

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
J. Derham Cole, Circuit Court Judge

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S.C. Supreme Court

Opinion No. 5156 (S.C. Ct. App. filed 7/3/2013)
08-GS-42-05308, 05308A

THE STATE,

RESPONDENT,

V.

MANUEL ANTONIO MARIN,

PETITIONER

APPELLATE CASE NO. 2013-002001

APPENDIX

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INDEX

INDEX	i
OPINION NO. 5156 FILED JULY 3, 2013	1
PETITION FOR REHEARING FILED JULY 18, 2013	10
ORDER DENYING PETITION FOR REHEARING FILED AUGUST 22, 2013	15

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Manuel Marin, Appellant.

Appellate Case No. 2010-177349

Appeal From Spartanburg County
J. Derham Cole, Circuit Court Judge

Opinion No: 5156
Heard February 5, 2013 – Filed July 3, 2013

AFFIRMED

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Appellant.

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Solicitor Russell D. Ghent, both of Spartanburg, for
Respondent.

FEW, C.J.: Manuel Marin appeals his convictions for murder and possession of a weapon during the commission of a violent crime. He argues the trial court erred in (1) refusing to instruct the jury that a person acting in self-defense has the right

to continue shooting until the threat has ended and (2) refusing to charge the jury on South Carolina Code subsection 16-11-450(A) (Supp. 2012), which provides immunity from prosecution for persons "justified in using deadly force." We affirm.

I. Facts and Procedural History

On July 20, 2008, Marin attended a Colombian Independence Day party at a nightclub in Greenville. His acquaintance Nelson Tabares was also present, and after several hours Tabares became so intoxicated he was unable to drive. Marin claimed to know where Tabares lived and offered to drive him home. The bouncer at the club testified that Tabares, although still able to converse, was stumbling around the club and needed help getting to Marin's vehicle.¹ The bouncer and Alfredo Jimenez helped Tabares into the backseat. Marin drove, with Jimenez in the passenger seat, towards Tabares's home in Greer.

Marin testified he and Jimenez were discussing politics when "all of a sudden Mr. Tabares says 'I'm sorry but he's got to go.' And he jumps up and he grabs me in a headlock." This caused the vehicle to swerve into the oncoming lane and head toward a telephone pole. After the initial attack, Marin was "very scared" and decided not to take Tabares home. He testified, "I was just trying to find a public place . . . where I could . . . possibly jump out of the car and get some help."

Marin apparently drove for some time after the initial incident, eventually reaching downtown Spartanburg. He testified, "Everything was dark and everything was closed. I mean, I was looking for a public place with people somewhere stopped,

¹ At the time of his death, Tabares's blood alcohol level was .323. The pathologist testified that "at a .300 level everybody is drunk." Perhaps the pathologist was engaged in understatement, as medical literature generally rates the consequences of such a high level of blood alcohol to be much more severe than "drunk." See, e.g., Vincent J. DiMaio & Dominick DiMaio, *Forensic Pathology* 519 (2d ed. 2001) (listing symptoms of blood alcohol levels above 0.300 as "impaired consciousness, stupor, unconsciousness"); James C. Garriott & Joseph E. Manno, *Pharmacology and Toxicology of Ethyl Alcohol*, in *Garriott's Medicolegal Aspects of Alcohol* 25, 28 (James C. Garriott ed., 5th ed. 2008) (listing symptoms of blood alcohol levels above 0.350 as "complete unconsciousness, coma, anesthesia, depressed or abolished reflexes . . . and possible death").

but everything, I mean, it was dark. Nothing seemed to be open." He explained Tabares repeatedly tried to grab the steering wheel and Marin repeatedly pushed him into the backseat.² After Tabares again tried to run the car off the road, Marin pulled his loaded gun out of the glove compartment and shot him. Tabares died from two gunshot wounds to the back of his head.

The trial court charged the jury on murder, voluntary manslaughter, and self-defense. After the charge, the court asked, "Are there any [objections] to the instruction or requests for additions to the instruction?" Marin renewed his earlier request that the court charge immunity under subsection 16-11-450(A). Marin also stated, quoting language from the dissenting opinion in *State v. Rye*, 375 S.C. 119, 651 S.E.2d 321 (2007), "I would like . . . , 'If the defendant is justified in defending himself or others and in firing the first shot, then the defendant is also justified in continuing to shoot until it is apparent that the danger of death or serious bodily injury has completely ended.'" 375 S.C. at 134, 651 S.E.2d at 328 (Moore, J., dissenting) (quoting the jury charge from the trial of that case). The trial court denied both requests. The jury found Marin guilty of murder and the trial court sentenced him to life in prison.³

II. The "Continuing to Shoot" Charge

This court will not reverse a trial court's decision to refuse a specific request to charge unless the trial court committed an error of law. *See State v. Commander*, 396 S.C. 254, 270, 721 S.E.2d 413, 421-22 (2011) ("An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion."); *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law . . ."). The trial court is required to charge the correct law applicable to the case. *State v. Mattison*, 388 S.C. 469, 478-79, 697 S.E.2d 578, 583 (2010); *State v. Burkhardt*, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002). When a party requests

² Jimenez, the passenger and only other eyewitness in this case, did not testify at trial. Multiple witnesses testified that Jimenez's statements to law enforcement immediately after the incident and while assisting investigators with recreating the events leading up to Tabares's death corroborated Marin's trial testimony.

³ Pursuant to subsection 16-23-490(A) of the South Carolina Code (2003), the trial court did not impose a sentence for possession of a weapon during the commission of a violent crime.

the trial court charge a correct and applicable principle of law, the court must charge it. *State v. Brandt*, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011). However, the court is not required to use any particular language in explaining the principle. *Id.*; *Mattison*, 388 S.C. at 479, 697 S.E.2d at 583; *Burkhart*, 350 S.C. at 261, 565 S.E.2d at 303. When reviewing a challenge to a trial court's refusal to use the specific language in a request to charge, an appellate court must consider the charge as a whole in evaluating whether the trial court charged the correct law applicable to the case. *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603; *Barber v. State*, 393 S.C. 232, 236, 712 S.E.2d 436, 438 (2011). Therefore, there is no error of law in refusing to give a specific request to charge where (1) the charge requested is an incorrect statement of law, or (2) the trial court used language different from that requested, but considering the charge as a whole, the charge as given stated the requested principle of law correctly. As we will explain, we find no error.

We are concerned the charge Marin requested is not a correct statement of law.⁴ Self-defense is premised on a person's right to use deadly force when, under the circumstances, he reasonably believes such force is necessary to prevent death or serious bodily injury. *See State v. Davis*, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984) (describing the third element of self-defense—"a reasonably prudent man of ordinary firmness and courage would have . . . belie[ved] he was in imminent danger") and requiring for "actual[] . . . imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself"). Therefore, if the State has not proven the absence of any other element, *see id.*, a person may use deadly force in firing the first shot when he reasonably believes it is necessary to prevent death or serious bodily injury. Under the language requested by Marin, however, a defendant could continue to shoot even if the first shot changed the circumstances to make the use of deadly force no longer reasonable, so long as the initial danger has not "completely ended." Thus, according to Marin's requested charge, the jury could

⁴ We do not mean to imply Justice Moore made an incorrect statement of law. In fact, the quote from *Rye* is not Justice Moore's statement at all, but a portion of the trial court's jury charge in that case, from which Justice Moore quoted extensively in his dissent. Justice Moore did not quote the jury charge to say it was correct, but to support his argument that it adequately covered the law on the subject of a proposed charge the trial court refused to give. *See* 375 S.C. at 134, 651 S.E.2d at 328 (Moore, J., dissenting) (stating "[i]t was unnecessary for the trial court to use the proposed charge when his charge to the jury adequately covered the contents of the proposed charge.").

determine that the danger almost completely ended after the first shot, and that no reasonable person would believe it was necessary to continue to shoot; however, the jury would nevertheless be required to find the defendant not guilty because a minimal danger to him remained—that is, the danger had not *completely* ended. Because the requested charge required the State to prove the danger had completely ended before it could defeat self-defense, and thus the charge allowed the use of deadly force when it was no longer reasonably necessary to prevent death or serious bodily injury, we question whether the charge contained a correct statement of law.

Even to the extent Marin requested that the trial court give the "continuing to shoot" charge using correct language—that a defendant may continue to shoot as long as he reasonably believes it is necessary to use deadly force—we find the trial court did not err in refusing to give the charge.

Our supreme court used language similar to the charge Marin requested in opinions in addition to the dissenting opinion in *Rye*. In *Douglas v. State*, 332 S.C. 67, 504 S.E.2d 307 (1998), the court quoted the trial court's charge to the jury, "[I]f the defendant was justified in using force and firing the first shot, he is justified in continuing to shoot until it appears that any danger to his life and body has ceased." 332 S.C. at 72, 504 S.E.2d at 309. The supreme court approved the charge as a proper way to deal with a different issue than the one we face in this case.⁵ In *State v. Hendrix*, 270 S.C. 653, 244 S.E.2d 503 (1978), the court faced the question of whether the trial court erred in refusing to direct a verdict for the defendant. 270 S.C. at 654, 244 S.E.2d at 504. In the course of discussing its holding that self-defense existed as a matter of law, 270 S.C. at 661-62, 244 S.E.2d at 507, the supreme court stated "the rule is also that 'when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased.'" 270 S.C. at 661, 244 S.E.2d at 507 (quoting 40 C.J.S. *Homicide* § 131(b) (1944)).

⁵ The issue in *Douglas* was whether the trial court erred in refusing to charge the jury "the defendant . . . has the right to use such necessary force as required for his complete protection from loss of life or serious bodily harm and cannot be limited to the degree or quantity of attacking opposing force." *Id.* The supreme court found that the "continuing to shoot" language was "consistent" with the requested charge and thus "the trial court's refusal to give Douglas's requested charge was not error." 332 S.C. at 73, 504 S.E.2d at 310.

From *Douglas*, we may infer that it is permissible for a trial court to instruct the jury that a defendant may continue to shoot as long as he reasonably believes it is necessary to continue to use deadly force. However, neither *Rye*, *Douglas*, nor *Hendrix* answers the question before us in this case—whether the trial court was required to charge this point to the jury.

Marin's request to charge derives from the correct principle of law that, if no other element has been disproven, any particular act of deadly force done in self-defense is justified if the act was reasonably necessary to prevent death or serious bodily injury, under the circumstances as they existed at the time of the act. *See State v. Dickey*, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (stating one "is justified in using deadly force in self-defense when . . . a reasonab[ly] prudent man of ordinary firmness and courage would have entertained the same belief"); *see also* S.C. Code Ann. § 16-11-440(C) (Supp. 2012) (codifying the right to use deadly force under certain circumstances if one "reasonably believes it is necessary to prevent death or great bodily injury"). Considered as a whole, the trial court's charge explained this principle of law. Therefore, we find there is no error, even though the trial court did not charge the "continuing to shoot" language Marin requested. *See Brandt*, 393 S.C. at 549, 713 S.E.2d at 603 ("The substance of the law is what must be charged to the jury, not any particular verbiage." (citation and quotation marks omitted)).

In this case, the trial court charged the jury:

Th[e] law recognizes the right of every person to protect himself or herself . . . from intruders and attackers and from death or sustaining great bodily injury while in his home, business, or vehicle. And to do this a person may use such force as is reasonably necessary even to the point of taking human life if such is reasonable to prevent death or great bodily injury to himself or to another person.

This excerpt from the trial court's charge includes the legal principle underlying Marin's request—in its correct formulation—that a person may use deadly force when it is reasonably necessary to prevent death or serious bodily injury. Under this correct formulation, a person who is justified in firing a first shot may lawfully shoot again if the second shot is reasonably necessary under the circumstances as they exist at the time of the second shot. Under the specific language of the trial

court's charge in this case, Marin "may use such force as is reasonably necessary [i.e., fire the second shot] . . . if such is reasonable to prevent death or great bodily injury."

The role of the trial court is to charge the jury correctly based on the evidence presented at trial. *Brandt*, 393 S.C. at 549, 713 S.E.2d at 603. The lawyers bear the responsibility to argue how a point of law affects the jury's interpretation of the evidence. When Marin made his request for the charge, quoting *Rye*, the trial court stated, "And that was an instruction? That sounds like a comment on the facts to me." It then stated, "Well, I certainly think that is proper argument." The trial court correctly observed it was the task of Marin's trial counsel to argue that the second shot was reasonably necessary under the circumstances, either because the initial danger of Marin losing control of the car persisted, or for some other reason. The charge the trial court gave enabled that argument by informing the jury that "a person may use such force as is reasonably necessary even to the point of taking human life if such is reasonable to prevent death or great bodily injury." We find the trial court's refusal to charge the "continuing to shoot" language requested by Marin was not error.

Marin argues, however, that this case is controlled by the supreme court's decision in *State v. Fuller*, 297 S.C. 440, 377 S.E.2d 328 (1989), in which the supreme court "instruct[ed] the trial court to consider the facts and circumstances of the case at bar in order to fashion an appropriate [self-defense] charge." 297 S.C. at 443, 377 S.E.2d at 330. Fuller argued on appeal the trial court erred in refusing to give three charges he requested: (1) "a defendant . . . has the right to act on appearances," 297 S.C. at 443, 377 S.E.2d at 331; (2) "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense," 297 S.C. at 444, 377 S.E.2d at 331 (quotation marks omitted); and (3) "an individual ha[s] no duty to retreat if by doing so he would increase his danger of being killed or suffering serious bodily injury." *Id.* The supreme court began its analysis by stating that the trial court correctly charged the elements of self-defense by taking "language . . . directly from the *Davis* case." 297 S.C. at 443, 377 S.E.2d at 330. As to each of the three charges requested, however, the supreme court found the request contained a substantive principle of law the supreme court had previously approved, which was not contained in the charge the trial court gave, and that facts

in the record supported the charge.⁶ On this basis, the supreme court reversed. 297 S.C. at 445, 377 S.E.2d at 331.

We find this case distinguishable from *Fuller* because the trial court here covered in its charge the substantive principle of law Marin requested—that a person may use deadly force when he reasonably believes it is necessary to do so under the circumstances. The trial court having correctly and adequately charged the jury, it was the trial lawyer's responsibility to argue how the principle of law affected the facts of the case.

III. Immunity Under Subsection 16-11-450(A)

Marin also argues the trial court erred in refusing to charge the immunity from prosecution provision contained in South Carolina Code subsection 16-11-450(A). We find the trial court correctly refused to charge this subsection because it does not contain any substantive provisions of law. Rather, it is a procedural subsection under which the circuit court may grant immunity from prosecution before a trial begins if the court finds the defendant acted lawfully in self-defense. *See id.* (providing "[a] person who uses deadly force as permitted by the provisions of this article or another applicable provision of law is justified in using deadly force and

⁶ As to the "act on appearances" charge, the court stated it "articulated" that rule in *State v. Jackson*, 227 S.C. 271, 277, 87 S.E.2d 681, 684-85 (1955), and it cited *State v. Rivers*, 186 S.C. 221, 229, 196 S.E. 6, 10 (1938). *Fuller*, 297 S.C. at 443-44, 377 S.E.2d at 331. The court stated *Fuller* was "entitled" to the charge "because he testified that he saw [the victims] open the trunk of their car and also thought he saw a shiny object in [one victim]'s hand." 297 S.C. at 444, 377 S.E.2d at 331. As to the "words accompanied by hostile acts" charge, the court cited as authority for the charge *State v. Harvey*, 220 S.C. 506, 518, 68 S.E.2d 409, 414 (1951), and *State v. Mason*, 115 S.C. 214, 216, 105 S.E. 286, 287 (1920). *Fuller*, 297 S.C. at 444, 377 S.E.2d at 331. The court stated *Fuller* was "entitled" to the charge because one victim "stated 'he was going to take care' of *Fuller*" and both victims threatened him with a racial slur. *Id.* As to the "no duty to retreat" charge, the court stated it had "approved such a charge in *State v. Jackson*, 227 S.C. 271, 87 S.E. (2d) 681 (1955) and *State v. Hardin*, 114 S.C. 280, 103 S.E. 557 (1920)." *Fuller*, 297 S.C. at 444, 377 S.E.2d at 331. The court explained the charge was required because the victims "rammed *Fuller*'s car door when he tried to leave his car" and "*Fuller* . . . testified that he did not believe it was safe to leave his car and run from the scene." *Id.*

is immune from criminal prosecution and civil action"); *see also State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) (stating subsection 16-11-450(A) was not intended as an affirmative defense but rather as a procedure for determining immunity prior to trial).

In this case, the trial court fully charged self-defense—the substantive point of law upon which subsection 16-11-450(A) depends. Subsection 16-11-450(A) is a procedural provision that is not relevant to the work of a jury. In fact, if a defendant is entitled to the relief set forth in the subsection, the defendant is "shielded from trial" and no jury will ever hear the case. 392 S.C. at 410, 709 S.E.2d at 665. Thus, the trial court correctly refused the requested charge.

IV. Conclusion

The trial court did not err in refusing to give Marin's requested jury instructions, and Marin's conviction for murder is **AFFIRMED**.

GEATHERS and LOCKEMY, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

MANUEL ANTONIO MARIN,

APPELLANT

APPELLATE CASE NO. 2010-177349

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

Opinion No. 5156

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SC Court of Appeals

PETITION FOR REHEARING

Respectfully, the Court erred in its determination that the trial court's instructions as a whole relieved it of its responsibility to craft a self-defense charge tailored to the facts of this case. The Court's decision is inconsistent. The Court first states its concern that the charge requested "is not a correct statement of the law." State v. Marin, Op. No. 5156, p. 4 (S.C. Ct. App. July 3, 2013). This concern apparently comes from the fact that in State v. Rye, 375 S.C. 119, 134, 651 S.E.2d 321, 328 (2007), Justice Moore quotes a trial court's jury charge. Marin at n. 4. However, the language requested by appellant comes from the Supreme Court's decision in State v. Hendrix, 270 S.C. 653,

661, 244 S.E.2d 503, 507 (1978). In Hendrix, the Court specifically held that “when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased.” Id. Any concerns this Court has regarding whether the requested charge is an appropriate statement of the law should be allayed by Hendrix.

The Court also incorrectly dissects the requested charge in order to give it an illogical meaning. Marin, at 4-5. The Court states that if the charge requested by appellant were correct, then defendants could continue to shoot “so long as the initial danger has not completely ended.” Marin at 4 (internal quotations omitted). In order to make this point, the Court improperly singles out the phrase “completely ended” from the remainder of the charge. The requested charge makes clear that what must “completely end” is the “danger of death or serious bodily injury.” This statement of the law is correct. The Court errs in taking this language out of context to produce the extreme result that a defendant would be justified in continuing to shoot if a “minimal danger” existed. “Minimal danger” was never the appellant’s argument. The danger to be defended against is death or serious bodily injury.

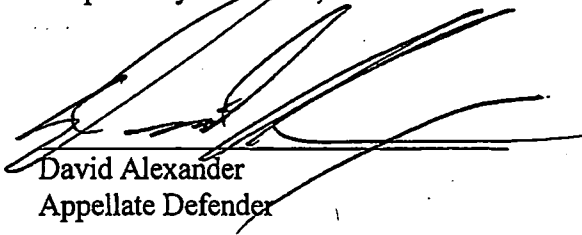
Finally, the Court erred in determining that the charge as a whole covered the requested language. It used this principle to distinguish a trial court’s duty to craft its instructions to the facts when fashioning a self-defense charge. State v. Fuller, 297 S.C. 440, 443, 377 S.E.2d 328, 330 (1989). The “continuing to shoot” charge was required by the facts of this case. On cross-examination, appellant explained to the solicitor that it was very dark as he was driving that night and he was trying to keep the decedent from “killing us” by wrecking his vehicle. R. 248, l. 1 – 251, l. 4. When the solicitor asked appellant on cross-examination why there were *two shots* fired, appellant answered: “It just happened within seconds.” R. 250, l. 22 – 252, l. 16.

The requested charge was even more necessary after the solicitor's inflammatory closing argument. The solicitor repeatedly referenced the fact that two shots were fired. The solicitor said, "So when you shoot somebody in the head and they stop struggling with you, if that's what they're doing, you don't have—you won't shoot them a second time unless you pull that trigger a second time." R. 293, ll. 15 – 22. The solicitor argued, "Would a reasonable person shoot someone twice in the back of the head?" R. 301, ll. 2 – 3. Finally, the solicitor made the extremely prejudicial argument that the jury could infer malice because two shots were fired instead of one. The solicitor said, "Ladies and gentlemen, I submit this is malice. Two shots, not one, two shots to the back of the head. One of them tight contact, barrel up against the head." R. 298, ll. 22 – 24. Defense counsel specifically referenced the solicitor's closing argument when he argued to Judge Cole that the "continuing to shoot" charge was required in this case. R. 332, ll. 6 – 12.

Finally, the Court erred in reasoning that appellant's requested charge was subsumed within the "may use such force is reasonably necessary" charge given by the trial court. If this reasoning were correct, then any specific self-defense charge would be unnecessary. The reasonableness requirement can be read as implicit in any self-defense instruction. Fuller's charge that the defendant has the right to act on appearances could be inferred, and as this Court states in its opinion, argued by the parties without a specific jury charge. But the Supreme Court reversed, in part, because the trial judge failed to give the appearances charge. Id. at 443-45, 377 S.E.2d at 330-31. This Court's opinion renders meaningless Fuller's command that trial courts shall tailor self-defense charges to the facts of the case. This Court should grant this petition for rehearing and modify its opinion to comport with its citation of State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011), that when a party requests a correct and applicable principle of law, the court must charge it. In doing so, the Court should reverse and remand this case for a new trial.

Respectfully submitted,

By:



David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

Attorneys for Appellant

This 18th day of July, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

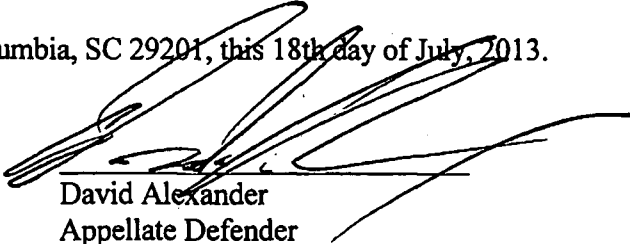
MANUEL ANTONIO MARIN,

APPELLANT

APPELLATE CASE NO. 2010-177349

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of July, 2013.


David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this
18th day of July, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

The South Carolina Court of Appeals

The State, Respondent,

v.

Manuel Marin, Appellant.

Appellate Case No. 2010-177349

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ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

John Cannon Jr

C.J.

John E. Deaton

J.

James E. Schenck

J.

*I WOULD GRANT
REHEARING*

Columbia, South Carolina

cc:

Robert Michael Dudek

Donald J. Zelenka

FILED

22 August 2013

Russell D. Ghent
David Alexander

10929

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MANUEL ANTONIO MARIN,

APPELLANT

RECORD ON APPEAL

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INDEX

INDEX	i
TRIAL TRANSCRIPT	1
TESTIMONY	
DIANE TABARES	
Direct Examination by Solicitor Reese	2
LAURA TABARES	
Direct Examination by Solicitor Reese	6
LARRY RODRIQUEZ	
Direct Examination by Solicitor Reese	12
Cross Examination by Ms. Jones	16
CHRISTOPHER McDONALD	
Direct Examination by Solicitor Reese	19
Cross Examination by Ms. Jones	26
Redirect Examination by Solicitor Reese	29
TRACI BODNER	
Direct Examination by Solicitor Reese	30
Cross Examination by Ms. Jones	34
Redirect Examination by Solicitor Reese	39
LARRY GORY	
Direct Examination by Solicitor Reese	40
Cross Examination by Ms. Jones	43
JEFFERY POWELL	
Direct Examination by Solicitor Reese	48
Cross Examination by Ms. Jones	54
GEORGE BROWN	
Direct Examination by Solicitor Reese	57
Cross Examination by Ms. Jones	61
Redirect Examination by Solicitor Reese	67
Recross Examination by Ms. Jones	68
SUSAN HRYCAJ	
Direct Examination by Solicitor Reese	69

LASHAE LIPSCOMB

Direct Examination by Solicitor Reese	72
Cross Examination by Ms. Jones	73

DALE ARTERBURN

Direct Examination by Solicitor Reese	75
Cross Examination by Ms. Jones	80

SHAMEKA SANDERS

Direct Examination by Solicitor Reese	87
Cross Examination by Ms. Jones	91
Redirect Examination by Solicitor Reese	92

JEREMY TAYLOR

Direct Examination by Solicitor Reese	93
Cross Examination by Ms. Jones	95

MILNER BEACH

Direct Examination by Solicitor Reese	96

JACK CHRISTOPHER DURHAM

Direct Examination by Solicitor Reese	98

DAVID HOGSED

Direct Examination by Solicitor Reese	101
Cross Examination by Ms. Jones	122
Redirect Examination by Solicitor Reese	128

STEVE CALHOUN

Direct Examination by Solicitor Reese	129

THOMAS HUGH MURPHY

Direct Examination by Solicitor Reese	131
Cross Examination by Ms. Jones	135

JACK D. WESTMORELAND

Direct Examination by Solicitor Reese	137

LINDSAY McGRAW

Direct Examination by Solicitor Reese	142
Cross Examination by Ms. Jones	151

ANITA MULLINAX

Direct Examination by Solicitor Reese	153

HEATHER COX McCLAIN	
Direct Examination by Solicitor Reese	155
Cross Examination by Ms. Jones	159
DR. JOHN DAVID WREN	
Direct Examination by Solicitor Reese	160
Cross Examination by Ms. Jones	170
Redirect Examination by Solicitor Reese	173
Recross Examination by Ms. Jones.....	173
KATHLEEN WOODWARD	
Direct Examination by Solicitor Reese	175
Cross Examination by Ms. Jones	182
DAVID WARREN BLACK	
Direct Examination by Solicitor Reese	183
Cross Examination by Ms. Jones	197
Redirect Examination by Solicitor Reese	198
Recross Examination by Ms. Jones.....	198
COLLOQUY REGARDING DEFENDANT’S RIGHT TO TESTIFY	201
MOTION FOR DIRECTED VERDICT.....	206
CHARGE CONFERENCE.....	209
TESTIMONY	
MANUEL ANTONIO MARIN	
Direct Examination by Ms. Jones	224
Cross Examination by Solicitor Reese	241
Redirect Examination by Ms. Jones.....	253
RENEW MOTION FOR DIRECTED VERDICT	255
CHARGE CONFERENCE.....	259
CLOSING ARGUMENT BY MS. JONES	266
CLOSING ARGUMENT BY SOLICITOR REESE.....	277
CHARGE ON THE LAW.....	304
EXCEPTIONS TO THE CHARGE.....	331
RE-CHARGE ON MALICE AND VOLUNTARY MANSLAUGHTER.....	336

COLLOQUY REGARDING RE-CHARGE.....	341
VERDICT	343
SENTENCING	346
INDICTMENT	347
CERTIFICATE OF COUNSEL.....	349

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COURT OF GENERAL SESSIONS

3 The State,)
4 -vs-) TRANSCRIPT OF RECORD
5) 2008-GS-42-5308
6 Manuel Antonio Marin,)
7 Defendant.) October 25 - 27, 2010
8) Spartanburg, South Carolina
9

10 B E F O R E:
11 HONORABLE J. DERHAM COLE, JUDGE; and a jury
12

13 A P P E A R A N C E S:

14 JENNIFER A. J. JORDAN, ESQUIRE
15 SUSAN BORRIES REESE, ESQUIRE
16 Attorneys for the State

17 TANYA R. JONES, ESQUIRE
18 Attorney for the Defendant
19

20
21 Linda D. Moffitt
22 Circuit Court Reporter
23
24
25

Diane Tabares
Direct examination by Ms. Reese

1 needs to be revealed to the jury. And you'll just have to
2 tell her she'll have to do the best she can about
3 controlling her emotions, because if she can't we'll have
4 to stop and send the jury out.

5 Okay. All right. Bring the jury in.

6 (The following takes place in the presence of the
7 jury.)

8 THE COURT: Okay. We are going to begin with the
9 state's presentation of evidence.

10 Ms. Reese.

11 MS. REESE: Thank you, Your Honor. The state calls
12 Diane Tabares.

13 DIANE TABARES, having been
14 first duly sworn, testified as follows:

15 DIRECT EXAMINATION BY MS. REESE

16 Q State your name for the jury, please.

17 A Diane Tabares.

18 Q And how did you know Nelson Tabares?

19 A He was my brother.

20 Q And where, where do you live?

21 A In Simpsonville, South Carolina.

22 Q How long have you lived in Simpsonville?

23 A I was born and raised there.

24 Q How about your brother? Was he born there as well?

25 A Yes, he was.

3

Diane Tabares
Direct examination by Ms. Reese

1 Q At the time of his death in July of 2008 where was
2 your brother primarily employed?

3 A He was employed at Greenville Technical College.

4 Q And what did he do there?

5 A He was a continuing education computer professor.

6 Q Did he have any other business or sideline that he
7 did?

8 A He had a website named Crazylatino.com.

9 Q And did you participate with him in that website?

10 A I did.

11 Q What was the idea of the Crazylatino.com website?

12 A He was trying to bring the community together. He
13 would host sporting events. He also -- he was a cancer
14 survivor. So he also sponsored cancer runs. And he also
15 had a -- he would host parties for his website. He would
16 take pictures at these events, and people would go to his
17 website to look at their pictures.

18 And the way he would raise money to sponsor events was
19 he would get advertisers like Charter and Dick James, just
20 different advertisers, to advertise on his website, which
21 brought more traffic to his website so that he could
22 continue sponsoring these events.

23 Q On the date of July the 20th of 2008 was there any
24 special event going on that day?

25 A Yes, sir. There was a Colombian Independence

Diane Tabares
Direct examination by Ms. Reese

1 Festival.

2 Q And did Nelson attend that festival?

3 A Yes.

4 Q Did you attend that festival with him?

5 A No.

6 Q Why not?

7 A Because I was due. I was pregnant, and I was due the
8 next day. And I just -- I could not really move around too
9 much.

10 Q What was Nelson's purpose in going to the event?

11 MS. JONES: Your Honor, I'm going to object to this.
12 She indicated she didn't go to the festival with
13 Mr. Tabares. So we're not really sure whether or not he
14 actually went. She personally didn't see him. She doesn't
15 have personal knowledge of that.

16 THE COURT: The question was what was the purpose for
17 him planning to go?

18 MS. REESE: To attend the event, yes.

19 THE COURT: Okay. Overrule the objection.

20 BY MS. REESE

21 Q What was the purpose for him attending the event?

22 A He wanted to go take pictures so that he could post on
23 his website the next day.

24 Q After the event itself was there another event or an
25 after-party?

5

Diane Tabares
Direct examination by Ms. Reese

1 A Yes.

2 Q And where was that scheduled to take place?

3 A It was at Bongos.

4 Q And where is Bongos?

5 A It's on East North Street in Greenville.

6 Q And did you attend that event?

7 A No.

8 Q Did your brother anticipate or plan to attend that
9 event?

10 A Yes.

11 Q Did your brother attend every event that the website
12 sponsored?

13 A Not always.

14 Q Why not?

15 A He --

16 MS. JONES: Object, Your Honor. Again, that's getting
17 into hearsay and why he would have gone.

18 THE COURT: Let me see y'all just a minute.

19 (Bench conference held off the record in the presence
20 of the jury but out of the hearing of the jury.)

21 THE COURT: All right. You may continue.

22 BY MS. REESE

23 Q On the evening of July the 20th did you -- when was
24 the first time that you heard or when was the first that
25 you heard that something was out of the ordinary in regard

Laura Tabares
Direct examination by Ms. Reese

1 to Nelson?

2 A The next day.

3 Q And who called you?

4 A Well, I was actually on my way to, to get checked for
5 the doctors and see was it my actual due date. And my
6 sister-in-law called me and --

7 Q Based on that discussion that you had with her, what
8 did you do?

9 A I went to the parking lot where his car was, which
10 it's -- which is Bongos -- to see if maybe he was in the
11 car, see why he didn't come home that day. And my mom
12 walked up to the car and an investigator came up. And told
13 us to stay away from the car. And we asked him why. He
14 said that they were investigating a murder.

15 MS. REESE: Nothing further.

16 MS. JONES: I have no questions for this witness.

17 THE COURT: You may step down.

18 MS. REESE: The state calls Laura Tabares.

19 LAURA TABARES, having been
20 first duly sworn, testified as follows:

21 DIRECT EXAMINATION BY MS. REESE

22 Q Can you state your name for the jury, please?

23 A My name is Laura Tabares.

24 Q And how did you know Nelson Tabares?

25 A He was my husband.

Laura Tabares
Direct examination by Ms. Reese

- 1 Q Where was your husband employed in July of 2008?
- 2 A He employed for Greenville Tech.
- 3 Q And what did he do at Greenville Tech?
- 4 A He teach computer.
- 5 Q Were you employed at that time?
- 6 A Yes.
- 7 Q And what did you do at that time?
- 8 A Office assistant.
- 9 Q Did you have a particular number of hours that you
- 10 worked every day?
- 11 A Yes, eight hours.
- 12 Q And from what time?
- 13 A 8:30 to 5:30.
- 14 Q And did Nelson have a particular number of hours that
- 15 he worked every day?
- 16 A Yes.
- 17 Q And what were those?
- 18 A Around 6:00 to 10:00 o'clock the night.
- 19 Q Was there any particular reason that Nelson had to be
- 20 home in the mornings when you went to work?
- 21 A Yes. We have a baby, and he take care of the baby in
- 22 the mornings. And when I come back I take care of the
- 23 baby, and he can go to work.
- 24 Q Other than Nelson's primary job, did he have the
- 25 Crazylatino.com business?

Laura Tabares
Direct examination by Ms. Reese

- 1 A Yes.
- 2 Q And did you work with him in that business?
- 3 A Yes.
- 4 Q And what was your primary role in the business?
- 5 A Help him, because it was for Spanish community. And
- 6 he speak more English than Spanish. So I help him to do
- 7 his stuff and help try to understand Spanish, speak it or,
- 8 or...
- 9 Q Is it fair to say you interpreted for him?
- 10 A Yes, I interpret for him because he understand more
- 11 English than Spanish. So my, my first language is Spanish.
- 12 Q On the date of July 20th about what time did Nelson
- 13 leave your home?
- 14 A He used -- can you repeat the question?
- 15 Q On the date of July the 20th, the last day that you
- 16 saw him, about what time did he leave your home?
- 17 A Around 11:30 in the morning.
- 18 Q And did he have his camera with him?
- 19 A Yes.
- 20 Q And based on -- did you attend any of the events that
- 21 day?
- 22 A No.
- 23 Q Was it planned for you to attend any of those events?
- 24 A No.
- 25 Q Was it Nelson's plan to attend those events?

Laura Tabares
Direct examination by Ms. Reese

1 A Yes.

2 Q At what time -- or did you hear from your husband any
3 more during the afternoon or the evening hours?

4 A Can you repeat the question?

5 Q Did you hear from your husband any more that day?

6 After he left you did you hear from him again?

7 A Oh, yes. He called me too many times in the day.

8 Q What was the last time that he called you, about what
9 time?

10 A Around 10:30 in the night.

11 Q And based on that discussion with him did you -- what
12 did you do?

13 A He asked me if --

14 MS. JONES: I am going to object to hearsay, Your
15 Honor.

16 THE COURT: Well, is it -- I mean, what purpose is it
17 being offered? I know what the question was.

18 MS. REESE: Okay. To, to establish the time and what
19 she did in regard to her phone.

20 THE COURT: All right. Don't tell us anything he told
21 you. Just tell us what you did as a result of the
22 conversation.

23 BY MS. REESE

24 A The result is he is -- he is going to be shortly
25 getting home.

Laura Tabares
Direct examination by Ms. Reese

1 Q And, and what did you do regarding your phone?

2 A I just turned the volume down, because he's -- say
3 he's going to be shortly --

4 MS. JONES: We object, Your Honor, and move to strike
5 that testimony as hearsay.

6 THE COURT: All right. Again, right now you can't
7 testify as to what he said.

8 THE WITNESS: Okay.

9 THE COURT: But you can tell us what you did because
10 of your conversation with him. Okay.

11 THE WITNESS: Okay.

12 BY MS. REESE

13 Q So you turned your phone down.

14 A Yes, ma'am.

15 Q Okay. And after you turned your phone down, what did
16 you do?

17 A Go to sleep.

18 Q At what point did you realize that Nelson did not come
19 home -- at what point? When did you realize that Nelson
20 wasn't home?

21 A Around 5:00 o'clock in the morning.

22 Q Had this ever happened before where he did not come
23 home?

24 A That I remember like two times.

25 Q And what did you do? Once you realized he was not

Laura Tabares
Direct examination by Ms. Reese

1 home what was -- what did you do?

2 A I just take, take the shower with my baby and me. And
3 I just ran the baby to a, a friend. And I go to work. But
4 I called him too many times.

5 Q And at some point during the day did you go to Bongos?

6 A Yes, when they called me, find out he's at.

7 Q And did you, did you look in the car?

8 A Yes.

9 Q And did you -- was his camera in the car?

10 A Yes, ma'am.

11 Q And did you later develop pictures on that camera?

12 A Yes, ma'am.

13 Q And did you confirm that it was his camera?

14 A Yes, ma'am.

15 Q And that he did have it with him that day? He did
16 have his camera with him that day?

17 A Yes.

18 Q What was your address at this time?

19 A Otis Drive, Simpsonville.

20 Q What was your address when you were living with
21 Nelson?

22 A Greer.

23 Q And do you remember the street address?

24 A Yes.

25 Q What was it?

Larry Rodriquez
Direct examination by Ms. Reese

1 A

2 Q And that was in Greer?

3 A Yes.

4 MS. REESE: Nothing further of this witness, Your
5 Honor.

6 MS. JONES: I have nothing for this witness, Your
7 Honor.

8 THE COURT: You may step down.

9 MS. REESE: The state calls Larry Rodriquez.

10 LARRY RODRIQUEZ, having been
11 first duly sworn, testified as follows:

12 DIRECT EXAMINATION BY MS. REESE

13 Q Will you state your name for the jury, please?

14 A Larry Rodriquez.

15 Q And what do you do?

16 A I'm a business owner.

17 Q And what businesses do you own?

18 A Family and Mexican restaurants and a night club.

19 Q And what are the names of these?

20 A Guardalajara Mexican Restaurant and Bongos Nightclub.

21 Q And is Bongos Nightclub -- where is that located?

22 A 3715 East North Street, Greenville, South Carolina.

23 Q Okay. And how about the restaurant?

24 A We got different locations in Greenville.

25 Q And do you -- you say you own these. Do you also

Larry Rodriguez
Direct examination by Ms. Reese

1 operate them?

2 A Yes, ma'am.

3 Q What businesses were you operating in July of 2008?

4 A Bongos.

5 Q And at that time do you have occasion to know a Nelson
6 Tabares?

7 A Yes, ma'am.

8 Q And how did you know Nelson?

9 A I know the family for many years and been working
10 with -- I was working with Nelson for five years on events
11 once a month in my establishment.

12 Q And what -- when you say you were working with him,
13 what did you do and what did he do?

14 A We did a lot of events once a month -- fundraisers,
15 family oriented stuff, yes.

16 Q Did you also have parties or social events at the
17 club?

18 A Yes, ma'am.

19 Q Did Nelson ever attend those social events?

20 A Sometimes.

21 Q Did you have occasion to see Nelson on July the
22 20th of 2008?

23 A Yes. I saw him at night when he went to the nightclub
24 to take pictures.

25 Q Were you there at the nightclub, at Bongos, that

Larry Rodriguez
Direct examination by Ms. Reese

1 evening?

2 A Yes, I was.

3 Q And what, what was going on there at the nightclub
4 that evening?

5 A We had an event, a Colombia after-party.

6 Q How many people were there would you say?

7 A It was early, maybe 30 or 40 people.

8 Q And is that when Nelson came in?

9 A Yes, ma'am.

10 Q Okay. When he came into the restaurant what was his
11 demeanor? Did you notice anything about him that
12 particular evening?

13 A Well, I know Nelson for a long time, and he, he was,
14 he was not feeling good. So I get him a bottle of water
15 and sit him in a chair. And I was trying to call his wife,
16 and she never answered. And after that I spent like 30
17 minutes with him, and after that I went back to my duties,
18 and I didn't see him again.

19 Q When you say he wasn't feeling well, do you have an
20 opinion about whether or not he was intoxicated?

21 A No, he was not. He was just not feeling good. And I,
22 I always see him like my brother, and so I see him -- I
23 mean, I took care of him, and to call his wife.

24 Q All right. So and where did you leave him when you
25 last saw him?

Larry Rodriguez
Direct examination by Ms. Reese

1 A I left him in the kitchen. I had a chair. And when I
2 went back to take care of the business I, I didn't see him
3 again.

4 Q Did you stay in the kitchen a long time or just a few
5 minutes?

6 A I stay in the kitchen about 25 to 30 minutes, yes.

7 Q When things began to -- as the evening went on did you
8 have an occasion, any occasion, regarding Nelson in terms
9 of getting him home?

10 A He was asking me to see if I can help him get him
11 home, and as well as trying to call his wife. But after
12 that one of my staff that I know after the fact that escort
13 him to the -- to somebody's car. I didn't see who it was.

14 Q Okay. Did you give any instructions to the staff or
15 anybody about how to get him home or to get him home,
16 anything?

17 A No. I just trying to, trying to help him out, yes.

18 Q In the past have you taken Nelson home on occasion?

19 A One time I took him home, but because he didn't have a
20 ride. That's about it.

21 Q And you actually physically attempted to call Laura,
22 is that correct?

23 A Yes, ma'am, I did.

24 Q And did she -- what was the result of those calls?

25 A She didn't answer.

Larry Rodriquez
Cross-examination by Ms. Jones

1 MS. REESE: Nothing further of this witness.

2 CROSS-EXAMINATION

3 BY MS. JONES

4 Q Mr. Rodriquez, what was the time you first saw
5 Mr. Tabares enter Bongos?

6 A Between that I remember about 11 -- 11:45. I don't
7 remember if it was 10:00 or 11:45. I don't, I didn't, I
8 didn't do time all of that time.

9 Q So around 10:00 to 11:45, something like that?

10 A Yes, ma'am.

11 Q Okay. And you indicated there were about 30 or 40
12 people there, is that correct?

13 A Yes, ma'am. It was just starting the night.

14 Q Okay. And when you say just starting the night, I'm
15 assuming a lot more people --

16 A Yes, ma'am.

17 Q -- came.

18 A Yes, ma'am.

19 Q Okay. And, in fact, you have pretty late hours, fair
20 to say?

21 A On Sunday not really, I mean, 2:00 o'clock at most,
22 yeah.

23 Q Okay. So was Mr. Tabares, Tabares still there at
24 2:00 o'clock in the morning?

25 A No, ma'am.

Larry Rodriquez
Cross-examination by Ms. Jones

1 Q What time did he leave?

2 A I didn't see him leave, but I, I know he wasn't there
3 because I didn't see him taking pictures or anything. So,
4 and then when we have a back door and a, and a side door,
5 and I didn't see him leave. I talk to my security or my
6 bouncers to help him get home, and that's all.

7 Q What time did you talk with the bouncers in terms of
8 trying to get Mr. Tabares home?

9 A Like I said, I don't remember the time, but it was
10 that time I talk. I was taking care of my business. So I
11 didn't took time on that.

12 Q Okay. So you, you didn't look at your clock then?

13 A I didn't look at my clock and, and say what time he
14 left, he left the premises.

15 Q Okay. What time does Bongos close down?

16 A We have different hours, like seven. The most we go
17 is like 2:00 o'clock on Sunday.

18 Q Okay. On this particular day it would have been
19 2:00 o'clock?

20 A On a Sunday, yes.

21 Q Okay. And is it one of those things where people just
22 get in their cars and leave and everybody's cleared out by
23 2:10, or is this something where people go to their cars,
24 they're still talking and they're still having
25 conversations and so it takes a while for those parking

Larry Rodriquez
Cross-examination by Ms. Jones

1 lots to empty out?

2 A I don't recall that, because I don't, I don't go out
3 to the parking lot and make sure they don't leave. I just
4 take care of my business inside. I don't know what's going
5 on outside sometimes.

6 Q What time do you leave work?

7 A I leave at different times -- 1:30, 2:00 o'clock. I'm
8 the last one leaving the premises, 2:00 o'clock.

9 Q Okay, okay. And as soon as the clock strikes two
10 you're out of there.

11 A Well, by the time I get everybody off and take care of
12 everybody, yeah.

13 Q Okay. And when you generally leave the premises are
14 people still congregating around their cars, getting in,
15 talking?

16 A Sometimes.

17 Q Saying see you later?

18 A Sometimes, yes, sometimes.

19 Q Okay. And at that time when you left at 2:00 o'clock
20 you didn't see Mr. Tabares, correct?

21 A I didn't see him, no.

22 Q But you'd already given instructions that he was
23 supposed to get home, correct?

24 A Well, to help him get home, yes.

25 Q But you didn't have any part of that.

Christopher McDonald
Direct examination by Ms. Reese

1 A No.

2 MS. JONES: Nothing further.

3 MS. REESE: Nothing further, Your Honor.

4 THE COURT: You may step down.

5 MS. REESE: The state calls Chris McDonald.

6 CHRISTOPHER McDONALD, having
7 been first duly sworn, testified as follows:

8 DIRECT EXAMINATION BY MS. REESE

9 Q Please state your name for the jury.

10 A Christopher McDonald.

11 Q And what is your occupation?

12 A At night and weekends I'm a bouncer.

13 Q And where are you employed as a bouncer?

14 A Right now I'm at a couple of different clubs, but at
15 the time I was at Club Bongos.

16 Q And when you say at the time, you mean July of 2008?

17 A Yes, July, yes.

18 Q And were you working security the night of
19 July 20th of 2008?

20 A Yes, I was.

21 Q And do you know Nelson Tabares?

22 A As far as club goes, yes, I do.

23 Q And how did you know him?

24 A He just was one of the party promoters come in to
25 parties.

Christopher McDonald
Direct examination by Ms. Reese

- 1 Q How long would you have known him, say, in July?
- 2 A I known him July probably about nine to ten months
- 3 that I was working at Bongos.
- 4 Q How many times had you seen him at the club before?
- 5 A He would come in the club maybe once or twice a month.
- 6 Q When you saw Nelson on July the 20th of 2008 how did
- 7 he appear?
- 8 A He appeared just not to be feeling good, maybe had a
- 9 couple of drinks.
- 10 Q Did you believe at that time he was intoxicated?
- 11 A Not, not, not to the point to where he wasn't -- he
- 12 was still functioning.
- 13 Q Okay. As the evening went on did that change?
- 14 A He seemed to get a little worse, yeah.
- 15 Q At some point did you actually have to have his drinks
- 16 cut off?
- 17 A That, yes, we did. We did actually have to cut him
- 18 off.
- 19 Q And at, at the point that he became that intoxicated,
- 20 how was he behaving?
- 21 A He was just pretty much just stumbling everywhere,
- 22 couldn't really stand up.
- 23 Q Did he cause any problems? Was he aggressive in any
- 24 way?
- 25 A No, never aggressive.

Christopher McDonald
Direct examination by Ms. Reese

1 Q So when you say he was just -- he was just stumbling,
2 is that right?

3 A Yes. He was basically just trying to catch his --
4 just trying to stand up.

5 Q What did you do? When you saw that he was having this
6 problem what, if anything, did you do?

7 A Well, we basically just took him in the back and let
8 him sit down in a chair.

9 Q And what room was this?

10 A That was in the back kitchen.

11 Q Okay. And how long would you say he stayed in the
12 kitchen?

13 A He was back there for maybe an hour, maybe an hour and
14 15 minutes.

15 Q Did he have any problems in the kitchen?

16 A No. He just kept wanting to go out into the crowd,
17 wanted him to come out there and talk.

18 Q Did you see him -- you say he was stumbling before.
19 Did you see him fall in the kitchen at all?

20 A No. He wasn't really falling around. He was just
21 needing some support.

22 Q Who all was in the kitchen when Nelson was in the
23 kitchen?

24 A It was me, Larry, Manuel and Nelson.

25 Q And were there any problems in the kitchen?

Christopher McDonald
Direct examination by Ms. Reese

1 A No, no problems other than Nelson keep wanting to try
2 to go out into the establishment.

3 Q At some point did you all make a decision about
4 whether or not it was wise to let Nelson drive home?

5 A Yeah. We made a decision that it was not in his
6 interest to let him drive home, try to find him a ride
7 home.

8 Q Okay. So did you speak with Larry, the owner of the
9 club?

10 A Yes. We, we discussed it.

11 Q Okay. And based on that information what did you then
12 do?

13 A Well, basically, Larry had told us just make sure
14 Nelson's taken care of. And we were sitting there trying
15 to find a ride for him.

16 Larry was trying to contact his wife, which we had
17 no -- couldn't contact anybody. And then we decided to try
18 to find him a ride home. One of the other promoters there
19 asked. They volunteered to take him home. But for some
20 reason Manuel spoke up and said I will, so.

21 Q And did he say anything to you about whether or not he
22 knew where Nelson lived?

23 A Yeah. He said he knew where he lived.

24 Q And I'm sorry?

25 A He said that in the kitchen.

Christopher McDonald
Direct examination by Ms. Reese

1 Q Okay. Who said that in the kitchen?

2 A Manuel.

3 Q Okay. And he said what in the kitchen?

4 A He said that he knew where he lived.

5 Q Okay. At that point did you make a decision about
6 whether or not you were going to let -- who you were going
7 to let take Nelson home?

8 A Well, we had, we had decided that since he had
9 volunteered and he knew where he lived we would just go
10 ahead and let him home -- let him take him home.

11 Q And how did you get Nelson out to the car?

12 A I basically had to not really carry him but put his
13 shoulder -- put his arm over my shoulder and basically
14 carry him out and actually put him in the truck.

15 Q Okay. Did the defendant ever make any other statement
16 to you regarding whether or not he knew where Nelson lived?

17 A When we got him in the car he actually -- they reached
18 for his laptop. So I really don't know where he's at. I
19 need to have his address so that -- that's when I held
20 Nelson up and took the wallet out and got his I.D. out of
21 his wallet and handed it to him.

22 Q How was Nelson when you put him in the car?

23 A He was pretty much out of it. I mean, he couldn't
24 even pretty much hold his head up.

25 Q I'm going to show you what's been marked as State's

Christopher McDonald
Direct examination by Ms. Reese

1 Exhibit 1 and State's Exhibit 2 for Identification. Do
2 those pictures look familiar?

3 A That's me there.

4 Q And that's you. And that's in State's Exhibit 1 for
5 I.D.

6 A In the picture, yes.

7 Q And what are these pictures of?

8 A They were basically just pictures of him being -- you
9 know, they were going to take pictures to put on the
10 Crazylatino.com the next day, you know, just kind of a
11 funny thing but...

12 Q Are those -- and those are pictures of what exactly?

13 A These are the pictures actually when I actually
14 carried him out and put him into the car. And I guess
15 that's a picture of when we closed the door.

16 Q Is that a fair and accurate depiction --

17 A Yeah.

18 Q -- of what Nelson looked like when you put him in the
19 car?

20 A Yeah.

21 Q And who was taking these pictures?

22 A It was Manuel.

23 MS. REESE: Your Honor, I'd move at this time State's
24 Exhibits 1 and 2 be introduced.

25 MS. JONES: Your Honor, we would object to relevance,

Christopher McDonald
Direct examination by Ms. Reese

1 simply the fact that there is no issue as to whether or not
2 Mr. Tabares got in the car or whether or not he was
3 actually found in the car. And they're more prejudicial
4 than probative.

5 THE COURT: Let me see it. All right. Overrule your
6 objection on those grounds.

7 MS. REESE: Thank you, Your Honor.

8 (Photograph marked State's Exhibit No. 1; photograph
9 marked State's Exhibit No. 2.)

10 BY MS. REESE

11 Q After you put Nelson in the car who -- well, as you
12 put Nelson in the car who was driving the car?

13 A There was -- it was -- Manuel was going to get in the
14 driver's side. At the time there was nobody until I put
15 him in the car. But Manuel did get into the driver's side.

16 Q And did you witness Manuel drive the car away?

17 A Yes.

18 Q Was there anybody else there?

19 A Yes. There was one other person.

20 Q Who was that?

21 A Alfredo. I'm not for sure of his last name. But
22 there was one other person in the car.

23 Q And where was he riding in the car?

24 A He was a passenger.

25 Q Is he -- what -- whose -- was he the passenger in the

Christopher McDonald
Cross-examination by Ms. Jones

1 front or the back?

2 A Who?

3 Q Alfredo.

4 A Alfredo was in, in front, front passenger.

5 Q Okay. And do you remember the type of car that he got
6 in?

7 A It was a Durango, red Durango.

8 MS. REESE: Nothing further.

9 CROSS-EXAMINATION

10 BY MS. JONES

11 Q What time did you start your shift as the bouncer?

12 A I would start shift between 8:00 and 9:00 o'clock.

13 Q 8:00 and 9:00. And what time did your shift end?

14 A Depends on when the people are gone, sometimes 1:30,
15 sometimes 2:00, sometimes 2:30. It just depends on the
16 night.

17 Q Okay. And so your job isn't complete until all the
18 folks leave the parking lot?

19 A Yes, well, no, just when they leave the club, out the
20 club. The parking lot's not basically our responsibility.

21 Q Okay. And are there generally people in the, in the
22 parking lot?

23 A I mean, yeah. You know, of course you got your
24 stragglers that want to hang out, you know, not wanting to
25 end the night but...

Christopher McDonald
Cross-examination by Ms. Jones

1 Q Okay. And was Mr. Tabares there basically until the
2 close of the club?

3 A I can't remember exactly what time we got him out of
4 there, but basically there was a lot of people outside. So
5 I would say towards the end of the night, yes.

6 Q Okay. So he stayed until the bitter end, so to speak.

7 A I would say, yeah, close to it. If not, yeah, close
8 to it.

9 Q Okay. And Mr. Tabares wasn't fighting you in terms of
10 getting into the vehicle, was he?

11 A Not, no, no, no way.

12 Q Okay. So he went in willingly and sat down.

13 A Oh, yeah, yeah, yeah, yeah.

14 Q Okay. You indicated that you got the driver's license
15 out or the license to give to Mr. Marin to type it into the
16 computer?

17 A Yes, yes.

18 Q Okay. Did you actually see him type?

19 A No, I didn't see him type anything. All I saw was him
20 just grab the computer out from underneath the seat, and
21 then that was it. I didn't see no more than that. I
22 didn't see him hand it to nobody. I didn't see anything
23 else.

24 Q Okay. And there was a passenger in the seat as well.

25 A Yes, there was.

Christopher McDonald
Cross-examination by Ms. Jones

- 1 Q Okay. Did you have any conversation with Mr. Jimenez?
- 2 A No, I mean, no, not that night, no.
- 3 Q All right. And so you shut the door.
- 4 A I shut the door.
- 5 Q Did you put -- did you put, put the seatbelt on at all
- 6 or just --
- 7 A Yeah, we did. Yeah, we did put the seatbelt on.
- 8 Q And shut the door.
- 9 A Shut the door, yeah.
- 10 Q And you indicated that when you first saw him he was
- 11 a -- he was little bit sick and looked like he had a couple
- 12 of drinks.
- 13 A Yeah, looked like he was -- yeah. I couldn't really
- 14 tell what it was. But, yeah, he looked like he wasn't
- 15 feeling too good.
- 16 Q Okay. And sounds like he continued to drink, because
- 17 at some point you indicated that you had to cut him off.
- 18 A Yeah, basically. He had a couple of drinks when he
- 19 got there. And then we realized he was just -- you know,
- 20 he wasn't -- he was actually getting intoxicated. So
- 21 that's when we gave him a water and told him just relax.
- 22 Q Okay. And stumbling around.
- 23 A Yeah.
- 24 Q Did he seem to know where he was at?
- 25 A Oh, yeah, yeah. He knew where he was at.

Christopher McDonald
Redirect examination by Ms. Reese

1 Q Okay. So you were still able to engage in some type
2 of conversation.

3 A Yeah, yeah, he was still go to -- yeah.

4 Q Okay. And then when you carried him out to the car .
5 and helped him was you still able to converse with him,
6 have a conversation with you?

7 A Yeah, yeah, he was still conversing, yeah.

8 Q Okay. All right. Nothing further.

9 MS. REESE: Only one followup.

10 REDIRECT EXAMINATION

11 BY MS. REESE

12 Q So at any point that night was he incoherent, or did
13 he seem to understand where he was and was he making sense?

14 A Well, he was -- he was kinda like in and out. He knew
15 where he was at.

16 But as far as incoherent, I mean, he was still with us
17 but not too much out of it, no.

18 MS. REESE: Nothing further.

19 THE COURT: Step down.

20 MS. REESE: Your Honor, may this witness be excused?

21 THE COURT: Any objection?

22 MS. JONES: No, Your Honor.

23 THE COURT: He may be.

24 (Whereupon, the witness was excused.)

25 MS. REESE: Traci Bodner.

Traci Bodner
Direct examination by Ms. Reese

- 1 TRACI BODNER, having been
2 first duly sworn, testified as follows:
3 DIRECT EXAMINATION BY MS. REESE
4 Q Will you state your name for the jury, please?
5 A Traci Bodner.
6 Q And, Ms. Bodner, where are you -- where is your
7 address now?
8 A Right now I'm currently living in Augusta, Georgia.
9 Q And where are you employed?
10 A I work for Dillard's and do a cosmetic label in
11 Farrens (sic) skin care cosmetics.
12 Q Now, do you know the defendant in this case, Manuel
13 Marin?
14 A I do not.
15 Q Did you know the victim in this case, Nelson Tabares?
16 A I do not.
17 Q Do you know the other person riding in the car that
18 night?
19 A I do not.
20 Q On the night of July the 20th of 2010 where were you
21 working?
22 A I was currently employed for Justin's Steakhouse. I
23 was also going to school. So being a full-time student, as
24 well as working for Justin's Steakhouse.
25 Q At some point that evening -- after you got off work

Traci Bodner
Direct examination by Ms. Reese

1 where did you go?

2 A Basically, I went back to my friend's apartment who
3 lives right on the outskirts of downtown Spartanburg.

4 I then went and -- after that I went and picked my
5 friends up. I was the designated driver that evening. And
6 so we came back home. And we were all basically talking in
7 the stairwell before their friends left.

8 Q Okay. And where was this apartment located?

9 A It was right at the corner at Daniel C. Morgan and
10 downtown Main Street, Spartanburg.

11 Q And this is located in Spartanburg County?

12 A Yes, ma'am. I could walk over.

13 Q And at the -- at the time that you were there that
14 night, can you tell me about what time you arrived there?

15 A I -- when we came back -- and we came back -- I, I'm
16 guessing it was probably about 1:30 or 2:00 o'clock.

17 Q And so you had been to the apartment a while.

18 A Yes, ma'am, and then had left and come back.

19 Q Did you drink while you were there?

20 A No, ma'am. I was not drinking.

21 Q At any point did you see anything on the street below
22 that was unusual?

23 A Yes, ma'am. We saw two gentlemen arguing.

24 Q And how would you describe these two gentlemen?

25 A They seemed very disturbing, like they were very upset

Traci Bodner
Direct examination by Ms. Reese

1 and hysterical. And they were arguing about a situation
2 that we didn't know about. We just assumed that they were
3 intoxicated.

4 Q Do you remember what they were wearing?

5 A One man had a black shirt on. The other man was
6 wearing all white. And that's what I recall them wearing.

7 Q At any time did you -- what were they doing? When you
8 first looked down what were they doing in regard to one
9 another?

10 A They were arguing about a situation and they -- one of
11 the men was upset, crying. And then another man, basically
12 the man in the black shirt, was trying to kind of walk
13 away. But after that they just continued arguing.

14 Q Did you ever see the man in the black do anything in
15 regard to the man in the white?

16 A Yes. He pulled something out of the man in the
17 white's pocket. And at first to me it looked like a
18 handgun. And they just continued arguing. And the other
19 man walked away from across the street, and he separated.

20 Q How was the man in the black after he took the gun
21 from the pocket of the man in the white shirt, how was he
22 acting? What was his demeanor?

23 A He had separated himself, and he was still kinda
24 yelling at the other guy from across the street. And then
25 he proceeded to throw the handgun down against the curb.

Traci Bodner
Direct examination by Ms. Reese

1 Q You never heard -- after that you never heard any
2 gunshots, is that right?

3 A No. There was no gunshots.

4 Q After you saw this what did you do?

5 A Basically, that's when we realized that this was
6 something very serious. The man in the black, he looked up
7 at us. And that's when he realized that he realized that
8 we were standing there. So of course once he saw us and
9 started walking towards us, we ran inside.

10 Q Other than the argument and watching the man in the
11 black take the gun from the man in the white, did you
12 understand any of the argument?

13 A No, ma'am.

14 Q Did you ever hear any gunshots?

15 A No, no, ma'am.

16 Q Were you aware of where -- that there was a vehicle
17 and where it was?

18 A We knew when we first saw them arguing they were
19 basically -- one of the gentlemen was walking away from the
20 vehicle. But of course we assumed that it was their
21 vehicle, but we never went, actually saw them get out of
22 the vehicle.

23 MS. REESE: Nothing further of this witness.
24
25

Traci Bodner
Cross-examination by Ms. Jones

1 CROSS-EXAMINATION

2 BY MS. JONES

3 Q Is it Ms. Bodner?

4 A Yes, ma'am.

5 Q I don't want to butcher your name.

6 What time did you see these two men in the street?

7 A It was about 1:30 or 2:00 a.m.

8 Q And where exactly were you located?

9 A In the apartment buildings right at that intersection
10 between Daniel C. Morgan and Main Street, Spartanburg.

11 Q Okay. Were you actually up in the apartment or were
12 you in the stairwell, were you out on the street?

13 A We were standing on the stairwell.

14 Q Okay. And what kind of -- is this an enclosed
15 stairwell?

16 A No, ma'am. It's open.

17 Q Okay. So you go up this open stairwell to the
18 apartment?

19 A There's a door that you can go in where there's
20 located one or more doors where there's individual
21 apartments.

22 Q Almost sounds like a fire escape type of...

23 A It wasn't -- it's not a fire escape. It's the main
24 stairwell to enter into that building.

25 Q But that would be a good way to describe it in terms

Traci Bodner
Cross-examination by Ms. Jones

1 of it's out like that and that's the way you get up to
2 these apartments -- open.

3 A Okay.

4 Q Okay. Sort of like a motel.

5 A I suppose.

6 Q Like a Motel Six. You know how they have the outside?

7 A Uh-huh.

8 Q I'm trying to get a visual of where this is at.

9 All right. And you saw two gentlemen. Did you
10 actually see any of them get out of the car or were -- was
11 your attention just directed when you heard the voices?

12 A We did not see them get out of their vehicle. We just
13 saw them walking from that general direction of the vehicle
14 and to be kinda in the middle of the street to the side.
15 We assumed it was.

16 Q Okay. You indicated that there was a man in a black
17 shirt, as well as a man in a white shirt, is that correct?

18 A Yes.

19 Q And you also indicated that they were very -- just one
20 of them was very hysterical and upset. Was that the one in
21 the black or the one in the white?

22 A They both seemed very upset.

23 Q Okay. Both of them very upset and very hysterical, is
24 that correct?

25 A Correct.

Traci Bodner
Cross-examination by Ms. Jones

- 1 Q Okay. You also indicated that one of them was crying.
- 2 A Uh-huh.
- 3 Q Was that the man in the white or the man in the black?
- 4 A I do not recall.
- 5 Q Okay. Is it possible both of them were crying?
- 6 A Sure.
- 7 Q Okay. And you indicated that the man in the black
- 8 looked like he went to the man in the white and pulled out
- 9 something.
- 10 A Yes, ma'am.
- 11 Q Okay. But you're not quite sure what it was, but it
- 12 looked like a handgun.
- 13 A Yes, ma'am. We were about 50 to 75 feet away. It did
- 14 look like a handgun, yes, ma'am.
- 15 Q Okay. And did the white -- the man in the white
- 16 resist in any way or try and grab at it, and was there
- 17 some --
- 18 A They were shouting, yes, ma'am.
- 19 Q Still hysterical, still lots of noise going on.
- 20 A Uh-huh.
- 21 Q Okay. But the man in the black got the gun and walked
- 22 it over.
- 23 A Across the street.
- 24 Q Okay. What did he do at that point?
- 25 A Basically, he was watching the other guy. He was

Traci Bodner
Cross-examination by Ms. Jones

- 1 yelling something at him. And then he threw it up against
- 2 the curb.
- 3 Q Okay. And then he walked. Did he walk back over to
- 4 the man in white?
- 5 A At that point, that's when we -- when he threw the gun
- 6 against the curb -- the other people with me, that's when
- 7 they kinda realized, oh, my goodness this is a handgun.
- 8 And basically we ran inside once he started walking towards
- 9 us after that.
- 10 Q Okay. So you don't recall whether or not the man in
- 11 the black walked back over to the other male wearing the
- 12 white and continued to talk with him.
- 13 A No, ma'am.
- 14 MS. JONES: Beg the Court's indulgence.
- 15 (Statement of Traci Bodner marked Defendant's Exhibit
- 16 No. 1 for Identification.)
- 17 Q I'm handing you something that's marked Defendant's
- 18 Exhibit No. 1. Do you recognize that?
- 19 A I do.
- 20 Q Okay. In fact, that's a statement you gave to the
- 21 police, correct?
- 22 A Correct.
- 23 Q Okay. Do you recall when you gave that statement?
- 24 A It was, I would say, about two and a half hours after
- 25 the incident occurred.

Traci Bodner
Cross-examination by Ms. Jones

1 Q Okay. Fair to say that that statement was given while
2 these events were pretty fresh in your mind.

3 A Yes, ma'am.

4 Q Okay. I'm going to have you take a look at right here
5 on this line.

6 A Uh-huh.

7 Q Does that refresh your memory in terms of what you
8 observed that night?

9 A Yes, ma'am.

10 Q Okay. So would you say that your memory was more
11 fresh today or would you say it was more fresh at the time
12 of the incident?

13 A Of course at the time of the incident.

14 Q Okay. And does this refresh your memory in terms of
15 the man dropping, the man in black dropping, the gun by the
16 curb and coming back over to talk again with the man in
17 white? Does that refresh your memory in terms of that
18 happening?

19 A Yes, ma'am.

20 Q Okay. So didn't seem like these two were mortal
21 enemies, correct?

22 A No, ma'am.

23 Q They weren't afraid of each other, correct?

24 A No, ma'am.

25 Q And both were, were loudly talking, hysterical and

Traci Bodner
Redirect examination by Ms. Reese

1 crying?

2 A Correct.

3 MS. JONES: Nothing further.

4 REDIRECT EXAMINATION

5 BY MS. REESE

6 Q I'd just ask you to refer to this statement. This is
7 the same statement she showed you, Defense Exhibit 1 for
8 Identification. Can you read the second sentence, "We
9 saw"?

10 A "We saw two male Hispanics arguing about an unknown
11 situation."

12 Q Okay. Continue there.

13 A "We observed the two gentlemen fighting and then one
14 of them trying to calm down the other who was acting
15 hysterical."

16 Q So according to that statement one of them was
17 hysterical and the other one was trying to calm him down,
18 is that right?

19 A He was. But they both seemed very distraught and
20 upset.

21 Q And that statement -- that statement was given -- the
22 time at the bottom, can you say when that was?

23 A 7:35 a.m.

24 Q And you testified that you think that was about two
25 and a half hours possibly after the incident.

Larry Gory
Direct examination by Ms. Reese

1 A I believed it was about two and a half to three hours
2 afterwards, uh-huh.

3 MS. REESE: Nothing further.

4 Your Honor, may this witness be excused?

5 THE COURT: Any objection?

6 MS. JONES: No, sir.

7 THE COURT: She may be. Thank you.

8 (Whereupon, the witness was excused.)

9 MS. REESE: State calls Larry Gory.

10 LARRY GORY, having been first
11 duly sworn, testified as follows:

12 DIRECT EXAMINATION BY MS. REESE

13 Q Will you state your name for the jury, please?

14 A Larry Gory.

15 Q Mr. Gory, where are you employed?

16 A D.G.D.

17 Q And what do you do there?

18 A Load and unload trucks.

19 Q Do you know the defendant in this case, Manuel Marin?

20 A No, ma'am.

21 Q Did you know the victim, Nelson Tabares?

22 A No, ma'am.

23 Q Did you know the other man there, Alfredo Jimenez?

24 A No, ma'am.

25 Q Did you have occasion to come in contact with these

Larry Gory
Direct examination by Ms. Reese

1 people in the early morning hours of July the 21st of 2008?

2 A Yes, ma'am.

3 Q And what were you doing that morning?

4 A I was leaving a friend's home.

5 Q And where were you going?

6 A Going to pick up my kids.

7 Q And what route were you traveling?

8 A Let's see west, east -- east on East Main.

9 Q Okay. And did anything unusual -- as you traveled
10 that route do you have any idea what time it was?

11 A No.

12 Q As you traveled that route in the early morning hours
13 did you have occasion to stop in the middle of the road
14 because something was going on?

15 A Yes, ma'am.

16 Q Can you describe for the jury what was going on?

17 A When I pulled up to the light two guys in the middle
18 of the road like -- they was like trying to pull, pull
19 something away from each other.

20 Q Uh-huh.

21 A And then they come on around to my -- to the passenger
22 side. I let the window down. I asked them was everything
23 okay. And then one of the -- one of the guys said could
24 you call the police, said he just -- he shot him.

25 Q Now, you are in your car, is that right, at this time?

Larry Gory
Direct examination by Ms. Reese

- 1 A Uh-huh.
- 2 Q And where are these two people when you first see
3 them? In your view where are they?
- 4 A In the front of the car.
- 5 Q Okay. And you said they, they were fighting.
- 6 A They was not really fighting. They was just trying to
7 like -- you know, had both of them by the hand trying to
8 like take something from each other.
- 9 Q Okay. And at some point did they come closer to your
10 car?
- 11 A Yes, ma'am.
- 12 Q And that's when you rolled the window down.
- 13 A Uh-huh.
- 14 Q Now, do you remember how one of them -- how they were
15 dressed?
- 16 A One black shirt and one white shirt.
- 17 Q Okay. And who spoke to you?
- 18 A The one in the black shirt.
- 19 Q And what did he say to you?
- 20 A Call, could you call, the cops or a taxi.
- 21 Q Okay.
- 22 A Said he just shot him.
- 23 Q He just shot him.
- 24 A Yeah. It was something, something like that.
- 25 Q Okay. At that point did you notice what they were

Larry Gory
Cross-examination by Ms. Jones

1 fighting over?

2 A Uh-huh.

3 Q What was it?

4 A A gun.

5 Q What did you do then?

6 A I pulled off.

7 Q Okay. And did you call 9-1-1?

8 A Yes, ma'am.

9 Q Okay. Did you see who ended up with the gun?

10 A No, ma'am.

11 Q Okay. And did you -- did you see where the defendant
12 ended up?

13 A Yes, ma'am.

14 Q And where did he end up?

15 A Sitting on the sidewalk.

16 Q Did -- could you tell anything about his demeanor at
17 that moment?

18 A He was just tired.

19 Q And this occurred in Spartanburg County, is that
20 right?

21 A Yes, ma'am.

22 MS. REESE: Nothing further.

23 CROSS-EXAMINATION

24 BY MS. JONES

25 Q You indicated you were coming from a friend's house,

Larry Gory
Cross-examination by Ms. Jones

1 is that correct?

2 A Yes, ma'am.

3 Q Okay. What were you doing at that friend's house?

4 A It was -- I rather not say.

5 MS. REESE: I'm -- Your Honor, would you direct the
6 defendant or the witness to answer the question of what he
7 was doing at his friend's house? I'm trying to determine
8 whether or not he's a credible witness in terms of what
9 he's talking about.

10 THE COURT: I understand. Let me see y'all just a
11 minute.

12 (Bench conference held off the record in the presence
13 of the jury but out of the hearing of the jury.)

14 THE COURT: Rephrase your question.

15 MS. JONES: Thank you, Your Honor.

16 BY MS. JONES

17 Q Were you drinking or doing any type of intoxicating
18 drugs or illegal drugs or anything like that at the
19 friend's house?

20 A No. I don't drink or smoke.

21 Q Okay. Something else of a personal nature?

22 A Yeah.

23 Q Okay. Fair enough.

24 What time did you leave that friend's house?

25 A I don't remember. I know it was late, but I don't

Larry Gory
Cross-examination by Ms. Jones

1 remember like what time it was.

2 Q Had you been up all night?

3 A It was -- I'm saying I know, I know it was late
4 because I was going to get my kids, and it was kind of late
5 when I was going to pick them up, because their mother had
6 to work earlier in the -- you know, in the night, so I had
7 to go pick them up. So I had to leave, leave there to go
8 get them.

9 Q Okay. But the question was did you sleep at all that
10 night or were you up all night.

11 A No. I had went to sleep when I got home.

12 Q From this incident or the night -- let me ask you
13 this. Okay. On -- this is -- on the morning that you were
14 going to go pick up your kids that you saw what was going
15 on did you actually get out of bed after you awoke, or had
16 you been up all night and got in --

17 A Yes. I'm up. I been up.

18 Q Okay. So how long had you been up?

19 A Like most all day.

20 Q Okay. All day and all night. And then you got in
21 your car and were going to go pick up your kids?

22 A Yeah.

23 Q Okay. All right. And you don't recall necessarily
24 what time you saw these two gentlemen?

25 A No, ma'am.

Larry Gory
Cross-examination by Ms. Jones

- 1 Q Okay. And you indicated that they didn't look like
2 they were really fighting but they were kind of talking,
3 sort of tussling over something.
- 4 A Yeah.
- 5 Q Okay. Did you hear any type of conversation going on?
- 6 A Uh-uh.
- 7 Q Okay. So as far as you were concerned there wasn't
8 really much talking going on?
- 9 A They were both like kind of tired.
- 10 Q Okay. They were tired. So they weren't saying
11 anything.
- 12 A Uh-uh.
- 13 Q Okay. And then who got control of the gun?
- 14 A I don't know.
- 15 Q Okay.
- 16 A They both, you know, like they were still trying to
17 like take it from each other.
- 18 Q Okay. Did you notice it was a gun?
- 19 A Yeah. When I noticed, that's when I pulled up.
- 20 Q Okay. But when you initially rolled down the window
21 you didn't know.
- 22 A Uh-uh.
- 23 Q Okay. You were just asking, hey, need some help.
- 24 A Yeah.
- 25 Q Okay. And did you actually call 9-1-1?

1 A Yes, ma'am.

2 MS. JONES: I have nothing further, Your Honor.

3 MS. REESE: Nothing further.

4 THE COURT: You may step down.

5 MS. REESE: Your Honor, may we approach?

6 (Bench conference held off the record in the presence
7 of the jury but out of the hearing of the jury.)

8 THE COURT: All right. We are going to take a short
9 break. Go to your jury room. Don't talk about the case.
10 I will bring you back after that break.

11 (The following takes place outside the presence of the
12 jury.)

13 THE COURT: All right. We will be at ease for 15
14 minutes.

15 (Whereupon, a recess was taken.)

16 THE COURT: Bring the jury in, please.

17 (The following takes place in the presence of the
18 jury.)

19 THE COURT: Ladies and gentlemen, I have some
20 evidentiary matters that I have to resolve and then have
21 exhibits marked and admitted, and that's going to take a
22 little while. And rather than just having y'all sit back
23 there waiting on us to do that I'm going to let you go for
24 the afternoon. We'll conclude with all of those matters,
25 and we'll be ready to continue with the taking of testimony

Jeffery Powell
Direct examination by Ms. Reese

1 (Proceedings October 26, 2010)

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

4 THE COURT: All right. Are we ready for the jury?

5 MS. REESE: Yes, sir, Your Honor.

6 MS. JONES: Yes, sir.

7 THE COURT: Okay. Bring them in.

8 (The following takes place in the presence of the
9 jury.)

10 THE COURT: Good morning, ladies and gentlemen.

11 As you know, when we recessed yesterday the state had
12 begun their presentation of evidence. So we'll continue
13 with that presentation this morning.

14 Ms. Reese.

15 MS. REESE: Thank you, Your Honor. The state calls
16 Jeffery Powell.

17 JEFFERY POWELL, having been
18 first duly sworn, testified as follows:

19 DIRECT EXAMINATION BY MS. REESE

20 Q Please state your name for the jury, please.

21 A My name is Jeffery Powell.

22 Q And, Officer Powell, where are you employed?

23 A I'm employed with the city of Spartanburg.

24 Q And how long have you been employed there?

25 A I've been employed there since 2004.

Jeffery Powell
Direct examination by Ms. Reese

1 Q And what are your duties as an employee of the
2 sheriff's -- I mean of the city? I'm sorry.

3 A I work patrol. A majority of the time I've been on
4 night shift.

5 Q And were you working on the early morning hours of
6 July 21st of 2008?

7 A I was.

8 Q And what were you doing that morning?

9 A I was on regular patrol.

10 Q Did you receive a call regarding an incident in
11 downtown City of Spartanburg?

12 A I did.

13 Q And when were you dispatched to that call?

14 A It was around -- I was dispatched at 4:04 a.m.

15 Q And when did you arrive at the scene?

16 A 4:05 a.m.

17 Q When you arrived what did you see?

18 A When I first arrived there was two males sitting in
19 the intersection near -- one of them sitting in the
20 intersection and one standing in the intersection of Daniel
21 Morgan Avenue and West Main Street.

22 Q The man sitting, do you remember what he was wearing?

23 A He had on a white shirt, and-but he was covered in
24 blood.

25 Q And what was his demeanor when you first arrived?

Jeffery Powell
Direct examination by Ms. Reese

1 A He was sitting on one of the center islands in the
2 roadway. He was just sitting there. He wasn't really
3 doing anything. He was calm. I never went towards him.

4 Q And was there another individual there?

5 A Yes.

6 Q And do you remember what he was wearing?

7 A He had on a black shirt.

8 Q And what was his demeanor?

9 A He was very upset.

10 Q And as you approached him did you ask him anything?

11 A As I was getting out of my car going towards him,
12 because he was the one that was -- he was moving around.
13 He was very upset. He, he started telling me things.

14 Q Now, it's very important. After you began asking him
15 questions -- you can't testify to anything after you began
16 asking him questions. Can you tell me what he said to you
17 when you arrived?

18 A Yes.

19 MS. JONES: I'm going to object, Your Honor. Hearsay.

20 THE COURT: The defendant's statement?

21 MS. REESE: No, Your Honor. This is an excited
22 utterance by the witness.

23 THE COURT: All right. Well, let me see y'all just a
24 minute.

25 (Bench conference held off the record in the presence

Jeffery Powell
Direct examination by Ms. Reese

1 of the jury but out of the hearing of the jury.)

2 THE COURT: You may continue.

3 MS. REESE: Thank you, Your Honor.

4 BY MS. REESE

5 Q Officer, you testified your response time to the 9-1-1
6 call was one minute, is that correct?

7 A Yes.

8 Q So you just arrived on the scene.

9 A I did.

10 Q The man in the black is -- again, describe how he is
11 acting when you arrive on the scene.

12 A He's extremely -- he's moving around. He's, he's
13 moved away from the other individual, and he's just very
14 upset.

15 Q And what, if anything, did he say to you as you
16 arrived on scene?

17 A As I arrived and was getting out of the car and maybe
18 taken about one or two steps out of the car he kept saying,
19 "Dude shot him, dude shot him," and he would point down the
20 road towards the guy with the white shirt on. And there
21 was a car behind him.

22 Q And did he say anything to you in regard to a weapon?

23 A He said -- yeah. He told me that he took the gun from
24 him, and then he pointed towards the sidewalk just a little
25 ways on down. And there was a weapon laying on the

Jeffery Powell
Direct examination by Ms. Reese

1 sidewalk.

2 Q And did you at that point go to the weapon?

3 A I did.

4 Q And what did you do in regard to the weapon?

5 A I secured the weapon. It had -- it had blood on it.

6 And I picked the weapon up and I put it in there and

7 secured it in the vehicle.

8 Q Okay. When you secured it in the vehicle, where did
9 you place the, the weapon?

10 A In the trunk of the vehicle.

11 Q Okay. And is that locked?

12 A Yes.

13 Q And during the time that you had the gun did you alter
14 it or tamper with it in any way?

15 A I did -- at that point I did make it safe.

16 Q Okay. What did you do by making it safe?

17 A I removed the round that was the round in the chamber.

18 Q Okay. After you finished doing that, what then did
19 you do?

20 A I just stayed, maintained at the scene and started
21 working just gathering information.

22 Q Okay. Who did you gather information -- any witness
23 that you gathered information from?

24 A The guy in the black shirt. I went back to him and
25 was talking to him. I did read him his rights at that

Jeffery Powell
Direct examination by Ms. Reese

1 point, because we didn't know what exactly was going on.

2 Q Okay. Did you speak to a Larry Gory at the scene?

3 A Yes.

4 Q Can you tell me whether or not you spoke to Mr. Gory
5 first or whether you spoke to, to the witness?

6 A I believe I went to Larry Gory first.

7 Q Okay. And did you speak to him about what had
8 happened?

9 A I went to him, and he, he was the one that said he had
10 called, called it in.

11 Q And after speaking to him did you go back and speak to
12 the -- to the witness in the black?

13 A Yes.

14 Q And you said you read him his rights and then talked
15 to him.

16 A Yes.

17 Q I'm going to show you what's been marked as State's
18 Exhibit 3 for Identification.

19 A Uh-huh.

20 Q Can you identify that?

21 A That was the weapon that was laying on the sidewalk.

22 Q And after you picked that up and secured it, made it
23 safe, what did you do with it?

24 A I later on turned it in to city evidence.

25 Q And other than making it safe you did not alter it or

Jeffery Powell
Cross-examination by Ms. Jones

1 tamper with it, is that correct?

2 A No.

3 MS. REESE: Nothing further of this witness, Your
4 Honor.

5 CROSS-EXAMINATION

6 BY MS. JONES

7 Q Officer, were you the first to arrive on the scene?

8 A Yes.

9 Q Okay. How long would you say it took for other
10 officers to arrive?

11 A It was a matter of seconds. We were all coming in
12 about real close to each other.

13 Q And you indicated you saw the, the man in the black,
14 came up to you, correct?

15 A Yes.

16 Q Okay. And the other person who was in white, he was
17 sitting on sort of the median area.

18 A Yes.

19 Q Okay. And you said he wasn't doing anything.

20 A No. He was -- I just remember him being -- he was
21 just sitting still, very calm --

22 Q Okay.

23 A -- is the only thing I could describe.

24 Q All right. Now, do you recall whether his head was
25 just down or if he was looking around or waving his arms?

Jeffery Powell
Cross-examination by Ms. Jones

1 A He, he wasn't waving his arms or anything, but I can't
2 recall anything about his head.

3 Q Okay. So you couldn't tell whether or not he was in
4 shock, for example.

5 A No. I wouldn't know that.

6 Q Okay. You also indicated he went -- you indicated the
7 man in the black was very upset, correct?

8 A Yes.

9 Q Okay. Kind of hard to calm down?

10 A Right there initially.

11 Q Okay. And, in fact, on the scene he came up to you.
12 He spoke with you. And at that point you tried to
13 Mirandize him, right?

14 A Not, not, not, not right off at first, because I went
15 and spoke to -- that was after I had picked up the weapon
16 and went and spoke to Mr. Gory, after securing the weapon
17 and everything. And then I went back to the guy in the
18 black shirt.

19 Q Okay. And was Mr. -- and how long would you say had
20 passed?

21 A I'm not sure. Five. It might have been five or ten
22 minutes.

23 Q Okay. And you asked him another question, correct?

24 A Yes.

25 Q And he didn't really respond to that question,

Jeffery Powell
Cross-examination by Ms. Jones

1 correct? He indicated another line. Basically, you asked
2 where this had happened, and he came back with another
3 utterance, correct?

4 MS. REESE: Your Honor, I'm going to object at this
5 point based upon hearsay. It's no longer an excited
6 utterance.

7 THE COURT: Overruled.

8 BY MS. JONES

9 Q What did he say to you?

10 A I asked him where it happened at, and he would just
11 say Wal-Mart. He did say Wal-Mart.

12 Q Did he also say the subject was shot trying to wreck
13 the vehicle by grabbing the steering wheel?

14 A Yeah. He said that the other individual was grabbing
15 ahold of the steering wheel.

16 Q Okay. And, in fact, trying to wreck the vehicle,
17 correct?

18 A Yes.

19 Q And, in fact, he just kept saying that over and over
20 again, correct?

21 A I know that he, he did say it at least once or twice.

22 Q Okay. And at that point you took him down to city
23 hall for a more thorough investigation.

24 A Yeah. Everything was over with at that point.

25 Q Okay. But my question was you took him down to city

George Brown
Direct examination by Ms. Reese

1 hall.

2 A I didn't take him, but, yeah, he was taken.

3 MS. JONES: Okay. Nothing further.

4 MS. REESE: Nothing further, Your Honor.

5 THE COURT: You may step down.

6 MS. REESE: The state calls George Brown.

7 Your Honor, may this officer be excused?

8 THE COURT: He may be.

9 (Whereupon, the witness was excused.)

10 GEORGE BROWN, having been
11 first duly sworn, testified as follows:

12 DIRECT EXAMINATION BY MS. REESE

13 Q Would you state your name for the jury, please?

14 A George Brown.

15 Q And where are you employed?

16 A Spartanburg City Police Department.

17 Q And how long have you been employed there?

18 A Approximately 22 years.

19 Q And what are your duties as an employee of the
20 department?

21 A Currently, I'm a shift supervisor on the third shift.

22 Q And what were your duties on July 21st of 2008?

23 A Master patrol officer on, on third shift.

24 Q And were you working on the early morning hours of
25 July 21st of 2008?

George Brown
Direct examination by Ms. Reese

1 A I was.

2 Q And did you receive a call-out that brought you to the
3 City of Spartanburg?

4 A I did.

5 Q And when you arrived on scene what did -- first of
6 all, how quickly did you arrive?

7 A I was the second officer on scene. As I pulled up I,
8 I was there just a matter of, I'd say, seconds after
9 Officer Powell. And then as I arrived it was like everyone
10 started arriving at the same time.

11 Q When you arrived on the scene what did you see?

12 A I saw a male subject wearing white, a white shirt
13 with, with blood covering the shirt, sitting across the
14 intersection from where I had pulled up.

15 And Officer Powell was near another subject wearing a
16 black t-shirt and was headed in my direction carrying a
17 pistol.

18 Q What did you do upon arriving on the scene?

19 A When I saw -- Officer Powell asked me to stand by the
20 guy with the black, black shirt. So I went up by him. And
21 I stood by with him while Officer Powell secured the
22 weapon.

23 Q Did you ask him any questions?

24 A No. I was just trying to get him to calm down. I was
25 telling him to, you know, calm down, settle down. He was,

George Brown
Direct examination by Ms. Reese

1 he was crying. He was bouncing all over the place and --

2 Q What, if anything, did he say while you were standing
3 there?

4 A He just kept, as Officer Powell testified, he just
5 kept saying, "Dude, dude shot him, due shot him," and kept
6 pointing over towards the male in the white shirt.

7 Q Did he tell you anything regarding whether or not he
8 took the gun away from the man?

9 A Yes. He, he, he said that he had taken the gun away
10 from him and that Officer Powell had taken that -- that it
11 was the gun that Officer Powell had taken. And that was it
12 as far as the gun. He just stated that like one time.

13 Q Okay. Did he tell you anything regarding whether or
14 not the victim had tried to wreck the car?

15 A Yeah. He, he said that they had left a club over in
16 Greenville and that they were supposed to be taking the
17 victim -- supposed to be taking him home. And they had
18 gone past his road and he got very upset and was trying to,
19 to get them to stop the car, and the driver wouldn't stop.
20 He said he just wouldn't stop. And he said that was when
21 he started fighting with the driver of the car.

22 Q After he spoke to you, what did you do?

23 A I took him, the, the gentleman, the black shirt, I
24 took him to city hall to stand by and wait for
25 investigators to, to come up and talk with him.

George Brown
Direct examination by Ms. Reese

1 Q During the time did you ever -- did you see the man in
2 the white?

3 A Yes.

4 Q And what was his demeanor when you watched him?

5 A He, he was just sitting there on the, the little
6 island, and just sitting there, and just real calm.

7 Q Nothing further. Oh, I'm sorry. This happened -- you
8 found. Okay. I'm sorry. I need to ask a few more
9 questions.

10 Was there a, a car or vehicle on the scene?

11 A Yes. From the direction that I pulled up -- I was on
12 Daniel Morgan. And across the intersection from me was the
13 gentleman in the white shirt. And then behind him was the
14 SUV setting.

15 Q Did you yourself approach the vehicle?

16 A No.

17 Q Did another person or officer approach the vehicle
18 while you were there?

19 A Yes.

20 Q And what, if anything, was in the vehicle?

21 A They indicated that there was, there was a victim, a
22 body, in the, in the vehicle.

23 Q And that was in the City of Spartanburg there on Main
24 Street.

25 A That's right.

George Brown
Cross-examination by Ms. Jones

1 Q And at that point what did your -- what did the city
2 do in regard -- you had the body. What happened then?

3 A We just, we secured the scene, secured whatever
4 witnesses that we could, and evidence. Notified
5 investigators and then tried to determine where this
6 actually, actually happened.

7 Q Thank you.

8 MS. REESE: Nothing further.

9 CROSS-EXAMINATION

10 BY MS. JONES

11 Q Is it Officer Brown or Detective Brown?

12 A It's been both, but now it's sergeant.

13 Q Okay. Sergeant. Make sure I call you right.

14 You indicated you were -- you arrived on the scene,
15 correct?

16 A Yes.

17 Q Okay. And you wrote a police report, correct?

18 A That's a simple report wrote out.

19 Q And it's important that we write reports, correct?

20 A That's correct.

21 Q And one of the important reasons why you write reports,
22 is because trials take a while to get to, right?

23 A That's correct.

24 Q And we have to make sure all of those details get into
25 that police report, correct?

George Brown
Cross-examination by Ms. Jones

1 A That's correct.

2 Q Okay. And we don't want to leave out important
3 details, correct?

4 A That's correct.

5 Q Okay. And certainly an excited utterance by the
6 witness in black saying, "We went by his house, we didn't
7 turn in and he then tried to take control because he
8 wouldn't stop," that's a pretty important detail, wouldn't
9 you say?

10 A Yeah, pretty.

11 Q Yes or no, sir?

12 A Yes.

13 Q Okay. I'm going to hand you something that's been
14 labeled Defendant's --

15 (Report of George Brown marked Defendant's Exhibit No.
16 3 for Identification.)

17 Q I hand you something labeled Defendant's Exhibit 3.
18 Do you recognize that?

19 THE COURT: Has that been admitted?

20 MS. REESE: No, Your Honor.

21 THE COURT: Well, it's marked Defendant's 3.

22 MS. JONES: For demonstrative purposes only. I'm not
23 going to necessarily introduce that into evidence, sir.

24 THE COURT: You can't use it for demonstrative
25 purposes.

George Brown
Cross-examination by Ms. Jones

1 MS. JONES: To refresh his memory.

2 THE COURT: He can look at it to refresh his memory,
3 but he can't read from it.

4 MS. JONES: I haven't asked him to, sir.

5 THE COURT: Well, let's see it.

6 BY MS. JONES

7 Q Do you recognize that, sir?

8 THE COURT: You may look at it if that'll assist you
9 in refreshing your memory of something that occurred prior
10 to today, but you can't read it. You can read it to
11 yourself. You can't read it orally.

12 THE WITNESS: Right.

13 BY MS. JONES

14 Q Do you recognize that?

15 A I'm, I'm trying to, trying to compare to what, what I
16 have here as far as my narrative, because this is on a
17 different form, but it looks to be the same, yes, same
18 narrative.

19 Q And that's a report you wrote, correct?

20 A Yes.

21 Q You didn't write anything in your report after meeting
22 the man in the black about someone trying to wreck the car
23 because they had passed his house, correct? That's not in
24 there.

25 A The reason that's not in --

George Brown
Cross-examination by Ms. Jones

1 Q Sir, that wasn't my question.

2 A Okay. No. It's not.

3 Q And, in fact, the only thing in your report is that
4 you went up to the person in black, and the only thing the
5 person in black was saying, someone -- "The dude shot him,
6 the dude shot him." And at that point you took him down to
7 be interviewed, isn't that correct?

8 A That's correct.

9 Q Okay. And, again, still even after you say you've
10 interviewed him, nothing about we went past his home, he
11 became concerned, he wanted the car to stop, nobody would
12 let him out. Nowhere in that report, correct?

13 A No.

14 Q Okay. Even after it says we interviewed him, correct?
15 Nothing about that, correct, in your report?

16 A I, I don't, I don't think I have in my report that
17 about we interviewed him, but, no, it doesn't say anything
18 about that.

19 Q It doesn't say in that report -- and you can look at
20 it to refresh your memory -- we took him down to city hall
21 for an interview.

22 A Right. But I didn't interview him.

23 Q And, again, you talk a little bit about what he said.
24 Nothing about we went past the house where the victim
25 lived, wouldn't let him out. Nothing about that, is that.

George Brown
Cross-examination by Ms. Jones

1 fair to say?

2 A Yes. That's very fair to say.

3 Q How many times did you talk with the state about this
4 case?

5 A I, I think I spoke with her once over the phone, and
6 we met for about five minutes before court this morning.

7 Q Okay. Were you aware that one of the witnesses wasn't
8 coming today?

9 A I didn't -- today I didn't know for sure whether he
10 was or was not.

11 Q The state didn't share with you that Mr. Jimenez
12 wasn't coming?

13 A Just before we came in the courtroom.

14 Q The man in black?

15 A Yes.

16 Q Okay. Did you have any conversation about what you
17 were supposed to try and get in it through excited
18 utterances?

19 A Just what I did get through, excited utterance. And
20 that's all that I included in my report, what was an
21 excited utterance on the scene.

22 Q Okay. And the only thing that he said on that scene
23 was that somebody was shot, the dude shot him, correct?

24 A He said, he said, "Dude shot him," and he said that,
25 the gun --

George Brown
Cross-examination by Ms. Jones

1 Q Is over there.

2 A "Is over there." And that he had, he had been
3 fighting with the guy over the, over the steering wheel
4 and --

5 Q And that's it. Fighting over the steering wheel. The
6 dude shot him. And that's all that was said. And he was
7 then taken down to be interviewed, correct, for a more
8 in-depth interview, correct?

9 A But prior to the in-depth interview, prior to the
10 investigators getting there, is when he was trying to tell
11 me where all this, all this happened. And as he's telling
12 me where all of this happened is when, when he said that
13 they had gone past the street and the guy got all upset and
14 came over the seat fighting with the driver.

15 Q And that's the first time we've ever heard that.
16 Because it's not in your report, is it, sir?

17 A It's, it's not in my report because I put in my report
18 what was, what was said on the scene. And then the
19 investigators were interviewing him. I did not interview
20 him.

21 Q Okay. So are you saying that that wasn't said on the
22 scene?

23 A I don't recall that it was. I don't recall whether it
24 was or was not. I do recall that it was said in the squad
25 room while I was waiting for the, for the investigators.

George Brown
Redirect examination by Ms. Reese

1 Q I think I'm confused. So now you're not sure whether
2 or not he actually said he passed his house at the scene?

3 A On the scene I'm -- I can't say for sure whether he
4 said that or not.

5 I know that in the squad room as we were waiting for
6 the investigators and he was trying to tell me where all of
7 this happened, I know that he said it there. He, he just,
8 he was very excited. He, he was just crying and screaming
9 and bouncing all over the place.

10 Q But, again, even when you took the notes, there's
11 nothing in there. You said in the interview there's some
12 things being said. Nothing about passed the house,
13 correct? You didn't put that in your report.

14 A Right.

15 Q And you're taught to write very important things in
16 your report, correct?

17 A Yes.

18 MS. JONES: Your Honor, may we approach?

19 THE COURT: Yes.

20 (Bench conference held off the record in the presence
21 of the jury but out of the hearing of the jury.)

22 MS. JONES: Nothing further.

23 REDIRECT EXAMINATION

24 BY MS. REESE

25 Q Officer, I'm going to ask you to look at your report

George Brown
Recross-examination by Ms. Jones

1 again.

2 Will you please -- is there a line in here where you
3 talk about him -- them dropping off the victim and the
4 defendant wouldn't stop? Start with "while there".

5 A "While there the subject told me that they were
6 leaving a club in Greenville and were going to drop the
7 victim off in Greer when the victim began trying to run the
8 vehicle off the road. He was fighting with the driver to
9 try to get him to stop."

10 Q So it is in your report, isn't it, Officer?

11 A Yes.

12 MS. REESE: Nothing further.

13 RECROSS-EXAMINATION

14 BY MS. JONES

15 Q Now, do you recall whether or not that was actually
16 said during the interview or on scene?

17 A I never interviewed him. I never, I never was there
18 for the interview. When the investigators got there I left
19 city hall and went back to the scene to talk with the
20 investigators that were, that were out there and see if
21 there was anything else that I needed to do.

22 Q How long were you part of this investigation? How
23 long were you there?

24 A It was -- it was well after we got off duty. We were
25 supposed to get off duty at 8:00 o'clock. So it was

Susan Hrycaj
Direct examination by Ms. Reese

1 probably, I'd say, 10:00 or 10:30 before I left altogether.
2 But I left city hall as soon as the investigators got
3 there, which was I would say probably right around
4 8:00 o'clock.

5 Q And did you go back to the scene at that point?

6 A At 8:00 o'clock when they got there I left and went
7 back to the scene.

8 MS. JONES: Nothing further.

9 MS. REESE: Nothing further.

10 THE COURT: You may step down.

11 MS. REESE: The state calls Lashae Lipscomb.

12 Your Honor, may this witness be excused?

13 THE COURT: He may be.

14 (Whereupon, the witness was excused.)

15 MS. REESE: The state calls Susan Hrycaj.

16 SUSAN HRYCAJ, having been
17 first duly sworn, testified as follows:

18 DIRECT EXAMINATION BY MS. REESE

19 Q Can you state your name? And spell it for the court
20 reporter, please.

21 A My first name is Susan. My last name is Hrycaj,
22 spelling H-R-Y-C-A-J.

23 Q Where are you employed?

24 A I'm sorry, ma'am?

25 Q Where are you employed?

Susan Hrycaj
Direct examination by Ms. Reese

- 1 A Currently employed with the Spartanburg County
2 Sheriff's Office.
- 3 Q And how long have you been employed there?
- 4 A Approximately one year now.
- 5 Q And where were you employed on July 21st of 2008?
- 6 A City of Spartanburg Police Department.
- 7 Q And at that time what were your duties with the City
8 of Spartanburg?
- 9 A Master patrol officer, third shift.
- 10 Q Did you have occasion to respond to a death scene in
11 downtown City of Spartanburg?
- 12 A Yes, ma'am.
- 13 Q And at the time that you got there do you know where
14 the defendant was?
- 15 A From my perspective, I came north on South Daniel
16 Morgan Avenue. And officers were in the proximity of the
17 intersection with two individuals. My vehicle stayed
18 behind.
- 19 Q And did you have occasion to take a piece of evidence
20 from the defendant?
- 21 A Yes, ma'am.
- 22 Q And I'm going to show you what's been marked as
23 exhibits -- State's Exhibit 6 for Identification. Can you
24 tell me what that is?
- 25 A Yes, ma'am. This is the shirt the gentleman was

Susan Hrycaj
Direct examination by Ms. Reese

1 wearing.

2 Q And the defendant was wearing?

3 A Yes, ma'am.

4 Q And what did you do in regard to that shirt?

5 A Taking it into my custody, I then went to city hall
6 placing it into property and evidence there.

7 Q During the time that you had the shirt did you tamper
8 with it or alter it in any way?

9 A No, ma'am.

10 Q And is it in substantially the same condition as when
11 you took it?

12 A Yes, ma'am.

13 MS. REESE: Your Honor, I would ask State's Exhibit 6
14 be admitted at this time.

15 MS. JONES: No objection, Your Honor.

16 THE COURT: It's No. 6?

17 MS. REESE: No. 6, Your Honor.

18 (Bloody shirt marked State's Exhibit No. 6.)

19 MS. REESE: Nothing further of this witness, Your
20 Honor.

21 MS. JONES: I have no questions for this witness.

22 THE COURT: You may step down.

23 MS. REESE: May this witness be excused, Your Honor?

24 THE COURT: She may be.

25 (Whereupon, the witness was excused.)

Lashae Lipscomb
Direct examination by Ms. Reese

1 MS. REESE: The state calls Lashae Lipscomb.

2 LASHAE LIPSCOMB, having been
3 first duly sworn, testified as follows:

4 DIRECT EXAMINATION BY MS. REESE

5 Q Can you state your name for the jury, please?

6 A Lashae Lipscomb.

7 Q And, Ms. Lipscomb, you're sick today, is that right?

8 A Yes.

9 Q If you would, just kinda try to speak loudly so that
10 the court reporter can hear you.

11 A Okay.

12 Q Where are you employed?

13 A Spartanburg EMS.

14 Q And where were you employed on July the 21st of 2008?

15 A Spartanburg EMS.

16 Q And did you have occasion to respond to the scene of a
17 death in downtown City of Spartanburg?

18 A Yes.

19 Q And on that date did you have interaction with the
20 defendant, Manuel Marin?

21 A Yes.

22 Q And as to Mr. Marin, what was your duty there at EMS?

23 A Provide care for whoever was hurt.

24 Q And did you, did you talk to him about whether or not
25 he needed assistance?

Lashae Lipscomb
Cross-examination by Ms. Jones

1 A Yes.

2 Q And what did he tell you?

3 A He said no.

4 Q Did he -- was he transported by EMS?

5 A No.

6 Q Why not?

7 A He wasn't hurt. I didn't find any injuries on him.

8 Q And did you actually look to see if there were any
9 injuries on him?

10 A Yes, I did.

11 Q And how did you do that?

12 A I removed his shirt and cut up the right side of his
13 pants leg because he had blood on him.

14 Q And were you able to determine whether or not he had
15 any injuries, at least that you could see?

16 A He did not have any injuries as far as I could see.

17 Q Did he tell you that he had injuries?

18 A Correct. He did not -- he stated he did not have any
19 injuries.

20 Q Nothing further.

21 CROSS-EXAMINATION

22 BY MS. JONES

23 Q Ms. Lipscomb -- is it Lipscomb?

24 A Lipscomb.

25 Q Lipscomb. I'm sorry. Is it fair to say that Mr.

Lashae Lipscomb
Cross-examination by Ms. Jones

- 1 Marin was a man of few words?
- 2 A Yes.
- 3 Q Was his demeanor sort of in shock or very, very quiet,
4 reserved? Would that be a fair and accurate statement?
- 5 A Yes. He was calm.
- 6 Q Did he look to or appear to be in shock?
- 7 A Not that I can recall as far as what shock looks like.
8 I can't say.
- 9 Q Just sort of slow and deliberate, you know, just
10 indicating I'm not hurt, I'm okay?
- 11 A Yes.
- 12 Q In fact, you had to ask a couple of times, correct --
- 13 A Yes.
- 14 Q -- are you hurt, are you hurt, are you hurt? And
15 finally you got the I'm okay, correct?
- 16 A No. When I came up I asked him was he hurt. And he
17 was like I'm not hurt, it's not my blood. That's what he
18 kept saying.
- 19 Q Okay. It's not my blood.
- 20 A Uh-huh.
- 21 MS. JONES: Nothing further.
- 22 THE COURT: You may step down.
- 23 MS. REESE: Your Honor, may this witness be excused?
- 24 THE COURT: She may be.
- 25 (Whereupon, the witness was excused.)

Dale Arterburn
Direct examination by Ms. Reese

1 MS. REESE: The state calls Dale Arterburn.

2 DALE ARTERBURN, having been
3 first duly sworn, testified as follows:

4 DIRECT EXAMINATION BY MS. REESE

5 Q Will you state your name for the jury, please?

6 A Dale Arterburn.

7 Q And could you spell it for the court reporter?

8 A Sure. First name is Dale, D-A-L-E. Last name,
9 spelling Arterburn, A-R-T-E-R-B-U-R-N.

10 Q And where are you employed?

11 A City of Greer at the police department.

12 Q And how long have you been employed there?

13 A Been there 14 years.

14 Q And you're with the City of Greer, is that correct?

15 A Yes, ma'am.

16 Q Did you have occasion to respond to a call in
17 Spartanburg, in the City of Spartanburg, July 21st of 2008?

18 A Yes, I did.

19 Q And when you arrived there, what was your job? What
20 was your goal?

21 A The call had come in that there had been a homicide
22 that had occurred in the City of Greer, yet the vehicle and
23 the victim were located downtown Spartanburg.

24 My job at that point was to arrive on the scene,
25 locate witnesses, establish jurisdiction.

Dale Arterburn
Direct examination by Ms. Reese

1 Q And how did you -- what did you do in an effort to
2 establish jurisdiction?

3 A In an effort to establish jurisdiction both myself and
4 my lieutenant at that time had arrived -- Lieutenant Eric
5 Pressley. And we had been briefed by Spartanburg Public
6 Safety officials that were there that there was two
7 individuals still there, and one deceased in the vehicle.

8 We at that time made contact with who we believed to
9 be witnesses at the time -- we did not know what would be
10 the defendant -- but made contact with one of the
11 individuals there at the scene.

12 Q And was that Alfredo Jimenez?

13 A Yes, ma'am.

14 Q And what did you do in an effort to establish where
15 the actual shooting occurred?

16 A We, we had met with that individual and asked him if
17 he would be willing to establish -- or not establish but to
18 show us where this crime had occurred, and basically we
19 kind of wanted him to rewind the evening for us as to where
20 this all had initiated, where they had come into contact
21 with each other, being that there was three individuals in
22 the vehicle. And he was able to tell us that they had
23 picked him up at the club or offered to give him a ride
24 home from the club.

25 Q Now, I'm going to caution you. You can't say what he

77

Dale Arterburn
Direct examination by Ms. Reese

1 told you.

2 A Okay. Sorry.

3 Q During the time that you were with him did you, in
4 fact, take him back to Bongos?

5 A Yes.

6 Q And did you instruct him to take you on the route that
7 they came all the way through to Spartanburg?

8 A Yes.

9 Q And were you able based on his indication to determine
10 a location for this incident?

11 A Yes.

12 Q And did you, in fact, see anything on your own that
13 would indicate this is where the incident or shooting
14 occurred?

15 A Yes.

16 Q And what did you find?

17 A The area that we had arrived to based on information
18 showed fresh skid marks on the roadway and particles of
19 debris that appeared to be consistent with the vehicle's
20 condition that had had some damage to the front end. But
21 it appeared to be damage to a vehicle or vehicle particles
22 in the roadway. They were freshly, freshly applied, I
23 mean, not something that was all debris, but it was new,
24 obviously, and that's where his -- I'm sorry -- where we
25 were taken to.

Dale Arterburn
Direct examination by Ms. Reese

1 Q And so what you saw at the scene corroborated or was
2 consistent with the information you had from the witness.

3 A Yes.

4 Q And at that point where was this, where was the
5 incident location?

6 A The incident location appeared to be within the 29
7 northbound roadway in between Tacapau Road and -- there is
8 a, a U.S. Lumber Company, which is on the right-hand side
9 of the road. And there's a couple of entryways or
10 exit-ways down further from the actual building itself
11 between that, that location. I'm not sure if it'd be a
12 hundred yards or 150 yards, somewhere within that.

13 Q And what -- in what county is that in?

14 A That's in Spartanburg County.

15 Q What did you do? After you established that the
16 actual incident occurred in Spartanburg County, what did
17 you then do?

18 A We then drove the, the witness back to Spartanburg,
19 made contact with Spartanburg officials and advised them
20 what had been stated to us. That information was turned
21 over to them, along with the witness.

22 After that we then left, left them with the witness
23 and the information that we had passed on to them.

24 Q Did you have any further contact with this case at
25 that time?

Dale Arterburn
Direct examination by Ms. Reese

1 A No.

2 Q Can you tell me rough estimate in mileage? What is
3 the mileage -- or a brief estimate of what the mileage
4 would be from the incident location to the downtown area of
5 Spartanburg?

6 A I'm not good with clocking, but I would guesstimate
7 somewhere between 6 and 10 miles.

8 Q And did you -- as an officer in Greer are you familiar
9 with the area of

10 A Yes.

11 Q And if you were coming from Greenville, the location
12 of Bongos --

13 A Yes, ma'am.

14 Q -- and you are attempting to get to
15 in Greer, where would the incident location be on that
16 route?

17 MS. JONES: I'm going to object to speculation, Your
18 Honor. I don't quite understand the question. It's
19 speculative.

20 THE COURT: Well, I think he's testified to most of
21 it.

22 Rephrase your question.

23 BY MS. REESE

24 Q If you are attempting to get to how
25 does the incident location relate to where you would need

Dale Arterburn
Cross-examination by Ms. Jones

1 to turn off to get to

2 A The incident location would be extremely further than
3 where you would turn off to get to multiple,
4 multiple miles out of the -- I mean, is
5 within the city limits of Greer, County of Greenville. And
6 you've actually driven past, way past, that 29 towards
7 Spartanburg into Spartanburg County. So you're way past
8 where would be.

9 Q So would you actually have to turn around to get to
10 that?

11 A Yes. You'd have to make a u-turn in traffic back
12 towards Greer.

13 MS. REESE: Nothing further.

14 CROSS-EXAMINATION

15 BY MS. JONES

16 Q You indicated that you were taking the man in black
17 around to try to establish the incident location, is that
18 correct?

19 A Yes.

20 Q Okay. So you were essentially assisting in this
21 investigation?

22 A Essentially, we were primary investigators involved at
23 the scene.

24 The information led to us or passed onto us was this
25 occurred in the city limits of Greer, in front of the

Dale Arterburn
Cross-examination by Ms. Jones

1 Wal-Mart in Greer.

2 Q Okay.

3 A So we were, we were actually advised that was where it
4 occurred. So at that time we, we were obviously using any
5 witness we could use to establish jurisdiction, yes.

6 Q Okay. You indicated you are a detective.

7 A Yes, ma'am.

8 Q How long have you been on the force?

9 A Been there 14 years.

10 Q Fourteen years. So I would imagine you've done a lot
11 of homicide investigations, correct?

12 A Yes.

13 Q Okay. And isn't it fairly important in any type of
14 investigation to write a few notes in your report?

15 A I would agree on the investigation, yes.

16 Q Okay. It's not good just to rely on hearsay and
17 telling folks anything. You should always write it down in
18 a report, correct?

19 A For anything that happens in Greer, yes.

20 Q Okay. In fact, you didn't write up any police report,
21 isn't that correct?

22 A On this case, no, ma'am.

23 Q Okay. And I think you testified that the witness
24 indicated that the general area was Tacapau Road and
25 Greenville Road.

Dale Arterburn
Cross-examination by Ms. Jones

- 1 A Tucapau Road off 29, yes, ma'am, past Tucapau Road,
2 yes, ma'am.
- 3 Q Okay. And to get a little bit better familiarization
4 with this road, Highway -- it's Highway 29 -- but
5 Highway 29 is actually Wade Hampton Boulevard in Greer,
6 correct?
- 7 A It's universal, yes.
- 8 Q Okay. And then becomes Highway 29, and I think
9 Greenville Highway, is that correct?
- 10 A I believe so.
- 11 Q West Ezell Road.
- 12 A I'll agree. I'm not sure about that.
- 13 Q Okay.
- 14 A I don't -- my job is to establish the area of Greer
15 and what we consider Wade Hampton or U.S. 29.
- 16 Q Okay. And it is the same road, fair enough?
- 17 A I would say so.
- 18 Q Okay. And, in fact, you were initially -- thought it
19 was at Wal-Mart, correct?
- 20 A That's the information that was passed to us, yes,
21 that it occurred in front of Wal-Mart in Greer.
- 22 Q And that's actually off Highway 29, correct?
- 23 A That's correct.
- 24 Q How far is Highway 29 to Tacapau? It's a little bit
25 of ways, isn't it?

Dale Arterburn
Cross-examination by Ms. Jones

- 1 A Yes.
- 2 Q Probably about 10 or 15 miles?
- 3 A Maybe.
- 4 Q Okay. And, in fact, when you got to Tacapau and
5 Highway 29 you actually did see skid marks, correct?
- 6 A Yes.
- 7 Q And some debris, fresh debris, in the road, correct?
- 8 A Yes.
- 9 Q Okay. Did you take any pictures?
- 10 A It's not in the City of Greer. No, I did not.
- 11 Q Okay. You didn't want to assist the city or the
12 county in their investigation of this murder case?
- 13 A Are you asking me if I would?
- 14 Q Yes.
- 15 A I believe we had at that point established that we
16 were assisting them by establishing jurisdiction, not in
17 Greer.
- 18 Q Okay. Who did you pass that information along, hey,
19 there's skid marks and looks there's some fresh debris in
20 the road?
- 21 A At that time we passed it on to Spartanburg County or
22 Spartanburg city officers who were present on the scene
23 over at the city hall. I apologize.
- 24 Q Okay. Do you recall who that would have been?
- 25 A I have no idea who we spoke with. There was, there

Dale Arterburn
Cross-examination by Ms. Jones

1 was multiple investigators, were called out, and they were
2 doing a roll-call. And there was, there were a lot of
3 people around, but I don't know who we spoke to directly,
4 no.

5 Q Okay. And that debris -- I think you indicated it
6 could have been car pieces or plastic or something that
7 came from a car.

8 A It was plenty of fragmentation, particles of, of
9 debris in that area where the skid marks were, yes.

10 Q And it looked like it could have came from a car.

11 A That could have came from anything. It looks like the
12 vehicle or something had struck something and, and part of
13 it was falling from it, yes.

14 (Photographs marked Defendant's Exhibit No. 4 for
15 Identification.)

16 Q I show you some pictures that have been labeled
17 Defendant's Exhibit 4. Do you recognize that area? Is
18 that the area near Tucapau Road?

19 A Yes. Tucapau Road actually would be further up than
20 where these pictures were taken.

21 Q Right. But on the --

22 A Correct. 29 northbound toward Spartanburg, correct.

23 Q Okay. And on the right is that lumber company you
24 were referring to.

25 A Yes, ma'am. U.S. Lumber.

Dale Arterburn
Cross-examination by Ms. Jones

1 Q Okay. Does that look like a fair and accurate
2 description of where the witness indicated that this
3 incident basically happened on that highway with the lumber
4 yard on the right?

5 A From what we can best recollect, yes.

6 MS. JONES: Your Honor, at this time I'd like to move
7 that into evidence.

8 MS. REESE: Your Honor, I would ask when those
9 photographs were taken.

10 THE COURT: Well, where did you get them? Where did
11 the photographs come from?

12 MS. JONES: Our investigator took them, Your Honor.

13 THE COURT: Well, y'all discuss it. Talk to her about
14 the photos, Ms. Reese.

15 (Pause.)

16 MS. JONES: Your Honor, we can stipulate on the record
17 that those pictures are not from 2008, that they're just
18 being entered, introduced to show basically the general
19 vicinity of where this witness took Mr. Clyburn (sic).

20 MS. REESE: Yes, Your Honor. I just want to be clear
21 that that -- it may look different now than it did in 2008,
22 but she, she apparently wants them just for purposes to
23 show the vicinity. And I have no objection to that.

24 THE COURT: All right. They're admitted. How many?
25 Four photographs on one sheet, which is Exhibit 4?

Dale Arterburn
Cross-examination by Ms. Jones

1 MS. JONES: Yes, Your Honor.

2 THE COURT: Okay.

3 (Photographs marked Defendant's Exhibit No. 4.)

4 MS. JONES: Your Honor may I publish this to the jury?

5 THE COURT: You may.

6 BY MS. JONES

7 Q Now, Detective, is this the area in which you, again,
8 where the witness basically took you to this area?

9 A May I step down?

10 (Whereupon, the witness left the stand.)

11 Q Keep a little context.

12 A Yes. In that -- this is 29 northbound towards
13 Spartanburg, correct.

14 Q Okay. And this is just to be over, overly clear, that
15 is the road that actually takes you into Spartanburg,
16 correct?

17 A Yes, ma'am.

18 Q Okay.

19 MS. JONES: Nothing further, Your Honor.

20 MS. REESE: Nothing further of this witness, Your
21 Honor.

22 THE COURT: You may step down.

23 MS. REESE: May this witness be excused, Your Honor?

24 THE COURT: He may be.

25 (Whereupon, the witness was excused.)

Shamika Sanders
Direct examination by Ms. Reese

1 MS. REESE: The state calls Shamika Sanders.

2 SHAMIKA SANDERS, having been
3 first duly sworn, testified as follows:

4 Q Would you state your name for the jury, please?

5 A Shamika Sanders.

6 Q Could you spell your name for the court reporter?

7 A I'm sorry?

8 Q Can you spell your name?

9 A First name Shamika, S-H-A-M-I-K-A. Last name is
10 Sanders, S-A-N-D-E-R-S.

11 Q And where do you currently work?

12 A City of Greenville Police Department.

13 Q And where were you employed July the 21st of 2008?

14 A I was assigned to the crime scene unit, Spartanburg
15 County Sheriff's Office.

16 Q And how long have you been in law enforcement?

17 A This will be my tenth year.

18 Q And were you asked by your supervisors to collect some
19 evidence in this case?

20 A Yes, ma'am.

21 Q And --

22 THE COURT: Excuse me just a minute. Let me be sure
23 I'm clear on something.

24 Did you say you were formerly with the sheriff's
25 department, Spartanburg County Sheriff's Department?

Shamika Sanders
Direct examination by Ms. Reese

- 1 THE WITNESS: Yes, sir.
- 2 BY MS. REESE
- 3 Q And on July the 21st of 2008 what was your assignment?
- 4 A I was assigned to the crime scene unit, Spartanburg
- 5 County Sheriff's Office.
- 6 Q And what were you to do that morning?
- 7 A I was asked to collect a gunshot residue kit.
- 8 Q And from whom?
- 9 A Alfredo Jimenez.
- 10 Q And what time did you arrive that morning?
- 11 A I believe I arrived between 0700 or 7:00 o'clock that
- 12 morning and 7:30.
- 13 Q And did you actually approach Mr. Jimenez at the
- 14 police department or sheriff's department?
- 15 A No, ma'am. I made contact with him at 145 Broad
- 16 Street, which is the City of Spartanburg, city hall.
- 17 Q And what was -- at the time that you first observed
- 18 him did you find that he had any blood or debris on him
- 19 that you noticed?
- 20 A No, ma'am.
- 21 Q Okay. And what did you do at that point?
- 22 A The gunshot residue kit was collected from him.
- 23 Basically, in this case the gunshot residue kit comes in a
- 24 small packet. It has --
- 25 Q Let me just show you State's Exhibit 8 for

Shamika Sanders
Direct examination by Ms. Reese

1 Identification. Okay. Can you identify what that is?

2 A It's a gunshot residue kit collected from Mr. Jimenez.

3 Q Can you show the jury what you do and how you collect
4 gunshot residue?

5 A It comes in a small package just like this. It has
6 information which will include the person I'm taking the
7 gunshot residue kit from, my name and the officer's name
8 that collecting evidence, the badge number, the agency, the
9 collecting agency, as well as the case number.

10 Inside -- am I allowed to open this? Inside we have
11 small vials. Each one of them were labeled with a part of
12 the hand that you would use and a small piece on this brown
13 area. There's an adhesive attached to this. And what that
14 does, it collects small particles or gasses that can be
15 found on a part of the hand which is indicated on the small
16 vials.

17 Q And so what is the first thing you do in taking that?

18 A The first thing I did is make sure to get all of the
19 subject's information.

20 The next thing, each file has a label with it like,
21 for instance, this one is the left back of the hand. The
22 top is removed. The DNA adhesive is applied to the
23 person's hand, pressing firmly in that area. And it will
24 collect any particles or anything that's on there.

25 Q After you complete that step what do you do with that

Shamika Sanders
Direct examination by Ms. Reese

1 material?

2 A All of the contents are placed back in the bag. It is
3 sealed with evidence tape.

4 I will then initial it and then again seal it in
5 another evidence bag such as this. It's placed into
6 evidence at the, at the department.

7 Q After you do the particle lifts is there another step
8 before the test is complete?

9 A There is. There is also contents of small swabs.
10 Those Q-tips or swabbing areas are saturated with a nitric
11 acid which is also applied to the palm of the hand or an
12 area of the hand. And then it's also used to collect any
13 particles or anything, anything from residue.

14 Q And is there final step you do for a controlled
15 sample?

16 A Yes. The controlled sample is an area that may not
17 have been exposed to gunshot residue such as the foot or
18 stomach area or something like that.

19 Q And did you follow all of those three steps in taking
20 the GSR kit of Alfredo Jimenez?

21 A Yes.

22 Q And after you had completed that kit and sealed it as
23 you testified, what did you do with the kit then?

24 A It's placed into evidence, and that's the end of it.

25 Q Okay. So you placed it into evidence. And other than

Shameka Sanders
Cross-examination by Ms. Jones

1 your doing the test and your sealing the bag, you did not
2 alter or tamper with the test after you completed it.

3 A No, ma'am.

4 MS. REESE: Nothing further of this witness at this
5 time.

6 CROSS-EXAMINATION

7 BY MS. JONES

8 Q Now, you only took the sample from Alfredo Jimenez, is
9 that correct?

10 A That's correct.

11 Q Okay. And when you indicate that you take the sticky
12 part -- and you just place it on one part of the hand, or
13 do you just go all over the hand?

14 A The vial has an indication on which part of the hand
15 to collect it from. For instance, on one vial it may say
16 the left back of the hand. I will do the entire back of
17 the hand.

18 Q And how many -- is it just one big sheet or is it a
19 couple of sheets that you get?

20 A Can I show?

21 Q Yeah. Please do.

22 A For example, this will be a swab taken from the left
23 back of the hand. When it's opened there's a small disc on
24 the end of it. It is dabbed across the entire area of the
25 hand from the person, yes, ma'am.

Shameka Sanders
Redirect examination by Ms. Reese

1 Q Okay. And then that is the part that is basically
2 sealed up.

3 A Yes.

4 Q And then you send it on to SLED.

5 A Yes.

6 Q Okay. That is the same thing with the hands as well.
7 You just put it all around the hand.

8 A Uh-huh.

9 MS. JONES: Nothing further.

10 REDIRECT EXAMINATION

11 BY MS. REESE

12 Q I just have for clarification. The second part that
13 you testified was the nitric swabs and the swabs, are that
14 -- is that also taken over the entire hand?

15 A Yes.

16 Q And is that also packaged and sent to SLED?

17 A Yes.

18 Q And a controlled sample is sent as well?

19 A Yes.

20 Q All of that goes in the kit.

21 A Yes.

22 MS. REESE: Nothing further.

23 THE COURT: You may step down.

24 MS. REESE: Your Honor, may this witness be excused?

25 THE COURT: She may be.

Jeremy Taylor
Direct examination by Ms. Reese

1 (Whereupon, the witness was excused.)

2 MS. REESE: The state calls Jeremy Taylor.

3 JEREMY TAYLOR, having been
4 first duly sworn, testified as follows:

5 DIRECT EXAMINATION BY MS. REESE

6 Q Would you state your name for the jury, please?

7 A It's Jeremy Taylor.

8 Q And where are you employed?

9 A I am assigned to the crime scene unit, Spartanburg
10 County Sheriff's Office.

11 Q And were you employed there July the 21st of 2008?

12 A Yes, ma'am.

13 Q And did you have occasion to collect evidence that
14 morning?

15 A I did.

16 Q And what was your assignment that morning?

17 A I was to respond with Investigator Sanders to city
18 hall to collect a GSR kit.

19 Q And was your assignment to collect a GSR kit from
20 Manuel Marin?

21 A That's correct.

22 Q I show you what's been marked as State's Exhibit 9 for
23 Identification. Do you recognize that?

24 A Yes, ma'am, I do.

25 Q And what is that?

Jeremy Taylor
Direct examination by Ms. Reese

1 A This is similar -- this is exactly the same thing that
2 Investigator Sanders -- this is a gunshot residue
3 collection kit.

4 Can I open it, ma'am?

5 Okay. And what it is is exactly what Investigator
6 Sanders says. Each, each particle, each disc, is a
7 self-contained container. It's a blotter. And it is done
8 between both sides. You have the left -- the left back of
9 the hand and a left inside, the palm of the hand.

10 And what you do is you actually take the blotter
11 particle, and you go over the entire back of the hand,
12 including the inside, the top of the hand, over the
13 entire -- and then the entire surface of the palm.

14 Q And after you do the blotter, just to abbreviate the
15 testimony, do you do the swabs?

16 A You do, yes, ma'am.

17 Q And then a controlled sample.

18 A Yes, ma'am, you do.

19 Q And were all three of those steps performed on Manuel
20 Marin, the defendant?

21 A Yes, ma'am, they were.

22 Q Now, did you -- did the defendant actually have blood
23 on his hands at the time?

24 A He did.

25 Q Now, that morning when you went to -- where was he

Jeremy Taylor
Cross-examination by Ms. Jones

1 located, at the sheriff's department or the city?

2 A He was located at city hall. He was located in a room
3 there at the city hall.

4 Q And what was -- when you arrived where was he other
5 than in the room -- in the room?

6 A He appeared to be asleep in the floor.

7 Q And at that time you did the GSR kit on him?

8 A That's correct.

9 Q And after you packaged that kit did you seal it?

10 A I did.

11 Q And what did you do with it?

12 A Again, the, the kit was sealed. The red evidence tape
13 comes within the kit also. It was placed back into the
14 evidence bag. It was placed in evidence at the sheriff's
15 office.

16 Q And that was at 7:42 that morning.

17 A That's correct.

18 MS. REESE: Nothing further.

19 CROSS-EXAMINATION

20 BY MS. JONES

21 Q You indicated that Mr. Marin had blood on his hands,
22 is that correct?

23 A That's correct.

24 Q Okay. Did you do the gunshot residue test with the
25 blood on the hands, or did you ask him to take, to try to

Milner Beach
Direct examination by Ms. Reese

1 wipe the blood off?

2 A No. Nothing, nothing is asked to be removed from the
3 hands. The bloodshot kid, I mean, the gunshot kit -- I'm
4 sorry -- was done with blood on the hands, yes, ma'am.

5 Q And do you know what time you took this kit?

6 A It was around between 7:30 and 7:40, yes, ma'am.

7 MS. JONES: Nothing further.

8 MS. REESE: Nothing further of this witness.

9 THE COURT: You may step down.

10 MS. REESE: The state calls Milner Beach.

11 May this officer be excused, Your Honor?

12 THE COURT: He may be.

13 (Whereupon, the witness was excused.)

14 MILNER BEACH, having been
15 first duly sworn, testified as follows:

16 DIRECT EXAMINATION BY MS. REESE

17 Q Can you state your name for the jury, please?

18 A Milner Beach.

19 Q And where are you employed?

20 A City of Spartanburg Public Safety.

21 Q And as -- what are duties as an employee of the public
22 safety department?

23 A I am one of two property and evidence technicians.

24 Q Did you have occasion to take any evidence in in this
25 case on July the 21st of 2008? You can just --

Milner Beach

Direct examination by Ms. Reese

1 A Yes, ma'am.

2 Q I'm going to show you what's been marked as State's
3 Exhibit 3 for Identification. State's Exhibit 6 has
4 already been admitted. Did you take into evidence that
5 morning a gun clip and rounds?

6 A Yes, ma'am.

7 Q And what did you do with it when you got it?

8 A Well, our normal procedure is to sign on the evidence
9 sheet that the officer turns in, bar code it, enter it into
10 the computer. And I was advised that my item was going to
11 be picked up by the Spartanburg County Sheriff's
12 Department.

13 Q Okay. And what officer turned that into you?

14 A The gun, the clip and the rounds were turned in by
15 Jeff Powell. And he's, he has marked here on the evidence
16 sheet.

17 Q And after you received it did you alter it or tamper
18 with it in any way?

19 A No, ma'am.

20 Q And to whom did you give it?

21 A I apologize. I have to refer to my notes. Todd
22 Ruffner actually signed for it with the Spartanburg County
23 Sheriff's Office. And Chris Durham was with him. The two
24 of them came together.

25 Q Now, as to the shirt did you -- who gave that to you

Jack Christopher Durham
Direct examination by Ms. Reese

1 that morning?

2 A Officer Hrycaj, Susan Hrycaj.

3 Q Okay. And you turned it over to the investigators as
4 well at that time.

5 A Yes, ma'am.

6 Q And did you alter it or tamper with it at any time?

7 A No, ma'am, not at all.

8 MS. REESE: Nothing further of this witness.

9 MS. JONES: I have no questions, Your Honor.

10 THE COURT: You may step down.

11 MS. REESE: The state calls Chris Durham.

12 JACK CHRISTOPHER DURHAM,

13 having been first duly sworn, testified as follows:

14 DIRECT EXAMINATION BY MS. REESE

15 Q Can you state your name, please?

16 A Jack Christopher Durham.

17 Q And where are you employed?

18 A Spartanburg County Sheriff's Office.

19 Q And how long have you been employed there?

20 A Since '99.

21 Q And in July of 2008 -- July 21st of 2008, what, what
22 were your duties that month?

23 A I, I was assigned to investigations.

24 Q Okay. And what was your assignment that morning?

25 A I was advised to go to city hall and pick up evidence

Jack Christopher Durham
Direct examination by Ms. Reese

1 and bring it back to the sheriff's office.

2 Q And did you, in fact, pick up two items of evidence
3 from the city?

4 A Yes, we did.

5 Q And I'm going to show you State's Exhibit 3 for
6 Identification and State's Exhibit 6. Did you pick these
7 two items up from the city that morning?

8 A I believe we did, yes.

9 Q Okay. And do you need to look at them?

10 A Yeah.

11 (Pause.)

12 A Thank you.

13 Q Did you, in fact, pick those two items up from the
14 city that morning?

15 A It is signed by Todd Ruffner, but I was with him.

16 Q And did you and Todd Ruffner take these items together
17 to the sheriff's office?

18 A Yes, ma'am, we did.

19 Q Were you with him the entire time?

20 A Yes. We went straight back to the sheriff's office.

21 Q And what did you do once you got to the sheriff's
22 office?

23 A Placed in a, in a unlocked room in the I.D.
24 department.

25 Q And did you alter or tamper with those items at any

Jack Christopher Durham
Direct examination by Ms. Reese

1 time during the time you had them?

2 A No, ma'am.

3 MS. REESE: Nothing further.

4 MS. JONES: I have no questions, Your Honor.

5 THE COURT: You may step down.

6 MS. REESE: Your Honor, may we approach?

7 (Bench conference held off the record in the presence
8 of the jury but out of the hearing of the jury.)

9 THE COURT: Ladies and gentlemen, we're going to take
10 a short break.

11 So I'll ask you to please go to your jury room. Do
12 not yet discuss the case. I'll bring you back after that
13 break to continue.

14 (The following takes place outside the presence of the
15 jury.)

16 THE COURT: We will be at ease for 15 minutes.

17 (Whereupon, a recess was taken.)

18 THE COURT: All right. Are we ready for the jury?

19 MS. REESE: Yes, Your Honor.

20 MS. JONES: Yes, sir.

21 (The following takes place in the presence of the
22 jury.)

23 THE COURT: All right. The jury is present. You may
24 proceed.

25 MS. REESE: The state calls David Hogsed.

David Hogsed
Direct examination by Ms. Reese

1 DAVID HOGSED, having been
2 first duly sworn, testified as follows:

3 DIRECT EXAMINATION BY MS. REESE

4 Q Can you state your name for the jury, please?

5 A David Hogsed.

6 Q And where are you employed?

7 A With Spartanburg County Sheriff's Office.

8 Q And what are your duties at the sheriff's department?

9 A I am currently assigned to the crime scene unit,
10 sergeant over the night shift.

11 Q And what does mean, you're assigned to the crime scene
12 unit?

13 A Basically, the crime scene unit with the sheriff's
14 office, any time a patrol officer, they need to call us out
15 for a crime scene, whether it be just to take photographs
16 or process a crime scene for latent prints, blood evidence,
17 pretty much anything, we respond and process those crime
18 scenes.

19 Q And how long have you been working in law enforcement?

20 A Twenty-one years.

21 Q And were you working on July the 24th of 2008?

22 A Actually, no, I was not.

23 Q What happened that morning?

24 A About 6:00 a.m. that morning I was called at home by
25 Sergeant Burgess, and informed me of the incident and told

David Hogsed
Direct examination by Ms. Reese

1 me that it was actually located in the City of Spartanburg.

2 There was some jurisdictional issues that it appeared
3 that the incident had initially taken place in Greer. At
4 that time the sheriff's office had an agreement with the
5 Greer Police Department that we would respond to and
6 process crime scenes within the City of Greer. So it was
7 requested that we respond, and I responded from my
8 residence.

9 Q What time did you arrive on the scene in downtown
10 Spartanburg?

11 A I arrived at 7:12 a.m.

12 Q I'm going to show you what's been marked as State's
13 Exhibit 20 for Identification. Do you recognize that?

14 A Yes, ma'am.

15 Q What is that?

16 A A Dodge Durango. It was actually setting on Daniel
17 Morgan Avenue like southbound where Broad Street turns to
18 the left behind, beside the Spartanburg Herald-Journal. It
19 was setting on Daniel Morgan Avenue close to that
20 intersection with Broad Street.

21 Q Was it on the side of the road, in the middle of the
22 road? How was it mentioned?

23 A Exactly. That's a 4-lane road. Daniel Morgan Avenue
24 is a 4-lane road. From working traffic before, it's what
25 we refer to as lane one, which is the closest to the median

David Hogsed
Direct examination by Ms. Reese

1 or the yellow line that separates the four lanes.

2 Q And was the car -- what, what was the positioning in
3 terms of was it pulled over, or was it actually in the
4 road?

5 A It was setting in the roadway.

6 Q What -- was the vehicle on or off?

7 A When I arrived the vehicle was off.

8 Q And what were the positions of the windows in the
9 vehicle?

10 A The front two windows, in fact, the driver's-door
11 window, passenger-front windows are down. The rear-door
12 windows are up.

13 Q And at the time that you arrived, what was the
14 position of the driver's-side door?

15 A The driver's-side door was open. That was the only
16 door that was open on the vehicle.

17 Q And does this picture, State's Exhibit 20 for
18 Identification, accurately depict what you saw when you
19 first arrived?

20 A Yes.

21 MS. REESE: I move to admit State's Exhibit 20.

22 THE COURT: Twenty?

23 MS. REESE: Twenty.

24 MS. JONES: No objection, Your Honor.

25 THE COURT: It's admitted.

David Hogsed
Direct examination by Ms. Reese

1 (Photograph marked State's Exhibit No. 20.)

2 BY MS. REESE

3 Q And so that was the scene as you arrived that morning,
4 is that correct?

5 A Yes, ma'am. That's the vehicle setting on Daniel
6 Morgan Avenue near the intersection of Broad Street.
7 Actually the marked patrol car that you see, the city
8 patrol car, he is pretty much -- you'll see two. The one
9 behind is actually setting on Broad Street.

10 Q Let me show you what's been marked as State's Exhibit
11 for Identification 21. What is that a picture of?

12 A This is a photograph of the driver's side of the car,
13 the entire car, with the door open.

14 Q And what did you find in that car?

15 A As you walk up to the driver's door of the car you --
16 we could tell or we observed a male slumped over the center
17 console of the vehicle. His left arm is pretty much on the
18 driver's seat of the vehicle.

19 We could tell that, you know, he had wounds to the
20 head at that time. We did not really tell anything else
21 until we were -- we took our initial photographs and were
22 able to open up the car.

23 Q Is that, is State's Exhibit 21 for Identification, an
24 accurate depiction of what you saw --

25 A Yes.

David Hogsed
Direct examination by Ms. Reese

1 Q -- in regards to the body in the car?

2 MS. REESE: Your Honor, at this time I would move to
3 admit State's Exhibit 21.

4 MS. JONES: No objection, Your Honor.

5 THE COURT: Okay. Let me see y'all just a minute.

6 (Bench conference held off the record in the presence
7 of the jury but out of the hearing of the jury.)

8 BY MS. REESE

9 Q Officer Hogsed, did you -- that morning when you were
10 at the scene were a number of pictures taken?

11 A Yes. Numerous pictures were taken.

12 Q Have you reviewed all of these pictures?

13 (Pause.)

14 Q And are they all complete and accurate depictions of
15 what you saw?

16 A Yes, they are.

17 Q Officer Hogsed, can you describe...

18 MS. REESE: Your Honor, at this time I would move to
19 admit these that I hold in my hand, 22 through 37.

20 THE COURT: And 21.

21 MS. JONES: No objection, Your Honor.

22 THE COURT: They're admitted.

23 (Photographs marked State's Exhibits Nos. 21 through
24 37.)

25 BY MS. REESE

David Hogsed
Direct examination by Ms. Reese

1 Q What is that a picture of?

2 THE WITNESS: Can I step down, Your Honor?

3 THE COURT: Uh-huh.

4 (Whereupon, the witness left the stand.)

5 BY MS. REESE

6 A This is basically a picture of -- what we'll do is
7 we'll take 360-degree photographs of the vehicle.

8 A picture of the driver's side of the vehicle as we
9 found or I found it when I arrived. On the ground just
10 underneath the open car door is a black nylon type pouch
11 here -- the upper portion of the body with the left arm in
12 the seat of the driver's seat with the palm up.

13 Q Can you describe what's in that picture?

14 A That is a photograph taken of the interior of the car
15 of the decedent while standing pretty much in -- we're not
16 standing or would not be all the way into the car. We
17 would be somewhat standing back away from the car using a
18 zoom lens, zoom type lens, to take the photograph showing
19 the position of the upper body and the way it is over the
20 center console, and positioning of the head and arms as we
21 found it when we walked up to the car.

22 Q And can you identify what is in the driver's seat
23 there?

24 A That is a -- it's a purse like, in fact, maybe
25 shoulder type purse. It has fur on it. It's multicolored.

David Hogsed
Direct examination by Ms. Reese

1 And as you can tell, the decedent's arm is lying across it.

2 Q Did you, in fact, collect that purse into evidence?

3 A We did, but we did not collect it at that time.

4 Q Can you identify that photograph?

5 A A photograph showing the positioning of the body from
6 the right side.

7 And let me clarify something for you. When I say
8 right side, left side, I am speaking as if I'm sitting in
9 the car. So left side is driver's side and right side is
10 the passenger side. So this is a photograph of the
11 positioning of the body from the right-side rear door.

12 Q Can you identify that picture?

13 A Photograph taken through the left-side rear seat. And
14 basically this is the passenger-side second-row seat. This
15 is actually a third row -- 3-row-seat car. This is the
16 second row of seats.

17 Q And what -- can you identify the items that you see in
18 that picture?

19 A This is a computer bag, clothing items underneath,
20 computer hanging or, excuse me, camera hanging off of the
21 driver's seat, on the back-side driver's seat.

22 This is a sandal, leather sandal. And this is
23 actually a, an identification card of Mr. Tabares.

24 Q Now, did that camera remain in that position?

25 A No, it did not.

David Hogsed
Direct examination by Ms. Reese

1 Q Why not?

2 A Once we got to a position where we could get into the
3 vehicle to examine the body more closely the camera was
4 taken off the back seat so that we would not be -- we would
5 not harm it, turn it on, delete or anything in any fashion,
6 so we wouldn't basically, wouldn't touch it and maybe
7 delete anything that was on it whatsoever.

8 So we removed it off the back of the seat because we
9 pretty much had to stand up in the back seat of the car to
10 get over and look at the body.

11 Q Did you, in fact, take the camera into evidence?

12 A Yes, we did.

13 Q Did you take the identification card into evidence?

14 A Yes, we did.

15 Q And the computer?

16 A Yes, we did.

17 Q Will you describe for the jury this photograph?

18 A This is a picture taken from the front of the car,
19 front windshield. That right there is actually a bullet
20 hole through the front windshield of the vehicle. As you
21 see, it's in the -- this would be pretty much the center
22 area of the windshield, because they pretty much put
23 rearview mirrors right in the center. So it's in the
24 center area of the windshield. This would be Mr. Tabares'
25 back and all of that. He's still in, within the vehicle.

David Hogsed
Direct examination by Ms. Reese

1 Q Were you able to determine whether the shot was fired
2 from inside the vehicle or outside the vehicle?

3 A Yes. The round actually went from inside the vehicle
4 out. And you can tell that by the glass breakage on the
5 inner part of the window.

6 When the round, the projectile, strikes the window the
7 momentum of the rounds will push the glass inward. And
8 once it comes out -- see all the breakage out. The
9 momentum is pushing all of that glass away from it.

10 Q Can you explain to the jury this photograph?

11 A That's just sort of a general closer-up picture of the
12 black nylon bag that was on the ground outside the driver's
13 door of the vehicle on the roadway.

14 Q And this would be just a closer picture of the nylon
15 bag.

16 A That's correct.

17 Q Now, were you able to find any blood outside of the
18 vehicle?

19 A From being briefed from the officers that was on the
20 scene originally we knew pretty much -- we knew that we had
21 two individuals other than Mr. Tabares in the vehicle.

22 So we, we started working from the car back towards
23 the intersection of Daniel Morgan and West Main. As we
24 were talking up through the roadway we actually found a
25 couple of pieces of paper that had blood on them, blood on

David Hogsed
Direct examination by Ms. Reese

1 it. And then we actually found blood on the concrete
2 median here.

3 Q And was this a closeup of the I.D. you already alluded
4 to in your testimony?

5 A Yes, ma'am. This is a closeup of the left-side rear
6 floorboard. You can see the computer bag here, the sandals
7 and the I.D., which is actually face down in the
8 floorboard.

9 Q And did you ever turn that face forward and take a
10 picture?

11 A We did.

12 Q And who did that I.D. belong to?

13 A It belonged to Nelson Fernando Tabares.

14 Q And did you take that into evidence?

15 A Yes, we did.

16 Q Can you describe what is in this picture for the jury?

17 A This is the right-side front floorboard of the
18 vehicle. Here is a Compact computer. And No. 8 is broken
19 pieces of plastic components from the inside of the G.P.S.
20 hanging unit that was hooked up to the computer.

21 Q And what was the significance? Why did you take a
22 picture of this?

23 A Well, it appeared at the time that the actual
24 projectile -- the wires to this computer actually go across
25 the center console, up and under the steering wheel or the

David Hogsed
Direct examination by Ms. Reese

1 steering column of the driver, or column with the steering
2 wheel -- up and over, back over it, up and over the
3 rear-view mirror where your G.P.S. would hang.

4 It has been shattered, and it's mostly -- all of it is
5 here in the floorboard. There was a piece of it in the
6 passenger-side front seat. That was hanging in the general
7 area where the round actually exited the vehicle and went
8 through the windshield.

9 Q And I assume this is another photograph just of the
10 I.D. and the camera being -- had moved, is that correct?

11 A Right. That's correct.

12 Q So you documented when you moved the camera.

13 A Yes.

14 Q I show you this photograph. What is this a picture
15 of?

16 A Passenger-side front seat. And let me move it this
17 way. Backing area, seat-cushion area. Plastic piece is
18 actually a broken piece from the G.P.S. unit that was
19 shattered.

20 Q And this is a different angle. Is that an angle of
21 the same area just before the body was removed?

22 A Yes, it is.

23 Q Now, can you tell the jury what this is?

24 A In Durangos between the two bucket seats you have your
25 center console. Over-the-center head area you will have a

David Hogsed
Direct examination by Ms. Reese

1 little storage compartment basically, one for like
2 eyeglasses. One is for, for your garage-door opener and so
3 forth.

4 This is what we refer to as blood spatter on the, on
5 that center storage compartment. This is blood spatter.
6 It's actually on the -- you have some.

7 All of this is the driver's side of that, taken from
8 the driver's door. This is the blood spatter that observed
9 on that, seen on that.

10 Q And finally what is this?

11 A That's a photograph of the registration card for the
12 Durango.

13 Q And that registration card was found in the Durango?

14 A Yes, in the glove box.

15 Q And the registration indicated it belonged to the
16 defendant.

17 A That's correct.

18 (Whereupon, the witness returned to the stand.)

19 Q Officer Hogsed, I'm going to ask you to identify
20 several pieces of evidence. I show you what's been marked
21 as State's Exhibits 4 and 5 for Identification. Can you
22 identify what those are?

23 A Both are Winchester 9mm Luger cartridge cases.

24 Q And where were those found?

25 A No. 9 was found in the right-side second-row seat and

David Hogsed
Direct examination by Ms. Reese

1 14 was found in the left-side second-row seat, floorboard.

2 Q So you found two cartridge cases.

3 A Two cartridge cases, yes, ma'am.

4 Q And did you take those into evidence?

5 A We did.

6 Q And what did you do with them?

7 A They would have -- once they're -- as you can see, of
8 course they're opened here. I'm assuming that was done by
9 SLED when we sent them down for analysis.

10 We seal them closed. Once they're turned into our
11 evidence room, then there would be documentation done or
12 paperwork done for those to go to the state law enforcement
13 division for firearms examination.

14 Q Did you tamper with or alter with those casings at any
15 time while they were in your possession?

16 A No, none whatsoever.

17 Q And you took them where?

18 A They would have been taken to the sheriff's office.
19 Once they were -- once we had all of our evidence completed
20 they would have been turned into our evidence room at the
21 sheriff's office.

22 Q I show you what's been marked as State's Exhibit 17.
23 Can you identify what that is?

24 A Yes. This is the I.D. that was found in the left-side
25 rear floorboard belonging to Nelson Tabares.

David Hogsed
Direct examination by Ms. Reese

- 1 Q Item 16 for Identification.
- 2 A This is the vehicle registration card for the Durango.
- 3 Q Item 14 for Identification.
- 4 A This is the black nylon pouch that was actually found
- 5 on the ground outside or in the roadway by the vehicle at
- 6 the initial crime scene.
- 7 Q No. 15 for Identification.
- 8 A Three broken pieces of the electronic G.P.S. component
- 9 that was broken that would have been from the right-side
- 10 floorboard and right-side front seat.
- 11 Q Items 45 and Items 18 for Identification.
- 12 A This is the Targus nylon computer bag from the
- 13 left-side rear seat, and this is the computer with all the
- 14 wiring from the right-side front floorboard.
- 15 Q Item No. 13 for Identification.
- 16 A Cannon. This is actually a Cannon PC1192 digital
- 17 camera. This is what was hanging on the driver's seat that
- 18 we moved so we could get in and look at the body and then
- 19 collect it as evidence.
- 20 Q Can you identify State's Exhibit 19 for
- 21 Identification?
- 22 A This is the actual shoulder purse that was in the
- 23 driver's seat underneath the decedent's arm.
- 24 Q Now, at some time were there other items in that
- 25 purse?

David Hogsed
Direct examination by Ms. Reese

1 A Yes. There were numerous items in the purse.

2 Q You don't have to go through all of those items. But
3 was there any identification in that purse?

4 A Yes. We found South Carolina driver's license, a
5 resident alien card and social security card and a Wachovia
6 check card all belonging to the defendant.

7 Q And I'm going to ask you to look at State's Exhibit 10
8 for Identification. Was that also found in the wallet?

9 A Yes. It was found in the inside -- actually inside
10 the wallet, which was inside the purse.

11 Q And what is that?

12 A It is a receipt from where a Ruger P95 9mm handgun was
13 purchased June the 7th of 2000.

14 Q My whom?

15 A Manual Marin. I'm sorry. I can't say the middle
16 name.

17 Q Did you, in fact, after you processed this evidence,
18 all of that evidence that I've shown you, did you alter or
19 tamper with it in any way?

20 A No.

21 Q And what did you do with it?

22 A It would all, all have been initially placed in our,
23 our evidence bag, sealed with evidence tape and then turned
24 over to the, to our evidence custodians, our evidence room.

25 Q Did you attend the autopsy of the victim?

David Hogsted
Direct examination by Ms. Reese

1 A I did.

2 Q And I'm going to show what's been marked as State's
3 Exhibit 7 for Identification. What is that?

4 A That's a gunshot residue kit that was actually done on
5 Mr. Tabares.

6 Q Did you perform that kit?

7 A Yes. I actually performed this kit on, on the scene,
8 not at the autopsy.

9 Q I'm sorry. You performed?

10 A It was actually done at the crime scene, not at the
11 autopsy.

12 Q And did you, in fact, use standard procedure in
13 getting this kit?

14 A Yes, we did.

15 Q Did you do the particle lifts?

16 A We did do the dabbers you do first. Then we did the
17 swabs with the nitric acid, and we also did a controlled
18 sample.

19 Q And at that point did you seal the kit?

20 A Yes. It's sealed. It's actually sealed in two ways.
21 One's actually on GS -- oops -- excuse me -- the GSR kit,
22 which we initialed. And then it's put into our evidence
23 bag, filled out and sealed again.

24 Q And what did you do with that item?

25 A Ma'am?

David Hogsted
Direct examination by Ms. Reese

1 Q What did you do with that item?

2 A It would have been turned into evidence and sent to
3 SLED for analysis.

4 Q After you got the truck back at the impound lot did
5 you do anything to determine whether or not you had any
6 possibility of any latent prints?

7 A Yes. Once, once we removed the items of evidence from
8 within the vehicle that we collect, are collected, the
9 vehicle was then processed for latent prints, basically
10 taking a black latent print powder and dusting the vehicle
11 for latent prints.

12 Q Okay. Did you perform that on this vehicle?

13 A I did.

14 Q And what areas did you perform?

15 A Pretty much the entire vehicle. The only -- we do not
16 do the dashboards and all of that because of what they're
17 made of. They're made up of a rough-textured surface.
18 Fingerprint powder on those is pretty much useless. But
19 anything that is smooth surface-wise, we do do latent
20 prints on them.

21 Q I am going to ask you to identify what's been marked
22 as State's Exhibit 38 for Identification. Can you tell the
23 jury what that is?

24 A It's a photograph of the left-side rear door exterior.
25 You'll see what we refer to as a lift tab on it. And

David Hogsed
Direct examination by Ms. Reese

1 you'll see the number B on it.

2 Basically, there was five areas of lifts done off this
3 car. Now, that doesn't mean that all five areas were
4 enough ridge detail to be identified as a person.

5 I'm looking at it with the naked eye. So I choose --
6 I get what I think may be of AFIS quality or comparable to
7 an individual. So I chose five areas.

8 For me, what I do is, is I'll put lift tabs on all
9 five of those areas, and I will mark them either with an
10 alphabet letter or a numeric system.

11 This time I choose the alphabet because we had so many
12 items of evidence already collected. I stayed away from
13 the numeric system. I numbered them A, B, C, D and E, and
14 then I photographed them to show where they're at on the
15 vehicle. That is for my purposes for later on down the
16 road. I can go back.

17 And if our AFIS examiner says, you know, he says this
18 belonged, this identifies a print, and he shows me that it
19 was lift tab B for me, I can go back to my photographs and
20 know exactly where B was at on the vehicle.

21 Q And is that a, an accurate depiction of the lift you
22 did on that day?

23 A It is.

24 Q And what does that indicate, which part of the car?

25 A It is the left-side rear door. It's on the edge of

David Hogsted
Direct examination by Ms. Reese

1 the door to the -- would be to the right of the vent window
2 and windows.

3 MS. REESE: Your Honor, I move to admit this as
4 State's Exhibit 38.

5 MS. JONES: No objection, Your Honor.

6 THE COURT: Thirty-eight?

7 MS. REESE: Thirty-eight.

8 THE COURT: It's admitted.

9 (Photograph marked State's Exhibit No. 38.)

10 BY MS. REESE

11 Q So this is just simply a picture from where you took
12 the lift.

13 A Yes.

14 Q I ask you to look at State's Exhibit 39 for
15 Identification. Can you identify what that is?

16 A It's another lift. It's actually on the right-side
17 front door. And it is letter C. And it is actually
18 underneath the window area of the vehicle.

19 Q And did you use the same process in taking that lift?

20 A Yes.

21 Q And is it an accurate depiction of the lift that you
22 retrieved from the right-side passenger door?

23 A It is. Basically, what we do once we put our lift
24 tabs on there and we're basically -- what we're doing is,
25 is once the prints are developed and I put a lift tab on

David Hogsed
Direct examination by Ms. Reese

1 them, I'm basically using the tape, and I am picking that
2 print up off the vehicle. And then I transfer it from here
3 to a latent backing card. I'm just taking it from off the
4 vehicle and putting it on a card.

5 MS. REESE: At this time, Your Honor, I would move
6 that State's Exhibit 39 be admitted.

7 MS. JONES: No objection, Your Honor.

8 THE COURT: It's admitted.

9 (Photograph marked State's Exhibit No. 39.)

10 BY MS. REESE

11 Q And that, again, is just a picture of how you had
12 taken the lift on that car.

13 A It's showing the area where the lift was at, yes.

14 Q I'm going to show you what's been marked as State's
15 Exhibit 44 for Identification. And I understand this is a
16 copy. What is this a copy of?

17 A Of the lifts B and C. This is actually, shows the
18 ridge detail of the fingers that I lifted that were
19 identified.

20 Q And on the card once you lift and transfer those lifts
21 to the card, what is done with it?

22 A The card is filled out basically with my name,
23 basically where the lifts came from, the type of incident,
24 who the victim is. And then I would turn them over to AFIS
25 so that our AFIS examiner can do his examination.

David Hogsted
Direct examination by Ms. Reese

1 Q And is the exhibit I handed you a copy, a complete and
2 correct copy, of those two lifts as they were turned over
3 to your AFIS examiner?

4 A Yes, they are.

5 MS. REESE: Your Honor, I would move to admit this as
6 State's Exhibit 44.

7 MS. JONES: No objection, Your Honor.

8 THE COURT: It's admitted.

9 (Fingerprint card marked State's Exhibit No. 44.)

10 BY MS. REESE

11 Q And that's simply a copy of what he looks at and
12 analyzes, is that correct?

13 A Yes. He actually looks at the actual lift, the taped
14 lift.

15 Q And this is a copy.

16 A That's a copy of it yes, ma'am.

17 Q Now, in terms of the computer and the camera, at any
18 point did you transfer that to another investigator?

19 A Yes. One of our computer -- one of our investigators
20 is a computer analyst. His name is Lindsay McGraw.
21 They -- those items were turned over to him for analysis.

22 Q And did you receive those back from him after he
23 finished his analysis?

24 A Once his analysis was done he gave those back to me.
25 And then they were eventually turned over to our evidence

David Hogsed
Cross-examination by Ms. Jones

1 room with the other items of evidence.

2 Q And did you alter or tamper with those while they were
3 in your possession?

4 A No, none whatsoever.

5 Q So all of this evidence was taken to your property
6 room and submitted in evidence to the Spartanburg County
7 Sheriff's Department property.

8 A That's correct.

9 MS. REESE: Nothing further, Your Honor.

10 CROSS-EXAMINATION

11 BY MS. JONES

12 Q You indicated that you were notified that this
13 incident may have happened within the city limits of Greer,
14 is that correct?

15 A That's correct.

16 Q And you actually have some type of agreement with
17 Greer to help them investigate?

18 A We did at that time, yes, ma'am.

19 Q Okay. And was information relayed to you that the
20 actual shooting incident probably took place around Tacapau
21 Road?

22 A Yes. I received a phone call that an area around the
23 Tucapau Road area had been pointed out, that's where the
24 shooting had actually taken place.

25 Q Okay. And that's actually in the Wellford area, is

David Hogsed
Cross-examination by Ms. Jones

1 that correct?

2 A That's correct.

3 Q Okay. That's not in Greer.

4 A No. Actually several miles from Greer.

5 Q Okay. Were you told as an investigating officer that
6 there were skid marks on the road on Highway 29 heading
7 into Spartanburg?

8 A I do not recall being told that.

9 Q Would that have been something you would have wrote
10 down and investigated?

11 A Yes.

12 Q Probably went out and took some pictures of it?

13 A Yes, ma'am.

14 Q Were you told that there was any debris in the road
15 that probably looked like a car or something -- something
16 fresh in the road?

17 A I do not recall being told that.

18 Q And, again, if you had been told that, would that have
19 been something you would have wrote a note on and taken a
20 look at exactly what it was?

21 A Knowing me and the way I am, I would have been on the
22 phone getting somebody out there.

23 Q And just for some information in terms of where
24 Tucapau Road is, it's actually on Highway 29, correct?

25 A Yes. It's actually -- Tucapau Road if you're -- is

David Hogsed
Cross-examination by Ms. Jones

1 between where I-85 goes over Highway 29. Tucapau Road is
2 between there and Wellford, where you start getting into
3 the main gist of Wellford.

4 Q Okay. And actually Highway 29 I think becomes
5 Greenville Highway, is that correct?

6 A It will go from W.O. Ezell Boulevard to Highway 29,
7 east, west Wade Hampton. And I have no clue what it turns
8 into once you get into Greenville.

9 Q Okay. And if we're traveling into Spartanburg,
10 Highway 29 becomes essentially West Ezell Boulevard.

11 A W.O. Ezell Boulevard, yes.

12 Q Thank you. And that road becomes West Main, correct?

13 A Correct.

14 Q Okay. And that's where West Main and Daniel Morgan,
15 is where the car was discovered, correct?

16 A Correct.

17 Q So essentially it's a straight line almost. I mean,
18 west -- Daniel is this way, but otherwise --

19 A It would be a straight line from Tucapau Road to where
20 West Main and Daniel Morgan intersect. It is a straight
21 sought.

22 Q Okay. And, in fact, if you go up the road from
23 Highway 29 where Wal-Mart is in Greer, that's a straight
24 line too, correct?

25 A That's correct.

David Hogsed
Cross-examination by Ms. Jones

1 Q You took pictures of the vehicle, is that correct?

2 A Yes, I did.

3 Q Did you note some damage on the vehicle?

4 A The front bumper is missing.

5 Q Okay. And I think you also -- let me ask you this.

6 Did you fill out a, a scene index, that scene index --

7 A We don't have the --

8 Q -- completed by Mr. Hogsed on 57?

9 A Index?

10 Q Basically, a full report.

11 A Yes. I did an incident report.

12 Q Okay. And do you recall writing in that report that
13 the car was actually on when you first arrived and was
14 overheating?

15 (Pause.)

16 Q Well, let me ask you this. Did you get the
17 information that initially the car was running when
18 officers arrived first on the scene?

19 A Yes.

20 Q Okay. And that the car looked like it was
21 overheating?

22 A Yes.

23 Q Okay. And, in fact -- in fact, you can tell that
24 there is a dark spot underneath the vehicle, correct, where
25 a radiator would be?

David Hogsed
Cross-examination by Ms. Jones

1 A Yes, ma'am.

2 Q Okay. And, in fact, that line kind of went down the
3 road.

4 A Well, that actually starts downhill, so yes.

5 Q Okay. And did you take a look at what that was, if it
6 was radiator fluid or anything like that?

7 A No, I did not.

8 (Photograph marked Defendant's Exhibit No. 5 for
9 Identification.)

10 Q I'm handing you a picture that's been labeled
11 Defendant's Exhibit No. 5. Does that look like a picture
12 you took?

13 A This may have actually been taken before my arrival.

14 Q Okay. Is it a fair and accurate representation of how
15 the vehicle looks?

16 A Yes. I can still see the water. I am not a mechanic.
17 I don't know if it was water or transmission fluid or
18 whatever on the road. But you could still -- it was there.

19 Q Okay.

20 MS. JONES: Your Honor, I move to admit Defendant's
21 Exhibit 5 into evidence.

22 MS. REESE: No objection.

23 THE COURT: It's admitted.

24 (Photograph marked Defendant's Exhibit No. 5.)

25 MS. JONES: May I publish this to the jury?

David Hogsed
Cross-examination by Ms. Jones

1 THE COURT: You may.

2 BY MS. JONES

3 Q And that's what we're talking about, that fluid.

4 A Yes, on the front.

5 Q Now, did you testify that you were actually the one
6 who removed the body, or was that somebody else?

7 A I wasn't asked the question if I removed the body.

8 Q Well, let me ask you that. Were you the one who
9 helped remove the body, or was the coroner's office?

10 A Actually I assisted the coroner's office in removing
11 the body.

12 Q Okay. And the position of the body was that the, the
13 full upper body was actually in the front of the vehicle.

14 A Well, between the front seats on the center console.

15 Q In the center console. So the whole upper part of the
16 body --

17 A Upper torso.

18 Q -- was taken -- okay. And the, the feet actually were
19 on the, the ground.

20 A One is on the floorboard and one is on the actual
21 seat.

22 Q And did you have any indication when you were
23 investigating that any of the shooting actually occurred
24 while Mr. Tabares would have been sitting in the back row,
25 or the back seat rather?

David Hogsed
Redirect examination by Ms. Reese ..

1 A No.

2 Q Okay. So there was no blood spatter on the back of
3 the window --

4 A No, no.

5 Q -- or on the sides. It was all up in the front area.

6 A That's correct.

7 MS. JONES: Nothing further Your Honor.

8 REDIRECT EXAMINATION

9 BY MS. REESE

10 Q Just a question for clarification. When you arrived
11 the car was not running.

12 A That is correct.

13 Q But you had information from the city police officers
14 when they arrived it was running.

15 A That's, that's correct. And I'm sure that they cut it
16 off for safety purposes.

17 MS. REESE: Nothing further.

18 THE COURT: Okay. You may step down.

19 MS. REESE: The state calls Steve Calhoun.

20 Your Honor, can this officer be excused?

21 THE COURT: He may be.

22 (Whereupon, the witness was excused.)

23

24

25

Steve Calhoun
Direct examination by Ms. Reese

1 STEVE CALHOUN, having been
2 first duly sworn, testified as follows:

3 DIRECT EXAMINATION BY MS. REESE

4 Q Officer Calhoun, where are you employed?

5 A I'm with the Spartanburg County Sheriff's Office.

6 Q And how long have you been employed there?

7 A Fifteen years.

8 Q And what were your duties in July of 2008?

9 A I was assigned to the investigations division.

10 Q And as a part of your duty at the sheriff's department
11 were you asked to assist in an interview?

12 A I was.

13 Q All right. You cannot say anything that was said, but
14 did you, in fact, assist in an interview of Alfredo
15 Jimenez?

16 A I did.

17 Q And at the time that you were present during that
18 interview did you observe him?

19 A I did.

20 Q And I'm going to show you what's been marked as
21 State's Exhibit 42 for Identification. Is that a fair and
22 accurate picture of his clothing at the time that you
23 interviewed him?

24 A Yes.

25 Q At the time that you interviewed him did he appear to

Steve Calhoun
Direct examination by Ms. Reese

1. have any blood on him?

2. A He did not.

3. Q Now, this was not your case, is that correct?

4. A That is correct.

5. Q So did you have any part in this other than that?

6. A No, ma'am.

7. Q You were simply asked to be present during that
8. interview.

9. A That is correct.

10. MS. REESE: At this time, Your Honor, I would move to
11. admit State's Exhibit 42 into evidence.

12. MS. JONES: No objection, Your Honor.

13. THE COURT: It's admitted.

14. (Photograph marked State's Exhibit No. 42.)

15. MS. REESE: May I publish it, Your Honor?

16. THE COURT: You may.

17. BY MS. REESE

18. Q So this is the clothing of Mr. Jimenez, is that
19. correct?

20. A That is correct.

21. MS. REESE: Nothing further of this witness.

22. MS. JONES: Your Honor, I have no questions.

23. THE COURT: You may step down.

24. MS. REESE: The state calls Hugh Murphy.

25. Your Honor, may this officer be excused?

Thomas Hugh Murphy
Direct examination by Ms. Reese

1 THE COURT: He may.

2 (Whereupon, the witness was excused.)

3 THOMAS HUGH MURPHY, having
4 been first duly sworn, testified as follows:

5 DIRECT EXAMINATION BY MS. REESE

6 Q Will you state your full name for the jury?

7 A Thomas Hugh Murphy.

8 Q And where are you currently employed?

9 A I am retired.

10 Q Were you employed anywhere in July, August, September
11 of 2008?

12 A With the Spartanburg County Sheriff's Office.

13 Q And what did you do there?

14 A I was the fingerprint specialist, AFIS operator.

15 Q What education and training have you received
16 regarding fingerprint identification?

17 A I've had most all of the fingerprint classes that SLED
18 offers. I've had advanced fingerprint with the F.B.I. and
19 had palm-print comparison, Ron Smith's, and ridgeology --
20 Ron Smith.

21 Q How many fingerprints -- well, let me ask you how long
22 you've worked at -- in fingerprints and identifying
23 fingerprints.

24 A Eight years.

25 Q And how many fingerprints have you examined during

Thomas Hugh Murphy
Direct examination by Ms. Reese

1 that time?

2 A I don't know how many I've examined. I've identified
3 a little over 2,400.

4 Q Are you certified? Are you certified in the area?

5 A No.

6 Q Were you at the time?

7 A No.

8 Q Have you attended seminars in fingerprint examination
9 as long as you were a fingerprint examiner? When you were
10 a fingerprint examiner --

11 A Yes.

12 Q -- were you constantly --

13 A Yes.

14 Q What technical equipment do you use in your work?

15 A I use an AFIS computer that you mark and initial,
16 which is the actual ridges of the fingerprint. And it
17 compares it to all the fingerprints that's on file at SLED.

18 Q Now, can you describe for me -- I mean, have you
19 testified as an expert in general sessions court regarding
20 identification of fingerprints?

21 A I have.

22 Q Do you have any idea how many times?

23 A Probably 15 to 20, twice in federal court.

24 MS. REESE: Your Honor, I would at this time move that
25 he be qualified as an expert in print analysis.

Thomas Hugh Murphy
Direct examination by Ms. Reese

1 MS. JONES: No objection, Your Honor.

2 THE COURT: He is so qualified.

3 BY MS. REESE

4 Q Tell me what an inked print is.

5 A An inked print is one that is -- a person's finger is
6 rolled in ink. And they're put on a card, and that's the
7 ink print.

8 Q What is a latent print?

9 A A latent print, it means it's one that is left when
10 you touch something and the oils and the, I mean, amino
11 acids and stuff is left on the surface of the object you
12 touch.

13 Q Are there distinguishing characteristics for each
14 fingerprint?

15 A Yes, there are.

16 Q And how many?

17 A How many?

18 Q I mean, is there a particular number of distinguishing
19 characteristics that you look for, or every fingerprint has
20 a certain amount of distinguishing characteristics?

21 A Every fingerprint is different.

22 Q How do people leave prints on something?

23 A By touching it.

24 Q Okay. Does everything you touch have a fingerprint?

25 A No.

Thomas Hugh Murphy
Direct examination by Ms. Reese

1 Q What kinds of things are more likely to create a
2 fingerprint than others?

3 A Something that is slick or shiny, it'll give you a
4 better print.

5 Q Once you receive a latent print, how do you compare it
6 to an inked print?

7 A I first look at the overall picture, I mean, the
8 overall view of the fingerprint. And I start looking at
9 the classifications, comparing the classifications. And
10 then I go on in and look at the individual ending lines and
11 bifurcations. That's where they separate or come together.
12 And I compare them that way.

13 Q Based on your training and experience, do any two
14 people have the same set of fingerprints?

15 A They do not.

16 Q I'm going to show you what's been marked as State's
17 Exhibit 44. And I understand that's a copy. Is that --
18 that is a copy of the fingerprint card you received from
19 David Hogsed, is that correct?

20 A It is.

21 Q And were you, in fact, able to identify the prints,
22 these two prints that came to you?

23 A Both fingerprints were identified.

24 Q Okay. And do you need to look at your report? Do you
25 have your report there?

Thomas Hugh Murphy
Cross-examination by Ms. Jones

1 A Yes.

2 Q The latent print you submitted as 002, which one is
3 that on that paper?

4 A It's number B.

5 Q Number B. And that's from the left-side rear door of
6 the Dodge Durango?

7 A That is correct.

8 Q And whose fingerprints were on the left-side rear door
9 of the Dodge Durango?

10 A Manuel Antonio Marin.

11 Q And latent print 001 is which fingerprint?

12 A It's number C.

13 Q And those were from the right-side front door of the
14 vehicle, is that correct?

15 A Yes.

16 Q And whose fingerprints were on the right-side front
17 door of the vehicle?

18 A Alfredo Marion Jimenez.

19 MS. REESE: Nothing further, Your Honor.

20 CROSS-EXAMINATION

21 BY MS. JONES

22 Q You indicated that you can get fingerprints off of
23 shiny objects, is that correct?

24 A The best way.

25 Q The best way.

Thomas Hugh Murphy
Cross-examination by Ms. Jones

1 A Yeah.

2 Q Okay.

3 A The rougher it is, the harder they are to get the
4 prints. And sometimes you have to use different methods to
5 get them.

6 Q Okay. And is it fair to say if somebody has used
7 something or occupied something or owned something their
8 fingerprints are probably going to be on?

9 A Possibly.

10 Q Fair enough?

11 A Fair enough.

12 Q And on my fridge at home my fingerprints are probably
13 all over it, correct?

14 A Right.

15 Q Okay.

16 MS. JONES: Nothing further.

17 THE COURT: You may step down.

18 MS. REESE: Your Honor, may he be excused?

19 THE COURT: He may be.

20 (Whereupon, the witness was excused.)

21 MS. REESE: Your Honor, the state calls Jack
22 Westmoreland.

23

24

25

John D. Westmoreland
Direct examination by Ms. Reese

1 JOHN D. WESTMORELAND, having
2 been first duly sworn, testified as follows:

3 DIRECT EXAMINATION BY MS. REESE

4 Q State your full name, please.

5 A John D. Westmoreland.

6 Q And where are you currently employed?

7 A Spartanburg County Sheriff's Office.

8 Q And were you employed there in July of 2008?

9 A Yes, ma'am.

10 Q And what were your duties at that time?

11 A Custodian of evidence.

12 Q And what did you do as custodian of evidence?

13 A I took in evidence, maintained the safe environment.

14 Q Did you, in fact, take in evidence regarding the case
15 at hand?

16 A I did.

17 Q And I'm going to show you several pieces of evidence.
18 I show you what's been marked as State's Exhibit 7. Can
19 you tell me what that is?

20 A That's a GSR kit on Nelson Tabares.

21 Q And can you tell me you took that into evidence?

22 A I did.

23 Q And when you take evidence like that into evidence
24 where does it go?

25 A I book into the computer system and place in evidence

John D. Westmoreland
Direct examination by Ms. Reese

1 as shown.

2 Q Is that a secured area?

3 A It is a secured area, yes, ma'am.

4 Q Did you alter or tamper with it while it was in your
5 possession?

6 A No, ma'am.

7 Q I am going to show you what's been marked as Exhibit
8 10. And that would have been present in person's wallet of
9 the defendant. Did you take those items in?

10 A I took the purse in, yes, ma'am.

11 Q And during the time did you take any of the items out
12 of the wallet?

13 A No, ma'am. I did not touch.

14 Q All right. Now, so was this item in a secured
15 location the entire time you had it?

16 A Yes, ma'am, in the purse.

17 Q And you have never tampered or altered with it?

18 A No, ma'am.

19 MS. REESE: Your Honor, at this time I would move
20 State's Exhibit 10 be introduced into evidence.

21 MS. JONES: No objection, Your Honor.

22 THE COURT: It is admitted.

23 (Receipt marked State's Exhibit No. 10.)

24 Q Show you State's Exhibit 19. And that's the purse you
25 said that you identified.

John D. Westmoreland
Direct examination by Ms. Reese

- 1 A Yes, ma'am.
- 2 Q And that also was kept in a secure location without
3 being altered or tampered with.
- 4 A Yes, ma'am. Everything is kept in a secured area.
- 5 MS. REESE: Your Honor, I would ask item 19 be entered
6 into evidence.
- 7 MS. JONES: No objection, Your Honor.
- 8 THE COURT: It is admitted.
- 9 (Male purse marked State's Exhibit No. 19.)
- 10 Q I'm also going to show you State's Exhibit 18 which is
11 a computer case.
- 12 A I took it into evidence, yes, ma'am.
- 13 Q How about State's Exhibit 15 which are broken pieces
14 of a G.P.S.?
- 15 A Yes, ma'am.
- 16 Q Black nylon pouch, State's Exhibit 14.
- 17 A Yes, ma'am.
- 18 Q Vehicle registration card, State's Exhibit 16.
- 19 A Yes, ma'am.
- 20 Q State's Exhibit 17, identification of Nelson Fernando
21 Tabares.
- 22 A Yes, ma'am.
- 23 Q None of these items were tampered or altered when you
24 had them in your possession, is that correct?
- 25 A No, ma'am.

John D. Westmoreland
Direct examination by Ms. Reese

1 MS. REESE: Your Honor, at this time I would move
2 State's Exhibits 17, 16, 14, 15 and 18 all be admitted into
3 evidence.

4 MS. JONES: No objection, Your Honor.

5 THE COURT: They are admitted.

6 (Black nylon pouch marked State's Exhibit No. 14;
7 broken piece of G.P.S. marked State's Exhibit No. 15;
8 vehicle registration marked State's Exhibit No. 16; driver's
9 license of the victim marked State's Exhibit No. 17; laptop
10 computer bag marked State's Exhibit No. 18.)

11 Q I am going to show you what has been admitted as
12 State's Exhibit 13. Did you take that into evidence? It
13 is a camera.

14 A Yes, ma'am.

15 Q And at any time did you, did you actually transfer
16 that to Detective McGraw, or did David Hogsed do that?

17 A David Hogsed did that.

18 Q Did you take it back into evidence after Mr. McGraw
19 was finished?

20 A I took it to David Hogsed.

21 Q And that was turned to him and then returned to you?

22 A Yes, ma'am.

23 Q Did you alter or tamper with it at any time?

24 A No, ma'am.

25 MS. REESE: Your Honor, I would move State's

John D. Westmoreland
Direct examination by Ms. Reese

1 Exhibit 13 be admitted into evidence.

2 MS. JONES: No objection, Your Honor.

3 THE COURT: It is admitted.

4 (Digital camera marked State's Exhibit No. 13.)

5 Q State's Exhibit 45 is a computer, is that correct?

6 A Yes, ma'am.

7 Q And did you, in fact, take that into evidence as well?

8 A Yes, ma'am.

9 Q And that had the same process as the camera, right?

10 It went to Detective McGraw and came back to evidence. You
11 simply took it in.

12 A I took it to David Hogsed, yes, ma'am.

13 Q And was it tampered with or altered in any way?

14 A No, ma'am.

15 MS. REESE: I move to admit State's Exhibit 45.

16 MS. JONES: No objection, Your Honor.

17 THE COURT: It is admitted.

18 (Computer marked State's Exhibit No. 45.)

19 Q State's Exhibits 4 and 5, shell casings, did you take
20 those into evidence?

21 A Yes, ma'am.

22 Q And did you alter or tamper with them at any time
23 while they were in your possession?

24 A No, ma'am.

25 Q State's Exhibit 3, gun, did you take that into

Lindsay McGraw
Direct examination by Ms. Reese

1 evidence?

2 A Yes, ma'am.

3 Q As well as State's Exhibit 8, gunshot residue test on
4 Alfredo Jimenez?

5 A Yes, ma'am.

6 Q And State's Exhibit 6, white shirt from the defendant?

7 A Yes, ma'am.

8 Q Did you take in three separate gunshot residue tests
9 in this case?

10 A Yes, ma'am.

11 Q And did you alter or tamper with them in any way?

12 A No, ma'am.

13 Q And those eventually were sent to SLED, is that
14 correct?

15 A Yes, ma'am.

16 MS. REESE: Nothing further of this witness, Your
17 Honor.

18 MS. JONES: Your Honor, we have no questions of this
19 witness.

20 THE COURT: You may step down.

21 MS. REESE: The state calls Lindsay McGraw.

22 LINDSAY MCGRAW, Having been
23 first duly sworn, testified as follows:

24 DIRECT EXAMINATION BY MS. REESE

25 Q Can you state your full name for the jury, please?

Lindsay McGraw
Direct examination by Ms. Reese

1 A Lindsay McGraw.

2 Q And where are you employed?

3 A I'm currently employed at the Spartanburg County
4 Sheriff's Office.

5 Q And what are your duties as an employee of that
6 office?

7 A I'm assigned to the investigations division. I am the
8 computer forensics investigator.

9 Q And did you have occasion in July of 2008 to work on
10 the case that we're here about today?

11 A Yes, ma'am.

12 Q And what was your job in regard to that?

13 A My job was to examine the computer and the digital
14 camera that was seized from the crime scene and determine
15 whether they contained any information that was of
16 evidentiary value relating to this investigation.

17 Q Now, initially you received the material from David
18 Hogsed, is that correct?

19 A Yes, ma'am.

20 Q And let's start with the computer first. Did you, in
21 fact, analyze State's Exhibit 45?

22 A Yes, ma'am.

23 Q And what was your purpose in analyzing State's
24 Exhibit 45?

25 A Primary purpose was to determine whether or not the

Lindsay McGraw
Direct examination by Ms. Reese

1 hard drive contained any information that would show
2 location points that were used by the installed G.P.S.
3 program. There was a G.P.S. program called Streets and
4 Trips that was installed on the computer. And I was trying
5 to determine whether or not the range of G.P.S. coordinates
6 contained on the hard drive -- stored.

7 Q Now, what is your training and experience in working
8 with computers and other electronic media in regard to
9 doing this kind of forensic examination?

10 A I've attended several computer forensics courses.
11 I've attended the seized computer evidence recovery classes
12 put on by the Department of Homeland Security. SCERS is
13 what the name of it is.

14 I've also received and have a current certification as
15 a computer forensics, excuse me, computer forensic examiner
16 from the International Association of Computer
17 Investigation Specialists.

18 Q And how long have you been doing this kind of work?

19 A Since about 2006, January of 2006.

20 Q And have you been qualified as an expert in different
21 courts in this state?

22 A No, ma'am. I've not had the opportunity to testify as
23 a witness in that.

24 MS. REESE: I would move at this time to move that he
25 be considered an expert in the area of computer forensics.

Lindsay McGraw
Direct examination by Ms. Reese

1 MS. JONES: No objection, Your Honor.

2 THE COURT: All right. He is qualified.

3 BY MS. REESE

4 Q Now, when you first took this computer and you're
5 looking at the G.P.S., explain to the jury why you would
6 look on this computer for information related to this
7 particular G.P.S.

8 A Okay. First, I need to make an analogy to modern
9 G.P.S. units that are available that you can purchase at
10 stores. Modern G.P.S. units like TomTom, Magellan, those
11 type of devices, will sometimes store what's called a
12 breadcrumb trail.

13 As you're using the G.P.S. unit and you're traveling,
14 the G.P.S. unit will, will query the G.P.S. satellites.
15 Those queries are sometimes daytime stamped. The location
16 will be stored. And essentially it provides a trail of
17 where you have driven your vehicle. And that information
18 can sometimes be recovered.

19 In this case the -- I wasn't dealing with a, a
20 specific G.P.S. unit. This is a program that is owned by
21 Microsoft. It's Microsoft Streets and Trips. It
22 essentially provides software and a hardware device, which
23 is a G.P.S. antenna that you attach to your computer. And
24 it turns your laptop computer into a, a G.P.S., for lack of
25 a better term.

Lindsay McGraw
Direct examination by Ms. Reese

1 Q So it would not be a G.P.S. like we would that we
2 purchase somewhere today.

3 A No, ma'am, no, ma'am. It's, it's an aftermarket
4 add-on. And in this case I did an examination. I
5 coordinated with Microsoft to find out whether or not the
6 data would be stored in the breadcrumb trail to find out if
7 either that information was stored or if I could tell the
8 last geographical fix, because the G.P.S. antenna had been
9 damaged. I checked the computer to find out if that
10 information was contained in the computer at all, and it
11 was not.

12 Q So you were looking for, for lack of a better term,
13 what we hear as a ping on a satellite or something to find
14 locations.

15 A Yes, ma'am, a date and time stamp and a location as
16 associated with the ping.

17 Q But you were not able to do that on this particular
18 G.P.S.

19 A No, ma'am.

20 Q Because it's older.

21 A It's, it's not as robust as the purpose built G.P.S.
22 units. It doesn't contain just, that that much
23 information.

24 Q Were you however able to determine some areas that are
25 considered less searched?

Lindsay McGraw
Direct examination by Ms. Reese

1 A Yes, ma'am. The Microsoft operating system will keep
2 track in the registry most recently used, and that covers a
3 wide variety of programs.

4 It's primarily for the user's convenience so that say,
5 for example, I opened a Word document and I wanted to get
6 access to that document again. Since I recently used that
7 document, that document will appear on a list that I can
8 select from. There may be ten, there may be 15, may be 20
9 that show up on a list. These are the most recently doc --
10 most recent documents I had access.

11 Similarly, in this case I found in the registry a
12 listing of addresses, street addresses, that had been
13 entered into the computer. And one of those addresses was
14 the address of Mr. Tabares.

15 Q So

16 A Yes, ma'am.

17 Q And that had been entered into the computer at some
18 point.

19 A At some point, yes, ma'am.

20 Q And you don't -- can you tell us what time?

21 A No, ma'am.

22 Q Now, the second, second thing you looked at was a
23 camera, is that correct?

24 A That's correct.

25 Q And what's the first thing did you in finding what --

Lindsay McGraw
Direct examination by Ms. Reese

1 well, in looking on the camera, what's the first thing you
2 had to do to investigate that camera?

3 A Well, the first thing I always photograph the
4 equipment to document their condition. Then I'm going to
5 inspect the camera, in this case from for any media that it
6 may contain. In this case this camera had installed a 512
7 megabyte S-D card. It's a flash media that you can buy at
8 stores. They're typically used by digital cameras to store
9 the photographs.

10 Q Were you able to determine whether the time and date
11 stamp on the camera was accurate?

12 A Yes, ma'am, I was.

13 Q And how did you do that?

14 A Initially when I looked at the, the photographs that
15 were installed on the camera --

16 THE COURT: Excuse me just a minute, Mr. McGraw. Be
17 careful of that microphone, please.

18 THE WITNESS: Yes, sir.

19 BY MS. REESE

20 A When I, when I looked at the cameras, the photographs
21 that were on the camera, it appeared that the, the lighting
22 conditions didn't match up with the date and time that was
23 indicated on the, the file.

24 In this case the digital cameras will write data as
25 part of the picture file. It's called exit data. It's

Lindsay McGraw
Direct examination by Ms. Reese

1 exchangeable in each file format. And basically it's -- it
2 can be a wide variety of data. Most typically it's going
3 to be date-time, but it'll also include S-stop, whether or
4 not a flash was used, that type of information.

5 Q And did you determine, were you able to determine,
6 technically whether or not this date stamp time on this
7 particular camera was accurate?

8 A Yes, ma'am. I did.

9 Q And was it?

10 A It was not. It was off by about, almost exactly 13
11 hours.

12 Q Did you make an effort to determine what the correct
13 date and time was?

14 A I did. I took a, another piece of media, sterilized
15 it, referentially sterilized it. In other words, I write
16 data to the card so that there's nothing on it.

17 I inserted that card into the camera and took a
18 picture of a website that's time.gov that displays the
19 current time and date.

20 So basically I took a picture of the, the screen and
21 then compared the time that was on the screen to the exit
22 data that was stored on the camera and found it to be
23 almost 13 hours off.

24 Q I'm going to show you what's been marked as State's
25 Exhibits 1 and 2. And those have already been admitted

Lindsay McGraw
Direct examination by Ms. Reese

1 into evidence. Were those pictures found on this camera?

2 A Yes, ma'am. These appear to be copies of pictures
3 that I extracted from the media that was contained on the
4 camera.

5 Q And in your expert opinion what was the time that that
6 photograph or those two photographs were taken?

7 A Let me check my notes real quick. The time stamp that
8 was indicated for State's Exhibit 1 on the camera showed it
9 to be 1:55:04 p.m. on July the 20th. But adjusting for the
10 difference in the daytime stamp and the actual time, it
11 actually appeared to have been taken on July 21st at
12 2:54:17 a.m.

13 Q And how about item 2?

14 A Item 2 would have been the same date, 2:54:38 a.m.

15 Q Now, were there other items or pictures that you found
16 on the camera?

17 A Yes, ma'am.

18 Q I'm going to show you what's been marked as State's
19 Exhibits 40 and 41. Do you recognize these as items that
20 were removed or pictures that were taken from the camera?

21 A Yes, ma'am. These are pictures that were contained on
22 the media that were contained in the camera.

23 Q And do those appear to be altered or tampered with in
24 terms of what you saw and observed?

25 A No, ma'am.

Lindsay McGraw
Cross-examination by Ms. Jones

1 MS. REESE: Move that State's 40 and 41 be admitted,
2 Your Honor.

3 MS. JONES: No objection, Your Honor.

4 THE COURT: They are admitted.

5 (Photograph marked State's Exhibit No. 40; photograph
6 marked State's Exhibit No. 41.)

7 MS. REESE: May I publish them?

8 THE COURT: You may.

9 BY MS. REESE

10 Q That was a picture found on the camera?

11 A Yes, ma'am.

12 Q And this one as well?

13 A Yes, ma'am.

14 MS. REESE: Nothing further, Your Honor.

15 CROSS-EXAMINATION

16 BY MS. JONES

17 Q You testified that the G.P.S. was actually on the
18 computer, is that correct?

19 A I'm sorry?

20 Q The G.P.S. system is actually a Microsoft program,
21 correct?

22 A It's a program that was installed on the laptop, yes,
23 ma'am.

24 Q Okay. So it's not like the traditional G.P.S.s that
25 we have installed in our car or necessarily mounted. But

Lindsay McGraw
Cross-examination by Ms. Jones

1 it's actually in the computer.

2 A The program is installed in the computer, yes, ma'am.

3 Q And you indicated you were able to get some addresses
4 out, that you were able to recover some addresses, correct?

5 A Yes, ma'am.

6 Q And one of them was the is that
7 correct?

8 A That's correct.

9 Q Okay. And, in fact, isn't that the one that appeared
10 on the top and then it listed some other ones?

11 A Yes, ma'am.

12 Q Okay. So in your opinion is that probably the last
13 one that was entered before the computer crashed?

14 A I can't say for sure. I don't know if there's any
15 significance to the order in which the addresses appear.

16 Q Okay. But certainly one of the first, correct?

17 A It's one of the most recent addresses that were
18 entered into the computer.

19 Q Okay. Did it appear --

20 A That's all I can -- but it appears to be at the top,
21 yes, ma'am.

22 Q It does. And then there's other addresses below it,
23 correct?

24 A Yes, ma'am.

25 MS. JONES: I have nothing further, Your Honor.

Anita Mullinax
Direct examination by Ms. Reese

1 MS. REESE: Nothing further from this witness.

2 THE COURT: You may step down.

3 MS. REESE: May this witness be excused, Your Honor?

4 THE COURT: He may be.

5 (Whereupon, the witness was excused.)

6 MS. REESE: The state calls Anita Mullinax.

7 ANITA MULLINAX, having been
8 first duly sworn, testified as follows:

9 DIRECT EXAMINATION BY MS. REESE

10 Q Can you state your name for the jury, please?

11 A Anita Mullinax.

12 Q And where are you employed?

13 A Spartanburg County Sheriff's Office.

14 Q And as an employee of that department what are your
15 duties?

16 A I am currently assigned to the evidence division.

17 Q And as a part of that division do you readily take
18 items to the South Carolina Law Enforcement Division for
19 testing?

20 A I do.

21 Q And did you take some items in this case?

22 A I did.

23 Q Did you take the GSR on the victim, the GSR on Alfreda
24 Jimenez and the GSR on the defendant, Manuel Marin, to
25 SLED?

Anita Mullinax
Direct examination by Ms. Reese

1 A I did.

2 Q Did you take the Ruger 9mm firearm and two Winchester
3 casings to SLED?

4 A I did.

5 Q And tell about the process. When you take these out
6 of evidence what do you do with them?

7 A Basically, what starts is the investigator from the
8 crime scene division will do a "I lab" which is just an
9 internet listing of the items that they want me to take for
10 the case, that they want me to take. And I will choose
11 those items from our locked homicide room and transport
12 them to SLED.

13 Q Okay. When you hand them into SLED is there a process
14 that you go through in entering that evidence?

15 A We actually take the sealed items to SLED, and we're
16 in front of another evidence person for SLED.

17 Sometimes they will repackage these with a heat-sealed
18 envelope. Sometimes they'll mainly just put a SLED piece
19 of tape on it. But everything that we give them, even if
20 they repackage them, we put the date that we take it and
21 our initials.

22 Q And is that the process you went through on each of
23 these items?

24 A That's correct.

25 Q Did you alter them or tamper with them in any way?

Heather Cox McClain
Direct examination by Ms. Reese

1 A No, I did not.

2 Q And you handed them each and every one over to SLED,
3 is that correct?

4 A That's correct.

5 MS. REESE: Nothing further.

6 MS. JONES: I have no questions, Your Honor.

7 THE COURT: You may step down.

8 MS. REESE: Your Honor, may we approach?

9 THE COURT: Yes, ma'am.

10 (Bench conference held off the record in the presence
11 of the jury but out of the hearing of the jury.)

12 MS. REESE: The state calls Heather Cox McClain.

13 HEATHER COX McCLAIN, having
14 been first duly sworn, testified as follows:

15 DIRECT EXAMINATION BY MS. REESE

16 Q Will you state your name for the jury, please?

17 A It's Heather Cox McClain.

18 Q And where are you employed?

19 A The Bureau of Alcohol, Tobacco and Firearms in
20 explosives.

21 Q And what do you do as an employee of that agency?

22 A I'm a special agent. Basically, most of our
23 investigations are firearms related investigations. We
24 also do arsons and explosive type cases.

25 Q I'm going to show you what's been marked as State's

Heather Cox McClain
Direct examination by Ms. Reese

1 Exhibit 43 for Identification. Do you recognize that?

2 A I do.

3 Q And what is that?

4 A This is an A.T.F., what we call a firearms trace.

5 Q And what kind of firearm was that was traced?

6 A Looks like it was a Ruger P95 9mm pistol.

7 Q And what's the serial number on that particular
8 pistol?

9 A Serial number is 31372379.

10 Q And looking at State's Exhibit 3, can you tell whether
11 that is that serial number?

12 A Yes. It is.

13 Q And tell me what firearms trace is.

14 A Basically, we use this in our course of our everyday
15 business, whether we trace it ourselves, or we have local
16 agencies that have access to the database as well and are
17 able to trace their own firearms.

18 What happens is once a gun is entered into this system
19 the national tracing center which is located in West
20 Virginia -- they in this case, for instance, they would
21 have called the manufacturer, which would have been Ruger.
22 They will call them directly and tell them this is the
23 firearm that we have, this is the serial number.

24 Ruger then goes back and looks into their records, and
25 we'll see where they actually sent that firearm. Based on

Heather Cox McClain
Direct examination by Ms. Reese

1 this trace Ruger indicated that they shipped this firearm
2 to North Pleasantburg Gun and Pawn in April, on
3 April 21st of 2000.

4 At that point the national tracing center will then
5 contact the dealer, the North Pleasantburg Gun and Pawn.
6 They will contact them and ask them for their records of
7 who -- of what happened to that firearm while it was at
8 their shop.

9 They're required as a federal firearm licensee to keep
10 records of every gun that's brought in the store and every
11 gun that leaves the store.

12 So based on their records it appears that the gun was
13 purchased on June 2nd of 2000 by Manuel Marin at the 204
14 Glen -- Glenda Lane in Easley.

15 Q So according to your trace the gun that you just
16 compared it with in court belonged to or was registered to
17 Manuel Marin.

18 A Yes.

19 MS. REESE: Your Honor, I move that this be admitted
20 as State's Exhibit 43.

21 MS. JONES: Your Honor, we would object to that
22 admission. She's already testified that it was traced to
23 Mr. Marin. It just has a lot of hearsay information and
24 personal information that we would request be redacted if
25 it's going to be a state's exhibit.

Heather Cox McClain
Direct examination by Ms. Reese

1 THE COURT: Let me see it, please.

2 (Pause.)

3 THE COURT: I sustain the objection.

4 BY MS. REESE

5 Q You are able to rely on this record to say that the
6 defendant was -- the firearm in question was registered to
7 him, is that correct?

8 A If I were using it in my own case, yes, we -- that we
9 would use this.

10 Q And did you, in fact, confirm that the gun was indeed
11 purchased by the defendant?

12 A I did go out to the shop, the North Pleasantburg Gun
13 and Pawn, last week. And I pulled the form, an ATF form,
14 that has to be filled out when you fire -- when you
15 purchase a firearm. And it has all of his information on
16 here.

17 Q Okay. And where -- the particular pawn shop where it
18 was purchased, what is that address?

19 A It's 502 East Blue Ridge Drive in Greenville.

20 Q And the gun was purchased by the defendant from that
21 location.

22 A Based on the forms that I saw, yes.

23 MS. REESE: Nothing further.

24

25

Heather Cox McClain
Cross-examination by Ms. Jones

1 CROSS-EXAMINATION

2 BY MS. JONES

3 Q There's nothing illegal about buying a gun, correct?

4 A No.

5 Q Okay. And, in fact, your trace didn't come up that
6 this gun had been stolen or anything like that, correct?

7 A No. The trace simply just goes from the manufacturer
8 to the original purchaser of the firearm.

9 Q And so far as you could tell it was a legitimate
10 transaction.

11 A Yes. It was.

12 MS. JONES: Nothing further.

13 MS. REESE: Nothing further, Your Honor.

14 THE COURT: You may step down.

15 MS. REESE: Your Honor, may this witness be excused?

16 THE COURT: She may be.

17 (Whereupon, the witness was excused.)

18 THE COURT: Is that all before lunch?

19 MS. REESE: Yes, Your Honor.

20 THE COURT: All right. Ladies and gentlemen, we'll
21 recess for lunch.

22 Keep in mind my caution previously given. No
23 discussions about the case, no research, no investigation,
24 no exposure to any type of media coverage.

25 Please report to your jury room at 2:30, at 2:30 this

Dr. John David Wren
Direct examination by Ms. Reese

1 afternoon. Have a good lunch.

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

4 THE COURT: Court is in recess until 2:30.

5 (Whereupon, a recess was taken.)

6 THE COURT: All right. Are we ready for the jury?

7 MS. REESE: Yes, Your Honor.

8 THE COURT: All right. Bring them in.

9 (The following takes place in the presence of the
10 jury.)

11 THE COURT: Good afternoon. We are going to continue
12 with the state's presentation of evidence.

13 MS. REESE: Thank you, Your Honor.

14 The state calls Dr. David Wren.

15 DR. JOHN DAVID WREN, having
16 been first duly sworn, testified as follows:

17 DIRECT EXAMINATION BY MS. REESE

18 Q Can you state your full name for the jury, please?

19 A John David Wren.

20 Q And where are you currently employed?

21 A I'm a pathologist with Carolinas Pathology Group. I'm
22 stationed at Spartanburg Regional Medical Center where I'm
23 the laboratory medical director there, as well as at
24 Spartanburg Hospital for Restorative Care.

25 Q And can you briefly explain to the jury what you do

Dr. John David Wren
Direct examination by Ms. Reese

1 and what your education and training is that enables you to
2 do what you do?

3 A Well, I have a bachelor's degree, a master's degree
4 and a doctor of philosophy degree in chemical engineering
5 from Clemson University.

6 I went to the Medical University of South Carolina. I
7 graduated there in three years and three months. I
8 directly started my residency. I finished the equivalency
9 of seven years of residency in three years and ten months
10 because I got credit for research that I had done in
11 biological systems and in nephrology, which is kidney
12 diseases, while I was at Clemson and at the Medical
13 University.

14 I did a combined anatomic and clinical pathology
15 residency at the Medical University. I was chief resident
16 in both clinical pathology and anatomic pathology while I
17 was there.

18 Starting in June, I mean, July of 1980 I was assistant
19 medical examiner in Charleston County. And then starting
20 in about October of that year I started doing one autopsy,
21 I mean, autopsies one weekend a month because one of the
22 forensic pathologists left the Medical University, and
23 there were only two left. And I was asked by the
24 department chairman to fill in while he was gone since I'd
25 already done my rotation in forensic pathology.

Dr. John David Wren
Direct examination by Ms. Reese

1 I did autopsies for all of the autopsies that were
2 sent to the Medical University during that weekend, which
3 varied from maybe four to ten or 12 a weekend under the
4 supervision of a forensic pathologist that was on call for
5 assistance if necessary.

6 When they were out, both of them were out, testifying,
7 if they were out of the university, I also did autopsies
8 while they were gone as part of my rotation.

9 I'm board certified in clinical and anatomic
10 pathology. I passed my boards on the first try. I did not
11 take them together. I took them on two separate occasions,
12 one in 1984 and the other one in 1987.

13 I am -- I was qualified to take the boards in forensic
14 pathology, but I was too busy to go ahead and do that. I
15 am qualified as an expert in forensic pathology in at least
16 ten, and probably more like half, of the counties in
17 Spartanburg -- in South Carolina.

18 To name a few -- Anderson, Greenville, Spartanburg,
19 Cherokee, Laurens, Greenwood, Fairfield, Orangeburg,
20 Dorchester, Dillon, Horry County, Charleston County,
21 Beaufort and Berkeley, to name those that come off, right
22 off, the top of my head. Lexington also.

23 Q And you have previously been qualified as an expert to
24 testify in those counties, is that true?

25 A Yes.

Dr. John David Wren
Direct examination by Ms. Reese

1 Q And in Spartanburg County previous.

2 A Yes.

3 MS. REESE: Your Honor, at this time I would ask that
4 Dr. Wren be recognized as an expert in the field of
5 pathology.

6 MS. JONES: Your Honor, I have no objection.

7 THE COURT: All right. He is so qualified.

8 BY MS. REESE

9 Q Dr. Wren, didn't you have occasion to perform an
10 autopsy on Nelson -- the body of Nelson Tabares?

11 A Yes. I performed an autopsy on an individual
12 identified as Nelson Tabares on July the 21st, 2008,
13 beginning at approximately 6:35 a.m. in the Spartanburg
14 Regional Medical Center Autopsy Room.

15 Q And prior to performing the autopsy do you -- do you
16 measure the individual for height and weight?

17 A Yes.

18 Q And what was his height and weight?

19 A He measured 63 inches in length, which may be up to
20 two inches variation. And there's actual height, because
21 there's some change sometimes postmortem when a person
22 relaxes. And he weighed 180 pounds.

23 Q So 63 inches would be 5'3"?

24 A 5'3", yes.

25 Q Were you able to determine the cause of death?

Dr. John David Wren
Direct examination by Ms. Reese

1 A Yes. A gunshot wound to the head. There were two,
2 but one of them was immediately fatal. The other one was
3 potentially fatal.

4 Q So there were two gunshot wounds, is that correct?

5 A That's correct.

6 Q And where? Take the first wound. First of all, can
7 you say which wound came first and which wound came second?

8 A Not necessarily. They, they came close together
9 because they were closely approximated.

10 Q Can you explain to the jury, take the first wound and
11 explain, what the point of entrance and exit was for that
12 particular wound?

13 A Well, basically there, there were four defects in the
14 head and a through-and-through defect to the right ear.

15 In our autopsy protocol we number autopsy, I mean, we
16 number gunshot wounds if they are relatively significant
17 from top to bottom, front to back.

18 So the first gunshot wound was in the left forehead
19 near the midline. It was 2 inches from the top of the head
20 and 1 inch to the left of midline, approximately this
21 location on me.

22 It was irregular in shape, and it had splitting of the
23 skin and underlying beveling of the, of the bone outwards,
24 so that indicated there was an exit gunshot wound.

25 The gunshot wound associated with that wound appeared

Dr. John David Wren
Direct examination by Ms. Reese

1 in the right -- into the left occiput region, the back of
2 the head. It was 6 inches from the top of the head and a
3 half inch to the left of midline. And it was split
4 horizontally, and it -- the horizontal dimensions were
5 5.5 centimeters, and it was half a centimeter wide. You
6 could ap -- re-approximate that wound, and it was 1
7 centimeter in diameter. And the entrance was medially.
8 Now, the reason it was like that is because it was
9 essentially a contact gunshot wound.

10 That wound passed into the base of the brain -- of the
11 skull. It passed through a large drainage area called the
12 sagittal sinus. It went through the cerebellum, which is
13 an inferior portion of the brain, went through the cerebrum
14 and came out anteriorly.

15 So the path of that bullet was back to front. It was
16 upward at about probably 15 or 20 degrees from the
17 horizontal. And it was almost sagittally, meaning that if
18 you drew a perpendicular line through the face and through
19 the body, that's the sagittal plane. So it was going from
20 back to front and slightly upward and almost straight
21 through.

22 Gunshot wounds three and four were, were associated
23 gunshot wounds. And as the gunshot wound exited it went
24 through the ear, the pinna of the ear, the surface of the
25 ear.

Dr. John David Wren
Direct examination by Ms. Reese

1 But, nevertheless, the gunshot wound entered in the
2 right posterior neck. It was a little bit lower,
3 6.75 inches from the top of the head, and it was a half
4 inch to the right of midline.

5 This wound also had a little bit of splitting of the
6 skin indicating that it was probably contact, being loose
7 contact. And there was a little bit of charring of the
8 skin surrounding that from the heat of the weapon. The
9 charring was from 5:00 to 1:00 o'clock.

10 If you look at the wound as if it were a clock, from
11 5:00 to 1:00 o'clock means around -- the way I designate it
12 is around the 5:00 to 6:00 to 9:00 to 12:00 to 1:00 o'clock
13 over on the -- his left side.

14 Now, that gunshot wound passed along the base of the
15 skull, did not go into the, into the cranial vault itself.
16 So it passed along the bone at the base of the skull. And
17 it exited behind the right ear five and three quarters
18 inches from the top of the head and two and three quarter
19 inches to the right of midline.

20 And it was irregular, indicating because it was
21 irregular it could be re-approximated together, because as
22 a bullet leaves the skin it sort of just tears its way out
23 rather than boring its way out.

24 It tears the skin apart. And you can put the skin
25 back together and make a nice -- although it's torn, it can

Dr. John David Wren
Direct examination by Ms. Reese

1 be actually sewn back together and make a complete covering
2 over the skin unless it's up against something and some of
3 the tissue is left. But, nevertheless, it was an exit.

4 That gunshot wound passed slightly upward from the
5 decedent's left to right and a little bit back to front.
6 And, as I stated previously, as the bullet exited the skin
7 it went through the pinna of his ear.

8 Now, the fatal gunshot wound was the one I described
9 first that went through the cranial vault and went through
10 the brain. And the other one was only potentially fatal,
11 because we designate them potentially fatal if they don't
12 hit any vital structures. But a person can die from
13 bleeding, can die from subsequent infection or other
14 complications, depending on their state of health. So it
15 was a potentially fatal wound.

16 Q Dr. Wren, is it your testimony that the entrance to
17 both of these wounds occurred to the back of the head?

18 A Yes.

19 Q And would these have been debilitating wounds at the
20 time they were inflicted?

21 A Yeah. The, the first one I described would have been
22 almost immediately fatal. The other one would have, like I
23 said, only been potentially fatal. He could have lost
24 consciousness from that one, but more than likely not.

25 Q Dr. Wren, tell us. You talked a little bit about

Dr. John David Wren
Direct examination by Ms. Reese

1 contact wounds. What -- is there a difference between a
2 close contact wound and a contact wound?

3 A Basically, gunshot wounds are described as contact,
4 intermediate and distant.

5 Now, distant gunshot wounds are wounds that are so far
6 away from the entrance that one cannot give -- does not
7 have any indication of how far it was away. And, in fact,
8 they can be from anywhere from several inches to miles
9 away, as far as the bullet will travel. So you get very
10 little information from that.

11 As you -- as one moves closer to a gunshot, to a
12 target, the burning powder and soot that exits the barrel
13 will -- the burning powder will tattoo the skin, just like
14 you put little stipples on it. And the soot will deposit
15 around -- if you can see the skin or whatever object it
16 passes through, if you can see the surface you'll see that
17 telltale indication.

18 Now, different projectiles and different weapons will
19 throw that soot and powder out a separate distance. And so
20 one would have to take the weapon and a similar bullet
21 cartridge and fire that at different distances.

22 And you can -- one can compare that pattern with
23 what's on the -- after firing and give a good indication of
24 how far it is. But as one gets closer and closer that,
25 that powdering and soot as it disburses at a distance --

Dr. John David Wren
Direct examination by Ms. Reese

1 one can imagine that eventually it won't go out far enough
2 to hit the skin or the object. . It will constrict in its,
3 in its pattern until one gets right up close to the skin
4 and doesn't actually touch the skin. There'll be hardly
5 any evidence around there, but one can see evidence inside
6 the wound.

7 Now, those are called intermediate gunshot wounds.
8 Once one becomes contact it can be either tight contact or
9 loose contact.

10 The difference between that is a tight contact wound
11 would be one that someone pressed the barrel of the weapon
12 up against the skin and it was tight enough to where the
13 powder and the, and the soot and the gasses went into the
14 skin. They have to exit somewhere. So they fly back
15 around the barrel and split the skin. If it's loose
16 contact you don't get quite as much splitting of the skin.

17 So those are the types of gunshot wounds. This one
18 appeared to be -- one of them was tight contact. One -- it
19 had the large split, I think. And the one, the other one,
20 the second wound, it went out behind the head and went
21 through the pinna of the ear, was more likely a looser
22 contact.

23 Q So -- and I'm sorry. Which one in terms -- the one to
24 the ear was a looser contact.

25 A The one to the right side of the back of the head that

Dr. John David Wren
Cross-examination by Ms. Jones

1 went out the base of the -- by the base of the skull came
2 out behind the ear and went through the pinna of the ear,
3 which is the loose part of the ear, the part that's loose,
4 went through that part of the ear. That was the looser
5 contact. That was loose contact, I think.

6 Q And the other wound that came through the center, as
7 you said, and came out the forehead --

8 A Was more likely a tighter contact, yes.

9 MS. REESE: Nothing further.

10 CROSS-EXAMINATION

11 BY MS. JONES

12 Q Dr. Wren, you testified that the through-and-through
13 was almost immediately fatal, is that correct?

14 A Yes, more than --

15 Q And that's essentially instant death, for lack of a
16 better term or put in layman's term. Let me rephrase it.
17 Kind of put in layman's terms.

18 A Well, that type of gunshot wound more than likely
19 would have caused immediate loss of consciousness and
20 the -- he, he would have bled some, because even though it
21 went through the brain it didn't hit a structure to stop
22 his heart from beating or him from breathing at that time,
23 which would have both re -- autonomic type things. But he
24 would have died shortly thereafter.

25 Q Okay. In fact, in your final diagnosis you indicated

Dr. John David Wren
Cross-examination by Ms. Jones

1 a single essentially immediate -- immediately fatal gunshot
2 wound, correct?

3 A Yes.

4 Q Okay.

5 A In all practical purposes, he would have lived less
6 than, certainly less than, ten minutes, more likely less
7 than -- well, I can't. One can't tell when the heart stops
8 beating.

9 Q And when you do an autopsy you take fluid and blood,
10 is that correct?

11 A Yes, ma'am.

12 Q And you certainly would have -- you took Mr. Tabares'
13 blood and sent it off to SLED, correct?

14 A I give it to the coroner's office. And we lock it up
15 in a refrigerator there in the morgue. And they recover it
16 and take it either to -- in violent deaths and sui -- most
17 likely suicides, homicides and traffic fatalities, those
18 are sent to SLED.

19 Q Okay.

20 A The others are sent to a private commercial
21 laboratory.

22 Q Okay. And Mr. Tabares' blood was sent to SLED for
23 analysis, correct?

24 A I assume they were, yes.

25 Q Okay. And when -- I'm going to show you what's been

Dr. John David Wren
Cross-examination by Ms. Jones

1 labeled Defendant's Exhibit 2. Were you provided or looked
2 at that report in preparing your autopsy -- in autopsy
3 report?

4 A No. I dictated this autopsy report and signed it
5 on -- I signed it on July the 23rd, which was only several
6 days later. The report was reported on August the 8th.

7 The -- in my opinion the cause of death was
8 unequivocal, so it didn't matter what the tox was unless
9 his blood alcohol would have been 500 or so in this case,
10 or other drugs would have been available that could have
11 killed them. Then I would have had to do a supplemental
12 and decide if he bled enough to have been alive at the time
13 he was shot.

14 Q Were you made aware of Mr. Tabares' blood alcohol
15 content?

16 A I'm not sure anyone told me what it was. I don't
17 remember. I have talked to the prosecutors on several
18 occasions between that, but I don't remember specifically
19 seeing it.

20 MS. JONES: Your Honor, I have nothing further.

21 Your Honor, we would move to enter Exhibit No. 2 into
22 evidence. It's Mr. Tabares' blood alcohol content.

23 MS. REESE: Your Honor, the state has no objection to
24 that report coming in.

25 THE COURT: Okay.

Dr. John David Wren
Redirect examination by Ms. Reese
Recross-examination by Ms. Jones

1 MS. JONES: We stipulated to some reports, Your Honor.

2 THE COURT: It's admitted.

3 MS. JONES: Thank you, Your Honor.

4 (SLED report marked Defendant's Exhibit No. 2.)

5 MS. JONES: I have nothing further.

6 REDIRECT EXAMINATION

7 BY MS. REESE

8 Q Dr. Wren, now having seen that toxicology report does
9 that give you any hesitation regarding your autopsy report
10 and cause of death of Nelson Tabares?

11 A It doesn't change the cause of death. It just means
12 he was what -- in Greenwood, South Carolina, what they call
13 knee-walking drunk.

14 Q And that would not affect what killed him.

15 A No. He just wouldn't have been very -- he wouldn't
16 have been -- his reaction would have been extremely slow.
17 He would have been almost at the point of being passing
18 out. He certainly is extremely drunk.

19 MS. REESE: Nothing further, Your Honor.

20 RECROSS-EXAMINATION

21 BY MS. JONES

22 Q Isn't it true, Dr. Wren, in terms of alcohol
23 content -- and just for the record, his blood alcohol
24 content was .323, correct?

25 A Yes.

Dr. John David Wren
Recross-examination by Ms. Jones

1 Q Okay. And isn't it true when you're talking about
2 somebody who drinks a lot their functioning level is going
3 to probably be a lot better than somebody who drinks less?
4 In other words, you have functioning alcoholics, correct?

5 A That's true, but at a 300 level everybody is drunk.

6 Q Right. But somebody who drinks every single day and
7 drinks a lot of alcohol might be able to be more
8 functioning than somebody who is just a binge drinker,
9 correct?

10 A Yes. That's true.

11 Q Okay. And we don't necessarily know whether or not
12 Mr. Tabares was an alcoholic. But in terms of differing
13 levels of functioning that certainly can happen, correct?

14 A Yes. Just for the jury's information, I have seen
15 people die with -- from a (sic) alcohol overdose at 270,
16 which this is 323. I've seen one person survive personally
17 who was admitted to the emergency room with an alcohol
18 level of 695.

19 MS. JONES: I have nothing further, Your Honor.

20 MS. REESE: Nothing further, Your Honor.

21 THE COURT: You may step down. Thank you.

22 MS. REESE: The state calls Kathleen Woodward.

23 Your Honor, may this witness be excused?

24 THE COURT: He may be.

25 (Whereupon, the witness was excused.)

Kathleen Woodward
Direct examination by Ms. Reese

1 KATHLEEN WOODWARD, having been
2 first duly sworn, testified as follows:

3 DIRECT EXAMINATION BY MS. REESE

4 Q State your name for the jury, please.

5 A My name is Kathleen Woodward, W-O-O-D-W-A-R-D.

6 Q And where are you employed?

7 A I'm currently employed with the South Carolina Law
8 Enforcement Division, commonly known as SLED, in their
9 trace evidence laboratory.

10 Q And what are your duties in the trace laboratory?

11 A Well, my title is forensic scientist, and I am
12 currently responsible for various types of analysis,
13 including gunshot residue analysis, fire debris analysis
14 and paint analysis.

15 Q And what are the -- what is the education and training
16 that leads you to or enables you to do what you do?

17 A I have a bachelor of science degree from Converse
18 College. And when I came to work for SLED I completed a
19 6-month training program in each discipline, which included
20 various readings, practice samples and various tests, and
21 have completed all of those, and began to take case work
22 from there.

23 Q And how many tests for gunshot residue would you say
24 you've done so far?

25 A Probably around 700.

Kathleen Woodward
Direct examination by Ms. Reese

1 Q And have you been qualified as an expert in the courts
2 of this state in determining gunshot residue?

3 A Yes, ma'am.

4 MS. REESE: Your Honor, at this time I would ask that
5 she be qualified as an expert in trace evidence,
6 specifically gunshot residue.

7 MS. JONES: No objection, Your Honor.

8 THE COURT: She is so qualified.

9 BY MS. REESE

10 Q Ms. Woodward, what is -- you call it GSR, but what is
11 the actual word?

12 A GSR is an acronym for gunshot residue.

13 Q And what is GSR or gunshot residue?

14 A Gunshot residue is the components that come out of the
15 barrel of the gun when it is fired. Those components are
16 lead, barium and antimony.

17 If you've ever seen a weapon fired the -- there is a
18 plume of smoke that comes out of the barrel of the gun.
19 And this can also be made up of bits of smoke that will
20 come out of other open spaces. And that plume of smoke is
21 comprised of small particles of lead, barium and antimony.
22 And those particles can come to rest on anything in the
23 vicinity of that weapon when it's fired.

24 Q And so when you receive a gunshot residue test you are
25 receiving what?

Kathleen Woodward
Direct examination by Ms. Reese

1 A I actually receive what we call gunshot residue kit.
2 And that kit is comprised of four particle lifts that are
3 taken from each area of the hands -- the right palm and the
4 right back of the hand, and the left palm and then the left
5 back of the hand. And also in that kit are swabs, and
6 those swabs are also taken from each of those areas of the
7 hands.

8 Q Do -- it's important that gunshot residue or the kit
9 for gunshot residue be completed within a certain amount of
10 time after the event.

11 A Yes. On a living person the kit needs to be taken
12 within six hours of the incident. And the reason for this
13 timeframe on a living person is that gunshot residue is
14 very fragile evidence. It can very easily be removed from
15 the hands just from everyday movements like taking your
16 hands in and out of your pockets.

17 It's also removed by washing your hands. It's
18 absorbed by the skin as well over time. So it's very -- it
19 is important that that's taken within that timeframe.

20 Q I'm going to show you what's been marked as State's
21 Exhibit 7. And you can open that. Can you tell me whether
22 or not you tested that particular item for gunshot residue?

23 A Yes. I did.

24 Q Okay. And that is the gunshot residue kit for Nelson
25 Tabares, the victim in this case, is that right?

Kathleen Woodward
Direct examination by Ms. Reese

1 A Yes. It is.

2 Q And when you received that item how -- when it comes
3 to you is it sealed?

4 A Yes, it's sealed when it, when it arrives at SLED.

5 Q Who breaks that seal?

6 A The, the seal on this white envelope is broken by our
7 technician in my laboratory who preps the swabs for
8 analysis.

9 Q And then what happens to it?

10 A The swabs are analyzed. And when all of the analysis
11 is complete on the kit, the kit is sealed and returned to
12 the agency.

13 Q Now, in this particular instant or instance did you
14 report a finding on Mr. Tabares' hands?

15 A Yes, I did.

16 Q And what was that finding?

17 A On the GSR kit that I analyzed for Nelson Tabares, I
18 found gunshot residue on the right palm of his hand and on
19 the right back and the right, excuse me, on the right back
20 and the left palm of his hands I found round lead particles
21 to be present. And round lead particles are considered to
22 be a component of gunshot residue.

23 On the left back of his hand I found one round lead
24 particle and, again, a round lead particle is a component
25 of gunshot residue.

Kathleen Woodward
Direct examination by Ms. Reese

1 Q In your expert opinion is this consistent, this
2 finding consistent, with a victim or a person who might be
3 a victim of a gunshot wound?

4 A Yes, it is.

5 Q And why is that?

6 A Like we previously discussed, when someone is in a
7 vicinity of a weapon when it is fired gunshot residue can
8 come -- that gunshot residue can come to rest on anything
9 that is, that is in that vicinity.

10 So if someone who has sustained a gunshot wound was
11 in, in the vicinity of a weapon when it was fired, so
12 therefore I would expect to see gunshot residue or
13 components of gunshot residue on their hands.

14 MS. REESE: Your Honor, at this time we would move to
15 admit State's Exhibit 7 into evidence.

16 MS. JONES: No objection, Your Honor.

17 THE COURT: It's admitted.

18 (GSR of victim marked State's Exhibit No. 7.)

19 Q Did you also perform a test on the defendant in this
20 case, Manuel Marin? I ask you to look at State's Exhibit 9
21 for Identification.

22 A Yes. I analyzed this kit as well.

23 Q And did you report a finding in that case?

24 A Yes, I did. From the analysis on the GSR kit from
25 Manuel Marin no gunshot residue was found on the right

Kathleen Woodward
Direct examination by Ms. Reese

1 palm.

2 On the right back I did not find any metals that
3 indicated gunshot residue.

4 There was no gunshot residue on his left palm.

5 And on the left back of his hand gunshot residue was
6 found.

7 Q Can you tell the jury in your expert opinion whether
8 or not the presence of blood on the palms of the hands
9 would affect the finding of gunshot residue or affect your
10 findings in terms of gunshot residue?

11 A In my experience the presence of blood on someone's
12 hands does affect whether gunshot residue would be found
13 during analysis, much like washing of the hands or coming
14 in contact with any liquid might remove those particles
15 from the hands.

16 Q But in this particular case you did find gunshot
17 residue on the back of the left hand, is that correct?

18 A That is correct.

19 MS. REESE: Your Honor, at this time we would move to
20 admit State's Exhibit 9 into evidence.

21 MS. JONES: No objection, Your Honor.

22 THE COURT: It is admitted.

23 (GSR of defendant marked State's Exhibit No. 9.)

24 Q And finally did you perform a test on -- I'll show you
25 State's Exhibit 8 for Identification. Did you perform a

Kathleen Woodward
Direct examination by Ms. Reese

1 test on a kit presented to you from Alfredo Jimenez?

2 A Yes, we did perform a gunshot residue analysis on this
3 kit as well.

4 Q And did you report a finding on Mr. Jimenez?

5 A I did. On all four areas of the hands Alfredo Jimenez
6 did not indicate the presence of gunshot residue.

7 Q In your opinion is there any evidence that you saw
8 that would indicate that he had recently fired a firearm
9 based on your test results?

10 A No. Based on my test results I, I don't have anything
11 that says that he fired a weapon, but, again, it can be
12 washed away or removed by, by different activities.

13 MS. REESE: I would ask that at this time State's
14 Exhibit 8 be entered.

15 MS. JONES: No objection, Your Honor.

16 THE COURT: It's admitted.

17 (Gunshot residue kit marked State's Exhibit No. 8.)

18 Q Did you prepare a report regarding your findings?

19 A Yes, I did.

20 Q Let me refer you to State's Exhibit 12 for
21 Identification. Is that your report?

22 A Yes, ma'am, it is.

23 MS. REESE: Move to admit State's Exhibit 12.

24 MS. JONES: No objection, Your Honor.

25 THE COURT: It's admitted.

Kathleen Woodward
Cross-examination by Ms. Jones

1 (SLED report marked State's Exhibit No. 12.)

2 Q So in your expert opinion, although there was the
3 presence of gunshot residue on the hands of the defendant
4 and the victim, there was none on the witness, is that
5 correct?

6 A That's correct.

7 MS. REESE: Nothing further.

8 CROSS-EXAMINATION

9 BY MS. JONES

10 Q Ms. Woodward, you testified that gunshot residue is
11 fragile, is that correct?

12 A Yes, ma'am.

13 Q Okay. And simply just wiping your hands like this can
14 remove gunshot residue, correct?

15 A Yes, ma'am.

16 Q And simply because you have gunshot residue really the
17 only -- all that indicates is that you were around a gun
18 being fired, correct?

19 A It indicates that you could possibly have fired a
20 weapon, that you were in the vicinity of a weapon when it
21 was fired, or that you have handled a weapon that has
22 previously been fired.

23 Q Okay. So there's three possibles. But simply finding
24 gunshot residue doesn't narrow any of those possibilities
25 down, correct?

David Warren Black
Direct examination by Ms. Reese

1 A Not definitively, no.

2 MS. JONES: Nothing further Your Honor.

3 MS. REESE: Nothing from the witness, Your Honor.

4 THE COURT: You may step down.

5 MS. REESE: May this witness be excused?

6 THE COURT: She may be.

7 (Whereupon, the witness was excused.)

8 MS. REESE: The state calls David Black.

9 DAVID WARREN BLACK, having
10 been first duly sworn, testified as follows:

11 DIRECT EXAMINATION BY MS. REESE

12 Q Will you state your name for the jury, please?

13 A Yes, ma'am. My name is David Warren Black. The last
14 name is spelled B-L-A-C-K.

15 Q And where are you certainly employed?

16 A Well, as of July 1 of this year I retired with 30
17 years of law enforcement service with the State of South
18 Carolina.

19 Q Where were you employed during August of 2008?

20 A I was employed with the South Carolina State Law
21 Enforcement Division, better known as SLED. And during my
22 tenure at SLED I did serve in the firearms department with
23 the forensic services laboratory.

24 Q And what -- can you explain to the jury your training
25 and your education that enabled you to do your job?

David Warren Black
Direct examination by Ms. Reese

1 A Yes, ma'am. I have an associate of arts degree in
2 criminal justice from Florence-Darlington Technical
3 College.

4 I transferred to the University of South Carolina in
5 Columbia and received a bachelor of science degree in
6 criminal justice with a minor in sociology.

7 In my 30 years of law enforcement duties I worked
8 first with the Richland County Sheriff's Department as a
9 line deputy and also as forensic scientist there primarily
10 doing latent print examination, crime scene investigation
11 and reconstruction.

12 When I was hired at SLED I also worked in the area of
13 latent prints in crime scene investigation and crime scene
14 reconstruction. It was during that time working in those
15 areas of latent print and crime scene work that I became
16 very familiar with various firearms and how those firearms
17 operated and how they functioned. I also became familiar
18 with ammunition and ammunition components at that time.

19 When I was transferred to and assigned to the firearms
20 department at SLED they had an intensive 3-year training
21 program. During this 3-year training program there are
22 various segments of training that you go through relating
23 to firearms evidence, and also toolmark evidence.

24 Each segment of training you have oral exams,
25 practical exams and written exams. And then at the end of

David Warren Black
Direct examination by Ms. Reese

1 the training there's a cumulative exam of all also written
2 tests, oral tests and practical examination.

3 During the 3-year training program I was also working
4 firearm cases under the direct supervision of a
5 court-qualified tenured firearms examiner. And also during
6 that training at least half my time was spent on the
7 comparison microscope. The work that I do in firearms
8 identification is done by and through microscopic
9 comparison.

10 Also, I've been to a number of armorer schools with
11 Smith and Wesson, Highpoint and Glock and others. I've
12 also been to several manufacturers to see how firearms are
13 made and how ammunition is made.

14 I'm also a member of AFTE, which is the Association of
15 Firearms and Toolmark Examiners. This is the governing
16 board that addresses how we operate as firearm and toolmark
17 examiners..

18 MS. REESE: Your Honor, at this time I would move to
19 have him recognized as an expert in the field of firearms
20 examination and identification.

21 MS. JONES: No objection, Your Honor.

22 THE COURT: He is so qualified.

23 BY MS. REESE

24 Q I'm going to show you what's already been marked
25 State's Exhibit 3 for Identification, State's Exhibits 5

David Warren Black
Direct examination by Ms. Reese

1 and 4 for Identification.

2 Can you look at those and tell me whether or not you
3 have actually examined these items?

4 THE WITNESS: If it please the Court, Your Honor, for
5 me to check the firearm I need to pull it out of the box
6 and make sure it's unloaded. Is that okay to do that?

7 THE COURT: It is.

8 THE WITNESS: Thank you.

9 BY MS. REESE

10 A Yes, ma'am. State's Exhibits 3, 4 and 5 I did receive
11 for firearms examination.

12 Each of these items have the SLED laboratory number on
13 them, the item number, respective item number, and my
14 initials, D. W. B. These are actually things that I
15 inscribed on the evidence when I had it in my custody.

16 Q Now, how do you receive or how did you receive those
17 items? What kind of -- how did they come to you? Were
18 they sealed when they come to you?

19 A Yes, ma'am. When I received State's Exhibit 3, yes,
20 ma'am, State's Exhibit 3, it contained a Ruger pistol, a
21 magazine and seven unfired cartridges. And they were
22 inside this sealed box.

23 And State's Exhibits 4 and 5 were also received in
24 these sealed craft envelopes. And in both of State's 4 and
25 5, are each a fired cartridge case.

David Warren Black
Direct examination by Ms. Reese

1 Q Now, tell me what you do once you receive those and
2 break the seal. What do you do in regards to testing the
3 item?

4 A Okay. Once I receive the evidence I will actually
5 photograph, document the evidence. I had a digital camera
6 in my office work space. I also have paperwork that I
7 would have to fill out to document this evidence.

8 In the case of the fired cartridge case, State's
9 Exhibits 4 and 5, I would write down any information that
10 may be present, for example, what was on the head stamp.
11 The head stamp is the manufacturing information that's on
12 the base of the fired cartridge case or on live cartridges.

13 In this case it was indicating the Winchester
14 manufacturer, and it gave the caliber of 9mm Luger.

15 In regards to State's Exhibit 3, which was a Ruger
16 firearm, in particular it's a Ruger Model P95DC, it's 9mm
17 Luger caliber. I would write down that information, along
18 with the serial number. And I'd also document the general
19 condition of the firearm and of the magazine and of the
20 cartridges that were with it, the unfired cartridges.

21 In this particular case on the pistol I noticed there
22 was blood and tissue present on various parts of the
23 firearm both outside and inside. After documenting that I
24 actually collected samples from the firearm from three
25 particular areas.

David Warren Black
Direct examination by Ms. Reese

1 If I may, I'm going to go to my report. I swabbed
2 blood and tissue from the muzzle and barrel of this
3 firearm, State's Exhibit 3. I also swabbed blood from the
4 inner ejection port from State's Exhibit 3, and also
5 swabbed blood from the decocking lever in right rear side
6 of State's Exhibit 3.

7 Now, once I collect those samples for matters of
8 safety I sanitize the weapon at that point using chemicals
9 that we have in the lab that will clean up the blood and
10 the tissue on the exterior only so I could handle it and do
11 what I need to do for safety reasons.

12 After I completed all of my documentation I then test
13 fired the firearm. During the test fire of the firearm we
14 have the bullet recovery room. When I say we, I'm
15 referring to the SLED firearms department. It's a
16 galvanized steel tank that goes through. It starts on the
17 second floor and ends on the first floor. It has
18 approximately 500 gallons of water in it.

19 Whenever a test fire is done the lid is secured down.
20 We fire through a port at 90 degrees straight into the
21 water.

22 There are switches that I activate that oscillate the
23 water. That way it prevents the fired bullet from being
24 damaged when it goes into the water. And also there are --
25 there are hoods present to suck out the lead and the other

David Warren Black
Direct examination by Ms. Reese

1 particles when the test firing is done.

2 When I fired the pistol the first time it did fire,
3 but there was a process -- in firearms where we call a
4 stovepipe. Stovepipe means that the fired cartridge
5 case -- it did extract from the chamber of the barrel but
6 it did not eject from the firearm.

7 And the reason why it looks like a stovepipe, a fired
8 cartridge case will stick straight up out of the ejection
9 port. And it literally looks like a stovepipe. If you
10 think of old potbelly stoves and what not, that's exactly
11 what it looks like.

12 When this happened -- earlier I had testified that I
13 had taken some blood from the inside of the firearm. There
14 was a tremendous amount of blood and body tissue and other
15 debris inside that firearm.

16 Before I could go any further without disassembling
17 the firearm I simply racked the slide or kept pulling the
18 slide back to work that debris free, and also took swabs
19 just to remove that debris.

20 Once that had been done I was able to successfully
21 test fire the weapon four more times. And there was no
22 problems. So I attribute that to the amount of blood and
23 tissue that was inside the firearm. And that is not
24 uncommon.

25 Based on my experience with a crime scene work and

David Warren Black
Direct examination by Ms. Reese

1 what I've done in firearms work, when you do have gunshot
2 wounds if there is a contact or close contact wound -- and
3 this was present on the front muzzle of the pistol -- there
4 was some blowback present, which was consistent with high
5 velocity blood spatter, which is consistent with a gunshot
6 wound.

7 Not only is there force going out from the barrel
8 there -- it acts as a vacuum. It's literally going to suck
9 blood and tissue back into the barrel and into the firearm.
10 In my opinion that's what happened in this case.

11 But after I was able to do that, after the one failure
12 to eject, one stovepipe, the other four times it fired
13 fine. I collected those test fires. I marked the test
14 fires. I scribed them.

15 I have a comparison microscope, and a comparison
16 microscope has optics or two eye pieces. And each optic
17 eye piece goes to its own stage. And what I can do, I can
18 look at my test fires against the evidence at the same
19 time.

20 The first thing I did was I examined the test fires to
21 each other to make sure I could identify them to one
22 another, and I could and they did.

23 And at that point I examined the test fires from
24 State's Exhibit 3 to the two fired cartridge cases, State's
25 Exhibits 4 and 5. And during that examination process I

David Warren Black
Direct examination by Ms. Reese

1 found that State's Exhibits 4 and 5, the two fired
2 cartridge cases, in my opinion were fired by the pistol,
3 State's Exhibit 3.

4 Q Now, and I believe you've already testified that this
5 firearm, other than the blood and tissue found, was in good
6 working order, is that correct?

7 A Yes, ma'am.

8 Q Can you describe for the jury what exactly is good
9 working order for this firearm? How is it used and how do
10 you fire it?

11 A Okay.

12 THE WITNESS: Is it okay if I demonstrate it? Take
13 the pistol out of the box and demonstrate?

14 THE COURT: You may.

15 THE WITNESS: Thank you.

16 BY MS. REESE

17 A It is unloaded. There's -- with the exception of the
18 cable lock, there's nothing. There's no ammunition. It is
19 unloaded.

20 When you take a loaded magazine such as the one that
21 was submitted with the pistol, you take the loaded
22 magazine, and you place it into the magazine well and you
23 push it up until you hear a clicking sound, a lock inside
24 the magazine well.

25 You have what is known as a slide release. When you

David Warren Black
Direct examination by Ms. Reese

1 depress this, because of the cable it won't go any further
2 for safety reasons. The slid will go completely forward.

3 What happened -- excuse me. When the slide is pulled
4 fully to the rear and let go, as the slide goes forward
5 it's taking a cartridge out of the magazine and placing it
6 into the chamber of the pistol, the chamber being the rear
7 most portion of this pistol barrel.

8 It also cocks the firearm. If you look back here the
9 hammer of the firearm is fully down. It's depressed. It's
10 out like as my hand's demonstrating.

11 This pistol is now ready for single-action fire. The
12 only thing you have to do is pull the trigger. The hammer
13 would go forward striking the firing pin. And that, in
14 turn, would fire the cartridge sending the bullet out of
15 the muzzle into the barrel. And from the forces of the
16 recoil the slide would go back to the rear. It would
17 extract and eject the fired cartridge case.

18 And when the slide goes back forward it'll take a
19 fresh, unfired cartridge and place it into the chamber.
20 And each time you pull the trigger the pistol will shoot,
21 will go bang.

22 Now, also present on the rear of the slid, what's
23 known as a decocking lever, which I'm pointing to right
24 here on both sides of the frame below the rear side.

25 When the pistol is loaded and it's ready to fire in

David Warren Black
Direct examination by Ms. Reese

1 single-action mode if you depress the decocking lever two
2 things will happen. The hammer will safely go forward.
3 There's a hammer lock that prevents that hammer from
4 striking the firing pin. So the hammer will be flush
5 against the frame, and it decocks the pistol.

6 When that happens to make the pistol fire the
7 travel -- the travel of the trigger is longer. You have to
8 pull the trigger further back. And in doing so it cocks
9 the pistol, recocks the pistol, and fires the pistol at
10 that point in time.

11 So the hammer will literally if you do it in a
12 double-action mode, it'll literally -- the hammer will go
13 to the rear and then go back forward striking the firing
14 pin.

15 Now, in the single-action fire when you pull the
16 trigger it'll keep firing single action, meaning each time
17 you pull the trigger it will fire.

18 When you go to the double-action fire you decock the
19 pistol. The first shot will be double action, but any
20 subsequent shot will be single action unless you depress
21 the decocking lever again each time.

22 Q For simplicity sake if -- how many times does this gun
23 fire when you pull the trigger?

24 A One time.

25 Q So each time you want to fire the gun you have to pull

David Warren Black
Direct examination by Ms. Reese

1 the trigger, is that correct?

2 A Yes, ma'am, that is correct.

3 Q And when you talk about the slide there and the slide
4 going back -- well, let me ask you another question about
5 that.

6 You've heard about hair trigger. What is a hair
7 trigger? That's a term that some of us have heard. What
8 is, what is that talking about or referring to?

9 A What that is basically referring to is that the, the
10 trigger mechanism has been worked on, that it takes a very
11 light amount of force to make it go off.

12 Most when you refer to a hair trigger like that --
13 that is usually, usually either done by the manufacturer or
14 trained gunsmith. You normally will find hair triggers or
15 somebody with a light trigger pull on rifles that may be
16 used for hunting or used for some type of competitive
17 shooting. Or if you see people do a lot of handgun
18 competitive shooting, yes, the triggers will be worked on
19 so it doesn't require as much pressure to pull the trigger,
20 not as much force.

21 Q Was that the case with this gun?

22 A Oh, no, ma'am. There was no hair trigger with this
23 pistol, no.

24 Q What would the, the amount of pressure to require that
25 gun to fire -- can you explain that to the jury?

David Warren Black
Direct examination by Ms. Reese

1 A Yes, ma'am. In this particular pistol when I did the
2 trigger testing for the weight, I did it both in -- for
3 single-action fire and double-action fire.

4 For single-action fire it takes four and three fourths
5 pounds of pressure or force to fire in single action. To
6 give you some reference, a half gallon of milk weighs
7 approximately four pounds.

8 So if you can think taking your index finger and
9 lifting a half gallon of milk, that's approximately 4
10 pounds of weight. In double action it's ten and a half
11 pounds.

12 So a full gallon of milk weighs approximately 8
13 pounds. If you take, again, your index finger and lift
14 that gallon of milk, that's approximately 8 pounds. That
15 gives you some reference to give you some idea of the
16 amount of force needed to pull the trigger.

17 Q There had been no modifications to this firearm that
18 would make it fire either more than one time or fire at a
19 lower pressure.

20 A That is correct. The pistol when I had it for my
21 examination does not have a hair trigger. It is not fully
22 automatic. It is as received from the manufacturer.

23 Q Now, showing the jury just how, how you would fire
24 that and how you would go about firing that, you at one
25 point pulled back the slide.

David Warren Black
Direct examination by Ms. Reese

1 A Yes, ma'am.

2 Q And if you -- in order to fire this gun the first time
3 must the slide be pulled back?

4 A Yes, ma'am. Any time to fire this firearm you first
5 have to pull back the slide. Again, pulling back the slide
6 to the rear and releasing it's doing two things. It is
7 cocking the firearm, making it where it can fire. The
8 firing pin is being put under spring tension. And also it
9 is loading the firearm from the magazine.

10 MS. REESE: Your Honor, at this time I would move to
11 admit Exhibits 3, 4 and 5 into evidence.

12 MS. JONES: No objection, Your Honor.

13 THE COURT: They're admitted.

14 (Ruger firearm, one round and one clip marked State's
15 Exhibit No. 3; shell casing marked State's Exhibit No. 4;
16 shell casing marked State's Exhibit No. 5.)

17 Q Did you, in fact, do a report indicating what you have
18 talked about to the jury?

19 A Yes, ma'am, I did.

20 Q And I show you State's Exhibit 11 for Identification.
21 Is that your report?

22 A Yes, ma'am, it is.

23 MS. REESE: Your Honor, I would move to admit State's
24 Exhibit 11 at this time.

25 MS. JONES: No objection, Your Honor.

David Warren Black
Cross-examination by Ms. Jones

1 THE COURT: It's admitted.

2 (SLED report marked State's Exhibit No. 11.)

3 MS. REESE: That's all the questions I have.

4 CROSS-EXAMINATION

5 BY MS. JONES

6 Q Mr. Black, you indicated that this gun -- let me
7 rephrase. This gun is not one where you have to pull back
8 on the cocking mechanism to shoot, pull back again, shoot,
9 pull back again, shoot.

10 A No, ma'am, no, ma'am.

11 Q As long as it's been load and you pull the trigger --
12 correct? And then you release that trigger. It's going to
13 reload again, correct?

14 A In general as long as there's no malfunction, yes,
15 that is correct.

16 Q And you didn't find any malfunction with this
17 particular gun, correct?

18 A No, ma'am. I did not.

19 Q You indicated that there was no modification of this
20 gun whatsoever.

21 A That is correct.

22 Q Okay. This gun is legal for all intents and purposes,
23 correct?

24 A Yes, ma'am.

25 Q Okay. Not illegal for a citizen to have a gun,

David Warren Black
Redirect examination by Ms. Reese
Recross-examination by Ms. Jones

1 correct? This particular gun.

2 A Yes, ma'am. That is correct.

3 Q Nothing further.

4 REDIRECT EXAMINATION

5 BY MS. REESE

6 Q I just have one question. At some point the first
7 time you fired the gun the slid has to have been pulled
8 back, is that correct?

9 A Yes, ma'am, that is absolutely correct. The only way
10 that weapon is fired, you have to, to charge or cock the
11 weapon. The only way to do that is you have to pull the
12 slide furthestmost to the rear, release it. That cocks it
13 and that loads it.

14 Q And then it will fire again each time you pull the
15 trigger, but you initially have to pull that slide.

16 A Yes, ma'am.

17 MS. REESE: Nothing further.

18 RECROSS-EXAMINATION

19 BY MS. JONES

20 Q And, in fact, somebody can pull that slide and get it
21 ready and set it down.

22 A That's correct.

23 Q Correct?

24 A That's correct.

25 Q And it's not going to go off necessarily unless

David Warren Black
Recross-examination by Ms. Jones

1 somebody pulls the trigger.

2 A Unless somebody pulls the trigger or -- I'm playing
3 schematics here. Unless somebody were to take it, it took
4 a hard fall or a hard hit. That may cause it to discharge,
5 but in general, no. If you just load it and set it there
6 in general, unless some force happens, it should not fire,
7 no.

8 Q Can you cock a gun and have it ready and put the
9 safety on as well?

10 A Are you talking about this firearm in particular?

11 Q Yes.

12 A Okay. This firearm doesn't necessarily have a safety.
13 What it has is a decocking lever. That's what I was
14 explaining earlier about the single action, double action.

15 When it's cocked it's ready to fire. It has a type of
16 safety feature. To make it go to double action you have to
17 activate that decocking lever which allows that hammer to
18 safely go forward. And it decocks the weapon.

19 Q And did you -- was that decocking lever up when you
20 received it, or you don't know?

21 A Well, when I received the firearm, State's Exhibit 3,
22 it was as -- when I pulled the slide back and locked it in
23 place, that's how I received it. So that's, that's my
24 answer, is going to be in that position as it's cocked
25 back. That's how I received it, locked in place.

David Warren Black
Recross-examination by Ms. Jones

1 Q And certainly a lot of officers had this weapon and
2 probably made it safe and different things like that.

3 A I can't answer that. I don't know.

4 Q Fair enough. But you can certainly cock this gun and
5 leave it and then pick it up at a later time and start
6 shooting.

7 A Sure.

8 Q And it's going to work.

9 A Yes, ma'am.

10 MS. JONES: Nothing further.

11 MS. REESE: Nothing further.

12 THE COURT: You may step down.

13 MS. REESE: Your Honor, may we approach?

14 THE COURT: Uh-huh.

15 (Bench conference held off the record in the presence
16 of the jury but out of the hearing of the jury.)

17 THE COURT: Ladies and gentlemen, we'll take a short
18 break.

19 I will ask you to please go to your jury room. Do not
20 yet discuss the case. I'll bring you back after that
21 break.

22 (The following takes place outside the presence of the
23 jury.)

24 THE COURT: We'll be at ease for 15 minutes.

25 MS. REESE: Your Honor, may Officer Black be excused?

1 THE COURT: He may be.

2 (Whereupon, the witness was excused.)

3 (Whereupon, a recess was taken.)

4 THE COURT: All right. Is the state going to present
5 any additional evidence?

6 MS. REESE: No, Your Honor. The state rests.

7 THE COURT: All of the exhibits have been accounted
8 for?

9 MS. REESE: Yes, Your Honor.

10 THE COURT: All right. Ms. Jones, what about the
11 defense? Do you intend to call any witnesses or introduce
12 any other evidence?

13 MS. JONES: Your Honor, the only person that we may
14 call would be Mr. Marin.

15 THE COURT: All right. Have you talked to him about
16 his right to testify, or not?

17 MS. JONES: We were discussing it, Your Honor, and I'm
18 not sure that he came to -- Your Honor, he does not want to
19 testify.

20 THE COURT: All right. Mr. Marin, your lawyer has
21 told me that you and she have talked about your right to
22 testify, as well as not testify.

23 Do you understand it's your decision, it's your
24 choice? You're the one that gets to decide whether or not
25 you will testify during the course of this trial. Do you

1 understand?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: You do? And have you had plenty of time
4 to talk with Ms. Jones about your decision as to whether or
5 not you will testify?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Do you understand you have an absolute
8 right to remain silent?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: Do you understand nobody can call you to
11 the stand without your consent?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Do you understand that you only have one
14 opportunity however to testify?

15 THE DEFENDANT: Yes.

16 THE COURT: Do you understand if you elect not to
17 testify I'm going to tell the jury they can't hold that
18 against you?

19 If you elect to testify you have to answer not just
20 your lawyer's questions, but you have to answer the
21 prosecutor's questions even if the responses to those
22 questions might tend to prove you guilty of the crime
23 they're claiming you committed.

24 Have you and Ms. Jones discussed the advantages to
25 testifying, as well as the disadvantages to not testifying,

1 and vice versa?

2 THE DEFENDANT: Yes.

3 THE COURT: And do you appreciate what the advantages
4 and disadvantages are to testifying, as well as not
5 testifying?

6 THE DEFENDANT: Yes.

7 THE COURT: Sir?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Can you speak a little louder so we can
10 hear you over here?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And have you made a decision about whether
13 or not you'll testify?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: And what is your decision?

16 THE DEFENDANT: No, sir.

17 THE COURT: What is your decision?

18 THE DEFENDANT: I will not testify.

19 THE COURT: And is that a decision that you made of
20 your own free will and accord?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Has anybody forced you into it?

23 THE DEFENDANT: No, sir.

24 THE COURT: Anybody pressured you into it?

25 THE DEFENDANT: No, sir.

1 THE COURT: You made that decision yourself?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: You're satisfied with it?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Okay. Do you have any other witnesses you
6 want Ms. Jones to call on your behalf?

7 THE DEFENDANT: No, sir, not at this time.

8 THE COURT: Do you understand this is the time? Do
9 you understand this is the only opportunity you're going to
10 have to present evidence?

11 (Pause.)

12 MS. JONES: Your Honor, he wanted me to recall the
13 bouncer and Mr. Rodriguez who was the actual owner of
14 Bongos, and I indicated that I did not necessarily see a
15 reason to do that and I was not going to do that.

16 THE COURT: Okay. Any other witnesses that have not
17 previously testified would you like for her to call?

18 THE DEFENDANT: No, sir.

19 THE COURT: Okay. All right. We'll bring the jury
20 in. You can rest, you can rest, and then I'm going to
21 excuse the jury for the day. We'll argue and charge in the
22 morning.

23 Okay. Bring the jury in, please.

24 (The following takes place in the presence of the
25 jury.)

1 THE COURT: All right. Any additional evidence to be
2 presented by the state?

3 MS. REESE: None from the state, Your Honor. At this
4 time the state rests.

5 THE COURT: All right. Ladies and gentlemen, that's
6 all of the evidence to be presented by the state. So we'll
7 now proceed with any additional, if any, to be offered by
8 the defense.

9 Ms. Jones.

10 MS. JONES: Your Honor, we actually do have a couple
11 of motions that we want to take up prior to that.

12 THE COURT: I understand. I'm going to reserve your
13 right to make any motions you need to. Do you have any
14 additional evidence you want to present?

15 MS. JONES: No, sir.

16 THE COURT: All right. Ladies and gentlemen, that is
17 all of the testimony and evidence to be offered in the
18 trial of this case. Therefore what remains to be done are
19 the lawyers' final summations after which I'll instruct you
20 on the law, and then you can begin with your deliberations
21 in the case.

22 I've got some other matters I've got to address this
23 afternoon, so we don't have time to do that. We will begin
24 with the lawyers' summations, followed by my instruction
25 and then your deliberations in the morning. We'll begin at

1 9:30.

2 So again you are excused for the balance of the
3 afternoon. Keep in mind the caution and instruction I've
4 previously given you. No discussions about the case, no
5 research, no investigation, no exposure to any type of
6 media coverage that might relate to the trial.

7 Have a good evening, and please report to your jury
8 room at 9:30 in the morning, 9:30 in the morning. Have a
9 good afternoon.

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

12 THE COURT: All right. For the sake of efficiency I
13 wanted to resolve the presentation of the evidence by the
14 state and the defense, reserving the defendant's right to
15 make any motions that it wished to make at the close of the
16 state's presentation.

17 All right. Ms. Jones, you have got some motions you
18 would make at the close of the state's presentation?

19 MS. JONES: Yes, Your Honor.

20 We would make a directed verdict motion regarding the
21 sufficiency of the evidence. My client is charged with
22 murder. There has been no testimony, or offered into
23 evidence, regarding my client acting with malice or with a
24 cold heart, Your Honor.

25 I think the only thing that was offered essentially

1 was hearsay in terms of that the victim in this case was
2 trying to run Mr. Marin off the road when my client shot
3 him.

4 There might have been some -- I think the testimony
5 came out that Mr. Marin missed the turn to Mr. Jimenez's
6 house and at that time he wanted him to stop.

7 We saw some pictures regarding where this incident
8 perhaps took place. He didn't immediately stop, and he
9 reached over, took control of the -- tried to take control
10 of the vehicle and essentially used this vehicle as a, as a
11 weapon. Clearly, a car accident could result in serious
12 bodily injury. There was a passenger in the car as well,
13 Your Honor. And at that point the decedent was shot.

14 There is no evidence or that has been presented that
15 the gun was being carried unlawfully or illegally. Your
16 Honor, at this time we would assert that there simply was
17 no evidence to establish that my client acted with malice
18 and with a cold heart.

19 The second issue we would bring up is we would make a
20 motion to dismiss based on venue. There has been no
21 testimony in terms of where actually this incident took
22 place.

23 There was some testimony that perhaps it took place at
24 Tucapau Road, which is in Wellford, which certainly is
25 within Spartanburg. But the other area that was mentioned,

1 Your Honor, was the Wal-Mart area in Greer.

2 However, there was absolutely no testimony
3 establishing where in Greer this is. Greer constitutes
4 both Greenville County, as well as Spartanburg County. And
5 if this had happened in Greenville, well, then proper venue
6 for this would be Greenville County. Your Honor, that was
7 not established. Therefore we would make a directed motion
8 based upon that.

9 THE COURT: Ms. Reese.

10 MS. REESE: Your Honor, we believe in the light most
11 favorable to the state enough evidence has been presented
12 to send the case to the jury.

13 As to malice, the fact that there were two shots and
14 they were contact wounds, that basically he was shot in the
15 back of the head, all of that we believe goes to malice.

16 Secondly, Your Honor, as to the venue, we did
17 establish with Officer Arterburn that he did go to a site
18 that was indicated to him to be the actual site of the
19 shooting or the event and that he did see signs in the road
20 that were consistent with that.

21 The body was also found in Spartanburg County in
22 downtown city limits. I believe there's enough evidence on
23 both issues to send this to the jury.

24 THE COURT: All right. Well, based upon my
25 consideration of the evidence I do find that there is

1 substantial circumstantial evidence establishing both the
2 element of malice necessary to establish the crime of
3 murder and also to establish proper venue. So the
4 defense's motions for a directed verdict are denied.

5 What other motions or matters to address?

6 MS. JONES: Your Honor, we would just have jury
7 instruction requests, Your Honor.

8 THE COURT: Okay.

9 MS. JONES: One would be we would request the lesser
10 included of manslaughter, Your Honor.

11 There was testimony regarding that the victim came
12 forward, was trying to take control of the vehicle. And
13 indeed in some of the pictures that were presented his
14 whole front body is actually in the front of the vehicle,
15 Your Honor.

16 There is no indication -- and I think I did ask the
17 question of whether he was actually shot in the back -- the
18 seat, Your Honor, in the back seat where he was initially
19 placed.

20 I think the officer testified that, no, it was all --
21 occurred right up front, Your Honor. And as you heard,
22 there was significant -- well, some testimony regarding
23 that Mr. Jimenez had indicated that there was a fight for
24 the vehicle and that in fighting for the vehicle that Mr.
25 Marin shot him.

1 And in terms of manslaughter we would believe that
2 would be sufficient provocation, not enough time to cool
3 off, because it was instantaneous. And certainly we
4 believe that lesser included of manslaughter should be
5 included in the jury charge, Your Honor.

6 THE COURT: Voluntary manslaughter?

7 MS. JONES: Yes, sir. Thank you.

8 THE COURT: Ms. Reese.

9 MS. REESE: Your Honor, I'm not going to object to
10 that charge. I think there's some evidence based on the
11 elicited testimony that there was an altercation between
12 the defendant and the victim. I'm not going to oppose
13 manslaughter.

14 THE COURT: Okay.

15 MS. JONES: Your Honor, we would also request the
16 lesser included of involuntary manslaughter.

17 There is case law suggesting that even if a -- if the
18 person is engaged in a lawful activity but acts with
19 reckless disregard for the safety of others, again, there's
20 no indication that my client had this gun illegally or that
21 it was stored in the car improperly.

22 There was indication in the testimony indicating that,
23 again, there was a fight for the vehicle and the gun went
24 off. We believe that that is enough -- raises enough of an
25 issue and a question to present that to the jury as well,

1 sir.

2 THE COURT: Ms. Reese.

3 MS. REESE: Your Honor, we don't believe there is any
4 evidence presented that this was unintentional or an
5 accidental shooting, and we would object to the involuntary
6 charge.

7 THE COURT: All right. Well, the crime of involuntary
8 manslaughter can be proven one of two ways.

9 No. 1, it can be established by evidence tending to
10 show that a killing was unintentional and was committed
11 without malice but while engaged in the commission of some
12 unlawful act not amounting to a felony and not naturally
13 tending to cause death. Well, that's certainly not the
14 case in this, under this factual scenario.

15 So, the second matter in which involuntary
16 manslaughter may be established is a showing that there was
17 an unintentional killing of another without malice while
18 engaged in a lawful activity in a criminally negligent
19 manner.

20 Now, Ms. Jones, what lawful activity do you contend
21 that your client was engaged in at the time that this
22 killing took place?

23 MS. JONES: Your Honor, we would -- which is going to
24 go along with some of the other jury instructions that we
25 were requesting -- we were focusing more on the case law of

1 the State vs. Brayboy, which is a 2010 case, Your Honor.
2 And basically that indicated that if you armed yourself in
3 self-defense and the gun went off either accidentally or
4 negligently you were allowed to have the involuntary
5 manslaughter charge, Your Honor.

6 And that's going to go along with what we're going to
7 also be asking for, is basically a self-defense claim, as
8 well as the defense of property under that new law, Your
9 Honor, 16-11-440. There is no question that this vehicle
10 was my client's car.

11 THE COURT: What's the statute number, 16-11 what?

12 MS. JONES: 440.

13 THE COURT: Okay.

14 MS. JONES: But as far as the involuntary manslaughter
15 charge goes, Your Honor, we believe that he armed himself
16 in self-defense.

17 There was testimony, again, regarding the fact that
18 the victim was trying to run this vehicle off the road,
19 that he grabbed the steering wheel and was trying to force
20 it off the road.

21 Clearly that can lead to substantial bodily injury and
22 even death. And the fact that there was a passenger in the
23 car is essentially too a defense-of-others type claim, Your
24 Honor.

25 At that point the gun is got and it is shot. So

1 therefore we believe that under State vs. Brayboy we would
2 be entitled to that charge, sir.

3 THE COURT: All right. Ms. Reese.

4 MS. REESE: Your Honor, I just don't think there's any
5 testimony that this comes unintentional for an involuntary
6 manslaughter charge.

7 MS. JONES: And I would respond to that, Your Honor,
8 that State vs. Brayboy doesn't necessarily turn to whether
9 or not it was intentional. If somebody actually arms
10 themselves in self-defense it's just a matter of whether or
11 not...

12 THE COURT: Well, I understand. If you, if you
13 lawfully arm yourself in self-defense and you act
14 criminally negligent, then you could be guilty of
15 involuntary manslaughter. But you have to arm yourself
16 appropriately in self-defense. I'm not certain that
17 there's been any evidence of self-defense.

18 MS. JONES: Do you want me to go into it?

19 THE COURT: Yeah. You might want to do that.

20 MS. JONES: Okay. Along with that, Your Honor, we
21 were going to request a jury instruction of self-defense.
22 One, based upon the castle doctrine. And if you're not so
23 inclined, perhaps just based on the idea of self-defense.

24 Your Honor, as you're probably aware, 16-11-1444 --
25 I'm sorry -- 16-11-440 is commonly referred to, the castle

1 doctrine, Your Honor. And it basically indicates, would be
2 Subsection C, "A person who is engaged in a lawful activity
3 and who is attacked in a place where he has a right to be,
4 including but not limited to his place of business, has no
5 duty to retreat, has the right to stand his ground and meet
6 force with force, including deadly force, to prevent that
7 great bodily injury to himself or another person, or to
8 prevent the commission of a violent crime."

9 And also when they talk about businesses when you go
10 into the definitions in what they are basically -- the
11 intent, it basically indicated that the general assembly
12 finds that people residing or visiting the state have a
13 right to expect and to remain unmolested and be safe within
14 their homes, businesses and vehicles.

15 Your Honor, we would allege that my client -- there is
16 no issue as to whether or not this was my client's car. He
17 was driving somebody home from a bar who was clearly
18 intoxicated, and through the testimony that was provided is
19 that this man who was in the back seat reaches over,
20 attempts to attack Mr. Marin and grabs ahold of the
21 steering wheel in trying to get this vehicle off the road,
22 again, putting in danger Mr. Marin's life as well as
23 Mr. Jimenez's life.

24 And we believe that the castle doctrine has -- is
25 codified, less my client meet force with force and use

1 deadly force if necessary.

2 The statute goes on to basically say that he has a
3 right to do that but basically he cannot be prosecuted for
4 that. So we would request that basic jury instruction.

5 If Your Honor is not necessarily inclined to believe
6 that the castle doctrine does apply, self-defense, again,
7 requires that the defendant was without fault in bringing
8 on the difficulty. There is no indication that Mr. Marin
9 was at fault in bringing on the difficulty.

10 THE COURT: Well, what about not taking the gentleman
11 to his house and going a different direction when he had
12 his address on the G.P.S.?

13 MS. JONES: Well, Your Honor, simply missing a turn,
14 we have a vehicle full of essentially people who had been
15 partying, and at Bongos at 2:00 or 3:00 at night.

16 The reasonable response if you miss a turn isn't to
17 say, oh, you missed my turn, you need to stop, and then
18 jump over the seat and try and grab the steering wheel. I
19 don't think that that necessarily rises to the fault that
20 the statute indicates. I think that clearly was an
21 overreaction on the part of the victim and I don't --

22 THE COURT: Well, it could have been, but that doesn't
23 mean he was without fault.

24 MS. JONES: Well, again, simply missing a turn doesn't
25 mean --

1 THE COURT: Well, I'm not exactly satisfied that's
2 what the testimony was, but I'll review it.

3 MS. JONES: Okay. So we would allege that my client
4 was simply not at fault for bringing that difficulty. And
5 too if the castle doctrine doesn't apply, that portion of
6 it isn't necessarily coming into play.

7 The second obvious requirement is that the defendant
8 was in actual imminent danger of death or sustaining
9 serious bodily injury. Clearly, crashing a vehicle will
10 result in death or serious bodily injury. I don't think
11 that that's necessarily an issue.

12 Three, that he actually believed or had a
13 reasonable -- or that a reasonable person of ordinary
14 fitness and courage would have entertained such a belief.

15 Again, forcing a vehicle off the road would probably
16 lead a reasonable, prudent person to fear injury or even
17 death, Your Honor, and that the defendant had no probable
18 way of avoiding the danger. However, one has no duty to
19 retreat if he's attacked in one's dwelling or vehicle.

20 Here we would allege that he didn't have a duty to
21 retreat. But, again, even if he did, he's in a vehicle,
22 and you can't simply get out of a vehicle that's moving at
23 a, at a rate of speed.

24 THE COURT: What about putting the brakes on?
25 Wouldn't that have avoided the difficulty?

1 MS. JONES: Well, Your Honor, we don't necessarily
2 know if slamming on the brakes and somebody trying to grab
3 the wheel wouldn't flip this vehicle. It was an SUV.

4 THE COURT: Well, I'm not suggesting you slam on
5 brakes. I'm just saying just put on the brakes and stop
6 the car.

7 MS. JONES: I think that that certainly could have
8 been something that somebody could have done, certainly,
9 but that doesn't negate the fact that somebody is still
10 trying to steer the wheel, and turn this vehicle
11 essentially into a missile.

12 There are trees; there are telephone poles. There are
13 a lot of different things that a vehicle can hit. Indeed
14 there was testimony that there was debris and skid marks in
15 the road as if something had been hit or somebody ran into
16 something. So certainly there is some testimony regarding
17 that.

18 THE COURT: So you're saying the only way to avoid
19 that is just to shoot somebody.

20 MS. JONES: I'm not -- that's, that's not necessarily
21 what I'm saying, Your Honor. But in terms of whether or
22 not we're entitled to the actual instruction is basically
23 whether or not there is any evidence to support that
24 charge. And if there's any evidence to support the charge,
25 then generally speaking the Supreme Court has indicated

1 that we should err on the side of caution and give that
2 charge, Your Honor. So that is why we're requesting a
3 self-defense, the castle doctrine defense, as well as the
4 involuntary manslaughter defense.

5 THE COURT: Ms. Reese.

6 MS. REESE: Your Honor, as to the castle doctrine,
7 440, which she just quoted, "The presumption of reasonable
8 fear of imminent peril when using deadly force against
9 another unlawfully, entering a residence or occupied
10 vehicle, a person is presumed to have a reasonable fear of
11 imminent peril of death or great bodily injury to himself
12 or another when using deadly force that is intended or
13 likely to cause death or great bodily injury to another
14 person if the person against whom the deadly force is used
15 is in the process of un -- unlawfully and forcefully
16 entering or has unlawfully and forcefully entered a
17 dwelling, residence or occupied vehicle."

18 There is no evidence that any of that occurred, Your
19 Honor, which would allow for application of this doctrine.
20 This was -- this is not -- at 420 they talk about attackers
21 and intruders. And it says that a victim of a crime should
22 not be required to surrender his personal safety to a
23 criminal.

24 That was not the case. This is not an attacker or
25 intruder. This is not someone who had unlawfully entered

1 this vehicle and he was trying to get out, get them out of
2 the vehicle.

3 MS. JONES: Your Honor, just for clarification, we're
4 not arguing that we're entitled to it under Subsection 1.
5 We're asking that we're entitled to it under Subsection C
6 which has, again, different criteria. And, again, that is
7 if he's not engaged in unlawful activity and he is attacked
8 where he has a place to be, in other words, his vehicle.

9 This is not about somebody trying to enter the
10 vehicle. Clearly, Subsection 1 does not apply. And that's
11 not what we're arguing. So I think we need to be on the
12 same basis in terms of what specifically and what specific
13 portion of the statute we're arguing for. And I think that
14 this is the correct one, Subsection C.

15 He had a right to be in his vehicle and he had a right
16 to be unmolested in his vehicle. And certainly somebody
17 trying to overtake the vehicle would -- and he would fear
18 obviously serious bodily injury, and at that point.

19 And I'm not saying whether this is a good law or a bad
20 law. This is the law. This is the one that they passed.
21 They have a right to meet force with force, including
22 deadly force, and that he would be immune from prosecution.
23 That is the actual subsection that we're arguing for, or
24 under rather.

25 THE COURT: Okay. Do you want to address that,

1 Ms. Reese?

2 MS. REESE: Your Honor, I would just argue this does
3 not apply. This statute specifically is to -- or victims
4 of crime should be required to surrender his personal
5 safety.. It talks about intruders or attackers.

6 That's not the testimony here. He was -- this is not
7 somebody who intruded. He was fighting for the steering
8 wheel. He was actually trying to make an effort to get him
9 to stop the vehicle. That's the testimony, not that he was
10 being attacked or that -- this is a situation where a
11 statute that's used primarily for a carjacking and that
12 kind of thing, not for a situation where you voluntarily
13 take somebody into your car and then don't stop, in effect
14 taking them away from their residence, and they try to stop
15 the vehicle.

16 THE COURT: Well, what if you take a hitchhiker into
17 your vehicle -- that's consensual -- and then they become
18 an attacker?

19 MS. REESE: Well, Your Honor, I mean, I -- and I don't
20 think that the evidence here would indicate that he was
21 attacking him personally. He was just simply trying to get
22 him to stop the vehicle.

23 THE COURT: Okay. All right. Any other requests?
24 I'll reflect upon those overnight as to involuntary
25 manslaughter and self-defense.

1 MS. JONES: I'll just double check, Your Honor.

2 And, Your Honor, if we did get the self-defense claim
3 we would just request the self-defense appearances, that he
4 has a right to act on appearances. And that's all, sir.

5 THE COURT: All right. Ms. Reese, do you have any
6 requests?

7 MS. REESE: No, Your Honor.

8 THE COURT: All right. I'll review the law as it
9 relates to the applicability of involuntary manslaughter,
10 16-11-440(c), and self-defense.

11 All right. Anything else?

12 Court is in recess until 9:30 in the morning.

13 END OF PROCEEDINGS OCTOBER 26, 2010
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1 (Proceedings October 27, 2010)

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

4 THE COURT: Any matters to address before the jury is
5 brought in?

6 MS. JONES: Yes, Your Honor.

7 THE COURT: All right. What is it?

8 MS. JONES: Your Honor, in conversations with my
9 client this morning he informed me that he, in fact, did
10 want to go ahead and testify, Your Honor, in his own
11 defense.

12 THE COURT: And what is it that he didn't understand
13 yesterday about our discussion when I asked him if he
14 wanted to and he said he did not?

15 MS. JONES: Your Honor, based upon my discussions with
16 my client, he was very confused. He thought that he would
17 be -- that it wasn't his last opportunity.

18 He thought basically that I would present some
19 rebuttal witnesses, perhaps call some other people that we
20 already let you know yesterday on the record, and he became
21 confused.

22 I will say that my client also is not originally from
23 the United States. He is a little bit unclear as to the
24 courtroom procedure. In fact, when we first sat down he
25 asked me where the jury sat.

1 So there has been some education in terms of how these
2 proceedings go, so he got a little bit confused and a
3 little bit nervous.

4 He is on trial for his life here, Your Honor. And I
5 think the -- just the nerves got to him yesterday. But on
6 a night of reflexion and speaking with me today again he
7 indicated that he would like to take the stand in his own
8 defense. And we believe in the interest of justice that
9 should occur.

10 THE COURT: All right. Does the state want to be
11 heard?

12 MS. REESE: Your Honor, the only thing the state would
13 say is after he testifies if there's information that comes
14 up we would just like some time to get an additional
15 witness here. We may have a witness in reply.

16 THE COURT: Okay. All right. I'll allow him to.

17 All right. Bring the jury in, please.

18 (The following takes place in the presence of the
19 jury.)

20 THE COURT: Good morning, ladies and gentlemen.

21 As you know, yesterday when I excused you I told you
22 that all of the evidence had been received and we would
23 begin this morning with the final summations and the
24 instruction and your deliberations.

25 But during the overnight recess there's been a change

Manuel Antonio Marin
Direct examination by Ms. Jones

1 of plan. And Ms. Jones has indicated that she does wish to
2 present some evidence on behalf of the defense... So we will
3 continue now with the receiving additional evidence to be
4 presented by the defense.

5 Ms. Jones.

6 MS. JONES: Thank you, Your Honor. The defense calls
7 Mr. Marin to the stand.

8 MANUEL ANTONIO MARIN, having
9 been first duly sworn, testified as follows:

10 DIRECT EXAMINATION BY MS. JONES

11 Q Mr. Marin, can you state your name for the record?

12 A My name is Manuel Antonio Marin.

13 Q Mr. Marin, where do you live?

14 A I live in Poe Mill, , Poe Mill in
15 Greenville.

16 Q What city is that?

17 A Greenville.

18 Q Okay. How long have you lived in the upstate area off
19 and on in your life?

20 A About 30 years.

21 Q Okay. Are you married?

22 A Divorced.

23 Q Do you have any children?

24 A Yes, ma'am.

25 Q How many?

Manuel Antonio Marin
Direct examination by Ms. Jones

- 1 A Two.
- 2 Q What are their ages, the ages of your children?
- 3 A One is 18. The other one is 11.
- 4 Q What's your occupation?
- 5 A Well, I was a marketing director for a newspaper,
6 (inaudible), and I was also intern manager for A-plus
7 Rentals.
- 8 Q I'm going to direct your attention back to
9 July 20th of 2008. Do you recall that date?
- 10 A Yes, ma'am.
- 11 Q Okay. Did you go anywhere during the day?
- 12 A Yes, ma'am.
- 13 Q Where did you go?
- 14 A I went to the Colombian festival.
- 15 Q Okay. What is this Colombia festival?
- 16 A Well, it's like a gathering. All sorts of people
17 gather. There's food, entertainment.
- 18 Q Okay. And what's the purpose of the festival? What
19 are y'all celebrating?
- 20 A Colombian independence.
- 21 Q Is it fair to say that you have some ancestry in
22 Colombia?
- 23 A Yes, ma'am.
- 24 Q So you were celebrating their independence.
- 25 A Yes, ma'am.

Manuel Antonio Marin
Direct examination by Ms. Jones

- 1 Q Is it kind of akin to cinco damio?
- 2 A Yes, somewhere.
- 3 Q What time did you arrive at the Colombian festival, do
- 4 you remember?
- 5 A It was around 12:30, 1:00 in the afternoon.
- 6 Q Okay. Did you have any drinks there?
- 7 A Had a couple of drinks, yes, ma'am.
- 8 Q And when you say drinks are we talking about Coke or
- 9 are we talking about the alcoholic variety?
- 10 A I had a couple of alcoholic drinks, yes.
- 11 Q Okay. Were you eating?
- 12 A Yes, ma'am.
- 13 Q What time did you leave that festival?
- 14 A At about 8:30, 9:00 o'clock.
- 15 Q At night?
- 16 A Yes, ma'am.
- 17 Q Okay. Did you go anywhere after that?
- 18 A Yes, ma'am.
- 19 Q Okay. At some point did you go to Bongos?
- 20 A Yes, ma'am.
- 21 Q What time did you go to Bongos, do you recall?
- 22 A It was about 12:30, 1:00 o'clock.
- 23 Q And that's a.m.
- 24 A Yes, ma'am.
- 25 Q Okay. So that would have been July 21st, is that

Manuel Antonio Marin
Direct examination by Ms. Jones

- 1 correct?
- 2 A Yes, ma'am.
- 3 Q When you went to Bongos was anybody with you?
- 4 A Yes.
- 5 Q Who else was with you?
- 6 A Mr. Alfredo Jimenez.
- 7 Q Okay. And did he ride with you, do you know?
- 8 A Yes, ma'am.
- 9 Q Okay. What did you do at Bongos?
- 10 A Well, I sat down. They have a lounge, and I was
- 11 basically sitting all night.
- 12 Q Okay. Were you commingling with folks?
- 13 A Well, with Alfredo. I mean, we was sitting down
- 14 basically.
- 15 Q Okay. At some point did you go to the kitchen?
- 16 A Yes, ma'am.
- 17 Q Okay. Who was all in the kitchen area?
- 18 A It was Larry Cabono, security guard, and Mr. Tabares.
- 19 Q And when you say the security guard, a bouncer
- 20 essentially?
- 21 A Yes, ma'am.
- 22 Q Okay. What, what happened when you were in the
- 23 kitchen?
- 24 A Well, I was -- when I went in the kitchen I was
- 25 talking to Mr. Larry. We talking about the club that is,

Manuel Antonio Marin
Direct examination by Ms. Jones

1 you know, how it was a nice club, and much nicer than the
2 one he had before and --

3 THE COURT: You need to get a little bit closer to
4 that microphone. And speak up, please.

5 BY MS. JONES

6 A When we walked in Mr. Tabares was sitting on a chair
7 and, and the security guard said he, you know, that he
8 couldn't drive. And Mr. Larry asked me if I could give him
9 a ride. And I agreed.

10 Q Okay. So did you know Mr. Tabares?

11 THE COURT: Excuse me just a minute.

12 The court reporter is having some difficulty in
13 hearing him.

14 MS. JONES: Okay.

15 THE COURT: So don't swivel in the chair. I want you
16 to move that microphone as you need to. But I need for you
17 to speak into it so everybody can hear you. Thank you.

18 BY MS. JONES

19 Q Did you know Mr. Tabares?

20 A Yes, ma'am.

21 Q Okay. Would you characterize that relationship more
22 as a friendship or just an acquaintance?

23 A Acquaintance.

24 Q You knew of him.

25 A Yes, ma'am.

Manuel Antonio Marin
Direct examination by Ms. Jones

- 1 Q Okay. You agreed to take him home.
- 2 A Yes, ma'am.
- 3 Q Do you know, do you recall what time this would have
4 been?
- 5 A About close to 3:00 o'clock in the morning.
- 6 Q So about 3:00 o'clock y'all were heading to the door.
7 Where was -- did you help Mr. Tabares to the car?
- 8 A No, ma'am.
- 9 Q Okay. What did you do?
- 10 A I went to get the car.
- 11 Q Okay. You went and got the car. And then what
12 happened?
- 13 A And I pulled it out to the curb, and the security
14 guard put Mr. Tabares in the back seat.
- 15 Q Do you recall which side of the vehicle, either the
16 left or right, that Mr. Tabares got into?
- 17 A It would be the passenger side rear seat.
- 18 Q Passenger back side?
- 19 A Yes, ma'am.
- 20 Q Okay. And do you recall Mr. Tabares's demeanor at
21 this point?
- 22 A He was pretty drunk, yeah, he was pretty drunk.
- 23 Q Was he slurring his words?
- 24 A I, I can't recall; I can't remember. I know he was,
25 you know, like walking, not walking pretty steady.

Manuel Antonio Marin
Direct examination by Ms. Jones

- 1 Q Okay. Kind of stumbling around?
- 2 A Yes.
- 3 Q Okay. You indicated that the bouncers had to help him
- 4 into the car.
- 5 A Yes.
- 6 Q Okay. Did anybody come with you on this trip?
- 7 A Yes.
- 8 Q Who came with you?
- 9 A Mr. Alfredo Jimenez.
- 10 Q Okay. And where did he sit?
- 11 A In the passenger seat.
- 12 Q Okay. And after everybody is in the car, what did you
- 13 do at that point?
- 14 A I asked the, the security, you know, I know where he
- 15 lives. So he got driver's license from Mr. Tabares and
- 16 handed it to me, and I put the address on the laptop.
- 17 Q Okay. So there was a laptop in the car as well?
- 18 A Yes, ma'am.
- 19 Q Okay. And that was your laptop?
- 20 A Yes, ma'am.
- 21 Q Okay. And that laptop sounds like has a G.P.S.
- 22 A Yes, ma'am.
- 23 Q Okay. So you put that address into the computer.
- 24 A Yes, ma'am.
- 25 Q Who was in charge of directing y'all where to go?

Manuel Antonio Marin
Direct examination by Ms. Jones

- 1 A Alfredo.
- 2 Q Okay. And what had Alfredo been doing at the club?
- 3 Was he drinking Cokes?
- 4 A No. He was drinking alcoholic beverages.
- 5 Q Okay. And what was he acting like? Was he acting
- 6 drunk or was he pretty sober?
- 7 A Yeah. He was, he was drunk too.
- 8 Q Okay. So after the point you get the address into
- 9 the, the computer, what did y'all do at that point?
- 10 A Well, we, we left the club and we got on East North
- 11 Street towards Mr. Tabares' house.
- 12 Q Okay. Is that where the little arrow was telling you
- 13 where to go?
- 14 A Yes.
- 15 Q On East North Street?
- 16 A Uh-huh.
- 17 Q Okay. And as you're driving down -- well, first of
- 18 all, describe East North Street for me. Is it a 2-lane; is
- 19 it a 4-lane?
- 20 A It's a 2-lane road.
- 21 Q Okay. Are there a lot of businesses open?
- 22 A No. It's more residential.
- 23 Q Okay. And you're driving along. What happens at that
- 24 point when you're driving?
- 25 A I was making a comment to Alfredo about the three

Manuel Antonio Marin
Direct examination by Ms. Jones

1 Americans that had liberated that past week, I mean, yeah,
2 the past week, and presidential candidate that were
3 kidnapped in Colombia.

4 Q Sounds like you were talking about Colombia
5 activities.

6 A Yes.

7 Q Okay. Is that in relationship to FARC, F-A-R-C, that
8 we saw in the picture, and a shirt that you were wearing
9 that day?

10 A Yes, yes.

11 Q Okay. And it said no mas tarco, correct?

12 A Yes.

13 Q Can you explain to the jury what that means?

14 A Well, tarco is, is the ones that had kidnapped the
15 Americans and, and president, presidential candidate, which
16 is what I was talking about.

17 Q Okay. So you and Mr. Jimenez were having this
18 discussion.

19 A Uh-huh.

20 Q Almost political in nature. Was the radio on, or was
21 it off, do you remember?

22 A It was on.

23 Q Okay. So y'all are talking and having a conversation.
24 What happens then?

25 A All of a sudden Mr. Tabares says I'm sorry but he's

Manuel Antonio Marin
Direct examination by Ms. Jones

- 1 got to go. And he jumps up and he grabs me in a headlock.
- 2 Q Okay. What did you do once he puts you in a headlock?
- 3 A I, I grabbed my, my hands. I'm like, hey, man, what
- 4 the hell you doing.
- 5 Q Okay. And then what happened?
- 6 A Like slumped back in the back seat.
- 7 Q Okay. Did he say anything after that?
- 8 A No, ma'am.
- 9 Q Okay. What happened to the car at that point?
- 10 A I hit the brakes. I hit the brakes, and the car went
- 11 on the oncoming lane. And it was headed towards a
- 12 telephone pole. But I, I got the car back on the road.
- 13 Q Okay.
- 14 A And, and at that point, you know, I was really scared.
- 15 I was wondering, you know, what, what had just happened,
- 16 you know, what, what, what he just did or why.
- 17 Q Okay. You indicated that the headlock was up on your
- 18 head more, or was it down? Where was that headlock?
- 19 A On my forehead.
- 20 Q Okay. And what was he doing? Was he --
- 21 A Twisted my neck.
- 22 Q Okay.
- 23 A I guess he was pulling back.
- 24 Q Okay. And how did that affect you?
- 25 A I was terrified.

Manuel Antonio Marin
Direct examination by Ms. Jones

1 Q What were you terrified of?

2 A Very scared. I mean, he had just jumped on me, I
3 mean, for what I -- for an unknown reason. I don't know
4 why he did that.

5 Q Okay. And it sounded like you were going towards a
6 telephone pole, is that correct?

7 A Yes, ma'am.

8 Q Okay. So it sounds like you're scared you would hit.

9 A Yes.

10 Q Okay. At that point where did you decide to go?

11 A Well, at that point, you know, I decided not to take
12 him home. I was just trying to find a public place, you
13 know, people where I could, you know, possibly jump out of
14 the car and get some help, you know.

15 Q So you wanted to get some help for the situation.

16 A Yes, ma'am.

17 Q Okay. At some point do you know where you ended up
18 on, what road?

19 A No, ma'am.

20 Q Okay. And were you able to find this public place
21 that you were looking for to get some help with the
22 situation?

23 A No, ma'am. Everything was dark and everything was
24 closed. I mean, I was looking for a public place with
25 people somewhere stopped, but everything, I mean, it was

Manuel Antonio Marin
Direct examination by Ms. Jones

1 dark. Nothing seemed to be open.

2 Q Okay. And you had been up all day, correct?

3 A Yes, ma'am.

4 Q Been drinking throughout the day.

5 A I had been.

6 Q Were you tired?

7 A Yes, ma'am.

8 Q Okay. And what happened as you're driving trying to
9 find a public place to, to get some help?

10 A All of a sudden, you know, Mr. Tabares jumps up and
11 grabs the steering wheel. And he tries to run the car off
12 the road.

13 Q Okay. What happened then?

14 A Well, I kept pushing him, pushing him back. You know,
15 I'm like, hey, what, where are you going, you know, what
16 are you doing.

17 Q So you pushed him back one time. Did that work? Did
18 he go back into the back seat?

19 A No. He kept coming back.

20 Q Yeah. But initially does he fall back or does he keep
21 coming?

22 A Yes. He goes back, but he kept coming again.

23 Q Okay. So he falls back into the back seat. What does
24 he do at that point again?

25 A He comes back and grabs the steering where and tries

Manuel Antonio Marin
Direct examination by Ms. Jones

- 1 to run it off the road again.
- 2 Q What did you do at that point?
- 3 A I pushed him back again.
- 4 Q Okay. Is this working at all?
- 5 A No, ma'am.
- 6 Q Okay. What did you do at that point?
- 7 A At that point I pushed him off, and I grabbed the, the
- 8 glove box and I opened the glove box and got the pouch out
- 9 which had the gun in it.
- 10 Q Okay. And then what did you do?
- 11 A I pulled out the gun and I shot Mr. Tabares.
- 12 Q Okay. And I think there has been some pictures. I'm
- 13 going to show you what's been marked State's Exhibit 28.
- 14 Do you recognize that?
- 15 A Yes, ma'am.
- 16 Q Okay. What is that?
- 17 A That is the pouch where I keep the gun.
- 18 Q Okay.
- 19 MS. JONES: Your Honor, may I publish this to the
- 20 jury?
- 21 THE COURT: Yes, ma'am.
- 22 BY MS. JONES
- 23 Q And that's the pouch that you kept the gun in?
- 24 A Yes, ma'am.
- 25 Q After Mr. Tabares is shot, what happens at that point?

Manuel Antonio Marin
Direct examination by Ms. Jones

- 1 A He fell on my knee.
- 2 Q Okay. What was your demeanor like at this point?
- 3 A I was terrified. I was really scared. I mean, I was,
- 4 I was in shock.
- 5 Q Okay. Was the car filling up with smells or anything?
- 6 A Yeah. It was -- seemed pretty chaotic. I mean, I was
- 7 really in shock. I was just in shock.
- 8 Q Okay. Did you stop the car?
- 9 A No, ma'am.
- 10 Q Okay. What did you do?
- 11 A I was trying to find a place where -- to get some
- 12 help.
- 13 Q Okay. At some point you just -- did you just drive in
- 14 a straight line?
- 15 A Yes, ma'am.
- 16 Q Okay. At some point you ended up in downtown
- 17 Spartanburg.
- 18 A Yes, ma'am.
- 19 Q Okay. After you ended up in downtown Spartanburg what
- 20 did you do?
- 21 A Well --
- 22 Q What happened, I should say.
- 23 A Yes. When we got to downtown Spartanburg I got in a
- 24 lane. Mr. Alfredo, Mr. Jimenez got out of the car, and I
- 25 got out of the car too and --

Manuel Antonio Marin
Direct examination by Ms. Jones

- 1 Q Okay. What was Mr. Alfredo Jimenez's demeanor like?
- 2 A He was in shock. I mean, he was, he was also in
- 3 shock.
- 4 Q Okay. Was he talking fairly loudly?
- 5 A Yes.
- 6 Q Okay. And what was your demeanor like at this point?
- 7 A The same. I was, I just kept saying why was he trying
- 8 to kill us, why was he trying to kill me, why, why was he
- 9 trying to run us off the road.
- 10 Q Okay. Were you talking along those lines too, what
- 11 happened, things like that?
- 12 A Yes, ma'am.
- 13 Q Okay. What happened to the gun?
- 14 A I didn't realize it. When I came out of the car I
- 15 still had the gun in my hand.
- 16 Q Okay. Then what happened to the gun? If you had it
- 17 in your hand did you put it somewhere, or what happened
- 18 with it?
- 19 A Alfredo grabbed the gun, and I let him have it.
- 20 Q And where did Mr. Alfredo Jimenez put the gun?
- 21 A I don't know. I didn't see where he put it.
- 22 Q Okay. What did, what did you do at that point?
- 23 Sounds like you were walking around or wondering around.
- 24 Do you keep wondering around? What happens?
- 25 A No, ma'am. Before, before -- as we got out of the car

Manuel Antonio Marin
Direct examination by Ms. Jones

1 some gentleman pulls up, and Alfredo asked him to call the
2 police.

3 Q Okay.

4 A And, and --

5 Q Did the police come?

6 A Yes, ma'am.

7 Q Okay. Did you stick around for the police?

8 A Yes, ma'am.

9 Q Okay. After the police were called or as soon as the
10 police were called what did you do?

11 A I sat down and waited for the police to come.

12 Q Do you recall where you sat down at?

13 A Yes. I sat down on the median.

14 Q Do you know how long that break would have been
15 between the police being called and them actually getting
16 there?

17 A Not really. I was in shock. I mean, it was -- I
18 don't know. I couldn't tell time really.

19 Q Is it fair to say it's traumatic?

20 A Yes.

21 Q Okay. Getting back to -- you indicated the initial
22 attack happened somewhere on Main Street -- North Fourth
23 Street?

24 A East North Street.

25 Q East North Street. How long do you think between the

Manuel Antonio Marin
Direct examination by Ms. Jones

1 first attack and the second attack?

2 A I don't know. Once the attack happened I was
3 terrified. I, I couldn't tell time. All, all that was in
4 my mind was trying to find a public place, you know,
5 somewhere with people where I could get some help. I mean,
6 that's, that's the only thing that was on my mind, trying
7 to get some help.

8 Q Did you think about stopping the car?

9 A No, ma'am.

10 Q That's not a thought that entered your mind?

11 A No, ma'am.

12 Q And what about when you're trying to push him back and
13 he's reaching for the wheel, you're pushing him back, he's
14 simply not stopping. Did you think about stopping the car
15 or slamming on the brakes?

16 A No. When, when, when I kept pushing him back he, he
17 pulled the car towards, you know, trying to run it off the
18 road. And I saw we, we were headed towards some trees, so.

19 Q Okay. Do you recall if he was saying anything to you?

20 A I don't recall.

21 Q Okay. Is it possible he was saying something and you
22 just didn't hear him, given the traumatic stuff that was
23 going on?

24 A Possible. I mean, I was really terrified.

25 Q Okay. Your main -- it sounds like your main objective

Manuel Antonio Marin
Cross-examination by Ms. Reese

1 was trying to keep that car on the road.

2 A Yes, ma'am.

3 Q Okay. Were you scared it was going to flip over?

4 A I was scared we were going to die.

5 Q And you owned an SUV, correct?

6 A Yes, ma'am.

7 Q That Dodge Durango.

8 A Yes, ma'am.

9 Q Did you have a cell phone?

10 A No, ma'am.

11 Q Okay. Are you aware of whether or not Mr. Jimenez had
12 a cell phone?

13 A He didn't have one.

14 Q Okay. So you didn't have any type of way to call
15 anybody while you were on the road while this is going on?

16 A No, ma'am.

17 MS. JONES: I have nothing further, Your Honor.

18 CROSS-EXAMINATION

19 BY MS. REESE

20 Q Mr. Alfredo (sic), were you drinking? I think you
21 said when you went to the initial Colombian festival you
22 were drinking. You said you had a couple of alcoholic
23 beverages.

24 A Yes, ma'am.

25 Q Did you drink any at Bongos that night?

Manuel Antonio Marin
Cross-examination by Ms. Reese

- 1 A Yes, ma'am.
- 2 Q How much?
- 3 A I had two drinks.
- 4 Q Only two.
- 5 A Yes, ma'am.
- 6 Q So two drinks during the day and two at Bongos.
- 7 A Yes, ma'am.
- 8 Q That was all.
- 9 A Yes, ma'am.
- 10 Q How much did Mr. Jimenez have to drink?
- 11 A He had quite a few drinks.
- 12 Q Okay. Now, so you knew he was intoxicated.
- 13 A Yes.
- 14 Q And you knew Mr. Tabares was intoxicated.
- 15 A Yes, ma'am.
- 16 Q Now, tell me, describe for me, how he got out to your
- 17 car -- Mr. Tabares.
- 18 A The security brought him out to the car.
- 19 Q And why did the security have to bring him out?
- 20 A Because he was, he was drunk.
- 21 Q Was he falling over?
- 22 A He was stumbling -- he was stumbling. I didn't see
- 23 him fall over. I mean, he was, he was -- he appeared to be
- 24 drunk.
- 25 Q At some point during the night in the kitchen did they

Manuel Antonio Marin
Cross-examination by Ms. Reese

- 1 not actually have to help him stay in the chair by tying
2 him into a chair? Do you remember that?
- 3 A No, ma'am.
- 4 Q And you live in Greenville, right?
- 5 A Yes, ma'am.
- 6 Q And where in Greenville?
- 7 A At , Poe Mill.
- 8 Q Is that where you lived in 2008?
- 9 A Yes, ma'am.
- 10 Q So you had to drive away from your house toward Greer
11 in order to get Mr. Tabares home, is that correct?
- 12 A No, ma'am. We were -- from the Colombia festival I
13 went to a friend's house, and from my friend's house we
14 went to the club. From the club we went to Mr. Tabares'
15 home.
- 16 Q Okay. But was Mr. Tabares on your way home?
- 17 A No, ma'am.
- 18 Q Okay. So you had to go away from your way home to
19 take Mr. Tabares.
- 20 A Yes, ma'am.
- 21 Q And you're in the car. And you tell us that you and
22 Mr. Jimenez -- now, Mr. Jimenez is -- let's talk about that
23 a minute. Are you actually related to Mr. Jimenez in some
24 way?
- 25 A No, ma'am.

Manuel Antonio Marin
Cross-examination by Ms. Reese

- 1 Q Okay. You have a daughter, do you not?
- 2 A Yes, ma'am.
- 3 Q And the lady that -- I guess your exwife --
- 4 A Yes, ma'am.
- 5 Q -- is the sister of Mr. Jimenez.
- 6 A Yes, ma'am.
- 7 Q So you're actually or used to be brothers-in-law.
- 8 A Yes, used to be, yes.
- 9 Q Do you socialize together?
- 10 A Yes, ma'am.
- 11 Q See each other on a regular basis?
- 12 A Every -- yes, now and then, yes.
- 13 Q Would you say you're also friends?
- 14 A Yes.
- 15 Q Now, when you say this first attack occurred -- and
- 16 you call it an attack -- you tell -- show me again how you
- 17 did your hands. You said that he, he grabs you. And how
- 18 do you do your hands?
- 19 A Said, "Hey, man, what the hell you doing."
- 20 Q So you take your hands off the wheel.
- 21 A Yes, ma'am.
- 22 Q And you push him away.
- 23 A Yes, ma'am.
- 24 Q And you said he said, "I've got to go."
- 25 A No. He said, "You've got to go."

Manuel Antonio Marin
Cross-examination by Ms. Reese

- 1 Q Are you sure you didn't say, "I've got to go"?
- 2 A No, ma'am. He said, "You got to go. I'm sorry, but
- 3 you got to go," but in Spanish.
- 4 Q In Spanish.
- 5 A Yes.
- 6 Q Now, didn't Mr. Tabares ask you over and over and over
- 7 again to let him out of the car?
- 8 A No, ma'am.
- 9 Q "Just stop, let me out."
- 10 A No, ma'am.
- 11 Q "Turn around."
- 12 A No, ma'am.
- 13 Q "Turn the car around, you've passed, I need to go
- 14 back."
- 15 A No.
- 16 Q That never happened.
- 17 A No, ma'am.
- 18 Q Now, what is Mr. Tabares doing in the back while you
- 19 and Mr. Jimenez are talking?
- 20 A I, I couldn't tell. I mean, I guess he was just
- 21 sitting there.
- 22 Q And you guys are having a discussion about the bar.
- 23 A Yes, ma'am. Well, about the Colombia and about the
- 24 three Americans that got liberated.
- 25 Q And the discussion is about how they're initially

Manuel Antonio Marin
Cross-examination by Ms. Reese

1 kidnapped and then liberated. I mean, that's the whole,
2 the whole story, right?

3 A It wasn't a discussion. It was just a commentary.

4 Q Now, Mr. Jimenez isn't Colombian, is he?

5 A No, ma'am.

6 Q He is from where?

7 A Mexico.

8 Q At some point did you ever pass Mr. Tabares' road and
9 then continue to drive very fast down 29?

10 A I don't know.

11 Q You don't know.

12 A No, ma'am.

13 Q Were you running red lights and driving erratically?

14 A I can't recall.

15 Q And did Mr. Tabares ask you to please slow down?

16 A No, ma'am.

17 Q And he never asked you to turn around.

18 A No, ma'am.

19 Q Did he ever ask you to stop, I need to get out, let me
20 out?

21 A No, ma'am.

22 Q Now, you say you're driving down 29 and you're trying
23 to find a public place.

24 A Yes, ma'am, well.

25 Q Some place to stop and let him out.

Manuel Antonio Marin
Cross-examination by Ms. Reese

- 1 A Some place to stop and get some help where I could
2 jump out and get some help, probably possibly let him out.
3 And I don't know, maybe later get a cab. But my main
4 concern was to get some help, me jumping out of the car.
- 5 Q Well, if you stopped the car, then he's not a threat
6 any more, right?
- 7 A Well, if, if, if there's people around and I can jump
8 out of the car, yes.
- 9 Q He never showed you a weapon.
- 10 A No, ma'am.
- 11 Q Didn't have a gun, didn't have a knife, didn't have a
12 plastic fork.
- 13 A No, not that I saw, no.
- 14 Q And had you stopped the car the threat would have been
15 gone.
- 16 A I don't know that.
- 17 Q Well, you've already testified he was drunk.
- 18 A Yes.
- 19 Q Stumbling.
- 20 A Yes.
- 21 Q Couldn't walk.
- 22 A I didn't say he couldn't walk. He was walking.
- 23 Q But he had to be helped out to your car because he
24 couldn't walk to your car.
- 25 A Yeah. He had -- he was helped.

Manuel Antonio Marin
Cross-examination by Ms. Reese

1 Q And is it your testimony that when you're driving down
2 this road looking for help, Wal-Mart, the 24-hour Wal-Mart,
3 was not open?

4 A I don't know where I was at.

5 Q On 29.

6 A I don't know where I was at.

7 Q The Waffle House isn't open.

8 A I didn't see anything.

9 Q And it's your testimony that at some point during this
10 altercation you reach over into the console, to glove box,
11 and pull out your gun.

12 A Yes, ma'am.

13 Q The gun was kept in the glove box.

14 A Yes, ma'am.

15 Q You didn't have it on you that night.

16 A No, ma'am.

17 Q Do you have it -- do you normally carry it on you, or
18 is it in that glove box?

19 A In the glove box.

20 Q So you reach over. And I guess Mr. Jimenez is still
21 in the passenger seat.

22 A Yes, ma'am.

23 Q And what is he doing the whole time this is happening?
24 This guy's attacking you. What does he do?

25 A I don't know. I, I wasn't paying attention to him. I

Manuel Antonio Marin
Cross-examination by Ms. Reese

1 was just trying to keep the car off the road and trying to
2 get him, keep him from, from killing us.

3 Q So you reach over and you grab the gun out of the
4 glove box, and it's in a pouch.

5 A Yes, ma'am.

6 Q All right. How do you get the gun out of the pouch?

7 A I put it between my legs.

8 Q You take one hand off the steering wheel to do that?

9 A No, ma'am. I did it with my right hand. I had my
10 left hand on the steering wheel, and I got the gun with my
11 right hand.

12 Q So a guy is coming over the back of your seat to try
13 to grab the steering wheel, and you decide at that moment
14 to take one hand off the steering wheel and to take this
15 gun out of its pouch.

16 A I'm pushing him off, and then I reached over to the
17 glove box.

18 Q And this guy is attacking you, and you're taking your
19 gun out of your pouch.

20 A Yes, ma'am.

21 Q It doesn't occur to you to stop the car.

22 A No, ma'am.

23 Q Once you got the gun out of the pouch what did you do
24 with it?

25 A I shot him.

Manuel Antonio Marin
Cross-examination by Ms. Reese

- 1 Q Did you pull the slide back?
- 2 A No, ma'am.
- 3 Q Why not?
- 4 A It was, it was already, it was already loaded.
- 5 Q And when did you load it?
- 6 A I keep it loaded.
- 7 Q So you keep it cocked like that in your glove
- 8 compartment.
- 9 A Not cocked, not cocked but loaded.
- 10 Q With the slide pulled back already. It's ready to
- 11 fire.
- 12 A Yes, ma'am.
- 13 Q All right. So it's in a pouch but it's ready to fire.
- 14 A Yes, ma'am.
- 15 Q Where did you shoot him?
- 16 A In the back of the head.
- 17 Q How many times?
- 18 A Twice.
- 19 Q After the first time was he -- what was he doing?
- 20 A I -- it was just boom, boom, I mean, and then he fell.
- 21 He fell, he fell down.
- 22 Q So you shot him in the head. But he wasn't fighting
- 23 you after you shot him in the head, was he?
- 24 A No, ma'am.
- 25 Q And you shot him again.

Manuel Antonio Marin
Cross-examination by Ms. Reese

- 1 A No. It happened real fast -- boom, boom.
- 2 Q After the first shot was he still fighting you?
- 3 A I mean, it, it just happened within seconds.
- 4 Q And you shot him twice in the back of the head.
- 5 A Yes, ma'am.
- 6 Q At different angles.
- 7 A I, I guess.
- 8 Q How many times did you pull the trigger?
- 9 A Twice.
- 10 Q Why did you take a picture of Mr. Tabares on your
11 camera?
- 12 A I don't know. When I went to get the laptop the
13 camera was, was on the back rest. I just grabbed the
14 camera and thought about taking a picture. I always take
15 pictures.
- 16 Q After you shot him and he's in your car and he's over
17 the seat is he leaning on you?
- 18 A I suppose, yes. I, I was, I was in shock, I mean,
19 I --
- 20 Q When you get out of the car do you agree with me that
21 there is blood all over you?
- 22 A Yes.
- 23 Q Your pants are drenched in blood.
- 24 A Yes.
- 25 Q It's all over your pants. It's all over your hands.

Manuel Antonio Marin
Cross-examination by Ms. Reese

1 A I suppose, yes.

2 Q And you drive ten miles into the City of Spartanburg.

3 A I don't know how far I drove.

4 Q And he's laying there, and you don't get him help.

5 You don't stop anywhere. There's a Wal-Mart on, on the way
6 into, into Spartanburg. You didn't stop.

7 MS. JONES: Objection. There's been no testimony that
8 there's a Wal-Mart. I think the testimony was actually
9 that it was farther back from Tucapau Road.

10 MS. REESE: Your Honor, I asked him as he drove into
11 Spartanburg.

12 THE COURT: Overruled.

13 BY MS. REESE

14 Q You didn't stop and try to get him help.

15 A I didn't see. Everything was dark, everything was
16 closed, and, and I just didn't see any --

17 Q There's not a gas station; there's not a business.
18 There's nothing open in the ten miles that you drove from
19 29 to downtown Spartanburg.

20 A I didn't see any.

21 Q And you didn't choose to stop that car in the road.
22 What happened is Mr. Jimenez jumped out of that car, isn't
23 that true?

24 A No. He got out of the car.

25 Q He got out of the car, but it wasn't stopped when he

Manuel Antonio Marin
Redirect examination by Ms. Jones

1 got out of the car.

2 A I, I don't know, I don't know.

3 Q He got out of the car, and you ran around the car with
4 the gun in your hand, and you told him get back in the car,
5 didn't you?

6 A No, ma'am.

7 Q He was afraid. That's why he got out of the car,
8 right?

9 A He was in shock. So was I.

10 Q And when you came around that car to talk to him you
11 had the gun in your hand.

12 A I didn't realize, but yes.

13 Q And he took it from you.

14 A Yes. He grabbed the gun.

15 MS. REESE: Nothing further, Your Honor.

16 REDIRECT EXAMINATION

17 BY MS. JONES

18 Q You testified that this was a traumatic event,
19 correct?

20 A Yes, ma'am.

21 Q Were you thinking clearly?

22 A No, ma'am.

23 Q Also, you indicated you keep a loaded gun in your car.

24 A Yes, ma'am.

25 Q Why do you have a loaded gun in your car?

Manuel Antonio Marin
Redirect examination by Ms. Jones

1 A I live in a very dangerous neighborhood.

2 Q So you fear for your safety?

3 A Yes, ma'am.

4 Q Okay. Any other reasons why you have a loaded gun in
5 your car?

6 A Yes, ma'am.

7 Q Why is that?

8 A Well, in my job one of my duties is to -- as a
9 manager one of my duties is to close the store at night
10 sometimes alone. And also one of my, my daily duties is to
11 make nightly deposits.

12 Q So sounds for security.

13 A Yes, ma'am.

14 Q Okay. And do you always a hundred percent of the time
15 keep that gun in the car?

16 A No. I keep it in the house as well.

17 MS. JONES: Nothing further.

18 MS. REESE: Nothing further, Your Honor.

19 THE COURT: You may step down.

20 MS. JONES: Your Honor, we have no other witnesses,
21 and we rest.

22 THE COURT: Any reply?

23 MS. REESE: No, Your Honor.

24 THE COURT: All right. Ladies and gentlemen, that's
25 all of the testimony and evidence to be offered in the

1 trial of the case, and now what remains to be done are the
2 final summations, my instruction and your deliberations.

3 Before we do that I've got a couple of matters I'll
4 need to address with the lawyers. So it'll take just a few
5 minutes. So I'll ask you to please go to your jury room.
6 Do not yet discuss the case. I'll bring you back shortly
7 to conclude.

8 (The following takes place outside the presence of the
9 jury.)

10 THE COURT: All right. Ms. Jones, do you want to
11 renew your motions?

12 MS. JONES: Your Honor, I would.

13 We would again move for a directed verdict based upon
14 insufficiency of the evidence. Your Honor, again, there
15 was no indication that my client acted in malice. In fact,
16 he was acting in self-defense -- and for all the other
17 reasons we articulated earlier yesterday.

18 Again, we would renew our motion regarding venue.
19 Venue has not been established. In accordance with my
20 client, he couldn't recall exactly where this incident, the
21 shooting, actually took place, Your Honor.

22 And we would also as another motion raise the castle
23 doctrine, Your Honor, which we talked about extensively for
24 jury instructions, that when somebody is lawfully where
25 they are allowed to be, including their occupied residence,

1 and they're attacked, they are qualified in giving immunity
2 and then cannot be prosecuted, Your Honor.

3 Here you heard from Mr. Marin. He testified that he
4 was driving Mr. Tabares home and Mr. Tabares began to
5 attack him. He pushed him back. He was looking for a
6 public place and couldn't necessarily find one in the haze
7 and the traumaticness of the event.

8 Again, the person came forward trying to take control
9 of the vehicle. Mr. Marin tried several times to push him
10 back trying to get him under control. And unfortunately
11 that wasn't working.

12 So Mr. Marin armed himself with self-defense and shot
13 Mr. Tabares. And we would argue under the castle doctrine,
14 Your Honor, that he is qualified for immunity in these
15 circumstances.

16 THE COURT: Well, when you refer to the castle
17 doctrine are you referring to the statutory reference you
18 made reference to yesterday, which was 16-11-44 --
19 16-11-440(c).

20 MS. JONES: I am, sir. I believe it was C, Your
21 Honor. I misplaced my statute, but I believe it was C.
22 That is correct.

23 THE COURT: Well, that appears just to be a
24 codification of the right to self-defense and when you do
25 not have a duty to retreat. Is that a fair statement?

1 MS. JONES: Well, and then you go on to the other
2 subsection, Your Honor. I think it's 450 that indicates
3 that that person would be immune from prosecution. And,
4 again, in hecticness of the morning I simply misplaced my
5 statute.

6 And I think there is, at least in talking to some
7 other practitioners on our list, there was some discussion
8 as to whether or not it's actually a motion -- here it
9 is -- whether or not a judge can sua sponte dismiss it or
10 if it's something that actually just goes to the jury.

11 It's actually 16-11-450. "A person who uses deadly
12 force as provided in this section is immune from criminal
13 prosecution in civil action for the use of deadly force."
14 And it goes on to talk about law enforcement officers,
15 which isn't relevant here, Your Honor, and also goes on,
16 "The Court shall award attorneys' fees, court costs and
17 compensation for loss of income."

18 We are not obviously alleging any of that. We're
19 simply raising this as an indication that he had a right to
20 be in his vehicle, a right to not be attacked. He was, was
21 in his vehicle. And the statute provides that he can use
22 deadly force. And if you do under those circumstances
23 you're immune from prosecution.

24 THE COURT: All right. Ms. Reese.

25 MS. REESE: Your Honor, under that subsection,

1 Subsection C, what it says is he has the right to stand his
2 ground and meet force with force, including deadly force,
3 if he reasonably believes it was necessary to prevent death
4 or great bodily injury to himself or another. I believe
5 that is a question for the jury, Your Honor.

6 THE COURT: Oh, I don't think there's any doubt it's a
7 question for the jury -- if, if, if the defense of
8 self-defense or defense of home is applicable, but
9 Subsection C just appears to me to be a codification of
10 what the law already requires and that is -- or the law
11 already provides -- and that is you have no duty to retreat
12 when you're at a place that you have a right to be and you
13 are attacked and reasonable -- and it is reasonable to use
14 deadly force in response to the attack. That's just simply
15 providing you don't have to retreat.

16 MS. JONES: Your Honor, that is true. But if you go
17 back over to the immunity from criminal prosecution,
18 16-11-450, which is still part of the castle doctrine,
19 Article Six, it talks about a person who uses deadly force
20 as permitted in this particular article is immune from
21 criminal prosecution, which is the basis of our
22 directed-verdict motion and simply --

23 THE COURT: Well, 16-11-450 says you're immune from
24 prosecution where you use deadly force permitted by
25 provisions of this article. And I believe you had told me

1 that what you believe to be applicable is 16-11-440(c).

2 Did I misunderstand you?

3 MS. JONES: No, sir.

4 THE COURT: Okay.

5 MS. JONES: Okay.

6 THE COURT: All right. What jury instructions are now
7 requested?

8 I'm going to deny your motion for a directed verdict.

9 MS. JONES: Yes, sir.

10 Your Honor, we, we would request the -- Your Honor,
11 may I approach?

12 THE COURT: Yes, ma'am.

13 MS. JONES: I actually broke these up. It might be a
14 little bit easier. I didn't give them to you yesterday
15 since there were more.

16 Going on the fly, Your Honor, but, again, these are
17 just the standard ones we requested yesterday -- the
18 self-defense as it relates to the castle doctrine in terms
19 of that he can meet force with force, it's his vehicle, he
20 has no duty to retreat, as well as self-defense, that it's
21 on the state to prove once it's raised -- they have a
22 burden to prove -- disprove self-defense by reasonable
23 doubt. And again simply self-defense, Your Honor.

24 I'm not sure where you were in terms of -- I think we
25 were going to come back today and talk about whether or not

1 you were going to give that instruction. I'm not sure that
2 that is necessarily -- we have a lot more to add except for
3 the fact that Mr. Marin has now testified. He had
4 testified that he was attacked. He indicated that it was
5 unprovoked, that there wasn't really a lot of words being
6 said.

7 So therefore we do believe that we are entitled to the
8 self-defense. We're entitled as well to the voluntary
9 manslaughter.

10 And the other issue was whether or not we're entitled
11 to involuntary manslaughter, Your Honor. And, again, we
12 would, we would request that for the reasons that we gave
13 yesterday, sir.

14 THE COURT: Involuntary manslaughter?

15 MS. JONES: Yes. We asked for that yesterday.
16 Remember you took it under advisement.

17 THE COURT: Well, I know. But I am questioning why
18 you're asking for it today. I thought your client
19 testified that he intentionally killed Mr. Tabares.

20 MS. JONES: Your Honor, again that just goes to
21 state --

22 THE COURT: Brayboy.

23 MS. JONES: Yes, sir. I'm trying to get the statute
24 and the case actually out. And it talks about, you know,
25 if you arm yourself in self-defense and you act negligently

1 in shooting it that you're entitled to involuntary
2 manslaughter.

3 I think my client testified basically that he grabbed
4 the gun and that the gun basically went off. And we're
5 just simply requesting that instruction, that it was a
6 reaction essentially, and so that the jury could infer
7 whether or not that reaction was intentional or simply
8 negligent.

9 THE COURT: Well, maybe I misunderstand. Are you
10 telling me the law has been changed, Brayboy changed the
11 law of whether or not it has to be an unintentional act
12 when involuntary manslaughter is being considered?

13 MS. JONES: I think Brayboy stands for the proposition
14 that if you arm yourself in self-defense, and you're
15 entitled to arm yourself in self-defense, that if that gun
16 goes off negligently or while you're carelessly holding the
17 gun that you're entitled to an involuntary.

18 THE COURT: But that's not what the evidence is in
19 this case.

20 MS. JONES: Then I'm just simply requesting that that
21 instruction be given based upon the fact that he did arm
22 himself in self-defense and that the gun went off.

23 He didn't testify that he, you know, purposely shot
24 the gun off, or with malice or anything like that. He
25 simply shot the gun. Just based upon that the jury could

1 infer perhaps that it was more of just a reaction and not
2 necessarily a purposeful event.

3 THE COURT: Ms. Reese.

4 MS. REESE: Your Honor, I don't believe there's been
5 any testimony at all that this was an unintentional. I
6 asked him did you pull the trigger, and he said yes twice.
7 There is no -- there was absolutely no testimony of
8 recklessness, no struggle for the gun. He clearly admitted
9 to shooting the defen -- the victim twice in the back of
10 the head.

11 THE COURT: Well, as I indicated yesterday,
12 involuntary manslaughter under either scenario, whether it
13 be an unintentional killing without malice while engaged in
14 the commission of some unlawful act not amounting to a
15 felony or naturally tending to cause death or serious
16 bodily harm, or whether it be involuntary manslaughter
17 established through the showing of an unintentional killing
18 of another without malice with while engaged in lawful
19 activity in a criminally negligent manner, under either
20 scenario it requires that the killing be unintentional or
21 the act resulting in the killing be unintentional.

22 And the defendant's own testimony was that the
23 decedent, Mr. Tabares, was trying to grab the steering
24 wheel, and he kept trying to grab the steering wheel. And
25 while he was fending him off or trying to prevent him from

1 doing that he deliberately reached over in the glove box
2 and pulled out a gun in a container and put it in his lap,
3 unzipped the pouch, pulled the gun out and, "I shot Mr.
4 Tabares." And through cross-examination he said he shot
5 him twice. He never said it was an accident or
6 unintentional.

7 I don't think you can interpret that testimony
8 anything but that it was an intentional act, and therefore
9 an intentional killing, and therefore involuntary
10 manslaughter does not apply.

11 All right. So the defense, the defense is requesting
12 murder, voluntary manslaughter and self-defense?

13 MS. JONES: Yes, sir.

14 THE COURT: All right. Ms. Reese.

15 MS. REESE: Your Honor, I don't have any objection to
16 any of those charges. I do have some concerns with some of
17 the charges sent up to you, and I would just ask you to
18 rest on your charges.

19 THE COURT: All right. So the state's in agreement
20 with the instruction on murder, voluntary manslaughter and
21 self-defense.

22 MS. REESE: Yes, Your Honor.

23 THE COURT: Okay.

24 MS. JONES: Your Honor, if I may inquire if the Court
25 is going to do the castle doctrine, that a person who is

1 engaged in a lawful activity is attacked where he has a
2 right to be is not -- has no need to retreat and stand his
3 ground and meet force with force.

4 THE COURT: Well, as I say, I think that's a
5 codification of what the law has always been, at least as I
6 recall it.

7 He's in a place where he has a right to be and he has
8 no duty to retreat. I'm certainly not going to instruct
9 the jury that he had a duty to retreat.

10 Okay. And I think that satisfies 16-11-440(c). Do
11 you not agree with that?

12 MS. JONES: I, I would -- I believe that the statute
13 also indicates that you are immune from criminal
14 prosecution, which I believe is a separate and distinct
15 codification in terms of self-defense versus criminal
16 immunity. I mean, that's just more about he's immune
17 versus being found not guilty. I think, I think there is
18 a, a distinction there, Your Honor.

19 Your Honor, and I did note that I still left in my car
20 inconsistent statement. We would not request that. There
21 was no indication of any prior inconsistent statements just
22 to make a note for the record.

23 THE COURT: Which one is that?

24 MS. JONES: That was the last specific charge, charge
25 No. 11, Your Honor.

1 THE COURT: Well, I don't have any. You must have
2 given me ten.

3 MS. JONES: Okay.

4 THE COURT: All right. 16-11-440(c) will be
5 instructed. 16-11-450, I think, is just dependent on
6 whether or not self-defense is made out. So I'm not
7 inclined to instruct the jury on 16-11-450.

8 All right. Anything else that needs to be addressed
9 before the jury is brought back? Anybody need a short
10 break? All right. How much time do you need -- ten
11 minutes?

12 MS. REESE: Ten.

13 THE COURT: All right. We'll take ten minutes.

14 (Whereupon, a recess was taken.)

15 THE COURT: All right. Are we ready for the jury?

16 MS. REESE: Yes, Your Honor.

17 THE COURT: Okay. Bring them in, please.

18 (The following takes place in the presence of the
19 jury.)

20 THE COURT: All right. Ladies and gentlemen, you're
21 going to hear from the lawyers, after which I'll give you
22 the instruction on the law. Then you can begin
23 deliberations.

24 So please give the lawyers your attention now as they
25 final you their final summations.

Closing arguments

1 Ms. Jones.

2 MS. JONES: Thank you, Your Honor.

3 Ladies and gentlemen of the jury, when I first stood
4 in front of you a couple of days ago I indicated to you
5 that there are many reasons or could be reasons as to why a
6 person might end up dead in a car. Those are not pretty
7 facts, but those are the facts.

8 But, ladies and gentlemen, we provided you with the
9 reason, and that reason is self-defense. The judge is
10 going to instruct you on self-defense. And he's also going
11 to instruct you on something known as the castle doctrine
12 or vehicle doctrine.

13 In other words, you have a right if you are attacked
14 in your place, your home or your vehicle to meet force with
15 force. You are not required to retreat because it's your
16 vehicle, it's your home. And you can meet force with
17 force, including deadly force. That, ladies and gentlemen,
18 is what happened here.

19 We've heard testimony that Mr. Tabares was trying to
20 wreck the vehicle. That vehicle is the weapon. We all
21 know what happens when you crash a vehicle.

22 And Mr. Marin wasn't the only one in the vehicle.
23 There was a passenger in that vehicle. It might not have
24 been his wife or his children, but there was another human
25 being in that vehicle as he was trying to crash it and take

Closing arguments

1 it off the road.

2 He tried to force him back. He wasn't going back. He
3 kept coming forward. So Mr. Marin grabbed his gun and shot
4 him in self-defense.

5 There is no crime -- he is not charged with unlawful
6 carrying. That's not alleged here, that you can't carry a
7 gun in your car. And if the law allows you to carry a gun
8 in a car, well, then the law allows you to use that weapon,
9 and use that weapon in certain circumstances, and that,
10 ladies and gentlemen, is what happened here.

11 Let's talk a little bit about what happened on
12 July 20th, as well as July 21st, in terms of the evidence
13 that was submitted.

14 We know that both Mr. Marin and Mr. Tabares went to
15 this Colombia festival, which is akin sort of to cinco
16 damio, as Mr. Marin indicated. It's a celebration of
17 heritage and freedom and to get together for a lot of
18 folks. And there was an after-party at Bongos. We
19 understood that. And Mr. Marin and Mr. Jimenez went, and
20 Mr. Tabares went.

21 Now, we heard testimony that Mr. Tabares was going to
22 promote his website. He was going to take pictures. He
23 was going to do some mingling. He was going to do all of
24 this.

25 Except he was drunk. He was too drunk to even mingle

Closing arguments

1 with anybody. They had to sit him in the kitchen and give
2 him water. And he didn't want to sit there. You heard the
3 testimony. He kept trying to get up, and they had to put
4 him back down because they don't want him to go out and
5 mingle with folks.

6 He had a blood alcohol content of .323, which you
7 heard Dr. Wren say that's near passing out. And, yes,
8 there's a difference between a functioning alcoholic and a
9 person who's just been drinking -- and we don't know what
10 Mr. Tabares was -- but even Dr. Wren said at that point, a
11 .323, it really doesn't matter. They're going to, they're
12 going to be really, really drunk. I think he said knee, knee
13 drunk or something along those lines. I'm not free
14 Greenwood. So I don't really recall those words. But
15 basically he was really, really drunk.

16 And they wanted somebody to take him home, and Mr.
17 Marin happened to be in the kitchen. No one has disputed
18 the fact that Mr. Marin is in the kitchen with Mr. Tabares.
19 And they say, hey, can you take him home. Mr. Marin being
20 a nice guy said I guess I can.

21 You heard from the bouncer. Mr. Tabares wasn't
22 fighting to not get in the car with Mr. Marin. He didn't
23 act like he didn't know Mr. Marin. Even the bouncer didn't
24 act like he didn't know Mr. Marin. Everybody was
25 comfortable with Mr. Tabares going with Mr. Marin. They

Closing arguments

1 were familiar with him.

2 You heard the bouncer talk about Mr. -- the victim's
3 demeanor. He could barely stand. He was drunk. He was
4 floating in and out of consciousness in terms of where he
5 was at. That's pretty drunk if you don't even know you're
6 at Bongos or a business. That's the kind of level of
7 intoxication we're talking about.

8 They place him in the car. They even take a picture,
9 ha, ha, let's see how -- it's funny that you're so drunk
10 and, you know, this is going to be really good news or
11 propaganda for that Crazylatino.com.

12 So they get in the car, and Mr. Jimenez is in the
13 passenger seat. He's the one who could hear. He's the one
14 who's going to be giving directions home for Mr. Tabares.
15 But he also was drunk.

16 And we also know that this isn't a regular G.P.S.
17 system like we all have and it's mounted on a car and we
18 get to watch it. It's actually on a computer system, and
19 somebody's got to be watching where it's going because the
20 other person is driving.

21 And we heard testimony that he was driving down East
22 North Street taking Mr. Tabares home when Mr. Tabares
23 attacks Mr. Marin. He says, sorry, you've got to go, and
24 he attacks him. He puts him in a headlock. He's able to
25 get him off. The car swerves off the road.

Closing arguments

1 He says at that point I was scared, I was terrified, I
2 didn't even think about stopping the car. I suppose
3 they're going to allege that he could have stopped the car
4 and let Mr. Tabares out.

5 But this was a dark 2-lane road. What about
6 Mr. Tabares' safety too? Are we just going to let somebody
7 just get out of the car and wonder around and get hit?
8 Well, they can be on trial for something completely less.
9 He says, and he testifies, I'm looking for a place to stop.

10 Now, they're going to say, oh, gosh, there were
11 numerous places. You could have stopped at a gas station,
12 you could have stopped at Waffle House, you could have
13 stopped all of these places.

14 Where is the proof of that? Where are the pictures of
15 these businesses? Are they even open at 3:00 o'clock in
16 the morning? Do we even have this route that she's talking
17 about that you're passing?

18 And you also heard from Mr. Marin I wasn't -- I was
19 terrified, I'm tired, I don't even know what to think, I
20 wasn't clearly thinking. Is that going to be a person kind
21 of looking around trying to find something?

22 We all don't act very well sometimes in stress, but
23 that doesn't negate the fact that Mr. Tabares was drunk and
24 he was attacking Mr. Marin.

25 After Mr. Tabares falls back into the seat, and he's

Closing arguments

1 looking for a place to pull over to stop to get some help
2 for himself as well as Mr. Tabares, he again reaches over
3 and he is grabbing that steering wheel.

4 Nobody has testified that he didn't attempt to get
5 that steering wheel and was trying to force that car off
6 the road. We even heard some of what the passenger said.
7 The passenger was saying he was trying to grab the wheel,
8 he was trying to wreck the vehicle and that's when Mr.
9 Marin shot him.

10 Do you think if he had a lot of extra to add to that
11 the state wouldn't have called him? Where is he? Is that
12 because he supports Mr. Marin's story of self-defense and
13 doesn't support the theory of murder in a cold-blood
14 killing? Why isn't he here? Why didn't he testify?

15 You heard Mr. Marin talk about he was trying to steer
16 the vehicle off the road. He was terrified, he was
17 terrified. This car going down the road is a missile. And
18 even if you're trying to stop it, it's still traveling and
19 you're still weaving all over the road.

20 He's pushing him back. He's trying to push him back,
21 and he keeps coming toward. And you push him back again,
22 and he's drunk. So he's stumbling back. Mr. Marin
23 testified to that. This is not a onslaught. He just falls
24 back, and he comes forward again.

25 And at that point he couldn't stop the attack, is when

Closing arguments

1 Mr. Marin shot him. And then he just drives because he's
2 in shock.

3 And we heard testimony regarding that when they get
4 out. We had the woman witness who had the apartment. She
5 testified she saw two, two Hispanic men in the road. One
6 grabbed a gun and he put it over on the, on the sidewalk
7 area. And, low and behold, that's where the police found
8 the gun. This isn't like they were trying to hide a gun.

9 And nobody's running away. If he is such a
10 cold-blooded murderer why isn't he running away? Why isn't
11 he taking that gun and stashing it somewhere? Why is he
12 not when he's on the road by Tucapau Road and Highway 29,
13 which is where we think this incident happened -- he's not
14 taking Highway 26 or I-26 or going down a country road and
15 getting rid of this body, getting rid of the evidence?

16 Isn't that what somebody who kills with malice, just
17 shoots someone for the simple pleasure of shooting someone,
18 would do? Are they going to act like Mr. Marin and just
19 drive until they really can't drive any more?

20 Because we heard testimony from the detective.
21 Highway 29 -- this was a straight shot. Highway 29 becomes
22 West Ezell Boulevard, and then it becomes West Main Street.
23 And that's basically where they were found. They were
24 found in a turn by West Main. They're just driving.

25 They get out, and they're acting -- they're crying and

Closing arguments

1 they're acting scared and traumatized. You heard that from
2 a witness, an independent witness, who has no dog in this
3 fight. She said they sounded very upset, very upset. And
4 nobody's running away. Waiting for the police to come.
5 You even heard Mr. Marin say Mr. Jimenez went to get the
6 police. Was he running at that point?

7 We also heard from the officer who actually was a
8 detective, Dale Arterburn. And he was from Greer. And he
9 testified that he took Mr. Jimenez around. They were
10 trying to figure out where this incident happened.

11 And lo and behold the witness pointed out an area on
12 Highway 29 where Tucapau Road intersects. That's why this
13 didn't happen on Tucapau Road. This is just a road that
14 goes by for a frame of reference.

15 This is the area. It's pretty desolate. Nobody. Mr.
16 Marin testified he didn't have a gun. Or I'm sorry. He
17 didn't have a cell phone. So you can see there's no street
18 lights.

19 We heard testimony through excited utterance regarding
20 Mr. Jimenez saying something along the lines that the
21 victim, Mr. Tabares, thought that they had gone by the
22 house, they had turned, gone by something, and he wanted
23 them to stop.

24 Take a look at this for a minute. If this is, in
25 fact, where Mr. Tabares finally regained some consciousness

Closing arguments

1 and looked around and didn't recognize where he was and he
2 wanted to stop, where is Mr. Marin supposed to stop? I
3 mean, there's a turnoff a little bit higher up, but you
4 just can't drive across the median, slam on the brakes,
5 drive across the median to turn around.

6 He also has to be a careful driver. He has to obey
7 the rules of the road. You just simply can't stop your
8 car.

9 There is no evidence that they were anywhere near
10 Mr. Tabares' house. There's evidence they started driving
11 to his house, but there's no evidence where in relation to
12 East Main Street Mr. Tabares' house is. How close did they
13 get?

14 Mr. Marin testified he was going there, but once he
15 got out of town he needed to find a public place. And what
16 better place to find a public place than I-29? And somehow
17 they ended up near the Wellford area simply driving.

18 And we also heard testimony that there were skid marks
19 and debris in the road -- skid marks and debris which
20 supports the fact that this car was being forced off the
21 road by a man who's got a .323 blood alcohol level.

22 Is this man firing on all four cylinders? Is it
23 really realistic for him -- for us to believe that he's
24 saying, oh, yes, by the way, I don't recognize this area, I
25 think you may have missed my turn, I don't live in

Closing arguments

1 Wellford, would you please turn around.

2 Does that sound like something that a .323 man is
3 going to say, a man who was in the Bongos Club trying to
4 get back out and mingle with people and he had to be sat
5 down again and then get up and do it again, or is this
6 probably a man who is not acting very rational?

7 Now, unfortunately Mr. Arterburn didn't take pictures.
8 And while he passed that information on to the city,
9 unfortunately the city didn't take any pictures of this
10 debris, because we do know this vehicle is damaged.

11 The detective, Hogsed, testified to that, that the
12 radiator, something was wrong with the radiator. The
13 radiator fluid was just pouring out as you can see. He
14 testified to that. The bumper is missing.

15 Where in the heck is all of this stuff? Did it happen
16 in regard to this relationship while they were trying to
17 force him off the road? We don't know because they don't
18 go back and look for debris. They didn't go back and look
19 in the ditch. They didn't go back and do anything. Is
20 that sloppy police work or did it just not support their
21 theory of murder?

22 They wanted to charge Mr. Marin with murder and they
23 want to charge him with cold blood and, gee, golly gee, an
24 allegation that somebody was being forced off the road and
25 damage to a vehicle, that doesn't support that theory. We

Closing arguments

1 can't preserve that evidence.

2 Ladies and gentlemen, we submit to you that this was
3 self-defense. If you are not inclined to believe it was
4 not self-defense, because self-defense is a complete
5 defense, if you find self-defense he's not guilty. And
6 it's the state's burden to prove it wasn't self-defense
7 beyond a reasonable doubt.

8 They need to show to you that Mr. Tabares wasn't
9 trying to run that vehicle off the run, that that vehicle
10 wasn't a missile, that that vehicle wasn't a weapon. And
11 if they can't prove that to you beyond a reasonable doubt,
12 then you must find him not guilty. It is their burden, not
13 mine.

14 As I indicated to you initially, I have no burden. My
15 client is innocent until proven guilty. He's not guilty
16 until proven innocent. It's innocent until proven guilty,
17 and it's their burden.

18 And if you don't believe that this is self-defense --
19 the judge is also going to instruct you on another lesser
20 included of voluntary manslaughter. And voluntary
21 manslaughter essentially is that a person is provoked
22 either through a physical attack or something along those
23 lines and he has no means of cooling down and he reacts
24 prior to cooling down.

25 We submit to you if you don't believe that this is

Closing arguments

1 self-defense that this -- that you consider voluntary
2 manslaughter. This is an act that provoked Mr. Marin. He
3 didn't have a chance to cool down. I mean, the vehicle is
4 going off the road. It was the second attack that he had,
5 and he acted. But we do believe that you won't even get
6 that far, because this is a classic case of self-defense.

7 It's not pretty. You have to acknowledge that a lot
8 of times jurors do feel bad for the victims, but that's not
9 your role. He's got a family. That family has been there
10 for a long time. They've been here throughout this trial.

11 But, ladies and gentlemen, this is not about their
12 feelings or anything along those lines. This is about you
13 all applying fact to law, fact to law, and not be persuaded
14 by your emotions. I implore you to simply apply fact to
15 law, because if you do that you are going to find my client
16 not guilty. Thank you.

17 THE COURT: Ms. Reese.

18 MS. REESE: May it please the Court.

19 When I spoke to you on Monday I mentioned to you that
20 my dad was a basketball coach. What I didn't tell you is
21 that was before he was a basketball coach he was an
22 analyst, and so I grew up in a no nonsense home.

23 There was no room for mistakes. We didn't have any
24 infractions, my father's rules. And I grew up seeing my
25 father. No mistakes, no nonsense. Rules by the books.

Closing arguments

1 When I was about ten years old a friend of my father's
2 came to dinner, and he sat at dinner one night and told
3 these stories about my dad in high school getting drunk,
4 going out on a leg and getting drunk and doing all of this
5 stuff that I believed -- my father. And my perceptions of
6 him started to change. As I got older it made it more
7 human to me, because the more mistakes I made the more
8 human he became.

9 One of the things that he liked to do with me was to
10 put puzzles together, and so we put these puzzles together.
11 And as I got older he decided that I was too good at
12 puzzles, so what he would do is bring a puzzle home and
13 take the box away so I couldn't see what the picture was.
14 And I'd have to put it together.

15 And at first it was hard, and then I thought, oh, this
16 is fun because I can kinda see how the picture develops.
17 And as I got older and started prosecuting I realized
18 that's kind of how we handle things in court too.

19 This is a murder case. We would love for every case
20 to be like "C.S.I.", to be like on television. We get
21 entertained. We like the idea that we can know everything,
22 everything that happened. But it's not real life.

23 And one person never has the whole piece to the
24 puzzle. So we have to look at each individual witness,
25 each individual person and see what they bring, bring to

Closing arguments

1 the case, what piece of the puzzle they bring.

2 Now, first we talked to Diane Tabares. And Diane is
3 the victim's sister. And she told us a lot. She told us
4 about her brother's -- told us about her brother's
5 business, how Crazylatino.com was becoming a big thing, how
6 he was getting more and more exposure, and about why he
7 took pictures and why he was going that day to the festival
8 and Bongos. It was a big day for him. And he went and he
9 drank.

10 She also told you that the next morning when she
11 realized he wasn't home she went to Bongos and the victim's
12 car was in the parking lot. So he had never left that
13 parking lot on his own.

14 Laura Tabares told you -- the most important thing she
15 tells you is at the time they are living together her
16 address is in Greer.

17 She tells you he left about 11:30 that day. She
18 talked to him several times during the day but the last
19 time at 10:30. She says when she talked to him at
20 10:30 based on her conversation with him she felt it was
21 okay to turn the phone off. So she turns the ringer down
22 and she goes to bed.

23 The next day when she's called to the Bongos parking
24 lot she finds Nelson's camera in his car. It's unlocked,
25 and his camera is in the car. She develops those pictures,

Closing arguments

1 and those pictures are consistent with the festival that
2 day and the things that happened that day. So she has his
3 camera.

4 Now, Larry Rodriguez who was the owner of the club
5 talked too. And he says that he saw Nelson from time to
6 time at the club but that they were social friends. He
7 says when Nelson first got there -- and he didn't know the
8 times. He says roughly 10:00 o'clock or 10:30 -- there
9 were only about 30 or 40 people there and the party,
10 after-party, was just starting. And he says that Nelson
11 seemed to him to be sick, not intoxicated at first, just
12 like he wasn't feeling well.

13 So he takes him back in the kitchen and gets him some
14 water, and he stays back there 30 or 40 minutes. He says
15 he doesn't really see the defendant at that time. He says
16 he didn't see him. He didn't see anybody else back there.

17 He says he invited him into the kitchen, like I said,
18 25 to 30 minutes. And then things get busy. He really
19 doesn't see him again, but bouncers come to him at some
20 point in the evening. And he instructs those bouncers to
21 get Nelson home. He never said he talked to this defendant
22 and asked him to take Nelson home.

23 He says he called Laura when he thought Nelson was
24 sick and he tried to start to reach her, but he couldn't
25 reach her. He called her several times. That corresponds

Closing arguments

1 with her time from about 10:30 to 11:00.

2 Now, there was a question raised, and the defense
3 counsel asked he stayed to the bitter end. But the truth
4 is Larry began to try to call somebody to come get him
5 around 11:00 o'clock or 11:30 that night, because at first
6 he wasn't feeling well.

7 Chris McDonald is important to this case. He is the
8 bouncer. He knows Nelson as a club promoter. He was
9 somebody that he worked with at the club. And he says he
10 saw him from time to time.

11 When he first saw him that night he didn't look like
12 he was feeling well. He'd maybe had a couple of drinks,
13 but he wasn't really intoxicated, so he was still
14 functioning. He looked like he just wasn't feeling well.

15 Later on in the evening he saw him look very
16 intoxicated. So he tells you that at some point they
17 stopped giving him drinks in that club. It was so bad that
18 this bouncer decided he's got to come into the kitchen and
19 I've got to sit him down because he can't walk, he's
20 stumbling.

21 He says he took him back into that kitchen. It's
22 about an hour or an hour and a half. That is the first
23 time we see the defendant, when he comes in the picture.
24 He says there are no problems back there. He said Nelson,
25 never aggressive, no, never aggressive.

Closing arguments

1 The bouncer decides he can't drive. They go back and
2 tell Larry he can't drive. And Larry instructs them get
3 someone to take him home. That's the second person that
4 testifies. Larry tells those bouncers find someone to get
5 him home.

6 And the bouncer tells you that he asked a club
7 promoter to take him home. The club promoter agrees to
8 take him home, and that this defendant says, no, I've got
9 it, I know where he lives. He intercedes. I know where he
10 lives.

11 Now, what we find out is that he lives in Greenville.
12 So he actually intercedes to take a man home he doesn't
13 really know toward Greer before he goes back to Greenville
14 at 2:00 o'clock in the morning or later. But he steps in
15 and says I know where he lives.

16 He says, the bouncer says, I had to help him out to
17 the car, I had to put his arm around my shoulder and had to
18 walk him out there, he couldn't walk by himself. He says
19 he gets out to the car and the defendant says, oh, I don't
20 really know where he lives, I'm going to need an address.
21 He says at that point he takes Nelson's I.D. card and he
22 hands it to him.

23 Ladies and gentlemen, I submit to you that that's good
24 information in this case. He went out of his way to take a
25 man home. He lied to the bouncer about whether he knew

Closing arguments

1 where he lived and got an address only after he was already
2 in the car.

3 And that is borne out by the evidence. That is borne
4 out by the evidence, because when you go back there you're
5 going to see this victim's I.D. laying in the back seat.
6 The pictures are going to show that this victim's I.D. was
7 found in the back seat of this car, exactly as the bouncer
8 said he took it out and handed it to the defendant.

9 And then he says I saw the G.P.S. come out, so I knew
10 they had a G.P.S. He took his computer out and said he had
11 a G.P.S. and he typed it in there. So it gets typed in
12 there in the parking lot. But he doesn't get home. They
13 don't take him home. They've got the G.P.S. They don't
14 take him home.

15 The bouncer says the defendant's driving, Jimenez is
16 in the passenger seat, saw the defendant grab his laptop.
17 Nelson's in and out at this point.

18 And you see the pictures. This is this aggressive man
19 who is attacking everybody one hour before he died. He
20 died within the hour. There's the bouncer doing exactly
21 what he said he was doing, which is helping him in the car.
22 Everything this man told you has been confirmed by the
23 physical evidence.

24 Then we heard from Tracy Bodner. And Tracy Bodner
25 doesn't have a dog in this fight. She is sitting up on an

Closing arguments

1 outside stairwell, and she sees two people underneath. She
2 says hysterical. She says she's 50 to 75 feet away.

3 One has on a black shirt. Alfredo Jimenez has on a
4 black shirt. And one has on a white shirt -- the
5 defendant. She says the man in the black shirt tries to
6 walk away. Then he goes over and he pulls the gun away
7 from the man in the white shirt. She thought it was out of
8 his pocket, but she says pulled the gun away.

9 She said that Mr. Jimenez walks over to the other side
10 of the street and throws that gun down on the curb. And
11 he's hysterical. He's walking back and forth. He comes
12 back.

13 The man in the white goes over and sits on the median.
14 She says Mr. Jimenez is walking back and forth. He's
15 hysterical. He goes back over to the guy. The gun is on
16 the curb.

17 She says both are upset. Remember what she said in
18 her statement. One is hysterical and the other is trying
19 to calm him down.

20 Then we have Larry Gory. Larry Gory is minding his
21 own business. He is driving downtown. He says he's going
22 on his way to pick up his kids. And that was made a big
23 deal about what's going on and where are you going. We
24 don't know where the kids are. Nobody ever asked him that.
25 Out of town. It's completely reasonable that he was

Closing arguments

1 traveling at 4:00 o'clock in the morning. We don't know
2 where he had to go.

3 He pulls up and he sees two males at the front of his
4 car struggling. And they come around his car. He rolls
5 down the window, and Mr. Jimenez approaches him and says
6 call a taxi or call the police, he shot him.

7 Mr. Gory says then the struggle continues and he sees
8 what they're struggling over. It's a gun. But there's a
9 struggle. He says both of them had their hands on it and
10 were trying to pull it one from the other.

11 Now, Mr. Gory got a hard time about what he was doing
12 before he came and whether he had any sleep. News flash,
13 ladies and gentlemen. He would have rather been
14 somebody -- somewhere else other than here. This man was
15 minding his own business traveling down the road. This
16 happened. He called 9-1-1. He did the right thing. He
17 stayed and talked to police. He has no reason to lie.

18 Then Officer Jeff Powell. He's the first one on the
19 scene. One minute response time since he was dispatched,
20 just a couple of minutes after Larry Gory calls 9-1-1.

21 He gets up on the stand. Mr. Jimenez is hysterical.
22 He crying; he's upset. He says I took the gun away from
23 him. He points to the curb. That dude shot him. The gun
24 was found right where he pointed to and right where Traci
25 Bodner said she saw him throw it down.

Closing arguments

1 Later he says the man was trying to wreck the vehicle
2 grabbing the steering wheel. The defendant is calm and
3 quiet sitting on a median. He's not hysterical; he's not
4 screaming.

5 Officer George Brown says he arrives seconds after.
6 He says Mr. Jimenez is so hysterical -- he uses the term
7 he's bouncing off the walls. He's crying; he's hysterical.
8 He keeps saying that dude shot him. We were supposed to
9 take him home, passed his road, the driver would not stop.

10 I took the gun away from him. As we were leaving the
11 club in Greenville and were dropping the victim off near
12 Greer, victim tried to run the vehicle off the road. He
13 was fighting with the driver because he wouldn't stop. And
14 the driver took the pistol out and shot him.

15 Now, there's a whole lot of drama about where this is
16 in his report. Ladies and gentlemen, I don't know what it
17 is. Every -- seasoned police officers get up on the stand
18 in a criminal courtroom and they lose their minds.

19 She's asked him if it's not in his report. He's
20 admitting it's not in his report. It was in his report all
21 along. Everything he testified to was in that report. He
22 had written it down. He had documented it. He just kind
23 of got stage fight and lost his mind a little bit. But he
24 had documented. It was in his report.

25 Lashae Lipscomb tells you that when she arrives the

Closing arguments

1 defendant is sitting calmly on the median. She asked him
2 are you hurt. It's not my blood, not hurt. There's no
3 injuries. She looks him over to make sure. Takes his
4 shirt off, cuts his pants leg up. He's not injured.

5 There are a lot of witnesses just here for no purpose
6 other than to show you the chain of evidence and how things
7 got around. Those weren't, those weren't fact witnesses.
8 They were just here to show you that the police had done
9 the right thing.

10 But Dale Arterburn tells you he gets a call. This
11 thing just happened in Greer. So he does the right thing.
12 He comes to Spartanburg. He gets the witness. And he says
13 I wanted to rewind you, because he needs to know if it's in
14 his jurisdiction.

15 So he talks to the guy. Mr. Jimenez is cooperative.
16 He puts him in the car and he takes him to Bongos. And he
17 says take me to the place where this shooting happened.

18 And where he is taken there is debris on the roadway.
19 You notice the defendant never testified to debris on the
20 roadway or in passing. He kept saying, oh, well, you know,
21 we avoided it and we missed a pole and we missed a tree.
22 He never says we wrecked. And yet it clearly happened from
23 the pictures. But he doesn't tell you that. Why not?

24 Dale Arterburn tells you that he finds the scene and
25 he does tell city police officers it's not in his

Closing arguments

1 jurisdiction. So it's not his report. But he does tell
2 city police officers that he's found it. He takes heat
3 from not doing the report.

4 Basically, he did not file a report in the county
5 where he doesn't work. So he tells you that. He does tell
6 you that he's familiar because the Greer area -- he works
7 in Greer -- with which is the residence
8 of the victim at the time. And he says if you're coming
9 from Bongos towards Spartanburg and you're headed towards
10 that where the shooting happened is way past
11 it. He said miles and miles past where you would turn off
12 to go to Miles and miles. He also tells
13 you that after the shooting they had to drive ten miles
14 with that body in the car.

15 Shamika Sanders comes and talks about what GSR is and
16 how she takes it and she does the GSR kit and she goes in
17 and she talks to Mr. Jimenez. He has no blood on his
18 hands. Has no blood on his clothes. And she takes the
19 gunshot residue.

20 Jeremy Taylor tells you he goes to find the defendant
21 who is asleep on the floor. He has still got blood on his
22 hands. He takes the GSR.

23 Steve Calhoun tells you that he's asked to interview
24 Mr. Jimenez, and he does so. And he interviews him. But
25 he also helps us by taking a picture, because you can see

Closing arguments

1 there's no blood.

2 David Hogsed says he arrives at the scene and the car
3 is in the middle of the road. Nobody pulled over. Nobody
4 decided to ask for assistance. The car's in the middle of
5 the road running with the driver door open. Both front
6 windows are down. He says there are no bullets, but we
7 know one exited through the windshield. And then two
8 windows are open.

9 There are two casings found in the car, and really
10 can't say much about that because we know they drove for
11 ten miles. So we don't know if that's where they were when
12 the shooting happened or not.

13 But he finds this nylon pouch, and he finds it near
14 the driver's side. And the defendant testifies that's
15 where he keeps his gun, in that pouch.

16 Blood in the median exactly where the witnesses said
17 he was sitting calmly after this happened. And there's a
18 computer and G.P.S. in the front seat.

19 Here's where the pouch is found. You notice that.
20 And you'll have it back there. You can look and see. This
21 is a zipper pouch.

22 And the computer and the G.P.S. are found. And this
23 G.P.S. is important because what it tells you, I would
24 argue, is that the shots came from the left side of the car
25 to the right, because the G.P.S. is in the middle, and it

Closing arguments

1 gets moved to the right side. When it shatters it all goes
2 to the right side. So the velocity of that shot took
3 everything to the right side.

4 There's blood spatter on the ceiling, the roof of the
5 car, right where -- only on the defendant's side. The car
6 is registered to the defendant. The male purse -- and you
7 will have it -- is the defendant's. It's got his
8 identification in it. What it also has in it is a receipt
9 for the gun, a receipt that has been in that wallet since
10 2000.

11 Hugh Murphy testified that on the driver's side of the
12 car there are fingerprints of the defendant, on the
13 passenger side fingerprints of Mr. Jimenez, consistent with
14 what everybody's told you happened.

15 Lindsay McGraw tells you that he can confirm that
16 these people searched He can confirm
17 that on the computer. They searched that address, yet the
18 defendant didn't take Mr. Tabares home. They had a G.P.S.
19 They used it. They put it in there. They know where
20 they're supposed to go, and yet they are miles and miles
21 past it.

22 Then we have the camera that is found in the car. It
23 belongs to the defendant, and two shots of our victim at
24 2:54 a.m. That's this man that is getting ready to attack
25 the driver.

Closing arguments

1 Kathy Kathleen Woodward told you she did GSR kits, and
2 she said she did Nelson Tabares, the victim, and he has
3 gunshot residue on his hands that is consistent with a
4 close-contact gunshot. It is consistent with a gun being
5 placed to the back of your head and you raising your hands.

6 The defendant has GSR on the back of his left hand.
7 But she tells you if he's got blood on his hands it's going
8 to affect whether I can get GSR. But he does have it on
9 the back. The witness never has GSR on any part of his
10 body, at least his hands, back, front, fingers, none of
11 that.

12 Heather Cox McClain tells you she works for A.T.F.
13 She can trace the gun to the defendant. It's his gun.

14 And then Dr. Wren comes in, and I think this is so
15 important. And he's a pathologist, ladies and gentlemen.
16 And, frankly, you know, he does this all the time. So he
17 may be a little bit too hardcore. He may say some things
18 sometimes that we don't want to hear, because we don't have
19 to deal with this all of the time.

20 But he says the victim is 5'3" tall. He says he has
21 two gunshot wounds. And the first wound comes from the
22 back of the head here and exits through the ear. He says
23 that's a contact wound, which means the gun had contact
24 with the back of his head.

25 Then he tells you the next shot or the second shot is

Closing arguments

1 right in the center from the back of the head and exiting
2 the forehead. It is a tight contact wound, which means the
3 gun had to be pressed up against the victim when it was
4 fired.

5 Ask, ladies and gentlemen, if that's reasonable with
6 the defendant's story. The defendant says, oh, my gosh, we
7 were struggling, he had me, I was trying to shove him off,
8 back and forth, back and forth.

9 If you shoot somebody like that how are you going to
10 get that gun right up against him? Because he's moving.
11 He's struggling. He's trying to get stuff. He's trying to
12 get the steering wheel. You're struggling to make it not
13 happen.

14 And yet these gunshot wounds, ladies and gentlemen,
15 are contact wounds. One was such a contact wound that it
16 sucked blood and tissue back into the barrel of the gun.
17 That's how tight the contact was.

18 He tells you that the victim had a .33 blood alcohol.
19 And I want you to look at that toxicology report because
20 this is what it also tells you. If you look at that
21 toxicology report -- and you'll have it back there -- it
22 shows that there was no other drugs in his system. Nothing
23 else. Alcohol was the only thing on board. He was not
24 under the influence of anything.

25 Dr. Wren said he would be knee-walking drunk. He

Closing arguments

1 was -- he said reactions would be extremely slow. He would
2 probably be about ready to pass out.

3 And David Black actually brought the firearm in, and
4 he talked about that and tells you a lot about how hard it
5 was to first get the blood and tissue cleared from the gun.
6 He says he does that twice. And then when he tries to fire
7 it he has the stovepipe effect because there's still so
8 much blood and tissue. And that happens with close contact
9 gunshot wounds, tight contact as Dr. Wren said, right
10 pressed up against the back of the head.

11 He says this is a hair-trigger gun, that it requires
12 either ten and a half or four and three quarters pull
13 weight to pull that trigger. So this isn't something that
14 just happens.

15 You have to pull the slide back before you shoot it
16 the first time. Only fires once when you pull the trigger.
17 So if you want it to fire again you have to pull the
18 trigger again. So when you shoot somebody in the head and
19 they stop struggling with you, if that's what they're
20 doing, you don't have -- you won't shoot them a second time
21 unless you pull that trigger a second time. He says the
22 casings were fired from this defendant's gun.

23 Alfredo Jimenez was not here. He's not here. I wish
24 it were different, but, you know, we can't control that.
25 This is what we do know though, and this is what he was

Closing arguments

1 able to tell you in what happened that day.

2 First of all, we know he didn't shoot the victim. The
3 defendant told you that. We also know that he is a friend
4 of the defendant. He went to the club with him. They
5 socialized together. They're close. They're actually
6 family. The defendant's daughter is Mr. Jimenez's niece.

7 He rode home with him that night. They socialized
8 that day. They have a family relationship. And something
9 happened that night so bad that this man got out of a car
10 in the downtown city of Spartanburg hysterically crying and
11 stopped a passerby and asked him to call the police or a
12 taxi. And notice he didn't say I need the cops, I want to
13 report this. He said call me a taxi or -- call me a taxi
14 or the police. He just wanted to get away from that
15 situation.

16 Everybody that testified talked about how stuff was.
17 Even the defendant said he was hysterical. It is so bad,
18 what he sees in that car is so bad, he has to get out.

19 And what does even the defendant admit to you? When
20 he gets out what happens? The defendant gets out. And,
21 oh, I just had the gun. I forgot. I've driven ten miles
22 with a dead body and somehow I still have the gun in my
23 hand. And I jumped out. And when I came around the car I
24 stood.

25 What do the witnesses see? The witnesses see that

Closing arguments

1 Mr. Jimenez tries to walk away, and then he takes the gun
2 away. First he tries to walk away. Then there's a
3 struggle for the gun. There's a struggle, there's a
4 struggle. He takes the gun away from him, and he crosses
5 the street and he throws it down, and he tells the police
6 where it is. The defendant's own friend knew in that
7 moment how wrong this was. He says he tried to wreck the
8 car. He was trying to get him to stop.

9 What does the defendant tell you? The defendant tells
10 you he's related to Mr. Jimenez. He tells you he lives in
11 Greenville. He tells you that the gun was in his glove
12 box. The gun was in his glove box, so he's having this
13 fight with this crazy man in the back seat.

14 Now, keep in mind he's got another man in the car with
15 him who can also help him in this fight. But he doesn't
16 know what Mr. Jimenez is doing.

17 Apparently Mr. Jimenez in this life or death
18 struggle -- Mr. Jimenez isn't even participating. Does
19 that make sense? If a person is in the passenger seat and
20 somebody's attacking a driver and the car is about to wreck
21 and everybody's about to be killed, would just sit there?
22 Life and death struggle. Mr. Jimenez apparently wasn't
23 paying attention.

24 He says the gun is in a pouch in the glove box but he
25 keeps it loaded. He keeps that slide back because he needs

Closing arguments

1 it for protection. But how much sense does that make to
2 keep it loaded and then put it in a pouch that you've got
3 to unzip? What's the point? If you've got to unzip the
4 pouch to get it out you're not going to be able to use
5 quickly. Why keep it loaded?

6 He told you that, ladies and gentlemen, because he has
7 to figure out a reason how he was able to slide that thing
8 back with the scenario he gave you. He couldn't do it. So
9 it had to be slipping forward.

10 He tells you that Larry asked him to take the victim
11 home. Never happened. But he admits to you the victim's
12 not walking steady.

13 And then he tells you an interesting thing. He and
14 this intoxicated person -- he's got Mr. Jimenez who he
15 claims he's so intoxicated, but they were having a
16 political discussion. They're talking about the fight.
17 They're talking about the kidnapping. There are political
18 discussions. Isn't that interesting?

19 And all of a sudden the victim freaks out. You've got
20 a gun. This man who hasn't been a problem to anybody, who
21 hasn't been able to walk, all of a sudden freaks out when
22 they're having this discussion. And in this struggle he
23 never tells you there was a wreck. He never tells you the
24 car left the road and was in any kind of accident.

25 He tells you, oh, we started, hit a pole and I

Closing arguments

1 swerved. And never tells you about the wreck. Obviously
2 there was something that happened on that road.

3 So he tells you when he starts to get this gun he
4 reaches over the G.P.S. computer -- Mr. Jimenez -- while
5 this guy is fighting him to take this out of the glove
6 compartment and takes a pouch. You've got somebody on top
7 of you, somebody struggling for control of this car.
8 Apparently the person he hasn't shot is comatose because
9 he's not doing anything to help you.

10 And you reach over and retrieve that pouch from that
11 glove box. Then he says there's still a struggle going on.
12 Got to put that pouch in between my legs and get the gun
13 out. So he's got, he's got to have at least one hand off
14 the wheel and he's going to be fighting this guy somehow.
15 I don't know who's driving the car, because he didn't stop
16 the car. Think about it. He didn't stop the car. Is that
17 reasonable?

18 He's got a man beside him who can clearly control the
19 situation if he needs to because the guy behind him can't
20 even walk. He didn't stop the car. Instead he chooses to
21 go and get his gun. And it's ready. He has the gun, and
22 it's ready.

23 Weren't you driving erratically? Weren't you running
24 red lights? Wasn't this guy asking you to slow down? I
25 don't remember. You weren't driving erratically? I don't

Closing arguments

1 remember.

2 The defense said, you know, he stayed with the body,
3 he stayed there at the scene. What else was he going to
4 do? It was his car and there was a body in it, and it was
5 registered to him. Where was he going to go?

6 His pants are blood soaked. And he tells you I got
7 the gun and I shot him. Where did you shoot him? In the
8 back of the head. Once? I shot him twice. Was he still
9 struggling after the first shot? Well, it was bam, bam.
10 But the shots are at different angles, one shot here and
11 one shot straight back, straight through the forehead.

12 Now, the state has to prove to you murder. What are
13 the elements of murder? Murder is an intentional killing of
14 another. There's no doubt this was intentional. With
15 malice aforethought.

16 And what is malice? Malice is the doing of a wrongful
17 act intentionally and without just cause or excuse. It
18 signifies a general malignant recklessness of the lives and
19 safety of others or a condition of the mind that shows a
20 heart, regardless of social duty, and fatally bent on
21 mischief.

22 Ladies and gentlemen, I submit this is malice. Two
23 shots, not one, two shots to the back of the head. One of
24 them tight contact, barrel up against the head.

25 No effort to help him. They drive 6 to 10 miles

Closing arguments

1 straight through, and he doesn't stop the car then. The
2 witness gets out. Calm. He actually falls asleep. The
3 amount of pressure used to pull that trigger, three and a
4 half pounds of force used twice.

5 And what is aforethought. We said malice. But what is
6 aforethought? Aforethought, there's no particular length of
7 time malice has to be present. It can be present in an
8 instant -- in an instant before you (inaudible).

9 And this guy made his decision in more than an instant,
10 because he admits he has to get the gun from somewhere. I
11 submit to you it's not in the glove compartment. But it's
12 somewhere. He has to unhook the pouch, he has to pull the
13 slide back and he has to fire it twice.

14 Now, if you don't believe it's murder, if you don't
15 believe there's anything, this does not get you to malice,
16 then the other option is manslaughter. And manslaughter is
17 the unlawful killing of another in the sudden heat of
18 passion. Heat of passion is something that renders the mind
19 of an ordinary person incapable of cool reflection and
20 produces an uncontrollable impulse to do that.

21 And there has to be a sufficient legal provocation.
22 And provocation must be that which naturally and instantly
23 produces in the mind of a reasonable person the highest
24 degree of exasperation.

25 So the question is is this malice. And people keep

Closing arguments

1 saying cold blood. That's not the standard here. It don't
2 have to be premeditated. Is it malice or is it in the heat
3 of passion with that, which would provoke a reasonable
4 person?

5 You're also going to have another charge for possession
6 of a pistol during the commission of a violent crime. And
7 if you find the defendant committed either of those crimes
8 and that he possessed a pistol, then you can find him guilty
9 of possession of a pistol during a violent crime.

10 Now, what is the defense? The defense is self-defense.
11 And there are several elements to self-defense. Let's see
12 whether it's met.

13 The first element is in order for there to be
14 self-defense the defendant was without fault in bringing on
15 the difficulty. He wasn't without fault in bringing on the
16 difficulty. He lied to the bouncer to get him in the car.
17 He drove past his house miles and miles because he knew how
18 to get there.

19 The defendant must have believed he was in imminent
20 danger of losing his life or sustaining serious bodily
21 injury. Stop the car, stop the car. Then you're not in
22 imminent fear. Stop the car.

23 Circumstances were such that would warrant a man of
24 ordinary prudence, firmness and courage to strike the fatal
25 blow. So a reasonable person would have reacted the way he

Closing arguments

1 reacted.

2 Would a reasonable person shoot someone twice in the
3 back of the head? Everything he said is true?

4 You've got a man with a .33 blood alcohol who can't
5 stand, can't walk, who is ready to pass out. You have
6 another one in the passenger seat. He grabs the steering
7 wheel and could have put on the brake, taken his foot off
8 the gas and stopped. He says, no, I was so fearful that I
9 had to take my hands off the wheel, get a gun, pull the
10 slide back and shoot him twice in the back of the head
11 rather than stopping the car.

12 The missile is the car. Talking about there's a
13 missile. This car is a missile. He's got a missile. He's
14 got his foot on the gas. Oh, no. I think I'll just keep my
15 foot on the gas and shoot him.

16 This is not reasonably necessary, this is not
17 reasonably necessary. And that's what we're talking about
18 with the castle doctrine, that's what we're talking about
19 with self-defense, is it reasonably necessary.

20 I would submit that we have proven that this is not
21 self-defense beyond a reasonable doubt. I would submit that
22 we've proven this is not reasonably necessary behavior
23 beyond a reasonable doubt.

24 Then there are other defenses, but the main one and the
25 one that's been underlying in all of this is he was drunk.

Closing arguments

1 That's really what we're talking about. He was drunk and he
2 brought this on himself.

3 There's no doubt Nelson Tabares had some bad decisions.
4 Didn't hide it from him. He drank too much. He was drunk.
5 He accepted a ride home with people he didn't know very
6 well:

7 My boss has a saying. He says bad choices will either
8 cost you \$40 or your life and you'll never know which one.

9 Now, I understand why my father expected so much of me.
10 I think of the family. I think of those years where he was
11 doing all of that crazy stuff, and I'm glad he never ran
12 into a person like this defendant, because my father got
13 through all of that. He had a chance to have tomorrow.

14 You know, Nelson Tabares doesn't have a tomorrow.
15 There will be no tomorrow because this defendant decided
16 there wouldn't be.

17 Nelson Tabares said it long ago in the early morning
18 hours of July the 21st completely intoxicated. He couldn't
19 walk. He was inebriated. A promoter offered to take him a
20 ride home. The defendant said, no, I'll take him home.

21 He was carried out to the car, and this picture was
22 taken at 2:54 a.m., an hour before he died.

23 Chris takes the victim's I.D. out of his wallet and
24 gives it to the defendant. He says the defendant on his
25 computer or sees him with a computer. And the G.P.S.

Closing arguments

1 address is put in. But he didn't make it home.

2 Nelson is in the back seat of the car. He was driven
3 miles and miles past his home. He wants to try to stop.
4 He's asked him to stop. And he continued to drive.

5 Nelson tries to grab the steering wheel, ladies and
6 gentlemen. But make no mistake. He's the one that was
7 trying to defend himself. They are not taking him home.
8 They would have had to turn around to take him home, is what
9 Dale Arterburn says.

10 He grabs the sheering wheel. He forces the car off the
11 road because there's damage, there's debris. There is
12 damage. And that's when I submit to you, ladies and
13 gentlemen, he was shot twice in the back of the head,
14 because that makes no sense.

15 This is malice. They drive ten minutes into
16 Spartanburg and there's a confrontation and they call for
17 help. From the time that Nelson Tabares accepted that ride
18 until the moment he was killed the defendant had complete
19 control. He was drunk and sluggish. He was slow. He was
20 unarmed. The defendant controlled the vehicle and the
21 defendant controlled the gun.

22 Nelson will never sit around the table and have old
23 friends tell his daughter stories about him because from
24 that time, from 2:54 a.m. to 4:00 a.m., this defendant
25 controlled him, and he took his life. You can't change

Jury charge

1 that, but you can do something about it, because today
2 Nelson's in your hands.

3 THE COURT: Ladies and gentlemen of the jury, it is
4 your exclusive duty to determine what the facts are, and
5 you do that through your own common sense examination and
6 evaluation of all of the testimony and evidence received
7 during the trial.

8 And you 12 jurors alone will decide what weight, value
9 and effect to give to any particular testimony or other
10 evidence in the case. Your sole objective is to simply
11 reach the truth in the matter. And by doing that you will
12 have fulfilled your obligations, and that is to simply give
13 both the state and the defendant a fair and impartial
14 trial.

15 Now, in this case, as you know, the state through the
16 solicitor has accused the defendant with having committed
17 two separate and distinct offenses, although each of those
18 offenses are alleged to have arisen out of one particular
19 event or course of events which the state alleges occurred
20 back on July the 21st of 2008.

21 But by way of the indictment the state is accusing the
22 defendant with the crimes of murder and with possession of
23 a firearm during the commission of a violent crime.

24 As to each of those allegations contained in those
25 separate counts and as to each of the charges contained in

Jury charge

1 the indictment the defendant has entered a plea of not
2 guilty. And as I've told you, that plea of not guilty has
3 therefore placed upon the state the burden of proving the
4 allegations that they have set forth in the indictment, the
5 burden of proving each of the essential elements of the
6 crimes alleged against the defendant; and therefore the
7 burden is upon the state to establish the defendant's guilt
8 to the satisfaction of you 12 jurors beyond a reasonable
9 doubt before a verdict of guilty could be returned as to
10 any charge.

11 The burden is never upon a defendant to prove that he
12 is not guilty or to prove that he is innocent because in
13 some cases that might not be possible. The burden is
14 always upon the state because they brought the charge
15 against the defendant to establish his guilt beyond a
16 reasonable doubt.

17 It is a vital, important and cardinal rule of law that
18 every defendant in a criminal trial, no matter how serious
19 the offense might be for which that person stands charged,
20 that person is always presumed innocent of the charge.

21 And, as I told you, that presumption of innocence
22 remains with this defendant as it does with any defendant
23 from the time that he is placed under arrest and throughout
24 the course of the criminal process and even throughout the
25 course of the trial.

Jury charge

1 And that presumption of innocence will be with him
2 even as you go back into the jury room to begin with your
3 deliberations in this case. And that presumption of
4 innocence will be with him in that jury room, and it'll be
5 with him forever unless you 12 jurors determine that he's
6 no longer entitled to that presumption of innocence.

7 In other words, after you've carefully considered all
8 of the evidence in the case, and from that evidence you've
9 decided the facts, and upon deciding those facts you apply
10 the law that I will have provided you, if you 12 jurors
11 unanimously determine that his guilt as to some crime has
12 been proven beyond a reasonable doubt, then he's no longer
13 entitled to the presumption of innocence as it relates to
14 that charge. But it's only if, unless and until you are
15 satisfied of his guilt as to a crime beyond a reasonable
16 doubt that the presumption of innocence would no longer be
17 applicable.

18 Now, while the state does have the burden of proving
19 the defendant's guilt beyond a reasonable doubt, that
20 doesn't meant that the state has to prove his guilt beyond
21 all doubt or beyond any possible doubt. But it does
22 require the state to prove his guilt to your satisfaction
23 beyond a reasonable doubt.

24 And the term reasonable doubt should be given its
25 plain and ordinary meaning. A reasonable doubt is the kind

Jury charge

1 of doubt that would cause a reasonable person to hesitate
2 to act upon the information provided.

3 And a defendant in a criminal trial is entitled to any
4 reasonable doubt that arises from the evidence or lack of
5 evidence in a case. And if upon any factual issue
6 essential to a finding of a verdict of guilty you have some
7 reasonable doubt as to how that issue should be resolved,
8 it would be your duty to resolve that reasonable doubt in
9 favor of the defendant.

10 And therefore if upon your consideration of the whole
11 case you have a reasonable doubt as to his guilt it is your
12 duty and obligation to return a verdict of not guilty.

13 And, at the same time, after you've considered all the
14 evidence and decided the facts and applied the law if you
15 find that the defendant's guilt as to a particular crime
16 has been proven beyond a reasonable doubt, then it would be
17 your corresponding duty to convict him of that offense.

18 Now, the same law that provides that you are the
19 judges of the facts also provides that I am the judge of
20 that law. And that simply means that nobody is going to
21 tell you how to arrive at your determination of fact in
22 this case.

23 You do that as I think I've already told you, through
24 the exercise of good judgment and common sense
25 conscientiously applied to the testimony and evidence

Jury charge

1 received during the trial.

2 You must however under your oath as a juror accept the
3 law as I provide it to you as being the law that is
4 applicable in this particular case. In other words, you
5 are never to concern yourself with what you thought the law
6 was before you came to serve as a juror this week or what
7 you think the law ought to be.

8 Under your oath as a juror you must simply accept the
9 law as I provide it to you as being the law that is
10 applicable in this particular case. And then you take that
11 law and you apply it to the facts as you 12 jurors
12 determine those facts to be based upon your common sense
13 examination of all of the evidence in the case.

14 Now, because you are the sole judges of the facts you
15 are therefore necessarily the sole judges of the
16 credibility and the believability of each witness that has
17 testified during the trial.

18 And you 12 jurors alone will decide what weight, value
19 and effect to give to any particular witness' testimony, or
20 even a portion of that testimony. And there are several
21 factors which you should consider in arriving at your
22 assessment as to the credibility of a particular witness,
23 and I'm going to list those factors for you.

24 You should consider the demeanor of the witness, that
25 is how the witness appeared to you as the witness testified

Jury charge

1 from the witness stand. Was the witness straightforward in
2 responding to questions that were asked of the witness, or
3 was the witness hesitant or evasive in responding to
4 questions asked of the witness. Simply put, did the
5 witness appear to you to be telling the truth and to have
6 knowledge of the facts to which that witness has testified.

7 You should also consider whether or not the testimony
8 of a witness is consistent, or is it inconsistent with that
9 witness' own testimony or with other testimony or evidence
10 received during the trial of the case.

11 You should also consider how a witness came to know
12 the facts to which that witness has testified. In other
13 words, what was the opportunity that that witness had to
14 perceive the existence of those facts to which that witness
15 has testified by having previously used his or her senses,
16 and then what is the ability of that witness to be able to
17 come into court and to accurately recollect to you as what
18 they have previously perceived.

19 You should also consider any bias or prejudice or
20 interest that you find a witness might have with respect to
21 the case. In other words, do you find some reason that a
22 particular witness would come into court and would testify
23 one way or another to help or to hurt one side or the
24 other. And you may consider any interest that a witness
25 might have in the outcome of the case if you determine that

Jury charge

1 a witness does have such an interest and you find that that
2 interest would bear upon that particular witness'
3 credibility.

4 And you should also consider whether or not the
5 testimony of a witness is strengthened, or is it weakened
6 by other testimony or other evidence received during the
7 trial.

8 Now, because you are the finders of the fact and
9 because you are the judges of the credibility of each
10 witness you are permitted to believe as much or as little
11 of what a witness has testified to as you deem is
12 appropriate.

13 And therefore you may believe everything that a
14 witness testified to. You may choose to believe none of
15 it. You may believe one portion of a particular witness'
16 testimony and reject some other portion of that same
17 witness' testimony.

18 And in a given case you may believe one witness as
19 opposed to several, or several as opposed to one. But
20 whatever your good judgment and common sense tells you is
21 the most believable and credible testimony is the testimony
22 you should accept. And you should reject any testimony or
23 other evidence that you find not to be credible or
24 believable. Again, your sole objective is to simply reach
25 the truth in the matter. And by doing that you will have

Jury charge

1 fulfilled your obligations as jurors.

2 Now, while there are various forms of evidence such as
3 testimony, photographs, documents, charts and other types
4 of physical exhibits that might be introduced during the
5 course of a trial, there are really only two types of
6 evidence, and either or both of those types of evidence may
7 be used to prove any fact in issue. But the two types of
8 evidence are direct evidence and circumstantial evidence.

9 Now, direct evidence is the testimony of a person who
10 testifies from actual knowledge of the fact. It is
11 testimony by a person who has perceived the existence of
12 some fact by means of his or her sense and then they come
13 into court and they testify as to what they have previously
14 perceived.

15 Circumstantial evidence, on the other hand, is the
16 proof of some other fact or set of facts which taken either
17 singly or collectively may prove the existence of a fact in
18 question as a necessary consequence, that is through an
19 inference.

20 And an inference is simply a deduction of fact that
21 may logically and reasonably be drawn from the proof of
22 some other fact or set of facts. In other words, it's not
23 a fact proved by the personal perception of a witness based
24 upon their own personal experience, but it is a conclusion
25 which might reasonably be drawn from the proof of other

Jury charge

1 facts.

2 In other words, you may infer that at a particular
3 event occurred or that a particular fact exists based upon
4 the proof of sufficient factual circumstances which would
5 reasonably warrant your arriving at a conclusion.

6 The law however makes absolutely no distinction
7 between the weight or the value to be given to direct
8 evidence or to circumstantial evidence, nor is a greater
9 degree of certainty required of circumstantial evidence as
10 opposed to direct evidence.

11 Whatever the type of evidence used to prove any fact
12 in issue, you should consider all of the evidence received
13 during the trial of this case. And after carefully
14 considering that evidence and weighing it in your minds if
15 you are not convinced of the guilt of the defendant as it
16 relates to a particular crime beyond a reasonable doubt,
17 then you must resolve that doubt in his favor and return a
18 verdict of not guilty as it relates to that charge.

19 Now, in this case, as you know, there are two -- two
20 offenses. Your decision as to count two, which is
21 possession of a firearm during the commission of a violent
22 crime, is dependent upon your determination as to a
23 decision in count one, which is the count charging the
24 defendant with the crime of murder.

25 I'm going to begin with count one, which is the crime

Jury charge

1 of murder. And then I'll proceed to count two, which is
2 the crime of possession of a firearm during the commission
3 of a violent crime.

4 I will also within the instruction for the crime of
5 murder, I'll be instructing you also on the law as it
6 relates to the lesser included offense, which is voluntary
7 manslaughter.

8 Now, murder is defined in a statute as the killing of
9 any person with malice aforethought either expressed or
10 implied. And therefore in order for you to find the
11 defendant guilty of the crime of murder it would be
12 necessary that the evidence in this case has established to
13 your satisfaction beyond a reasonable doubt that the
14 defendant did commit some act or acts which proximately
15 caused, that is directly caused, the death of the
16 decedent -- and in this case that would be Nelson Fernando
17 Tabares -- and that the killing was done with malice
18 aforethought. Malice aforethought is an essential element
19 of the crime of murder.

20 So what is malice? Well, malice as an essential
21 element of the crime of murder is a state of mind connoting
22 an ill will and having an intent to do harm.

23 The term intent refers to the state of a person's mind
24 which directs his actions towards a specific object or
25 goal. And the term intent would include those consequences

Jury charge

1 which represent the very purpose for which an act is done,
2 as well as those consequences which are known to be
3 substantially certain to result whether actually intended
4 or not.

5 Malice is also a technical term importing wickedness
6 and excluding just cause or legal excuse. It is something
7 which springs from depravity, from a heart devoid of social
8 duty and fatally bent on mischief.

9 It is a state of mind indicating an extreme disregard
10 for or an extreme inference to human life. And malice may
11 be likewise defined as a state of mind which indicates a
12 formed purpose and a design to do a wrongful act under
13 circumstances that exclude any legal right to do it.

14 And the words expressed or implied malice do not mean
15 different kinds of malice but merely the manner in which
16 malice may be shown to have existed, that is to say either
17 by direct evidence or by circumstantial evidence implying
18 or inferring the existence of malice.

19 Malice may be expressed as where there is an expressed
20 threat to kill or a lying in wait or where the
21 circumstances show directly that an intent to kill was
22 entertained by the killer.

23 Malice may be inferred, though no expressed intent to
24 kill is proven by direct evidence, where the facts and
25 circumstances which have been proven by the evidence in the

Jury charge

1 case satisfy you beyond a reasonable doubt that malice was
2 present in the mind of the killer at the time any killing
3 took place.

4 And the existence of malice may be inferred from acts,
5 declarations and conduct of the killer, as well as from any
6 other circumstances shown to have existed at the time of
7 the event from which you might reasonably infer the
8 existence of malice as often the state of a person's mind
9 can only be proven by circumstantial evidence.

10 Malice as an essential element of the crime of murder
11 does not necessarily require proof of an actual or specific
12 intent to take human life, although that may be proven.
13 But rather it means a state of mind accompanying conduct
14 signifying a general malignant recklessness and an extreme
15 disregard for or an extreme indifference to human life.

16 The state has the burden of proving malice just as it
17 must prove any other essential element of the crime of
18 murder, and it is for you 12 jurors to determine whether or
19 not the evidence in this case establishes malice beyond a
20 reasonable doubt.

21 It's also essential that any malice proven must be
22 aforethought. Now, the law does not require that malice
23 must exist for any appreciable length of time before the
24 commission of an act which results in a fatal result.

25 Indeed, it may be conceived at the very moment that

Jury charge

1 the fatal act is committed. It is sufficient in the law so
2 long as the state does prove beyond a reasonable doubt both
3 the existence of malice and the commission of an act or
4 acts by the defendant which proximately cause a fatal
5 result.

6 And you must determine whether or not malice
7 aforethought exists based upon your consideration of all of
8 the evidence introduced during the trial and any reasonable
9 inferences that might be drawn from that evidence.

10 As I told you, I'm also going to instruct you on the
11 law of the lesser included offense, which is voluntary
12 manslaughter. And you are instructed that an indictment
13 for murder may also include the lesser offense of voluntary
14 manslaughter, even though that lesser offense is not
15 actually set out in the indictment.

16 A jury may find a defendant guilty of the lesser
17 included offense of voluntary manslaughter where the
18 evidence in the case warrants such a finding. In other
19 words, a defendant who has been charged with the crime of
20 murder may be found guilty of the lesser included offense
21 if a jury determines that the evidence in this case
22 warrants such a finding, whether or not the lesser included
23 offense is actually set out in the indictment itself.

24 Now, manslaughter is defined as an unlawful killing or
25 an unlawful homicide of a human being without the element

Jury charge

1 of malice being present. While the element of malice must
2 be proven in order for the defendant to be found guilty of
3 the crime of murder, malice is not an element of the
4 offense of manslaughter.

5 Voluntary manslaughter is defined in the law as the
6 unlawful killing of another person which is committed in
7 sudden heat of passion provoked by a sufficient legal
8 provocation.

9 The law recognizes that sudden heat of passion
10 arousing out of exasperation, rage, anger, sudden
11 resentment, fear or terror may for the time being affect
12 the self control of an individual temporarily disturbing
13 the ability to properly reason and creating an
14 uncontrollable impulse to do violence; and therefore
15 reduces the crime from that of murder to that of voluntary
16 manslaughter provided it was committed in sudden heat of
17 passion and that heat of passion was provoked by a
18 sufficient legal provocation.

19 The law does not reduce from murder to manslaughter
20 every homicide that is committed in the heat of passion.
21 It must be the heat of passion justly excited by a
22 sufficient legal provocation. If a sufficient legal
23 provocation does not exist, then the killing even committed
24 in the heat of passion is murder and not voluntary
25 manslaughter.

Jury charge

1 The sudden heat of passion aroused by a sufficient
2 legal provocation which may reduce a homicide from that of
3 murder to that of manslaughter need not dethrone reason
4 entirely or shut out knowledge or volition. But it must be
5 such heat of passion provoked by such facts or
6 circumstances as would naturally disturb the ability of an
7 ordinary reasonable and prudent person to properly reason
8 rendering in his mind -- or rendering his mind incapable of
9 cool reflection and producing what according to human
10 experience may be described as an uncontrollable impulse to
11 do violence.

12 In determining whether an act resulting in the death
13 of another was impelled by heat of passion aroused by a
14 sufficient legal provocation or was impelled by malice you
15 should take into consideration all of the surrounding
16 circumstances and conditions accompanying the event in
17 question.

18 And therefore while the crime of murder is a killing
19 of another person with malice aforethought either expressed
20 or implied, voluntary manslaughter is an unlawful homicide
21 committed in the absence of malice but in sudden heat of
22 passion aroused by a sufficient legal provocation.

23 Now, in this case the defendant has raised what is
24 known in the law as the castle doctrine. That law
25 recognizes the right of every person to protect himself or

Jury charge

1 herself or a friend or relative or some other from
2 intruders and attackers and from death or sustaining great
3 bodily injury while in his home, business or vehicle.

4 And to do this a person may use such force as is
5 reasonably necessary even to the point of taking human life
6 if such is reasonable to prevent death or great bodily
7 injury to himself or to another person. And the term great
8 bodily injury refers to bodily injury creating a
9 substantial risk of death.

10 Section 16-11-440(c) provides that a person who is
11 engaged -- let me start over. Section 16-11-440(c)
12 provides that a person who is not engaged in an unlawful
13 activity and who is attacked in a place where he has a
14 right to be, including his home, business, or motor
15 vehicle, has no duty to retreat and has the right to stand
16 his ground and to meet force with force, including deadly
17 force, if he reasonably believes it is necessary to prevent
18 death or great bodily injury to himself or to another
19 person.

20 There is however a requirement of objectivity. In
21 other words, the belief must be reasonable. That is an
22 ordinary reasonable and prudent person if acting under the
23 same or similar circumstances as established by the
24 evidence in this case would have entertained the same
25 belief and would have been warranted in acting as the

Jury charge

1 defendant did in this case.

2 Now, although the defendant has raised the castle
3 doctrine as a defense, the burden is not upon the defendant
4 to establish its existence, because, as I've already told
5 you, the burden is upon the state to prove the defendant's
6 guilt beyond a reasonable doubt. And in order to prove an
7 unlawful homicide on the part of the defendant it would
8 therefore necessarily require that the state disprove the
9 existence of the castle-doctrine defense.

10 In this case the defendant has also raised what is
11 known in the law as the defense of self-defense. The law
12 recognizes the right of every person to defend himself or
13 herself or a friend, relative or another from death or from
14 sustaining serious bodily harm. To do this a person may
15 use such force as is reasonably necessary even to the point
16 of taking human life where such is reasonable.

17 The right of self-defense is founded upon necessity,
18 either actual or reasonably apparent necessity. And it is
19 a complete defense to a charge of an unlawful homicide
20 should you find that it exists based upon your evaluation
21 of the evidence produced during the trial of this case.
22 The existence of self-defense entitles a person charged
23 with the commission of an unlawful homicide to a verdict of
24 not guilty.

25 And although the defendant has raised the defense of

Jury charge

1 self-defense, the burden of proof is not on the defendant
2 to prove the existence of self-defense. As I have already
3 told you, the burden is always upon the state to prove the
4 defendant's commission of the crime alleged against him
5 beyond a reasonable doubt. And this would therefore
6 necessarily require that the state prove beyond a
7 reasonable doubt the absence of self-defense.

8 But in order for you to consider the defense of
9 self-defense you obviously must know what the elements are.
10 And there are four basic elements that are required before
11 self-defense may be established.

12 First, it must be shown that the defendant was without
13 fault in bringing on the immediate difficulty which gave
14 rise to the necessity of using deadly force which resulted
15 in the taking of human life.

16 One cannot provoke, initiate or otherwise through his
17 own fault bring about a difficulty and then claim the right
18 of self-defense in the use of deadly force against an
19 attack which was caused by that provocation.

20 Secondly, it must be shown that at the time the fatal
21 act was committed the defendant actually believed that he
22 was in imminent danger of losing his life or sustaining
23 serious bodily injury, or some other person was, or that
24 the defendant actually was in such imminent danger. And
25 the term imminent danger means an immediate or present

Jury charge

1 danger and not a past or future danger.

2 And, thirdly, if the defense is based upon a belief of
3 imminent danger, then it must be shown that the belief was
4 reasonable, that is a reasonably prudent person of ordinary
5 firmness and courage would have entertained the same
6 belief.

7 If the defendant or the other person being defended
8 actually was in imminent danger, then it must be shown that
9 the circumstances were such as would warrant a person of
10 ordinary prudence and courage to inflict the fatal injury
11 in order to save himself or some other person from death or
12 serious bodily injury.

13 In other words, it must be shown that a reasonably
14 prudent person of ordinary firmness and courage if acting
15 under the same or similar circumstances would have reached
16 the same conclusion and entertained the same belief.

17 Deadly force is only appropriate when necessary and
18 may only be exercised where the defendant entertains a
19 reasonable belief that he or some other is about to sustain
20 loss of life or suffer serious bodily harm.

21 The law of self-defense encompasses preventive action
22 taken to protect one's own life without another if such
23 action is taken in anticipation of imminent danger of
24 losing one's life or sustaining serious bodily injury.

25 A defendant has a right to act upon appearances. He

Jury charge

1 may be mistaken. The law does not hold someone to a
2 refined assessment of the danger as might be accomplished
3 having an adequate time to reflect, provided however that
4 the defendant has acted as a person of ordinary reason,
5 firmness and courage would have acted or should have acted
6 in meeting the appearance of the danger.

7 In other words, one does not have to wait until his or
8 her assailant gets the advantage, for one always has the
9 right under the law of self-preservation to prevent another
10 from getting an advantage.

11 Again, there is however a requirement of objectivity.
12 Any such belief must be reasonable, that is a reasonable
13 and prudent person if acting under the same or similar
14 circumstances would have so believed or would have also
15 been warranted in acting as the defendant did.

16 And, fourthly, it must be shown that the defendant had
17 no other means of avoiding the danger of losing his life or
18 sustaining the infliction of serious bodily injury other
19 than to act as he did under the particular circumstances as
20 existed, because, as I have stated, self-defense is founded
21 upon necessity.

22 Now, if you have a reasonable doubt as to the
23 defendant's guilt as it relates to a proof of an unlawful
24 homicide after considering all of the evidence received
25 during this case, including any evidence relating to the

Jury charge

1 issue of self-defense, then it would be your duty to
2 resolve that reasonable doubt in favor of the defendant and
3 find him not guilty.

4 And if, on the other hand, you have no reasonable
5 doubt as to the defendant's guilt after considering all of
6 the evidence, including any evidence relating to the issue
7 of self-defense, then it would be your duty to find the
8 defendant guilty of any unlawful homicide that has been
9 proven to your satisfaction beyond a reasonable doubt based
10 upon my instruction already provided you as it relates to
11 the elements of those particular homicide offenses.

12 Now, as you know, in count two of the indictment the
13 defendant is also charged with possession of a firearm
14 during the commission of a violent crime. And that's also
15 a statutory offense, and it's set forth in 16-1, excuse me,
16 16-23-490 of the Code of Laws of South Carolina.

17 And that statute provides as follows: It shall be
18 unlawful to possess a firearm or visibly display what
19 appears to be a firearm during the commission of a violent
20 crime. And the crimes of murder -- excuse me. The crimes
21 of murder and of voluntary manslaughter are classified as
22 violent crimes under the law of this state.

23 So in order for the defendant to be found guilty of a
24 violation of this particular section of law it would be
25 necessary that the evidence in this case has established to

Jury charge

1 your satisfaction beyond a reasonable doubt that the
2 defendant did commit the crime of murder or the defendant
3 did commit the crime of voluntary manslaughter and that
4 during the commission of that crime he did possess a
5 firearm or did visibly display what appeared to be a
6 firearm during the commission of that offense.

7 Now, ladies and gentlemen, I am not in any way
8 concerned with what your decisions are, but, as I believe I
9 previously told you, any decision that you reach has to be
10 unanimous. All 12 jurors must be in agreement.

11 Now, Mr. Foreman, you're going to preside over the
12 jury deliberations simply to ensure that they are carried
13 out in an orderly fashion, but all jurors are expected to
14 participate in deliberations, because, as I say, the
15 verdict has to be unanimous. All of you have to be in
16 agreement.

17 Now, you have two separate offenses, and therefore
18 you'll be rendering two separate verdicts. Count one is
19 the count charging the crime of murder; count two is the
20 count charging the crime of possession of a firearm during
21 the commission of a violent crime.

22 With respect to the first count in the indictment
23 charging the crime of murder, you will have three potential
24 verdict forms depending upon your determination of fact and
25 then your application of the law.

Jury charge

1 If the state has proven beyond a reasonable doubt that
2 the defendant guilty of the crime of murder, then the
3 verdict form would be one word. That would be guilty,
4 meaning guilty of the crime of murder.

5 If the state has failed to satisfy you of one of the
6 essential elements of the crime of murder but the state has
7 proven beyond a reasonable doubt the defendant's commission
8 of the lesser included offense, that being the crime of
9 voluntary manslaughter, in that event the verdict form
10 would be guilty of voluntary manslaughter. You'd have to
11 write that out, guilty of voluntary manslaughter.

12 And if the state has failed to establish beyond a
13 reasonable doubt either the crime of murder or the crime of
14 voluntary manslaughter, then the verdict form would be not
15 guilty.

16 So, again, the three verdict forms are guilty -- the
17 one word, meaning guilty of the charge in the indictment,
18 which is murder -- or guilty of voluntary manslaughter or
19 not guilty.

20 And then with respect to the count two of the
21 indictment, possession of a firearm during the commission
22 of a violent crime, you have two potential verdict forms.
23 Those verdict forms are guilty or not guilty.

24 Understand that the defendant may not under any
25 circumstances be found guilty of count two, possession of a

Jury charge

1 firearm during the commission of a violent crime, unless he
2 has been found guilty of the crime of murder or the crime
3 of voluntary manslaughter.

4 Now, during your deliberations there may come a time
5 where you have some question about the facts or the
6 evidence or you wonder if there's some other evidence that
7 you could have so assist you in resolving the case.

8 No additional evidence may be received now that you're
9 getting ready to go back and begin your deliberations. So
10 even if there was some piece of evidence that you think
11 would be helpful and it did exist out there somewhere, you
12 still can't have it because the case is closed. All of the
13 evidence that is going to be presented has been presented.
14 So no additional evidence may now be received.

15 If you have a question about the testimony of a
16 witness, while I do not have transcripts of the witness'
17 testimony, if you think a question that you have about that
18 testimony can be answered by having testimony replayed in
19 whole or in part, I can bring you back into the courtroom
20 to have a witness' testimony replayed in its entirety, or
21 only some portion of it if that's all you need. So while
22 no additional evidence can be received, testimony can be
23 replayed.

24 So if you need to have testimony replayed, Mr.
25 Foreman, you'll have to let me know through the bailiff,

Jury charge

1 and I'll bring you back to have that witness' testimony
2 replayed in whole or in part.

3 If you ever have a question about the law that is
4 applicable I am permitted to answer those questions. So if
5 you need for me to give you the instruction again, or you
6 need an explanation of some portion of it, or you need a
7 clarification of the law that I provided you, I am
8 permitted to answer those questions. So I can always bring
9 you back to give you a reinstruction, an additional
10 instruction or a clarification of the law that you are to
11 apply, which I have already provided you.

12 If we have any smokers on the jury, you can smoke, but
13 you can't smoke in the jury room. You have to go outside
14 to accomplish that. So if you want to smoke, let the
15 bailiff. They'll take those who need to or want to outside
16 for that purpose.

17 You are instructed however that at any time if any
18 juror is absent based upon an authorized purpose, then the
19 deliberations must stop. And they can only resume when all
20 12 jurors are present so that all can participate.

21 And I'm not sure whether your lunches are here or not.
22 I expect they may be. So when you go back you can eat
23 lunch and then deliberate afterwards, or you can deliberate
24 while you eat lunch. I'll leave that up to you. You can
25 decide that however you wish to do it.

Jury charge

1 As I say, Mr. Foreman, if at any time you have a
2 question you need to address to me, if you'll write it on a
3 piece of paper, give it to the bailiff, he'll provide it to
4 me and I'll respond accordingly.

5 I do have some matters I'll need to address with the
6 lawyers. So while now I'm going to ask you to go back to
7 your jury room, I'm going to tell you and instruct you not
8 to begin deliberations until I send you word to do so.

9 If I do not need to bring you back for any reason I'll
10 tell the bailiff to instruct you you can begin
11 deliberations. In that event he'll -- he or she will bring
12 to the jury room all of the exhibits which have been
13 introduced.

14 And to you, Mr. Foreman, he'll also -- he or she --
15 will bring the verdict form, I mean, the indictment which
16 will serve as the verdict form.

17 The indictment, as I've told you, is the charging
18 paper. It's not evidence; it's not proof of anything. But
19 it will be in the jury room, because you will need to.
20 indicate the jury's decisions on back of the indictment.
21 On the back of the indictment in the lower left-hand
22 corner, Mr. Foreman, you'll see the word verdict. And it's
23 beneath that word that you will indicate the jury's
24 decision.

25 And I'm going to write in that space count one and

Jury charge

1 count two. And you just indicate the jury's decision by
2 those, count one and count two.

3 Sign your name as the foreperson and place the date on
4 it. You're the only juror that needs to sign the verdict
5 form. So it'll only have your signature.

6 All right. So please retire to your jury room, but do
7 not begin deliberations until I send you word to do so.
8 And I just want the 12 to go back.

9 The two alternates, I'll ask you to stay here in the
10 courtroom with me, please. But you can stand up if you
11 want to.

12 (Whereupon, the jury retired to deliberate at
13 1:10 p.m.)

14 THE COURT: As I understand it -- I assume you ordered
15 lunch too. So we'll provide you with your lunch.

16 I'm going to ask you to stay with me, because if
17 during the course of the deliberations a juror became ill
18 or couldn't continue to serve, then one or both of you
19 would be called upon to take that person's place.

20 So you are both going to be taken to a separate
21 location from the 12 jurors. You can eat your lunch there.
22 Do not talk about the case -- do not talk about the case.
23 You're not permitted to do that because you're still
24 theoretically participating.

25 So you can talk about anything else you want to. Just

Jury charge

1 don't talk about the case for right now. And you'll have
2 your lunch too.

3 Okay. So if you'll take them to a separate location,
4 not the jury assembly room because it's occupied, but to a
5 separate jury room.

6 (Whereupon, the alternate jurors were excused from the
7 courtroom but remained in the courthouse in a separate
8 location from the trial jury.)

9 THE COURT: Are there any exceptions taken to the
10 instruction or requests for additions to the instruction by
11 the state?

12 MS. REESE: None, Your Honor.

13 THE COURT: By the defendant?

14 MS. JONES: Your Honor, we would just take exception
15 to your prior ruling on 16-11-450(a) regarding the immunity
16 you indicated that you would not charge, to preserve that
17 issue for appeal.

18 THE COURT: Okay. Well, I charged it as a defense,
19 and I told them if they found it exists or if they had a
20 reasonable doubt as to it, then they'd find him not guilty.
21 So I think that accomplishes the same purpose.

22 MS. JONES: Your Honor, we'd also --

23 THE COURT: I don't they -- I don't think jurors can
24 grant immunity.

25 MS. JONES: I understand. And I'm just simply

1 excepting to preserve that have issue for appeal, sir.

2 THE COURT: Okay.

3 MS. JONES: Also, in our lengthy request regarding the
4 self-defense some of that was left out. We're fine with
5 that.

6 However, I would like, given the closing of the state,
7 if the defendant is justified in defending himself or
8 others in firing the first shot, then the defendant -- also
9 continue -- to continue shooting until it is apparent that
10 the danger of death or serious bodily injury has been
11 completed -- has completely ended. Your Honor, that is
12 State vs. Rye, 375 S.C. 119.

13 THE COURT: And that was an instruction? That sounds
14 like a comment on the facts to me.

15 You're saying that the Court approved of that
16 instruction or necessitated the giving of that instruction?

17 MS. JONES: Yes. I don't have State vs. Rye with me,
18 Your Honor, but if somebody is -- if they're entitled to
19 shoot the first shot, then they're also entitled to
20 continue shooting until the danger has basically been
21 abated.

22 THE COURT: Well, I certainly think that's proper
23 argument. You're telling me that that was an instruction
24 that the appellate court required the trial judge to give?

25 MS. JONES: I -- Your Honor, I don't have the case

1 here with me, so I can't necessarily comment on the actual
2 facts and circumstances.

3 However, it is a jury instruction. There's other ones
4 that other folks have used, and we would just in light of
5 what the state has argued in terms of this is malice,
6 because not only did he shoot one time, he shot twice --
7 the Supreme Court has indicated that if you were authorized
8 to in defending yourself, you fired the first shot, then
9 the defendant is also continued -- justified in continuing
10 to shoot until it's apparent that the danger of death
11 has --

12 THE COURT: I know. You've already told me that at
13 least once, or maybe twice.

14 MS. JONES: I understand.

15 THE COURT: But, but my question is not whether that
16 is appropriate to be argued and whether or not that is a
17 fact of the case, but it sounds like it's a comment on the
18 facts by the Court. And that's the reason I asked the
19 question on the facts of the case that you've cited, did
20 the appellate court say the trial court should have given
21 that instruction. Tell me the name of the case.

22 MS. JONES: It is State vs. Rye, Your Honor. The cite
23 is 375.

24 THE COURT: Spell it for me.

25 MS. JONES: R-Y-E, sir.

1 THE COURT: R-Y-E?

2 MS. JONES: That's correct.

3 THE COURT: Do you have that case with you now, or
4 not?

5 MS. JONES: I didn't, Your Honor. I'm sorry. I
6 apologize for that.

7 THE COURT: I don't see that in that case. Could you
8 find it for me? I have the case, but I don't see -- I
9 don't see where that is addressed. Is that a quote that
10 you handed up? Usually if you're quoting a case it's in
11 quotes if it's a jury instruction, but I don't see that in
12 the case. The case is being reversed on the basis that the
13 Court didn't properly charge the jury on the defense of
14 habitation.

15 (Pause.)

16 MS. JONES: Your Honor, I don't necessarily see where
17 it is quoting that by reading it.

18 THE COURT: I don't either.

19 MS. JONES: I may have accidentally quoted the, the
20 wrong law on that, Your Honor.

21 However, we simply requested -- I have seen that that
22 has been requested before simply reading some of the
23 information on the criminal defense lists served --

24 THE COURT: Well, I understand that.

25 MS. JONES: That this instruction has been given, Your

1 Honor. We are requesting it. If you don't want to give
2 it, that's, that's your right, and we'll simply except to
3 that ruling and preserve that issue.

4 THE COURT: Well, okay. That's easy enough said. But
5 I believe it to be a comment upon the facts. But if you
6 have a case besides the Rye case, which does not state
7 that, that says that that's a proper instruction and should
8 have been given, then I'll be happy to give it, because I'm
9 going to give the law that's applicable. It's required.
10 The Rye case doesn't support that proposition.

11 MS. JONES: Your Honor, I'll, I'll look back at my, my
12 notes.

13 THE COURT: So you don't know of another case?

14 MS. JONES: Not off the top my head, sir.

15 THE COURT: Okay.

16 MS. JONES: I'm not a walking encyclopedia.

17 THE COURT: Well, I understand. But you made the
18 request and you cited the case.

19 MS. JONES: I understand.

20 THE COURT: So that's why I'm asking you.

21 MS. JONES: I understand, sir, and I --

22 THE COURT: I'm not a walking encyclopedia either.

23 That's why I'm asking you, because you cited the case that
24 stood for the proposition, but it apparently does not. So
25 I thought maybe you had another case there that did stand

Jury charge

1 for that proposition.

2 All right. Let me ask y'all to verify the exhibits
3 before they go back, please.

4 (Pause.)

5 THE COURT: All of the exhibits are accounted for?

6 MS. REESE: Yes, sir, Your Honor.

7 THE COURT: All right. The jury can begin
8 deliberations. We'll be at ease while they to so.

9 (Whereupon, a recess was taken.)

10 THE COURT: All right. The jury has asked that I
11 redefine or give them an additional -- a reinstruction
12 defining malice and defining voluntary manslaughter.

13 So bring them back, please.

14 (Whereupon, the jury returned to the courtroom at
15 3:00 p.m.)

16 THE COURT: All right. Mr. Foreman, I understand you
17 and your fellow jurors would like for me to provide you a
18 reinstruction on the definition of malice and also the
19 definition of voluntary manslaughter.

20 THE FOREMAN: Yes, sir.

21 THE COURT: All right. Malice as an essential element
22 of the crime of murder is a state of mind connoting an ill
23 will and having an intent to do harm.

24 It is a technical term importing wickedness and
25 excluding just cause or legal excuse. It is something

Jury charge

1 which springs from depravity, from a heart devoid of social
2 duty and fatally bent on mischief. It is a state of mind
3 indicating an extreme disregard for or an extreme
4 indifference to human life.

5 Malice may be likewise defined as a state of mind
6 which indicates a formed purpose and design to do a
7 wrongful act under circumstances that exclude any legal
8 right to do it.

9 And malice may be either expressed or implied. The
10 terms expressed or implied do not mean different types of
11 malice but simply the manner in which malice may be shown
12 to have existed, that is to say by proof, by direct
13 evidence or proof by circumstantial evidence from which
14 malice might be reasonably inferred.

15 Mr. Seay --

16 THE BAILIFF: Yes, sir.

17 THE COURT: -- I don't want anyone coming in and out
18 of that door.

19 THE BAILIFF: All right, sir.

20 THE COURT: Malice may be expressed as where there is
21 an expressed threat to kill or a lying in wait or where the
22 circumstances show directly that the intent to kill was
23 entertained by the killer.

24 Malice may be inferred, though no expressed intent to
25 kill is proven by direct evidence, where the facts and

Jury charge

1 circumstances which have been proven by the evidence in the
2 case satisfy you beyond a reasonable doubt that malice was
3 present in the mind of the defendant at the time any
4 killing took place.

5 And the existence of malice may be inferred from acts,
6 declarations and conduct of the defendant, as well as any
7 other circumstances shown to have existed at the time of
8 the event.

9 Malice as an essential element of the crime of murder
10 does not necessarily require proof of an actual or specific
11 intent to take human life, but rather it means a state of
12 mind accompanying conduct signifying a general malignant
13 recklessness and an extreme disregard for or an extreme
14 indifference to human life.

15 And malice must be malice aforethought, the law not
16 requiring that malice exist for any appreciable length of
17 time before the commission of an act causing a fatal
18 result. Indeed, it might be conceived at the very moment
19 that the fatal act is committed.

20 It is sufficient in the law so long as the state does
21 prove beyond a reasonable doubt both the existence of
22 malice and the commission of an act or acts by the
23 defendant which proximately caused the fatal result.

24 Manslaughter is defined as an unlawful killing of a
25 human being without the element of malice either expressed

Jury charge

1 or implied being present. While the element of malice must
2 be proven in order for the defendant to be found guilty of
3 the crime of murder, malice is not an essential element of
4 the offense of voluntary manslaughter.

5 Voluntary manslaughter is defined in the law as the
6 unlawful killing of another human being which is committed
7 in sudden heat of passion provoked by a sufficient legal
8 provocation.

9 The law recognizes that sudden heat of passion arising
10 out of exasperation, rage, anger, sudden resentment, fear
11 or terror may for the time being affect the self control of
12 an individual temporarily disturbing the ability to
13 properly reason creating an uncontrollable impulse to do
14 violence and therefore reduces the crime from that of
15 murder to that of voluntary manslaughter provided that the
16 killing was committed in sudden heat of passion and that
17 that sudden heat of passion arose from a sufficient legal
18 provocation.

19 The sudden heat of passion aroused by a sufficient
20 legal provocation which may reduce a homicide from that of
21 murder to that of voluntary manslaughter need not dethrone
22 reason entirely or shut out knowledge and volition, but it
23 must be such heat of passion provoked by such facts or
24 circumstances as would naturally disturb the ability of an
25 ordinary reasonable and prudent person to properly reason

Jury charge

1 rendering his mind incapable of cool reflection and
2 producing what according to human experience may be
3 described as an uncontrollable impulse to do violence.

4 All right. I think that covers the definition of
5 malice and voluntary manslaughter.

6 So as you go back to continue with your deliberations
7 if that is not sufficient, please let me know, and I'll be
8 happy to try to provide you with an additional
9 clarification or explanation.

10 Okay. So I'll ask the 12 primary jurors to go with
11 the bailiff back to your jury room.

12 The two alternates will go with the bailiff to a
13 separate room.

14 (Whereupon, the jury retired to deliberate at
15 3:07 p.m.)

16 THE COURT: Are there any exceptions taken to that
17 additional instruction by the state?

18 MS. REESE: Your Honor, did you charge sufficient
19 legal provocation?

20 THE COURT: I thought I did.

21 MS. REESE: I'm sorry. I didn't hear it. If you did,
22 I'm sorry.

23 THE COURT: I'm certain I did. Y'all don't think I
24 did?

25 MS. REESE: I'm not, I'm not sure, Your Honor.

1 MS. JONES: I just missed that. I'm sorry.

2 (Whereupon, the relevant portion was read by the court
3 reporter.)

4 MS. JONES: But there was no definition of sufficient
5 legal provocation.

6 THE COURT: Well, the definition is it must be such
7 heat of passion provoked by such facts or circumstances as
8 would naturally disturb the ability of an ordinary
9 reasonable and prudent person to properly reason and
10 rendering his mind incapable of cool reflection.

11 MS. REESE: I just missed that. I'm sorry.

12 THE COURT: Y'all pay careful attention, now.

13 All right. Any exceptions?

14 MS. JONES: Your Honor, we have no exceptions to that,
15 that particular jury charge.

16 However, I did find the case law in terms of if the
17 defendant was justified in using force in firing the first
18 shot he is justified in continuing to shoot.

19 That was actually a jury instruction given in Douglas
20 vs. State, which is 504 S.E., 2d. 307, South Carolina,
21 1998. And the Supreme Court indicated that that was
22 actually a proper instruction to give.

23 He was actually asking for a different instruction,
24 but the Court noted because this one was actually given
25 that was sufficient.

1 There is also State vs. Hendrix that indicated that
2 self-defense -- he was entitled to self-defense as a matter
3 of law and the defendant was entitled to a directed verdict
4 despite the fact he shot a shotgun four times in rapid
5 succession, did not indicate that it was excessive force.
6 That is State vs. Hendrix, 244 S.E., 2d 503, 1978, Your
7 Honor.

8 So we would again renew our request to have the jury
9 instruction that basically if you fire once you are allowed
10 to continue shooting until the threat is removed. And I
11 can provide those two cases for your review, sir.

12 THE COURT: Please do.

13 Well, in the Douglas case that just happens to be what
14 the trial judge gave. And the Supreme Court said that was
15 sufficient, because there was another request made. But
16 the law -- what the Supreme Court did say -- if this is the
17 Supreme Court -- it is the Supreme Court.

18 It simply says that the Court found that the trial
19 court's charge was consistent with the dictates of
20 Campbell. And the dictates of Campbell were that the
21 defendant does not have to wait until the deceased gets the
22 drop on him or the deceased begins to shoot him. He has a
23 right to act upon the law of self-preservation. And I've
24 instructed the jury on that.

25 So I think, I think the law has been properly

Verdict

1 communicated to the jury. So I note your request, although
2 it comes after the deliberations have already begun.

3 All right. We will continue to be at ease while the
4 jury is deliberating.

5 (Question from the jury marked Court's Exhibit No. 1.)

6 (Whereupon, a recess was taken.)

7 THE COURT: I understand the jury has reached a
8 decision. Are we ready to receive the verdict?

9 MS. REESE: Yes, Your Honor.

10 MS. JONES: Yes, sir.

11 THE COURT: Okay. Bring them in, please.

12 (Whereupon, the jury returned to the courtroom at 4:25
13 p.m. to report its verdict.)

14 THE COURT: Mr. Foreman, have you and your fellow
15 jurors reached a unanimous decision?

16 THE FOREMAN: Yes, sir, we have.

17 THE COURT: Have you indicated those decision on the
18 back of the indictment as requested?

19 THE FOREMAN: Yes, sir.

20 THE COURT: Did you sign your name and date it?

21 THE FOREMAN: Sure did.

22 THE COURT: Okay. If you will, please hand that form
23 up by way of the bailiff. She'll come to you.

24 You may publish the verdict.

25 THE CLERK: State of South Carolina, County of

Verdict

1 Spartanburg, Indictment No. 2008-GS-42-5308, State vs.
2 Manuel Antonio Marin, indictment for murder, we, the jury,
3 find count one, murder, guilty; count two, guilty.

4 Signed by the foreperson, Steven Hill, today's date,
5 10/27/2010.

6 Ladies and gentlemen of the jury, is this is your
7 verdict and still your verdict? If so, please raise your
8 right hand.

9 (Whereupon, all jurors responded in the affirmative.)

10 THE CLERK: So say you all.

11 THE COURT: Does the defendant wish to have the jury
12 polled?

13 MS. JONES: Yes, sir.

14 THE COURT: All right. Poll, poll the jury please,
15 ma'am.

16 THE CLERK: Ladies and gentlemen of the jury, I'll be
17 asking you a question, and that question is is this your
18 verdict and still your verdict.

19 Once I call your name and jury number, if you'll just
20 answer yes or no.

21 Juror No. 156, Robert Thrailkill.

22 THE JUROR: Yes.

23 THE CLERK: Juror No. 25, Doris Burris.

24 THE JUROR: Yes.

25 THE CLERK: Juror 139, Charles Sinclair.

Sentence

1 THE COURT: Anything further prior to the imposition
2 of sentence?

3 MS. JONES: Yes, Your Honor.

4 We would make a motion for a new trial based upon our
5 directed motions that we made, more specifically that there
6 was no sufficiency of the -- there was not enough evidence.
7 Your Honor, there was no evidence of malice to take that to
8 the jury, as well as venue was not properly established.

9 We also believe that we're entitled to a directed
10 verdict via the castle doctrine in that my client was
11 acting in self-defense and was -- and should have been
12 granted prop -- immunity, Your Honor, as well as the jury
13 instructions regarding the castle doctrine, 16-11-450(c),
14 as well as the other one that we discussed quite
15 extensively regarding if you're entitled to shoot once you
16 are entitled to shoot until the threat is abated, and any
17 other objections that we made during the trial, sir.

18 THE COURT: All right. That motion is denied.

19 (Pause.)

20 THE COURT: All right. Anything further on behalf of
21 the state?

22 MS. REESE: Yes, Your Honor. Two of the family
23 members of the victim would like to address Your Honor.
24 And I do have a prior record.

25 THE COURT: Okay.

Sentence

1 THE COURT: All right. On Indictment 2008-5308, count
2 one charging the defendant with murder, wherein you have
3 been found guilty by the jury for that offense, the
4 Sentence of the Court is you, Manuel Antonio Marin, be
5 confined to the South Carolina Department of Corrections
6 for the period of your natural life.

7 Count two, possession of a firearm during the
8 commission of a violent crime, no sentence is imposed
9 pursuant to 16-23-490 in that a life sentence has been
10 imposed for count one.

11 Now, Mr. Marin, you have a right to appeal the
12 verdicts of the jury and the Sentence of the Court. You
13 must file any notice of your intention to appeal those
14 decisions within ten days of today's date. Your lawyer
15 will discuss that with you.

16 END OF REQUESTED TRANSCRIPT OF RECORD

17

18

19

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24

25

SPARTANBURG COUNTY CLERK'S OFFICE

Computer

1. REPORTED ☒

3. CARD FILED ☒

4. INDEXED ☒

5. CHECKED ☒

6. CHECKED SIGNATURE ☒

Computer

7. ASSESSMENT AND FINE CARD FILED ☒

8. TRAFFIC VIOLATIONS ☒

ARREST WARRANT NUMBER

M023052 and DIRECT INDICTMENT

ACTION OF GRAND JURY

True Bill

[Signature]

Foreperson of Grand Jury

Date: 8/21/08

VERDICT

Count I: *MURDER GUILTY*

Count II: *GUILTY*

[Signature]

Foreperson of Petit Jury

Date: 10/27/10

DOCKET NO. **08-GS-42-5308**

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

AUG 25 2008

TERM

THE STATE

vs.

Manuel Antonio Marin

Indictment for
MURDER AND POSSESSION
OF FIREARM DURING COMMISSION
OF A VIOLENT CRIME

SC Code 16-03-0010, 0020 and 16-23-490

CDR CODE: 0116: 0549

CLASS: FEL-EXM: FEL/F

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2008 AUG 26 PM 3:25

MARC KITCHENS

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on AUG 21 2008, the
Grand Jurors of Spartanburg County present upon their oath:

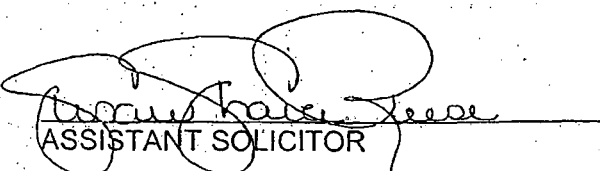
COUNT ONE—MURDER

That Manuel Antonio Marin did in Spartanburg County on or about July 21, 2008, feloniously, willfully and with malice aforethought, kill one Nelson Fernando Tabares, by shooting the victim with a gun, and that the said victim died as a proximate result thereof, all in violation of §16-3-0010, 0020, *CODE OF LAWS OF SOUTH CAROLINA*, (1976, as amended).

**COUNT TWO—POSSESSION OF FIREARM DURING
COMMISSION OF A VIOLENT CRIME**

That Manuel Antonio Marin did in Spartanburg County on or about July 21, 2008, possess a firearm, during the commission of a violent crime as defined in Code §16-1-60, to wit: MURDER, in violation of Code §16-23-490. *CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended

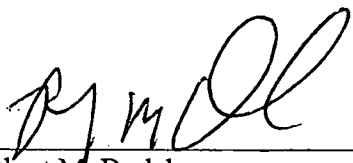
Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

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 and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 5th, 2012



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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MANUEL ANTONIO MARIN,

APPELLANT

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUES ON APPEAL.....	3
STATEMENT OF THE CASE	4
ARGUMENT	
1.	
The court erred by refusing to instruct the jury on self-defense that a defendant acting in self-defense had the right to continue shooting until it was apparent that the danger of death or serious bodily injury had ended since this was a widely accepted correct instruction on the law, and appellant had a right to have the instruction crafted to the facts of the case.	5
Relevant Facts	5
Exceptions	10
Discussion	11
2.	
The court erred by refusing to charge South Carolina Code § 16-11-450(a) that a person protected by the Castle Doctrine who was acting lawfully was immune from criminal or civil prosecution, since the judge erred by refusing to give a full jury instruction on the Castle Doctrine where it was raised by the evidence in this case	13
Relevant Facts	13
CONCLUSION	15

TABLE OF AUTHORITIES

Cases

<u>Douglas v. State</u> , 332 S.C. 67, 504 S.E.2d 307 (1998).....	12
<u>State v. Burriss</u> , 334 S.C. 256, 513 S.E.2d 104 (1999)	14
<u>State v. Duncan</u> , 392 S.C. 404, 709 S.E.2d 662 (2011)	13, 14
<u>State v. Fuller</u> , 297 S.C. 440, 377 S.E.2d 328 (1989)	11
<u>State v. Gaines</u> , 380 S.C. 23, 667 S.E.2d 728 (2008).....	14
<u>State v. Hardin</u> , 114 S.C. 80, 103 S.E. 557 (1920).....	11
<u>State v. Hendrix</u> , 270 S.C. 653, 244 S.E.2d 503 (1978).....	11, 12
<u>State v. Jackson</u> , 227 S.C. 271, 87 S.E.2d 681 (1955)	11
<u>State v. Rye</u> , 375 S.C. 119, 651 S.E.2d 321 (2007)	10

Statutes

South Carolina Code § 16-11-440.....	9, 13
South Carolina Code § 16-11-450.....	9, 10, 13

STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by refusing to instruct the jury on self-defense that a defendant acting in self-defense had the right to continue shooting until it was apparent that the danger of death or serious bodily injury had ended since this was a widely accepted correct instruction on the law, and appellant had a right to have the instruction crafted to the facts of the case?

2.

Whether the court erred by refusing to charge South Carolina Code § 16-11-450(a) that a person protected by the Castle Doctrine who was acting lawfully was immune from criminal or civil prosecution, since the judge erred by refusing to give a full jury instruction on the Castle Doctrine where it was raised by the evidence in this case?

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County Grand Jury for the offenses of murder and possession of a weapon during a violent crime. His case was called to trial on October 25, 2010 before the Honorable J. Derham Cole, and a jury. Tanya Jones represented appellant. Jennifer Jordan and Susan Reese were the assistant solicitors. R. 1

On October 27, 2010, the jury found appellant guilty on both counts. R. 343, l. 25 – 344, l. 3. Judge Cole sentenced appellant to life imprisonment for murder. R. 346, ll. 1-6.

This appeal follows.

ARGUMENT

1.

The court erred by refusing to instruct the jury on self-defense that a defendant acting in self-defense had the right to continue shooting until it was apparent that the danger of death or serious bodily injury had ended since this was a widely accepted correct instruction on the law, and appellant had a right to have the instruction crafted to the facts of the case.

Relevant Facts

Diane Tabares testified that on July 20, 2008 her brother, the decedent, was going to the Colombian Independence Festival. She testified the decedent had a website named “crazylatino.com,” and he liked to take photographs at events such as this one. R. 2, l. 16 – 4, l. 23.

It was undisputed that the decedent ended up late that night at Bongos Nightclub in Greenville, South Carolina. R. 12, l. 13 – 14, l. 18. Larry Rodriguez, the owner of Bongos, testified he had known the decedent for a long time and the decedent was not feeling well that night. Rodriguez would be the only witness to testify the decedent was not extremely intoxicated: “He was just not feeling good.” R. 13, l. 21 – 14, l. 18. Actually, he had a blood-alcohol reading of .323. R. 173, ll. 22-25.

A bouncer at Bongos, Christopher McDonald, acknowledged the bar staff had to “cut him off” at the bar. McDonald said that although the decedent was “just pretty much stumbling everywhere” and “couldn’t really stand up” that “he knew what he was doing.” R. 20, l. 10 – 22, l. 15. McDonald and Rodriguez were looking for someone to give the

decedent a ride home when "Manual [appellant] spoke up and said I will [give him a ride]."

R. 22, l. 11 – 23, l. 10.

McDonald remembered that he "basically carried him [the decedent] out and actually put him in the truck [appellant's SUV]." McDonald recalled appellant reached for his laptop and typed in the decedent's address -- apparently on the GPS -- that went with his laptop. R. 22, l. 11 – 24, l. 22. McDonald claimed: "He [the decedent] knew where he was at but as far as incoherent, I mean, he was still with us but not too much out of it, no." R. 29, ll. 12-17.

It was undisputed that appellant drove, and that his friend Alfredo Jimenez (his former brother-in-law) rode in the front seat. The decedent was placed in the backseat of appellant's SUV. R. 243, l. 21 – 244, l. 6.

Larry Gory was apparently coming home from "personal business" early that morning when he came upon appellant and Jimenez standing beside the road. Gory said it appeared they were trying to "pull something away from each other . . . one of the guys said could [you] call the police, he just – he shot him." R. 41, ll. 3-24.

Spartanburg Police Officer Jeffery Powell testified he arrived on the scene at about 4:04 a.m. and he recalled seeing appellant and Jimenez. Powell testified: "One of them was sitting in the intersection and one standing in the intersection of Daniel Morgan Avenue and West Main Street." He recalled that one of the men was very calm and the other was very upset. R. 49, l. 17 – 50, l. 13. Powell saw a weapon lying on the sidewalk and he picked it up and put it in his trunk. R. 51, l. 15 – 52, l. 7.

Powell remembered: "I asked him where it happened at, and he would just say Wal-Mart. He did say Wal-Mart . . . he said that the other individual [the decedent] was grabbing

a hold of the steering wheel” and he was trying to wreck appellant’s SUV. R. 56, ll. 9-18. Jimenez told Powell that they had left a club in Greenville and were supposed to be taking the decedent home and when they apparently passed what he thought was “his road” and “[h]e got very upset and was trying to, to get them to stop the car, and the driver wouldn’t stop. He said he just wouldn’t stop. And he said that was when he started fighting with the driver.” R.59, ll. 2-21. Jimenez never testified, and it was unclear from the record in this case if he disappeared prior to trial or why he was not called as a witness.

Appellant later testified in his own defense. Appellant was the marketing director for a newspaper, and he recalled the events of July 20, 2008. R. 225, ll. 4-10.

Appellant went to the Colombian Festival that evening and after that he made his way to Bongos Nightclub. R. 225, l. 8 – 226, l. 20. Appellant was mingling with Alfredo Jimenez when Larry Rodriguez, the owner of the club, asked him to give the decedent a ride home “and I agreed.” R. 227, l. 5 – 228, l. 9.

Appellant remembered one of the bouncers gave him the decedent’s driver’s license “and I put the address on my laptop.” The laptop included a GPS. R. 230, l. 12 – 231, l. 20.

Appellant recalled as they were driving he was talking with Alfredo “about the three Americans that had been liberated that past week, I mean, yeah, the past week, and the presidential candidate that [was] were kidnapped in Colombia.” R. 231, l. 23 – 232, l. 6.

While he was talking with Jimenez, the decedent jumped up from the backseat and put appellant in a headlock: “I hit the breaks. I hit the breaks, and the car went on the oncoming lane. And it was headed towards a telephone pole. But I got the car back on the road.” R. 232, l. 11 – 233, l. 12.

Appellant said he was very scared after he almost hit the telephone pole, and "at that point . . . I decided not to take him home. I was just trying to find a public place, you know, people where I could, you know, possibly jump out of the car and get some help . . ." R. 234, ll. 8-14. Appellant testified that given the hour "nothing seemed to be open . . . all of a sudden, you know, Mr. Tabares [the decedent] jumps up and grabs the steering wheel and he tries to run the car off the road . . . I kept pushing him, pushing him back . . ." Appellant said the decedent continued coming after him, and "I grabbed the glove box and opened the glove box and got the pouch out which I had the gun in it . . . I pulled the gun out and I shot Mr. Tabares." R. 234, l. 5 – 236, l. 11.

Appellant identified a photograph of the pouch at trial. Appellant said the decedent fell on his knee and "I was terrified. I was really shocked." Appellant continued to look for a public place where he could stop the car and that he ended up in downtown Spartanburg. R. 236, l. 2 – 237, l. 18.

Appellant testified that Jimenez was also in shock when the men got out of the car. They were both talking "fairly loud": "[W]hy was he trying to kill me? Why was he trying to run us off the road?" Appellant said Jimenez "grabbed the gun, and I let him have it." Appellant did not recall where Jimenez put the gun. R. 238, ll. 1-21. However, as seen above, the gun was found nearby by the police officer and placed in his trunk. Appellant testified, "I sat down and waited for the police to come . . . I sat down on the median." R. 239, ll. 7-20.

On cross-examination, appellant explained to the solicitor that it was very dark as he was driving that night and he was trying to keep the decedent from "killing us" by wrecking his SUV. R. 248, l. 1 – 251, l. 4. When the solicitor asked appellant on cross-examination

why there were *two shots* fired, appellant answered: "It just happened within seconds." R. 250, l. 22 – 252, l. 16.

Defense counsel requested jury instructions on self-defense and the Castle Doctrine pursuant to South Carolina Code § 16-11-440(c) and South Carolina Code § 16-11-450 which instructed the jury that a person entitled to the protection of the Castle Doctrine (acting lawfully, in a place he had a right to be) was immune from criminal and civil prosecution for use of deadly force against an attacker. An automobile was obviously provided with just as much protection from attack as residence.¹ R. 256, l. 6 – 265, l. 7.

The judge stated he was not inclined to instruct the jury on South Carolina Code §16-11-450. R. 265, ll. 4-7. The judge ultimately charged the jury on part of the Castle Doctrine, having noted beforehand that he thought that portion was already covered by basic principles of self-defense anyway. The judge charged the jury:

Section 16-11-440(c) provides that a person who is engaged - - let me start over. Section 16-11-440(c) provides that a person who is not engaged in an unlawful activity and who is attacked in a place where he has a right to be, including his home, business, or motor vehicle, has no duty to retreat and has the right to stand his ground and to meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or to another person.

There is however a requirement of objectivity. In other words, the belief must be reasonable.

R. 319, ll. 10-21.

¹ Defense counsel also requested a jury instruction on involuntary manslaughter which is not an issue on appeal since appellant shot the gun in protection of himself and Jimenez under the Castle Doctrine.

Exceptions

Defense counsel took exception to the judge not charging the jury that a person acting in self-defense could "continue shooting until it is apparent that the danger of death or serious bodily injury has been completed" R 331, l. 14 – 334, l. 24. Counsel also took exception to the judge's refusal to charge South Carolina Code § 16-11-450 (a) on a person acting lawfully pursuant to South Carolina Code Section 16-11-440(c) above was immune from criminal or civil prosecution. R. 333, l. 12 – 335, l. 10.

Defense counsel said although State v. Rye might not be the case on point for the principle of law that one acting in self-defense had the right to continue to act or shoot until the threat of death or great bodily injury was removed that that *was a correct proposition of law*. She told the judge that this jury charge had been on the criminal defense lawyer's listserv. The judge stated: "Well I understand that." R. 333, l. 12 – 335, l. 10. However, the judge maintained that he considered this instruction a comment on the facts and he ruled was not going to charge it. R. 335, ll. 4-10.

After the judge recharged the jury on murder and voluntary manslaughter at the request of the jury, defense counsel and the judge discussed Douglas v. State and State v. Hendricks, which firmly stated this elementary principle of self-defense that if a person fired once in self-defense he was allowed to continue shooting *until the threat was removed*. R. 341, l. 14 – 343, l. 2.

The judge noted he had charged the jury that defendant did not have to wait for the decedent to get the drop on him, and he maintained that his instructions were sufficient under the law. R. 342, l. 12 – 343, l. 2.

Discussion

The solicitor in this case brought out the fact that appellant shot the decedent twice. Appellant explained that the shots were fired rapidly when he was attacked.

In State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989), the Court held the trial judge had a duty to craft his self-defense instruction to the facts of the case. In State v. Fuller, the Court noted the trial judge erred in not charging a jury that in a self-defense case a defendant had the right to act on appearances.

In Fuller, the judge also erred in not charging that “words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense.” Finally, the judge erred in not instructing that an individual had no duty to retreat if by doing so he would increase his danger of being killed or suffering serious bodily injury. See, State v. Jackson, 227 S.C. 271, 87 S.E.2d 681 (1955); State v. Hardin, 114 S.C. 80, 103 S.E. 557 (1920).

Here, the proper jury instruction appellant wanted was similar in content – although a different principle – to the one just above in State v. Fuller that was improperly refused. The solicitor was playing on the incorrect sophomoric idea that you never have to shoot more than once to defendant yourself. Self-defense is not an algebra problem and a defendant has the right to have the jury understand that. It was an elementary request on the law that once a defendant *properly fires in self-defense he can continue firing* until the danger is removed.

In State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978), the Supreme Court rejected the State’s argument that Hendrix used excessive force by firing four times. The

Court noted that the rule is that "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." State v. Hendrix, 270 S.C. at 661, 244 S.E.2d at 507.

In Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998), the Supreme Court noted the judge had charged that if the defendant was justified in firing the first shot he was justified in firing in continuing to shoot until any danger to his life and body had ceased. The jury had a right to know that firing more than one shot was not excessive force and that it did not remove a legitimate case of self-defense. Here, again, it is clear appellant fired two shots and the solicitor made a point of that during her cross examination of appellant.

This is a legitimate case of self-defense. Appellant acted consistently with a person acting in self-defense. He waited on the police to arrive and he was in shock and disturbed after the bizarre events that the grossly intoxicated decedent – with a .323 blood-alcohol reading – had inflicted on him. R. 273, ll. 1-25. Appellant described how the decedent grabbed him from the backseat and almost caused him to hit a telephone pole after his SUV was forced into oncoming traffic. Appellant was entitled to a fair trial with a properly instructed jury on self-defense.

The court erred by refusing to charge South Carolina Code § 16-11-450(a) that a person protected by the Castle Doctrine who was acting lawfully was immune from criminal or civil prosecution, since the judge erred by refusing to give a full jury instruction on the Castle Doctrine where it was raised by the evidence in this case.

Relevant Facts

As seen, defense counsel requested jury instructions on the Castle Doctrine pursuant to South Carolina Code § 16-11-440(C) and South Carolina Code § 16-11-450(a). The judge stated that he would charge 16-11-440(C) that “a person who was not engaged in unlawful activity and was attacked in a place where he had a right to be had no duty to retreat and had the right to stand his ground and meet force with force, including deadly force, if he reasonably believed it necessary to prevent death or great bodily injury to himself or another person” However, the judge refused to charge the jury that a person who used deadly force as permitted by the Castle Doctrine -- who was justified in deadly force -- was immune from criminal prosecution and civil action for use of deadly force. The judge refused to give this instruction, arguing that he thought immunity was not a jury function.

It is thus ironic, that undersigned counsel, one of the appellate attorneys in State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011), witnessed the Attorney General’s office argue on appeal in Duncan that the provisions of 16-11-450 were in fact *a jury instruction and not an issue of immunity to be decided pre-trial*. This case was tried before State v. Duncan was decided where our Supreme Court held the trial judge properly granted immunity pre-trial to Duncan where he shot another man who attempted to enter his porch after being told to leave because of crude remarks he made about Duncan’s daughter.

In State v. Duncan, the Court held that when a party properly raises the statutory immunity prior to trial the proper standard for the circuit court to use under the Act was whether a defendant proved his right to immunity by a preponderance of the evidence.

With the guidance of State v. Duncan today, it appears the Court in Duncan did **not** hold that if a defendant did *not raise the immunity pre-trial*, i, or if the judge refused to grant immunity pre-trial, that the defendant was barred from receiving a proper jury instruction under the Castle Doctrine *as requested here*.

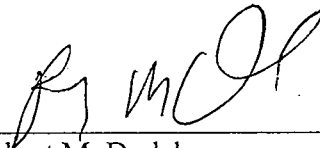
By enacting the Castle Doctrine the General Assembly provided it was law of this state. Moreover, it is elementary that the law to be charged is determined by the evidence presented at trial. State v. Gaines, 380 S.C. 23, 31, 667 S.E.2d 728, 732 (2008). If there is any evidence to support a jury charge, the trial judge should give the requested charge on the matter. State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999).

Here, the jury should have understood the policy determination in South Carolina that a person acting lawfully where he had the right to be, *here in his care and under attack*, was immune from criminal prosecution. The judge's decision to charge only part of the Castle Doctrine was error, and appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Spartanburg County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

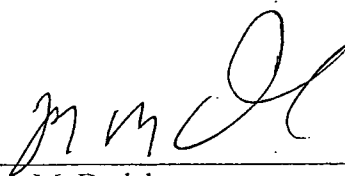
ATTORNEY FOR APPELLANT

This 20th day of September, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 20th, 2012



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MANUEL ANTONIO MARIN,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of September, 2012.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of September, 2012.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge

Appellate Case No. 2010 - 177349

THE STATE,

Respondent,

V.

MANUEL ANTONIO MARIN,

Appellant

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
APPELLANT’S STATEMENT OF ISSUES ON APPEAL.....	1
RESPONDENT’S STATEMENT OF THE CASE.....	2
RESPONDENT’S VERSION OF THE FACTS.....	2
Requests to Charge	11
ARGUMENTS	
I. The trial court did not err in its charge to the jury on the law of self-defense.....	12
II. The trial judge’s charge under the Castle Doctrine was a proper statement of the law.....	28
A. The trial judge's charge under the Castle Doctrine was proper statement of the law	28
B. The immunity provision under the Act was not intended to be a jury function.	29
C. The creation of a judicial fix to a statutory dilemma.....	30

D.	The remedy of a pre-trial motion for immunity only applies prospectively	31

E.	The trial judge's failure to charge the jury on the issue of immunity, or to hold a pretrial hearing as to same, even if error, was harmless	32

CONCLUSION.....	34

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

<i>Anderson v. Liberty Lobby Inc.</i> , 477 U.S. 242, 250-51, 106 S.Ct. 2502, 2511 (1986)	33
<i>Douglas v. State</i> , 332 S.C. 67, 504 S.E.2 nd 301 (SC 1998).....	19,20, 21
<i>Hercules Inc. v. South Carolina Tax Comm.</i> , 274 S.C. 137,262 S.E. 2 nd 45 (1980).....	30
<i>Lynch v. Toys “R” Us- Delaware, Inc.</i> , 375 S.C. 604, 654 S.E.2 nd 541 (Ct. App.	
2007).....	22
<i>State v. Adkins</i> , 353 S.C. 312, 317-18, 577 S.E. 2 nd 469 (Ct. App. 2003).....	32
<i>State v. Brayboy</i> , 387 S.C. 174, 691 S.E.2 nd 482 (S.C. App. 2010)	11, 23, 24
<i>State v. Campbell</i> , 111 S.C. 112, 113, 96 S.E. 543, 544 (1918).....	19, 20
<i>State v. Davis</i> , 282 S.C. 45, 317 SE 2 nd 452 (SC 1984)	22
<i>State v. Dickey</i> , 380 S.C. 384, 403-405, 716 S.E. 2 nd 917, 927-28, (Ct. App. 2011)	30
<i>State v. Dickey</i> , 394 S.C. 491, 499-503, 716 S.E. 2 nd 97 (SC 2011)	29,30
<i>State v. Duncan</i> , 392 S.C. 404, 709 S.E.2 nd 662(SC 2011)	passim
<i>State v. Fuller</i> , 297 S.C. 440, 377 S.E.2 nd 328 (SC 1989).....	22
<i>State v. Hardin</i> , 114 S.C. 280, 103 S.E. 557, 558-59(SC 1920)	23
<i>State v. Hendrix</i> , 270 S.C. 653, 657-658, 244 S.E. 2 nd 503 (SC 1978).....	passim
<i>State v. Hicks</i> , 305 S.C. 277, 407 S.E. 2 nd 907 (1991).....	20, 27
<i>State v. Kelsey</i> , 331 S.C. 50, 502 S.E.2 nd 63 (1998).....	33
<i>State v. Prince</i> , 316 S.C. 57, 447 S.E.2 nd 177, 182 (SC 1994)	33
<i>State v. Rye</i> , 375 S.C. 119, 651 S.E. 2 nd 321 (SC 2007).....	23, 25, 26
<i>State v. Santiago</i> , 370 S.C. 153, 634 S.E. 2 nd 23,27 (Ct. App. 2006).....	14
<i>State v. Slater</i> , 373 S.C. 66, 644 S.E.2 nd 50 (SC 2007)	14
<i>State v. Wigington</i> , 375 S.C. 25, 649 S.E. 2 nd 185(Ct. App. 2007)	14

<i>State v. Wood, 1 S.C.L. (1 Bay)(1794)</i>	16

STATE STATUTES

<i>S.C. Code Ann. Sec. 16-3-910</i>	22
<i>S.C. Code Ann. Sec. 16-11-430(1) and (4)</i>	25
<i>S.C. Code Ann. Sec. 16-11-440(C)</i>	28, 32
<i>S.C. Code Ann. Sec. 16-11-450(A)(Supp. 2010)</i>	30

AUTHORITIES

<i>Black's Law Dictionary p. 505 (West 6th Ed. 1990)</i>	25
<i>McAninch, The Criminal Law of South Carolina, (The South Carolina Bar, 4th Ed., 2002)</i>	13,16

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I.

Whether the court erred by refusing to instruct the jury on self-defense that a defendant acting in self-defense had the right to continue shooting until it was apparent that the danger of death or serious bodily injury had ended since this was a widely accepted correct instruction on the law, and appellant had a right to have the instruction crafted to the facts of the case?

II.

Whether the court erred by refusing to charge South Carolina Code §16-11-45(a) that a person protected by the Castle Doctrine who was acting lawfully was immune from criminal or civil prosecution, since the judge erred by refusing to give a full jury instruction on the Castle Doctrine where it was raised by the evidence in this case?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Manuel Marin, murdered the victim, Nelson Tabares, on July 21, 2008 in Spartanburg County. Appellant was arrested the same date. Appellant was subsequently indicted by the Spartanburg County Grand Jury for murder and possession of a weapon during a violent crime. (Indictment no. 2008-GS-42-5308).

Appellant was tried by a jury beginning on October 25, 2010, the Honorable J. Derham Cole, Circuit Court Judge presiding. (ROA. p. 1). Assistant Solicitors Susan Reese and Jennifer Jordan of the Office of the Solicitor for the Seventh Judicial Circuit prosecuted the case for the State. Appellant was represented by Tanya Jones, Esq. Assistant Public Defender for the Seventh Judicial Circuit. (ROA. p. 1).

At the conclusion of the trial on October 27, 2010, Appellant was found guilty of murder and possession of a weapon during a violent crime. (ROA. pp. 343-344). Judge Cole sentenced Appellant to life for murder and five (5) years concurrent for the weapon charge. (ROA. p. 346). This appeal followed.

RESPONDENT'S VERSION OF THE FACTS

Appellant claims reversible error arising from issues concerning self-defense. These claims are made against a backdrop of overwhelming proof of the fact that the Appellant shot the victim twice in the back of the head at point blank range during the early morning hours on or about July 21, 2008.

The victim, Nelson Tabares, was a well-known celebrity in the Latino community of Greenville. He was a computer professor at the local technical college who also advertised Latino events (July 20 is Colombian Independence day) on his commercial

web-page, Crazylatino.com. (ROA. p. 2, line 13 - p. 4, line 19). A day that ended in his brutal murder included an Independence Day celebration he attended where he took photos for his website. Afterwards, he attended an after-party at Bongo's restaurant and bar on East North Street in Greenville. (ROA. p. 3, line 9 - p. 5, line 10).

The victim's wife was Colombian, a working mother who assisted her husband in his web-site business as a translator because she was more proficient in Spanish than he was. (ROA. p. 8, lines 4- 11). She went to bed the evening of the murder after turning down the volume on the telephone. (ROA. p.10, lines 13- 21).

The owner of Bongo's testified that on the night of the murder the victim stayed until closing, was not feeling good and that he, the owner, tried to help the victim phone home, without success. (ROA. p. 12, line 13 - p. 15). One of the bouncers at the club testified that during the course of the evening the victim became intoxicated to the point that the bar cut him off, that he was "pretty much just stumbling everywhere, couldn't really stand up," (ROA. p. 20), but that he was not at all aggressive with anyone. (ROA. p. 20). The victim was then seated by staff in the kitchen, where he remained; at some point, the Appellant and his former brother-in-law, Alfredo Jimenez, (ROA. pp. 21-22; ROA. p. 244), joined them and when the owner and other promoters began discussing how to get the victim home "for some reason [Appellant] spoke up and said I will... [h]e said he knew where he lived." (ROA. p. 22, lines 16-25).

Though the Appellant had at first said he knew where the victim lived, once the victim had been carried to Appellant's car, the victim was too intoxicated to give information. Appellant actually did not know the victim's address. Instead, the victim's address was obtained from his driver's license. (ROA. p. 22-26). The Appellant drove

away with the victim apparently passed out in the back seat and Mr. Jimenez riding in the passenger front seat. (ROA. p. 23, line 15 - p. 26, lines 7). The victim was found later at an intersection in Spartanburg in the same car, shot to death. Mr. Jimenez was at the scene with the Appellant whose pants were covered in the victim's blood.

Ms. Traci Bodner testified that, at a time that would have been later on that same evening/early morning, she was with friends outside an apartment in downtown Spartanburg at the corner of Daniel Morgan and Main Street in Spartanburg when they saw two men arguing heatedly in the street, outside a vehicle; one of the men was in a black shirt, the other in a white shirt. One of the men pulled what appeared to be a handgun out of the other man's pocket and threw it down in the street. (ROA. p. 31, line 21 - p. 33).

Mr. Larry Gory testified that he came by the scene described in Ms. Bodner's testimony. He saw the two men described by Ms. Bodner arguing in the street. He stated that the one in the black shirt told him to call the cops, and that "he (appellant) just shot him." (ROA. p. 41 - p.42, line 23). He saw the gun the two men had been fighting over and then called 9-1-1. (ROA. pp. 42-43).

Officer Jeffery Powell of the Spartanburg Department of Public Safety testified that he responded to the call. At the scene, he found the Appellant wearing white and covered in blood. He was "sitting there calm", while the other individual in the black shirt was "very upset." (ROA. p. 49 - p. 50, line 9).

The individual in the black shirt (later determined to be Mr. Jimenez) "moved away from the other individual, and he's just very upset... he kept saying, 'Dude shot him, dude shot him,' and he would point down the road towards the guy with the white

shirt on.” (ROA. p. 51, lines 10-20.). The man in the black shirt said “he took the gun from [Appellant], and then he pointed towards the sidewalk just a little ways on down. And there was a weapon laying on the sidewalk.” The gun was taken into custody and secured by Officer Powell. (ROA. p. 51, line 22 - p. 52, line 21).

Officer George Brown of the Spartanburg Department of Public Safety testified that he was the shift supervisor on the scene. He testified that, at the scene, he found the Appellant wearing a “white shirt, with blood covering the shirt, sitting across the intersection from where I had pulled up.” (ROA. p. 58, lines 12 to 22).

He also attempted to help calm down an individual in a black shirt. (ROA. p. 58, lines 19-25). The individual in the black shirt remained very upset, “crying...bouncing all over the place,” and told Officer Brown “[Mr. Jiminez] just kept saying, ‘Dude, dude shot him,’ and kept pointing over towards the male in the white shirt... he said that he had taken the gun away from him and that Officer Powell had taken that – that it was the gun that Officer Powell had taken.” (ROA. p. 59, lines 4-11)

Officer Brown further testified that the man told him “they had left a club over in Greenville and that they were supposed to be taking the victim—supposed to be taking him home. And they had gone past his road and he got very upset and was trying to, to get them to stop the car, *and the driver wouldn’t stop. He said he just wouldn’t stop. And he said that was when he started fighting with the driver of the car.*” (ROA. p. 59, lines 15-21)(emphasis added).

Officers found the victim’s body inside the vehicle in the intersection where the two men had been arguing. (ROA. p. 60).

At trial, Appellant's attorney used the out of court statements of Mr. Jimenez in an effort to place a prior written report of the incident before the jury, an effort to discredit Officer Brown with prior inconsistencies between the report and his testimony. It suggested to the jury a theory of defense based on a struggle in the car but had the collateral effect of highlighting the fact that, if any struggle took place, it occurred *solely* between the victim and Appellant. The passenger in the front seat, who was supposedly as much in danger, remained inexplicably detached from the "fight". According to Mr. Jimenez's words at the scene, the struggle would have taken place after Appellant's car continued moving further and further from the victim's home, into Spartanburg County, and over the victim's protests. (ROA. pp. 61-67).

Officer Dale Arterburn of the Greer Police Department retraced the route taken from Bongo's with the other passenger, Alfredo Jimenez. The location of the shooting was determined to have taken place on Highway 29 in Spartanburg County, across from U.S. Lumber Company, far removed from the victim's street address in Greer. This was approximately 6 to 10 miles from downtown Spartanburg where the vehicle finally stopped. (ROA. pp. 76-80).

Gunshot residue examination and other evidence regarding Mr. Jimenez, including fingerprints, blood spatter, placement of relevant physical evidence within the car, and location of road debris on Highway 29 tended to corroborate his story and tended to eliminate him as being the shooter. (ROA. pp. 88-92; ROA. pp. 131-135; ROA. pp. 137-142; ROA. pp. 143-153; ROA. pp. 175-182). It tended to establish that the Appellant was the shooter, using a Ruger 9mm automatic which belonged to him. This was the gun taken from Appellant by Alfredo Jimenez during their argument in downtown

Spartanburg, and thrown by Mr. Jimenez to the curb where it was found and retrieved by investigating officers. (ROA. pp. 93-128; ROA. p. 135; ROA. pp.153-158; ROA. pp. 175-198).

The pathologist testified that the victim was 5'3" tall, 180 pounds, and died from two gunshot wounds to the back of the head. The shots "came close together because they were closely approximated" and one of which was immediately fatal.(ROA. pp.163-164).

The first wound was "irregular in shape, and it had splitting of the skin and underlying beveling of the, of the bone outwards, so indicated there was an exit gunshot wound...that [entry] wound appeared in the right—*into the left occiput region, the back of the head.* It was 6 inches from the top of the head and a half inch to the left of midline. And it was split horizontally, and it—the horizontal dimensions were 5.5 centimeters, and it was half a centimeter wide. You could ap--re-approximate that wound, and it was 1 centimeter in diameter. And the entrance was medially. Now, *the reason it was like that is because it was essentially a contact gunshot wound...* That wound passed into the base of the brain – of the skull. It passed through a large drainage area called the sagittal sinus. It went through the cerebellum, which is an inferior portion of the brain, went through the cerebrum and came out anteriorly... So the path of that bullet was back to front. It was upward at about probably 15 or 20 degrees from the horizontal. And it was almost sagittal, meaning that if you drew a perpendicular line through the face and through the body, that's the sagittal plane. *So it was going from back to front and slightly upward and almost straight through.*" (ROA. p. 164, line 22 to p. 165, line 21)(emphasis added).

The pathologist went on to testify that "wounds three and four were associated gunshot wounds. And as the gunshot wound exited it went through the ear, the pinna of

the ear, the surface of the ear... But, nevertheless, the gunshot wound entered in the right posterior neck. It was a little bit lower, 6.75 inches from the top of the head, and it was a half inch to the right of the midline... This wound also had a little bit of splitting of the skin indicating that it was probably contact, being loose contact. And there was a little bit of charring of the skin surrounding that from the heat of the weapon. The charring was from 5:00 to 1:00 o'clock... *The, the first [wound] I described would have been almost immediately fatal.* The other one would have, like I said; only been potentially fatal. He could have lost consciousness from that one, but more than likely not." (ROA. p. 165, line 22 to p. 167, line 24)(emphasis added).

At the close of the State's case, the Appellant was appropriately advised by the trial judge of his constitutional rights not to have to prove anything in his own defense and his right not to testify, or his right to testify should he choose to do so. He was thoroughly questioned by the trial judge as to whether he wished to take the stand in his own behalf and advised the court that he did not. (ROA. pp. 201-204). The judge denied the request of Appellant's counsel for a directed verdict, (ROA. p. 206-209, line 4), and entertained requests by Appellant's counsel for charges to the jury on voluntary and involuntary manslaughter, self defense under S.C. Code Ann. 16-11-440(c), and statutory immunity from prosecution purportedly under the Castle Doctrine. The trial judge deferred rulings on these jury charge requests overnight. (ROA. pp. 209 to p. 221).

The following morning the Appellant informed the court that he wanted to testify in his own behalf and then did so. (ROA. p. 222 to p. 224, line 7). The Appellant testified that at the time of the incident, he had imbibed only four drinks during the course of the entire day, (ROA. p. 226, lines 3-14; ROA. p. 242, lines 3-9), but that Mr. Jimenez was

intoxicated , (ROA. p. 231, lines 2-7) and the victim was intoxicated. (ROA. p. 229, line 20 to p. 230, line 5). He claimed that he was asked by the club owner to give the victim a ride home, (ROA. p. 228, lines 6-9), but knew of the victim only as an acquaintance. (ROA. p. 291, lines 19-25). He stated that the security guard helped the victim into the back seat of Appellant's vehicle at approximately 3:00 a.m. (ROA. p. 229 to 230). He told the security guard initially that he knew where the victim lived but then had to get his address off his driver's license; then he and Mr. Jimenez, who was riding in the front passenger seat, proceeded up East North Street in Greenville to take the victim home. (ROA. p.230, 231).

According to the Appellant, he and Mr. Jimenez were having a discussion "[a]lmost political in nature" about kidnappings in Colombia by FARC, a revolutionary group which opposes the government there. (ROA. p. 232). The Appellant claimed the victim then sprang from the back seat and grabbed him "[o]n my forehead." (ROA. p. 233). Prompted by constant leading from his attorney, the Appellant elaborated on his terror, his efforts "to find a public place, you know, people where I could, you know, possibly jump out of the car, and get some help you know...I mean, I was looking for a public place with people somewhere stopped." (ROA. p. 234, lines 11-25).

The Appellant testified that he had "been up all day", had "[b]een drinking throughout the day," and was tired. (ROA. p. 235, lines 2-7). He stated the victim kept jumping forward to grab the steering wheel, and that he pushed repeatedly but that did not seem to work. (ROA. p. 235, line 10 to p. 236, line 5). " At that point I pushed him off, and I grabbed the, the glove box and I opened the glove box and got the pouch out

which had the gun in it... I pulled out the gun and I shot Mr. Tabares... He fell on my knee.” (ROA. p. 236, line 2 to p. 237).

Again, with extensive leading from his attorney the Appellant recounted his fear and shock after shooting the victim, driving from a point somewhere on East North Street in Greenville, and ending up in downtown Spartanburg. He elaborated on his confrontation with Mr. Jimenez in Spartanburg while he “still had the gun in [his] hand”, his remaining at that scene, it being “fair to say it’s traumatic” when something like this happens. (ROA. pp. 238-241).

He was asked by his attorney whether he ever thought about stopping the car or slamming on the brakes. The answer was: “No. When, when, I kept pushing him back he, he pulled the car towards, you know, trying to run it off the road. And I saw we were headed towards some trees. So.” (ROA. pp. 240, lines 12-18).

Under cross-examination by the assistant solicitor, the Appellant reiterated his knowledge of the extent of the victim’s intoxication before agreeing to take him home, (ROA. p. 242), and confirmed the road to the victim’s home took him in the opposite direction of his own home. (ROA. p. 243, lines 4-20). The Appellant offered denials and then equivocations that the victim became upset because the Appellant passed by the road he lived on and because Appellant would not stop or turn around when told to do so. (ROA. p. 245, lines 6-17; ROA. p. 246, lines 8-14). He claimed again that he was looking for a public place to stop and let the victim out, “[s]ome place to stop and get some help where I could jump out and get some help, possibly let him out. And I don’t know, maybe later get a cab. But my main concern was to get some help, me jumping out of the car.” (ROA. p. 246, line 22 to p. 247, line 4).

The Appellant admitted that the victim had no weapon, not a gun, or a knife, or even a plastic fork. (ROA. p. 247, lines 9-13). However, he argued that he didn't *know* that simply stopping the car would have ended the threat, retreating from his earlier testimony about the extent of the victim's inebriation. (ROA. p. 247, lines 14-25).

The Appellant could not deny that he had the presence of mind to reach into the glove box, extract a bag, and take a loaded and cocked gun from that bag. Then, while the victim supposedly struggled with him, and while a front seat passenger supposedly sat idly by with a threat of death clear and imminent, the Appellant moved the victim into a position of total helplessness and shot him twice, point-blank, in the back of the head, killing him instantly. (ROA. pp. 248 to 253).

Requests to Charge

Appellant's counsel requested the trial judge charge the law of self defense, the castle doctrine, voluntary manslaughter and involuntary manslaughter. (ROA. p. 255 to p. 265). In support of involuntary manslaughter the Appellant relied upon *State v. Brayboy*, 387 S.C. 174, 691 S.E.2nd 482 (S.C. App. 2010), (ROA. p. 260, line 10 to p. 263, line 10). The State agreed to a charge to the jury on murder, voluntary manslaughter, and on self-defense, (ROA. p. 263, lines 14-22).

The trial judge gave proper instructions to the jury on charges of possession of a firearm during the commission of a violent offense, (ROA. p. 324, line 12 to p. 325, line 6), the law of murder, (ROA. p. 313, line 4 to 316, line 9), of voluntary manslaughter, (ROA. p. 316. line 10 to p. 3198, line 22), the Castle Doctrine, (ROA. p. 318, line 23 to p. 320, line 9), and of self-defense, (ROA. p. 320, line 10 to p. 324, line 11). The instructions fully and correctly stated the law applicable to the facts of the case.

ARGUMENTS

I. The trial judge did not err in his charge to the jury on the law of self-defense.

At the conclusion of the case, Appellant requested that the trial judge charge the jury that when a defendant acts in self-defense and shoots he is entitled to shoot until the threat is eliminated. Appellant argues “[t]his is a legitimate case of self-defense. Appellant acted consistently with a person acting in self-defense. He waited on the police to arrive and he was in a state of shock and disturbed after the bizarre events that the grossly intoxicated decedent - with a .323 blood-alcohol reading – had inflicted on him.” (*Initial Brief of Appellant*, p. 12). The argument is without merit.

The Appellant glosses over the actual facts of the murder and the fact that the victim died of two gun-shot wounds to the back of the head. The contact bullet wounds were all but instantly fatal and were inflicted on a diminutive man who had been put into the Appellant’s car, either with Appellant’s consent and acquiescence (his story) or at Appellant’s request (the story of other witnesses).

The entire reason why the victim was put there was that he had too much to drink and needed to be driven home. The testimony was clear he was unable to walk to the car without assistance. The tale ended with the man dead and in the Appellant’s car, the Appellant covered in his blood and in another city, miles and miles removed from the club they had departed from, and equally far removed and in the wrong direction from the home to which the victim was to have been driven. The Appellant did not “wait on the police to arrive” so much as he was resigned to the inevitable, an impending place in the dock after a heated exchange with his former brother in law, the other passenger in the

car, who had witnessed what happened and finally was able to take the murder weapon away from the Appellant.

The elements of self-defense are: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; (3) if his defense was based upon his belief of imminent danger, that a reasonable prudent man of ordinary firmness and courage would have entertained the same belief, or if his defense is based on his being in actual danger, that the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm, or losing his own life; and (4) the defendant had no other means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. *State v. Hendrix*, 270 S.C. 653, 657-658, 244 S.E. 2nd 503 (SC 1978); McAninch, *The Criminal Law of South Carolina*, pp. 675-686 (*The South Carolina Bar*, 4th Ed., 2002).

The Appellant either agreed to (or offered) his car as a means of transit, one for taking the victim from a club where he had had too much to drink, and to deliver the victim to his home. This was the underlying cause of all circumstances which followed. It is therefore undisputed the Appellant assumed the care, custody and control of a person whom he recognized as being too intoxicated to care for himself. He then continued to drive by the street where the victim actually lived and continued into another county over the victim's protests.

Even assuming for argument the events were as Appellant claimed at trial, the Appellant was not "without fault" in bringing on the difficulty which ultimately led to a man's death. There was simply no question that the State had negated the first element of self-defense in its case in chief through all of the circumstances proven; *see, State v. Santiago*, 370 S.C. 153, 634 S.E. 2nd 23,27 (Ct. App. 2006)(*taking a loaded gun to the site of a prior confrontation with the victim, and where the fatal encounter occurred, repudiated a claim defendant was without fault in bringing on the confrontation*); *State v. Wigington*, 375 S.C. 25, 649 S.E. 2nd 185(Ct. App. 2007)("[a] person need not retreat or seek to escape, even though he can do so without increasing his danger, but may lawfully resist event to the extent of taking life if necessary, where, being without fault in bringing on the difficulty, he is assaulted while in his own dwelling house... *However, the rule is predicated on the absence of aggression or fault on his part in bringing on the difficulty; the doctrine is for defensive, and not offensive, purposes*) (emphasis added).

A defendant must be without fault in bringing on the difficulty, meaning "[o]ne who provokes or initiates an assault cannot escape criminal liability by invoking self-defense...*Any act of the accused in violation of the law and reasonably calculated to produce the occasion* amounts to bringing on the difficulty and bars his right to assert self-defense as a justification or excuse for a homicide." *Wigington*, 375 S.C. at p. 32. In *State v. Slater*, 373 S.C. 66, 644 S.E.2nd 50 (SC 2007), our Supreme Court held that the defendant was not entitled to a self-defense charge, having approached an altercation that was already underway with a loaded weapon by his side, such activity being reasonably calculated to bring on the difficulty that arose.

The Appellant here offered/consented to take the victim home under conditions that gave him notice the victim was intoxicated. The State's case established that Appellant's conduct clearly showed his own fault in provoking or initiating circumstances leading to the fatal assault by ignoring the victim's protest to stop or turn around, violations of the law which were reasonably calculated to produce the occasion and amounting to his having brought on the difficulty.

Furthermore, it cannot be credibly argued that, once Appellant took the stand in his own behalf, anything he said demonstrated his lack of fault in those underlying circumstances. He could have stopped the car, but he did not. He could have let the victim out, but he did not. Instead he chose to reach in a glove box, remove a gun contained in a bag, remove the gun from the bag and then he shot the victim twice in the back of the head.

The State's proof demonstrated by the facts and circumstances offered in its case in chief that Appellant could have resorted to other means of avoiding danger. Even after taking the stand, Appellant did not point to, and could not point to any evidence that he had *no other means* to avoid the danger presented, other than to shoot the victim twice in the back of the head.

The danger posed by a car in motion, which Appellant's counsel argued "going down the road is a missile", (ROA. p. 271, lines. 15-19), could have been negated far short of taking a man's life. The car could have simply been stopped. The victim could have been removed. The matter should have been ended without resorting to deadly force.

A life would not have been taken had the response to this “danger”, allegedly that of a small, inebriated man wanting to get out of a car, been one other than using deadly force to kill him. Even in a time and place that venerates the right “for law-abiding citizens to protect themselves, their families, and others from intruders and attackers”, reasonableness and proportionality still remain “the key to self-defense.” See *McAninch, The Criminal Law of South Carolina, 4th Ed., p. 674 (The South Carolina Bar-CLE Division, 2002)*, citing *State v. Wood, 1 S.C.L. (1 Bay)(1794)*.

There was neither a perceived nor actual imminent danger under which a man of ordinary prudence, firmness and courage would have acted as Appellant did under these circumstances. There could be no reasonable belief that a person of ordinary prudence, firmness and courage would have entertained any notion that using deadly force was the only way he could have saved himself.

It is further respectfully noted that shooting a man in the back, or here more specifically the back of the head, is generally construed by “law-abiding citizens” as being an oxymoron when describing acts which are of either “firmness” or “courage”. The fact that the victim was not even facing the Appellant at the time he was shot further negates any claim of self-defense and underscores his helplessness when he was murdered.

The Appellant’s reliance on *State v. Hendrix* is totally misspent. In *Hendrix*, the defendant and the deceased had a confrontation during a lake outing on undeveloped property. The hostilities continued until both were armed with shotguns and defendant fired four times in rapid succession, killing the victim.

The Court concluded the defendant was entitled to a directed verdict of acquittal *as a matter of law*. The defendant was on his own property, attempted to avoid the encounter and made this known to the victim, had done nothing to provoke the altercation, and the facts were conclusive the defendant was actually in immediate danger of losing his life.

The rule as stated in *Hendrix* was that one is *not* justified in shooting or employing a deadly weapon after the adversary has been disarmed, but a confrontation with shotguns which resulted in firing four shots in such rapid succession that the last was fired before the deceased "hit the ground...[showed] that "[u]nder these circumstances the force used was not excessive." *Hendrix*, 270 S.C. at 661.

In the instant case, Appellant had secured the release of the victim into his care and custody, knowing the victim was inebriated, with an understanding with bar personnel that he would take him home. The victim was not armed with any type of weapon whatsoever. The Appellant drove past the street where the victim lived, and continued on for miles in another direction, and this was done over the victim's objections, continued as the Appellant murdered him and continued on until the car finally stopped in another city, downtown Spartanburg. The victim died face down, shot twice in the back of the head. The facts, the position of the body, the victim's head resting on the Appellant's knee and leg, the blood that covered the Appellant's pants, the testimony of witnesses including the Appellant, as well as the location of the lethal wounds, all of this evidence did not support a charge from the trial judge of a right to keep shooting until danger had ceased. Rather, the rule that offset such an instruction, one taken from the same paragraph in the same case, *id*, was that "*ordinarily one is not*

justified in shooting or employing a deadly weapon after the adversary has been disarmed or disabled.” Id.(emphasis added).

The victim was never armed in the instant case. The Appellant was not without fault in bringing on the circumstances of the murder. The facts and circumstances fully established that the victim had been disabled (facing down and away from the Appellant and his gun) and the Appellant never denied shooting the man twice in the back of the head. He could not explain this, because there was no valid excuse or explanation. Any answer was a matter of credibility and the indefensibility of what he had done was overwhelmingly supported by the facts.

The fact that both shots were in the back of the head speaks inevitably to whether “[u]nder these circumstance the force used was... excessive,” *Id.* and whether Appellant was in the first instance “justified in shooting or employing a deadly weapon.” *Id.*

Assuming that trial judges should tailor their self-defense charges to the facts of a case, as they should, and where, as here, it is a given that the victim was shot twice in the back of the head, the jury instruction requested by Appellant was simply not proper to the facts of the case. One shot to the back of the head of a prostrate, intoxicated and unarmed man was excessive *per se*, as likewise would have been the second one.

The trial judge tailored the charge to what was before the jury to decide: “[A] person may use such force as is reasonably necessary even to the point of taking human life if such is reasonable to prevent death or great bodily injury to himself or to another person...The law recognizes the right of every person to defend himself or herself or a friend, relative or another from death or from sustaining serious bodily harm. To do this a person may use such force as is reasonably necessary even to the point of taking human

life where such is reasonable. The right of self-defense is founded upon necessity, either actual or reasonably apparent necessity... The law does not hold someone to a refined assessment of the danger as might be accomplished having an adequate time to reflect, provided however that the defendant has acted as a person of ordinary reason, firmness and courage would have acted or should have acted in meeting the appearance of danger. In other words, one does not have to wait until his or her assailant gets the advantage, for one always has the right under the law of self-preservation to prevent another from getting an advantage.” (ROA. pp. 318-319; 323).

The Appellant’s reliance on *Douglas v. State*, 332 S.C. 67, 504 S.E.2nd 301 (SC 1998) is without merit. *Douglas* was a post-conviction relief action resulting in the grant of a belated appeal. The case arose from conviction of the applicant for voluntary manslaughter and possession of a firearm during the commission of a crime of violence. The applicant and another individual had begun shooting into a crowd at a Waffle House after, according to the applicant, a group of people in the crowd rushed them.

Douglas claimed that the trial judge erred in rejecting a proposed jury instruction that “the defendant, if without fault, has the right to use such necessary force as required for his complete protection from loss of life or serious bodily harm and cannot be limited to the degree or quantity of attacking opposing force.[citing *State v. Campbell*, 111 S.C. 112, 113, 96 S.E. 543, 544 (1918)].”

In *Campbell*, the defendant shot a man who attacked him with a bottle and claimed self-defense. The trial judge instructed the jury that the defendant was limited in his response to one which used force, essentially measure for measure.

In *Douglas*, the Supreme Court applied the “dictates” of *Campbell* which had rejected the trial judge’s conclusion that a defendant acting *without fault* could use *the same force and no more* than that with which he was threatened. *Douglas*, 332 S.C. at p. 72. The charge in *Douglas* instructed the jury that (1) a justified firing of a first shot could justify a subsequent shot until it appears any danger to life and body had ceased, and (2) that the defendant does not have to wait until “the deceased gets the drop on him or the deceased begins to shoot him. He has the right to act upon the law of self-preservation and prevent this.” *Id.* at 72-73.

The Court in *Douglas* held that the refusal of the trial judge to give the requested instruction, and the instruction as actually given was, again, “consistent with the dictates of *Campbell*” and was therefore not error. *Id.* at p.73.[citing *State v. Hicks*, 305 S.C. 277, 407 S.E. 2nd 907 (1991) as unstated support, but following from the proposition that “although charges requested by a party may be a correct statement of law, a judge does not err by refusing to deliver the charges verbatim.”](emphasis added).

As in *Douglas*, in the instant case the trial judge in no way limited the force that Appellant could use to a *measure for measure* equivalence, as Appellant suggests in his brief. (*Initial Brief of Appellant*, p.11). Instead, the charge was a correct statement of law carefully crafted to the evidence put before the jury, without invading the province of the jury to find the facts: “The law of self-defense encompasses preventive action taken to protect one’s own life without another if such action is taken in anticipation of imminent danger of losing one’s life or sustaining serious bodily injury. A defendant has a right to act upon appearances. He may be mistaken. The law does not hold someone to a refined assessment of the danger as might be accomplished having an adequate time to reflect,

provided however that the defendant has acted as a person of ordinary reason, firmness and courage would have acted or should have acted in meeting the appearance of the danger. In other words, one does not have to wait until his or her assailant gets the advantage, for one always has the right under the law of self-preservation to prevent another from getting an advantage.” (ROA. pp. 322-323).

The requests made by the Appellant for charges included “self-defense as it relates to the Castle Doctrine in terms of that he can meet force with force, it’s his vehicle, he has no duty to retreat, as well as self-defense.” (ROA. p. 259, lines 16-23). As indicated above, the trial judge gave a proper instruction regarding the use of force and self-defense. The charge given on the Castle Doctrine was proper under both S.C. Code Ann. Sec. 16-11-440(C) and the common law : “Section 16-11-440 (C) provides that a person who is not engaged in an unlawful activity and who is attacked in a place where he has a right to be, including his home, business, or motor vehicle, has no duty to retreat and the right to stand his ground and to meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or to another person.” (ROA. p. 319, lines 10-19). The charge was a correct statement of the law and gave the Appellant every benefit that could be accorded to him under the facts of the case.

Again, as in *Douglas*, the charge was “consistent with the tenets of *Campbell*” and provided the jury with a proper and fair statement as to the exercise and use of deadly force.

Furthermore, the charge, the statute and the common-law are all consistent in stating that there is no duty to retreat in a place where one has a right to be, *provided he is not engaged in an unlawful activity while he is there.*

When the Appellant chose to continue on instead of taking the victim back to the club, or instead of releasing him by the side of the road, or instead of taking him to his home, Appellant was no longer even arguably within the ambit of S.C. Code Ann. Sec. 16-11-440 (C) (“[a]person who is not engaged in an unlawful activity”); and *cf.* S.C. Code Ann. Sec. 16-3-910, Kidnapping, (“Whoever shall unlawfully ...confine...or carry away any other person, by any means whatsoever without authority of law...is guilty of a felony”); *Lynch v. Toys “R” Us- Delaware, Inc.*, 375 S.C. 604, 615; 654 S.E.2nd 541, 547-48 (Ct. App. 2007)(“The essence of the tort of false imprisonment consists of depriving a person of his or her liberty without lawful justification... To establish false imprisonment under South Carolina law, the plaintiff must show that the defendant restrained the plaintiff; the restraint was intentional and the restraint was unlawful.”).

The victim in this case was not trying to force his way *into* any dwelling, habitation, or vehicle of the Appellant. According to the account of the only other passenger in the vehicle, the victim just wanted *out of the vehicle* because the Appellant was taking him well past his home, while the Appellant ignored his protests. The car had only to be stopped by the Appellant and the victim allowed to get out of it or to be removed from it.

The Appellant’s reliance on *State v. Fuller*, 297 S.C. 440, 377 S.E.2nd 328 (SC 1989) is also misplaced. Unlike in *Fuller*, here the trial judge did not use the charge set forth in *State v. Davis*, 282 S.C. 45, 317 S.E.2nd 452 (SC 1984) as “an exclusive

charge...to eradicate the body of common law self-defense.” *Fuller*, 377 S.E. 2nd at p. 330. And the trial judge here satisfied the Supreme Court’s language as to the law of appearances in his charge. See *Fuller*, 297 S.C. at pp. 444-45; and cf. *ROA*. p. 321, line 20 to p. 323, line 15. The trial judge’s instruction on the law of appearances was equally consistent with language from *State v. Hardin*, 114 S.C. 280, 103 S.E. 557, 558-59(SC 1920), and neither precedent offers any support for a claim as to deficiency in the charge based upon “words accompanied by hostile acts.” *Fuller*, 297 S.C. at 445; *Hardin*, 103 S.E. at 559.

The Appellant complains that the instructions requested by his trial counsel were not granted. To a great extent, this glosses the record of what took place in the lower court proceedings, and the issues first invited and then almost as quickly laid to rest by the Appellant’s own words and testimony.

Appellant claims in his initial brief that the reliance of his counsel on *State v. Rye*, 375 S.C. 119, 651 S.E. 2nd 321 (SC 2007) , “might not be the case on point” for the principle of law that one may continue shooting until the threat is ended but “that that was a correct proposition of law.”(Initial Brief of Appellant, p.10). He then claims that the matter ended when “the judge maintained that he considered this instruction a comment on the facts and he ruled was not going to charge it.” (Initial Brief of Appellant, p. 10).

The issue was first raised by trial counsel who was in fact clearly relying at that time on *State v. Brayboy*, 387 S.C. 174, 691 S.E. 2nd 482 (Ct. App. 2010), not upon *Rye*, and the primary issue Appellant’s attorney was arguing over was whether a charge of involuntary manslaughter was proper; Appellant’s counsel argued it was proper, because

“as far as the involuntary manslaughter charge goes, Your Honor, we believe that he armed himself in self-defense.” (ROA. p. 212, ll. 14-16). The trial judge agreed that “if you lawfully arm yourself in self-defense and you act criminally negligent, then you could be guilty of involuntary manslaughter. But you have to arm yourself appropriately in self-defense. I’m not certain that there’s been any evidence of self-defense.” (ROA. p. 213, lines. 12-17).

Appellant’s counsel then asked for and was granted leave to lay out her case for the Appellant’s having acted in self-defense. (ROA. pp. 213, line 18- p. 221). The trial judge did *not* at that time reject the request, but clearly stated on the record that the matter remained open: “Okay. All right. Any other requests? I’ll reflect upon those overnight as to involuntary manslaughter and self-defense.” (ROA. p. 220, ll. 23-25).

As noted hereinabove, the next morning the Appellant invited the trial proceedings to continue by making his own decision to testify and show the jury he acted in self-defense. (ROA. pp. 222-224). The effort obviously failed both in the facts he testified to, as well as in the verdict which resulted. Most significantly, the Appellant’s own testimony established there was no struggle for the gun, no accidental shooting, but rather only a deliberate firing of two shots from Appellant’s pistol, by the Appellant, which killed the victim almost instantly.

The decision in *Brayboy* involved a question of fact over whether the firing of the fatal shot during an argument and the handling of the gun was accidental or not. 287 S.C. 174, 178. The Court of Appeals held that “under the facts of this case, there is evidence from which the jury could determine Brayboy was lawfully armed in self-defense and negligently handled the loaded gun causing it to discharge, and he was therefore entitled

to a charge on involuntary manslaughter.” Appellant does not now argue the application of *Brayboy*, a claim for a charge on involuntary manslaughter, even though it was the first authority cited by his attorney at trial so as to argue his having been lawfully armed in self-defense.

Instead, the Appellant argues the applicability of *State v. Rye*. However, the decision in *Rye* offers even less support than *Brayboy* for Appellant’s efforts to rework his claim on appeal.

The Appellant here did not also claim a defense of habitation, as was the case in *Rye*, but rather only asserted self defense, which “our precedents properly recognize... are analogous [but] the defenses are not identical.” *Rye*, 375 S.C. 119, 124. As the Court noted in *Rye*, “the defense of habitation provides that *where one attempts to force himself into another’s dwelling*, the law permits an owner to use *reasonable force to expel the trespasser*.” *Id.* The Appellant never requested a charge on habitation nor on the reasonableness of the force used under a theory of defense of habitation, nor could he under the statute; by definition, the scene of the murder was a vehicle, not a dwelling. S.C. Code Ann. Sec. 16-11-430 (1), and (4); *Black’s Law Dictionary* p. 505 (West 6th Ed. 1990).

Even assuming for argument that the charge had been requested and given, the only scenario under which it might in theory have been claimed to apply, that of standing upon the right of self-defense while claiming immunity from a duty to retreat, *id.*, would still have been to no avail to the Appellant under the tenets of *Rye*.

In *Rye*, trespassers upon the defendant’s business property stole his tools, damaged the property and made sport of killing his pets. A confrontation between the

defendant and some of these trespassers resulted in one of the victims being shot and killed by the defendant. 375 S.C. 119, 121-123.

The trial judge refused the defendant's proposed request on the defense of habitation. *Id.* at p. 124. In his charge to the jury, the trial judge differentiated habitation from self-defense "with the sole caveat that "[a] person defending his or her home or premises...has no duty to retreat." Though this was most of the picture, it was not the complete picture." *Id.*

The Court in *Rye* held that "the charges in the instant case incorrectly implied that habitation requires a defendant to establish that his person or property was in some danger of injury or harm." *Id.*

The Appellant in this case never sought a charge on defense of habitation; his argument at p. 10 of his brief is merely an effort to now reconfigure and raise an issue via the back door. The question put to the jury was whether the killing of the victim was self-defense, murder, or voluntary manslaughter. Appellant's counsel did not, and again could not, claim the car was a habitation in which the Appellant was lawfully armed and acting reasonably to *expel* a trespasser. The vehicle was claimed by Appellant *as a weapon*, a "missile" against which the Appellant was acting in self-defense when he used deadly force upon the victim.

After the charge to the jury, Appellant's counsel argued *Rye* only as support for the proposition that if a defendant is justified in shooting once, he is justified to continue until the threat is completely ended. (ROA. pp. 332-335). Later on, at the jury's request during their deliberations, the judge recharged on the law of murder and voluntary manslaughter. (ROA. p. 336). After that, Appellant argued *Douglas* and *Hendrix* in

support of the one shot warranting another shot argument, which had been raised before without supporting precedent. The argument for that charge has been refuted hereinabove at pages 16-20.

Here, the jury requested only to be recharged on the law of murder and voluntary manslaughter at that point in the proceedings. For the trial judge to have added the improper charge of "shoot him once and you can shoot him again" at that point in time would have potentially confused the jury, or improperly suggested some particular weight to be given to a charge that was properly refused in the first place.

The trial judge gave a properly crafted charge to the jury on the law of self defense. During the incident in question, the facts at trial clearly established there was no danger present that would justify shooting the victim and continuing to shoot him.

Even assuming the charge as it was requested, that the Appellant could continue shooting the victim after the first shot, was a correct proposition of law, a trial judge is not required to give a charge, as requested, verbatim and the charge actually given to the jurors in this case properly covered the issue of a reasonable use of deadly force in defense of self or of others. The request to charge was not properly raised and supporting authority was not offered to the court in timely fashion.

There was no error, there was no prejudice, and the denial of the request to charge was harmless, if constituting error at all. *See State v. Hicks, Douglas v. State and discussion hereinabove at pp. 18-21.*

II. The trial judge's charge under the Castle Doctrine was a proper statement of the law.

The Appellant argues "the jury *should have understood the policy determination* in South Carolina that a person acting lawfully where he had the right to be, here in his care (sic) and under attack, was immune from criminal prosecution. Appellant further argues that the judge's decision to charge only part of the castle doctrine was error, and appellant should be granted a new trial." (*Initial Brief of Appellant*, p. 14)(emphasis added). This argument is also without merit.

Juries are to be charged on statements of law, not policy. They are to render verdicts which are findings of fact, decisions covering the law as applied by them to the findings of fact they make in the case. A verdict is intended as a final disposition, not a policy statement nor a suggestion, as to what they have decided upon as the outcome in a case. In this case, the trial judge fully and properly instructed the jury as to the law to be applied in this case.

A). The instruction as a whole properly informed the jury of the law to be applied.

Again, after properly instructing the jury on murder, (ROA. p. 312, l. 25 to p. 316, l. 9), and voluntary manslaughter, (ROA. p. 316, l. 10 to p. 318, l. 22), the trial judge gave an extensive charge under South Carolina Code Ann. Section 16-11-440 (C), regarding the castle doctrine, (ROA. p. 318, line 23 to p. 320, line 9), as well as the established law of self-defense. (ROA. p. 320, line 10 to p. 324, line 11; see *infra* p. 21). The statute may be cited as "The Protection of Persons and Property Act", or here "the Act".

The trial judge instructed the jury under the language of the Act and in line with the common-law regarding the castle doctrine in South Carolina. He clearly charged the jury that the Act is a complete defense and the State had the burden of disproving the defense beyond a reasonable doubt. The provision dealing with immunity was properly omitted. *See State v. Dickey*, 394 S.C. 491, 499-503, 716 S.E. 2nd 97, 101-103 (SC 2011). The charge was proper in all respects.

B). The immunity provision under the Act was not intended to be a jury function.

The Appellant concedes that the request by Appellant's counsel for a charge on the Castle doctrine, including the language of S.C Code Ann. Sec. 16-11-440 (C), was in fact given by the trial judge. (*Initial Brief of Appellant*, p. 13); (ROA. p. 213, line 20 to p. 215, line 9); (ROA. p. 318, line 23 to p. 320, line 9).

Appellant still argues, however, that it was error by the trial judge to fail to "charge the jury that a person who used deadly force as permitted by the Castle Doctrine—who was justified in deadly force—was immune from criminal prosecution and civil action for use of deadly force. The judge refused to give this instruction, arguing that he thought immunity was not a jury function," (*Initial Brief of Appellant*, p. 13). The Supreme Court's decision in *Duncan* has resolved this issue; pursuant to the Act, it is not a jury function.

C). *The creation of a judicial fix to a statutory dilemma.*

The Appellant's argument ignores the language of the statute and the necessity of our Supreme Court's decisions under *State v. Duncan*, 392 S.C. 404, 709 S.E.2nd 662(SC 2011) and *State v. Dickey*, 394 S.C. 491, 716 S.E. 2nd 97(SC 2011), as well as the record of what actually took place in the lower court.

The "*Protection of Persons and Property Act*" creates immunity from criminal or civil liability, S.C. Code Ann. Sec. 16-11-450 (A)(Supp. 2010), for those who use permissible deadly force as otherwise provided for under the act.

The Act was passed and became effective June 9, 2006. The Act included a savings clause which provided clear guidance that it was only to apply prospectively. *See State v. Dickey*, 380 S.C. 384, 403-405, 716 S.E. 2nd 917, 927-28, (Ct. App. 2011), (reversed on other grounds), *State v. Dickey*, 394 S.C. 491, 509-10, 716 S.E. 2nd 97, 106-107 (S.C. 2011)(Beatty, A.J., dissenting).

The retrospective operation of a statute is not favored by the courts, and statutory enactments are presumptively prospective in effect. An exception to this presumption is that remedial or procedural statutes are generally held to operate retrospectively, as opposed to those creating or affecting a substantive right. *Hercules Inc. v. South Carolina Tax Comm.*, 274 S.C. 137, 143, 262 S.E. 2nd 45 (1980).

In *Duncan*, our Supreme Court recognized the immunity granted by the legislature under the Act was a "statutorily granted right." It also noted that "the only way [the immunity] could be meaningfully enforced was for the defendant to be able to raise immunity in a pretrial motion... an issue of first impression in this state." 392 S.C. at 410.

The Court then looked to other states with similar provisions under similar statutes and held that, “upon motion of either party,” 392 S.C. at p. 411, a hearing should be held pre-trial to determine the issue of immunity by a preponderance of the evidence.

In other words, although the statute created the right, it was left for the courts to fashion the proper remedy for its enforcement or application. The remedy created by the Supreme Court in *Duncan* (May 9, 2011) followed the Appellant’s trial and conviction in this case (October 27 to October 31, 2010).

D) The remedy of a pre-trial motion for immunity only applies prospectively.

There is no basis for a retroactive application of the rule fashioned by our Supreme Court in *Duncan*; the rule was one created by the Court to clarify a procedural issue left unaddressed under the Act. The decision in *Duncan* created a remedy for the statutory right, but did so only after this Appellant’s conviction.

The rule in *Duncan* does not provide a basis for informing jurors in cases prior to *Duncan* of “policy” matters, and would be at odds with the Court’s decision in *Duncan*. That precedent clearly understood the issue of immunity under the Act as one to be resolved solely by the trial judge at a pre-trial hearing. The language of the Act does not support Appellant’s argument that the legislature intended to include jurors in reviewing, considering or weighing “policy determinations” of the legislature.

The trial judge fulfilled his obligation to charge the current and correct statement of the law of South Carolina. The jury charge as a whole and in light of the evidence and issues presented at trial was correct. The charge as a whole was otherwise free from error,

adequately covered the law applicable to the case and was substantially correct. *State v. Adkins*, 353 S.C. 312, 317-18, 577 S.E. 2nd 469 (Ct. App. 2003).

E) The trial judge's failure to charge the jury on the issue of immunity, or to hold a pretrial hearing as to same, even if error, was harmless

The trial judge in *Duncan* “found that, applying any standard of proof, respondent would be entitled to immunity under the Act.” *Duncan*, 392 S.C. 404,410, 709 S.E.2nd 662,665 (2011). The Supreme Court noted that the standard of proof for immunity, too, also presented a novel issue of law. *Id.* .

The Court in *Duncan* held that “when a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence...*We find respondent showed by a preponderance of the evidence that the victim was in the process of unlawfully and forcefully entering respondent's home in accordance with [S.C. Code Ann. Sec. 16-11-440. Accordingly, the circuit court properly found respondent was entitled to immunity under the Act. We further find the circuit court's order of dismissal was proper because it found respondent was entitled to immunity under the Act under any standard of proof.* In other words, had the circuit court held respondent to a stricter standard of proof, such as clear and convincing evidence or even proof beyond a reasonable doubt, the circuit court would have nonetheless found respondent was entitled to immunity.” *Duncan*, 392 S.C.at 411 (2011) (*emphasis added*).

The evidence presented at trial resulted in motions for a directed verdict, renewed at the close of the Appellant's case, and after the verdict. (ROA. pp. 205-209; 259; 346). The motions were denied.

In these motions and rulings, the trial judge's decision established there was substantial evidence reasonably tending to prove the guilt of the accused, or from which the guilt of the accused could be fairly and logically deduced. *See State v. Prince*, 316 S.C. 57, 447 S.E.2nd 177, 182 (SC 1994); *State v. Kelsey*, 331 S.C. 50, 502 S.E.2nd 63 (1998); *State v. Hendrix*, 270 S.C. 653, 244 S.E. 2nd 503 (1978).

As in the circuit court's pre-trial determination in *Duncan* when writing on a blank slate, in this case the trial judge's denial of the motions constituted a proper determination there existed substantial evidence to negate permissible use of deadly force, by the Appellant, under the provisions of the Act. *Cf. Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 250-51, 106 S.Ct. 2502, 2511 (1986) (*the standard for summary judgment under FRCP 56(c) mirrors the standard for that of a directed verdict under FRCP 50(a)*). This constituted a completely appropriate pre-Duncan basis to deny Appellant's entitlement to immunity from prosecution.

There was no error, nor prejudice in the trial judge's charge to the jury on the Castle Doctrine, and if the immunity issue had constituted error, the manner of its resolution rendered it harmless.

CONCLUSION

Based upon the foregoing, the judgment and convictions should be affirmed.

Respectfully submitted,

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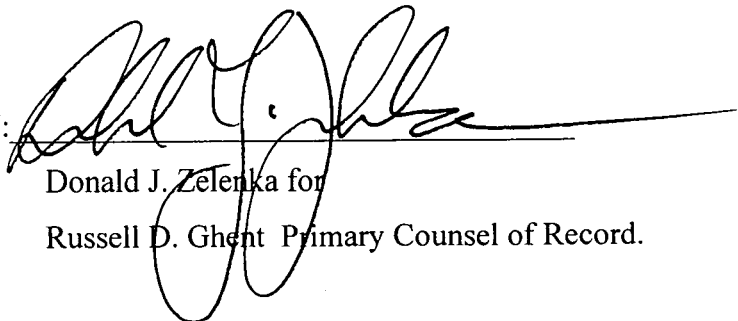
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September 14, 2012

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Spartanburg County
J. Derham Cole, Circuit Court Judge**

THE STATE,

Respondent,

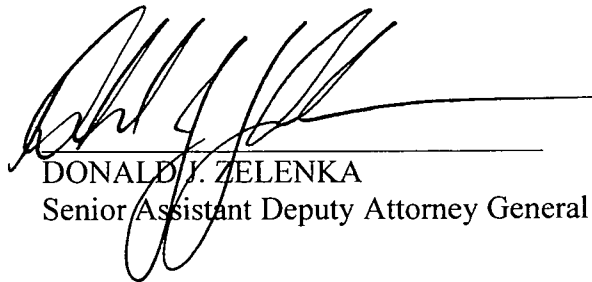
V.

MANUEL ANTONIO MARIN,

Appellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007 Order of the South Carolina Supreme Court entitled “Re Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.”


DONALD J. ZELENKA
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September 14, 2012

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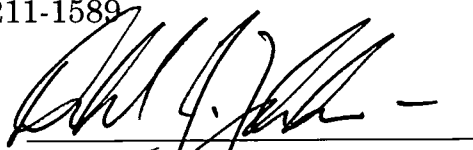
Appellant

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, certify that I have served the Final Brief of Respondent on Appellant by depositing two (2) copies of same in the Inter-agency mail of the State of South Carolina United States for delivery addressed to his attorney of record:

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This 14th day of September, 2012.



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