I am -- I am aware that the issue was raised by
25 appellate counsel. I certainly don't agree that it had any

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1 merit, but from the standpoint of appeal, that's what the
2 appellate counsel responsibility is, to raise anything that
3 will apply.

4 Q. And you are aware that the act declined to reach ---

5 A. Yes Ma'am.

6 Q. --- the merits of the case based on the
7 procedural ---

8 A. The Court -- the Court did not decide the issue
9 because it was not properly preserved at trial.

10 Q. Now, I assume, sir, as a lawyer of long-standing that
11 you've stayed pretty familiar with appellate opinions from
12 both the Court of Appeals and the Supreme Court?

13 A. I've certainly tried to.

14 Q. Isn't it true that the Court, even in finding
15 procedural bar, will sometimes make a comment in dicta that
16 the issue would not have had merit even if it had been
17 preserved?

18 A. The Court doesn't always do that. Most times the
19 Court stays away from dicta. I mean, they don't -- the
20 object is not to give advisory opinions, and most times our
21 Court does not -- does not do that, and in some cases, some
22 of the Judges, but generally unless a matter is necessary to
23 -- for the Court to decide to be able to make a decision,
24 the Court is usually limited to what's necessary to make a
25 decision properly before it.

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1 **MS. SHURLING:** Your Honor, for the record, the
2 materials before the Court should indicate that the Court of
3 Appeals' decision was appealed to the Supreme Court of South
4 Carolina specifically on -- with regard to issue one on the
5 ground questioning whether or not the appellate court was
6 accurate in finding that the issue was not preserved and,
7 therefore, procedurally barred.

8 Q. Mr. Barr, ---

9 A. Yes Ma'am.

10 Q. --- are you familiar, I assume you would be, with the
11 indictment in this case?

12 A. I hadn't seen it -- I hadn't seen it in a long time.
13 We've been up here for this case a couple of times, but I
14 hadn't seen it in a while.

15 Q. I hope only one previous time because if it was more
16 than that, I wasn't here. Would you -- do you recall that
17 the indictment in this case for assault and battery with
18 intent to kill specifically charged your client with
19 striking the car of his ex-wife and causing it to leave the
20 road and flip? Do you remember that?

21 A. I don't specifically remember it, but if it's an
22 indictment for ABIK, I know that it must contain at least
23 the elements of ABIK.

24 Q. My point being, sir, that the indictment in its
25 language charged with specificity that the act which was

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1 being asserted by the State as constituting assault and
2 battery with intent to kill was striking the car, thereby
3 causing it to leave the road and flip?

4 A. All right. Yes Ma'am.

5 Q. As opposed to a more general allegation ---

6 A. That was the prosecution's theory.

7 Q. Okay. Do you recall your client's testimony at
8 trial?

9 A. No Ma'am.

10 Q. Okay. What was your theory of defense in this case?

11 **MS. SHURLING:** And, Your Honor, I stand cautioned.

12 I'm not going to venture into the areas where they relate to
13 another day. I just have a question with regard to
14 proximate causation.

15 **THE COURT:** All right.

16 Q. What was your client's theory of the case?

17 A. That he didn't bump her off the road.

18 Q. Did you consider requesting a jury charge on the law
19 as it relates to proximate causation?

20 A. No Ma'am.

21 Q. Why not?

22 A. I didn't see where it had anything to do with this.

23 Quite frankly, I think that with respect to -- to the
24 indictment, and I don't know what -- what we requested by
25 way of requests to charge, but I would think that if we

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1 requested criminal intent, which is something I do in every
2 case, I check it off in every case, if we requested criminal
3 intent, criminal intent would, from the standpoint of
4 elements of the offense of assault and battery with intent
5 to kill, criminal intent would cover, in my opinion, any
6 peripheral issues that might exist concerning whether or not
7 the Defendant did, in fact, either himself made some direct
8 contact with the victim or placed into motion something else
9 that made in contact with her, which would have been the
10 necessary element for assault and battery with intent to
11 kill.

12 Q. My question is where the State expressly alleged that
13 a specific act by your client caused her car to leave the
14 road and flip, did you consider ---

15 A. No Ma'am.

16 Q. Thank you. Mr. Barr, were there any plea
17 negotiations in this case?

18 A. I -- I don't remember. I'm sure there were. There
19 always is in most cases.

20 Q. All right. There was an audio tape of a 911
21 transmission call in this case. It was introduced into
22 evidence and published at Mr. Cohens' trial. Do you recall
23 that?

24 A. Yes Ma'am.

25 MS. SHURLING: Your Honor, a moment's indulgence.

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1 I'll give you the page cites. I'll find that in a moment
2 for the Court.

3 Q. But do you agree that during the presentation of the
4 State's case in chief that the State published that 911 call
5 in its entirety?

6 A. They published it.

7 Q. Okay. And, in fact, there was reference to the 911
8 call during the testimony of two witnesses, wasn't there?

9 A. I'm not sure.

10 Q. Well, Adrian Dunmore, this testimony begins on Page
11 75, was the 911 operator, and she testified concerning the
12 911 call. Do you recall that?

13 A. No Ma'am. I do recall that the 911 tape was played.

14 Q. I understand. And then, of course, subsequently
15 during the actual testimony of Nadine Cohens, she is
16 questioned about making the call to 911, and the tape is
17 played for the jury at Page 107, Line 20, going over -- the
18 notation that it is being played for the jury is found at
19 107, Line 20 through 108, Line 3, but the text of that
20 communication is not reproduced in the transcript, but do
21 you recall it being played for the jury?

22 A. Yes Ma'am.

23 Q. Do you recall during the State's closing argument
24 there coming a time when Prosecutor Modica asked that the
25 911 tape be re-played for the jury during his closing

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1 argument?

2 MS. SHURLING: Your Honor, I will direct the
3 Court's attention to Page 384, Line 22, is where the State's
4 closing argument begins and the reference to the 911 tape
5 being played is found on 394.

6 THE COURT: 394?

7 MS. SHURLING: Yes sir, Your Honor.

8 Q. Do you remember that, Mr. Barr?

9 A. Yes Ma'am.

10 Q. Why didn't you object to the State re-playing this
11 piece of evidence during closing argument?

12 A. I -- I think the State pretty much felt that the 911
13 tape was the centerpiece of their case, but I don't -- I
14 don't believe that the jury we had focused -- and when I say
15 the jury we had, I'm talking about the racial makeup, the --
16 and the racial makeup more than anything else.

17 I don't think that the 911 tape was that effective in
18 terms of appealing. I think they heard it because it was
19 bad for us, but I think the jury in this case would have
20 considered in terms of making a decision, what happened
21 before the 911 tape, as well as whether or not the Defendant
22 flagrantly disobeyed the police when they turned on the
23 police siren.

24 Now, juries -- juries have -- particularly white
25 juries in Georgetown will punish you for that.

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1 Q. Well, ---

2 THE COURT: Ms. Shurling, before you ask -- I'm
3 sorry. I know you said the 911 tape wasn't played, but it's
4 not in the transcript of record what's on the 911 tape.
5 Where is it in the trial? When did that occur in the trial?
6 Where is that?

7 MS. SHURLING: In the trial, it was initially --
8 I'm sorry, Your Honor. I had that, and I moved on.

9 THE COURT: I'm sorry.

10 MS. SHURLING: That's okay. No, it won't take me
11 but a second to find it again.

12 107, Line 20, to 108, Line 3, is the reference to
13 its publication, Your Honor, but again, the content of the
14 tape is not ---

15 THE COURT: It's not in there, but it's ---

16 MS. SHURLING: It's not in there.

17 THE COURT: But it is a State's exhibit, though,
18 right? If it was introduced, whatever -- however the 911
19 tape was ---

20 MS. SHURLING: A C.D., Your Honor.

21 THE COURT: A C.D., because ---

22 MS. SHURLING: State's Exhibit Number 79.

23 THE COURT: Okay, great.

24 MS. SHURLING: And for the record, Your Honor, I
25 served a subpoena on the Georgetown County Clerk of Court's

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1 Office and asked that the Clerk and/or their designee see to
2 it that that C.D. was brought to the courtroom today so that
3 Your Honor would have the benefit of listening to that tape
4 in reference to this allegation, should you be willing to do
5 so.

6 I would submit that listening to the tape or to the
7 audio recording is probably essential to rule on this issue.

8 Q. Would you agree, Mr. Barr, that in the 911 tape Ms.
9 Cohens sounded hysterical?

10 A. She certainly did, absolutely.

11 Q. Okay. And that she was clearly asserting that her
12 husband was trying to harm her and she was ---

13 A. Well, she was asserting that, but the physical
14 evidence, I mean, she could -- I didn't -- I didn't like her
15 necessarily getting that much time, that much play with the
16 jury, but I think they were playing essentially on something
17 that the jury was not going to make a decision regarding
18 when the jury sat down and listened to the evidence.

19 Q. Okay, thank you. You just gave me -- I like the way
20 you phrased that, giving her that much play. This evidence
21 was cumulative, wasn't it? It had already been heard by the
22 jury?

23 A. Sure. It had been admitted into evidence, and
24 Matthew used it in his closing argument.

25 THE COURT: I think that's a question, sir, -- I

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1 understand your argument here, Ms. Shurling, ---

2 MS. SHURLING: My argument, Your Honor, ---

3 THE COURT: --- but let me ask you a question about
4 it.

5 It's an exhibit of the State. It's in the record,
6 correct?

7 MS. SHURLING: Yes sir, Your Honor.

8 THE COURT: All right. Are you telling me you
9 think it's improper for the State in its closing argument to
10 be able to make reference to and to use an exhibit that is
11 in evidence in the case? Is that what you're telling me?

12 MS. SHURLING: It's narrower than that, Your Honor.

13 THE COURT: Well, what might your argument be? I
14 mean, it is an exhibit in the case, okay?

15 MS. SHURLING: Yes, Your Honor.

16 THE COURT: It's available then. The Court has
17 already ruled on it, all right? It's in evidence. It's
18 available then to the State and the Defense to make whatever
19 use of it in their closing arguments that they want to. If
20 it's a picture, they can hold it up and they can circulate
21 it among the jury in their closing argument if they want to,
22 all right?

23 MS. SHURLING: I understand.

24 THE COURT: So how is that different than the 911
25 tape, an exhibit in the case, being played for the jury?

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1 **MS. SHURLING:** Your Honor, it would be my position
2 that where the tape was published during the testimony of
3 Ms. Cohens and discussed at length during the testimony of
4 the 911 operator, that everything of probative value had
5 already been heard by the jury and that given the
6 inflammatory nature of the audio tape itself, that to allow
7 the State to re-play that published exhibit for the jury
8 during closing argument was not only cumulative, but
9 prejudicial.

10 **THE COURT:** All right. So let's take the example
11 of a photograph. You've got -- you've got a murder and
12 there is a bloody photograph, and all proper motions are
13 made and the State allowed -- and the Court allows it into
14 evidence, so it's in evidence. All the objections have
15 already been made about that.

16 In the closing argument, the Solicitor holds up the
17 photograph as an example of what happened during that
18 murder. You're telling me there is some decision of the
19 South Carolina Supreme Court or the Court of Appeals, or the
20 U.S. Supreme Court saying that's improper?

21 **MS. SHURLING:** No sir, Your Honor, I'm not, but may
22 I explain?

23 **THE COURT:** Then just tell me how that's any
24 different than what you're trying to do here now.

25 **MS. SHURLING:** Well, first of all, what I'm saying,

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1 there was no Miranda, so there was Miranda. I mean, the
2 fact that there's not a case directly on point doesn't make
3 it a valid point.

4 I understand Your Honor's position with regard to
5 something like a photograph, but in this case in lieu of
6 either the 911 operator or Ms. Cohens testifying verbatim as
7 to exactly what was told the operator, the tape of the
8 conversation was introduced in -- in a context that was
9 virtually testimony, and because of the inflammatory nature
10 of the audio recording itself, I would submit that the
11 cumulative publication of that audio tape was prejudicial
12 and should have been objected to by Trial Counsel.

13 **THE COURT:** And it being an exhibit in the case, it
14 went into the jury room, correct?

15 **MS. SHURLING:** Correct, Your Honor.

16 **THE COURT:** All right. And the jury could have
17 listened to it five hundred times if they wanted to in that
18 jury room, correct?

19 **MS. SHURLING:** Assuming they had the technical
20 capacity to do so, Your Honor. We don't know that they ---

21 **THE COURT:** Well, usually all juries do, okay, but
22 they had the ability to look at any exhibit in the case, so
23 -- all right, fine. Thank you. You may continue.

24 **MS. SHURLING:** Thank you.

25 Q. I'm going to backtrack for just a minute because

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1 we've already basically covered the allegations that we were
2 going to be addressing here today, but backtracking for a
3 moment to your plan to go by your office the morning of the
4 second day of trial, what was the document that you felt
5 like it was necessary to go get, do you recall?

6 A. It was -- it was -- it was something related to the
7 statement that the victim had made at a Family Court
8 hearing.

9 Q. And you, in fact, during your cross-examination of
10 Ms. Cohens did make a couple of references to her earlier
11 Family Court testimony?

12 A. I may have.

13 Q. The record will show you did. My question is
14 preparing for this trial, you knew -- I mean, if there was
15 any witness that there was no question the State would be
16 calling, it was Ms. Cohens, right?

17 A. Yes Ma'am.

18 Q. And as the victim in the case, you knew with
19 certitude that -- that being able to impeach her credibility
20 any way you could was going to be crucial to your client's
21 defense?

22 A. Yes.

23 Q. Why in preparing for this case would you not have
24 already put that Family Court record in your file so that
25 you would have it with you?

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1 A. Well, it -- I probably stayed up most of the night
2 preparing for the case at home. When you try cases, and I
3 try probably more cases than any other lawyer in the Third
4 Circuit, criminal cases, including murder cases, you don't
5 ever -- they stay on your mind all the time. Now, sometimes
6 you second-guess yourself. As I drove along, I remember I
7 thought about something and I had a question and I needed an
8 answer, and I decided to try to get the record.

9 MS. SHURLING: One moment, Your Honor.

10 THE COURT: Yes Ma'am.

11 MS. SHURLING: May I approach, Your Honor?

12 THE COURT: Yes Ma'am.

13 Q. Mr. Barr, this appears to be the transcript you
14 referenced during your cross-examination of Ms. Cohens. Can
15 you tell us the date on that transcript?

16 A. April 6, 2006.

17 Q. And who was counsel of record for Mr. Ronald Cohens
18 at that proceeding?

19 A. I was.

20 Q. So you were handling the domestic aspect of this case
21 in addition to representing him in criminal charges?

22 A. I had already handled the domestic aspect of it.

23 Q. And as recently as April 2006 preceding this trial in
24 June 2006, you had been counsel of record at this hearing
25 where statements were made referencing this very incident,

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1 correct?

2 A. Yes Ma'am. That's what the whole thing was about.

3 Q. And notwithstanding that, it's your position that it
4 didn't occur to you until the morning of the second day that
5 this might be helpful?

6 A. I'm not sure I didn't have the transcript itself, but
7 it was either some notes or something that I had collected
8 regarding something that she had said. This case didn't
9 start on the bridge. It started way out in the country
10 where if the jury believed Mr. Cohens, that he didn't stay
11 out there and wait for her until she came out, then I think
12 the case would have gone the other way, but if they believed
13 that he waited on her to leave home, jumped out there on 41
14 behind her and followed her to the Swamp Fox and turned
15 right behind her and followed her where the -- according to
16 the testimony that the police gave on the blue light issue,
17 then -- then he was in trouble, because it smacks -- it
18 smacks on laying in wait and premeditation, and that's where
19 the issue -- that's where the issue was in this case. The
20 bridge thing was important, but that's -- that's not what --
21 what was going to carry a jury.

22 Q. Would being in violation of a Family Court Order not
23 to be within certain proximity of his wife have gotten him
24 in as much trouble as an ABWIK charge?

25 A. I -- I don't think so, depending on whether or not he

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1 was convicted. It depends on whether or not -- on the
2 criminal side and on the Family Court side, it depends on
3 whether or not he was held in contempt.

4 Q. And there was evidence before this jury in the form
5 of the testimony of both Mr. and Mrs. Cohens that they had,
6 in fact, separated and reconciled on numerous previous
7 occasions?

8 A. It's the kind of thing that people do everyday, and
9 that, for the jury, what it does, it humanizes a victim and
10 a defendant.

11 Q. They were one of those couples that would break up to
12 make up?

13 A. They'd break up to make up, but not the ABIK. We
14 don't want that. Anything else, I certainly wanted them to
15 feel like they were just normal people who were having it
16 out, but not Mr. Cohens assaulting her with the intent to
17 kill her.

18 Q. And do you recall your opening argument in this
19 case?

20 A. No Ma'am, not the specifics of it. I probably
21 outlined our theory or at least what I wanted to float that
22 part of our theory that we needed to disclose at this time,
23 hopefully not a whole lot.

24 Q. I understand. With regard to -- looking at a
25 specific portion of your opening argument ---

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1 A. What page?

2 MS. ELLIOTT: Your Honor, I would not ---

3 Q. In the area of ---

4 THE COURT: Okay, what? Okay. All right, very
5 good. I'll just leave it to the State. If you believe you
6 have an objection, I'll be glad to hear from you.

7 All right, go ahead, Ms. Shurling.

8 Q. Page 68, Lines 23 through 25. The only thing that I
9 can promise you as a defense lawyer, I'm here to see my
10 client has a fair trial. Do you recall making that
11 argument?

12 A. It's in the record. I mean, I don't ---

13 Q. I understand.

14 A. --- might say that in a hundred cases.

15 Q. Were you -- going back to the question on the jury
16 charge, were you not concerned that your being late for
17 Court could be viewed by the jury as your not being a
18 zealous advocate for your client?

19 A. I don't ever want to be late for Court. I never
20 wanted to be late for Court. It was something that had
21 already happened. I couldn't change it. I certainly didn't
22 want to draw any more attention to it than I needed to draw
23 to it, and quite frankly it was something that under the
24 circumstances could have been handled altogether different,
25 but it wasn't.

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1 Now, the reality of that situation in a trial
2 atmosphere is that you make a decision that's going to best
3 be consistent with what -- what you are trying to do in
4 terms of exonerate your client, and you do have to exonerate
5 him, particularly here in Georgetown, and I didn't -- you
6 know, it wasn't the kind of thing that I wanted to happen,
7 but after it had happened, there was nothing I could do
8 about that other than make the best of what would have
9 otherwise been a bad situation.

10 Q. If I could get you to look at Page 150, Line 15, for
11 me, please.

12 A. 150. Yes Ma'am.

13 Q. The Judge explains that he is going to allow you to
14 cross-examine the witness from yesterday, and then you begin
15 to address the jury on Line 23 of Page 150, going over to
16 approximately Line 6 on Page 151.

17 A. Right.

18 Q. You repeat three times by my count that you're not
19 offering any excuses, that you don't want excuses, that you
20 were late and you're sorry?

21 A. Yes Ma'am.

22 Q. Did you consider that it might have mitigated the
23 impact of being tardy for Court if you had in the context of
24 your apology impressed upon the jury that you had a good
25 reason for being late?

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1 A. What -- what I considered is that I was standing up
2 in front of twelve people, looking in their eyes, and I
3 don't know -- you -- I don't know whether you ever tried a
4 case where some jurors turned their back to you. I've tried
5 those. I tried one once in Florence County, but what you
6 want to do as a Defense attorney is pick up the jurors as
7 best you can and not just ingratiate yourself with them, but
8 you want to develop a relationship with them.

9 Now, out of that twelve, you're going to have all
10 kinds of people, but while you're standing up there talking
11 to them, you need to be able to identify who they are,
12 whether they like what you're saying, what direction you're
13 going in, whether you've gone too far with that.

14 What -- what I try to do when I stand up in front of
15 a jury, every time I get a chance, and I love standing up in
16 front of them, is to befriend a jury and get a jury to
17 believe what I'm telling them as opposed to listening to
18 somebody else.

19 Q. Thank you.

20 MS. SHURLING: I, Your Honor, would not have any
21 additional questions with regard to the allegations we're
22 proceeding on today.

23 THE COURT: All right, very good.

24 All right, ---

25 MS. ELLIOTT: Thank you, Your Honor.

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1 CROSS-EXAMINATION BY MS. ELLIOTT:

2 Q. And just -- I'm going to go back to the beginning,
3 but just to follow up with that last question, Mr. Barr, you
4 said that in your apology -- or I guess during a trial, is
5 it correct that you're trying to develop a rapport with a
6 jury?

7 A. Well, I try cases in Horry, Florence, Williamsburg,
8 Sumter, Columbia. Each jury, and any lawyer that try cases
9 know that when you look at the constituency of the jury or
10 based on the geography of the situation, juries are
11 different, and there are some that you can approach some
12 ways and some that you can't approach, and what you need to
13 know is -- is how -- how you develop some good working idea
14 as to how you can impress yourself with this particular jury
15 given the location of where you are.

16 And I happen to know -- I've tried enough cases here
17 in Georgetown, I know what to say and at least hopefully
18 aspire -- or what to say to a Georgetown jury and what not
19 to say.

20 Q. And that's based on your experience in trying cases
21 here in Georgetown?

22 A. Yes Ma'am, thirty-two years.

23 Q. Interacting with the jurors in Georgetown?

24 A. Yes Ma'am.

25 Q. Okay. And also, I guess, interacting with this

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1 particular jury, because this was the -- at least the second
2 day of trial, is that correct?

3 A. It was.

4 Q. So you at least had one day to interact and then
5 watch the jury as witnesses were testifying?

6 A. Yes Ma'am.

7 Q. And did you take that into consideration, your
8 experience with this particular jury and your experience
9 with jurors in Georgetown County generally in the trial of
10 criminal cases in formulating what apology you would give to
11 this juror -- to this jury?

12 A. The -- the apology itself, quite frankly I don't -- I
13 don't know that at the end of the day, as I said, other than
14 maintaining, trying to maintain or stay on particular --
15 with the jury, but if you're in Georgetown County and you've
16 got -- in a criminal case where law enforcement is involved,
17 you -- you -- you have to have -- you have to be somewhat
18 straight with law enforcement. Otherwise, you've got a more
19 of a law and order kind of attitude, and in this case with
20 Mr. -- Mr. Cohens, I think as far as the jury is concerned,
21 the failure to stop for the blue light was probably worse
22 than -- than the bumping -- which we denied, if, in fact, it
23 occurred.

24 Q. Let me ask you this, Mr. Barr. In your apology to
25 the jury, did you, in addition to your experience generally

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1 with trying cases and with juries in Georgetown, and with
2 this jury in particular, make a strategic decision about how
3 you would apologize to the jury?

4 A. Yes Ma'am.

5 Q. Okay. And is that -- and your strategic decision is
6 reflected in the apology you made?

7 A. The content of whatever was stated in the record as
8 far as what I indicated to the jury, that's what I thought
9 they needed to hear at the time.

10 Q. That you weren't going to come forward and make a
11 bunch of excuses to the jury?

12 A. No Ma'am.

13 Q. Okay. And why did you decide that that would be the
14 best tactic to take?

15 A. Jurors -- jurors are ordinary people just like --
16 just like we are. They don't want to hear excuses. I mean,
17 they know that when you do something that you make a bad
18 decision, then you have to live with it, and -- and you --
19 and I am sure that there are jurors that have made bad
20 decisions, and so rather than offering an excuse for having
21 made a bad decision, I could have got up at six o'clock that
22 morning and would have been in Georgetown by seven, but
23 that's not something that this particular situation called
24 for.

25 As it turned out, in making the decision to go to

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1 Kingstree to get the -- the information, that turned out to
2 be the best decision at least as it relates to that single
3 issue, but at the end of the day, I don't know, it could
4 have been the right one.

5 Q. Mr. Barr, the next morning after Court broke for the
6 evening, the next morning, do you recall that a juror was
7 also late for Court?

8 A. I -- I -- I don't remember, ---

9 Q. You don't recall that?

10 A. --- no Ma'am.

11 Q. Because would you agree that that's something that
12 jurors can relate to that happens -- can happen to anyone?

13 A. I -- I would agree, yes.

14 Q. And perhaps that juror or the jury panel as a whole
15 might be more understanding of your tardiness based upon
16 that juror's tardiness?

17 A. I -- I don't think it was -- it's too difficult for a
18 jury, and certainly you don't want to -- jurors, they've got
19 very short patience. You don't want to tie them up, but in
20 general most times I've found them to be understanding when
21 it comes to normal kinds of behavior, especially, you know,
22 I wouldn't have felt comfortable spinning up a lie or
23 something like that and saying, well, look here, something
24 that they knew that wasn't true.

25 Q. And I guess to go back to the beginning, then, Mr.

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1 Barr, you indicated that you had been practicing law for
2 thirty-two years, is that correct?

3 A. Yes Ma'am.

4 Q. And what portion of your practice has been devoted to
5 criminal law?

6 A. A substantial portion of my practice is devoted -- as
7 I said earlier, I think I probably try more cases than any
8 other trial lawyer or criminal lawyer in the Third Circuit.

9 Q. Including cases for assault and battery with intent
10 to kill?

11 A. Yes Ma'am.

12 Q. And failure to stop for a blue light?

13 A. Sure.

14 Q. So you have experience with the law relating to those
15 charges?

16 A. I -- I've had experience, and if I might say so, if
17 you ask the right people, I think they'll tell you that I've
18 been more successful than any others.

19 Q. Did you discuss -- you obviously engaged in an
20 investigation into the facts of this case, is that correct?

21 A. Yes Ma'am.

22 Q. You had all the discovery material, including
23 incident reports, statements, and things of that sort?

24 A. Yes Ma'am.

25 Q. You had the S.L.E.D. Report ---

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1 A. Yes.

2 Q. --- of the bumper?

3 And made Batson motions and made search and seizure
4 issues -- you brought search and seizure issues to the
5 Judge's attention, is that correct, during trial, the ---

6 A. I don't specifically recall all the details. I know
7 that there was some suppression issues involved, and I --
8 I'm -- I'm pretty sure that those issues were resolved by
9 the Trial Judge.

10 Q. And you'd reviewed the photographs that were admitted
11 into evidence at trial?

12 A. Yes Ma'am.

13 Q. And you had heard the 911 audio, is that correct?

14 A. Yes Ma'am.

15 Q. And you'd seen the Rule to Show Cause because you
16 represented Mr. Cohens in the Family Court matter as well,
17 is that correct, ---

18 A. Yes Ma'am.

19 Q. --- and knew that that was outstanding?

20 Did you discuss with Mr. -- if I can ask just
21 briefly, can you briefly -- or would you agree with me that
22 the State's case in this -- in this matter was that the
23 Defendant basically laid in wait as his wife left for work
24 at 7:00 A.M., is that correct?

25 A. Yes Ma'am.

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1 Q. And that he followed her in his car, called her when
2 he saw her go by where he was waiting for her? She turned
3 the phone off. He basically followed her on her route to
4 Myrtle Beach to her job, is that correct, ---

5 A. That's -- that's essentially what ---

6 Q. --- taking different roads, that route, to get to
7 Myrtle Beach, is that correct?

8 A. That's what they claimed.

9 Q. And that on 17 at some point he accelerated -- or
10 they passed each other back and forth; he at some point
11 accelerated to catch up with her, is that right?

12 A. Yes Ma'am.

13 Q. And that she testified that he drove right behind her
14 bumper and was bashing into the back of her car
15 approximately three to four times, is that correct?

16 A. Well, -- well, that's correct. Of course, the
17 difference was how supposedly from Marion how she got where
18 she got in front of him.

19 Q. Right, and then her testimony was that the last time
20 he bashed into her car, that she -- it caused her to run off
21 of the road in front of a school bus and flip over, is that
22 correct?

23 A. That's -- that -- that was her testimony.

24 Q. And there were two State's witnesses who were on
25 Highway 17 who observed that and basically testified

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1 consistently to the victim's version, is that correct?

2 A. Well, they claimed they saw it happen.

3 Q. And then the Defendant -- what was the defense in
4 this case?

5 A. Well, first of all, the Defendant denied that in
6 terms of making the contact with her that caused her to
7 flip, that he was -- that he -- that that was his vehicle,
8 and, of course, it was questionable as to whether or not
9 even with the forensic evidence that they had, I mean, when
10 they got to describing the details of the damage to Mr.
11 Cohens' vehicle, I think one of the experts -- I can't
12 remember what his name -- admitted that it was old damage.

13 But for whatever reason, and taking that into
14 consideration with the testimony of the eye witness, they --
15 they obviously chose to believe that he did cause her to
16 leave the road, and as I think -- I think that that -- the
17 ABIK just piggy-backed on the failure to stop for the blue
18 light. That was just -- they believed the police.

19 Q. And your client, his defense basically at trial and
20 his testimony was that he denied that he bumped her car, ---

21 A. Yes Ma'am.

22 Q. --- was behind her bumping her car? He said at some
23 point they might have both come together side by side, but
24 at the time of the last bump that caused her to go off of
25 the road, was it not his testimony that she ran into him?

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1 A. She ran into him.

2 Q. Okay, that he did not cause her to leave the road,
3 but she ran into him? He did no act that caused her to run
4 off the road?

5 A. No Ma'am, he didn't say that he did. He denied that
6 he did.

7 MS. ELLIOTT: One moment, Your Honor, to find my
8 other notes.

9 Q. Did the trial transcript, if you will agree, reflect
10 that you were fifteen minutes late arriving for Court
11 because you went by your office to get the Family Court
12 transcript, is that ---

13 A. I'm not sure. I don't -- I don't -- I think I
14 probably had the transcript. I think it was my notes ---

15 Q. Okay.

16 A. --- concerning some notations I had made concerning
17 the transcript. I believe that that's what -- because I
18 would have had the transcript with me.

19 Q. Okay. And obviously no idea that that would cause
20 you to be late for Court, correct?

21 A. I -- I certainly hoped it wouldn't be.

22 Q. Okay. In your absence, I think you testified that
23 you spoke with the Assistant Solicitor ---

24 A. Matthew Modica.

25 Q. --- and determined what had happened up to that point

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1 before you arrived?

2 A. Well, I asked him, and -- and -- and, in fact, I
3 asked him why did y'all let the Judge get started, and he
4 said it wasn't his call. He said nothing had happened, but
5 he couldn't stop the Judge from going -- and Judge Baxley
6 went on and got -- and he got started.

7 Q. Okay, and basically you reviewed the transcript of
8 those portions, I believe, on direct-examination, is that
9 correct, Page 121? Initially is that what happened when you
10 arrived?

11 A. Yes Ma'am. I -- I took a look at it.

12 Q. Okay. And basically what had happened in your
13 absence was the jury came out, Judge Baxley asked them about
14 exposure to any information about the case overnight, and
15 then -- is that correct?

16 A. I don't see where at least, and certainly in the
17 transcript, that he indicated anything other than the normal
18 kinds of things, whether or not they'd heard anything about
19 the case, and whether -- and they proceeded with the calling
20 of the next witness after Ms. Cohens.

21 Q. And the witnesses were sequestered, isn't that
22 correct?

23 A. As far as I recall, they were.

24 Q. And the State called the next witness, State's
25 witness, and as that witness was being -- was being, I

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1 guess, delivered to the courtroom, you arrived, is that
2 correct?

3 A. It was either before the witness was sworn -- I can't
4 remember whether or not the witness had been sworn, but I
5 went straight to the bench. I didn't ---

6 Q. And there had been no testimony presented by that
7 witness?

8 A. No Ma'am. No.

9 Q. No witness had testified that day?

10 A. Uh uh (**indicating negative**).

11 Q. And you then -- the case proceeded with the Direct
12 and Cross-examination of that next State witness who was one
13 of the witnesses on Highway 17, is that correct?

14 A. I think it was Mr. Lewis, I believe. I think it was.

15 Q. So you had the benefit of his Direct-examination ---

16 A. Yes Ma'am.

17 Q. --- before you had -- were able -- before you cross-
18 examined the victim, is that correct?

19 A. Yes Ma'am.

20 Q. And you say you don't recall what discussions you
21 might have had in the bench conferences?

22 A. I -- I -- I do not recall the details of what we
23 talked about. I didn't necessarily want to do it the way
24 that the Judge -- because quite frankly I was thinking I was
25 still thinking about the issue of whether or not we were

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1 going to have to put Mr. Cohens on the witness stand. That
2 was my ---

3 Q. Did you perceive -- so at that point you had not
4 decided whether you would present Defense evidence?

5 A. No Ma'am.

6 Q. And you were concerned that you might have to call
7 the victim in the State's -- in the Defense case, is that
8 correct?

9 A. Well, if I did that, then ---

10 Q. Right.

11 A. --- the advantage of -- or at least perceived
12 advantage of being able to either not call him or to call
13 him would have been lost.

14 Q. But ultimately that did not come to pass, is that
15 correct?

16 A. No Ma'am.

17 Q. Because you apologized to the Judge again and asked
18 not to punish your client, but to please have the State
19 recall the victim so that you could conduct your Cross-
20 examination of her, is that correct?

21 A. And he did.

22 Q. And he did do that, and did you perceive ---

23 A. I -- quite frankly, the apologizing, even though it's
24 a situation you don't want to be in, but it gives you
25 another opportunity to talk to a jury about things that are

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1 not even in evidence, that you can just talk about whatever
2 you want to talk about.

3 Q. To develop a rapport?

4 A. Yes Ma'am.

5 Q. So you used it to your advantage as best you could?

6 A. Sure.

7 Q. And did you perceive any disadvantage in the fact
8 that another State witness testified before you cross-
9 examined the victim? Did it -- was it advantageous to
10 you ---

11 A. No -- well, no -- no. Well, you know, the
12 Prosecution could have called them in some other order. I
13 didn't -- I didn't -- I really didn't attach any real
14 significance to -- to that.

15 Q. Was your ability to cross-examine the victim hindered
16 in any manner because you did not do it the very first thing
17 the next morning?

18 A. No Ma'am.

19 Q. Because there had already -- as you have mentioned,
20 there had already been that break for the evening?

21 A. Yes, split -- split her testimony, yeah.

22 Q. Did you consider objecting to -- on the record to the
23 Judge not immediately calling her back to the stand so that
24 you could cross-examine her?

25 A. I think when -- when I get -- I think I gave it some

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1 thought, but I wasn't sure whether or not Mr. Cohens was
2 going to get convicted, and if so, it seemed that in that
3 present atmosphere Judge Baxley was getting pretty rough,
4 and quite frankly it turned out that he did because he gave
5 him twelve years, but I didn't -- I didn't see any reason to
6 -- for -- unless there was something that we could gain,
7 something more than just something incremental, I didn't see
8 concerning Judge Baxley and -- because he -- apparently he
9 wasn't in any mood to play around.

10 Q. And was your ability to cross-examine the witnesses,
11 present a defense, in any way inhibited by the fact that you
12 were fifteen minutes late ---

13 A. No Ma'am.

14 Q. --- the second day of trial?

15 Were you able to make all the motions you needed
16 to make?

17 A. As far as I know.

18 Q. Did you vigorously in front of the jury cross-examine
19 witnesses?

20 A. Yes Ma'am.

21 Q. Did you vigorously make motions and objections for
22 your client?

23 A. I -- I thought I did. They're in the record.

24 Q. Did you professionally represent your client during
25 those days of trial in front of the jury?

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1 A. I always try to do that.

2 Q. And there's also a claim that not only did you not
3 object to the fact that -- that you weren't able to go
4 forward with the cross-examination of the victim when you
5 arrived in Court that second day, there's also the claim
6 that you failed to object on the record when the Trial Judge
7 admonished you in the presence of the jury, and that would
8 be on Page 121. If you could review that. Please let me
9 find the line numbers for you.

10 MS. SHURLING: Ms. Elliott, could you repeat that
11 page.

12 MS. ELLIOTT: It's Page 121, Lines -- Line 1
13 through 5.

14 MS. SHURLING: Thank you.

15 MS. ELLIOTT: Or wait. That might be the wrong
16 page. I'm sorry. It's 121, Lines 18 through 24.

17 A. If I was in Williamsburg County, I would have done
18 that, but in Georgetown County, no Ma'am.

19 Q. And why is that? Well, first of all ---

20 A. It -- it comes over confrontational, which doesn't
21 play -- well, when I say doesn't play, it just simply --
22 it's the constituents of the jury. I mean, it ---

23 Q. And would it have caused it to highlight the issue to
24 the jury if you had continued to argue or object to the
25 Judge?

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1 A. No Ma'am. I think that -- I think it just would have
2 created a problem and the best thing to do was to leave that
3 alone.

4 Q. And did you consider making a mistrial motion based
5 on that -- that statement by the Judge?

6 A. No Ma'am.

7 Q. And why not?

8 A. I -- quite frankly, I don't know that a mistrial
9 under the circumstances would -- would put us any -- at any
10 advantage any more than -- more so than where we were. We
11 didn't have a perfect jury, but for Georgetown County, we
12 had as good jury as you're probably going to get and, in
13 fact, I've had lots worse. I didn't want a new trial.

14 Q. Okay. And had you made it, would it have been
15 granted based on what the Judge said?

16 A. I would think it would -- I -- Judge Baxley wouldn't
17 have granted it, but, I mean, if I had to make the motion,
18 unless I asked the Judge to excuse the jury, then -- then I
19 would have had to made the motion in front of the jury or at
20 least move for a new trial, and then the Judge would have
21 had to send the jury out, and I don't -- I don't -- juries
22 are, at least in my experience, they get suspicious about
23 things when you start doing things that are not necessarily
24 in their presence, and even though the Judge -- the Judge
25 might give instructions as to what -- I don't think they pay

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1 that a whole lot of attention sometimes.

2 Q. Okay. And a lot of the discussion, would you agree,
3 that occurred on Page 148 and 149 later when you are putting
4 on the record what was discussed during prior bench
5 conferences and when the Judge is indicating that he is
6 going to let you -- he is going to have the victim recalled,
7 none of that occurred in the presence of the jury, is that
8 correct?

9 A. No Ma'am.

10 Q. Okay. So the only remark that occurred in front of
11 the jury really was the one that we've just talked about on
12 Page 121, and then there is no indication when you apologize
13 to the jury that you are being prompted to do so, is there?

14 A. No Ma'am.

15 Q. So all that occurred outside the presence of the
16 jury?

17 A. Yes Ma'am.

18 Q. If you're going to apologize to the jury, and I know
19 you asked to do it in the closing argument, but do you
20 believe that perhaps it might have been more heartfelt and
21 accepted by the jury to have heard it contemporaneously?

22 A. My -- my primary reason for wanting to do it at the
23 end of the case is I would have had a much better feel for
24 the dynamics of what would have been -- what they would have
25 had to consider after all the evidence was presented, but to

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1 do it at that point would have left me with sterile --
2 issues of sterile things to say to the jury and not use that
3 opportunity to really argue about what the evidence was or
4 was not, and -- and that would have been the -- then would
5 have been the advantage in doing that because clearly once
6 if we had put the Defendant up, then that meant that we
7 would have had to have gone first.

8 Q. Did you feel like the apology in any way violated
9 your client's rights?

10 A. If I'd felt like they had violated his rights, I
11 would have moved for a mistrial.

12 Q. Did it inhibit you in any way from doing what you
13 needed to do to defend your client?

14 A. No Ma'am.

15 Q. Did it perhaps assist -- the apology assist in the
16 impression you were giving the jury in any way do you
17 believe?

18 A. I can't say that it did.

19 Q. Okay.

20 A. I mean, I hope it did, but certainly -- but I can't
21 say that it did. I don't know.

22 Q. And then there was no further mention of any of this
23 throughout the rest of the trial?

24 A. Dead issue.

25 Q. Did the Judge's comments to you in any way influence

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1 the defense you had planned to present, the cross-
2 examination, the motions, the objections, or any way in
3 which you handled the defense in this case?

4 A. No Ma'am. I've known Judge Baxley for years, met him
5 in Washington, D.C. years ago.

6 Q. So you presented the defense as planned?

7 A. Yes Ma'am.

8 Q. Okay. And did you, in fact, use that transcript and
9 those notes in your cross-examination of the victim?

10 A. I most certainly did.

11 Q. The Judge, you would agree, made no personal remarks
12 about you in that -- in that exchange?

13 A. He -- Judge -- he's not going to -- he didn't, and
14 he's not going to do that. I mean, that's just not ---

15 Q. And you would agree that he has discretion to control
16 the conduct of the trial?

17 A. Absolutely.

18 Q. And that could be part of what was going on?

19 A. That's -- that's a part of the ---

20 Q. Did he ever in any way insinuate that you lacked
21 professionalism or skill in your handling of this matter?

22 A. No Ma'am.

23 Q. Did he threaten you with contempt or anything else in
24 front of the jury?

25 A. No, he didn't.

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1 Q. Now, the issue as to jury charge on -- requesting a
2 jury charge on proximate cause, tell me why you did not
3 request that.

4 A. You know, I -- since -- somebody brought it up to me
5 this morning, and -- because, I mean, that's the first time
6 I've even heard of anything about this -- this issue, would
7 have been here in the courtroom, but I can't -- I can't
8 think of a criminal case where I have had an occasion to
9 ever ask for instructions on causation issue within the
10 context of proximate cause.

11 It would seem to me that if you -- once a jury is
12 charged on reasonable doubt, presumption of evidence or
13 presumption of innocence and charged on -- properly charged
14 on the -- on criminal intent and the actual elements of the
15 offense, I would think that a proper charge on those issues
16 would clearly embrace what would otherwise be tantamount to
17 a causation issue as it might develop somewhat synonymous
18 with how it could be, say for instance, in a civil context,
19 so I don't ever recall asking for a proximate cause per se
20 instruction in a criminal case.

21 Q. And in this case, I believe, State's cases, your
22 client bashed the victim off the road with his car?

23 A. Well, if I request a charge, there must be some
24 evidence presented, either documents or testimony, or
25 demonstrative evidence or something to support the charge,

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1 and I don't -- I don't -- I'm not aware of any -- and
2 certainly wasn't aware of that at that point ---

3 Q. His position was he didn't do it?

4 A. He didn't -- he didn't hit her.

5 Q. He said she hit him, is that correct?

6 A. That -- that was my understanding of -- so, I mean,
7 insofar as the element of the offense, that is the battery
8 that would have been necessary, say for instance, to be --
9 to present evidence sufficient to get a charge on that. You
10 don't get -- she was the one that was actually in our -- the
11 aggressor, causing, if anything, any contact between the
12 vehicles.

13 Q. So you felt that the jury with the charge given by
14 the Judge ---

15 A. I thought the charge, you know, given was sufficient
16 based on what we had testified what the evidence was. I
17 certainly wasn't going to argue to the jury in closing,
18 well, look, he accidentally hit her.

19 Q. But the law that he charged is determined by the
20 evidence presented at trial, is that correct?

21 A. Yes Ma'am.

22 Q. And you have to look at it as a whole, is that also
23 correct, ---

24 A. I would think so.

25 Q. --- everything the Judge said?

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1 And is it your position that the general charge given
2 in this case on the State's burden of proof and what the
3 State must show to prove the Defendant guilty accurately
4 provided to the jury those issues that it must consider?

5 A. If -- if he had not, I would have objected to the
6 charge as being insufficient.

7 Q. The testimony earlier or mentioned earlier about the
8 portion of the transcript in which Judge Baxley indicated
9 that he has arrived at 9:00 A.M. for motions or to explore a
10 possible agreement or consent, do you even know if that was
11 in your case?

12 A. I -- I don't even -- I have no recollection of that,
13 you know. I don't -- my -- my recollection was that we were
14 supposed to be back in Court at 9:30.

15 Q. All right. And actually -- and I don't know if you
16 remember this or not, but actually there was a stipulation
17 entered later during the trial respecting when your client
18 was served with a Rule to Show Cause for the Family Court
19 proceeding, is that correct?

20 A. If it's in the record, I'm -- but I don't ---

21 Q. Okay. So then your late arrival would not have
22 affected that stipulation or agreement?

23 A. I don't see how.

24 Q. Okay.

25 A. I mean, you don't -- you don't need thirty minutes to

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1 stipulate a piece of evidence coming in the record.

2 MS. ELLIOTT: May I have one moment, Your
3 Honor, ---

4 THE COURT: Yes Ma'am.

5 MS. ELLIOTT: --- just to look through my notes
6 real quick?

7 Q. Okay. The 911 tape, the audio tape, if I could
8 direct your attention to that. The -- you knew about it.
9 You had been provided with it prior to trial, is that
10 correct?

11 A. Yes Ma'am. We listened to it.

12 Q. You listened to it, and it was introduced into
13 evidence at trial as a State's exhibit, is that correct?

14 A. It was -- I mean, I didn't like it, but it was not
15 per se inflammatory to a point that it was objectionable,
16 not in my opinion.

17 Q. So the jury heard it? It was published to the jury
18 with the victim's testimony, is that correct?

19 A. Yes Ma'am.

20 Q. And --

21 A. I mean, I didn't -- I didn't think it was
22 substantially unduly prejudicial, you know, anything that
23 would have kept it out.

24 Q. And it was an exhibit, so it was going to go back
25 into the jury room, is that correct?

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1 A. It was evidence.

2 Q. Just like the photographs? The jury would have all
3 the photographs?

4 A. It -- it -- it was evidence. I mean, once it came
5 in, that -- they could ---

6 Q. Okay. And in this case, why did you not object when
7 the Solicitor played that 911 tape in his closing argument?

8 A. I didn't care if he played it. I didn't care if he
9 played it a hundred times ---

10 Q. Did you have ---

11 A. --- other than from the standpoint that -- that he
12 had a woman screaming and carrying on, but I don't think --
13 I don't think that, you know, -- and I'm not going to say
14 that that didn't have an effect on the jury, but I think the
15 more they focused on the 911 tape, the more they would have
16 to direct -- divert their attention from what the real issue
17 was, ---

18 Q. Did -- I'm sorry.

19 A. --- and that would have been how -- how they got
20 started together and the act of perhaps not obeying, at
21 least according to the police officer, the siren, the blue
22 light.

23 Q. Okay. Did you have -- really have a basis to object
24 to the jury hearing it during the Solicitor's closing
25 argument because it was already a State's exhibit, isn't

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1 that correct?

2 A. Well, you know, to say that it's cumulative, that's
3 an -- that's an issue that has to be raised when the -- when
4 the evidence is offered into evidence. I mean, that -- if I
5 want to use the fact that it's cumulative as the basis for
6 an objection, that would be raised at that point, not -- not
7 once it comes into evidence, and once it -- once -- once it
8 comes into evidence, it becomes -- it's there for the jury's
9 disposal.

10 Q. Right. And the purpose of closing argument is for
11 Counsel to direct the jury's attention to the evidence and
12 the reasonable inferences to be obtained from that evidence,
13 isn't that correct?

14 A. That's -- that's what -- that's what the -- that's
15 what the art of persuasion is about at that time.

16 Q. The Prosecutor can hold up a gun that's been admitted
17 into evidence during his closing argument?

18 A. If it's been admitted into evidence.

19 Q. And they do it here, don't they? They pick up pieces
20 of evidence during closing argument and use it in their
21 arguments to the jury, the prosecutors, is that correct?

22 A. I think both sides do that.

23 Q. Okay. Both sides, and the Defense does it, too,
24 because that's the purpose of closing argument is to marshal
25 the evidence and to argue the reasonable inferences, is that

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1 correct?

2 A. That's -- that's my understanding of it.

3 Q. So the jury heard it when it was admitted, and they
4 heard it -- rather than the Solicitor discussing what was on
5 it, he just played it, just like hold- -- instead of
6 describing a photograph, you can hold it up and show it to
7 the jury, is that correct?

8 A. Yes Ma'am.

9 Q. And then the jury would also have that evidence to
10 take back to the jury room later with all the other exhibits
11 like in every other case, is that correct?

12 A. Yes Ma'am.

13 Q. And the jury can touch those pieces of evidence and
14 look at those pieces of evidence as many times as they want
15 to in any trial during jury deliberation, is that correct?

16 A. Yes Ma'am.

17 Q. And, in fact, in this case, didn't the jury ask for a
18 computer so that they could listen to that 911 tape again in
19 the jury room?

20 A. I'm -- I'm just -- I just don't remember, unless it's
21 in the record.

22 Q. And that was something certainly when a jury's
23 purview is to review the exhibits again prior to reaching a
24 verdict, isn't that right?

25 A. If -- if they -- if they -- if they want to take a

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1 look at it, I mean, it's in evidence and they have every
2 right ---

3 Q. It certainly -- I'm sorry.

4 A. --- to review it.

5 Q. It certainly accurately portrays what happened that
6 day, doesn't it?

7 A. It accurately -- accurately portrays what went on in
8 the courtroom. I mean, you know, the woman had gotten up
9 and cried and carried on, and not to say that I'm -- you
10 know, but from the standpoint of my client, even though --
11 like I said, even though the 911 tape was bad, her -- her --
12 her testimony in Court was probably equally as damaging
13 to ---

14 Q. Okay, not only her testimony, but the testimony -- I
15 mean, she testified about it and the 911 operator testified
16 about what happened during that call?

17 A. Well, the witnesses that came along and said we saw
18 it.

19 Q. Yes.

20 A. That -- that -- that was ---

21 Q. The two eye witnesses?

22 A. That was a problem.

23 Q. Okay. Are you aware of any case that would have
24 prohibited the Solicitor from using -- from playing that 911
25 tape during his closing argument, any case law that would

1 have -- would have met that you needed to object to that,
2 you were required to?

3 A. I'm -- I'm not aware of any, not that you could argue
4 in good faith.

5 MS. ELLIOTT: And, Your Honor, if I may look at
6 this application one more time just to make sure I'm not
7 overlooking anything.

8 THE COURT: Yes Ma'am.

9 MS. ELLIOTT: That would be it, Your Honor. Thank
10 you very much.

11 THE COURT: Very good.

12 Redirect?

13 MS. SHURLING: Very briefly:

14 REDIRECT-EXAMINATION BY MS. SHURLING:

15 Q. I believe I understood you to say a few moments ago
16 that you would have already had the Family Court transcript
17 in your file, that you were going by to get some notes?

18 A. I'm thinking, Ms. Shurling, because it was something
19 that -- that -- and I know that I would have probably spent
20 that entire night preparing, I don't specifically remember
21 not having the transcript itself, but there was something
22 related to it. It was a question that came up in my mind or
23 some issue that came up, and I felt like I needed to --
24 whatever it was that I had left related to that transcript.

25 Now, of course, when I told Judge Baxley, you know, I

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1 had to tell him why, you know, I wasn't here on time, but I
2 don't remember specifically what it was, but it was
3 something related to that transcript, some information in
4 the transcript.

5 Q. I understand, but you wouldn't deliberately mislead
6 Judge Baxley or any Judge about the reason for your being
7 late, would you?

8 A. I don't have to.

9 Q. Okay. Well, on Page 147, Lines 8 through 13, you
10 advised the Court that you had realized the night before
11 that having a copy of that transcript would be helpful, so
12 will you agree that the record reflects that you told the
13 Judge you realized you needed it the night before and that
14 it was the transcript you went to get?

15 A. If that's what I said in the -- in the record, that's
16 -- that's -- you know, I don't -- I don't deny that I said
17 that.

18 Q. And ---

19 A. But what I'm telling you is I don't remember --
20 specifically remember at this time whether or not it was the
21 transcript or whether it was something related to the
22 transcript. It could have been something I had scribbled,
23 but there was some question in my mind concerning something,
24 and I knew it was covered in -- it was related to that
25 transcript.

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1 Q. I understand.

2 A. Yes Ma'am.

3 Q. I would assume -- would you agree with me that your
4 recollection of what you'd gone by to get would have been
5 keener very shortly after arriving at Court than it would be
6 these many years later?

7 A. I don't know. I had a lot on my mind that morning.

8 Q. You said you'd never seen a proximate cause
9 instruction of any sort given in a criminal matter?

10 A. Not that I -- I had never requested one.

11 Q. Okay. You sound like you have really extensive
12 criminal trial experience. Mr. Barr, have you ever tried
13 felony DUI cases?

14 A. Yes Ma'am.

15 Q. And isn't it true that in the felony DUI statute it
16 requires not only ---

17 A. I said I have never requested one in any case that
18 I've tried.

19 Q. Will you agree with me that based on the language of
20 the felony DUI statute, and I realize this is not a felony
21 DUI case, but in that example, for a for instance, it is
22 necessary to establish the nexus of the actions of the
23 driver and the accident that caused great bodily harm or
24 death, proximate causation?

25 A. Well, in almost any context, of course even in that

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1 context, once you get a pathologist to come to Court and
2 say, look, the person is dead and here's what caused their
3 death, I don't know if that's really a substantial issue
4 even -- within that context, but I don't disagree with you
5 if you say so. You've probably tried more felony DUI cases
6 than I've tried.

7 Q. Well, I'll move on. At trial, the victim testified
8 initially that both she and her estranged husband were
9 traveling in the left lane when he bumped her from the rear
10 and caused her to lose control and leave the road. Do you
11 recall that?

12 A. No Ma'am, but if it's in the record, I'm sure that's
13 what she said.

14 MS. SHURLING: Your Honor, this is the portion of
15 the transcript found roughly at 106, Lines 11 through 19.

16 Q. And subsequently in another portion of the transcript
17 that Mr. Modica is leading, she indicates that she was in
18 the left lane moving toward the right lane. Do you recall
19 that?

20 A. What did you say -- Page 106, you said?

21 MS. SHURLING: A moment's indulgence, Your Honor.

22 THE COURT: Yes Ma'am.

23 MS. SHURLING: I've got a flag that fell off.

24 Q. 106, Lines 11 through 19, is when she indicates that
25 she had gotten back into the left lane, that he was directly

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1 behind her, struck her for the fourth time and caused her to
2 lose control and leave the road. Do you see that?

3 A. I see that in the transcript.

4 Q. And during subsequent examination she indicates that
5 she was moving toward the right lane from the left lane?

6 A. Well, if I'm not mistaken, I -- I believe she did
7 testify inconsistently in her -- in that very case.

8 MS. SHURLING: A moment's indulgence, Your Honor.
9 I'm so sorry my flag came off.

10 Q. Well, moving on to other witnesses in this case,
11 there was a witness, Mr. Frederick Kimlock, who
12 testified, ---

13 MS. SHURLING: And I apologize, Your Honor. I
14 believe the quote I'm thinking of was actually Mr. Kimlock's
15 testimony on 196, Lines 18 through 24.

16 Q. Mr. Kimlock says she was in the slow lane. I'm
17 starting with Line 18. Where was the SUV when it lost
18 control? The SUV was in the slow lane. She was getting
19 ready to turn in the slow lane.

20 And Mr. Modica says was she in the slow lane or was
21 she in the fast lane at the time she was moving towards --
22 moving in the slow lane and then the Honda came up on the
23 side and knocked her off the road. Do you see that portion
24 of the testimony?

25 A. You're on Page 196, you said, what line?

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1 Q. 196, Lines 18 through 24.

2 A. Yes Ma'am. What's your question now?

3 Q. My question is as opposed to the testimony of the
4 victim that they were both in the left lane, the testimony
5 of Frederick Kimlock was that she was, in fact, changing
6 lanes from the left fast lane over to the right slow lane
7 when your client came up on the side and knocked her off the
8 road, correct?

9 A. Let's see what he says here. Line 15 you said or 16
10 -- starting on Line 15?

11 Q. Line 18.

12 A. Line 18.

13 Q. Through 24.

14 A. Where was the SUV when it lost control initially?
15 The SUV was in the slow lane. She was getting ready to turn
16 in the slow lane. She was in the slow lane or was she in
17 the fast lane? Now, I'm not sure what you're asking me.

18 Q. His answer found on Lines 22 through 24 is that she
19 was in the slow lane -- pardon me -- at the time she was
20 going towards, moving in the slow lane, and then the Honda
21 came up on the side and knocked her off the road. Do you
22 see that testimony?

23 A. I see that testimony.

24 Q. Okay. Now, your client subsequently testified, did
25 he not, that he was in the right lane, that the victim was

CHARLES DAVID BARR - REDIRECT BY SHURLING

1 moving from the left lane to the right lane, and the rear of
2 her car clipped his bumper and she lost control and ran off
3 the road and went in a ditch.

4 MS. SHURLING: Your Honor, that's roughly Page 337,
5 Line 24, going over to 338, Line 12.

6 Q. Do you remember that testimony?

7 A. I don't remember it, but it's in the record.

8 Q. So it was your client's position that at the point in
9 time when the -- the bump that was alleged to have been the
10 cause of her losing control and flipping occurred, he was in
11 the right lane and she was moving from the left lane to the
12 right lane, and that she clipped him causing her to lose
13 control of the car and flip?

14 A. Well, I don't know that -- I don't know that -- and
15 again, of course, if you -- I guess looking at it from your
16 perspective of the proximate cause theory, his position was
17 that he didn't bump her and knock her off the road. Now, as
18 to when she lost control of the car or what caused her to
19 lost (sic) control of the car, quite frankly there's --
20 there's an issue as to why she lost control of the car or
21 why she wound up with the car flipping over.

22 I mean, was it because somebody knocked her over or
23 she just was a bad driver, but be that as it may, Mr. Cohens
24 didn't say that he cau- -- yes Ma'am, I ---

25 Q. I understand, but your client's testimony, if

CHARLES DAVID BARR - REDIRECT BY SHURLING

1 believed, would provide an evidentiary foundation for the
2 argument that his actions were not the proximate cause of
3 her losing control, that he did not strike her, she struck
4 him, causing herself to lose control?

5 A. Well, my client's -- you know, in terms of stating it
6 more in the context of where we -- where we were, my
7 client's position would have been that he did not commit the
8 elements of the offense of assault and battery with intent
9 to kill. Now, naturally we're dealing with the battery, the
10 battery issue there.

11 Q. Let me back up just one more thing and I'm going to
12 let you go. With regard to the whole line of allegations
13 that we've addressed today about not finding out what the
14 Judge had said to the jury in your absence, you could have
15 ascertained that outside the presence of the jury, couldn't
16 you?

17 A. I didn't believe he had said anything in my absence.

18 Q. But you didn't ask, did you?

19 A. I didn't need to. When I spoke to Matthew, I said,
20 Matthew, you know, why did y'all get started, and he told
21 me, well, we hadn't done anything. I tried to get the Judge
22 not to -- not to get started until you got here, but we went
23 on, and that was that.

24 Q. Had you wanted to, you could have requested the
25 opportunity to briefly make an objection on the record

CHARLES DAVID BARR - REDIRECT BY SHURLING

1 outside the presence of the jury, couldn't you?

2 A. If I wanted to, I could -- if I wanted to, I could
3 make any motion that I deem appropriate as attorney for my
4 client if I wanted to.

5 Q. I understand, but my point is in terms of it
6 antagonizing the jury, you could have made a motion -- you
7 could have made an objection, you could have made a motion
8 for a curative charge, a motion for a mistrial. Any of
9 those things could have been done discreetly outside the
10 presence of the jury, but on the record so that it preserved
11 those issues?

12 A. If I had -- if I had seen in my opinion as trial
13 counsel, if I had determined that that was the appropriate
14 thing to do, then I would have asked the Judge to excuse the
15 jury and I would have made them and put the motion -- and
16 made the motion and put it on the record, but I didn't. I
17 mean, I didn't see a need to do that.

18 Q. And lastly going back to your apology to the jury
19 when you say about three times that you're not making any
20 excuses, that you're sorry, what -- you said that was a
21 strategic or a tactical decision to apologize in that
22 way, ---

23 A. Well, I think ---

24 Q. --- what would have been the potential down side of
25 giving the jury a reason why you were late, a reason that

CHARLES DAVID BARR - REDIRECT BY SHURLING

1 was directly related to trying to do a good job defending
2 your client as opposed to just being late?

3 A. Unless I'm going to take the witness stand for my
4 client, I wouldn't even want to think about getting into
5 that, and I don't intend to take the witness stand for my
6 client.

7 I think you're getting into evidence, and I'm not --
8 you know, I'm -- I'm at liberty to talk to a jury, and the
9 Judge gave me permission to -- to make a statement to the
10 jury, but when I -- to go beyond that, quite frankly I'm
11 almost -- what you sound like, you're suggesting that
12 perhaps I should have -- should have presented some
13 testimony, and I'm not -- I'm not going to do that.

14 Q. Judge Baxley did not in any way prohibit your
15 offering the jury an explanation for your tardiness in your
16 apology?

17 A. Not beyond -- not beyond what was stated in the
18 record.

19 Q. Okay.

20 MS. SHURLING: Thank you, Your Honor. With regard
21 to the allegations we're pursuing today, I have nothing
22 further.

23 THE COURT: All right, very good.

24 MS. ELLIOTT: Your Honor, if I -- I just have two
25 questions, if I may. I'm sorry.

CHARLES DAVID BARR - RECROSS BY ELLIOTT

1 **THE COURT:** Yes Ma'am.

2 **RECROSS-EXAMINATION BY MS. ELLIOTT:**

3 Q. Mr. Barr, when you arrived you told the jury and the
4 Judge -- or actually told the Judge in front of the jury,
5 that you had to go by Kingstree, that's why you were late,
6 is that correct?

7 A. Told the Judge that first.

8 Q. Okay, in front of the jury, and did you want to
9 convey to the jury in your apology that you were accepting
10 responsibility for being late, for your actions of being
11 late ---

12 A. Yes Ma'am.

13 Q. --- and were sorry for it?

14 A. Yes Ma'am.

15 **MS. ELLIOTT:** Thank you.

16 **THE COURT:** All right.

17 Any further questions?

18 **MS. SHURLING:** Nothing, Your Honor.

19 **THE COURT:** All right.

20 You may step down, Mr. Barr.

21 Do you intend to call Mr. Barr at any point in time
22 today during this proceeding, Ms. Shurling?

23 **MS. SHURLING:** I do not, Your Honor.

24 **THE COURT:** Does the State intend to call Mr. Barr
25 today?

1 MS. ELLIOTT: No, Your Honor.

2 THE COURT: Mr. Barr, ---

3 MR. BARR: Yes sir.

4 THE COURT: --- at this point in time you are
5 excused. The proceedings are not over. They will reconvene
6 another day and you may very well need to be back on that
7 particular day, all right?

8 MR. BARR: Yes sir.

9 THE COURT: Thank you very much.

10 All right, we're going to break for lunch at this
11 point in time. 2:15.

12 (THE FOLLOWING TAKES PLACE AFTER A LUNCH BREAK.)

13 THE COURT: All right, Ms. Shurling, you want to
14 call your next witness, please Ma'am.

15 MS. SHURLING: Yes sir, Your Honor. For the
16 record, I would at this time call the applicant, Ronald
17 Cohens, to the stand.

18 THE COURT: All right.

19 All right, Mr. Cohens, could you come around and be
20 sworn, sir.

21 RONALD COHENS, being first duly sworn,
22 testifies as follows:

23 THE CLERK: State your name, please.

24 MR. COHENS: Ronald Cohens.

25 THE COURT: Go ahead, Ma'am.

RONALD COHENS - DIRECT BY SHURLING

1 **DIRECT-EXAMINATION BY MS. SHURLING:**

2 Q. Good afternoon, Mr. Cohens. State your full name for
3 the record.

4 A. Ma'am?

5 Q. State your whole name for the record.

6 A. Ronald Cohens.

7 Q. And your middle name?

8 A. Ain't none.

9 Q. Ain't none. Okay, there we go.

10 Now, Mr. Cohens, I'm going to ask you a few questions
11 by way of some background and then cover just so much of
12 your testimony as would be relevant to what we've covered so
13 far, but let's start out with something really important.

14 I have explained to you the statutory law as it
15 applies to assault and battery with intent to kill, have I
16 not?

17 A. Yes Ma'am.

18 Q. And the possible maximum penalty for that offense?

19 A. Yes Ma'am.

20 Q. And I've also explained to you the statutory law
21 concerning failure to stop for a blue light?

22 A. Yes Ma'am.

23 Q. And the maximum offense for that -- I mean the
24 maximum sentence for that?

25 A. Yes Ma'am.

RONALD COHENS - DIRECT BY SHURLING

1 Q. And have I also discussed with you the difference
2 between concurrent and consecutive sentences?

3 A. Yes Ma'am.

4 Q. Okay. And have you and I discussed the fact that
5 when you do a PCR, you keep your eye on the ball, as they
6 say, the prize that you are trying to get is the opportunity
7 to start completely over, get a new trial starting from
8 scratch. You understand that?

9 A. Yes Ma'am.

10 Q. And I have explained to you that under South Carolina
11 law, specifically the case of State vs. Lewis Hilton, 2, the
12 second, one of the Lewis Hilton decisions, that if you were
13 to be blessed with a new trial and went back, that it would
14 be possible for a sentencing Judge, if you were convicted,
15 to give you a sentence that was harsher than the one you
16 have now?

17 A. Yes Ma'am.

18 Q. You understand that?

19 A. I understand.

20 Q. I'm not saying that you would get more time, but do
21 you clearly understand that you could?

22 A. Yes Ma'am.

23 Q. And notwithstanding that risk, you still want to go
24 forward with your PCR?

25 A. Yes Ma'am.

RONALD COHENS - DIRECT BY SHURLING

1 Q. And I have also explained to you that in the event we
2 were to be blessed with a grant of a new trial, that the
3 State has a right to appeal such a decision, and there's a
4 possibility that there would be an appeal even if we won.
5 You understand that?

6 A. Yes Ma'am.

7 Q. Okay. And notwithstanding that, you still want to go
8 forward with this?

9 A. Yes Ma'am.

10 Q. Okay. A couple of other things I need to cover with
11 you. I also need to address the fact that I took over your
12 direct appeal at some juncture, didn't I?

13 A. Yes Ma'am.

14 Q. And you -- your case had already been briefed in the
15 Court of Appeals when I took it over, and I represented you
16 in a Petition for Writ of Cert to the State Supreme Court,
17 correct?

18 A. Correct.

19 Q. Did I explain to you that one of the issues that you
20 have a right to pursue on collateral review under the
21 Uniform Post Conviction Relief Procedure Act is a claim of
22 not only ineffective assistance of trial counsel, but also
23 ineffective assistance of appellate counsel?

24 A. Right. Yes Ma'am.

25 Q. And I also explained to you in no uncertain terms

RONALD COHENS - DIRECT BY SHURLING

1 that if I was your PCR lawyer, I was not going to PCR
2 myself, didn't I?

3 A. Right.

4 Q. So by hiring me, I required that you do so knowing
5 that you would be expressly waiving any allegations of
6 ineffective assistance of counsel against me for the portion
7 of the direct appeal that I handled?

8 A. Correct, Yes Ma'am.

9 Q. And you understand that and knowing that, you made
10 the voluntary decision to waive any of those potential
11 issues so that I could be your PCR lawyer?

12 A. Yes Ma'am.

13 Q. And we have not raised any claims of ineffective
14 assistance of appellate counsel against your former attorney
15 either, have we?

16 A. No Ma'am.

17 Q. Okay. And you and I have gone over the reasons for
18 that, haven't we?

19 A. Yes Ma'am.

20 Q. We've gone over what issues were and weren't
21 preserved and what the appellate lawyer had to work with?

22 A. Yes Ma'am.

23 Q. Okay, so you're comfortable that -- that we haven't
24 raised any claims of ineffective assistance of appellate
25 counsel, but you're comfortable with the fact that we have

RONALD COHENS - DIRECT BY SHURLING

1 not done so?

2 A. I am.

3 Q. Lastly, I have advised you ---

4 **MS. SHURLING:** And this is, Your Honor, perhaps
5 overkill, but I prefer to be this cautious.

6 Q. I have advised you that I have known Counsel for the
7 Respondent for many, many years, haven't I?

8 A. Yes Ma'am.

9 Q. In fact, I told you I've known her since our days in
10 college?

11 A. You did.

12 Q. That we knew each other before we went to law school,
13 much less before we became lawyers?

14 A. You did.

15 Q. And I assured you, did I not, that notwithstanding
16 that long-standing knowledge of one another, that we argued
17 cases against each other on a regular basis and have done so
18 for over thirty years?

19 A. You did, Yes Ma'am.

20 Q. But I also -- should note for the record that she was
21 not originally the lawyer representing the Respondent. It
22 was another young woman named Karen Ratigan. Do you
23 remember when she was here last time?

24 A. Oh, yes, I do.

25 Q. And I explained to you that because Ms. Ratigan had

RONALD COHENS - DIRECT BY SHURLING

1 taken another position, that the case was being taken over
2 by Ms. Elliott?

3 A. You did.

4 Q. And I asked you if you had any problem with me
5 continuing to represent you in this PCR setting knowing that
6 I have a long-standing personal acquaintance with Ms.
7 Elliott, correct?

8 A. I have no problem.

9 Q. No problem?

10 A. None.

11 Q. Okay. You are absolutely waiving any potential claim
12 of a conflict later down the road?

13 A. Waiving.

14 Q. Okay. I just want to be sure that you are
15 comfortable with the fact that I am not compromising my zeal
16 as an advocate. We are cool on that?

17 A. We are cool.

18 Q. All right. Now, your lawyer, Mr. Barr, testified
19 this morning. Did you hire Mr. Barr yourself or was he
20 hired by your family?

21 A. Through my family.

22 Q. Two of your family members?

23 A. Yeah, well, my mother and I guess my sister and them
24 really talked to him, and one of my brother.

25 Q. Okay. Well, I'll rephrase that. You have two

RONALD COHENS - DIRECT BY SHURLING

1 sisters and eight brothers or two sisters -- I mean two
2 sisters and seven brothers? You're one of eight boys?

3 A. Yes Ma'am.

4 Q. Okay. And ---

5 A. One of nine.

6 Q. One of nine brothers?

7 A. Yes.

8 Q. Okay. So you have eight brothers and two sisters?

9 A. Right.

10 Q. And your mom and your siblings collectively chipped
11 in to get you a lawyer?

12 A. Yes Ma'am.

13 Q. Okay. Were you on bond while this case was pending?

14 A. I never made bond.

15 Q. You never made bond?

16 A. Never did.

17 Q. So you were at the jail?

18 A. All the time.

19 Q. Nobody had any question about where you were, huh?

20 A. No Ma'am. I was right there.

21 Q. The morning of the second day of your trial, did you
22 have any notice whatsoever before you got here that your
23 lawyer was potentially going to be late for court?

24 A. No, I did not.

25 Q. You didn't get any messages at the jail or any

RONALD COHENS - DIRECT BY SHURLING

1 messages once you got to the courtroom that he'd called to
2 let you know he was going to be late?

3 A. No Ma'am, ---

4 Q. When ---

5 A. --- not a word.

6 Q. That's okay. Let me explain something to you. That
7 nice lady with the mask on ---

8 A. Yes Ma'am.

9 Q. --- has to write down every word we say, which I find
10 to be miraculous in and of itself, and it's even harder when
11 we both talk at the same time, so let's try not to, okay?

12 A. All right.

13 Q. When you got to Court on the second day and they
14 brought you in and sat you down presumably at a table
15 similar to this, did anybody say anything to you about why
16 your lawyer wasn't there?

17 A. No Ma'am, not a word.

18 Q. Did His Honor, Judge Baxley, question you as to
19 whether or not you had any knowledge as to why your lawyer
20 wasn't there?

21 A. No Ma'am. The only thing they did was brought me in
22 and sit me down like I said.

23 Q. And when the Judge addressed the jury about the fact
24 that there obviously wasn't going to be any cross-
25 examination of your wife and directed the State to call the

RONALD COHENS - DIRECT BY SHURLING

1 next witness, how did that make you feel?

2 A. Well, I was wondering right then where's my lawyer,
3 you know. It made me feel kind of bad at that point.

4 Q. Did that incident have any effect in your confidence
5 in your lawyer?

6 A. Yes, it did. I felt like he should have been on time
7 if he -- you know.

8 Q. Let me ask you this: I can't ask you what anybody
9 said. That would be hearsay.

10 A. All right.

11 Q. But did you have occasion to later find out whether
12 anybody in your family had any kind of notice that your
13 lawyer was going to be late?

14 A. No, nobody.

15 Q. Nobody knew anything?

16 A. Nobody knew nothing.

17 Q. The on- -- all of the issues that we have addressed
18 here today with the exception of one, I believe, or possibly
19 two, go to the circumstances surrounding Mr. Barr being
20 late, but one of those involves the fact that we've asserted
21 that he should have asked for a mistrial.

22 A. I'd think he would have.

23 Q. Okay. Well, do you -- you and I have discussed this,
24 haven't we?

25 A. Yes Ma'am.

RONALD COHENS - DIRECT BY SHURLING

1 Q. And you understand that if your lawyer had made a
2 motion for a mistrial and it had been granted, you would
3 have just been starting over. I mean, it wouldn't be like
4 you were getting out from under the charges or anything.
5 You would just get another trial on another day, ---

6 A. Right.

7 Q. --- correct?

8 Would you have wanted him to make a motion for a
9 mistrial and give you the chance to start over with another
10 jury?

11 A. Yeah. I would feel like I would wanted him to do
12 that, but he didn't. I thought he would have during that
13 point.

14 Q. Did he discuss with you that as a possible option and
15 ask how you felt about whether you should ask that the case
16 be mistried or go on with the jury you had? Was there any
17 discussion between you and your lawyer about that decision?

18 A. No, he didn't discuss or ask me no question about it.

19 Q. Did your lawyer, once he got to the courtroom, did he
20 tell you why he was late?

21 A. No. The only thing he did, he came in and he asked
22 me how long this was going on, and I said for a few minutes
23 now, and that's when he came and approached the bench and
24 talked to the Judge, and that was it.

25 Q. So he never offered any explanation to you as to why

RONALD COHENS - DIRECT BY SHURLING

1 he was late?

2 A. Not at that point.

3 Q. Did he ever later?

4 A. Well, when -- when he was -- when the Judge was
5 asking him why he was late, then that's why I found out why
6 he was late, but he never came to me personally and told me
7 why he was late.

8 Q. So everything you know concerning why he was late for
9 Court is what you heard in the courtroom just like everybody
10 else?

11 A. Right.

12 Q. Okay. This is -- I've gone at this somewhat
13 backwards, and I apologize, but if he didn't have that
14 discussion with you, did he discuss with you whether you
15 wanted to request any kind of curative instruction directing
16 the jury to disregard him being tardy and instructing them
17 not to hold it against you?

18 A. No.

19 Q. If you had known that it was possible to ask for such
20 a charge, would you have wanted him to request one?

21 A. Yes Ma'am.

22 Q. The Judge, in a portion of the transcript we talked
23 about earlier, referenced having been there at nine so that
24 he could hopefully speed the trial along by reaching some
25 decisions with the lawyers about evidence that was to be

RONALD COHENS - DIRECT BY SHURLING

1 admitted or not admitted. Do you remember that testimony
2 discussed a little while ago?

3 A. Yes Ma'am.

4 Q. And I say testimony. The Judge -- what a Judge says
5 isn't testimony, but you remember the discussion earlier
6 today about that being said from the bench?

7 A. Yes Ma'am.

8 Q. And the best of your recollection, about what time
9 were you brought into the courtroom that day? Was it 9:30
10 or was it earlier?

11 A. I think I left the detention center about 7:30 or
12 eight o'clock, somewhere along that time, and I think I was
13 brought in the courtroom like a quarter 'til nine or
14 something like that. It was like fifteen minutes before
15 time court start.

16 Q. Okay. And during that period of time, was the Judge
17 up on the bench the whole time or not?

18 A. When -- when -- when they had started?

19 Q. Okay. Once you were brought in and seated at the
20 table, ---

21 A. No. He ---

22 Q. --- was His Honor up on the bench or not?

23 A. No, he was not right then, not at that time.

24 Q. And when His Honor came in the courtroom and took the
25 bench, did you overhear any discussions between the lawyers

1 who were present for the Prosecution and the Judge
2 concerning where Mr. Barr was, whether he had notified the
3 Court he was going to be delayed? Was there any discussion
4 in your presence about that?

5 A. No, I didn't heard anything.

6 MS. SHURLING: Thank you, Your Honor. I have no
7 further questions.

8 The remaining issue that we dealt with today would
9 directly deal with a matter of law that I don't need the
10 client's testimony for. Thank you.

11 THE COURT: Okay, great. Thank you, Ma'am.

12 Cross-examination?

13 MS. ELLIOTT: One question, Your Honor.

14 CROSS-EXAMINATION BY MS. ELLIOTT:

15 Q. Mr. Cohens, when -- when Judge Baxley came in the
16 courtroom to start trial that second day, did he come into
17 the courtroom and immediately say okay, and talk about the
18 cross-examination and the fact that your attorney was not
19 present? Did he walk in and immediately proceed when he
20 walked in?

21 A. Well, he called the jurors in, and then he speak to
22 them, and then he said, well, we could go on. He told Mr.
23 Modica, you can call your next witness.

24 Q. Okay. So he didn't come in and sit up where Judge
25 John is sitting now for a period of time before that

RONALD COHENS - CROSS BY ELLIOTT
EXAMINATION BY THE COURT

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1 happened? He came in and that happened almost immediately
2 with the Judge coming in, is that correct?

3 A. Well, he came in and spoke to -- called the jurors
4 in, ---

5 Q. Okay.

6 A. --- spoke to them, telling them good morning and
7 everything, and then he told Mr. Modica to call his
8 witness ---

9 Q. Okay.

10 A. --- and let's begin with the trial.

11 MS. ELLIOTT: Thank you.

12 That's all I have, Your Honor.

13 THE COURT: Okay.

14 Just so that I'm clear, and as the record reflected,
15 that's when Mr. Barr came in the courtroom?

16 A. Yeah, but a couple of minutes after ---

17 THE COURT: Okay.

18 A. --- because the witness was up on the stand.

19 THE COURT: Okay. He was on the stand?

20 A. Yes sir.

21 THE COURT: Had he been asked any questions ---

22 A. He was asked ---

23 THE COURT: --- by Mr. Modica?

24 A. Yes sir.

25 THE COURT: Okay. Do you remember what they were?

RONALD COHENS - EXAMINATION BY THE COURT

1 A. I don't remember at the time.

2 THE COURT: Okay. So it's your recollection that
3 Mr. Modica had started questioning the witness when your
4 attorney came in the courtroom?

5 A. Well, he was already questioning the witness before
6 my attorney even came in the courtroom.

7 THE COURT: Okay. So the witness had come up and
8 was placed -- like you were placed under oath, he was placed
9 under oath by the Clerk of Court?

10 A. Yes sir.

11 THE COURT: Okay. And he sat down and introduced
12 himself, and then the State's attorney, Mr. Modica, started
13 asking him some questions?

14 A. Yes sir.

15 THE COURT: And that's when Mr. Barr came in?

16 A. Yeah, he came in, yeah.

17 THE COURT: And that's your ---

18 A. Well, he had already told him he could step down.

19 THE COURT: Okay, told the witness to step down?

20 A. Yeah, he could step down, because Mr. Modica said,
21 well, I have no further questions for -- for my witness,
22 Your Honor.

23 THE COURT: Okay. So that's your recollection of
24 when Mr. Barr came in the courtroom?

25 A. Yes sir.

RONALD COHENS - REDIRECT BY SHURLING

1 **THE COURT:** Okay, great.

2 Anything on those questions, Ms. Shurling?

3 **REDIRECT-EXAMINATION BY MS. SHURLING:**

4 Q. Mr. Cohens, the day before when the trial finished
5 for the day, the State had finished their Direct-examination
6 of your ex-wife, correct?

7 A. Right; right.

8 Q. The next day when the Judge made note your lawyer
9 wasn't there, so he guessed there wasn't going to be a Cross
10 of your wife, he then told the State, as you recall, to call
11 the next witness, right?

12 A. Right.

13 Q. That witness took the stand?

14 A. Right.

15 Q. Isn't it true that Mr. Barr walked in before Mr.
16 Modica began to question that witness about any substantive
17 matters?

18 A. I think he was questioning him before -- I think he
19 was questioning him before he walked in.

20 Q. Well, that's been quite a while ago. You might -- do
21 you have a clear recollection of that or you're not sure?

22 A. I'm not sure, but I think he was questioning him
23 before because I remember Mr. Barr walk in and then the
24 Judge asked him why he was late or something like that, and
25 that was -- and then he approach the bench and they started

RONALD COHENS - REDIRECT BY SHURLING

1 talking.

2 MS. SHURLING: Thank you. No further questions.

3 THE COURT: Thank you.

4 Anything from the State?

5 MS. ELLIOTT: No, Your Honor.

6 THE COURT: You may step down, sir.

7 MS. SHURLING: Your Honor, I would have ---

8 THE COURT: I was just waiting until your client
9 got back, back over there, and then I was going to ask ---

10 MS. SHURLING: Oh, I'm sorry. Do you think I'm
11 eager to get out of here, Judge? I'm sorry.

12 THE COURT: That's all right. That's okay.

13 All right, any -- any further presentation at this
14 point in time?

15 MS. SHURLING: Not at this point in time, Your
16 Honor. I greatly appreciate the Court's consideration in
17 allowing us to do that at another time.

18 THE COURT: Okay, and we'll talk about that now.
19 I've had a chance to look at the schedule. This is an
20 important matter, so what I'm going to do is probably at
21 least cancel a portion of another day to try and accommodate
22 the rest of this, so I need to ask you your best estimation
23 of the time you'll need to make the rest of your
24 presentation, your best estimation.

25 MS. SHURLING: Two Hours.

1 **THE COURT:** Okay.

2 **MS. SHURLING:** And I believe that's probably an
3 overly-generous estimation, Your Honor. We might can do it
4 in an hour and a half.

5 **THE COURT:** All right.

6 For the State?

7 **MS. ELLIOTT:** Your Honor, it will depend on the
8 witnesses presented. If I can find any information about
9 that act or that I can use to cross-examine character
10 witnesses, that would probably be it, depending on what the
11 new claims are. I guess Mr. Barr will have to testify about
12 the pending claims, so I wouldn't think I would take more
13 than thirty minutes, depending on ---

14 **THE COURT:** Okay. All right.

15 **MS. SHURLING:** And, Your Honor, I will make the
16 commitment, I have the names of my witnesses. I don't have
17 their dates of birth and Socials, but I will get them, and I
18 will get them to her ---

19 **THE COURT:** Get them and pass them on so she can do
20 an examination ahead of time of the records and see if
21 there's anything.

22 **MS. SHURLING:** Okay.

23 **THE COURT:** Okay, great. Okay, so with that, what
24 we're going to do is this is going to be a Thursday
25 afternoon. It's June 14th, Flag Day, okay, June 14th, a

1 Thursday afternoon, 2:00 P.M. We'll be back here. I don't
2 know if it's going to be this courtroom or a courtroom down
3 the hall, but it will be on the third floor here, 2:00 P.M.

4 I will have other non-jury court that morning here
5 in Georgetown. We will conclude those matters and we will
6 start the 14th at 2:00 P.M., got it?

7 MS. SHURLING: Got it.

8 THE COURT: Okay. So that should give you plenty
9 of time to get organized and -- and you've got my Law
10 Clerk's e-mail address to e-mail that?

11 MS. SHURLING: I do.

12 THE COURT: Great. Good deal.

13 All right, anything further from the State at this
14 point in time?

15 MS. ELLIOTT: No, Your Honor. Thank you.

16 THE COURT: All right. Thank y'all very much. We
17 will continue it until then.

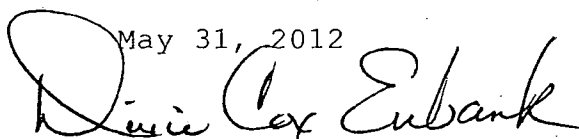
18 (Conclusion of Transcript of Record.)
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C E R T I F I C A T E

I, the undersigned, DIXIE COX EUBANK, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Georgetown County, South Carolina, on the 26th day of April 2012.

I DO FURTHER CERTIFY that I am neither of kin, counsel nor interest to any party hereto.

May 31, 2012



DIXIE COX EUBANK

CIRCUIT COURT REPORTER

FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

FILED
 GEORGETOWN COUNTY, S.C.
 2012 MAY -8 AM 9:21
 ALMA Y. WHITE
 CLERK OF COURT

RONALD COHENS, #316306)
 Applicant,)
)
)
)
 THE STATE OF SOUTH CAROLINA,)
 Respondent.)
 _____)

2010-CP-22-1592

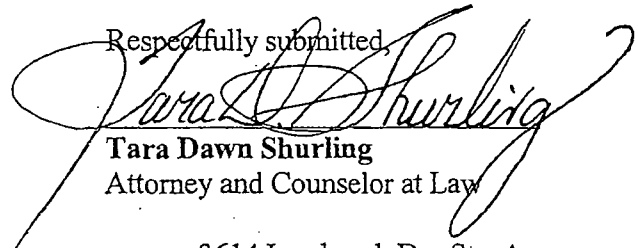
**SECOND AMENDED APPLICATION
 FOR
 POST-CONVICTION RELIEF**

The Post-Conviction Relief Application previously filed on October 31, 2006 under docket number 2010-CP-22-1592. Applicant subsequently filed an Amended Application for Post-Conviction relief on April 24, 2010. Those applications are hereby amended to include the following additional allegations:

1. Trial Counsel was ineffective for making an opening argument to the jury in which he impugned the integrity of his client and thereby called into question his overall character.
2. Trial Counsel was ineffective for making an opening argument to the jury in which he impugned the integrity of the victim and thereby created the danger that the defense would be seen by the jury as impugning the character of the victim without foundation thereby inflaming the passions and prejudices of the jury against the Applicant.
3. Trial Counsel was ineffective for failing to request a jury instruction on the law as it relates to the defense of accident where one reasonable interpretation of the evidence adduced at trial would have supported a finding of that defense.
4. Trial Counsel was ineffective for failing to present in closing arguments to the jury a summary of the evidence presented at trial which supported the Applicant's assertion that the wreck involved in this case was an accident.
5. Trial Counsel was ineffective for failing to argue to the jury in closing arguments that one reasonable interpretation of the evidence presented at the Applicant's trial supported a finding that the car wreck involved in this case was accidental.

The Applicant has no further amendments at this time. For the reasons set forth herein, as well as those set forth in his original and previous amended applications, the Applicant asserts that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, was violated in the trial court. Copies of these amendments have been served on opposing counsel, Salley W. Elliot, Assistant Deputy Attorney General, and Trial Counsel for the Applicant, Charles D. Barr, Esquire.

Respectfully submitted,



Tara Dawn Shurling
Attorney and Counselor at Law

3614 Landmark Dr., Ste. A
Columbia, SC 29204
803-738-8622
803-738-1600 (Fax)

ATTORNEY FOR APPLICANT.

This 27th day of April, 2012.
Columbia, SC

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

RONALD COHENS, #316306)
Applicant,)

2010-CP-22-1592

v.)

CERTIFICATE OF SERVICE

THE STATE OF SOUTH CAROLINA,)
Respondent.)

The undersigned attorney hereby certifies that one copy of the Applicant's Second Amended Post-Conviction Relief Application in the above-entitled cause has been served upon, Salley W. Elliott, Deputy Assistant Attorney General by E-mail on the 25th ²⁰¹² day of April, 2012.

Fax to (803) 734-4113

Tara Dawn Shurling
TARA DAWN SHURLING
Attorney and Counselor at Law

3614 Landmark Drive, Suite A
Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT

SWORN TO BEFORE ME this 27th day of

April, 2012.

Dyanne Graham (L.S.)
Notary Public for South Carolina

My Commission Expires: 3/12/2013

FILED
GEORGETOWN COUNTY, S.C.
2012 MAY -8 AM 9:21
ALMA Y. WHITE
CLERK OF COURT

1 STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS NON-JURY
2 COUNTY OF GEORGETOWN) (2010-CP-22-01592)
3)
4 RONALD COHENS)
5 vs.) TRANSCRIPT OF RECORD
6)
7 STATE OF SOUTH CAROLINA) June 14, 2012
8) Conway, S. C.
9)

10 B E F O R E:

11 HONORABLE STEVEN H. JOHN, Judge

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

13 TARA DAWN SHURLING, ESQ.
14 ATTORNEY FOR APPLICANT

15 SALLEY W. ELLIOTT, ESQ.
16 ASSISTANT ATTORNEY GENERAL
17 STATE OF SOUTH CAROLINA
18 ATTORNEY FOR STATE
19
20
21

22 DIXIE COX EUBANK
23 CIRCUIT COURT REPORTER
24 FIFTEENTH JUDICIAL CIRCUIT
25

I N D E X

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>RD</u>	<u>RC</u>
WILLIAM TRAVIS BROWN				
Ms. SHURLING	5		14	
MS. ELLIOTT		7		
DAVID ROBINSON				
MS. SHURLING	17		23/27	
MS. ELLIOTT		20		26
JAMES ALLEN BRITTAIN				
MS. SHURLING	28		41	
MS. ELLIOTT		36		
VONDA GAIL JOHNSON				
MS. SHURLING	42		50/54	
MS. ELLIOTT		47		52
RONALD COHENS				
MS. SHURLING	56			
MS. ELLIOTT		69		
CHARLES DAVID BARR				
MS. ELLIOTT	76		120	
MS. SHURLING		85		
COURT				126

1 (THE FOLLOWING TAKES PLACE ON JUNE 4, 2012.)

2 THE COURT: All right. This is the continuation of the
3 Post-Conviction Relief Application. It's in (2010-CP-22-
4 01592). We had previously heard the majority of the matters
5 in the Post-Conviction Relief Application on April 26, 2012.
6 I continued it at the request of the Applicant to allow him to
7 make an additional argument that was set forth in a filing
8 that was made, I believe, the Friday after April 26th, and
9 that is the purpose of today's hearing.

10 Ms. Shurling, what -- you want to state for the record
11 the additional grounds that you would be arguing today?

12 MS. SHURLING: Yes sir, Your Honor. In the First
13 Amended Application for Post-Conviction Relief there was an
14 issue that as added very late in preparation for the first
15 hearing concerning the failure of defense counsel to discuss
16 with his client the right to present character witnesses, and
17 his failure to call character witnesses. We agreed not to
18 dispose of that issue last time and deferred hearing on that
19 issue till today.

20 In addition, Your Honor, there was a, at the instruction
21 of the Court, a Second Amended Application for Post-Conviction
22 Relief that has been filed, on May 8th, 2012, outlining an
23 additional set of issues. There are five in total, although,
24 frankly, several of them are related. It's really only a
25 couple of additional issues, and those would be the ones that

1 we would be proceeding on today.

2 THE COURT: All right. Very good. All right.

3 And anything from the State before we proceed further
4 with the Amended Application?

5 MS. ELLIOTT: No, Your Honor. The State is ready to
6 proceed.

7 THE COURT: All right. Very good.

8 All right, Ms. Shurling, let me -- I'll be glad to hear
9 from you.

10 MS. SHURLING: May we approach?

11 THE COURT: Sure. Absolutely.

12 (BENCH CONFERENCE TAKES PLACE OFF THE RECORD.)

13 THE COURT: All right. Do you want to call your
14 proposed witness?

15 MS. SHURLING: Yes sir, Your Honor. I believe we will
16 start out pursuing the allegation that defense counsel was
17 ineffective for neglecting to discuss with his client the
18 potential for presenting character witnesses in this case, and
19 toward that end I would present several character witnesses on
20 behalf of my client, Your Honor.

21 I will first call Mr. Travis Brown.

22 THE COURT: All right.

23 MS. SHURLING: We have agreed that character the
24 witnesses would be sequestered, so I would ask if the Bailiff
25 would call Mr. Brown.

WILLIAM TRAVIS BROWN - DIRECT BY SHURLING

5

1 **THE COURT:** All right, sir. If you want to come all
2 the way up here to where the Bailiff is, please sir.

3 **WILLIAM TRAVIS BROWN,** being first
4 duly sworn, testifies as follows:

5 **DIRECT-EXAMINATION BY MS. SHURLING:**

6 **MS. SHURLING:** Your Honor has heard the oft-repeated
7 excuse, my dog ate my homework, well, my new puppies ate my
8 hearing aid, so if the Court will grant me permission I will
9 stand a little close to the witness.

10 **THE COURT:** Yes Ma'am.

11 Q. Could you please state your full name for the record?

12 A. William Travis Brown.

13 Q. Mr. Brown, do you know the Applicant, Ronald Cohens?

14 A. Yes Ma'am.

15 Q. And how do you know him?

16 A. He was a former employee of mine.

17 Q. And how long did he work for you?

18 A. He started working with me in December of 1999, till
19 January of 2004.

20 Q. And was he a good employee?

21 A. Yes Ma'am.

22 Q. Dependable?

23 A. Yes Ma'am.

24 Q. Did you know him even before he came to work for you?

25 A. Briefly. Not -- not really.

1 Q. Okay. Are you familiar with his general reputation for
2 truth and veracity in the community?

3 A. Yes Ma'am.

4 Q. Would you say it is positive or negative?

5 A. Positive.

6 Q. Based on that reputation in the community, and your own
7 interaction with him as an employee, if called upon to do so
8 would you believe him under oath?

9 A. Yes Ma'am.

10 Q. Is there any reason why you would come to court and
11 testify on behalf of Mr. Cohens other than simple desire to --

12 -

13 MS. ELLIOTT: Your Honor, I object to the leading
14 nature ---

15 MS. SHURLING: Well, I apologize. That was unartfully
16 put anyway.

17 THE COURT: That's all right.

18 Q. Has anyone promised you anything in exchange for your
19 testimony here today?

20 A. No Ma'am.

21 Q. Do you have any current business affiliation with Mr.
22 Cohens, or anyone in his family?

23 A. No Ma'am.

24 Q. Do you stand to gain anything personal or financially
25 from your appearance here today?

WILLIAM TRAVIS BROWN - CROSS BY ELLIOTT

7

1 A. No Ma'am.

2 MS. SHURLING: Thank you. No further questions.

3 THE COURT: Very good.

4 CROSS-EXAMINATION BY MS. ELLIOTT:

5 Q. Mr. Brown - and I apologize if this is not you, but
6 have you ever been in Illinois?

7 A. No Ma'am.

8 Q. Okay. You've never been arrested for disorderly
9 conduct, escape, possession of cocaine, or resisting arrest?

10 A. No Ma'am.

11 Q. Okay. We didn't have your Social Security number, and
12 Brown is a rather, you know -- the name that pops up, so I
13 apologize for asking you those questions ---

14 A. Yes Ma'am.

15 Q. ---But I just needed to make sure.

16 Your relationship to Mr. Cohens is as an employer; is
17 that correct?

18 A. Yes Ma'am.

19 Q. And did you have any interactions with Mr. Cohens
20 outside of work?

21 A. No Ma'am.

22 Q. So your only interaction with him was in your place of
23 business?

24 A. In our place of business, and then also he did work --
25 helped me out on the weekends and stuff, Saturdays.

1 Q. In a work capacity?

2 A. Yes Ma'am.

3 Q. Okay. And that is the logging industry; is that
4 correct?

5 A. Yes Ma'am.

6 Q. Exactly what did he do for you?

7 A. He ran a Feller Buncher.

8 Q. Okay. And have you met his family, or have any
9 interaction with Mr. Cohens' family?

10 A. I know some of them.

11 Q. I'm -- you ---

12 A. I know some of them, yes Ma'am.

13 Q. And who would that be? a

14 A. One of his brothers.

15 Q. Okay. All right. And have you just met him once, or
16 what interaction have you had with his brother?

17 A. He -- his -- one of his brothers is a truck driver, and
18 he actually pulls off of one of our other jobs.

19 Q. Okay. So you also work with Mr. Cohens' brother?

20 A. Not directly.

21 Q. Okay. But have -- his work and your work coincide?

22 A. Not really. He work -- he actually -- his brother
23 actually works for my grandfather.

24 Q. Okay. All right. And does his brother now still work
25 for your grandfather?

WILLIAM TRAVIS BROWN - CROSS BY ELLIOTT

9

1 A. I'm not sure, to be honest.

2 Q. All right. When was the last time you had any
3 interaction with Mr. Cohens' brother?

4 A. Six months, maybe.

5 Q. Okay. So it's fairly an ongoing, off and on,
6 interaction; is that correct?

7 A. That's probably the first time I've seen him in five or
8 six years.

9 Q. Okay. Did y'all catch up on Mr. Cohens when you -- the
10 Applicant when you had the last discussion with his brother?

11 A. No Ma'am.

12 Q. Okay. And you live -- tell me where you live.

13 A. I live the north end of Georgetown County.

14 Q. And where did Mr. Cohens live at the time; do you know?

15 A. In Oakland Community.

16 Q. Okay. And what is the proximity of those two
17 communities?

18 A. Thirty miles.

19 Q. Okay. And how did you acquire the information that he
20 had a general reputation for veracity?

21 A. Veracity?

22 THE COURT: Truthfulness.

23 A. Just from being around him every day. I mean, he
24 worked with me for five years.

25 Q. So your testimony is based on specific instances of

1 your interaction and conduct with the particular Defendant?

2 A. Yes Ma'am.

3 MS. ELLIOTT: Okay.

4 Your Honor, I move to strike this testimony because it's
5 not appropriate. Testimony -- there's not a sufficient basis
6 to show that this witness has information about Mr. Cohens'
7 veracity in the community; it cannot be based upon specific
8 interactions and conduct; it has to be based upon a general
9 hearsay information received by this witness as to the
10 communities' belief of veracity of Mr. Cohens, not this
11 particular witness's.

12 MS. SHURLING: Your Honor, if I might be allowed
13 limited cross I believe I can correct that problem.

14 THE COURT: Well, I'm -- what I'm -- before I rule on
15 it I will allow you to ask a few additional questions.

16 MS. SHURLING: Thank you, Your Honor.

17 THE COURT: Go ahead. Go ahead and do it now.

18 MS. ELLIOTT: Actually I did have a couple more
19 questions.

20 THE COURT: I know you do, I know you do, from the
21 State, but what I want to do is just resolve this issue right
22 now, and then I'll turn it back over to the State.

23 DIRECT-EXAMINATION BY MS. SHURLING CONTINUED:

24 Q. In your business do you employ a lot of people?

25 A. Yes Ma'am.

WILLIAM TRAVIS BROWN - CROSS BY ELLIOTT

11

1 Q. Can you give us an approximate number?

2 A. At the current time he was employed with me, probably
3 seventy to seventy-five people.

4 Q. And did some of those people come from the same
5 community that Mr. Cohens did?

6 A. Yes Ma'am.

7 Q. And did some of those people work with you over a
8 significant period of time?

9 A. Yes Ma'am.

10 Q. And in the work environment did you have occasion, on a
11 day to day basis, to have conversations with other people who
12 lived in the community with Mr. Cohens?

13 A. Yes Ma'am.

14 Q. And were you aware that any of your other employees
15 personally knew Mr. Cohens?

16 A. Yes Ma'am.

17 Q. Did you hear, in the context of your relationship with
18 your other employees, discussions about Mr. Cohens in the
19 community?

20 A. Yes Ma'am.

21 Q. And did you ever hear anyone recount any incident
22 involving him having a reputation for being deceitful, or
23 untruthful, being a liar?

24 A. No Ma'am.

25 MS. SHURLING: Thank you, Your Honor. I would

1 believe -- it would be my opinion, Your Honor, that based on
2 that testimony, that there would be a sufficient basis for him
3 testifying to the general positive reputation in the
4 community.

5 THE COURT: I'll -- before I rule if the State, through
6 the Attorney General's Office, would like to ask any further
7 questions I'll be glad for you to do so, Ma'am.

8 MS. ELLIOTT: Thank you, Your Honor.

9 And thank you, Mr. Brown.

10 CROSS-EXAMINATION BY MS. ELLIOTT CONTINUED:

11 Q. You agree that Mr. Cohens and his wife were having
12 marital difficulties; did you know about that prior to this
13 incident?

14 A. No Ma'am.

15 Q. Did you know the incident occurred?

16 A. Yes Ma'am.

17 Q. Did you know Mr. Cohens was in violation of protect --
18 violating a protective order ---

19 A. No Ma'am.

20 Q. ---Issued to protect his wife?

21 A. No Ma'am.

22 Q. All right. Do you know Mr. Cohens' nickname?

23 A. Yes Ma'am.

24 Q. And what is that?

25 A. Slim.

1 Q. Okay. And so Ms. Shurling asked you whether or not you
2 had heard anything negative about Mr. Cohens with the co-
3 workers you employ; is that correct?

4 A. Yes Ma'am.

5 Q. And you have not?

6 A. No Ma'am.

7 Q. How many co-workers did you employ in 2005 and 2006 who
8 knew Mr. Cohens?

9 A. I would say at least ten.

10 Q. Ten. And were there any discussions about Mr. Cohens'
11 truthfulness or deceitfulness at any point in time during 2005
12 and 2006?

13 A. No Ma'am, I mean, nothing negative. I mean, I've never
14 ---

15 Q. I'm sorry. Go ahead.

16 A. We've never heard -- I've never heard anything negative
17 about Mr. Cohens.

18 Q. Was there a discussion at all, I guess is what I'm
19 trying to ask?

20 A. Just about the incident that had happened.

21 Q. Okay. After it happened?

22 A. Yes Ma'am.

23 Q. Okay.

24 MS. ELLIOTT: That's all I have, Your Honor.

25 THE COURT: All right. I'm going to deny the State's

1 motion to disallow the testimony. I'm going to allow it for
2 the purposes as presented.

3 Thank you.

4 MS. ELLIOTT: Your Honor, may I -- and I'm not arguing
5 with your ruling ---

6 THE COURT: Yes Ma'am.

7 MS. ELLIOTT: ---May I just make one other point for
8 the record too?

9 THE COURT: Sure.

10 MS. ELLIOTT: ---That the witness testified that he was
11 aware, that ten people knew of Mr. Co -- did not -- had not
12 ever said that Mr. Cohens was deceitful, but that's not really
13 the test; the test is a community-wide standard, and it's
14 based on his reputation for truthfulness, and the witness has
15 not said that he had a reputation for truthfulness based on a
16 community, a large enough group of people in order to be able
17 to classify as a community.

18 THE COURT: I appreciate the State's position.

19 MS. ELLIOTT: Thank you, Your Honor.

20 THE COURT: I'm going to allow it though.

21 MS. SHURLING: Your Honor, if I might have -- I have
22 two or three very brief redirect questions.

23 THE COURT: All right.

24 REDIRECT-EXAMINATION BY MS. SHURLING:

25 Q. Thank you.

1 Mr. Brown, in your day to day work environment did you
2 have occasion to hear your employees talk about other people
3 that had lied to them, cheated them, and other contexts?

4 A. Yes Ma'am, definitely.

5 Q. And did you have the kinds of conversations with your
6 employees where they would complain to you when someone had
7 cheated them, or lied to them in some capacity?

8 A. Yes Ma'am.

9 Q. And you never heard any such comments from other
10 employees concerning Mr. Cohens?

11 A. No Ma'am.

12 Q. Now you've been asked if you were aware that Mr. Cohens
13 was accused of violating a protective order in Family Court
14 and I believe you said you were not.

15 A. No Ma'am. I was not aware of that.

16 Q. This question is not going to make a lot of sense, but
17 I assume you were also not aware that that protective order
18 was mutual, that they -- there was a protective order that
19 went both to Mr. Cohens and his wife, in terms of them ---

20 A. Okay.

21 Q. ---Being protected from each other; you weren't aware
22 of that either?

23 A. No Ma'am.

24 Q. Okay. And in your line of work is your reputation in
25 the community important?

1 A. Yes Ma'am, definitely.

2 Q. Do you do business with a lot of people in this
3 community?

4 A. Yes Ma'am.

5 Q. Do you sometimes even do handshake deals?

6 A. Yes Ma'am.

7 Q. So it's fair to say your word is very important?

8 A. Yes Ma'am. In our line of work it is.

9 Q. Pardon?

10 A. In our line of work it is.

11 Q. I understand. My grand-daddy was in the same business.

12 Would you, under any circumstances, jeopardize your own
13 reputation in the community by coming in here to testify from
14 Mr. Cohens untruthfully?

15 A. No Ma'am.

16 Q. If you would have been asked to be a witness for him at
17 his original trial would you have been willing to appear, and
18 do so?

19 A. Yes Ma'am.

20 MS. SHURLING: Thank you. No further questions.

21 THE COURT: Anything on those questions?

22 MS. ELLIOTT: No, Your Honor.

23 THE COURT: All right. Thank you, sir. You may step
24 down.

25 Do you wish the witness to be excused?

DAVID ROBINSON - DIRECT BY SHURLING

17

1 MS. SHURLING: Thank you.

2 A. Thank you.

3 THE COURT: Any objection?

4 MS. ELLIOTT: No objection, Your Honor.

5 THE COURT: All right, sir, you are released from your
6 Subpoena. You may go back to your regular activities, sir.

7 All right, your next witness, Ma'am.

8 MS. SHURLING: Thank you, Your Honor. I would call Mr.
9 David Robinson.

10 THE COURT: All right, Mr. Robinson, if you would come
11 all the way up here to where the Bailiff is, sir.

12 DAVID ROBINSON, being first duly
13 sworn, testifies as follows:

14 DIRECT-EXAMINATION BY MS. SHURLING:

15 Q. How do you know Ronald Cohens?

16 A. Well, we lived in the same neighborhood for about
17 thirty-six years, and I was one of his eighth grade teachers.

18 Q. You were one of what?

19 A. His eighth grade teachers.

20 Q. Oh, okay. And you are now retired, aren't you, sir?

21 A. Yes Ma'am.

22 Q. And prior to retirement were you a school principal?

23 A. I was an assistant principal.

24 Q. Thank you. And would it be fair to say that you know a
25 lot of people in the community that know Ronald Cohens?

1 A. Yes Ma'am.

2 Q. And are you familiar with his general reputation for
3 truthfulness?

4 A. Yes.

5 Q. Would you say that it was positive or negative?

6 A. It was positive.

7 Q. Do you have specific experience with people in the
8 community that would cause you to have knowledge concerning
9 his reputation as an honest person?

10 A. Yes Ma'am.

11 Q. And can you tell us whether or not you have heard
12 people in the community specifically refer to him as being an
13 honest person?

14 A. Yes.

15 Q. Have you ever heard anyone in the community raise
16 complaints about him being deceitful, or dishonest, or
17 cheating them in a business deal, or anything of that sort?

18 A. No, I haven't.

19 Q. Are you active in your church, sir?

20 A. Yes Ma'am.

21 Q. What church do you go to?

22 A. I go to St. Paul AME, in the Oakland Community of
23 Georgetown.

24 Q. And are you active in that church?

25 A. Yes Ma'am.

DAVID ROBINSON - DIRECT BY SHURLING

19

1 Q. Have you ever participated in the leadership of the
2 church?

3 A. Yes Ma'am.

4 Q. Can you describe what capacity to us?

5 A. Well, I'm a member of the Steward Board, I'm an adult
6 Sunday School teacher, and I'm an usher.

7 Q. Thank you. Is your reputation in the community
8 important to you?

9 A. Yes Ma'am.

10 Q. Has anyone promised you anything in exchange for your
11 testimony here today?

12 A. No Ma'am.

13 Q. Do you have any business dealings with either Mr.
14 Cohens or any of his siblings or parents?

15 A. No Ma'am.

16 Q. Is there any opportunity for any kind of financial or
17 personal gain that could come to you as a result of testifying
18 here today?

19 A. No Ma'am.

20 Q. Would you ever be willing to jeopardize your own
21 reputation in the community by coming to court and testifying
22 untruthfully on behalf of Mr. Cohens?

23 A. No Ma'am. I just took an oath.

24 Q. I understand, sir. Thank you.

25 Now back when Mr. Cohens' case was originally tried

1 would you have been willing to come to court and stand up for
2 him and give character testimony?

3 A. Yes.

4 MS. SHURLING: Thank you. Answer the State's
5 questions, please.

6 THE COURT: Cross-examination.

7 MS. ELLIOTT: Thank you, Your Honor.

8 CROSS-EXAMINATION BY MS. ELLIOTT:

9 Q. Good afternoon, Mr. Robinson.

10 A. Good afternoon.

11 Q. Do you live in the same neighborhood with Mr. Cohens
12 and his family?

13 A. Yes Ma'am.

14 Q. Would that be his mom ---

15 A. Yes Ma'am.

16 Q. ---His parents' home. Did he always live there?

17 A. No Ma'am.

18 Q. Where did he live when he wasn't there?

19 A. Well, he lived about -- approximately about five
20 hundred feet away from where I live.

21 Q. Okay. So he has always lived in close -- close to your
22 home; is that correct, either at his mom's home or his own
23 home?

24 A. Yes Ma'am.

25 Q. Both of those were close to your home?

- 1 A. Yes Ma'am.
- 2 Q. Okay. So you had a lot of interaction with Mr. Cohens?
- 3 A. Well, we -- had a coincidence when he was in school,
- 4 but after he grew up, you know, I didn't see him that often,
- 5 unless he came to our church.
- 6 Q. Okay. But you had -- did you have more interaction
- 7 with his family after that time?
- 8 A. Yes.
- 9 Q. Okay. And do you still have interaction with his
- 10 family?
- 11 A. Yes Ma'am.
- 12 Q. Okay. Do y'all attend the same church?
- 13 A. Yes Ma'am.
- 14 Q. Okay. And how close do you live to his mom's house?
- 15 A. About one mile.
- 16 Q. One mile. Okay. And is his family -- is Mr. Cohens'
- 17 family a group of people that you are friends with?
- 18 A. Yes.
- 19 Q. Okay. And you have church functions with them. Do you
- 20 have other functions?
- 21 A. No Ma'am.
- 22 Q. Okay. You just see them at church ---
- 23 A. Yes Ma'am.
- 24 Q. ---About once a week or so?
- 25 A. Yes Ma'am.

1 Q. Did they ask you -- how were you contacted to come to
2 court today to testify?

3 A. Well, one of the -- one of the sons asked me would I be
4 -- would I be a character witness ---

5 Q. Okay. That would be one of Mr. Cohens' brothers?

6 A. Yes Ma'am.

7 Q. Okay. All right. And your most frequent interaction
8 with Mr. Cohens was when he was in the eighth grade?

9 A. Yes Ma'am.

10 Q. Okay. And that's been probably thirty years ago or so?

11 A. Possibly.

12 Q. Okay. And you are testifying that -- that your
13 experience is that people in the community believe Mr. Cohens
14 is honest; is that correct?

15 A. Yes.

16 Q. And what do you base that on?

17 A. I've never heard anyone say anything about him being
18 dishonest.

19 Q. Okay. So you -- you are taking from the fact that no
20 one said he's dishonest, you are jumping to the fact that they
21 must then believe that he's honest?

22 A. I'm not jumping to the fact. You asked me a question
23 and I answered it.

24 Q. Okay. So your answer, when I asked you about your
25 experience in your community with Mr. Cohens' reputation for

1 truthfulness, is that no one has said that he was dishonest?

2 A. No one ever said it to me.

3 Q. Okay. All right. Has anyone said that he is honest to
4 you? Has there been an occasion for the issue to come up at
5 all, ever?

6 A. No.

7 Q. Okay.

8 MS. ELLIOTT: That's all I have, Your Honor.

9 THE COURT: Thank you very much.

10 MS. SHURLING: Your Honor, may I?

11 THE COURT: Yes Ma'am. I'm sorry. Go ahead.

12 REDIRECT-EXAMINATION BY MS. SHURLING:

13 Q. Very briefly.

14 Mr. Robinson, have you ever heard people discuss Ronald
15 Cohens?

16 A. No Ma'am.

17 Q. Well, after this incident happened were there
18 conversations in the church about Mr. Cohens and the incident
19 that had happened?

20 A. I've heard about -- about it, but no one discussed it
21 at any length with me.

22 Q. Okay. Now, in your -- well, let's back up for a
23 second. We talked about your church. Did Ronald Cohens also
24 attend your church?

25 A. Yes Ma'am.

1 Q. And fairly frequently?

2 A. I would say yes.

3 Q. Okay. And in the church, particularly in a leadership
4 capacity, do you frequently have occasion to become aware of
5 disputes between members of the congregation?

6 A. Yes.

7 Q. And when there are disputes between members of the
8 congregation that involve accusations of deceit or dishonesty
9 do you become aware of them in the church community?

10 A. At times.

11 Q. And have you ever been aware of any such discussion or
12 dispute involving Ronald Cohens?

13 A. No Ma'am.

14 Q. Have you ever heard anyone in the community at large
15 refer to him in terms of whether or not he was a good person,
16 for example?

17 A. Well, no one never discussed his character with me.

18 MS. SHURLING: Okay.

19 A. All I know but from what -- I know about him
20 personally.

21 Q. Okay. And in your community is it fair to say that the
22 logging industry, the forestry industry, is a very important
23 industry in this area?

24 A. Yes Ma'am.

25 Q. And would a significant percentage of the people in

1 your church be involved in that line of business?

2 A. Yes Ma'am.

3 Q. And are you aware that many of them in your church had
4 business dealings with Mr. Cohens on a regular basis?

5 A. Yes Ma'am.

6 Q. And ---

7 MS. ELLIOTT: Your Honor, I'm going to object to that
8 unless he can provide some specific information that's not
9 hearsay.

10 MS. SHURLING: Okay.

11 Q. Mr. Robinson, were you aware of other members of your
12 church that had worked with Mr. Cohens?

13 A. Yes Ma'am.

14 Q. Were you aware at times of people in your church that
15 had business dealings with Mr. Cohens?

16 A. So far as work?

17 Q. Yes.

18 A. Yes.

19 A. And did you ever hear any of those individuals express
20 a negative opinion of him in terms of his character or
21 veracity?

22 A. No Ma'am.

23 Q. I've asked you if you would believe Mr. Cohens under
24 oath, I believe, but if I didn't, would you?

25 A. Would you please repeat that?

1 Q. If you had occasion to, for some reason, would you
2 believe Mr. Cohens' statements or testimony under oath?

3 A. Yes Ma'am.

4 Q. And is there anything in your background, in terms of
5 your interaction with others in the community that would cause
6 you to hesitate to believe him for any reason?

7 A. No Ma'am.

8 MS. SHURLING: Thank you. No further quest -- oh, I
9 think I asked you, if you had been asked to come to court and
10 testify for him would you have?

11 A. Yes.

12 MS. SHURLING: Thank you.

13 MS. ELLIOTT: Your Honor, I just ---

14 THE COURT: Yes Ma'am. Go ahead.

15 MS. ELLIOTT: ---Have one question.

16 THE COURT: Go ahead.

17 RECROSS-EXAMINATION BY MS. ELLIOTT:

18 Q. And Mr. Robinson, were you aware that Mr. -- that there
19 was a protective order in place between Mr. Cohens and his
20 wife right before this incident?

21 A. No Ma'am.

22 Q. Did you know they were having a domestic -- I want to
23 say domestic situation. Did you know they were separating and
24 having marital difficulties?

25 A. No Ma'am.

1 Q. Did you know they had separated about four times?

2 A. No Ma'am.

3 Q. And did you know that Mr. Cohens not only violated that
4 protective order by harassing his wife ---

5 A. No Ma'am.

6 MS. ELLIOTT: That's all I have, Your Honor.

7 THE COURT: Do you wish the witness to be excused?

8 MS. SHURLING: First, Your Honor, I would object to the
9 last question that was asked. There was a citation for
10 violation of the protective order. I'm not aware of anything
11 in evidence that reveals a final disposition on that citation
12 for violating a protective order.

13 MS. ELLIOTT: Your Honor, I believe Mr. Cohens'
14 testimony from the trial, he indicated that he had been to
15 Family Court, I believe, in April, or perhaps counsel did, in
16 April, 2006, and that there had been a determination of that,
17 unless I misread the transcript.

18 MS. SHURLING: In any event, I'll go on.

19 RE-REDIRECT EXAMINATION BY MS. SHURLING:

20 Q. Mr. Robinson, very briefly. You've been asked about
21 the domestic situation. Were you aware of Mr. Cohens' marital
22 problems?

23 A. No Ma'am.

24 Q. This is kind of going backwards, but the State has
25 asked you if you were aware that there were allegations that

1 Ronald Cohens had violated a protective order, and I believe
2 your answer to that was no?

3 A. Yes, it was no.

4 Q. Then logically I know your answer to this next
5 question, but I've got to answer it. Were you aware that his
6 wife was also under a protective order not to harass or bother
7 him?

8 A. No.

9 MS. SHURLING: Thank you. No further questions.

10 THE COURT: All right, sir, you may step down.

11 Do you wish the witness to be excused?

12 MS. SHURLING: Thank you, Your Honor. I would
13 appreciate it.

14 THE COURT: Any objection?

15 MS. ELLIOTT: No, Your Honor.

16 THE COURT: All right, sir. You are released from your
17 Subpoena. You may go back to your regular activities, sir.

18 A. Thank you, sir.

19 THE COURT: All right. Next witness, please Ma'am.

20 MS. SHURLING: Your Honor, I would ask for James Allen
21 Brittain.

22 JAMES ALLEN BRITTAIN, being first
23 duly sworn, testifies as follows:

24 DIRECT-EXAMINATION BY MS. SHURLING:

25 Q. Mr. Brittain, do you know Ronald Cohens?

JAMES ALLEN BRITTAIN - DIRECT BY SHURLING

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1 A. Yes, I do.

2 Q. How do you know him?

3 A. We lived in the -- we live in the same neighborhood,
4 and we become to be friends.

5 Q. And can you tell us approximately how long you've known
6 Ronald Cohens?

7 A. All his life.

8 Q. Okay. And are you friends with anyone else in his
9 family?

10 A. His oldest brother.

11 Q. And who is closer to you in age, his brother or Mr.
12 Cohens?

13 A. His brother.

14 Q. And would Mr. Cohens' brother be a closer friend of
15 yours than Mr. Cohens?

16 A. Yes.

17 Q. Okay. And you say you worked in the same neighborhood.
18 That neighborhood is in what community?

19 A. The Oakland Community.

20 Q. And is that a fairly small community?

21 A. It's -- yes. It's not too big.

22 Q. Is it kind of like on the outskirts of Georgetown?

23 A. Yes, it is.

24 Q. I'm a Columbia girl. I don't know the area. I'm
25 sorry.

1 A. It's ---

2 THE COURT: Go ahead, sir.

3 A. It's the Browns Ferry Community, but you have other
4 little areas in there, and that part is the Oakland Community.

5 Q. Is it a close-knit community?

6 A. Yes, it is.

7 Q. Do most of the people who live in the community seem to
8 know one another?

9 A. Yes, because the kids -- the older kids, they kind of
10 know one another, but as the younger ones coming along it's
11 kind of hard for us to, you know, remember them.

12 Q. As my father would say, back in the day everybody knew
13 each other?

14 A. Yes.

15 Q. Okay. What line of work -- I see you are wearing a
16 uniform, and I see your name on it, and I believe it says
17 Brittain Logging. Is that your company?

18 A. Yes, it is.

19 Q. And has my client, Mr. Cohens, ever worked for you?

20 A. Yes, he has.

21 Q. How long did he work for you?

22 A. He worked with me for about maybe three -- three or
23 four months.

24 Q. And his employment with you ended for what reason?

25 A. Because he had -- he came to court, and they found him

JAMES ALLEN BRITTAIN - DIRECT BY SHURLING

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1 guilty, and that's why it ended.

2 Q. So his arrest on the charges that we are here in court
3 over is what terminated his employment with you?

4 A. Yes.

5 Q. Otherwise, was he a good employee?

6 A. Oh yes, he was.

7 Q. Was he reliable?

8 A. Yes, he was.

9 Q. Dependable?

10 A. Yes.

11 Q. Okay. Do you employ a lot of people in the community?

12 A. Yes. I have seven -- six brothers, besides me, and we
13 mostly -- we all work, not together because we have like three
14 jobs, and the brothers kind split up, and then we have like
15 other people, you know, working for us.

16 Q. Is logging and forestry the major business in your
17 community?

18 A. Once, it used to, but not too many in it now, but it's
19 still pretty good bit.

20 Q. All right. And what aspect of the business do you work
21 in?

22 A. I operate the cutting machine.

23 Q. The cutting machine as in the thing that turns the ---

24 A. I cut the trees down.

25 Q. Cuts the trees down?

1 A. Yes.

2 Q. You are not the one that turns the trees into lumber?

3 A. No.

4 Q. Okay. You are the ones cutting the trees down. Now,
5 in the logging industry there are all sorts of groups that do
6 different functions in the industry, aren't there?

7 A. Right.

8 Q. And in your particular company you are dealing with
9 cutting trees down?

10 A. Yes.

11 Q. Do you also, on a day to day basis, deal with other
12 companies that handle other aspects of the business?

13 A. Yes.

14 Q. And are you acquaintances with, and know people
15 involved in those other areas of the industry?

16 A. Yes.

17 Q. Okay. In the business community, in the community in
18 general, are you familiar with Ronald Cohens' reputation for
19 truthfulness?

20 A. Yes.

21 Q. Would you say that it's positive or negative?

22 A. Positive.

23 Q. Have you ever heard people in the community discuss him
24 being an honest or truthful man?

25 A. Pardon me?

JAMES ALLEN BRITTAIN - DIRECT BY SHURLING

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1 Q. Have you heard people talk about him as being a
2 truthful, honest man?

3 A. Yes, I have.

4 Q. And have you ever heard anybody in the community
5 complaining about him being a liar, or a cheat, or dishonest
6 or deceitful?

7 A. No Ma'am.

8 Q. Do you go to church in that community?

9 A. Yes.

10 Q. Where do you go?

11 A. Go to St. Paul AME Church.

12 Q. Is that the same church that the Cohens family goes to?

13 A. Yes.

14 Q. Okay. And are you a regular at church?

15 A. I try to be. Yes, I do.

16 Q. Me too. Are you involved in the church leadership at
17 all?

18 A. Yes.

19 Q. Okay. As such, are you familiar with most of the men
20 folk in the church?

21 A. Yes.

22 Q. Have you ever, in your capacity in the leadership of
23 the church, do you have occasion to get involved in, and hear
24 about disputes between the brethren that involve dishonesty or
25 cheating?

1 A. Yes.

2 Q. Have you ever heard of any such dispute involving
3 Ronald Cohens?

4 A. No Ma'am.

5 Q. Have you ever heard him referred to in the community,
6 or in the church, as someone that was dependable and honest?

7 A. Yes.

8 Q. Now, if you had occasion to, for some reason, would you
9 believe statements made by Mr. Cohens under oath?

10 A. Yes.

11 Q. Is there anything, based on your knowledge of him from
12 the community, and things you have heard from others in the
13 community, both in the personal and business environment that
14 would cause you to hesitate to believe him under oath?

15 A. I don't quite understand your question.

16 Q. Okay. Have you ever heard anybody say anything about
17 Mr. Cohens that would make you reluctant to believe Mr. Cohens
18 under oath?

19 A. No.

20 Q. Okay. If you had been asked to come to court and be a
21 witness for him, a witness to his character at his original
22 trial, would you have been willing to do so?

23 A. Yes.

24 Q. Now, in the business community is your word as a
25 businessman important?

JAMES ALLEN BRITTAIN - DIRECT BY SHURLING

35

1 A. Yes Ma'am.

2 Q. Is your own reputation for veracity essential to your
3 business?

4 A. Yes.

5 Q. Do you do some work on handshake deals?

6 A. No, not -- not any more.

7 Q. Not any more?

8 A. Uh uh (NODS NEGATIVE)

9 Q. There goes that again, back in the day, but not today.

10 A. Yes. Yes.

11 Q. But generally speaking, what would happen to your
12 business if you had a reputation for not being truthful, for
13 coming to court and lying for Mr. Cohens, or anyone else?

14 A. My business would -- I would lose it, or it would go
15 down, because I depend on the people out, you know, to buy the
16 stuff for me to -- you know, the timber for me to cut to -- to
17 work.

18 Q. Has anybody promised you anything in exchange for your
19 testimony here today?

20 A. No Ma'am.

21 Q. Do you have any business relationship with any member
22 of the Cohens family, or any of his close personal friends
23 that we should be aware of?

24 A. Me and his brother are in the church on the same -- we
25 are Stewards in the church.

1 Q. Stewards in the church?

2 A. Yes.

3 Q. Okay. But you don't stand to gain any kind of business
4 contract as ---

5 A. Oh no. No Ma'am.

6 Q. ---A favor for doing this, or anything like that, do
7 you?

8 A. No Ma'am.

9 Q. Okay. And nobody has promised you any kind of business
10 in the future, or anything in exchange for your testimony?

11 A. No Ma'am.

12 Q. Is there any reason why you would be willing to put
13 your own reputation on the line to come to court and lie for
14 Mr. Cohens?

15 A. Oh no.

16 Q. And again, short-term memory isn't what it used to be,
17 you did say you would have come to court and testified for him
18 if he had asked you to, wouldn't you?

19 A. Yes, I would.

20 MS. SHURLING: Thank you. No further questions.

21 THE COURT: Cross-examination, please.

22 MS. ELLIOTT: Hi, Mr. Brittain.

23 A. Hello.

24 CROSS-EXAMINATION BY MS. ELLIOTT:

25 Q. You are here today because someone asked you to come

JAMES ALLEN BRITTAIN - CROSS BY ELLIOTT

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1 and testify for Mr. Cohens; is that correct?

2 A. Yes.

3 Q. And who asked you to -- who contacted you to come,
4 first asked you to come?

5 A. His brother, Markie -- Markie Cohens.

6 Q. Is that the one that you are the closest to, that you
7 testified that you are the closest to? Are y'all pretty good
8 friends?

9 A. Yes.

10 Q. Okay. And you've had a long, life-time friendship with
11 Mr. Cohens' brother?

12 A. I've known him for a good while.

13 Q. Okay. And I guess you are distressed that Mr. Cohens
14 is now in jail too, that that has happened?

15 A. Yes.

16 Q. And you would like to help his family, and Mr. Cohens?

17 A. I would like to help him.

18 MS. ELLIOTT: Okay.

19 Q. Now, you testified earlier that you had heard that Mr.
20 Cohens is dependable and honest. Who did you hear that from?

21 A. I didn't hear it. He prove it to me.

22 Q. Okay. But you didn't really hear it from anyone else;
23 it's just your personal interaction with Mr. Cohens?

24 A. I heard it from other people too, but he prove it to
25 me.

1 Q. All right. Who did you hear that from?

2 A. Who -- who was it?

3 Q. Yes.

4 A. Some of the workers that -- that -- he worked with me,
5 but he worked on another -- one of the other jobs, and my
6 brother, which is Ronald Brittain, he's ahead of that job, and
7 he was telling me what kind of person he is; he's dependable -
8 --

9 Q. Hard worker?

10 A. ---And you could -- yes, you could depend on him.

11 Q. Is that when he was working for Travis Brown?

12 A. No, when he was working for Brittain Logging.

13 Q. Okay. Okay. So he worked for your brother and then
14 worked for you later?

15 A. Well, the Brittain Logging is just that one company,
16 but I have like different little jobs ---

17 Q. Okay. All right.

18 A. ---And ---

19 Q. So y'all shared?

20 A. Yes.

21 Q. Okay. And your brother spoke highly of him; is that
22 what you are saying?

23 A. Yes. And I ---

24 Q. Who -- who else, and what -- specifically what did your
25 brother say?

1 A. Well, it's a machine at that time that special -- you
2 have to get -- find people who could run it, and we couldn't
3 hardly find nobody to really run it, and take care of it, and
4 after we heard about him, and we got him, and he drove -- the
5 month, the week that he was there he showed us a lot of things
6 that we didn't know, and not only that, but he improved --
7 improved our business by operating that machine.

8 Q. Okay. So he was a good worker, and he was a very
9 creative worker; is that what you are saying?

10 A. Yes Ma'am.

11 Q. Okay. But who told you that he was honest?

12 A. Just knowing him, and hearing from other people that he
13 used to work with.

14 Q. And who is that, hearing from other people; who are
15 those other people?

16 A. Travis, like I say, my brothers, some of the workers
17 that ---

18 Q. Okay. Travis, and your brothers, and some other
19 workers. How many workers would that have been?

20 A. They've got like thirteen, fourteen people work.

21 Q. So thirteen or fourteen people in your work community.

22 A. (NODS HEAD AFFIRMATIVE)

23 Q. Okay. And when would that have been?

24 A. When would that have been?

25 Q. Yes.

1 A. This was -- this was before I hired him.

2 Q. Okay. So -- and when did you hire him? When did he
3 work for you?

4 A. I can't remember the dates, but he worked for me like
5 three to four months, just before he got sentenced.

6 Q. Okay. So shortly -- in 2005, probably, shortly before
7 the incident?

8 A. I mean years and years before that, I mean, as we were
9 growing up in the community there were good things talking
10 about him.

11 Q. Okay. And who was that, and when would that have been?

12 A. I can't remember the people's names, but there are
13 people that, at times we get together, and we just talk, you
14 know, about different things, and at that time, different
15 times, his name just came up. We were just talking about
16 different things that -- people that you could trust and
17 depend on.

18 Q. Okay. So he was known as being trustworthy and
19 dependable?

20 A. To me, yes.

21 Q. Okay. And did anybody say he was truthful?

22 A. Oh yes.

23 Q. And who said that, and when was that?

24 A. I can't remember names.

25 Q. Okay. And when was that?

1 A. In our period of time of just -- you know, that was way
2 before I hired him.

3 Q. Okay. So it's way before the incident?

4 A. Yes.

5 MS. ELLIOTT: Okay. That's all I have, Your Honor.

6 THE COURT: Anything else, Ma'am?

7 REDIRECT-EXAMINATION BY MS. SHURLING:

8 Q. Would Mr. Cohens' reputation for truthfulness in the
9 community have been one of the reasons you hired him?

10 A. Oh yes.

11 Q. You were aware of his general reputation for honesty?

12 A. Yes Ma'am.

13 Q. If he had had a reputation for not being honest would
14 you have hired him?

15 A. No Ma'am.

16 MS. SHURLING: Thank you. No further questions.

17 THE COURT: All right. You may step down.

18 Do you want the witness to be excused?

19 MS. SHURLING: I would appreciate it, Your Honor.

20 THE COURT: Do you have any objection?

21 MS. ELLIOTT: No sir.

22 THE COURT: All right, sir, you are released from your
23 Subpoena. You can go back to your regular activities, sir.

24 A. Thank you, sir.

25 MS. SHURLING: Our last character witness, Your Honor,

1 would be Vonda Gail Johnson.

2 VONDA GAIL JOHNSON, being first
3 duly sworn, testifies as follows:

4 **DIRECT-EXAMINATION BY MS. SHURLING:**

5 Q. Ms. Johnson, how do you know the Applicant, Ronald
6 Cohens?

7 A. We have been -- I have known him about twenty or
8 twenty-five years. I consider him to be a friend of mine.

9 Q. Okay. And are you from the same community?

10 A. Yes, I am.

11 Q. And what would that community be known as?

12 A. Georgetown County.

13 Q. Okay. And what's your job, by the way?

14 A. I am the Deputy Treasurer for Georgetown County.

15 Q. You are the Deputy Treasurer?

16 A. Yes.

17 Q. And would you consider that to be a position of
18 fiduciary trust?

19 A. Yes, I do.

20 Q. Is your reputation for truthfulness in the community
21 important to your job?

22 A. Yes, it is.

23 Q. Is there any reason why you would be willing to
24 jeopardize that reputation by coming to court and testifying
25 untruthfully for Mr. Cohens?

- 1 A. No.
- 2 Q. Would you risk losing your job for him?
- 3 A. No, I would not.
- 4 Q. In the years that you've been knowing him, can you
- 5 truthfully say that you've also known a large number of people
- 6 in the community that also knew Ronald Cohens?
- 7 A. Yes.
- 8 Q. And are you familiar with whether he has a positive
- 9 reputation for being an honest, truthful person or not?
- 10 A. Yes, he does.
- 11 Q. Now, it's important that we understand how you know
- 12 that? I mean, have you heard people in the community discuss
- 13 whether or not he was an honest man?
- 14 A. No, I haven't heard people discuss. It's just my
- 15 opinion and what I have experienced. With him from the time
- 16 that I've been around him I've always known him to be a calm,
- 17 smiling, happy person. I've never known him to be ---
- 18 Q. Let's back up for a minute. Do you know a lot of the
- 19 same people he knows?
- 20 A. Yes, I do.
- 21 Q. Do you know a lot of people that know him in the
- 22 community as personal friends?
- 23 A. Yes.
- 24 Q. Do you know a lot of people that are his neighbors?
- 25 A. I know a few of them.

1 Q. Okay. And have you also known people that were
2 involved with him in the context of business dealings?

3 A. I don't know any people dealing with him business-wise.

4 Q. So it's all personal ---

5 A. Yes.

6 Q. ---Community relationship?

7 A. Yes.

8 Q. Okay. And in addition to your personal interaction
9 with him have you ever heard any of the other people that know
10 him refer to him as being a liar or a cheat?

11 A. No, I haven't.

12 Q. Have you ever heard anyone of the people that you know
13 that knows him, interacts with him, refer to him as being
14 deceitful or untrustworthy?

15 A. No.

16 Q. And again, you do know people that know him?

17 A. Yes.

18 Q. And you know people that you have heard talk about him
19 in general terms in your presence?

20 A. Yes.

21 Q. And in those experiences you've never heard anybody say
22 anything negative?

23 A. No, I haven't.

24 Q. Have you heard people say positive things about him?

25 A. Yes.

1 Q. Okay. If you were called upon to, for any reason,
2 would you believe anything that Mr. Cohens said under oath?

3 A. Yes.

4 Q. Is there anything in your experience, either your own
5 personal dealings, or more importantly, is there anything
6 you've ever heard from anybody in the community that would
7 cause you to be reluctant to believe what he said under oath?

8 A. No.

9 Q. Based on your general impressions of him, from what
10 you've heard, from other people in the community, do you
11 believe him to be an honest person?

12 A. Yes, I do.

13 Q. And is it your position ---

14 MS. ELLIOTT: Your Honor, I'm going to object, and move
15 to strike that answer. She's already answered that she has
16 not talked to anybody, ever, about his truthfulness. All she
17 has said is that -- that some type of personal interaction
18 with him.

19 THE COURT: I appreciate that, but then she went on to
20 testify about knowing people that know the Applicant, and she
21 has not heard them, in their discussions about him, say that
22 he is untruthful, so I would find that to be sufficient.

23 Thank you.

24 Q. And to address for a moment that, if you've never heard
25 anybody specifically talk about him being a truthful man, have

1 you heard people express the opinion that he's a good person?

2 A. Yes, I have.

3 Q. Have you heard people express the opinion that he's a
4 reliable person, somebody you can count on?

5 A. Yes, I have.

6 Q. And again -- and you've never heard anyone say that he
7 would cheat you, or lie to you, or deceive you in any way?

8 A. Not to me they haven't, no.

9 Q. Okay. Now, is there any reason why you would be
10 willing to put your own reputation in the community at risk by
11 coming here to testify for Mr. Cohens?

12 A. No.

13 Q. Untruthfully, that is?

14 A. No.

15 Q. Okay. Has anybody, either a close personal
16 acquaintance or friend, or family member of his promised you
17 anything in exchange for your testimony?

18 A. No. They never even asked me to testify.

19 Q. How did you come to be a witness here today?

20 A. I was here supporting a friend of mine, and they were
21 asking about character witnesses. No one never asked me. And
22 I said, well, I've known Slim, as I call him, approximately
23 twenty-five years, and I do not mind being a character
24 witness.

25 Q. So you volunteered?

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1 A. Yes, I volunteered.

2 MS. SHURLING: Thank you. No further questions.

3 THE COURT: All right. Cross-examination.

4 MS. ELLIOTT: Thank you, Your Honor.

5 CROSS-EXAMINATION BY MS. ELLIOTT:

6 Q. Ms. Johnson, who was asking for character witnesses
7 here?

8 A. I heard Ms. Deborah Ann Grove was speaking about it.
9 She's a close friend of mine.

10 Q. Okay. And who is -- how is she related to Mr. Cohens?

11 A. They have a daughter together.

12 Q. Okay. All right. And that -- they share a daughter
13 now; is that right?

14 A. She's ---

15 MS. ELLIOTT: That was not a very good question.

16 Move to strike that.

17 Q. How old is that child?

18 A. I'm not exactly sure, but I'm going to say twenty-six,
19 twenty-seven years old.

20 Q. Okay. And that's one of the older children?

21 A. Yes.

22 Q. Okay. All right. And then he has two younger children
23 by the victim in the case that we are here about; is that
24 correct?

25 A. I don't know what he has ---

1 Q. Okay. So you don't know how many children he has?

2 A. No, I don't.

3 Q. Okay. And how -- you and he have been good friends for
4 twenty to twenty-five years?

5 A. Yes Ma'am.

6 Q. Okay. And is there some point where you did not have
7 as much interaction with him as you did before, or have you
8 always had a lot of interaction with him?

9 A. Maybe -- approximately ten -- ten years ago I didn't
10 have a lot of interaction with him, but I would see him every
11 now and then, like in the grocery store or somewhere.

12 Q. Okay. So it's been since about 2001 that you've had
13 much interaction with Mr. Cohens?

14 A. Maybe.

15 Q. Okay. All right. So the younger children you are just
16 not that familiar with, or his -- I guess -- or his -- the
17 victim in this case, his wife, or his ex-wife; is that
18 correct?

19 A. Correct.

20 Q. Okay. And the discussions you've had, and the
21 perceptions you have about Mr. Cohens would have been from
22 2001, and before that time?

23 A. Yes.

24 Q. Okay. And what people would say that he -- I believe
25 you testified that you never heard anyone say anything

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1 negative about him; is that correct?

2 A. Correct.

3 Q. All right. Did you have occasion where people actually
4 made specific positive comments about him, or you just never
5 heard anything negative?

6 A. I've had occasion when people made positive statements
7 about him.

8 Q. Okay. And that would have been 2001, and earlier when
9 you were having more frequent contacts with him?

10 A. Yes.

11 Q. Okay. And how many people would that have been, and in
12 what area did they live or work?

13 A. I don't know the exact number of people, but one of
14 them is my sister. She now currently lives in Raleigh, North
15 Carolina, and when she calls she'll ask how Slim -- we call
16 him Slim -- how is Slim doing, and she will say things like,
17 man, a good person in trouble like that. A relative of his
18 that I've know.

19 Q. Okay. So family members, and people he grew up with
20 that he knew when he was a young man?

21 A. A relative -- relative of -- yes. Uh huh (indicating
22 positive)

23 Q. All right. Did you know that there was a Restraining
24 Order between -- that applied to Mr. Cohens and his wife, that
25 they weren't to have contact and harass each other?

1 A. No, I did not.

2 Q. And did you know that Mr. Cohens violated that order
3 and harassed his wife?

4 A. No, I did not.

5 MS. ELLIOTT: That's all I have. Thank you.

6 THE COURT: Any redirect?

7 MS. SHURLING: Just very briefly.

8 REDIRECT-EXAMINATION BY MS. SHURLING:

9 Q. Since you've been asked about this Restraining Order, I
10 assume you also didn't know that the violation of that
11 protective order that was alleged was making telephone calls;
12 right?

13 A. Right.

14 Q. Okay. And the State has worded the question in a way
15 that puts this out there, but yeah, I don't know if you paid
16 attention to the fact that she said it was a mutual
17 Restraining Order.

18 A. No, I did not pay ---

19 Q. Did you ever hear anything about there being a
20 Restraining Order against the wife?

21 A. No.

22 Q. Okay. Now, about 2001 you said there was a little
23 period in there where you were not as close with Mr. Cohen as
24 you had been?

25 A. Yes. I would only see him occasionally.

1 Q. Okay. But during that time period from 2001 to 2005
2 you still lived in the same community, didn't you?

3 A. Yes.

4 Q. You still knew the same people, didn't you?

5 A. Yes.

6 Q. You still knew a lot of the same people that knew Mr.
7 Cohens?

8 A. Correct.

9 Q. And during that time period you still had occasion to
10 have conversations with people that knew Mr. Cohens well?

11 A. Yes.

12 Q. And you had occasion to have day to day interactions
13 with other people, whether you did with Mr. Cohens or not,
14 that knew Mr. Cohens, right?

15 A. Yes.

16 Q. And so even during that time period when you may not
17 have been seeing him as much as you used to you still didn't
18 hear -- well, let me ask -- I don't want to answer it for you.
19 Even during that time period did you ever hear anybody say
20 anything negative about him, being a liar or a cheat, or a
21 dishonest man?

22 A. No, I did not.

23 Q. And did you continue to hear favorable things about him
24 in the community from various people from time to time?

25 A. Yes, from time to time.

1 Q. Now you've been asked about the people that you know
2 that have made favorable comments being friends and family
3 members.

4 A. Yes.

5 Q. In your opinion who has a tendency to know what's best,
6 know our character best?

7 A. Friends and family.

8 Q. So logically, would it be someone's friends and family
9 whose opinion you would care about when it comes to character
10 issues?

11 A. Yes.

12 MS. SHURLING: Thank you.

13 Q. And if I had asked you to, or if any other lawyer had
14 asked you to you would have been willing to come to court and
15 testify for him at the original trial?

16 A. Yes.

17 MS. SHURLING: Thank you. No further questions.

18 MS. ELLIOTT: Your Honor, if I may follow up?

19 THE COURT: Yes Ma'am.

20 RECROSS-EXAMINATION BY MS. ELLIOTT:

21 Q. Ms. Johnson, you said you live in Georgetown County,
22 but where exactly in Georgetown did you grow up?

23 A. Georgetown.

24 Q. In Georgetown?

25 A. Yes.

1 Q. What -- is there a particular community area? Is it
2 designated as a particular community area?

3 A. No Ma'am. Georgetown.

4 Q. Okay. Did you live near Mr. Cohens?

5 A. No, I did not live near him. I lived in Georgetown.

6 Q. Okay. So you didn't go to school with him?

7 A. No, I didn't go to school with him.

8 Q. Okay. How did you -- how do you know him?

9 A. Just by going out in that area at that time, and during
10 the summer it was like an every day process, that I would just
11 -- me and a group of friends would go to the area where he
12 lived.

13 Q. Okay. So the comments that you've heard are just from
14 a group of friends who would go out together?

15 A. Yes.

16 Q. Okay. And that stopped around 2001?

17 A. Yes. It stopped around 2001.

18 Q. Other than comments you received from your sister and
19 from his brother?

20 A. No. It's other -- other people. What I've said is, I
21 can't keep up with the count of people. There's been other
22 people who has mentioned about him. I just don't keep up with
23 who.

24 Q. Okay. So how many people would you estimate that's
25 been?

1 A. Well, I can't estimate, because I don't keep up with
2 who all ---

3 Q. Ten people?

4 A. I cannot estimate because I don't keep up with who
5 ask ---

6 Q. So you don't know?

7 A. No.

8 Q. Okay.

9 MS. ELLIOTT: That's all I have, Your Honor.

10 THE COURT: All right. Thank you.

11 Do you wish the witness to be excused?

12 MS. SHURLING: Your Honor, may I ask one more ---

13 THE COURT: Yes Ma'am.

14 RE-REDIRECT EXAMINATION BY MS. SHURLING:

15 Q. During the time period when you were going to that
16 community, you said on a daily basis almost?

17 A. On a daily basis during the summer time.

18 Q. Right. When you would go out and about in the
19 community did you talk to other people other than just your
20 little group of friends?

21 A. Yes, I did.

22 Q. Okay. So you had conversations with people in the
23 community at large, not just your little group of two or three
24 friends?

25 A. No.

1 Q. And you can recall hearing conversations about -- with
2 and about Mr. Cohens during that time period?

3 A. It wasn't always about Mr. Cohens, but whenever it was
4 about Mr. Cohens it was positive.

5 MS. SHURLING: Thank you. No further questions.

6 THE COURT: All right, Ma'am, you may step down.
7 Do you want the witness to be excused?

8 MS. SHURLING: I would appreciate it, Your Honor.

9 THE COURT: Any objection?

10 MS. ELLIOTT: No, Your Honor.

11 THE COURT: All right, Ma'am, you are released from
12 your Subpoena and may go back to your regular activities,
13 Ma'am.

14 All right, Ms. Shurling, further testimony, please
15 Ma'am.

16 MS. SHURLING: Yes, Your Honor, a moment's indulgence.

17 Your Honor, at this time -- we had previously presented
18 testimony from Mr. Cohens regarding the issues that were dealt
19 with in the other proceeding ---

20 THE COURT: Yes Ma'am.

21 MS. SHURLING: ---So I would call him briefly to
22 address the issues concerned with today's hearing.

23 THE COURT: All right. Come around, please sir.

24 Madame Clerk, if you would place him under oath again,
25 please.

1 RONALD COHENS, being first duly
2 sworn, testifies as follows:

3 DIRECT-EXAMINATION BY MS. SHURLING:

4 Q. Mr. Cohens ---

5 A. Yes Ma'am.

6 Q. ---In your conversations with me concerning this case,
7 we discussed the circumstances that surrounded your wife's
8 accident on the date in question, haven't we?

9 A. Yes Ma'am.

10 Q. And have you ever had a chance to review your testimony
11 from the trial transcript as well?

12 A. Not all of it, just some of it.

13 Q. You remember your testimony from that day pretty
14 clearly?

15 A. Well, no, not clearly.

16 Q. Well, was it ever your intent to say that your wife
17 deliberately hit your car that day?

18 A. No, she didn't deliberately, you know.

19 MS. ELLIOTT: Your Honor, I'm going to object. The
20 record speaks for itself, and we are not here to rehash the
21 testimony.

22 THE COURT: I would find the question as it was phrased
23 to be improper. If you want to refer to something specific in
24 the transcript.

25 MS. SHURLING: I will, Your Honor. I'm sorry. That

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1 was unartfully phrased. I apologize.

2 Q. Would you agree, Mr. Cohens, that in it's totality, the
3 intent of your trial testimony was to convey that your wife
4 had accidentally hit your car?

5 A. Yes Ma'am.

6 Q. And that it was upon impact with your car that she lost
7 control of the vehicle and went off the road and flipped?

8 A. Yes Ma'am.

9 Q. Did your attorney ever discuss with you in advance of
10 trial the possibility of arguing the defense of accident?

11 A. No.

12 Q. Did he ever review the indictment in your case with
13 you?

14 A. No, I -- no. No, he didn't.

15 Q. Did he ever discuss with you the fact that the
16 indictment specifically alleged that you were guilty of
17 assault and battery with intent to kill because you hit her
18 car, causing it to go off the road and wreck?

19 A. Yes Ma'am.

20 Q. Okay. And did you discuss with your lawyer how it
21 actually happened?

22 A. Yes, I did.

23 Q. Okay. And again, was there any discussion of asking
24 the Judge for a jury instruction on accident?

25 A. I don't think so.

1 Q. Okay. What was your understanding of what the theory
2 of defense was going to be at trial?

3 A. I don't understand.

4 MS. SHURLING: Proof positive I didn't prep my witness,
5 Your Honor. He doesn't even know what I'm saying.

6 Q. When you go into a trial, and you've got to have a
7 theory for how you are going to defend yourself against the
8 charges.

9 A. Right.

10 Q. If it were a murder case it might be self-defense, for
11 example. What was the theory of defense, what was the plan
12 for how to defend you against this charge of assault and
13 battery with intent to kill?

14 A. I thought -- I think he said that -- that he would get
15 it dropped to a lesser-included offense, and that I shouldn't
16 have been charged with assault and battery with intent to
17 kill; should have been a simple assault because I didn't cause
18 the accident.

19 Q. Okay. And did he ever discuss with you, in any way,
20 what effect the specificity of the indictment would have in
21 terms of what the State would have to prove at your trial?

22 A. No.

23 Q. Do you know what I'm saying when I ask you that
24 question?

25 A. What, the nature of the accident?

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1 Q. Let me be a little more specific. Did he ever discuss
2 with you the fact that the allegation against you in the
3 indictment was very narrow, very specific?

4 A. No, he didn't.

5 Q. And I believe you've already answered this. So he
6 didn't discuss with you what the wording of the indictment
7 would do in terms of the State's burden of proof, and what
8 they would have to prove at trial?

9 A. No.

10 Q. Was there ever any discussion about the proximate cause
11 issue, about whether or not they've ---

12 MS. ELLIOTT: Your Honor, we've already litigated that.
13 I'm going to object.

14 THE COURT: I know we talked about proximate cause,
15 because I made notes about it, and ---

16 MS. SHURLING: Thank you, Your Honor.

17 THE COURT: ---Highlighted certain things, so I know we
18 talked about proximate cause already.

19 Q. Mr. Cohens, you and your wife were separated during
20 this time period. There's been a number of -- there have been
21 a number of comments made here today about the order of
22 protection in this case. The order of protection in this case
23 went both to you and your wife, did it not?

24 A. Yes Ma'am.

25 Q. And the allegation that you violated the order of

1 protection involved your making phone calls to your wife?

2 A. No. They said my violation is when we had the
3 accident.

4 Q. No sir. Mr. Cohens, I'm talking about the day before
5 the accident, and you were served with papers saying that you
6 had violated the Restraining Order.

7 A. Oh yeah, yeah.

8 Q. The allegation that you had violated the -- it's been
9 referred to repeatedly as an order of protection. The
10 violation that was alleged was that you made phone calls;
11 isn't that true?

12 A. Yes Ma'am.

13 Q. Okay. So there weren't -- there wasn't an allegation
14 that you had beaten her, or done anything violent toward her
15 prior to that day, was there?

16 A. No Ma'am.

17 Q. Okay. Now, are you divorced from her now?

18 A. Yes Ma'am.

19 Q. And what were the grounds for your divorce?

20 A. I really don't -- I really don't remember.

21 Q. Does the term irreconcilable differences sound
22 familiar?

23 A. I think that was one of them.

24 Q. Okay. Were you accused of adultery?

25 A. No Ma'am.

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1 Q. Were you accused of beating her?

2 A. That's what she said.

3 Q. Okay. But the divorce decree was issued, if I
4 understand correctly, on no-fault grounds?

5 A. Right.

6 Q. Okay. Do you recall your defense attorney's opening
7 argument?

8 A. I think he said something like both of us break our
9 vows, me and her had broked our vows.

10 Q. Do you remember that portion of the trial transcript
11 when he was talking about how you had both taken an oath
12 before God and broken your promises?

13 MS. SHURLING: Your Honor, I'm specifically looking at
14 trial transcript page sixty-seven, starting at about line
15 fifteen through page sixty-eight, line eleven.

16 Q. Were you surprised by your attorney taking that
17 approach in opening argument?

18 A. I was.

19 Q. Did you feel like those remarks portrayed your
20 character in a negative light to the jury?

21 A. In some ways.

22 Q. How about your wife? Were you concerned that those
23 were not ---

24 MS. ELLIOTT: Your Honor, I'm objecting to the leading.

25 Q. Okay. Would you have approved, if you had been asked

1 in advance, of your lawyer saying those same things about your
2 wife?

3 A. Would I have approved it?

4 Q. Approved of him saying that about your wife, in the
5 opening argument?

6 A. No.

7 Q. You've testified moments ago that your entire
8 characterization of the automobile going off the road and
9 flipping was that it was accidental?

10 A. Yes Ma'am.

11 Q. Did you have any reason to want to attack your wife's
12 character?

13 A. No.

14 Q. At the time the opening argument was made your wife
15 hadn't testified yet, had she?

16 A. No Ma'am.

17 Q. Were you concerned about how that argument might affect
18 her temperament on the witness stand?

19 A. I guess somewhat.

20 Q. How long were y'all married?

21 A. Thirteen years.

22 Q. In your experience, was your wife the kind of person
23 that would take that kind of comment on her character
24 personally?

25 A. Yes Ma'am.

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1 Q. And again, did that give you cause for concern in terms
2 of how she might react to that?

3 A. Yes Ma'am.

4 Q. And once again, you had no advance discussions with
5 your lawyer about the fact that he was going to do that, did
6 you?

7 A. No Ma'am.

8 Q. Now, most -- the rest of the trial most people were
9 sequestered, but you were the Defendant; you were sitting
10 there the whole time, right?

11 A. Yes Ma'am.

12 Q. Was there any testimony introduced, any evidence
13 introduced about either one of you breaking your vows, and
14 being unfaithful to God in your marriage; was any of that the
15 subject of evidence that ultimately came in at court?

16 A. No.

17 Q. Okay. Let's move on to something else. How old are
18 you now?

19 A. Forty-five.

20 Q. How long have you been in jail?

21 A. Six years.

22 Q. Well, let's be specific. You've been at SCDC for how
23 long?

24 A. Since June the 5th, 2006.

25 Q. And before that you were in the Detention Center for

1 how long?

2 A. I got arrested May -- I mean, March 23rd.

3 Q. And you never made bond for ---

4 A. Never made bond.

5 Q. Okay. Did you have a prior criminal record, sir?

6 A. I had one little incident.

7 Q. Pardon?

8 A. I had one little incident.

9 Q. Okay. And what was that little incident for?

10 A. I had failed to stop for a blue light.

11 Q. Okay. And how many years earlier had that been?

12 A. Probably about fifteen years, or twenty years,
13 something like that.

14 Q. So fifteen or twenty years before this you had a
15 failure to stop for a blue light?

16 A. Yes Ma'am.

17 Q. And other than that you had a clean record?

18 A. Yes Ma'am.

19 Q. Let's talk about your work history. We heard you were
20 working for Mr. Brittain, I believe, when you were arrested?

21 A. Yes Ma'am.

22 Q. Before that who did you work for?

23 A. Travis, Travis Brown.

24 Q. Mr. Brown. That would be the caucasian gentleman that
25 testified?

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- 1 A. Yes Ma'am.
- 2 Q. How long did you work for Mr. Brown?
- 3 A. It was about five or six years.
- 4 Q. Five or six years. And before you worked for Mr. Brown
5 who did you work for?
- 6 A. Eddie Armstrong.
- 7 Q. Mr. Armstrong?
- 8 A. Yes Ma'am.
- 9 Q. And what was his company?
- 10 A. He was a logger too.
- 11 Q. Okay. How long did you work for him?
- 12 A. About six years.
- 13 Q. Six years?
- 14 A. Yes Ma'am.
- 15 Q. How about before that?
- 16 A. I started -- that's when I started in logging, with
17 Eddie.
- 18 Q. Okay.
- 19 A. And I went on from there.
- 20 Q. So altogether you are talking about -- about twelve
21 years or so before this incident you've been involved in the
22 logging business?
- 23 A. No, it was longer than that.
- 24 Q. Longer than that?
- 25 A. Yes Ma'am.

1 Q. Okay. When you left each of these jobs, when you left
2 Mr. Armstrong to go to Mr. Brown, and left Mr. Brown to go to
3 Mr. Brittain, had you been fired from any of your jobs?

4 A. No Ma'am.

5 Q. Why did you leave one job for another during that time
6 period?

7 A. To pursue a better opportunity.

8 Q. And did you leave on favorable terms with your previous
9 employers?

10 A. Good terms.

11 Q. Now, at least one of them came and testified for you
12 here today?

13 A. Yes Ma'am.

14 Q. All right. In your trial did you have discussion with
15 your lawyer in advance about how he was going to go about
16 convincing the jury that you didn't try to kill your wife?

17 A. No.

18 Q. Was there a recess after all the evidence was closed,
19 before closing arguments?

20 A. I can't recall.

21 Q. Well, before closing arguments did you have any
22 opportunity to discuss with your lawyer what evidence he was
23 going to summarize for the jury, or what arguments he was
24 going to make to try to convince the jury of the merit of your
25 side?

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1 A. I can't recall.

2 Q. Okay. Did your lawyer ever discuss with you how
3 important credibility was going to be at your jury trial?

4 A. Yes.

5 Q. Does the expression, it's a he-said, she-said kind of
6 thing ring a bell?

7 A. Yes Ma'am.

8 Q. Okay. So, your truthfulness was important at trial,
9 wasn't it?

10 A. Yes Ma'am.

11 Q. Did your lawyer ever discuss with you the fact that you
12 had a right to put up character witnesses at trial?

13 A. No Ma'am.

14 Q. Did you know that on your own?

15 A. I didn't know that.

16 Q. If you had known that would you have wanted your lawyer
17 to investigate, and present on your behalf, people that could
18 speak to your positive reputation in the community?

19 A. Yes Ma'am. Oh yeah.

20 Q. And again, that just didn't happen?

21 A. No Ma'am.

22 Q. Okay.

23 MS. SHURLING: A moment's indulgence, Your Honor.

24 THE COURT: Yes Ma'am.

25 Q. Mr. Cohens, did you personally ask any of the witnesses

1 that came to court today to come and testify for you?

2 A. No Ma'am.

3 Q. Did you have any discussions with any of your family
4 members in which you asked them to tell people to say anything
5 in particular about you?

6 A. No Ma'am.

7 Q. Did you ask them to make any promises on your behalf to
8 anybody in exchange for being willing to come to court and
9 testify for you?

10 A. No Ma'am.

11 Q. Until I visited you -- when did I come to see you at
12 the jail, at the penitentiary?

13 A. Yesterday.

14 Q. And until I went over with you the list of witnesses
15 that had been provided to me by family members did you even
16 know who your character witnesses were going to be here today?

17 A. Not until you told me.

18 Q. Okay. Notwithstanding that fact, prior to your trial,
19 if your lawyer had asked you to come up with some folks that
20 would be familiar with your general reputation in the
21 community would the people who have testified here today have
22 been among the people whose names you would have provided him?

23 A. Yes Ma'am.

24 Q. Thank you. Now, we went over a lot of stuff in the
25 last hearing, and I'm not going to repeat it, but one thing

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1 that bears repeating, you and I have gone over several times
2 the fact that if His Honor is gracious enough to grant you a
3 new trial you do understand we will be starting over?

4 A. Yes Ma'am.

5 Q. And you understand that the maximum penalties for both
6 of these crimes could be imposed, and that the Judge might not
7 even give them to you concurrent next time; it could be
8 consecutive; you know that?

9 A. Yes Ma'am.

10 Q. We've talked about that risk at length, haven't we?

11 A. Yes Ma'am.

12 Q. Notwithstanding that risk, are you sure you want to ask
13 Judge John to grant you a new trial?

14 A. Yes Ma'am.

15 MS. SHURLING: Thank you. No further questions.

16 MS. ELLIOTT: Good afternoon, Mr. Cohens.

17 A. How are you doing?

18 CROSS-EXAMINATION BY MS. ELLIOTT:

19 Q. I just want to review just a few things with you if you
20 don't mind. I know you said that you haven't read all of your
21 trial testimony, but I just want to ask you a few questions
22 about that, if I may. Just -- the questions go to the points
23 that have been raised, that you've testified about on direct-
24 examination, okay?

25 A. Yes Ma'am.

1 Q. All right. During trial I believe you admitted that
2 you called -- you tried to call your wife that morning when
3 you saw her pass by; is that correct?

4 A. Called -- I called her the day before, yes Ma'am.

5 Q. And you called her as she -- you picked up the phone
6 and tried to call her as she passed by that morning?

7 A. Yes Ma'am.

8 Q. And you testified that you knew you weren't suppose to
9 call her, but you did?

10 A. Yes Ma'am.

11 Q. And you knew you weren't suppose to call her because
12 that was part of that order of protection that says that y'all
13 weren't suppose to have contact with each other?

14 A. Yes Ma'am.

15 Q. Okay. And you also testified as to what ultimately
16 happened, at the very end when she went off the road, that she
17 came over and hit your car; isn't that right?

18 A. I said she changed lanes when she was coming over. I
19 was right there, and when she came over she hit the front of
20 my vehicle.

21 Q. Right. She hit you; you didn't hit her?

22 A. No Ma'am.

23 Q. And your testimony was that you didn't -- you didn't
24 cause anything to happen; she hit you?

25 A. She came over. She changed lanes. When she was

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1 changing lanes that's when she hit my ---

2 Q. Right.

3 A. ---Our vehicle.

4 Q. And you were in your lane, and she came into your lane
5 and hit you; isn't that right?

6 A. I was in -- I was in the right lane and she was in the
7 left lane.

8 Q. Okay. And you said that you didn't do anything to
9 cause the wreck; isn't that correct?

10 A. Driving down the road ---

11 Q. And she hit you?

12 A. She came -- she left -- she came from her lane to my
13 lane.

14 Q. Okay. Right. And you also testified that, when the
15 Prosecutor was asking you about the Rule to Show Cause that
16 you had been served with the night before, he was asking you
17 about that, and didn't you tell him you had been to Family
18 Court many times?

19 A. Not for that, not for -- not for -- not for my wife.

20 Q. What had you been to Family Court for?

21 A. Child support.

22 Q. Okay. For failing to pay child support?

23 A. Well, going to pay child support.

24 Q. Okay. Just going up there to the Clerk's Office to pay
25 it?

1 A. Well, just -- well, going to court and -- and the Judge
2 was working a deal out for I had to pay child support.

3 Q. Okay. For failing to pay it, and then working out a
4 deal to catch it up?

5 A. Well, no, not with -- not with my wife.

6 MS. SHURLING: Objection, Your Honor. He's already
7 said it wasn't for failure to pay.

8 THE COURT: I appreciate that. I'm going to allow her
9 to explore the issue, and the witness may explain his answer.

10 So go ahead and finish your answer, sir.

11 A. All right. It was not for my wife; it was for my other
12 kids.

13 Q. Okay. All right. But it was for not paying child
14 support for children that you have?

15 A. Yes. Well, I agreed to pay more.

16 Q. Okay. And was the more because you hadn't paid before,
17 so you were trying to catch it up?

18 A. No, because the money -- the money I was making.

19 Q. Okay.

20 A. Yeah.

21 Q. Your salary increased, so your support obligation
22 increased?

23 A. Every time ---

24 Q. Okay. All right. And so that happened a lot?

25 A. Every time I changed jobs.

1 Q. Okay. All right. And so basically your -- when you
2 testified you basically said, we were traveling down the road;
3 she hit me; I did nothing to cause the wreck?

4 A. She -- she came from her lane to my lane, and that's --
5 that's what caused the accident.

6 Q. Okay. And your lawyer argued during closing argument
7 that, what we have is the victim saying one thing, that is,
8 that you were hitting the back of her bumper; you were
9 colliding with her several times, and caused her to run off
10 the road, and then you were saying another thing, is that I
11 didn't do anything; she ran into me; is that correct? That's
12 what your ---

13 A. Well, I was not behind her; I was on the side of her.

14 Q. But isn't that what your attorney argued in closing
15 argument to the jury?

16 A. I ---

17 Q. You don't remember?

18 A. I don't recall.

19 Q. Okay. All right. All right, and you testified earlier
20 that you thought your wife would take it personally, about the
21 opening argument made by your attorney?

22 A. Yeah, I feel she would.

23 Q. All right. And do you think she probably took it
24 personally that you ran her off the road too, don't you? She
25 came in to testify about that?

1 A. I didn't ran her off the road. She came into my lane.

2 Q. And you have had a prior failure to stop; is that
3 correct, about fifteen year before this?

4 A. I think it was about that long ---

5 Q. Okay.

6 A. ---Or longer.

7 Q. All right. And was that in Georgetown County as well?

8 A. Yes Ma'am.

9 Q. Okay. And while you've been at the Department of
10 Corrections I believe you said that you've been there since
11 when, 2006?

12 A. 2006, January the 5th -- since June 5th, June 5th,
13 excuse me.

14 Q. All right. And since you've been there you've been
15 written up for refusing, or failing to obey an order?

16 MS. SHURLING: Objection, Your Honor. I haven't been
17 provided copies of the SCDC records in this case. I checked
18 before I came to Court. I was sent the State's Return, and
19 under ordinary circumstances I'm provided a copy of SCDC
20 records and Clerk of Court records along with the Return, and
21 in this case I did not get it.

22 THE COURT: Solicitor, do you have any -- I'm sorry --
23 Madame Attorney General, do you have any proof that you
24 forwarded SCDC records?

25 MS. ELLIOTT: I will retract that. Apparently our

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1 Return says that they will be forwarded upon receipt, so I
2 apologize. I will retract that question ---

3 MS. SHURLING: Thank you.

4 MS. ELLIOTT: ---Or questions relating to this record
5 at the Department of Corrections.

6 Q. And the character witness that came -- the witnesses
7 that came in today I believe were contacted by your family
8 members; is that correct?

9 A. I don't have no ---

10 Q. You don't know?

11 A. No Ma'am.

12 Q. Do -- your family members are working on your behalf to
13 try to help you out?

14 A. I think they are.

15 MS. ELLIOTT: Okay. That's all I have, Your Honor.

16 THE COURT: Anything on redirect?

17 MS. SHURLING: No sir, Your Honor.

18 THE COURT: All right. Sir, you may step down. Thank
19 you.

20 A. Thank you.

21 THE COURT: Further witnesses on behalf of the
22 Applicant?

23 MS. SHURLING: No sir, Your Honor.

24 THE COURT: All right. Now, counsel, I understand that
25 both of you would like to submit a proposed order to the

1 Court.

2 I'm sorry. You have a reply?

3 MS. ELLIOTT: Your Honor, I would like to call Mr. Barr

4 ---

5 THE COURT: I'm sorry.

6 MS. ELLIOTT: ---To respond to a couple of issues. I
7 apologize.

8 THE COURT: All right. Very good. All right, I'm
9 sorry.

10 Come on, Mr. Barr, come around, please sir.

11 CHARLES DAVID BARR, being first
12 duly sworn, testifies as follows:

13 DIRECT-EXAMINATION BY MS. ELLIOTT:

14 Q. Mr. Barr, have you had a chance to skim over the
15 State's opening argument, and your opening argument in this
16 case?

17 A. Yes Ma'am. Portions of it.

18 Q. Portions of it. And what is the purpose generally
19 served by an opening argument by defense counsel?

20 A. It outlines, essentially to the jury, who has certain
21 duties and responsibilities, to further outline exactly what
22 the defense's perspective is as it relates to what, and how
23 the State might be proceeding, also outline the defense's
24 response to the allegations that have been raised in the
25 indictment.

1 Q. And prior to you making your opening argument were --
2 did you know the evidence the State would present against your
3 client at trial?

4 A. Yes Ma'am.

5 Q. And you know the theory -- you knew the theory of the
6 State's case?

7 A. Yes Ma'am.

8 Q. And what was that theory, very briefly?

9 A. Assault and battery with intent to kill, and failure to
10 stop for a blue light.

11 Q. That your client basically chased the victim down the
12 highway over a period of time, and ---

13 A. And bumped her vehicle and ran her off the road, caused
14 her to overturn.

15 Q. Okay. And what was the theory of the Defense?

16 A. Reasonably doubt. That's always the defense's theory.
17 Of course in some cases, depending upon how -- how you
18 perceive that the evidence is going to play there might be
19 additional things, but generally the defense's responsibility,
20 from our prospective, is to cause the jury to see reasonable
21 doubt as it relates to the allegations, and that is the
22 elements of the offense, or offenses, as in this case, that
23 are contained in the indictment.

24 Q. All right. And were you able to develop a strategy for
25 your opening argument in this case?

- 1 A. Yes Ma'am.
- 2 Q. Was that based partly on the facts of the case?
- 3 A. Yes, based totally on the facts of the case.
- 4 Q. On your client, your client's position as to ---
- 5 A. Yes Ma'am.
- 6 Q. ---His version of the facts, and your -- is that yes?
- 7 A. Yes.
- 8 Q. ---And your experience in the trial of criminal cases -
- 9 --
- 10 A. Yes Ma'am.
- 11 Q. ---And your experience with jurors in Georgetown
- 12 County?
- 13 A. Absolutely.
- 14 Q. And what was the theory, or the strategy you used for
- 15 your opening argument?
- 16 A. The parties in this case, clearly, I think the one
- 17 thing that everybody could agree on, was that there were some
- 18 domestic issues.
- 19 Q. Okay. And had there been a comment made, that you
- 20 responded to, by the Solicitor in his opening argument?
- 21 A. Well, the comment regarding the Defendant and the
- 22 Plaintiff, and their oath, and their marriage, and the object
- 23 there was to get the jury away from the issue of a criminal
- 24 trial, even though you are involved in a criminal trial, but
- 25 for them not to think in criminal terms, but to think,

1 perhaps, in terms of things that they could more readily
2 identify with, that would generally happen where people are
3 involved in domestic situations.

4 Quite frankly, domestic court is more dangerous from the
5 standpoint of the individuals than people, at least I've
6 found, in criminal court, because they get extreme when it
7 comes to certain conduct. Generally you can pretty much
8 anticipate what people do, and will do, and what they -- but
9 they get all upset about children, they get upset about money,
10 and they go to extremes, so what you want to do initially, and
11 what I tried to do initially in this case, is to get the jury
12 to see, or to view the Defendant and the Plaintiff or -- and
13 the alleged victim, as both being somewhat in this particular
14 situation because of their domestic situation.

15 Of course the Defendant is the one that was charged, so
16 at the end of the day, he's the one that it made a difference
17 to.

18 Q. Okay. So you are trying to do what, again, as far as
19 the victim and the Defendant in this ---

20 A. I wanted the jury -- and keep in mind -- juries are not
21 reluctant to convict, especially black defendants, in criminal
22 cases of violence, and in order to -- to be successful many
23 times you have to take almost the worse and put it up front to
24 make certain that, from the standpoint of the character of the
25 jury that the jury don't develop an attitude about the

1 defendant that makes it very easy for them to convict the
2 defendant.

3 Q. And is that the strategy you used?

4 A. Yes Ma'am.

5 Q. And when you made that opening argument, after it was
6 over did the Defendant say anything to you, express any
7 concern about it?

8 A. I don't have any recollection of him saying anything to
9 me.

10 Q. And how was the victim's demeanor toward you during
11 your cross-examination?

12 A. I think the victim conducted herself as she had been
13 prepped to do.

14 Q. Not hostile?

15 A. No Ma'am.

16 Q. All right. And if I may ask you too, as far as -- and
17 you've been in the courtroom today, all day, all afternoon,
18 and heard the character witnesses testify ---

19 A. Yes Ma'am.

20 Q. ---Witnesses testify. Did you consider using character
21 witnesses in this case?

22 A. I always consider using character witnesses.

23 Q. All right. And have you had experience in that area?

24 A. Yes Ma'am.

25 Q. And did you make a decision not to use character

1 witnesses?

2 A. I absolutely did.

3 Q. And why?

4 A. I've probably tried hundreds of felony cases in General
5 Sessions Court in South Carolina, and I've probably used
6 character witnesses in no more than three.

7 Q. And why did you not use character witnesses in this
8 case?

9 A. When you consider the use of character witnesses, first
10 of all, you've got to be able to match the profile of the
11 character witness to at least, to some degree, the profile of
12 at least one or two individuals on the jury. In those cases
13 where I've used a character witness I have known that, when
14 the character witness got on the witness stand and said, I
15 know what the defendant's reputation is in the community for
16 truth and veracity, and it's good, then I want that person --
17 I expect that person to be able to carry the rest of the
18 jurors, and that's what -- from a defense perspective that's
19 what you look for. Quite frankly, irrespective of what -- as
20 long as the evidence is not too wide, that's the whole purpose
21 of utilizing a character witness.

22 Now, in those situations where a character witness can't
23 add to nothing but the compilation of people that are being
24 called I think you are exposing yourself to the potential for
25 issues, and especially issues regarding your client, that

1 ordinarily you may find yourself defending against, which is
2 something you want to do. You want to keep it simple.

3 Q. And you've heard the character witnesses testify today?

4 A. Character witnesses that testified today, in my
5 opinion, would have only -- and any of them -- number one,
6 there were witnesses, there were eyewitnesses. Moreover, in
7 addition to the ABIK charge there was also a blue light
8 charge, and the police made it very clear that Mr. Cohens took
9 off and they had to run him down, and he failed to stop for a
10 blue light, I mean, he disregarded the effort of the police to
11 arrest him.

12 Now, of course, his testimony would have been that he
13 didn't do that. As it relates to his wife, his testimony was
14 that, well, I didn't bump her off the road, even though the
15 forensic evidence was such that it tended to prove the State's
16 theory, and even the eyewitnesses tended to prove the State's
17 theory. Those witnesses would, as far as I'm concerned, that
18 would have caused this jury to make it's decision, was not so
19 much an issue of whether we can believe Mr. Cohens versus Ms.
20 Cohens, but first of all, we believe what we've heard the
21 witnesses testify to, and what the police have said, so the
22 second thing is whether that we believe Mr. Cohens intended to
23 kill his wife, and then that goes back to the initial part, or
24 the initial defense theory starting with his calling the woman
25 that morning as they were coming to work, and starting with

1 whether or not the jury would believe that he wouldn't sit
2 down out there at the road and wait for her to come out there.

3 Q. Was there a character witness presented today that you
4 believe the jury would listen to?

5 A. Well, I think they would have listened to all of them,
6 but as far as whether or not -- what they said, and
7 essentially -- a character witness can only, you know, testify
8 to what the defendant's -- what they know about the
9 defendant's reputation is in the community for truth and
10 veracity.

11 Now, I don't want the witnesses getting up and saying
12 over and over again, well, believe what Mr. Cohens is saying
13 when at the same time you've got witnesses which, in my
14 opinion, to this particular jury, would have appeared more
15 credible, who said just the opposite of what he had said, so
16 the issue is to find, hopefully, reasonable doubt, not get
17 into a situation where I've got to defend the defendant beyond
18 and above what he's called upon to defend himself against in
19 the indictment.

20 Q. Muddy the water rather than make it clearer?

21 A. Yes Ma'am.

22 Q. The Applicant has asserted that you were ineffective
23 for failing to argue to the jury that what happened, the
24 wreck, was an accident, and that you were ineffective for
25 failing to ask for a jury charge on the defense of accident.

1 Can you tell us, please, whether you considered those matters,
2 and what decisions were made in regard to that?

3 A. First of all, from a defense perspective, I think you
4 are obligated to ask the Judge for a charge on the law based
5 on what the evidence -- or what has been presented in the
6 evidence, and of course the Prosecution had the burden of
7 proving the Defendant's guilt as it relates to each and every
8 element of the offense.

9 Now Mr. -- as far as Mr. Cohens is concerned -- well,
10 quite frankly there were actually two collisions, as I recall,
11 and when the vehicles collided initially Mr. Cohens didn't
12 know where the wife came from, or she banged into him.

13 Q. I believe, isn't it correct that the transcript shows
14 that he said, I don't know if she ran into me or I ran into --

15 -

16 A. Well, he -- I think he said, well, there was a
17 collision. But then as far as the vehicle -- as far as the --
18 what was the assault and battery with intent to kill, he did
19 say that the lady came across in front of him, nipped his
20 vehicle; he doesn't know whether she did it intentionally or
21 unintentionally, which that part of it would lend itself to
22 the whole accident theory, but our position was that Mr.
23 Cohens himself did not assault and commit a battery as it
24 relates to the defendant's -- or the lady's vehicle, so I
25 don't see -- I guess it's arguable the other way, but from the

1 standpoint of what the Defendant did, and what the Judge would
2 be charging the jury that the Prosecution has to prove, that
3 is, each and every element of the offense of assault and
4 battery with intent to kill, the same as murder except
5 somebody is getting killed, then I don't see how -- I don't
6 see how it would have become our responsibility, say for
7 instance -- and necessarily how --- why it would have been in
8 our best interest other than to cause the Prosecution maybe to
9 add something on, or to put something up in rebuttal, to get
10 into this issue. I thought that the Judge's charge was
11 adequate under that circumstance, or under those
12 circumstances.

13 MS. ELLIOTT: That's all I have, Your Honor. Thank
14 you.

15 THE COURT: All right. We'll take a short break for
16 about five minutes before we go into cross-examination.

17 Thank you very much.

18 (THE FOLLOWING TAKES PLACE AFTER A BREAK.)

19 THE COURT: All right, Ms. Shurling, cross-examination.

20 MS. SHURLING: Thank you.

21 CROSS-EXAMINATION BY MS. SHURLING:

22 Q. With regard to the other witnesses in the trial that
23 you've referred to, do you recall the fact that their
24 testimony was -- oops, my apologizes, Your Honor.

25 THE COURT: That's all right, go ahead. You hadn't

1 said anything, so -- go ahead. Hadn't started but a bit.

2 MS. SHURLING: Thank you.

3 Q. Do you recall the fact that the other witnesses'
4 testimony was somewhat inconsistent with regard to the
5 specifics of the instance leading right up ---

6 A. Two of them were.

7 Q. Well, other than the wife, how many other witnesses
8 were there?

9 A. There was -- I think there was somebody from the
10 Forensics Department, I believe, who did some work on some
11 debris.

12 Q. I understand, so I was referring to eyewitnesses from
13 the scene.

14 A. Pardon me?

15 Q. I said, I was referring to eyewitnesses from the scene,
16 and would it be fair to say that their testimony was not
17 altogether consistent with their testimony?

18 A. It wasn't -- no, their testimony wasn't altogether
19 consistent.

20 Q. Okay.

21 A. Uh huh (indicating positive)

22 Q. And is it fair to say that your client testified that
23 he was in the slower lane, the right lane, and his wife was in
24 the left lane when she ---

25 A. That would have been fine if they wasn't listening to

1 the 911 tape, but that was ---

2 MS. SHURLING: Sir -- Your Honor, if I could be allowed
3 to finish my question.

4 THE COURT: I ---

5 A. Yes Ma'am.

6 Q. Isn't it fair to say that your client testified that he
7 was in the left lane, she was in the left lane, that she went
8 to merge into the right lane and her car clipped his front
9 bumper, causing her to lose control and leave the road?

10 A. He didn't say that it caused her to lose control; he
11 said it clipped her (sic) front bumper and she then drove, I
12 believe, across the road. That's my recollection of it,
13 counsel. But she drove across the road and then drove into
14 the ditch. They were both going into the ditch, and I think
15 he was able to salvage his vehicle, and -- but she was not,
16 and she went into a ditch and flipped over, or something like
17 that.

18 Q. Looking specifically at page three thirty-eight of the
19 trial transcript.

20 THE COURT: Do you want him to look at a copy of the
21 transcript, Ma'am?

22 MS. SHURLING: I apologize. I thought you had one up
23 there with you, Mr. Barr.

24 A. Three thirty-eight?

25 Q. Three thirty-eight, line three through eight.

1 A. You want me to read it?

2 Q. Please.

3 A. "When she started to come over she catch the front of
4 my vehicle. Me and her were going into the ditch. I slammed
5 on the brakes. When I slammed on the brakes she went straight
6 across in front of me and went in the ditch, and I went down
7 the road and turned around and came back."

8 Q. Now, your client testified that she was changing lanes,
9 caught the front of his car, and then went off the road; is
10 that correct?

11 A. My client testified as his transcript -- the testimony
12 is recorded in the transcript.

13 Q. And did he, anywhere in his testimony, accuse his wife
14 of deliberately ramming into him?

15 A. Not that I can recollect.

16 Q. Now, testimony came out ---

17 A. Now he did say that there was a collision before that
18 portion of the transcript that I just read, but even -- even
19 with that collision he did not specifically say that she
20 caused the collision.

21 Q. And isn't it, in fact, true that what he said was that
22 they were traveling along side by side each other, gesturing
23 at each other, and yelling back and forth, and at some point
24 their cars touched, and there was a collision, a slight
25 connection, correct?

1 A. Well, I don't know that that's what he said, but I know
2 that he said that there was some kind of collision that
3 occurred between the two vehicles.

4 Q. I understand. My question is, did your client ever say
5 his wife deliberately hit him?

6 A. I have no recollection of Mr. Cohens ever saying that
7 his wife deliberately struck his vehicle with hers.

8 Q. Have you reviewed the indictment in this case, sir?

9 A. No Ma'am.

10 MS. SHURLING: A moment, Your Honor.

11 Q. Now, your client was charged with assault in addition
12 to the blue light charge, pardon me.

13 A. Assault and battery with intent to kill.

14 Q. Correct. And in the body of the indictment, can you
15 please publish for us the exact wordage of the allegation,
16 please?

17 A. You want me to publish the indictment itself?

18 Q. Yes.

19 A. "That Ronald Cohens did, in Georgetown County, on or
20 about March 23rd, 2006, feloniously, and with malice
21 aforethought, commit an assault and battery upon the minor
22 victim, Cohens, with the intent to kill the victim, to
23 witness, ramming his vehicle into the victim's vehicle while
24 the vehicles were in motion, causing the victim's vehicle to
25 wreck into trees and overturn, resulting in the victim's

1 having to seek medical attention, in violation of Code Section
2 16-3-620 of the Code of Laws of South Carolina, 1976 as
3 amended."

4 Q. Thank you. So in this indictment the State
5 specifically alleged, did they not, that the act which
6 constituted assault and battery with intent to kill was
7 striking her vehicle, causing it to run off the road and
8 wreck?

9 A. As far as I remember, and as far as what's in the
10 indictment, that's what it says.

11 Q. Okay. Now, the State doesn't have to be so specific in
12 an indictment, do they?

13 A. They certainly don't.

14 Q. But once they are they are stuck with it, aren't they?

15 A. Well, not necessarily.

16 Q. Once the State narrows, with specificity, the direct
17 allegations which constitute the offense for which the
18 individual was indicted are they not then required to prove
19 those allegations in order to get a conviction?

20 A. The State, at a minimum, is required to prove the
21 elements of the offense that's alleged in the indictment to
22 the extent that it constitutes a criminal offense, at a
23 minimum.

24 MS. SHURLING: That's a legal point I can argue
25 elsewhere.

1 Q. Mr. Barr, will you agree with me that there were
2 basically three choices for this jury with regard to the
3 assault and battery with intent to kill, and those are, that
4 your client did it deliberately, and intended to kill his
5 wife, that she did it deliberately, or that it was an
6 accident?

7 A. I don't think that the jury, in terms of what, from a
8 psychological standpoint, what they may or may not have been
9 thinking, but that's not what they were called upon to decide.
10 My recollection is that they were called upon to make a
11 decision regarding whether or not the Defendant had been
12 proven guilty of what he's charged with in the indictment.

13 Now how they go about that, that's food for thought.

14 Q. Well, how -- you say what they were called upon to
15 decide. You didn't assert the defense of accident, did you?

16 A. No, I didn't.

17 Q. If you had, they would have been called upon to decide
18 it, wouldn't they?

19 A. If I had asserted the defense of accident they would
20 have been called upon to decide whether or not the Prosecution
21 had proved that there was an accident. That's what the jury
22 would have been called upon to decide.

23 Q. Your client said that his wife was changing lanes,
24 caught the bumper of his car, and then left the road and
25 wrecked, correct?

1 A. That's what he said that the -- that the alleged victim
2 did, yes, not him.

3 Q. Correct. I understand.

4 A. Yes Ma'am.

5 Q. And isn't it a fact, legally, that a defendant may be
6 entitled to a jury instruction at times based solely on an
7 assertion that's presented in his own testimony?

8 A. The defendant -- my understanding of the law is that
9 the defendant is entitled to jury instructions on whatever the
10 evidence supports as it relates to the elements of the
11 offense, to the extent that there have been facts presented on
12 the elements of that offense. You can get a charge if you ask
13 for it.

14 Q. My point exactly.

15 A. Yes Ma'am.

16 Q. And you can get a jury instruction based -- in some
17 circumstances, based solely on the position put forth by the
18 testimony of the accused; isn't that true?

19 A. If it's presented into evidence, yes Ma'am.

20 Q. Well, this was presented into evidence, was it not?
21 Your client testified to it.

22 A. Well, my client testified to what -- what's in the
23 record as to what he said, I mean, I ---

24 Q. Okay. I'll move on from that.

25 A. Yes Ma'am.

1 Q. Your -- let me rephrase. This couple had been married
2 a long time, hadn't they?

3 A. They had been married for quite a while.

4 Q. And they had been separated off and on over a lengthy
5 period of time?

6 A. My understanding is that they were.

7 Q. And you actually brought it out at trial that they had
8 reconciled a number of times, gone back and forth?

9 A. Yes Ma'am.

10 Q. So although they were currently separated, there was a
11 history of these two people going back and forth with one
12 another, correct?

13 A. As far as I knew, yes. Uh huh (indicating positive)

14 Q. And the evidence of violating a Restraining Order was
15 phone calls after all, wasn't it?

16 A. As far as what I knew.

17 Q. Okay. And starting straight out of the shoot in
18 opening argument the State said that he was lying in wait for
19 her that morning. Remember that? Do you recall that part of
20 the State's opening argument?

21 A. I don't recall it, but if you say it was there.

22 Q. Okay. Well, isn't it true that all of these people
23 lived very close together?

24 A. They do.

25 Q. And not only did Mr. Cohens live close to where his ex-

1 wife lived, but Mr. Cohens' immediate family members lived
2 very near where his ex-wife -- and she wasn't even an ex
3 then ---

4 A. Uh huh (**indicating positive**)

5 Q. ---Estranged wife lived, correct?

6 A. Yes Ma'am.

7 Q. Did you argue in your closing argument that it was
8 certainly feasible for him to have been spotted in that
9 neighborhood that morning without it meaning anything?

10 A. I may have, I may not have. I don't remember.

11 Q. Okay. And did you point out that the road on which
12 this incident occurred was one of the major traffic lanes in
13 this community?

14 A. I would have not ordinarily argued about, or emphasized
15 it, because quite frankly, when Mr. Cohens got up supposedly
16 he saw his wife, and at the same time somehow he left home,
17 and she left home about the same time, but she was supposedly
18 driving on Highway 527 behind Mr. Cohens. They drove together
19 somehow to Swamp Fox, turned right on 701, still together, and
20 turned on Black River, still together, and somehow wound up on
21 the bridge still together. Now I -- you know, I don't -- I
22 just, as I said, my concern was, or one of my primary
23 concerns, was that the jury did not believe that -- from the
24 standpoint of Mr. Cohens actually having laid in wait for her,
25 that he, in fact, did. But now it strikes me even now as kind

1 of unusual that this would happen that way.

2 Q. Well, let me stop you. What was the first highway you
3 named, 527?

4 A. 527. It's Highway 41, I'm sorry, 41. That's where the
5 Detention Center is.

6 MS. ELLIOTT: 51.

7 A. 51. I'm sorry. 51.

8 Q. And isn't it true that that is a main thoroughfare in
9 this community?

10 A. Yes Ma'am, and it sure is.

11 Q. Isn't that the road you have to use to get just about
12 anywhere in this community?

13 A. No Ma'am. I mean that's -- depending on where you are
14 going.

15 Q. Well, what were the other highways you mentioned?

16 A. 701.

17 Q. 701 is a major highway, isn't it?

18 A. Well, I guess, again, depending on where you are going.

19 Q. And which one of those two roads did they initially
20 spot each other on?

21 A. I think it would probably have been 51.

22 Q. Okay. Would 51 be the logical route to take if you
23 were going to the other big highway?

24 A. Counsel, it wasn't so much the route, it's the timing.
25 That's -- from a defense perspective, it was the timing that

1 concerned me.

2 Q. Okay.

3 A. That they just happened to be there together, and just
4 happened to -- and keep in mind, the issue was whether or not
5 he intended to kill his wife.

6 Q. I understand that.

7 A. Yes Ma'am.

8 Q. My question is -- let me rephrase. This wasn't
9 Charlotte, wasn't it?

10 A. I certainly don't think so.

11 Q. It wasn't Atlanta. It wasn't a major metropolitan
12 city, was it?

13 A. Not by a long shot.

14 Q. On any given day, what would be the odds that you might
15 see someone you know in the community in morning traffic?

16 A. I have no idea, and I wouldn't even speculate. My
17 concern was defending Mr. Cohens, not playing odds and
18 gambling on something.

19 Q. Well, you've got eyewitness testimony that's divergent,
20 and it conflicts with each other on certain important points,
21 and the record will speak for itself on that, but what
22 possible benefit was it to your client -- and I heard your
23 earlier testimony, but I'm not sure I understood - to start
24 out the trial by saying that he had violated his oath to God,
25 that they both had, that they had broken their vows. What was

1 the benefit in that?

2 A. You -- you want me to explain it again to you?

3 THE COURT: She asked a question, please, Mr. Barr.
4 Please respond.

5 A. The jury, in Mr. Cohens' case, was primarily an all-
6 white jury, primarily. I believe that, from the standpoint of
7 the jury being less likely to convict, or to condemn -- now if
8 you are talking about the motives behind how they make the
9 decision that they have to decide, I believe that they would
10 have been less likely to convict if they saw this whole
11 incident as the continuation of a domestic discord, domestic
12 dispute, even though it had actually led -- resulted in the
13 criminal charges being file, I didn't want the jury to focus
14 on the criminal charges; I wanted the jury to focus on the
15 fact that these people were husband and wife who, as so many
16 people that are husband and wife have done, somehow lost their
17 way, and that perhaps they shouldn't be quite as -- when it
18 comes to making the decision in the case, that perhaps they
19 shouldn't be quite as strict as they ordinarily would be in
20 how they view criminal conduct.

21 Q. Mr. Barr, we have no-fault divorce in South Carolina?

22 A. I believe we do.

23 Q. Irreconcilable differences is a grounds that the
24 majority of divorces are granted on, isn't it?

25 A. I don't think so.

1 Q. Well, would it be fair to say a substantial number are
2 granted on that ---

3 A. I don't think it's recognized in South Carolina.

4 Q. Okay. Is it fair to say then -- I may be using the
5 wrong word, that living separately apart from one year
6 continuously can be a basis for divorce in South Carolina?

7 A. I believe that's recognized as a grounds for divorce in
8 South Carolina, and the one that we call, and may refer to as
9 no-fault.

10 Q. And do you handle divorces?

11 A. Yes Ma'am.

12 Q. And in a final divorce proceeding is it not true that
13 in virtually every case the Judge will ask the parties if they
14 foresee anything that can be done that would make them
15 reconcile, and not culminate the marriage?

16 A. It is required in every case.

17 Q. So they are required to show that they can't reconcile
18 their differences, correct?

19 A. Yes Ma'am.

20 Q. Thus the express, irreconcilable differences, correct?

21 A. Well, when you asked me about it you indicated as a
22 grounds for divorce. The Family Court Judges are required to
23 inquire of the parties as to whether or not the relationship
24 can be reconciled prior to the time, and make a finding
25 specifically that they cannot be reconciled before proceeding

1 with the divorce action itself. That's what the law requires.

2 MS. SHURLING: Pardon me, and I apologize, Madame Court
3 Reporter.

4 Let's go into some slightly different angle.

5 Q. You've talked about the purpose of opening arguments a
6 little bit. Isn't it true that as an officer of court you are
7 restricted in opening arguments to arguing matters which you,
8 as an officer of the Court, in good faith, believe will be the
9 subject of evidence at trial?

10 A. That's the ethical rule.

11 Q. Pardon?

12 A. That's the ethical rule.

13 Q. Okay. And was there any reason, in your mind, that you
14 were going to be introducing evidence, or the State would be
15 allowed to introduce evidence that these people had broken
16 their marriage vows?

17 A. From a practical standpoint, even if there would not
18 necessarily be evidence introduced, this was opening
19 statement, and I do not believe that, in opening statement
20 that the argument that I made would, in terms of establishing
21 the contours of the criminal prosecution, I don't think it was
22 out of bounds ethically.

23 Q. Were you not concerned, Mr. Barr, that your statements
24 in opening argument could be taken by the jury as the defense
25 lawyer bad-mouthing the poor victim?

1 A. No Ma'am. I was hoping that the jury would see Mr.
2 Cohens and his wife as being on an equal footing.

3 Q. Was one problem with that, wasn't there?

4 A. No Ma'am, not that I see.

5 Q. Well, it was all coming out of your mouth, right?

6 A. Well, I don't think there's anything wrong with that.

7 Q. Well, I mean, it was coming out of your mouth, and you
8 were the advocate for whom?

9 A. For the Defendant.

10 Q. Okay. So you, who are his champion, his advocate, are
11 telling the jury that he has broken his vows before God,
12 broken his promises to God, so you are his agent, and you are
13 admitting that to this jury, correct?

14 Q. Yes?

15 A. Absolutely. Yes Ma'am.

16 Q. You didn't represent the wife, did you?

17 A. No Ma'am.

18 Q. And you didn't have any evidence of her violating her
19 vows or anything, did you?

20 A. I didn't need any.

21 Q. So you just get up there and slander her in opening
22 arguments without a foundation?

23 A. That's not slander. She wasn't slandered by that.

24 Moreover, this is the judicial process. I'm not -- slander
25 rules apply to that. My objective was that the jury not see

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1 her as being in a preferred position as it comes -- when it
2 came to Mr. Cohens. Even though Mr. Cohens was the one
3 charged with the criminal offense I wanted the jury to see
4 both of them as being, in whatever it was that they were
5 involved in, which essentially led to this whole issue, I
6 wanted the jury to see them both on an equal footing, and not
7 see Mr. Cohens necessarily as the Defendant defending himself
8 of these criminal charges.

9 Q. But in the process, weren't you arguing matters not in
10 evidence, and that weren't going to be in evidence?

11 A. No Ma'am.

12 MS. ELLIOTT: Your Honor, I'm going to object. This
13 has been asked and answered a couple of times.

14 MS. SHURLING: I'll move on, Your Honor.

15 THE COURT: Thank you.

16 Q. Mr. Barr ---

17 A. Yes Ma'am.

18 Q. ---With regard to this case, would you agree that the
19 relative veracity and truthfulness of the witnesses were going
20 to be a pretty important issue?

21 A. It would have been perhaps a pretty important issue
22 if -- if the Defendant had not alluded the police. I mean,
23 after all, they chased him from Debordieu back to Oakland.

24 Now, when it comes to the weight that you give
25 testimony, and in most jurisdictions, and not just in

1 Georgetown, you can believe that that jury that we had sitting
2 out there was going to believe what the police said. Now, if
3 Mr. Cohens said something different, and even though that the
4 ABIK charge was the most serious and substantial, you can't
5 divorce that from the considerations that you have to take a
6 look at when you look at the fact that the -- the police also
7 testified in that case, and I can assure you, I can assure you
8 that jury was going to find them credible. And if Mr. Cohens
9 said, well look, I didn't see the blue light, or I didn't
10 commit the offense of failure to stop for the blue light or
11 whatever, and the police said well, he did, then I mean, you
12 know, it doesn't take a rocket science (sic) to figure out
13 what you've got there.

14 Q. In your opinion, was guilt of ABIK a foregone
15 conclusion ---

16 A. No Ma'am.

17 Q. ---Thought he was guilty of evading a blue light?

18 A. Absolutely not.

19 Q. Well, that's my question, sir.

20 A. This was a trial ---

21 Q. Mr. Barr ---

22 A. Yes Ma'am.

23 Q. ---Please answer my direct questions or we are going to
24 be here all day.

25 A. Well, I hope not.

1 **THE COURT:** Both of y'all, be quiet for now. Okay.

2 Now, I've been lenient. If you've got a problem with
3 how the witness is responding you address that matter to the
4 Court, not to the witness.

5 **MS. SHURLING:** Yes sir, Your Honor. I apologize.

6 **THE COURT:** Now, let's go over the rules. The attorney
7 will ask the question, the witness will answer the question to
8 the best of their ability. If they need to explain the answer
9 they may do so.

10 Let's continue on, and let's get this thing completed.

11 Thank you.

12 Q. Mr. Barr, if your client's position, as reflected by
13 the transcript, was that there was an accidental automobile
14 collision where the wife went off the road, wasn't it possible
15 for you to argue that he panicked after that, and that his
16 state of panic is what caused him to evade the blue light?

17 A. It's possible.

18 Q. And thereby arguing that the fact that he panicked when
19 she went off the road and flipped, did not necessarily mean
20 that he had deliberately and intentionally caused her to go
21 off the road and flip?

22 A. And your question is, is that possible?

23 Q. Yes.

24 A. That's possible.

25 Q. So the fact that he did have a period of time where law

1 enforcement believed he was evading capture afterwards did not
2 exclude, factually, the possibility that the actual collision
3 was an accident, did it?

4 A. That's possible.

5 Q. And in fact, as you've been over repeatedly here today,
6 there was a Restraining Order arguing that -- I mean, ordering
7 that these two people leave each other alone, correct?

8 A. There was a Restraining Order.

9 Q. Against both of them?

10 A. I don't recall whether or not it was against -- it's
11 mutual, but I do recall it was against Mr. Cohens.

12 Q. Well, if the victim admitted it was mutual on the
13 record you don't dispute that?

14 A. I certainly don't.

15 Q. Okay. And he had already been cited for violating that
16 over phone call issues the day before this wreck, right?

17 A. I don't remember what -- I remember that he was under --
18 -- I handled the domestic case for him, but the specifics of it
19 -- I noted at the time he was under a Restraining Order not to
20 have contact with the wife.

21 Q. So you had facts at your disposal from which you could
22 have argued that his flight after the automobile accident was
23 indicative of panic, not evidence of guilt?

24 A. I suppose so. That's possible.

25 Q. So I ask you again, what did -- what was your reasoning

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1 behind not arguing, and not asking for a jury instruction that
2 this was accidental?

3 A. From the standpoint of Mr. Cohens, and what he was
4 charged with, that is, assault and battery with intent to
5 kill, his testimony did not include any facts to suggest that
6 he committed an assault, that is, that he initiated any
7 physical contact with the victim's vehicle. From that
8 standpoint I did not deem it necessary, under those
9 circumstances, to ask the Judge for a charge on accident. I
10 think if the jury -- if the jury believed that he committed,
11 or initiated the contact between the two vehicles then they
12 would have convicted him, which they obviously did, but I
13 think that the jury's conclusion probably took into
14 consideration that they also believed that, in terms of
15 formulating the intent, that that may have occurred beginning
16 at a point long before they got on the highway, and as I said,
17 probably got started early that morning when Mr. Cohens called
18 his wife - he indicated that he called her three times and she
19 didn't answer -- and I believe the jury probably formulated
20 intent when you put all of those things together.

21 Q. Mr. Barr ---

22 A. Yes Ma'am.

23 Q. ---What did this jury know about Ronald Cohens, the
24 man? What opportunity did you, by your direct examination,
25 and witnesses you presented, give them to learn about him, the

1 man, and whether or not he was likely to have been somebody
2 who did this with the intent to kill his wife?

3 A. I think the jury, when they listened to the information
4 concerning who he was, what he did, his family, all of which
5 he testified to, to the extent that there was a profile of who
6 he was, then I think they had that information in front of
7 them.

8 Q. Did you ask him about his work history?

9 A. I don't recall exactly what I asked him about it. I
10 probably -- I would suspect that I did ask him something about
11 -- ask him some questions about his work.

12 Q. Did you ask him about his prior criminal record?

13 A. No Ma'am.

14 Q. You are aware, are you not, that he has no record
15 whatsoever for having ever been arrested for hurting anybody?

16 A. I know exactly what his record is, and I would not have
17 asked him about any criminal record when I put him on the
18 witness stand.

19 Q. Why not?

20 A. I would have seen no purpose to ask him about -- about
21 his criminal record. Quite frankly, I don't know that that
22 even would have been proper for me to put him on the witness
23 stand and ask him whether he's got a criminal record. Might
24 have been considered bolstering.

25 Q. Well, you didn't explore at any length his work

1 history. You didn't ask him whether or not he's ever been in
2 trouble with the law. Let's talk about character.

3 THE COURT: Let me ask a question, so that just -- I
4 understand it. You are asking him did he ask his client on
5 the stand whether or not he had a prior criminal record?

6 MS. SHURLING: Correct.

7 THE COURT: Okay. His client being under oath, would
8 he not have been required then to truthfully answer the
9 question and say, yes, I do have a criminal record; I was
10 convicted of failure to stop for a blue light, a crime for
11 which he is charged before that jury that you are asking him
12 not to find him guilty of?

13 MS. SHURLING: Absolutely, Your Honor, and I'll explore
14 that in a second.

15 THE COURT: All right.

16 MS. SHURLING: And I'll try to do it quickly.

17 Q. The failure to stop for a blue light charge carries
18 what, sir, three years?

19 A. I believe it carries -- first offense carries a maximum
20 of three years.

21 Q. And it had been more -- been ten, closer to fifteen
22 years since the previous incident, correct?

23 A. Probably so.

24 Q. And to your knowledge your client had no intervening
25 criminal history whatsoever?

1 A. I don't think so.

2 THE COURT: Let me ask another question, Ma'am, since
3 you -- you bring it up, and so you are asking me to make a
4 decision here.

5 MS. SHURLING: Yes sir.

6 THE COURT: Would then -- wouldn't it have been the
7 responsibility of the Trial Judge then to charge the jury, in
8 his instructions to the jury about credibility of the witness,
9 that they can use a prior conviction to judge the credibility
10 and believability of a witness ---

11 MS. SHURLING: Your Honor ---

12 THE COURT: ---Putting into question the Defendant's
13 credibility and believability before that jury? Wouldn't that
14 have had that effect if Mr. Barr had asked that question of
15 his client and he answered the question truthfully?

16 MS. SHURLING: I believe, Your Honor, as a predicate
17 matter, given the age of the conviction, the answer would be
18 no, that it wouldn't be available ---

19 THE COURT: No. He would have to because the defense
20 brought it up. What the Rule does is precludes the State from
21 bringing it up, but if the defense volunteers information it
22 then becomes facts and evidence in the case, the trial judge
23 is required to take notice of that, and then so charge the
24 jury, and tell the jury, you can now judge the credibility and
25 believability of the defendant, for both these crimes for

1 which he is now charged, by the fact that he has been
2 convicted of a crime in the past.

3 MS. SHURLING: My answer is two-fold, Your Honor. I
4 believe that the crime would have been available for
5 impeachment purposes if he had denied having it, if he
6 volunteered the information, and the crime was older than is
7 allowed to be used for impeachment purposes, I believe that
8 there was a solid argument to be made that it could not be
9 used for that purpose, but even so, even so, even if this jury
10 heard that, isn't it true that they would have heard that that
11 was the only blemish on his record, and that it was like
12 fifteen years ago?

13 A. Counsel, in all fairness, I think the Trial Judge would
14 have insisted, the Rule regarding stale impeachment applies
15 when the defense -- or when the prosecution attempts to
16 impeach a witness's credibility with a stale crime, however,
17 opening the door, and using that testimony to bolster his
18 character, I think any trial judge would have, in terms of all
19 fairness, would have insisted that that prior conviction come
20 in, and it would only be fair.

21 Q. Well, wasn't there, in fact, a passing reference to the
22 ex-wife having a record for something ---

23 A. I don't know.

24 Q. ---Something minor?

25 A. I don't remember.

1 Q. The record will speak for itself on that point, but Mr.
2 Barr ---

3 A. Yes Ma'am.

4 Q. ---You were asked by the State about presenting
5 character witnesses, and you said something that I didn't
6 understand, and I appreciate your clarifying, that you only
7 present character witnesses if you can match that person up
8 with someone on the jury. Can you explain that again?

9 A. I have to go with what works for me, and quite frankly,
10 I can say that - and hopefully that's probably the reason Mr.
11 Cohens came to me in the first place - I've had success. From
12 a defense perspective ordinarily you don't even want to have
13 to put the defendant himself up as a witness, unless it's one
14 of those situations where -- such as this, where that may very
15 well be of some assistance to the defense, even though you get
16 to -- lose the close, but when you call a witness to the
17 witness stand for purposes of -- no other purpose other than
18 to call attention to the defendant's credibility, in actuality
19 that's not what you are doing. You are calling a witness to
20 take the witness stand to use their own flaunt to impress the
21 jury. Now you can call it whatever you want to call it, but
22 in essence that's what you are doing. If you've got a
23 character witness that's -- that doesn't have -- that doesn't
24 have his own individual prestige such that he can command
25 influence with the jury I would never, ever consider putting

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1 that kind of character witness on the witness stand.

2 Now, when I say the profile, when you -- when you've got
3 a good idea about who your jurors are, that is, when you don't
4 know them personally, now in those situations, as I said,
5 within the last thirty-three, thirty-four years when I have
6 used a character witness, which has been less than three
7 times, in each one of those situations there has been a
8 relationship between - and I'm not saying an interest - but a
9 relationship between somebody on the witness stand - in one
10 case it was the foreman - and the character witness, such that
11 I knew that the witness, the character witness getting on the
12 witness stand and say yes, I know the defendant, I don't his
13 reputation in the community for truth and veracity and it's
14 good, well, that's what the law says that they get up there
15 and say, but I can tell you right now, that's not what you are
16 putting them up there for, and that's not what you are looking
17 for, and if you are then you can just fall on in the crack,
18 because that's just not the case. What you are using him for
19 is somebody that could have some influence with that jury.

20 It's kind of like the **Batson** issue; everybody knows that
21 race is an issue, everybody knows that, but yet we continually
22 promote the rules, and don't get me wrong, you have to abide
23 by the rules, but now what the rule does is, it makes liars
24 out of a lot of lawyers, and I think you know that if you try
25 cases.

1 Q. Well, I'm not raising a **Batson** issue.

2 A. I understand that.

3 Q. But isn't it possible, sir, to put people on the
4 witness stand whose own stature in the community, and own life
5 circumstances, such as positions of trust in the community,
6 leadership in the church, owning your own businesses,
7 whatever, are such that a jury is likely to identify that
8 person as someone who would not come to court and lie on
9 behalf of the defendant?

10 A. I think that you are assuming that different people,
11 with different ideas, that somehow we all don't have our own
12 individual biases, that we live in some kind of sterile
13 environment. That's just simply not the case. I have jurors
14 all the time who stand up and take an oath and say, I intend
15 to be fair; I've heard nothing about this case, and they know
16 all about the case, and if you are a trial lawyer and you sit
17 down and depend upon what people say, and not go to the next
18 step of trying to diagnose and analyze and predict, then you
19 are going to be a loser.

20 Q. Okay. You keep bringing race up. I didn't bring it
21 up, but this is a -- not only was this black on black ---

22 A. Yes.

23 Q. ---But this was a husband and wife, correct?

24 A. Sure. Yes. And I can tell you, race has -- race plays
25 a -- makes a very -- it makes a difference from the standpoint

1 of a defense lawyer.

2 Q. So you were concerned that this largely white jury was
3 going to assume that this black man was violent?

4 A. Every case I've ever tried in that kind of situation
5 it's an issue that you need to take into consideration.
6 That's the reality of it.

7 Q. And by the time you rested your case what evidence had
8 you given them to show that he wasn't a violent black man?

9 A. I'm not required to present evidence. That's not the
10 defendant's responsibility. If we were in that kind of
11 situation then I would plan an entirely different strategy,
12 and operate under an entirely different theory, but the simple
13 fact of the matter is, that's not what -- you've got to take
14 what's given to you and use it to your advantage.

15 Now, we are not -- we didn't have the burden of proof
16 going forward and proving anything, but you cannot ignore the
17 reality of the make-up of a jury when you are trying a
18 criminal case, or any other kind of case for that matter.
19 Now, depending up the circumstances of the case, the tide
20 swings, things change, the pendulum swings, you may approach a
21 case in a different kind of way, but now if it's a civil case
22 I know - and listen to me very carefully - I know that if it's
23 a civil case I'm going to have a very, very difficult time
24 getting a substantial jury verdict out of a predominately
25 white jury. I know that. Now, if I don't, then I had better

1 get out of the business of practicing law, and if I don't
2 consider that, irrespective of what the facts are, or what
3 they might tend to be, if I ignore that then I may wind up
4 leaving not too happy that day. That's the reality of it.

5 Q. Well, I've certainly been practicing law for thirty-
6 three years. I know what -- who's got what burden of proof,
7 but ---

8 A. Yes Ma'am.

9 Q. ---You talk about the practical side here ---

10 A. Absolutely.

11 Q. ---Based on the defense that you presented, what
12 evidence did you give this jury the opportunity to hear that
13 let them know that this was a man with a positive reputation
14 in the community, a man who has good work history, a man who
15 has never harmed anybody?

16 A. The last thing that I wanted to do was to put Mr.
17 Cohens' character in issue, and have them call the wife on
18 reply - and I know they would - and she would get up there and
19 said, my husband has assaulted me, now I'm -- that -- that was
20 something that I would not risk, and I assure you, just as
21 sure as I allowed his character to become a real issue,
22 whether it be by character witnesses, or be by whatever else,
23 she would have gotten up there and said he has assaulted me,
24 on reply.

25 Q. Do you think those chances might have been increased

1 once you accused her of violating her oath and ---

2 A. She didn't even understand that.

3 Q. ---Everything on your opening?

4 A. That went straight over her head. That's not even --
5 the only person that probably picked that up is you, after you
6 read the transcript.

7 Q. I'm glad you are a mind-reader, Mr. Barr. I'm not.

8 A. Well, that's what -- that's what we get paid for.

9 Q. Last thing. Last thing.

10 THE COURT: All right. Again, I'm not letting that
11 pass. I don't need any extraneous comments. You will be
12 respectful to the witness.

13 MS. SHURLING: Yes sir.

14 THE COURT: Thank you very much.

15 Q. Mr. Barr ---

16 A. Yes Ma'am.

17 Q. ---We started -- we are going to go full circle for a
18 second. We started this out saying that your object in the
19 beginning was to get this jury's mind off this being something
20 criminal in nature, and focus their attention more on this
21 maybe being something domestic; is that a fair paraphrase?

22 A. That's a fair assessment, as it relates to the opening
23 statement and the remarks that you've pointed to that were
24 made in the opening statement, yes Ma'am.

25 Q. And your client ultimately gave testimony which, if

1 believed, could be interpreted as saying that he had just run
2 into - and I don't mean run into physically, I mean, just
3 happened to see his wife on the highway, correct?

4 A. What his -- what his testimony was, if I'm not
5 mistaken, was he happened -- he just happened to see her when
6 he got up that morning. This was before they got on the road.
7 And there is a disconnect after that, and it doesn't reconnect
8 until he just happened to have seen her behind him on Highway
9 51 as they were coming toward the Swamp Fox store.

10 Q. Okay. And he admitted that they were yelling things at
11 each other, and hand gesturing at each other on the way on the
12 road?

13 A. That took place after they got across the first bridge,
14 going toward Pawleys Island. That takes place over there on -
15 --

16 Q. It is a fact, is it not, the record will reveal that he
17 admitted that at some point out there on that highway, that he
18 and his estranged wife were yelling at each other, pulling up
19 next to each other, hand gesturing each other, that kind of
20 thing, right?

21 A. After they crossed the first bridge.

22 Q. Okay. But before the accident, correct?

23 A. Yes Ma'am.

24 Q. Before the wreck, to be more careful in my use ---

25 A. Now, I believe that that may have occurred after the

CHARLES DAVID BARR - CROSS BY SHURLING

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1 first collision, and I'm not sure, but I -- as I said, I know
2 that there was an impact. There was the first collision, and
3 then that collision was not the one that led to her going off
4 the road, but there was a second collision, and I'm not sure
5 whether or not the gesturing -- I think it came after -- it
6 may have come after the first -- after the first impact, I'm
7 just not sure, but I know there was a time after they crossed
8 the first bridge where his testimony was that they were
9 gesturing toward each other, or making signs at each other,
10 something like that, on the highway.

11 Q. And ultimately your client testified that he was in
12 right lane and she was in the left, she went to merge right,
13 caught his car, went off the road, correct?

14 A. I can't remember what lane they were in. I know that
15 he testified that she came across -- came across his lane and
16 a portion of her vehicle caught his, and then she drove
17 across, and he threw on brakes, and she landed in the ditch,
18 and flipped over.

19 Q. My point being, Mr. Barr, is, didn't the opportunity to
20 argue accident based on your client's testimony fit nicely
21 with what you say your strategy was ---

22 A. No Ma'am. It did not fit -- didn't fit nicely.

23 THE COURT: Mr. Barr -- Mr. Barr ---

24 A. Yes sir.

25 THE COURT: The attorney was not through with the

1 question. I've asked her to be respectful of you. You need
2 to be respectful of her.

3 A. Thank you, Judge.

4 THE COURT: Allow her to finish the question, then you
5 can explain it, and fully explain your answer.

6 A. Yes sir.

7 THE COURT: Go ahead, Ma'am.

8 Q. Didn't the opportunity to argue accident based on the
9 testimony fit nicely with your articulated goal to portray
10 this as an ongoing domestic dispute between these people?

11 A. No Ma'am, not in my opinion.

12 Q. Did you discuss with your client his right to present
13 character evidence?

14 A. I'm sure I did.

15 Q. Did you tell him under what circumstances, and what
16 type of testimony he could present through character
17 witnesses?

18 A. I don't recall when that would have been done. I
19 noted, in preparation for the case, I always go through and
20 find out who a defendant wants to call as a witness on his
21 behalf. That's just -- that's something we do routinely.

22 Q. Do you have any specific recollection of him agreeing
23 not to present character evidence?

24 A. Counsel, when -- generally when most of my clients, and
25 Mr. Cohens is no exception, the most of them hire me to

1 represent them in a criminal case, I think most decisions
2 regarding trial strategy are actually made by me, and as I
3 said earlier, I would think that that's one of the reasons why
4 -- why he hired me. I don't go through every little minor
5 detail and say, look, you've got a right to do this, or this
6 is what -- we are trying to win the case. I take no case that
7 I don't prepare for, and don't try to develop a strategy to
8 win the case.

9 Q. What was the reasoning behind your not pointing out to
10 the jury the inconsistencies between the various witnesses'
11 testimony?

12 A. Well, I -- I hope that I did to the extent that I could
13 point out whatever inconsistencies there were. I certainly
14 hope that that was done, if it should have been done under the
15 circumstances, and I would have to go back -- I would have to
16 look at the testimony and determine what was inconsistent with
17 what, and make a decision on that basis, but if it was not
18 done then it was something that I obviously decided not to do.

19 Q. Did you discuss with your client the defense of
20 accident in South Carolina?

21 A. I don't know that I did.

22 Q. So, to your knowledge you did not discuss with him the
23 availability of accident as a theory of defense?

24 A. I have no recollection of discussing with him the
25 availability of accident as an affirmative defense.

1 Q. So you would not assert here today that he, in any way,
2 knowingly waived his right to be heard on that defense?

3 A. I certainly would make no such assertion.

4 MS. SHURLING: Thank you. No further questions.

5 THE COURT: Any redirect?

6 MS. ELLIOTT: Just a couple of questions, Your Honor.

7 REDIRECT-EXAMINATION BY MS. ELLIOTT:

8 Q. Mr. Barr, you would agree that the testimony of the two
9 eyewitnesses was consistent to the point that they both
10 testified that your client hit the back of the victim's car in
11 succession as they traveled, and was on her bumper at least as
12 close as two feet at other points in time, and caused her to
13 leave the road?

14 A. It was consistent with each other, and it was also
15 consistent with what the woman was saying was actually taking
16 place on the 911 tape.

17 Q. Your client either hit the back of her car, or hit her
18 car on the back or the side, and caused her to run off the
19 road?

20 A. Well, that's what she said, but that's not what he
21 said.

22 Q. Okay. And the other two eyewitnesses also said?

23 A. That's what they said.

24 Q. Okay. And the Oath of God that you reference in your
25 closing argument, were you not also responding to the

1 Solicitor's reference to that?

2 A. Well, I think the Solicitor had made some reference to
3 that. Moreover, the --- from the standpoint of violating --
4 violating ---

5 Q. The vows?

6 A. ---The marriage vows itself, that is, something that
7 would give you grounds for a -- for I think what we call in
8 South Carolina, it's not a complete divorce but separate
9 maintenance, something that would give you grounds for
10 separate maintenance. That's kind of -- that's what I was
11 referring to, an action for separate maintenance as opposed to
12 a divorce.

13 Q. Okay. And I believe the Solicitor's comment was ---

14 THE COURT: I'm sorry. Ms. Shurling, do you have an
15 objection?

16 MS. SHURLING: Yes, Your Honor. That's the second time
17 the State has referenced an alleged comment on breaking
18 marriage vows by the State in their ---

19 And by the way, you said closing, I believe you meant
20 opening argument ---

21 MS. ELLIOTT: I did. I did.

22 MS. SHURLING: ---Without page reference. I would ask
23 for specific reference to the record, please.

24 MS. ELLIOTT: The reference is, the Solicitor said, by
25 the Grace of God.

1 A. Well, under our domestic law any act of one party that
2 violates the sanctity of the marriage relationship is an
3 appropriate grounds for an action for separate maintenance,
4 which is a -- it's an entirely different cause of action in
5 South Carolina; it's not grounds for a divorce, but when you
6 look at it as a whole, clearly as it relates to these two
7 people, again -- and all of this was within the context of
8 humanizing these two people to this jury, and even from not so
9 much -- I couldn't very well argue favorably about Mr. Cohens
10 and leave the woman out altogether, I mean, that would have
11 been -- you know, that's no kind of strategy. I mean, I don't
12 think that she gained anything from what I've said, and the
13 object was not so much to disparage her, or to help her or
14 whatever, but to elevate Mr. Cohens to a point where, when the
15 jury looked at them they didn't look at them differently.

16 Q. Okay. And is it your experience, and your opinion,
17 that character witnesses are of minimal probative value?

18 A. Well ---

19 Q. Is it your experience, and are you telling us today
20 that you have found, in your experience, that character
21 witnesses are of minimal probative value, unless there's a
22 special circumstance?

23 A. I think it depends on who they are, and the
24 circumstances, and when it's appropriate in your best interest
25 to use them.

1 Q. And you did not find those circumstances in this case?

2 A. No Ma'am.

3 Q. That's all ---

4 A. Absolutely not.

5 MS. ELLIOTT: That's all I have, Your Honor.

6 THE COURT: All right.

7 MS. SHURLING: Nothing further, Your Honor.

8 THE COURT: I hesitate to do so, but I need to ask you
9 one question, Mr. Barr.

10 A. Yes sir.

11 THE COURT: In the cross-examination of your client by
12 the Solicitor, when they were talking about the first accident
13 and the second accident, and the time in between - and I
14 need -- the Solicitor said, or it reflects that it took him
15 about four times asking the same question, did he not get your
16 client to admit that between the first accident - and I'm
17 saying accident, the first collision and the second
18 collision - that your client sped up to catch the victim
19 before the second collision occurred?

20 And if you want to look at it I'll be glad to hand the
21 transcript to you.

22 A. I -- I -- yes sir. Let me look through it.

23 THE COURT: Look at page three forty-four, please.

24 Have you read the page?

25 A. I read that, Judge. What's the question now?

1 **THE COURT:** All right. Did the Solicitor, on cross-
2 examination, force your client to admit that, between the
3 first collision and the second collision, that he sped up to
4 catch her before the second collision occurred?

5 A. I think he admitted that.

6 **THE COURT:** Sir?

7 A. I think he admitted that in this record.

8 **THE COURT:** All right. So my question to you is, did
9 that impact your decision about what you wanted to ask the
10 Judge to charge to the jury when you are faced with that kind
11 of testimony, and let's focus on accident, did you think about
12 that?

13 A. That -- I do not -- I didn't ---

14 **THE COURT:** If you didn't, just tell you don't ---

15 A. I don't -- I just -- no, I don't remember even thinking
16 about that, Judge.

17 **THE COURT:** All right. Thank you. Very good.

18 A. Yes sir.

19 **THE COURT:** All right. You may step down. Thank you,
20 Mr. Barr.

21 A. Yes sir.

22 **THE COURT:** Is there any reason the witness cannot be
23 excused?

24 **MS. SHURLING:** No sir, Your Honor.

25 **MS. ELLIOTT:** If the Applicant rests, that's -- and it

1 has rested, and is not going to call any reply, then the
2 witness may be excused.

3 THE COURT: Are there any further witnesses on behalf
4 of the Applicant?

5 MS. SHURLING: May I ask one moment's indulgence, Your
6 Honor?

7 THE COURT: Yes Ma'am.

8 If you could just hold on one second, Mr. Barr, please.
9 Thank you, sir.

10 MS. SHURLING: Nothing further, Your Honor.

11 THE COURT: Mr. Barr, you are excused. You may go back
12 to your regular activities, sir.

13 A. Thank you, Judge.

14 THE COURT: Thank you.

15 MS. SHURLING: Your Honor, I would note for the record
16 that, at the last proceeding I had indicated that there was an
17 allegation in the First Amended Application concerning, I
18 believe, a jury instruction concerning intent to kill that I
19 had abandoned. With that exception, Your Honor, we stand by
20 all of the allegations as contained in the original
21 Application, and the Two Amended Applications, and we will
22 address each and every one of those with reference to
23 testimony at both proceedings in our proposed order.

24 THE COURT: All right.

25 MS. ELLIOTT: And Your Honor, I know you indicated a

1 desire to hear the 911 tape at the last hearing, and I don't
2 know if you still want to hear it, but we do have it -- I have
3 it in the courtroom. It's really -- it would be Ms.
4 Shurling's burden, so -- but if Your Honor would like to hear
5 it it is present.

6 **MS. SHURLING:** I have no interest in doing so, Your
7 Honor.

8 **THE COURT:** All right. Very good. Thank you.

9 All right, counsel, as I understand it the -- the State
10 and the Applicant would like to present proposed orders for
11 the Court's consideration. I'll tell you, I would like for
12 you to present those such that they are in my office by next
13 Thursday at twelve noon. The reason for that is, after that
14 period of time I will be outside this Circuit for two weeks,
15 and will not be able to address the issue. If you get them to
16 me before then I'll be able to address it before I'm outside
17 of the Circuit. If you do not, I will not be able to address
18 the issue, and you will not receive an order until, at the
19 earliest, the middle of July, so understand, if I get them
20 from both of you, that means both of you, by Thursday twelve
21 noon, I can consider it, if not, there will not be a written
22 order in this matter until the middle of July, so understand;
23 how soon I respond depends entirely on whether or not I get
24 the responses from both of you by Thursday twelve noon, all
25 right.

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1. MS. SHURLING: Yes, Your Honor.

2. THE COURT: Thank y'all very much.

3. MS. SHURLING: Oh, Your Honor ---

4. THE COURT: Yes Ma'am.

5. MS. SHURLING: ---I do apologize. I had pointed out to
6. Ms. Elliott, traditionally when I am served with the Return it
7. is accompanied by the Clerk of Court records and the SCDC
8. records. In this case I did not get them. I inquired before
9. we began whether Your Honor had a copy of the indictment in
10. your packet, and she wasn't certain whether you did. Can you
11. please check, sir, and if it's not we need to provide you a
12. copy of it.

13. THE COURT: Hold on a second.

14. MS. SHURLING: Your Honor, it might be simply if ---

15. THE COURT: They are not part of the Clerk of Court's
16. file.

17. All right. These are the copies that you wanted me to
18. have, Ms. Shurling?

19. MS. SHURLING: Yes sir, Your Honor.

20. THE COURT: Very good. Thank y'all very much.

21. MS. ELLIOTT: Thank you.

22. -----END OF REQUESTED TRANSCRIPT OF RECORD-----

23.

24.

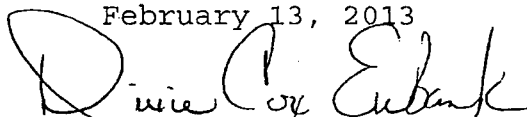
25.

C E R T I F I C A T E

I, the undersigned, DIXIE COX EUBANK, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the POST-CONVICTION RELIEF HEARING of the captioned case, relative to appeal, in the COURT OF COMMON PLEAS NON-JURY for GEORGETOWN COUNTY, SOUTH CAROLINA, on the 14th day of June, 2012.

I DO FURTHER CERTIFY that I am neither of kin, counsel nor interest to any party hereto.

February 13, 2013


DIXIE COX EUBANK

CIRCUIT COURT REPORTER

FIFTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	
RONALD COHENS, #316306	)	2010-CP-22-1592
	)	
Applicant,	)	
	)	MEMORANDUM IN SUPPORT OF
	)	PCR APPLICATION IN THE
	)	FORM OF A PROPOSED ORDER
v.	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

THIS MATTER comes before the Court by way of an Application for Post-Conviction Relief filed on October 8, 2010, an amended application filed on April 25, 2012 and a second amended application filed on May 8, 2012. The State filed its Return on November 15, 2010. An evidentiary hearing was convened in this matter on April 26, 2012, during which the Applicant was present and represented by Tara Dawn Shurling, Esquire and the State was represented by Senior Assistant Deputy Attorney General, Salley W. Elliott. At the outset of this proceeding, this Court determined that the Respondent had not had adequate notice of certain issues contained in the Applicant's Amended PCR Application. In addition, Counsel for the Applicant requested leave to present additional issues of which the Respondent had been notified the day of the proceeding. For that reason, this Court ordered that the hearing proceed only as to the issues upon which the State had been given sufficient notice. This Court however, agreed to hear the balance of the Applicant's issues at a later date and instructed Counsel for the Applicant to serve the Respondent, and the Court, with her final amendments in writing. A second evidentiary hearing was convened in this matter on June 14, 2012, during which the Applicant was present and was once gain represented by Tara Dawn Shurling, Esquire. The State was again represented by Senior Assistant Deputy Attorney General, Salley W. Elliott.

I.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to convictions from Georgetown County. The Applicant was indicted in April 2006 for assault and battery with intent to kill (ABWIK) (2006-GS-22-354) and failure to stop for a blue light (2006-GS-22-355). Charles D. Barr, Esquire represented the Applicant on the charges. On June 27-30, 2006, the Applicant was tried before the Honorable J. Michael Baxley. The jury found the Applicant guilty as indicted on both charges. Judge Baxley sentenced the Applicant to twelve (12) years for ABWIK and three (3) years, concurrent, for failure to stop for a blue light.

A notice of appeal was timely filed, and an appeal was perfected on the Applicant's behalf by Kathrine H. Hudgins, Esquire. After the Final Briefs were filed, Tara Dawn Shurling, Esquire, took over the representation of the Applicant. The South Carolina Court of Appeals affirmed the conviction in an Unpublished Opinion on February 9, 2009 (2009-UP-064). The Court of Appeals denied the Applicant's Petition for Rehearing on April 6, 2009. The South Carolina Supreme Court denied the Applicant's Petition for Writ of Certiorari on April 8, 2010, and the case was remitted to the circuit court on April 12, 2010. During the evidentiary hearings held in this matter, the Applicant expressly waived any claim of ineffective assistance of appellate counsel either by Attorney Shurling or Attorney Hudgins.

II.

ALLEGATIONS RAISED

In his initial PCR Application filed on October 8, 2010, the Applicant raised a general claim that his right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 14, of the South Carolina Constitution, were violated both prior to and during his

jury trial. He specifically alleged the following:

- (1) Trial Counsel was ineffective for failing to be punctual during the Applicant's trial. Trial Counsel's late arrival to Court resulted in him not being able to cross-examine the victim at the appropriate time and damaged his effectiveness as an advocate by making a negative impression on the jury.
- (2) Trial Counsel failed to adequately preserve for appellate review his objection to being required to apologize to the jury for being late to court during the trial.
- (3) Trial Counsel was ineffective for failing to request a mistrial after the trial judge required him to apologize to the jury in a manner that irreparably damaged his effectiveness as an advocate for the balance of the trial.

In the Applicant's first Amended Application he alleged the following additional allegations.

1. Trial Counsel was ineffective in failing to object to the lower court not allowing him to go forward with cross-examination of the victim when he arrived in court before the direct examination of the next State witness began.
2. Trial Counsel was ineffective for neglecting to request a jury instruction on the law of proximate causation where under the evidence presented at trial there was some evidence from which the jury could have found that his actions did not cause the wreck involved in this case.
3. Trial Counsel was ineffective for failing to appear in Court in a timely manner in that Counsel was absent when the second day of the Applicant's trial convened.
4. Trial Counsel was ineffective for failing to ascertain what remarks the Court had made to the jury concerning his absence from the Courtroom when the trial convened on the second day of the Applicant's trial.
5. Trial Counsel was ineffective for failing to object on the record when the trial judge admonished him, in the presence of the jury, concerning his tardiness for Court on day two of the Applicant's trial.
6. Trial Counsel was ineffective for failing to make a motion for a mistrial following an exchange with the trial judge which tended to damage defense counsel's image in the eyes of the jury, and thereby violated his right to

effective assistance of counsel in his defense.

7. Trial Counsel was ineffective for neglecting to request a curative charge after remarks from the bench damaged trial counsel's image and effectiveness as an advocate in the eyes of the Applicant's jury.
8. Trial Counsel was ineffective for failing to object, on the record, to being required to apologize to the jury before cross-examination of the victim.
9. Trial Counsel was ineffective for neglecting to object to the State playing State's Exhibit No. 79, an audio tape of the 911 call in the case, during its closing argument where the publication of the tape was cumulative to evidence previously introduced during the State's case in chief, and unduly emphasized the evidence in question thereby prejudicing the Applicant.
10. Trial Counsel was ineffective for neglecting to advise the client of his right to present character witnesses as part of his defense at trial.
11. Trial Counsel was ineffective for failing to call character witnesses at trial to present to the jury testimony concerning the Applicant's reputation for veracity in the community.

In his Second Amended Application for PCR the Application amended his application further to include the following claims.

12. Trial Counsel was ineffective for making an opening argument to the jury in which he impugned the integrity of his client and thereby called into question his overall character.
13. Trial Counsel was ineffective for making an opening argument to the jury in which he impugned the integrity of the victim and thereby created the danger that the defense would be seen by the jury as impugning the character of the victim without foundation thereby inflaming the passions and prejudices of the jury against the Applicant.
14. Trial Counsel was ineffective for failing to request a jury instruction on the law as it relates to the defense of accident where one reasonable interpretation of the evidence adduced at trial would have supported a finding of that defense.
15. Trial Counsel was ineffective for failing to present in closing arguments to the jury a summary of the evidence presented at trial which supported the Applicant's assertion that the wreck involved in this case was an accident.
16. Trial Counsel was ineffective for failing to argue to the jury in closing arguments that one reasonable interpretation of the evidence presented at the

Applicant's trial supported a finding that the car wreck involved in this case was accidental.

III.

EVIDENCE BEFORE THE COURT

At the Post-Conviction Relief hearings held in this case, the Applicant presented his own testimony as well as testimony from defense counsel, Charles Barr. In addition, he presented testimony from character witnesses; Travis Brown, Vonda Gale Johnson, David Robinson, and James Allen Britton. In addition to this testimony, the Court had before it a transcript of the Applicant's June, 2006 trial, a copy of the records of the Georgetown County Clerk of Court regarding the subject convictions, and a transcript of the first PCR hearing held on April 26, 2012. At the conclusion of the second PCR hearing convened in this matter, this Court took this application under advisement and afforded both sides the opportunity to submit a memorandum in support of their respective positions in the form of proposed orders. Those submissions have been reviewed and considered by this Court in reaching the ruling issued in this matter.

What follows below are the findings of fact and rulings of law made by this Court in accordance with the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 *et seq.* (1985).

IV.

FACTUAL BACKGROUND

The charges in this case arose from an incident in which the Applicant's wife was involved in a car wreck which the State charged he deliberately caused. In addition, the Applicant was charged with Failure to Stop for a Blue Light in connection with the State's assertion that the Applicant subsequently failed to timely pull over in response to a blue light when he was being pursued by law enforcement following this incident. It was the State's theory of the case that the Applicant had lay in wait for his estranged wife and after a protracted car chase, deliberately rammed her SUV with his car causing her to

run off the road, wreck in the trees and flip her car over. The Applicant's wife, Nadine Cohens, testified that just before this wreck, she and the Applicant were in the left lane. She stated that the Applicant was directly behind her and that when he hit her vehicle she "lost control and ...went off the road." Trial Tr. p. 106, ll.16-19.

State witness Ronnie Lewis testified that just prior to this wreck he observed the Applicant and his wife and both were traveling in the left lane. He too claimed that the Applicant struck his wife's vehicle from behind causing her vehicle to leave the road and wreck. He testified that a bus was traveling in the right lane and when the victim lost control and left the road her car went across the right lane in front of that bus. Trial Tr. p. 136, l.18 – p. 141, l. 16.

Another State witness, Frederick Kinloch initially testified that the victim was traveling in the slow, right, lane just before being hit by the Applicant's Honda and losing control of her vehicle. He described her as "getting ready to turn in the slow lane." Trial Tr. p. 196, ll.10 – 20. In response to questioning by the State he then stated that the SUV driven by the Applicant's wife was "moving in the slow lane and then the Honda came *on the side* and knocked her off the road." Trial Tr. p. 196, ll.21 – 24, (Emphasis added). This witnesses' testimony on cross-examination however, clearly states that the vehicle driven by the Applicant's wife was changing lanes from the fast, left lane to the right, slow lane when it was struck by the Honda and went off the side of the road. Although he testified that the Applicant was in the fast lane when he came up beside the victim and struck her vehicle, his testimony is otherwise consistent with the position of the Applicant in that he described the SUV being driven by the Applicant's wife as changing from the left to the right lane when she was struck on the side by the Applicant causing her to

leave the road. Trial Tr. p. 211, l. 21 – p.213, l. 16.

The driver of the yellow school bus did not appear as a witness for the State at the Applicant's trial.

The Applicant on the other hand countered that he and his family lived near his estranged wife and that his seeing her in morning traffic on the date in question was entirely coincidental. He explained that on the morning in question he was headed to the IRS office in Myrtle Beach to make arrangements for a payment plan. Trial Tr. p. 336, ll.1 – 10. He acknowledged that he had called his wife on her cell phone and that they had been making gestures at each other as they came side by side in traffic. He admitted that at one point their two vehicles hit each other and then proceeded on down the highway. Trial Tr. p. 337, l. 13 – 23. It was his sworn testimony that, immediately prior to the wreck involved in this case, he was traveling in the right lane and his wife was in the left. He asserted that when she went to change lanes, merging into the right lane, she clipped the front left side of his car and left the road across the front of his car and wrecked. Trial Tr. p. 337, l. 22 – p. 338, l. 7. He asserted that he came back to the scene of the wreck, saw that she was moving and free of the wreckage before he got back in his car and headed to his mother's house. He testified that when he turned off to go to his mother's house he saw the police and just put his hands up in the air. He denied having seen any blue lights or hearing a siren before that point in time. Trial Tr. p. 338, l.7 – p.339, l. 6. In his PCR testimony the Applicant indicated that he instinctively headed to his mother's house because he was upset about what had just taken place and he was scared.

V.

STANDARD OF REVIEW

This Application for Post-Conviction Relief generally raises numerous specific allegations of ineffective assistance of counsel. The burden of proof is on the Applicant in a Post-Conviction Relief proceeding to prove the allegations asserted in his Application for Relief and at his Post-Conviction Relief hearing. *Thompson v. State*, 340 S.C. 112, 531 S.E.2d 294 (2000); *Rule 71.1(e), SCRPC*. In evaluating an Application for Post-Conviction Relief, the moving party must demonstrate that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). In other words, the Applicant must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. *Id.*; *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). A reasonable probability has been defined by our Supreme Court as a probability sufficient to undermine confidence in the outcome of the trial. *Ard v. Catoe*, 372 S.C. 318, 330, 642 S.E.2d 590, 596 (2007).

Where trial counsel articulates a valid reason for employing certain trial strategies, such conduct should not be deemed ineffective assistance of trial counsel. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Defense counsel may not, however, explain away errors and omissions which acted to prejudice his client's ability to receive a fair trial

simply by labeling them matters of trial strategy or tactics. In the case of *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002), the Supreme Court of South Carolina found that

Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness. Where counsel articulates a strategy, it is measured against an objective standard of reasonableness.

(Emphasis in original) (internal citations omitted).

VI.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Failure to Request Appropriate Jury Instructions

Indictment No. 06-GS-22-354, issued at the April, 2006 term of the Grand Jury for Georgetown County, charged the Applicant with Assault and Battery with Intent to Kill. The language of this indictment specifically alleges: "That Ronald Cohens did in Georgetown County on or about March 23, 2006, feloniously and with malice aforethought commit an assault and battery upon the minor victim, Cohens with the intent to kill the victim, to *wit ramming his vehicle into the victim's vehicle while the vehicles were in motion causing the victim's vehicle to wreck into trees and overturn* resulting in the victim having to seek medical attention, in violation of § 16-3-620, South Carolina Code of Law, 1976, as amended." App. pp. 194-195. (Emphasis added).

Therefore, under the indictment as true billed it was not sufficient that the State prove that the Applicant's car struck the victim's vehicle *at some point* but rather, that a specific act of ramming her vehicle *caused* her vehicle to wreck and overturn. The Applicant alleges that trial counsel was ineffective for neglecting to request a jury instruction on the law as it relates to proximate causation. On the narrow facts of this case, this Court is constrained to agree.

Where the State elected to charge the Applicant with ABWIK by expressly

alleging that a specific act by the Applicant, ramming the victim's vehicle causing it to wreck, and overturn, it was necessary and appropriate for the jury to be charged on the law as it relates to proximate causation. During his PCR testimony, defense counsel was questioned concerning his failure to request such a charge. It was apparent from his testimony that he did not consider requesting such a jury instruction, and therefore that he had no strategic or tactical reason for failing to do so. An appropriate charge on the law relating to causation was particularly necessary where the evidence adduced at trial arguably established more than one instance when the Applicant's vehicle and the vehicle drive by the victim made contact. It was therefore crucial that the Court charge the jury in a manner which focused the jury on the necessity that they find, beyond a reasonable doubt, that the Applicant 1) rammed the victim's vehicle and 2) that this specific contact *caused* the victim's vehicle to wreck. On the unusual facts of this case, defense counsel was ineffective for failing to request that the jury be appropriately instructed on the issue of causation. Our Supreme Court has recognized the need for a trial judge to tailor an appropriate jury instruction to unusual facts and circumstances present in a given case. *State v. Day*, 341 S.C. 410, 535 S.E.2d 431 (2000). *State v. Fuller*, 297 S.C. 440, 377 S.E.2d 328 (1989); *State v. Sales*, 285 S.C. 115, 328 S.E.2d 619 (1985). The law to be charges in any case must be determined by the evidence presented at trial. *State v. Patterson*, 367 S.C. 219, 231-32, 625 S.E.2d 239, 245-46 (Ct.App. 2006). Absent a charge on causation, it is impossible to know if the jury understood that they had to find that the specific act alleged in the indictment caused his wife's car to leave the road and wreck. On the facts of this case, and the narrow charge contained in the ABWIK indictment against the Applicant, a charge on the law of causation was necessary and appropriate and should have been requested by defense counsel.

The Defense of Accident

As previously noted, the Applicant expressly testified that he was traveling in the right lane, and his estranged wife was in the left lane, when she began to merge left into his path. He testified that *she hit him*, and lost control and *wrecked her vehicle*. Trial Trans. p.339, l. 18 – p.340, l. 15. Therefore, the Applicant's testimony clearly asserted a

defense of accident. His testimony, standing alone, would have supported his request for a jury charge on the defense of accident. The fact that eye witness accounts of the movements and location of the Applicant and the victim were not consistent further support the Applicant's position that he was prejudiced by not receiving this charge.

The refusal to grant a jury instruction based upon a sound principle of law applicable to the case before the court is an error of law. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). If there is any evidence to support a jury charge, the trial judge should give the charge in question. *State v. Burriss*, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). "In South Carolina, the defense of accident requires a showing that the harm caused was unintentional, that the defendant was acting lawfully at the time of the incident, and due care was exercised in handling the weapon" *State v. Harris*, 382 S.C. 107, 674 S.E.2d 532 (Ct. App., 2010). In the case before this Court, the State alleged that the Applicant used his car as a weapon. The Applicant clearly testified that he was driving in the right lane when his wife hit his car while attempting to change lanes from the left lane to the right lane. If believed by the jury, this testimony would have established the defense of accident. The Applicant has met his burden of proof regarding this claim. Defense counsel was ineffective for failing to request a jury instruction on the defense of accident.

Issues surrounding Defense Counsel's failure to come to Court in a timely manner on day two of the Applicant's trial.

Day one of the Applicant's trial ended with the conclusion of the direct examination of the Applicant's wife; the alleged victim in this case. Trial Tr. p. 116, l. 22- p. 120, l. 10. When the trial reconvened the following morning, defense counsel was not present. In his absence, the trial judge stated,

"Now we ended the day with closing direct examination of the witness, Mrs. Cohens. And is Mrs. Cohens present? She is. And is there cross examination of Mrs. Cohens? *Mr. Barr is not present and therefore it appears at this time there is not.* Please call your next witness Mr. Modica.

Trial Tr. 120, l. 23- p. 121, l. 5. (Emphasis added).

After the State called its next witness, defense counsel arrived in Court at which time the following colloquy took place.

The Court: Mr. Barr, good morning, Sir, where have you been? We began Court at nine-thirty this morning, everyone was here. Where have you been?

Mr. Barr: Judge I had to stop in Kingstree this morning on my way over here. I apologize to the Court for being late.

The Court: Well, please understand as a courtesy to the jury who is here giving their time when we say we're going to start at a particular time, we begin at that time. We've called another witness. Please come forward and take the oath of a witness, sir.

Trial Tr. p. 121, l. 14- p. 122 l. 1.

The next witness was sworn, but *before* his examination began defense counsel asked to approach the bench. Trial Tr. p. 122, ll. 2-5. The trial judge initially denied counsel's request, but ultimately relented stating,

Well, Counsel, we are in the presentation of a witness, so not at this time. We'll take just moment. Counsel, come to the side if you would, please. (Off the record, counsel at the bench).

Trial Tr. p. 122, ll. 6-9.

After the bench conference with defense counsel, the State was permitted to go forward with its direct examination of prosecution witness, Ronnie Lewis. Defense Counsel did not place an objection on the record to the State being allowed to proceed with its next witness before he was given the chance to cross-examine the previous witness; the victim. Trial Tr. p. 122, l. 10. After the conclusion of that witness's testimony the State was directed to call its next witness. The State called its next witness, Freddie Kinloch, however, before his examination began another bench conference took place after which the jury was excused from the courtroom. Trial Tr. p. 146, l. 11-25. During the in camera proceeding which followed, defense counsel acknowledged being fifteen (15) minutes late for court that morning, and asked to be allowed to cross-examine

the victim. Trial Tr. p. 147, l. 1- p. 148, l. 6. The trial judge accepted defense counsel's apology after noting that the lawyers had in fact been told that the judge would be there at 9:00 a.m. to resolve an evidentiary issue. Thus, apparently indicating that defense counsel was actually forty-five (45) minutes late, not fifteen (15). Trial Tr. p. 148, ll. 12-25. The Court then advised the defense counsel that it would permit the cross-examination of the victim after defense counsel apologized to the jury for being late to Court that morning. Trial Tr. p. 149, ll. 1-9. Defense counsel stated that while he did not mind apologizing to the jury, he would prefer to do so in closing as opposed to during the trial. He did not, however, object to being required to apologize to the jury immediately before he began his cross-examination of the victim. Trial Tr. 149, ll. 10-14. In response, the trial judge stated,

Well, I would require you when they come back in and when you begin to question this witness, you just turn to the jury and just tell them you're sorry, you apologize for being late this morning. And I would require that to be contemporaneous so that it will have some effect.

Trial Tr. p. 149, ll. 15-20.

Defense Counsel did apologize to the jury before beginning his cross-examination of the victim. Trial Tr. p. 150, l. 23- p. 151, l. 6. Nothing further was said concerning defense counsel's tardiness during the Applicant's trial. Defense counsel never inquired concerning what the jury was told in his absence. He did not request a mistrial after the trial judge admonished him harshly in the presence of the jury, and he did not request a curative jury charge.

On direct appeal the Applicant presented the following question concerning this aspect of his trial.

- Did the trial judge err in beginning the trial without the presence of counsel and then requiring counsel to apologize to the jury for arriving late as a condition for allowing cross examination of the victim?

App. p. 200, Issue 1.

In its unpublished decision, the South Carolina Court of Appeals found that these

issues were not preserved for appellate review. *State v. Ronald Cohens*, Unpublished Opinion No. 2009-UP-064 (S.C. Ct. App. filed February 9, 2009). The Applicant subsequently sought certiorari to the Court of Appeals arguing in the Supreme Court that these issues were, on the facts of this case, adequately preserved for review on direct appeal. By Order dated April 4, 2010, the Supreme Court denied the Applicant's Petition for Writ of Certiorari.

In his original Application for PCR, and in his subsequent amendments, the Applicant specifically alleged that trial counsel failed to provide him with reasonable professional assistance of counsel in that he committed the following errors and omission with reference to this issue.

1. Trial Counsel was ineffective for failing to be punctual during the Applicant's trial. Trial Counsel's late arrival to Court resulted in him not being able to cross-examine the victim at the appropriate time and damaged his effectiveness as an advocate by making a negative impression on the jury.
2. Trial Counsel failed to adequately preserve for appellate review his objection to being required to apologize to the jury for being late to court during the trial.
3. Trial Counsel was ineffective for failing to request a mistrial after the trial judge required him to apologize to the jury in a manner that irreparably damaged his effectiveness as an advocate for the balance of the trial.
4. Trial Counsel was ineffective in failing to object to the lower court not allowing him to go forward with cross-examination of the victim where he arrived in court before the direct examination of the next State witness began.
5. Trial Counsel was ineffective for neglecting to request a jury instruction on the law of proximate causation where under the evidence presented at trial there was some evidence from which the jury could have found that his actions did not cause the wreck involved in this case.
6. Trial Counsel was ineffective for failing to appear in Court in a timely manner in that Counsel was absent when the second day of the Applicant's trial convened.
7. Trial Counsel was ineffective for failing to ascertain what remarks the Court had made to the jury concerning his absence from the Courtroom when the trial convened on the second day of the Applicant's trial.

8. Trial Counsel was ineffective for failing to object on the record when the trial judge admonished him, in the presence of the jury, concerning his tardiness for Court on day two of the Applicant's trial.
9. Trial Counsel was ineffective for failing to make a motion for a mistrial following an exchange with the trial judge which tended to damage defense counsel's image in the eyes of the jury, and thereby violated his right to effective assistance of counsel in his defense.
10. Trial Counsel was ineffective for neglecting to request a curative charge after remarks from the bench damaged trial counsel's image and effectiveness as an advocate in the eyes of the Applicant's jury.

As a threshold matter, the Applicant alleges that defense counsel was ineffective in that he was inexcusably late for Court without just cause or excuse. It is clear from the record below that the Court expected the lawyers to be present in court on day two of the Applicant's trial at 9:00 a.m. It is apparent that defense counsel did not arrive until approximately fifteen (15) minutes after the trial resumed at 9:30 a.m. Defense counsel presented no reason for his tardiness that would justify his late arrival. This Court concludes that Counsel's actions in this regard constituted ineffective assistance of counsel.

Having arrived late to Court, the Applicant alleges that defense counsel compounded the prejudice to the Applicant by failing to inquire as to what, if anything, the jury was told in reference to his absence. It is the position of the Applicant that the remarks of the trial judge, absent a curative charge, may have been taken by the jury to suggest that the Applicant's own lawyer did not attach significance to the need to cross-examine the victim. In a case where her credibility was a key issue, the Applicant asserted that counsel was ineffective for failing to ascertain what was said to the jury in his absence and for failing to request an appropriate curative charge. This Court agrees. "It has long been recognized that even a slight remark, apparently innocent in its language, may, when uttered by the court, have a decided weight in the shaping the opinion of the jury. Vested as the trial judge is, with superior authority, disinterested, and possessing experience not available to the ordinary layman, jurors, as a rule, are anxious to catch his view, upon which to found their conclusions." *Crenshaw Southern Railway Company*, 214 S.C. 553, 53 S.E.2d 789 (1949).

The Applicant also alleges that trial counsel erred in failing to place appropriate objections on the record in a timely manner. The Applicant asserts that defense counsel should have objected, on the record, to the trial court permitting the State to go forward with its next witness before the defense had the opportunity to cross-examine the victim. This Court agrees. While the next witness, Ronnie Lewis, had been called to the stand, he had not even been sworn when defense counsel finally arrived in Court. At the juncture, defense counsel should have raised an appropriate objection to the Court directing the State to present its next witness before cross-examination of the victim. This Court notes that when defense counsel finally did put his argument in favor of being permitted to cross-examine the victim on the record, he persuasively urged the Court not to punish the Applicant for his mistake and bad judgment. Trial Tr. p. 147, l. 23- p. 148, l. 2 and Trial Tr. p. 149, ll. 1-5. There is every reason to believe that if defense counsel had made a timely objection to the testimony of the second witness being taken *before* the cross-examination of the victim, and advanced this same argument in support thereof, the trial court would have relented and allowed defense counsel to cross-examine the victim before another witness was heard; thus, preserving the normal sequence of the trial. Even if the objection had been overruled, the issue would then have been preserved for appellate review. Likewise, had defense counsel entered an objection on the record to being required to apologize to the jury before cross-examining the victim, rather than merely expressing a preference for doing so at the end of the trial, the Applicant's right to argue that issue on appeal would have been preserved. Likewise he asserts that defense counsel should have objected on the record when the trial court admonishing him, in the presence of the jury, in a manner which negatively commented on counsel's competence. This Court must regrettably agree.

Canon 3 of Rule 501, SCACR, requires that a judge act with absolute impartiality in the performance of his duties. Reference by a judge to an attorney's age, gender, or competence are improper and constitute reversible error upon a showing of prejudice to the defendant. *Pace, supra*. See also, *State v. Simmons*, 267 S.C. 479, 229 S.E.2d 597 (1976). In the often quoted dissent in *State v. Mitchell*, 261 S.C. 452, 200 S.E.2d 448 (1973), Justice Brailsford, joined by Justice Bussey, stated,

The remarks of the court tended to impugn the credibility of

counsel and to diminish him and his defense of the appellant in the eyes of the jury. Counsel's ability to furnish effective representation was to that effect impaired, perhaps to the appellant's serious prejudice. 261 S.C. at 461, 200 S...E.2d at 453.

The Applicant further alleges that defense counsel after ascertaining what remarks the Court had made to the jury in his absence, defense should have requested a mistrial, or at minimum, a curative charge. This Court agrees. While a mistrial may not have been granted, it was necessary and appropriate for the trial court to charge the jury that they were not to in any way hold defense counsel's actions against the Applicant, and further that any remarks from the bench concerning defense counsel's tardiness should not be interpreted by the jury in any way as a negative reflection on the Applicant or the strength of his defense. Appropriate curative instructions have been found to mitigate possible prejudice to a defendant arising from remarks from the bench admonishing an attorney for improper actions during a trial. *United States v. Elder*, 309 F.3rd 519 (Ninth Cir.Ct. App.2002). Both the Sixth Amendment to the United States Constitution and Article I, Section 14 of the South Carolina Constitution, protect the right of an accused to be fully heard in his defense. Having shown up late to Court without just cause, it was incumbent upon defense counsel to insure that the jury was appropriately admonished not to hold defense counsel's actions against the Applicant and not to interpret the Court's remarks in reaction to his tardiness as negative comments concerning the Applicant or the strength of his defense to the charges against him. Counsel's failure to ask for a mistrial, or at minimum a curative charge, constituted ineffective assistance of counsel on the facts of this case. This case was largely a credibility battle between the Applicant and his estranged wife. Remarks from the court indicating that the Applicant's own lawyer evidently saw no need to even cross-examine the wife were highly prejudicial. Remarks admonishing counsel, in the presence of the jury, for his tardiness in a manner and tone which called into question counsel's general competence were highly improper. Counsel should have requested a mistrial, however, at minimum he should have requested an appropriate curative charge to the jury.

Defense Counsel's Failure to Argue the Applicant's theory of the case in closing arguments

The testimony of the State's witnesses was far from consistent as it pertained to the events immediately preceding the wreck. Furthermore, the Applicant testified that it was his wife who accidentally clipped the front end of his car as she changed from the left lane to the right lane where he was traveling. He did not claim that she deliberately struck his car, but rather that she accidentally hit him while changing lanes thereby causing *herself* to lose control of her car, and go off the road wrecking in the trees and flipping her car.

A review of defense counsel's closing statement to the jury reveals no effort to demonstrate that the wreck involved in this case was accidental. While defense counsel argued that the testimony of the eye witnesses was "somewhat different", he made no attempt to advance his client's position that she hit him while changing lanes thereby accidentally causing this wreck. In his PCR testimony, defense counsel seemed to say he didn't want the jury to think the wife accidentally hit the Applicant. This position is inexplicable in light of the testimony advanced by the Applicant at trial. In his own PCR testimony, the Applicant was unambiguous in his testimony and he asserted that he had *never* claimed his wife deliberately hit his car, and that it had always been his position that the wreck addressed in the indictment was an accident.

Defense counsel failed to point out in his closing arguments the precise act alleged in the Applicant's indictment for ABWIK. Rather, defense counsel argued the State's failure to prove ABWIK in more general terms. Given the narrow allegation alleged in the indictment against the Petitioner, he argues that defense counsel should have argued the inconsistencies in the various witnesses' testimony as a reason to question whether the Applicant deliberately struck the blow which caused his wife's car to leave the road. He argues further that defense counsel failed to provide him reasonable professional assistance of counsel by failing to argue *his client's* position that the wreck was an accident. This Court agrees.

In his PCR testimony defense counsel advanced the view that he wanted the jury

to believe the wife *deliberately* struck the Petitioner's car. That position was not only inconsistent with the Applicant's testimony, it had the added disadvantage of requiring the jury to find the victim was malicious as opposedly to merely mistaken. Our Supreme Court has found ineffective assistance of counsel where the arguments made by defense counsel to the jury were not consistent with the defendant's own theory of the case and where the argument was found to not advocate in the defendant's favor. *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008). In this case, defense counsel declined to argue the theory of defense advanced by his client's own testimony; accident. Throughout his cross-examination by the State, the Applicant resisted repeated attempts to have him portray his wife's actions as deliberate. The Applicant's testimony clearly presented a claim of accident. As recognized above, this Court has already found that defense counsel was ineffective for failing to request a jury charge on the defense of accident. The Court now additionally rules that defense counsel was ineffective for neglecting to argue the defense advanced by his client and for failing to point out in his closing the specific portions of the trial testimony which supported that defense.

Failure to Present Character Witnesses

As regarded the act specifically alleged in the indictment for ABWIK, the testimony came down to a question of credibility and accuracy of perception. The Applicant alleges that his defense counsel failed to provide him reasonable professional assistance of counsel in that he failed to advise him of his right to present character witnesses at trial. In his PCR testimony the Applicant testified that he had no prior criminal record with the exception of a prior charge for Failure to Stop for a Blue Light from approximately fifteen (15) years earlier.¹ There is no record of a judgment for an earlier charge of Failure to Stop for a Blue Light. The Applicant therefore faced a maximum sentence of three (3) years for first-offense Failure to Stop for a Blue Light in

¹ This Court takes judicial notice of the fact that the records of the South Carolina Law Enforcement Division reflect that he Applicant has no prior criminal record. While the Applicant obviously has a recollection of some incident he believed resulted in such a charge, the records of SLED do not show even an arrest for any other crime other than those resulting from the incident currently before the Court. A copy of the Applicant's record on the SLED database was submitted by Counsel for the Applicant along with her proposed order granting relief. There was no testimony presented in this case which tended to establish that the Applicant had ever made defense counsel aware of his belief that such an old charge existed.

his current case. Given the relative severity of his charges, the Applicant testified in his PCR proceeding that he would have risked the jury finding out about his old Failure to Stop for a Blue Light charge for the opportunity to have the jury hear testimony regarding his reputation for truthfulness from character witnesses.

The Applicant presented four character witnesses during his PCR hearing. Each of these witnesses were well established members of the community in which the Applicant was born and where had lived the majority of his life. These witnesses, a retired school principal, two business owners who had previously employed the Applicant and a public official, universally testified to the Applicant's positive reputation for truthfulness and veracity. They each affirmed that they would have been willing to testify on the Applicant's behalf if they had been asked to do so.

During his PCR testimony, at the second hearing, defense counsel was asked about his failure to advise his client about his right to present character witnesses. His response was that he rarely used character witnesses. He explained that on the rare occasion when he did present a character witness, it was because of some connection known to him between a potential character witness and a juror. Defense counsel totally dismissed the possibility that some carefully chosen character witnesses might, because of their own background and position in the community, have universal appeal to an entire jury absent some specific connection to a single juror.

The credibility of the Applicant was perhaps the most crucial issue in the trial record before this Court. For example, the victim interpreted having seen the Applicant near her home the morning of this incident, and later on the highway as evidence he was following her or lying in wait. The Applicant on the other hand explained that his family lived near his estranged wife, and that he had been on his way to the Office of the Internal Revenue Service in Myrtle Beach when he and his wife spotted each other in traffic. Trial Tr. p. 336, ll. 3-10 and Trial Tr. p. 347, ll. 5-11. While his wife claimed he had intentionally struck her vehicle multiple times prior to the impact that caused her wreck, the Applicant painted a far different picture. He recalled that they got up next to each other in traffic, and began gesturing between their vehicles, when they suddenly made contact. Trial Tr. p. 227, ll. 13-18. His PCR testimony was consistent with his trial testimony. Not once did the Applicant ever claim his wife deliberately struck his

car. He rather presented testimony depicting two upset, estranged spouses who acted out their domestic disharmony on the highway with potentially tragic, but accidental consequences.

Trial counsel further indicated that he would not have wanted to present character witnesses because he was afraid that bad act evidence from the couple's divorce action would come if he did so. This explanation fails to pass close scrutiny when you consider that the fact that the Applicant was being cited for contempt of court for violating an order of the family court, by making phone calls to his wife, had already come into evidence during the State's case in chief. The Applicant's wife had even admitted that the Order of Protection issued by the Family Court was mutual and covered her as well as the Applicant.

The character witnesses presented by the Applicant were highly credible individuals whose background and stature in the community was such that their testimony would likely have been given consideration by the Applicant's jury. On the facts of this case, this Court finds that defense counsel was ineffective in his failure to advise the Applicant of his right to present character witnesses and for failing to work with the Applicant and his family to develop readily available character witnesses for trial. Defense Counsel's assertion of strategic reasons for this error does not provide a credible explanation for this shortcoming. As previously noted, the credibility of the parties was the central issue in this case. Defense counsel's failure to advise his client of his right to present character witnesses was particularly prejudicial where the Applicant's credibility was crucial to his defense.

Improper Opening Remarks to the Jury

In his opening remarks to the Petitioner's jury, defense counsel stated,

But in any situation where people have done less than they ordinarily would be required to do, you wind up with some bad consequences; in other words, sometimes you give your word and you don't keep it, you wind up having to pay. And just like anything wrong, it has consequences. Now this situation involves two people who over 14 years ago stood up before God and took an oath to love and to cherish one another until death do them part. Well, it didn't quite work out that way.

They had marital problems. As a result of having martial problems -- of course they had the martial problems, number one, *they were disobedient to the oath that they took. They were disobedient to the oath that they took.* I don't the evidence will how anything other than that. As a result of that they went off on their individual courses, and as a result of going off on their individual courses, *they forgot the oath that they took.* God's hands did not cause this, in fact he is what sustains us, but *they got in trouble because they were disobedient. They didn't keep the oath they took.*

Trial Tr. p. 67, l. 15- p. 68, l. 11.

The Applicant has alleged that defense counsel was ineffective for making these statements to the jury for three reasons: 1) these remarks were likely interpreted by the jury as admissions of negative character traits by the Applicant's own lawyer, 2) these remarks, coming from the Applicant's lawyer, were likely to be viewed by the jury as an unsubstantiated attack on the character of Applicant's wife, the mother of his children, and 3) the nature of these remarks was such that they were likely to inflame the Applicant's wife and insure her testimony would be presented in the most negative light possible.

Defense counsel asserted in his PCR testimony that this opening statement was nothing more than his attempt to characterize this entire incident as a domestic incident as opposed to a criminal event. He further seemed to believe that these remarks were somehow responsive to the State's opening argument. This Court finds neither explanation for this highly inflammatory opening argument persuasive. The record below establishes that the Applicant and his wife had been married for approximately twelve (12) years at the time of this incident. They had dated for three years before their marriage. They had two sons, ages eleven (11) and eight (8), at the time of this trial. Trial Tr. p. 92, l. 20- p. 93, l. 12. The record further establishes that these individuals had separated and reconciled *four times* prior to the event that lead to the Applicant's trial. Trial Tr. p. 94, ll. 11-21. The Applicant argues that with this domestic history, there was ample room to characterize these people as a couple in domestic chaos without portraying them in the manor defense counsel did.

The State repeatedly submitted in its opening statement that it was *a miracle* the Applicant's wife survived the wreck involved in this case. Trial Tr. p. 61, l. 10- p. 65, l.

25. While defense counsel did reference that portion of the State's opening in its own remarks, this position that his own inflammatory remarks were responsive to the State's opening simply doesn't hold water. The idea that defense counsel needed to counter the State's assertion of a miracle with these admissions and accusations does not logically follow. This is particularly true where the Petitioner's position was that the wreck was accidental. Logically, defense counsel could have easily submitted that it may be that it was a miracle she survived the wreck, but that did not mean the Applicant *caused* the wreck.

The Petitioner has demonstrated that the opening remarks in question were unnecessary, highly inflammatory and unsupported by the evidence to be adduced at trial. Defense counsel's assertion of strategy does nothing to mitigate this error. There was no benefit to be gained for the Applicant from these statements, and the potential prejudice is obvious. The Applicant has established that defense counsel was ineffective for making the opening statements by the Applicant. As in *Lounds, supra*, defense counsel's remarks served no constructive purpose. There was no scenario under which defense counsel's remarks could have potentially benefited the Applicant's case. The remarks were inflammatory and unsupported by any evidence defense counsel had reason to believe would be admitted during this trial. In a case where the Applicant's credibility was key to his defense, defense counsel started out the trial with opening remarks portraying the Applicant as someone who did not take oaths seriously. These remarks went outside the evidence to be adduced at trial and came across as an unfounded assault on the moral character of the Applicant's wife. In addition, these remarks had the potential to inflame the wife who was present in the courtroom and who had yet to testify. Once again, defense counsel's explanations for these remarks simply do not justify them. The Applicant has met his burden of proof on this issue in addition to those discussed above.

Conclusion

This Court finds that the Applicant has met his burden of proof with regard to his claim that he received ineffective assistance of counsel prior to and during his trial in violation of his rights pursuant to both the *Sixth and Fourteen Amendments to the United States Constitution, as well as, Article I Section 14 of the South Carolina Constitution*. This Court finds that each of the errors and omission found herein warrant the grant of a new trial. The Court further finds however, that to the extent that any individual error or omission might be found on appellate review not to warrant that remedy, the collective impact of the errors and omissions addressed herein clearly violated the Applicant's rights to reasonable professional assistance of counsel, due process of law and a fair trial. Any issues raised by the Applicant in his applications, and in the hearings held in this case, which are not specifically discussed herein, have been fully reviewed by this Court and found to lack merit. Accordingly, the Applicant's judgments and sentences are hereby vacated, and his case is remanded to the Court of General Sessions for a new trial.

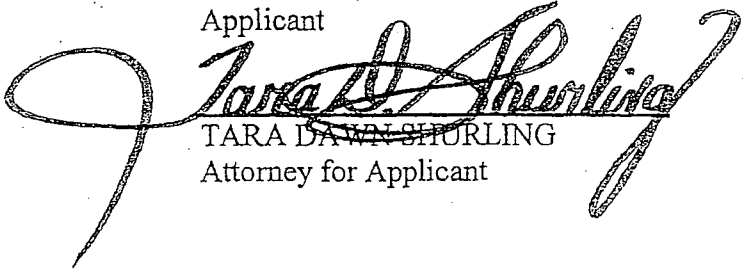
IT IS SO ORDERED.

Steven H. John
Presiding Judge for the
Fifteenth Judicial Circuit

This _____ day of _____, 2012.

_____, South Carolina.

Proposed Order above respectfully
Submitted by Counsel for the
Applicant


TARA DAWN SHURLING
Attorney for Applicant

This 2nd day of July, 2012.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF GEORGETOWN)

RONALD COHENS, #316306)
 Applicant,)

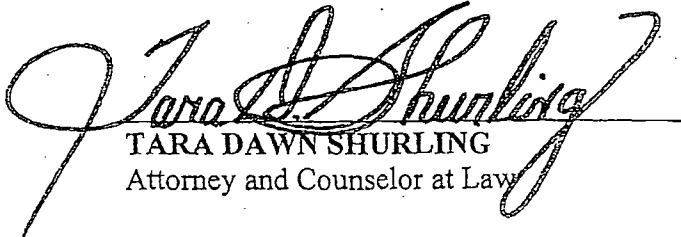
2010-CP-22-1592

v.)

CERTIFICATE OF SERVICE

THE STATE OF SOUTH CAROLINA,)
 Respondent.)

The undersigned attorney hereby certifies that one copy of the Applicant's proposed order in the above-entitled cause was served upon, The Honorable Steven H. John, Circuit Court Judge by E-mail on the 2nd day of July, 2012.


 TARA DAWN SHURLING
 Attorney and Counselor at Law

3614 Landmark Drive, Suite A
 Columbia, S.C. 29204
 (803) 738-8622
 (803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

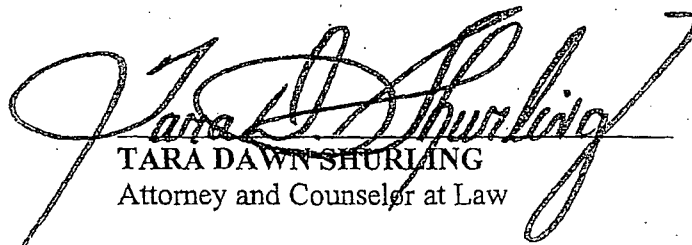
SWORN TO BEFORE ME this 15th day of

October, 2012.

 (L.S.)
 Notary Public for South Carolina
 My Commission Expires: 3/12/2013

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	
 RONALD COHENS, #316306	)	 2010-CP-22-1592
Applicant,	)	
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
THE STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

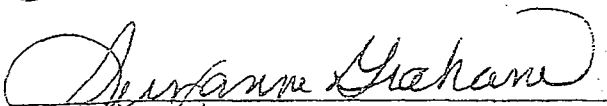
The undersigned attorney hereby certifies that one copy of the Applicant's proposed order in the above-entitled cause was served upon, Salley W. Elliott, Senior Assistant Attorney General by E-mail on the 2nd day of July, 2012.


TARA DAWN SHURLING
Attorney and Counselor at Law

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Columbia, S.C. 29204
(803) 738-8622
(803) 738-1600 Fax

ATTORNEY FOR THE APPLICANT.

SWORN TO BEFORE ME this 15th day of
October, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: 3/12/2013

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Ronald Cohens, 316306,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2010-CP-22-1592

ORDER OF DISMISSAL

HORRY COUNTY
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MELANIE HUGGINS
CLERK OF COURT
CLOCK TIME
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CANCELLED

This matter comes before the Court by way of an Application for Post-Conviction Relief filed October 8, 2010, Amended Application filed April 26, 2012, and Second Amended Application dated April 27, 2012. The State made Return on November 8, 2010. Evidentiary hearings into the matter were convened on April 26, 2012 and June 14, 2012, at the Georgetown County Courthouse. The Applicant was present at the hearing and was represented by Tara D. Shurling, Esquire. The Respondent was represented by Salley W. Elliott, Senior Assistant Deputy Attorney General.

The Applicant and his trial attorney, Charles D. Barr, Esquire, testified at the hearing. Also testifying were William Travis Brown, David Robinson, James Allen Britton, and Vonda Gail Johnson. This Court also had before it a copy of the transcript of the Applicant's trial, the records of the Horry County Clerk of Court, the briefs, petitions, returns, opinion, and orders from Applicant's direct appeal, and the transcript from the April 2012 evidentiary hearing.

Prior to presentation of testimony, Applicant acknowledged that his post-conviction relief counsel also handled direct appeal matters arising from the convictions and sentences that are the subject of this action. Applicant specifically waived any ineffective assistance of appellate

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counsel claims regarding his counsel pursuant to Carter v. State, 293 S.C. 528, 362 S.E.2d 20 (1987).

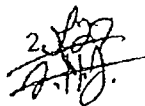
PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. The Applicant was indicted in April 2006 term of the Court of General Sessions for assault and battery with intent to kill (ABWIK) (2006-GS-22-354) and failure to stop for a blue light (2006-GS-22-355). He was represented by Charles D. Barr, Esquire. On June 27-30, 2006, Applicant proceeded to trial before the Honorable Michael Baxley and a jury. Applicant was found guilty as charged and was sentenced to confinement for twelve (12) years for ABWIK and three (3) years, concurrent, for failure to stop for a blue light.

A timely notice of appeal was served and filed on Applicant's behalf and an appeal was perfected on Applicant's behalf by Kathrine H. Hudgins, Esquire. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Ronald Cohens, 2009-UP-064 (S.C. Ct. App. filed February 9, 2009). A Petition for Rehearing was submitted on Applicant's behalf by Tara D. Shurling, Esquire. The petition was denied by the South Carolina Court of Appeals by Order dated April 6, 2009. Thereafter, a Petition for Writ of Certiorari was submitted by Tara D. Shurling on Applicant's behalf. The State submitted a Return to the Petition for Writ of Certiorari. The Petition for Writ of Certiorari was denied by the South Carolina Supreme Court by Order dated April 8, 2010. The remittitur was issued on April 12, 2010.

ALLEGATIONS

In his application, amended application, and second amended application, Applicant

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alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel in that trial counsel:

- (a) failed to be punctual during trial, resulting in a late cross-examination of the victim and damaging his effectiveness as an advocate by making a negative impressions on the jury;
- (b) failed to adequately preserve for appellate review his objection to being required to apologize to the jury for being late to court during trial;
- (c) failed to request a mistrial after the judge required him to apologize to the jury in a manner that irreparably damaged his effectiveness as an advocate for the balance of the trial;
- (d) failed to object to the lower court not allowing him to go forward with cross-examination of the victim where he arrived in court before the direct examination of the next State witness;
- (e) failed to object to the jury instructions for the offense of assault and battery with intent to kill which failed to clearly advise the jury that they could not find the Applicant guilty of that offense unless they found that he acted with the intent to kill the victim;
- (f) neglected to request a jury instruction on the law of proximate causation where under the evidence presented at trial there was some evidence from which the jury could have found that his actions did not cause the wreck involved;
- (g) failed to ascertain what remarks the Court had made to the jury concerning his absence from the courtroom when the trial convened on the second day of Applicant's trial;
- (h) failed to object on the record when the trial judge admonished him, in the presence of the jury, concerning his tardiness for court on day two of Applicant's trial;
- (i) failed to make a motion for mistrial following an exchange with the trial judge which tended to damage defense counsel's image in the eyes of the jury;
- (j) neglected to request a curative charge after remarks from the bench damaged counsel's image and effectiveness as an advocate in the eyes of the jury;
- (k) failed to object, on the record, to being required to apologize to the jury before cross-examination of the victim;
- (l) neglected to object to the State playing State's Exhibit No. 79, an audio tape of the 911 call in the case, during its closing argument where the publication of the tape was cumulative to evidence previously introduced during the State's case in chief, and unduly emphasized the evidence in question thereby prejudicing Applicant;

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- (m) neglected to advise witnesses Applicant of his right to present character witnesses as part of his defense at trial;
 - (n) neglected to call character witnesses at trial to present to the jury testimony concerning Applicant's reputation for veracity in the community;
 - (o) made an opening argument to the jury in which he impugned the integrity of his client and thereby called into question his overall character;
 - (p) made an opening argument to the jury in which he impugned the integrity of the victim and thereby created the danger that the defense would be seen by the jury as impugning the character of the victim without foundation thereby inflaming the passions and prejudices of the jury against Applicant;
 - (q) failed to request a jury instruction on the law as it relates to the defense of accident where one reasonable interpretation of the evidence adduced at trial would have supported a finding of that defense;
 - (r) failed to present in closing argument to the jury a summary of the evidence presented at trial which supported Applicant's assertion that the wreck in this case was an accident;
 - (s) failed to argue to the jury in closing arguments that one reasonable interpretation of the evidence presented at Applicant's trial supported a finding that the car wreck involved in this case was accidental;
2. The judgments and sentences against Applicant were entered in violation of his right to due process of law and effective assistance of counsel.

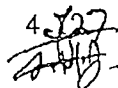
FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003).

I.

Ineffective Assistance of Trial Counsel

In a post-conviction relief proceeding, the Applicant bears the burden of proving the

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allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. at 441. 334 S.E.2d at 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, 466 U.S. at 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, 466 U.S. at 668. 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. Where counsel articulates a valid reason for employing a particular trial strategy, counsel's conduct will not be determined ineffective assistance of counsel. Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006). Watson v. State, 370 S.C. 68, 634 S.E.2d 642 (2006). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decision in the case." Ard v. Catog, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

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A. Tardy Arrival

Applicant contends that he received ineffective assistance of counsel when trial counsel failed to appear in court in a timely manner on the second day of trial resulting in an admonition from the presiding judge, an apology to the jury, and late cross-examination of the victim. He also asserts that he received ineffective assistance of counsel when counsel failed to ascertain the remarks made by the trial judge in his absence and when counsel failed to object and move for mistrial for not being allowed to immediately cross-examine the victim, for being admonished in the jury's presence, and for being required to apologize to the jury for his late arrival. Applicant contends the late arrival damaged counsel's effectiveness as an advocate by making a negative impression on the jury. Applicant further alleges that counsel's exchange with the trial judge and apology to the jury damaged counsel's image and effectiveness in the eyes of the jury and violated Applicant's right to effective assistance of counsel.

The trial transcript reflects the State presented the testimony of the 911 operator and direct examination of the victim on the first day of trial. When the trial recessed for the evening the trial court indicated that the trial would resume the following morning at 9:30 a.m. (Tr. p. 117). When the trial resumed the next morning, the trial court inquired of the jury whether any juror had any discussion or contacts about the case and, after confirming the victim's presence for cross-examination, stated that counsel for Applicant was not present to cross-examine the victim. The trial court directed the State to call its next witness. (Tr. pp. 120-121). The State announced its next witness and the trial court explained to the jury that the witnesses were sequestered and would be brought into the courtroom as they were called to testify. The court followed that explanation to the jury with a greeting and inquiry to Applicant's counsel. The trial court stated "we began court at nine-thirty this morning, everyone has been here. Where have

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you been?" (Tr. p. 121). Counsel apologized for being late and explained that he "had to stop in Kingstree." (Tr. p. 121). The trial court responded, "Please understand as a courtesy to the jury who is here giving their time when we say we're going to start at a particular time, we begin at that time. We've called another witness." (Tr. p. 121). This colloquy occurred in the presence of the jury. Counsel for Applicant twice approached the trial court for bench discussions. (Tr. pp. 122; 131). Thereafter, an eye-witness testified, followed by the morning break for the jurors.

In the jury's absence and referencing the earlier bench discussions, counsel for Applicant conceded he arrived fifteen (15) minutes late for court, explained the reason for being tardy, and requested permission to cross-examination the victim rather than calling the victim as a defense witness. (146 - 148). The trial court agreed but required counsel to apologize to the jury for being late. (Tr. p. 149). Counsel stated that he would be delighted to apologize to the jury but requested permission to do so during closing arguments. The trial court required a contemporaneous apology. (Tr. p. 149).

When the jury returned to the courtroom, the trial court explained that counsel requested cross-examination of the victim so that the jury would not be deprived of facts counsel might elicit during his examination. (Tr. p. 150). Counsel thereafter apologized to the jury for his tardiness and stated that he did not believe in making excuses but explained that he was late and was sorry. (Tr. p. 151). Counsel then cross-examined the victim.

At the post-conviction relief hearing, Applicant testified that he did not know his attorney would be late for court and that he did not receive any messages from counsel about counsel's tardiness. Applicant stated that he was not questioned by the trial court about his attorney's absence. Applicant testified that he had little confidence in his attorney after the tardy arrival and now wishes his attorney had moved for a mistrial or requested curative instructions but was

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not presented with the options by counsel. Applicant testified that, upon his arrival in the courtroom, counsel inquired about the proceedings to which Applicant responded that court started a few minutes before counsel's arrival.

At the post-conviction relief hearing, trial counsel testified that the morning of the second day of trial, he drove to his office in Kingstree to obtain material from the prior family court proceeding between Applicant and the victim for use in cross-examination of the victim and that doing so caused him to arrive approximately fifteen (15) minutes late for court. Counsel testified that he did not try to contact his client or the court to advise that he might arrive late because counsel did not have a cellular telephone at the time and did not want to expend additional time searching for a telephone to make the call. Instead, counsel traveled as fast as he could with the hope that he would not be late. Counsel testified that the prosecutor was in the process of calling a witness when he arrived, that the witness was being brought up, that examination of the witness had not begun, and that he ascertained from the prosecutor what transpired in the courtroom prior to his arrival. Counsel stated that he requested a bench conference during which he asked permission to cross-examine the victim. Counsel rejected the idea of making an objection on the record because cross-examination of the victim had already been delayed by the evening recess and he knew he could call the victim as a defense witness if he needed to do so; however, he was provided the opportunity to cross-examine the victim after an intervening witness. Counsel also determined that he was not absent from the courtroom during the presentation of testimony or other evidence, and did not want to cause negative consequences for Applicant by objecting or further highlighting the matter for the jury and trial court. Counsel also did not object, move for mistrial, or request a curative instruction in response to the trial court's comments about his tardiness or for being required to apologize to the jury because he did not find the comments or

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timing of the apology to be sufficiently objectionable, and because most of the discussion about the tardiness and all of the discussion about the apology occurred outside the jury's presence. Counsel also did not want a mistrial at that point in the trial because he felt the jury composition was favorable to Applicant. Instead, counsel employed a trial strategy to present an apology to the jury for his tardiness in which he accepted responsibility for his actions in order to develop a rapport with the jury and to put an early end to the matter. Counsel did not request a curative instruction because he did not want to draw additional attention to the issue. Counsel stated that was not hindered in any way in his ability to cross-examine the victim or other witnesses, make motions and objections, or to present a defense for Applicant.

The trial court is vested with wide discretion in the conduct of a trial. State v. DeBerry, 250 S.C. 314, 157 S.E.2d 637 (1967). However, the trial court must act with impartiality in the performance of its judicial duties. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999); State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994). References by a judge to an attorney's age, gender, or competence are improper and constitute reversible error upon a showing of prejudice. Id.

This Court finds trial counsel was expected to be present for court on the second day of trial at 9:30 a.m. but arrived fifteen (15) minutes later than the time designated by the trial court. Contrary to Applicant's contention, this Court finds that counsel inquired and determined what transpired in the courtroom prior to his arrival. Counsel determined that the trial court made an initial inquiry of the jury and directed the State to call its next witness when counsel was not present for cross-examination of the victim. Counsel also determined that no testimony or evidence was presented before he arrived. This Court finds that no testimony or other evidence was presented before counsel arrived and that the trial transcript reflects what occurred in counsel's absence. After his arrival, counsel engaged in a bench discussion with the trial court

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during which he requested permission to cross-examine the victim. After the intervening witness testified, counsel requested permission to cross-examine the victim but did not object to being prohibited from doing so immediately upon his arrival in the courtroom. Trial counsel also did not object or move for mistrial for being questioned about his tardy arrival in the jury's presence or when he was required to apologize to the jury because counsel was allowed to cross-examine the victim and concluded the matter and treatment of the issues by the trial court was not erroneous. Counsel also did not object or move for mistrial because counsel did not want to exacerbate matters with the jury or the trial judge to the disadvantage of Applicant and because it was counsel's strategy to use the timing of the victim's cross-examination and apology to the jury to Applicant's advantage at trial.

Although counsel was tardy for trial as alleged and elected not to object, move for mistrial or request curative instructions, this Court finds that Applicant failed to establish the requisite prejudice from counsel's tardy arrival or for failing to object to the comments made in the jury's presence about counsel's absence, for being required to apologize and for not demanding immediate cross-examination of the victim. Because Applicant failed to establish the necessary prejudice, it is not necessary for this Court to address whether counsel's performance respecting these matters was deficient. See Edmond v. State, 341 S.C. 340, 347, 534 S.E.2d 682, 686 (2000) ("[A] PCR applicant must show both error and prejudice to win relief in a PCR proceeding.").

Also, this Court finds that the matter of counsel's tardiness, the comments by the trial court, apology respecting the late arrival, and the timing of the victim's cross-examination were minor incidents occurring during a four day trial that included the presentation of overwhelming evidence against Applicant. This Court finds that counsel's absence did not occur during a

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critical stage of trial and Applicant failed to establish it had an adverse impact on the verdict or the jury's perception of counsel or Applicant. No substantive rights of Applicant were affected. See McKnight v. State, 465 S.E.2d 352 (1995)(stating counsel's absence during cross-examination of victim constituted denial of right to counsel for which prejudice will be presumed). Applicant enjoyed full, extensive cross-examination of the victim and all other witnesses and had the advantage of hearing the testimony of the intervening eye-witness before he cross-examined the victim.

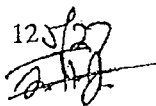
This Court also finds that the timing of the victim's cross-examination did not have an adverse impact upon the jury's verdict. A break between the victim's direct examination and cross-examination had already occurred as a function of the evening recess and Applicant was able to gain the benefit of hearing and cross-examining of one of the eye-witnesses before conducting cross-examination the victim in this case. Other than pure speculation, Applicant failed to show that he was prejudiced by the timing of counsel's cross-examination of the victim.

As to the comments about counsel's momentary absence from the courtroom on the second day of trial, this Court finds that the jury was not aware of any discussions about counsel's tardiness other than the initial comment by the trial court when counsel arrived. The jury was also unaware of any of the discussions between counsel and the trial judge about counsel's apology to the jury. Applicant failed to show that the remarks of the trial judge that occurred in the jury's presence impugned the credibility of counsel or diminished him in the eyes of the jury. It is reasonable for the trial court to make some comment about counsel's obvious absence and any additional comment by the trial court occurred outside the jury's presence. Obviously, comments made outside the jury's presence had no influence on the jury. Graves v. State, 309 S.C. 307, 442 S.E.2d 125 (1992).

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Also, unlike in State v. Pace, 316 S.C. 71, 447 S.E.2d 186 (1994) and State v. Simmons, 229 S.E.2d (1976), the trial court's acknowledgement of counsel's obvious absence from the courtroom did not constitute an improper personal comment about counsel, was not hostile or threatening in nature, did not tend to impugn counsel's credibility, and did not insinuate a lack of skill or professionalism in counsel's representation of Applicant. The comments made by the trial judge to counsel were not such as would have influenced the jury and would have been prejudicial to Applicant. Further, counsel was clearly uninhibited by his interaction with and comments made by the trial court about his tardiness. Counsel specifically testified that his subsequent performance was not influenced by the judge's comments and that he vigorously defended Applicant by way of objections, motions, examinations, and cross-examination as planned.

While the Court of Appeals determined the issue of the trial court proceeding in counsel's absence was not preserved for appellate review, counsel's continued pursuit of the matter at trial in order to preserve the issue for appeal might have caused counsel to lose the opportunity to cross-examine the victim and the necessity to call the victim as a witness at a time when the decision whether to forego defense witnesses in favor of the last argument had not yet been made. As was acknowledged by Applicant in his Petition for Writ of Certiorari, further pursuit of objections to preserve these matters for appeal could come at the risk of further damage to Applicant. This Court agrees. Counsel had the option of persisting with the objections and motions now raised by Applicant and taking the chance of making matters worse for Applicant at trial to preserve issues that ultimately would have been of little merit on appeal but made a strategic decision not to pursue the objections or motions. This Court concludes that counsel's decisions were reasonable. See Simpson v. Moore, 367 S.C. 587, 603, 627 S.E.2d 701, 709-710

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(2006) (stating where counsel articulates a valid reason for employing a particular trial strategy, counsel's conduct will not be determined ineffective assistance of counsel); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) (same). McLaughlin v. State, 352 S.C. 476, 483-484, 575 S.E.2d 841, 844-845 (2003) (same). The trial court would not have granted a motion for mistrial and a curative instruction would have emphasized the matter for the jury. Any prejudice is speculative and is insufficient to establish ineffective assistance of counsel. There is simply no showing that the actions and inactions as alleged by Applicant had an adverse impact or that counsel effectiveness was damaged in the eyes of the jury, particularly in view of the overwhelming evidence of Applicant's guilt.

This Court finds the Applicant failed to meet his burden of establishing that he received ineffective assistance of counsel. These allegations are denied and dismissed.

B. Character Witnesses

Applicant also asserts that he received ineffective assistance of counsel for counsel's failure to advise him of the right to present character witnesses as part of his defense at trial and for failing to present character witnesses to testify as to his reputation for veracity in the community. Applicant presented four witnesses at the evidentiary hearing in support of these allegations. The character witnesses generally testified that Applicant's reputation for veracity was positive. Testimony was also presented describing Applicant as calm person and as a good employee and good person.

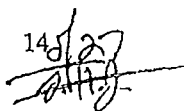
Counsel testified that he did not specifically discuss the possibility of using character witnesses at trial with Applicant because it was his understanding that, based upon the relationship established with Applicant, Applicant relied upon counsel to make such decisions respecting trial strategy. At the post-conviction relief hearing, Applicant did not refute counsel's

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understanding that Applicant relied upon him to make decisions about the defense as counsel thought best without discussion with Applicant. This Court finds that the relationship established between Applicant and counsel was one in which Applicant relied upon counsel to make strategic decision respecting presentation of the defense, therefore, it was reasonable for counsel to make the decision respecting the presentation of character witnesses. Moreover, Applicant never testified that he would have insisted that counsel present character witnesses had counsel advised against it. This Court finds that counsel's failure to discuss the possibility of calling character witnesses with Applicant was neither deficient nor resulted in the requisite prejudice to Applicant as is discussed more fully below.

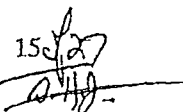
As to presentation of character witnesses in Applicant's defense at trial, counsel testified that he considered the use of character witnesses and made a decision not to use character witnesses as a matter of trial strategy in this case. Counsel stated that he rarely uses character witnesses at trial because the evidence is viewed skeptically by jurors, is usually of minimal probative value and could open the door to admission of evidence detrimental to the defense. It was counsel's experience that character evidence of the sort offered by Applicant at the post-conviction relief hearing is not persuasive and counsel does not use character evidence unless absolutely necessary and only when special circumstances are present which did not exist in this case. Counsel also testified that he would not have used the character witnesses to testify as they did at the post-conviction relief hearing. Counsel voiced concern that presentation of the character witnesses would have opened the door to admission of evidence about the Applicant's previous domestic assaults upon the victim in this case. This Court finds that counsel's trial strategy regarding the use of character witnesses to be reasonable.

First, this Court finds that the character witnesses would have added little to Applicant's

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defense and that counsel's strategy in electing not to present character witnesses was reasonable in light of the questionable foundation for the character witness testimony, the friendships and relationships between Applicant, Applicant's family and the character witnesses, the unpredictable nature of domestic violence of the sort involved in this case, and the overwhelming evidence against Applicant, including two eye-witnesses who observed the actions of Applicant and the victim at the time of the incident.

This Court notes that, in addition to offering testimony about Applicant's reputation for veracity, the character witness testimony presented at the post-conviction relief also included statements that Applicant was "calm" and "a good man," thereby creating the impression that Applicant possessed a peaceful character such that he would not have acted violently toward his estranged wife. While acts of criminal domestic violence might be unrelated to Applicant's reputation for truthfulness, State v. Grace, 350 S.C. 19, 564 S.E.2d 331 (Ct. App. 2002); Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999), the State would have been entitled to offer evidence as to incidents of Applicant's prior violence toward the victim to correct what might be considered a misimpression created for the jury as to Applicant's character for being a good law-abiding and peaceful man. See State v. Major, 301 S.C. 181, 391 S.E.2d 235 (1990) (stating that when an accused offers evidence of his good character, the prosecutor may cross-examine him as to particular bad acts or conduct for the traits focused on by the defendant); U.S. v. Giese, 597 F.2d 1170, 1191 (9th Cir. 1979) ("Justice would not have been served had the jurors been left with only the one-sided impressions created by [defendant's testimony respecting character evidence]). By eliciting this testimony, Applicant opened the door to evidence about prior violence committed by Applicant upon the same victim and perhaps the prior conviction for failure to stop for a blue light as the State's response to Applicant's evidence that he possesses a

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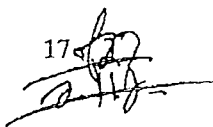
non-violent character. See State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (1991) (stating prosecutor may elicit evidence about defendant's failure to pay child support in response to testimony describing defendant as a "good worker" and a "good man," implying defendant was a good, reliable law abiding person). Applicant acknowledged at the post-conviction relief hearing that he had been accused of committing prior violence upon the victim and trial counsel expressed concern that this information could find its way to the jury. See State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976) (stating by testifying that, despite being a habitual criminal, he had not committed acts of force so as to harm anyone, defendant placed his good character and propensity for non-violence in issue and was subject to cross-examination on his credibility as a witness and on the specific character trait covered by the charge); State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984); State v. Doby, 273 S.C. 704, 258 S.E.2d 896 (1979) (stating that testimony respecting defendant's passiveness and lack of sexual desire opened door to cross-examination about defendant's prior instances of trespass into women's restrooms); State v. Gibert, 196 S.C. 306, 12 S.E.2d 451 (1941) (stating where defendant voluntarily places his good character in issue and has made it an issue in the case, he may be cross-examined as to the particular acts or conduct derogatory to his good character but the examination must be limited to the nature of the charge against him); see also State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998) (stating defendant opened door to impeachment with prior conviction for criminal domestic violence when defendant opened door about his relationship with his wife). When the defendant opens the door to admission of evidence of prior conduct, the issue whether convictions are admissible to impeach the defendant's credibility under Rule 609, SCRE is not applicable. State v. Dunlap, 353 S.C. 539, 579 S.E.2d 318 (2003); State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984); compare State v. Young, 378 S.C. 101, 661 S.E.2d 387 (2008) (defendant's

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A.H.

testimony that he hated to see a woman cry did not open door for admission of prior CDV and CSC convictions because defendant was not offering evidence of a specific character trait but was relating the events that occurred on the night in question).

Moreover, this Court questions whether the Applicant's reputation for veracity would have been admissible when the charges the Applicant faced at trial were assault and battery with intent to kill and failure to stop for a blue light. Our Court of Appeals determined that a "defendant does not have an automatic right to introduce evidence of his character for truthfulness simply because he has testified." State v. Weaverling, 337 S.C. 460, 472, 523 S.E.2d 787, 793 (1999), citing State v. Mizzell, 332 S.C. at 280, 504 S.E.2d 338 (Ct. App. 1998). However, "evidence of a defendant's truthful character can become admissible when his character for truthfulness has been attacked." Id. Merely taking the witness stand and being subjected to cross-examination does not mean the State challenged the defendant's character for truthfulness. Id. Otherwise, in order for a defendant's character for truthfulness to be admissible, truthfulness must be 'a trait pertinent to the offense charged.'" Id. see also Rule 404(a)(1), SCRE (stating that a defendant may introduce evidence that he possesses a "pertinent trait of character and the prosecution may introduce evidence of the defendant's character trait when offered to rebut the defendant's character evidence). There must be a relationship between the particular trait offered and the elements of the charge. "The reason for this rule is that character evidence is, at best, of little probative value." Id.

As in Weaverling, although Applicant took the stand at trial, his character for truthfulness was not attacked nor was evidence of Applicant's character for truth and veracity admissible as pertinent to failure to stop for a blue light or assault and battery with intent to kill. Therefore, the evidence Applicant complains should have been discussed with him by counsel and presented at

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trial was likely not admissible.

This Court finds counsel articulated a reasonable strategy for electing not to present character witnesses and that Applicant failed to demonstrate counsel's performance in this regard was deficient or that he suffered the requisite prejudice. See Simpson v. Moore, 367 S.C. 587, 603, 627 S.E.2d 701, 709-710 (2006) (stating where counsel articulates a valid reason for employing a particular trial strategy, counsel's conduct will not be determined ineffective assistance of counsel); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) (same). McLaughlin v. State, 352 S.C. 476, 483-484, 575 S.E.2d 841, 844-845 (2003) (same). This Court finds the suggestion that counsel was ineffective for failing to present character evidence in this case to be a clear example of second-guessing counsel's trial strategy after learning the defense strategy used for trial was not successful. This Court will not engage in an exercise of second-guessing the reasonable strategy used in this case, particularly in light of the overwhelming evidence of Applicant's guilt.

C. 911 Recording

Applicant contends his attorney provided ineffective assistance for neglecting to object when the State played State's Exhibit No. 79, an audio recording of the victim's 911 call, during the State's closing argument. Specifically, Applicant alleges that publication of the 911 recording during the closing argument was cumulative to evidence previously introduced during the State's case-in-chief was inflammatory in nature and unduly emphasized the evidence in question. He does not challenge the admissibility of the recording but asserts he was prejudiced when the State played the recording for a second time during the State's closing argument.

The solicitor's closing argument must be tailored so as not to appeal to the personal bias of the jurors or be calculated to arouse the passion and prejudice of the jurors. State v. Finklea,

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388 S.C. 379, 697 S.E.2d 543 (2010). The Applicant has the burden of showing error during the State's closing argument deprived him of a fair trial. Id. The relevant inquiry is whether the prosecutor's action so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id. In making the determination, the reviewing court must review the argument in the context of the entire record. Id.

The trial transcript reflects that the recording of the victim's 911 call was introduced without objection during the testimony of the 911 operator, (Tr. pp. 82-83), and published to the jury during the victim's testimony. (Tr. p. 108). The recording was later replayed for the jury during the State's closing argument and was made available to the jury during deliberations as an exhibit introduced into evidence at trial. In fact, the jury specifically requested equipment to use to listen to the recording during deliberations. (Tr. pp 395, 414, 417). Trial counsel testified that he did not object to the prosecutor's use of the 911 recording because the recording was properly admitted as evidence, it was not unduly prejudicial, and he had no basis to object when the prosecutor used it to argue the evidence and suggest reasonable inferences the jury should draw. This Court agrees.

The purpose of closing argument is to direct the jury's attention to relevant evidence and to suggest reasonable inferences that might arise from the evidence. Replaying the 911 recording which was properly admitted as evidence at trial during the prosecutor's closing argument was not improper in this case and counsel had no basis for objection. The prosecutor did not unduly exploit the 911 recording but used it for demonstrative purposes in the same manner he would have used a photograph or chart or otherwise refer to admitted evidence presented at trial during summation. Applicant failed to show that use of the exhibit was excessive or used to suggest a verdict on an improper basis. See State v. Finklea, 388 S.C. 379,

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697 S.E.2d 543 (2010)(stating prosecutor's use of a lighted match-shaped fire starter in closing argument as he described defendant lighting victim on fire was proper for demonstrative purposes and not unduly prejudicial); State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2002) (finding that solicitor did not unduly exploit a properly admitted 911 tape by playing it during summation); see also State v. Kendell, 723 N.W.2d 597 (MN 2006); People v. Jackson, 689 N.E.2d 191 (IL 1997).

Further, this Court finds that Applicant failed to show that counsel's failure to object resulted in the requisite prejudice. The 911 recording, although present in the courtroom, was not offered by Applicant as evidence at the post-conviction relief hearing. Therefore, any claim of prejudice is purely speculative. See Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) (stating any finding of prejudice is purely speculative in a claim counsel was ineffective for failing to present an expert witness at trial where the applicant fails to present the testimony of the expert at the post-conviction relief hearing); see also Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (same); Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993) (same). Without more, this Court finds that Applicant failed to establish that simply playing the 911 recording one additional time was unduly cumulative or prejudicial when the recording had already been admitted as evidence at trial, was a proper matter for comment by both parties during closing argument, and was available to the jury for review as many times as the jury desired during deliberation and when the evidence of Applicant's guilt was overwhelming. "In a post-conviction relief action, the Applicant "may not simply posit suppositions and speculations in an attempt to establish that counsel was ineffective." Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701, FN 2 (2006). This Court refuses to engage in speculation and finds this claim to be without merit.

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D. H.

D. Counsel's Opening and Closing Argument References to Applicant and Victim

Applicant also alleges counsel was ineffective for purportedly impugning the integrity of Applicant and the victim during his opening and closing arguments to the jury. He contends that the comments called his character into question and that his references to the victim inflamed the passions and prejudices of the jury against Applicant.

The purpose of the opening argument is to inform the jury generally of the nature of the charges so that the jury will be better able to understand the case and the significance of evidence as it is presented during trial. 75 Am Jur 2d Trial, Section 429. During closing argument the parties may argue the evidence presented at trial and its reasonable inferences. State v. Navy, 370 S.C. 398, 635 S.E.2d 549 (2006); State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996).

Applicant testified that he was surprised by counsel's opening and closing argument references to Applicant, the victim and their marriage and expressed concern that the victim might have taken the comments personally and reacted negatively.

Trial counsel testified that the portions of his opening and closing arguments about which Applicant complains was his effort to portray Applicant and the victim as a couple married for some time and who had a history of separations and reconciliations. Counsel stated that he was portraying Applicant and the victim as a couple engaged in a continued domestic dispute arising from their marital separation – a husband and wife who had lost their way – rather than a defendant engaged in criminal conduct. Counsel disputed that he maligned the victim but, as a matter of strategy, was portraying the victim and Applicant on equal footing and attempting to humanize them and the situation in which they found themselves.

Based upon counsel's testimony and a review of counsel's opening and closing arguments in view of the record as a whole, including the evidence before the jury and

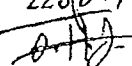
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arguments of the prosecutor, this Court finds that trial counsel's strategy was reasonable. Applicant failed to establish deficient performance and/or prejudice. Applicant is merely second-guessing counsel's strategy and defense through hindsight after an adverse verdict. The allegations are denied and dismissed as being without merit.

E. Jury Charges and Counsel's Failure to Argue Accident

Applicant claims trial counsel provided ineffective assistance of counsel for failing to request jury charges on proximate causation and accident. He also asserts he received ineffective assistance of counsel for counsel's failure to argue facts that support the theory that the wreck was an accident. This Court finds the allegations to be without merit.

"The law to be charged to the jury must be determined by the evidence presented at trial." State v. Harris, 382 S.C. 107, 114, 674 S.E.2d 532, 535 (2009). "A jury charge is correct, if, when read as a whole, it contains the correct definition and adequately covers the law." State v. Commander, 396 S.C. 254, 270, 721 S.E.2d 413, 422 (2011). "Ordinarily, the trial court has the duty to give requested instructions which correctly state the law applicable to the issues and which are supported by the evidence." State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996). When a jury instruction provides the proper test for determining the issues, the failure to give a requested instruction is not prejudicial. State v. Hughey, 339 S.C. 439, 452, 529 S.E.2d 721, 728 (2000), *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). When considering the trial court's refusal to provide an instruction requested by a defendant, the appellate court must consider the evidence in the light most favorable to the defendant. State v. Commander, 396 at 422, 721 S.E.2d at 422. "Failure to give a requested jury instruction is not prejudicial error where the instructions given afford the proper test for determining issues." State v. Harris, at 114, 674 S.E.2d at 536.

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"Harm caused to another, including death, cannot entail criminal responsibility for the actor if the harm was accidentally inflicted without intent to harm and without recklessness or negligence." MCAninch, Fairey, and Coggiola, *THE CRIMINAL LAW OF SOUTH CAROLINA* (5th Ed. 2007), citing State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945); State v. McDaniel, 68 S.C. 304, 47 S.E. 384 (1904). "Accident is not an affirmative defense because the existence of the mens rea, be it intent to kill or criminal negligence, is an element of the offense which must be established by the state by proof certain beyond a reasonable doubt." Id., citing State v. McDaniel, at 316-17, 43 S.E. at 388-89. "In South Carolina, the defense of accident requires showing the harm caused was unintentional, the defendant was acting lawfully at the time of the incident, and due care was exercised" Id. at 114, 674 S.E.2d at 537.; see also State v. Brown, 205 S.C. 514, 32 S.E.2d 825 (1945).

Proximate cause is the immediate cause. State v. Clary, 222 S.C. 549, 73 S.E.2d 681 (1952). It is defined as "that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred." State v. DeChamps, 126 S.C. 416, 416, 120 S.E. 491, 492 (1923). "But that doctrine is more broadly, rather than more narrowly, applied against the wrongdoer in a criminal prosecution than against a tort-feasor in a civil action. Thus, in a criminal action, the wrongdoer whose crime has resulted in injury to another will not be absolved on the ground that the wrongful act of negligence of the person injured contributed to the injury as a proximate cause." State v. DeChamps, 126 S.C. 416, 416, 120 S.E. 491, 492 (1923); see also State v. Hanahan, 111 S.C. 58, 96 S.E. 667 (1918); see also State v. Badget, 87 S.C. 543, 70 S.E. 301 (1911)(stating if intervening acts were the result of defendant's negligence, the intervening acts do not prevent the result from being attributed to defendant). Additionally, the intervening act which was

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 A.H.D.

reasonably foreseeable by the defendant does not absolve the defendant of the original wrong.

Id.

Trial counsel testified that the theory that the wreck was an accident did not comport with the Applicant's version of the facts as explained by Applicant, with the evidence presented at trial or strategy developed for the defense. Counsel stated that he did not argue to the jury facts supporting the theory of accident because Applicant denied that he committed any act that caused the wreck; rather, Applicant insisted that the victim hit his car while he was driving in his lane and he did nothing wrong. Counsel did not request a charge on the law of accident because the instruction was not warranted based upon the evidence presented at trial and in view of the charges Applicant faced and the instructions given to the jury. Counsel testified that he also did not request an additional instruction on proximate cause because the charge given properly addressed the matters in issue for the jury as the issues related to assault and battery with intent to kill.

This Court agrees. Considering the testimony in the light most favorable to Applicant, this Court finds that the evidence presented at trial did not support a charge on accident. State v. Glover, 27 S.C. 602, 4 S.E. 564 (1888). The evidence presented at trial fails to disclose any contention by Applicant that he committed an act accidentally; on the contrary, Applicant specifically denied that his vehicle struck the victim's when the wreck occurred. Instead, Applicant testified that the victim drove her vehicle into his lane of travel and struck him while she was attempting to make a lane change and thereafter traveled off of the highway. The evidence also reflects that Applicant was driving his vehicle in excess of the posted speed limit and admitted at trial that he intentionally sped up between the first and second collisions to catch the victim before the second impact. Applicant committed an intentional act, was not exercising

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due care and was not acting in a lawful manner. An instruction on the law respecting accident was not warranted based upon the evidence presented at trial. It is also clear that counsel did not entertain the view that accident was applicable at the time of trial and counsel's argument to the jury was consistent with Applicant's testimony and Applicant's version of the events and did not constitute ineffective assistance of counsel.

Moreover, the jury charge given by the trial judge made it clear to the jury that Applicant could only be found guilty of assault and battery with intent to kill if the State showed beyond a reasonable doubt that Applicant possessed the requisite criminal intent in conjunction with an act or omission. The jury was charged that the State was required to prove beyond a reasonable doubt that Applicant committed an unlawful act of violent nature with malice aforethought. The instruction given also specifically made clear that Applicant could not be found guilty if the act committed was accidental or involuntary but must have been committed with evil intent on the part of the accused and with the intent that the result occur.

This Court finds that the charge given to the jury properly instructed the jury as to the issues for consideration as presented by the evidence and that additional charges on the law of proximate cause or accident were not warranted based upon the evidence adduced at trial and the charges the Applicant faced. Applicant failed to establish deficient performance on the part of counsel or prejudice.

F. Charge on Intent

At the post-conviction relief hearing, Applicant specifically stated that he would not pursue the allegation that counsel was ineffective for failing to object to the jury instruction for ABWIK because it did not include a statement indicating that he could not be found guilty unless

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[Signature]

the jury found he acted with intent to kill the victim. Based upon Applicant's statements, this Court finds the allegation was specifically waived.

II.

CONCLUSION

This Court finds as to each claim raised, that Applicant wholly failed to establish prejudice arising from counsel's conduct such that there is a reasonable probability the outcome of the trial would have been different. This Court finds trial counsel demonstrated the normal degree of skill, knowledge, professional judgment, and representation that is expected of an attorney who practices criminal law in South Carolina. State v. Pendergrass, 270 S.C. 1, 239 S.E.2d 750 (1977); Strickland, 466 U.S. at 668; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant's complaints concerning counsel are without merit and are denied and dismissed.

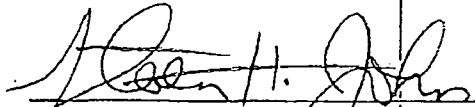
Based on the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that a notice of appeal must be served and filed within thirty (30) days after receipt of written notice of entry of this Order to secure the appropriate appellate review. The Applicant's attention is also directed to South Carolina Appellate Rules for appropriate procedures after notice has been timely served and filed.

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[Signature]

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and Dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.


The Honorable Steven H. John
Resident Judge
Fifteenth Judicial Circuit

July 30, 2012
At Chambers, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS

2010-CP-22-1592

RONALD COHENS, #316306

Applicant,

vs

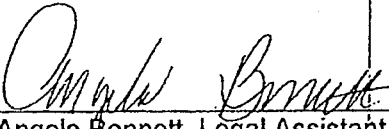
AFFIDAVIT OF SERVICE BY MAIL

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 **Order of Dismissal** in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Tara D. Shurling, Esquire
3614 Landmark Dr., Suite A
Columbia, South Carolina 29204

DATED this 13th day of August, 2012


Angela Bennett, Legal Assistant
For Respondent

FILED
GEORGETOWN COUNTY, S.C.
2012 AUG 23 AM 10:45
ALMA Y. WHITE
CLERK OF COURT

ARREST WARRANT

K-011816

K011816

STATE OF SOUTH CAROLINA

County of GEORGETOWN Municipality of GEORGETOWNFILED
GEORGETOWN CO. CLERK OF COURSE

MAR 28 2006

THE STATE

RONALD COHENS

ALMA Y. WILKINSON
CLERK OF COURSESTATE OF SOUTH CAROLINA)
County of GEORGETOWN Municipality of GEORGETOWN)

AFFIDAVIT

INV. MICHAEL THACKER

RONALD COHENS

Personally appeared before me the affiant INV. MICHAEL THACKER being duly sworn deposes and says that defendant RONALD COHENS on 3/23/2006 State of South Carolina (or ordinance of County/ Municipality of 16-03-0620) violate the criminal laws of the

the following particulars:

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

THAT ON OR ABOUT 3/23/2006 AT APPROX. 7:20AM IN THE DEBORDEU AREA OF GEORGETOWN COUNTY. THE DEFENDANT DID WITH MALICE AFORETHOUGHT AND WITH INTENT TO KILL, COMMIT A BATTERY UPON NADINE COHENS BY RAMMING HIS VEHICLE INTO THE VICTIMS VEHICLE WHILE THE VEHICLES WERE IN MOTION AND BY STRIKING HER VEHICLE WITH HIS OWN VEHICLE CAUSING THE VICTIMS VEHICLE TO WRECK INTO TREES AND OVERTURN. THIS ALL WHILE TRAVELING ON HWY 17 NORTH FROM GEORGETOWN TOWARDS PAULEYS ISLAND. THE VICTIM REQUIRED MEDICAL ATTENTION AS A RESULT OF THE ASSAULT. THIS BEING AGAINST PEACE AND DIGNITY OF THE STATE OF SC AND A VIOLATION OF SC CODE OF LAW 16-03-0620. CASE # 03061694

Signature of Affiant

Affiant's Address 430 N. FRASER ST.GEORGETOWN, SC 29440Affiant's Telephone 8434363600

STATE OF SOUTH CAROLINA)

County of GEORGETOWN Municipality of GEORGETOWN)

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that defendant RONALD COHENS did violate the criminal laws of the State of South Carolina (or ordinance of County/ Municipality of 16-03-0620) as set forth below:DESCRIPTION OF OFFENSE: RONALD COHENS

16-03-0620

Having been advised of the contents of the above affidavit, you, appearing, appeared and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on March 23, 2006Judge's Address 333 CLELAND STREETGEORGETOWN, S.C.Judge's Telephone 8435453381Issuing Court ☒ Magistrate ☐ Municipal ☐ CircuitForm Approved by
SCA Approval General
April 21, 2003
SCCA 618

Address: GEORGETOWN, SC 290029440

Sex: M Race: B SSN: TO Weight: 200

DL State: SC DL #: --- Agency ORI #: ---

DOB: --- Prosecuting Agency: ---

ASSAULT AND BATTERY WITH INTENT TO KILL
(ABWIK)

Code/Ordinance Sec. 16-03-0620 Offense Code: ---

This warrant is CERTIFIED FOR SERVICE in the County/ Municipality of ---

Is to be arrested and brought before me to be dealt with according to law.

Signature of Judge (L.S.)

Date: ---

RETURN

A copy of this arrest warrant was delivered to defendant Ronald Cohens on 3-23-06 @ 16:55Signature of Constable/Law Enforcement Officer ST. J. B. BroussardRETURN WARRANT TO:
JUDGE ISAAC L. PYATT
333 CLELAND STREET
GEORGETOWN, S.C.

294420807

ORIGINAL

WITNESSES:
GEORGETOWN SHERIFFS DEPARTMENT
ARREST WARRANT/TICKET NUMBER:

K-011816

0014 16-03-0620

SID:

DOI: 3-23-06

D/L

ACTION OF GRAND JURY

TRUE BILL

Date

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

DOCKET NO. 06-GS22-354A

The State of South
Carolina,

County of Georgetown

21368 001 MJM
COURT OF GENERAL
SESSIONS

April TERM 2006

THE STATE

vs.

RONALD COHENS

Georgetown, SC 29440

DOB:

SS#:

J. GREGORY HEMBREE,
SOLICITOR

INDICTMENT FOR

Assault and Battery with Intent to
Kill

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Georgetown
 STATE VS.
Ronald Cohens
 AKA:
 Race: B Sex: M Age: 34
 DOB: SS#:
 Address:
 City, State, Zip Georgetown SC 29440
 DL# SID#

INDICTMENT/CASE#: 06 -GS- 22 - 354
 A/W#: 12-011816
 Date of Offense: 3-23-06
 S.C. Code §: 16-03-0620
 CDR Code #: 01 01 1 14
☐ CASE RESTORED
 SENTENCE
☐ PLEA ☒ TRIAL 0-20yrs.

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
 TO: Assault & Battery w/ Intent to Kill
 in violation of § 16-3-620 of the S.C. Code of Laws, bearing CDR Code # 0, 0, 1, 4
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

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.

ATTEST:

Stephen J. Stedman
 Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 12 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation,
 which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
 Department of Corrections. Time since 3/12/06

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms:

☐ set by SCDPPPS _____

Recipient:

*Fine: \$ _____

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

\$14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

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

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

\$35.13 (Public Def/Prob) \$500 \$ _____

\$73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00

\$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) \$ 3.75

TOTAL \$ 128.75

John A. Moore
 Clerk of Court/Deputy Clerk

Court Reporter: Pamela Dymond-Carter

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ 20.00 beginning 1st after release

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP
 Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

STATE OF SOUTH CAROLINA)
COUNTY OF GEORGETOWN)

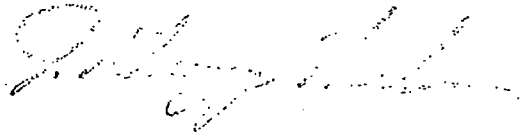
INDICTMENT FOR

Assault and Battery with the Intent
to Kill

At a Court of General Sessions, convened on April 5, 2006, the Grand Jurors of Georgetown County present upon their oath:

That Ronald Cohens did in Georgetown County on or about March 23, 2006, feloniously and with malice aforethought commit an assault and battery upon the minor victim, Cohens, with the intent to kill the victim, to wit: ramming his vehicle into the victim's vehicle while the vehicles were in motion causing the victim's vehicle to wreck into trees and overturn, resulting in the victim having to seek medical attention, in violation of §16-3-620, South Carolina Code of Laws, 1976, as amended.

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



SOLICITOR

ARREST WARRANT

K-011821

K011821

STATE OF SOUTH CAROLINA
☒ County/☐ Municipality of
 GEORGETOWN

FILED
 GEORGETOWN
 2006 MAR 29

THE STATE
 against
 RONALD COHENS

ALMA V. VIN, the following particulars:
 CLERK OF COURTS FAILURE TO STOP FOR A BLUE LIGHT, NO INT

56-05-0750(B)(1)
 VIOLATE THE CRIMINAL LAWS OF THE

AFFIDAVIT

INV. MICHAEL THACKER
 RONALD COHENS
 3/23 2006

Form Approved by
 S.C. Attorney General
 April 21, 2003
 SCCA 918

Address: GEORGETOWN, SC 000029440

Sex: M Race: B Height: 5'10" Weight: 200

DL State: SC Agency ORI#:

DOB: Prosecuting Agency:

Prosecuting Officer:

FAILURE TO STOP FOR A BLUE LIGHT, NO INT

Code/Ordinance Sec. 56-05-0750(B)(1)

This warrant is CERTIFIED FOR SERVICE in the
☐ County/☐ Municipality of

The accused
 is to be arrested and brought before me to be
 dealt with according to law.

Signature of Judge (L.S.)

RETURN

A copy of this arrest warrant was delivered to
 defendant RONALD B COHENS
 on 3-24-06

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:
 JUDGE ISAAC L. PYATT
 333 CLELAND STREET
 GEORGETOWN, S.C.

294420807

I further state that there is probable cause to believe that the defendant named above did commit
 the crime set forth and that probable cause is based on the following facts:

THAT ON OR ABOUT 3/23/2006 IN GEORGETOWN COUNTY, THE DEFENDANT, WHILE DRIVING
 A MOTOR VEHICLE ON HWY 17 SOUTH, FAIL TO STOP FOR WHEN SIGNALLED BY MEANS
 OF A SIREN /FLASHING LIGHT ON A LAW ENFORCEMENT VEHICLE OF GEORGETOWN
 COUNTY SHERIFF'S OFFICE. THIS BEING AGAINST THE PEACE AND DIGNITY OF THE
 STATE OF SOUTH CAROLINA AND A VIOLATION OF SOUTH CAROLINA CODE OF LAW
 56-06-0750(B)(1).

CASE# 03061694 / 29442005

Signature of Affiant

STATE OF SOUTH CAROLINA
☐ County/☐ Municipality of

Affiant's Address 430 N. FRASER ST.
 GEORGETOWN, SC 29440
 Affiant's Telephone 8434363600

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
 defendant RONALD COHENS
 did violate the criminal laws of the State of South Carolina (or ordinance of GEORGETOWN) as set forth below.

DESCRIPTION OF OFFENSE: 56-05-0750(B)(1)
RONALD COHENS

Having been personally sworn by the undersigned, I hereby certify that the above is a true and correct copy of the original

the defendant at the time of its execution, or as soon thereafter as is practicable.
 Sworn to and subscribed before me on 3-24-06

Judge's Address 333 CLELAND STREET
 GEORGETOWN, S.C.
 Signature of Issuing Judge Isaac L. Pyatt (L.S.)
 Judge Code: 899
 Issuing Court ☐ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

DOCKET NO. 06-GS22-355

**The State of South
Carolina,**

County of Georgetown

21368 001 MJM
COURT OF GENERAL
SESSIONS

April TERM 2006

THE STATE

vs.

RONALD COHENS

Georgetown, SC 29440

DOB:

SS#:

J. GREGORY HEMBREE,
SOLICITOR

INDICTMENT FOR

Failure to Stop For Blue Light

WITNESSES:

GEORGETOWN SHERIFFS
DEPARTMENT

ARREST WARRANT/TICKET NUMBER:

K-011821

0065 56-05-0750(B)(1)

SID:

DOI: 3-23-06

D/L

ACTION OF GRAND JURY

TRUE BILL

Date

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

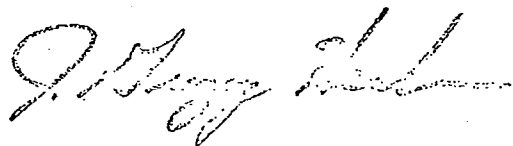
INDICTMENT FOR

Failure to Stop For Blue Light

At a Court of General Sessions, convened on April 5, 2006, the Grand Jurors of Georgetown County present upon their oath:

That Ronald Cohens did in Georgetown County on or about March 23, 2006, while operating his motor vehicle on a road, street or highway of the State of South Carolina, fail to stop his motor vehicle when signaled to do so by a law enforcement vehicle, by means of a siren and/or flashing light, in violation of §56-5-750(B)(1), South Carolina Code of Laws, 1976, as amended.

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



SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Georgetown
STATE VS.AKA: Ronald CohensRace: BSex: MAge: 39DOB: SS#:Address: Georgetown, SC 29440

City, State, Zip

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

06-GS-22355AW#: K-011821Date of Offense: 3-23-06S.C. Code §: 56-05-0750(A)(1)CDR Code #: 0101615☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIAL90 days - 3 yrsIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: FAIL TO STOP FOR A BLUE LIGHTIn violation of 56-05-0750(A)(1) of the S.C. Code of Laws, bearing CDR Code # 0101615☒ NON-VIOLENT☐ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ 17-25-45The 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.

ATTEST:

[Signature]
Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 3 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: 06-22-354☒ 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. time since 3/12/06

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:

\$14-1-206 (Assessments 107.5%)	\$
\$14-1-211(A)(1) (Conv. Surcharge)	\$100
\$14-1-211(A)(2) (DUI Surcharge)	\$100
\$56-5-2995 (DUI Assessment)	\$12
\$35.13 (Public Def/Prob)	\$500
\$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)	\$
TOTAL	\$

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$_____ beginning _____

\$_____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: 01112011Sentence Date: 06/30/06Court Reporter: Pamela O'Connell - Carter

Clerk of Court Deputy Clerk

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

SCCA/217 (7/2003)