

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Luke N. Brown, Trial Judge
The Honorable R. Markely Dennis, Jr., Post-Conviction Relief Judge

Lower Court Case No. 2005-CP-10-3313
Appellate Court Case No. 2012-213419

Wesley Max Myers, ... Respondent,

v.

State of South Carolina, ... Petitioner.

APPENDIX

VOLUME 6 of 7

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Hurst -- Voir dire

1 believe it was Chief Norris who testified
2 earlier and he said that he does not find
3 arson in all the fires he investigates?

4 A Only sixty per cent.

5 Q And, well, do you find that
6 number unreasonable?

7 A Totally. Absolutely outrageous.
8 Sixty per cent of all the fires he
9 investigates are arson. That's absolute
10 nonsense. The vast majority of all fires
11 are accidental. Obviously. There're all
12 kinds of ways that accidental fires start.

13 Q And you would of course know
14 that having not had anything to do with any
15 of those five thousand fires he's
16 investigated?

17 A Yes. With a large number like
18 that, that's a very large number. I mean
19 that's a career number. So we're talking
20 about an entire career, man finds arson more
21 often than not arson. It also vastly
22 exceeds anything that, any estimate that the
23 federal government has made. In fact it's
24 higher than any other arson investigator
25 I've ever seen. I have seen one that went

Hurst -- Voir dire

1 up to fifty-five per cent.

2 THE COURT: See here, wait a
3 minute.

4 MR. DURANT: Yes, sir.

5 THE COURT: These are things
6 that you can -- what we're trying to do
7 is qualify him.

8 MR. DURANT: Yes, sir.

9 THE COURT: Okay. So let's
10 don't talk about --

11 MR. DURANT: I have no objection
12 to his qualifications.

13 THE COURT: Did you want to say
14 something?

15 MR. KULP: I didn't hear what
16 the solicitor said. I'm sorry.

17 MR. DURANT: I said I have no
18 further questions on him.

19 THE COURT: All right. I'll
20 qualify him. Go ahead.

21 MR. KULP: Thank you very much.

22

23

24 CONTINUED DIRECT EXAMINATION BY

25 MR. KULP:

Hurst -- Cont'd. Direct

1 Q Now, Dr. Hurst, would the -- as
2 you said, you reviewed a number of
3 photographs in this case. And would
4 reviewing those photographs aid you in your
5 testimony?

6 A Yes.

7 MR. KULP: Okay. Well, may I
8 approach the witness, your Honor?

9 THE COURT: Yes, sir.

10 Q Let me hand you a number of
11 exhibits that are marked, that are either
12 marked for I. D. or in evidence in this
13 case. In fact it may very well be that --
14 is there a quick and easy way to tell --
15 Okay. We'll sort that out.

16 A stack of photos, and I want
17 you to first look through those photos and
18 tell me. . .

19 (Whereupon, marked for
20 identification was Defendant's Exhibit
21 No. 36, photograph.)

22 THE COURT: You ended with the
23 words "tell me".

24 MR. KULP: I'm sorry?

25 THE COURT: Go ahead tell me

Hurst -- Cont'd. Direct

1 what?

2 Q Oh. What I'd like you to do is
3 go through there and tell me if in fact you
4 have had the occasion to examine those
5 photos before and cull out any ones you have
6 not seen, if you will.

7 A Yes. I've seen all of these
8 photos or I've seen photos that are so
9 substantially similar that I cannot remember
10 any difference.

11 Q All right. And the solicitor
12 has a couple of those, and I'm sure he has
13 some photos for you to look at as well.

14 Let me ask you, in reviewing
15 these, did these photos aid you in making
16 your determination of your assessment of the
17 fire scene and the cause and origin issues
18 associated with the fire at the Mill Inn on
19 3/13/97?

20 A Yes. They did assist me
21 greatly.

22 Q Did the testimony of Mr -- Chief
23 Benjamin Norris aid you and offer you
24 information into your overall assessment of
25 the fire scene?

Hurst -- Cont'd. Direct

1 A Yes, sir. It certainly did.

2 Q How about the testimony of
3 Special Agent Lester Rich of the Alcohol,
4 Tobacco and Firearms, Bureau of Alcohol,
5 Tobacco and Firearms?

6 A Yes. He was very helpful.

7 Q Okay. Now, please tell the
8 ladies and gentlemen of the jury what those
9 individuals -- let's start with that. Those
10 individuals told you -- excuse me.
11 Testified to that aided you in your
12 assessment of the fire scene.

13 A Okay.

14 Q Let's start I guess with Agent
15 Rich.

16 A Well, Agent Rich testified that
17 the ceiling was made out of the same kind
18 of -- a laminate, simple laminate. A
19 laminate similar to what you see there on
20 the courtroom. Same thing the walls were
21 made out of. The ceiling and walls were all
22 the same thing. They were one of those
23 inexpensive thin laminates and, more
24 importantly, he testified that when the fire
25 reached the ceiling that it spread and

Hurst -- Cont'd. Direct

1 burned uniformly across the entire ceiling
2 in the bar area. Now, I'm not talking about
3 the entire ceiling in the bar itself,
4 because the bar area is separated from the
5 rest of the bar by a soffit. A soffit is
6 like the space above the door which is part
7 of the wall.

8 Well, here there's a soffit that
9 goes around three sides of the bar and acts
10 as a barrier to hot gases. Hot gases rise
11 up and they set ceilings on fire and they
12 travel laterally at very high speeds.
13 They're called "ceiling jets", but they stop
14 when they hit a soffit, just like water
15 stops if you put it in a basin, only this is
16 upside down. So it acts as a collection
17 point.

18 And he testified basically that
19 the hot gases that it collected there had
20 set the entire ceiling in that area on fire,
21 and that's important because it means that
22 you're going to get uniform radiation from
23 the ceiling and that you can therefore know
24 that you will have this -- essentially the
25 same radiation effects on lower objects all

Hurst -- Cont'd. Direct

1 the way across that area that is encompassed
2 by the soffits.

3 Q Please explain to the ladies and
4 gentlemen of the jury what you mean by
5 radiation in the course of your last answer.

6 A Okay. Fires burn up. You know,
7 that is when you set say a piece of wood on
8 fire, hot gases are released and as they
9 combust they expand and they have a low
10 density and they move up. Fires spread up
11 very easily because the hot rising gases set
12 the higher fuels on fire. Fire does not
13 like to burn downward and it's not very
14 eager to burn sideways except on ceilings
15 where you get the ceiling jet effect.

16 But as the fire burns up, let's
17 say in a stack of logs, it heats the bottom
18 surfaces of the logs and they begin to glow.
19 They radiate back down at the top of the
20 lower logs. And it's a mutual effect, this
21 radiation, hot gases rising, so that the
22 fuel from the lower logs is heating the top
23 logs and then heat radiating back down to
24 re-enforce the lower logs that allows you to
25 ignite a stack of logs in the fireplace but

Hurst -- Cont'd. Direct

1 will not allow you to light one log.

2 When you have one log there's
3 nothing above it to receive its hot gases
4 and then there's nothing above it to radiate
5 down.

6 The ceiling's just like those
7 upper logs. When you set a fire on the
8 floor, all of the hot gases go up to the
9 ceiling. If you have a high enough heat
10 release by whatever is burning on the floor
11 or on a table, on a piece of furniture, if
12 you have a high enough heat release you can
13 heat the ceiling and the gases that are
14 accumulating there and getting lower and
15 lower as they build, they can become so hot
16 that they -- radiation downward from them
17 will become so intense that it can set
18 everything in the room ablaze in almost an
19 instant once it has reached --

20 THE COURT: Hold it a minute.

21 Who's got that phone? Take that phone
22 out of the courtroom. You can't bring
23 it in. Thank you.

24 Nobody else can bring a
25 telephone in the courtroom.

Hurst -- Cont'd. Direct

1 Go ahead.

2 A Okay.

3 THE COURT: Forgive me, Doctor.

4 MR. KULP: That's all right.

5 THE WITNESS: Thank you, your
6 Honor.

7 A When the ceiling reaches
8 about -- there's a number for it. When the
9 ceiling reaches about six hundred degrees
10 centigrade the radiation downward becomes so
11 intense that everything in a room, walls,
12 table tops, anything exposed to that
13 radiation, will burst into flame and
14 everything goes up within a matter of
15 seconds and then you have full room
16 involvement and this usually winds up with
17 destruction of everything that's there and
18 wipes out the patterns.

19 In this fire the -- Agent Rich
20 testified that the ceiling didn't get that
21 hot. It got hot enough to radiate down, but
22 it didn't get hot enough to set things on
23 fire.

24 Q What is that known as, Doctor?

25 A That's known as flash over. And

Hurst -- Cont'd. Direct

1 flash over, it's not actually a point in a
2 fire but it's a very brief area.
3 Everything -- what happens is like -- works
4 like this. Like a toaster. These black,
5 hot gases up here radiate their heat
6 downward and if their -- as they start to
7 approach about five hundred and ninety
8 degrees, the radiation would become so
9 intense that all of the plastics and wood
10 and what have you begin to give off
11 combustible vapors. And although they're
12 capable of burning, there's nothing to
13 ignite them down below. And then there will
14 come the tiniest spark or some
15 extra-sensitive material somewhere in the
16 room will create a little flame, and that
17 liberates free radicals and the flames
18 simply spread across every surface there
19 which already has these combustible gases
20 above it. And then a holocaust ensues that
21 nobody could survive, not even in a fire
22 suit. People would die when that happens.

23 But if a room is open so that it
24 has too much ventilation, you'll never reach
25 that point. Fire can burn on forever and it

Hurst -- Cont'd. Direct

1 will get hot and radiate down and toast a
2 few things, but nothing catches on fire.
3 That's also if the room is too closed and
4 small, like a bedroom and the door is
5 closed, you can set a bed on fire. That
6 could bring the room to flash over in three
7 minutes flat, but it won't reach flash over
8 because it will burn the oxygen out too
9 quickly.

10 We had something in between
11 here. We didn't get really very close to
12 flash over. Just got a nice hot layer of
13 ceiling gases moving down and you can tell
14 by looking at the walls how far they moved
15 down. They moved about halfway down. They
16 were somewhere, oh, somewhere above the bar
17 they would have been hovering and radiating
18 down, and you can see their effects on the
19 tops of the stools that are in there. Every
20 stool in the whole bar has a black top. So
21 they've all suffered some of this radiation.

22 At least -- the advantage --
23 and, and what Mr. Rich gave us, and I'm glad
24 he did, was the uniformity of this
25 situation. He was acknowledging that the

Hurst -- Cont'd. Direct

1 radiation effects will be the same across
2 the board.

3 So now we look for differences
4 in the burns there to see what other
5 phenomena may have been occurring.

6 Q Okay. Having as you said and
7 testified, heard the testimony of those two
8 men, did you have the occasion to form an
9 opinion regarding the dynamics of any of the
10 fire aspects behind the bar?

11 A Yes. It's pretty obvious behind
12 the bar there's not, not a lot of fuel on
13 the -- at the bar itself. Here. This is --
14 you got metal cooling units here and metal
15 cooling units there. Not much to burn.

16 But somewhere in this area right
17 here between two metal cooling units there
18 is a wooden cabinet. Wooden cabinet with a
19 wooden top and a wooden door on it. It had
20 a cash register sitting on it. And there's
21 a bit of fuel in an otherwise fuel-less line
22 of, of bar area behind the bar area. And
23 that cabinet was burned.

24 This is where the testimony of,
25 of Chief Norris is important. Chief

Hurst -- Cont'd. Direct

1 Investigator Norris. The cabinet was
2 burned, but it wasn't completely burned.
3 First of all, in the picture you can see
4 some pieces of wood that haven't burned up.
5 But he also told us that the door that was
6 on the front of it was only partially
7 burned.

8 And then -- I believe these are
9 his photographs, not certain -- but the
10 photographs of the scene show you that there
11 was a modest fire that burned in that wooden
12 cabinet and left marks on the adjacent
13 stainless steel, but that the fire was of
14 moderate intensity because even though
15 stainless steel is stainless, it does not
16 remain so in a fire. It becomes highly
17 discolored. This stainless steel is lightly
18 discolored. It has seen some fire, but it
19 hasn't seen a really very intense fire.

20 He also told us there was a cash
21 register on the top of this wooden cabinet,
22 and that cash register had a plastic
23 keyboard. And the plastic keyboard would be
24 what we call a 94V0 plastic probably, a fire
25 resistant plastic. That's the kind of

Hurst -- Cont'd. Direct

1 plastic that won't burn by itself, but if
2 you put it in a fire it will burn up.

3 It was only sort of melted and
4 heavily damaged along the front, which tells
5 you that at least as long as that cash
6 register stayed there before the, the top
7 fell in and dumped it down lower, that there
8 wasn't -- there was fire there but there
9 wasn't a heck of a lot of it.

10 So bottom line would be that the
11 testimony and the pictures show you that the
12 cabinet burned but it burned pretty much
13 normally, the way wood burns in, in your
14 fireplace. It probably had a nice little
15 fire going there but it doesn't look like it
16 was enough fire to reach the ceiling and set
17 the ceiling on fire. They would have to
18 bridge something like five feet to get
19 there.

20 So that left the problem of how
21 did the fire get to the ceiling?

22 Q Okay. Now, let me draw your
23 attention to what's been marked as
24 defendant's exhibit number twenty-three for
25 identification --

Hurst -- Cont'd. Direct

1 THE COURT REPORTER: In

2 evidence.

3 Q Oh, in evidence. I'm sorry.

4 And ask you to draw your attention to that
5 and if you could come around here and as
6 you're talking about, testifying about that
7 to the jury, so they can -- we don't have
8 the photo enlarger here today, so. . .

9 A Okay. You want me to bring
10 this?

11 Q Yes, sir.

12 A This is the bar here. And this
13 is the half-wall here. And this is the
14 break in the half-wall where people can walk
15 through on each end but there is still, up
16 above, it's more like a doorway, there's a
17 soffit hanging down. And that soffit goes
18 around the bar area and, or at least it goes
19 across this. This is more than walls at
20 these ends, but the soffit is there and
21 there, and that holds those hot gases in
22 against the ceiling.

23 On the bar itself partway down
24 there's -- you got metal coolers here.
25 They're stainless steel coolers. But

Hurst -- Cont'd. Direct

1 roughly opposite the body here, in the back.
2 Metal cooler. Metal cooler.

3 You got a wooden cabinet right
4 there. And the wooden cabinet is shorter
5 than the bar. It sits down below and then
6 it has the cash register sitting on it. And
7 if you look at a pre-fire film you can just
8 see the readout on the cash register
9 sticking up above the bar. So you figure
10 it's six or eight inches lower than the bar.
11 And if you just look at the picture, it
12 looks like it's all burned up, like it's
13 gone. But what has actually happened is
14 since we know that the door survived, we
15 know that it just had a normal wooden fire
16 there, that they fell down and eventually
17 dropped the cash register on the floor, and
18 then the fire department came along and they
19 did an overhaul and in the overhaul they had
20 to get rid of all the embers, so they got in
21 there and they cleaned this thing out.

22 This was a cabinet under a cash
23 register so it would have had rolls of cash
24 register paper in it, and also receipts from
25 when tradesmen come in and so on and so

Hurst -- Cont'd. Direct

1 forth, so you'd expect to find paper there
2 and sure enough you do find paper. It's
3 paper laying on the bottom and this burned
4 away paper typically is in fires. You
5 always find remaining paper in the fire.
6 Stacks of paper just don't like to burn.
7 It's got little burns, burned edges, but
8 most of the text would still be legible on
9 it. And that's lying there, back on the
10 floor where it's pulled out.

11 When you look at the pre-fire
12 photo you also learn that behind the cash
13 register what looks like a log book and on
14 this particular day there was some envelopes
15 up there and some other paper items and what
16 have you, and these would have at some point
17 in the fire have gotten singed, burned if
18 they're stacked there or something, and they
19 would have come down.

20 So there's not much fuel there.
21 But you got a nice, heavy burn in the
22 walkway, just in one spot. And that spot's
23 more or less in front of that cabinet, so it
24 sort of looks like somebody said "I think
25 I'll start a fire there." And they put

Hurst -- Cont'd. Direct

1 something down there and set it on fire and
2 that set the wood on fire.

3 The problem with that theory is
4 that that's really hard to do with paper.
5 You can do it if you wad up a bunch of
6 pieces and take some time and stack it up
7 there so that the heat from the first sheet
8 can effect the second sheet and the third
9 sheet and the carbon is produced and radiate
10 down. But it's really hard to do with
11 writing paper or newspapers or what have
12 you. It tends to just burn at the edges and
13 go out.

14 So the question is if, if it
15 wasn't this modestly burning piece of wood
16 cabinetry that set the ceiling on fire, then
17 you need to find another mechanism for the
18 fire to get from wherever it started to the
19 ceiling.

20 One possibility would be, and I
21 don't think this happened, but somebody
22 might have struck a big match and held it up
23 to the ceiling anywhere, long enough to
24 finally start a fire. And if they did, it
25 would have spread across, become a uniform

Hurst -- Cont'd. Direct

1 fire, radiated down, and if it could find
2 some fuel it would have set things on fire,
3 whatever it can find high. It can't set it
4 on fire down low because it didn't get to
5 flash point. But it, but up here of course
6 you, you really got some high temperatures,
7 much higher than what's produced by the
8 radiation.

9 So my job began to be to find
10 out what was there before the fire. You
11 can't tell after the fire because everything
12 gets either burned up or cleaned out or
13 moved by the hoses or what have you, so it's
14 kind of difficult.

15 Luckily, there was a pre-fire
16 video and I got to look at the video, and of
17 course it wasn't made for this purpose and
18 it was probably made by somebody who was
19 drunk so it, this video flies all over the
20 place, but it takes a short sweep behind
21 the, the bar and at least in 1996, the year
22 before this fire, I know what was back
23 there. And there was a lot of fuel back
24 there hanging on the walls because you had
25 bags of potato chips and other snack foods.

Hurst -- Cont'd. Direct

1 Papers pinned up and, and this and that.
2 And just various items, and a big old stack
3 of styrofoam bowls of the sort that nachos
4 are served in. About that big around and a
5 stack about that deep. Polystyrene. Foam
6 and plastic. A wonderful fuel. Melts,
7 burns, smokey as heck, and it will set
8 anything else on fire.

9 So I said well, there's a
10 mechanism that will work. I don't know
11 where the ceiling got set on fire, but if, I
12 know it did get set on fire so wherever it
13 was set on fire, the heat would have gone
14 over behind the bar. Nothing to stop it
15 from going across the ceiling and it would
16 have found all this stuff hanging up there
17 in plastic packages.

18 That would catch on fire and it
19 would fall down and it would land in this
20 general area, because the packaging is kind
21 of here and here. So that general area is a
22 good place for bags of potato chips and
23 peanuts and other plastic stuff to land.

24 This then made some sense. If I
25 can figure out how the ceiling caught on

Hurst -- Cont'd. Direct

1 fire, then I can explain why this wooden
2 cabinet burned, because the ceiling set the
3 fuel on the wall on fire, the fuel fell
4 down, and it set the front of the cabinet on
5 fire, and the cabinet had plenty of time to
6 sit there and burn the way wood normally
7 burns. And in fact it was kind of like
8 being in a fireplace because it had a, it
9 had a concrete wall behind it and it had
10 stainless steel on the sides. So in effect
11 it was -- and you open -- at the top would
12 be the chimney. So it was burning about the
13 way it would burn if you put it in a
14 fireplace.

15 But when you look along this
16 wall behind the bar though, to see did
17 somebody set the paneling on fire or did
18 they set a shelf on fire or something like
19 that so that the fire traveled up to the
20 ceiling, the first thing you find out is
21 that not many photographs were taken of that
22 because I think it was Agent Rich who said
23 what he saw, on the other side of the
24 walkway behind the bar was just some
25 radiation damage from the cabinet burning.

Hurst -- Cont'd. Direct

1 But there is some photographs
2 where you can look down the bar and there is
3 no fire path up there. There's some wooden
4 shelves sticking out all along and they show
5 some radiation damage, but usually when you
6 got shelves on a wall they are just great
7 for burning up. One shelf burns the next
8 shelf and it usually guts them out and all
9 you see are the metal brackets that are
10 holding them there. There's nothing like
11 that there.

12 Q Let me hand you State's exhibit
13 forty and State's exhibit ten and ask you to
14 look at those and see if -- I just picked
15 them -- if they would relate to your
16 testimony at this juncture?

17 A Yes. Here you see some of the
18 shelves and cabinets, and some of it is
19 light-weight wood.

20 Q Please hold it up for --

21 A I don't know if you can see from
22 there, but it's light-weight wood on there.
23 Looks like shutters on the cabinet and so on
24 and so forth. You can still see the color
25 of the wood. And the only darkening is the

Hurst -- Cont'd. Direct

1 smoke level which has come down about
2 halfway in the picture. And that has banked
3 down from up top and has not done any damage
4 to this cabinetry at all, even though it was
5 just a short way up from where the cabinet
6 was burning.

7 And then there's another
8 photograph, and actually you can get a shot
9 of some of the cabinetry directly behind
10 this cabinet, and you can see that there's
11 only radiation damage there. Let's see.

12 Well, here's a good shot of the
13 ceiling. Let's look at that first, since it
14 came up.

15 Q And please identify that by the
16 exhibit number on the back, Doctor.

17 A This is exhibit number
18 thirty-five, and it's a long shot looking
19 down the bar and the lens was wide enough to
20 pick up nearly the entire ceiling. And I
21 don't know if you can see it, but can I --

22 THE COURT: Yes, sir.

23 MR. KULP: With the Court's
24 permission.

25 A If you look at the ceiling

Hurst -- Cont'd. Direct

1 you'll see that there used to be paneling up
2 there and it was wired or screwed onto a
3 metal framework that was behind the grid of
4 metal. And essentially all of that paneling
5 is gone and you see this perfect gridwork
6 all the way down, and the damage appears to
7 be perfectly uniform.

8 Apparently above that they had a
9 layer of noncombustible insulation and the
10 fire just simply didn't go any further.
11 Readily burned the paneling up but then
12 couldn't find any fuel, just saw metal and
13 glass probably, and that was the end of it,
14 for the fire.

15 Let's see if I can. . .

16 Here's one. This is one that
17 will give you a hint. If you look at the
18 left-hand side of this one you can see the
19 bottom of the cabinetry directly opposite
20 the cabinet that we were talking about, the
21 bottom of the shelves. And it's a little
22 bit discolored and what have you, but it
23 hasn't seen anything more than radiation.

24 In the available pictures I
25 couldn't find anything on that wall that

Hurst -- Cont'd. Direct

1 looked like there'd been a fire trail that
2 went up the wall from anything that was
3 started on, on the floor.

4 Then I turned my attention to
5 the other side of the bar. Didn't look like
6 much had happened over there. This is one
7 of those deceptive fire scenes. Very often,
8 you don't very often -- you get a lot of
9 house fires and building fires, and usually
10 it's some kind of combustibles around like
11 stuffed chairs, couches, or a carpet that
12 will burn. But on this side of the bar all
13 you've got are these wooden stools. They
14 probably have a little plastic on the top of
15 them, but they're just straight wood and
16 they're light-colored wood. This whole area
17 here is the concrete with, with asbestos
18 tile on it that is just solidly embedded in
19 the concrete. It's hard to affect an
20 asbestos tile with a blow torch. They don't
21 make them any more. They were hard like
22 concrete and absolutely impervious to fire.

23 The pre-fire photos of this, you
24 could see it in the video, show that this
25 floor was black and ugly. It was just black

Hurst -- Cont'd. Direct

1 from years of traffic going across it,
2 getting grit into it, and it was mottled.
3 In fact it looked before the fire kind of
4 like a lot of floors look after a fire. But
5 there wasn't anything to burn there.

6 The nearest fuel was this
7 half-wall, which again was paneling, pretty
8 much like this bar in front of the jury.
9 Only fuel that I could see out here was the
10 blouse. That was pretty well burned in the
11 back. But there's not much mass there. Not
12 much fuel. And the chairs, the chairs were
13 not really damaged. Some of them were
14 blackened and some of them were not.

15 Q Let me hand you in that regards
16 defendant's exhibit number twenty-three and
17 ask you if that would aid you in your
18 testimony? If so, please. . .

19 A Yes. This was a picture that
20 gave me a clue of what I believe happened
21 there. When I noticed this wooden stool had
22 a burned top, which you expect that, that
23 cloud is radiating straight down on it, but
24 it actually showed a fire pattern. The edge
25 of a fire pattern. You see, when fire

Hurst -- Cont'd. Direct

1 burns, it burns up a little bit and out
2 several degrees. Comes up and it goes out
3 and if it passes across a combustible
4 surface it will leave a trail which, if you
5 extrapolate it, you call it a "V pattern".

6 In other words if you set this
7 piece of wood here on fire in front of the
8 jury, you set it on fire with a blow torch
9 down at the bottom and manage to get it
10 caught, it will burn into a nice "V" coming
11 up. The pattern will get wider as it goes
12 up.

13 And if you only have a simple
14 fire, you can look that the bottom of the
15 "V" and say that the fire started there.
16 But I looked at this stool though and said
17 hey, it's only half-burned. Then I looked
18 at the stools in the back and they were
19 browned or blackened, all of them, uniformly
20 blackened. And it finally dawned on me that
21 all of the stools down this way were black,
22 solid black, and then you got to about here
23 and suddenly you had a stool that was
24 half-blackened and it showed a "V" pattern
25 on it, moving away, in this direction. And

Hurst -- Cont'd. Direct

1 then you had these two stools here, and they
2 were pristine. The tops had seen the
3 radiation but the wood on the legs was just
4 wooden-colored. Nice light wood.

5 The half-wall here, the
6 half-wall was made out of the same paneling
7 that was used in the rest of the bar. When
8 you look at the back of this half-wall you
9 can see how far the smoke layer came down,
10 and it came down just to about what would be
11 bar level, approximately, and everything
12 below that in the photographs looks as clean
13 as the wood in front of you there. That
14 told me how far the fire had actually banked
15 down where I could expect to see fire
16 staining.

17 But when you go around to this
18 side of the wall, this fire stained all the
19 way down to the floor, and almost uniformly.
20 The whole length of this half-wall is
21 totally, is blackened from that end to this
22 end. It's not blackened at all on this
23 side. Nothing unusual there. You know you
24 had fire back here and you didn't have any
25 over here, but we get to see, the privilege

Hurst -- Cont'd. Direct

1 of seeing only one end, this end right here
2 is blackened, this stool is blackened, this
3 stool is blackened, that stool is blackened,
4 that one is half-blackened, and these are
5 white.

6 And then we get to see the end
7 of the bar down here where we've got more of
8 that paneling, and lo and behold, it's right
9 there again. You can see the smoke level
10 and clear wood underneath it.

11 So why would this entire side of
12 this wall be blackened and this side of the
13 wall be blackened, and all of this be
14 totally unblackened here, and why would
15 these stools here, these, those two and that
16 one be black, this was half-black, and those
17 two still as white as wood gets? And it's
18 obvious. Somebody, some source of fuel
19 extended from somewhere back here, down
20 through here, but didn't approach these
21 stools here. It must have come like this,
22 got close enough to this one to put a "V"
23 pattern on it, overlapped this one,
24 blackened this side, and didn't touch
25 anything here. This is pristine in here,

Hurst -- Cont'd. Direct

1 except for the smoke layer that has banked
2 down.

3 The local fuel there that we
4 don't see. Something burned there intensely
5 enough, but for a short period of time. I
6 say short because if it had burned for a
7 long time, it would have charred these
8 stools heavily and they would have simply
9 have had their legs burned out from under
10 them and they would have toppled over.

11 But they don't look that way at
12 all. They're so uniform they almost look
13 like they were painted black. The thing
14 that can do that is vapor from an
15 accelerant. If you pour an accelerant on a
16 concrete floor and if it's a flammable
17 accelerant, I don't mean that flammable in
18 the sense that it will burn, all accelerants
19 burn, but if it's flammable in the sense
20 it's giving off enough vapor so that the
21 vapor can ignite, then if you pour it out a
22 flame will move rapidly across the vapors,
23 usually about the same speed, about two feet
24 per second. You will create a very hot
25 cloud. It's got enough intensity to set

Hurst -- Cont'd. Direct

1 light-weight things like a blouse on fire.
2 Probably not enough to set blue jeans on
3 fire, but it can be hot enough to brown your
4 wood, to darken your wood. And that's
5 exactly what we're seeing here.

6 If you set a fire of that size,
7 it will be a -- and it's a very volatile
8 accelerant, one that's literally flammable,
9 is creating a flammable mixture of gases
10 above it, because of the wide surface area
11 the heat release rate is astronomical.

12 Wood is a real slow poke when it
13 comes to burning. You light wood and it
14 will burn for a couple of hours if it has
15 any mass to it. But if you light an
16 accelerant, it will simply sort of "flash
17 off". The heat that radiates down from the
18 vapor immediately vaporizes the rest of it
19 and you get this fireball that occurs,
20 doesn't last long, but it all winds up at
21 the ceiling and it will set a ceiling on
22 fire.

23 If you use, if you assume for a
24 second that there was an accelerant and that
25 these marks explain, the marks are evidence

Hurst -- Cont'd. Direct

1 of that accelerant, then you can
2 "back-engineer" this thing and everything
3 makes sense. Somebody starts here, pours an
4 accelerant along the body, maybe around the
5 body, comes over this way, and then stops.
6 Runs out of the accelerant or just stops
7 pouring. Doesn't get close enough to these
8 walls here to cause them to blacken.
9 Approaches this stool here, but then moves
10 over in this direction. Then you've got
11 your flash. It discolors the stools. It
12 sets the ceiling on fire. The ceiling gases
13 which are banked down to about here will
14 have banked over, all that stuff that's
15 hanging on the wall back there, the potato
16 chip bags, the peanuts, that sort of stuff,
17 they'll all come tumbling down, land on the
18 floor back here. Then they will set the
19 wood on fire and the wood will burn at a
20 modest rate until the fire department
21 finally puts it out.

22 The theory that an accelerant
23 was poured there explains what's in the
24 pictures. It's satisfactory proof for me
25 that you can see the basis that I have for

Hurst -- Cont'd. Direct

1 the proof.

2 There may be other ways to
3 explain this fire, but this is the best one
4 that I've been able to find, and so I
5 conclude that an accelerant was used, was
6 poured in an attempt to destroy the evidence
7 of how the person was killed, which is
8 pretty typical of these arson/murder cases,
9 and that it was poured by somebody who was
10 on their way out. Started about here and
11 they poured down to about there so that they
12 got on the other side of this and then they
13 stopped pouring.

14 Q Had samples been taken for
15 testing for the presence of an accelerant in
16 an area, in any, any area in the bar, tell
17 the ladies and gentlemen of the jury how
18 those samples might be analyzed for
19 identification of the nature or type of the
20 accelerant.

21 A Tell you what's missing here,
22 because I've testified this way before.
23 I'll be the first person to tell you that
24 just looking at a fire pattern and saying I
25 know that an accelerant was used, really

Hurst -- Cont'd. Direct

1 isn't enough. And I, I wish I knew the
2 answer to the next stage.

3 The next stage, once you've
4 looked at a fire pattern and said this makes
5 sense in terms of an accelerant, is to
6 actually analyze some of the debris that's
7 there, using gas chromatography combined
8 with mass spectrometry to see if you can
9 identify the accelerant that was used.

10 And in this case the obvious
11 thing you would have done, kind of hard to
12 find it on asphalt tile. Just going to
13 evaporate. You'd have to jackhammer the
14 stuff up. But this body also gives us some
15 evidence, and you get the other little
16 pieces of evidence now that there was a fuel
17 here. This body's got wrap-around burns.
18 They come down into the inner curve. And
19 it's also got some cloth that burned in,
20 under. That is indicative of an accelerant.
21 It's not proof. It's indicative of an
22 accelerant. How did fire get under the
23 body?

24 Also have to take into account,
25 you got falldown coming down from this, from

Hurst -- Cont'd. Direct

1 the ceiling. Doesn't just burn. It also
2 drops in flaming bits down. The kind of
3 bits that this kind of material drops are
4 the surface layer. Surface layer has some
5 plastic in it. It's impregnated with
6 hydrocarbon-type materials.

7 You can see that this is one of
8 those where the hydrocarbon-laden layer
9 comes loose, very thin and curls up, and it
10 will drop in flames and land on the ground.
11 And if it finds something to set on fire
12 there, it will set it on fire. For
13 instance, working against my theory, one of
14 those could have fallen and landed on her
15 blouse and it could have set her blouse on
16 fire, and the fire -- it was a cotton
17 blouse. It could have worked its way around
18 as -- not burning with flame, but it could
19 have smoldered around underneath her and
20 that could have caused some of the burn
21 damage, you see. So it's indicative of an
22 accelerant, but you can't prove it.

23 But there's more evidence. The
24 stuff that falls down on the floor doesn't
25 burn very well, for a simple reason. You

Hurst -- Cont'd. Direct

1 can't start a fire with a pile of just about
2 anything that's an inch high. You have to
3 stack it up to get a fire. If you have a
4 camp fire, for instance, and it's burning
5 very nicely, you got a whole bunch of sticks
6 burning, you got a cheerful fire and you
7 knock it out, just spread it across the
8 ground, all those little sticks want to go
9 out. They just start smoldering again.
10 They lose their open flame because they're
11 not being re-enforced by the radiation of
12 other sticks. They're lying on a cold,
13 relatively cold surface compared to the
14 fire, so they just sit there and smolder. A
15 lot of people put their camp fires out that
16 way, just by scattering it.

17 So these little bits and pieces
18 that falling down are not much of a heat
19 source themselves, but they're a good source
20 of ignition. They'll ignite something if
21 it's ignitable. If all you've got out here
22 is a concrete floor, there's nothing to
23 ignite. On her back they might ignite
24 something. The only thing they're not going
25 to do is create the impression of a big fire

Hurst -- Cont'd. Direct

1 on the floor.

2 But there was a fire on the
3 floor and we know it because there's a
4 carafe located right about here, there's the
5 body, and that carafe looks like it had been
6 in a trash fire or an accelerant fire. It's
7 all smoke, blackened, all over.

8 There's another carafe top,
9 approximately the same dimensions, located
10 past this half-burned stool, up in this
11 area, and it is basically clear glass. It
12 shows a little soot deposition, but it
13 doesn't look like it's been in a fire at
14 all. You got those two.

15 Down here, under the bar, you
16 have burning under the lip of the bar
17 sticking out. The only time you see that in
18 a fire of this kind is if you go past flash
19 over. Once you get past flash over you got
20 so much activity going on that things start
21 to burn underneath. But a typical fire
22 that's where everything is coming from
23 overhead and you're getting some falldown,
24 you will never see a burn underneath. And
25 the charring here on the very edge of the

Hurst -- Cont'd. Direct

1 bar is fairly significant and it shows you
2 the flame coming up like this and going
3 across. If this is the lip of the bar, it's
4 going up here, burning the edge of the bar
5 pretty well, and then filtering back so that
6 you've got a light layer of charcoal and
7 smoke over the whole thing.

8 So the indicators are unequal.
9 You got two wine carafes, vastly different.
10 One of them has seen a lot of fire. The
11 other hasn't seen any fire. You have
12 burning underneath here. You have burning
13 underneath the body. You have the entire
14 wall here blackened due to the action of the
15 fire all the way down to the ground. You
16 have the same thing on this end here. You
17 have no effect over here, yet the radiation
18 and the falldown are the same all across
19 that area. In other words, if you're going
20 to get falldown fire over here, you're also
21 going to get it here. But there's no
22 evidence of anything happening there.

23 There's nothing up against these
24 walls that's happening. It's all localized.
25 Back in here. Something has burned back

Hurst -- Cont'd. Direct

1 there.

2 Now I think what they should
3 have done is taken a sample of the clothing,
4 especially underneath where it was protected
5 from the radiation and from the falldown,
6 and that clothing should have been analyzed,
7 using gas chromatography to see if they
8 could find an accelerant there.

9 No samples were taken for
10 analysis, and so my analysis has to end at
11 that point because there is nothing for me
12 to look at that's been produced by a
13 laboratory. Your back fire patterns. You'd
14 like to have more, but you work with what
15 you've got.

16 For me, the pictures are pretty
17 convincing. Somebody literally torched the
18 area of this body.

19 Q Doctor, let me hand you
20 defendant's exhibit -- well, if you can,
21 State's exhibit number seventeen. There are
22 gloves if you need them.

23 A That's all right.

24 Q And ask you if your testimony --
25 to explain your testimony regarding the

Hurst -- cont'd. Direct

1 appearance of that piece glass in the
2 position it was found that you testified
3 about near the, the victim's body.

4 A Fine. This piece of glass has
5 been in a fire. Radiation won't do anything
6 to it. A little piece of falldown won't do
7 anything. Might leave a little streak on it
8 or something, but this has been surrounded
9 by fire, all the way around. And it's not
10 as dark as it was in the pictures. It's
11 been handled by a lot of different people.
12 It's been swabbed and so on. This is just
13 what's left over.

14 If you have the other one, it's
15 interesting to look at the two to compare
16 them.

17 Q I now hand you defendant's
18 exhibit number eleven.

19 A Okay. And this one has seen a
20 fire environment. You can actually see some
21 minerals. That's from ash that fell on it,
22 the white stuff, and then water got on and
23 spread it around a little. But there is
24 such a difference between those. This looks
25 like what you find when you're out hiking

Hurst -- Cont'd. Direct

1 and you find some old place where they used
2 to burn their trash and you find an old
3 bottle. They look like that.

4 This is typical glass out of a
5 fire. It's been in an unpleasant
6 environment but it hasn't been in the middle
7 of a fire.

8 And these things are located,
9 the black one here and the other one a
10 little farther up the bar, and located where
11 the fire seems to end when you look at the
12 stool.

13 Q All right. Doctor, I want to
14 have a couple of photos marked to use for
15 your review. If we can have these photos
16 marked.

17 (Whereupon, marked for
18 identification were Defendant's Exhibit
19 Nos. 37, 38, and 39, photographs.)

20 MR. KULP: All right. We offer
21 these, your Honor, I think without
22 objection.

23 THE COURT: Is there any
24 objection?

25 MR. DURANT: No objection.

Hurst -- Cont'd. Direct

1 (Whereupon, entered into
2 evidence were Defendant's Exhibit Nos.
3 37, 38, and 39, photographs.)

4 Q Doctor, handing you defendant's
5 exhibits in evidence, photographs 37, 38,
6 and 39, and ask if you could, one at a time,
7 tell the ladies and gentlemen of the jury if
8 those photographs aid or supplement your
9 testimony that you've given and, if so, how?

10 A Yes, they do. Exhibit
11 thirty-seven is a shot under the lip of the
12 bar and it also shows the heavier charring
13 right out on the edge of the bar. You're
14 going to see some clean wood in that shot
15 but that's because it was so badly burned
16 that the piece that they nailed across the
17 front has burned and fallen off, leaving the
18 underlying wood clear. That's number one.

19 In the lower left-hand side you
20 can see one of the blackened legs sticking
21 up.

22 Q So is the testimony that would
23 be the underside of the bar proximate to the
24 area of the victim's body?

25 A Yeah. It's actually -- comes at

Hurst -- Cont'd. Direct

1 about her feet or a little further down than
2 her feet. She's not actually very close to
3 it so some other fuel back there, and it's
4 immediately adjacent to completely blackened
5 area. Oh. There's a mark on here.

6 Q Would you please identify the
7 photo, by the way?

8 A Yes. This is thirty-eight.
9 There is a mark on here, a white line right
10 there. Just a little imperfection in the --
11 just to the right of the stool. That mark's
12 approximately the middle of the, of the
13 photograph that's being handed down now
14 where you can see the underside burned. You
15 can also see the missing front where the
16 bare wood is showing. That tells you where
17 it is.

18 Q How about the next photo,
19 defendant's exhibit number thirty-nine.

20 A Number thirty-nine shows you the
21 other side of the half-wall. And that shows
22 you exactly how far the gases banked down in
23 that area. And you'll see that it is
24 unaffected by the fire and has about the
25 same color that you see at the ends of the

Hurst -- Cont'd. Direct

1 bar area itself where there obviously was no
2 accelerant at those ends either. Pretty
3 uniform in the depth at which the smoke is
4 sitting.

Has this been passed?

5 MR. KULP: If your Honor please,

6 I would like to publish exhibit,
7 defendant's exhibit number twenty-three
8 in evidence to the jury, your Honor.

9 Q If you've already addressed
10 that, I don't know if you did or not in your
11 narrative. Please go ahead and publish
12 that.

13 A Let me explain the significance.
14 You have one photograph there where you will
15 see one aspect of a stool seen from the side
16 of the body, and you will see that the legs,
17 the two legs you can see appear to be
18 completely blackened. This photograph shows
19 you the other side of the legs, and you can
20 see that they are not blackened. And it
21 also lets you see that since the bottom of
22 this unblackened leg here on the other side
23 is black, so the other side has seen fire.
24 The fire has come by it and has hit the
25

1 second leg higher because heat rises and
2 it's gone to the third leg, which is even
3 higher. And that's what we call a "v
4 pattern".

5
6 So if you look at this
7 particular stool from this side, it looks
8 completely different than it does from the
9 other side.

10 Q Let me draw your attention to
11 State's exhibit number forty-one and ask you
12 if -- does that depict some of the
13 observations that you've made about the
14 stools from a different angle?

15 A Yes, it does. That's a perfect
16 example. You can see two black legs and two
17 white legs on one stool and the previous
18 photograph I showed shows that chair from
19 the other side, and you can see that the
20 other side of the blackened leg is actually
21 not blackened.

22 Q Okay. Let me ask you to please
23 examine State's exhibit number two, and ask
24 you if you can identify that and how what's
25 depicted there might impact your assessment
of this fire scene?

Hurst -- Cont'd. Direct

1 A Okay. This photograph I'm
2 holding now shows you the rear exit. You've
3 gone past the bar and as we left the bar
4 area, the cigarette machine on the left
5 you'll see, and there's a doorway. But
6 there's been no accelerant poured up here
7 because again you'll be able to see the
8 smoke layer down in the bottom half or the
9 bottom third, fourth, whatever, of the wall
10 itself is your original wood color.

11 So whatever it was that
12 blackened the bottom of the half-wall,
13 didn't reach as far down as the end wall.

14 Q Could you please explain to the
15 jury -- you might take your seat. I know --

16 A Yes, sir.

17 Q I'll take this chart down.
18 Please explain to the jury the difference
19 between flammable and combustible.

20 A I can best do that with an
21 example. Let's take the bar scene. Imagine
22 that I went in and I poured kerosene, which
23 is called a combustible liquid, on the floor
24 and I lit it. I'd have to hold the match or
25 a lighter down to it for a few seconds for

Hurst -- Cont'd. Direct

1 it to ignite because not being a flammable
2 material I would have to raise it, its
3 temperature to the point where it was giving
4 off vapors that could ignite. Liquids
5 themselves don't burn. It's always the
6 vapors above the liquid that burn. Once a
7 fire started, it would spread at a very,
8 very slow rate.

9 Even on a carpet like this, if
10 you pour a line of kerosene three feet long
11 it will take it a couple of minutes to burn
12 along that line. Very, very slow. And it
13 is slow because the kerosene has to heat the
14 other kerosene in front of it that's on the
15 cold cement, bring it up to its flash point,
16 then it can ignite. Then that increment has
17 to heat the concrete ahead of it to get the
18 kerosene hot enough to give off the vapor.
19 So it would move very, very slowly.

20 If you had a floor covered with
21 kerosene and you had these stools there, it
22 would burn those stools up because rather
23 than flashing off and losing all its heat to
24 the ceiling, it would burn low and slow, and
25 it would overcome the thermal inertia of the

VOLUME SIX OF SIX VOLUMES

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Luke N. Brown, Jr., Special Circuit Court Judge

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RESPONDENT,

V.

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Hurst -- Cont'd. Direct

2502

1 appears to be what was used here. And so
2 the common things that could fall into that,
3 some charcoal lighter fluids are flammable.
4 Most of them, though, are not. The ones
5 that are made by respectable companies are
6 not. They're combustible. You have to hold
7 your match down there for a while to heat
8 them up to get them to burn. But there are
9 some on the market that go "whumpf" when you
10 put them out. And then there're a whole
11 bunch of sort of paint products, paint
12 thinners, that are flammable and even larger
13 number of them that are combustible. So we
14 know this fire was not -- we know it wasn't
15 done with one of the higher boiling things.
16 Kerosene wasn't used here, for instance.

17 The aspect that's important for
18 combustibles is if you pour two puddles near
19 each other. One will burn without setting
20 the other one on fire. If they're not
21 really close to each other, the fire won't
22 spread from puddle to puddle. With gasoline
23 you can pour one little puddle here and pour
24 another one ten feet away and the first one
25 ignites the second one because the vapors

Hurst -- Cont'd. Direct

1 will run across the floor and flash back.

2 So even spots of a flammable material laid
3 out will give you a uniform burn.

4 Q And, Dr. Hurst, are you
5 absolutely sure that your assessment of the
6 cause and origin of the fire is the way it
7 happened?

8 A No. No. I wish it were.

9 Q Why not?

10 A I'm -- I mean I'd like to be
11 sure about something in this, but when you
12 work with limited evidence like this you
13 give it your best shot based on the science
14 and on the experiment -- experience and the
15 experiments that you've run. I can tell you
16 that I'm pretty well convinced that an
17 accelerant was used here and that it was
18 poured in an effort to cover up the murder
19 or cover up the method of the murder, get
20 rid of things like hairs and blood and that
21 sort of thing so that they couldn't be
22 analyzed. It looks like a fairly typical
23 scene there. The evidence is strong for the
24 use of an accelerant, but I can't call it
25 conclusive because they did not take samples

Hurst -- Cont'd. Direct

2504

1 and run an -- for an accelerant analysis
2 with equipment that they've got. I'm sorry
3 they didn't and I imagine they're sorry,
4 too.

5 MR. KULP: Thank you very much.
6 Please answer any questions Mr. Durant
7 may have.

8 MR. DURANT: May we approach?
9 (Whereupon, there was an
10 off-the-record bench conference.)

11 THE COURT: Would you like five
12 minutes?

13 THE FORELADY: Yes, sir.

14 (The jury leaves the courtroom
15 at 4:57 p. m.)

16 THE WITNESS: Would you like me
17 to step down while they're out, your
18 Honor?

19 THE COURT: You can. You can
20 get down and walk around. Just don't
21 discuss the case with anybody yet.

22 THE WITNESS: I'm perfectly
23 content here and if I'm under your eye
24 I don't have to worry about it.

25 (Whereupon, a recess is called

Hurst -- Cont'd. Direct

2505

1 at 4:58 p. m.)

2 (The Judge enters the courtroom

3 at 5:17 p. m.)

4 (The jury enters the courtroom

5 at 5:18 p. m..)

6 THE COURT: All right. Go

7 ahead.

8 MR. DURANT: Thank you, Judge.

9

10

11

12

13 G E R A L D L E R O Y

14 H U R S T, previously sworn as a

15 witness in the presence of the jury,

16 resumes the stand and testifies as

17 follows:

18 CROSS-EXAMINATION BY MR. DURANT:

19 Q The NFPA-21, 921 that is a guide
20 for fire investigators. Is that correct?

21 A For fire and explosion
22 investigation, yes.

23 Q And that is the one that you
24 said is a learned treatise in the area of
25 fire investigation. Is that correct?

Hurst -- Cross

2506

1 A Yes. It doesn't cover all the
2 bases but it is, put it this way, it is
3 imperfect but it is better than anything
4 else.

5 Q And does it state that: "The
6 investigator should keep in mind that during
7 the progress of a fire burning debris often
8 falls to lower levels and then burns upwards
9 from there. This occurrence is known as
10 falldown or drop-down. Falldown can ignite
11 other combustible materials, producing low
12 burn patterns that may be confused with the
13 area of fire"?

14 A Yes, it does.

15 Q Is that true?

16 A Yes. That's true.

17 Q I may have misunderstood your
18 testimony. Did you say that there was no
19 burn pattern at the back wall of the bar?

20 A No. I didn't say that.

21 Q Was there a "V" pattern on the
22 back wall of the bar?

23 A Oh, there're probably several.
24 It's rare that you have a fire that you
25 can't find at least a few "V" patterns, and

Hurst -- Cross

1 frequently you can find fifty or sixty of
2 them.

3 Q Okay. And so there was a "V"
4 pattern on the back side of the bar as well?

5 A I'm sure there was probably one
6 "V" pattern back there. You usually see "V"
7 patterns.

8 Q And you aware that this fire
9 spread into the building, and referring to
10 State's exhibit number one, this fire
11 extended and caught on fire the building on
12 this side. Is that correct?

13 A Yes. That's right.

14 Q But didn't even catch the roof
15 on fire on this side of that little
16 half-wall?

17 A Probably not. The fire --
18 probably there was a hole in the ceiling on
19 the other side of the, of the wall, and it
20 probably just went on the other side of the
21 soffit. That, the hot gases spilled over
22 the soffit, probably went right up into the
23 attic.

24 Q But it may have --

25 A It's also broken through there.

Hurst -- Cross

2508

1 You can't tell from the photos that there
2 isn't some channel where it could get up
3 there, so it might have.

4 Q Okay. But there's no question
5 that this building was caught on fire as
6 well?

7 A No. It -- there was fire damage
8 in the adjacent building.

9 Q Fire damage --

10 A Yes.

11 Q -- in the adjacent building?

12 A Yes.

13 Q And no fire damage to the
14 ceiling, the ceiling --

15 A Basically --

16 Q -- in this --

17 A -- just smoke still identifiable
18 as what it was originally.

19 Q Okay.

20 A If there was, it doesn't show in
21 the photos and I don't have any reason to
22 believe there was any.

23 Q Now, you would acknowledge that
24 things that you relied on in looking at the,
25 in these photographs, could have been moved

Hurst -- Cross

2509

1 to some degree during the putting out of
2 this fire?

3 A Yes.

4 Q Including the stools?

5 A Yes.

6 Q Correct? Including these
7 carafes here?

8 A Possibly. I doubt it. But it's
9 not impossible.

10 Q Okay. And for example, this
11 one, being hit with a high stream, high
12 stream thing of water or a stream of water
13 could tend to wash off some of the char if
14 that were the case, too, wouldn't it?

15 A Some of it, but this is an oily
16 char. It's, it's pretty hard for water to
17 take it off.

18 Q Okay. Now, I hand you what's
19 been marked as State's exhibit number
20 fourteen which is a photograph and it shows
21 State's exhibit number seventeen, being this
22 piece of carafe, in the location that it was
23 found.

24 A The darker one.

25 Q Right. The darker one.

Hurst -- Cross

2510

1 A Yes.

2 Q And there appears to be a great
3 deal of debris right around where that, that
4 carafe was found. Would you agree to that?

5 A It's wash-up debris.

6 Q Could be wash-up debris?

7 A Well, I think it is. The bar
8 support acts like a dam and when they come
9 in from the, from the door, this is very
10 light-weight material so it probably gets
11 washed up. Very easy. You could blow it up
12 with your breath if it were dry.

13 Q Could it also be falldown debris
14 from the burning ceiling?

15 A Well, it is falldown debris from
16 the ceiling, but I'm saying it --

17 Q And if it --

18 A -- didn't all fall there --

19 Q I'm sorry.

20 A -- in the bar. It was pushed
21 under the bar by the water.

22 Q And could it be falldown debris
23 from the ceiling that was on fire when it
24 fell down?

25 A It probably, some of it was

Hurst -- Cross

1 probably flaming as it fell, yes.

2 Q And should that falldown fall on
3 that carafe, it would scorch it, wouldn't
4 it?

5 A It would if a piece landed right
6 adjacent to it and it was burning it would
7 leave a smoke mark on it, yes.

8 Q Okay. Now, human body could be
9 a source of ignition, too, couldn't it?

10 A No.

11 Q Fat in the human body can't?

12 A No. This, those are old wives'
13 tales about spontaneous human ignition.

14 Q I'm not talking about
15 spontaneous human ignition.

16 A Oh. You mean --

17 Q I'm talking about if flame's
18 applied to a body, will a body burn?

19 A It will after if it's applied
20 long enough to heat the body up and dry the
21 water out so that the fat can burn. But
22 that comes to a significant degree only much
23 later in a very hot fire where the body is
24 thoroughly roasted.

25 Q And as you said, obviously

Hurst -- Cross

2512

1 clothing that the body is wearing is
2 certainly combustible?

3 A Yes. In this case it looks like
4 part of the blouse burned up. The blue
5 jeans seemed to be damaged but in -- more or
6 less intact, except where a little bit
7 burned underneath the body. There's kind of
8 a trail there. But they're more or less
9 intact.

10 Blue jean, denim material, if
11 you hold it up and light it so that the heat
12 can rise vertically, it burns very rapidly.
13 But in the horizontal position, it doesn't
14 burn well at all. Especially not if it's up
15 against skin.

16 Q But your testimony is that you
17 can't tell from looking at the clothing
18 itself whether it was started from an
19 accelerant or it started from radiation
20 heat?

21 A No. I can't tell from looking,
22 no.

23 Q Okay. And in that regard, you
24 were contacted by Mr. Kulp when?

25 A Yes.

Hurst -- Cross

1 Q When?

2 A Oh, when? I'm sorry. I didn't
3 hear that. You know, I don't know the exact
4 time. It might have been as much as a
5 couple of years ago. It's been quite a long
6 time.

7 Q Couple of years? Could it be as
8 long as three years ago?

9 A It could be. I'm not, I'm not
10 accurate on it. It's been quite a long
11 time.

12 Q Okay. And I would assume that
13 from the beginning he sent you the video
14 that was shot by the fire department or a
15 copy of the video and all the photographs
16 that you looked at and testified concerning
17 today?

18 A No.

19 Q So you never saw any of those
20 before, beforehand?

21 A I saw them beforehand, but it
22 was not at the very beginning.

23 Q Okay.

24 A We, we discussed it more in
25 terms of just general forensics.

Hurst -- Cross

2514

1 Q Okay.

2 A We weren't discussing it in the
3 context of my actually testifying or
4 appearing or even studying the case other
5 than as just, I have this general interest
6 in any case that involves fire. Civil -- as
7 long as it's an interesting case, I'll ask
8 for details and look at the case.

9 Q But there's no question but that
10 you had this information well in advance of
11 the trial in this case?

12 A Yes. I had it in advance of
13 trial. Yes.

14 Q And well in advance of trial?

15 A Yes. Well in advance.

16 Q And I would assume that your
17 theories were, were developed from, you
18 know, looking at these photographs.
19 Correct?

20 A Well --

21 Q And talking to Mr. Kulp?

22 A I really had to -- I really had
23 to sit in trial and listen to the testimony
24 of the fire experts for the State because
25 the written materials were sketchy at best.

2515

Hurst -- Cross

1 There was very little information.

2 There was -- typically in a fire
3 investigation you get a long report written
4 up with a lot of detail. In this the
5 write-up was simply, sort of amounted to "we
6 walked in, we looked, we saw a burnt
7 cabinet, that must be the origin, there was
8 a burn behind it there on the floor." And
9 that was about it. So I needed photographs
10 obviously, but I also needed some detailed
11 information.

12 Q Well, correct me if I'm wrong,
13 whatever you testified to concerning your
14 opinion here today was based upon what you
15 observed in those photographs?

16 A It was based on what I observed
17 in the photographs and what I heard
18 testified to by the A. T. F. agent and by
19 Chief Norris.

20 Q And the fact of the matter is
21 you never once requested Mr. Kulp to have
22 that clothing tested, did you, the victim's
23 clothing tested?

24 A I don't -- you know, I don't
25 know whether I did or not. We may have

Hurst -- Cross

2516

1 discussed it. I don't recall. We had quite
2 a number of communications. Whether I did
3 or not, I --

4 Q You're well --

5 A -- I can't say.

6 Q I'm sorry. I thought you were
7 through.

8 A No.

9 Q You're well aware that Mr. Kulp
10 had an order allowing him to test whatever
11 he wanted to?

12 A Well, my recommendation was test
13 everything you can get your hands on,
14 independently. Have an independent lab look
15 at all elements of forensic evidence, and
16 that would, of course, included -- I'm
17 always in favor of testing everything if you
18 can. If you can get your hands on it.

19 Q But you don't recall ever once
20 having specifically asked Mr. Kulp to have
21 this clothing tested for the presence of an
22 accelerant?

23 A I don't know. I mean if the
24 subject came up, I would have recommended
25 it. I don't know if that subject came up or

Hurst -- Cross

1 not.

2 You know, excuse me, counselor.
3 I've spoken very badly there. I've got to
4 add something to that. That's assuming that
5 the clothing that was taken from the body
6 was put in hermetically sealed cans.

7 If the material was just
8 collected and put in bags, or just collected
9 and stacked somewhere or boxed, it would be
10 pointless to look for accelerants. They
11 don't hang around that long.

12 You have to -- you have to get
13 them hermetically sealed in an impervious
14 container as close to the time of the fire
15 as possible, preferably right after the
16 fire. Then you can maintain them for a long
17 time.

18 But just having evidence that's
19 let's say a month old, two months old, it
20 would be pointless to try to analyze it.
21 Whatever accelerant was used would have had
22 to have been volatile, so it would have
23 volatilized, be gone.

24 Q And the bottom line is, and I
25 believe you said it at the conclusion of

Hurst -- Cross

2513

1 your testimony, is that you can't tell that
2 your version is correct and the other
3 version is incorrect, can you? And you
4 wouldn't be able to unless there was some
5 test for the accelerant?

6 A That's, that's sort of true.
7 But I'd have to explain it this way. I'm
8 rarely ever super-certain about anything and
9 I'm absolutely never a hundred per cent
10 certain of anything because in -- my
11 scientific philosophy is that only a fool is
12 a hundred per cent certain of anything.

13 I'm reasonably well convinced
14 and probably about as reasonably well
15 convinced as I can get in a fire case,
16 unless there has been a heck of a lot more
17 forensic work done early in the game. The
18 more laboratory work you do early in the
19 game, the more likely you are to approach
20 that one hundred per cent confidence level,
21 but you never get there.

22 Q But the fact of the matter is
23 that the cause and origin concerning a fire
24 starting behind the bar is equally as
25 plausible as yours?

Hurst -- Cross

1 A No. No.

2 Q In your opinion --

3 A Well, at least put it this way.

4 Given the evidence you can see, it's not as
5 plausible, otherwise I would have simply
6 accepted that. It doesn't really matter to
7 me where the fire started. I just look at
8 the patterns and say does it look like it
9 started there? No. It doesn't look to me
10 like it started there.

11 When I say I have doubt, I keep
12 talking about a liquid accelerant. But if
13 you go to the hundred per cent level, I
14 can't rule out that somebody used a solid
15 accelerant. Very rare. I don't think I've
16 ever actually seen it in my career, but it's
17 not theoretically impossible.

18 Q And with regard to the damage
19 next door, the damage next door, why was
20 it -- is it more logical that the fire would
21 spread next door through a wall than it
22 would to spread to the ballroom side of the
23 bar, which is not even separated by a full
24 wall?

25 A Well, I don't know the

Hurst -- Cross

2520

1 construction, but what usually happens I can
2 tell you is that once a fire gets into an
3 attic or a crawl space, it goes like
4 gangbusters. And when buildings are
5 adjacent to each other, the transmission
6 mechanism is usually via the attic.

7 Since I have no pictures of the
8 inside of that other building, I don't know,
9 and I don't have any diagrams of the
10 construction. But not knowing anything
11 else, my first bet would be that it's an
12 attic-spread fire.

13 Q Well, you got the same attic
14 here as you do there, do you not?

15 A Well, then you may well have
16 fire spreading through that way.

17 Q Okay. Well, we have pictures of
18 this side, sir, and the ceiling is not even
19 burned on this side.

20 A That's true, but there's a crawl
21 space that is not just above that ceiling,
22 it's also above another ceiling layer.
23 There's an empty space up there and you may
24 well have a lot of fire up there. But if
25 there was, I have not seen any photographs

Hurst -- Cross

1 of that area. So I'm telling you what I
2 know.

3 Q Okay. And so wouldn't you say,
4 sir, that it would be likely to get a heat
5 transfer from this side to this side, than
6 from this side through a solid wall?

7 A Not necessarily. It -- if it --
8 the heat transfer is most likely to occur
9 where the heat is, which is up high. If you
10 have a breach in the wall, it will go right
11 through it because there's actually, in a
12 hot area, there's more pressure at the top
13 of a room that is hot than there is at one
14 at room temperature.

15 So if you have a fissure, for
16 instance, between two bricks and it's
17 located high, the pressure on the hot side
18 is higher than it is on the low side and hot
19 gases will shoot through. But more commonly
20 you simply have adjoining attics with no
21 particular fire wall between them and fire
22 just races through an attic or crawl space
23 in this case.

24 Q And State's exhibit number ten,
25 there's no evidence of scorching to the

Hurst -- Cross

2522

1 concrete bar or wall of that bar, is there?

2 A Of scorching?

3 Q Yes, sir.

4 A Yeah, there's scorching.

5 There's scorching all over the place.

6 Q Certainly paint's not burned off
7 the bar there?

8 A I think that bar was Formica.

9 Q I'm talking about the cinder
10 block wall, sir.

11 A Oh, the cinder block wall.

12 No -- the cinder block wall has a big mass
13 behind it. When you paint concrete,
14 concrete is a heat sink and it sucks the
15 heat out of the paint. So it takes a longer
16 application to heat it up than it does to
17 heat wood up. Wood doesn't conduct heat
18 very well.

19 Q Where are the pictures you used?

20 A I think they're on the table.

21 MR. KULP: I think they're right
22 here, or --

23 THE COURT: On the jury rail.

24 MR. KULP: Oh.

25 MR. DURANT: Thank you.

Hurst -- Cross

1 Q Okay. Could you stand up here
2 just a second, sir.

3 A Sure.

4 Q I want to show you what's been
5 marked as State's exhibit number
6 thirty-five. And I believe that shows, if
7 I'm not mistaken, it's a look down the bar
8 toward the front door, basically from this
9 view toward the front door.

10 A Yes, sir.

11 Q And it shows the ceiling?

12 A Yes, sir.

13 Q Okay. And it shows that the
14 entire ceiling on this side of the bar being
15 burned up, pretty much? At least --

16 A On that side of the half-wall?

17 Q On that side of the half-wall.

18 A Yes, sir, it does.

19 Q Okay. Would you agree that at
20 least from the part that you could see with
21 this photograph. Is that correct?

22 A Yes. Uh-huh.

23 Q And this is defendant's exhibit
24 number thirty-nine which basically shows the
25 ceiling on the ballroom side of the bar. Is

Hurst -- Cross

1 that correct?

2 A Yes.

3 Q And the ceiling over there seems
4 to be relatively intact. Correct?

5 A Yes.

6 Q Okay. And the only difference
7 is basically about a one-foot overhang there
8 which you call the soffit that goes across
9 the length?

10 A Yes. I don't know its
11 dimension, but --

12 Q Okay.

13 A -- the soffit.

14 Q You would say roughly a foot
15 then?

16 A I don't know, but yeah.

17 Q Roughly a foot?

18 A Sure.

19 Q Okay.

20 A There may initially have been a
21 lower soffit. It looks like something has
22 been burned away there, so I don't know how
23 it was originally. May or may not have
24 been.

25 Q Okay.

2525

Hurst -- Cross

1 A The remaining soffit, yes.

2 Q And so you're telling the jury
3 that in presumably that side, that side of
4 the building, the ballroom side of the
5 building is part of the same building?

6 A Oh, yes.

7 Q Same ceiling?

8 A Yes.

9 Q Okay. The only difference being
10 that one-foot soffit there?

11 A Whatever it originally was --

12 Q Okay.

13 A -- but, yes, the soffit.

14 Q Okay. And so, just so I'm
15 clear, your testimony is that it's more
16 likely that that fire would have spread to
17 this building through a solid wall, than it
18 would be to have spread to that ceiling,
19 past the little one-foot dropdown in the
20 ceiling?

21 A Oh, I don't think it spread that
22 way. I think it spread from the crawl space
23 overhead, which we haven't seen.

24 Q Uh-huh. Now, the fire was
25 started in this area, sir. Don't you think

Hurst -- Cross

2526

1 it's equally plausible that it would have
2 spread this direction as that direction?

3 A It spread in both directions.

4 Q It would spread in both
5 directions. Is that --

6 A And, and it will start secondary
7 fires where it finds fuel --

8 Q Okay.

9 A -- and it's got no fuel over
10 here, but it does over there.

11 Q Okay. And the ceiling over here
12 is not fuel?

13 A It is fuel, but the hottest
14 gases are up against the ceiling. The gases
15 a foot below that are considerably cooler.

16 Q Uh-huh. And like I said, once
17 again over on this side you have a solid
18 wall --

19 A Well --

20 Q -- and on this side you don't.

21 A We know that -- we only know
22 that we have a wall up at ceiling level. We
23 don't know what we've got between the two
24 buildings once you get up into the crawl
25 space and/or attic space area.

Hurst -- Cross

2527

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

3 MR. KULP: Just one question.
4 Just let me see that.

5 THE COURT: One?

6 MR. KULP: Two.

7 THE COURT: All right.

8 (Whereupon, marked for
9 identification was Defendant's Exhibit
10 No. 40, photograph.)
11
12
13

14 REDIRECT EXAMINATION BY MR.

15 KULP:

16 MR. KULP: Approaching the
17 witness, your Honor.

18 Q Dr. Hurst, let me hand you
19 what's been marked as defendant's exhibit
20 number forty. Without objection?

21 MR. DURANT: No objection.

22 MR. KULP: Without objection.

23 In evidence.

24 (Whereupon, entered into
25 evidence was Defendant's Exhibit No.

Hurst -- Redirect

2523

1 40, photograph.)

2 Q Ask you if, draw your attention
3 to the ceiling area here in I guess what
4 would be termed the poolroom or ballroom
5 area. What is that object there?

6 A That's an access space into the
7 crawl space up above. It's a hole in the
8 ceiling.

9 MR. KULP: Okay. Thank you.

10 That's all I have, your Honor.

11 THE COURT: All right. You can
12 come down. Thank you, Doctor.

13 THE WITNESS: Thank you.

14 MR. KULP: May we approach,
15 please.

16 (Whereupon, there was an
17 off-the-record bench conference.)

18 THE COURT: Do you want me to
19 send the jury out?

20 MR. KULP: It might be better,
21 your Honor.

22 THE COURT: All right. We need
23 about five minutes. Might save some
24 time.

25 (The jury leaves the courtroom

Hurst -- Redirect

1 at 5:40 p. m.)

2 (The Judge enters the courtroom

3 at 5:52 p. m.)

4 THE COURT: Bring the jury in.

5 (The jury enters the courtroom

6 at 5:53 p. m.)

7 THE COURT: Now, Madam

8 Forelady, door ladies and gentlemen of
9 the jury, I got good news for you. We
10 just got two very short witnesses,
11 perhaps one witness for tomorrow and
12 then we'll be able to have the
13 summations by the attorneys and we can
14 get you out of here. We can get the
15 case to you hopefully before lunch and
16 so we won't have to work late tonight.

17 So I'm going to send you home.
18 I want you to be back at 9:30 tomorrow
19 morning. They have enough money to get
20 you some snacks in the morning but I'm
21 talking about good solid diet biscuits
22 and things. I don't know where they
23 getting them. They're getting them
24 where the biscuits are. They also got
25 places that sell croissants, so the

Hurst -- Redirect

2530

1 ladies might rather have that, but
2 whatever.

3 MR. DURANT: May we approach
4 just a second, your Honor?

5 THE COURT: I'm going to order
6 some for you, too.

7 MR. DURANT: Okay.

8 (Whereupon, there was an
9 off-the-record bench conference.)

10 THE COURT: Well, the weather up
11 north has got a problem with us and I
12 don't know what's going to happen. Be
13 here at ten o'clock. Have a good
14 lunch. See you tomorrow at ten.

15 Remember what -- my admonitions
16 about talking and newspapers and T. V.
17 and radio and street gossip.

18 (The jury leaves the courtroom
19 at 5:55 p. m.)

20 THE COURT: Well, can we be here
21 at 9:30 and dispose of everything
22 except that witness and then after --
23 I'm not going to say anything that's
24 going to interfere with that.

25 MR. DURANT: I can be here any

Hurst -- Redirect

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1 time you want me to be here, Judge.

2 MR. KULP: Likewise.

3 THE COURT: Well, do you want to
4 do it now?

5 MR. DURANT: Except right now.

6 No. Now, now is fine, too, but --

7 THE COURT: I knew it. All
8 right. 9:30.

9 MR. KULP: Yes, sir.

10 MR. DURANT: Thank you, Judge.

11 MR. KULP: Thank you, your
12 Honor.

13 (Whereupon, the matter was
14 adjourned at 5:56 p. m.)

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C E R T I F I C A T I O N

I, the undersigned HEATHER GAYLE BURNS, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the proceedings in the captioned case, relative to appeal, heard in the Court of General Sessions for Charleston County, South Carolina, on the 5th day of March, 2001.

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

DATED: July 31, 2001

Heather Gayle Burns
HEATHER GAYLE BURNS, R.D.R.
Official Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF GENERAL SESSIONS
DOCKET NO. 97-GS-10-4319, 4320

STATE OF SOUTH CAROLINA,

TRANSCRIPT OF PROCEEDINGS

-VS-

WESLEY MAX MYERS,

MARCH 6, 2001

Defendant.

CHARLESTON, SOUTH CAROLINA

BEFORE:

THE HONORABLE LUKE N. BROWN, Judge, and a Jury.

APPEARANCES:

D. BRUCE DURANT, ESQ.
SENIOR ASSISTANT SOLICITOR
FOR THE STATE

TIMOTHY CLAY KULP, ESQ.
FOR THE DEFENDANT

BY: HEATHER GAYLE BURNS, R.D.R.
CIRCUIT COURT REPORTER

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1 (The Judge enters the courtroom
2 at 10:37 a. m.).

3 (The jury enters the courtroom
4 at 10:38 a. m.)

5 THE COURT: Madam foreman, as I
6 just earlier told you, we got this last
7 witness grounded up in Philadelphia I
8 think. It's nobody's fault. It's just
9 that the weather didn't clear out as
10 fast as they expected it to, so what
11 we've done is rigged a telephone to
12 where we can have a conference call and
13 you all can listen. We just tested, we
14 just tested it a moment or two. So at
15 this time Mr. Kulp is going to, is
16 going to dial the telephone. The
17 clerk's going to swear her, and then
18 they'll ask questions just like they
19 ordinarily would, and I think you'll be
20 able to hear. Anything else?

21 MR. DURANT: I just wanted to
22 let you all know in advance I would
23 stipulate to Dr. Melton's expertise. I
24 don't know how much, what you --

25 THE COURT: Well, you don't have

1 to go into it -- well, you can go into
2 it very small.

3 MR. KULP: Yes, sir.

4 THE COURT: Because he's willing
5 to stipulate that she's an expert.

6 MR. KULP: I will do so, you
7 Honor.

8 THE COURT: All right.

9 MR. KULP: If the Court please.

10 THE COURT: Go ahead, dial.
11 What's her name?

12 MR. KULP: Dr. Terri Melton,
13 M-e-l-t-o-n.

14 THE COURT: All right. Thank
15 you. Explain to her the setting.

16 MR. KULP: I will.

17 FEMALE VOICE: Hello?

18 MR. KULP: Dr. Melton?

19 FEMALE VOICE: Yes.

20 MR. KULP: This is Tim Kulp. We
21 just spoke earlier on a test call.

22 FEMALE VOICE: Yes.

23 MR. KULP: Your voice is being
24 broadcast here in the courtroom via the
25 circuit court courthouse in Charleston,

1 South Carolina. The Honorable Luke
2 Brown is presiding. The jury is
3 present and seated and all parties are
4 here in the courtroom.

5 We are calling you as a witness
6 in this case and the clerk will need to
7 swear you in in that regard, and will
8 ask you to identify yourself and I
9 understand -- do you understand we're
10 doing this because of the weather
11 conditions and you being grounded there
12 in Pittsburg?

13 FEMALE VOICE: That's correct.

14 MR. KULP: Okay. I'll turn this
15 over to the clerk of court.

16 CLERK OF COURT: Dr. Melton?

17 FEMALE VOICE: Yes.

18 CLERK OF COURT: Yes. This is
19 Deputy Clerk Scott Wilson. Do you
20 swear or affirm that the testimony you
21 shall give the Court and jury in the
22 trial of this case shall be the truth,
23 the whole truth, and nothing but the
24 truth, so help you God?

25 FEMALE VOICE: I do.

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1 CLERK OF COURT: Very well.

2 MR. KULP: May it please the
3 Court.

4 THE COURT: Go ahead.

5

6 T E R R I M E L T O N, having
7 been called as a witness, is sworn over
8 the telephone lines and testifies as
9 follows:

10 DIRECT EXAMINATION BY MR. KULP:

11 Q Dr. Melton, what do you do
12 professionally?

13 A I am president and laboratory
14 director of a company called Mitotyping
15 Technologies in State College, Pennsylvania.

16 Q And could you briefly, the
17 solicitor, prosecutor has stipulated to your
18 qualifications in the area of mitochondrial
19 DNA analysis, but I would like you to very
20 briefly give the jury an overview of your
21 educational background and professional
22 experience.

23 A Very well. I have a bachelor's
24 degree from Wake Forest University. I have
25 a masters degree and a Ph.D. from Penn State

Melton -- Direct

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1 University, both in the area of genetics.

2 I graduated with my degree in
3 1996, my Ph.D., and since then I've been
4 exclusively devoting my time to doing
5 mitochondrial DNA forensic testing.

6 I have published a number of
7 papers and refereed scientific journals.
8 These would be journals where effectively a
9 jury of your peers decides whether your
10 research is valid, and those articles have
11 been published in several journals,
12 including the Journal of Forensic Sciences
13 and the American Journal of Human Genetics.

14 I've also been an invited
15 speaker in a number of meetings around the
16 United States and also abroad, including the
17 Promega Identification Symposium, the
18 American Academy of Forensic Sciences, and
19 Human Identification Symposium in London in
20 October of 1999. So I have a, a fair amount
21 of experience in presenting my scientific
22 findings to other forensic scientists and so
23 primarily I would guess that my, my
24 publications, my presentations of scientific
25 research, and so forth would qualify me as

Melton -- Direct

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1 someone who has a great deal of experience
2 in mitochondrial DNA testing. And I hope
3 that sort of sufficiently covers it.

4 MR. KULP: Yes. Thank you.

5 Your Honor, based on the
6 information testified to by the witness
7 and the solicitor's stipulation, we
8 would ask the Court to declare Dr.
9 Melton an expert witness in the area of
10 mitochondrial DNA analysis and
11 determination.

12 THE COURT: I do. Proceed.

13 MR. KULP: Thank you, your
14 Honor.

15 Q Dr. Melton, did you have
16 occasion to be contacted by the State, the
17 solicitor's office in this case?

18 A Yes.

19 Q All right. And did they contact
20 you regarding the possibility or intention
21 of having fragments or pieces of hair
22 tested?

23 A Yes, they did.

24 Q And was the intended test that
25 of mitochondrial DNA analysis?

254i

1 A Yes, it was.

2 Q And was it your understanding
3 that that was a result of the fact that
4 standard or P. C. R. testing could not be
5 done on the hair?

6 A That's correct. To, to clarify
7 that slightly, mitochondrial DNA testing is
8 a kind of P. C. R. testing but it is applied
9 to a different kind of DNA in the cell,
10 mitochondrial DNA so, yes, it's typically
11 reserved for cases where there's
12 insufficient nuclear DNA to do nuclear DNA
13 P. C. R. testing.

14 Q All right. And did you, as a
15 result of that did you undertake and
16 contract with the solicitor and the State of
17 South Carolina to conduct mitochondrial DNA
18 analysis of the sample hairs that we're
19 talking about?

20 A Yes, I did.

21 Q Okay. And what was the charge
22 for that analysis that was a, was a part of
23 the contract?

24 A You'll have to wait while I look
25 that up in my file. The charge was five

Melton -- Direct

1 thousand dollars. That included the testing 2542
2 of, of the hair which was three thousand,
3 five hundred dollars and the testing of one
4 known blood sample at one thousand, five
5 hundred dollars.

6 Q Okay. Thank you. And has the
7 State -- did they contact you and procure
8 your appearance here at trial in this
9 matter?

10 A No.

11 Q Okay. Now, as a result of your
12 analysis did you have the occasion to issue
13 a report of your findings that was dated
14 November the twenty-seventh, year 2000?

15 A Yes, I did.

16 Q Okay. And as a result of your
17 analysis of, of the samples -- well, first
18 off, in the analysis of these samples, did
19 you find, have the occasion to find any
20 degradation of the hair samples?

21 A Yes. In the first round of
22 testing we attempt to use P. C. R., which is
23 a way to make more of the DNA that you're
24 interested in with our standard analysis.
25 And when that did not work, we go in our

Melton -- Direct

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1 laboratory to what we term an ancient DNA
2 analysis, which is typically applied to
3 samples where there is minimal and very
4 degraded or very old degraded DNA in the
5 sample. So we had to go to an ancient DNA
6 approach with this particular hair.

7 Q All right. And what are the
8 possible causes of degradation of the
9 nuclear DNA in the sample to be tested?

10 A There're several possible
11 causes. One is simply the age of the
12 sample. We find that in all hairs and bones
13 that are very, very old -- and that could be
14 decades or dozens of years old -- that the
15 DNA just naturally over time degrades. And
16 by degrading I mean the pieces of DNA get
17 smaller and smaller and harder and harder
18 to, to recover from the testing, in the
19 testing process. So age is one factor.

20 There're other factors. One
21 very common reason a hair would be degraded
22 is that it's been exposed to a lot of
23 sunlight. So, for example, in a woman with
24 very long hair, it would be very difficult
25 to get DNA out of the piece of hair that's

Melton -- Direct

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1 extremely far from her scalp as opposed to
2 the piece of hair that's close to her scalp
3 because the piece of hair at the end has
4 been floating around in the sunlight for a
5 long time. So, so sunlight exposure,
6 exposure to chemicals such as bleach or hair
7 dye, exposure to extremely high temperatures
8 over a long period of time would degrade
9 DNA.

10 There're a number of things that
11 can cause degradation of DNA.

12 Q That's correct. Now, during the
13 process of analysis of a sample or hair
14 under these circumstances, contamination is
15 certainly a concern and problem in any
16 laboratory setting. Is that correct?

17 A Yes. Contamination is a concern
18 for all DNA laboratories.

19 Q Okay. And in fact there was a
20 belief in this case that there was some
21 contamination that occurred at the time of
22 testing regarding blank reagent controls?

23 A That's correct. And to just
24 explain that a little bit --

25 Q Thank you.

Melton -- Direct

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1 A -- when we take the hair through
2 the process of taking the DNA out of it, we
3 put a tube in that part of the analysis that
4 has nothing in it, so one tube would have
5 the hair in it, then the tube beside it
6 would have nothing. So it has all the
7 chemicals in it, and it does -- just lacks
8 the sample.

9 The purpose of that tube is to
10 confirm that all your chemicals are staying
11 clean throughout the extraction of DNA.

12 And in this case, yes, we had an
13 instance where the tube accompanying that
14 hair sample showed some DNA, very minimally,
15 but nevertheless despite our best
16 precautions on a rare occasion this does
17 happen.

18 Q Okay. And bear with me one
19 second please, Doctor.

20 Now, regarding those sites
21 relating, sites and you might need to
22 explain that, relating to contamination,
23 contamination, you're able to identify
24 those, are you not?

25 A That's correct. In the reagent

Melton -- Direct

1 blank we can identify the DNA profile that's
2 coming up in the contaminant, so what you're
3 referring to is identification of those
4 positions that characterize that particular
5 DNA type in the DNA sequence.

6 Q Okay. And having benn able to
7 identify those, if you subtract those out,
8 what is your finding based upon the analysis
9 of the sample?

10 A Well, what happens is -- what
11 happened in this case is that we not only
12 saw the contaminant in the reagent blank
13 negative, we also think we saw it in the
14 sample with the hair. Now, if you subtract
15 those contaminant sites out, the type that
16 remains is, is present and does not appear
17 to be that of Mr. Myers.

18 However, I should -- I would
19 like to qualify that because when you have a
20 mixture of two types, you really can't say
21 that it's just two types. You have to allow
22 for the possibility that any possible
23 combination of all those different sites in
24 the DNA can give more than two types.
25 Therefore, of it's very complex and very

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Melton -- Direct

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1 difficult to sort out what's going on with
2 the mixture.

3 Q Okay. Did you report that
4 "based on this observation, if the type
5 obtained for the reagent blank control is
6 subtracted from the mixture of types in the
7 hair sample, the sequence developed from the
8 two zero five six K. one, Wesley Myers type,
9 does not match the sequence presumed to be
10 the hair type"?

11 A That's true.

12 Q And then again, after that, you
13 reported that that finding would be
14 inconclusive. Is that correct?

15 A Yes. I reported that it would
16 be inconclusive for the following reason.
17 We can sometimes, when there is a mixture,
18 end up excluding someone as a contributor
19 because there are a number of sites in the
20 mixture that clearly do not belong to the
21 person that you're, you're comparing it to.
22 But you have to have at least two places in
23 the DNA in order to call that a clear
24 exclusion.

25 In this situation we had only

Melton -- Direct

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1 one, and for that reason the result becomes
2 an inconclusive result.

3 Q Okay. And one of the reasons as
4 well that you cite in your report of your
5 findings is that because of company
6 guidelines, that is the reason that you
7 deemed the overall result to be inconclusive
8 and for the reason that you just stated
9 pertaining to the one and two sites.

10 Correct?

11 A That's correct. In fact all the
12 laboratories that currently do mitochondrial
13 testing that I'm aware of use a one base
14 pair difference to say that a result is
15 inconclusive. And that not only goes for
16 mixtures, but for any clear-cut types that
17 you get in samples. If you got a clear-cut
18 type from a hair and a clear-cut type from
19 the known person, if there's one difference
20 that would be called inconclusive. So
21 technically this is an inconclusive result.

22 Q Okay. And but apart from that
23 company policy, you have an opinion about,
24 do you not, which you expressed to me and
25 Mr. Durant, about whether this hair is

2540

Melton -- Direct

1 Mr. Myers or not?

2 A Yes, I do.

3 Q And what is that opinion?

4 A That based on my experience with
5 this kind of testing, that this hair simply
6 does not appear to have the same type as
7 Mr. Myers.

8 Q Okay. Thank you, ma'am. Please
9 answer any questions that the solicitor has
10 for you. He'll approach the conference
11 microphone and telephone at this time.

12

13

14 CROSS-EXAMINATION BY MR. DURANT:

15 Q Thank you, Dr. Melton. This is
16 Bruce Durant speaking at this time, and I
17 have very little to ask you. I believe you
18 covered most of this on your direct. But
19 just to reiterate, this was a very
20 degraded sample of DNA you received. Is
21 that correct?

22 A Yes, it was.

23 Q And I believe one of the things
24 you mentioned that could cause degradation
25 was bleaching or dying?

Melton -- Cross

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1 A That's true.

2 Q And does this degradation of the
3 sample affect your ability to perform an
4 adequate test?

5 A Sometimes it does. Typically we
6 are able to recover enough of the DNA to
7 make a clear-cut comparison. And
8 unfortunately in this case with the mixture,
9 a clear-cut interpretation was really not as
10 possible as we would like.

11 Q And as a matter of fact in a
12 previous conversation we had you said that
13 this was "pushing the limits to even get a
14 result in this case", was it -- did you not?

15 A Well, I think what I meant was
16 when we have to do an ancient DNA test, we
17 would like to be able to repeat and see
18 these sorts of results over and over again.
19 In this case there was not enough DNA to do
20 that.

21 Q And there's no question but that
22 this sample was contaminated. Not just the
23 reagent blank, but the actual hair sample
24 you tested. Is that correct?

25 A That's correct.

Melton -- Cross

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1 Q And you received how many
2 fragments, hair fragments to actually
3 perform testing on?

4 A There were four fragments.

5 Q And did you extract these
6 fragments separately or due to the amount
7 did you have to combine them all together
8 and then do the extraction?

9 A We combined them together
10 because of the minimal size of each
11 fragment.

12 Q And in this case how many, how
13 many locations do you test at or did you
14 test at?

15 A Well, we typically in a, in a
16 test where we can get a full result, we're
17 actually looking at seven hundred and
18 eighty-three places in the DNA. This is the
19 DNA sequence. This is the order of the
20 chemical bases that make up the DNA.

21 In this situation we were only
22 able to get three hundred and fifty-nine of
23 those bases for the hair, so it is a partial
24 analysis.

25 Q Okay. And I believe you stated

Melton -- Cross

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1 earlier in a phone conversation, and correct
2 me if I'm wrong, that the questioned sample
3 matched the defendant's at all but one
4 location?

5 A Well, the questioned sample
6 matches him if you consider the fact that we
7 can't sort out in a mixture which sites
8 belong to which type. So the mixture truly
9 does confound the interpretation, however
10 there is that one site that is clearly
11 different between Mr. Myers and the type we
12 turned up in the hair, and because of that
13 we have to call it inconclusive.

14 Q But in all other sites it did
15 match?

16 A Well, at all other sites that we
17 had, when you take the mixture into
18 consideration. But as I said before, if you
19 subtract the mixture away, then there are
20 three sites that, that differ. So it is
21 confusing and very difficult to sort out
22 what's going on with the mixture, and for
23 that reason it's very difficult to, to make
24 a final call. We just call it inconclusive.

25 Q So the bottom line is you think

Melton -- Cross

1 it's not his, but you can't be sure?

2 A That's correct.

3 MR. DURANT: Thank you.

4 MR. KULP: Just one question.

5

6

7 REDIRECT EXAMINATION BY MR.

8 KULP:

9 Q Is there -- Dr. Melton, you
10 testified on direct that it is your
11 experience and your, your opinion about this
12 that it is not Mr. Myers's hair.

13 A Based on my experience, my
14 feeling is that it is not. That's correct.

15 MR. KULP: Okay. Thank you. No
16 further questions.

17 MR. DURANT: Thank you very
18 much, Dr. Melton.

19 MR. KULP: Thank very much,
20 Doctor.

21 THE WITNESS: You're welcome.

22 MR. KULP: Bye-bye.

23 THE WITNESS: Bye.

24 MR. KULP: Your Honor, the
25 defense rests.

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1 THE COURT: All right. Anything
2 in reply?

3 MR. DURANT: I don't believe so,
4 your Honor.

5 THE COURT: All right. Go to
6 your room for about five minutes. You
7 all had a chance to smoke? Okay. I'll
8 give you a chance to get about two
9 draws.

10 (The jury leaves the courtroom
11 at 11:01 a. m.)

12 THE COURT: All right. How
13 about give this to each of you.

14 MR. DURANT: Yes, sir.

15 MR. KULP: Yes, sir.

16 THE COURT: Those are the
17 charges that I think, I have found in
18 this case and the charges that I give.
19 You'll be able to argue your case, the
20 charge that you gave me, Mr. Kulp.

21 MR. KULP: Yes, sir.

22 THE COURT: But it's, it's not
23 in the form that I give. It's a good
24 case, and that's the law. But I got
25 a -- the general charge on it which I

1 use, but it covers that, so you can
2 argue that.

3 MR. KULP: Yes, sir. All right.

4 THE COURT: That, I think you
5 decided that was what you going to use
6 because of the word "totality of the
7 circumstances".

8 MR. KULP: Yes.

9 THE COURT: Yes. I mean I'll
10 show it to you if you want to.

11 MR. KULP: Yes, sir.

12 THE COURT: But anyway, look at
13 those and tell me if there's anything
14 else. In the mean time, I'll hear any
15 motions you got.

16 MR. DURANT: I think that pretty
17 much covers it, your Honor, from my
18 perspective.

19 THE COURT: All right, sir.

20 MR. KULP: Yes, your Honor.

21 With that comment that the Court just
22 made regarding the totality.

23 THE COURT: All right.

24 MR. KULP: Your Honor, if the
25 Court please.

1 **THE COURT:** All right. I'll
2 listen to you.

3 **MR. KULP:** Yes, sir. Thank you.
4 We would at this time renew our motion
5 for a directed verdict of not guilty or
6 acquittal on both, both of the
7 indictments, your Honor. We allege
8 there's a failure of competent evidence
9 tending to prove the charge in the
10 indictment, in the indictments.

11 The grounds upon which we would
12 make that motion, your Honor, is
13 two-fold. One, as to the murder
14 charge, we feel that there certainly
15 has not been proof in any respect of
16 the standard necessary for the integral
17 and essential element of murder, and
18 that would be the intent to kill,
19 malice aforethought, except for the use
20 of -- the allegations or testimony
21 regarding the use of a weapon.

22 As to the arson indictment, your
23 Honor, I think that that matter is in
24 such dispute at this point --

25 **THE COURT:** What is this about

1 the weapon now?

2 MR. KULP: Well --

3 THE COURT: It doesn't have to
4 be a gun. Anything that's calculated
5 to render serious bodily harm or death.
6 And the confession or statement,
7 whatever you want to call it, indicates
8 that he used something that could be
9 described as a deadly weapon, so I
10 didn't quite understand when you're
11 talking about deadly weapon.

12 MR. KULP: I think you
13 understood what I was saying, your
14 Honor. I was saying except for that
15 aspect, the use of --

16 THE COURT: Oh. All right.

17 MR. KULP: -- in the course of
18 making a motion.

19 And as to the arson, your Honor,
20 we would submit that the actual cause
21 and origin of the fire is in such a
22 dispute apart from that which you just
23 reflected, your Honor, is reflected in
24 the confession or statement, that there
25 would not be sufficient proof of

1 evidence occurring in the trial to send
2 to it the jury. Thank you, your Honor.

3 THE COURT: Well, that's what
4 makes it a jury question. All right,
5 sir.

6 MR. KULP: Yes, sir.

7 THE COURT: Would you like to
8 have about five minutes? Where my
9 bailiffs?

10 MR. DURANT: Judge, I did want
11 to state for the record I'm going --
12 I'm going to waive opening on the law
13 and close in full in this case. And
14 I'd also like to request, because I
15 have a feeling that both of us being
16 rather long winded kind of folks, that
17 our arguments might be rather lengthy,
18 and I am going to ask that there be a
19 brief break in between.

20 THE COURT: Well, I'll have --

21 MR. DURANT: In other words --

22 THE COURT: He's going to
23 open --

24 MR. DURANT: With all due
25 respect to Mr. Kulp here I don't want

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1 to stand up in front of that jury after
2 he's been talking to them for an hour
3 and a half.

4 MR. KULP: That's fine, your
5 Honor.

6 THE COURT: All right, sir.
7 What I'm going to do is -- how long you
8 think it will take? Judge Ellsroth,
9 you remember Judge Ellsroth?

10 MR. KULP: Yes, sir, I do.

11 THE COURT: He says they quit
12 listening after fifteen minutes so. . .

13 MR. KULP: I don't plan to wear
14 them out, your Honor.

15 THE COURT: Would you like for
16 me to tell you when you reach a certain
17 point?

18 MR. KULP: Telepathically, your
19 Honor. Could we have -- I would like
20 ten minutes to set up.

21 THE COURT: All right, sir.
22 What I want my bailiffs to do, be sure,
23 and I tell you all who are sitting out
24 there, once these attorneys start their
25 summation, nobody, that includes court

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1 personnel, can go outside or come in.
2 But as soon as that attorney sits down,
3 we'll either take a break or, or you
4 can move in or out.

5 The same thing after, while the
6 solicitor is talking. The same thing
7 while I'm giving the jury instructions.
8 That's because, you know, somebody
9 comes in, I got to turn around and see
10 who it is. Jury does, too. So if you
11 get locked out, you going to be locked
12 out temporarily.

13 All right. Court's in recess.

14 MR. KULP: Thank you, your
15 Honor.

16 THE COURT: Let me know when
17 you're ready.

18 (Whereupon, a recess is taken at
19 11:06 a. m.)

20 (By agreement between the
21 parties at this time Defendant's
22 Exhibit No. 36, photograph, is entered
23 into evidence.)

24 (The Judge enters the courtroom
25 at 11:22 a. m.)

1 THE COURT: Counselor, you
2 wanted to look at my confession charge.

3 MR. KULP: Yes, sir, your Honor.
4 Thank you for the opportunity.

5 MR. DURANT: The circumstantial
6 evidence charge you're going to give,
7 Judge, is Grippon?

8 THE COURT: Yes, sir.

9 MR. KULP: I see. Exactly like
10 you said. Not that -- I don't doubt
11 you. Thank you, Judge.

12 THE COURT: All right. Bring
13 the jury in.

14 (The jury enters the courtroom
15 at 11:24 a. m.)

16 THE COURT: Now, Madam Foreman
17 and ladies and gentlemen of the jury,
18 all the testimony is in now, and you'll
19 notice that the defendant did not
20 testify. I'll be telling you about
21 that because if you recall at the
22 beginning of the case I told you
23 neither he nor his attorney had to get
24 up from that table if they didn't want
25 to. Now the State has the burden of

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1 proof. Defense doesn't have to prove
2 anything. So I'll be telling you not
3 to even consider that. Don't even
4 discuss it when you go in your jury
5 room because he's merely exercising one
6 of his constitutional rights.

7 Now because the State has the
8 burden of proving their case first,
9 they have to put up their witnesses
10 first, the law gives them the right to
11 talk to you last. So at this time
12 Mr. Kulp will present his summation,
13 then the solicitor will present his.

14 Now I don't let anybody come in
15 or go out while they are talking to
16 you, but as each one of them sits down,
17 I'll take a break. Might even take a
18 break after Mr. Kulp sits down so you
19 can refresh yourselves, but that
20 doesn't apply to you all. Any time
21 somebody wants to take a break on the
22 jury I always stop what I'm doing.

23 So with that in mind, Mr. Kulp.

24 MR. KULP: May it please the
25 Court, your Honor, Mr. Durant.

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1 Ladies and gentlemen of the
2 jury, the murder of Teresa Haught was a
3 horrible, terrible thing. Nobody would
4 disagree with that. That's a fact.
5 That's not an issue in this case. The
6 issue is who did the murder? Wes Myers
7 did not do the murder.

8 I told you Monday a week ago,
9 right out of the chute, that this would
10 be a difficult case. You patiently and
11 very patiently and clearly listened to
12 and seen all the evidence in this case.
13 The basic issue in this case is this,
14 all comes down to. This is the case.
15 The confession versus no evidence
16 against him and significant evidence
17 for him in terms of this issue of
18 identity.

19 And what I submit to you is that
20 dilemma alone should make you pause,
21 should make you hesitate to act, here
22 in this sea of reasonable doubt.

23 Now, what do we know now that we
24 didn't know last Monday? We know a
25 lot. The question is does the crime

2564

1 fit the confession, or does the
2 confession fit the crime? The police
3 we know made their mind up very, very
4 early and nothing affected that.
5 Nothing dissuaded them from the path
6 that they pursued, based on a hunch,
7 suspicion, and nothing more.

8 And then they went to another
9 fellow who also operated on a hunch
10 theory, and that was Captain or Major
11 McHale. And at that point the offer
12 was for Mr. Myers to take a polygraph
13 examination, which he agreed to do, and
14 which after as you saw in that blank
15 portion of the videotape that you saw
16 after eighteen minutes of deliberation
17 or discussion that we don't know
18 anything about, the decision was made,
19 the decision was made not to give it to
20 him.

21 Now what about Mr. McHale? Is
22 what he told you reliable? Is what he
23 told you something that you can rely
24 upon and not cause you to hesitate?
25 Well, there are problems with that, and

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1 this isn't a circumstance of
2 personalities at all. But he told you
3 he just knows and he just knows
4 subjectively, and I suggest to you that
5 when he says he knows someone did it,
6 that nothing else matters, and that's a
7 bit scary.

8 You saw the video and you saw
9 the testimony associated with it.
10 Well, let's take him down to the
11 specialist. Let's take him down there
12 for an interview. You saw the video.
13 I urge you to take the opportunity to
14 look at it again when you're
15 deliberating and you determine if
16 that's an interview or is that
17 something else?

18 You know it's taken us years and
19 years as a society, but there aren't
20 any rubber hoses any more. There
21 aren't any bright and shining lights
22 like you see in the old black and white
23 movies. There's a new way. Those
24 techniques of getting people to confess
25 to things they did or didn't do has

1 been abandoned because of the
2 intervention of our courts and concern
3 over that method and under the totality
4 of the circumstance when this thing
5 happened, concern that maybe the use of
6 a rubber hose or bright lights or close
7 proximity to the person, all those
8 other things, might be dangerous.

9 Now, why would they be
10 dangerous? They're dangerous because
11 those types of techniques we found and
12 everyone knows can produce
13 circumstances where people say things
14 the police want them to say, but in
15 fact which they did not do and they
16 don't want to say and shouldn't say.

17 So the new trick. Once that's
18 out of the way, there are new
19 techniques and some of those techniques
20 you saw in this case. Maybe you
21 haven't seen those sorts of techniques
22 before. Now you have. We didn't see
23 these techniques until three years
24 after this case was made, when the tape
25 came forward. And we were very

1 thankful that it did. That tape gave
2 our expert, Dr. Kassin, a birds's eye
3 view and gave you as well a bird's eye
4 view about how those things occurred.
5 That is such an important thing to this
6 case and to our defense, and I can't
7 even tell you how fortunate I feel that
8 we did finally get it.

9 "I can build a case against
10 anybody. I can build a case against a
11 cop in this building if he was sleeping
12 last night with his wife in bed. I
13 could still make a case against him
14 because his wife can't verify she knows
15 that he was in bed the whole time."

16 Now, despite all his insistence,
17 Mr. McHale, that he was interviewing,
18 acquiring information, you can see and
19 you heard from Dr. Kassin, Mr. Myers
20 didn't do a lot of talking in that
21 video, and the talking that he did do
22 is quite important.

23 The person that did most of the
24 talking was Mr. McHale, and you saw the
25 nature of what he told Myers. And

1 there's a reason for that. That is to
2 suggest to him -- and I'm not the
3 expert. You heard from the expert
4 about what I would refer to as the "new
5 rubber hose", the new techniques that
6 were used on people, to prompt him with
7 all of these things, all of these
8 things while the man is there under the
9 auspices and with the understanding
10 that if he doesn't remain there and if
11 he doesn't answer questions and if he
12 doesn't take the polygraph and if he
13 doesn't do everything they want him to
14 do, what happens? Well, what happens
15 is, is that the police have told him
16 very clearly that since he's the prime
17 suspect or that he's the boyfriend and
18 that if they don't exclude him, they
19 can't find the real killer.

20 Now this was a little bit out of
21 order but I would tell you there's a
22 lot of significance with the police
23 about his questions, and I did ask one
24 of the witnesses, very importantly I
25 would submit, "Well, do you think it

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1 would be -- your assessment would be
2 different if it was in fact as opposed
3 to someone who was involved with
4 someone, a stranger asking about the
5 purse and asking about this and that?"

6 I submit to you that there is a
7 difference, and someone who knows the
8 person is going to want to know those
9 kind of details to find out what
10 happened. However, that was misread,
11 like many things in this case. That
12 which wasn't innocuous was discounted;
13 that which was innocuous was considered
14 and put into the stew pot of the clear
15 march down the path to Mr. Myers.

16 So the purpose with Mr. McHale I
17 submit and the delay was to -- there's
18 some dispute about that. They had a
19 little disagreement, but the basic
20 notion was I think you can gather I
21 submit to you was to let things sink in
22 overnight. Let those suggestions and
23 that weird conversation, that bizarre
24 exchange, let that sink in overnight.

25 And later that night of course

2570

1 there was a hatched plan, after
2 something happened that should have
3 dispelled the officers' slow march to
4 Mr. Myers. They searched his house.
5 They tossed it. That's the expression
6 used. They looked everywhere. No one
7 hindered whatsoever their search of his
8 parents' house. Did they find
9 anything? No. They didn't find a
10 thing.

11 Did he agree to let them search
12 his truck? Yes. Did they find
13 anything? Well, they said they didn't.
14 Well, they didn't really want to say
15 they didn't in terms of hair and blood
16 in the truck, but they didn't find
17 anything.

18 Now, instead somehow of that
19 dissuading them from their beliefs,
20 they continued on. And they hatched a
21 plan and you heard about the plan. And
22 the plan was to, as you know, to get
23 together and lie to him and to go in
24 and stage an event which was the cap on
25 what they -- the ground work they had

1 laid for two days. And that was now
2 Wes -- now first they tried to say that
3 he came up with the idea of the hair in
4 the hand, but we kind of got rid of
5 that. The idea was, "Now, Wes, you
6 agree it's A and B, A, B, you agree
7 that if we find the contributor of the
8 hair in her hand we'll have the
9 killer?" And he said yes.

10 Now I tried to bring it out
11 through the questioning but what if he
12 said "No, I'm absolutely sure it
13 couldn't be," wouldn't that cause more
14 concern on the part of the police than
15 to, I mean to disagree with them? So
16 part A was set.

17 So the plan was hatched to go
18 ahead and apply part B, and that was
19 the confrontation the next day, the
20 fake phone call, the plan, the scheme
21 to push him over the edge, to make him
22 believe in association with the notion
23 of blackouts, alcoholic blackouts, that
24 he had in fact committed the crime.

25 And then somehow photos this

1 big, the bad ones of which were
2 addressed and described in testimony
3 but are not in evidence for a number of
4 reasons, obvious reasons, these somehow
5 came into the plan that nobody would
6 admit that that was an aspect of the
7 plan of the confrontation, but I submit
8 to you that it was.

9 Now, in terms of the motive,
10 that's been a bit confusing.
11 Mr. Durant got up here and advised you
12 about jealous rage. Excuse me. And he
13 said that's what this case was all
14 about.

15 Well, we found out something.
16 We found out there was a little problem
17 with that. The problem was that
18 everyone in this case or rather no one
19 says that this Alan White fellow was
20 anyone anyone would give any credence
21 to or to be jealous about. He himself
22 told all of you, "Well, it was just a
23 joke. Everybody knew it was a joke. I
24 left jokes around." So it's clear that
25 that aspect of jealousy doesn't ring

2573

1 true. At least not for Alan White, the
2 person who they identified, and no one
3 else has been identified.

4 Now then they also dribbled in
5 something in the case about Mr. Myers
6 sneaking out of the driveway in some of
7 the testimony or whatever. That wasn't
8 in any police report. It wasn't put in
9 there in police reports in four years,
10 although you could certainly go back as
11 you found out and modify the police
12 report.

13 But you can't have it both ways.
14 Either this is a case of jealous rage
15 or it's a premeditated murder, and if
16 in fact they're suggesting on the fly
17 in the testimony in this case that
18 there was some sneaking out of the
19 driveway, it doesn't make sense because
20 in theory -- and I'll address the note
21 and the note on the windshield in a
22 minute -- there was no basis to think
23 of any jealousy to sneak out and go in.
24 So you can't have it both ways.

25 Now how are the issues presented

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1 to Myers on that Saturday? How did
2 they come forward? Well, what they
3 want to suggest to you is something
4 that didn't happen. It just didn't
5 happen. And we don't have any video.
6 We don't have any audio that day. Even
7 a secret video. But they kind of want
8 to suggest to you and it came out best
9 for them through Chief Norris who's --
10 and I didn't mean to be facetious with
11 him when I asked him where are from
12 you, where you from and you've got a
13 smooth voice, because he sat there and
14 kind of parroted out the story of what
15 happened as if that was coming that
16 Saturday from Mr. Myers.

17 But that's not way it happened.
18 But if they had done something apart
19 from video and audio, I really wouldn't
20 have any issue to address. And they
21 didn't do that, and what is it? Well,
22 they certainly could have simply done
23 this. You don't need a camera. You
24 don't need a tape recorder. Here's
25 what you need. You need a pen and a

2575

1 pencil. And you say, "You just said
2 you must have did it then. Didn't you
3 say that?

4 "Yes.

5 "Please go in this room, you run
6 out of ink, call us. And I want you to
7 take this -- I mean you graduated from
8 high school, right?

9 "Yeah.

10 "You know how to write?

11 "Right.

12 "And I want you to write out a
13 narrative of exactly what you did."

14 They didn't do that. What they
15 did do is what you heard about, with
16 some teeth pulling. Detective Tetanich
17 asked Myers did he see the note on the
18 windshield? Not "did you see anything
19 outside the bar that was of interest?"

20 Detective Cumbee asked if Myers
21 wanted to hurt himself. Not "why would
22 you have remained at the scene?"

23 Cumbee asked, quote, if there
24 was something important like a trinket
25 that he wanted to keep of the victim's.

2570

1 Not "why" did you take the purse?"

2 And we do know, despite the
3 resistance to let you know, right from
4 the video there is no doubt whatsoever
5 that this stack of pictures was given
6 to Mr. Myers and it wasn't just a
7 rattlesnake sitting on the corner of
8 the desk in the room that he sat in,
9 that they gave it to him and they let
10 him or had him look through them and
11 from those pictures, some of which
12 you've seen, you can gather a lot of
13 information about what happened.

14 Now, did they offer any reason
15 why -- other than a sneak video which
16 is critical to our case -- did they
17 offer any explanation for why Saturday,
18 the critical moments of Saturday were
19 not recorded with a thirty-nine dollar
20 tape recorder? No. There was no
21 legitimate reason.

22 I think the best and as far as
23 we got was we just don't do that. We
24 haven't done that before. Well, you
25 know, if we had that, we'd know exactly

2577

1 what happened.

2 What about the facts of the
3 information culled? Not only do we
4 submit to you and I think the proof is
5 clear that the police knew everything,
6 every element of that. We had a little
7 battle here over the pink note and I
8 think it became clear that the pink
9 note was something known by the police
10 and in all this contact with those days
11 and the elements clearly related to
12 him. They didn't want to say that, but
13 we finally found out that Mr. Hallman
14 did make that notation. It was later
15 learned about the note. Doesn't know
16 when. Doesn't know where. Could have
17 gone back and put in there a critical
18 passage like he did when he went back
19 and changed his report to take out the
20 notation of strangulation. Just go
21 back and change it. He could have gone
22 in there, ladies and gentlemen. He
23 could have put not "it was later
24 learned," but that this was a unique
25 fact about this confession that we only

2578

1 got from Mr. Myers. But he didn't do
2 it and he didn't do it for how long of
3 a period? Four years.

4 We know for a fact through the
5 testimony there's not one iota of
6 evidence at all that the police made
7 any effort whatsoever to control the
8 information about the case. People at
9 Shores were talking about it. This
10 Dana fellow is over there, supposedly
11 finds out about the hair in the hand at
12 noon on Thursday. They made no effort.
13 And why is that important? I think you
14 heard from Dr. Kassin that it's
15 important and it's common sense that if
16 you want, if you have a suspect or you
17 have people you want to interview, what
18 is critical? To keep control of the
19 information about the case from the
20 crime scene that no one else would
21 know. Was any effort made to do that?
22 No.

23 Now I want to ask you to go back
24 on something, this note. Margaret
25 Jensen testified on direct very

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1 differently, that she told the police
2 about the note. So if you wonder about
3 that, you might want to ask that
4 testimony be played back because once
5 that was realized, on direct
6 examination, it got changed a little
7 bit. But go and look at that. "Yes.
8 I talked to the police." That's
9 significant.

10 Now, is it reliable that Mr.
11 Clayton, Detective Clayton suddenly on
12 April the twenty-fifth, the year 2000
13 realized that it certainly might make
14 our attack on the confession less
15 believable if he went back and got a
16 statement from Mr. Little Alan White
17 three years later to make reference to
18 the pink note? And somehow Detective
19 Clayton must have not reviewed his file
20 before that to go back in Mr. Hallman's
21 notation to see that "it was later
22 learned" that the note was involved.

23 Now what about the writing on
24 the windshield, that aspect? Well,
25 that's very important. I think you

2580

1 could discern from the testimony that
2 it's clear that that was only noticed
3 when Mr. Hallman was doing photography
4 and taking pictures of the victim's car
5 that he happened to notice it. Day
6 light.

7 And then what did he do after
8 that? Well, he took the car back to
9 the station and he put fingerprint
10 powder on it and he had to do a number
11 of approaches to it, to do what? To
12 effectively be able to read it with any
13 ease, and then he lifted it like
14 fingerprints, and you have pictures of
15 that. And he taped it down and he put
16 it onto pieces of paper and then it's
17 still not clear.

18 And what's missing? I asked
19 Margaret Jensen on the stand, Margaret
20 Jensen White and Tamya Gonzalez. They
21 didn't see anything on the windshield.
22 How about Mr. Woody? How about Dana
23 Chaples? Did he see anything on the
24 windshield?

25 What is logically missing from

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1 this two-page statement, the confession
2 that they wrote out for Mr. Myers that
3 they had him sign? Well, we already
4 know it includes things the police
5 already knew in it and conveyed to him
6 either through the pictures or having
7 contact with him during those days. We
8 need you to help. Like a junior
9 deputy. Come with us. Assist us in
10 finding the true killer. Sharing with
11 him the details of the investigation.

12 Well, what's missing, logically?
13 Wouldn't the inquiry about other things
14 of him been critically important,
15 inquiry that never, ever occurred? Why
16 didn't they ask and put into the
17 confession things that even seemed
18 reasonable to ask? Then that Saturday,
19 in driving around and going here and
20 there, "well, wasn't your clothing
21 blood-soaked? What'd you do with the
22 clothing, the clothing, Wes? How'd you
23 clean it up? How you did avoid any
24 injury, smashing a piece of glass and
25 not cutting your hand? Did you drop

1 it, a watch at the scene? Do you even
2 wear a watch? Do you know if Teresa
3 wore a watch? Why didn't you use that
4 flare we found in the truck to start
5 the fire? How about, Mr. Myers, this
6 buck knife on your belt that you wore
7 all the way to the jailhouse? Do you
8 mind if we test that? Does that have
9 any role in this case, including this
10 cut in the head? And how'd you clean
11 your truck up of all the evidence, the
12 blood, the hair, the trace evidence?
13 How'd you do that?" Nobody asked him
14 that.

15 The "perp walk", as I mentioned
16 in opening. Where are you in this case
17 as a detective? What do you do? Well,
18 you been over and looked at the
19 parents' house, you can't find
20 anything. Nothing. Not even just a
21 little snitch of trace evidence. You
22 can't find the purse and you have, that
23 Saturday, the fellow here, who -- and
24 we all know and, and you've followed
25 this very closely, all of you, I

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1 know -- that if we have an alcoholic
2 blackout, nobody remembers anything.
3 Nothing. But we have someone who,
4 according to the police, remembers all
5 the details of the crime, totally
6 cooperative, totally voluntary,
7 volunteering every bit of information,
8 can't remember where her purse is. No
9 explanation for that.

10 So even after going out,
11 suggesting, well, and I think it came
12 out of their mouths, the detectives,
13 well, if didn't you put it there, where
14 might else you put it? Okay. Let's --
15 maybe the hollow tree. Maybe here.
16 Maybe there. Maybe between, and there
17 was some discrepancy about that, behind
18 my mother's bed or behind my bed or
19 maybe between the mattresses? Well,
20 that was immediately searched. No, no
21 purse. There was a reason for that.

22 So then we get down to the point
23 where, and they admitted this, they
24 didn't want to admit that it occurred
25 in sequence, boom, "I guess I must have

2584

1 did it then." And then, boom. At that
2 point here are the pictures. They're
3 out on the table.

4 Well, we did hear some testimony
5 about, you know, how many and where
6 they were and so forth. But here the
7 pictures. Gory pictures. And the
8 suggestion is made, and I told you in
9 opening there are two parts to this.
10 One is "I must have did it then" and
11 then the second hit, "you got to
12 apologize." That's to seal and secure
13 the confusion (sic), under the totality
14 of the circumstances. You need to
15 apologize to Teresa. Come on.

16 Let me see what I got at this
17 point. We got this micro --
18 microscopic comparison that Joe Powell
19 did at S. L. E. D. Half a day. We all
20 know you can't do DNA in half a day,
21 S. L. E. D. doesn't even do microscopic
22 examination any more. We got that.
23 What else do we have? We don't have
24 any eyewitnesses -- until last Friday.
25 I'll address that in a minute. So what

2585

1 are we going to do?

2 This is kind of thin right now.

3 This is so thin. Goodness, gracious.

4 Let's let him talk to her mother, with

5 a buck knife on his side. Let's let

6 him maybe talk with some reporters with

7 a buck knife on his side. We don't

8 have a real big case. We need to seal

9 this up. How can we do it?

10 What's the new rubber hose?

11 What's the new bright light? Trickery.

12 Deception. Let's get the mother,

13 Miss Justice, who tragically lost a

14 daughter. Let's, let's get

15 Miss Justice over here. Let him

16 apologize to her. She goes up there

17 and what does that do? That suggests

18 to him that might make his case better,

19 like Dr. Kassin was talking about.

20 Certainly. And it also does another

21 thing, too. Creates a witness to come

22 into the courtroom.

23 That's not enough. You heard

24 from the reporter. Hey, you know, the

25 case you looking at? Yeah. Well,

1 guess what? We made an arrest and he's
2 got something to say. You all better
3 get up here. That happened.

4 So they brought him out and all
5 of a sudden during the case something
6 came out, another dribble in the
7 courtroom, I call it. Well, you know,
8 we took him out front. Not in the
9 police report anywhere. It's pretty
10 significant. But smoked a cigarette or
11 two, and we asked him if he'd like to
12 be taken away from the front door to
13 avoid the press. And he said no. I
14 want to go out the back, into the
15 gauntlet. Is that something that
16 should be in the police report? If you
17 can go back four years later at any
18 time and modify the police report, is
19 that something that should be put in?
20 Is it significant? Is it significant
21 enough to at least write down
22 somewhere? Or is it something that's
23 offered at trial to try to counter a
24 suggestion with a clear indication that
25 the police set up the whole scenario of

1 the "perp walk"?

2 Now, you can refuse, and the
3 judge will tell you, to accept the
4 confession and the apologies and
5 everything if your assessment of the
6 totality of the circumstances indicates
7 to you that the confession was not
8 voluntary, that it was not a product of
9 free will.

10 Now of course I submit to you
11 that all aspects of this and the
12 bizarre circumstances of this, on that
13 slow path and march to Wes Myers, leads
14 you to the point where you must reject
15 that for these reasons we've reviewed
16 and more.

17 It's not just the issues about
18 the confession, but all the other
19 evidence that says -- that doesn't
20 point to him and that points away from
21 him. That cannot be ignored. That is
22 something the State doesn't like.

23 Now, quickly, the Dana issue.
24 Dana Chaples. Is there more proof
25 against Dana than there is against

2583

1 Myers? Was he nervous? Was he asked
2 about? Did he ask about the hair in
3 the hand -- they didn't explain -- he
4 heard at Shores that morning before
5 twelve when they confronted him? Did
6 he deny being there although two
7 witnesses of the State put him there?
8 Did he shave his mustache within
9 several hours of being seen at the
10 Mill? Was he ever himself taken down
11 to the specialist, to Mr. McHale, to be
12 interviewed? No. He didn't cooperate.
13 They said at first he consented to take
14 standards and then he said no, not
15 going to do that. Not going to
16 cooperate.

17 You, and I submit to you and you
18 know I do, and my argument is to
19 discount the whole confession for a
20 myriad of reasons why. You take that
21 out and there's more evidence in this
22 case against Dana Chaples than there is
23 against Wes Myers, and that's apparent.

24 Now what about the evidence and
25 forensic issues, all of which point to

2589

1 the falsity of the confession?

2 The watch. They can't challenge
3 the watch. It wasn't Teresa's watch
4 and it wasn't Myers's watch. Tammy and
5 Margaret didn't see it on leaving and
6 they said they cleaned up. It was
7 ripped from its strap or the strap was
8 burned. We don't know. It appears to
9 have stopped, you decide, at 3:14 a. m.
10 or p. m. It just happens to coincide
11 with the time that Officer O'Neal saw
12 the fire when he was driving around the
13 corner. But they think it just didn't
14 have any relation to the case. It
15 wasn't near the slow march and the path
16 they were on from the gut reaction that
17 first morning to Wes Myers, and they
18 didn't even test it until the defense
19 asked them to do so.

20 What about the meat cleaver?

21 The meat cleaver, Margaret testified
22 she cleaned up the bar. It may have
23 been something behind bar, but she
24 wasn't sure. She didn't want to
25 suggest that it wasn't behind the bar

2590

1 because what would that have meant?
2 That it was brought there. It was of
3 no interest to the police. I want you
4 to look at the photo of it that's in
5 evidence where it was in place at the
6 bar. Remember, they cleaned up. And
7 this is what the police found when they
8 walked and looked behind the bar. It's
9 of no interest to us. We're on the
10 slow road to Myers.

11 Now also look at the photograph
12 of it after it was tested at whose
13 request? The defense request. Looks a
14 little different. Don't know why.
15 Maybe whatever was on there, whatever
16 it was, dried up. We asked that it be
17 tested.

18 Mr. Durant's going to say it was
19 tested and there was no blood on there.
20 Well, I don't think we had any
21 explanation about the extent to which
22 it was tested, but it is impossible to
23 know all of what is on there. What it
24 is.

25 And we also heard from Dr.

2591

1 Nichols, and that was important, the
2 medical examiner, who said when I
3 handed him this object, "I can't
4 exclude this as being something that
5 caused the cut in the back of the
6 head." Even -- and I would imagine, I
7 didn't ask him, and I would suggest to
8 you by way of argument that he was in a
9 position to suggest that or opine that
10 to Mr. Hallman there at the autopsy,
11 but Mr. Hallman didn't take that
12 because the police had no interest in
13 it.

14 Now, very, very, very important.
15 State's exhibit number twenty-seven, I
16 think you've seen it. I don't know if
17 you have actually passed it among you.
18 Was the subject bleeding? "Subject"
19 doesn't mean deceased. "Subject" means
20 the suspect. On the exhibit who are
21 interestingly listed here, Wes Myers
22 and Dana Chaples. Mr. Myers wasn't
23 bleeding. Mr. Myers was not injured.
24 Mr. Myers was photographed by the
25 police all the way down to his B. V

2592

1 D.'s. And he did not show an injury.
2 But the form is confusion since the
3 police listed Mr. Chaples as well. So
4 we don't know why or if Mr. Chaples was
5 bleeding. Now, Mr. Hallman put that
6 in, the man who is the crime scene
7 technician.

8 Now what about the blood stained
9 bar stool legs that came out during the
10 trial? Seemed to be a bit of a
11 surprise to the police testifying when
12 I asked them about it. And I said
13 what's that look like right there?
14 What's that, is that red stuff there on
15 the bottom of the bar stool, with
16 substantial injuries to the cranial
17 area of Miss Haught? Did that play a
18 role in any respect in this case?
19 Don't know. But does it relate to the
20 suspect or subject bleeding? Don't
21 know.

22 The wine carafe is the weapon of
23 assault. Is it plausible for the State
24 to suggest, to try to show this
25 confession to be reliable that the

2593

1 object the State suggests was, was
2 used, was, used as a blunt instrument
3 and a battering ram? And I will not
4 smash it here in the courtroom, so. . .
5 Held like a mallet and violently
6 smashed. Not one scratch or cut.
7 There were some burns but they were old
8 welding burns on Mr. Myers' hands. Is
9 that a doubt? Is that a reason to
10 hesitate?

11 Were the fingerprints,
12 consistent with what's in the
13 statement, of either Mrs. Haught or
14 Mr. Myers on any glass piece? No. Was
15 there any suggestion that Mr. Myers
16 used gloves? Was he even asked? There
17 are none. The best the police could do
18 was to say well, as best we could tell,
19 you know, in a fire, it destroys
20 fingerprints so that's why there are
21 none on there.

22 And again it came out during the
23 trial, not until Monday last week, the
24 day before the trial started, did the
25 police even realize that there were two

2594

1 apparently broken, conveniently, in
2 manner that could be held, wine carafe
3 pieces. And how many are in the
4 confession? One. Just one.

5 Does the confession fit the
6 crime or the crime fit the confession?
7 Was this an attempted sexual assault?
8 There was testimony her clothes were
9 ripped away. It's not in the
10 confession testimony about her jeans
11 being zipped all the way down to the
12 bottom. Of course the answer was that
13 she got bloated drinking eighteen beers
14 or so and, as many people do, let that
15 button out to give themselves a little
16 room. But did that seem to suggest
17 anything to the police? Did it
18 indicate anything? No. On the slow
19 road and the march to Wes Myers, based
20 on their hunches. And they knew that
21 that didn't seem to fit, that if he
22 slept with her two nights before that
23 it would be any forceable sexual
24 contact. Didn't fit.

25 So when they got down to the

2595

1 autopsy, Mr. Hallman -- as you finally
2 heard from Dr. Nichols -- said, "We
3 don't need to do full C. S. C.
4 protocol. We don't need to do all
5 that." And Dr. Nichols, out of an
6 abundance of caution, did a public swab.
7 But like many aspects of this case that
8 didn't do any good in pointing the path
9 to the truth because the freezer died
10 and it was lost.

11 What kind of evidence do we not
12 have? Very surprising during the
13 trial, not otherwise apparently
14 documented, was the revelation by Chief
15 Norris that this cabinet right in front
16 of where the fire was set, that burned,
17 and the door's left. Well, I don't
18 know if that caused you pause, but the
19 question is should it? How do you burn
20 a whole cabinet down to the floor and
21 the cabinet door not burn?

22 And as well does that relate to
23 the confession? Does it relate, ladies
24 and gentlemen, to the last sentence in
25 the confession, exhibit thirty?

2596

1 "I forgot to mention" -- and in
2 Detective Clayton's handwriting,
3 corrections made by him, handed to
4 Mr. Myers to initial as we learned --
5 "I forgot to mention that when" -- and
6 why, why would he make a grammatical
7 correction that when the guy who said
8 "I must have did it then" according to
9 them -- "I forgot to mention I opened
10 the cabinet behind the bar looking for
11 something to burn." Well, now we know
12 what happened and why that's in there.
13 Well, unfortunately I hate to tell you
14 or you heard, they, the State didn't
15 offer that in evidence, and I don't
16 know whether there was any testing
17 conducted on it or not, but it's gone.
18 It's not here. But you must ask, and I
19 submit, was it taken, was that added to
20 the statement in case something came
21 back, and was it examined and did
22 nothing come back?

23 Something else we don't have
24 that Dr. Nichols explained to us.
25 Carbon monoxide levels or carby --

2597

1 carboxyhemoglobin levels clearly
2 establishes someone who'd been exposed
3 to the fire, such as described in the
4 two-page confession, would have an
5 elevated level of carboxyhemoglobin.
6 In fact they did the study and the
7 analysis of the blood of Miss Haught
8 and it was determined that she had
9 minimal, which of course suggests, as
10 Dr. Nichols testified, that she died
11 before breathing it.

12 But the statement that they took
13 from Mr. Myers indicates that "I sat
14 there and closed my eyes and the fire
15 was getting really big."

16 Let me shift for a minute.
17 Officer O'Neal goes by and sees the
18 fire, some smoke. He comes back and
19 it's raging. Something he forgot to
20 say, because it didn't happen. That
21 would seem to suggest in the chronology
22 Mr. Myers' truck would be on fire and
23 that maybe Mr. Myers might be walking
24 down the sidewalk with blood on his
25 clothes, carrying the purse about that

1 time. He didn't say that because it
2 didn't happen. But they had Mr. Myers'
3 blood. They took it. They told you
4 that they had his blood. Did they test
5 it for the presence of elevated levels
6 of carboxyhemoglobin? No. On the slow
7 road.

8 Because if they did and if it
9 came back to be within the level that
10 smokers have, that would have been a
11 problem. That would have been a real
12 problem with this. It wouldn't have
13 made sense.

14 Many, many objects were examined
15 by the State, some of which you haven't
16 even seen. You haven't seen them
17 because they didn't produce any
18 evidence of guilt or any evidence
19 linking Mr. Myers to this crime. But
20 there were some things, as you heard in
21 the testimony, that the defense asked
22 to be tested that you might think would
23 be kind of brave to do. But not. The
24 police just didn't want to bother with
25 the defendant's clothing. They didn't

2593

1 want to bother with the victim's
2 clothing. They didn't want to bother
3 with the meat cleaver. They didn't
4 want to bother with the watch. They
5 didn't want to get the hair tested for
6 DNA. I think you heard the testimony
7 that as early as the summer of 1997 the
8 defense was asking for the DNA testing
9 of that hair, the hair, the critical
10 aspect of what was presented to
11 Mr. Myers in the hatched plan to get
12 him to confess.

13 How about the matches at the
14 scene as well? Now the opinions of Dr.
15 Nichols again are very important. It
16 could be the wine carafe. That's the
17 murder weapon. That's murder weapon.

18 Now wait a minute, Dr. Nichols.
19 Very nice gentleman. A professional.
20 No, I have to say it could be something
21 else.

22 And, you know, but we did take
23 one or the other of these, when I asked
24 him because he didn't know there were
25 two. They only brought him down one.

2600

1 And I asked him if he used both or made
2 any effort to do so and he said well,
3 it was the one that matched.

4 Well, if it's "either/or", it's
5 neither. And I also asked him if he
6 photographed that to document it so
7 that you, the people of the jury, could
8 see a basis for his comparison and
9 opinion that that matched and was the
10 murder weapon. Then again like the
11 freezer, those things, the photographs,
12 were lost or missing.

13 How about the ear, big cut, back
14 of the head -- I mean this case is, and
15 I said from the outset when I stood up
16 here today, no one takes issue.
17 Tragic, horrible murder of Miss Haught.
18 That's not an issue in this case.

19 One of the aspects of it that is
20 well within that envelope of horror is
21 the cut in the back of her head that I
22 asked Dr. Nichols about and how it
23 could be made. It certainly was not
24 made by the bottle. It certainly was
25 not made by being a smashing act of a

2601

1 wine carafe, and that's a problem
2 because it's inconsistent with the
3 confession. And from the confession
4 came the apologies, as we know it, to
5 the mother and to the media.

6 Dr. Nichols did the autopsy that
7 morning on 3/13. He didn't go to the
8 crime. He's a forensic pathologist, he
9 didn't go to the crime scene, never
10 knew how the appearance of the crime
11 scene and aspects of the evidence there
12 might impact some of these decisions
13 and opinions he was rendering.

14 I don't think and he certainly
15 didn't say that he ever reviewed any
16 pictures or video of the crime scene,
17 and he certainly didn't take that
18 bloody dollar bill from the body until
19 Mr. Hallman got there because he told
20 you that they don't do that. They
21 don't collect the evidence. That's up
22 to the police.

23 And he said something else very
24 important. It's sometimes the things
25 that don't seem important that are

2602

1 really critically important, especially
2 from a forensic or practical setting.
3 Were there any glass fragments in any
4 of the wounds, the terrible wounds that
5 Mrs. Myers -- I mean that Mrs. Haught
6 suffered? No. No. Not one glass
7 shard.

8 How about the lack of fingernail
9 scrapings? Well, based on the
10 appearance of Mrs. Haught with her
11 clothing torn away, jeans down, and
12 information from the police, it was
13 certainly apparent that an exchange
14 with another human had occurred in a
15 setting where, as they said and
16 pointing to the finger injury, and I'll
17 address that in a minute, the defensive
18 aspect. Did you take fingernail
19 scrapings? No. We didn't do that.
20 Isn't it common sense and why? I mean
21 why won't they do that? Didn't the
22 mere appearance of suggestibly,
23 suggestibly someone else's hair in her
24 hand which was there bagged and
25 collected by Detective Hallman at the

2603

1 autopsy suggest to them that she had
2 grabbed, that there'd been some
3 exchange, some contact with another
4 person, that that would warrant, that
5 it would warrant fingernail scrapings
6 that could be subjected to all kinds of
7 forensic analysis these days within the
8 level of science that we have?

9 Now, the DNA of the hair. The
10 DNA is something that's interesting.
11 Five thousand dollars of taxpayers'
12 money was spent to test that hair,
13 although as you see from the testimony
14 the defense requested that in the
15 summer of 1997. Now, the problem with
16 that is that prior to the time they
17 sent it off for testing, no issue was
18 raised about whether it was the hair or
19 not. And logically if the State really
20 thought that, would they spend five
21 thousand dollars to send it off to be
22 tested? Now they're going to say well,
23 if we didn't do that then Mr. Kulp
24 would raise that issue. Well, I was
25 raising that issue three years ago.

2604

1 But what they're going to do and admit
2 it into evidence as a Court exhibit for
3 your review are documents from the
4 F. B. I. who aren't here, and these
5 documents indicate that in fact, in the
6 affidavit of Agent John or Jeb Stuart,
7 John Stuart, that the slide was broken,
8 as you heard, when it came. They
9 remounted it then and put it on another
10 slide and held it for a while and sent
11 it back to S. L. E. D.

12 What Mr. Durant is going to do,
13 and I submit to you it's because the
14 mitochondrial test just didn't come out
15 the way he wanted, the principal piece
16 of evidence, the hair being Mr. Myers,
17 is to reflect back and think and, and I
18 guess understandably, "how can I
19 undermine the efficacy of what Dr.
20 Melton told us?" And what did
21 Dr. Melton tell us? She said that it
22 wasn't Myers' hair. Now, there are
23 standards that apply to that but she
24 certainly was in no position to say
25 that it was his.

2605

1 And it's a little bit confusing
2 and it's a little bit hard to follow,
3 but there's no way. Don't you think
4 for one minute if there was a basis for
5 her to say that it was Myers' hair
6 under those protocols that she would
7 say so? She said "Well, after years of
8 experience my, my opinion is that it's
9 not his hair. It's not his hair."

10 So what's the State got left to
11 do? Well, if they can't really
12 challenge their own testing they got to
13 say what? They got to say it's not the
14 same hair. That's why we heard from
15 Joe Powell and everyone, because that's
16 the only out for them, because it is
17 conclusive proof. If they can't
18 through the highest level of DNA
19 analysis say that that's Wes Myers'
20 hair, this confession isn't worth the
21 paper it's written on. So they got to
22 say to you and they're going to refer
23 to these documents and say well, we
24 know that Dr. Melton said that and so
25 forth but, you know, it doesn't count,

2606

1 it doesn't count at all because it's
2 the F. B. I. and they must have
3 apparently lost it. So expect to hear
4 that.

5 What about the DNA on the dollar
6 bill? Well, it's not Wes's. It's of a
7 male and it's in a mixture of some
8 solution on the dollar bill. That's in
9 evidence and you can look at it. And
10 when you look at it you're not going to
11 see a bunch of blood on there like you
12 would expect. Passage of time, I don't
13 know. But they're going to argue to
14 you when Mr. Durant gets up here that
15 that dollar bill doesn't have any blood
16 on it. But the problem with that is
17 that Mr. Hallman told us in identifying
18 exhibits that you have before you and
19 you'll have in the jury room on
20 exhibits eighteen and nineteen that he
21 wrote it up as a blood-stained dollar
22 bill. And if you recall, and I know
23 you do because you were paying such
24 close attention, when I asked him about
25 that issue on defendant's exhibit

2607

1 eighteen he said, on line seven that he
2 referred to as being highlighted, that
3 one partially burned one-dollar bill.

4 And not to be too dramatic about
5 it, but I walked away and said wait a
6 minute. Please read the rest. Blood
7 stained. So they want to suggest to
8 you that the DNA testing of the dollar
9 bill in this case that showed the
10 presence of DNA of another male, not
11 Mr. Myers, is worthless. No.

12 What about the arson issues?
13 Well, that has to, in the theory of the
14 State's case, has to fit into the, the
15 elements and the aspects of the
16 confession. Doesn't. This isn't a
17 contest of personalities. This isn't a
18 contest to see who has more education.
19 This is a search for the truth.

20 And we heard from our witness
21 about it. And I submit to you that the
22 initial impression about the fire is
23 not accurate, and for the reasons that
24 Dr. Hurst told you, who conceded that
25 he can't say one hundred per cent that

2603

1 was the way it happened, but he can say
2 that there's substantial doubt and
3 there is his hesitation about whether
4 the fire started there.

5 And also there's some logical
6 aspects of that. By the statement
7 Mr. Myers is said to say he wanted to
8 commit suicide. Now we know through
9 the examination of the State's
10 witnesses, do we not, that there were
11 propane tanks there, that there was
12 charcoal and charcoal lighter, yet what
13 the State has in his confession they
14 handwrote out for him is the mention of
15 papers that were started and were the
16 source of flames for the fire. And why
17 did they do that? They did it because
18 Mr. Norris, Chief Norris, came in as he
19 told you and at least in a preliminary
20 finding made the determination that's
21 where the fire started and it started
22 with papers. But the question is, is
23 that accurate?

24 And we heard of course about the
25 cabinet door and so forth, but also

1 what do we say about the presence --
2 excuse me. It's just simple, and this
3 isn't a contest of personalities or who
4 has done what. The evidence, the
5 question is what is the evidence and
6 the testimony? What prohibited the
7 gentlemen, even if their initial
8 impression was that the fire started by
9 the cabinet with paper, from collecting
10 some samples to test for the presence
11 of accelerants? Nothing. Nothing did
12 so.

13 Now I mentioned it in passing,
14 but it's very important. They offered
15 you the testimony of Dr. Powell to say
16 that the time he examined the hair on
17 the fly, without making notes until
18 July, he examined microscopically on
19 the thirteenth and advised Mr. Hallman
20 that "it could be considered as the
21 hair of Mr. Myers." He indicated they
22 don't do that test any more because
23 there are better tests. And at that
24 time what I suggest to you is can you
25 consider that to be some indication of

2610

1 Mr. Myers' guilt? No. Because he's
2 not guilty. He didn't do it.

3 And the point is that there's
4 the talk about the rat tailed hair to
5 try to explain why there was a notation
6 of a eight ten inch long hair. And of
7 course you now saw and introduced into
8 the record the fact that the pictures
9 of Mr. Myers contemporaneously taken
10 with the investigation show that he
11 didn't have rat tail hair.

12 And you'll also see what was a
13 little disturbing I must admit was that
14 despite the twenty-two thousand dollar
15 microscope Mr. Powell, who's a very
16 nice gentleman, indicated that his --
17 he approximated the hairs he examined
18 between four and six inches long.

19 Well, that is not reliable
20 evidence and it isn't because I simply
21 had to ask him how many other people
22 would fall within that range of similar
23 to or similar characteristics? And he
24 couldn't really tell. It's a screening
25 type of test that they don't do any

2611

1 more.

2 Now, I need to address this and
3 you know that I need to do it. So,
4 last Friday a witness appeared before
5 you, Mrs. Villabolos (sic), and that
6 was presented by the State as an
7 eyewitness to Mr. Myers's being at the
8 scene which is a, for lack of a better
9 word, "carbuncle hole" approach to the
10 case. But the judge is going to tell
11 you something very important that
12 applies to any trial and that is you
13 are the judges of the facts in the
14 case. Each and every one of you are
15 the judges of the facts. You can
16 discount testimony. You can accept
17 part of it. None of it. You can
18 consider the way the witness testifies,
19 the bias, any aspect of it, lack of
20 recollection in the case.

21 And I submit to you and, and,
22 and would, her testimony is absolutely
23 incredible and unbelievable. Four
24 years of this case, and she runs into a
25 witness in a bar who's been sitting

2612

1 here most of the week and has a
2 conversation about the trial and it's
3 like as if she said she went to a Red
4 Sox game four years ago in Detroit,
5 wherever they are. She says, "By the
6 way, you know, funny you should mention
7 that. I saw the killer, but I haven't
8 told anyone about that for four years."
9 As we heard, "Not my boyfriend then,
10 not my boyfriend recently. And the
11 reason I did is, I don't really
12 remember why I didn't, but the reason
13 is because of the fact that I saw
14 Mr. Myers on television confessing and
15 really didn't think it was necessary."

16 Ladies and gentlemen, no.
17 Didn't recall if there were cars out
18 front. Called at one o'clock and the
19 lady who was passed out drunk didn't
20 sound drunk. She didn't even get the
21 purse right. The purse was a
22 carpetbagger purse. The purse has been
23 described. Did Margaret Jensen say
24 anything about a carpetbagger purse?
25 Did she describe anything like

2613

1 Mrs. Villabolos (sic) did? No.

2 She was one drink away from
3 being blown away. She said I had six,
4 maybe six 7 and 7's. She was drunk and
5 I submit to you that she was entirely
6 unbelievable.

7 And then she said, and I asked
8 her, I said, "Well if you came at 1:30,
9 if you came at 1:30 in the morning, did
10 you see Margaret, Tammy, and Woody and
11 maybe Dana?

12 "No.

13 "If you came at 2:30, did you
14 see anything burning?

15 "No."

16 "And you withheld this critical
17 last minute 'go up on the stand'
18 evidence until now, until you saw Tammy
19 at the bar?

20 "Yes."

21 Eighteen beers in five hours.
22 The State's going to say, well, but,
23 you know, the blood alcohol level is
24 .06 and that's, as Dr. Nichols said,
25 less than the legal standard of .10 or

2614

1 whatever, but also he said also it was
2 measured from the liver and we don't
3 know all of the aspects of that or the
4 defective exposure to the fire on that
5 type of measurement.

6 Margaret didn't deny and no one
7 else, that she had eighteen beers. She
8 was sitting up at the bar, didn't look
9 drunk, didn't have slurred speech in
10 the phone call, and she's having a
11 conversation. And it was very
12 convenient to the other things that
13 were mentioned, that Wes was there.
14 Very convenient. That in fact she
15 looked upset, that her mascara was
16 running. And had the purse sitting
17 right out on the bar.

18 What about the, the witnesses in
19 the "other camp" as Paul told you
20 about? Well, Paul said, you know, at
21 the beginning that he -- what's
22 interesting about his testimony,
23 McKeever's (sic), is that he said that
24 in the beginning he believed, he was in
25 the camp that said "Wes won't do this;

2615

1 Wes loved Teresa." But another camp
2 formed and did that camp form or, or
3 did the formation of that camp have
4 anything to do with maybe, you know, a
5 basic dislike for Wes in that East
6 Montague area, in that bar crowd, or is
7 it the result of some of the
8 information being emanated or was
9 emanating from the police about their
10 hunches or their suspicions?

11 And here is Mr. McKeever (sic)
12 driving around, protecting Mr. Myers
13 from killing himself over the tragedy
14 of the loss of his girlfriend, helping
15 him out, protecting him, thinks he
16 didn't do it, and he shifts to the
17 other camp. Well, when did the police
18 go take a statement from him? They
19 didn't. There is no statement.

20 And did he say he shifted and
21 why he shifted, or was it because he,
22 too, was told by the police that
23 Mr. Myers did it? Or did he watch the
24 T. V., the confession or the statement
25 on the television? And is he here so

2616

1 vehemently trying to make up for his
2 first alliance with the camp in support
3 of Wes?

4 Now, Mr. Durant gets up here and
5 suggests to you that Mr. Myers, to fill
6 in that Mr. Myers was in fact all
7 bloody as he should have been from the
8 profuse blood that came from the wounds
9 that Miss Haught tragically
10 experienced, "Well, you don't know if
11 he went over there and cleaned up in
12 that back little house behind her."

13 But we do know that the police
14 searched that house. I'm sorry. They
15 said they photographed it. But when
16 they photographed it they didn't search
17 it. And then as you can see from the
18 driveway there's nothing hidden or
19 obscure about that, and that's the
20 house that was open, so in theory
21 nothing prohibited the police from
22 going in there to insure and cover
23 those kinds of issues. And in fact if
24 they had as they said they had a hunch
25 that morning, wouldn't that be

2617

1 somewhere they would look? No
2 evidence. Nothing collected. Nothing
3 seen.

4 Billy King. Billy King comes in
5 and says yeah, he told me, you know,
6 the big call, the tragic call,
7 everybody fears. You know, you got
8 terminal cancer. Something is going to
9 happen. "You know, I would burn that
10 place down."

11 But in the context of that I
12 think I recall, and you're the judges
13 of the facts, that what he said was,
14 Billy even admitted, that he had, that
15 Wes had concerns over Teresa's
16 exposure, that she was doing things
17 like what happened this evening,
18 drinking to excess, sleeping on the
19 pool table, had four children. And
20 that that place was something -- you
21 know, we all think about that, you
22 know. We make comments to people about
23 things. Do we ever intend to do them?
24 No. Was that one thing that was
25 interpreted in a manner that's

2613

1 consistent with the State's theory of
2 the case? And did Billy King say that
3 the comment about burning was
4 associated with jealousy? No.

5 What about the anger
6 questionnaire? Anger questionnaire
7 comes in. You've read it. You've seen
8 what it says. Did the comment by Wes
9 at the bottom, and we clarified that by
10 saying that was what was given to him
11 when he was in Charter for chronic
12 alcoholism and he indicated at the
13 bottom that those feelings that he had,
14 if you look close, some of which are
15 changed with a pencil no, yes, or
16 corrected. But those are feelings that
17 he had prior to his treatment.

18 Now, one thing I left out that's
19 critical and I think you will remember
20 it, really critical, and I almost can't
21 believe that I left it out, was that
22 very first morning. Now their
23 suggestion is that the confession is
24 accurate, that it's all true because of
25 the things contained therein. That

2613

1 Mr. Myers held her body as it was
2 bleeding until he was overcome by
3 smoke. Also, as we brought out, that
4 it was a little strange in the
5 sequence. I'm shifting gears a little
6 bit here, but that when he's overcome
7 by smoke, what does he do? They
8 suggest he goes back around to the
9 area, into the flames where he set the
10 fire, to get the purse with the little
11 trinket, the one that Detective Cumbee
12 said, "Did you -- was there anything in
13 the purse like a trinket?" on the
14 Saturday.

15 But the parts about that that
16 are important -- excuse me. So that it
17 doesn't make sense. So they're saying
18 that he was holding her and she was
19 bleeding, until he was overcome by
20 smoke, and that he left. And that he
21 went back to his parents' house and
22 somewhere, somehow, some way that we
23 don't know, he got all the evidence
24 disposed of and got rid of everything
25 and cleaned up.

2620

1 Well, between, between three and
2 five, 3:14 and his appearance at the
3 scene and they might make a big deal
4 about that. There's nothing in this
5 case about Mr. Myers being any kind of
6 pyro-whatever. They might suggest that
7 he came to the scene because he wanted
8 to see what happened and they're going
9 to mention Dan Perry, but we clarified
10 that because Mr. Perry wasn't told all
11 the details about that phone call.

12 But he at work at seven o'clock,
13 comes by the scene. At that time we
14 know what? That at 6:40 or so, a. m.,
15 three hours and twenty-six minutes
16 after the fire is reported, where is
17 Mr. Myers? He's sitting in a patrol
18 car with Detective Payne who's taking
19 his statement, background information.
20 Like a real interview. And does
21 Detective Payne tell you that he sees
22 one mark on Mr. Myers? Does he tell
23 you that he smells even cigarette smoke
24 in a closed car? That is significant.

25 Now, the judge -- what I'm going

1 to tell you is this. Mr. Durant gets
2 to speak and I don't get to get back
3 up. That's the nature of the court
4 procedure. And I want to tell you
5 right now, considering the length of
6 this case and the issues that are
7 involved, when I'm sitting over there
8 and listening to him and watching you,
9 I'm going to be thinking of things that
10 I didn't say that are critical in this
11 case. As the judge will tell you, you
12 decide this case based on the evidence
13 or the lack of it, so keep that in
14 mind, please.

15 As well, what's the standard of
16 review in this case? Well, in a civil
17 case, not a criminal, it's a
18 preponderance of the evidence is the
19 standard for a jury to make a decision.
20 Fifty-one per cent to forty-nine. A
21 slight tipping of the scales is the way
22 the lawyers always illustrate that.

23 In this case it is much higher.
24 The standard of proof is the highest in
25 this land applying to any jury and it

2622

1 is this, and the judge will tell you,
2 your instruction, you must find Wes
3 Myers not guilty of murder and arson or
4 manslaughter unless the State has
5 proven to each and every one of you
6 beyond a reasonable doubt that he did
7 so. And at the outset of this case the
8 judge told you a definition of
9 reasonable doubt and that is one that
10 would cause a reasonable person to
11 hesitate to act. That is the standard
12 of review.

13 One thing I want to mention, you
14 heard on cross-examination of
15 Dr. Kassin some interesting information
16 came out that I don't recall asking
17 him, and that was about the DNA and the
18 Innocence Project, and that came out,
19 and Mr. Durant exchanged a colloquy
20 with Dr. Kassin about that and learned,
21 and I guess we all did, that there were
22 twenty-two cases that DNA reversed
23 convictions where the person had
24 confessed. Now, Mr. Durant and the
25 State can come in here and discount the

1 notion of false confessions all he
2 wants, but it's reality and the
3 evidence is there. And, as Dr. Kassin
4 said, we're learning that as we go.
5 The iceberg. The tip. And one of the
6 reasons he says they're learning that
7 is because of DNA.

8 We have DNA in this case, as
9 much as the State doesn't like it. So
10 what I suggest to you, ladies and
11 gentlemen, is that we shouldn't wait,
12 like those other cases with DNA, to
13 show the truth. We don't have to,
14 because we already have it.

15 Excuse me one second.

16 MR. DURANT: May we approach,
17 your Honor?

18 THE COURT: Yes.

19 (Whereupon, there was an
20 off-the-record bench conference.)

21 MR. KULP: It's the standard,
22 it's the totality of the circumstances
23 as the standard to consider the
24 confession.

25 You know, I was thinking this

2624

1 week about all of you. I was thinking
2 not about you individually -- we've
3 never met -- I was thinking about you
4 as jurors and what you do. And I was
5 thinking about the importance of the
6 jury and how fascinating it is how we
7 in our system randomly select people
8 and then we select them based upon our
9 assessment of whether they would be a
10 good juror for us or not, twelve in a
11 criminal case, and we put them in a
12 setting and we let them hear the
13 evidence and make a decision that's
14 called a verdict about the case in a
15 criminal setting.

16 And what I submit to you is
17 while life in the big picture contains
18 and reality of the circumstances with
19 the police -- and I've told you from
20 the beginning I'm not here to beat the
21 police up -- but in the big picture
22 where things don't always go as we
23 would like and maybe we can excuse
24 that, jurors, each and every one of you
25 or you as a collective jury, you're the

1 guardians of all of the rights that
2 each and every one of us have under the
3 constitution in this country, man,
4 woman, child. All of the "I don't
5 know's", all of the "it got lost", all
6 of the tricks, all of the lies, all of
7 the "this is the way we got to do it",
8 end here. You in this configuration
9 are the guardians of all those rights.
10 You are the ones who can say "not
11 enough." You are the ones who can say
12 that this shouldn't happen.

13 You know, we don't know each
14 other. We've never even formally met,
15 but we spent a lot of time together,
16 and a lot of time as I told you in a
17 matter that none of us will ever, ever,
18 ever, ever, forget.

19 It's interesting, it's a part of
20 the entire nature of this criminal
21 court that through this long trial as
22 you've sat here and patiently and
23 carefully listened to the evidence, you
24 haven't been able to say a thing. It's
25 a strange and interesting phenomenon.

2626

1 All of us out here have talked, in
2 summation and opening, his Honor in
3 ruling and in giving you the law, and
4 the lawyers in their questions, and the
5 witnesses in their answers.

6 Now we're at the end of the
7 case. Now you take the evidence or the
8 lack of it, and now is when you'll go
9 back into the jury room to be the
10 defenders, the soldiers, the guardians
11 of our rights, applying the high
12 standard, that the judge will tell you
13 that it is the law of the land, in this
14 case. And then when you get to do that
15 and talk, what you say will be the
16 verdict of the jury. That will be both
17 as well a hybrid of both the individual
18 assessment of each one of you,
19 assessment of the case, and then the
20 collective assessment, and you will
21 announce that verdict. Then you can
22 talk.

23 Ladies and gentlemen of this
24 jury, Wes Myers did not kill Teresa
25 Haught and I urge you to return a

2627

1 verdict to say and speak not guilty.

2 Thank you very much.

3 THE COURT: Let's take about
4 five minutes. Let me know when you're
5 ready, Madam Foreman.

6 (The jury leaves the courtroom
7 at 12:36 p. m.)

8 THE COURT: Court's in recess.
9 In about five minutes let me see the
10 attorneys, will you?

11 (Whereupon, a recess is taken at
12 12:37 p. m.)

13 (The Judge enters the courtroom
14 at 12:51 p. m.)

15 THE COURT: While I'm waiting on
16 the jury I wonder if you would stand
17 for just a minute, Mr. Myers. Let me
18 ask you question, too. Your attorney
19 as you know said that you didn't want
20 to testify or -- and you have a right
21 to do that. I'll tell the jury they
22 can't hold it against you. As a matter
23 of fact you already heard what I told
24 the jury, because you're merely
25 exercising one of your constitutional

1 rights.

2 Is it your and your attorney's
3 decision that you will not testify?

4 THE DEFENDANT: Yes, your Honor.

5 THE COURT: All right. Thank
6 you so much.

7 THE DEFENDANT: Thank you, sir.

8 THE COURT: All right. You can
9 bring them in if they're ready.

10 (The jury enters the courtroom
11 at 12:52 p. m.)

12 THE COURT: All right,
13 Solicitor.

14 MR. DURANT: Thank you, your
15 Honor.

16 I told you at the beginning of
17 this case that Wesley Max Myers was an
18 angry, jealous, and possessive man and
19 I stand by that statement. And I think
20 that you as jurors have seen that
21 during the course of this trial, and I
22 think you've seen it basically from two
23 sources. Everyone that knew him and
24 from the defendant himself.

25 Everyone that testified before

1 you in this case that was aware of
2 their relationship, Margaret Jensen
3 White, Tammy Gonzalez, Dixie Justice,
4 Billy King, Paul McKeithan all stated
5 that it was a rocky relationship, that
6 he was jealous of her, that it led to
7 frequent arguments and frequent
8 difficulties, and probably
9 Mr. McKeithan says it best when he
10 said, "Look, she was a female bartender
11 working in a bar where just about all
12 the patrons were guys, and he couldn't
13 stand it."

14 And he acknowledges that it was
15 a tumultuous relationship in his
16 interview with Mr. McHale. "She and I
17 have had ours." Tells about all the
18 difficulties he's had with her.

19 He also acknowledges that he's a
20 jealous guy. He told that to McHale,
21 he told that to Clayton, he told that
22 to Tetanich.

23 And we also know that he's an
24 angry man. This was passed around
25 before and I'd like you to take a look

2630

1 at it back there in the jury room, this
2 anger questionnaire that he tries to
3 discount. This will give you some
4 insight into the depth of this man's
5 anger. And although he may try to say
6 he was being treated for alcoholism, he
7 was in a group for anger and
8 resentment. No alcoholism group. He
9 was there for anger management.

10 "I don't show my anger about
11 everything that makes me mad but when I
12 do, look out. Yes.

13 "I often find myself having
14 heated arguments with the people who
15 are closest to me. Yes.

16 "If I get really upset about
17 something I have a tendency to feel
18 sick later, either with a weak spell,
19 headache, upset stomach, or diarrhea.
20 Yes.

21 "People I've trusted have often
22 let me down, leaving me feeling angry
23 or betrayed. Yes.

24 "I've been so angry at times I
25 couldn't remember things I said or did.

2631

1 Yes.

2 "I am apt to take frustration so
3 badly that I cannot put it out of my
4 mind. Yes.

5 "Some people are afraid of my
6 bad temper. Yes.

7 "I've gotten so angry at times
8 that I've become physically violent,
9 hitting other people or breaking
10 things. Yes.

11 "At times I felt angry enough to
12 kill. Yes." And one of those times
13 was in the early morning hours of March
14 thirteen, 1997.

15 Now, against that backdrop,
16 let's look at what happened on March
17 twelve, late night March twelfth, March
18 thirteenth, early morning March
19 thirteenth. There's no question that
20 the parties were breaking up. By all
21 accounts Teresa Haught was trying to
22 break up this relationship with the
23 defendant. He admits himself that she
24 was breaking up with him. He told that
25 to McHale. She said it, he said it, on

1 the T. V. interview. "We were breaking
2 up." 2632

3 He had been rebuffed by her that
4 night. And how do we know that?
5 Because Margaret Jensen says he called
6 over there four to six times that
7 night. Talked to Teresa a couple of
8 times and finally she got to the point
9 where she wouldn't even take his calls
10 and the last time he called I told him
11 she didn't want to talk to you. That
12 was at about eleven o'clock I believe
13 she said, she said it was.

14 So before he gets in his truck
15 and drives over there that night he's
16 already mad. And he's mad at her
17 because she's breaking up with him and
18 he, she's, she's, he's calling her up
19 four or five times. That also gives
20 you some insight into how obsessed this
21 man was with her.

22 And she says buzz off. I don't
23 want to talk to you. So he's already
24 fuming. He's starting to steam already
25 when he goes over to check on her.

2633

1 And when he gets there, what
2 does he find? Well, he parks his truck
3 beside her car and sees "Love you,
4 baby. Do me later. [REDACTED]
5 Avenue." And he knocks on the door and
6 Teresa takes five to ten minutes to
7 open the door. And she comes to the
8 door with her pants undone. And he
9 goes inside and he sees the note to her
10 from little Alan White.

11 And now something else is
12 working here in addition to the anger.
13 Now you got the jealousy aspect of it
14 kicking in, too. He's not just angry
15 any more. He's jealous of her and he's
16 jealous that she is having some
17 relationship behind his back, that
18 she's being unfaithful to him.

19 And sometime about this time
20 Laurie Villalobos shows up, walks into
21 the middle of this uncomfortable
22 situation. Something obviously is
23 going on between these parties. This
24 is at night after this bar is closed.
25 And she gets her money and she leaves.

1 And he confronts her about this 2634
2 relationship with little Alan White.
3 Well, there's one person that didn't
4 think that that relationship was a
5 joke, and he's sitting right at that
6 table over there. He didn't see
7 anything funny about that relationship
8 or joking about that relationship.
9 He's seen the note. He's seen Alan
10 kiss her. He's seen Alan pinch her on
11 the butt before. And he's irate.
12 He confronts her about it. She
13 tells him, "It's none of your business.
14 Get out of my life. You're a fool."
15 She pushes him away.
16 And by this time he's gone
17 beyond mere anger. In his own words,
18 "I was raged. I was upset. I was real
19 mad." He's taken all he can take at
20 this point and he's not going to take
21 any more. And he takes this wine
22 carafe, or one similar to this, and he
23 bashes her in her forehead right there,
24 probably with that end, breaking the
25 wine carafe. And he hits her again by

2635

1 this time with the broken part, and he
2 stabs her in the left side of her face.
3 And she goes down to the ground and he
4 is right on top of her because his
5 anger is not yet quenched and he beats
6 her and he beats her and he smashes her
7 head on the ground, and he slashes her
8 until her head is completely, every,
9 every bone in her skull is broken, both
10 of her eyes are blackened, and he keeps
11 on and he keeps on and he keeps on
12 until all the life has expired from her
13 body and all of his anger has finally
14 been quenched.

15 And when he realizes what he's
16 done he does just what anybody does,
17 just what Mr. Kassin said we all do.
18 We go into that self-preservation mode.
19 Oh, no, what have I done? I've got to
20 hide this. And everything he does from
21 that point on is calculated to divert
22 attention away from himself.

23 He begins by making a conscious
24 decision to start that fire. He didn't
25 start that fire because he wanted to

1 stay in there and burn up. He started
2 that fire to destroy evidence. To
3 cover up what he did. He had no more
4 intention of staying in there and
5 burning up than I do. But he's in that
6 self-preservation mode and he does that
7 to start covering his tracks. And he
8 grabs the purse which is apparently
9 back up on the bar by this time,
10 according to Miss Villalobos, and he
11 goes out the back door, but he doesn't
12 go home. And he goes where he knows he
13 has a safe haven, which is about three
14 to four blocks away, at Teresa Haught's
15 house where he used to live, and he
16 knows that there is a detached garage
17 back there with a shower in it, and a
18 detached shed with a washer and drier
19 in it. And he goes there and he cleans
20 himself up. And he takes a shower.
21 And he puts his clothes in the washer
22 and washes them. And he leaves there
23 and maybe he goes to Westvaco Park or
24 maybe he does not. Maybe he leaves the
25 purse in that tree or maybe he didn't.

2637

1 He could have. Police did not get
2 there until two days later. The purse
3 could have very well been left there
4 and taken by somebody else by that
5 time. Or, what's more likely, he's not
6 being truthful about where he put the
7 purse, because he kept changing his
8 story.

9 In any event, he gets himself
10 cleaned up and he goes home and he
11 starts the big lie. The big act like
12 nothing has happened. Nothing's going
13 on. And according to his mother that's
14 just what he did.

15 And at that point everything he
16 did was calculated to make himself look
17 like the good guy and to divert
18 attention away from himself. But he
19 starts making some mistakes, almost
20 right off the bat.

21 And the first mistake he makes
22 is Danny Perry. And the significance
23 of that, ladies and gentlemen, is quite
24 simply this, time. Because if you take
25 what his mom says, she gets up at six

2633

1 o'clock. She gets up, puts on her gown
2 presumably, goes into the kitchen, puts
3 the coffee on. While she's making the
4 coffee she hears his alarm go off. He
5 gets up, he goes into the bathroom,
6 gets cleaned up, puts on his clothes,
7 comes into the kitchen, has a cup of
8 coffee with mom, chitchats for a little
9 while, goes outside, opens the hood of
10 his truck, puts some water in the
11 radiator, closes the hood, cranks up
12 his trunk, and leaves. All according
13 to his mom in twenty minutes. And
14 according to her he left the house at
15 about 6:20.

16 But the only problem with that,
17 ladies and gentlemen, is that on the
18 other side you have Mr. Perry at the
19 scene of the crime at 6:34, and he's
20 been called ten to fifteen minutes
21 before by this guy at a time when, if
22 those times are right, we know the time
23 that, that Roper talked to the man
24 because he had it documented in his
25 notes at 6:30. And if this man -- so

1 which would mean that that call had to
2 have come at the time that according to
3 his mom he was leaving the house. And
4 if he made the call then, before he got
5 to the scene of the crime, how did he
6 know about the fire? Because he
7 started it.

8 And if you argue the converse
9 well, he did get there. He's at
10 Beasley Mechanical right across the
11 street. You have, you have the Mill
12 Inn, Montague Avenue, and Beasley
13 Mechanical. If he's at Beasley
14 Mechanical, sitting there, watching the
15 fire, watching the fire trucks and
16 seeing Teresa's car out there, why is
17 he calling Danny Perry to have him come
18 down and check on Teresa, when all's
19 he's got to do is walk across the
20 street? Because he's trying to divert
21 attention from himself. He wants
22 somebody else to find the body. It
23 just doesn't make sense, ladies and
24 gentlemen.

25 I could understand him calling

2640

1 Mr. Perry and saying, "Look, Danny, I
2 was on my way to work, I saw this fire,
3 Teresa's car is out there, I don't know
4 what's going on, I'm going to be late
5 to work, I may not come into work at
6 all today." But he didn't say that.
7 He said, "There's a fire. Would you go
8 check on Teresa for me?"

9 Then his displays with Detective
10 Tetanich and Payne. He tries to make
11 the good show. Finds out, they tell
12 him Teresa's in the fire. He breaks
13 down, crying for thirty seconds, and
14 then he gets up like somebody flipped a
15 switch. Eyes dry. "Oh, and I've kept
16 telling them about the wiring in that
17 place." Is that the way some -- a man
18 who's just lost his girlfriend is going
19 to react? That's why Detective
20 Tetanich was suspicious of him. That's
21 why Detective Payne was suspicious of
22 him in his car, because his emotions
23 were contrived and he kept making
24 suggestions to the police about how
25 this fire could have started, without

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1 them ever having asked him anything
2 about that.

3 His cooperativeness with the
4 police. Oh, you've heard about that.
5 Defense has attached great significance
6 to how cooperative he was. Well,
7 ladies and gentlemen, that's nothing
8 but another attempt by him to deflect
9 attention from himself. Because what
10 is the converse of that? What if he
11 says, "To heck with you. I'm not
12 talking with you. I'm not giving you
13 any blood samples. You guys can go
14 blow."

15 Then of course what are the
16 police going to do? They're going to
17 start looking at him as a real suspect,
18 and that is exactly what he does not
19 want. Of course he's going to be
20 cooperative with the police. He's got
21 no choice but to be cooperative with
22 the police. And it also has the added
23 benefit that if he's cooperative enough
24 and can get in there close enough, that
25 he can find out what they know. And he

2642

1 does want to do that because he wants
2 to know how close they are to getting
3 to him.

4 And that morning, that Thursday
5 morning, this was kind of a little
6 piece of testimony but it's kind of
7 important, is Payne talked to him out
8 at the scene at about I believe it was
9 either seven or eight o'clock. He left
10 right after that to take the defendant
11 to get sem-tabs and fingerprints.

12 Well, Hallman shows up, the
13 crime scene Officer Hallman shows up
14 back at the station after processing
15 the scene and he's asked by Wes, "Did
16 you locate her purse?" Well, number
17 one, Mr. Hallman didn't know a purse
18 was missing at the time, nor did
19 anybody in the police department
20 because the person that told them about
21 that purse, Margaret Jensen White, did
22 not give the police a statement about
23 that purse until 10:20 in the morning,
24 and that was well after this man had
25 left the scene.

2643

1 And then we have the incident
2 with Paul McKeithan. I tell you why
3 Paul McKeithan changed his mind about
4 what he felt about Wes. Wes changed it
5 for him. Nobody else changed it for
6 him. Not anybody at Shores. Wes
7 changed his mind. And why did Wes
8 change his mind? Because when they
9 were at Shores and all of Teresa's
10 friends were there and all of Wesley's
11 friends there and people had kind of
12 divided up into these opposing camps,
13 he was playing the good, grieved
14 boyfriend. "Oh, Teresa, I miss her so
15 much." And showing everybody pictures
16 of her. And what happened to those
17 pictures as soon as he got away from
18 Shores? They went into the glove
19 compartment and never came back out
20 again. Never mentioned her the rest of
21 that night.

22 And then what did he do? And I
23 can understand, you know, you've lost
24 your girlfriend and you're, you're
25 distraught and going and sitting in a

2644

1 bar and drinking yourself into
2 oblivion, but go to the Joker and start
3 feeding the kitty, with a big wad of
4 cash? And we know he hadn't been paid
5 that day because Mr. Perry said, "I
6 didn't pay him that day because he
7 didn't come to work."

8 But he's got the big wad of
9 cash, and he's buying Paul McKeithan
10 drinks, and he's buying himself drinks,
11 and he's buying the girls drinks, and
12 he's stuffing money down their
13 G-strings. Is that how you would act
14 if you lost a loved one?

15 And then lastly from
16 Mr. McKeithan's testimony we find that
17 he has a key to her place. Go in there
18 any time he liked. So even though he's
19 made some mistakes along the way, he
20 thinks things are going pretty well for
21 him. Cops have not dragged him in or
22 anything like that, accused him of
23 doing anything.

24 But it all kind of came to a big
25 grinding halt on Friday afternoon in

2645

1 Lieutenant Cumbee's office when he
2 finds out about the hair, and for the
3 first time this man has got a knot in
4 his stomach as big as a basketball
5 because for the first time he thinks,
6 "Oh, my goodness, they got something."

7 So he's gone from this totally
8 evasive mode to he's anxious now. He's
9 anxious about what the police may know
10 and about what the police may find out.
11 And from that point on the pressure
12 starts to build. But it doesn't build
13 from any external source. It builds
14 from in here, because he goes -- he's
15 taken to McHale's office and the one
16 thing, he can say whatever he wants
17 about Major McHale, that he's the devil
18 incarnate, but the one thing that Major
19 McHale did was made him focus about
20 what he did the day before.

21 He was not at a bar. He was in
22 his office and he made him focus on
23 what he did. And so now not only do
24 you have this anxiety over the police
25 having something on him, you've got him

2646

1 focussing on what he did and the grief
2 associated with it, because he did love
3 this woman. There's no question about
4 that. He did love her. And he knew
5 what he did to her. And when he
6 started dwelling on that, his guilt
7 over what he had done together with his
8 anxiety over getting caught for doing
9 it, started to build and it started to
10 build, and it started to build, and it
11 continued to build and he almost blew
12 it in the interview with McHale.
13 "Every time I close my eyes I can see
14 her face. It just got out of hand."
15 Those are the type of cues that Major
16 McHale was telling you about. You
17 know, don't deny that he was under
18 extreme pressure at this time, but this
19 pressure at this point was not
20 external. It was internal. It was
21 self-inflicted. It was not due to
22 anything the police said or did to him,
23 because you saw that interview with
24 McHale. He was very cordial during the
25 entire thing. He never accused the man

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1 of anything. He never threatened him
2 in any way. He never promised him a
3 thing. But he got him thinking about
4 what he did, didn't he?

5 Then he goes --

6 THE COURT: Where is that coming
7 from? Go out that -- forgive me.

8 MR. DURANT: Excuse me. And
9 then he goes home, and then he goes
10 home and he's got to sleep on that.
11 And they didn't send him home to sleep
12 on it. They sent him home, you heard
13 the interview. He had been out
14 drinking all night. We know that from
15 McKeithan. He'd been taking caffeine
16 pills and he was tired. That's the
17 reason he was sent home.

18 But he did -- he did, he was
19 sent home. And he sat there thinking
20 all night about what he had done and
21 how close these police were to catching
22 him.

23 And then the next day, within
24 minutes of being confronted by that
25 hair, that dam broke and he did what

2648

1 Professor Kassin told you most people
2 have an innate desire to do even though
3 it may not be in their best interests,
4 to tell them what happened and get it
5 off his chest, and that's what he did.

6 He didn't think that hair was
7 his. He knew the hair was his. And he
8 told the police what happened. And
9 they went out with him on this field
10 trip and he told them what happened,
11 and it was put in a two-page statement
12 that he signed and that he corrected.
13 And if it wasn't his statement, all's
14 he's got to do, ladies and gentlemen,
15 is not sign it. And like Mr. Kulp
16 says, the rubber hose days are over.
17 Just doesn't happen.

18 And he signed that confession,
19 and he called his mother and told her
20 he did it, and he told Dixie Justice
21 that he did it, and he told the news
22 media that he did it, and you all have
23 seen that tape, and I would ask you all
24 if you want to take another look at
25 that when you all are back in the jury

2649

1 room.

2 And now, ladies and gentlemen,
3 it's four years down the road almost,
4 and Wesley Myers is not thinking about
5 Teresa any more. And he's not thinking
6 about his grief. And he's not guilt
7 ridden any more. Now he's thinking
8 about Wesley Myers. And he finds out
9 that the hair may not be his, and he
10 knows Laurie Villalobos has not shown
11 up, and now he wants you to believe oh,
12 it was all a joke. It was not a true
13 confession. It was a false confession.

14 Well, ladies and gentlemen,
15 don't buy it. To begin with, and using
16 Professor Kassin's analysis, if you
17 take what he characterizes as voluntary
18 confessors and coerced compliant
19 confessors out of it and be left with
20 what he calls these coerced
21 internalized confessors, which whatever
22 amount of, of fluff he wants to put
23 into it, is brainwashing, that he, his
24 contention is that the police
25 brainwashed this man to admit to a

2650

1 crime he did not commit. Well, ladies
2 and gentlemen, if those exist at all,
3 they are exceedingly rare and they
4 almost always involve very vulnerable
5 people; children, mentally retarded,
6 the mentally deficient, the very tired,
7 none of which you have in this case.
8 You've got a thirty-seven year old man,
9 twelve years of high school, one year
10 of college, six years in the military,
11 a big strapping guy, that's been home
12 and had a good night's sleep. And
13 there's no way that he is vulnerable
14 when he goes there except from what he
15 carries inside, and that's why he's
16 vulnerable.

17 And secondly, what the defense
18 would have you believe is a three-day
19 ordeal in this case is nothing of the
20 sort. Payne talked to him about an
21 hour on Thursday morning. Just took a
22 regular witness statement. Very low
23 key. Very non-threatening. He goes on
24 about his way that day. Goes over to
25 Shores. Drinks all day. Goes out,

1 drinks all night. Shows back up at the 2651
2 police department about twelve o'clock
3 on Friday and has a brief at the most
4 thirty-minute conversation in Mr.
5 Cumbee's office before he goes over and
6 McHale talks to him that afternoon.
7 And he's with McHale for about an hour
8 and a half, and you've all seen the
9 tape of what went on there.

10 And he's sent home. The next
11 morning he comes back and he's talked
12 to for about an hour and a half before
13 he confesses. And from somewhere in
14 there Professor Kassin indicated
15 fifteen to eighteen hours. The
16 evidence just does not bear that out.

17 He was never strong-armed, he
18 was never rubber hosed, he was never
19 promised a thing, he was never
20 threatened in any way, and he was never
21 even accused of doing this until
22 Saturday at twelve noon when he was
23 confronted with that hair and as soon
24 as he was accused, he confessed. This
25 is no eighteen or three-hour -- or

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1 three-day twelve-hour-a-day
2 interrogation. It just didn't happen.

3 And I'll ask you to do something
4 at this point, ladies and gentlemen.
5 If you can go home today to your wife
6 or your husband or your child or your
7 loved one to find that they were
8 brutally murdered, and suppose they
9 identified -- they came to you as being
10 a suspect because of your familial
11 relationship with this person, and
12 suppose the police did and said the
13 exact same things to you that were said
14 to this man over that three-day period.
15 There's not a single person among you
16 that would confess to killing someone
17 you did not kill under those
18 circumstances. I don't care if they
19 showed you pictures, I don't care what
20 kind of evidence they say they had
21 against you, if you did not do it, you
22 would not admit to it, and it's that
23 simple.

24 The only reason he confessed to
25 this crime is due to the fact that he

2653

1 killed her. He's guilty. He did it.
2 It was the truth. That guilt and
3 anxiety had boiled up in him for three
4 days and it had reached the point where
5 he could no longer hold it in, and when
6 he thought that the police had him, it
7 all came out.

8 And what he told them matched
9 what the police found at the crime
10 scene in terms of what doors were
11 opened, in terms of his injuries, in
12 terms of the carafe being used, in
13 terms of how the fire started, in terms
14 of how he left the building. But
15 that's not to say that everything he
16 said in his statement is the absolute
17 truth, because in all likelihood it
18 isn't. He was minimizing, just like
19 Dr. Kassin says people minimize when
20 they tell what they did. They want to
21 make themselves look, paint themselves
22 in the best possible light and paint
23 the victims in the worst possible
24 light, and that's what he was doing.

25 You know, you shouldn't believe

1 for a minute he doesn't know how many
2 times he hit this woman. And you
3 shouldn't believe for a minute that he
4 stayed in there until he was overcome
5 by smoke and fire. And you shouldn't
6 believe for a minute that he doesn't
7 know what he did with her purse. But
8 despite the fact that he was fudging a
9 little bit on these little points, the
10 substance of what he told the police
11 was true, and how do we know that? We
12 know that because of the pink note.
13 And I want you to think a little bit
14 about this one, ladies and gentlemen.
15 There was a very thorough examination
16 of that fire scene. There was never
17 any note found, and the reason being is
18 because the note was apparently left up
19 by the cash register which was
20 completely burned in the fire. The
21 police had no knowledge of any note
22 from examination of the fire scene.
23 They did have statements from little
24 Alan and they did have statements from
25 Margaret Jensen. Both of them each

2655

1 gave two statements on Thursday, the
2 day of the fire investigation. Neither
3 of them mentioned anything about the
4 note and, quite frankly, why would
5 they? At that point what possible
6 significance could this little note
7 that Alan had written to Teresa, what
8 possible significance or consequence
9 would that have in this case? It had
10 none. And the police, not knowing
11 about the note, certainly have no
12 reason to ask about any note. They ask
13 about the one on the car because they
14 saw that one. They had no reason to
15 inquire of anyone about that note until
16 Wes Myers told them about it Saturday.
17 That's the only way they knew about it.
18 That's the only thing that makes sense.

19 And that, ladies and gentlemen,
20 is why we know that his confession is
21 not a false confession. And that was
22 why, according to his own witness's
23 testimony, that type of evidence that
24 was not known to the police absolutely
25 corroborates his confession as a guilty

1 confession.

2650

2 And now we come to Laurie
3 Villalobos, the woman that this man
4 quite frankly had hoped had dropped off
5 the face of the earth, because he knew
6 she was out there and he knew that the
7 police didn't know about her. He knew
8 everything the police had in this case
9 and he knew the police had never had
10 any contact with her.

11 And she was in there that night,
12 and that's not something you forget,
13 ladies and gentlemen. You go in to
14 this bar and you're going into an
15 uncomfortable situation, and the next
16 day you find out that the person you
17 just got this money from was killed and
18 burned up, or at least burned up in a
19 fire, that's something you remember.
20 And given the fact that on Saturday
21 this man was on T. V. telling the world
22 that he did it, there's no wonder she
23 didn't come forward. And she finds out
24 four years later when she runs into
25 Miss Gonzalez that he's not admitting

1 to what did he any more and now
2 claiming that he wasn't even in the
3 bar. And she says "Well, that's not
4 true. I saw him in the bar that
5 night." And she comes up here and she
6 testifies and he did not --

7 MR. KULP: Your Honor, I have a
8 matter of law. I hate to interrupt.

9 THE COURT: Approach the bench a
10 minute.

11 MR. KULP: Yes, sir.

12 (Whereupon, there was an
13 off-the-record bench conference.)

14 MR. DURANT: And she comes here
15 and she tells you what happened, and he
16 couldn't shake her testimony. And he
17 couldn't shake her testimony because
18 she was telling the truth. And if
19 there's a reason why that woman would
20 come up here and give that story, what
21 she would hope to gain by that, I don't
22 know. But I would submit she told that
23 story because it was the truth and it
24 had the ring of truth to it.

25 And finally we come to the

2653

1 statements to Miss Justice and the news
2 media in this case. Even if you
3 disbelieve everything the police told
4 you, how do you explain those? Once
5 again would you, having experienced the
6 same thing this man experienced over
7 those three days, get in front of the
8 camera and say that if it weren't true?

9 As much as he wants you to
10 believe that they set it up, this is
11 something that Wes Myers wanted to do.
12 Did you see anybody, did you see
13 anybody hold a gun to his head and make
14 him stand up in front of those cameras?
15 He walked right out that door and he
16 stopped. No one's even holding onto
17 him this time.

18 The question in this case is not
19 whether or not he did it. The question
20 is what did he do? Was it murder or
21 voluntary manslaughter? And murder,
22 the judge is going to charge you on
23 what the law is in this case, and
24 murder basically is the killing of
25 another human being with malice

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1 aforethought, expressed or implied.

2 And I'm not going to dwell on this in
3 great depth, but there are a couple of
4 things I would want to explain to you.

5 What makes something murder is
6 malice. Malice is a term of art in the
7 legal profession. It means hatred, ill
8 will, hostility, wickedness. It can
9 even encompass a, a reckless disregard
10 for the rights and safety of others.
11 It is a mental state and it can be
12 express malice in that I go up to
13 someone and say "I'm going to kill you"
14 and I shoot you. That's expressed
15 malice. Or it can be implied malice.
16 I may not say anything, but I use a
17 gun. And you can imply from the fact
18 that I use a deadly weapon that it was
19 a malicious act. Or you can imply from
20 the fact that I commit serious bodily
21 injury to someone that I did so with
22 malice. Or you can infer from an
23 intent to kill, malice. Or you can
24 infer malice from the commission of an
25 unlawful act. Or you can infer malice

2660

1 from the seriousness of the injuries
2 that occurred in this case, because
3 injuries don't -- like that don't occur
4 in the absence of malice. They don't
5 occur in the absence of ill will. And
6 they don't occur in the absence of
7 hatred.

8 But it does not have to be a
9 specific intent to kill. You can kill
10 someone, you can be convicted of murder
11 in this state and never mean to kill
12 anybody. And just as a "for instance"
13 I mean if I got rip-roaring drunk this
14 afternoon and I drove through a school
15 zone going a hundred miles an hour and
16 hit a kid, a child and killed them, I
17 could be guilty of murder in that case
18 even though I didn't intend to kill a
19 child. So intent to kill has nothing
20 to do with it.

21 And one other little thing.
22 Malice aforethought is what it is. Now
23 don't confuse aforethought with
24 premeditation because it's not the same
25 thing. We don't have anything in this

2661

1 state called premeditated murder. What
2 makes it murder is malice, not
3 premeditation. And all aforethought
4 means is, is that at the time that
5 fatal blow was struck, malice has to
6 exist in the heart. It can form right
7 at the time, right before that fatal
8 blow is struck, but it does not have to
9 be premeditated.

10 And that's another example. If
11 I'm walking down the street and I
12 encounter somebody that I had a beef
13 with in the past, completely
14 fortuitously, and I pull out a pistol
15 and shoot him, it's murder. Doesn't
16 make any difference that I didn't plan
17 it, that it just happened. It's
18 murder. Because if I pulled the
19 trigger with malice, then it's murder.

20 Voluntary manslaughter is what's
21 considered a lesser included offense of
22 murder. And what voluntary
23 manslaughter is, is the killing of
24 another person in a sudden heat of
25 passion, with sufficient legal

2662

1 provocation. And I don't dispute in
2 this case that you have heat of
3 passion. In fact you have a bunch of
4 passion in this case. But what you
5 need to consider is was there
6 sufficient legal provocation? Is the
7 fact that his girlfriend is getting rid
8 of him sufficient provocation to kill
9 her? Is the fact that his girlfriend
10 rebuffed him that night sufficient
11 provocation to kill her? Is his
12 suspicion that she was having -- being
13 unfaithful to him sufficient cause to
14 kill her? Was any of that sufficient
15 for what he did to this woman? Quite
16 frankly, ladies and gentlemen, that's
17 the question that you have to answer as
18 a jury. I would submit that it is not
19 sufficient.

20 Now I've been up here a long
21 time and I know you're tired because I
22 can tell from looking at you, but I
23 just want to go through a few other
24 points and then I'm going to sit down.
25 And I'd like to address some of the

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1 points that were raised by the defense
2 in his closing argument, and I want to
3 start with the hair. Maybe this is the
4 hair, or the hair that Dr. Melton
5 eventually tested was the same hair
6 that was collected at the scene of the
7 crime. We don't know because we sent a
8 single hair to the F. B. I. and this is
9 what we got back. And this F. B. I.
10 report that has been designated as
11 Court's exhibit number one outlines
12 what the F. B. I. says they received.
13 "Q-2, slide containing debris. No
14 hairs suitable for significant
15 comparison purposes were found in
16 specimens Q-1 through Q-3."

17 And it was not until -- and that
18 hair was sent to them in December of
19 1998, and it was not until this
20 affidavit from Mr. Stuart in May of
21 2000 that the F. B. I. even
22 acknowledged having received any hair
23 from our -- from the North Charleston
24 Police Department. So maybe it is,
25 maybe it isn't. Maybe it is his hair,

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1 maybe it isn't. I think you've heard
2 the testimony, and bottom line is Dr.
3 Melton's testimony was that I don't
4 think it's his. Can't be sure. Does
5 match on all but one loci, but doesn't
6 think it's his hair. Sample very much
7 degraded. Sample very much
8 contaminated. That she was pushing the
9 envelope to even perform a test on this
10 particular hair.

11 But so there's legitimate
12 reasons to question the hair but
13 let's -- the point that I made to you
14 in my opening statement is the point
15 that I reiterate, that if this hair
16 belongs to him, it doesn't prove that
17 he's the killer. And the reason it
18 doesn't prove that he's the killer is
19 because of the relationship he had with
20 the victim in this case and the
21 relationship he had with that bar.
22 That accordingly, you know he had a
23 sexual relationship with this woman as
24 soon as two nights before then. He was
25 in the bar that day. He had been in

2663

1 the bar on numerous occasions. And the
2 fact that his hair may be on her or in
3 her hand sometime, somewhere does not
4 make him guilty of murder.

5 And the converse is also true.
6 The fact that it isn't his hair, does
7 not mean he is innocent, for a couple
8 of reasons, ladies and gentlemen. If
9 you're fighting with someone in a bar,
10 you're fighting an assailant and you
11 grab the hair, the chances are that
12 you're coming away with one hair are
13 virtually impossible. If you grab
14 someone by the hair and yank, you're
15 going to have a clump of their hair in
16 your hand. And I'll guarantee you it
17 wasn't a situation where she was going
18 "poof" and picking out one hair.

19 The second thing you need to
20 take into consideration was where this
21 occurred. Public bar. It was a floor
22 that had not been swept. Probably
23 hadn't been swept in weeks. I don't
24 know. And I guarantee you at any time
25 there would have been thousands of

2666

1 hairs on that floor. And this woman
2 has been beaten down with a wine
3 carafe, crawling around. We know she
4 was found facedown on the floor. At
5 some point before she was facedown she
6 was crawling on that floor when this
7 man was beating her to death, and
8 that's a very reasonable explanation as
9 to how numerous hairs could have gotten
10 into her hand and there was more than
11 one kind of hair and hairs found on the
12 front of her body, too.

13 Dana Chaples. No evidence. No
14 motive. No confession. Period. He's
15 an alcoholic. He's a drunk. He had no
16 idea of where he was that night. When
17 last seen he was getting in his car to
18 leave. And who was the last person
19 seen with the victim before her death?
20 Him.

21 MR. KULP: Your Honor, I object.
22 That's not even a reasonable inference,
23 reasonable inference that can be drawn
24 that.

25 THE COURT: All right. Well,

1 I'll allow it. Allow each of you a lot
2 of leeway. The jury will remember what
3 the facts are they heard.

4 MR. DURANT: Dr. Hurst.

5 Dr. Hurst is a professional witness.
6 That's what he does for a living. And
7 the bottom line is in this case, he
8 says the same thing, that there was a
9 fire started behind the bar, using
10 available paper materials. But he
11 interjects this thing, this additional
12 element about another fire being set at
13 the victim's body. Well, you've heard
14 the testimony, ladies and gentlemen,
15 and you've seen the pictures and you're
16 going, you're going to draw your own
17 conclusions, but the only point I was
18 trying to make with him, and I don't
19 know if I made it, but the testimony is
20 two separate agencies, that both
21 examined -- well, actually they're at
22 the scene of the crime and actually saw
23 it -- unlike Mr. Hurst -- testified
24 that a fire was started in this area,
25 ran up the back wall to the ceiling,

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1 and burned the ceiling in this area and
2 the ceiling in the next, in the next
3 building.

4 Mr. Hurst indicated to you that
5 a fire here at the victim's body was
6 what created the fire in the ceiling,
7 and that's what he suggested to you.
8 Also went on to say that he couldn't
9 say that for sure, which is why I
10 showed you these two photos. This
11 photo shows the condition of that
12 ceiling in the bar area, from basically
13 here over. This picture shows the
14 ceiling from this way, over to what was
15 called the little soffit there.

16 But the only problem I have with
17 his testimony is that if the fire
18 started here where he says, in the roof
19 area, would it be more likely to spread
20 all the way across here through a solid
21 wall, not a little open soffit like was
22 up here, through a solid wall and into
23 that building, before it spread right
24 here? And that's why I dispute what he
25 said to you.

2669

1 And there was no evidence on the
2 defendant's clothes. And you know why
3 that is, ladies and gentlemen? Because
4 these aren't the clothes he was
5 wearing. These boots, obviously work
6 boots. Obviously a work hat.
7 Obviously work pants. And an old
8 T-shirt. And the only reason I
9 introduced those into evidence is for
10 this purpose. If you get up at 1:30,
11 two o'clock in the morning and go over
12 to see your girlfriend, get out of bed
13 to go over to see your girlfriend, are
14 those the clothes you going to wear?
15 Un-un. Those are the clothes he wore
16 to work on Thursday. Those are not the
17 clothes he wore Thursday morning when
18 he killed her. Those clothes were
19 never recovered because in all
20 likelihood those clothes ended up over
21 in the washing machine at Teresa
22 Haught's house. And Payne didn't smell
23 any smoke for the same reason. He went
24 there and he cleaned up.

25 And the burned one-dollar bill

2670

1 with DNA from two people on it, two
2 people on it, so what? You can't tell
3 if it's blood, you can't tell if it's
4 sperm, you can't tell if it's
5 perspiration, you can't tell if it's
6 saliva, and you can't tell if it's
7 tears, and you can't tell if it came
8 from handling the money. And it could
9 have been deposited on that dollar bill
10 from any time from the time it was
11 minted to the time that it went into
12 her pocket.

13 The watch. Ladies and
14 gentlemen, if nothing else, look at
15 these pictures back there of the fire
16 scene. You'll have a bunch of them.
17 This place had been burned. This place
18 had had three high pressure hoses in
19 it. Things were not found. Things
20 were washed away. Things fell down
21 from the ceiling. There's no telling
22 where that watch was earlier. There's
23 no telling where these carafes were
24 earlier. There's no telling how many
25 of these carafes were broken before and

2671

1 after the fire. You know, because if a
2 carafe gets knocked off of a bar with a
3 high pressure hose, it's going to
4 break, too. And so big deal if there
5 were two broken carafes. I would have
6 been real surprised if they didn't find
7 five broken carafes there. And the
8 stools are there and firemen had been
9 in there and there was standing water
10 in this place before any of these
11 pictures were ever even taken.

12 You know there's two videotapes
13 in this case, your Honor -- ladies and
14 gentlemen, and there's not a videotape
15 of when the defendant confessed but
16 there is a videotape that I would
17 welcome you to watch, and if you want
18 to watch Mr. McHale's that's fine, too.
19 I got no problem with that. But if you
20 take a look at, take a look at the one
21 with Carla Lothery on Channel 5.

22 Red herring, no blood on it, no
23 testimony that it was used. Examined
24 by our experts, examined by his
25 experts, no blood. No relevance.

2672

1 The knife on his belt. Once
2 again, you'll have the tape back there
3 of his interview at the police station.
4 When it was played to you as a jury I
5 didn't see any knife on there. You all
6 can look and draw your own conclusions.

7 I'm not going to bore you any
8 more. I'm going to sit down. But I'm
9 going to sit down and I want to tell
10 you that despite all of this that
11 you've heard, and this has been a long
12 case and it's been wearing on you, and
13 it's been wearing on Mr. Kulp and
14 myself as the attorneys in this case,
15 and a lot of material has been covered
16 both in the trial and in these
17 arguments before you today. But when
18 you get right down to it, you're still
19 left with really one question. It's
20 really a simple case, and that is this.
21 Would a man of his age, training,
22 experience, of his fortitude, having
23 encountered the things that he
24 encountered over that three-day period,
25 everything that you've heard in this

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1 testimony, in the testimony in this
2 case, if that person and you're back
3 there and you're convinced that that
4 person would confess to a murder that
5 he did not commit based upon that
6 amount of pressure, then let him go.
7 But I would submit, ladies and
8 gentlemen, if you're honest with
9 yourselves and you ask that question,
10 would a man do this, I think the honest
11 answer is, no, he would not. And you
12 don't have to feel sorry for that man.
13 You're not here to reward enemies, or
14 punish enemies or reward friends. You
15 are here to seek the truth, and the
16 truth in this case is that that man
17 there killed Teresa Haught.

18 THE COURT: Thank you. Go to
19 your room just a minute, Madam
20 Forelady. Has the food come?

21 CLERK OF COURT: Yes, sir, it's
22 here, sir.

23 THE COURT: I want you to eat
24 your food while it's hot. Let me know
25 when you're ready. Take your time.

1 (The jury leaves the courtroom
2 at 1:56 p. m.)

3 **THE COURT:** Well, pull that door
4 shut. Has anybody in this courtroom
5 got a cell phone on them?

6 **MR. KULP:** Judge, in all candor
7 I think it was your phone ringing.

8 **THE COURT:** Well, it wouldn't
9 make any difference at all.

10 **MR. KULP:** Yes, sir.

11 **THE COURT:** Mr. Bailiff -- beg
12 your pardon?

13 **SPECTATOR:** I've got one, but
14 it's cut off.

15 **THE COURT:** Yes, sir. But we've
16 got a ruling from the Supreme Court
17 that says people who come in courtrooms
18 with a cell phone, got to leave it
19 outside. Just recently. And so you
20 all need to get some kind of policy
21 about cell phones. I don't want to
22 catch another cell phone in this
23 courtroom, even if it's turned off. No
24 reflection on you.

25 **THE BAILIFF:** Yes, sir.

1 **THE COURT:** It's just a
2 reflection on those who's supposed to
3 carry out these policies. But you all
4 can figure out what you want to do but
5 I'd talk to Court Administration, I'd
6 talk to the administrative judge about
7 it.

8 All right. Now, during the
9 argument of the solicitor, Mr. Kulp,
10 you put me a little note up here, you
11 wanted to make a motion. I asked you
12 would you wait because I didn't hear
13 anything I felt like would require a
14 correction.

15 You said "he's not admitting
16 what he did." Can you tell me now what
17 your objection was?

18 **MR. KULP:** Yes, sir. The
19 contemporaneous objection I made then
20 to the Court was that the solicitor
21 made the comment, I can't remember the
22 prefatory remark, but that he, the
23 defendant, is not now admitting what he
24 did. I would make the objection
25 pursuant to the rule or the principle

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1 that applies on commenting on the
2 defendant's failure to testify,
3 inasmuch as we would suggest that that,
4 that was a reference to his exercise of
5 that constitutional right.

6 I brought it to the Court's
7 attention. I didn't want to
8 over-emphasize it so I wrote the
9 sentence out on a piece of paper for
10 your Honor and you kindly at that
11 moment indicated that you'd allow me to
12 put that on the record at the
13 appropriate time.

14 THE COURT: All right, sir. In
15 the first place just the mere fact that
16 he said -- that you pled him not
17 guilty, carries with that that he's
18 pleading not guilty and not admitting
19 anything, but I don't think that the
20 statement by the solicitor conflicts
21 with it.

22 MR. DURANT: And just for the
23 record, your Honor, I believe the
24 witness testified to that, too, when
25 she heard that he wasn't admitting it

1 that, you know, she told, she told
2 Miss Gonzalez about this incident.

3 MR. KULP: I felt compelled to
4 make the objection, your Honor.

5 THE COURT: Of course. No
6 problem.

7 MR. KULP: Yes.

8 THE COURT: All right. Let's
9 see.

10 MR. KULP: I apologize. Just a
11 couple of --

12 THE COURT: All right. Let's
13 recess for just a few minutes. The
14 food came. The solicitor talked a
15 little longer than he indicated he was
16 going to talk.

17 MR. DURANT: I can't believe
18 that, Judge.

19 THE COURT: Well, let's see.
20 I'll give you something. Mr. Kulp
21 talked an hour and eleven minutes, and
22 you talked an hour and six minutes.

23 MR. DURANT: See, I knew I came
24 in under.

25 MR. KULP: Your Honor, there

1 was -- there was one issue. When we
2 agreed to the F. B. I. documents as the
3 court exhibit, I think what we need,
4 based on the solicitor's argument, is
5 to supplement that and to supplement it
6 with something that would cover the
7 issue for the jury when they review
8 that court exhibit.

9 He suggested that the F. B. I.
10 did not acknowledge receipt of the hair
11 until the date of the affidavit. In
12 fact what's true, and we both know
13 this, I think the solicitor forgot, is
14 that the solicitor's office themselves
15 procured confirmation of the receipt of
16 it from the F. B. I. and there also,
17 when we reviewed this issue the other
18 day, Mr. Durant and I both reviewed a
19 document that indicated that they
20 received it on December -- Mr. Durant,
21 fourteenth or whatever? Just didn't
22 open it until the accompanying
23 transmission from Mr. Hallman came on
24 the seventeenth.

25 So I think it's not really

1 accurate, and since we used that
2 vehicle to get it before the jury I
3 think what we should probably do, you
4 can ask me what I suggest, I would
5 propose or I would think, is that we
6 take that page from the documents we
7 both have that indicates that the
8 F. B. I. received it on that day and
9 simply clip it to court's exhibit
10 number -- Mr. Durant, one?

11 MR. DURANT: Well, I have no
12 problem with that.

13 MR. KULP: Okay.

14 MR. DURANT: It's just, just the
15 receipt there, and it says it --

16 MR. KULP: Well --

17 THE COURT: Show him what you
18 want.

19 MR. KULP: Yes, sir.

20 MR. DURANT: Yeah. It says in
21 here that I mean that they received the
22 stuff on December seventeenth anyway.
23 I mean it acknowledges here when they
24 received it, so I didn't --

25 MR. KULP: It does?

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1 MR. DURANT: Yeah. I mean right
2 here it says --

3 MR. KULP: Okay.

4 MR. DURANT: -- it says
5 specimens received December seventeen,
6 1998 under the communication date
7 December seventeen.

8 MR. KULP: Okay. That's fine.
9 As long as there's a reference in the
10 document. Thank you, Judge.

11 THE COURT: Court's in recess.

12 MR. KULP: For how long, your
13 Honor?

14 THE COURT: When the jury
15 finishes lunch.

16 MR. DURANT: So you're going to
17 let them eat? You going to give us a
18 chance to eat, or. . .

19 THE COURT: As soon as I finish
20 charging the jury I'll give you time.

21 MR. KULP: Yes, sir. We'll
22 stand by. Thank you, Judge.

23 (Whereupon, a recess is taken at
24 2:02 p. m.)
25

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AFTERNOON SESSION

(The Judge enters the courtroom
at 2:32 p. m.)

THE COURT: Well, Mr. Juror,
you're a full-time juror now. We had
to send Miss Doctor home. She, as you
know, forgot her medicine, and so I'm
not going to make her sit back there
again.

Now, it now becomes the time for
me to charge you. Well, that just
means to instruct you on the law that
applies to this case. Of course by now
you know that this is a case in which
the State charges Wesley Myers with two
offenses, murder and third degree
arson. And to these indictments he
pleads not guilty. And remember, I
told you at the beginning of the case,
I said sitting at that table with his
attorney he's just as innocent as you
and I, unless and until the State of
South Carolina, if indeed they can,
convict -- convince twelve you of his

1 guilt beyond a reasonable doubt,
2 because if you have a reasonable doubt
3 you must find him not guilty.

4 Well, what's a reasonable doubt?
5 You've heard what the attorneys had to
6 say about reasonable doubt. And I told
7 you at the beginning of the case, I
8 said it's said that a reasonable doubt
9 is a doubt which would make a
10 reasonable person hesitate to act in
11 his or her most important affairs.
12 Remember I told you, I said use those
13 words "reasonable doubt" like you would
14 in your everyday affairs.

15 Well, some of you indicated that
16 you had served on a jury before, and if
17 you served on a civil jury, we got one
18 going on down the hall down there,
19 that's where people sue each other for
20 money. Usually property, automobile
21 accidents, those type things. And if
22 you served on that type jury, you were
23 told that it was only necessary to
24 prove that a fact was more likely true
25 than not.

1 Well, in criminal cases, it's
2 more powerful proof. It's proof beyond
3 a reasonable doubt. Suspicion, however
4 strong, does not suffice to sustain a
5 conviction, nor is probability. Proof
6 beyond a reasonable doubt is proof that
7 leaves you firmly convinced of the
8 defendant's guilt.

9 Now, we know that there are very
10 few things in this world that we know
11 with absolute certainty. And in
12 criminal cases the law does not require
13 proof that overcomes every possible
14 doubt. If based on your consideration
15 of the evidence you are firmly
16 convinced that the defendant is guilty,
17 you must find him guilty. On the other
18 hand, if you think there's a real
19 possibility that he's not guilty, then
20 you give him the benefit of that doubt
21 and find him not guilty.

22 And of course reasonable doubt
23 can exist from evidence in the case or
24 lack of evidence. You alone must make
25 that determination of whether or not

1 reasonable doubt exists.

2 Now I told you earlier that you,
3 the jury, our Constitution makes you
4 the judge of the facts in this case,
5 and as judges of the facts you must of
6 necessity determine the credibility,
7 the believability of the witnesses who
8 testified in this trial.

9 Well, how do you do that? You
10 know, you do it every and you don't
11 even think about it. You can't see out
12 of this courtroom. If somebody came in
13 the door back there and says it's
14 raining outside, you'd feed that into
15 your mind kind of like a computer. And
16 you'd add things to it like well, what
17 do I know about that fellow? How was
18 it when I left my jury room, if you
19 could see outside from your jury room?
20 What did the weatherman tell me this
21 morning? And you will add those facts
22 together and then you'd make up your
23 mind whether or not to believe it or
24 not.

25 Well, you do the same thing in

1 determining the credibility of the
2 witnesses that testify here in this
3 court, and some of the things that you
4 would use would be just like you'd use,
5 just like I told you. The appearance
6 of the witness. How did the witness
7 testify? Was the witness's testimony
8 forthright or was it hesitant? Did the
9 witness have something to gain or
10 something to lose from the way he or
11 she testified? But you wouldn't do it
12 by counting the number witnesses on
13 either side, obviously, because as the
14 attorneys have explained to you, you
15 could believe everything that a witness
16 testified to, or nothing. You could
17 believe a small portion and disregard
18 the larger, or vice-versa. You could
19 believe one witness against many or
20 many against one, always keeping two
21 things in mind. First, you always give
22 the defendant the benefit of every
23 reasonable doubt, and secondly, you
24 don't have to punish anyone, you don't
25 have to reward anyone. Just bring in a

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1 verdict that speaks the truth.

2 Now that same constitution which
3 made you the judge of the facts in the
4 case made me the judge of the law. And
5 I'll tell you what the law is, and you
6 might disagree with it. You might have
7 heard different. You might have
8 thought it ought to be different. But
9 you just take the law as I give you,
10 apply it to the facts as only you can
11 find, deliberate and reach a verdict in
12 the case.

13 Now, during the trial if I ruled
14 in favor of either side it doesn't mean
15 I'm favoring that side, because I told
16 you this at the beginning of the trial.
17 It just means I must rule as a matter
18 of law. So don't -- if I said
19 something or asked a question or made a
20 statement or for that matter had some
21 look on my face, you think I'm trying
22 to take away your job, disregard that.
23 I just tell you what the law is.

24 Well, what is the law that I
25 need to tell you to apply to the facts

1 as only you can find? Well, in the
2 first place, as I told you earlier, the
3 defendant did not take the stand.
4 Didn't testify. You can't use that
5 against him because you remember at the
6 beginning of the case I told you that
7 he didn't even have to get up from that
8 table, nor his attorney. He is merely
9 exercising one of his constitutional
10 rights by not testifying. So when you
11 go back in the jury room don't even
12 discuss the fact that he did not
13 testify.

14 Now, in a trial of a case
15 generally there are two types of
16 evidence presented at the trial.
17 Sometime it's called direct evidence
18 and sometime called indirect evidence,
19 circumstantial evidence. And of course
20 direct evidence just speaks for itself.
21 That's the testimony of a person who
22 asserts or claims to have knowledge of
23 a fact, such as an eyewitness, and
24 comes in the courtroom and tells you
25 about it.

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1 Well, circumstantial evidence is
2 proof of a chain of facts and
3 circumstances indicating the existence
4 of a fact, such as if you look up at
5 the sky and you see water coming down,
6 you know it's raining. But if you
7 can't see outside and somebody comes in
8 the door back there and it's raining or
9 has a raincoat and umbrella and they're
10 all dripping water, you didn't see it
11 rain, but those facts that you did see
12 indicate that it's raining outside.

13 So I want to tell you that the
14 law makes absolutely no distinction
15 between the weight or value to be given
16 either direct or circumstantial
17 evidence, nor is a greater degree of
18 certainty required of circumstantial
19 evidence than of direct evidence. You
20 should weigh all the evidence in this
21 case. After weighing all of the
22 evidence, if you're not convinced of
23 the guilt of the defendant beyond a
24 reasonable doubt, you must find him not
25 guilty. On the other hand, if there is

1 no reasonable doubt then you must find
2 him guilty.

3 Now, you heard some testimony
4 in the case about somebody who
5 testified had a record, a criminal
6 record, and that's allowed in. It's
7 called crimes of moral turpitude, and
8 formally speaking moral turpitude is an
9 act of baseness, violence, or depravity
10 in the private and social duties a man
11 owes to his fellow man or to society in
12 general, contrary to the accepted and
13 customary rule of right and duty
14 between man and man.

15 But I want to tell you that in
16 considering crimes of moral turpitude
17 for that particular witness, you can
18 only use it, if you decide to use it at
19 all, in deciding the credibility or
20 believability of that witness, and for
21 no other purpose.

22 Now, every time somebody
23 testified who you heard the attorneys
24 say I want to qualify this person as an
25 expert, you'll notice that when people

1 come up here and testify, generally
2 they testify from their senses, as I
3 said. They come up here and tell you
4 something about it, such as an
5 eyewitness, and generally speaking
6 those people can't give you an opinion.
7 But there are people who, through
8 education or experience or a
9 combination of both, become proficient
10 in certain fields and they call them
11 experts. But I tell you about experts
12 just like I would tell you about any
13 witness who testified, you give that
14 witness's testimony whatever weight you
15 feel it deserves under the facts and
16 circumstances of this case.

17 Now the defendant is charged
18 with murder and murder, formally
19 speaking, is the killing of a human
20 being with malice forethought, either
21 expressed or implied. There must be
22 malice or there can be no murder.
23 Malice is any formed or planned design
24 to do mischief. Whether it arises from
25 hatred or ill will or otherwise, it's

1 still malice. And malice aforethought
2 means that the malice must have been in
3 the mind of the party at the time the
4 blow was struck or the shot fired.

5 Now I tell you that malice need
6 not be in the mind of the party who
7 struck the blow or fired the shot any
8 appreciable length of time. If it was
9 in the mind just before the blow was
10 struck or the shot fired, and at the
11 time the blow was struck or the shot
12 fired, then under the law that is
13 malice aforethought.

14 Now in its popular sense the
15 term "malice" conveys the meaning of
16 perhaps ill will or hatred or hostility
17 toward another. In its legal sense,
18 however, it's employed, as it's
19 employed in the description of murder,
20 it does not of necessity import ill
21 will toward the individual injured but
22 signifies rather a malignant, reckless
23 disregard of the lives and safety of
24 others, or a condition of the mind
25 which shows a heart devoid of social

1 duty and fatally bent on mischief. In
2 other words, a malicious killing is
3 where the act is done without legal
4 justification, excuse, or extenuations,
5 and malice has been frequently
6 substantially so defined as consisting
7 of the intentional doing of a wrongful
8 act toward another without legal
9 justification or excuse.

10 Now, malice is divided into two
11 kinds. That is express malice and
12 implied malice. Express malice, for
13 instance, is shown when one by word of
14 mouth expresses his hatred or ill will
15 toward another. When the State shows
16 that one is making preparation
17 beforehand to do the deed that was
18 later done, such as lying in wait for a
19 person, or any act of preparation going
20 to show that the deed was in the mind
21 of that person, that would be express
22 malice.

23 What's implied malice? Implied
24 malice, that is malice may be implied
25 where though no express intent to kill

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1 is proved by direct evidence, it's
2 indirectly but necessarily inferred
3 from facts and circumstances which are
4 proved. For instance the law says that
5 when one intentionally kills another
6 with a deadly weapon, the implication
7 of malice may arise. So I say if facts
8 are proved beyond a reasonable doubt
9 sufficient to raise an inference of
10 malice to your satisfaction, this
11 inference would be simply an
12 evidentiary fact to be taken into
13 consideration by you, the jury, along
14 with other evidence in the case and
15 given whatever weight you feel it
16 deserves.

17 Now you can infer malice also
18 based on evidence of such recklessness
19 and wantonness as to indicate a
20 depravity of mind and disregard of
21 human life, notwithstanding the actual
22 intent to kill or injure another. In
23 other words, a person may be guilty of
24 murder although there was no actual or
25 specific intent to kill, general malice

1 being sufficient without a specific
2 intent to kill.

3 Now from a principle, Madam
4 Forelady and ladies and gentlemen of
5 the jury, that a greater crime as
6 murder may include a lesser crime, an
7 indictment for murder may include the
8 lesser crime of unlawful homicide known
9 as manslaughter. So you're going to
10 have three possible verdicts in a
11 charge of murder. And the fact that I
12 say one before the other has no
13 bearing. You can consider not guilty,
14 you can consider guilty of murder, or
15 you can consider guilty of voluntary
16 manslaughter. In other words, a
17 defendant indicted for murder may be
18 convicted for manslaughter if the
19 evidence warrants it.

20 Now, we got a section of the
21 code, 16-3-50, that defines voluntary
22 manslaughter as the unlawful killing of
23 another without malice, express or
24 implied. So you see murder has malice
25 and voluntary manslaughter does not

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1 have malice.

2 Now voluntary manslaughter --
3 and I explained to you what malice was.
4 Voluntary manslaughter is commonly
5 defined as the unlawful killing of a
6 human being in sudden heat of passion,
7 upon sufficient legal provocation. It
8 involves intent on the part of the
9 perpetrator, but not malice. Now the
10 law does not reduce from a murder
11 charge to a manslaughter charge every
12 homicide committed in the heat of
13 passion. It must be passion justly
14 excited by legal provocation. If an
15 adequate legal provocation does not
16 exist, even in the heat of passion,
17 it's murder and not voluntary
18 manslaughter.

19 Well, what are some examples of
20 the words "sufficient legal
21 provocation"? A humiliating,
22 humiliating assault such as spitting in
23 the defendant's face. An assault on a
24 family member. I'm just giving you
25 some examples. Finding one's spouse

1 has -- in the act of adultery. The
2 deceased having molested your minor
3 child. These are just some examples.
4 In other words, something that would
5 naturally disturb and sways one
6 reasons -- one's reason, and render the
7 mind of an ordinary person incapable of
8 cool reflection. That is, to produce
9 what according to human experience
10 could be called as "an uncontrollable
11 impulse to do violence."

12 Now, if the blow is then struck
13 or the shot fired while under the
14 influence of that type of passion or
15 impulse to do violence, then the law
16 says that is not murder but it's
17 manslaughter.

18 But if the blow is struck or the
19 shot fired after he has time to cool,
20 goes away and has time to cool or calm
21 down and then he comes back and resents
22 the indignity by killing his adversary,
23 the law says that's not manslaughter
24 but it's murder.

25 So in connection with what I

1 just said regarding the time to cool or
2 calm down, in determining whether
3 reasonable time for cooling has
4 elapsed, you should take into
5 consideration all of the circumstances
6 surrounding the difficulty. You should
7 consider the nature of the provocation,
8 the defendant's physical and mental
9 condition, his education, his habits,
10 his conduct, his manner, and
11 conversation throughout the
12 transaction. In other words, all
13 pertinent circumstances should be
14 considered and the time in which an
15 ordinary person in like circumstances
16 would have cooled, that is the
17 reasonable time.

18 I tell you that words alone,
19 however insulting, are not sufficient
20 to constitute legal provocation for
21 homicide by the use of a deadly weapon.
22 But I do tell you, however, that words
23 accompanied by hostile acts or even
24 slight physical aggression may,
25 according to the circumstances, reduce

1 a killing from murder to manslaughter.

2 Now I'll be telling you a little
3 later on, if you find -- of course you
4 could find the defendant not guilty.
5 But if you have a -- if you find him
6 guilty, and there's a reasonable doubt
7 as to whether a defendant is guilty of
8 murder or manslaughter, then here again
9 you would find him guilty of the lesser
10 offense; that is manslaughter. But of
11 course, if you have a reasonable doubt
12 as to whether the defendant is not
13 guilty at all, then of course you must
14 find him not guilty.

15 Now, the defendant is charged
16 with arson third. We got a statute
17 that covers that, and it goes like
18 this. That's Section 16-11-110(c).
19 Any person who willfully and
20 maliciously set fires -- sets fire to
21 or burns or caused to be burned or
22 aids, counsels, or procures the burning
23 of any barn, stable, garage or other
24 outhouse or building, whether the
25 property of himself or another, that is

1 not a parcel of a dwelling house, then
2 it goes on to say any shop, storehouse,
3 warehouse, factory, mill, or other
4 building, whether the property of
5 himself or another, and it goes on to
6 say or any church, a meetinghouse, a
7 courthouse, a workhouse, a school, or
8 jail, or other public guilty --
9 building shall be guilty of third
10 degree arson.

11 So under that statute the State
12 must prove beyond a reasonable doubt a
13 willful and malicious act. Willful
14 just means to be intentional. Two, a
15 burning to a building of the type
16 charged by the State. And three, a
17 burning that was done with an intent to
18 destroy or damage such building.
19 That's the proof that the State must
20 prove beyond a reasonable doubt to
21 convict the defendant of arson.

22 Now, the defendant in this case
23 from the testimony indicates what we
24 call a plea of alibi. That is, that he
25 was not at the scene of the crime at

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1 the time it was committed, but that he
2 was elsewhere and has nothing to do
3 with it. I tell you as I told you
4 earlier, the defendant has no
5 obligation, he has no burden to prove
6 his alibi. The burden is upon the
7 State to prove that he was actually
8 present at the scene of the crime, and
9 that he actually participated in it,
10 and that he was not elsewhere, and of
11 course all of that must be proved
12 beyond a reasonable doubt.

13 Now, the defendant, the State
14 introduced a confession, a statement
15 alleged to be by the defendant. I
16 charge you that no statement or
17 confession or alleged statement or
18 confession can be considered against
19 any defendant if it was made through
20 force or fear or under duress or
21 compulsion of any kind, or if it was
22 induced by any promise of leniency or
23 reward of any kind. In other words, an
24 alleged statement or confession
25 actually made by a defendant

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1 constitutes no evidence against him,
2 unless it was made freely and
3 voluntary, made without any threats, or
4 inducements addressed to fear or hope,
5 and further that the defendant
6 understood the contents of the
7 statement or confession. Hence, it's
8 your duty, Madam Forelady and ladies
9 and gentlemen, to determine from all of
10 the evidence whether the State has
11 established that any such statement or
12 confession was in fact free and
13 voluntary under the totality of the
14 circumstances.

15 As to any alleged statement or
16 confession introduced in evidence in
17 this case, it must be disregarded by
18 you and not considered against the
19 defendant unless the State has
20 satisfied you from the testimony beyond
21 a reasonable doubt that it was not only
22 actually made by the defendant, and
23 that it was not extorted by force or
24 fear, or induced by promises, but that
25 it was free and voluntary under the

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1 totality of the circumstances. And of
2 course in order to constitute any
3 evidence, an alleged statement or
4 confession would also have to be
5 believed by you, the jury, in whole or
6 in part.

7 If you find that any alleged
8 statement or confession was made freely
9 and voluntary under the totality of the
10 circumstances, then of course it would
11 be considered by you, the jury, along
12 with all of the other evidence in the
13 case and given whatever weight you feel
14 it deserves.

15 Now, you've been chosen as fair
16 and impartial jurors, sworn to fairly
17 try this case and bring in a verdict
18 that speaks the truth, and when you've
19 done that you don't have to apologize
20 to anyone.

21 And you're going to have these
22 two indictments in your room. They're
23 not evidence. Just pieces of paper
24 that gets the case into, into court,
25 and contains the charges against the

1 defendant on the back of them, where
2 I've highlighted in kind of an
3 off-chartreuse color the word
4 "verdict". And I have on the third
5 degree arson one, I have put down "not
6 guilty" on one line and "guilty" on
7 another and a space where you can just
8 put a checkmark. And I put down here
9 "note, place checkmark in one of spaces
10 above to indicate verdict and jury
11 foreman sign."

12 If you find that the State has
13 failed to satisfy you of his guilt
14 beyond a reasonable doubt as to arson,
15 you would just put a checkmark where it
16 says not guilty and sign your name.
17 And when you sign your name, it
18 indicates that all of you agree,
19 because it takes all twelve of you to
20 agree on whatever the verdict is.

21 On the other hand if there is no
22 reasonable doubt, just check where it
23 says guilty, and likewise sign your
24 name.

25 Now on the indictment that says

2704

1 murder, I've got three possible
2 verdicts. Here again the fact that I
3 say one before the other has no
4 bearing. If you find that the State
5 has satisfied -- or has failed to
6 satisfy you of his guilt beyond a
7 reasonable doubt, just put a checkmark
8 where it says not guilty, and then sign
9 your name. And here again it takes all
10 twelve of you to agree on whatever the
11 verdict is.

12 If you find him guilty of murder
13 beyond a reasonable doubt, just put a
14 checkmark where it says murder, and
15 likewise sign your name.

16 If you find him guilty -- not
17 guilty of murder, you can find him
18 guilty of manslaughter. Put a
19 checkmark and sign your name.

20 If you find him guilty and
21 there's some question in your mind as
22 to whether he's guilty of murder or
23 manslaughter, here again you give him
24 the benefit of the doubt and find him
25 guilty of the lesser offense. But as I

2705

1 said of course you could find him not
2 guilty. Or you could find him guilty
3 of one, not guilty of the other. You
4 could find him not guilty of both. Or
5 guilty of both. Just depends upon your
6 view of the evidence in the case.

7 We'll send you to your room for
8 just a minute. I might have forgotten
9 something. If I did, I'll bring you
10 right back. Don't start your
11 deliberations quite yet. If I don't
12 bring you back, I'll send these in to
13 you. I'll send all exhibits in. It
14 will take a few minutes because we'll
15 have to check them off. We got that
16 videotape. You need to play that tape
17 let us know and we'll make arrangements
18 to get this in there or bring you out
19 and let you watch it, whichever one you
20 prefer doing. Any other exhibits that
21 I can't think of? But if you need any
22 information about the exhibits, just
23 let us know. If you need anything to
24 make you comfortable, let us know. If
25 you need us to make telephone calls for

1 you let us know.

2706

2 If the case deliberations last
3 till tonight, I'll try to do better,
4 feed you better.

5 All right. Just follow the
6 bailiff there for just a minute.

7 (The jury leaves the courtroom
8 at 3:02 p. m.)

9 THE COURT: Any exceptions or
10 additions from the State?

11 MR. DURANT: No, sir.

12 THE COURT: Defense?

13 MR. KULP: Your Honor, the
14 only -- none really, your Honor. The
15 only thing that came to mind was the
16 charge regarding the prior animus of
17 the parties only can be considered for
18 purposes of determining who is the
19 aggressor.

20 THE COURT: Say that again.

21 MR. KULP: Prior animus between
22 the parties is only relevant to the
23 issue of who was the aggressor if
24 there's an alleged assault or --

25 THE COURT: Did you give me a

1 charge on that?

2 MR. KULP: No, I didn't, your
3 Honor. I was thinking -- it came to
4 mind as you were --

5 THE COURT: Well, tell me what
6 you'd like me to charge them. I'm
7 always reluctant to carry something
8 back if you don't give it to me.

9 MR. KULP: Yes, sir. I'll let
10 that one go, your Honor.

11 THE COURT: All right. How
12 about check with the court reporter
13 here and get those things straightened
14 out.

15 MR. KULP: Yes, sir.

16 (The jury is given the exhibits
17 and instructed to commence
18 deliberations at 3:07 p. m.)

19 (Whereupon, marked for purposes
20 of the record was Court's Exhibit
21 No. 4, jury notes.)

22 (The Judge enters the courtroom
23 at 7:51 p. m.)

24 THE COURT: We got a verdict,
25 Solicitor. Now for all of you back

2708

1 there, the jury's got a verdict and I
2 don't know what the verdict is. I've
3 got a lot of family from both the
4 defendant and both the victim, got a
5 lot of friends of both, but I just
6 don't condone any outburst, so please
7 remember that if you will, please.

8 All right. Bring the jury in.

9 (The jury enters the courtroom
10 at 7:52 p. m.)

11 THE COURT: All right,
12 Mr. Clerk.

13 CLERK OF COURT: Madam Forelady,
14 has the jury reached a verdict?

15 THE FORELADY: Yes, we have.

16 CLERK OF COURT: Please pass the
17 verdict form up.

18 (The Clerk of Court hands the
19 verdict form to the Court.)

20 THE COURT: Appears to be in
21 order. You may publish.

22 CLERK OF COURT: Okay. Will the
23 defendant please stand.

24 (The defendant and counsel
25 stand.)

2703

1 CLERK OF COURT: As to
2 indictment 97-GS-10-4319, the State of
3 South Carolina versus Wesley Max Myers,
4 indictment for murder, verdict of the
5 jury: Guilty of murder.

6 As to the indictment
7 97-GS-10-4320, the State of South
8 Carolina versus Wesley Max Myers,
9 indictment for third degree arson:
10 Guilty.

11 Signed, Foreperson Elizabeth
12 Babcock, dated March six, 2001.

13 Ladies and gentlemen of the
14 jury, if these are your verdicts,
15 please verify by raising your right
16 hand.

17 (All members of the jury
18 comply.)

19 THE COURT: Appears to be in
20 order. Anything further from the
21 State?

22 MR. DURANT: No, sir, your
23 Honor.

24 THE COURT: Defense?

25 MR. KULP: Like the jury polled,

1 your Honor.

2 THE COURT: All right. Now,
3 Madam Forelady, the clerk has got your
4 names there and she's going to call
5 your names, and when your name is
6 called I want you to stand up and she's
7 going to ask you this one question:
8 Was this your verdict and is it still
9 your verdict? You'll answer
10 accordingly whatever it is, and then
11 you'll sit down and she'll call the
12 next name.

13 Madam Clerk.

14 CLERK OF COURT: As I call your
15 name, please stand.

16 Elizabeth Babcock, is this your
17 verdict and is it still your verdict?

18 THE JUROR: Yes.

19 CLERK OF COURT: David Carlton,
20 is this your verdict and is it still
21 your verdict?

22 THE JUROR: Yes.

23 CLERK OF COURT: Patricia White,
24 is this your verdict and is it still
25 your verdict?

2711

1 THE JUROR: Yes.

2 CLERK OF COURT: Ronald Paxton,
3 is this your verdict and is it still
4 your verdict?

5 THE JUROR: Yes.

6 CLERK OF COURT: Angela
7 Thompson, is this your verdict and is
8 it still your verdict?

9 THE JUROR: Yes.

10 CLERK OF COURT: Diana
11 Lauderdale, is this your verdict and is
12 it still your verdict?

13 THE JUROR: Yes.

14 CLERK OF COURT: Thomas Buist,
15 is this your verdict and is it still
16 your verdict?

17 THE JUROR: Yes, ma'am.

18 CLERK OF COURT: Laverne
19 Sherman, is this your verdict and is it
20 still your verdict, ma'am?

21 THE JUROR: Yes.

22 CLERK OF COURT: William
23 Steinmeyer, is this your verdict and is
24 it still your verdict, sir?

25 THE JUROR: Yes.

2712

1 CLERK OF COURT: Leila Tamblyn,
2 is this your verdict and is it still
3 your verdict, ma'am?

4 THE JUROR: Yes.

5 CLERK OF COURT: David Goude, is
6 this your verdict --

7 THE JUROR: Yes.

8 CLERK OF COURT: -- and is it
9 still your verdict?

10 THE JUROR: Yes.

11 CLERK OF COURT: Sandra Burnett,
12 is this your verdict and is it still
13 your verdict?

14 THE JUROR: Yes.

15 CLERK OF COURT: The jury has
16 been polled and the verdict stands,
17 your Honor.

18 THE COURT: All right. Thank
19 you. Be seated, please. Now Madam
20 Foreman and ladies and gentlemen, I
21 want to tell you how much I appreciate
22 your service. All of us do. I know it
23 must be a terrible imposition on
24 yourself to serve on the jury and
25 render a verdict against a fellow

2713

1 citizen of this type, but I don't see
2 anything wrong with your verdict. I
3 watched you. You paid careful
4 attention to the witnesses as they
5 testified. You were polite to the
6 attorneys. After all, this thing has
7 lasted for you all six days. You were
8 polite to the attorneys when they made
9 their summations to you. I didn't see
10 anybody looked like it wasn't paying
11 attention every moment during the
12 trial. So you followed the system, and
13 even though it might have been
14 distasteful to you to render a verdict
15 of this type, having followed the
16 system you don't have to apologize to
17 anyone, not to yourself or anyone.

18 Now I'm going to excuse you at
19 this time. If you're drawn as a juror
20 in the next three years it would be a
21 computer error. Feel free to stay
22 there if you like because I'm fixing to
23 hear motions now, and perhaps sentence
24 him. It just depends on whether or not
25 they want me to sentence him at this

2714

1 time.

2 We're going to mail you a check.
3 Don't spend much money because as I
4 told you, it won't be much money.

5 You are allowed to talk about it
6 if you like, but you don't have to. So
7 if someone talks to you and you don't
8 want to talk to them, just tell them
9 you don't want to discuss it. But you
10 can if you want to. Just depends upon
11 your view.

12 I think that's about all. Any
13 questions or anything I can answer for
14 you? Feel free to go. You can go out
15 this same door. If you need help
16 getting to your cars or any of you
17 don't have transportation, we'll make
18 arrangements for you. Thank you so
19 much for your service.

20 (The jury leaves the courtroom
21 at 7:57 p. m.)

22 THE COURT: All right. I'll
23 hear any motions, or I'll hear them
24 later, if you like.

25 MR. KULP: I was just waiting

2715

1 for the jury.

2 THE COURT: All right, sir. If
3 you're tired and you want to give it
4 some thought, I don't have any
5 objection to doing it later.

6 MR. KULP: In the morning, your
7 Honor.

8 THE COURT: In the morning. All
9 right, sir. Let's see. I'm going to
10 draw a jury at 9:30. Well, I'll make
11 it convenient to you. So when, when
12 would you like to do it?

13 MR. DURANT: I'm here at any
14 time from eight o'clock on.

15 MR. KULP: Maybe just before you
16 break for lunch.

17 THE COURT: All right. So why
18 don't we just do it at twelve and I'll
19 take long enough to do it. Is that
20 convenient?

21 MR. KULP: Very good, your
22 Honor.

23 THE COURT: All right, sir. All
24 right now. Everyone remain seated.

25 Remove the defendant for me,

2716

1 please.

2 Counsel, approach the bench a
3 minute, Mr. Solicitor.

4 MR. KULP: Yes, sir.

5 (Whereupon, the defendant is
6 escorted from the courtroom.)

7 (Whereupon, there was an
8 off-the-record bench conference.)

9 THE COURT: Now I know that I
10 won't have any problems with any of
11 you, because you all have been ladies
12 and gentlemen throughout the entire
13 trial, but I know this is trying to you
14 so I'm going, I'm going, I'm going to
15 let Mr. Kulp and the defendant's family
16 and friends leave first. And,
17 Mr. Kulp, I can see that everything is
18 kept there, if you like.

19 MR. KULP: Yes, sir. I'll just
20 take this.

21 THE COURT: All right, sir.

22 MR. KULP: Yes, sir.

23 (Whereupon, this matter was
24 adjourned at 8:02 p. m.)

25

C E R T I F I C A T I O N

I, the undersigned HEATHER GAYLE BURNS, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the proceedings in the captioned case, relative to appeal, heard in the Court of General Sessions for Charleston County, South Carolina, on the 6th day of March, 2001.

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

DATED:

August 4, 2001

Heather Gayle Burns R.D.R.
HEATHER GAYLE BURNS, R.D.R.
Official Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

COURT OF GENERAL SESSIONS
DOCKET NO. 97-GS-10-4319, 4320

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STATE OF SOUTH CAROLINA,

TRANSCRIPT OF PROCEEDINGS

-VS-

WESLEY MAX MYERS,

MARCH 7, 2001

Defendant.

CHARLESTON, SOUTH CAROLINA

BEFORE:

THE HONORABLE LUKE N. BROWN, Judge

APPEARANCES:

D. BRUCE DURANT, ESQ.
SENIOR ASSISTANT SOLICITOR
FOR THE STATE

TIMOTHY CLAY KULP, ESQ.
FOR THE DEFENDANT

BY: HEATHER GAYLE BURNS, R.D.R.
CIRCUIT COURT REPORTER

1 THE COURT: First let me have
2 your motions.

3 MR. KULP: Be right there, sir.

4 THE COURT: All right, sir.

5 MR. KULP: Your Honor, we would
6 reiterate all of our previously made
7 motions for the record and note our
8 objections and exceptions taken during
9 the trial. We'd also move for a new
10 trial at this time based on the
11 insufficiency of the evidence and also
12 based upon the fact that the jury,
13 there was insufficient evidence upon
14 which the jury could come to the
15 decision that they did. We
16 respectfully make those motions, your
17 Honor.

18 THE COURT: It's a jury
19 question. I deny the motions.

20 MR. KULP: Yes, sir.

21 THE COURT: All right, sir.
22 Solicitor, I'll hear from you if you
23 like.

24 MR. DURANT: Your Honor, I have
25 very little to add to what you've

1 already heard over the past seven days.
2 Believe you're aware, well aware of the
3 facts in this case.

4 The defendant does not have a
5 prior record. I do have a number of
6 people from the victim's family would
7 like to have the opportunity to address
8 you prior to sentencing.

9 THE COURT: All right, sir.
10 Bring them up.

11 MR. DURANT: Would you come on
12 up, please. And if you would please
13 tell the, the judge who you are.

14 THE COURT: Why don't everybody
15 who wants to say something come on up.

16 MR. DURANT: Okay.

17 THE COURT: Come right up. And
18 anybody who's going to have something
19 to say for Mr. Myers come up if they
20 like now.

21 MR. KULP: We don't have that
22 many more your Honor, if they come up.

23 THE COURT: Of course they can
24 come right here.

25 MR. KULP: Yes.

1 THE COURT: Go ahead, solicitor.

2 MR. DURANT: Thank you.

3 THE COURT: And if you will,
4 identify yourself for my court
5 reporter.

6 MR. DURANT: Identify yourself.

7 MS. EVANS: Yes, sir. Your
8 Honor, my name is Cynthia Evans and
9 Teresa was my sister, and what I wanted
10 to say to you was not only has our
11 family been tore apart, her children,
12 this is the first time that they've
13 been together, all four of them, since
14 she was murdered. And not only has our
15 family been destroyed and ripped apart
16 and torn apart, but also Wes's. And we
17 feel for them also, what they have been
18 through, this.

19 But she didn't deserve this.
20 She loved that man and he loved her,
21 but like I've said one time before, I
22 don't ever want to be loved like that.
23 And it just has devastated both
24 families, and ours has been just ripped
25 apart.

2722

1 Teresa was a very large part of
2 our family. Her loving ways and the
3 way she was just so very kind to
4 people, animals, everything, I just --
5 and to see her die in such a brutal
6 way, I just want you to take all that
7 into consideration.

8 THE COURT: Well, you understand
9 that the least I can give him is thirty
10 years, and he would have to serve every
11 day of it, with no parole. And the
12 maximum I could give him is life in
13 prison without parole. You know, that?

14 MS. EVANS: Yes, sir. I
15 understand that.

16 THE COURT: All right.

17 MR. DURANT: This is Dixie
18 Justice, the victim's mother.

19 THE COURT: Miss Justice.

20 MS. JUSTICE: I'm the victim's
21 mother. This has been a hard time for
22 everybody and I feel for them. The
23 only thing I would ask you, though, I
24 won't say anything about her ways or
25 anything. I know what she was in my

1 heart.

2 I turned this over to you and
3 God a long time ago, and I would ask
4 that you look at the evidence that came
5 through in the last week, and give the
6 judgment according to that and we'll
7 live with that.

8 THE COURT: Okay.

9 MS. JUSTICE: Thank you.

10 MONICA HAUGHT: I'm Monica. I'm
11 Teresa's daughter. I just ask that you
12 give him the maximum sentence that you
13 feel is respectable, and I want to
14 apologize for what he's put you all
15 through and what he's put us through.

16 VICTIM'S BROTHER: I'm Teresa's
17 brother. What I missed the most about
18 Teresa, Halloween, Thanksgiving,
19 Christmas, when she would decorate the
20 whole place. Every -- Halloween, who
21 decorates? Well, she had kids. Of
22 course she would Halloween -- I mean
23 decorated for that. Everything.

24 I'm thirty-nine years old and
25 I'm fixing to have my first baby, and

2724

1 she's not here to see it. She wasn't
2 here to see her granddaughter. It's so
3 much that we're missing out because
4 Teresa's not here, because of the
5 person that she was. I mean I don't
6 think, I don't, I don't think it would
7 have been anybody out there that would
8 be more happier for me than me myself
9 than my sister Teresa, or I mean in my
10 family, too, as far as how I've changed
11 my ways, and she would be proud of it,
12 and especially coming up with a baby.

13 As far as the family, I do feel
14 for the family. Do I feel for Wesley?
15 No. And I'm sorry I feel that way. He
16 took my sister. I ask you to give him
17 everything you can give him. The full
18 max. And if you consider that, I
19 appreciate it.

20 THE COURT: Thank you.

21 MR. DURANT: This is Lily
22 Southpaw, your Honor.

23 MS. SOUTHPAW: I'm the victim's
24 step-mother and I would just like to
25 reiterate just what they've said.

1 There's just a terrible void in our
2 family, and we'll never be back. And I
3 would ask for the maximum sentence.

4 Not only did he kill her, he
5 "over killed" her, and in such a brutal
6 way. And I just, I feel so bad, so bad
7 for his family. That's it.

8 MR. DURANT: We would have
9 nothing else, your Honor.

10 THE COURT: Thank you.
11 Counselor.

12 MR. KULP: Your Honor, we have
13 members of his family and family
14 friends in support here as well, and I
15 know you want to hear from them, your
16 Honor, and I would ask anybody --

17 THE COURT: Anybody, just
18 identify themselves, please. Some of
19 them I know --

20 MR. KULP: Fine.

21 THE COURT: -- and some of them
22 I've heard and I've watched in the
23 courtroom, so --

24 NEAL KNUDSON: Your Honor, my
25 name is Neal Knudson. I've known

2726

1 Wesley for twenty-four years. His
2 family does not deserve to go through
3 what they've gone through. I do feel
4 for Mrs. Haught and her family. Nobody
5 wins. And I'm asking you for as much
6 leniency as you can give this family.

7 DONNA KNUDSON: Your Honor --

8 THE COURT: Your name?

9 DONNA KNUDSON: My name is Donna
10 Knudson. I'm proud to tell you that
11 I'm Wesley Myers's sister. I want you
12 to know that we are a very close-knit
13 family, a lot of love between us, and
14 we draw strength from one another.

15 I guess what I'm trying to say
16 is that we need him as much as he needs
17 us, and I'm asking you to please show
18 leniency for all of our sakes, and I
19 thank you.

20 MRS. MYERS: I'm Rose Marie
21 Myers. I'm the mother. Wesley is and
22 has always been the most loving son
23 anyone could hope to have. I've never
24 been anything but proud of him. He has
25 been there for his twelve year-old son,

2727

1 for his wife who has suffered from
2 severe cancer, leukemia, since 1988.
3 He has had to endure, and he has done
4 so in the most steadfast, bravest
5 manner.

6 Obviously not having him there
7 for his son is a devastation. We can
8 fill in so much, but no one can take
9 the place of the father. Not only
10 that, but he has been there in our
11 community that is an aging community
12 with time given to help out in any way
13 that he could. Always able to see
14 before being asked how he could help.

15 This is a man with a very big
16 heart, and that is the only way this
17 man has ever been known by anyone who
18 knows him. And I beg of you for
19 leniency, as much as you possibly can
20 give.

21 THE COURT: Thank you.

22 MR. MYERS: I'm his father. My
23 name is Max E. Myers. (Crying.)

24 THE COURT: Take your time,
25 Mr. Myers.

2723

1 MR. MYERS: I've raised him to
2 set an example for him, and he's met
3 it. And always. I'm sorry their
4 family and our family has to go through
5 this but anything you can do, your
6 Honor, towards leniency toward him,
7 having him close by so we can go see
8 him. And I'll take his son to see him
9 and our blood runs thick, and I love
10 him so very much. And I thank you for
11 listening.

12 THE COURT: Thank you,
13 Mr. Myers.

14 MR. COPELAND: Judge, my name is
15 Clyde Copeland. Wesley Myers is my
16 best friend. I've known him for
17 twenty-one years. I've never known him
18 to do anything like he's been accused
19 of, and in my heart I know he didn't do
20 it. He was found guilty.

21 But, Judge, I ask you to look at
22 the evidence, you saw the same evidence
23 we saw, and rule by in your conscience,
24 and I believe that you will give Wesley
25 a fair sentence. I pray that you don't

1 give him the maximum sentence, but just
2 give him a fair sentence, your Honor,
3 because he's a good man.

4 I feel sorry for Teresa's
5 family. I feel sorry for both families
6 because the guilty man hasn't been
7 caught yet. But this man is going to
8 have to pay the penalty until we can
9 catch the man that did it, and we will
10 get him.

11 And Wesley is going to have to
12 stay strong, put his faith in God that
13 the right man will be caught, and I
14 pray that it's not very long. And we
15 thank you, Judge.

16 MR. KULP: Your Honor, I, I met
17 Wes Myers and his family on the morning
18 of March the sixteenth, 1997. I met
19 his family sitting in a car outside the
20 bond court. And then I met Wesley and
21 began representing him in this case and
22 have for almost four years.

23 Some clients to you as a
24 criminal defense lawyer and we all know
25 the big picture and they say I made a

2730

1 mistake, or I did it, I exercised an
2 error in judgment and they ask for help
3 and they ask for advocacy and
4 representation as they move through the
5 system so that their interests can be
6 met.

7 Shortly after meeting Wesley, he
8 advised me that he did not do this
9 crime. Our tact and our approach and
10 our development and work in this case
11 has been associated only under that
12 theme for this entire period of time as
13 you I think, presiding over this trial,
14 saw very clearly. That is a unique
15 situation compared to the normal
16 situation and it particularly applies
17 here at sentencing.

18 As everyone here today has said,
19 the tragedy of this and horror of this
20 has spread all over this courtroom and
21 every life, every life that it has
22 touched.

23 Here at sentencing it is a, what
24 I have mentioned creates an unusual
25 situation for me. My client, I have

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1 spoken with him this morning and am not
2 surprised that when he addresses you at
3 elocution he will say that he as well
4 is very sorry for everything that
5 happened. He loved Teresa. He misses
6 Teresa. And as we know and, there's no
7 dispute, she loved him.

8 However, your Honor, I am not
9 able to discuss with you issues that I
10 normally would because he to this day
11 maintains his innocence and that is
12 what he will tell you. He is not here,
13 and I don't -- I'm not challenging the
14 gentleman who spoke, his friend, but I
15 obviously didn't speak to everyone
16 beforehand. The jury has rendered its
17 decision. That is the way our system
18 works and we do not challenge that.

19 But I cannot change my client's
20 mind. He is the defendant. He is the
21 person who stands before you. Nor can
22 I change how he thinks and how he has
23 thought for the past four years.

24 I of course can tell you that as
25 you can see that he's well loved, well

2732

1 needed. He's a father.

2 And I think the family members
3 who spoke covered a lot of the issues
4 that I would, in terms of his ex-wife's
5 illness and other aspects. As the
6 solicitor himself said, he has no prior
7 record.

8 Of course, your Honor, it is
9 incumbent upon me and I would do so at
10 this juncture to ask you to consider
11 within the broad range of sentence
12 applicable that you might choose to
13 certainly sentence him at the lower
14 level of that range as you see fit.

15 I've gotten to know this, sounds
16 funny to say, young man, younger than I
17 am, very well over the past four years.
18 He spent two years in jail, almost two
19 years pretrial before he was able to be
20 released.

21 THE COURT: What is exactly the
22 time? Have you calculated it?

23 MR. DURANT: Six hundred and
24 forty-five days, your Honor.

25 THE COURT: Go ahead.

1 MR. KULP: He spent six hundred
2 and forty-five days, for which we would
3 ask you to give him credit for, before
4 he was able to be released and only
5 then he was released because his loving
6 family put up their home that they
7 resided in for thirty-five years to
8 secure his appearance. And during that
9 period, although the solicitor and I
10 had a call or two about an issue of him
11 being seen somewhere, there was no
12 issue since December the fifth, 1998 to
13 date that led to any attempt to revoke
14 his bond or otherwise.

15 He was on electronic monitoring
16 and would even call in when it looked
17 like the machine broke, to have it come
18 and checked out and replaced. He's
19 done everything I've asked him to do,
20 and he's been responsible as a client
21 in that regard.

22 I would ask you to hear from
23 him.

24 THE COURT: Thank you.

25 Mr. Myers.

1 THE DEFENDANT: Your Honor, I
2 loved Teresa Haught with all my I
3 heart. I would have done anything for
4 her. My biggest regret was I was not
5 there that night to protect Teresa
6 Haught, and I've stood by that this
7 whole time. I've told her family that
8 morning that it's ate me up inside
9 because normally I would have been
10 there to protect Teresa.

11 I ask you to look at the
12 evidence, and give your best judgment
13 for me, your Honor. I am so sorry that
14 this family has been put through, and
15 my family, has been put through such a
16 tragic time. And I know it's hurt an
17 awful lot of our family members and
18 friends.

19 But, your Honor, I did not kill
20 Teresa Haught. And I love her to death
21 and to this day I love her, and I
22 always will. And ask you to be lenient
23 and let me at least be close enough to
24 my family where I can see them.

25 THE COURT: Thank you. Anything

2735

1 else?

2 MR. KULP: No, sir. Thank you
3 your Honor.

4 THE COURT: Well, in the first
5 place, I was talking to your father
6 Mr. Max Myers, I don't have the
7 authority to tell the Department of
8 Corrections where to put him. I do
9 pray that they'll put him to where it
10 will be convenient for you to see him,
11 the family to see him.

12 It's always a tragedy when you
13 see two families, loving families,
14 obviously, with a tragedy like this.
15 But in defense of the jury, Mr. Myers,
16 I would hae found you guilty. I
17 listened carefully to the trial, but
18 it's nothing unusual that a person,
19 even after making a confession, just
20 don't want to face up to it. It
21 happens in a lot of cases. I don't
22 think this is any exception. But I
23 don't know whether you killed her or
24 not. I believe you when you gave that
25 statement and I would have voted for

1 conviction, but -- and I believe you
2 loved her, and I got an idea what
3 happened, but I still believe your
4 confession, but I think that the
5 sentence that I want to sentence you to
6 is more appropriate.

7 Now today and yesterday I just
8 want to tell you I don't want an
9 outburst back there. You always
10 conducted yourself during the trial,
11 both families, friends, as the ladies
12 and gentlemen that you are, so I hope I
13 don't get any outbursts, because I will
14 not condone it.

15 And I want to say, Solicitor and
16 Mr. Kulp, that you both conducted
17 yourselves as efficient, real trial
18 attorneys. And on behalf of you,
19 Mr. Kulp, and your client, I don't know
20 of anything else that you could have
21 done. I really, I just don't know of
22 anything else you could have done, and
23 I expect the solicitor would agree
24 there.

25 MR. DURANT: Yes.

1 THE COURT: With the amount of
2 time and -- that you spent on this
3 case, so as you look back I don't think
4 you could say well, I made any mistakes
5 because I think you covered everything
6 that could be covered. But I think
7 this is more appropriate under the
8 facts of the case.

9 Judgment of law and sentence of
10 the Court you, Wesley Max Myers, in
11 Indictment 97-4320, that's arson third,
12 that's ten years; concurrent with
13 97-4319, murder, thirty years, and I'll
14 give him credit for six hundred and
15 forty-five days jail time on each of
16 them. Good luck.

17 MR. KULP: Thank you, your
18 Honor.

19 MR. DURANT: Thank you, your
20 Honor.

21 THE DEFENDANT: Thank you, your
22 Honor:

23 THE COURT: Now I want
24 Mr. Myers' family to leave first if you
25 will as I did last night, so would you

1 all vacate the courtroom for me,
2 please. I know you'll conduct yourself
3 properly, but the friends and the
4 family of Mr. Myers, I want them to
5 leave the courtroom at this time.
6 Everyone else remain seated.

7 (Whereupon, this matter was
8 concluded.)

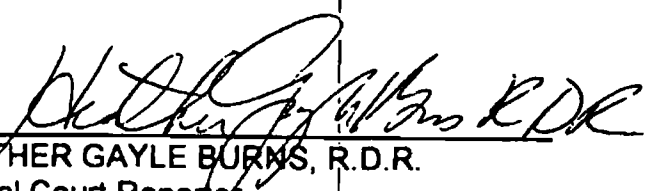
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C E R T I F I C A T I O N

I, the undersigned HEATHER GAYLE BURNS, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the proceedings in the captioned case, relative to appeal, heard in the Court of General Sessions for Charleston County, South Carolina, on the 7th day of March, 2001.

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

DATED:

August 3, 2001
HEATHER GAYLE BURNS, R.D.R.
Official Court Reporter

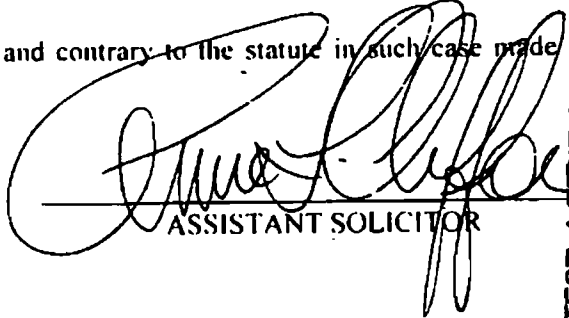
STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

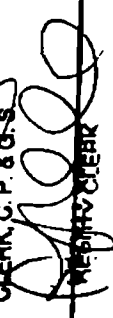
INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on July 7, 1997 the Grand Jurors of Charleston County
present upon their oath:

That Wesley Max Myers did in Charleston County on or about March 12 or 13, 1997, willfully
and with malice aforethought, kill Theresa Haught by inflicting several blows to her head and
that Theresa Haught died as a proximate result thereof. This is in violation of the common law
of South Carolina.

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


ASSISTANT SOLICITOR

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P. & O.S.

CLERK

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

JULY TERM 1997

THE STATE

vs.

WESLEY MAX MYERS

ARREST WARRANT NUMBER

F-339393

03/16/97

ACTION OF GRAND JURY

TRUE BILL

Karen P. Thorne

Foreperson of Grand Jury

JUL 17 1997

VERDICT

Not Guilty

Guilty of Murder ✓

Guilty of Manslaughter

✓ *Elizabeth B. Baker*

Foreperson of Petit Jury

Date: 3-6-2001

Indictment for

MURDER

Note: Place check mark in one (1) of space above, to indicate verdict, and Foreman sign.

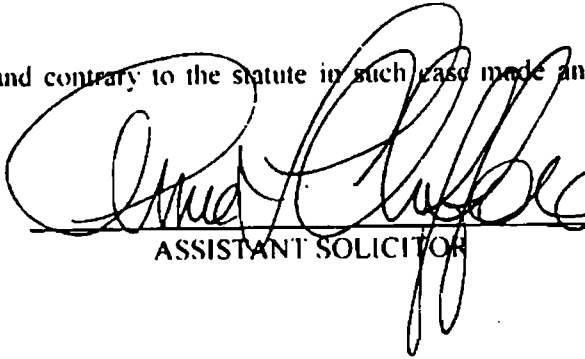
STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT FOR
THIRD DEGREE ARSON

At a Court of General Sessions, convened on July 7, 1997 the Grand Jurors of Charleston County
present upon their oath:

That Wesley Max Myers did in Charleston County on or about March 12 or 13, 1997, willfully
and maliciously set fire to, burned, or caused to be burned or aided, counseled, or procured the
burning of a building with the intent to destroy or damage the building. This is in violation of
S.C. Code Ann. section 16-11-110(C) (Cum. Supp. 1996).

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


ASSISTANT SOLICITOR

TEST: A TRUE COPY
J. ARMSTRONG (SEAL)
CLERK C. P. & G. S.


JOHN BURNETT AND/OR

KEITH HAIR

CLAYTON, NCPD

OCA#: 97-0006877

Kios

ARREST WARRANT NUMBER

F-339394

03/16/97

ACTION OF GRAND JURY

TRUE BILL

Karen E. Thurner
Foreperson of Grand Jury

300 05 394

VERDICT

Not Guilty " "
Guilty " ✓ "

✓ Elizabeth A Babcock
Foreperson of Petit Jury

Foreperson of Petit Jury _____ Date: 3-6-2001

Note: Place checkmark in one (1) of spaces above, to indicate verdict, and Foreman sign.

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

JULY TERM 1997

THE STATE

vs.

WESLEY MAX MYERS

STATE'S
EXHIBIT

3

ll 5/22/00

2818

2744

NCPD 017

COMPLAINT # 9700687-

PAGE 1

**NORTH CHARLESTON POLICE DEPARTMENT
WITNESS STATEMENT**

STATEMENT OF Wesley Max Myers DATE OF BIRTH 8-24-59 AGE 37

HOME ADDRESS [REDACTED] HOME PHONE 747-8196 BUS. PH. 744-9432

EMPLOYER Midland Mechanical BUS. ADDRESS _____

THIS STATEMENT IS IN REFERENCE TO Arson Death

WHICH OCCURS AT [REDACTED] ON OR ABOUT 3-13-97

AT APPROXIMATELY 0200 HOURS, IN NORTH CHARLESTON, SOUTH CAROLINA.

THIS STATEMENT IS GIVEN 3-15-97 (DATE) AT 1530 (TIME) AT _____

N. Charleston Police Dept (LOCATION)

This statement was written by Detective Clayton as told by me upon request. On March 13th, 1997 at about 2:00AM or so. I drove to the Mill Inn to checking on my girlfriend, Theresa Haight. I parked my truck beside her Mercury parked in front of the Mill Inn. I went to the front door and knocked. Theresa came to the door about 5-10 minutes later. It is not uncommon for me to go by and check on her at closing time. There was no one in there or I don't think there was any one in there. While I was in the bar, I found a pink note on the bar. It was a note signed by Allen White. I think it said that "I'll see you later" and it was signed by him. I thought that they might of had something going. I had seen Allen pinch her and kiss her on lips. I asked her about the note and she said that it wasn't any of my business. Theresa pushed me by the chin and the chest hard. I told her not "don't push me Theresa". She hit me in my chest with her fist. Then she pushed me.

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE. I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY STATEMENT.

WITNESS:

WITNESS:

SIGNATURE:

up against the bar I told her not to hit on me. Teresa grabbed the glass wine craft and she told me to get away. I grabbed the winecraft from her. Then, she pushed me in the face. I struck her in the center of the head with the winecraft. Both of us went down to the floor. Like a blur, I lost control. I went around the counter behind the bar. I believe I held her for a while on the floor before I went around the ~~corner~~ ^{counter}. I think I struck her twice. I was raged upset, real mad. I couldn't believe what she was saying. She called me a fool. I grabbed "closed on Sunday" ^{sign} and some papers. At that state I grabbed anything around. I piled some papers up behind the bar and lit it with a lighter. I remember ~~wanting to~~ ^{was} wanted to die. I wanted to burn up in there with her. I sat there and closed my eyes and the fire was getting really big. I went out the back door and went to the right. I went around front and got into my truck. I put a purse behind the seat of my truck. I don't remember what I did with the purse. I drove home. I forgot to mention ~~what~~ ^{that} I opened the cabinet behind the bar looking for something to burn. End of Statement ~~xxx~~

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY STATEMENT.

WITNESS:

WITNESS:

SIGNATURE:

SIGNATURE:

I HAVE BEEN PROVIDED A COPY OF MY STATEMENT.

2820

NCPD 017

COMPLAINT # 97006877

PAGE 1

NORTH CHARLESTON POLICE DEPARTMENT WITNESS STATEMENT

STATEMENT OF Wesley Max Myers DATE OF BIRTH 8-24-59 AGE 37HOME ADDRESS [REDACTED] HOME PHONE 747-8190 BUS. PH. 744-9432EMPLOYER Midland Mechanical BUS. ADDRESS _____THIS STATEMENT IS IN REFERENCE TO Arson DeathWHICH OCCURS AT [REDACTED] ON OR ABOUT 3-13-97AT APPROXIMATELY 0200 HOURS, IN NORTH CHARLESTON, SOUTH CAROLINA.THIS STATEMENT IS GIVEN 3-18-97 (DATE) AT 1530 (TIME), AT _____N. Charleston Police Dept (LOCATION)

This statement was written by Detective Clayton as told by me upon request. On March 13th, 1997 at about 2:00AM or so, I drove to the Mill Inn to checking on my girlfriend, Theresa Haight. I parked my truck beside her Mercury parked in front of the Mill Inn. I went to the front door and knocked. ^{Umm} Theresa came to the door about 5-10 minutes later. It is not uncommon for me to go by and check on her at closing time. There was no one in there or I don't think there was anyone in there. While ^{Umm} I was in the bar, I found a pink note on the bar. It was a note signed by Allen White. I think it said that "I'll see you later" and it was signed by him. I thought that they might of had something going. I had seen Allen pinch her and kiss her on lips. I asked her about the note and she said that it wasn't any of my business. ^{Umm} Theresa pushed me by the chin and the chest hard. I told her ^{Umm} "don't push me Theresa". She hit me in my chest with her fist. Then, she pushed me

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE. I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY STATEMENT.

WITNESS: Det. D. ClaytonWITNESS: Det. George TelamSIGNATURE: Wesley M. Myers

up against the bar I told her not to hit on me. Teresa grabbed the glass wine craft and she told me to get away. I grabbed the winecraft from her. Then, she pushed me in the face. I struck her in the center of the head with the winecraft. Both of us went down to the floor. Like a blur, I lost control. I went around the counter behind the bar. I believe I held her for a while on the floor before I went around the ~~corner~~^{counter}. I think I struck her twice. I was raging upset, real mad. I couldn't believe what she was saying. She called me a fool. I grabbed "closed on Sunday" ^{sign} and some papers. At that state I grabbed anything around. I piled some papers up behind the bar and lit it with a lighter. I remember ~~wanting to~~^{****} wanted to die. I wanted to burn up in there with her. I sat there and closed my eyes and the fire was getting really big. I went out the back door and went to the right. I went around front and got into my truck. I put a purse behind the seat of my truck. I don't remember what I did with the purse. I drove home. I forgot to mention ^{what} ~~that~~ I opened the cabinet behind the bar looking for something to burn. End of Statementx ~~can~~

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE. I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY STATEMENT.

WITNESS:

WITNESS:

SIGNATURE:

SIGNATURE:

I HAVE BEEN PROVIDED A COPY OF MY STATEMENT.

GROUP: FOCUS GROUP
SESSION: ANGER AND RESENTMENT
SESSION #: FG-1

ADULT OUTPATIENT
TREATMENT MANUAL
PHASE II

907 5N

"ANGER QUESTIONNAIRE" WORKSHEET

1. I don't show my anger about everything that makes me mad, but when I do-look out! Y
2. I still get angry when I think of the bad things people did to me in the past. Y
3. Waiting in line or waiting for other people really annoys me.
4. I fly off the handle easily. N
5. I often find myself having heated arguments with the people who are closest to me. Y
6. I sometimes lie awake at night and think about the things that upset me during the day. Y
7. When someone says or does something that upsets me, I don't usually say anything at the time, but later I spend a lot of time thinking up cutting replies I could and should have made. Y
8. I find it very hard to forgive someone who has done me wrong. N
9. I get angry with myself when I lose control of my emotions. Y
10. People really irritate me when they don't behave the way they should, or when they act like they don't have the good sense God gave lettuce. Y
11. If I get really upset about something, I have a tendency to feel sick later, either with a weak spell, headache, upset stomach, or diarrhea. Y
12. People I've trusted have often let me down, leaving me feeling angry or betrayed. Y
13. When things don't go my way, I get depressed. N
14. I am apt to take frustration so badly that I cannot put it out of my mind. Y
15. I've been so angry at times I couldn't remember things I said or did. Y
16. After arguing with someone, I hate myself. Y
17. I've had trouble on the job because of my temper. N

GROUP: FOCUS GROUP
SESSION: ANGER AND RESENTMENT
SESSION #: FG-1

ADULT OUTPATIENT
TREATMENT MANUAL
PHASE II

18. When riled up, I often blurt out things I later regret saying. Y
19. Some people are afraid of my bad temper. Y
20. When I get angry, frustrated, or hurt, I comfort myself by eating or using alcohol or other drugs. *Before Help* Y
21. When someone hurts or frustrates me, I want to get even. N
22. I've gotten so angry at times, that I've become physically violent, hitting other people or breaking things. Y
23. At times, I've felt angry enough to kill. Y
24. Sometimes I feel so hurt and alone I feel like committing suicide. Y
25. I'm a really angry person, and I know I need help learning to control my temper and angry feelings because it's already caused me a lot of problems. Y

*Most of these anxious feelings
was before I Got help for my feelings.
now they are gone.*

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF CHARLESTON

WARRANT NO: F339394; F339393

FILED
2001 FEB 20 PM 2:03
JULIE J. ARMSTRONG
CLERK OF COURT

STATE OF SOUTH CAROLINA

BY _____

-versus-

WESLEY MAX MYERS,

Defendant.

DEFENDANT'S MOTION TO SUPPRESS CONFESSION AND STATEMENTS

NOW COMES the Defendant, by and through his counsel, Timothy Clay Kulp, moving this Honorable Court to Suppress any and all incriminating statements made by the Defendant relating to this case. This motion is based on the following submissions, argument and law.

1. On May 23, 2000, the Defendant sought to have suppressed incriminating statements which he made when in police custody.
2. There are three particular incriminatory statements the State intends to offer against the Defendant at trial of this matter scheduled for February 26, 2001. There is no other evidence against the Defendant in this case; despite extensive forensic testing, the only forensic evidence that has been tested to result has produced exculpatory or exonerative findings.
3. The State intends to offer testimony of the police officers as to the Defendant's incriminating statements. They also intend to offer a two-page written statement of the Defendant handwritten by a police officer. The State also intends to introduce statements of the Defendant made to the victim's mother who was brought to the police station the third day of Defendant's contact with the police, for the sole purpose of allowing the Defendant to "apologize" to the victim's

mother. The third incriminating statement which the State intends to offer at trial against the Defendant are those made just outside the police station to reporters who were contacted by the investigating Lieutenant in the case and advised to come to the station. The investigating Lieutenant advised the reporter that an arrest had been made in the case, that they should come to the station house because they were going to "walk him," and that the Defendant "has something to say" to reporters.¹ When the Defendant was taken out of the back door of the police station, after being allowed to smoke a cigarette outside the front door of the police station where nothing prohibited the officers from avoiding the press entourage that had assembled, he was positioned by police while handcuffed to be questioned by news media agents until they had no further questions. Then the Defendant was taken to jail for booking.

4. Some of these issues were addressed in a Jackson v. Denno Hearing before Judge Edward Cottingham on or about May 22-23, 2000. The State presented a number of witnesses. One of the witnesses testifying, the case officer, disclosed on the witness stand during his testimony that he possessed a black and white, surreptitiously made videotape of a extensive interrogation of the Defendant prior to a polygraph test that the police decided not to administer.² Despite repeated requests by the Defense during the previous three years for production of any videotape of the Defendant, and written motions to discover any statements made by him, and despite written confirmation from the State that no such tapes

¹See Exhibit A, attached hereto

²See Exhibit B, attached hereto.

existed,³ he produced this videotape from the file folder he held as he testified. The court ruled that all confessions were voluntary. The court refused to let the Defense re-examine the Jackson v. Denno witnesses of the State using the midnight-hour-revealed video tape despite assertions by Defendant's counsel that a comparison of the conversation on the videotape and the testimony of the Detectives during the Jackson v. Denno Hearing would show mis-statements if not perjury. The court denied reopening the hearing. The court also directed that this black and white surreptitiously made video tape would not be admissible in the trial of this case since it contained self-serving statements, despite counsel for the Defendant's assertions that the tape could be edited. The court itself reviewed the videotape and placed it into the record as an exhibit.

5. Counsel for the Defendant submits that this ruling was made pre-trial, without a jury being sworn, and is subject to review by the judge who will try this case to conclusion. Recently, an Assistant Solicitor with this Solicitors's Office conceded this when asking that a Motion to Suppress be continued from one judge acknowledging that a ruling by the motion judge would not be binding on a different trial judge in the case at some future term.
6. As well, there are changed circumstances in this case. Since the circumstance of the Jackson v. Denno ruling, the defense has been able to provide a copy of this video tape to its retained expert witness on false confessions, Dr. Saul Kassin of Williams College in Boston, Massachusetts. In the interim, Dr. Kassin has had the opportunity to review this video tape at length and incorporate it into his

³See attached responses of the State, as Exhibit C.

findings and opinions.

7. Therefore, the ability to re-examine the voluntariness of the Defendant's incriminating statements would be based upon new and different facts, those being the assessment by Professor Kassin of this videotape on the issue of voluntariness; and his testimony thereabout.
8. Specifically, counsel for the Defendant made specific and repeated requests in writing and otherwise for copies of any videotapes of the Defendant. The State, despite the responsibilities set forth in Kyles v. Whitley, State v. Quattlebaum, and a succeeding line of cases, failed to produce the videotape which the defense expert finds so critical to his opinion of voluntariness at this time. Had the State adhered to its responsibilities to thoroughly review with police agents and detectives all available evidence in the case, this videotape would have been produced, and is unequivocally discoverable by the defense since it contains statements of the Defendant recorded by the State. Had this videotape been produced by the State on a timely basis pursuant to their duty to so,⁴ testimony of Mr. Kassin about the impact of what transpired during the videotape could have been offered.

Had the defense been provided this tape sometime sooner than three years after requesting it, rather than during the Jackson v. Denno Hearing, it certainly would have been able to have its expert witness incorporate its substance into the Jackson v. Denno Hearing.

In summary, it is respectfully requested that this court convene a Jackson v. Denno

⁴State v. Quattlebaum, copy attached.

Hearing to determine the voluntariness of the incriminating statements of the Defendant considering these different facts, and to allow the videotape to be played by defense counsel in cross-examination of the detectives testifying for the State, and by the defense expert, Professor Saul Kassin.

Respectfully submitted,



Timothy Clay Kulp
Attorney for the Defendant
Riesen Law Firm, L.L.P.
3660 W. Montague Ave.
N. Charleston, S.C. 29418
(843) 760-2450

Charleston, South Carolina

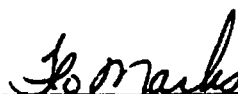
February 20, 2001.

CERTIFICATE OF FILING

I, Flo Marks, Legal Secretary, hereby certify that I have this 20th day of February, 2001, mailed the original of Defendant's Motion to Suppress Confession and Statements in the United States mail, postage prepaid, for purposes of filing, to the Clerk of Court for Charleston County, at 2144 Melbourne Avenue, North Charleston, South Carolina, 29405.

CERTIFICATE OF MAILING

The undersigned hereby certifies that on this 20th February day of 2001, a true and correct copy of the above and foregoing Defendant's Motion to Suppress Confession and Statements was mailed, via United States Mail, postage prepaid, to Bruce Durant, Esquire, Senior Assistant Solicitor, 2144 Melbourne Avenue, North Charleston, South Carolina, 29405.



Flo Marks, Legal Secretary
Riesen Law Firm, L.L.P.
3660 West Montague Avenue
Post Office Box 40997
N. Charleston, SC 29423
(803) 760-2450

1 Q And how did that occur?

2 A We make a series of what we call beat checks where
3 you check with all law enforcement agencies about three
4 times a day to find out if there have been any arrests in
5 cases we're interested in. When they do make an arrest,
6 they give us a call back. Lieutenant Melvin Cumbee called
7 us back that evening and said that they had made an arrest
8 in the arson case they were investigating. And that they
9 were going to walk the suspect they had arrested that
10 night. And so we grabbed a photographer and headed up to
11 the North Charleston Police Department.

12 Q Okay. So you had called -- your station had called
13 Cumbee previously to request to be provided with that
14 information?

15 A Yes.

16 Q Is that correct?

17 A Yes.

18 Q Did he say anything -- did Detective Cumbee say 
19 anything to you about this defendant wanting to say
20 anything?

21 A He said, He says he has something to say. And that
22 was the extent of -- and we didn't know what that would be
23 or how detailed it would be. We just went up there to
24 hear it.

25 Q But you were advised by Cumbee that this defendant

EXHIBIT A

1 had something to say to the press?

2 A Yes.

3 Q One other thing, you were the one that actually asked
4 the defendant questions when he came out the door?

5 A Yes, I was.

6 Q And would you describe to the Court how that came
7 about? How that physically happened?

8 A Okay. He came out in handcuffs with the
9 investigators or the officers who were transporting him,
10 I'm not sure exactly what they were. And when they came
11 out the door, Mr. Myers stopped in front of us. And it
12 was kind of a big awkward pause. And then when we all --
13 my job is to ask questions so I just said, Well, are you
14 remorseful for what you did? And he answered, I'm really
15 sorry. It was a terrible crime that I committed. And
16 then I asked just a couple other things that I knew about
17 the victim in terms of how the victim died, police told us
18 that she had been beaten. So I said, How many times did
19 you strike her? He said he didn't know. I asked if he
20 had been under the influence of drugs or alcohol at the
21 time? He answered no. And when I ultimately -- I said,
22 What led up to it? And he said they were breaking up and
23 had an argument and things got out of hand.

24 And when I ran out of questions, and there were no
25 other reporters there -- there were two other cameras

1 there, but there were no other reporters there, so they
2 didn't have any questions either, then he proceeded to go ~~to~~
3 get in the back of the police car along with the
4 investigators.

5 Q Now, did he stop or was -- or did the police stop him
6 for you?

7 A No, he stopped. He came out the door and stopped
8 right in front of us. And just kind of -- we all looked
9 at each other not knowing what to expect. And so our job,
10 as we are told and we get in trouble for not doing it, if
11 we go up and see someone who has been arrested, our job,
12 the first question -- if our news director looks at our
13 tape and we are not -- he does not hear the question, did
14 you do it, or how did you feel about doing it, why did you
15 do it, then we get in trouble so we have to ask those
16 questions when we go up there.

17 Q But you weren't told that by the police to ask those
18 questions?

19 A Oh, no, no, no.

20 THE COURT: Let me ask you this, were the detectives
21 who had him in custody encouraging him to talk in any way?

22 A No. He was not even -- they didn't have -- they
23 weren't holding onto him at all because I was standing
24 right next to him within, I guess, a foot or so.

25 Q Did he stop voluntarily there to answer your

1 questions or did they assist him in any way?

2 A No, he stopped. He came out and he stopped and he
3 looked at us and just kind of waited.

4 Q Did you get the impression that the interview he had
5 was his freely and voluntarily?

6 A Yes.

7 Q Unassisted by the detectives who had him there?

8 A Yes.

9 THE COURT: All right. You may cross-examine.

10 CROSS-EXAMINATION

11 BY MR. KULP:

12 Q I didn't catch your last name.

13 A Lothery.

14 Q Lothery?

15 A Yes.

16 Q Sorry. Ms. Lothery, do you recall that Mr. Myers was
17 handcuffed when you saw him?

18 A Yes.

19 Q And he was in police custody and that appeared
20 obvious to you, did it not?

21 A Yes.

22 Q Did the police do anything that you observed to hurry
23 and rush him into the car like they sometimes do to get
24 him out of there and get him to the jail?

25 A No, but I have never in just in a few cases that I've

1 seen, unless it's children involved, they don't often rush
2 you to a car.

3 Q Okay. Well, I was just asking what you observed that
4 day.

5 A Okay, I'm sorry.

6 Q Was he shackled, do you recall?

7 A I don't recall his feet, I'm sorry.

8 Q Now, you spoke directly with Lieutenant Cumbee you ~~star~~
9 testified on direct exam?

10 A Yes.

11 Q He told you they had made an arrest?

12 A Yes.

13 Q And he asked you to come by there?

14 A No. He said, We're going to walk him were the words
15 that he used, meaning take him out of the building and put
16 him in the police car and transport him to the jail. And
17 he said -- I don't remember the time frame he gave me, but
18 he said we were going to walk him. So then we -- because
19 we were interested in the case and had been following on
20 that, we went up there and camped out where we do in those
21 cases.

22 Q Right. And they didn't say anything like we made an
23 arrest and the bond hearing will be at 6:30 over in Judge
24 Guedalia's office?

25 A We were told the bond hearing would be the next

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) WARRANT #S:F 339394; F 339393

STATE OF SOUTH CAROLINA) MOTION FOR THE SOLICITOR TO
-versus-) VERIFY THAT NO AUDIOTAPES OR
WESLEY MAX MYERS,) VIDEOTAPES WERE MADE BY THE
) POLICE DURING ANY INTERVIEW
) OR INTERROGATION OF
) THE DEFENDANT BY THE POLICE;
) OR VERIFY IF ANY AUDIOTAPES
) THAT WERE SO MADE WERE LOST OR
Defendant.) DESTROYED

NOW COMES the Defendant, by and through his counsel, Timothy Clay Kulp, moving this Honorable Court to compel the Solicitor to verify that no video or audiotapes were made by the police during any interview or interrogation of the Defendant by the police; or verify if any video or audiotapes that were so made were lost or destroyed.

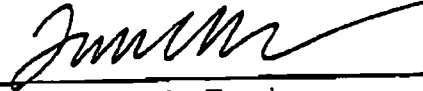
The Defendant would respectfully show unto this Honorable Court:

1. That the Prosecution has not disclosed the existence of any video or audiotapes made by the police during the interrogation or interview of the Defendant events of which spanned three days.
2. The Defendant finds this to be confusing considering the number of times he was interviewed, and the nature of the questioning he experienced.
3. The prosecution has not clarified that no tapes of any nature were either:
 - a. made at any time.; or,
 - b. made at any time and discarded; or
 - c. made at any time and discarded after a signed statement was obtained from the Defendant;
 - d. made at any time and inadvertently not produced to date;
 - e. absolutely not made at any time, in any manner, by any officer or agent of the police.

EXHIBIT B

4. The Defendant respectfully moves the Court to compel the Solicitor to clarify the foregoing.

Respectfully submitted,



Timothy Clay Kulp, Esquire
Riesen Law Firm, L.L.P.
3660 West Montague Avenue
North Charleston, SC 29418
(803) 760-2450

Charleston, South Carolina

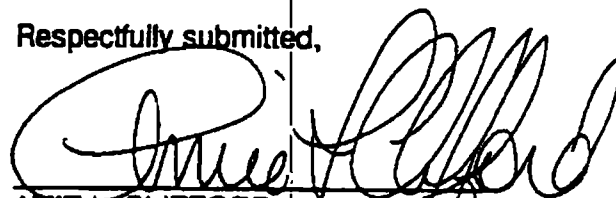
March 26, 1998

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) Indictments: 97-GS-10-4319 and 4320
) Arrest Warrants: F 339393, F 339394

STATE OF SOUTH CAROLINA)
v.) RETURN TO "MOTION FOR THE SOLICITOR TO VERIFY
) THAT NO AUDIOTAPES OR VIDEOTAPES WERE MADE
) BY THE POLICE DURING ANY INTERVIEW OR
WESLEY MAX MYERS,) INTERROGATION OF THE DEFENDANT BY THE POLICE;
) OR VERIFY IF ANY AUDIOTAPES THAT WERE SO MADE
Defendant.) WERE LOST OR DESTROYED"
) (Motion Dated March 17, 1998)

The State has been informed and believes that the North Charleston Police Department did not record any interviews of the defendant and that, consequently, no tapes of such interviews are available.

Respectfully submitted,



AMIE L. CLIFFORD
Assistant Solicitor
Charleston County Solicitor's Office
2144 Melbourne Avenue
North Charleston, SC 29405
(843) 740-5850

North Charleston, South Carolina
December 15, 1998

INROC / UNITED
FBI / CHARLESTON
LS 9 13 91 0300

EXHIBIT C

20 2838 4
MAR 23 1998

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF GENERAL SESSIONS
CASE NUMBER: 97-GS-10-1394
WARRANT #S: F339393, F339394

STATE OF SOUTH CAROLINA)
-versus-)
WESLEY MAX MYERS,)

DEFENDANT'S MOTION TO COMPEL
THE STATE TO DISCLOSE ALL NOTES
OR ANY OTHER MEMORANDA OR
DOCUMENTATION PREPARED BY
THE POLYGRAPH EXAMINER
RELATED TO THIS CASE

Defendant.

NOW COMES the Defendant, by and through his counsel, Timothy Clay Kulp, moving this Honorable Court to compel the State to disclose any and all memoranda, notes or any other documentation in any form including pre-test forms and handwritten notes made by Lieutenant McHale of the Charleston County Sheriff's Department in regard to an attempted polygraph of the Defendant regarding charges associated with this case.

Respectfully submitted,



Timothy Clay Kulp, Esquire
Riesen Law Firm, L.L.P.
3660 West Montague Avenue
North Charleston, SC 29418
(803) 760-2450

Charleston, South Carolina
March 23, 1998

BY _____
JULIE A. HARRIS
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EXHIBIT B

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) Indictments: 97-GS-10-4319 and 4320
) Arrest Warrants: F 339393, F 339394

STATE OF SOUTH CAROLINA)
)

v.)

WESLEY MAX MYERS,)

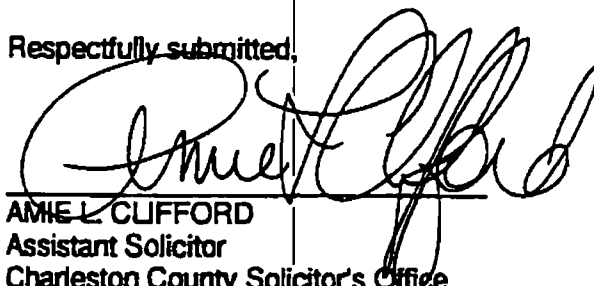
Defendant.)

) RETURN TO "DEFENDANT'S MOTION TO COMPEL
) THE STATE TO DISCLOSE ALL NOTES OR ANY
) OTHER MEMORANDA OR DOCUMENTATION
) PREPARED BY THE POLYGRAPH EXAMINER
) RELATED TO THIS CASE"

(Motion Dated March 23, 1998)

The State has recently provided to the defendant copies of documents prepared by Charleston County Sheriff's Office Lieutenant McHale which relate to the contemplated polygraph of the defendant by Lieutenant McHale.

Respectfully submitted,



AMIE L. CLIFFORD
Assistant Solicitor
Charleston County Solicitor's Office
2144 Melbourne Avenue
North Charleston, SC 29405
(843) 740-5850

North Charleston, South Carolina
December 15, 1998

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EXHIBIT C

STATE v. QUATTLEBAUM, 338 S.C. 441 (2000) .
527 S.E.2d 105

The State of South Carolina, Respondent, v. Robert Joseph Quattlebaum,
Appellant.

Opinion No. 25051

Supreme Court

Heard November 30, 1999

Filed January 24, 2000

2766

Appeal From Lexington County, Thomas W. Cooper, Jr., Circuit
Court Judge.
Page 442

REVERSED

Page 443

[EDITORS' NOTE: THIS PAGE CONTAINED HEADNOTES AND HEADNOTES ARE
NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT
DISPLAYED.]

Page 444

Assistant Appellate Defender Robert M. Dudek, of South Carolina
Office of Appellate Defense, of Columbia; and Joseph M.
McIlloch, Jr., of Columbia, for appellant.

Attorney General Charles M. Condon, Chief Deputy Attorney
General John W. McIntosh, Assistant Deputy Attorney General
Donald J. Zelenka, Assistant Attorney General Robert E. Bogan, of
Office of the Attorney General, of Columbia; and Solicitor Donald
V. Myers, of Lexington, for respondent.

BURNETT, A.J.:

Appellant was convicted of murder, first degree burglary, armed
robbery, assault and battery with intent to kill, and possession
of a firearm during the commission of a violent crime: He was
sentenced to death. We reverse.

FACTS

Appellant voluntarily presented himself to the Lexington County
Sheriff's Department on May 29, 1995, for questioning concerning
his involvement in a murder, armed robbery, and assault which
took place earlier that day. He agreed to take a polygraph
examination. After administering the examination, the detective
left appellant in the polygraph room and returned to his own
office. A video camera in the polygraph room fed into the
detective's office. Appellant's attorney joined appellant in the
polygraph room. While appellant and his attorney conferred,
several sheriff's officers and a deputy solicitor were present in
the detective's office where the privileged conversation between
appellant and his attorney was monitored and recorded. Several of
the detectives present testified at appellant's trial that when
one of the detectives asked the deputy solicitor, "Can we use
this?" the deputy solicitor replied, "I'm not sure, but if we
do, it will be an interesting Supreme Court case." The fact of
the eavesdropping and the existence of the videotape were not
revealed to appellant or his attorneys for two years.

Appellant was subsequently arrested and indicted. While in jail
awaiting trial, appellant made incriminating statements to a
cellmate who testified against him at trial.
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The deputy solicitor who participated in the eavesdropping was
an active participant in appellant's trial and gave the closing
argument in the guilt phase of the trial. The jury convicted
appellant and recommended a sentence of death. This appeal

follows.

ISSUES

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I. Did the trial judge err in refusing to disqualify the Eleventh Circuit Solicitor's Office from prosecuting appellant?

A. Was appellant's Sixth Amendment right to counsel violated?

B. Should the solicitor's office have been disqualified to protect the integrity of the judicial system?

II. Did the trial judge err in refusing to allow appellant to impeach law enforcement witnesses with their participation in the videotaping?

III. Did the trial judge err in ruling appellant's cellmate was not a government agent at the time appellant made incriminating statements to him?

IV. Did the trial judge err in refusing to allow appellant to call the solicitor and deputy solicitor to testify?

Did the trial judge err in admitting evidence drugs were mailed to appellant at the detention center?

DISCUSSION

I. Did the trial judge err in refusing to disqualify the Eleventh Circuit Solicitor's Office from prosecuting appellant?

Appellant contends the trial court erred in refusing to disqualify the solicitor's office from prosecuting him after a deputy solicitor participated in the videotaping of appellant's conversation with his attorney. Appellant makes two arguments for disqualification. First, he argues his Sixth Amendment right to counsel^[fn1] was violated when investigators and Page 446 the deputy solicitor eavesdropped on his conversation with his attorney, and disqualification of the solicitor's office is an appropriate remedy for the violation. Second, he argues the solicitor's office should have been disqualified because the deputy solicitor's misconduct and his subsequent participation in appellant's trial was an affront to the integrity of the judicial system. We agree with each of these contentions.

A. Was appellant's Sixth Amendment right to counsel violated?

Appellant argues his Sixth Amendment right to counsel was violated and the solicitor's office should have been disqualified as a result. We agree.^[fn2]

The Sixth Amendment right to counsel protects the integrity of the adversarial system of criminal justice by ensuring that all persons accused of crimes have access to effective assistance of counsel for their defense. The right is grounded in "the presumed inability of a defendant to make informed choices about the preparation and conduct of his defense." *United States v. Levy*, 577 F.2d 200, 209 (3d Cir. 1978). Although the Sixth Amendment right to counsel is distinguishable from the attorney-client privilege, the two concepts overlap in many ways. The right to counsel would be meaningless without the protection of free and open communication between client and counsel. See *id.* The United States Supreme Court has noted that "conferences between counsel and accused . . . sometimes partake of the inviolable character of the confessional." *Powell v. Alabama*, 287 U.S. 45, 61 (1932).

In 1932, the United States Supreme Court declared the Sixth Amendment applicable to the states through the due process clause of the Fourteenth Amendment. *Id.* However, Page 447

South Carolina had recognized the fundamental nature of the right to counsel as early as 1731. See *id.* ("[I]n South Carolina, the original Constitution of 1776 did not contain the provision as to counsel, but it was provided as early as 1731 that every person charged with treason, murder, felony, or other capital offense, should be admitted to make full defense by counsel learned in the law.") (citing Act of August 20, 1731, § XLIII, Grimke, S. Car. Pub. Laws, 1682-1790, p. 130).

This is, fortunately, a case of first impression in South Carolina. Never before have we addressed a case involving deliberate prosecutorial intrusion into a privileged conversation between a criminal defendant and his attorney. Federal jurisprudence in this area is decidedly ambiguous, and we have found no precedent dealing with a prosecutor deliberately eavesdropping on an accused and his attorney.

In the 1950s and 1960s, when first faced with cases involving government eavesdropping on attorney-client conversations, federal courts refused to examine either the government's motives or the degree of prejudice to the defendant. Note, *Government Intrusions Into the Defense Camp: Undermining the Right to Counsel*, 97 Harv. L. Rev. 1143, 1146 (1984). Over time, the rule that began to emerge would require either a showing of deliberate prosecutorial misconduct or prejudice, but not both. See *State of South Dakota v. Long*, 465 F.2d 65 (1972) ("It is certainly true that where there is gross misconduct on the part of the Government, no prejudice need be shown.") (citing *Black v. United States*, 385 U.S. 26 (1966), *O'Brien v. United States*, 386 U.S. 345 (1967), *Caldwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953), *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951)); *Fajeriak v. State*, 520 P.2d 795 (Alaska 1974) ("Following *Coplon*, courts have agreed that proof of deliberate eavesdropping upon attorney client communications automatically invalidates a conviction. The United States Supreme Court implicitly adopted this rule in *Black v. United States*.").

In 1977, the United States Supreme Court appeared to alter this standard in *Weatherford v. Bursey*, 429 U.S. 545 (1977). *Weatherford* involved an informant/codefendant who attended meetings between Bursey and his attorney. The Supreme Court found no Sixth Amendment violation where there was no tainted evidence, no communication of defense strategy to the prosecution, and no purposeful intrusion by the government. *Id.* at 558. The Court held that establishing a violation of a defendant's Sixth Amendment right to counsel requires a showing of "at least a realistic possibility" of prejudice. *Id.*

Because the government interceptions in *Weatherford* were "unintended and undisclosed" (*id.* at 565, Marshall, J., dissenting), the Court did not address whether the rule would be different in a case involving deliberate misconduct by the government. Nor did the Court decide who bears the burden of proving prejudice. In 1988, the Supreme Court declined to hear a case that would have resolved a hopeless conflict among the circuits on that issue. See *Cutillo v. Cinelli*, 485 U.S. 1037 (1988). Dissenting from the denial of certiorari, Justice White, joined by the Chief Justice and Justice O'Connor, summarized the positions taken by the various circuits. At one extreme are those courts which require the defendant to prove prejudice. At the other extreme are those which find a *per se* violation of the Sixth Amendment when the prosecution improperly obtains

confidential defense strategy information or intentionally places an informer in the defense camp. In the middle are those courts which hold that where confidential defense strategy information is transmitted to the prosecution and the defendant makes a prima facie showing of prejudice, the burden then shifts to the prosecution to prove there was no prejudice to the defendant from the disclosure. *Id.* Thus, we have little guidance from the federal courts on this issue.

Weatherford is inapplicable to the case *sub judice*, where a member of the prosecution team intentionally eavesdropped on a confidential defense conversation. We conclude, consistent with existing federal precedent, that a defendant must show either deliberate prosecutorial misconduct or prejudice to make out a violation of the Sixth Amendment, but not both. Deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice. The content of the protected communication is not relevant. The focus must be on the misconduct. In cases involving unintentional intrusions into the attorney-client relationship, the defendant must make a

Page 449

prima facie showing of prejudice to shift the burden to the prosecution to prove the defendant was not prejudiced.

Because a deputy solicitor of the Eleventh Circuit Solicitor's Office eavesdropped on a privileged conversation between appellant and his attorney, we reverse appellant's conviction and disqualify the Eleventh Circuit Solicitor's office from prosecuting appellant at his new trial.

B. Should the solicitor's office have been disqualified to protect the integrity of the judicial system?

Although we have disqualified the Eleventh Circuit Solicitor's Office from prosecuting appellant, we address appellant's second assertion because of its importance to judges, attorneys, criminal defendants, and indeed all citizens of this state. Every South Carolinian has a vital interest in the fair administration of justice. This Court bears the ultimate responsibility for maintaining judicial integrity and high standards of professional conduct among the members of the bar, and for protecting and defending the constitutional rights of the accused.

The integrity of the entire judicial system is called into question by conduct such as that engaged in by the deputy solicitor and investigating officers in this case. Prosecutors are ministers of justice and not merely advocates. See Rule 3.8, cmt., Rules of Professional Conduct. A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics. The participation at trial of a prosecutor who has eavesdropped on the accused and his attorney tarnishes us all. We will not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice.

II. Did the trial judge err in refusing to allow appellant to impeach law enforcement witnesses with their participation in the videotaping?

Appellant contends the trial court erred in not allowing him to impeach law enforcement witnesses with their participation in the videotaping of his conversation with his attorney. We disagree.
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As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed absent a manifest abuse of discretion. *State v. Mitchell*, 330 S.C. 189, 196, 498 S.E.2d 642, 645 (1998).

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Under Rule 608(b), SCRE, specific instances of a witness's misconduct may be inquired into on cross-examination if probative of the witness's character for truthfulness or untruthfulness. The inquiry under Rule 608(b) is limited to those specific instances of misconduct which are clearly probative of truthfulness or untruthfulness such as forgery, bribery, false pretenses, and embezzlement. *State v. Kelsey*, 331 S.C. 50, 75, 502 S.E.2d 63, 75 (1998) (citing Weinstein's Federal Evidence, Character and Conduct of Witness § 608.12(4)(a-b) (1998)). Rule 608(c), SCRE, permits impeachment of a witness with evidence of "bias, prejudice or any motive to misrepresent."

The occurrence of the videotaping is not relevant to any trial issue. Any mention of the videotape, even by the defense, could have jeopardized the trial by raising questions in jurors' minds about the contents of the tape. The trial judge made every effort to prevent jurors from knowing about the videotape. His refusal to allow the questioning was not an abuse of discretion.

III. Did the trial judge err in ruling appellant's cellmate was not a government agent at the time appellant made incriminating statements to him?

Appellant contends the trial court erred in ruling his cellmate was not a government agent at the time appellant made incriminating statements to him. Therefore, he argues, the trial court erred in admitting the informant's testimony. On the record before us, we disagree.

When the government intentionally places a paid informant in close proximity to a defendant and tells him not to initiate any conversations with the defendant but to be alert to any incriminating statements, it violates the accused's Sixth Amendment right to counsel. *United States v. Henry*, 447 U.S. 264 (1980), *Massiah v. United States*, 377 U.S. 201 (1964). However, the *Massiah/Henry* rule is not implicated
Page 451

every time an inmate receives information from a fellow inmate and subsequently transmits it to the government, even when the transmission is made in hope of receiving a benefit. See *United States v. Stevens*, 83 F.3d 60, 64 (2d Cir. 1996). In *Stevens*, the court found no Sixth Amendment violation where there was support in the record for the trial court's conclusion that the defendant had been the primary initiator of contact with the inmates/informants, and that the government never encouraged the contact. *Id.* at 64-65. In *Thomas v. Cox*, 708 F.2d 132 (4th Cir. 1983), the Fourth Circuit likewise found no Sixth Amendment violation where the inmate/informant was "self-initiated" and had no prior arrangement with the government. The court noted

[F]or whatever reason[the informant] acted - whether "conscience," as the state court found, or "curiosity," as he testified, or even conceivably from an unencouraged hope to curry favor - he could not properly be characterized, as could the informant in *Henry*, as "a Government agent expressly commissioned to secure evidence."

Id. at 136 (internal citations omitted).

At an in camera hearing to determine the admissibility of the cellmate's testimony and evidence derived from it, appellant presented evidence suggesting he was placed in a cell with the other inmate with the intent that the inmate elicit information from him about the crime. Appellant further introduced evidence the informant was given special treatment in the form of canteen privileges, \$1500 worth of dental work, and release on a personal recognizance bond. The State presented evidence tending to show

appellant initiated the conversations, the informant acted on his own initiative when he informed on appellant, and the canteen privileges and dental work were given to the informant in connection with an unrelated case. The State also offered an explanation for the informant's release on a personal recognizance bond.

The evidence concerning the informant's involvement is highly contradictory and susceptible of both appellant's and the State's interpretations. In some instances, the testimony is diametrically opposed. Furthermore, there are a disturbing number of unexplained occurrences surrounding this event, including the disappearance of jail records for the three days

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encompassing the time appellant was moved into the informant's cell. However, the trial judge carefully considered both the evidence and lack thereof and made a well reasoned decision in light of all the evidence before him to admit this testimony. In making his rulings, the trial judge stated that he had considered the testimony of the various witnesses, with particular focus on what could be corroborated by independent facts, and had taken into account the interests and biases of the witnesses, as well as their credibility. He concluded the informant was not acting as a government agent at the time appellant initially confessed to him, and allowed the informant to testify to statements made by appellant concerning the crime and the disposal of the stolen property and the weapon. The trial judge further concluded the informant's release on a personal recognizance bond was connected to his assistance in locating the murder weapon. He therefore excluded both the informant's testimony in that regard and the murder weapon itself.

Appellant makes no claim - and we see no basis for a claim - that the trial judge incorrectly applied the above law to the facts as he found them. Appellant instead challenges the factual findings underpinning the court's rulings of law. However, this Court is bound by the trial court's factual findings unless they are clearly erroneous. See *State v. Amerson*, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993) (appellate courts are bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law). On the facts in this record, we cannot say the trial court's findings were clearly erroneous. [fn3]

IV. Did the trial judge err in refusing to allow appellant to call the solicitor and deputy solicitor to testify?

Appellant argues the trial judge should have allowed him to call the solicitor and deputy solicitor to testify *in camera* regarding their use of the information contained in the videotape of appellant and his attorney and their knowledge of

Page 453

circumstances surrounding the use of appellant's cellmate as an informant. We agree.

In *State v. Lee*, 203 S.C. 536, 28 S.E.2d 402 (1943), we held a criminal defendant has a right to call the prosecuting attorney as a witness, subject to the trial court's usual discretion to exclude witnesses or evidence:

It seems to be well settled that litigants, and especially defendants in criminal cases, should not be hampered in their choice of those by whom they choose to prove their cases. And it has been held that they have the right to call as their witness the prosecuting attorney.

Id. at 541, 28 S.E.2d 404. [fn4]

Here, appellant sought to examine the solicitor and deputy solicitor *in camera*. The court did not articulate its reasons for refusing to allow appellant to examine the solicitor and deputy solicitor. Thus, it appears the decision was controlled by an error of law and was therefore an abuse of the trial court's discretion. See *Winchester v. United Ins. Co.*, 231 S.C. 288, 98 S.E.2d 530 (1957) ("abuse of discretion" means the trial judge committed an error of law in the circumstances).

The State argues any error was harmless because the testimony of the solicitor and deputy solicitor would have been cumulative to that of other witnesses and to the statement made by the deputy solicitor as an officer of the court. We disagree. We have no way of concluding whether the prosecutors' testimony would have been merely cumulative. The deputy solicitor's statements as an officer of the court he was unaware of the informant's involvement in this case until a month before trial and he was advised by those involved that the informant had received no reward or inducement in connection with appellant's case were no substitute for under-oath cross-examination. Significantly, his statements did not address the critical question of when the informant became a government agent. The trial court's error in ruling to allow the cross-examination of the solicitor and deputy solicitor was not harmless beyond a reasonable doubt.

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V. Did the trial judge err in admitting evidence drugs were mailed to appellant at the detention center?

During the penalty phase of the trial, the State introduced evidence that several pieces of mail containing illegal drugs were addressed to appellant at the Lexington County Detention Center, but never received by him. Appellant argues it was error to admit this evidence when the State could not show appellant had conspired to have the drugs mailed to him. We agree.

A trial judge is accorded broad discretion in ruling on the admissibility of testimony. *State v. Langley*, 334 S.C. 643, 515 S.E.2d 98 (1999). All relevant evidence is admissible. Rule 402, SORE. Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. Rule 401, SCRE; *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991).

In *State v. Bailey*, 279 S.C. 437, 308 S.E.2d 795 (1983), we held it was error for the lower court to allow evidence the appellant's father and brother had attempted to procure perjured testimony because "the effect of its introduction into evidence was to create the inference that appellant Bailey had attempted through his father and brother to procure perjured testimony, when there was no evidence to connect appellant with the attempt other than his blood relationship." *Id.* at 440, 308 S.E.2d 797. The conduct of the appellant's father and brother "was irrelevant to the issue of appellant's guilt or innocence as charged." *Id.* at 439-40.

Without evidence of some nexus between appellant and the drugs or evidence appellant conspired to have the drugs sent to him, evidence that drugs were addressed to appellant in prison is not relevant to appellant's adaptability to prison life. The trial court therefore abused its discretion in admitting such evidence.

REVERSED.

TOAL, A.C.J., MOORE, WALLER, JJ., and Acting Associate Justice William T. Howell, concur.

[fn1] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."
U.S. CONST. amend. VI.

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[fn2] The State asserts appellant's Sixth Amendment rights had not yet attached at the time of the eavesdropping and tape recording of appellant's conversation with his attorney. See *State v. George*, 323 S.C. 496, 508-09, 476 S.E.2d 903, 911 (1996) (Sixth Amendment right to counsel in judicial proceedings does not attach until adversarial proceedings have been initiated). This argument ignores the two years during which the State continued adversarial proceedings against appellant while failing to disclose the fact of the eavesdropping and the existence of the videotape. In fact, the occurrence of the videotaping was denied at appellant's preliminary hearing.

[fn3] Additional facts may come to light when the solicitor and deputy solicitor are cross-examined. See *infra* part IV. These facts may affect the trial court's conclusions.

[fn4] We did not reverse in *Lee*, finding the evidence sought from the prosecutor to be merely cumulative, and therefore within the trial court's discretion to exclude.

P 455

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MAR 23 1998

STATE OF SOUTH CAROLINA)

IN THE COURT OF GENERAL SESSIONS

COUNTY OF CHARLESTON)

CASE NUMBER: 97-GS-10-1394

WARRANT #S: F 339393, F 339394

STATE OF SOUTH CAROLINA)

DEFENDANT'S MOTION TO COMPEL

-versus-

THE STATE TO DISCLOSE ALL NOTES

OR ANY OTHER MEMORANDA OR

DOCUMENTATION PREPARED BY

WESLEY MAX MYERS,

THE POLYGRAPH EXAMINER

RELATED TO THIS CASE

Defendant.

NOW COMES the Defendant, by and through his counsel, Timothy Clay Kulp, moving this Honorable Court to compel the State to disclose any and all memoranda, notes or any other documentation in any form including pre-test forms and handwritten notes made by Lieutenant McHale of the Charleston County Sheriff's Department in regard to an attempted polygraph of the Defendant regarding charges associated with this case.

Respectfully submitted,



Timothy Clay Kulp, Esquire
Riesen Law Firm, L.L.P.
3660 West Montague Avenue
North Charleston, SC 29418
(803) 760-2450

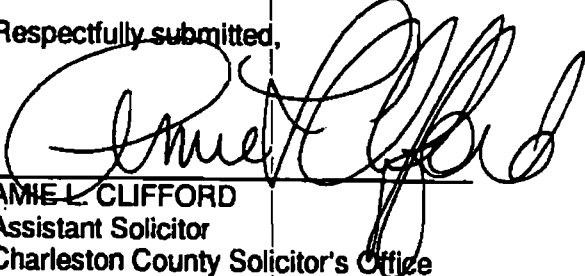
Charleston, South Carolina
March 23, 1998

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CLERK OF COURT
BY

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) Indictments: 97-GS-10-4319 and 4320
) Arrest Warrants: F 339393, F 339394

STATE OF SOUTH CAROLINA)
)
 v.) RETURN TO "DEFENDANT'S MOTION TO COMPEL
) THE STATE TO DISCLOSE ALL NOTES OR ANY
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) PREPARED BY THE POLYGRAPH EXAMINER
 Defendant.) RELATED TO THIS CASE"
) (Motion Dated March 23, 1998)

The State has recently provided to the defendant copies of documents prepared by Charleston County Sheriff's Office Lieutenant McHale which relate to the contemplated polygraph of the defendant by Lieutenant McHale.

Respectfully submitted,

AMIEL CLIFFORD
Assistant Solicitor
Charleston County Solicitor's Office
2144 Melbourne Avenue
North Charleston, SC 29405
(843) 740-5850

North Charleston, South Carolina
December 15, 1998

98 DEC 15 PM 4:57
CLERK OF COURT
18600 11/11/98

MAR 23 1998

STATE OF SOUTH CAROLINA)

IN THE COURT OF GENERAL SESSIONS

COUNTY OF CHARLESTON)

CASE NUMBER: 97-GS-10-1394

STATE OF SOUTH CAROLINA)

WARRANT #S F 339393, F 339394

-versus-

DEFENDANT'S MOTION TO COMPEL
THE STATE TO DISCLOSE THE
IDENTITIES OF ALL AGENTS, POLICE

OR OTHER PERSONS PRESENT AT

ANY TIME THE DEFENDANT WAS

WESLEY MAX MYERS, JR.)

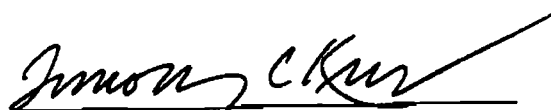
PRESENT DURING THE

INVESTIGATION OF THESE CHARGES

Defendant.)

NOW COMES the Defendant, by and through his counsel, Timothy Clay Kulp, moving this Honorable Court to compel the State to disclose the names and addresses of all individuals, officers or agents of the officers or any other persons who were in proximity to the Defendant at any time during the Defendant's interview or interrogation regarding this case whether such contact took place at the North Charleston Police Department or at any other location.

Respectfully submitted,



Timothy Clay Kulp, Esquire
Riesen Law Firm, L.L.P.
3660 West Montague Avenue
North Charleston, SC 29418
(803) 760-2450

Charleston, South Carolina
March 23, 1998

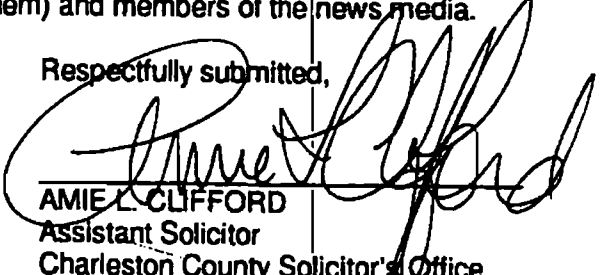
BY
JUL 15 1998
CLERK OF COURT
93 MAR 23 PM 4:16

STATE OF SOUTH CAROLINA	) IN THE COURT OF GENERAL SESSIONS
	) Indictments: 97-GS-10-4319 and 4320
COUNTY OF CHARLESTON	) Arrest Warrants: F 339393, F 339394
STATE OF SOUTH CAROLINA	)
	)
v.	) RETURN TO "DEFENDANT'S MOTION TO COMPEL
	) THE STATE TO DISCLOSE THE IDENTITIES OF
WESLEY MAX MYERS,	) AGENTS, POLICE OR OTHER PERSONS
	) PRESENT AT ANY TIME THE DEFENDANT WAS
Defendant.	) PRESENT DURING THE INVESTIGATION OF
	) THESE CHARGES" (Motion Dated March 23, 1998)

The State is informed and believes that North Charleston Police Department officers who spoke to the defendant about his knowledge of or involvement in this murder and arson are: Lieutenant Cumbee (at the crime scene and North Charleston Police Department), Sergeant Tetanich (at crime scene and North Charleston Police Department), Detective Payne (at the crime scene and hospital), and Detective Clayton (at the North Charleston Police Department, Charleston County Sheriff's Office, Shoney's restaurant, defendant's home, and in a car). The State is also informed and believes that Charleston County Sheriff's Office Lieutenant McHale and Chief Norris, of the North Charleston Fire Department, also questioned the defendant about his knowledge of or involvement in this murder and arson.

The State would also note that, as the defendant has previously been informed, the defendant confessed or made incriminating statements to member(s) of the deceased's family (after the defendant requested to speak to them) and members of the news media.

Respectfully submitted,


 AMIEL L. CLIFFORD
 Assistant Solicitor
 Charleston County Solicitor's Office
 2144 Melbourne Avenue
 North Charleston, SC 29405
 (843) 740-5850

North Charleston, South Carolina
 December 15, 1998

DEC 15 PM 4:57

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF GENERAL SESSIONS

MAR 23 1998

CASE NUMBER: 97-GS-10-1394

WARRANT #S: F339393, F339394

STATE OF SOUTH CAROLINA

-versus-

WESLEY MAX MYERS,

Defendant.

DEFENDANT'S MOTION TO COMPEL
THE STATE TO DISCLOSE THE BLOOD
TYPE AND GROUPINGS OF THE
DEFENDANT'S BLOOD, THE
DECEDENT'S, AND ANY OTHERS
IDENTIFIED ON ANY OTHER
EVIDENTIARY ITEM IN THE CASE

NOW COMES the Defendant, by and through his counsel, Timothy Clay Kulp, moving this Honorable Court to compel the State to issue its order compelling the State to disclose the blood group and type from the Defendant's blood from samples collected, the same as to the decedent's blood, and the same as to any serological evidentiary item seized in this case, whether intended to be evidence at trial by the State or not.

Respectfully submitted,


Timothy Clay Kulp, Esquire
Riesen Law Firm, L.L.P.
3660 West Montague Avenue
North Charleston, SC 29418
(803) 760-2450

Charleston, South Carolina
March 23, 1998

BY _____
JULIE L. RYAN
CLERK OF COURT
93 MAR 23 PM 4:06

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) Indictments: 97-GS-10-4319 and 4320
) Arrest Warrants: F 339393, F 339394

STATE OF SOUTH CAROLINA)
))

v.)

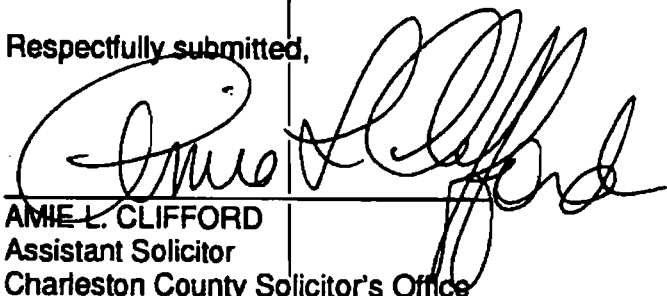
WESLEY MAX MYERS,)

Defendant.)

) RETURN TO "DEFENDANT'S MOTION TO COMPEL
) THE STATE TO DISCLOSE THE BLOOD TYPE AND
) GROUPINGS OF THE DEFENDANT'S BLOOD, THE
) DECEDENT'S, AND ANY OTHERS IDENTIFIED ON
) ANY OTHER EVIDENTIARY ITEM IN THE CASE"
) (Motion Dated March 23, 1998)

The State is informed and believes that neither the victim's nor the defendant's
blood have been analyzed for determining the blood type or grouping.

Respectfully submitted,


AMIE L. CLIFFORD
Assistant Solicitor
Charleston County Solicitor's Office
2144 Melbourne Avenue
North Charleston, SC 29405
(843) 740-5850

North Charleston, South Carolina
December 15, 1998

93-1-10 91 030 85

2780

MAR 23 1998

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

STATE OF SOUTH CAROLINA

-versus-

WESLEY MAX MYERS,

Defendant.

IN THE COURT OF GENERAL SESSIONS

CASE NUMBER: 97-GS-10-1394

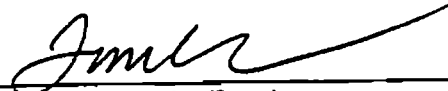
WARRANT #S: F 339 393, F 339394

DEFENDANT'S MOTION TO COMPEL
THE STATE TO DISCLOSE ANY AND
ALL ACTIVITY OF FORENSIC
ANALYSIS OF FINGERNAIL SCRAPINGS
TAKEN FROM THE DECEASED

NOW COMES the Defendant, by and through his counsel, Timothy Clay Kulp, moving this Honorable Court to compel the State to disclose all information in any form whatsoever associated with the following:

1. The presence of any material in any form observed under the decedent's fingernails when the police examined the body or at any time thereafter;
2. Whether or not any efforts were made by any person at any time to scrape or collect any evidentiary material or any material at all from the fingernails of the deceased at the time of the examination by police or fire department agents or federal agents at the time of the crime or at any time thereafter;
3. The results of any analyses of any fingernail scrapings referred to above.

Respectfully submitted,



Timothy Clay Kulp, Esquire
Riesen Law Firm, L.L.P.
3660 West Montague Avenue
North Charleston, SC 29418
(803) 760-2450

Charleston, South Carolina
March 23, 1998

MAR 23 11 46 AM
CLERK OF COURT
JAMES H. HARRIS

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) Indictments: 97-GS-10-4319 and 4320
) Arrest Warrants: F 339393, F 339394

STATE OF SOUTH CAROLINA)
v.)

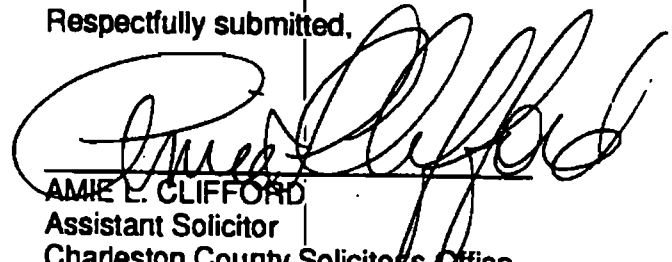
WESLEY MAX MYERS,

Defendant.

) RETURN TO "DEFENDANT'S MOTION TO COMPEL
) THE STATE TO DISCLOSE ANY AND ALL ACTIVITY
) OF FORENSIC ANALYSIS OF FINGERNAIL
) SCRAPINGS TAKEN FROM THE DECEASED"
) (Motion Dated March 23, 1998)

The State is informed by Dr. Clay Nichols and believes that, due to the condition of the deceased's body and the conditions under which it was discovered, no material was observed under the deceased's fingernails and no scrapings from the deceased's fingernails were collected.

Respectfully submitted,



AMIE L. CLIFFORD
Assistant Solicitor
Charleston County Solicitor's Office
2144 Melbourne Avenue
North Charleston, SC 29405
(843) 740-5850

North Charleston, South Carolina
December 15, 1998

AG
INVESTIGATIVE
96 DEC 15 PM 4:56

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT NO. 97-65-10-1394

MAR 17 1998

THE STATE)

MOTION FOR THE COURT'S ORDER
COMPELLING THE PRODUCTION OF
FORENSIC SAMPLES FROM SUSPECT
DANA CHAPLES

VS.)

WESLEY MAX MYERS,
Defendant.)

98 MAR 17 PM 1:51
CLERK OF COURT
J. H. LONG

NOW COMES THE DEFENDANT, by and through his
counsel Timothy Clay Kulp, moving this Honorable Court to order the suspect Dana Chaples to
provide forensic hair, blood and other samples to law enforcement authorities for purposes of
comparison to forensic evidence in this case.

THE DEFENDANT would respectfully show unto this
Honorable Court:

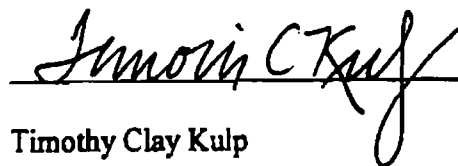
1. That when the Defendant was arrested, another person was suspected of the murder;
2. That this person was Dana Chaples;
3. That Mr. Chaples:
 - a. Was put at the murder scene at the time of the murder by three witnesses;
 - b. But denied being there; later admitting being there;
 - c. Refused to provide forensic samples when requested by the police;
 - d. Was arrested when confronted by police for possession of a loaded gun and had a double-edged knife at the time;

- e. Stated that another person, James Moriarty, told him that the deceased was passed out on the pool table that night when Moriarty provided a statement that he did not tell Chaples that;
 - f. Was announced as a suspect in the murder by police at his bond hearing on the pistol charge;
 - g. May have had a key to the business where the murder took place since he may have been employed by the company owning the video poker machines in the business;
 - h. Wore facial hair when seen at the murder scene the night of the murder by three witnesses, yet was clean shaven the next day;
 - i. Is still identified in headings of SLED Laboratory reports as a suspect;
4. Current DNA analyses are reportedly underway by the FBI Laboratory. The defense is moving for independent analysis of evidence. SLED has developed DNA profiles for the Defendant Myers and for the decedent victim.
5. Considering the time consuming and costly methods of DNA analysis, the defense submits that it is non-sensical to not have the DNA profile of Chaples to use in the analysis process.
- a. Chaples was a clear suspect;
 - b. Lied about his presence at the scene of the murder;
 - c. And has been elusive since.
6. DNA analyses are time consuming and expensive. Should analyses identify the DNA of a person not the Defendant and not the decedent, should the Defendant remain in jail for another year while a search is conducted for other explanations that could very well lead

to Mr. Chaples now? Or, in the interest of justice, exclude him as a suspect?

7. The prosecution has indicted that it is opposed to this motion and the defense cannot understand why.
 - a. First, the prosecution has no standing in the matter. When Mr. Chaples is served with a copy of this motion, as the defense intends to formally do, it is *his* prerogative to challenge the motion without or without counsel of his choice or as appointed by the court-not the solicitor.
 - b. Even if the prosecution asserts that this would cause delay in the case, the defense strongly asserts that the delay in the movement of this case is the sole fault of the state. The state has been privy to the same information the defense has reviewed to draw these concerns. In any event, to not make these DNA comparisons complete and exhaustive, would be to waste additional time.
 - c. Finally, why would the state oppose exclusion of a suspect that would resolve that issue now?
 - d. The prosecution's duty is to see that justice is done, not to take a position of protecting a person deemed to be a suspect by the police from the outset.
8. Lastly, existing law provides for the court to order the collection of these samples providing that there is a basis to do so. The defense respectfully submits that there is probable cause to compel Dana Chaples to provide known hair, blood and DNA samples to the prosecution for forensic analysis and to the Defendant's experts should the court rule that the defense may independently test the evidence.

Respectfully Submitted,

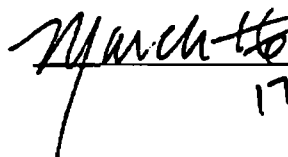


Timothy Clay Kulp

Riesen Law Firm
3660 West Montague Ave.
North Charleston, SC 29418

(803) 760-2450

Charleston, SC

, 1998.
17th
TCL

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) Indictments: 97-GS-10-4319 and 4320
Arrest Warrants: F 339393, F 339394

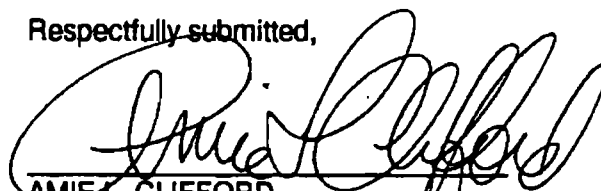
STATE OF SOUTH CAROLINA)
v.) RETURN TO "MOTION FOR COURT ORDER
WESLEY MAX MYERS,) COMPELLING THE PRODUCTION OF
FORENSIC SAMPLES FROM SUSPECT
DANA CHAPLES"

Defendant.

(Motion Dated March 17, 1998)

As the State has stated on the record during the recent hearings before the Honorable A. Victor Rawl, judge, the State is opposed to the Court issuing any order compelling Dana Chaples or anyone else to provide bodily samples for forensic evidence without a showing by the defendant that (1) probable cause exists to believe that evidence of a crime is to be found in the samples, and (2) any evidence of the other person's guilt is totally inconsistent with the defendant's guilt.

Respectfully submitted,



AMIE L. CLIFFORD
Assistant Solicitor
Charleston County Solicitor's Office
2144 Melbourne Avenue
North Charleston, SC 29405
(843) 740-5850

North Charleston, South Carolina
December 15, 1998

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CLERK OF COURT
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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT NO. 97-68-10-1394

MAR 17 1998

THE STATE)

VS.)

WESLEY MAX MYERS.)
Defendant.)

DEFENDANT'S MOTION FOR *IN CAMERA*
INSPECTION OF ALL MATERIAL, ITEMS
OR EXHIBITS DEEMED BY THE
PROSECUTION TO BE EXEMPT FROM
DISCOVERY BY THE DEFENSE

NOW COMES THE DEFENDANT, by and through his

counsel Timothy Clay Kulp, moving this Honorable Court to inspect *in camera* all material
deemed by the prosecution to be exempt from provision to the Defendant.

Respectfully submitted,



Timothy Clay Kulp
Riesen Law Firm
3660 West Montague Ave.
North Charleston, SC 29418

(803) 760-2450

Charleston, SC

March 17th 1998.

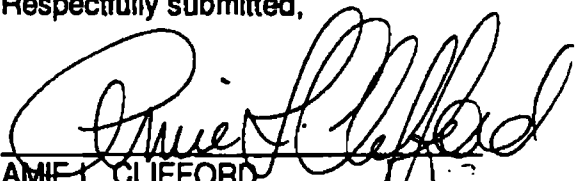
BY
JULIE J. STRONG
CLERK OF COURT
98 MAR 17 PM 1:51

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) Indictments: 97-GS-10-4319 and 4320
) Arrest Warrants: F 339393, F 339394

STATE OF SOUTH CAROLINA)
))
v.) RETURN TO "DEFENDANT'S MOTION FOR IN
) CAMERA INSPECTION OF ALL MATERIAL, ITEMS
WESLEY MAX MYERS,) OR EXHIBITS DEEMED BY THE PROSECUTION TO
) BE EXEMPT FROM DISCOVERY BY THE DEFENSE
Defendant.) (Motion Dated March 17, 1998)
_____)

The State opposes the defendant's Motion, and would affirmatively state that counsel for the defendant has been provided with a copy of the entire file of Solicitor's Office relating to this case (as well as a Rule 5 package from the Office's file in an unrelated murder case in which the victim herein was a witness) except for correspondence, internal memoranda and work product developed during the preparation of the prosecution of this case. The State has also made, and will continue to make, a continuing effort to provide the defendant with copies with or access to all documents prepared or collected by the North Charleston Police Department and the South Carolina Law Enforcement Division except for notes or other work product.

Respectfully submitted,


AMIE L. CLIFFORD
Assistant Solicitor
Charleston County Solicitor's Office
2144 Melbourne Avenue
North Charleston, SC 29405
(843) 740-5850

North Charleston, South Carolina
December 15, 1998

DEC 15 PM 4:56

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT NO. 97-GS-10-1394

MAR 17 1998

THE STATE)

DEFENDANT'S MOTION FOR
 PRODUCTION OF HANDWRITTEN
 NOTES OF DETECTIVE CLAYTON

VS.)

WESLEY MAX MYERS,
 Defendant.)

98 MAR 17 PM 1:54
 JULIE T. MASTRANGE
 CLERK OF COURT
 BY

NOW COMES THE DEFENDANT, by and through his

counsel, Timothy Clay Kulp, moving this Honorable Court to order the production of the handwritten notes of Detective Clayton of the North Charleston Police Department pertaining to the interrogation of the Defendant leading to the taking of an inculpatory statement from the Defendant.

THE DEFENDANT would respectfully show unto this
 Honorable Court:

1. That after a three day period of the interrogation of the Defendant, Detective Clayton hand-wrote a two-page statement which he presented to the Defendant for signing.
2. That while the Defendant is aware of the law pertaining to the provision of notes generally under discovery requests, he submits that:
 - a. The Detective testified at preliminary hearing that he took notes that he used to prepare the statement he wrote out for the Defendant;
 - b. No audio or videotape of the interrogation was made;

- c. The notes are critical to the defense preparation to challenge the admissibility of the statement;
- d. And were made by the Detective for the purpose of drafting the statement.

Respectfully submitted,

Timothy Clay Kulp

Timothy Clay Kulp
Riesen Law Firm
3660 West Montague Ave.
North Charleston, SC 29418

(803) 760-2450

Charleston, SC

March 16th, 1998.

March 16^{17th} 1998.

2865

2791

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) Indictments: 97-GS-10-4319 and 4320
Arrest Warrants: F 339393, F 339394

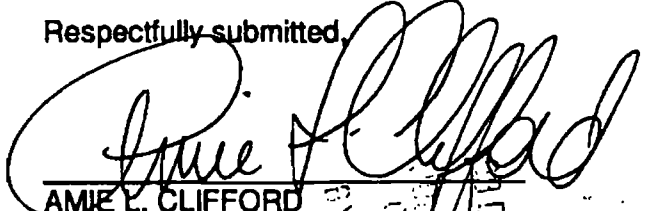
STATE OF SOUTH CAROLINA)
v.) RETURN TO "DEFENDANT'S MOTION FOR
WESLEY MAX MYERS,) PRODUCTION OF HANDWRITTEN NOTES OF
DETECTIVE CLAYTON"
Defendant.) (Motion Dated March 23, 1998)

The State admits only so much of the defendant's Motion as alleges that Detective Clayton took a written statement from the defendant and that no tape of the statement, or the questioning which resulted in such, was made.

Detective Clayton took notes, but has not been able to, due to his physical relocations (4 or 5 times since the time he took the defendant's statement) within the North Charleston Police Department, to locate them.

The State specifically denies that the defendant was subjected to a "three day period of interrogation."

Respectfully submitted,


AMIE L. CLIFFORD
Assistant Solicitor
Charleston County Solicitor's Office
2144 Melbourne Avenue
North Charleston, SC 29405
(843) 740-5850

North Charleston, South Carolina
December 15, 1998

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF GENERAL SESSIONS
INDICTMENT NO. 97-68-10-1394

MAR 17 1998

THE STATE)

VS.)

WESLEY MAX MYERS,
Defendant.)

DEFENDANT'S MOTION FOR THE
PRODUCTION OF RECORDS
IDENTIFYING ALL ASPECTS OF THE
POSSESSION OF THE STRAND OF HAIR
TAKEN FROM THE VICTIM SINCE ITS
RECOVERY AT AUTOPSY UNTIL ITS
EVENTUAL SUBMISSION TO THE FBI
LABORATORY

98 MAR 17 PM 1:51
JULIUS R. LONG
COURT

NOW COMES THE DEFENDANT, by and through his
counsel, Timothy Clay Kulp, moving this Honorable Court to order the prosecution to produce
all records identifying each and every link in the chain of custody associated with the strand of
hair taken from the body of the Defendant by the police and submitted to SLED for analysis,
now, hopefully submitted to the FBI Laboratory for analysis.

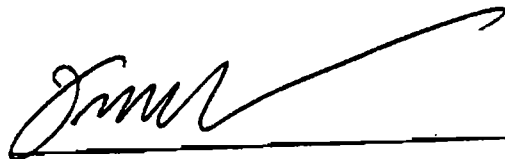
THE DEFENDANT would respectfully show unto this

Honorable Court:

1. That this hair strand is the primary forensic exhibit in this case;
2. That it was taken from the body of the deceased on or about March 14, 1997;
3. That it was transported to SLED on or about March 14, 1997 by the North Charleston
Police for SLED analysis where it was microscopically examined and determined to be
"similar" to known head hair of the Defendant;
4. That since that time, the defense has unsuccessfully sought DNA analysis of the hair
strand by the prosecution; months later, the defense has learned that the strand was being
prepared for submission to the FBI Lab by SLED;

5. That during the past year, the whereabouts of this strand of hair are unknown to the Defendant;
6. That the defendant's concerns about the handling of evidence are well founded considering that the hair strand taken from the hand was undeniably commingled with additional suspect hairs taken from the chest area of the deceased by placement into the same envelope by the crime scene technicians. Several *known* hairs of the defendant were provided voluntarily by him and the handling details of those strands are unknown to the defense as well.
7. The prosecution should suffer no prejudice by the production of this information since the information should be readily available, should have been provided to the defense anyway pursuant to the "continuing duty" to provide this information set forth in Rule 5 of the SCRCRP, and should assist in resolution of these issues so that other matters may be examined and resolved.

Respectfully submitted,



Timothy Clay Kulp
Riesen Law Firm
3660 West Montague Ave.
North Charleston, SC 29418

(803) 760-2450

Charleston, SC

March 17th, 1998.

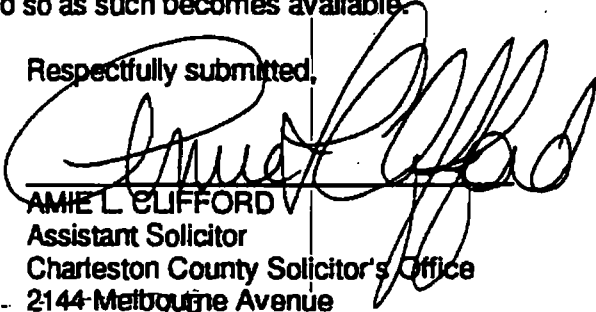
STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) Indictments: 97-GS-10-4319 and 4320
) Arrest Warrants: F 339393, F 339394

STATE OF SOUTH CAROLINA)
))
v.) RETURN TO "DEFENDANT'S MOTION FOR THE
) PRODUCTION OF RECORDS IDENTIFYING ALL
WESLEY MAX MYERS,) ASPECTS OF THE POSSESSION OF THE STRAND OF
) HAIR TAKEN AUTOPSY UNTIL ITS EVENTUAL
Defendant.) SUBMISSION TO THE FBI LABORATORY"
) (Motion Dated March 17, 1998)

The State admits only so much of the defendant's Motion as alleges that a hair taken from the body of the deceased has been determined by the South Carolina Law Enforcement Division (SLED) to be microscopically consistent with that of the defendant, and that this hair evidence appears to be the primary piece of physical evidence against the defendant collected from the crime scene. The State would affirmatively state that arrangements have been made to have the Federal Bureau of Investigation (FBI) perform a DNA analysis of the hair in question and that such analysis is currently underway; the State would also state that hair evidence collected from different sources at the crime scene have been kept separate and that, while the incorrect hair evidence may have been initially submitted to the FBI, the correct hair evidence has been forwarded to the FBI for analysis.

The State has previously provided information to the defendant about the chain of custody over the hair analysis, and will continue to do so as such becomes available.

Respectfully submitted,


AMIE L. CLIFFORD
Assistant Solicitor
Charleston County Solicitor's Office
2144 Melbourne Avenue
North Charleston, SC 29405
(843) 740-5850

North Charleston, South Carolina
December 15, 1998

ENCLOSURE
99-11-10 51 030 86

STATE OF SOUTH CAROLINA

)

IN THE COURT OF GENERAL SESSIONS

)

COUNTY OF CHARLESTON

)

WARRANT NO: F339394; F339393

STATE OF SOUTH CAROLINA

)

-versus-

)

)

WESLEY MAX MYERS,

)

)

Defendant.

)

CERTIFICATE UNDER SEAL - UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT A STATE IN CRIMINAL PROCEEDINGS

A Petition for Certificate under the Uniform Act referenced above was made to this court on or about February 23, 2001.

This court finds that as follows:

1. The State of South Carolina had by its laws made provision for commanding persons within its borders to attend and testify in criminal prosecutions about to commence in the State of South Carolina.
2. That the individuals named within the certificate are material witnesses in the prosecution captioned above, this case set to be tried during the February 26, 2001 term of General Sessions Court, a Court of Record, in the County of Charleston, Ninth Judicial Circuit, State of South Carolina;
3. That the persons named below, are material witnesses to the prosecution of this matter;
 - a. Robert Fram
 - b. John E. Stewart
 - c. Marsha Cecil
 - d. Kim Brown
 - e. Melissa (last name unknown)
 - f. (First Name Unknown) Russell
 - g. Debra Randall

- h. P. Aogaard (possibly misspelled)
- i. C. Curtis

FBI Laboratory, FBI Headquarters, J. Edgar Hoover Building
Pennsylvania Avenue, Washington, D.C.

- 5. That the Defendant captioned above in petitioning this court under the Uniform Act, has indicated to the court that he shall tender costs and fees under Section 19-9-80 of the South Carolina Code of Laws as amended for travel expenses;
- 6. That it appears that the witnesses shall not be needed for any longer than two days.

NOW WHEREFORE the foregoing is certified and it is hereby Ordered that this Certificate shall bear the seal of this Court. Certificate shall be presented to a judge of a court of record in the District of Columbia, where the named witnesses may be found and that pursuant to the provisions of the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings these named witnesses be compelled to appear at the trial of this case as directed and specified in the lawfully issued subpoenas attached hereto.

IT IS FURTHER ORDERED that the Defendant shall tender to these witnesses, the sum of ten cents a mile for travel and five dollars a day for each day of travel and appearance at trial.

AND IT IS SO ORDERED.

Luke N. Brown, Judge
Ninth Judicial Circuit

Charleston, South Carolina

_____, 2001.

2793

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT NO. 97-65-10-1394

THE STATE)

MAR 17 1998

DEFENDANT'S MOTION FOR INDEPENDENT
 TESTING OF EVIDENCE

VS.)

WESLEY MAX MYERS,)
 Defendant.)

98 MAR 17 PM 1:51
 JULIE J. BOSTON
 CLERK OF COURT

NOW COMES THE DEFENDANT, by and through his
 counsel Timothy Clay Kulp, moving this Honorable Court to order that the state take all
 reasonable steps to permit the independent testing of any and all evidence collected by the police
 in the investigation of this case.

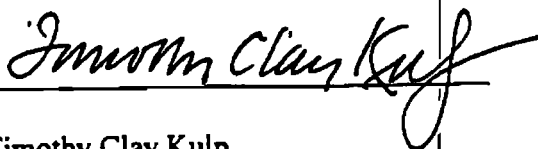
THE DEFENDANT WOULD respectfully show unto this
 Honorable Court that:

1. A number of items were collected by the police in this case.
2. Among these items, after the Defendant has been incarcerated pre-trial, for over one year, testing by the state has been promised and not carried out, has not been pursued and is critical to the Defendant's case. and assumedly, should be to the State's case.
3. Without the ability to independently test the evidence, the Defendant will be unable to present an effective and complete defense to obtain a fair trial as guaranteed him by the South Carolina and United States Constitutions.
4. Considering the delay in DNA testing the single piece of physical evidence in this case. a hair strand. which the state agreed to do six months ago. the Defendant came only

conclude that the State does not want this piece of evidence tested and that the reasons for this reticence is apparent.

5. The Defendant's only recourse ^{is} for the Court to order that the State permit the Defendant to independently test each and every item of evidence possessed by the State relevant to this case, as soon as possible under conditions where chains of custody are preserved according to accepted methods of doing so in circumstances of independent testing of state's evidence in a criminal case, where independent testing is non-destructive and under such other conditions as the Court may impose *sua sponte* or after hearing on this matter.

Respectfully submitted,



Timothy Clay Kulp
Riesen Law Firm
3660 West Montague Ave.
North Charleston, SC 29418

(803) 760-2450

Charleston, SC

March 16, 1998.

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF GENERAL SESSIONS

INDICTMENT NUMBER 97-OW-10-4320 F3 3939
97-OW-10-4319 F 33939

STATE OF SOUTH CAROLINA)

v.)

WESLEY MYERS,)

Defendant.)

DEFEND MOTION TO SUPPRESS
ALL STATEMENTS OF THE
DEFENDANT AND MEMORANDUM
OF LAW IN SUPPORT THEREOF

FILED
2000 MAY 22 AM 11:00
JULIE L. ARMSTRONG
CLERK OF COURT
BY

NOW COMES THE DEFENDANT, by and through his Counsel, Timothy Clay Kulp, moving this Honorable Court to suppress all statements of the Defendant made to police or those made to others when in the custody or presence of the police, based upon the violation of the Defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and complimentary provisions and protection granted him under the South Carolina Constitution.

Respectfully Submitted,


Timothy Clay Kulp
Counsel for the Defendant
Riesen Law Firm
3660 West Montague Avenue
North Charleston, SC 29418
843.760-2450

Charleston, SC
May 19, 2000

**MEMORANDUM IN SUPPORT OF
MOTION TO SUPPRESS**

INTRODUCTION

The Defendant, Wesley Myers, has been charged with murder and arson arising out of the death of Teresa Haught. The sole evidence linking Myers to these crimes consists of an inculpatory statement which was obtained after three days of intermittent interrogation by officers at the North Charleston Police Department and of comments made to the media during unethical exposure of the Defendant by police to elements of the local media. The circumstances of this interrogation were nothing less than shocking, as the police officers who questioned Myers consistently misrepresented the evidence against him, lied to him about the results of forensic tests, disregarded Myers's requests for an attorney, tricked Myers into confessing to the crime and threatened Myers with the imposition of the death penalty consciously using every means available to them to overbear Myers's will; when there was no other evidence of his complicity in the crimes.

More specifically, the facts show that Myers was considered a suspect in the crimes because he was the boyfriend of the victim, and he was first questioned by Detective Payne in a closed police cruiser at the scene of the murder on March 13, 1997, some four hours after the commission of the alleged murder and fire setting by him. Nothing in Myers's statement at that time could be considered inculpatory, and he was initially advised that he could go away for the weekend. However, the police subsequently invited Myers in for

additional questioning under the ruse of needing his assistance in apprehending the murderer.

During the subsequent interrogation, the officers lied to him repeatedly regarding the nature of the evidence in their possession, including a statement that a hair found in the victim's hand was an absolute and positive match to a sample of hair from a particular area of Myers's head. Myers was told, untruthfully, that God placed the strand of hair in the victim's hand for the police to find, and that the hair was conclusive proof of his guilt. He was urged to agree with detectives that the hair in the victim's hand would identify the killer. In fact, the police fabricated an oral report from the state police laboratory concerning the hair, when on the third day of interrogation Detective Cumbee, in the presence of Myers, received a telephone call which he falsely told Myers was from the laboratory. He spoke on the telephone, then turned to Myers and told him that "the worst has happened," and that the laboratory had "positively identified the hair as coming from [Myers's] head." Only then did Myers state: "I must have done it." Now that the Defendant has demanded that this hair be tested pursuant to DNA protocol, the hair has been "lost" by law enforcement authorities who cannot explain its disappearance.

Despite the availability of the means to do so, no tape- or video-recording was made of the interrogation. The arson investigator in the case, Benjamin Norris, easily used a video camera to record the crime scene, somehow without sound, but chose not to use the camera during questioning of Myers in which he participated. Numerous other incidents during the interrogation contributed to the undue psychological pressure placed upon Myers and the overbearing of his will. For example, at one point during the questioning, Myers was shown enlarged 11 x 14 glossy photographs of the autopsy of the victim his girlfriend which showed pieces of her body dismembered during the autopsy process. Myers was repeatedly falsely told that the victim's hair and blood were found all over his truck. He was told that his coat was covered in the victim's blood-a lie. He was told his blood was in fingernail scrapings taken from the victim's fingernails. The wife of the Detective Lieutenant was paraded before Myers and the Lt. told Myers that the Lt. would kill her himself if he thought she was fooling around on him. The Chief of Police approached Myers, shook his hand, and thanked him for the excellent job he was doing to help find the killer. He was also told, untruthfully, that there were video surveillance cameras in the area of the murder suggesting that they had films of his presence at the crime scene. This was a lie. Knowing that the client was an alcoholic but who had not consumed alcohol the evening of the homicide, the detectives suggested to Myers that he must have had a blackout. The officers invited the victim's parents to come to the police station to speak with Myers, at which point they were allowed to berate him. Officers, amazingly, invited members of the media to the police station and allowed a reporter to interview Myers within the non-public area of the detective division office. The officers told Myers that he needed to get this off his chest and that the best way to do that

was to tell the media. Myers was told that the only way to feel better about what he had done was to apologize to the mother of the victim and the media.

At numerous times during the interrogation, prior to making any inculpatory statements, Myers raised the issue of obtaining a lawyer through various statements ranging from "Do you think I need a lawyer?" to "I need to get a lawyer." He was told that he did not need a lawyer since he was "assisting" the police in finding the killer of his girlfriend. All of these requests were disregarded. He was not provided means to secure legal advice, nor did questioning and a clear pattern of deception cease. Perhaps most shocking was the fact that the officers arranged for the media to come to the station to be present when Myers was taken outside the station for the purpose of having him questioned by television reporters. During the pendency of this case, the state has suggested that Myers himself called the police from the police station wanting to get things off his chest. This is untrue and absurd. The officers took Myers to the front of the police station under the guise of letting him smoke a cigarette, while media cameras were getting setup. The police paused a handcuffed Myers there, did not advance to the police car, and gave the reporters free rein with him. He then made certain inculpatory statements to them.

Following Myers's initial inculpatory statements to police, prior to being presented to the victim's mother, and thereafter to the media, police officers threatened Myers by telling him that if he changed his statement or sought the assistance of counsel prior to signing the statement the death penalty would be sought against him.

In support of the suggestion by detectives to Myers of what he did during his proposed "blackout," material discrepancies exist between the factual elements of his written statement,

and a description of what he said as detailed in police reports. Myers was told that if he signed the statement and apologized to Teresa through the media, they would get him some help.

ARGUMENT

I. THE DEFENDANT'S STATEMENTS MUST BE SUPPRESSED BECAUSE THEY WERE INVOLUNTARY DUE TO THE CIRCUMSTANCES UNDERLYING THE INTERROGATION.

The statements made by Myers as a consequence of police interrogation must be suppressed and excluded from trial on the grounds that they were involuntarily obtained in violation of Myers's constitutional guarantee that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; S.C. Const. art. I, § 12. The test for determining whether a statement is voluntary is "whether the confession was 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influences.'" *Hutto v. Ross*, 429 U.S. 28, 30 (1976) (quoting *Bram v. United States*, 168 U.S. 532, 542-43 (1897)); *State v. Rochester*, 301 S.C. 196, 391 S.E.2d 244, 246 (1990). The proper inquiry focuses on whether, as a matter of law, under the totality of the circumstances, "the defendant's will has been 'overborne' or his 'capacity for self-determination critically impaired.'" *United States v. Pelton*, 835 F.2d 1067, 1071 (4th Cir. 1987) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973)); *State v. Franklin*, 299 S.C. 133, 382 S.E.2d 911 (1989). Coercive police

conduct can compel a finding that a confession is not voluntary within the meaning of the Due Process Clause. *Colorado v. Connelly*, 479 U.S. 157 (1986). Deceptive practices and psychological intimidation which distort a suspect's rational choice and free will can render a confession involuntary. *United States v. D.F.*, 63 F.3d 671 (7th Cir. 1995); *United States v. Drake*, 934 F. Supp. 955 (N.D. Ill. 1996). The government bears the burden of proving that a statement was made voluntarily, in compliance with the dictates of the Fifth Amendment. *Lego v. Twomey*, 404 U.S. 477, 489 (1972).

Clearly, under all of the circumstances of this case, there can be little doubt that the combination of the egregious nature of the falsification of evidence, threats of the electric chair, the psychological pressures placed upon Myers, and the coercive police tactics designed to obtain a confession, together render Myers's confession involuntary and untrustworthy. While the courts are understandably reluctant to suppress confessions which result from police deception, and have on occasion held that police may lawfully use deception to induce confessions, *e.g.*, *State v. Register*, ___ S.C. ___, 476 S.E.2d 153 (1996), *cert. denied*, 117 S. Ct. 988 (1997), there are limits to this principle, and, when deceptive and overbearing police tactics are so egregious as to impact upon the free will of an individual, as in the present case, then the courts must exclude from evidence the products of such tactics. Simply stated, the issue is one of degree, and this case presents an extreme example of coercive police tactics. Under all of the circumstances, this court must conclude that Myers's inculpatory statements at the end of three days of questioning were the product of the police coercion, and not the result of a personal choice to inculcate himself.

There are a number of cases in which the courts have suppressed evidence in cases similar to, or even less egregious than, this case. For example, in *State v. Randle*, 366 S.E.2d 750 (W. Va. 1988), the court reversed the murder conviction of the defendant where the facts showed that the conviction was obtained with the assistance of a confession obtained through trickery and deceit. The court noted that "where physical or mental coercion in the interrogation process operates to override the defendant's freewill, a confession is involuntary in fact and cannot be used for any purpose." *Id.* at 753. The court further pointed out that one of the many factors which may negate a defendant's free will, and thereby render a confession involuntary, is "the use of promises and psychological ploys to foment hope or despair." *Id.* Reviewing the circumstances surrounding the confession, the court emphasized that the police falsely told the defendant that his fingerprints were "all over the place" at the scene of the murder, including on the murder weapon. Thus, the court found, the physical evidence at the crime scene was "blatantly misrepresented." *Id.* at 754. Moreover, the court found that the transcript and tape-recording of the confession showed that the method of questioning was highly suggestive. When the defendant gave an exculpatory statement, the officers simply dismissed it as a lie. The officers also proposed to the defendant that the killing might have resulted from an aborted robbery, and probably resulted from a situation which just "got out of hand." *Id.* Further, the questioning was punctuated with "long pauses and audible sighs," the plain purpose of which was to overwhelm the defendant's will to resist. *Id.* The court thus concluded: "We are persuaded that the defendant's freewill was overborne, and that the circuit court erred in holding that the confession could be used for impeachment." *Id.* The court then found that the defendant's conviction must be reversed,

even though the confession had not been admitted into evidence at trial due to its suppression on the basis of a *Miranda* violation. Because the trial court had erroneously ruled that the confession could be used as impeachment evidence, and because the defendant had elected not to testify because of this ruling, the appellate court found that the defendant's defense was seriously prejudiced by the ruling.

In *State v. Cayward*, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989), the court found that the deception of the defendant, accused of sexual assault, through the creation of false forensic reports, which purported to show that the semen stains on the victim's underwear came from the defendant, required the suppression of the defendant's confession. The court stated:

[B]oth the suspect's and the public's expectations concerning the built-in adversariness of police interrogations do not encompass the notion that the police will knowingly fabricate tangible documentation or physical evidence against an individual. Such an idea brings to mind the horrors of less advanced centuries in our civilization when magistrates at times schemed with sovereigns to frame political rivals.

Id. at 974. The court found that such a practice "offends our traditional notions of due process of law under both the federal and state constitutions." *Id.* It should be noted that the report of the forensic test result in this case is indistinguishable from the fabricated test report in *State v. Cayward*.

For other cases in which suppression was found to be required because of nonphysical coercive interrogation conduct, see *United States v. D.F.* (confession by defendant was not voluntary where facts showed that defendant was pressured into making statement by therapist who told defendant that she would not "recover" until she took responsibility for her wrongs and was held accountable for them); *State v. Denny*, 555 P.2d 111 (Ariz. Ct. App. 1976) (where defendant wife was charged with death of husband, where confession was obtained after wife's repeated inquiries to police as to condition of husband, and where officer told wife husband would be all right even though officer knew husband had died, trial court properly excluded admission of confession into evidence but erred in permitting its use to impeach wife's testimony at trial; untrustworthy statement obtained by subterfuge should have been excluded from use for any purpose); *People v. Azure*, 224 Cal. Rptr. 158 (Ct. App. 1986), *disapproved on other grounds*, *People v. Markham*, 260 Cal. Rptr. 273 (Cal. 1989) (defendant's confession to sexually molesting granddaughters of wife was involuntary, though defendant was given *Miranda* warnings and was made physically comfortable during police interrogation, where interrogation lasted for four hours and interrogating officer consistently lied about statements granddaughters made and refused to accept defendant's statements that he could not remember alleged incidents); *People v. Freeman*, 668 P.2d 1371 (Colo. 1983) (officers' false representations regarding the extent of their knowledge and evidence of defendant's participation in murders, coupled with their assertions of defendant's obvious guilt, rendered confession involuntary when viewed in totality of circumstances); *State v. Ritter*, 485 S.E.2d 492 (Ga. 1997) (confession held to be involuntary in light of detective's misrepresentation that victim was alive, when victim had in fact died); *In re T.S.*,

502 N.E.2d 761 (Ill. App. Ct. 1986) (defendant's written confession to arson was coerced and should have been suppressed where defendant was falsely informed that certain pieces of evidence which were sent to crime lab would link him with fire, that certain witnesses would testify to his involvement in fire, and that officer had videotape of him entering and exiting trailer that burned); *People v. Lee*, 471 N.E.2d 567 (Ill. App. Ct. 1984) (defendant's confession to rape was involuntary and inadmissible in evidence where defendant was positively told that his fingerprints had been found in complainant's apartment); *Edwards v. State*, 412 N.E.2d 223 (Ind. 1980) (where defendant confessed to murder after interrogators had policewoman walk by door of room in which defendant was being interrogated and say "yes, that's the man," state failed to establish voluntary waiver of privilege against self-incrimination and right to counsel); and *State v. Mayes*, 825 P.2d 1196 (Mont. 1992) (in prosecution for incest, trial court committed reversible error in denying father's motion to suppress evidence of admission of inappropriately touching daughter approximately one year earlier where police lied about evidence against him). *Cf. State v. Rochester*, 391 S.E.2d at 247 (upholding voluntariness of confession where facts showed that defendant "was not worn down by improper interrogation tactics such as lengthy questioning, trickery, or deceit" (emphasis added)).

As these cases demonstrate, a confession which is the product of coercive tactics by police, including the falsification of evidence, psychological coercion, and misleading statements, cannot be considered to be voluntary for purposes of the due process protections of the United States and South Carolina Constitutions. Consequently, the statements of Myers, which were a product of such coercion, were not voluntary and must be suppressed.

II. THE DEFENDANT'S STATEMENT WAS TAKEN IN
VIOLATION OF HIS RIGHT TO COUNSEL.

Prior to the interrogation of Myers, he was given his *Miranda* warnings by police officers. That fact plus the nature and location of the questioning make it clear that Myers was subject to custodial interrogation at the police station at the time he gave his inculpatory statements. Clearly, the officers had to scrupulously honor any request for counsel. *Edwards v. Arizona*, 451 U.S. 477 (1981) (once a defendant invokes his right to counsel, interrogation must cease); *State v. Sims*, ___ S.C. ___, 405 S.E.2d 377 (1991) (same). While ambiguous statements regarding counsel may not necessarily constitute a clear request for counsel, *e.g.*, *Davis v. United States*, 512 U.S. 452 (1994); *State v. Kennedy*, ___ S.C. ___, 479 S.E.2d 838 (Ct. App. 1996), the facts in this case show unquestionably that at least some of Myers's statements were unequivocal requests for an attorney. At one point during the interrogation, Myers flatly stated: "I need to get a lawyer." This statement is an unequivocal request for an attorney. *See Correll v. Thompson*, 63 F.3d 1279 (4th Cir. 1995) (testimony by detective that defendant said he "thought he wanted an attorney" showed an unequivocal request for counsel); *United States v. Clark*, 499 F.2d 802 (4th Cir. 1974) ("I had better talk to a lawyer" was a request for counsel); *Robinson v. Borg*, 918 F.2d 1387 (9th Cir. 1970) ("I have to get me a good lawyer" was a request for counsel); *Cannady v. Dugger*, 931 F.2d 752 (11th Cir. 1991) ("I think I should call my lawyer" was a request for counsel).

III. THE STATE'S FAILURE TO RECORD THE INTERROGATION OF THE DEFENDANT VIOLATED THE DEFENDANT'S DUE PROCESS RIGHTS UNDER THE UNITED STATES AND SOUTH CAROLINA CONSTITUTIONS.

The facts show in this case that Myers was interrogated at the police station over a period of several days, under conditions of duress and psychological coercion, and there are significant discrepancies between Myers's version of what transpired at the interrogation and the officers' version. Under these circumstances, where the very content and substance of the interrogation are in dispute, Myers is at a significant disadvantage in demonstrating the facts.

In any swearing match between police officers and a defendant, the officers invariably receive the benefit of the doubt because of their official status. This advantage to the state is particularly unfair in situations such as the interrogation in this case, when the state itself has the means and the ability to faithfully record everything which transpires through videotaping or tape-recording. Yet, in this case, the officers admitted that they made a conscious decision not to tape-record the interview, despite the fact that the equipment to make a recording was available.

This conscious decision to make sure that the court and the jury would not hear the actual statements of the defendant is a violation of his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and under Article I, § 3 of the South Carolina Constitution. It is well established in South Carolina and elsewhere that the state has an obligation under the Due Process Clause to preserve exculpatory and material physical evidence, and that the destruction or loss of such evidence can constitute a violation of due process which can preclude the state's use of testimony regarding that evidence at

trial. *E.g.*, *California v. Trombetta*, 467 U.S. 479 (1984); *State v. Jackson*, 302 S.C. 313, 396 S.E.2d 101 (1990). These decisions rest on the principle that defendants are to be given a meaningful opportunity to present a complete defense. To protect this right, the United States Supreme Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). Suppression by the prosecution of evidence favorable to an accused, where the evidence is material either to guilt or to punishment, is violative of due process. *Brady v. Maryland*, 373 U.S. 83 (1963).

These principles led the South Carolina Supreme Court to order the reversal of a conviction and the dismissal of charges against the defendant in *State v. Jackson*. The facts in *Jackson* showed that the defendant had been videotaped by police after being arrested on DUI charges. Later, the charges were dismissed and the tapes were erased, but the solicitor subsequently changed his mind and notified the defendant that the charges would be prosecuted. Following his conviction, the defendant argued on appeal that due process precluded his prosecution in light of the unavailability of the videotaped evidence. The South Carolina Supreme Court agreed, finding that the erasure of the tapes was the equivalent of the destruction of evidence which could have been exculpatory.

A number of other courts have found that the intentional destruction of material tape-recordings requires suppression of the content of the tapes. *E.g.*, *Farrell v. State*, 317 So. 2d 142 (Fla. Dist. Ct. App. 1975) (state's unintentional destruction of tape recording of drug transaction violated defendant's right to due process); *State v. Koutsakis*, 627 N.E.2d 388 (Ill. App. Ct. 1993) (failure to preserve recording of stop and search of car; suppression of

officer's testimony regarding stop and search was remedy); *People v. Bramble*, 615 N.Y.S.2d 896 (App. Div. 1994) (failure to preserve tapes required suppression of officer's testimony regarding content of tapes).

The same principles underlying these cases compel the conclusion that the intentional decision by police to fail to record a custodial interrogation, where the tape would corroborate the defendant's testimony regarding coercion and duress, constitutes a deprivation of due process. This conclusion has been adopted by the Alaska Supreme Court, which has squarely held that due process "requires that custodial interrogations in a place of detention, including the giving of the accused's *Miranda* rights, must be electronically recorded." *Stephan v. State*, 711 P.2d 1156, 1162 (Alaska 1985). In *Stephan*, the defendants were interrogated by police in a room in which a working audio- or video-recorder was located and used during portions, but not all, of the interrogations. The officers offered no satisfactory explanation for their failure to record the entire interrogations. Each defendant sought to suppress the statements made during the interrogations, and at the suppression hearings the defendants alleged that threats and promises had been made during the untaped portions of the interrogations. One defendant claimed that his ultimate confession was induced by promises of leniency and was obtained in the absence of an attorney, after he had requested one. The officers' testimony was to the contrary. Without a full recording to resolve the conflict, the trial court was required to make a credibility determination, and chose to believe the officers' versions of the facts.

On appeal, the Alaska Supreme Court concluded that the evidence from the interrogations had to be suppressed because the officers failed to record the interrogations.

In adopting this exclusionary rule, the court stated:

We reach this conclusion because we are convinced that recording, in such circumstances, is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self-incrimination and, ultimately, his right to a fair trial.

Id. at 1160. Resting its decision on the due process clause of the Alaska Constitution, the court noted that the Alaska Constitution, like the United States Constitution, imposed a heavy obligation on the state to prove that a confession was obtained with a knowing and intelligent waiver of the defendant's privilege against self-incrimination and his right to counsel. The court noted:

The contents of an interrogation are obviously material in determining the voluntariness of a confession. The state usually attempts to show voluntariness through the interrogating officer's testimony that the defendant's constitutional rights were protected. The defendant, on the other hand, often testifies to the contrary. The result, then, is a swearing match between the law enforcement official and the defendant, which the courts must resolve.

The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado.

... Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.

Miranda, 384 U.S. at 445, 448, 86 S.Ct. at 1612, 1614, 16 L.Ed.2d at 707, 709.

Id. at 1161 (footnote omitted). It then concluded that a recording requirement was justified because "a tape recording provides an objective means for evaluating what occurred during interrogation." *Id.* The court further emphasized that dishonesty was not its primary concern, and it did not find, in demanding an objective recordation of custodial interviews, that a police officer was more dishonest than others. Instead, the court stressed that all parties to the action benefited from a recording requirement:

In the absence of an accurate record, the accused may suffer an infringement upon his right to remain silent and to have counsel present during the interrogation. Also, his right to a fair trial may be violated, if an illegally obtained, and possibly false, confession is subsequently admitted. An electronic recording, thus, protects the defendant's constitutional rights, by providing an objective means for him to corroborate his testimony concerning the circumstances of the confession.

The recording of custodial interrogations is not, however, a measure intended to protect only the accused; a recording also protects the public's interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics. A recording, in many cases, will aid law enforcement efforts, by confirming the content and the voluntariness of a confession, when a defendant changes his testimony or claims falsely that his constitutional rights were violated. In any case, a recording will help trial and appellate courts to ascertain the truth.

Id. The court flatly rejected the argument that the compelled recording of interrogations would have a "chilling effect" on a suspect's willingness to talk: "Given the fact that an accused has a constitutional right to remain silent, under both the state and federal constitutions, and that he must be clearly warned of that right prior to any custodial interrogation, this argument is not persuasive." *Id.* at 1162.

Finally, the court in *Stephan* emphasized that the exclusionary rule was necessary to protect the defendants' constitutional rights:

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Finally, the court in *Stephan* emphasized that the exclusionary rule was necessary to protect the defendants' constitutional rights:

Strong protection is needed to insure that a suspect's right to counsel, his privilege against self incrimination, and due process guarantees are protected. A confession is generally such conclusive evidence of guilt that a rule of exclusion is justified, when the state, without excuse, fails to preserve evidence of the interchange leading up to the formal statement. This is particularly true when, as in these cases, the defendant may have been deprived of potentially favorable evidence simply because a police officer, in his own discretion, chose to turn the recorder on twenty minutes into the interview rather than at the beginning. Exclusion is warranted under these circumstances because the arbitrary failure to preserve the entire conversation directly affects a defendant's ability to present his defense at trial or at a suppression hearing. Moreover, exclusion of the defendant's statement is the only remedy which will correct the wrong that has been done and "place the defendant in the same position he or she would have been in had the evidence been preserved and turned over in time for use at trial." *Harris*, 678 P.2d at 413-14 (Singleton, J., concurring and dissenting).

Id. at 1164 (footnotes omitted).

The Minnesota Supreme Court has also adopted the rule that evidence from interrogations which are not recorded will be suppressed. In *State v. Scales*, 518 N.W.2d 587 (Minn. 1994), the court approved the decision in *Stephan*, and noted that Uniform Rule of Criminal Procedure 243 and § 130.4(3) of the Model Code of Pre-Arrest Procedure both contain recording requirements for all questioning which occurs at a place of detention, such as a police station. The court concluded:

We are persuaded, as was the *Stephan* Court, that the recording of custodial interrogations is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self incrimination, and, ultimately, his right to a fair trial.

518 N.W.2d at 592. In imposing its recording requirement, the court elected to rely on its supervisory power to insure the fair administration of justice, but did not rule out the conclusion that its policy would also be demanded by the Due Process Clause of the Minnesota Constitution. *Id.*; see also *United States v. Brimage*, 115 F.3d 73, 77 (1st Cir.

1997) ("there may be a case where selective recording presents a reviewing court with constitutional concerns"; court declined to find a violation of defendant's rights where police engaged in selective recording of firearms transaction because defendant did not adequately assert that government acted in bad faith); *United States v. Van Nuys*, 707 F. Supp. 465 (D. Colo. 1989) (prosecutor's instruction to law enforcement officers to conduct interview with coconspirator without making notes constituted violation of obligation to preserve evidence, and was a deliberate denial of opportunity to attack credibility of coconspirator).

These cases compel the conclusion that in the circumstances of this case, where the police acted in bad faith and contrary to standard practice in failing to record the interrogation of the defendant, suppression of Myers's statement elicited by the police is required. Such a conclusion is based on the Due Process Clauses of the United States Constitution and the South Carolina Constitution.

Based on the foregoing argument, and that to be presented to the Court after testimony is taken, the Defendant respectfully moves the Court to suppress any and all statements made by the Defendant of an inculpatory nature, including those to family members of the victim and those to agents of the media which directly stemmed from the statement obtained from the Defendant by the police when they finally overbore his will.

Respectfully Submitted,



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Charleston, South Carolina
May 21, 2000

STATE OF SOUTH CAROLINA)

IN THE COURT OF GENERAL SESSIONS

COUNTY OF CHARLESTON)

WARRANT #S:F 339394; F 339393

STATE OF SOUTH CAROLINA)

MOTION FOR THE SOLICITOR TO
VERIFY THAT NO AUDIOTAPES OR
VIDEOTAPES WERE MADE BY THE
POLICE DURING ANY INTERVIEW
OR INTERROGATION OF

-versus-

THE DEFENDANT BY THE POLICE;

WESLEY MAX MYERS,

OR VERIFY IF ANY AUDIOTAPES
THAT WERE SO MADE WERE LOST OR
DESTROYEDDefendant.

NOW COMES the Defendant, by and through his counsel, Timothy Clay Kulp, moving this Honorable Court to compel the Solicitor to verify that no video or audiotapes were made by the police during any interview or interrogation of the Defendant by the police; or verify if any video or audiotapes that were so made were lost or destroyed.

The Defendant would respectfully show unto this Honorable Court:

1. That the Prosecution has not disclosed the existence of any video or audiotapes made by the police during the interrogation or interview of the Defendant events of which spanned three days.
2. The Defendant finds this to be confusing considering the number of times he was interviewed, and the nature of the questioning he experienced.
3. The prosecution has not clarified that no tapes of any nature were either:
 - a. made at any time.; or,
 - b. made at any time and discarded; or
 - c. made at any time and discarded after a signed statement was obtained from the Defendant;
 - d. made at any time and inadvertently not produced to date;
 - e. absolutely not made at any time. in any manner, by any officer or agent of the police.

4. The Defendant respectfully moves the Court to compel the Solicitor to clarify the foregoing.

Respectfully submitted,



Timothy Clay Kulp, Esquire
Riesen Law Firm, L.L.P.
3660 West Montague Avenue
North Charleston, SC 29418
(803) 760-2450

Charleston, South Carolina

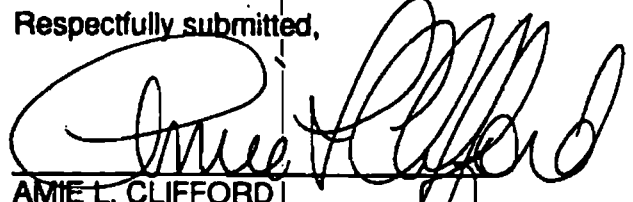
March 26, 1998

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) Indictments: 97-GS-10-4319 and 4320
Arrest Warrants: F 339393, F 339394

STATE OF SOUTH CAROLINA)
v.) RETURN TO "MOTION FOR THE SOLICITOR TO VERIFY
WESLEY MAX MYERS,) THAT NO AUDIOTAPES OR VIDEOTAPES WERE MADE
Defendant.) BY THE POLICE DURING ANY INTERVIEW OR
INTERROGATION OF THE DEFENDANT BY THE POLICE;
OR VERIFY IF ANY AUDIOTAPES THAT WERE SO MADE
WERE LOST OR DESTROYED"
(Motion Dated March 17, 1998)

The State has been informed and believes that the North Charleston Police Department did not record any interviews of the defendant and that, consequently, no tapes of such interviews are available.

Respectfully submitted,


AMIE L. CLIFFORD
Assistant Solicitor
Charleston County Solicitor's Office
2144 Melbourne Avenue
North Charleston, SC 29405
(843) 740-5850

North Charleston, South Carolina
December 15, 1998

1998
F-101
LS 11 13 51 0303

STATE OF SOUTH CAROLINA

)

IN THE COURT OF GENERAL SESSIONS

)

COUNTY OF CHARLESTON

)

WARRANT NO: F339394; F339393

STATE OF SOUTH CAROLINA

)

)

DEFENDANT'S MOTION TO COMPEL

THE STATE TO DISCLOSE THE

-versus-

CURRENT WHEREABOUTS OF THE

"CASIO" WRISTWATCH NOTED AS

BEING FOUND NEAR THE DECEASED'S

WESLEY MAX MYERS,

BODY

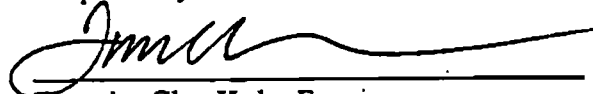
Defendant.

)

NOW COMES the Defendant, by and through his counsel, Timothy Clay Kulp, moving this Honorable Court to compel the State to disclose the "Casio" wristwatch found proximate to the decedent's body during the crime scene investigation.

Defense counsel is aware that a Gitano wristwatch was taken into evidence by the police which stopped functioning at 3:14. However, if in fact the notation by the police of recovery of a Casio watch is an error or a clerical error, the Defendant moves the Court to compel the State to disclose that fact so that the defense investigation can focus on the Gitano wristwatch in identifying its role in this homicide since the deceased nor the victim wore a Gitano wristwatch.

Respectfully submitted,



Timothy Clay Kulp, Esquire

Riesen Law Firm, L.L.P.

3660 West Montague Avenue

North Charleston, SC 29418

(803) 760-2450

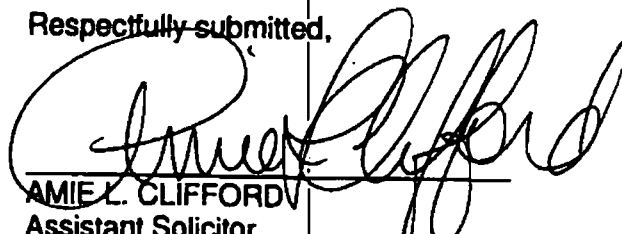
Charleston, South Carolina
March 24, 1998

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) Indictments: 97-GS-10-4319 and 4320
) Arrest Warrants: F 339393, F 339394

STATE OF SOUTH CAROLINA)
))
v.) RETURN TO "MOTION TO COMPEL THE STATE
) TO DISCLOSE THE CURRENT WHEREABOUTS
WESLEY MAX MYERS,) OF THE 'CASIO' WRISTWATCH NOTED AS BEING
) FOUND NEAR THE DECEASED'S BODY"
Defendant.) (Motion Dated March 24, 1998)
)

The defendant through a supplemental Rule 5 package prepared on today's date, has been provided with a December 11, 1998, Memorandum prepared by North Charleston Police Department Crime Scene Officer Hallman. In that memorandum, Officer Hallman states that the only watch or watch pieces collected at the crime scene were from a "Gitano" brand watch and that the labeling of the watch as a "Casio" brand was a mistake.

Respectfully submitted,


AMIEL L. CLIFFORD
Assistant Solicitor
Charleston County Solicitor's Office
2144 Melbourne Avenue
North Charleston, SC 29405
(843) 740-5850

North Charleston, South Carolina
December 15, 1998

BY
AMIEL L. CLIFFORD
ASSISTANT SOLICITOR
DEC 15 1998

STATE OF SOUTH CAROLINA)

IN THE COURT OF GENERAL SESSIONS

COUNTY OF CHARLESTON)

WARRANT NO: F339394; F339393

STATE OF SOUTH CAROLINA)

-versus-

WESLEY MAX MYERS,

Defendant.

MOTION FOR THE POLICE TO
 INVESTIGATE THE CRIME STOPPERS
 REPORT THAT SUSAN EDWARDS
 AND LYNN RAY ARE AWARE OF THE
 PERSONS WHO MURDERED THE
 VICTIM, TERESA HAUGHT

NOW COMES the Defendant, by and through his counsel, Timothy Clay Kulp, moving
 this Honorable Court to compel the State to investigate and determine any information regarding
 the murder of Teresa Haught possessed by Susan Edwards and/or Lynn Ray as set forth in a
 Crime Stoppers tip received by Crime Stoppers at 2:30 p.m. on March 14, 1997. That Crime
 Stoppers tip is attached hereto and is self explanatory.

At preliminary hearing in this matter which was held on June 18, 1997, Detective Clayton
 of the North Charleston Police Department testified as follows:

Question: And I think you are familiar with it. The Crime Stoppers tip said the
 victim was murdered because she owed a large cocaine debt. Listed
 suspects were her partners and probably know about the murder. The sales
 take place at the Piano Lounge. And the Crime Stoppers tip also indicates
 the name of Susan Edwards and Lynn Ray. When were those two
 individuals interviewed?

Answer: I don't recall them being interviewed.

Question: O.K. Were any actions taken to pursue that tip?

Answer: No sir.

The Defendant respectfully submits that this is a lead which offers direct information about the murder of the deceased. While the Defense is ready, willing and able to prepare and present its defense, it is clear that this is a lead that the police should have pursued and under a prosecutor's duty to see that justice is done and not simply to obtain a conviction, it falls within the prosecutor's duty to direct the police to do it.

Respectfully submitted,



Timothy Clay Kulp, Esquire
Riesen Law Firm, L.L.P.
3660 West Montague Avenue
North Charleston, SC 29418
(803) 760-2450

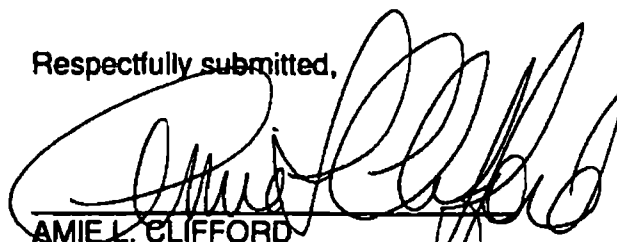
Charleston, South Carolina
March 24, 1998

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) Indictments: 97-GS-10-4319 and 4320
) Arrest Warrants: F 339393, F 339394

STATE OF SOUTH CAROLINA)
))
v.) RETURN TO "MOTION FOR THE POLICE TO
) INVESTIGATE THE CRIME STOPPERS REPORT
WESLEY MAX MYERS,) THAT SUSAN EDWARDS AND LYNN RAY ARE
) AWARE OF THE PERSONS WHO MURDERED
Defendant.) THE VICTIM, TERESA HAUGHT"
) (Motion Dated March 24, 1998)

The State understands and appreciates its ethical and legal obligation to seek justice rather than to simply seek convictions. The State would affirmatively state that credible, strong and sufficient evidence of the defendant's guilt exists to support convictions of the crimes with which the defendant had been charged. Moreover, there is an absence of any credible evidence, which would be totally inconsistent with the defendant's guilt, that another person is guilty. Therefore, the State has no obligation to investigate spurious tips that another person may be guilty, or to assist the defendant in the preparation of a defense, and will not do so.

Respectfully submitted,



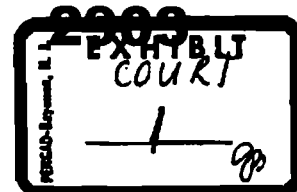
AMIE L. CLIFFORD
Assistant Solicitor
Charleston County Solicitor's Office
2144 Melbourne Avenue
North Charleston, SC 29405
(843) 740-5850

North Charleston, South Carolina
December 15, 1998

RECEIVED
CLERK OF COURT
JAN 14 1999
5:15 PM '98



FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535



2829

To: Mr. A.R. Hallman,
Investigator
North Charleston Police Department
4900 Lacross Rd.
North Charleston, SC 29419

Date: February 17, 1999

Case ID #: 95A-HQ-1248287

Lab No. 980402041 S KM ZJ
980707056 S KM ZJ
981217025 S KM ZJ

Reference: Communications dated March 30, 1998, July 1, 1998, and
December 17, 1998

Your No. L97-3580

Title: THERESA HAUGHT - VICTIM;
WESLEY MYERS - SUBJECT;
HOMICIDE

Specimens received: April 2, 1998, July 7, 1998, and December 17,
1998

Specimens:

Specimens received April 2, 1998 under the communication dated
March 30, 1998.

- Q1 Hair from victim's body (#9)
- K1 Dried blood sample from WESLEY MYERS (10.4)
- K2 Dried blood sample from THERESA HAUGHT (#4)

Specimens received July 7, 1998 under the communication dated
July 1, 1998.

- K3 Head hair from THERESA HAUGHT (#8 packet and #6 slide)

K4 Pubic hair from THERESA HAUGHT (#7)
K5 Head hair from WESLEY MYERS (#10.1)
K6 Pubic hair from WESLEY MYERS (#10.2)

Specimens received December 17, 1998 under the communication dated December 17, 1998.

Q2 Slide containing debris (#9)
Q3 Vial containing debris (#6)

This report contains the results of the Trace Evidence examinations. All requested examinations have been completed. The submitted items Q1 through Q3 and K1 through K6 will be returned under separate cover.

980402041 S KM HL
980707056 S KM HL
981217025 S KM HL



FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

Report of Examination

Examiner Name: John E. Stewart *JS*

Date: February 17, 1999

Unit: DNA II

Phone No.: (202) 324-5574

Case ID #: 95A-HQ-1248287

Lab No.: 980402041 S KM ZJ
980707056 S KM ZJ
981217025 S KM ZJ

Results of Examinations:

Because no microscopic associations between the questioned hairs and the known hair standards were made in this case, no mitochondrial DNA examinations were conducted.



FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

Report of Examination

Examiner Name: ¹⁰⁴²Robert Fram

Date: 2/1/99

Unit: Trace Evidence

Phone No.: (202) 324-8915

Case ID #: 95A-HQ-1248287

Lab No.: 80402041 S KM ZJ
980707056 S KM ZJ
981217025 S KM ZJ

Results of Examinations:

No hairs suitable for significant comparison purposes
were found in specimens Q1 through Q3.

STATE OF SOUTH CAROLINA

PLAINTIFF

VS.

CAUSE NOS. 28,010 & 94-00098

WESLEY MAX MYERS

DEFENDANT

AFFIDAVIT OF JOHN E. STEWART

John E. Stewart, being duly sworn, deposes and says:

1. I am currently both the Program Director of the Missing Person DNA Database at the FBI Laboratory at Quantico, Virginia, as well as a forensic DNA Examiner in the DNA II Unit (Mitochondrial) in the FBI Laboratory (Headquarters).
2. I have been employed at the FBI since 1996.
3. I have a Bachelor of Science degree in Zoology, a Masters of Science degree in Biology, as well as a Doctorate in Molecular Biology.
4. On April 2, 1998, the FBI Laboratory received one envelope sent by Federal Express (FedEx # 804493462200) from A.R. Hallman, Investigator, North Charleston Police Department (FBI Laboratory number 980402041 KM ZJ). Three separately packaged sealed brown envelopes in heat sealed bags were enclosed in one heat sealed plastic bag labeled "L97-3580, vic-Theresa Haught, 3-30-98." The first brown envelope was labeled "left hand and chest area victim, L97-3580 SL Item 9..."; this item was given the designation of Q1. The second brown envelope was labeled "L97-3580, serology/DNA Myers, Wesley 3/13/97 ..." containing a dried blood sample from Wesley Myers; this item was designated as K1. The third brown envelope was labeled "L97-3580 Haught, Teresa 3/13/97, blood ..." containing a dried blood sample from Theresa Haught; this item was designated as K2.
5. On July 7, 1998, the FBI Laboratory received one envelope sent by Federal Express (FedEx # 807550812261) from Dr. Steve Lambert, DNA Analyst, South Carolina Law Enforcement Division (SLED) (FBI Laboratory number 980707056 KM ZJ). Four separately packaged items were enclosed in two heat sealed plastic bags. In the first bag, there was a sealed brown envelope labeled "Theresa Haught" (#6, #8), containing a sealed slide mailer with one microscope slide labeled "#6" and a packet containing hair labeled "#8"; these items were designated as K3. The second sealed brown envelope was labeled "Teresa Haught (#7)" and contained pubic hair; this was designated as K4. The second heat sealed plastic bag contained two sealed white envelopes: one contained head hair from Wesley Myers labeled "#10.1" designated as K5; and the other contained pubic hairs from Wesley Myers labeled as

2834

"#10.2" designated as K6. On September 4, 1998, the Q1 hair from the Victim's body (Teresa Haught), K3, K4, K5 and K6 were given to Trace Evidence for analysis. No hairs suitable for significant comparison purposes were found in Q1.

6. On December 16, 1998, the FBI Laboratory received another envelope sent by Airborne Express (#6740970246) from A.R. Hallman, Investigator, North Charleston Police Department (FBI Laboratory number 981217025 KM ZJ). In a sealed plastic bag labeled "case #97006877, Dept. N. Charleston, SLED lab #L9703580, 6789 ..." there were two other plastic bags. One plastic bag labeled "Case # 97006877, N. Charleston SLED Lab #L9703580, 6789...", contained one cardboard microscope slide mailer labeled "L9703580, #9, Unknown ..." the contents of which held one microscope slide which was received in broken condition, as well as hair fragments. The broken slide had been initially designated as Q2. Upon discovering the broken microscope slide, the slide and the Q3 debris were given to Trace Evidence for analysis. These hair fragments were remounted onto a new microscope slide redesignated as Q2. The other plastic bag was labeled "Case # 97006877, N. Charleston SLED Lab #L9703580, 6789..." with a vial containing debris labeled "#6 JDP/DLF ...". The vial's flip top was open when received within the sealed bag, the tube was closed and designated as Q3. No hairs suitable for significant comparison purposes were found in the redesignated Q2 or Q3.

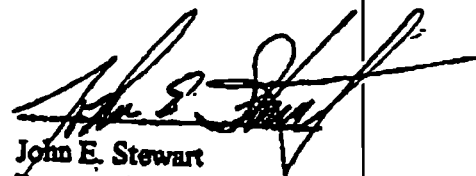
7. It should be noted that the envelope described in Paragraph 4 of this Affidavit received by the FBI Laboratory on April 2, 1998, was designated by the North Charleston Police Department as Item # 9. This same designation--Item# 9--was again used to label the slide mailer contained in the envelope the FBI Laboratory received on December 16, 1998, which is described in Paragraph 6 of this Affidavit.

8. A report was sent to A.R. Hallman, Investigator, North Charleston Police Department dated February 17, 1999. This report contained the results of the Trace Evidence examinations.

9. All items of evidence were packaged and returned on March 22, 1999 (U.S.P.S. registered mail #R627882116) to Lt. Joseph Powell, SLED, as per the telephonic communication request by Amy Clifford (840-740-5850) of the Charleston County Solicitors Office and Joseph Powell (803-896-7265). Mr. Powell stated during the phone call that A.R. Hallman was aware that the evidence was being sent to him (Powell).

10. All items of evidence (Q1 through Q3 and K1 through K6) were handled according to current FBI Laboratory protocols on evidence handling and the American Society of Crime Lab Directors (ASCLD) guidelines.

2835



John E. Stewart
Program Manager
Missing Person DNA Database
FBI Laboratory

Sworn to before me this 18th day of May, 2000

A. Benjamin Adams
Notary Public, SC

My commission expires July 1, 2003

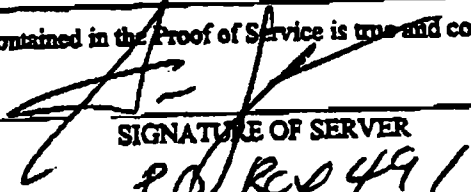


2833

SUBPOENA IN A CRIMINAL CASE

AFFIDAVIT
Cory

SOUTH CAROLINA GENERAL SESSIONS	COUNTY OF CHARLESTON
THE STATE OF SOUTH CAROLINA V. WESLEY MAX MYERS	CASE NO.: F 339394; F 339393 Indictment No.: 97-OW-10-1394 (2 counts)
	SUBPOENA FOR ☒ PERSON ☒ DOCUMENT(S) OR OBJECT(S)
TO: David Schwacke, Solicitor 9th Cir 2144 Melbourne Ave NC SC	
☒ YOU ARE HEREBY COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above-entitled case.	
PLACE CHARLESTON COUNTY JUDICIAL CENTER 2144 MELBOURNE AVENUE NORTH CHARLESTON, SC 29405	COURTROOM "B"
	DATE AND TIME MONDAY, MAY 22, 2000 at 2:00p.m.
☒ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s).	
LIST OF DOCUMENT(S) OR OBJECT(S): See attached page. Yes _____ No _____	
This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.	
CLERK OF COURT <i>Julie J. Armstrong</i> (BY) DEPUTY CLERK OF COURT <i>Debra L. Miller</i>	DATE May 18, 2000
THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE: ☐ SOLICITOR ☒ DEFENDANT	ATTORNEY'S NAME AND ADDRESS Timothy Clay Kulp Riesen Law Firm 3660 West Montague Avenue North Charleston, SC 29418 (803) 760-2450

PROOF OF SERVICE		
SERVED	DATE 5/18/00	PLACE 2144 Melbourne N. chas, SC
SERVED ON (PRINT NAME) David Schwacke (Myra m=6'11)		MANNER OF SERVICE IN Person
SERVED BY (PRINT NAME) NICK JENKINS		TITLE Pvt. Detective
DECLARATION OF SERVER		
I certify that the foregoing information contained in the Proof of Service is true and correct.		
Executed on	5/18/00 DATE	SIGNATURE OF SERVER 
		ADDRESS OF SERVER Ladson, SC 29456

2833

Attachment to Subpoena for David Schwacke.**Items to Be Produced:**

1. Copies of all letters written to Chief of Police of the North Charleston Police Department at any time, or to anyone at the North Charleston Police Department addressing or referring to in any manner, the presence of any arrested person before the media at the North Charleston Police Department or any other location, whether the presence of the media was the result of their appearance, or being contacted by the police.
2. A copy of the letter written by former Assistant Solicitor Amie Clifford to Chief Chad Caldwell of the North Charleston Police Department, or any other person at or of the North Charleston Police Department, addressing in any manner the performance of the North Charleston Police Department in the investigation of the homicide of Teresa Haught, particularly but not limited to, the expression of a concern that the North Charleston Police Department did not fully investigate the homicide and the involvement of all suspects.

2833

SUBPOENA IN A CRIMINAL CASE

APPEAL
C.C.V.

SOUTH CAROLINA GENERAL SESSIONS		COUNTY OF CHARLESTON
THE STATE OF SOUTH CAROLINA v. WESLEY MAX MYERS		CASE NO.: F 339394; F 339393 Indictment No.: 97-OW-10-1394 (2 counts)
		SUBPOENA FOR ☐ PERSON ☒ DOCUMENT(S) OR OBJECT(S)
TO: David Schwacke, Solicitor 9th Civ. 2144 Melbourne Ave NC SC		
☒ YOU ARE HEREBY COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above-entitled case.		
PLACE CHARLESTON COUNTY JUDICIAL CENTER 2144 MELBOURNE AVENUE NORTH CHARLESTON, SC 29405		COURTROOM "B"
		DATE AND TIME MONDAY, MAY 22, 2000 at 2:00p.m.
☒ YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s).		
LIST OF DOCUMENT(S) OR OBJECT(S): See attached page. Yes _____ No _____		
This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.		
CLERK OF COURT <i>Julie J. Armstrong</i>	DATE May 18, 2000	
(BY) DEPUTY CLERK OF COURT <i>Reina L. Baker</i>		
THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE: ☐ SOLICITOR ☒ DEFENDANT		ATTORNEY'S NAME AND ADDRESS Timothy Clay Kulp Riesen Law Firm 3660 West Montague Avenue North Charleston, SC 29418 (803) 760-2450

2810

PROOF OF SERVICE	
SERVED	DATE 5/18/00
PLACE 2144 Melbourne N. chas, SC	
MANNER OF SERVICE	
IN Person	
SERVED ON (PRINT NAME)	TITLE
David Schwacke (Myra McGill)	Pvt. Detective
SERVED BY (PRINT NAME)	
NICK JENKINS	
DECLARATION OF SERVER	
I certify that the foregoing information contained in the Proof of Service is true and correct.	
Executed on	SIGNATURE OF SERVER
5/18/00	PO Box 491
DATE	ADDRESS OF SERVER
	Ladson, SC 29456

2841

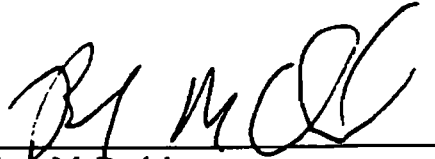
Attachment to Subpoena for David Schwacke.**Items to Be Produced:**

1. Copies of all letters written to Chief of Police of the North Charleston Police Department at any time, or to anyone at the North Charleston Police Department addressing or referring to in any manner, the presence of any arrested person before the media at the North Charleston Police Department or any other location, whether the presence of the media was the result of their appearance, or being contacted by the police.
2. A copy of the letter written by former Assistant Solicitor Amie Clifford to Chief Chad Caldwell of the North Charleston Police Department, or any other person at or of the North Charleston Police Department, addressing in any manner the performance of the North Charleston Police Department in the investigation of the homicide of Teresa Haught, particularly but not limited to, the expression of a concern that the North Charleston Police Department did not fully investigate the homicide and the involvement of all suspects.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

April 30, 2003

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

Robert M. Dudek
Assistant Appellate Defender

South Carolina Office of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON
STATE VS.WESLEY MAX MYERS

AKA:

Race: W Sex: M Age: 41DOB: 8/24/56 SS#: 249-31-6309Address: [REDACTED]DL# HANAHAN, SC SID#: 1110479IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:97-GS-10-4319A/W#: F339393Date of Offense: 3/13/97S.C. Code §: COMMON LAW 8-16-3-10CDR Code #: 011116☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: MURDER
in violation of § 16-3-10 & COMMON LAW of the S.C. Code of Laws, bearing CDR Code # 011116☐ 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:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☐ The Defendant is to be given credit for 645 days/months jail time.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: _____ \$

§14-1-206 (Assessments 100%) . . . \$

§14-1-211(A)(1) (Surcharge) . . . \$ 100.00

§14-1-211(A)(2) (Surcharge) . . . \$

§56-5-2995 (DUI Assessment) . . . \$

3% to County (if paid in installments) . . . \$ 3.00TOTAL . . . \$ 103.00Don Miller

Clerk of Court/ Deputy Clerk

Court Reporter: G. Burns

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

SCC 3/217 (1/2001)

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc Rehab. or Job Corps _____
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: _____PRESIDING JUDGE [Signature]Judge Code: 019101Sentence Date: 3/7/01

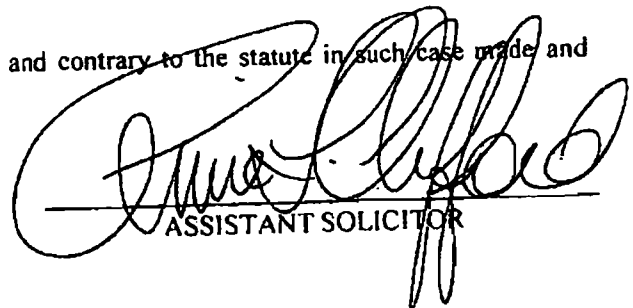
STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on July 7, 1997 the Grand Jurors of Charleston County present upon their oath:

That Wesley Max Myers did in Charleston County on or about March 12 or 13, 1997, willfully and with malice aforethought, kill Theresa Haught by inflicting several blows to her head and that Theresa Haught died as a proximate result thereof. This is in violation of the common law of South Carolina.

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


ASSISTANT SOLICITOR

97-03-CL-01083

DOCKET NO. 97-GS-10-4319

The State of South Carolina

WITNESSES

OHN BURNETT AND/OR

County of Charleston

SEITH HAIR

COURT OF GENERAL SESSIONS

LAYTON, NCPD

JULY TERM 1997

JCA#: 97-0006877

THE STATE

vs.

ARREST WARRANT NUMBER

WESLEY MAX MYERS

F-339393

03/16/97

ACTION OF GRAND JURY

TRUE BILL

Karen P. Thorne

Foreperson of Grand Jury

JUL 03 1997

VERDICT

Not Guilty ☐Guilty of Murder ☒Guilty of Manslaughter ☐

Elizabeth Padgett

Foreperson of Petit Jury

Date: 3-6-2001

Indictment for

MURDER

Note: Place checkmark in one (1) of space above, to indicate verdict, and Foreman sign.

STATE OF SOUTH CAROLINA

AFFIDAVIT

COUNTY OF CHARLESTON
CITY OF NORTH CHARLESTON

OCA# 97006877INV. Clayton

Personally appeared before me, a magistrate of this County, one Detective Clayton who, first being duly sworn, deposes and says that (name of the defendant)

Wesley Max Myers

did within this County and State on the 13TH day of MARCH, 1997,
violate the criminal laws of the State of South Carolina in the following particulars:

DESCRIPTION OF OFFENSE
MURDER,
VIOLATION OF SECTION 16-3-10

The affiant states there is probable cause to believe that the defendant named above did commit the crime(s) set forth, and that such probable cause is based on the following facts:

That on or about 3-13-97, while at [REDACTED] located in the County and State aforesaid, one Wesley Max Myers did commit the offense of MURDER, in violation of section 16-3-10 of the South Carolina Code of Laws of 1976, as amended. In that he did willfully, unlawfully and feloniously and with malice aforethought, while armed with a deadly weapon, to wit: an empty glass wine caraf, beat one Theresa Haught, without just cause or provocation and the said victim did die as a result of these acts. Facts to establish the above are that the victim was discovered dead inside the [REDACTED] by the North Charleston Fire Department while fighting an arson fire there. Investigation by the NCFD, the Coroner's Office and the Medical Examiners Office determined that the victim died as a result of several blows to the head prior to the fire being set. The victim has been trying to break off a relationship with the defendant for the last several months. A single human hair was found on the left index finger of the victim, with part of the hair beneath the fingernail. This hair was recovered by Crime Scene Officer Hallman and transported to the South Carolina Law Enforcement Division, where it was delivered to one S/A Joseph Powell of the Trace Evidence Division. The unknown hair was compared to hair samples taken from the defendant through a consent to search authorized by the defendant, and it was determined to have good matching characteristics to the known hair sample of the defendant. It is the overall opinion of S/A Powell that the unknown hair did come from the defendant's head. The defendant was advised of his rights and gave a statement admitting to the murder. Det. Clayton, and Raymond Allen White are witness to prove same. All this done against the form of the Statute and against the peace and dignity of the State of South Carolina.

Sworn to and Subscribed before me
this MAR 15 day of 1997
1997.

[Signature]
Signature of Judge

Det. D. Clayton
(AFFIANT)

Address: _____

Phone: _____

ARREST WARRANT

F- 339393

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTON

 THE STATE
 against
WESLEY MAX MYERSAddress: **HANAHAN, SC 29406**Phone: **803747-8190** SSN: **[REDACTED]**Sex: **M** Race: **W** Height: **6'2** Weight: **200**DL State: **SCDL #** **004978716**DOB: **8-24-59** Agency ORI #: **[REDACTED]**Prosecuting Agency: **NCPD**Prosecuting Officer: **CLAYTON**Offense: **MURDER**Offense Code: **[REDACTED]**Code/Ordinance Sec. **16-3-10**
 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.

(L.S.)

Signature of Judge

Date: **[REDACTED]**

RETURN

 A copy of this arrest warrant was delivered to
 defendant **Wesley Max Myers**
on **3-16-97**Signature of Constable/Law Enforcement Officer **[REDACTED]**

RETURN WARRANT TO:

 PRELIMINARY HEARING COURT
 THE RUSSELL BUILDING
 2144 BELGORD STREET, ROOM 201
 NORTH CHARLESTON, S. C. 29405
 (703) 742-1111

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTON

 Personally appeared before me the affiant **DET. CLAYTON**
 being duly sworn deposes and says that defendant **WESLEY MAX MYERS**
 did within this county and state on **MARCH 13, 1997**
 State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of **CHARLESTON**)
 in the following particulars:

DESCRIPTION OF OFFENSE:

MURDER
16-3-10

 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:

SEE ATTACHED AFFIDAVIT

 Sworn to and subscribed before me
 on **MARCH 16, 1997**
 Signature of Issuing Judge **[REDACTED]** (L.S.)

Signature of Affiant

Affiant's Address

Affiant's Telephone

Det. D. Clayton
DET. CLAYTON
4900 LACROSS RD.
N. CHARLESTON, SC 29418
554-5700

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTON

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
 on **MARCH 13, 1997** defendant **WESLEY MAX MYERS**
 did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of **CHARLESTON** as set forth below:

DESCRIPTION OF OFFENSE:

MURDER
16-3-10

 Now, therefore, you are empowered 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.

 Signature of Issuing Judge **[REDACTED]**
 Judge Code: **749**

(L.S.)

Judge's Address **3841 LEEDES AVE.****CHARLESTON, SC 29405**Judge's Telephone **529-7482**
 Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

 2021
 For use by
 S.C. Highway Patrol
 July 20, 1980
 SCCA 518

MAIL sent by

WITNESSES

Name: _____
Address: _____
Telephone: _____

Name: _____
 Address: _____
 Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

CODEFENDANTS

NOTICE TO REPORT

YOU MUST REPORT FOR ARRANGEMENT OR
PLEA ON THE CHARGE LISTEN TO THE
COURT OF GENERAL SESSIONS, LOCATED
IN THE RUSSELL BUILDING, 2144 MEL-
BOURNE STREET, NORTH CHARLESTON, ON
THE 2ND FLOOR AT 9:00 A.M. 8:30

ON 5-16-97
IF YOU DO NOT REPORT, AN ARREST
WARRANT WILL BE ISSUED FOR YOU.

Date: Baldwin
3-16-97
 Bond and Amount: No BOND
 To be paid: Simply

PRELIMINARY HEARING held by

$$\begin{aligned} & \text{1. } \text{H}^+ + \text{H}_2\text{O} \rightleftharpoons \text{H}_3\text{O}^+ \\ & \text{2. } \text{H}_2\text{O} + \text{H}_2\text{O} \rightleftharpoons \text{H}_3\text{O}^+ + \text{OH}^- \\ & \text{3. } \text{H}_2\text{O} + \text{H}_2\text{O} \rightleftharpoons \text{H}_2\text{O} + \text{H}_2\text{O} \\ & \text{4. } \text{H}_2\text{O} + \text{H}_2\text{O} \rightleftharpoons \text{H}_2\text{O} + \text{H}_2\text{O} \end{aligned}$$

DISPOSITION in part

97 MAR 19 PM 4:55
JULIE A. STROUD
CLERK OF COURT
BY _____
[Illegible text]

JUDGES

1696 01
1394
0111

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON
STATE VS.AKA: WESLEY MAX MYERSRace: W Sex: M Age: 41DOB: 8/24/59 SS#: [REDACTED]Address: [REDACTED]DL# [REDACTED] SID#: 1110479IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:97-GS-10-4320A/W#: F 339 394Date of Offense: 3/13/97S.C. Code §: 16-11-110(C)CDR Code #: 0101018☐ CASE RESTORED

SENTENCE

☐ PLEA ☐ TRIAL☒ CONVICTED OF or ☐ PLEADS

In disposition of the said indictment comes now the Defendant who was

TO: ARSON 3rd DEGREE
in violation of § 16-11-110(C) of the S.C. Code of Laws, bearing CDR Code # 0101018☒ 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[Signature]
Defendant[Signature]
Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 10 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.☒ The Defendant is to be given credit for 645 days/months jail time.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 97-GS-10-4319

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:\$ _____

§14-1-206 (Assessments 100%)\$ _____

§14-1-211(A)(1) (Surcharge)\$ 100.00

§14-1-211(A)(2) (Surcharge)\$ _____

§56-5-2995 (DUI Assessment)\$ _____

3% to County (if paid in installments)\$ 3.00TOTAL\$ 103.00[Signature]

Clerk of Court/ Deputy Clerk

Court Reporter: G. Burns

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

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: _____

PRESIDING JUDGE [Signature]Judge Code: 019101Sentence Date: 3/7/01

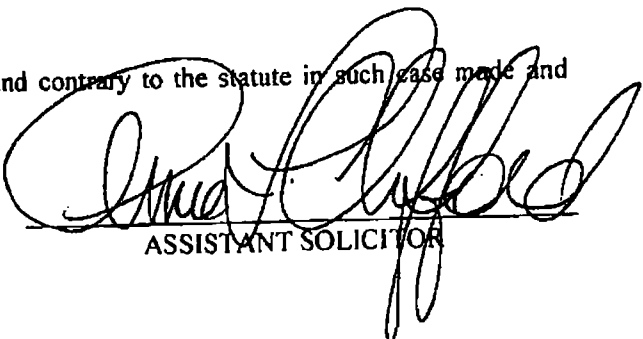
STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

INDICTMENT FOR
THIRD DEGREE ARSON

At a Court of General Sessions, convened on July 7, 1997 the Grand Jurors of Charleston County present upon their oath:

That Wesley Max Myers did in Charleston County on or about March 12 or 13, 1997, willfully and maliciously set fire to, burned, or caused to be burned or aided, counseled, or procured the burning of a building with the intent to destroy or damage the building. This is in violation of S.C. Code Ann. section 16-11-110(C) (Cum. Supp. 1996).

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


ASSISTANT SOLICITOR

97-03-CL-01083

DOCKET NO. 97-GS-10-4320

The State of South Carolina

WITNESSES

IN BURNETT AND/OR

TH HAIR

LYTON, NCPD

A#: 97-0006877

1025

County of Charleston

COURT OF GENERAL SESSIONS

JULY TERM 1997

THE STATE

vs.

WESLEY MAX MYERS

ARREST WARRANT NUMBER

F-339394

03/16/97

ACTION OF GRAND JURY

TRUE BILL

Robert S. Thorne
 Person of Grand Jury

JUL 08 1997

VERDICT

Not Guilty " " "
 Guilty " " "
 Guilty " " "

Indictment for

THIRD DEGREE ARSON

Elizabeth A. Babcock
 Person of Petit Jury

JUL 08 1997

note: Place check " " mark in one (1) of space above, to indicate verdict, and Foreman sign.

STATE OF SOUTH CAROLINA

AFFIDAVIT

COUNTY OF CHARLESTON
CITY OF NORTH CHARLESTONOCA# 97006877INV. Clayton

Personally appeared before me, a magistrate of this County, one Detective Clayton who, first being duly sworn, deposes and says that (name of the defendant)

Wesley Max. Myers

did within this County and State on the 13TH day of MARCH, 1997,
violate the criminal laws of the State of South Carolina in the following particulars:

DESCRIPTION OF OFFENSE

16-11-110 ARSON 3rd DEGREE

The affiant states there is probable cause to believe that the defendant named above did commit the crime(s) set forth, and that such probable cause is based on the following facts:

That on or about 3-13-97, while at [REDACTED] Ave., [REDACTED], located in the County and State aforesaid, one Wesley Max Myers did commit the offense of Arson - 3rd Degree, in violation of section 16-11-110 of the South Carolina Code of Laws of 1976, as amended. In that he did willfully, unlawfully and feloniously set fire to the business known as the Mill In Social Club, located [REDACTED], in the City of North Charleston. Facts to prove the same are that on 03-13-97 at about 3:14 AM the North Charleston Fire Department responded to a reported structure fire at the above location. Upon their arrival there was extensive fire inside the structure that also spread to the business next door. During the extinguishment of the fire, fire department personnel discovered the deceased body of one Theresa Haught on the floor of the business. An investigation into the origin, cause and circumstances of the fire was begun by members of the NCFD Fire Investigation Division and agents of the U. S. Treasury Dept., Bureau of Alcohol, Tobacco and Firearms. Through examination of the fire scene it was determined that the origin of the fire was behind the bar, near the center, at floor level. Further examination determined that there was no accidental source of ignition at this location and ordinary combustible materials in the form of paper products had burned at this point. On 3-13-97, the defendant, Wesley Max Myers, gave both a verbal and written statement that after ~~the~~ an altercation with the victim Theresa Haught, he went behind the bar and removed paper and cardboard from a cabinet under the cash register and placed the material on the floor and set it on fire using a lighter. All this done against the form of the Statute and against the peace and dignity of the State of South Carolina. Chief Investigator Benjamin Norris, NCFD, and Special Agent Lester Rich, Bureau of ATF are witnesses to prove the same.

Sworn to and Subscribed before me
this 13TH day of MARCH,
1997.

[Signature]
Signature of Judge

Det. D. Clayton
(AFFIANT)

Address: _____

Phone: _____

ARREST WARRANT

F- 339394

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTON

THE STATE

against

WESLEY MAX MYERSAddress: **HANAHAN, SC 29406**Phone: **803-747-8190** SSN: **[REDACTED]**Sex: **M** Race: **W** Height: **6' 2"** Weight: **220**Dt. State: **SC** DL #: **004978716**DOB: **8-24-59** Agency ORI #: **[REDACTED]**Prosecuting Agency: **NCPD**Prosecuting Officer: **CLAYTON**Offense: **ARSON 3RD DEGREE**Offense Code: **[REDACTED]**Code/Ordinance Sec. **16-11-110**

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to law.

Signature of Judge

(L.S.)

Date: **[REDACTED]**

RETURN

A copy of this arrest warrant was delivered to
defendant **Wesley Max Myers**on **3-16-97**Signature of Constable/Law Enforcement Officer **[Signature]**

RETURN WARRANT TO:

PRELIMINARY HEARING COURT
THE RUSSELL BUILDING
2144 MELBOURNE STREET, ROOM 201
NORTH CHARLESTON, S. C. 29405
(803) 740-5873

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTON

AFFIDAVIT

Personally appeared before me the affiant

DET. CLAYTON

who

being duly sworn deposes and says that defendant

WESLEY MAX MYERSdid within this county and state on **MARCH 13, 1997**violate the criminal laws of the
CHARLESTONState of South Carolina (or ordinance of ☒ County/ ☐ Municipality of

in the following particulars:

DESCRIPTION OF OFFENSE:

ARSON 3RD DEGREE**16-11-110**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:

SEE ATTACHED AFFIDAVIT

Sworn to and subscribed before me

on **MARCH 16, 1997****[Signature]**

Signature of Issuing Judge

(L.S.)

Signature of Affiant

Affiant's Address

Affiant's Telephone

Det. D. P. [Signature]
DET. CLAYTON**4900 LACROSS RD.****N. CHARLESTON, SC 29418****554-5700**

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of
CHARLESTON

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
on **MARCH 13, 1997** defendant **WESLEY MAX MYERS**

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of**CHARLESTON****ARSON 3RD DEGREE****16-11-110**

DESCRIPTION OF OFFENSE:

Now, therefore, you are empowered 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.**[Signature]**

Signature of Issuing Judge

Judge Code: **749**

Judge's Address

Judge's Telephone

3841 LEEDS AVE.**CHARLESTON, SC 29405****529-7482**Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

BAIL set by

WITNESSES

Judge BaldernOn 3-16-97Bail amount 100,000 A

Name of Bailor

PRELIMINARY HEARING held by

Judge

Judge

Defense Attorney

Prosecution

DISPOSITION below

Judge

BY

BY

(Indicate any that be, find, and, not, etc.)

Disposition

Sentence

JURORS

CRIMINAL

SM. CRT. CASE # 1696-12FILE # 39LREPORT GROUP 0008

DISP. CODE

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

CODEFENDANTS

NOTICE TO REPORT

YOU MUST REPORT FOR ARRAINGMENT OR PLEA ON THE CHARGE HEREIN TO THE COURT OF GENERAL SESSIONS, LOCATED IN THE RUSSELL BUILDING, 2104 MELBOURNE STREET, NORTH CHARLESTON, ON THE 2ND FLOOR AT 8:30 A.M. 8:30

ON 5-16-97

IF YOU DO NOT REPORT, AN ARREST WARRANT WILL BE ISSUED FOR YOU.

CMTI330D SCDC OFFENDER MANAGEMENT SYSTEM 11/04/05
OMCOMITA RELEASE DATE SCREEN C031341
SCDC# > 273328 LOC: KIRKLAND
MYERS, WESLEY MAX SCDC CLASSIFICATION... VIOLENT

SEXUAL REGISTRY...: N
OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL PREDATOR...: NOT APP
DNA STATUS...: COMPLETED
CURRENT SENTENCE: 030-00-000 CONSECUTIVE SENTENCE ...: N
CURRENT SENT START DATE: 06/01/1999
PROJECTED COMPLETION DATES
MAXOUT DATE: 05/24/2029 CURRENT EWC ..: 3 F 5
YOA SIX YEAR DATE: / / CURRENT EEC ..: NOT CURRENTLY EARNING EEC
INITIAL PAROLE DATE: 00/00/0000 NEXT PAROLE HEARING DATE: 00/00/0000

TOTAL GT DAYS EARNED: 000000 LABOR CREW/WORK PROG DATE: 99/99/9999
TOTAL EARNED WORK CREDITS ...: 000550 LABOR CREW DISQ REASON:
TOTAL EDUCATION CREDITS: 000000 CATEGORY 4 OR 5 OFFENSE
TOTAL EXTRA EARNED CREDITS ..: 000
TOTAL SERVICE TIME EARNED ...: 002313

PFKEYS: 5:HISTORY OF DATE CHANGES
4-© 1 Sess-1 167.7.50.33 TNET1020 3/11

CLASSIFICATION SUMMARY REPORT DATED 11/04/05

C031341

SCDC# 273328 MYERS, WESLEY MAX

FBI# 132212EB1

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION .: KIRKLAND CORR INST

SECURITY/CUST.: 3 MINIMUM IN

CURR INCARC SENT...: 30 YRS 0 MOS 0 DYS

CENTRAL MONITORING.: YES SEPREQ

MED CLASS: 1 NO MED PROB/NO WORK RESTRICT

MENTAL CLASS: NMH (NO MENTAL HEALTH TRE

CURRENT PROGRAM.: NO CURRENT PROGRAM

AGE...: 46

DORM.....: B20060A

TOBACCO USER....: Y

PROJ MAXOUT DATE: 05/24/2029

PROJ PAROLE DATE: 00/00/0000

EWC JOB.: GENERAL WORKER

EDUC PGM.: NO CURR EDUC PROGRAM

EWC LEVEL: 3F5 EEC LEVEL:

ASSIGNMENT.: MAINTENANCE

PREVIOUS NUMBERS:

** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE				SENTENCE			
	YRS	MOS	DYS	COUNTY	START	V/NV	CAT	INDICT
ARSON-3RD DEGREE	10	0	0	CHARLESTON	06/01/1999	N	3	976S10-4320
MURDER	30	0	0	CHARLESTON	06/01/1999	V	5	976S10-4319

PRIOR COMMITMENTS OVER 90 DAYS:

INMATE HAS NO PRIORS

DETAINEES (HOLD, WANTED, NOTIFY):

NO DETAINEES

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

NO ASSAULTIVE DISCIPLINARY HISTORY

NON-ASSAULTIVE DISCIPLINARIES:

NO NON-ASSAULTIVE DISCIPLINARY HISTORY

HISTORY OF MOVEMENTS:

DATE	LOCATION	STATUS	REASON
08/17/01	KIRKLAND	INCARCERATED	ADMINISTRATIVE
07/24/01	ALLENDAL	INCARCERATED	ADMINISTRATIVE
07/19/01	LIEBER	INCARCERATED	ADMINISTRATIVE
07/05/01	KIRKLAND	INCARCERATED	ADMINISTRATIVE
07/03/01	KIRKLAND INFRM	INCARCERATED	MEDICAL
03/09/01	KIRKLAND	INCARCERATED	R&E PROCESSING
03/09/01	LIEBER	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
GENERAL WORKER	04/04/02	00/00/00		3F5
WARDKEEPER	08/20/01	04/03/02	LATERAL TRANSFER	3F5
USTODIAN HELPER	07/26/01	08/17/01	INSTIT TRANSFER	3F5
USTODIAL WORKER	03/29/01	07/19/01	INSTIT TRANSFER	3F7

HISTORY OF EARNED EDUCATION CREDITS:

EDUC DESCRIPTION	START DATE	END DATE	TERMINATION REASON

NO SCHOOL ASSIGNMENTS*

***** END OF REPORT *****

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:

2931

COUNTY OF CHARLESTON
STATE VS.WESLEY MAX MYERS

AKA:

Race: W Sex: M Age: 41DOB: 8/24/59 SS#: [REDACTED]Address: [REDACTED]HAWAIIAN, SCDL# [REDACTED] SID#: 111047997-GS-10-4319
A/W#: F339393
Date of Offense: 3/13/97
S.C. Code §: COMMON LAW 8-16-3-10
CDR Code #: 011116☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: MURDERin violation of § 16-3-10 & COMMON LAW of the S.C. Code of Laws, bearing CDR Code # 011116☐ 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

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☒ The Defendant is to be given credit for 645 days/months jail time.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:\$ _____

§14-1-206 (Assessments 100%)\$ _____

§14-1-211(A)(1) (Surcharge)\$ 100.00

§14-1-211(A)(2) (Surcharge)\$ _____

§56-5-2995 (DUI Assessment)\$ _____

3% to County (if paid in installments) ...\$ 3.00TOTAL\$ 103.00

PTUP _____

_____ days/hours Public Service/Employment

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

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: _____

PRESIDING JUDGE [Signature]Judge Code: 019101Sentence Date: 5/7/01TRUE COPY
ATTEST
JULIE J. ARMSTRONG (SEAL)
CLERK OF COURT & G.S.
By [Signature] DEPUTY CLERK

Clerk of Court/ Deputy Clerk

Court Reporter: G. Burns

White - Clerk

Green - Corrections

Cyan - Probation

Pink - Defendant

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

STATE VS.

WESLEY MAX MYERS

AKA:

Race: W Sex: M Age: 41

DOB: 8/24/59 SS# [REDACTED]

Address: [REDACTED]

HANAHAN, SC

DL# [REDACTED] SID#: 1110479

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

97 -GS- 10 - 4320

A/W#: F 339.394

Date of Offense: 3/13/97

S.C. Code §: 16-11-110(C)

CDR Code #: 0/0/0/8

☐ CASE RESTORED

SENTENCE

☐ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO: ARSON 3RD DEGREE

in violation of § 16-11-110(C) of the S.C. Code of Laws, bearing CDR Code # 0/0/0/8

☒ 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:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 10 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.

☒ The Defendant is to be given credit for 645 days/months jail time.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 97-GS-10-4319

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:\$ _____

§14-1-206 (Assessments 100%)\$ _____

§14-1-211(A)(1) (Surcharge)\$ 100.00

§14-1-211(A)(2) (Surcharge)\$ _____

§56-5-2995 (DUI Assessment)\$ _____

3% to County (if paid in installments) ...\$ 3.00

TOTAL\$ 103.00

PTUP _____

_____ days/hours Public Service Employee

Obtain GED _____

Attend Voc Rehab. or Job Corps _____

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: _____

PRESIDING JUDGE [Signature]

Judge Code: 0/9/10/1

Sentence Date: 3/7/01

Clerk of Court/ Deputy Clerk

Court Reporter: G. Burns

White - Clerk

Green - Corrections

Orange - Probation

Pink - Defendant

TRUE COPY

JULIE J. ARMSTRONG (SEAL)
CLERK, C.P. & G.S.

DEPUTY CLERK

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Luke N. Brown, Jr., Special Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WESLEY MAX MYERS,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Assistant Appellate Defender

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of Appellate Defense
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ATTORNEY FOR APPELLANT.

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1.

The court erred by admitting an anger management questionnaire against appellant, which concerned his problems with controlling his emotions. Any probative value this anger management questionnaire had was substantially outweighed by its unduly prejudicial effect. The state's theory of the case was that appellant became enraged at the victim and he killed her, and this dated anger management questionnaire had the effect of impermissibly leading the jury to conclude appellant was acting in "character" when the victim was killed.

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2.

The court erred by ruling Dr. Saul Kassin could not use other examples or facts of interrogations from other states to illustrate his opinion before the jury. Dr. Kassin's testimony was admissible under Rule 702, SCRE, because it was helpful to the jury. Therefore, Dr. Kassin had the right to testify about facts and data he relied on.

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3.

Appellant's confession should have been suppressed since it was the coerced product of coordinated police efforts to overbear his will, and it produced the "I must have done it" confession. The quick subsequent apologies to the decedent's mother and the media were all part of the same staged event.

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4.

The apology to the decedent's mother was part and parcel of the same subterfuge. That apology statement should have been suppressed as the immediate fruit of the poisonous tree. 48

5.

Appellant's apology to the media during the "perp walk" should have been suppressed as part of the immediate fruit of the poisonous tree. The reporter acknowledged she was told the police were going "to walk" appellant, and they were contacted and given the opportunity for dramatic nightly footage of appellant apologizing to his detriment. 50

6.

The trial court should have granted appellant's motion to reveal the contents of letters from Solicitor David Schwacke and Assistant Solicitor Amie Clifford to the North Charleston Police Department. The defense learned during trial preparations that the solicitor's office had warned, admonished or asked for the cooperation of the police department. Police misconduct regarding the perp walk, confession, as well as their failure to investigate were critical issues in this case. The contents of these letters should have been revealed since they contained impeachment or exculpatory evidence. 52

7.

The judge erred by refusing to allow the defense to call Assistant Solicitor Clifford to testify *in camera* where issues of withholding evidence, failure to investigate and police misconduct were at issue. The case law clearly allowed such *in camera* testimony by a solicitor where issues such as these are involved. 60

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by allowing an "anger management" questionnaire into evidence against appellant where any probative value this dated document had was substantially exceeded by its unduly prejudicial effect since it concerned appellant's temper, and therefore invited a verdict on an improper basis?

2.

Whether the court erred by refusing to allow appellant's expert witness on interrogations, Dr. Saul Kassin, to testify about other examples of confessions or interrogations he relied on in forming his opinions in this case since these were facts or data the expert relied on, and consequently they were admissible under the South Carolina Rules of Evidence?

3.

Whether the court erred in ruling appellant's confession was admissible where appellant's "I must have done it" confession was the product of organized police trickery and coercion where law enforcement undisputedly set-up appellant with what was proved to be a ruse of false evidence about an inculpatory hair found underneath the victim, where Lt. McHale suggested there was other evidence against appellant, and McHale planted different "lesser guilt" scenarios in the vulnerable appellant's mind, since appellant's will was overborne by this calculated police misconduct?

4.

Whether the court erred by allowing evidence appellant apologized to the victim's mother after he confessed, since this apology was also set-up by law enforcement just after appellant confessed, and was it part of the same continuous coerced confession?

5.

Whether the court erred by allowing evidence and the videotape of appellant's media apology or confession outside the police station since the "perp walk" was also set-up by law enforcement who had contacted the media, and it was the continuing product of police trickery and coercion that garnered the first "I must have done it" confession?

6.

Whether the court erred by refusing to allow the defense to inspect two letters from the solicitor's office to the police department where the defense had strong evidence these letters were relevant to issues of police misconduct, and the failure to investigate which were issues the defense had raised, since these letters were discoverable because they contained impeachment or exculpatory material?

7.

Whether the court erred by refusing to allow the defense to call Assistant Solicitor Clifford to testify in camera about the state's intentional failure to test evidence, failure to investigate suspects, and police misconduct since the judge erred as a matter of law by refusing this legitimate in camera request?

STATEMENT OF THE CASE

Appellant was indicted at the July 7, 1997, term of the Charleston County grand jury for the offenses of murder and arson in the third degree. R. 2740. His case came on for trial on February 26, 2001, before the Honorable Luke N. Brown and a jury.¹ Timothy Kulp represented appellant. The solicitor at the time of trial was Bruce Durant. R. 1.

Appellant was found guilty. Judge Brown sentenced appellant to thirty years imprisonment for murder and ten years imprisonment for arson in the third degree.

This appeal follows.

¹The Honorable Edward B. Cottingham was originally the trial judge prior to his retirement. Judge Cottingham held a Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964), that continued as part of this case. The Honorable Luke Brown later held a supplemental Jackson v. Denno hearing.

STATEMENT OF FACTS

Introduction

Lt. Kevin McHale was an unabashed expert in interrogation, in obtaining confessions. There was not any physical evidence linking appellant to the murder of the decedent in a tavern fire, and there were no eyewitnesses. Yet, in an interrogation that is on videotape before this Court, McHale told appellant, who was vulnerable to the alcohol “black-out” pitch, that he understood how difficult women could be, that he had hit his own wife when she “got in his face,” that sometimes people deserved to be hit, and that it was amazing how easily people died. He suggested to appellant that he may be in denial if “he did it.” See McHale tape. All of this set up what the state would finally admit was a ruse to obtain appellant’s bizarre “I must have done it” confession the next day when appellant was told a critical piece of hair found underneath the decedent matched his hair. The solicitor would have to confess to the jury in his opening statement that the hair actually did not match appellant.

The facts

The state’s theory of the case was that the decedent, Teresa Haught, who ran the Mill Inn tavern in North Charleston was hit in the head with a large object – a wine carafe – after the tavern had closed in the early morning hours of May 13, 1997. The decedent at times stayed in the bar after closing, and she slept on the pool table. It was undisputed that after killing the decedent, the perpetrator set the tavern on fire. R. 1063, l. 21 – 1066, l. 22; R. 1143, l. 5 – 1147, l. 18.

Appellant was dating the decedent, and he normally drove by the tavern in the morning because it was on his way to work.² Detective George Tetanich of the North Charleston Police Department remembered the decedent's body was found inside the bar by a fireman at four or five o'clock in the morning. R. 1552, l. 5 – 1553, l. 18.

At the scene of the fire, Tetanich observed appellant "coming down Montague Avenue. He approached me and we had a conversation about the Mill Inn. About the fire at the Mill Inn. Mr. Myers wanted to know if anybody'd been found in there and I told him that we did have a deceased person in there. And he said that his girlfriend frequently, she worked in there and she frequently spent the night there and that it might be her. And he got real upset, fell down on the ground, crying, and, and really, really upset." R. 1552, l. 5 – 1553, l. 18.

Tetanich saw appellant at the police station the following day, a Friday. "He wanted to help in the investigation and he came back up there . . . sometime in the morning. Around nine or ten o'clock." R. 1556, ll. 9–18.

A hair was found in the decedent's hand. The police got appellant to agree that that hair belonged to the killer — that single piece of evidence would solve this crime. As will be seen *infra*, DNA testing ultimately revealed that the hair did not match appellant — the state had no physical evidence against appellant, despite the police deception that now follows: Lt. Kevin McHale interrogated or interviewed appellant that same Friday, May 14, 1997. R. 1527, l. 5 – 1528, l. 1; See McHale tape on file with this Court.

²Appellant explains his routine to Lt. McHale in a videotaped interrogation that is a key piece of evidence — for many reasons — in this case. See McHale tape. It was considered by the trial judge in his rulings, and by the jury.

McHale acknowledged that appellant knew about the hair, and appellant said there was not any way that hair belonged to him since he was not at the bar that night, or that day at all for that matter. Appellant told McHale on the videotape before this Court that he was at home in his parent's house that evening. As will also be seen *infra*, appellant's mother, in a separate interview, also told the police that appellant did not leave home that evening.

McHale, during the Friday interrogation, asked appellant how he would react if the critical piece of hair belonged to him. Appellant said he would "freak out" because he was not at the bar that night, and there was no way the hair belonged to him. McHale then asked appellant how he would explain it if testing showed the hair belonged to him, and appellant answered "there's no possible way to explain it because I wasn't there." R. 1527, l. 5 – 1528, l. 1; McHale tape.

On this videotape, Lt. McHale talked about Colombo and how an innocent person reacts versus a person guilty of premeditated murder or one who kills in a heat of passion.³ Lt. McHale told appellant that the following items the police knew about would not change in this case:

- ◆ The victim's cause of death;
- ◆ The physical evidence left behind;
- ◆ The physical evidence taken;
- ◆ Any blood splatter, whether invisible to the naked eye or not;
- ◆ The fact there was no forced entry and that the victim let the perpetrator inside.

³ At one point Lt. McHale is referred to as "Major" McHale. Whatever his actual title, he is referred to throughout this brief as "Lt. McHale" for ease of reference.

- ♦ The perpetrator was not female;
- ♦ The perpetrator was a white male;
- ♦ The perpetrator frequented the bar.

As will be seen infra there was no physical evidence linking appellant to this crime whatsoever. The blood left behind was not appellant's blood.

McHale talked to appellant about the difference between premeditated murder and a crime in the heat of passion where you know someone, and where you lose control. McHale spoke to appellant about the difference between how a person would act if they intentionally killed someone they loved (their wife) or if they killed the victim by accident. Appellant interjected that he did not kill the decedent. See McHale tape.

McHale told appellant that he knew he had not been one-hundred percent truthful with the police. Appellant then inquired what he had not been honest about. McHale ignored the question. McHale told appellant to remember that fingerprints can be left behind even in a fire. See McHale tape.

McHale asked if appellant ever thought about killing the victim, and appellant told McHale he had never had any such thought. McHale talked to appellant about he would feel if he killed his own wife. He said he would feel differently if he intentionally beat her to death, just lost control, or if it was by accident. Regardless, McHale told appellant he knew how difficult women could be, and that he had hit his own wife when she "got in his face." He would "tie one on" regardless of how he killed her. Appellant then gave McHale and the police consent to take his clothes, his hat and his boots. See McHale tape. Again, none of those items linked appellant to the crime.

The videotape shows that McHale leaves for a short time and returns with another detective or officer. McHale told appellant that appellant had been drinking the night before, and that appellant was tired and that he was "dragging butt." McHale told appellant there was not any sense in him taking the polygraph exam that Friday evening in that condition. Appellant replied that he had "nothing to hide." See McHale tape.

Lt. McHale told appellant his "story" was very consistent. When appellant inquired if the testing of the physical evidence — the hair — would be available that night, McHale told him that SLED stood for "stop, let's eat dinner." There was not any way SLED would have the hair examination results on a Friday night. See McHale tape.

Appellant was asked to return Saturday, the next day. McHale told appellant he could have a few beers, but to return fresh. Appellant answered that he would not drink at all before returning.

McHale told appellant if he "did this" he was probably still in denial and did not want to give himself away. McHale said the police would probably accuse four or five people of this crime, even though they knew only one person did it. McHale offered that these people would initially be angry with the police for being accused of a crime that they did not commit. See McHale tape.

McHale also insinuated the police had an eyewitness placing appellant at the bar that night. Appellant responded that whoever told the police they had seen him at the bar that night was wrong, and that he did not commit the crime. McHale suggested that often the person close to the victim knows who may have committed the crime, and McHale offered that he might question a suspect himself if he was in appellant's shoes.

Appellant responded that he did not think that it was a good idea for him to confront suspects. See McHale tape.

Appellant would not learn until a pre-trial hearing, as seen below — much later — that he was being set-up by this entire spectacle.

The state later admitted it used a “ruse” the following day, Saturday, May 15, 1997, when it set up a call from SLED to the police department where appellant was again talking with the police. Appellant was told the SLED analysis of the hair revealed it belonged to appellant. None of this was on videotape as was the McHale interrogation.

When informed the hair matched him, appellant “got real emotional, threw his hands up, started putting his hands on his head and just shaking and saying, ‘It can’t be,’ or something like that. And then he said, ‘It’s got to be. I must have done it.’ He said something about blacking out or something to that effect.”⁴ R. 357, ll. 7–16. In the presence of the jury, Tetanich said appellant “put his head in hands. You know, crying and going, ‘No, no, no. You know. I must have, no. It can’t be. You know. I must have blacked out.’” R. 1580, ll. 7–23.

Detective Tetanich admitted when he earlier talked with appellant, they agreed it was “a miracle” that the hair was not destroyed in the fire and appellant agreed that when the police “find out whose hair that is, you’re going to find the killer.” R. 343, ll. 5–18.

⁴The May 22, 2000, suppression hearing was held before Judge Cottingham. A supplemental suppression hearing was held before Judge Brown on February 26, 2001, after Judge Cottingham retired. The May 22, 2000, transcript was cited by the defense in motions, and the testimony from that hearing remained part of this case since it was all subject to cross-examination, and is not inconsistent in any particular as used briefly herein. Further, Judge Brown stated he had read the May 22, 2000, transcript in detail, and reminded the witnesses he would consider that testimony. Feb. 26th R. 634, ll. 1–18.

Once appellant made his "I must have done it," statement, Lt. Cumbee "showed him a picture of the victim, one photograph I think from the, from the crime scene. And, and said something to the, to the defendant about apologizing to Teresa or something like that, where — and he did. He apologized. He was crying. And he was, I mean tears were just flowing. And he said, 'I'm sorry. I'm sorry, Teresa. I'm sorry. I didn't mean to.'" R. 1581, ll. 3-12.

Although the law enforcement witnesses ducked and weaved when asked to admit that it arranged the "apology" to the victim's mother after appellant confessed, and called the media to let them know appellant would be paraded from the station to the jail, it eventually became unmistakably clear both incidents were as set-up as the original "I must have done it" confession. Law enforcement telephoned both the decedent's mother and the press after the confession. R. 365, l. 7 – 371, l. 12.

Channel Five television reporter Karlyn Lothery acknowledged that on Saturday, March 15, 1997, she received a telephone call from Detective Cumbee. She was told the police "were going to walk him . . . [so] we went up there and camped out where we do in those cases." Lothery said during the Jackson v. Denno hearing that she knew what the term "perp walk" meant. R. 422, l. 13 – 424, l. 13.

Lothery testified consistently in the presence of the jury. She said, "we received a phone call from Lieutenant Melvin Cumbee letting us know that they had made an arrest . . . that the defendant or suspect may want to make a comment. And we went up to the, to the police department to wait outside." R. 2069, ll. 1-12.

Appellant answered questions from the press. He told them it was an accident. He did not remember how many times he hit the decedent. He was not under the influence of alcohol or drugs. R. 2071, l. 2 – 2072, l. 14. See Media tape of file.

During the Jackson v. Denno hearing, Dr. Saul Kassin testified for the defense. He had a Ph.D. in social psychology and had “a fellowship at the US Supreme Court.” He was a professor of psychology at Williams College. R. 838, l. 25 – 839, l. 21. Dr. Kassin testified appellant’s confession was the “product of some fairly coercive set of influences.” R. 886, ll. 13-18. When the judge earlier ruled appellant’s confession was admissible and that it was a jury question on voluntariness, the judge said, “this is kind of a ‘comedy of errors’ from the very beginning, tragically.” R. 995, l. 2 – 998, l. 13.

The state concedes no physical evidence against appellant during the trial

The assistant solicitor told the jury at the start of appellant’s trial about the hair found underneath the decedent after the fire at the Mill Inn. He said, “And the bottom line of that testing *is that it [the hair] was either inconclusive or that it does not belong to Wes Myers.*” R. 1027, l. 6 – 1028, l. 17. (emphasis added). The solicitor acknowledged, “And I will admit that’s the one piece of forensic evidence we had in the case.” R. 1028, ll. 18-23. The solicitor also admitted that the only evidence against appellant was his admission to the crime under the circumstances briefly outlined above. R. 1028, l. 18 – 1029, l. 7. Detective Melvin Cumbee agreed with the solicitor in his sworn testimony during the pre-trial hearing. Cumbee admitted there was “no forensic evidence in this case to tie Mr. Myers to the murder.” R. 764, l. 22 – 765, l. 5.

In his opening remarks, defense counsel Kulp told the jury that the decedent had drunk about sixteen beers that evening and that she had the habit of “passing out” in the bar

and sleeping on the pool table. R. 1032, l. 1 – 1033, l. 2. Kulp told the jurors appellant's parents would testify that he was home the evening of the bar fire. R. 1033, l. 7 – 1034, l. 24.

In the presence of the jury, Deputy O'Neal testified on March 13, 1997, at 3:14 a.m., he was dispatched to a fire at the Mill Inn. R. 1063, l. 21 – 1064, l. 18. Fireman Kevin Cornell testified the fire department found that both the front and back doors were unlocked. R. 1073, l. 22 – 1074, l. 5.⁵ Cornell was surprised to find the decedent's body inside. R. 1078, l. 22 – 1079, l. 14.

Margaret White was a bartender at the Mill Inn. The decedent was her boss. R. 1089, l. 8 – 1090, l. 16. She testified that appellant and the decedent had a "rocky" relationship "mainly about Wesley's possessiveness and his drinking of liquor." R. 1091, l. 12 – 1092, l. 7. As will be seen *infra*, another state's witness, Billy Gene King, testified that appellant was concerned about the decedent's heavy drinking, and that was major point of contention. R. 2121, l. 17 – 2127, l. 11. White recalled that on the morning of the fire, bartender Allen White left a note for the decedent, which contained "sexual innuendoes."⁶ R. 1093, l. 25 – 1090, l. 9.

White did not remember seeing appellant at the bar that day at all. However, she testified that appellant called the decedent "a few times" on the telephone. R. 1099, l. 16 – 1100, l. 15.

⁵ Feb. 27, 2001, transcript.

⁶ Investigator Albert Hallman, with the North Charleston Police Department, found a note on the decedent's car in the parking lot of the Mill Inn. It was "written with some kind of clear wax pencil or grease pencil and it formed the words, I think it was 'I love you, baby. Do me later. 1102 Buist Avenue.'" R. 1229, l. 13 – 1230, l. 14.⁶

White recalled that the decedent fell asleep that night with her head on the bar. Her pants were unfastened. White explained, "she just got bloated, I guess. You know how you drink a few beers and you get bloated and just undo your britches so you have your belly rest." R. 1101, l. 5 – 1102, l. 23.

After 1:00 a.m. that morning, White awoke the decedent inside the bar, and asked if she wanted a ride home. The decedent told her that "she was going to stay there that night. So she finally got up and went to the pool table." R. 1103, l. 22 – 1105, l. 1.

White "did the money and paperwork" and put "some money in Teresa's purse and then the rest of the money I put in a paper – brown paper bag – we had paper bags in the freezer..." R. 1104, l. 7 – 1105, l. 17. When the bar closed at 1:24 a.m., the only people there were "Teresa, Tammy, Woody" and her. Woody was a customer, and Tammy was a co-worker. R. 1107, l. 23 – 1108, l. 3.

White said she locked all of the doors. R. 1108, ll. 11-20. White recalled: "after I locked the door, I turned around and a customer was coming up from his car from across the street, named Dana [Chaples]. And I told him the bar is closed, he'd have to come back tomorrow. He started coming up towards us and he went to my girlfriend, Tammy." White recalled that Chaples was drunk and tried "sweet-talking" Tammy. R. 1110, ll. 1-15.

White said the last time she saw Chaples, he was "getting into his car." White left the parking lot of the bar, and dropped Woody off "at home." R. 1110, l. 1 – 1111, l. 6. White acknowledged on cross-examination that when she saw Chapels the following day, he had shaved off his moustache. R. 1132, l. 13 – 1133, l. 18. White also said that Chapels "hit up on everybody" and that the decedent did not like him. R. 1135, ll. 10-23.

Tammy Gonzales also testified that after they closed the bar she saw Dana Chapels in the parking lot. Gonzales said Chapels made a pass at her in his drunken state. R. 1148, l. 5 – 1149, l. 15.

Gonzales remembered that when she left with White, she saw Chapels open his car door. However, "I didn't see him get in his car." R. 1148, l. 5 – 1149, l. 21. The following day, Chapels had shaved his moustache off.⁷ R. 1160, l. 10 – 1161, l. 11.

The state called appellant's mother, Rose Myers, as a witness. R. 1164, l. 23 – 1165, l. 10. Mrs. Myers is the principal of the School of the Arts in Charleston. She has twenty-seven years in education. Appellant is her only son. R. 1169, l. 22 – 1170, l. 15.

Mrs. Myers testified she had informed Detective Clayton that on the morning of March 13, 1997, that she got out of bed at 6:00 a.m. Appellant's "alarm went off right after that" and Mrs. Myers observed appellant going through his normal morning routine preparing for work. R. 1165, l. 11 – 1167, l. 8.

Mrs. Myers recalled that when appellant left that morning in his pickup truck, "it was dry under where the pick-up truck had been, and I said, 'Did it rain last night?' and he said, 'No. I think it was a heavy dew.'" R. 1167, ll. 17-25. Mrs. Myers testified that appellant's pickup truck needed a muffler and was very loud. She said appellant did not leave the home on the evening of the Mill Inn fire or she would have heard his truck. R. 1168, l. 20 – 1172, l. 7.

Appellant had similarly told Lt. McHale during the March 14, 1997, interrogation that his truck needed a muffler, and there was no way that he could have "snuck out" of the

house without everyone knowing he was leaving. That answer was in response to Lt. McHale's statement that he could sneak out of the house on his wife at night. See McHale tape.

Appellant's boss, Joseph Perry, at Midland Mechanical Millwright, a pipe fitting and welding company testified that appellant called him on the morning of March 13, 1997, as Perry was preparing to leave home for work. Perry said it was about 6:15 a.m. R. 1188, l. 10 – 1191, l. 1.

Perry would later admit he did not know where appellant was calling him from, but denied the police told him that appellant called him from a telephone near the Mill Inn fire – at Beasley's Mechanical Company. Perry testified appellant told him about the Mill Inn fire and he said appellant "was kind of upset." R. 1190, l. 22 – 1191, l. 21. Appellant told Perry he thought the decedent, Teresa, might have been inside and asked Perry to go inside the Mill Inn and check. R. 1191, ll. 2-21.

On cross-examination, Perry acknowledged that Beasley's Mechanical Company was just around the corner from the Mill Inn. Perry denied the police also had told him that appellant had been on the fire scene already when he made the call from Beasley's. Perry did admit he knew the decedent, and that he socialized at the bar. R. 1194, l. 23 – 1199, l. 6.

The police took a statement from Perry at 6:43 that morning. Perry had asked the police "where's Teresa?" or "what's the deal with Teresa." Perry said he only wanted to know if anybody was inside the burned bar, but admitted his questioning the police about a victim possibly being inside precipitated his being questioned about the fire. Perry also said

⁷ As will be seen *infra*, the defense alleged police misconduct not only over the confession, but for the failure to investigate, and to test other evidence that was

the police did not tell him appellant was also sitting in another police car at the scene with Detective Payne giving a statement at the same time he was being questioned. R. 1198, l. 21 – 1201, l. 20.

Appellant had mentioned Perry in his interview or interrogation with Lt. McHale. See McHale tape.

Detective Harry Roper testified that he was aware appellant had called Perry, but said he did not know whether appellant telephoned Perry from Beasley's Mechanical Contractors. R. 1205, l. 23 – 1207, l. 13. Roper also interviewed Dana Chapels and acknowledged that Chapels appeared to be "very nervous" when questioned about the fire. R. 1208, l. 2 – 1210, l. 1. Roper admitted Chapels avoided answering certain questions. R. 1210, ll. 2-14. Chapels was arrested at a traffic stop for having a gun in his possession. R. 1210, l. 10 – 1212, l. 17.

Roper recalled that Chapels claimed he learned from someone at Shores, another bar, that the decedent had been shot in the head, and that she had a hair in her hand. R. 1212, l. 20 – 1215, l. 19. Roper acknowledged he learned during his investigation that Chapels had come to the Mill Inn at 1:30 a.m. on the morning of the fire. Roper admitted that when he interviewed Chapels, Chapels denied being at the bar at all that night. R. 1218, l. 18 – 1220, l. 11.

The decedent was found laying face down inside the bar after the fire. "The front part of her body was virtually untouched by fire. She was wearing a black bra, I believe it was, and a white shirt and blue jeans. The shirt and the bra had been basically torn open, away from her body...when we rolled it [the decedent's body] over, the palm of her hand

exculpatory to appellant, and likely inculpatory of Chapels.

was slight, it was slightly open and I saw several hairs on the palm of her left hand." R. 1231, l. 14 – 1232, l. 22.

Outside the presence of the jury, defense counsel told the judge that mitochondrial DNA testing results showed the hair could not be identified as appellant's hair. Defense counsel noted that mitochondrial DNA was the "highest level of the DNA testing." Defense counsel argued the solicitor's office had not made any attempt to have the FBI testify because the evidence exonerated appellant. "[I]f it had been inculpatory they'd [the FBI] be out here in the hall right now." R. 1267, l. 2 – 1273, l. 18.

The solicitor said "[t]hey [the FBI] for some reason did not get the unknown. They called, SLED called him to ask if the unknown was back in the evidence room. He found it and sent it. " Defense counsel noted that the hair was not lost at all, but was "at the North Charleston Police Department the whole time." The solicitor claimed the hair was found in a box mailed to SLED from the FBI. The judge again mentioned "the comedy of errors," and said under the circumstances he was inclined to inform to jury that no one could be sure of the test results. However, defense counsel told the judge he could not agree to that because "the result is that the hair cannot be identified through mitochondrial DNA testing to be Wes Myers hair."⁸ R. 1271, l. 2 – 1272, l. 14. As will be seen *infra*, the defense would later present the expert DNA testimony of Dr. Terri Melton that the hair was not

⁸ As seen, the solicitor admitted to the jury that the state had no physical evidence linking appellant to the crime. However, the police told appellant the hair matched him to get him to confess. Further, the failure to test evidence until ordered to do so by Judge Rawl, the mishandling of evidence, and the failure to investigate concrete leads are all germane in this case.

appellant's hair: "based on my experience with this kind of testing, that this hair simply

542, l. 12 – 2066s not appear to have the same type as Mr. Myers."

Defense counsel noted his days as an FBI agent, and said the FBI had concluded "that there was no significant comparison between those two hairs that would warrant DNA testing." Although the solicitor disputed that fact, Court's Exhibit 1, the FBI laboratory report of examination reads "No hairs suitable for significant comparison purposes were found in specimens Q1 through Q3." That report was dated February 1, 1999. R. p. 2832. Another part of Court's Exhibit 1 dated February 17, 1999, noted that a head hair from the victim and the defendant had been received on July 7, 1998. The report also noted that a "slide containing debris" and a "vial containing debris" had been received on December 17, 1998.⁹ Court's Exhibit 1; R. 2829-2830.

As will be seen infra, the Honorable A. Victor Rawl had ordered the state to cooperate in having the physical evidence tested after the defense continued to complain the state did not have any interest in testing evidence since it had decided appellant's confession ended this case.

Despite all of the above, Detective Hallman said earlier in the presence of the jury that he was led to believe by SLED agent Powell on Friday, apparently the day after the murder, that the hair matched appellant's hair. The defense objected to the word "match" because it was not the appropriate scientific term for the alleged similarities observed. The similarities were allegedly based on the length of the hair found, its tone, appellant's "rat

⁹ Hallman testified when the hair was returned to the North Charleston Police Department from the FBI, the container contained "broken glass." Hallman claimed that the hair returned from the FBI had "absolutely no resemblance to what I sent to the FBI whatsoever." R. 1301, l. 4. – 1302, l. 22.

tail," and that half of the hair was supposed to be dyed. R. 1254, l. 4 – 1256, l. 14. The defense disputed the fact appellant had a rat tail, and SLED agent Powell would later admit that SLED would not even given an opinion today on the basis of the "science" it used to call a "match" in this case. See McHale tape that was played for the jury on appellant's hair.

SLED agent Powell defended his having told Detective Hallman that microscopically the hair he examined matched appellant. However, Powell also said "I cannot say at the exclusion of everyone else in the world. I can say that the characteristics of the hairs that I looked at from his standard fall or are consistent with the unknown hair, so thus it *could have come from him. It could have come from someone else.*" R. 1382, ll. 3–17. (emphasis added).

Powell admitted that the defense wanted DNA testing on the hair, and the type of examination he conducted — "this type of examination itself is no longer, in my laboratory, a primary source of information to go the court with . . ." Powell said "we're finding DNA saying no [match], they're not a match, where in the microscopic they do." R. 1403, l. 18 – 1405, l. 4.

Powell acknowledged the hair he examined was long, and Detective Hallman told him appellant "had a rat tail. *I said Okay. Then that would explain that.*" R. 1405, ll. 1–15.

While acknowledging the controversy over the use of the word match in his examination, Powell maintained that he considered the terms "match," and "can be considered" but "also can be considered by a unknown number of other people," to be "equivalent." R. 1406, l. 7 – 1408, l. 18.

Powell admitted he was not working on Saturday, March 15, 1997, at SLED when, as seen, appellant was informed that SLED had just telephoned with the results of the hair examination, and that it matched his hair. R. 1405, l. 16 – 1406, l. 21.

Detective Denver Clayton testified about the ruse the day after the McHale interview or interrogation. Clayton said appellant was very cooperative with the police and told him that he was going “to do whatever it takes to find out who did this.” As seen, appellant was told by Lieutenant Cumbee that the victim had hairs in her hand and appellant agreed that the hair would be matched to the murderer. R. 1662, l. 12 – 1664, l. 4.¹⁰

Detective Clayton testified in the presence of the jury, by consent, that appellant agreed to take the polygraph, but one was never administered it.¹¹ R. 1669, ll. 8-22. As seen, that Friday afternoon appellant was talking with the detectives at the police station. Clayton acknowledged that there were photographs of the deceased victim laying on Lieutenant Cumbee's desk, but he did not know if appellant saw them or was shown them.¹² R. 1670, ll. 3-25. Appellant declined the invitation to go to lunch with the detectives that day. R. 1671, l. 7 – 1672, l. 4.

Clayton testified while at lunch on Friday, before the McHale interview with appellant, that Lieutenant Cumbee received a telephone call from Albert Hallman saying “that the hair matched the – the defendant.” R. 1671, ll. 1-21. Clayton did not participate in

¹⁰ March 1, 2001, transcript.

¹¹ Clayton “let slip” during his testimony on direct examination that a polygraph was planned. Under the principle of a bell once rung cannot be unrung, the attorneys agreed to let the jury hear this testimony.

¹² The significance of this was that appellant could ascertain much about the crime scene if he saw these photographs. Regardless, the confession was not written by appellant, but by the detective.

the interview by McHale that day which set up appellant's "I must have done it" admission. R. 1672, l. 22 – 1675, l. 13.

In the statement written for appellant following the successful ruse, it was written that appellant "lost control" with the decedent after he confronted her about the Allen White note, and that she hit him. State's Exhibit 3 at R. 2744-2745. The statement said the decedent had grabbed the "glass wine craft," and "like a blur I lost control." The statement stated that appellant started a fire with some papers behind the bar, and "I remember I wanted to die." R. p. 2745. Appellant would later present expert testimony from Dr. Gerald Hurst, whose credentials were impeccable, who said accelerants were actually used to start the fire, and that the state's "paper" theory of the origin of the fire was simply wrong. R. 2479, l. 15 – 2492, l. 18; R. 2503, l. 4 – 2504, l. 4.

The defense did not learn of the ruse until the August 7, 1997, pre-trial hearing before the Honorable Daniel F. Pieper. The assistant solicitor then admitted that the events surrounding the March 15, 1997, confession were a ruse. The defense complained at that time that the report did not say what happened had been a ruse. Defense counsel then said, "At least I know a lot more about it now. R. 97, l. 2 – 100, l. 20.

Other evidence

State's witness Billy Gene King knew the decedent and he knew appellant. King opined that the decedent was "head-over-heels" with appellant in the beginning, but that did not last. King said appellant was possessive, and King said he did not try to become involved in any arguments between the two. R. 2117, l. 11 – 2120, l. 9.

King recalled one incident where the decedent slapped appellant. King opined, "she [the decedent] could take care of herself." King also testified appellant got angry with the decedent for getting drunk, and he claimed appellant threatened to burn down the Mill Inn about two weeks before the fire. King acknowledged on cross-examination that appellant made the "burn down" comment because "he was concerned about her drinking the night prior to that . . . and he said she got drunk the night before and he just said, 'I don't know what I'm going to do with our girl.'" King admitted he did not think appellant was jealous. R. 2121, l. 17 – 2127, l. 11.

A surprise witness appeared at the end of the state's case. The state had earlier acknowledged it had no evidence linking appellant to crime except his confession. Laurie Villalobos testified that she knew the decedent "'very well.'" R. 2148, ll. 13–23.

Villalobos had never talked to the police in the four years between the fire, and the night before her trial testimony. She claimed that she saw Tammy Gonzalez at a bar the afternoon before at about 4:15 p.m., and Gonzalez told her she had been watching the trial, and told her appellant "was using as a defense the fact he was not there that night." Villalobos claimed she went by the Mill Inn on the night of the fire, and saw appellant there. She admitted she had been drinking that night, and said she could not tell from her telephone conversation with the decedent whether the decedent was intoxicated. R. 2151, l. 20 – 2154, l. 1; R. 2159, l. 4 – 2161, l. 10; R. 2169, ll. 16–18.

Villalobos said she took a taxi to the Mill Inn and arrived between 1:30 and 2:30 in the morning. The door was locked, and she claimed appellant let her in. She testified the victim was crying inside. Villalobos said the decedent told her "she could handle it, I'll be

okay." Villalobos said the decedent cashed her check and she left. R. 2154, l. 11 – 2156, l. 3.

Villalobos never came forward with her allegation "because I didn't think anyone would believe me." R. 2158, l. 25 – 2159, l. 14. Villalobos denied Tammy Gonzales told her the trial was not going well for the state. R. 2171, l. 13 – 2172, l. 12. Villalobos' boyfriend at the time, Carl Chaplin, testified that Villalobos never said a word to him about allegedly seeing appellant at the Mill Inn on the night of the fire. R. 2224, l. 6 – 2226, l. 8.

DNA expert Michael DeGuglielmo testified his laboratory did DNA profiles on the wine carafe, the blood on a dollar bill, and the blood on a meat cleaver, all of which were at issue. The meat cleaver did not produce any results. R. 1924, l. 1 – 1926, l. 7. DeGuglielmo said there were mixtures of DNA found on the other objects, one that matched the victim. However, DeGuglielmo testified that none of the blood items tested was consistent with appellant's DNA. R. 1926, l. 8 – 1930, l. 7.

ATF agent Lester Rich testified for the state that in his opinion the fire started behind the bar, and that the fire started from an open flame to materials found behind the bar. Rich said he ruled out an electrical fire, and said he did not collect any samples to test for accelerants. However, Rich opined "from the burn patterns" that it did not appear any accelerants were used. R. 1857, l. 2 – 1858, l. 11.

Dr. Gerald Hurst had a doctorate in chemistry from Cambridge University. Dr. Hurst founded an explosives manufacturing corporation in Dallas in 1969, and was involved in explosives work during the "moon race." R. 2428, l. 13 – 2437, l. 12.

Dr. Hurst testified that common fire investigations, such as the one in this case, were the "poor stepchild" of forensic science. R. 2437, l. 13 – 2438, l. 9. Dr. Hurst said that the

Mill Inn fire was started with an accelerant, and explained his findings on the burn pattern to the jury. "For me, the pictures are pretty convincing. Somebody literally torched the area of this body." R. 2479, l. 15 – 2492, l. 18; R. 2503, l. 4 – 2504, l. 4. Appellant's statement, of course, said the fire was started with paper. R. 2747.

Dr. Terri Melton was president and laboratory director at Mitotyping Technologies. The state stipulated to her expertise in mitochondrial DNA analysis. R. 2538, l. 11–22.

After testing the degraded hair sample in this case, Dr. Melton agreed, "the sequence developed from the two zero five six K. one, Wesley Max Myers type, does not match the sequence presumed to be the hair type." R. 2547, ll. 3–11. Based upon "company policy, Dr. Melton reported her findings on the hair as inconclusive. However, she acknowledged her person opinion "that based on my experience with this kind of testing, that this hair simply does not appear to have the same type as Mr. Myers." R. 2547, l. 12 – 2553, l. 14.

1.

The court erred by admitting an anger management questionnaire against appellant which concerned his problems with controlling his emotions. Any probative value this anger management questionnaire had was substantially outweighed by its unduly prejudicial effect. The state's theory of the case was that appellant became enraged at the victim when he killed her, and this dated anger management questionnaire had the effect of impermissibly leading the jury to conclude appellant was acting in "character" when the victim was killed.

Anger Management Questionnaire

Detective Clayton testified that appellant consented to a search of his house and his automobile. R. 1674, l. 14 – 16777, l. 12. Clayton said that none of the times taken from appellant were of any evidentiary value in this case. R. 1677, ll. 10-20.

When Clayton was asked by the solicitor if he collected a document from appellant's house, the jury was sent out. R. 1677, l. 21 – 1678, l. 5. A discussion out of the presence of the jury was then held on the seized "anger management questionnaire." Defense counsel argued the document was not dated, and it could have been taken four or five years prior to this incident. Counsel argued that it was more prejudicial than probative. The solicitor claimed, "Of course it's prejudicial, Judge. But it's also very probative." R. 1678, l. 4 – 1679, l. 23. The judge ruled, "I think its probative value exceeds the prejudicial effect, so I'll allow it." R. 1679, l. 21 – 1680, l. 3.

The solicitor then questioned Clayton about the anger management questionnaire. R. 1680, l. 17 – 1681, l. 20. The anger management questionnaire was then put into

evidence by the state. That questionnaire, State's Exhibit #29, is before this Court for consideration. R. 1681, ll. 6-20; R. 2748.

In this document that went to the jury, appellant acknowledged that when he showed his anger over becoming mad, "Look out!" The questionnaire also stated appellant often found himself having heated arguments with people who were close to him, that he lost control of his emotions, and that he became angry or felt betrayed when the people he trusted let him down. R. 2748.

Appellant admitted in this treatment document that he could not put his anger out of his mind, that some people were afraid of his bad temper and "*I felt angry enough to kill.*" R. 2749. (emphasis added). Appellant acknowledged needing help to control his temper and angry feelings. R. 2749.

In this anger checklist, appellant said that he sometimes laid awake at night and thought about things that upset him during that day. R. 2748. Appellant also acknowledged that he got angry with himself when he lost control of his emotions. R. 2748. Appellant also stated that sometimes he felt so hurt and alone, he felt like committing suicide. R. 2749; R. 1718, l. 20 – 1720, l. 24.

In his confession, Clayton said appellant told him that he found the pink note from Allen White on the bar at approximately 2:00 a.m. when he went to check on the decedent. R. 1704, l. 4 – 1705, l. 3. Clayton said appellant became angry when he asked the decedent about the note and when she pushed him away. R. 1704, l. 12 – 1705, l. 3. Clayton said appellant related that the decedent grabbed a "glass wine carafe and told me, 'get away.' I grabbed the wine carafe from her. Then she pushed me in the face. I struck her in the center of the head with the wine carafe. Both of us went down to the floor. Like a blur. I lost

control...I was raged, upset, real mad. I couldn't believe what she was saying." R. 1705, ll. 4-22; R. 2747.¹³

Closing argument by the state

The solicitor was arguing the anger management checklist very early into his closing argument. It was a theme. The solicitor reminded the jurors of many items in the checklist, including the "look out" when I get angry line, and the "at times I felt angry enough to kill" line. R. 2629, l. 23 – 2631, l. 14.

The solicitor then said, "Now, against this backdrop, let's look at what happened on March twelve . . . [the] early morning hours of March thirteenth." R. 2631, ll. 15–19.

Discussion

Rule 403, SCRE, provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

The anger management questionnaire worksheet in this case was explosively prejudicial. The state's theory of the case was that appellant became enraged at his girlfriend, the decedent, and killed her. It was the theme of the state's closing argument, and the solicitor told the jurors it provided the "backdrop" under which they should analyze the evidence.

What the state did in this case was to use the anger management questionnaire to have the jury think appellant was probably guilty of killing the decedent because she was

¹³Appellant's statement; R. 2744-2745.

close to him, appellant admitted to having a bad temper, and to having felt angry enough to kill in the past. That was an unacceptable basis for a murder verdict, particularly given that almost no evidence existed against appellant besides the “ruse” coerced confession.

The Supreme Court has held that undue prejudice means an undue tendency to suggest a decision on an improper basis. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001); State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001). It is difficult for appellant to imagine a case where that holding applies more than in this case — on this issue.

In State v. Saltz, the Court held that evidence appellant missed school one day following the victim’s disappearance was not even relevant evidence. Further, witnesses’ thoughts and feelings about what could have occurred did not make the existence of any fact of consequence to the case more or less probable.

Defense counsel here correctly argued that there was no way to ascertain the age of the anger checklist since it was not dated. Although appellant apparently wrote that some of these anger symptoms had been assisted by counseling, there was not any way to tell which symptoms he did not think were problematic following treatment. R. 2748. The trial judge abused his discretion by ruling the probative value of this anger management questionnaire outweighed its prejudicial effect.

Further, the error was not harmless in this case. Cf. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). The evidence in this case was slim. Appellant’s inculpatory statement was made under very strange circumstances. The “I must have done it” confession was obtained through trickery based on a hair found on the victim’s body that did not match appellant.

The surprise testimony of Lori Villalobos that appellant let her in the bar that evening was simply not credible. The witness did not contact the police for four years because she did not think anyone would believe her. Further, her former boyfriend, Carl Chaplin, testified Villalobos never mentioned seeing appellant inside the bar with the decedent to him.

The anger management document was extremely prejudicial, and any probative value it had was substantially outweighed by its extremely prejudicial effect. Rule 403, SCRE. Appellant should be granted a new trial.

2.

The court erred by ruling Dr. Saul Kassin could not use other examples or facts of interrogations from other states to illustrate his opinion before the jury. Dr. Kassin's testimony was admissible under Rule 702, SCRE, because it was helpful to the jury. Therefore, Dr. Kassin had the right to testify about facts and data he relied on.

During the Jackson v. Denno hearing, the defense called Dr. Saul Kassin as a witness. As stated, Dr. Kassin had a Supreme Court fellowship. He had written extensively on the process of interrogation. R. 839, l. 2 – 842, l. 3.¹⁴

Dr. Kassin testified in camera that he had studied the process of interrogations and confessions and served “as an expert witness in a number of trials, military, state trials, on that topic.” R. 842, ll. 4-13. The solicitor did not challenge Dr. Kassin's qualifications, but reserved the right to cross-examine him in front of the jury. R. 842, l. 19 – 845, l. 15.

Dr. Kassin considered the police reports, interviews, videotapes, and appellant's two statements in this case. R. 847, l. 12 – 848, l. 4. Dr. Kassin said these were the typical documents relied upon when testifying in a case such as this one. R. 848, ll. 1-11.

Dr. Kassin said that people did confess to crimes that they did not commit. He testified that it was difficult to put an exact figure on the number of confessions that were false. R. 850, l. 6 – 851, l. 11.

Dr. Kassin said the legal profession was usually able to tell if a confession was false by later DNA tests that exonerated the person, or by another person confessing to the crime. At times, it turned out the crime had not been committed at all. R. 851, l. 2 – 852, l. 2.

¹⁴ February 26, 2001, transcript.

As will be seen infra, Dr. Kassin effectively illustrated his points during the Jackson v. Denno hearing with actual cases he had studied and relied on. The solicitor objected to the expert being allowed to do the same before the jury, and the judge ruled Dr. Kassin could not do the same before the jury. It is important to note that Dr. Kassin never sought to give the jury his opinion on whether appellant's confession was false, the defense only sought to give the jury the underlying base of facts and data Dr. Kassin relied on in his testimony.

In camera, Dr. Kassin gave the example Billy Jean Davis in Austin, Texas, who confessed to the murder of his ex-girlfriend when she had disappeared. Following his confession, she showed up alive in Tuscon, Arizona. R. 851, l. 12 – 852, l. 2.

Dr. Kassin also cited a New York case where Robert Moore confessed to an armed robbery/murder, but then ballistics evidence disproved the confession, and a second person pled guilty to the crime. R. 852, ll. 2-13.

Dr. Kassin noted that in the Charles Lindbergh's baby kidnapping case, "two hundred people volunteered confessions to that kidnapping. You see it today in a number of cases. In the federal case I was involved in a few years ago, the police had to sift through three or four suspects, all of whom had confessed, and to their credit, what they did was they looked at other evidence that corroborated or didn't corroborate those confessions." R. 853, ll. 1-14.

Dr. Kassin then explained that there were several reasons why people gave false confessions. They may want to protect someone else, such as a loved one or friend. They may have a pathological need for attention or want to have their name in the newspaper. R. 853, l. 16 – 854, l. 20.

Dr. Kassin testified that a coerced compliant confession was a confession where a person finally succumbed to pressure, and capitulated. R. 854, l. 21 – 855, l. 24. Dr. Kassin cited an example of a compliant false confessions from Arizona where one person phoned in a confession and implicated three others. The other people eventually confessed, but a ballistics report showed those confessions were not true. R. 856, ll. 3-19.

Dr. Kassin said that although it was difficult to understand a false confession, a person interrogated is easily told there is independent overwhelming evidence of their guilt. Those people wanted to “get out of a bad situation, even though that short term benefit did not make any sense.” R. 856, l. 20 – 858, l. 20.

Dr. Kassin then explained that highly suggestive interrogation techniques, coupled with questionable memories, could also lead to a false confession. R. 857, l. 20 – 860, l. 7.

Dr. Kassin then cited a Connecticut case where a man by the name of Peter Reilly came home to find his mother dead on the floor. He called the police and thought he was helping in the investigation. R. 860, l. 8 – 862, l. 7.

The police in Connecticut gained Reilly’s trust, he took a polygraph test, and was told that he failed the polygraph. Reilly was also told that the polygraph was infallible. Reilly could not believe he committed the crime, but Dr. Kassin said people then begin to wonder if they had actually committed the crime. The investigator suggested, “that happens all the time. People black out these sorts of things.” Reilly then said, “Well, then, I guess I must have done it.” And he gave a confession.” Dr. Kassin said Reilly had actually come to believe his own confession. R. 860, l. 8 – 862, l. 7.

Dr. Kassin also cited an Indiana confession by a man named Edgar Garrett. He was accused of killing his daughter and throwing her in the lake. Garrett ultimately