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May 26 2026
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Honorable William Thomas McGee, III, Circuit Court Judge

DERRICK L. PORTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-002578

APPENDIX

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STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
State of South Carolina,	)	CASE NO. 2016-GS-10-06124
	)	2016-GS-10-06125
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	
	)	
Derrick Lamar Porter,	)	
	)	
DEFENDANT.	)	
_____	)	

April 11, 2018 to April 12, 2018

Charleston, South Carolina

B E F O R E:

The Honorable R. Markley Dennis and a Jury.

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

Benjamin Chad Simpson, Assistant Solicitor
For the State

Daniel Cooper, Assistant Solicitor
For the State

Grant Smalldone, Esquire
For the Defense

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(DW) - DENOTES DEFENSE WITNESS

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(WHEREUPON, State's Exhibit Number 1, map photo, marked for identification.)
(WHEREUPON, State's Exhibit Number 3, photo, marked for identification.)
(WHEREUPON, State's Exhibit Number 4, photo, marked for identification.)
(WHEREUPON, State's Exhibit Number 5, photo, marked for identification.)
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identification.)
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(WHEREUPON, State's Exhibit Number 26, photo, marked for identification.)

(WHEREUPON, State's Exhibit Number 27, Shell Casing, marked for identification.)
(WHEREUPON, State's Exhibit Number 28, 911 Call, marked for identification.)
(WHEREUPON, State's Exhibit Number 29, CD Body Cam, marked for identification.)
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(WHEREUPON, State's Exhibit Number 35, Article – Post and Courier photo, marked for identification.)
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THE COURT: Let the record -- you are Mr. Porter; you are Derrick Porter?
MR. SMALLDONE: Yes.
THE COURT: Good morning, sir.
MR. SMALLDONE: Good morning.

THE COURT: Are there any matters, Ms. Smalldone?
MR. SMALLDONE: None at this time, Your Honor.
THE COURT: Okay. Good. Thank you, sir.
Strikes are five and ten?
MR. SIMPSON: Judge, I believe they are five and five.
THE COURT: Are they, on attempted? I haven't looked at the statute. That is why I said it more as a question.
MR. SIMPSON: By my reading, yeah, I think it is five and five.
THE COURT: All right.
MR. SIMPSON: Here is a copy. It doesn't ---
THE COURT: It doesn't ---
MR. SIMPSON: It is a very intuitive -- attempted murder is not on the -- it is ---
THE COURT: Murder is, but not attempted murder?
MR. SIMPSON: Right. Correct.
THE COURT: Let me look at that. It is an obscure statute. Perjury is. Forgery is. How about that.
I agree with you. I think it is five and five. Thank you, Solicitor.
You agree, Mr. Smalldone?
MR. SMALLDONE: Unfortunately I do.
THE COURT: Well, I mean there has been some talk

about changing this over the years. And thus far we haven't done.

And this is really for the benefit of Mr. Porter. We have very restricted use of. And what would be nice is if we get uniform as we have in a civil matter.

But we typically have five and five except in these specific crimes that are enumerated in 14-7-1110. And they spell them out specifically. And you really can't expand the statute by adding something. So that is -- that is what -- and your lawyer can explain that to you if necessary.

(WHEREUPON, Mr. Smalldone confers with client.)

(WHEREUPON, pause awaiting jury panel.)

(WHEREUPON, bench conference has had, requested by courtroom deputy.)

THE COURT: We have a juror, Robert Weldon, who is trying to record -- every device. He wanted to wear a body camera. He wants -- plans to use his cell phone. He has been making statements about you can't deny him that because of -- on constitutional rights.

I think he ought to be -- personally, ought to be excused from the proceeding. Any --

What is your position, Mr. Smalldone?

MR. SMALLDONE: Your Honor, that sounds like a lot of trouble. I don't have an objection to excusing him

from whatever he wants to be excused from.

MR. SIMPSON: No objection.

THE COURT: Let's excuse the man.

THE DEPUTY: Yes, sir. I will take care of that.

THE COURT: Tell me he -- if he has -- he can go and take that up somewhere else.

THE DEPUTY: Yes, sir.

THE COURT: Tell him he can file his action in court.

THE DEPUTY: Thank you, sir.

THE COURT: Okay. The best way to resolve that. We don't need that for either side.

(WHEREUPON, deputy exits to excuse juror, April 11, 2018, 9:41 a.m.)

(WHEREUPON, awaiting jury panel until April 11, 2018, 9:50 a.m.)

VOIR DIRE:

THE COURT: Good morning. First let me apologize for any inconvenience, the situation yesterday to call at 11:30 to check. We were hoping to finish that case at a time where we could go ahead and bring you in yesterday and maybe conclude your services, but as it turned that case we went into -- I think we finished it at about six o'clock last night. But that -- that -- but that included the jury's deliberation. So but anyway thank

you for your patients with us regarding that.

The case we have today is the next case. And I believe that this will be the last case that we will probably try this week. So for those of you that aren't selected you will complete your services today. So you won't have to come back and call again.

And let me tell you in advance thank you again for your participation in the process and for your assistant in helping us resolve these cases this week.

The case that we have I am going to tell you the parties involved. This is a criminal dispute, so one of the parties of course is the State of South Carolina who makes the claim.

And the claim in this matter is being made against Derrick L. Porter. Mr. Porter is seated at the table to my left.

Mr. Porter, good morning. If you would please stand and face the jury panel for me, please.

(WHEREUPON, Mr. Porter complied.)

THE COURT: Thank you, sir. You may be seated.

Are there any members of the jury panel related by blood or marriage, have any business dealings with, socially or casually acquainted with, have any connection with Mr. Porter; if so, please stand.

(WHEREUPON, no jury panel member standing.)

THE COURT: Thank you. There appear to be none.

Mr. Porter is represented by Mr. Smalldone. If you will identify yourself and your law firm, please.

MR. SIMPSON: Good morning. My name is Grant Smalldone. I work here in Charleston, South Carolina. I am a sole practitioner with the Law Office of Grant Smalldone. I represent Mr. Porter.

THE COURT: Thank you, sir.

Are there any members of the jury panel related by blood or marriage, have any business dealings with, socially or casually acquainted with, ever been represented by Mr. Smalldone or have any connection with anyone employed with him; if so, please stand.

(WHEREUPON, no jury panel member standing.)

THE COURT: Thank you. There appear to be none.

The State of South Carolina throughout the state is represented by the circuit solicitor, and the circuit solicitor for the Ninth Circuit is Scarlett Wilson.

Are there any members of the jury panel related by blood or marriage, have any business dealings with, socially or casually acquainted with, ever been represented by Ms. Wilson; if so, please stand.

(WHEREUPON, no jury panel member standing.)

THE COURT: Thank you. There appear to be none.

Ms. Wilson has a number of assistant solicitor and

deputy solicitor that help her present the cases. We have one here. Mr. Simpson, if you will identify yourself and anyone who will be here assisting you, sir.

MR. SIMPSON: Thank you, Your Honor.

Good morning. My name is Benjamin Chad Simpson. I have the honor of representing the State of South Carolina for the Office of the Ninth Circuit Solicitor, Scarlett Wilson. Assisting me in this case is Assistant Solicitor Daniel Cooper. You may also see Investigator Tommy Walters coming in and out of the courtroom throughout trial. He is assisting us as well.

THE COURT: Tommy -- what is his last name?

MR. SIMPSON: Walters.

THE COURT: Walters. Thank you, sir.

Are there any members of the jury panel related by blood or marriage, have any business dealings with, socially or casually acquainted with, Mr. Simpson, Mr. Cooper, or Mr. Walters; ever been represented by Mr. Simpson or Mr. Cooper; if so, please stand.

(WHEREUPON, no jury panel member standing.)

THE COURT: Thank you. There appear to be none.

Are there any members of the jury panel related by blood or marriage, have any close personal friends or have any business dealings with anyone employed with the solicitor, whether they are assistant solicitors or just

other -- otherwise employed; if so, please stand.
(WHEREUPON, jury panel member standing.)
THE COURT: Okay. Yes, ma'am?
THE JURY PANEL MEMBER: I work with Stanley Flood who is married to Sandra Flood. And I believe she in the office.
THE COURT: Would that influence or affect you, ma'am?
THE JURY PANEL MEMBER: No.
THE COURT: And your number, please?
THE JURY PANEL MEMBER: Eleven.
THE COURT: Thank you. You may be seated.
(WHEREUPON, jury panel member standing.)
THE COURT: Yes?
THE JURY PANEL MEMBER: Number 154, Charlene Hubenthal. Casual acquaintance a long time ago with Mark Bourdine.
THE COURT: Would that influence or affect you, ma'am?
THE JURY PANEL MEMBER: None.
THE COURT: And -- thank you. You may be seated.
(WHEREUPON, jury panel member standing.)
THE COURT: Yes?
THE JURY PANEL MEMBER: Number 113. Training partners with Chris -- Chris Leitzo.

THE COURT: Okay. Would that influence or affect you, sir?
THE JURY PANEL MEMBER: No.
THE COURT: Thank you, sir. You may be seated.
Are there any others?
(WHEREUPON, no jury panel member standing.)
THE COURT: Thank you. There appear to be none.
I am going to identify a number of persons, ladies and gentlemen. And if you are related by blood or marriage to any of these individuals, have any business dealings with them, are socially or casually acquainted with any of them, you need to stand and share that information.
The following persons are employed or work for the North Charleston Police Department: Jerome Desheers, Detective Rebecca Bailey, Detective Jellico, Tiffany Adams, Jackie -- is it Ong?
MR. SIMPSON: Yes, Your Honor.
THE COURT: Ong. Lisa Kubicsko?
MR. SIMPSON: Yes, Your Honor.
THE COURT: John Reynolds, Patrick Norwood, Jamel Foster, Jerrid Riley, Ryan Terrell or Terrell, Michael Cook, Sean -- is it Reiter or Reiter?
MR. SIMPSON: Reiter.
THE COURT: Reiter. Also Officer -- I didn't say

Mr. -- Officer Joe Niemic or Niemic -- Niemic.

MR. SIMPSON: Niemic.

THE COURT: Fitzgerald -- the following individuals: Fitzgerald Byas, Shiela Brooks, Jacqueline Harrison, Joel Barton who is Dr. Barton with MUSC, Dr. Alejandro Spiotto.

MR. SIMPSON: Spiotto.

THE COURT: Spiotto at MUSC, Kristen Hood-Watson or Dr. Hood-Watson with MUSC, David Palawasky -- ... wasta with Charleston EMS, Samia Abunie (ph) -- Abuni (ph)?

MR. SIMPSON: Abuhani.

THE COURT: Abuhani, Rami Abuhani, Pierra Martin, Investigator Thomas Walters which we have already identified.

Any of those persons?

(WHEREUPON, jury panel member standing.)

THE COURT: Yes?

THE JURY PANEL MEMBER: 154 again, Charlene Hubenthal. I am a former North Charleston police officer and I know several on that list.

THE COURT: Would that affect or influence you in this case?

THE JURY PANEL MEMBER: It has been since 2001 that I was a cop. So no.

THE COURT: Will you base your decision on the

evidence and the law and will that decision be fair to both sides?

THE JURY PANEL MEMBER: Yes, sir.

THE COURT: And you would not be influenced by your prior employment?

THE JURY PANEL MEMBER: Not at all.

THE COURT: You would apply your experience there fairly and impartially though?

THE JURY PANEL MEMBER: Yes, sir.

THE COURT: Very well. Thank you. You may be seated.

Any others?

(WHEREUPON, no jury panel member standing.)

THE COURT: Thank you. There appear to be none.

The dispute that brings us here is framed in these two documents that I am holding in my hand now. They are what they appear to you to be -- and some of you have already heard this. Is they are called indictments.

An indictment is simply a name used to identify the formal charge. It is an allegation and nothing more. It is not evidence.

But I need to share with you what is alleged so I can ask you certain questions about it. But it is alleged that Mr. Porter did in Charleston County on or about April 16th, 2016, with the intent to kill and

malice aforethought attempt to kill Fitzgerald Bias which allegedly violates the statute dealing with attempted murder. And that is the charge that has been placed against him by that indictment.

It is further alleged that at that time on April 16, 2016, in Charleston County Mr. Porter possessed a firearm and did visibly display what appeared to be a firearm or did visible display a knife during the commission or attempted commission of a violent crime which they have set forth as attempted murder. And attempted murder is a violent crime as defined by our law.

I share that with you, ladies and gentlemen, to find out if any member of the jury panel has heard anything, read anything, you have any prior knowledge of this dispute. If so, please stand.

(WHEREUPON, no jury panel members standing.)

THE COURT: Thank you. There appears to be none.

Is there anything about your life experiences, your person philosophies, your strong feelings, your beliefs that would in any way affect your ability to fairly and impartially apply your common sense, your sense of logic and reason, at the appropriate time when directed by the court to analyze the evidence which consists of testimony of witnesses and exhibits that might be introduced through their testimony, deciding for yourself what you

believe to be the true facts and then once deciding that taking the law as I give it to you, not like as you think you -- it should be or what you wish it was or what you believe it to be, but rather take it as I give it to you and apply it fairly and impartially to those facts. If you feel you could not do that, please stand.

(WHEREUPON, no jury panel members standing.)

THE COURT: Thank you. There appears to be none.

Are there any members of the jury panel that -- or member of your immediate family that have ever involved in a dispute of a criminal nature where someone has been accused of attempted murder or assault or something of that nature, taking some action with a firearm or other weapon, and you have either been involved by being accused, being a witness for, being the person who was the alleged victim, any of those -- any of those situations; if so, please stand.

(WHEREUPON, jury panel member standing.)

THE COURT: All right. I am going to ask for them to come forward, please. The attorneys may approach as well.

(WHEREUPON, bench conference was had as follows:)

THE COURT: Good morning.

THE JURY PANEL MEMBER: Good morning.

THE COURT: Your name and number, please.

THE JURY PANEL MEMBER: Amy Johnson, 167.
THE COURT: Yes, ma'am. I need you to turn and face this way.
THE JURY PANEL MEMBER: Okay. So this was a while back, but my husband was assaulted when he was in college. But we were dating at the time.
THE COURT: Okay.
THE JURY PANEL MEMBER: And I served as a witness.
THE COURT: All right. Would that affect you in any way?
THE JURY PANEL MEMBER: No.
THE COURT: Will you judge this case based on his situation and not anything about that?
THE JURY PANEL MEMBER: Yes.
THE COURT: And you can be fair to both sides?
THE JURY PANEL MEMBER: Sure.
THE COURT: Your number again?
THE JURY PANEL MEMBER: One, six, seven.
THE COURT: One sixty-seven will remain. Thank you.
(WHEREUPON, end of bench conference.)
THE COURT: Are there any others?
(WHEREUPON, jury panel member standing.)
THE COURT: Yes, ma'am?
THE JURY PANEL MEMBER: Oh, no, I was just making room for her. I'm sorry.

THE COURT: That's all right. No problem. Stay there in case we have some others that need to respond.

I am going to name a number of organizations. And if you are a member or participate in any of these organizations I will need for you to stand. The National Rifle Association, Gun Owners of America, the Second Amendment Foundation, Armed Females of America, Brady Center to Prevent Gun Violence, Mayors Against Illegal Guns, the Coalition to Stop Gun Violence, or March For Our Lives, Mothers Against Drunk Driving, South Carolina Law Enforcement Association, ALENON, Partnerships With Drug-Free America, Sister Care, The State Office of Victim's Assistance, or any neighborhood watch group. If so, stand.

(WHEREUPON, jury panel member standing.)

THE COURT: Yes, sir.

THE JURY PANEL MEMBER: Juror 291, David Steigerwald. Did you say NRA?

THE COURT: Yes.

THE JURY PANEL MEMBER: Yes, I am.

THE COURT: Thank you, sir. Your Number again?

THE JURY PANEL MEMBER: 291.

THE COURT: Okay. Thank you, sir.

(WHEREUPON, jury panel member standing.)

THE COURT: Yes?

THE JURY PANEL MEMBER: Number 11, Jean Anderson. I am a member of the NRA.

THE COURT: Okay. Thank you, ma'am.

(WHEREUPON, jury panel members standing.)

THE COURT: Yes?

THE JURY PANEL MEMBER: Juror Number 3, Karissa Adams. I am psychologist so I work a lot with the associations for domestic violence, Women Against Rape and so forth.

THE COURT: Would that influence or affect you in this dispute?

THE JURY PANEL MEMBER: Um, no.

THE COURT: Well, I appreciate ---

THE JURY PANEL MEMBER: Maybe ---

THE COURT: Let me -- let the record reflect there was a movement. And I understand that. And for 24 years it has been my observation and that is why I love -- I tell people all the time it is important to watch people too because their body language sometimes speaks louder than their voice.

And that shows to me there may have been some hesitation in responding to that.

THE JURY PANEL MEMBER: Sure.

THE COURT: And I appreciate that. And that is a fair response. The question I guess, would you -- would

it affect how you viewed the evidence in any way?
THE JURY PANEL MEMBER: No.
THE COURT: All right. And would you -- you would view it fairly and would you apply your experiences and your knowledge fairly and impartially in analyzing the evidence and then once deciding what you believe to be the true facts take the law and apply it fairly and impartially?
THE JURY PANEL MEMBER: Yes, sir.
THE COURT: Thank you. Your number again?
THE JURY PANEL MEMBER: Three.
THE COURT: Thank you. You may be seated.
(WHEREUPON, jury panel members standing.)
THE COURT: Yes, ma'am?
THE JURY PANEL MEMBER: Elizabeth Ilderton, 159.
THE COURT: Yes.
THE JURY PANEL MEMBER: I am a member of the Brady Center.
THE COURT: All right. And that would not influence or affect you one way or the other in this dispute?
THE JURY PANEL MEMBER: No.
THE COURT: Thank you, ma'am.
Are there any others?
(WHEREUPON, no jury panel members standing.)
THE COURT: Thank you. There appear to be none.

And let me just reiterate there may be testimony concerning the use of a weapon in this case. And none of you have any strong feeling or philosophies that would deal one way or the other with that; in other words, you could apply your feelings and philosophies fairly and impartially in analyzing the evidence in deciding what you believe to be the true facts; it wouldn't be motivated in either direction initially because of what you believe; is that -- if that be the case -- not be the case if any of you would please stand.

(WHEREUPON, no jury panel members standing.)

THE COURT: Thank you. There appear to be none.

Any additional questions from the State?

MR. SIMPSON: No, Your Honor.

THE COURT: Any additional questions from the defendant?

MR. SMALLDONE: No, Your Honor.

THE COURT: As I told you when I qualified you, the last question, and it really it -- summarizes what we are about and what you will be asked to do and what you will commit to do. And that is at the appropriate time you will apply your common sense, your sense of logic and reason fairly and impartially in analyzing that evidence and then once you decide those true facts take the law and apply it fairly. And you will take an oath to do

that.

Is there anything that you have heard about this dispute that would give you any hesitancy of making that commitment to the State, to the defendant, and to the court; if so, please stand.

(WHEREUPON, no jury panel members standing.)

THE COURT: Thank you very much.

JURY SELECTION:

THE COURT: Some of you already -- have already participated in this process.

I am going to back this up just a tad.

(WHEREUPON, podium moved.)

THE COURT: And when your name is called you will come forward and stand and face your fellow jurors and face the parties. And each side in this case can excuse five jurors.

Some of you have been through this before. And if they use it and they say excuse the juror, then don't be offended by that. No harm. That is not telling you anything, not whether you are bad or good or anything else.

If they say seat the juror then it will be passed to Mr. Porter and he will have the same opportunity. And if they both say seat then you take your seat over there.

And we will go through this process until we get our

twelve jurors and two alternates. And thank you very much for your patience.

And I will turn it over to the clerk now and he will perform that task. Or she will. Which one? She. Good.

One and two for the alternates. Five for the -- for each.

THE CLERK: Yes, sir.

THE COURT: All right. Your turn.

THE CLERK: When I call your name and number please come stand in front. Number 1, Onufer -- I'm sorry. I'm sorry; 224, John Onufer.

THE JURY PANEL MEMBER: Onufer.

THE CLERK: Onufer.

(WHEREUPON, jury panel member, a white male, comes forward.)

THE CLERK: Stand in front and face the attorneys.

THE COURT: You can come stand -- if you will come stand -- put your back to that podium, please, sir.

There we go. Thank you so much.

THE CLERK: What say you for the State?

MR. SIMPSON: Please seat Mr. Onufer.

THE COURT: What say you for the defendant?

MR. SMALLDONE: Please seat the juror.

THE CLERK: You have been selected for this trial. Please go have a seat in the jury box.

Juror Number 176, Alison Kennedy.
(WHEREUPON, jury panel member, a white female, comes forward.)
THE CLERK: What say you for the State?
MR. SIMPSON: Please seat Ms. Kennedy.
THE COURT: What say you for the defendant?
MR. SMALLDONE: Please seat the juror.
(WHEREUPON, juror is seated in jury box.)
THE CLERK: Number 249, Sandy Roach.
(WHEREUPON, jury panel member, a black female, comes forward.)
THE CLERK: What say you for the State?
MR. SIMPSON: Please seat Ms. Roach.
THE COURT: What say you for the defendant?
MR. SMALLDONE: Please seat the juror.
THE CLERK: You have been selected for service. Please have a a seat in the jury box.
Number 281, Margretta Smith.
(WHEREUPON, jury panel member, a black female, comes forward.)
THE CLERK: What say you for the State?
MR. SIMPSON: Please seat Ms. Smith.
THE COURT: What say you for the defendant?
MR. SMALLDONE: Please seat the juror.
THE CLERK: You have been selected for service.

Please have a seat in the jury box.

Number 299, Robert Sutton.

(WHEREUPON, jury panel member, a white male, comes forward.)

THE CLERK: What say you for the State?

MR. SIMPSON: Court's indulgence. Please seat Mr. Sutton.

THE COURT: What say you for the defendant?

MR. SMALLDONE: Please excuse the juror.

THE CLERK: You have been excused from service. Please have a seat in audience.

Number 66, Amanda Conn.

(WHEREUPON, jury panel member, a white female, comes forward.)

THE CLERK: What say you for the State?

MR. SIMPSON: Please seat Ms. Conn.

THE COURT: What say you for the defendant?

MR. SMALLDONE: Madam Clerk, may I inquire the juror number again.

THE CLERK: Sixty-six.

MR. SMALLDONE: Court's indulgence

THE COURT: Take your time.

MR. SMALLDONE: Please seat the juror.

THE CLERK: Please have a seat in the jury box. You have been selected for service.

Number 174, Kevin Keenan.
(WHEREUPON, jury panel member, a white male, comes forward.)
THE CLERK: What say you for the State?
MR. SIMPSON: Please seat Mr. Keenan.
THE COURT: What say you for the defendant?
MR. SMALLDONE: Please seat the juror.
THE CLERK: You have been selected for service. Please have a seat in the jury box.
Fifty-one, Scott Carnley.
(WHEREUPON, jury panel member, a white male, comes forward.)
THE CLERK: What say you for the State?
MR. SIMPSON: Please seat Mr. Carnley.
THE COURT: What say you for the defendant?
MR. SMALLDONE: Please seat the juror.
THE CLERK: You have been selected for service. Please have a seat in the jury box.
Number 39, Brandon Brown.
(WHEREUPON, jury panel member, a white male, comes forward.)
THE CLERK: What say you for the State?
MR. SIMPSON: Please seat Mr. Brown.
THE COURT: What say you for the defendant?
MR. SMALLDONE: Please seat the juror.

THE CLERK: You have been selected for jury service. Please have a seat in the jury box.

Two eighty-two, Martin Smith.

(WHEREUPON, jury panel member, a white male, comes forward.)

THE CLERK: What say you for the State?

MR. SIMPSON: Please seat Dr. Smith.

THE COURT: And what say you for the defendant?

MR. SMALLDONE: Court's indulgence.

THE COURT: Yes, sir.

MR. SMALLDONE: Please excuse the juror.

THE CLERK: You have been excused from service. Please have a seat in the audience.

Two sixty-three, Eugene Samuel.

(WHEREUPON, jury panel member, a black male, comes forward.)

THE CLERK: What say you for the State?

MR. SIMPSON: Please seat Mr. Samuel.

THE COURT: What say you for the defendant?

MR. SMALLDONE: Please seat the juror.

THE CLERK: You have been selected for service. Please have a seat in the jury box.

Number 1, Rory Adair.

(WHEREUPON, jury panel member, a white male, comes forward.)

THE CLERK: What say you for the State?
MR. SIMPSON: Please seat Mr. Adair.
THE COURT: What say you for the defendant?
MR. SMALLDONE: Please seat the juror.
THE CLERK: You have been selected for the trial. Please have a seat in the jury box.
Number 243, Paula Reihl.
(WHEREUPON, jury panel member, a white female, comes forward.)
THE CLERK: What say you for the State?
MR. SIMPSON: Please seat Ms. Reihl.
THE COURT: What say you for the defendant?
MR. SMALLDONE: Please seat the juror.
THE CLERK: You have been selected for this trial. Please have a seat in the jury box.
Number 222, Mitchell Newell.
(WHEREUPON, jury panel member, a white male, comes forward.)
THE CLERK: What say you for the State?
MR. SIMPSON: Please seat Mr. Newell.
THE COURT: What say you for the defendant?
MR. SMALLDONE: Please seat the juror.
THE CLERK: You have been selected for this trial. Please have a seat in the jury box.
No selecting our alternates. Strikes will be one

and two.

THE COURT: Correct.

THE CLERK: 121, Elizabeth Gourlay.

(WHEREUPON, jury panel member, a white female, comes forward.)

THE CLERK: What say you for the State?

MR. SIMPSON: Please seat Ms. Gourlay.

THE COURT: What say you for the defendant?

MR. SMALLDONE: Please seat the juror.

THE CLERK: You have been selected for this trial. Please have a seat in the jury box.

154, Charlene Hubenthal.

(WHEREUPON, jury panel member, a white female, comes forward.)

THE CLERK: What say you for the State?

MR. SIMPSON: Please seat Ms. Hubenthal.

THE COURT: What say you for the defendant?

MR. SMALLDONE: Please excuse the alternate.

THE CLERK: You have been excused from this trial. Please have a seat in -- or in the audience.

320, Matthew Wain.

(WHEREUPON, jury panel member, a white male, comes forward.)

THE CLERK: What say you for the State?

MR. SIMPSON: Please seat Mr. Wain.

THE COURT: What say you for the defendant?
MR. SMALLDONE: Please seat the alternate.
THE CLERK: You have been selected for service. Please have a seat in the jury box.
Your Honor, we have our jury.
THE COURT: Thank you very much. Are there any motions from the State regarding the selection process?
MR. SIMPSON: None from the State.
THE COURT: Any motions from the defendant?
MR. SMALLDONE: No motions, Your Honor.
THE COURT: Thank you very much. Ladies and gentlemen, those of you that were not selected, this is the last case and you are now free to leave.
Thank you so much for your participation. And I wish you well. And I appreciate your service to your state and to your county. Have a great day. Thank you.
(WHEREUPON, jury panel exits courtroom.)
THE COURT: Ladies and gentlemen, thank you for your service too. And this is your last case that you will be participating in.
In so far as the seating is concerned the two -- the last two, Ms. Gourlay and Mr. Wain. Mr. Wain looks familiar.
(WHEREUPON, note that Mr. Wain served on jury panel earlier in the week.)

THE JURY PANEL MEMBER: Yes, Your Honor.

THE COURT: You now have an assigned seat. And Ms. Gourlay, you have an assigned seat. You are alternates, and but that really doesn't mean anything.

In fact we had -- we used an alternate in the jury we tried yesterday. So you never know when that becomes necessary. But while you are an alternate if will both occupy those two seats we would appreciate it.

The rest of you are free to occupy any other seat that is there. There is only one other assigned seat, and that will be occupied by the person that you will select.

The statute allows me to select the foreperson - or I call them presiding jurors - or let you select it. And I have done that in my career. I have found that to be the best approach to it.

It doesn't have to be done right away. At some point if you will select from the first 12 of you. All of you are eligible to serve other -- the only two that are not right now are our two alternates.

But someone has to be responsible for signing the verdict form at the conclusion of this trial, for receiving any exhibits that might be introduced during the trial, and then once the jury has completed its deliberations returning those exhibits to the court.

And there may be occasions for that the jury needs to have some written communication with the court. It would be your responsibility to draft that on behalf of your fellow jurors. Other than that that is the only additional responsibilities.

As I say, all of you are qualified. It has been my observation over the years that a presiding juror really serves as a facilitator. And some persons are better facilitators than others. And that is why I let the jury pick the person they want to lead that process.

So at some point if you will do that I would appreciate it. Please, again, until you do that you won't have to worry about the seating arrangement. But once you have done it -- Mr. Carnley is occupying that seat at this moment. But and he is free to occupy it until -- unless he is selected and then he will occupy it continuously. But once -- anybody can occupy it until that person is selected.

So thank you very much. I would ask the clerk now to administer your oath.

Thank you, Ms. Mason.

THE CLERK: You are welcome.

(WHEREUPON, the jury was duly sworn.)

THE COURT: Thank you.

And thank you ladies and gentlemen. You now have

become a judge with me, and you and I will now work to resolve this dispute. It is a wonderful process. And it works exceedingly well.

And as I said when I qualified you, I give you the credit for that and for that opinion. Because you -- and there were reactions I think that said I don't really want to do this. And I get that and understand that perfectly well. And that really is why it is good, because it is not something you really want to do but you accept your responsibility as a citizen in this community and you will perform this task.

And rest comfortable, as I told you when I qualified you, you are more than -- you are amply qualified. There is no one in the world more qualified unless you can convince me somebody can apply your common sense, your sense of logic and reason better than you can. And I don't believe that person exists.

And that is all you are going to do. And you heard me ask the questions over and over about whether you will use that fairly and impartially. And that is the essence of what we are -- you are about and I am about. Because we both have to make that commitment to use our knowledge and our logic and our reasoning fairly and impartially.

And I made that commitment. I am going to do the best I can. And I just ask that you do the same thing.

And when we do that we will combine our efforts at the end and a result will be obtained and that result will be fair and impartial to both sides and be a result based on the law and the evidence.

Now you and you alone will be the sole judges of that of what the true facts are in this case. And you will make that decision only after the court directs you to begin your deliberations.

Until that instruction is given -- and, folks, I will tell you now it is the last thing that you will hear before you leave this courtroom as to when you may start the process of deciding this case.

So until that point occurs, you each have made a commitment either by your statements or not -- not saying anything and really with the last question that you brought something and you sat down with it; and that is an open mind. You haven't decided anything. And, as I said, there is nothing about this case that would give you any concern about at the appropriate time applying that sense of logic and reason that serves you so well in your life.

So keep that open mind and don't change it. And I will confess something I have to do. Because I am human -- we all are human. You know, you hear something and you want to -- you tend to jump to a conclusion. You

tend to say, well, wait a minute; I know where this is going.

Don't -- resist that temptation. You may be right with your gut feeling. That may be true. But don't -- but don't -- don't go there until you are instructed to begin your deliberation.

And it is very important to the entire process. Because there are four distinct parts of this process. Each of them is uniquely important to your decision.

You will hear from the attorneys twice. Once before you hear the evidence and then once after you have heard the evidence.

The obvious difference, you have heard the evidence the second time. But it is proper for them to speak to you in what we call opening statements. They will tell you a little bit about the dispute. They may discuss some of the evidence they expect you will hear. And also maybe discuss some of the law that you will be asked to apply to that -- to those facts that you ultimately will determine.

Then we will hear the evidence. And as you know -- as we told you when we were qualifying, and some of you have had experience with this, the four parts are the same, whether it is a civil dispute or a criminal dispute. But in this case there are two really major

differences between a civil dispute and a criminal dispute.

The first deals with what I am about to say. The only party, the only party, that has any burden of proof in this entire process is the State of South Carolina.

Mr. Porter has nothing to prove, disprove. He doesn't have to say anything. He doesn't have to present any evidence. He has no responsibility whatsoever. Because the law says the State makes the accusation and they alone have to prove it.

And your verdict will be really addressing whether or not the State has met that burden of proof. And I will explain that in just a moment.

So because the State has the burden of proof, they go first. And you will hear the evidence. And they will have to present evidence that will convince you to a standard that is also the second difference.

In a civil dispute typically the standard of the burden of proof, the term we use, is the preponderance or greater weight of the evidence. That is the legal name and a legal term that says the probability standard, it is more likely so than not.

Well, in a criminal case it is much greater than that. It is more than just a probability of being guilty. It is proof beyond a reasonable doubt.

I will tell you now, and I will define it in my charge; but reasonable doubt is a doubt that would make an honest, conscientious, sincere juror who is searching for the truth in a case to hesitate to act or take some action.

And that is the standard that you will be asked to apply when you begin your deliberations. And I know that you will do that. And you are very competently and capable of doing that.

And when I say apply, what do I mean? I will also define for you the various elements of the two crimes that are charged. And I will list them for you. Then when you retire you will be analyzing that evidence to decide whether the State has met each one of those elements.

If the State satisfies you individually and collectively - well, obviously it has to be collectively - beyond a reasonable doubt as to each element then they have met their burden of proof and you must return a verdict of guilty.

Why? Because the law says the State has the burden of proving each of the element and you are duty bound to return that verdict if they have convinced you to that standard.

On the other hand, if as to any element you are not

firmly convinced beyond -- that terms beyond a reasonable doubt, as to that element, that stops it. You must return a verdict of not guilty. Because the State has to prove every element to that requisite standard. And that is what you will be about.

And so the State will present evidence that will -- that you will have to analyze and decide what you believe to be the true facts.

And that is the process that we all do every day of our lives. Or I can't tell you how many times this morning I am just watching the news. I have to make a decision for it, I believe this or not, and how strongly do I do it. You will do the same thing. And we do that -- sometimes we do that really spontaneously. Sometimes we ponder it.

I would ask you to do something. Don't make any spontaneous judgments. Now just like the lady that stood and I mentioned about body language and my reaction to when she was hesitant about doing it, that was an instant reaction I had. That is -- that is okay to have it. How I would distinguish that and what you have to do is it is okay to think what I just thought but don't make the conclusion.

And as whereas we went through the process, I concluded that it did not apply. Because she sat with

the jury. But my initial reaction was, ah, she has some reluctance to think she can be fair and impartial.

Don't get -- don't go to that. Because if you do, you have decided something. Keep that thought in your mind, and when you begin your deliberations then you can talk about it. And maybe some of your other jurors will be able to justify or explain that to you so that it allays your concern about the truthfulness or the untruthfulness of that particular thing.

So make those mental notes. Just don't go to the ultimate conclusion until you begin -- until you are instructed to begin your deliberations.

Now the State has the burden of proof. You hear their evidence. There is a very logical reason why you want to keep that open mind.

Because while the defendant in this case has absolutely nothing to prove or disprove and no responsibility whatsoever to present any evidence, but he still has the right to do so if he chooses to. But that won't come until you have heard all of the evidence from the State. So another reason you need to keep that open mind, because you have to hear all of the evidence obviously.

But more importantly and equally importantly, there are two remaining parts. But at the conclusion of the

evidence the attorneys will have their second opportunity to speak to you.

And unlike the first, now it is proper for them to discuss the evidence with you, suggest reasonable inferences that you may draw from that evidence. And you will find those remarks will be extremely helpful to you when you begin the process of deciding this case.

But I will tell you now and I will remind you in my charge, while their remarks as officers of this court are very important, please remember their remarks just as my remarks, should never be considered evidence.

Because the evidence will come through the testimony of a witness that you will hear. And you will have an opportunity to reflect on that when you begin your deliberations.

The last stage will be when I give you the law which you will take and apply fairly and impartially to those facts and perform the function and task that you just accepted when you became a judge with me.

It is an honor and a privilege to try this case with each one of you. And I thank you for your attention to my remarks. And I ask you to please give that same attention now to the attorneys as they give their opening statements.

Solicitor.

MR. SIMPSON: Thank you, Your Honor.
THE COURT: You may proceed.
THE JURY PANEL MEMBER: Excuse me. Before you start, I am not sure how she (pointing) is related to this case, but when you said the name earlier I wasn't sure it was her.
THE COURT: All right, ma'am, hold on a second.
I am going to ask the jury to go to your jury room. Ask you to remain, please, ma'am, okay.
(WHEREUPON, remainder of jury panel in process of exiting courtroom.)
THE COURT: Sir, you had a question too?
THE JURY PANEL MEMBER: Yes.
THE COURT: Another one. Yes, sir. All right. Just -- both of you remain then, please.
(WHEREUPON, remainder of jury exits the courtroom.)
THE COURT: All right. Ma'am, your name and number, please.
THE JURY PANEL MEMBER: Sandy Roach, 249.
THE COURT: All right. Yes, ma'am?
THE JURY PANEL MEMBER: I am not sure how she (pointing to audience member) is related to the case. And I am related to her through marriage with Byas. And when you said the name earlier I wasn't sure if it was her until she came into court.

THE COURT: Okay.
MR. SIMPSON: The individual we have confirmed that that is correct from our -- this is the mother of the victim.
THE COURT: All right. Okay. And would that influence or affect you in any way in this dispute?
THE JURY PANEL MEMBER: I believe it would, yes.
THE COURT: Very well. Then I am going to excuse this juror. Your number again
THE JURY PANEL MEMBER: Two forty-nine.
THE COURT: Two forty-nine is excused. Thank you. Sir?
THE JURY PANEL MEMBER: Two sixty-three, ---
THE COURT: Yes, sir.
THE JURY PANEL MEMBER: --- Eugene Samuel. I am not an acquaintance to her, but I know her from in passing at work. And to be truthful with you I think it would influence me with my job.
THE COURT: Very well. Then I will excuse you from participation in this dispute as well. Thank you, sir.
In the future if you have any questions and you are asked that question, please stand up then. Okay.
Thank you, ma'am. You are free to leave.
(WHEREUPON, ex-jurors exit the courtroom.)
THE COURT: All right. Any exceptions or objections

to the court's actions from the State?
MR. SIMPSON: Not after their comments, Your Honor.
THE COURT: Any from the defendant?
MR. SMALLDONE: None from the defendant.
THE COURT: Thank you very much. We will move the two alternates on then. Are you ready to make your opening statement?
MR. SIMPSON: Yes, Your Honor.
THE COURT: Or do you need a moment to regroup?
MR. SIMPSON: No, sir.
THE COURT: All right.
Thank y'all very much. I appreciate it.
Boy, this job it never ceases to amaze me what can come up.
(WHEREUPON, break was had awaiting jury.)
(WHEREUPON, jury enters courtroom.)
THE COURT: Our alternates, you are now on the jury. It didn't take long.
THE BAILIFF: May I approach, Your Honor?
THE COURT: Yes, sir. Certainly.
(WHEREUPON, bench conference was had with bailiff.)
THE COURT: Number 281, yes, ma'am -- do you want to -- why don't -- why doesn't the jury retire except for 281, please.
(WHEREUPON, jury exits courtroom with the exception of

Juror 281.)

THE COURT: You indicated to the bailiff you have some problems. What is that?

THE JURY PANEL MEMBER: That I was waiting on but you didn't ever ask the question concerning a relative that you have some ill feelings about as far as his murder trial that he was unjustly caught. And so I was waiting for some sort of a question as far as that. But you didn't. So I didn't know when to answer it.

THE COURT: Well, ma'am, why -- what did you think when I asked you the last thing and I said is there anything about this case that would give you any concern about taking the oath that you took and you didn't stand up; why did you -- why didn't you stand up then?

THE JURY PANEL MEMBER: I don't remember exact actual question but ...

THE COURT: I'm sorry, I don't ---

THE JURY PANEL MEMBER: I didn't remember that actual question.

THE COURT: You didn't remember that?

THE JURY PANEL MEMBER: Didn't hear that actual question.

THE COURT: You didn't hear that, ma'am? That was the last thing I said to you. And I talked about it when I qualified you. So it is the second time you have heard

it. Why didn't you stand up then?
THE JURY PANEL MEMBER: I just thought I needed to give forth the information.
THE COURT: Well, I understand that. So you are telling what, that would affect and influence you in this case?
THE JURY PANEL MEMBER: What I am saying is I don't think it will have any affect because I don't know anything ---
THE COURT: No, no, I didn't ask you whether you thought it was. I said will it affect you?
THE JURY PANEL MEMBER: No.
THE COURT: All right.
THE JURY PANEL MEMBER: I just wanted to give the information.
THE COURT: Well, I appreciate that. That is very helpful to me. And the information that you have is what -- I didn't understand what -- you had some prior involvement with?
THE JURY PANEL MEMBER: My brother.
THE COURT: With your brother. And what was the involvement?
THE JURY PANEL MEMBER: It's a murder case.
THE COURT: It's a murder case, and he was accused or -- or ---

THE JURY PANEL MEMBER: He is serving time.
THE COURT: He is serving time. But it would not affect you in any way?
THE JURY PANEL MEMBER: No.
THE COURT: Okay. And you would be able to set that aside and apply your sense of logic and reason fairly and impartially in analyzing that evidence?
THE JURY PANEL MEMBER: Yes. I just wanted to give the information.
THE COURT: And I appreciate that. You are doing exactly -- you are doing the right thing. I don't want you to think that I am chastising you for telling me. That is precisely what you should do.
But you should have done it before we excused the jury panel. That is the problem. So I am going to ask you to step out. Do not rejoin the jury at this point, okay.
You haven't -- have you talked with any of the jurors about that?
THE JURY PANEL MEMBER: No.
THE COURT: Okay. Thank you, ma'am. If you will just step out with Mr. Pryor and we will be with you very quickly.
(WHEREUPON, juror exits the courtroom.)
THE COURT: All right. I would assume the defendant

doesn't have any problem going forward. But what is the State's position?

MR. SIMPSON: Well, Your Honor, I mean just to speak frankly, I probably would have exercised a preemptory strike.

THE COURT: I am confident you would have.

MR. SIMPSON: Having said that, I embrace the challenge of convincing the juror ---

THE COURT: So you are willing to go forward?

MR. SIMPSON: --- where we can go forward. Yes, Your Honor.

THE COURT: Do you have an objection?

MR. SMALLDONE: Well, no, Your Honor, I -- I couldn't
understand ---

THE COURT: Well, I will tell -- her brother is serving time for murder.

MR. SMALLDONE: Okay. And it is not related to this case?

THE COURT: No.

MR. SIMPSON: I didn't understand ---

MR. SMALLDONE: Oh, okay. It is just a relative -- I think it was just a relative ---

MR. SIMPSON: My understanding was that she feels like her brother was wrongly convicted of a violent

crime.
THE COURT: Yeah, that is what it sounded like to me.
MR. SMALLDONE: No objection here.
THE COURT: Well, that is why I said what I said.
MR. SMALLDONE: I just want to -- there is a little bit of a back story in this case. I wanted to make sure it doesn't involve the back story.
THE COURT: I can't go into the back story in this case about that with her. I don't think there is a need. She just told me that it would not influence her.
And frankly, I defer to the State and I -- Mr. Simpson, I appreciate your position. Because I really think that the State would have exercised a challenge, not the defendant.
MR. SIMPSON: I would have. But, Your Honor, if I may ask just to have a couple of moments to confer with my victim's family kind of ---
THE COURT: Absolutely. You take as much time as you need, Mr. Simpson.
MR. SIMPSON: I appreciate it. And we will just be a few moments.
THE COURT: No, sir. Please. And I respect their position as well.
(WHEREUPON, break was had.)

MR. SIMPSON: Your Honor, we are ready to go.
THE COURT: Thank you.
MR. SIMPSON: No objection to her remaining.
THE COURT: All right. If you will ask her to come back in, please.
(WHEREUPON, Juror 282, Margretta Smith, return to courtroom.)
THE COURT: Ms. Smith, I appreciate that that you have done. As I told the others that said it would affect them, and we have excused them, if you ever have -- if you are ever in that situation again and you have an inkling that, well, maybe I need -- it is better to err on the side of caution than not.
But you did exactly what you are supposed to do, ma'am. And I thank you for that.
THE JURY PANEL MEMBER: I apologize.
THE COURT: Well, you don't -- and I appreciate you. But I want to make sure that you understand you have done nothing wrong in the sense of disclosing what you did. In fact you did exactly what we should -- what needs to be done.
I have discussed this with the parties and they are comfortable with your commitment that you will be fair and impartial in performing the task that you have undertaken. So you are still on our jury. Thank you so

much, ma'am. I appreciate it.
(WHEREUPON, juror exits the courtroom.)
THE COURT: Any exceptions or additions from the State regarding the instruction to the juror?
MR. SIMPSON: No, Your Honor.
THE COURT: From the defendant?
MR. SMALLDONE: No, Your Honor.
THE COURT: Let's take about five minutes.
(WHEREUPON, break was had.)
THE COURT: Mr. Pryor, bring in our jury please.
(WHEREUPON, jury enters 4/11/2018, 10:54 a.m.)
THE COURT: Thank you, ladies and gentlemen. And during the break it appears that you have selected as your presiding jury Mr. Wain; is that correct?
Thank you very much. And that will be your seat for the balance of the trial.
MR. WAIN: Yes, sir.
THE COURT: Thank you very much, ladies and gentlemen. We are now down to 12. And that is fine, and that is okay. And we understand that is the reason we have alternates.
The fact that I have excused two jurors should not be considered by you at all. I just urge you all to stay healthy. And thank you very much. We are ready to continue.

Mr. Simpson, you may proceed.

MR. SIMPSON: Thank you. Anybody?

OPENING BY MR. SIMPSON:

Ladies and gentlemen, good morning. My name -- we met briefly before. My name is Mr. Simpson. It is my honor to represent the State of South Carolina in the case against -- South Carolina versus Derrick Porter.

I want to start -- start every opening - and you will hear this from a lot of people this week - with a sincere thank you. Thank you for your time. Thank you for this disruption to your lives.

I know, you know, Ms. Smith got a little grief this morning for her reaction. That is a perfectly normal reaction to have. It is usually someone's reaction when they get put on a jury.

But almost every time I have talked to jurors after this experience they have expressed what a meaningful experience it was and how important it is.

Because as we have also talked this morning, everybody brings different experiences to the table and valuable insights that they can provide in that room. And we thank you all so much for your time this week.

While I am on that subject let me go ahead and start on a bad note. Just as your lives have been disrupted so have all of the witnesses' lives this week.

I say that because our first witness is going to go a little out of order than we would normally do. And that is because she had some conflicts through this week as a crime scene tech. So you are going to hear about a crime scene before you hear about a crime.

I apologize for that, and I just ask you to pay attention to her, our first witness, even though it may seem a little bit out of context.

Derrick Porter is charged with attempted murder. Attempted murder is one of those crimes that is legally defined. You will hear a fancier definition later. But it is legally defined exactly as I am sure you assume it is. And that is when a person's actions, their physical actions, and when a person's intent and purpose is to take the life of another. And our evidence in this trial is going to show that Derrick Porter did intend to take the life of another.

It is a murder case where because of some fact the person is still on this earth, is still with us and is still alive, but other than for the person surviving it is a murder. It is when a person intends to kill another. To take the life of another human being, murdered, intentionally.

That phrase sort of comes to me a lot when I think about this trial. Because it in many ways although

legally it is an attempted murder, sadly for the victim's family it is a murder when you define murder in taking the life of another.

Fritzgerald Byas was 29 years old on April 16th of 2016. And the Fritzgerald Byas that existed, sadly, on that day, is in many very meaningful ways is no longer with us due to the damage done to his person, to his brain, to who he was on this day.

That damage was done because another person intended to harm him and did harm him. And that is going to be part one of your challenge this week, which is always hard, and that is to determine what Derrick Porter's intent was, what his purpose was. And that is always difficult to go inside another person's head and determine what they meant to do, what they intended to do.

Always difficult, but not very difficult in this case that I present to you. Because in this case you are going to see with your own eyes what Mr. Porter did. And you are going to be able through your own perception - and that is a rare thing in a trial - through your own perception to determine what he intended to do.

And for such horrifying tragic results to Fritzgerald Byas, the actual actions of what happened are pretty simple and pretty easy to understand. And, like I

said, you are going to see that.

Mr. Porter by what the best we can tell was just complete chance saw someone he didn't care for on April 16, 2016. And they walked by by horribly tragic circumstances past each other at the Quick Mart in North Charleston.

And what you are going to see is they pass, sort of acknowledge one another, and Mr. Byas goes into the Quick Mart. Goes into the store to conduct his business for that day.

But Mr. Porter, the gentleman here (pointing), waits. And waits outside for nearly two whole minutes. Two minutes doesn't sound like a lot. But you are going to see it. And you are going to see it going real-time, and you are going to be able to perceive just how long two minutes is, just how many opportunities a person in two minutes has to leave.

Mr. Porter didn't. He paces. And he waits. And he is waiting for one thing, for Mr. Byas to come out of that store. When he does they approach one another. And they start by talking. And they start by talking in a way that seems kind of friendly.

But you know that is not Mr. Porter's purpose because very quickly you are going to see that it escalates into a confrontation. Into an argument.

You are going to see from body language and you are going to see -- it is not crystal clear, but you are going to hear that this is not a friendly conversation, that Mr. Porter had a problem with Mr. Byas. And Mr. Byas quickly you are going to see has a problem with Mr. Porter.

And then Mr. Byas does something that is going to be very important to your perception and your analysis of this case. Mr. Byas does what society asks people to do, and demand certainly of you and I that we do when things are getting heated. He tries to leave. And the only thing that stops Mr. Byas from leaving is the man seated here, Mr. Porter, who follows him to his car, who positions himself within the open door of the driver's side and continues this argument.

As far as I am away from some of you right now and even closer, standing in the doorway of a passenger seat.

The emotions escalate. The language escalates. Until in a moment it is going to blow your mind. The man seated right here pulls out a gun, puts it inches from the head of Mr. Byas, and pulls the trigger. And walks off as coolly and as casually as he can and leaves the scene.

Why is Mr. Byas still alive today? Is it because of the actions and the intent of Mr. Porter? No.

It is because of heroic efforts that you are going to hear about from the neurosurgeons at MUSC. Heroic efforts that survived a version of Mr. Byas that is very different than the version of Mr. Byas that existed before April 16th of 2016.

It is never probably a good idea in opening statements to anticipate what the defense it going to be. But we have -- we think we know at least in this case. And we anticipate you are going to hear a little bit about self defense and you are going to hear an assertion that perhaps Mr. Porter was acting in fear for his own life.

Rather than discuss what all that means right now and go through all of the elements and all of the reasons we don't think that is true, I want to wait and talk about that when you have heard things with your own ears, when you have seen things with your own eyes, when you have heard things from the people who were there that day and when you have had time to see the evidence.

Because I am confident once you have had time to see and perceive all of that, you are not going to have a problem finding that self-defense does not apply in this case.

But I will go ahead and do what I guess the younger people would call it a spoiler alert, that self-defense

claim arises because Mr. Byas did have a gun that day. But you are going to hear where that gun was and what was happening with that gun. Nothing. Out of sight when this shooting occurred.

And I am confident that once you have had time to look at the evidence and perceive all of what happened that day with your own eyes and ears that you are going to find that self-defense did not play a part in the actions that day.

You are going to find -- you are going to conclude that the gun although present in the car was not perceived by Mr. Porter and played no appreciable role in his decision and his actions of this day.

And you are going to conclude that Mr. Porter is guilty of what he is charged with, which is attempted murder and possessing a firearm during the commission of a violent crime, and that violent crime being attempted murder.

Again I thank you so much for your time and attention this week. We are going to do the best we can to present this in an efficient way to you to make the most of your time. And we appreciate your consideration. Thank you.

THE COURT: Thank you, Solicitor.

Mr. Smalldone.

MR. SMALLDONE: Thank you, Your Honor. May it please the court.

THE COURT: Yes, sir.

MR. SMALLDONE: Counsel.

OPENING BY MR. SMALLDONE:

Ladies and gentlemen of the jury, good morning. April 16, 2016. That was about almost exactly two years ago. You are going to hear a lot about that day. You are going to hear a lot about -- you are going to hear for maybe two days what happened in five minutes.

Isn't that crazy. You are going to analyze something that happened for five minutes for maybe a day, maybe two days, maybe three days. And I don't want to anticipate how long it is going to go.

And it is so easy to look back on five minutes for that long. And it is so easy to try to analyze things, to put your mind inside Mr. Porter's.

So I want to give you a little bit more than the five minutes. I want to give you a little bit of a back story as to what happened that day and what happened during then, what happened before then, and a little bit about what happened after. So let's start with what I said, April 16th, 2016. Mr. Porter is at the gas station, North Charleston. Minding his own business. Who did he see? Someone you heard about. Mr. Byas.

See, the back story is important here. Mr. Porter knew Mr. Byas. Obviously you have heard that. Mr. Porter, my client, Derrick, Derrick thought -- for whether true or not, that is not what we are here for, Derrick thought that Mr. Byas was involved in the killing of his cousin years ago.

And we are not here to try that. I am not here to put Mr. Byas on trial. That is not fair. That is not my job. But that is what Derrick thought. It is important to get in the mind of Derrick.

So Derrick sees Mr. Byas at the store. What does he do? Does he hit him; does he punch him; does he yell at him?

Derrick tries to be responsible. Right. Derrick acknowledges him. Tries to break the tension. Talks to him briefly.

And you have already heard this. What does he do? He waits for him. He talks to him in his car. He talks to him for a while.

And picture -- we have to picture -- how much tension there had to be there. How much tension to talk to and try to analyze and try to resolve really a conflict that involved the death of someone else. At least in Derrick's mind. You will hear more about that, obviously. You will hear more about this.

So he is talking to Mr. Byas. And you will see it all. Again, does he hit him; does he do anything? No, he waits I count about -- it is between three and four minutes that they are talking at the car. And, yeah, you will hear it. They talk. Yeah, they argue. What do they do? They argue.

A split second. Derrick thinks that Mr. Byas is going for a gun. And you will hear more about that. You have already heard that. What you heard, Mr. Byas did have a gun. Derrick thinks that Mr. Byas is going for his gun.

So what does Derrick do? In a second -- you can barely see it. In a second Derrick reaches for his. And that is why we are here.

Derrick -- you will see the video. Derrick is in shock. You never know what it is like until you see it. We always want to put -- again, we want to put our mind in someone else's.

It is easy to say -- how many times have you talked with your friends; well, if I was there I would have done this. If I was there I would have yelled or I wouldn't have done anything. Right? You always want to have hindsight. You want to say what you would do in a shocking situation.

You know, I think our president said about a school

shooting if I was there I would have gone in. You know, and not to -- not to get political, but it is easy to say stuff like that.

And it is easy to say if I was there I would have resolved it or if I was there I would have ran away screaming.

Well, you will see the video. We don't know what is in his mind. We can try to put it in there, but we can't.

Derrick walks away in shock. Calm, cool, and collected. He can't believe what he did. You will see it.

And that is why we are here. And what does Derrick do weeks later? You will find out he turns himself in. He volunteers. He goes and turns himself in and gives a statement, which you will hear, to law-enforcement.

Derrick thought that his life was in danger by a guy that he thought was dangerous. By a guy that he thought had a gun. And what do you see? As sure as I am standing in front of you right now he did have a gun. He thought he had a gun, and he did. That is why Derrick had to do what he had to do. You will see Derrick shoots him one time.

Derrick probably saved his own life that day. No one is happy for what happened. I can assure you

everyone here wishes Derrick never ran into him at that gas station. This wasn't planned. This was spontaneous. This was a split-second decision from fear.

So that is what this is about today. That is what this is about. This is about defending yourself against a threat. And at the end of this case when you see all of the evidence or when the judge charges you on the law, he will give you specifics about what is attempted murder, what is self-defense, all the law. You will hear it. What is reasonable doubt, all of that. You will hear it. And you will see clearly Derrick did the only thing that he could do in that situation.

And if the State hasn't proved beyond a reasonable doubt that he didn't, that it is not self-defense, then it is. And that is why at the end of this and at the end of all of this I am going to ask you to return a verdict of not guilty. Because he is not. He did what he had to do.

No one is glad to be here. No one is happy. Maybe including y'all. No one is happy. But this is the result of a bad situation.

Thank you.

THE COURT: Thank you, sir.

Call your first witness, please.

MR. COOPER: The State calls Tiffany Adams.

(WHEREUPON, the witness was duly sworn.)
THE CLERK: Please have a seat. State your full name and spell your last name.
MR. COOPER: Tiffany Adams. A-D-A-M-S.
THE COURT: Proceed.

DIRECT EXAMINATION BY MR. COOPER OF TIFFANY ADAMS:

Q Good morning, Ms. Adams.
A Good morning.
Q How are you?
A Good.
Q Can you please tell the jury where you are currently employed.
A North Charleston Police Department.
Q And what do you do at the North Charleston Police Department?
A I am a crime scene investigator.
Q How long have you been a crime scene investigator?
A Five years.
Q Will you tell the jury a little bit about what a crime scene investigator does.
A We go out. Anything that is deemed a crime such as breaking and entering of a business, home, vehicles, we go out, process the scene. Sexual assaults, homicides, attempted murders; anything that falls under assaults.
Q And when you are processing the scene can you

describe for the jury what kind of things you are looking for, what you are keeping an eye out for.
A We do dusting for fingerprints, DNA, blood. Any evidentiary evidence that will be helpful for the detectives in the investigation.
Q Do you also photograph the crime scene?
A Yes.
Q Focusing your attention back to April of 2016, how did you become involved in this case?
A I was the responding crime scene investigator. I got called out for a shooting at 2000 McMillan Avenue.
Q And what was your task when you -- once you arrived on the scene?
A And so what happens is we arrive on the scene. We speak with the responding officer. Kind of get a debriefing of what is going on.
So we were advised that there was a shooting. The victim was transported to the ER via EMS. Start doing your photographs of the whole thing and then start processing the scene.
Q And can you describe the scene for the jury.
A So it is like a parking lot with like -- like a little mall strip. And it is called the Quick Mac Stop. And it is just like a little -- like a little store. And the victim's vehicle was parked in front of the Mac's

Quick Stop.
Q Where was the victim shot?
A In the head.
Q Where was he when he was shot?
A Sitting in his vehicle in the driver's seat.
Q And can you explain for the jury what things you noticed when you began to process the scene.
A I was advised that on the driver's seat where the victim was sitting his firearm was on the front seat along with a hat. And there was a card placed for the marking of a spent shell casing that was at the right front tire.
Q And you mentioned that you did take pictures of the scene that day?
A Yes.
Q Would you recognize those pictures if I showed them to you?
A Yes.
MR. COOPER: Beg the court's indulgence.
THE COURT: Certainly.
MR. COOPER: Your Honor, May I approach the witness?
THE COURT: You may.
Q Ms. Adams, I am going to show you what has been marked for ID purposes only as State's Exhibit 1 and then State's Exhibit 3 through 12. If you will take a moment

and review those for me, please.
(WHEREUPON, pause for review of documents by the witness.)
Q Do you recognize those photos?
A Yes.
Q What are they?
A Photographs at the scene of that day and of the incident.
Q And do they appear in the same or similar conditions as they were when you took them?
A Yes.
MR. COOPER: Your Honor, at this time the State would offer Exhibits 1 and then 3 through 12 that have been previously marked for ID only into evidence.
THE COURT: Any objection?
MR. SMALLDONE: Your Honor, I do object to Exhibits 9 and 10.
THE COURT: Let me see 9 and 10. What is the basis of your objection?
MR. SMALLDONE: 403 objection.
THE COURT: Okay.
MR. COOPER: Your Honor, May I approach?
THE COURT: You may.
MR. COOPER: Your Honor, these are pictures where the victim was shot in the vehicle.

THE COURT: Let's don't ---
MR. COOPER: Okay.
THE COURT: You don't need to say a word.
At this point she can talk about them. I am not going to admit them at this point. Subject to further testimony. I will have to wait and see. And we will have -- we will discuss it at the first break so I can analyze and do the 403 analysis. Thank you.
MR. COOPER: Thank you.
THE COURT: I will have to excuse the jury to do that. Let's move on. That is not critical at this point. But if he chooses to admit this through other witnesses -- because the witness as I understand has a conflict. You are not -- it has already been authenticated and the only challenge is a 403, correct?
MR. SMALLDONE: That is correct. I won't raise that issue.
THE COURT: This witness won't have to be here if he chooses to introduce it after their arguments.
MR. COOPER: Yes, Your Honor.
THE COURT: Thank you.
MR. COOPER: Thank you.
Q All right, Ms. Adams, I am going to -- with Exhibit 1, and then 3 through 12, except 9 and 10, are into evidence?

THE COURT: That is correct. Without objection.
(WHEREUPON, State's Exhibit Number 1 was admitted into evidence.)
(WHEREUPON, State's Exhibit Number 3 was admitted into evidence.)
(WHEREUPON, State's Exhibit Number 4 was admitted into evidence.)
(WHEREUPON, State's Exhibit Number 5 was admitted into evidence.)
(WHEREUPON, State's Exhibit Number 6 was admitted into evidence.)
(WHEREUPON, State's Exhibit Number 7 was admitted into evidence.
(WHEREUPON, State's Exhibit Number 8 was admitted into evidence.)
(WHEREUPON, State's Exhibit Number 11 was admitted into evidence.)
(WHEREUPON, State's Exhibit Number 12 was admitted into evidence.)
Q Ms. Adams, I am going to put these items on the screen where they will also appear on the monitor right in front of you. Ms. Adams, can you please tell the jury what this picture shows us.
A All right. This is Google Maps. This is the Quick Stop where the incident took place.

Q Okay.
A And ....
Q Please continue.
A And then this address is where I had to go -- sorry about the circling. Where I had to go. This is where the suspect's vehicle was located.
Q And it is a little hard to read. What is the title above where the incident occurred, the words?
A [redacted] Pine Ridge Circle. And then the Quick -- Quick Stop.
Q And [redacted] Pine Ridge Circle is where you found the vehicle ---
A Where ---
Q --- that we will discuss in a few minutes?
A Where I was dispatched over, because they located the suspect's vehicle.
MR. COOPER: Beg the court's indulgence.
THE COURT: All right.
Q I am showing you State's Exhibit 2. Would you please tell the jury what this shows us.
A Okay. As I stated earlier, the -- this is the Mac's Quick Stop. The victim's vehicle that is parked in front of the Mac's Quick Stop.
Q You said that was the victim's vehicle, correct?
A Yes.

(WHEREUPON, pause to clear ELMO monitor.)
Q I am showing you State's Exhibit 4. What is this a picture of?
A This is just a closer up of the vehicle. It is a Chrysler 200.
Q Okay. I am showing you State's Exhibit 5.
A Just doing overalls. This is the passenger side of the inside of the vehicle.
Q And as we mentioned earlier, your job when you are on the scene is to photograph the entire scene?
A Yes.
Q I am showing you State's Exhibit 6.
A This is the driver's side. I am showing the inside and the driver's seat.
Q And the victim was shot as he was sitting in the driver's seat?
A Yes.
Q And then that was the weapon -- his weapon that was in the driver's seat once he was taken away?
A Yes.
Q Okay. I am showing you State's Exhibit 7.
A A closer up of the driver's seat with the firearm and the hat.
Q And what appears to be on the center console?
A A can of Mike's Hard Lemonade.

Q I am showing you State's Exhibit 8. What is that picture?
A A closer up of the Mike's Hard lemonade.
Q I am showing you State's Exhibit 11. What does that picture show us?
A Showing the right passenger, the right front tire, and Marking Number 1 with the spent shell casing.
Q And I am showing you State's Exhibit 12.
A Closer up of the spent shell casing near the right front tire.
Q And so is this also part of your responsibility when you are on the scene, not just to photograph but to try to find any evidence that may be related to the crime?
A Yes.
Q Was this the only shell casing that you found?
A Yes.
Q Did you collect that shell casing?
A Yes, I did.
Q Would you recognize that if I were to show you that?
A Yes.
MR. COOPER: Your Honor, may I approach the witness?
THE COURT: You may.
Q Ms. Adams, I want to show you at this time what has been marked for ID purposes only as State's Exhibit 27. Do you recognize that?

A Yes.
Q And what is that?
A This is the spent shell casing near the right front tire marked number one.
Q And how do you know that?
A That is my name on the label and my signature and date on the back of the sealing.
Q Okay.
MR. COOPER: Your Honor, at this time the State would like to offer State's Exhibit 27 for ID purposes only into evidence.
THE COURT: Any objection?
MR. SMALLDONE: No objection.
THE COURT: Without objection State's 27 is admitted.
MR. COOPER: Thank you, Judge.
(WHEREUPON, State's Exhibit 27 was admitted into evidence.)
Q And now Ms. Adams, while you were on the scene and processing the scene did you have the occasion to view any surveillance video?
A Yes.
Q Where did you view interview the surveillance video?
A I was advised that at the beauty shop, which is right next to the -- it is my picture. That they had

surveillance of the incident that took place.
Q I am showing you again State's Exhibit 3. Could you indicate where for us on the picture the beauty shop is located.
A The Unique Beauty Store and then where the incident is.
Q And video surveillance was obtained from both locations, correct?
A I obtained if from the Unique Beauty, yes.
Q Okay. And would that video has been put on a disk?
A Yes.
Q Would you recognize that if I were to show you that?
A Yes.
MR. COOPER: Your Honor, may I approach the witness?
THE COURT: Yes, you may.
Q I am going to show you, Ms. Adams, what has been marked for ID purposes only as State's Exhibit 16. Do you recognize that?
A Yes, I do.
Q And what is that?
A This is the video from the beauty shop.
Q And how do you know that?
A Is has my initials on it and the date.
Q Okay.
MR. COOPER: Your Honor, at this time the State

would offer what has been marked for ID purposes only as State's Exhibit 16 into evidence.

THE COURT: Any objection?

MR. SMALLDONE: No objection.

THE COURT: Without objection State's Exhibit 16 is admitted.

(WHEREUPON, State's Exhibit 16 was admitted into evidence.)

Q And now, Ms. Adams, I believe you touched on this just a few minutes ago, but other than being on the scene were you asked to process anything else related to the crime that day?

A I went inside where the clerk stated that the suspect went and purchased a can of the Mike Hard -- Mike Hard's Lemonade. So when I entered into the store they had that cooler blocked so no one could go there for processing purposes.

Q And that was the Quick Stop that was directly in front of the vehicle ---

A Yes.

Q --- in the picture?

A Yes.

Q And once you finished there did you happen to go anywhere else to process something related to this crime?

A At that time I was advised when I finished

processing at the Quick Stop to go to Pine Ridge because the suspect's vehicle was located over there.

Q I am going to show you again State's Exhibit 1. Indicate again for us where [redacted] Pine Ridge Circle is.

A (Marked on ELMO).

Q This is just a few streets over from the Quick Stop?

A Yes.

Q And, again, what were you asked to do at [redacted] Pine Ridge Circle?

A To photograph the vehicle.

Q If I were to show you pictures of the vehicle would you recognize those?

A Yes.

MR. COOPER: Your Honor, may I approach the witness?

THE COURT: Yes, you may.

MR. COOPER: Thank you, Judge.

Q I am going to show you, Ms. Adams, what has been marked for ID purposes only as State's Exhibits 13, 14, and 15. Do you recognize those?

A Yes, I do.

Q And what are they?

A Photographs of the vehicle. It is a Ford Taurus.

Q Okay. And then are they in the same or similar conditions as they were when you took the photos?

A Yes.

MR. COOPER: Your Honor, at this time the State would offer State's Exhibit 13, 14, and 15 into evidence.
THE COURT: Any objection?
MR. SMALLDONE: No objection.
THE COURT: Without objection State's 13 through 15 are admitted.
MR. COOPER: Thank you, Judge.
(WHEREUPON, State's Exhibit 13 was admitted into evidence.)
(WHEREUPON, State's Exhibit 14 was admitted into evidence.)
(WHEREUPON, State's Exhibit 15 was admitted into evidence.)
Q I am going to show these to you on the screen. I am going to show you State's Exhibit 13. What is that?
A It is showing the positioning of the vehicle where it was parked.
Q State's Exhibit 14.
A A closer shot of the license plate.
Q And then State's Exhibit 15.
A When we take pictures of the vehicles we take an all-around view.
Q And then would you just indicate on the spot for the vehicle where those marking happened to be, if you can just draw those on the screen for the jury.

A (Witness complied).
Q And obviously you didn't put those on there?
A No.
MR. COOPER: If I could just beg the court's indulgence JUST one second.
THE COURT: Certainly.
Q Ms. Adams, a few more questions for you. Were you on the scene when the victim was removed from the vehicle?
A I was not.
Q And that gun that was in the driver's seat when you arrived, do you have any idea how it came to be there?
A I was advised that as they were moving him ---
MR. SMALLDONE: Objection.
A --- from the vehicle ---
THE COURT: Sustained.
MR. COOPER: I will rephrase the question, Judge.
Q Based on what you saw once you arrived on the scene, just what you saw, do you have any knowledge of how that gun came to be there?
A Only from what the -- what I was advised on the scene.
Q Okay. And then so again your job was to take pictures of what you saw once you arrived on the scene?
A Yes. Everything is -- when I come on the scene

everything is as is.
Q Okay. And then that video that was obtained from the beauty shop, how did you obtain it?
A The owner at the time was not on the scene so they didn't know how to retrieve it to put it on a USB or on a flash drive. So I had to record it from my camera.
Q So the recording on the CD is a recording of you video recording the video as it is playing?
A Yes.
Q As it is playing at the beauty shop?
A From their laptop.
Q Okay.
MR. COOPER: Beg the court's indulgence for one second.
THE COURT: Yes, sir.
Q Ms. Adams, Thank you for your time. I have no further questions for you. If you would answer anything the defense may have for you.
THE COURT: Cross-examination, Mr. Smalldone.
MR. SMALLDONE: No questions for this particular witness.
THE COURT: Thank you.
Do you wish the witness to be excused?
MR. COOPER: Yes, sir. Please, Judge.
THE COURT: Any objection?

MR. SMALLDONE: No objection.

THE COURT: Ms. Adams, thank you. You may step down and you are free to leave.

THE WITNESS: Thank you.

THE COURT: Yes, ma'am.

You may call your next witness, please.

MR. SIMPSON: Thank you, Your Honor. The State calls Pierra Martin.

Your Honor, may I approach the exhibits too?

THE COURT: Yes, sir. You surely may.

THE CLERK: State your full name and spell your last name.

THE WITNESS: Pierra Martin. M-A-R-T-I-N.

DIRECT EXAMINATION BY MR. SIMPSON OF PIERRA MARTIN:

Q Ms. Martin, good morning.

A Good morning.

Q My name is Chad Simpson. I work for the State of South Carolina. How are you today?

A Good.

Q Are you a little nervous to be here?

A Kind of.

Q A little bit? Okay. Well, let's introduce you a little bit to the jury. Where are you from?

A Charleston.

Q Have you lived here your whole life?

A Uh-huh.
Q Where do you live; whereabouts in Charleston?
A I live in North Charleston right now.
Q Okay. Have you lived in North Charleston for a while?
A Uh-huh.
THE COURT: Excuse me, Ms. Martin. What you are doing, we all do. But we need you to say yes or no ---
THE WITNESS: Oh.
THE COURT: --- so the court reporter and I can be sure and the jury be sure of your responses. Okay.
THE WITNESS: Okay.
THE COURT: Thank you.
Q Ms. Martin, where are you currently employed?
A At Exxon on Rivers and McMillan.
Q Okay. And do you know -- you are aware of the incident that brings you here today; is that correct?
A Yes.
Q Where were you employed back in April of 2016?
A Unique Beauty Supply on McMillan Avenue.
Q And what did you do at Unique's back then?
A Just help sell, just help customers, and stock and everything.
Q Okay.
MR. SIMPSON: Your Honor, may I approach the

witness?

THE COURT: Yes.

Q Where is Unique's?

A On McMillan Avenue in Charleston.

Q Okay. And McMillan is that close to Rivers?

A Yes. It is connected.

Q You are going to see this on the screen in front of you and on the screen behind you. I am showing you what has been marked and admitted as State's 3.

Do you recognize this area here that we see in that picture?

A Yes.

Q And where is that?

A In front of Unique's on McMillan.

Q And that is where you worked back in April of 2016?

A Yes.

Q Okay. And if you could I am just going to let you in your own words explain to the jury what occurred on April 16th of 2016, from your point of view what you perceived that day.

A We were in the store and then I heard a shot, what sounded like a gunshot. And I went outside and I just saw, you know, the man in the car. And I called 911.

Q Okay. What -- when you walk out -- and, you know, we can see the area here. When you walk out of Unique's

that day what was -- what is the first thing that you noticed?
A I saw the door's open. And like I walked towards -- you know, towards him. And then I saw all the blood. And like -- and like I kind of panicked and I called 911.
Q Okay. And, you know, we are in the courtroom here today which is kind of a sterile environment. Was it -- was this -- what was your demeanor like once you saw that? You said you kind of panicked. Could you explain that.
A Yeah, I -- because I experienced something like that before. My friend actually shot himself in the head in front of it. So it was just like, you know, I kind of had like flashbacks.
Q So this was a traumatic thing for you?
A Yeah.
Q How close did you get -- where was this -- you saw a person, right?
A Uh-huh.
Q And you said you saw blood?
A Uh-huh.
Q Was the ---
THE COURT: Was that yes?
THE WITNESS: Yes. Sorry.
Q Describe what -- was the person moving, talking?

A No, he wasn't moving. I couldn't really tell if he was breathing. The door was open. He was kind of like leaned over a little bit. And I could tell because I could see like the blood coming from his head.

So that is why I just figured like, you know, he got shot.

Q How close to the driver's side of the vehicle did you get; did you get a good look at him?

A I stood right in -- inside of the door.

Q Okay. That screen in front of you, you can mark on it. Can you maybe show the jury where you were when you approached the car.

A I was like in -- you know, in this area (pointing). I came around in the door and I was standing next to him.

Q Okay. And did you actually lean into the car?

A A little bit when I was on the phone. Because I was trying to ask the dispatcher if I could do anything to help stop -- you know, I didn't touch him or anything. But, you know, just -- I -- and then I was trying to make sure to see if he was breathing. And then he was breathing.

Q Okay. Did you see -- so I don't want to put words into your mouth. When you leave you went straight to the car?

A Uh-huh.

Q Was anybody else at the driver's side of that car when you got there; or were you by your perception the first one to get right to ---
A I was one of the first ones that were out there. Other people came, but they were just standing.
Q Okay.
A They were looking.
Q Okay. From your close view did you see at any point in time when you were standing next to that car you just described, did you see a gun?
A No. I don't -- no.
Q Okay. Did you have a view of the individual in the car; did you have a view of both of his hands?
A Yes.
Q Okay.
A He had a drink in one of his hands. And then I believe like he didn't have anything in his other hand. And so. I know it was a drink and the drink was like open.
Q Okay.
A It was an alcoholic drink.
Q Your perception going right to the car was that he had a drink in one hand ---
A Uh-huh.
Q --- and nothing in the other hand?

A Uh-huh.
THE COURT: Was that a yes, ma'am?
THE WITNESS: Yes. Sorry, sir. I'm sorry.
Q At any point in time did you see a gun in that individual's hands when you were standing there?
A No.
Q Did you see a gun on the seat when you were standing there?
A No.
Q Did you see a gun on the front of the dashboard when you were standing there?
A No.
Q Did you see a gun on the floorboard?
A No.
Q Did you see a gun anywhere whatsoever in the -- in the compartment of that car?
A No. I was just really looking at him trying to make sure ....
Q Okay. You mentioned that you were on the phone part of this time?
A Yes, I -- when I called 911.
Q Okay. And you recall calling 911?
A Uh-huh.
Q Do you think had you ever perceived or seen a gun during that phone call you would have mentioned that to

911?
A Yes.
Q Did you ever mention that to 911?
A No.
Q Okay.
MR. SIMPSON: Your Honor, may I approach the witness?
THE COURT: Yes, you may.
Q I am showing you what has been marked for ID only as State's 28. Can you take a minute to review that.
A Yes.
Q Do you recognize that?
A Yes.
Q And how do you recognize it?
A It was played back to me. That was my 911 call from that day.
Q Okay.
A And I put my signature -- my initials on it.
Q Okay.
A And the date that I listened to it.
Q And you said you were given an opportunity to review the contents of this CD?
A Uh-huh.
THE COURT: Is that a yes?
THE WITNESS: Yes.

MR. SIMPSON: I'm sorry, Your Honor.
THE COURT: That's all right.
THE WITNESS: I'm sorry.
THE COURT: It is normal. It's what -- but you are in a situation where the person seated next to you is taking down what you are saying. It helps her know exactly what you are saying, please.
Q And does this contain a fair and accurate recording of your 911 call that day?
A Yes.
Q Any hesitancy recognizing your own voice on this recording?
A No.
Q Okay.
MR. SIMPSON: Your Honor, at this time the State would seek to admit State's 28.
THE COURT: Any objection?
MR. SMALLDONE: No objection.
THE COURT: Without objection State's 28 is admitted.
(WHEREUPON, State’s Exhibit Number 28 was admitted into evidence.)
MR. SIMPSON: Thank you, Your Honor. Permission to publish?
THE COURT: You may.

(WHEREUPON, State's Exhibit Number 28 published.)
Q Ms. Martin, so is that when your call concluded what happened?
A Yes.
Q It was when police arrived that your call concluded?
A Yes.
Q Now you were obviously emotional.
A Uh-huh.
Q Okay. But by your recollection did you still nevertheless get a good view of the individual seated in that car?
A Not really. I can't really remember how he looked.
THE COURT: Ma'am, you need to take your hands down so we can hear you. Thank you.
Q Did you ever -- I think we heard in the call there was a time where -- I'm sorry. If you need a second.
(WHEREUPON, witness regains composure.)
A I am all right.
Q Okay. Was there a time that you perceived that the individual seated in that car was in fact still breathing?
A Yes, because he -- he like made like a sound.
Q Okay. So you were close enough to him at that time to hear a sound?
A Uh-huh.

Q And to perceive a continued breathing?
A Uh-huh.
THE COURT: Was that ---
A Yes.
Q Okay. And at any time being that close to him did you again see a gun?
A No.
Q Okay. I think you answered this in your 911 call for us, but did you know the person in the car?
A No.
Q Did you ever see or know the person that could have done this to him?
A No.
Q Okay. So and are you here today trying to help anybody out?
A No.
Q Are you here today trying to hurt anybody?
A No.
Q Okay. But you -- were you there that day to help in any way you could?
A Yes.
Q And, again, did you perceive at any time a firearm in that vehicle?
A No.
Q How long did you work for the beauty shop?

A I worked there for about -- about a year off and on. I have known them for awhile, so I go in there all the time. So sometimes I still help out if they need me.
Q Okay. Did you work there long enough to know if the beauty shop had any sort of like video surveillance equipment?
A Yes.
Q Okay. Did you in fact watch any of that on that day after the police got there?
A Yes.
Q I am showing what has been entered into evidence as State's 16.
MR. SIMPSON: May I approach, Your Honor?
THE COURT: You may.
Q Do you recognize that exhibit?
A Yes.
Q And, again, how do you recognize that?
A It was played back to me.
Q Okay. Does this -- is that a fair and accurate representation of the surveillance video that you watched that -- later that day?
A Yes.
Q And how did you indicate that on the exhibit?
A I signed it. I mean put my initials on it and the date.

MR. SIMPSON: Your Honor, at this point the State would seek to publish State's 16 already in evidence.

THE COURT: Very well. Any objection?

MR. SMALLDONE: No objection.

THE COURT: You may publish it.

(WHEREUPON, begin publications of State's 16.)

(WHEREUPON, State's 16 publication paused.)

Q Ms. Martin, the audio we hear is just people talking in the beauty shop; is that correct?

A Yes.

Q Okay. Not from -- you can't hear -- on this video you can't hear what is going on outside?

A No. The video has no sound.

(WHEREUPON, resume publication of State's 16.)

Q Ms. Martin, the red car we saw in that video, was that the same car that you approached that day?

A Yes.

Q Okay. Is that the car containing the person that you initially thought of as deceased?

A Yes.

Q Again, you discontinued your 911 call when police got to the scene?

A Yes.

Q Did EMS also later arrive?

A Yes.

Q Did you -- or are you aware that -- did you -- did you inform police that there was some video that captured the incident?
A No.
Q Okay. Did you ever see them come in and get copies of that?
A Yes, they were there.
Q Okay.
MR. SIMPSON: Court's indulgence.
THE COURT: Yes, sir.
MR. SIMPSON: Ms. Martin, thank you for your time. Thank you for being here. Please answer any questions that the defense has for you.
THE COURT: Cross-examine.
CROSS-EXAMINATION BY MR. SMALLDONE OF PIERRA MARTIN:
Q Good morning, Ms. Martin.
A Good morning.
Q I just have a few questions for you. And like we talked and like the judge said, just make sure to say yes or no.
A Okay.
Q Because all of the uh-huh's and uh-hum they look a lot alike when they are typed out.
A Yes.
Q Do you understand? Thank you. I just want to

clarify. You didn't see -- you didn't see this man there, correct?
A No, I didn't see.
Q And I -- and I just want to clarify. You didn't see what happened before you heard the shot, right?
A No.
Q All right. You didn't see any cars out there?
A No.
Q Okay. So you -- you only saw what happened afterwards; isn't that right?
A Yes.
Q Okay. And that is all I have for you. Thank you.
THE COURT: Redirect.
REDIRECT EXAMINATION BY MR. SIMPSON OF PIERRA MARTIN:
Q In the time after, that Mr. Smalldone was referring to, did you ever see a firearm in the car? A gun?
A In the gray car?
Q Yes.
A No.
MR. SIMPSON: Nothing further, Your Honor.
THE COURT: Recross.
MR. SMALLDONE: No recross, Your Honor.
THE COURT: All right. Thank you. You may come down.
All right, ladies and gentlemen, given the time it

would be a good point -- you can step down, Ms. Martin.

Do you wish the witness to be excused? Your wishes?

MR. SIMPSON: Yes, Your Honor.

THE COURT: Any objection?

MR. SMALLDONE: No objection.

THE COURT: You are also free to leave if you want.

At this point, ladies and gentlemen, we will let you go to lunch. Please remember that you are not at liberty to talk about this case among yourselves. And while you are out do not let anybody talk to you about it or don't talk to anyone else.

Don't do any independent research or evaluations. And I ask you to be back in your jury room, please, by 1:30. We will resume the trial at that time. Have a good lunch. Thank you.

(WHEREUPON, jury exits courtroom 4/11/18, 12:00 p.m.)

THE COURT: All right. Anything from the State before we take our recess?

MR. SIMPSON: No, Your Honor. I would just briefly note the State is withdrawing its attempt to admit nine and ten. So we don't have to discuss that.

THE COURT: That is fine. Well, let's leave it up because they were identified.

MR. SIMPSON: Oh, I'm sorry. Yes. Thank you, Your Honor.

THE COURT: Okay. Just leave them -- just leave them there. But they won't go back to the jury. Thank you.

MR. SIMPSON: Thank you, Your Honor.

THE COURT: Anything from the defendant?

MR. SMALLDONE: No, Your Honor.

THE COURT: Okay. Is the defendant on bond?

MR. SMALLDONE: He is not.

THE COURT: Okay. All right. Thank you. All right. We will be at ease until 1:30, please. Thank you.

(WHEREUPON, recess for lunch 4/11/18, 12:00 p.m.)

(WHEREUPON, resume trial 4/11/18, 1:26 p.m.)

(WHEREUPON, Court's Exhibit 1, juror note, was marked for identification.)

(WHEREUPON, Juror Number 320 appears before the court.)

THE COURT: We have marked your note as Court's Exhibit Number 1. And I appreciate your note and appreciate you doing that. I have shared it with the attorney.

And as I read this, you know him just to say hello but don't know him that well; is that fair?

THE JURY PANEL MEMBER: That is fair. Yes.

THE COURT: And my question -- you have shared that. Having done it I would ask you would you be able to

consider his testimony the same as any other witness?

THE JURY PANEL MEMBER: Yes, Your Honor.

THE COURT: And you would determine what you find to be credible and believable and determine the true facts and then apply the law fairly to it?

THE JURY PANEL MEMBER: Yes, Your Honor.

THE COURT: And the fact that you have some knowledge of him would not influence one way or the other?

THE JURY PANEL MEMBER: No, Your Honor, it would not.

THE COURT: Thank you so much. If you will just step out for just for a moment. I want to share that with the attorneys. Thank you so very much.

(WHEREUPON, jury exits courtroom.)

THE COURT: What is the State's position?

MR. SIMPSON: We would like the juror to remain.

THE COURT: What is the defendant position?

MR. SMALLDONE: Your Honor, I don't have an objection to him remaining. I will just preserve the record a bit. Not preserve but cover my own record, Your Honor, just to say that I believe the surgeon is a -- not an eyewitness, not a -- he is just a surgeon who treated the complaining witness. So because of that I can't form ---

THE COURT: Well, and I ---
MR. SMALLDONE: --- a good faith basis to object.
THE COURT: --- don't know what -- I am only reacting -- thank you. And I interrupted you. I apologize for that.
But based on your opening statement it is my understanding that this is not a question of whether your client shot this man or not. That is almost a given. He shot him but his claim is to defend himself. So the consequence of all of that is what these persons are going to testify to. So it is what it is I would think so.
MR. SMALLDONE: That is my position.
THE COURT: Very well.
Ask him to come back in, please.
(WHEREUPON, juror enters courtroom 1:28 p.m.)
THE COURT: Mr. Wain, thank you very much. And thank you again for this. And that is -- again, I commend you and the other jurors that have come forward and stated that. Based on your responses, based on the note, we will ask you to remain, please, with the jury panel.
THE JURY PANEL MEMBER: Thank you, Your Honor.
THE COURT: Thank you very much, sir.
(WHEREUPON, juror exits the courtroom.)

THE COURT: Any exceptions or additions from the State?
MR. SIMPSON: No, Your Honor.
THE COURT: Any exceptions or additions from Mr. Porter?
MR. SMALLDONE: No, Your Honor.
THE COURT: Thank you. Okay.
THE BAILIFF: We still have a couple coming.
THE COURT: Okay. That is good.
(WHEREUPON, break was had 1:36 p.m. for the Court to handle matters unrelated to trial.)
(WHEREUPON, trial resumed 4/11/18, 1:48 p.m.)
THE COURT: The State is ready? Mr. Simpson?
MR. SIMPSON: Yes, sir.
THE COURT: The defendant is ready, Mr. Smalldone?
MR. SMALLDONE: Yes, Your Honor.
THE COURT: Very well. Okay. Let's bring in our jury.
THE CLERK: All jurors are present, Your Honor.
(WHEREUPON, jury enters 4/11/18, 1:49 p.m.)
THE COURT: Thank you very much, ladies and gentlemen. Appreciate it. Hope you have a good lunch, and we are ready to continue.
And I noticed something and I appreciate what one of the jurors is doing. And it is one of the reasons -- a

lot of judges have the lawyers stand when the jury comes in. And I understand why. You are the judge and that is what they are supposed to do. But me I try to sneak in so they don't sometimes. But I know I am not always successful.

What happens when they do that is what happened there; do I sit down, do I sit down, what is the protocol. And so it is better if we all sit and then it makes you feel a little more comfortable.

And that is the whole purpose. It is in no way disrespectful to your role of being a judge, I can assure you. So thank you very much.

Solicitor, you may call your next witness.

MR. SIMPSON: Thank you, Your Honor. The State calls David T. Palawasta.

(WHEREUPON, the witness was duly sworn.)

THE CLERK: Please have a seat and state your full name spelling your last name.

THE WITNESS: Sure. My name is David T. Palawasta. P-A-L-A-W-A-S-T-A.

DIRECT EXAMINATION BY MR. SIMPSON OF DAVID PALAWASTA:

Q Mr. Palawasta, Chief ---

A Yes.

Q Good afternoon. How are you?

A Good. How are you, sir?

Q I am doing well. If you could -- we see the uniform, but if you could explain to the jury your current occupation and rank and role and your organization.
A I am a paramedic for Charleston County EMS. I am a division chief. So I am a supervisor. I work the evening shift right now. Currently responsible for 30 employees during the night shift. I have been working for Charleston County for 18 years. Been a paramedic for 29 years now.
Q Well, let's expand on that a little bit and just kind of introduce you to the jury. You have kind of an interesting background. If you could just explain to the jury where you are from and a little bit about your professional training and experience.
A Sure. I have been in public service for 29 years now. I was born and raised in New York City. I started my career with New York City EMS, one of the best training places in the world because you see over a million call a year with New York City EMS.
After working there for several years I decided to move out of there. I have done fire work as well. I was a firefighter paramedic and so forth.
Worked both World Trade Center bombings, unfortunately, in '94 and then again in 2001. That is

when I decided to move down here to Charleston to kind of get away from things.

But I still enjoyed what I did, so that is why I am still here with Charleston County.

Q Chief Palawaska, thank you for your service. You certainly have had an opportunity to have an interesting background. We appreciate that.

What all does it take to be an EMT, a member of EMS?

A As a paramedic first you have to go through what is considered emergency medical training. And that takes 250 hours. Once you complete that you can go on to advance into a paramedic. I went up to a paramedic position. That takes an additional 1,800 hours of training in order to treat people using what is considered advanced life-support skills.

Every single year we are tested on our competency. And we have to recert every three years for state, every four years for our national certification, to show provision that we are proficient in our skills and our knowledge.

Q It probably goes without saying; you mentioned obviously some historical incidence of this, but are you used to in your experience being involved in situations that can be defined as chaotic ---

A Yes.
Q --- or high stress situations?
A Yes, sir.
Q And can you talk a little bit about your training and how you personally deal with that.
A It is something that you learn to deal with through the years. I have treated several people that I have known very personally and never realized until I got to the hospital after I started doing my paperwork.

Because when I treat a patient I am not so looking at whether or not I recognize a person. I am looking at are they breathing, do they have a pulse. And I am trying to compartmentalize what it was going on with a patient. I don't want to, you know, build a rapport with a patient. I want to be able to do the best thing that is possible.

The same thing with dealing with kids. I have little kids myself. So if I am dealing with a little kid I want to look and say that is my son or something. I want to be able to do the best job as possible.

So I always, you know, treat whoever they are to the best of my ability and move on from there.
Q And do you have any experience and/or training regarding coming into contact with dangerous instruments, weapons and the like?

A Yes. For Charleston County EMS we do a lot of training with the Sheriff's Office and SWAT. We are trained -- first off, that we are not allowed to go into a scene until the police department deem that the scene is secure.

They want to make sure that there is no shooter still there. They also want to make sure -- they are trying to preserve any kind of evidence. So if there is a gun laying on the ground they usually would designate a police officer to stand over the gun to make sure that EMS or Fire doesn't kick it accidentally, move or disturb the scene or so forth.

Being as a supervisor, and as I said being in this 29 years, I have learned, you know, what their role is, what our responsibility is. So my job as a supervisor usually is to stand back and make sure that every safety precaution is taken care of. That way none of our employees or anybody is injured while they are trying to render aid to somebody.

Q So as a supervisor in the protocol as it applies to you in your unit, if it is expected that there is a weapon on the scene you aren't even allowed in?

A That is correct.

Q Okay. Were you still employed in this line of work in April of 2016?

A Yes, I was.
Q Specifically April 16th of 2016?
A Yes.
Q And you know the incident that brings us here today, correct?
A Correct.
Q If you could, explain to the jury from your point of view what occurred -- what you experienced on that day.
A Sure. I am just reviewing back to my notes upon that day. On April the 16th at approximately 15:41 hours or 3:41 p.m. we were dispatched to 2000 McMillan Avenue in reference to a shooting.

We went in route to the call. Dispatch advised us immediately that we needed to stage. Meaning we had to wait for the police to get there first to make sure the scene was secure. They advised that the scene was secure. About three minutes later ---
Q Okay, I may interrupt you from time to time ---
A Yes, sir.
Q --- if that is okay. So you say you were told the scene isn't secure, like you can't go in?
A That is correct, sir.
Q And then about three minutes later you were told what, again?
A That the scene was secure, that we were allowed to

enter the property.
Q Okay. I am showing you what has already been entered into evidence. This will show up on the screen in front of you. As State's 3. I am going to leave this up. The screen in front of you is a touch screen.
A Okay.
Q It allows you to make markings on the screen. We can clear it if it gets cluttered at any time if you want me to. If you think it will help your testimony from here on out I am going to have that in front of you.
A Sure. No problem. Thank you.
Q So you are allowed into the scene. What happens then?
A Once I arrive on the scene I pulled in with another supervisor who happened to be in the area and the Fire Department. The medic unit was not there yet.
As soon as I got out of my vehicle I went to the rear of my vehicle to grab my equipment, and I came and approached on the driver's side door where I was met by a police officer advising the patient was still breating and still had a pulse.
Q Okay. Were you informed at that time -- was anything mentioned at that time to you about a weapon or a firearm?
A No.

Q Okay.
A They just said, you know, that the patient, again, was conscious, was breathing. So immediately I came up on the driver's side door. I reached in to feel for a carotid pulse in his neck. Felt that he had a pulse. Reached down to his wrist and felt that he did have radial pulses; however, they were extremely weak.
Tried to arouse him. And got no response from him whatsoever. We do a basically anybody that is injured we do a test which is called a Glasgow coma score which basically is done on people that have traumatic brain injuries to see what their mental capacity is. We try ---
Q We discussed it there too ---
A Yes.
Q You may have mentioned this. But were any obvious traumatic injuries readily apparent to you?
A You could see a gunshot wound to his head. And you could see some blood that was on his shirt and his shoulder.
Q Okay. Go on.
A So I tried to arouse him. I tried to rub him sternum to see if I can get any -- illicit any kind of a response. He didn't respond to me whatsoever.
So at that point EMS places somebody in terms of

category in terms of is this life-threatening, is this something that is a routine transport. At that time I decided that this was an immediate transport.

And at that time the medic unit was pulling up. As they pulled up I instructed them to get the stretcher. Rather than taking him out and laying him on the ground I wanted to him right on the stretcher. That way we could get him in the ambulance and going down to the hospital as quick as we could.

Q In your training are there any inherent risks in moving someone at all with that trauma?

A With head trauma there are -- there are some risks that we have to worry about especially in a case that involves a cervical spine. But when somebody who is as critical as this gentleman was we have to make that decision. And if we sit there and wait too long he might perish and die in the vehicle. So we decided that it was best to move him quickly out of the vehicle.

Q So is it a risk reward sort of analysis ---

A Yes.

Q --- that you have to do?

A Yes. That is correct, sir.

Q Okay. And you made what call in this ---

A We made the -- that he was a high risk patient and that it was better to save his life and get him out of

the vehicle immediately rather than to put him in a collar or do any other kind of interventions that might take us longer to try to get him out of the vehicle and put him in more danger or if not dying in the vehicle.
Q Is that kind of high-stakes medical decision best left in the hands of a medical professional such as you as opposed to a patrol officer or ---
A Yes. They rather leave that up to us for the simple fact is most will tell you they don't have the medical training so they would rather leave it up to EMS to make that decision on whether something is life-critical or not.
Q Okay. Once that decision is made what do you do at that point?
A At that point we make sure we all talk to each other. Come up with a plan of figuring out how we are going to get the patient, such as this patient, from the driver's seat out of the vehicle onto the stretcher in a timely manner and also work together to make sure nobody gets hurt in the process, picking him up and moving him or doing anything that is going to be harmful to the patient or to us.
Q Okay. Well, that is a good segue into my next question. At this point during the process has anyone mentioned the possibility or presence of a firearm?

A No, sir.
Q Okay. And so what do you personally do at that point ---
A At that point the medic unit is bringing over the stretcher. As you can see outside of the vehicle here there is kind of a curb there which kind of hinders our ability to get the structure right next to where the vehicle was.
I had some firefighters and police officers who were at the driver's side door while I was trying to direct the crew what to do. And they were trying to pull the patient out as we pulled the stretcher up. And they weren't able to get a good grip on him.
Q Okay. Let me stop you there. And I probably should have asked you this earlier. Had you already been to the driver's side door?
A I had already been there. I had already evaluated the patient. And I stepped away from the door to talk ---
Q We all probably know this. But you mentioned earlier checking a pulse.
A Yes.
Q How do you physically check for a pulse?
A I get in the vehicle. I stuck my head in the vehicle and I actually put in up on his throat to feel

for a carotid pulse. So you feel for the Adam's apple and you pull over to the side. So you feel for a pulse.
Q So at point you have leaned in the vehicle; is that correct?
A That is correct.
Q And enough to put your -- did you observe a firearm?
A No, I did not.
Q Okay. And that is leaning in the vehicle and checking on the pulse?
A That is correct.
Q Okay. So sorry. I kind of backtracked you a little bit.
A No problem.
Q You determined then -- you testified you were having some problems?
A The fire -- the fire and the police officers were having some problems getting the patient out. Somebody who is, for lack of better words, dead weight, they are not able to assist us at all, so we are responsible for picking up all of that weight and manipulating somebody. They were having problems getting out.
Due to my experience I have found that a lot of times if you go around to the other side of the vehicle you can grab onto somebody's belt and as they pull I can lift up and then we can get them basically out of the v-

shape of the seat to move them out of the vehicle.

And when I saw them having problems that is what I decided to go was to go around to the side of the vehicle to enter there to try and assist them to get him out of the vehicle at that point.

Q Okay. So did you enter through the passenger's side?

A No, I came through the passenger's side at that point; yes, sir.

Q Okay. When you entered through the passenger's side did you notice a firearm on the passenger seat?

A No.

Q On the dashboard?

A Nowhere -- nowhere in plain view when I got in the vehicle. Q Okay.

A I just climbed in the vehicle. Put both knees on the passenger seat and went to move over to the patient to try and assist as I could.

Q Floorboard? Firearm on the floorboard?

A No, sir.

Q Center console?

A Nowhere in visible plain view, no, sir.

Q Okay. So did you proceed in the manner that you described to the jury with the waistband?

A Yes. So I entered into the vehicle. And the

vehicle has I am going to say a high console but a medium-height console. I talked to the firemen and the police officer there and I told them that on the count of three I am going to grab the belt, I will lift up, and at the same time you are going to pull him out of the vehicle.

I said let me get a hold of the belt for a second. As I went down to reach for the belt I noticed there was some hard object there.

At that point I told everybody to stop. When I felt it more, you could obviously tell that it was a gun; so I advised the Police Department that I had a gun in my possession.

I asked them if they wanted me to get out of the vehicle or stay in the vehicle. They said are you comfortable securing it. I say, yes, I will take it off of the patient.

I needed to lift up -- he basically had two shirts on. A button-down shirt that was on top. So I had to pull that out of his pants. Then he had a T-shirt on. I had to lift that up out of his pants. And that is when I was able to see the butt of the handle and the trigger guard aspect of the firearm.

Q So in order to get that visualization of the gun in the waistband you had to pull up two items of clothing?

A That is correct, out of being tucked into his pants.
Q Okay. And what part of the waistband was the gun?
A It was in the backside of the posterior aspect of his hip or his waist area. So it wasn't directly on his side where most people keep a cell phone. It is kind of sitting in the back -- back side almost on his rear-end a little bit.
Q If I could ask you --
MR. SIMPSON: May I ask the witness to stand up, Your Honor?
THE COURT: You may.
Q If I could get you to stand up and sort of show us so that the jury can visualize where ---
A So where I have my phone here (pointing) it is more tucked into the back section here (pointing).
Q Okay.
A Is where the gun -- where the gun was located. So even as when I came in here (pointing) I felt basically the barrel of it, not the back side of it, as I went to grab the belt on his side.
Q Okay. Was it easy to remove the gun?
A It was not easy. The first time I went to grab it -- I am right-handed, so I reached over with my right hand just to try and pull it straight up. And I was not able to remove it out of his pants. Tried twice doing it

that way.

Finally what I ended up having to do is take my left hand, pull the belt and his pants away from his hip and his body, to be able to pull the gun out. And then I was able to pull the gun out.

Once I had the gun freed then I was able to use my left hand to help kind of pick the patient up and slide him over as we picked him out the rest of the way.

Q So you had to remove two layers -- move two layers of clothing to first see the gun; is that correct?

A That is correct.

Q Okay. And then take a whole nother hand to pull the belt out to remove the gun?

A That is correct.

Q Okay. Once you had done all of this to remove the gun what -- what were you told to do with the gun?

A Once we had the patient out of the vehicle I turned to the officer and he asked me what he wanted me to do with the firearm. He said just go ahead and place that back in the driver's seat exactly where the position was and leave it for the evidence technician when they arrived on the scene.

Q Is securing evidence in a case is that your job at all?

A No, that is not my job; no.

Q Okay. You were told by the police to put it in the driver's seat?
A That is correct.
Q I am showing you what has been entered as State's 7. Do you recognize this exhibit at all?
A Yes, that is exactly where I would have -- where I placed down the firearm after I had taken it off -- off the patient.
Q So if someone is here today, myself, saying -- asking how that gun got to be in that seat out like that, the answer is you put it there?
A I put it there, yes.
Q Okay. After removing it from the victim's waistband?
A That is correct.
Q And indicate again, if you don't mind, where in the waistband that was.
A It was towards his backside on the right-hand side. So if you are actually looking at this picture basically the gun would be sitting back here (pointing).
So you would have the seatbelt here (pointing), and the patient would be sitting here (pointing). So I have to kind of reach in behind him to get to him. And that is where I was talking about that console having to reach down in there to get to it.

Q And visually it was hidden from view by what?
A By two layers of clothes, his T-shirt and his outer layering of -- his shirt that he has on.
MR. SIMPSON: Court's indulgence.
THE COURT: Certainly.
MR. SIMPSON: Chief Palawasta, thanks so much for your time. I am going to ask you to answer any questions that the defense has.
THE WITNESS: Sure. Thank you, sir.
THE COURT: Cross-examine.

CROSS-EXAMINATION BY MR. SMALLDONE OF DAVID PALAWASTA:

Q Good afternoon.
A Good afternoon, sir.
Q I just want to clarify a few things. Obviously as an EMT person you got there after the incident, right?
A That is correct.
Q All right. So you -- you never saw where the gun was before the incident, correct?
A Correct.
Q All right. And -- so you wouldn't have known if it was out earlier, right?
A I would not know that, no, sir.
Q You wouldn't have known if it had shifted after he had been hit, right?
A I would not know that, no, sir.

Q Okay. Your testimony today -- just to make sure we are all on the same page. Your testimony is where the gun was once you got there?
A Correct.
Q All right. Thank you. That is all. Thank you. Have a good afternoon.
THE WITNESS: Thank you.
THE COURT: Redirect.
MR. SIMPSON: Just briefly, Your Honor.
REDIRECT EXAMINATION BY MR. SIMPSON OF DAVID PALAWASTA:
Q You did -- you do have medical training in your job, correct?
A Correct.
Q In the status as you found it was the victim mobile?
A No.
Q Moving?
A Not at all. As I said, when I did the Glasgow comma score he had a rating of three. So he had no purposeful movement. In terms of movement or eye movement and so forth, he wasn't responding to us at all.
Q Okay. When -- you know, particularly that moment when you are leaning into the car and checking the pulse could you visualize his hands?
A They were on his lap.
Q Did you witness any movement of the hands while you

were there in the presence?
A No, he did not move anything at all when I was on the scene. And that is why I put him in a critical state, because there was no movement whatsoever.
Q And your job is to give him that rating, you said ---
A Correct.
Q And explain a little bit more about what means.
A Sure. The rating is -- we rate somebody for their eye movement, for personal -- purposeful movement in terms of we ask you to squeeze our hands, move your hands. We pinch you to see if you pull back or retract. And we also ask you to obey certain commands.
The highest rating you can get is a 15. The lowest score you can get is a three. And he received a three because he had no movement. When I pinched him, tried to elicit any kind of a response, he had no movement whatsoever at that time.
Q And you say this is a range that allows you professionally to give someone a whole spectrum of a three to a fifteen?
A That is correct.
Q And you gave him what, again?
A The three. The lowest score that is possible.
Q Does that indicate the less amount of response to

stimuli as you can rate a person?
A Yes. So ---
Q And how many years of experience do you have, again, as an EMT?
A Twenty-nine years.
MR. SIMPSON: No further questions, Your Honor.
THE COURT: Re-cross.
MR. SMALLDONE: Briefly.
RECROSS-EXAMINATION BY MR. SMALLDONE OF DAVID PALAWASKA:
Q And using your medical training and common sense, after someone is hit by a gunshot it is pretty common and normal for them to move or slump; right? Not move around. But it is common for them to move, slumped, react to the gunshot?
A It is depending on their positioning. Somebody who is in the driver's seat with a high console as it showed on the other, there is not really move -- any place to move in that kind of position.
Somebody who is standing, yes, will fall down. But somebody who is sitting won't move very much.
Q Sure. But it is normal -- it would be normal for them to -- at least shift their weight around, right?
A Yes.
Q Okay. That's all. Thank you.
THE COURT: All right. Thank you. You may come

down. Do you wish this witness to be excused, Solicitor?

MR. SIMPSON: Yes, Your Honor.

THE COURT: Any objection?

MR. SMALLDONE: No objection, Your Honor.

THE COURT: You are also free to leave, sir. Thank you.

THE WITNESS: Thank you, sir.

THE COURT: Call your next witness.

MR. SIMPSON: Thank you, Your Honor. The State calls Officer Patrick Norwood of the North Charleston Police Department.

THE COURT: Okay.

(WHEREUPON, the witness was duly sworn.)

THE CLERK: Please have a seat and state your full name spelling your last name.

THE WITNESS: Full name is Patrick William Lawrence Norwood. Spelling my last is N-O-R-W-O-O-D.

MR. SIMPSON: May I proceed, Your Honor?

THE COURT: You may.

MR. SIMPSON: Thank you.

DIRECT EXAMINATION MR. SIMPSON OF OFFICER PATRICK NORWOOD:

Q Officer Norwood, where are you currently employed?

A North Charleston Police Department.

Q And if you could, let's just introduce you a little

bit to the jury. Explain to them a little bit about your educational and professional background.
A Okay. I have got a college degree from the Citadel. I have been working for North Charleston Police for about ten years now. I am currently assigned to the patrol division. I work in the South Bureau Area.
Q And does the South Bureau there cover the area of 2000 McMillan Avenue?
A Yes, sir, it does.
Q And is the entirety of your jurisdiction -- you say you have been with North Charleston for ten years?
A Ten years, yes, sir.
Q Is the entirety of your jurisdiction within Charleston County?
A It is.
Q Okay. You mentioned earlier that you are currently employed with the patrol division. What does that mean? What are some of your duties?
A We generally handle emergency calls for service. And that can vary from a simple alarm call to a shop lifting, even up to a homicide or attempted homicide.
Q Okay. And what is your current rank in the North Charleston Police Department?
A Patrolman first class.
Q Okay. You know the incident that brings you here

today, correct?
A Yes, sir.
Q Were you employed in that manner on April 16th of 2016?
A I was, yes, sir.
Q Did you have occasion on that date to respond to the area of 2000 McMillan?
A I did.
Q If you could can you describe a little bit about the location to the jury.
A Yeah, it is a little shopping strip mall area. They have got a pawn shop over there and also a Quick Mart Shop and a beauty -- a beauty shop over there.
Q And what did you observe on that scene when you arrived at the location?
A Initially pulled in. The victim was in the front driver's-side seat. Once I had come around to him on the front -- front driver's-side I saw him suffering from a gunshot wound to the head.
Q Okay. Is it fair to say that you were one of the first uniformed law enforcement officers on the scene?
A That is correct.
Q Okay. Did you get there approximately the same time as some others?
A I pulled in right at the same time as Officer Riley

did.
Q Okay.
A Another officer. We were at the scene at the same time.
Q Okay. But you were one of the first, right?
A I was.
Q Okay.
A I was.
Q And what did -- what again do you observe, a vehicle when you pull up?
A I did.
Q Okay. And what did you do then?
A Came up to the driver's side. And then initially noticed, again, the victim suffering from a gunshot wound. He was breathing but making groaning sounds. Not really speaking at all. At that time we just secured the scene.
Q Okay. Now as part of being a law-enforcement officer do you receive some -- some general first aid training?
A I have.
Q Okay. Training to a level that you feel you can deal with a gunshot wound to the head?
A Not at that point. Particularly where the victim was sitting in his state we -- it wasn't trained that we

could actually render the type of aid that he needed at the time. So we immediately cleared the scene and had EMS respond to him which was there shortly after.
Q Okay.
A Within minutes.
Q So you arrived before EMS?
A I did.
Q Okay. And if I understand your testimony, determined that it was best to wait for them to get there before ---
A Correct.
Q So I believe you testified you secured the scene?
A Yes.
Q Okay. What does that mean?
A Securing the scene particularly on a shooting we are trying to make sure that it is safe, particularly for EMS and also just making sure there's no weapons present. And also making sure that, you know, we can secure the crime scene the best we can.
Q Okay.
A And also just giving as much information as we can to dispatch about the victim's condition.
Q Okay. You noted earlier the victim's condition. Were you going to move the victim at all before EMS got there?

A Not due to the state he was in. From where he was sitting due to the gunshot being to the head it would have -- it could have been dangerous for him to move him due to possibly having a neck injury or something else.

So typically we due to EMS being so close we have them come in, assess him, before even deciding to even move or anything.

Q Okay. So you want to leave that decision to people better trained in that area?

A Correct.

Q Okay. But you did secure the scene?

A Correct.

Q Okay. And securing the scene mainly means looking for what?

A With something like a gunshot wound we are looking for weapons ---

Q Okay.

A --- and of that nature.

Q And did you on the scene at this point visually scan the interior of that car for weapons?

A I did. I looked over the car thoroughly from where I was at. And the back seat in that area as well.

Q Okay. And did you -- did that securing of the scene reveal any weapons in the car?

A Nothing.

Q If you had, would you have alerted someone to the presence of a weapon?
A I would have, yeah.
Q Now you said EMS did arrive a few minutes later?
A Yeah, within minutes they were there. Very quickly.
Q Okay. And what happened once EMS arrived?
A Once EMS arrived they assessed the victim's condition. And then they were determined on -- that he needed to go to the hospital quickly due to his condition. And at that point they were deciding the best way to move him to get him up on the stretcher from where he was seated.
Q And did you assist in any way with that action?
A I did. I assisted with removing him from the seat.
Q Okay. Were there more EMS -- more than one EMS technician at that point?
A Yes, sir, there were.
Q Okay. And do you remember anything of particular interest happening during the movement of that person?
A Once we began to move him out of the driver's seat onto the stretcher once he was lifted up one of the EMS techs yelled out that he has a gun, there is a gun in his lower waistband.
Q Okay. And ---
A And he yelled out gun very quickly. So we knew we

had to address that at the time.
Q Okay. Now you had previously secured the inside of that vehicle?
A Yes.
Q You had previously -- previously looked in the vehicle for a gun and not seen one?
A That is correct.
Q And so was this the first time that anyone became aware to -- or you became aware to your knowledge that there was a gun present?
A That is correct, the first time.
Q How did everyone respond to this EMS tech saying that there is a gun?
A Once he yelled out that there was a gun there is him saying that he was going to secure it. And at that point we knew -- we immediately told him to leave it on the seat, the driver's seat, just to leave it there and not touch it, for crime scene to come.
Q Okay. And so you -- you know, obviously it had been moved?
A Sure.
Q You were aware -- you were aware the gun had been moved?
A Correct.
Q Okay. But told him to wait until who came?

A For crime scene to come and process the scene with it.
Q And he was instructed to leave it where?
A On the driver's seat.
Q Okay. Forgive me for backtracking a little bit. But when you say you secured the scene were you able to see visibly see both of the victim's hands at that time?
A I did.
Q And, again, you did not see a firearm?
A I did not.
Q Okay. Are you equipped when you are on the job as a patrol officer at least back in 2016 are you equipped with what are called body cams?
A Yes, sir.
Q Is that a relatively recent development?
A It is. So the past couple of years we have had them.
Q So in your experience can you explain a little bit to the jury about what we are talking about when we talk about body cams.
A So the body camera is just a camera that clips onto your front uniform. And any time you come into contact or take any type of police action or responding to any scene, any contact with the public, there is a switch on it that we turn and it immediately starts recording video

and audio of the scene.
Q It starts recording when you tell it to?
A Once I ---
Q Once you tell it to -- once you ---
A Yeah, pretty -- yeah, once I activate it, turn the switch, it will start recording right there.
Q So how do you decide when you are going to activate your body cam?
A Generally before we are about to come on the scene we will turn it on as a practice. So, yeah. And then, you know, immediately definitely when you get into contact with a victim or anybody during that police encounter you are going to have that body camera turned on.
Q Okay.
A Right before.
Q Officer, I am handing you what has been marked at this time for ID only as State's Exhibit 29. Do you recognize that?
A Yes, sir.
Q And what is that?
A That is the body camera footage of the incident.
Q Okay. And how do you know that this CD contains that body cam footage?
A It has got my initial on it.

Q Okay. So you have reviewed the contents of the CD?
A I have.
Q Is that a fair and accurate depiction of what was captured, what you viewed through your body cam on that day in that response to the scene?
A Yes, sir.
MR. SIMPSON: Your Honor, at this time the State would seek to admit State's 29.
THE COURT: Is there any objection?
MR. SMALLDONE: It is without objection.
THE COURT: State's 29 is admitted. Thank you.
(WHEREUPON, State's Exhibit Number 29 was admitted into evidence.)
MR. SIMPSON: And we would seek to ---
THE COURT: Without objection.
MR. SIMPSON: --- publish a portion ---
THE COURT: You may.
MR. SIMPSON: --- of State's 29.
THE COURT: Publish a portion by agreement; is that ---
MR. SIMPSON: Yes. For 403 reasons we will be muting the sound ---
THE COURT: Oh, I understand.
MR. SIMPSON: --- until EMS arrives.
THE COURT: That is no problem.

And ladies and gentlemen, that is pursuant -- that is very proper. There is nothing that is being kept from you improperly. It is part of our procedure and part of the rules, the rules of evidence. Okay. Thank you.
(WHEREUPON, published State's Exhibit Number 29.)
Q So Mr. Polawasta -- I'm sorry, Officer. What we just heard there, was that the first moment anyone indicated that there was a gun on the scene?
A Yes, sir.
Q Okay. At any time previous to that to the best of your knowledge, being there on the scene, did anyone indicate that there could possibly be a gun in the car?
A No.
Q And had you scanned that passenger compartment and the victim for a firearm?
A I did.
Q I am going to show you what has been marked for ID only as State's 30. Take a moment to review that exhibit. Do you recognize that exhibit?
A I do.
Q And what is that?
A That is the frame from my body camera.
Q Is that a still from the videos that we just watched?
A That is correct.

Q Does that fairly and accurately reflect what you saw when you looked into the lap of that victim ---

A Yes, sir.

Q --- that day?

MR. SIMPSON: Your Honor, at this point the State would seek to admit State's 30.

THE COURT: Any objection?

MR. SMALLDONE: No objection.

THE COURT: Without objection State's 30 is admitted. You may publish it.

(WHEREUPON, State's Exhibit Number 30 was admitted into evidence.)

MR. SIMPSON: Thank you, Your Honor. Permission to publish?

THE COURT: You may.

Q Officer, did you see a firearm in the hand of the victim they day?

A I did not.

THE COURT: Ladies and gentlemen, let me also -- you are probably aware of this, but any -- any exhibit that is introduced into evidence it will accompany you to your jury room. So you have an opportunity to study it in closer detail and more thoroughly when you begin your deliberations.

Q And, again, we saw it in live time on the video from

the initiation -- is that the initiation of your body cam up until when the gun was located?
A Actually, well, I had it running initially approaching up to the vehicle.
Q Okay. Approximately it was at the -- we can -- okay, at any time -- at any time prior to what we just saw in the minutes intervening did anyone see a gun?
A No, sir.
Q Until the body was moved?
A Correct.
MR. SIMPSON: Court's indulgence.
THE COURT: Yes, sir.
MR. SIMPSON: Thank you, Officer. Please answer any questions Mr. Smalldone has for you.
THE COURT: Cross-examine.
MR. SMALLDONE: No questions for this witness.
THE COURT: Thank you. You may come down, sir. Thank you.
THE WITNESS: Thank you.
THE COURT: Do you wish him to be excused?
MR. SIMPSON: Yes, Your Honor. I would just like to for record purposes say we stopped the video at four minutes and six seconds.
THE COURT: That is fine. Okay. And that is by agreement. And you don't wish any additional portions to

be published at this point?

MR. SMALLDONE: No, Your Honor. I will just add that the audio that was not published ---

THE COURT: Was by agreement?

MR. SMALLDONE: --- would never be published.

THE COURT: That is correct. Okay.

Thank you. You are free to leave.

THE WITNESS: Thank you.

THE COURT: Thank you, sir.

Call your next witness, please.

MR. SIMPSON: The State calls Sean Reiter.

(WHEREUPON, the witness was duly sworn.)

THE CLERK: Please have a seat and state your first and last name and spell your last name for the record.

THE WITNESS: Sean Reiter. R-E-I-T-E-R.

DIRECT EXAMINATION BY MR. COOPER OF SEAN REITER:

Q Good afternoon, Mr. Reiter.

A Good afternoon, sir.

Q Will you please tell the jury where you currently reside.

A Hamilton, New Jersey.

Q And what do you do in Hamilton, New Jersey?

A I am a claims investigator for CSX Transportation.

Q How long have you been working for CSX?

A June 2016.

Q Where did you work prior to that?
A At the North Charleston Police Department.
Q And how long had you been working with North Charleston Police Department?
A About seven years.
Q Can you explain to the jury what your roles were at the North Charleston Police Department?
A Certainly. I started in the patrol division. I was then assigned to the detective division where I worked property crime for about a year-and-a half. And then I worked person's crime.

From there I transferred into the neighborhood resource officer unit where I was assigned to two specific neighborhoods. Basically I embedded myself in the neighborhood. Got to know the people. Part of the role you were basically a street-level detective. So any cases of burglary, car break-ins, I would handle the investigations for those all the way through charging a suspect if one was identified. And for violent crimes help the detective division identify possible suspects, any witness information, and pass that along to them.

And then in March of 2016 I was promoted to sergeant, and I was assigned to our South Districts, the evening shift.
Q And what did your duties include as sergeant over

the South District evening patrol?
A Every day I would go through e-mails, find pertinent information that I needed to pass on to the officers working for me. Make sure their equipment was all up to standards. Deal with any issues if they had any. A daily roll call. Assign them to their specific patrol zones and then send them out.

And generally every day I would meet with the two other sergeants. I work with my lieutenant. Get together. We would deal with any issues we had.

At the scene of major events I would respond. Make sure that the -- if it were a crime scene that it was secure, a crime scene log was being maintained. And generally make sure that everybody got home safely at the end of the night.
Q Focusing your attention to April 16th of 2016, in this case specifically, why did -- how did you become involved in this case?
A I was -- this incident happened in the South District. So my officers were dispatched along with some dayshift officers. And I responded to manage the crime scene until a ranking officer or detectives showed up.
Q What did you do while you were on the scene?
A As soon as I arrived my officers had already secured the area with crime scene tape. Someone was already

maintaining a crime scene law.

Made sure everyone had what they needed, that the scene was safe. And then went into Max's Quick Stop and inquired about the video footage if they had any.

Q Why did you begin looking for video footage?

A I -- from past experience I know that that store has video cameras. And the victim's vehicle was parked directly in front of the store. So I wanted to make sure that the video system was working at the time.

Q Did they actually have video footage from this incident?

A They did. I was able to view it. After I made sure that customers had left the store I was able to view the video on the TV screen that it sits opposite the cash register. And through watching that I was able to relay pertinent information to the units that were patrolling the area looking for the suspect and the suspect's vehicle.

Q Were you able to download that video footage?

A I was. I used a USB thumb drive. I downloaded the video and turned it over to detectives so that they could then transfer it to a CD and place it into evidence.

Q Mr. Reiter, I want to show you a CD, what's been marked as State's Exhibit 17 for ID purposes only. Do you recognize that?

A I do, sir. This is a CD of the video from the store.
Q And how do you recognize that?
A My initials are right here circled.
Q And so you viewed the video on this disk?
A I did, sir.
Q And that happens to be the same video footage you viewed at the Quick Stop?
A It is.
Q Does it appear to be a fair and accurate representation of the video footage as you saw it on April 16th?
A Yes, sir, it.
Q Your Honor, at this time the State would offer what has been marked as State's Exhibit 17 for ID purposes only into evidence.
THE COURT: Any objection?
MR. SMALLDONE: I do object under authentication, Your Honor.
THE COURT: Authentication? Subject to the objection of authentication. The witness has identified it. He has viewed it. It has been authenticated, so I overrule your objection.
THE COURT: Thank you.
MR. SIMPSON: Thank you, Your Honor. May we publish

to the jury?

THE COURT: You may.

MR. SIMPSON: Thank you, Your Honor.

(WHEREUPON, State's Exhibit Number 17 was admitted into evidence.)

(WHEREUPON, State's Exhibit Number 17 was published.)

MR. SIMPSON: And, Your Honor, for the record, we stopped the video at 15:43:12.

THE COURT: Okay.

Q Mr. Reiter, thank you for your time. No further questions for you. Please answer anything else the defense may have for you.

THE WITNESS: Yes, sir. Thank you.

MR. SMALLDONE: No questions for this witness, Your Honor.

THE COURT: Very well. You may come down, sir.

THE WITNESS: Thank you, Your Honor.

THE COURT: Do you wish the witness to be excused, Solicitor?

MR. SIMPSON: Yes, Your Honor, please.

THE COURT: Any objection?

MR. SMALLDONE: No objection.

THE COURT: You are also free to leave, Mr. Reiter. Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right. Call your next witness.
MR. SIMPSON: Thank you, Your Honor. The State calls Sergeant Ryan Terrell.
(WHEREUPON, the witness was duly sworn.)
THE CLERK: Please have a seat. State your full name, spelling your last name.
THE WITNESS: Sergeant Ryan Terrell. Last name T-E-R-R-E-L-L.
DIRECT EXAMINATION BY MR. SIMPSON OF SERGEANT RYAN TERRELL:
Q Sergeant Terrell, good afternoon.
A Good morning -- afternoon.
MR. SIMPSON: May I proceed, Your Honor?
THE COURT: You may.
MR. SIMPSON: Thank you.
Q Sergeant, I can see the uniform; but where do you work currently?
A Yes, sir, I am sergeant over the neighborhood resource officer unit, ---
Q With ---
A --- City of North Charleston.
Q With what department?
A City of North Charleston.
Q Okay. And if you could just, kind of introduce yourself to the jury. Tell us a little bit about where

you are from, your educational background, and your law enforcement experience.
A Good afternoon. I am from the Charleston area. West Ashley to be exact. I hold multiple college degrees. Went to school West Ashley. Joined the military. Got out. Went to school. Been in North Charleston for almost 11 years now.
Q And how many of those 11 years have been with the North Charleston Police Department?
A Ten.
Q Ten. Okay. And what -- you know, for those of us who aren't familiar with law enforcement what is a sergeant and what does a sergeant do?
A A sergeant is a supervisor over multiple officers. In my case my officers have individual neighborhoods they are assigned to and they are the liaison between the community and the Police Department.
Q Okay. How are you employed in -- or what rank and role did you have in April of 2016?
A In 2016 I was a patrol supervisor. So I had six officers that worked underneath me in a patrol capacity.
Q Okay. And you know what incident brings you here today, correct?
A Yes, sir.
Q Did you have occasion on April 16th, 2016, to

respond to the area of 2000 McMillan?
A Yes, sir.
Q And tell us a little bit about that area.
A We got a call for a shooting. And officers -- I responded to assist Sergeant Reiter to determine if he needed anything on the scene at the shooting.
Q Okay. Were you briefed when you arrived on the scene as to what officers believed had occurred thus far?
A Yes, sir.
Q And what sort of task did you set out to accomplish when you arrived?
A When I arrived I went to the hair store next store, the beauty store, to view the video. Our job at that point was to try to determine the suspect and search the area.
Q Okay. And were you able to view a certain vehicle on that video?
A Yes, sir. It was clear video.
Q Okay. And any observations that you made about the video -- about the vehicle from that video?
A Yes, sir. It was a tan in color Ford Taurus with a sunroof that was open. And there was some body damage.
Q Okay. And so fair to say that was sort of the first lead to find that video -- I mean that vehicle?
A Correct.

Q And was the vehicle located?
A Yes, it was.
Q Okay. And where was it located?
A In Pinecrest Apartments.
Q Okay. Is that nearby?
A It is right next-door.
Q Okay. I am showing you what has been admitted into evidence as State's Exhibit 1. Does this area look familiar to you?
A Yes, sir.
Q And is this part of your jurisdiction?
A Yes, sir.
Q The jurisdiction you have worked in for ten years?
A Yes, sir.
Q Okay. Can we see the location of the crime in this case on this?
A Yes, sir.
Q And where is that?
A It is the first parking spot right here. I (Marking on ELMO). Oh, I'm sorry; I didn't know I was going to ....
Q No, no, it marks. That is great. Go ahead. Mark it up.
A It is right -- right here (drawing).
Q And you mentioned an area where you initially

believed that you found this vehicle depicted in the video. Where is that?
A Yes, sir. It is parked in a spot right here (drawing).
Q Okay. Now you said you were looking for a Taurus -- Ford Taurus with a sunroof, correct?
A Yes, sir.
Q Is there anything that led you to believe that this particular Ford Taurus was the Ford Taurus that you saw in the video ---
A Well, when we searched the area we found a Ford Taurus ---
Q Okay.
A --- that matched the same color.
Q Okay.
A And when we got out the vehicle was still warm to the touch.
Q Okay.
A The sunroof was still open like it was in the video from the wig store.
Q Okay.
A And there was also some damage on the front right side.
Q Okay. I am showing what has been admitted into evidence, State's -- beginning with State's 13. Do you

recognize the vehicle depicted in this exhibit?
A Yes, sir.
Q Okay. Is that the Taurus that you are testifying about?
A Yes, sir.
Q State's 14.
(WHEREUPON, showing exhibit on ELMO.)
A Yes.
Q Okay. Now I want to show you a State's 15. Is there anything in particular you could point out? Feel free to ---
A Yes, sir.
Q --- point it in front of you about the vehicle in this.
A When you are looking at the vehicle from the wig store you could actually see some damage on the vehicle. It is actually right around here (pointing).
Q Okay.
A It is clear. I also pointed out that the sunroof was still ajar ---
Q Okay.
A --- up here at the top (pointing). Which was consistent with the video from the store as well.
Q Now you keep saying damage. Are you talking about the damage or markings?

A The damage.
Q Do you mean ---
A It is like an indentation up here by the light. It is kind of hard to see from this angle.
Q Okay.
A But it is right here (pointing).
Q I am handing you what has been marked for ID only at this point as State's 36. Do you recognize this exhibit?
A Yes, sir.
Q Okay.
A The damage that I was talking to you about is right here (pointing).
Q Okay.
A It is right here in the right headlight area (pointing).
Q Okay. Where does this image come from; do you know?
A That is the wig store.
Q Okay. Do you mean the ---
A The hair store, beauty store. They sell a lot of wigs there, so I call it the wig store.
Q Okay. You mentioned earlier viewing some video from the beauty salon.
A Yes, sir.
Q Okay. Do you recognize this as State's 36 as part of that video?

A That is it.
Q All right. The video that you viewed that day?
A Yes, sir.
MR. SIMPSON: Your Honor, the State would seek to admit State's 36.
THE COURT: Is there any objection?
MR. SMALLDONE: No objection.
THE COURT: State's 36 is admitted without objection.
(WHEREUPON, State's Exhibit Number 36 was admitted into evidence.)
Q Okay. And if you could indicate to the jury, you said you saw some consistent damage?
A Yes, sir. Here is the damage here on the hood (pointing).
Q Okay.
A As well as the open sunroof here (pointing).
Q And you said you felt the hood of the car. And what did that lead you to believe -- to conclude?
A It was warm to the touch, what led me to believe it has just been driven.
Q Okay. How did you -- compiling all of these observations how did you proceed to there? Was the investigation continued in regard to this video -- this vehicle?

A Yes, sir, actually it did. If you have the one of the rear of the vehicle.
Q State's 14?
A Yes, sir. I ran this tag here. And when I ran that tag it came back to a female individual.
Q Okay.
A From there I ran it through our management system and found out ---
Q Okay, let me stop you there. Did -- did you search the vehicle?
A No, sir.
Q Okay. Was your department tasked with searching the vehicle?
A Searching that vehicle, no, sir, not at this time.
Q Oh, not at this time; but ---
A Because we were more concerned with looking for a suspect at this time.
Q Okay. In the future, to the best of your knowledge. did your department ever conduct a search of this vehicle?
A Not to my knowledge that I was on the team for, no, sir.
Q Okay.
MR. SIMPSON: Court's indulgence.
THE COURT: Certainly.

MR. SIMPSON: Sergeant Terrell, I have no further questions for you. Answer any questions Mr. Smalldone has.

THE COURT: Any questions?

MR. SMALLDONE: No questions, Your Honor.

THE COURT: Thank you. You may come down, Sergeant.

All right, at this point, ladies and gentlemen, let's take a break. About ten minutes. Do not begin your deliberations. Don't discuss the case. You may retire to your jury room.

(WHEREUPON, jury exits courtroom 4/11/18 2:54 p.m.)

THE COURT: Okay. Anything from the State before recess?

MR. SIMPSON: No, Your Honor.

THE COURT: Anything from the defendant?

MR. SMALLDONE: No, Your Honor.

THE COURT: Thank you. We will be at ease for about ten minutes.

(WHEREUPON, break was had 4/11/18, 2:54 p.m.)

(WHEREUPON, resumed trial 4/11/18, 3:14 p.m., after hearing other matters unrelated to this trial.)

THE COURT: Let the record reflect Mr. Brown is present.

Are you ready, Mr. Smalldone?

MR. SMALLDONE: I am ready.

THE COURT: Bring the jury, please.
(WHEREUPON, jury enters 4/11/18, 3:15 p.m.)
THE COURT: Thank you, ladies and gentlemen. We are ready to continue. You may call your next witness, Solicitor.
MR. COOPER: Thank you, Your Honor. The State calls Officer Michael Cook.
(WHEREUPON, the witness was duly sworn.)
THE CLERK: Please have a seat. State your full and spell your last.
THE WITNESS: Michael Cook. C-O-O-K.
DIRECT EXAMINATION BY MR. COOPER OF MICHAEL COOK:
Q Good afternoon, Officer Cook.
A Good afternoon.
Q Would you please tell the jury where you are currently employed.
A I work for the City of North Charleston Police Department.
Q And what do you do for the North Charleston Police Department?
A I am assigned to the crime scene unit.
Q How long have you been in crime scene?
A Almost five years.
Q And then can you explain what that position entails for the jury.

A Our main goal is to photograph, video graph, collect and preserve evidence.
Q Focusing your attention to April of 2016, how did you get involved in this case?
A I photographed a vehicle that was in our warehouse for a search warrant.
Q And then were you assisting detectives who were actively searching the vehicle pursuant to that search warrant?
A Yes, sir.
Q And then when you photograph a vehicle what all do you take pictures of?
A I take 360 photographs of the vehicle starting at the front and work my way all the way around back to the front of the vehicle. And then I photograph the interior.
Q Do you also photograph things they the detectives flag and ask you to photograph?
A Yes.
Q Would you recognize some of the pictures that you took that day if I showed them to you?
A Yes, sir.
Q I want to show you what has been marked for ID purposes only as State's Exhibits 19 through 26. Would you take a look at those for a moment, please.

(WHEREUPON, witness reviewed photographs.)
A These are my photographs.
Q And you recognize those photos?
A Yes, sir.
Q Are those the ones that you took back in April 2016?
A Yes, sir.
Q Are they in the same or similar conditions as the last time you saw these photos?
A Yes, sir.
MR. COOPER: Your Honor, at this time the State would seek to admit State's Exhibit 19 through 26.
THE COURT: Any objection?
MR. SMALLDONE: No objection.
THE COURT: State's 19 through 26, each being a photograph, admitted without objection.
(WHEREUPON, State's Exhibit Number 19 was admitted into evidence.)
(WHEREUPON, State's Exhibit Number 20 was admitted into evidence.)
(WHEREUPON, State's Exhibit Number 21 was admitted into evidence.)
(WHEREUPON, State's Exhibit Number 22 was admitted into evidence.)
(WHEREUPON, State's Exhibit Number 23 was admitted into evidence.)

(WHEREUPON, State's Exhibit Number 24 was admitted into evidence.)
(WHEREUPON, State's Exhibit Number 25 was admitted into evidence.)
(WHEREUPON, State's Exhibit Number 26 was admitted into evidence.)
MR. COOPER: Thank you, Judge. If we may publish to the jury.
THE COURT: You may.
Q Officer Cook, I am going to show you each of these photos. If it becomes necessary you can mark on the screen. If you will just help me. If you need to mark and clear them, just hit that (pointing) ---
A Okay.
Q --- and clear. All right?
A Yes, sir.
Q Showing you State's Exhibit 19. Will you indicate to the jury what this is.
A This is the rear of the vehicle. It basically gives the make of the vehicle and the tag number.
Q And what kind of vehicle is that?
A It is a Ford Taurus.
Q I am showing you State's Exhibit 20. What is this picture?
A This is a picture of the glove box.

Q I am showing you State's Exhibit 21. What does this picture show us?
A That is a pay stub with Derrick Porter's name on it.
Q Is that a pay stub or is that a bill?
A Oh, I am sorry; it is a bill from a hotel.
Q And where is it from?
A From inside the vehicle.
Q Where is the business in which the bill is from? I'm sorry.
A Oh, I'm sorry. Creekside Land Inn -- Lands Inn off of Savannah Highway.
Q And then who does it list of the bill, the name of the person?
A Derrick Porter, guest.
Q And then the address?
A [redacted] Pine Ridge Circle, Apartment [redacted], North Charleston South Carolina 29405.
Q And then you said this was found in the glove box?
A It was found in the vehicle.
Q In the vehicle. Okay. I am showing you State's Exhibit 22. Can you tell us what this is?
A That is the vehicle registration for the Ford Taurus.
Q For that specific Ford Taurus?
A Yes, sir.

Q And what is the name -- I believe it is the bottom -- on that. Let's see if I can move it up for you.
(WHEREUPON, adjust ELMO display.)
A Jacqueline Mary Harrison.
Q And what is the address listed?
A [redacted] Pine Ridge Circle, Apartment [redacted], North Charleston, South Carolina.
Q I am showing you State's Exhibit 23. What is this picture?
A That is a payroll stub.
Q Okay. I am showing you State's Exhibit 24. Is that the same payroll stub?
A Yes, sir.
Q Just a close-up version?
A Yes, sir.
Q What is the name listed on that payroll stub?
A Derrick L. Porter.
Q I am showing you State's Exhibit 25. What does this appear to be?
A This is our Police Department tow sheet.
Q And what is the date listed on that tow sheet? I know it is a little hard to read.
A I believe it is 2/17/2016.
Q And what is the name listed?

A Derrick Lamar Porter.
Q And then the address? The street address is fine.
A [redacted] Pine Ridge Court.
Q And then showing you State's Exhibit 26. What does that appear to be?
A That is a Boeing badge with Derrick Porter's name on it.
Q Okay. And then in all of these items that we just went through, the tow receipt, the bill from the hotel, the pay stub, and the Boeing ID, those were all found inside the vehicle?
A Yes, sir.
Q I want to ask you one more thing. I am showing you State's Exhibit 23 again, that pay stub. Can you tell on the top right corner what the date of the check is?
A 4/1/16.
MR. COOPER: Beg the court's indulgence just one second.
THE COURT: Yes, sir.
MR. COOPER: Officer Cook, I have no further questions for you. Thank you for your time. Please answer any the defense may have for you.
THE COURT: Cross-examine.
MR. SMALLDONE: Briefly.
THE COURT: Okay.

CROSS-EXAMINATION BY MR. SMALLDONE OF MICHAEL COOK:

Q Good afternoon.

A Good afternoon, sir.

Q I have just got a couple -- one or two quick things for you. To your knowledge -- do you know where the incident took place?

A Do I know where it took place?

Q Do you know where it took place throughout the course of your investigation?

A On McMillan.

Q Okay. And that is about a quarter of a mile away from where the car was found?

A I don't know where the car was found.

Q Okay.

A I just executed the search warrant.

Q All right. And is that about a quarter of a mile away from the address listed on the registration? Maybe half?

A Approximately.

Q Okay. Thank you.

THE COURT: Redirect.

MR. COOPER: Nothing from the State, Your Honor.

THE COURT: Thank you. You may come down.

MR. COOPER: We would ask this witness be excused.

THE COURT: Any objection?

MR. SMALLDONE: No objection.
THE COURT: You are free to leave, sir.
Call your next witness.
MR. SIMPSON: Thank you, Your Honor. The State calls Detective Jerry Jellico, North Charleston Police Department.
(WHEREUPON, the witness was duly sworn.)
THE CLERK: Please take a seat. State your full name and spell your last name for the record. Thank you.
THE WITNESS: Jerry Jellico. J-E-L-L-I-C-O.
MR. SIMPSON: Court's indulgence.
THE COURT: Certainly.
DIRECT EXAMINATION BY MR. SIMPSON OF DETECTIVE JERRY JELLICO:
Q Detective Jellico, where do you work and in what capacity?
A I am with the North Charleston Police Department, and I am an investigator.
Q Okay. How long have you been with the North Charleston Police Department?
A Altogether I have been in law-enforcement 30 years.
Q Okay. Tell the jury a little bit about that 30 years of experience. Just kind of summarize that for them.

A I worked -- I started my career 30 years ago with the Charleston County Police Department that later became the Charleston County Sheriff's Office.

And during -- after that I stayed a while with the Charleston County Sheriff's Office. Then I made a lateral move and came to the North Charleston Police Department.

I was an investigator in basically homicide and sex crimes in Charleston County. And I do the same thing in North Charleston.

Q Okay. And so what does an investigator do? What is the general -- generally ---

A It depends on where you are assigned. I mainly handle violent crime and sex crimes. So you respond to any kind of incident involving that.

Q Does part of the job of investigator ever involve conducting interviews of witnesses and suspects?

A All the time.

Q Okay. And over the course of that rather lengthy career, if you even can, approximately how many times you have had to conduct an interview of a suspect, a person suspected of a crime?

A It would be in the thousands I am sure.

Q Okay. Speaking over the timeframe of April 2016 is it the policy of the North Charleston Police Department

when practical to record interviews of suspects?
A Yes.
Q Okay. You know of the incident that you are here today on, right?
A That is correct.
Q Okay. Did you work at all the day of the incident; did you respond to this incident?
A No. I don't -- I didn't respond to the actual crime scene, no.
Q Okay. What was your role in this particular case?
A I was familiar with it. We always brief after a major incident. So I was familiar with it.
Q Okay.
A And later on when the defendant was captured in that -- because I had knowledge of the case I was asked to do the interview.
Q Okay. Had you viewed any of the video evidence at that point in time?
A Yes, I had reviewed the video from the scene after the incident; and then prior to the interview I reviewed it.
Q Okay. And you mentioned the suspect being captured. Were you involved in any way with the apprehension of the suspect?
A No, sir.

Q Okay. Would it -- are you certain that it involved a capture, or could it have been a more voluntary ---
A He could have turned himself in. He was apprehended, taken into custody.
Q Okay. If just -- you know, I understand you deal with a lot of incidents. But if I could, do you mind taking a look at your supplemental report in this case.
A Sure.
(WHEREUPON, State's Exhibit Number 37, report, was marked for identification.)
THE COURT REPORTER: State's Exhibit Number 37 marked for identification.
THE COURT: Thirty-seven for ID only.
Q I am showing you what has been was marked for ID only. Do you recognize that document?
A Yes, I do.
Q And what document is that?
A This is a police supplemental report which details my involvement in the case.
Q Okay. And it is a pretty limited involvement, correct?
A That is correct.
Q But if you could -- would that refresh your recollection if you took a minute to review this?
A Yes.

Q Okay. And regarding -- you know, again, you weren't personally involved; but regarding the means in which the suspect came into custody what was that?
A No, I was not.
Q Okay.
A I just happened to be in the detective office and they told me that he had been -- was ---
Q Okay. But does your report refresh your recollection at all as to how he came into that custody?
A I just was told that he had turned himself in to police.
Q Okay. And what date was that?
A This was -- I wrote this on May the 9th.
Q May the 9th.
A 2016.
Q Okay. Thank you. You say you have conducted a lot of suspect interviews over your career?
A That is correct.
Q You know, we have all seen Law and Order, but what -- how does an interview with a suspect typically begin?
A Well, the first thing we do is we placed them into an interview room which is audio and visually captured. So we turn it on before we bring them in. We bring them in. And then we get basic information like who are you.

And get the basic information. And then we usually advise them of their rights.
Q Okay. And what might we commonly hear those rights referred to as?
A A Miranda warning.
Q Okay. Again, you have given Miranda warnings before, I presume?
A Yes.
Q Does your department typically use any sort of a form sheet or documentation of Miranda warnings?
A Yes, we have got a standard form that has the advisement of rights on it.
(WHEREUPON, State's Exhibit Number 38, advisement of rights, marked for ID.)
Q Okay. I am handing you what has been marked for ID only as State's 38. Do you recognize that exhibit?
A Yes, sir. This is the standard form that we use at the North Charleston Police Department for their advise of constitutional rights.
Q Okay. Does that exhibit contain any sort of signature or initialing by the defendant Derrick Porter?
A Yes, it has the defendant's initials next to each right after it read to him and his signature in two separate places. One that he understands his right. And the second portion is a waiver of his rights and he

wished to answer questions.

Q Okay. And if we could, just for no other reason than just a basic civics' lesson, can we review what those rights are and what you explained to Derrick Porter his rights were in this case?

A Sure. The first thing I did was I filled out the top portion of the form which is just basic identification about who I am talking to do.

And it says, I, Derrick Porter, have been advised by Jerry Jellico of the North Charleston Police Department that. And the first right I had Mr. Porter read out loud to me. But it says, I have the absolute right to remain silent and do not have to answer any questions or give a statement and this fact cannot be used against me.

After that he -- I would ask him if he understood. He said, yes. And he placed his initials later on after he was finished on all of these lines.

If I do answer questions or give a statement, anything I say can and will be used against me in a court of law. That is the second right.

The third right is I have the right to consult with the lawyer of my choice before I answer questions and give a statement and also have them present while I am being questioned. The next right is if I wish to talk to a lawyer or him present or her present but I am unable

to hire a lawyer one will be appointed to represent me free of charge.

The last right is if I decide to answer questions or give a statement without having a lawyer present representing me I have the absolute right during this interview to stop answering questions and to remain silent.

Q Did Mr. Porter in the interview and questioning indicate that he understand those rights?

A Yes, he did.

Q Did he initial each right indicating that?

A Yes, he did. And then he placed his signature under a statement that says I fully understand each of these rights which has been explained to me.

Q Okay. Thousands of suspect interviews ---

A Yes, sir.

Q --- during your career, correct? Is it fair to say that interviews sometimes take on different sort of tones?

A Yes.

Q They can? Can be aggressive. You have got serious stakes in your job. Can it be aggressive sometimes?

A Yes, it can.

Q Can it be confrontational at times?

A Yes, it can.

Q And, you know, can it involve some pretty direct - I don't want to say in your face - but some pretty direct questions?
A Yes.
Q Difficult questions?
A Yes.
Q Was -- did this interview contain any of that?
A No.
Q Okay. What was the general tone -- how would you describe how this interview went down?
A Well, basically I have to advise him a right and waive him his rights. I basically said you tell me your side of the story of what happened out there at the scene.
Q Okay. So at any point in time previous to Miranda warnings, during, after, or at any time, did you ever scream at the defendant?
A No.
Q Did you ever threaten the defendant?
A Never.
Q Did you ever promise the defendant benefits if he were to cooperate?
A No.
Q Did the defendant appear to you to understand all of the questions you were asking?

A Yes, he did.
Q Did he appear to understand the English language?
A Yes, he did.
Q Did he communicate with you in a manner that led you to believe that he understood what was happening?
A Yes, he did.
Q Did the defendant show any signs whatsoever in this interview of intoxication, being under the influence of alcohol or drugs?
A No, sir.
Q Have you had occasion in your career to come in contact with people under the influence of alcohol or narcotics?
A Numerous times.
Q Okay. At any times in this case?
A No, sir.
Q Any indication of -- that you viewed visually or that was given to you verbally that the defendant was in any sort of pain when he gave this?
A No, sir. He was fine.
Q Okay. Any sort of threats, again, made to the defendant to get him to cooperate?
A No, sir.
Q Okay.
MR. SIMPSON: Your Honor, at a point convenient to

the court I would like to raise a matter of law. I can do that now or later.

THE COURT: All right, ladies and gentlemen -- do you mean on the record?

MR. SIMPSON: Yes, Your Honor.

THE COURT: Ladies and gentlemen, there is a matter I have to place on the record. So you have seen us have bench conferences. But occasionally we have to have you excused so we can hear the matter.

I am going to ask you to go to your jury room. Do not begin your deliberations.

And it is perfectly proper that this is being done this way. Thank you.

(WHEREUPON, jury exits courtroom 4/11/18, 3:33 p.m.)

THE COURT: Yes, sir.

MR. SIMPSON: Thank you, Your Honor. I appreciate the court's indulgence and apologize for the interruption at this time.

THE COURT: That's okay.

MR. SIMPSON: Mr. Smalldone previous to trial indicated he did not find any issues with the voluntariness of the statement. We appreciate that. And as a fellow lawyer and member of the Bar nor do I. Nevertheless, you know, when admitting a statement I think it is always a good idea ---

THE COURT: Well, that is fine.

MR. SIMPSON: --- to preserve this issue for the record. We think we have met our burden in the previous testimony showing that the statement was freely and voluntarily given.

THE COURT: I agree with you. And that is fine. But in fact -- you are not challenging the statement because -- well, I judged from your opening statement that you are kind of relying on some things there possibly. May or may not be.

But the first case I had I had the charge -- I had the typical charge about statement, there is no challenge.

As I read the law, you are correct. And I appreciate you doing that. But it is not required to have a Jackson v. Denno hearing.

So but there is no challenge to the State?

MR. SMALLDONE: There is -- there is no challenge to the voluntariness or Miranda portions ---

THE COURT: All of the necessary factors are in present. But even if they aren't, you are not raising an issue and you are not asking to suppress it or prevent it from being introduced?

MR. SMALLDONE: Correct. I think they are, and I am also not ---

THE COURT: Excuse me?
MR. SMALLDONE: They -- all of the factors are present.
THE COURT: Okay. That is fine.
MR. SIMPSON: And, again, I hope you don't think it a waste of time or ---
THE COURT: I don't think it is a waste of time. I think it is just being ---
MR. SIMPSON: --- to put that on the record.
THE COURT: I would rather be safe than sorry.
MR. SIMPSON: Likewise.
THE COURT: But for the record this is your opportunity to challenge him. And we are going to publish it and publish it with the consent of the defendant?
MR. SMALLDONE: That is correct. Although for expediency sake ---
MR. SIMPSON: Oh, yes.
MR. SMALLDONE: --- the second issue ---
MR. SIMPSON: Sure.
MR. SMALLDONE: --- that we briefly discussed earlier it is my position that I would ask the State to introduce the -- state the relevant -- not relevant. Let me backtrack.
I would introduce -- ask them to introduce the

entirety of the statement except for a few seconds that needs to be redacted because of 404(b) issues as well as portions where my client is just sitting there and the detective has walked out.

I ask this pursuant to Rule 106, the document of completeness.

THE COURT: I understand Rule 106. Okay.

MR. SMALLDONE: And that it is my position that I am not admitting it; I am asking the State to admit their evidence in a manner that presents it fairly to the defendant.

THE COURT: Okay.

MR. SIMPSON: But the State's position is that it is as the party carrying the burden our role, privilege, and burden to present a case in whatever manner we see fit.

I understand the rule of completeness, and I have no objection to that. I believe that is a rule that allows the defense to when they so choose, counter the State's presentation with a more complete version of that picture.

Even though I do have, arguably, some hearsay objection - I know we have done that before and made the argument as a prosecutor that we could put in whatever we want, if he wants to counter he can take the stand, I am not doing that. I am waiving any sort of objection to

that.

I agree that if Mr. Smalldone wants this in under the rule of completion that I would not object to that. But I do think that that constitutes entering evidence ---

THE COURT: Well, let me just ask -- inquire as to this. From the standpoint of the completeness are we interrupting some statement that he has given in the midpoint or contextually is necessary to -- for a jury to consider the context of the statement? That is my concern.

106 I think is a rule that require it to be done at the time. And that has been my typical -- if it is for completeness for a jury's comprehension.

I don't disagree with you that if there are parts where he comes in and start talking -- voluntarily saying things that you didn't -- that you are not -- you don't find it is necessary -- it may be good for him, but it is not necessary for yours, then that may be a different -- that may be something that 106 would say to you, you -- at your point you say I would like to have these portions published. So it is kind of like a deposition I think, from my way of thinking.

So I can't rule -- it is hard for me ---

MR. SIMPSON: Sure.

THE COURT: --- to rule that on a 106 at the time you publish it. I don't ---

MR. SIMPSON: Well, to answer your question and it is more a style than anything. I like to just get right to the -- to the -- I mean I might -- what I was going to seek to admit was maybe 20 seconds ---

THE COURT: That is fine.

MR. SIMPSON: --- of the interview portions. So are some of those pulled out of the complete picture? Of course.

THE COURT: Well, but for instance -- let me -- give you an example. I shot him ---

MR. SIMPSON: That is the kind of think I am putting in.

THE COURT: --- but it was -- it was -- I was in fear of my life. If you are going to publish I shot him and not publish but it was in fear of my life, then I would agree with Mr. Smalldone.

MR. SIMPSON: Well, and to answer that I would say I never cut off a sentence to take something out of context.

THE COURT: Well, it may be the next sentence.

MR. SIMPSON: But I do not include -- he includes, yeah, how many times -- the question is on one of the clips, how many times did you shoot him. I shot once.

THE COURT: Okay.
MR. SIMPSON: What kind of gun did you use? A nine millimeter.
And then the conversation continues. And I am not going to hide with this. I am going to illicit this. I shot because he was going for a gun.
THE COURT: All right, and you ---
MR. SIMPSON: That -- so I do remove that part. I am not going to -- I am going to illicit that testimony, but I do remove that part from my clips. So I just have maybe 20 seconds of clips I was going to show. So ---
THE COURT: Well, if -- you are going to have -- you are going to have this witness testify to what he is going to say?
MR. SIMPSON: Oh, yeah, I am going to try to present as full of a picture ---
THE COURT: Then I -- then I would say it needs to be published consistently with what he is saying. Because that is the purpose of showing it to verify and corroborate everything that he is saying.
MR. SIMPSON: Well, considering, Your Honor, that it was just little clips I was going to show, I may just not show anything.
THE COURT: That is fine.
MR. SIMPSON: But I have no objection to Mr.

Smalldone showing whatever ---

THE COURT: Oh, I understand that. That's -- you can ask him anything you want, because there is not any challenge to the statement.

MR. SIMPSON: Okay.

MR. SMALLDONE: And then I -- I would then probably ---

THE COURT: Let me just throw this out. We had a statement published -- the last one. I think it would have been probably a little bit stronger had the person taken the stand. He didn't have to. And I would say that. And I have said that in this case.

But self-defense is a different ballgame. I mean it is -- you know, especially when you have got a picture of it.

But you do what you want from a strategy standpoint. You will just have to balance that when you get to it. That's fine. All right. Thank you.

MR. SIMPSON: I am not -- I would not seek to admit any ---

THE COURT: You don't have to -- you certainly don't have any obligation to have this witness testify to negative things. I mean that is ---

MR. SIMPSON: Right.

THE COURT: That -- according to some trial strategy

you want to deal with your problems before they do on cross-examination. But this is not a problem I don't think from what I would envision.

MR. SIMPSON: Okay.

THE COURT: So that would be up -- that would be up to Mr. Smalldone. So you don't play the statement to support or corroborate his, then the statement is there available for anybody to play.

MR. SIMPSON: Thank you, Your Honor.

THE COURT: Thank you. All right. Thank you. So we have identified -- we have identified the disk?

MR. SIMPSON: I can do that.

THE COURT: Yeah, let's get it so that it is there.

MR. SIMPSON: I will lay the foundation for it.

THE COURT: Lay the foundation for it so if Mr. Smalldone wants to have it played then he can introduce it.

MR. SIMPSON: Yes. I don't mind doing that at all.

THE COURT: All right. Thank you. Okay. Thank you for -- no, and I appreciate -- you didn't -- you didn't -- neither one of you did anything wrong.

That is precisely what -- I was sitting here thinking I know I didn't hear the Jackson v. Denno, so I -- okay.

MR. SMALLDONE: And my concern now is AV, audio

video issues. I would ---

THE COURT: Well, they will play it.

MR. SMALLDONE: Do you have -- okay.

MR. SIMPSON: Yeah. We are fine.

THE COURT: Oh, they will play it.

MR. SIMPSON: I just don't know where you want -- you have got to stop it where you want to stop.

MR. SMALLDONE: Stop when I -- and I will -- and just from my end I will add I am redacting one portion and the only part I am omitting is parts where the detective walks out and my client is sitting there.

THE COURT: Well, that is fine. Well, of course -- whatever he rejects -- unless there is -- unless there is an evidence issue you can publish on redirect then because it will be his exhibit.

MR. SIMPSON: Right.

THE COURT: Yeah.

MR. SIMPSON: I don't think it will.

MR. SMALLDONE: I think -- it is a 404(b) evidence.

THE COURT: That's fine. I understand. No problem.

MR. SMALLDONE: Okay.

THE COURT: I am not going to make you do it. That is for sure.

Okay, let's bring in the jury.

(WHEREUPON, jury enters 4/11/18, 3:42 p.m.)

THE COURT: Thank you very much, ladies and gentlemen.

You may continue your examination.

MR. SIMPSON: Thank you, Your Honor.

Q Detective Jellico, again, to take you back to I believe May 9th of 2016. You conducted an interview with the defendant Derrick Porter?

A Yes.

Q After the Miranda rights that we have privileged discussed did he agree to speak with you?

A Yes, he did.

Q Again, did you at any time have to -- were you aggressive with him at any time during the course of this interview?

A Our interview was more like two people just talking.

Q Okay. And the entirety of this interview was recorded on audio ---

A Audio and visual.

Q I am handing you what has been marked as State's Exhibit 18 for ID only. Do you recognize that exhibit?

A Yes. This is my initials on this. It is the interview.

Q Okay. And does that exhibit contain the entirety of your interview with the defendant Derrick Porter?

A It contains my interview, yes, sir.
Q Okay. Getting to the substance of that interview would you -- did Derrick Porter acknowledge -- did you share with Derrick Porter that you had watched the video in this case?
A Yes.
Q Did he through the back and forth contacts acknowledge that that was him on the video?
A Yes. Well, he never denied that, being at the scene or anything.
Q Okay. Did he indicate that he had shot a person ---
A Yes, he did.
Q --- on April the 16th? Did he indicate what type of weapon he used to shoot the person?
A A nine. A nine millimeter.
Q Okay. Did he indicate to you during the course of that interview how many times he shot?
A Yes, he did. He said he fired one time.
Q Okay. After making those admissions did he offer to you some excuse or justification for that firing?
A Yes, he did.
Q And what was that?
A He said that the victim in this case had a gun and he had saw a gun on the victim on his side.
Q Okay. And did he indicate -- was it his position

that he had fired at this victim in some kind of self-defense?
A Yes, he did.
Q But he acknowledged that -- as we watched this video that that was in fact him on the video?
A Yes.
Q And that, again, he acknowledged that he shot the person?
A Yes, he did.
Q And this was captured on ---
A The video ---
Q This interview was videotaped?
A Yes, sir.
MR. SIMPSON: Court's indulgence.
THE COURT: Certainly.
Q Now do you recall if he said he just saw the gun or that a gun was pulled on him?
A He just saw a gun.
Q Okay.
A Saw the handle of the gun.
MR. SIMPSON: Nothing further, Your Honor.
THE COURT: All right. Cross-examine.

CROSS-EXAMINATION BY MR. SMALLDONE OF DETECTIVE JERRY JELLICO:

Q Good afternoon.

A Yeah.
Q You conducted this interview of Mr. Porter?
A Yes, I did.
Q And this was about -- this was May in 2016?
A That is correct.
Q All right. So you -- Mr. Porter turned himself in, correct?
A Yes.
Q And you were not a responding officer; is that right?
A That's correct.
Q How did you get this case?
A I didn't.
Q Okay. Well, you talked to Mr. Porter?
A That is correct.
Q Were you just on duty and you wanted to talk to somebody?
A What happens is, like I said, after a major incident we all have a brief and we know about it.
Q Okay.
A And then when this incident when he was picked up or turned himself in I was available. And I do a lot of the interviews. So they said, you are up again. And I went and watched the video. Kind of made myself basic. And he was brought up. Put him in a room and talked to him.

Q Well, you had been briefed a little bit about the facts of the case and the background of the case; is that correct?
A Yes. Yes.
Q All right. And you knew that -- you know, again, we are not on trial for this; but you knew there was a little bit of a history between Derrick and the complaining witness, correct?
A Yes. And he actually told me about it too.
Q Okay. And you knew that beforehand though, right?
A I can't say I knew that beforehand.
Q All right. You were familiar with who Rush was?
A No.
Q All right. Would it refresh your memory to watch a video?
A Yes, I would have to watch the video.
Q Okay. You haven't watched the video ever?
A Yes, I have watched it.
Q Oh, okay.
A I also watched it just recently.
Q Oh, okay. All right.
A Yes.
Q When was the last time you watched it?
A About two hours ago.
Q Oh, goodness. All right. And let me check --

MR. SMALLDONE: Court's indulgence.
THE COURT: Certainly.
Q Okay. And just to make sure we are good, this is -- is this the video ((pointing)?
A That is it.
Q All right. Are those your initials on it?
A That is it.
Q Okay. And you were present?
A Yes.
Q All right. You watched this about two hours ago?
A I watched a video of the interview at the office.
Q Okay.
A Not that particular disk.
Q Just ---
A Right.
Q But you know what this disk contains?
A Yes.
Q All right.
A It is the interview.
Q And I think we already laid the foundation. But just to be sure.
And at this time the defense -- the defense would move what has been previously marked State's Exhibit 18, but I suppose we will change that ---
THE COURT: You don't have to. It is State's

Exhibit 18. It is introduced by -- any objection to them introducing it?

MR. SIMPSON: No.

THE COURT: Very well. State's Exhibit 18 is admitted.

MR. SMALLDONE: All right.

(WHEREUPON, State's Exhibit Number 18 was originally admitted into evidence by the Defendant; however, for clarity of the record since it was a defense exhibit was subsequently labeled Defendant’s Exhibit Number 1.)

MR. SMALLDONE: All right. And just bear with me one second. I used to think I was good at computers until I tried to do a website. Now, you know, I ....

(WHEREUPON, pause for video setup.)

(WHEREUPON, begin publication of video, courtroom date of 4/11/18 at 3:49 p.m.)

(WHEREUPON, resume questioning while video is playing.)

Q And just to kill some dead air; this is the interview room, correct?

A Yes.

Q All right. And this is the interview room that you talked to Mr. Porter in?

A Yes.

Q All right.

(WHEREUPON, pause in questioning while video continues to

play.)
(WHEREUPON, resume questioning while video continues to play.)
Q And that is you, correct, coming in ---
A Yes, I walked in there.
Q And that is Mr. Porter?
A I can't ...?
Q And that is Mr. Porter?
A Yes, that is Mr. Porter.
(WHEREUPON, continue publication of State's Exhibit Number 18.)
THE COURT: Can you turn it down just a little bit. Just a tab. It is echoing.
(WHEREUPON, Mr. Smalldone complied.)
(WHEREUPON, continue to play video.)
(WHEREUPON, pause video.)
Q All right. Just to break up the monotony a bit. You were there and you heard on this video and at the time that he was -- you heard my client say that Mr. Byas was reaching for a gun?
A Yes.
Q Okay. And you said that he -- it looked -- it looked like a nine?
A Yes. Yes.
Q All right. He said -- I think he said he saw the

handle ---
A Yes.
Q -- or something of that nature? All right. And he said he was trying to pretend like he was playing with a cell phone or something like that?
A Right.
Q All right. And you also heard a little bit about the back story; Mr. Porter believes that he was somehow or another involves in his cousin's death, right?
A That is correct.
Q Okay. And let me just check my times. All right. And just to confirm; he said he shot once, right?
A Yes, Mr. Porter said he shot once.
Q Right. And you are aware that he lives pretty close by the scene?
A Yes.
Q All right. And it is everyone's understanding that he was not targeting Mr. Byas that day, he didn't go there with the intent ---
MR. SIMPSON: Objection, Judge. Speculative.
THE COURT: I will -- rephrase your question. Because you said everyone understands.
MR. SMALLDONE: Okay. I would rephrase.
Q Is it your understanding -- is it your belief that he went there to try to find Mr. Byas; did you learn that

in the course of your investigation?
A No, I did not.
Q All right. And in the course of your investigation you learned that he got -- I believe he got there first, right?
A Yes.
Q Okay. All right. Let me just check my times. Court's indulgence.
THE COURT: Certainly.
(WHEREUPON, resume publication of video.)
(WHEREUPON, pause publication of video.)
Q All right. So just to clear up a few things. I know the audio wasn't great on that. But you heard what you said, right?
A Some of it.
Q Yeah. And you heard some of what my client said both now and at the time of the interview, right?
A I don't know what your question is. I heard some stuff, but ---
Q You were there at the interview, right?
A Yes.
Q And you heard the audio from this?
A Yes.
Q Is it fair to say the audio in Charleston isn't H -- THX quality?

A This is before we put the acoustic tiles in, yes.
Q Okay. All right. But you heard him say that he thought that the other guy was grabbing for a gun, right?
A Right.
Q You heard him say -- we already talked about there was a back story there; you heard that, right?
A Right. Which I already knew from prior it was inconsistent.
Q Okay. You heard it thought, right?
A Yes. But I knew it wasn't consistent with the video which I reviewed.
Q Right. Right. The video that you said was grainy, right?
A Right. But it is clear when you watch. It points into it.
Q All right.
A Moments before the shooting -- seconds before the shooting ---
Q Hold on ---
A But I mean you want to know the truth. He put his hand on the steering wheel ---
Q Motion to strike an unresponsive, Your Honor.
THE COURT: No, sir, he is responding to your question.
MR. SMALLDONE: Okay.

THE COURT: You asked him ---
MR. SMALLDONE: Okay.
THE COURT: --- about the video whether it was grainy.
MR. SMALLDONE: Okay.
THE COURT: He is explaining what -- what you could see.
Q Okay. You said the video was grainy, right?
A If you would zoom in, try to zoom in. But what I saw and you are looking at, seconds before the shooting -- I knew the victim was right-handed. That is one of the things I was looking in the file. He puts his hand -- the victim puts his hand on the steering wheel, which you clearly see he can't be grabbing a gun. And then he is shot.
Q Right. And but you don't know -- you weren't there, though, right?
A No, I am watching a video. It kind of puts me there in a way.
Q And you can't hear the audio though, can you?
A No, you can't -- the audio is choppy.
Q And you heard in the interview, both then and now, that my client was talking about the other guy threatening to kill him?
A Yes.

Q All right. And you couldn't hear that on the video, slash, ---
A You can't ---
Q --- audio; correct?
A I can't testify to anything on that other video.
Q All right.
A I can't make heads or tail of it.
Q Okay. And you -- to your knowledge my client never saw that video before, right?
A To my -- no, I don't believe he -- no.
Q Did you show him the video?
A No, I did not show it to him; no.
Q Okay. To your knowledge did anyone in law enforcement or anyone show him that video?
A Are you talking about the store video?
Q The store video, yeah.
A No.
Q To your knowledge did he see either video?
A I couldn't hear you.
Q I'm sorry. To your knowledge did Derrick see either video?
A No. No. He wouldn't have seen the videos. We wouldn't have shown it to him.
Q Right. And to your knowledge they weren't published in the media or anything of that nature?

A No.
Q All right. Okay.
MR. SMALLDONE: Court's indulgence.
THE COURT: Okay.
Q All right. And just to clear up things. And you are aware that a gun was found at the scene, right?
A I was told a gun was found there jammed between his pants, and the seatbelt was covering it and everything at the time.
Q A gun?
A On the -- yes, on the victim.
Q Right. A firearm?
A Yes.
Q Okay. And Mr. Porter said that a gun was found -- or Mr. Porter said that a gun was there, didn't he?
A Yes, he did.
Q All right.
A Which he could have got from other information though.
Q All right. But he said that at the interview, right?
A Yes.
Q Okay. And that is what was there, wasn't it? And that is what was ---
A There was a gun at the scene, yes.

Q Okay. And you confirmed through both your knowledge and general law enforcement knowledge that that wasn't the gun that he used, right?

A I never got that information back.

Q Okay. All right. I don't have any further questions for you at this time.

THE COURT: Redirect.

MR. SIMPSON: Yes, Your Honor. Thank you.

THE COURT: Sure.

REDIRECT EXAMINATION BY MR. SIMPSON OF DETECTIVE JERRY JELLICO:

Q Detective Jellico, I want to take a few moments and I want to just talk sort of about interviews and interview styles in general. We referenced earlier instances in your career where you have gotten aggressive with somebody.

A Yes.

Q That is not always the best tac is it?

A No.

Q Is being nice also often a great way to get somebody to open up and talk to you?

A Being nice, being dumb like you don't really know anything. And you can let the defendant talk. And if they are talking why get aggressive when it probably will shut them down.

Q And so do you try to establish a rapport with someone?
A Yes.
Q Do you try to make them feel comfortable?
A Yes. There are a lot of times I will minimize the actual event so it doesn't seem as serious as it really is.
Q Which leads me to my next question. Is making them feel like maybe there is an explanation to something that might get them out of it, is that ---
(WHEREUPON, Mr. Smalldone standing.)
THE COURT: Hold on a second. What is the objection?
MR. SMALLDONE: I will object, Your Honor. This is -- this is actually redirect, so I would say it is beyond the scope.
THE COURT: No, it is not beyond the scope. I overrule that.
MR. SMALLDONE: Okay.
THE COURT: Thank you.
Q Is -- you sort of hinted to that. I want you to expand on that a little bit. Is making somebody feel like there might be a justification is that an interview tactic that you use?
A Yes, if somebody is in an interview and I am

speaking to them and they are speaking to me freely, I will bounce around -- like I knew about the seconds before the shot the victim's hand is on the steering wheel and I knew he was right-handed and so I knew he couldn't be reaching for anything ---

Q But you didn't share that with him in the interview?

A No.

Q Okay.

A I did not share it because I want to gauge his truthfulness to tell me what he was doing.

Q Okay. And part of having a person open up is it -- well, let me ask you. Is it to make them feel like you are on their side?

A Yes.

Q And is that just how you are trained -- a tactic that you use in interviews?

A It works a lot better than telling them you are going to prison if you tell me everything.

Q Okay. Yes, it is more successful, right?

We heard some phrases that you used in that interview. And I want you to tell the jury -- I mean are you saying that is an interview tactic when you say like, oh, I know everything you have told me was the truth?

A That is correct. I am just -- that is a tactic.

Q Okay.

A I knew ---
Q To make the person more comfortable?
A Yes. I knew he was being deceptive, but he was still talking.
Q Okay.
A And I knew what the video said, so I knew that would be based -- it would be compared against his statement.
Q Okay. The other evidence, the evidence that we present in this courtroom and watch on that video?
A That is correct.
Q Okay. Now he did tell you some things; is that correct?
A Yes.
Q Right off the bat, you know, what was the problem with you guys -- how long ago did that -- did he tell you -- the first time he is asked, how long ago did this arise that he ---
A 2011 he said that there was some kind of what I call a beef.
Q Okay. Mentioned something that happened to his cousin?
A That is correct.
Q Now was it alleged that it was something that happened to his cousin at the hands of Derrick Porter or at the hands of ---

A It wasn't Derrick Porter; it was a relative.
Q I mean Fritzgerald Byas.
A Right.
Q Excuse me.
A It was a family member of him. Because he later on says in the video that he didn't have any knowledge that the alleged victim in this case was even involved in that incident.
Q Okay. So we are talking about this happening, according to Derrick Porter, because of something that happened to Derrick Porter's cousin in 2011 from a relative of Fritzgerald Byas?
A That is correct.
Q Okay. And that is from the mouth of Derrick Porter?
A Yes, it is.
Q Once he gets comfortable does he acknowledge that is him on the video?
A Yes.
Q Does he acknowledge that that is him shooting Fritzgerald Byas?
A Yes, he never denies any of that.
Q Okay. I want to ask you a question. He says he saw a gun in that car, correct?
A That is correct.
Q And he tells you -- does he tell you what caliber he

thought that gun was?
A Yes, he did.
Q Does he also tell you what brand he thought that gun was?
A Yes, which was highly -- yes, he did.
Q Okay. And he correctly identifies the brand of the gun?
A That is correct.
Q Okay. Is it -- oh, do most nine millimeters look sort of similator -- similar ---
A Yes.
Q --- even brand to brand?
A I can't tell them apart.
Q Okay. How long have you had experience in firearms being in law enforcement?
A Thirty years.
Q Okay. And you are saying in 30 years of experience is nine millimeter a caliber firearm you come into a lot of contact with?
A That is correct. Oh, yes.
Q And you say you can't -- like if I was holding a nine millimeter back here you can't tell ---
A If I just see the butt, like he was saying, it's -- there is no way.
Q Okay.

A I can't tell from the handle.
Q Okay. But he correctly identified the brand of that nine millimeter?
A Yes, as a Hi-Point.
Q Okay. As a Hi-Point?
A Yes, sir.
Q Okay. Detective Jellico, no further questions from the State.
THE COURT: Re-cross, Mr. Smalldone.
MR. SMALLDONE: Briefly on re-cross.

RECROSS-EXAMINATION BY MR. SMALLDONE OF DETECTIVE JERRY JELLICO:

Q Are you familiar with firearms? You ---
A Yes. Yes.
Q --- are familiar with firearms, right?
A Yes.
Q You have shot them?
A Several times.
Q Fair to say in law enforcement firearms are a pretty big part of that community?
A Do you mean in North Charleston?
Q I'm sorry, in the law enforcement community -- I will back that up. In all law enforcement most offices carry guns?
A Yes, we all carry guns.

Q Fair to say a lot of -- a lot of cops like guns and they are into guns in their personal lives as a hobby?
A Some are, and some aren't.
Q Right.
A I am not.
Q You are not. Okay. Fair to say that you have seen different brands of guns?
A Oh, yes.
Q All right. Fair to say that Glocks are a big popular brand, right?
A Among law enforcement, yes.
Q Among law enforcement. And amongst the general community a Glock is pretty popular, right?
A Yes. Oh, yeah, yeah.
Q To your knowledge?
A Yes.
Q Because you are out that and you see stuff. Fair to say though that Hi-Point is a little bit different, isn't it?
A Oh, yes; a cheap gun.
Q It is a cheap gun. Is it fair to say that it looks different too, doesn't it?
A Not -- well, if you put them side by side and you can see the whole weapon. But if you are just looking at the handle of it, no, I can't tell the difference.

Q Is it fair to say that a Hi-Point at any -- from any view looks a lot blockier than a Glock, doesn't it?
A That could be your prospective, yes.
Q Is that a yes or a no?
A Not really, no. Not to me. I can't tell the difference in them. I mean it just looks like a handle of a gun that I know probably is from a semi-automatic.
Q Okay. I am talking about the whole gun. Let's not talk about specific parts. The whole -- the whole gun, a Hi-Point looks different than probably every other brand; does it not?
A Yes, but in this particular incidence he was describing he could see that brand from just seeing the handle of it. Which I knew that is next to impossible.
Q I am just talking about the gun. A Hi-Point looks different than a Glock?
A Yes.
Q All right. No further questions.
THE COURT: All right, sir. You may come down. Thank you, sir.
Do you wish the witness to be excused?
MR. SIMPSON: Yes. Yes, Your Honor.
THE COURT: Any objection?
MR. SMALLDONE: No objection.
THE COURT: You are also free to leave, sir. Thank

you.

Next witness.

MR. SIMPSON: Thank you, Your Honor. I would like to call Tommy Walters as investigator for the Ninth Circuit.

THE COURT: Okay.

(WHEREUPON, the witness was duly sworn.)

THE CLERK: Please have a seat and state your full name spelling your last name.

THE WITNESS: Thomas Walters. W-A-L-T-E-R-S.

MR. SIMPSON: Your Honor, may I proceed?

THE COURT: You may.

DIRECT EXAMINATION BY MR. SIMPSON OF INVESTIGATOR THOMAS WALTERS:

Q Investigator Walters, good afternoon.

A Good afternoon.

Q And where do you work?

A I am an investigator for the Ninth Circuit Solicitor's Office.

Q Okay. So you work in the same office as Daniel and I?

A Yes, sir.

Q Okay. How long have you been with that office?

A Since 2000.

Q And explain a little bit to the jury what an

investigator for the Solicitor's Office does.

A I work as a liaison between law enforcement and the Solicitor's Office maintaining the relationship. We -- our office picks up cases post-arrest and goes until the disposition of a case.

During that time when we receive a file I will be -- it is my job to keep up with that file and make sure it says complete and make sure we have everything for disposition.

Like a drug case might include a chain of custody, a drug report, a lab report. In more violent crimes I will follow it to make sure that we have incident reports, supplemental reports from detective's crime scene, SLED reports of any testing that would that would be done to make sure that we have fingerprints or we have DNA. Whatever needs to be done and make sure the file is complete. Body-worn video, surveillance video, interviews. I keep that until we -- maintain those records.

Q It is a lot of different roles; is that fair to say?

A It is a lot of roles. That is the main -- the main thing.

Q Generally speaking managing, monitoring, being familiar with the evidence as it develops from being a file in our office up to trial?

A Yes, sir.
Q Okay. Might that sometimes include monitoring of press accounts covering trials that are pending in our office?
A Yes, sir.
Q Being familiar with that?
A Yes, sir.
Q Being familiar with that as it relates to what we would call public -- publicly available information that might color a witness's statement?
A Yes, sir.
MR. SIMPSON: Your Honor, may I approach the witness?
THE COURT: You may.
Q Investigator Walters, I am handing you what has been marked for ID only as State's 35.
A Yes, sir.
Q Do you recognize that exhibit?
A Yes, sir.
MR. SIMPSON: Your Honor, at this point I am going to seek to question the witness pursuant to Rule 902-6. Which we can approach if ---
THE COURT: What is ---
MR. SMALLDONE: I also will approach on that.
THE COURT: Sir?

(WHEREUPON, bench conference was had, 4/11/18, 4:38 p.m.)

THE COURT: You may proceed.

MR. SIMPSON: Thank you, Your Honor.

Q Investigator Walters, you had mentioned that before you broke of the many duties that you might have one might be familiarizing yourself with press accounts?

A Yes, sir.

Q Involving cases that we have pending in our office. And what again have you identified that has been marked for ID only as State's 35?

A It is an article from the Post and Courier dated April 17th, 2016.

Q Okay. And are you familiar with the incident date of this incident?

A This incident was April 16th, 2016.

Q And I am going to ask you at this time to read the -- so this article was published the day after this incident?

A Yes, sir.

Q And I am going to ask you if you would to read the headline of that article for the jury. And wait one ---

MR. SMALLDONE: Yes, at this time I would enter my objection to relevance and foundation.

THE COURT: Okay. Relevance is an article -- it was published in a newspaper. Which you have acknowledge at

the bench and the sidebar that it is -- it is what it purports to be, a printed -- a copy or a printed article from the Post and Courier; is that what is the publishing agency?

MR. SIMPSON: Correct, Your Honor.

MR. SIMPSON: And under Rule 902-6 it is self -- self-authenticating. You do not argue that it is not the article that he purports it to be. So your objection is overruled for that reason. Okay.

MR. SIMPSON: Thank you, Your Honor.

Q Investigator Walters, if you could share for the jury what the headline of that article is from the Post and Courier the day after this incident?

A North Charleston Police Shooting Victim Had Gun, Cash, in Car.

Q So in the big headline it reports that the victim had a -- was in possession of a gun?

A Yes, sir.

Q And anywhere in the body of that article does it identify the gun, the caliber, and/or brand of the gun that the victim is found in the car?

A In the article it states a black Hi-Point nine millimeter handgun

Q Okay. Does the article also contain the defendant Derrick Porter's name anywhere?

A Yes, sir.

MR. SMALLDONE: Court's indulgence.

THE COURT: Yes.

Q Again, the date of that publication of that article?

A April 17th, 2016.

Q Thank you, Investigator Walters. Please answer any questions Mr. Smalldone may have.

THE COURT: You may cross-examination.

CROSS-EXAMINATION BY MR. SMALLDONE OF INVESTIGATOR THOMAS WALTERS:

Q Good afternoon.

A Good afternoon.

Q You are an investigator for the Solicitor's Office?

A Yes, sir.

Q All right. And throughout your investigation did you -- do you know whether Derrick subscribes to the Post and Courier?

A No, sir.

Q All right. Did you check the records to see who subscribes?

A No, sir.

Q All right. Did you ask Derrick if he subscribes to the Post and Courier?

MR. SIMPSON: Objection, Your Honor.

A No, sir.

THE COURT: Sustained. That would be an improper question because the person wouldn't -- you understand that.

The jury disregard that question.

Q Do you have any information -- do you have any knowledge of whether or not Derrick reads any newspaper?

A No, sir.

Q All right. And you have no knowledge that he reads the Post and Courier?

A No, sir.

Q You have no knowledge that he knows anyone that reads the Post and Courier?

A No, sir.

Q You have no knowledge of if the Post and Courier has delivered to his neighborhood ---

THE COURT: Mr. Smalldone, you have covered that. So you don't need to ask anymore. He doesn't have any knowledge of what he -- what he -- what who knows what about it so.

MR. SMALLDONE: Okay.

Q So just -- just to be clear, your testimony is that this article was published?

A Yes, sir.

Q Okay.

A Post -- Post and Courier April 17th, 2016.

Q On that day, correct?
A Yes, sir.
Q Okay. Thank you.
THE COURT: Thank you. Redirect.
MR. SIMPSON: Just briefly.

REDIRECT EXAMINATION BY MR. SIMPSON OF INVESTIGATOR THOMAS WALTERS:

Q Do you have knowledge that the Post and Courier is available in more than paper format; is it also available on the internet?
A Yes, sir.
THE COURT: Re-cross?
MR. SIMPSON: No re-cross.
THE COURT: Thank you. You may come down. All right. Any additional witnesses from the State?
MR. SIMPSON: Your Honor, we have one additional witness that we have got scheduled for tomorrow.
THE COURT: Okay. That is fine.
MR. SIMPSON: If that is suitable to you.
THE COURT: That is perfectly fine. This is a good stopping point for the jury. I appreciate it.
(WHEREUPON, court reporter retrieves exhibit.)
THE COURT: Let me explain something, ladies and gentlemen, too that -- because I have had this question come up over the years. I have told you the exhibits

will accompany you to your jury room. And you heard that one was marked as Plaintiff Exhibit for identifi- -- or excuse me, State's exhibit for identification only.

If it is for identification only you will consider the testimony regarding that exhibit, but if it is not introduced it does not accompany you to your jury room.

So don't think, oh, well, there was something about an article, where is it. It is right there on that table. It is where it has to be unless and until it is introduced into evidence.

Perfectly normal. Nothing unusual about that. You -- testimony. You just don't have an opportunity to physically review the exhibit. So please understand that.

We are going to take our recess. And you are certainly not at a point where you can begin your deliberations or change that status that you maintain when we started, that is that open mind that we talked about. Please do everything in your power to maintain that tonight.

I am going to ask that you be back in your jury room --

(WHEREUPON, the court confers with law clerk for scheduling.)

How about 9:45? There is a matter not related to

this that I have to take up tomorrow. And we should be finished by 9:45, I am comfortable.

And so be back in your jury room, please, by 9:45. Do not discuss this case with anyone or among yourselves. And especially tonight. Mr. Wain has already heard, when you go home tonight I am sure if there is somebody there they are going to ask you a question, what are you doing. And you will -- the temptation is there to talk about it.

If you start talking about it you will have commenced your deliberations. You will finish this case probably by tomorrow, and then if you want to talk about it you will be free to. Talk about something else.

I don't think there will be any news coverage of this. But if there is, if it should come on television, turn if off or walk out.

Because that is -- again, not that it would misstate anything. I am not suggesting that. It is just you are going to make -- your commitment is to decide this case based on what occurs in this courtroom. And that is the key. And what you are considering is what is presented into evidence and what is admitted. So that is the rationale for that. So don't -- if there are any newspaper accounts don't read any of that either tomorrow morning before you come.

Have a good evening and a restful evening. And I

thank you for your patience today. Thank you.
(WHEREUPON, jury exits 4/11/18, 4:45 p.m.)
THE COURT: All right. Anything from the State before we recess?
MR. SIMPSON: No, Your Honor.
THE COURT: Anything from the defendant before we recess?
MR. SMALLDONE: Nothing from the defense, Your Honor.
THE COURT: All right.
(WHEREUPON, recess for the evening, 4/11/18, 4:49 p.m.)
(WHEREUPON, resume trial 4/12/18, 9:57 a.m.)
THE COURT: Is the State ready to proceed?
MR. COOPER: Yes, Your Honor.
THE COURT: Is the defense ready to proceed?
MR. SMALLDONE: Yes, Your Honor.
THE COURT: All right. Let the record reflect Mr. Porter is present.
After we adjourned last night I had further conversation with my court reporter. And she is my expert in this department and she suggested something and I think she is correct so the record will be clear if this matter has to be reviewed. We are going to mark State's -- I think it is 18 ---
THE COURT REPORTER: Eighteen.

THE COURT: We are going to mark State's 18 and have a dual marking. Because that way for purposes of a review it won't conflict with the for identification only. It was the testimony was State's Exhibit 18 we will just make the record clear that when you introduced it it became Defendant Exhibit 1. It is just -- and then it will have -- it will keep both markings for the review court.

So I think that is a better approach to it from the standpoint of just going forward. So we will make that change. But other than we will proceed, okay.

And I understand -- but it is clearly your desire to put it in, and that is why we need to put that in there so that it is clearly -- that is clearly confirmed by the record as well.

(WHEREUPON, Defendant's Exhibit Number 1, CD – Interview, was marked for identification and admitted into evidence.)

Okay. Are you are ready to call your next witness?

MR. COOPER: Yes, Your Honor.

THE COURT: All right. Let's bring in our jury, please.

(WHEREUPON, jury enters 4/12/18, 10:00 a.m.)

(WHEREUPON, the witness was duly sworn.)

THE CLERK: Please have a seat. State your name and

spell your last name, please.

THE WITNESS: Alejandro Spiotta. S-P-I-O-T-T-A.

THE COURT: You may proceed.

MR. COOPER: Thank you.

DIRECT EXAMINATION BY MR. COOPER OF DR. ALEJANDO SPIOTTA:

Q Good morning, Dr. Spiotta.

A Good morning.

Q Would you please tell the jury where you are currently employed.

A At the Medical University of South Carolina.

Q And what position do you hold at the Medical University?

A I am a professor of neurosurgery and a professor of neuroendovascular surgery.

Q Can you please explain for the jury what your position entails.

A So it is the highest ranking academic position. It entails not just doing the clinical aspects of taking care of patients but also doing research and also teaching the next generation of physicians on all aspects of neurosurgery.

Q Can you please elaborate for the jury on your educational and professional background.

A Sure. So I obtained my bachelor's degree from the University of Pennsylvania in 2001. My medical degree

also from the University of Pennsylvania in 2005. Then I did my neurosurgery training with the Cleveland Clinic between 2005 and 2012. And then I did a two-year neuroendovascular fellowship, the first year in Cleveland and my second year here at the Medical University of South Carolina.

Q Can you please explain what license or certifications that you also hold.

A So I am board certified in neurosurgery by the American Board of Neurological Surgery. And I have licensure here in the State of South Carolina.

Q And if you can just ballpark for us about how many -- approximately how many surgeries do you think you have performed or have been involved with?

A Roughly between three and six hundred every year for about fifteen or sixteen years.

Q And have you ever testified before?

A I have.

Q Approximately how many times have you testified?

A Once that I can recall about a few years ago.

Q And were you qualified as expert?

A Yes, I was.

Q In what areas?

A Neurosurgery and traumatic brain injury.

MR. COOPER: Your Honor, at this time the State

would offer Dr. Spiotta as an expert in both general trauma surgery and neurosurgery.

THE COURT: And how about traumatic brain injuries as well? Just -- just those two areas?

MR. COOPER: I think that encompasses that.

THE COURT: Okay.

MR. COOPER: Yes, sir.

THE COURT: Very well. That is fine.

Do you care to examine him as to his qualifications?

MR. SMALLDONE: I do not. I will not object to his admission as an expert.

THE COURT: He will be permitted to render opinions in those areas. Thank you.

MR. COOPER: Thank you, Your Honor.

Q Dr. Spiotta, can you please explain for the jury just briefly what is all involved when a patient arrives at the ER.

A So it depends on the status of patient. But, for example, for the case we are going to discuss today with a gunshot wound to the head, that is something that the trauma team would have been notified before arrival. So it is not something they want to be surprised about.

And with that information they would have had information on quickly about how the patient is doing as far as the status of are they breathing on their own, is

their blood pressure stable or not, how much have they bled. And the trauma team would take that first call and prepare, you know, accordingly.

And then in a case like this with a gunshot wound to the head they would have notified my team even before arrival. So we would have been expecting a patient like this. And we probably would have a team member of mine actually waiting in the ER to greet the patient as they came in along with the trauma team.

Q And at what point do you get involved when a patient much like this one comes into the ER?

A Something like this, I would be involved immediately. So we have a team. You know, I am one of the neurosurgeons and teach the physicians that are trained to be neurosurgeons. So we have a team of about 10 to 12 residents at any given time that are training in neurosurgery. And they are kind of out and about like our soldiers in the field.

So a mid level, a third or fourth year physician in training to be a neurosurgeon, would have been in the ER to greet that patient and would have done the first assessment with the trauma team. I would have been aware that they are here, and I would have been immediately available, you know, just down the hall by phone.

A patient like that with a gunshot wound would have

been, like I said, alerted to the fact that they were coming. Would have been meeting them in the ER. And the trauma team would have done their assessment which involves, you know, their breathing, are they going to -- are they going to die within minutes, is there another injury, obviously the head injury, and we will look at it as the obvious kind of injury.

But they have to look at is there any chest wounds, any abdominal wounds, anything else that we are maybe missing so we don't lose sight about what we are dealing with the head injury. So that would have been done within the first several minutes of arrival. Blood labs, etc., x-rays, whatever would be required to stabilize the patient.

And then we would have been ready and our team would have been assessing the neurological exam of the patient and getting a CAT scan ready to get pictures.

I would have been alerted by phone, and basically as the CAT scan is being done I would basically be able to pull them up as they are being imaged. And then at that instant we make a decision whether to do surgery or not.

But that would depend on not just what the CAT scan shows but also the status of the patient.

Q So to focus your attention to the case at hand, did you have the opportunity in April of 2016 to treat a

Fritzgerald Byas?
A I did.
Q Can you explain to the jury what his condition was when he arrived at MUSC that day.
A So his condition was critical to grave. He arrived with a gunshot wound in the right forehead. It was evident it was bleeding from the forehead.

My team members noted in the emergency department that there was actually what appeared to be some oozing brain matter out of the wound. Which is obviously a very poor -- poor sign and poor prognosis.

So we already obtained a CAT scan after we did a neurological exam to determine if we should do surgery or not. And that is based on again the status when he came in.

We look at things, for example, the pupil response, if his pupils are equal. So he didn't have a herniation syndrome. And that is one positive sign.

But he was -- you know, had a breathing tube in place to help him support his breathing. He was essentially in a coma when he arrived. His left side was not moving at all. His right side to painful stimulation, so we pinch people to see what those arms do. The most -- the most reassuring signs we pinch somebody and they open their eyes and yell and grab your

hand. He was not doing any of that. He was not opening eyes, and his arms were just doing some reflexive posturing. So he is essentially in a pretty more than comma.

With that information we went to CAT scan. Like I mentioned, I was looking at the CAT scan as it was being obtained. And given his young age I determined to go for surgery to give him a chance for survival.

Q So I want to ask you about that. So you mentioned that based on his young age that you decided to go to surgery. What would have happened in a situation like this with injuries if the person was older?

A So if the patient had been 65, 75, certainly 80, with an injury pattern that he had, it would not have been advisable to perform a surgery.

Q And why would that be?

A Because the chance of a good outcome especially in that age group, frankly, any age group with the injury that he had, was very small. We know that patients that are younger rebound better. They rehab better. Their brain responds better. So given a young age we gave him the benefit of the doubt and I proceeded with the surgery.

But I will emphasize that when he came in he was on the brink of death. I mean, you know, he arrived. We

took him to surgery within 15 minutes of arrival. That is the fastest possible response that we could do. And ---

Q Does MUSC assign trauma levels to patients upon their arrival at the ER?

A Yes. We are a level-one trauma center. So we have different activation alerts. So this was a Level 1A. There is a level 1A, B, and then 2 and 3. And the 1A is the most immediate response.

And that entails when I am looking at the CAT scan I make -- I make the decision to go to surgery. I basically call the OR and say we have a level 1A gunshot to the head. They know what that means. They will set up everything. I don't have to say anything else. And they are -- within minutes they are ready for us.

Q So you mentioned that a CT scan was ordered on -- for this Mr. Byas. Did you have a chance at that time to review those images?

A Yes.

Q If I were to show you those images would you recognize them?

A Yes.

Q Dr. Spiotta, I want to hand you what has been marked for ID purposes only. It is State's Exhibit 31 and 32. Do you recognize those images?

A Yes, I do.
Q And what are they?
A It is a non-contrasted CAT scan of the brain of Mr. Byas on the date of arrival.
Q And are they in the same or similar conditions as they were when you viewed them originally?
A Yes, they are.
MR. COOPER: Your Honor, at this time the State would offer State's 31 and 32 into evidence.
THE COURT: Any objection?
MR. SMALLDONE: No objection.
THE COURT: Without objection State's 31 and 32 are admitted.
(WHEREUPON, State's Exhibit Number 31 was admitted into evidence.)
(WHEREUPON, State's Exhibit Number 32 was admitted into evidence.)
MR. COOPER: And may I publish to the jury?
THE COURT: Yes, you may.
MR. COOPER: Thank you, Judge.
Q Dr. Spiotta, those are going to appear on the screen both in front of you and behind you.
A Okay.
Q And if you want to mark on the screen to help indicate anything, feel free to do that. You can -- it

will show up on the screen.

I am showing you State's Exhibit 31. Dr. Spiotta, will you please explain to the jury what we are looking at in this case.

A Sure. So you are looking at a non-contrasted head CAT scan. It is an x-ray based modality that we use very frequently. It is very quick and readily accessible. Within minutes we can image the brain. It doesn't have the resolution of an MRI, but for something like this it gives us the immediate information that we need.

So that oval shaped is the head cut into cross-section. The patients are laying on their -- the back of their head. So you are looking up, from their feet up.

So all that bright things I am going to describe what they are. On your left side is actually the right side of patient because they are laying like this (motioning). You are looking up.

And that oval -- the bright white outline, that is the skull. So what shows up very bright on the CAT scan are things like skull, things that are very dense with a CAT scan. Also things like bullet, metal, also shows very bright.

The grayer areas are the brain. So if I mark here can you see?

(WHEREUPON, witness marks on screen.)

A Am I able to erase that?
(WHEREUPON, instruction given to witness to operate display.)
A Okay. So here is the skull outline. And you can see there is a break over here (pointing). Although the left and the right sides of the brain, the middle is right where this line is drawn here (pointing).

Also the left and right sides of the brain have a whole different function. On the CAT scan they should appear equal and symmetric. You can clearly see there is a very gross asymmetry.

And things should be balanced so that things on the left side appear to be the same as on the right side. And that is the midpoint that point is marked you can see here the radiologist has marked (pointing). It is about a centimeter shift. So you get the sense things are shifted over from this side to that side (pointing). These little hockey stick.

Fluidal spaces that I am circling, those should be space in the middle. And they are pushed over about a centimeter from right to left. And that is from the pressure and the swelling from the right side of the brain pushing over to the left side. So literally there is herniation and there is movement of the brain across the midline.

There are some midline structures here (pointing) and here (pointing) which are pretty tough and they should hold things in place. But the pressure is such that it is actually shifting. It is over about a centimeter which is about a third of an inch.

Here you can see there are some bone fragments. So you see there is an abnormal contour of the skull. There is jagged bone fragments. You see a lot of these bright things. These all here (pointing) are bullet fragments in this are here (pointing) as well as over here (pointing).

So what you see is there was an entry wound which happened right here (pointing).

I am just learning how to use this here (drawing).

Notice the swelling here in the scalp compared to the other side (pointing). That is all from the swelling and bruising from the entry wound. Which the bullet entered this way (pointing). And the trajectory it took was roughly this one (pointing).

You can see all of the fragments of metal artifact that shows white, these streaks. It shows like it is almost like a brilliant sparks flying from them. That is just the artifact from the CAT scan being x-ray modality.

So bullet entered here (pointing). Fractured these (pointing). And more bullet fractures as it went it --

because of the energy some pieces of bone fractured and raised. And some pieces the bullet fractured. Some of that came over here (pointing).

And then as you cross the middle to the other side of the brain these are all fragments of skull as well as bone (pointing).

And ultimately here (pointing) where it landed and hit the inside of the skull you can see scattering of the bullet fragments here (pointing).

In addition, you can see this is what normal appearing brain should be over here (pointing). Which is sort of a median intensity gray (pointing). Over here in this area (pointing) you can see it is a lot darker.

And in this area too (pointing) I think the other CAT scan shows is better, but that degree of darkest, that is swelling and pressure in the brain. And that results in further compression and mass effect and pressure in the brain.

Q I want to show you State's Exhibit 32. Is this also a scan of Mr. Byas' head prior to the operation?

A That is correct. This a CAT scan prior to surgery.

Q Will you explain what we see in this picture.

A Sure. So this again is another slice of the same -- the patient is laying back. You are looking from the feet up. So on the left side of your screen is the right

side of the patient's head. This is a cut. Think of it slicing like Wonder Bread. We are looking at the slices now with laying them on the table to look at them.

This is a cut slightly higher up. You can see here this is clearly where the bullet had come in. And, again, that trajectory was this way (pointing). It is about 10 or 15 degrees to the side.

Had it been any trajectory the same degree towards the inside I believe the patient would have died on the scene. And you have your bullet fragments here that I am circling. Again, more bullet fragments here (pointing).

And we see in this whole area it is very dark. So there is a lot of swelling, and the brain is very much -- has a lot of bleeding within it, a lot of contusions, a lot of bruising and swelling. And, again, this is a dire situation.

The skull is essentially fixed compartments. When you have swelling and bleeding in the brain and energy transfer, the pressure goes up very dramatically because there is no outlet. The only outlet is at the basis of the skull where the spine comes in. But that is very much a filament.

So if you have any small amount of volume it increases the pressure dramatically. And that is direct injury on the brain as well as indirect injury on

surrounding parts of the brain. And then globally if the pressure exceeds the arterial pressure your heart literally can't pump blood into the brain and it can reduce the blood flow to the brain and cause a global injury that way.

In this case there is a lot of energy, a lot of energy transferred from the bullet. So that the injury would have been not just the trajectory of the bullet itself but also a more broad path where those bullets fragmented and sprayed and fanned out.

That would have been immediate energy as the energy was transferred even in surrounding parts of the brain that would have caused further injury. And that would have been propagated to surrounding parts of the brain that would cause bleeding and bruising.

And that is a process that we expect to actually worsen. So it would have happened immediately, and then there would have been a pattern of injury that happened at that moment; and then it would have worsened over the next several hours.

And this is somebody who is as sick as you can possibly be. Like I mentioned, we took him to surgery immediately. And it is hard to say, but I think another 20 minutes to another hour and he probably would not have survived.

Q Can you indicate for the jury on your own and where approximately the entry wound would have been for the victim in this case?
A The entry wound would have been here (pointing).
Q Now where about -- if you would indicate with your hand just so we can get an idea of where would that be and would that have been on the left side or the right side?
A Right side.
Q Okay. Now you talked about -- you touched on it a little bit in a few of your prior answers, but once you get somebody like this to the operating room what are some of your main concerns with an injury like this?
A So the main concern is, you know, just looking at this picture is immediate death. So is the patient even alive at that point.

And he did have enough of a neurological exam that it was worth giving him the best chance and doing the surgery. But I worry about bleeding. I worry about further injury to the brain. I worry about, again, that energy transfer that is a really high-impact, the shattering the bone, the bullets flying that cause a lot of energy. And, like I say, when the pressure builds up in the brain it can cause severe injury.

So the goals of the surgery in this case, like I

mentioned, I offered it for him because he was young. I thought he had although a low chance, a chance of survival. Not zero, but a low chance of survival.

The goals of surgery were to address the problems, you know, inherited in this which is the pressure increase in the brain. So to remove parts of the skull. Some of them have already been lifted up. Like imagine like a jiggly puzzle that is on the table and you kind of push it together and the pieces kind of crumple up.

And so that the bullet and energy had already done some of that. But removed a larger portion of the bone. And actually that closed compartment, enlarge that compartment and open it so that swelling of the brain from energy transfer from the bleeding and from the bullet can expand outward rather than inward.

When it -- when the brain expands and is in an enclosed skull it can't go outward. It compresses on itself. And that is where people die frequently.

So the goal of surgery would have been to stop any bleeding. There's evidence of bleeding from all those -- bullet -- bullet fragments. The brain has a very rich blood supply. There is a tangle of blood vessels that supply the brain because the brain requires a lot of blood supply function. So we expect a lot of blood loss. So we have to do a control of blood loss. But, again,

the goal is to remove part of the skull, allow that pressure to go outward rather than inward.

Q Can you discuss for the jury about the operation itself what you were able to accomplish?

A And one more thing about the surgery, the goal is to prevent further injury. Surgery like this, you are not being able to undo the damage that was being done initially before they arrived to you. It is to prevent further injury.

So surgery like this we went straight to the operating room. Shaved broadly on the right side of the head and made a very large incision. And typically either a big question mark or a big t-incision. But a very large incision.

And the goal is to try to make the bone opening as large as we can. Usually about 15 centimeters or so. It is about a third of the size of the whole side of the skull.

In this case, like I mentioned, from the bullet energy there were some fragments. The skull already floating on top of the brain. Some of them were jagged and they were going to cut the surface of the brain. There was a lot of bleeding.

So from the -- from the immediate incision, which we extended the scalp laceration of the wound to where the

bullet had gone, there was a tremendous amount of bleeding from both the scalp and the bone and the covering of the brain, the dura, and the brain itself.

So once we opened up, there was a ton of bleeding that we had to deal with. And we removed those bone fragments. And then which was just lifting them off. And then we expanded with the drill much larger bone window again so that the brain could expand out.

Even when we did that because of all of the energy and the pressure and that compression of the brain there was a lot -- the brain was mushrooming out quite a bit. So and we can see.

And there was a lot of bleeding. So it took a while, quite a while to actually control some of the bleeding. And then part of that brain where the bullet had first gone in was beyond repair. It was really just swelling and bleeding. So I actually opted to remove a big portion of that part of the brain.

So I removed a portion of the brain about the size of an apricot or a nectarine just to be able to allow for more room for the brain swelling in that case. And we also closed the scalp over it.

Q So with injuries like this and then with what you had to remove as part of the surgery what is the prognosis for somebody that if they survive that surgery?

A So the prognosis is very poor. Like I mentioned, had he been older I think it would have been the right thing to do to not to take him, if he was 65, 75, for example. Because of his age we opted to take him.

But involving the right side you can expect a lot of weakness than the left side. Perhaps paralysis, to never -- to never return. Injury of that frontal lobe here in the front and as -- post ops CAT scans will show there was also injury from the bullet fragments and there was some pressure on the other frontal lobe.

So injury to both frontal lobes. That is where the -- a lot of the executive function is. So, for example, organizing, preparing and executing a game plan.

To hold a job there are five tasks you have to do with organize them and arrange them. We have injury to both of those. You just cannot do that.

Language is on the left side. So it is on the uninvolved side. So I would expect that some language functions would be preserved, like understanding and speaking. In simple ways.

But, again, with injury to this area here (pointing) a lot of the functions that we take for granted just in our everyday going to the grocery store, picking up kids, going to work, is that executive function of multitasking that that involves.

Q And so having conversations, asking and answering questions, that would also be very difficult for somebody with these kinds of injuries?
A Yes. Again, the language itself not affected on this side (pointing). But the ability to -- for complex thinking and thinking things through. So simple -- simple conversation. Very plain, hello, how are you doing. But anything beyond that would be difficult.
Q And you mentioned about the just minute ago the post operation CT scan. Did you take images after the surgery?
A We did.
Q Did you view those images that day?
A Yes, I did.
Q If I were to show you those images would you recognize them?
A Yes, I would.
Q Dr. Spiotta, I want to show you what has been marked for ID purposes only as State's Exhibit 33 and 34. Do you recognize those?
A Yes, I do.
Q And what are they?
A They are post-operative CAT scans of Mr. Byas.
Q And are they in the same or similar condition as you viewed those back in 2016?

A Yes, they are.
MR. COOPER: Your Honor, at this time the State would offer State's Exhibit 33 and 34 into evidence.
THE COURT: Any objection?
MR. SMALLDONE: No objection.
THE COURT: Without objections. Thirty-three and thirty-four.
MR. COOPER: And may I publish?
THE COURT: You may. They are admitted without objection.
MR. COOPER: Thank you, Judge.
(WHEREUPON, State's Exhibit 33 was admitted into evidence.)
(WHEREUPON, State's Exhibit 34 was admitted into evidence.)
Q Dr. Spiotta, I want to show you State's Exhibit 33. Will you describe for the jury what we are looking at in this picture.
A So this is a CAT scan similar to what the other one was. This is a post-operative one. But it is still in the same position. The patient is laying on their back. We looking from the feet up. So on the left side of the screen is the right side of the head.
And here (pointing), here is the normal contour of the skull. And you see there is a big break here

(pointing). So that is what we did in surgery. This part of the skull (pointing) is what I removed.

And you can see here -- and I am circling here this area. There is bullet fragments. They are really really bright artifacts with the shinning lights away from that. Some of the bullet fragments.

The white patchier areas, for example here and here (pointing), that is actually bleeding and bruising. We notice now with that big decompression of the bone that we did here (pointing). So this is a large piece of bone about this size (motioning) that was removed to go along with the bone fragments that were already broken up by the bullet itself.

You can see the bruising along here along the brain (pointing). You can see how it is a lot darker than this side (pointing). And darker here (pointing) than the other side.

And now things are in that middle line that we had before there was that pressure. Now things are more in the middle. So that pressure now is being relieved because the brain is able to push outward on the scalp.

So here (pointing) although we removed a big portion of the skull you wouldn't be able to tell by looking at the patient because the scalp would be tense with the brain pushing it out.

So the outline of the head, a visual appearance, would be normal. And that is because the brain is occupying that space that we removed the skull. And that is what the goal of the operation was.

And here you are seeing a lot of bleeding (pointing). Crossing over to the other side of the brain that is bleeding and bruising that is more visible now than in the first CAT scan because now some of the pressure has been relieved.

Before it was sort of squished in, and now it -- now it is being able to blossom and manifest. But he has injury not just on the side of the brain where he was shot but also on the other side.

Q I am going to show you State's Exhibit 34. Will you also explain that to the jury, please, Doctor.

A So that is a -- like another slice. Those slices that we take like slicing of the Wonder Bread. And then we lay that slice open to look at it. That is another -- that is sliced slightly lower. With the same brain of the same patient after the -- after the surgery as well.

Just for reference, here is that part of the bone was removed (pointing). You can see how it is missing there. And here are those bullet fragments (pointing). So they entered, you know, higher up but in this plane. And hit here (pointing) and shattered and scattered.

And you are seeing all of this compared to the brain on this side, that should be gray with some dark areas, slightly darker areas of gray. Here you can see it is much more gray. And that is a little swelling. There's lots of bleeding and bruising. And essentially you have -- and here again injury on the other side of the brain (pointing).

So we have achieved the goals of surgery which was stopping the bleeding, expanding the cranial vault to allow the pressure to expand outward rather than inward.

But the surgery, again, cannot address the injury that has already occurred at the time of the shooting and the time of the shooting to get the ride to the hospital. And the surgery the goal was to prevent any further injury.

Q So in other words you can't revert what has been done but you can stop further damage from being done?

A Right, we can try to stop further damage from being done I should say.

Q Now with some of the things you mentioned that you were able to do in surgery, taking out parts of the brain and things like that, was the focus quality of life or was the focus just sheer survival?

A At that point given his condition and what -- and the appearance of the brain and the CAT scan, as well as

the pressure and the bleeding that we encountered, surgery was strictly a survival benefit to see if he could survive that.

Q Now after an operation like this, after recovery, what kind of quality of life, if you will, would a patient like this expect -- or what would you expect for them?

A Again, it can be very variable from patient to patient. But generally speaking I would have informed the family that, number one, the surgery has been a success but there was no -- there's no assurance that the patient would even survive the night.

And we have to watch very closely. If they did survive then I would expect long-term weakness or even paralysis on the left side. And, like I mentioned, the damage to the bilateral both sides of the frontal lobe and things like the executive function. So being able to hold more than just a simple menial job would be very difficult. And also very high chance of needing assistance with being fed, etcetera, not being able to take care of himself. And, again, it can be very variable. And patients can respond very differently.

But just the most likely scenario given this and how the course of not just when he arrived but how things looked at surgery, etcetera, that is the picture I would

have painted.
Q And then is that a prognosis that you would expect to improve after a while, or is that pretty much the condition throughout the rest of their natural life?
A Again, patients, every patient they can vary quite a bit. We do hope to see improvement. And generally when you see improvement you see it in the first three to six months. It is unusual for someone to stay plateaued for three years and then have drastic improvement three years later.

Usually if you are going to see improvement you see it early on. And that is a good indicator of further improvement.

Again, every patient recovers slightly differently. Again, because he was young he had a higher chance than someone who is older. And that just goes to emphasize if they had been 65, 75, I probably would have just told the family that it was a nonsurvivable injury and that doing surgery would not have helped and that it should not have been done.

But given his age we gave him the benefit of the doubt and we gave him the best shot we could.
Q Did you meet with Mr. Byas after the surgery to evaluate his condition in the months afterwards?
A Yes. So he was in the hospital for some time. And

then I have seen him in follow-up I believe -- I don't know remember the exact date. I believe it was late summer of 2016 I saw him last.

Q And then at that time at least was he still needing the care that you described and suffering from a lot of the difficulties that you described?

A He did require care. He actually had improved more than we would have expected. So that the left side of his body was moving stronger than I would have expected. So that was a great surprise for us. He was able to speak very simply. Again, I haven't seen him in almost two years. I can't speak to his condition now. But he did recover and improve more than we had hoped for. Which is great to see, obviously.

MR. COOPER: Beg the court's indulgence for just one second

THE COURT: Certainly.

MR. COOPER: Dr. Spiotta, I appreciate your time. I have no further questions for you. If you would answer anything the defense may have for you. Thank you, sir.

THE COURT: You may cross-examine.

MR. SMALLDONE: I don't have any questions for this witness, Your Honor.

THE COURT: Thank you, very much. Thank you, sir.

Do you wish the witness to be excused?

MR. COOPER: Yes, sir, we do.
THE COURT: Any objection?
MR. SMALLDONE: No, sir.
THE COURT: You are free to leave, sir. Thank you. Have a good day.
THE WITNESS: Thank you.
THE COURT: You may call your next witness.
MR. SIMPSON: Your Honor, at this time the State rests.
THE COURT: Very well.
Ladies and gentlemen, there are some matters of law that I need to take up now out of your presence. I am going to ask you to retire to your jury room. Please do not begin your deliberations. We will be with you as quickly as we can. Thank you.
(WHEREUPON, jury exits 4/12/18, 10:29 a.m.)
THE COURT: All right. Anything from the State at this point?
MR. SIMPSON: No, Your Honor.
THE COURT: Anything from the defendant at this point; any motions?
MR. SMALLDONE: Your Honor, at this point the defense moves for a directed verdict.
THE COURT: Okay. Based on I assume that there is only one reasonable inference and that is that he acted

in self-defense?

MR. SMALLDONE: Your Honor, both that he acted in self-defense as well as the lack of expressed malice for the attempted murder charge.

THE COURT: Well, expressed malice there is no question they have to prove a specific intent. And there is a decision. And the court skirted on that. I don't recall that they actually decided and accepted that.

They -- they said that clearly the specific intent had to be established to kill. And there is no question about that. But of course when you talk about that you could consider the nature of everything about it to determine the specific intent, obviously. But it has to be intent to kill.

I think implied malice, as I read the decision, I don't think they modified that aspect of it. It may be expressed or implied.

So clearly the intentional doing of a wrong -- wrong -- wrong act or an act likely to cause severe injury or bodily harm to somebody is clearly sufficient to establish for the jury to infer malice from that.

There is -- since we didn't hear -- I couldn't hear what was being said. There was obviously an argument. I don’t know what was said, so I can't -- I agree with you, I can't say specific.

But express malice would be -- could be that he was sitting around waiting on him too. So I mean that could be inferred from that as well.

So and again all of those would be inferences. I am not -- I can't pass on that. I am just merely responding in the light most favorable to the State in response to your motion.

So clearly I think there is sufficient evidence to support all of the elements of the crime of attempted murder. I further would find that there is specific evidence that shows the reasonable inference to be drawn which would defeat and disprove, which the State is required to do, self-defense; and that is who brought on the harm -- or who brought about the altercation.

Clearly we would note that there was an argument. But clearly the victim left. And it was in a matter of -- and we know there is -- they are not on somebody -- they are not on -- he is not on his own property, so there is a duty to leave if you can do so safely.

There was no threat of anything at that particular point. All he had to do was turn around and walk back to his car. So those two elements are clearly established as to who brought on the altercation and therefore would defeat self-defense. And so for those reasons I would deny your motion.

Okay. Now we have been talking about it. Have you had a conversation with your client concerning his desire to testify or not testify?

MR. SMALLDONE: I have had several conversations regarding that, Your Honor.

THE COURT: And he -- has he indicated to you his intention?

MR. SMALLDONE: I have informed him that he is free to make up his mind at any moment. But my understanding is that he does not wish to testify.

THE COURT: All right, Mr. Porter, you have had an opportunity -- he can remain seated ---

MR. SMALLDONE: Okay.

THE COURT: --- if he wants to. Whatever -- if you want to stand, that is fine. But you can remain seated as well.

You have talked with your lawyer about your right to testify or not testify, sir?

MR. PORTER: Yes, sir.

THE COURT: And have you had sufficient time to ask him questions and discuss strategies, discuss your theories about how to proceed in this case?

MR. PORTER: Yes.

THE COURT: And have you made a decision as to whether you want to testify or not to testify?

MR. PORTER: Yes, sir.
THE COURT: And what is that?
MR. PORTER: Not to testify.
THE COURT: Very well. And of course you have heard me tell the jury at the onset that they are not to look to you to prove or disprove anything. You have no obligation to say anything or present any evidence. But it is your right, you understand, to testify if you choose to or present any -- are there any other witnesses that you intend to present?
MR. SMALLDONE: No, Your Honor.
THE COURT: Okay.
It would be your right to present testimony obviously for the jury's consideration. But -- and I will charge the jury again in my charge that they cannot infer anything from your decision not to testify. They can't even discuss it in the jury room.
But that having been said, you still have the absolute right to take the stand. Do you understand that, sir?
MR. PORTER: Yes.
THE COURT: But it is your decision today not to take the stand, correct?
MR. PORTER: Yes, sir.
THE COURT: Are you under the influence of any

medication, any alcohol, any type of drugs?
MR. PORTER: I am currently under a medication.
THE COURT: What kind of medication?
MR. PORTER: Remeron.
THE COURT: I'm sorry?
MR. PORTER: Remeron.
THE COURT: What is that taken -- what do you take that for?
MR. PORTER: Stress.
THE COURT: It helps you with stress?
MR. PORTER: Yes. I had -- I had the little altercation that happened in the jail when I turned myself in with -- with a little bit -- my injuries.
THE COURT: Okay.
MR. PORTER: Things like that.
THE COURT: So you are taking it; a doctor has prescribed that for you?
MR. PORTER: Yes, my jail.
THE COURT: All right. And you have taken it as prescribed?
MR. PORTER: Yes.
THE COURT: You haven't taken any -- you haven't taken less or more than the dosage that you are -- supposed to take; is that correct?
MR. PORTER: No, I only get like -- like once. Once

a day.

THE COURT: And you have taken yours today?

MR. PORTER: Yes.

THE COURT: Does it in any way impair or affect your ability to think or reason other than it probably helps you, I would think and that is why you take it I would assume.

MR. PORTER: Yeah.

THE COURT: So it really enhances your ability to think and reason?

MR. PORTER: Yeah.

THE COURT: Okay. And you have had sufficient time to think about it, and this is your decision; correct?

MR. PORTER: Yes. That's right.

THE COURT: Are you satisfied in the manner in which your attorney has advised you concerning your rights in this matter?

MR. PORTER: Yes, sir.

THE COURT: Okay. All right. I find that Mr. Porter has had the benefit of competent counsel with whom he has indicated he is totally satisfied. And I find he has made a decision for himself that I find to be freely, voluntarily, knowingly and intelligently made; and he has elected to continue to exercise his right to remain silent.

Mr. Porter, you have the right to change that at any time. Until -- I am going to bring this jury back in very shortly. And I am going to turn -- first I am going to tell them -- remind them what I said, that you have no burden to prove anything but you still have the right to present any additional testimony for their consideration.

And then I am going to turn to your lawyer and ask whether he wishes to present any additional witnesses for the jury's consideration. And I assume consistent with our discussion he is going to say, no, the defense rests.

When that occurs you have lost the right to testify. Do you understand that, sir?

MR. PORTER: Yes.

THE COURT: If you change your mind before that occurs just let your lawyer know and I will excuse the jury and we will resume this conversations, okay?

MR. PORTER: Okay.

THE COURT: If I don't hear from you I am going to assume that you stand by your decision, okay?

MR. PORTER: Yes

THE COURT: Is that fair?

MR. PORTER: Yes.

THE COURT: Okay. All right. Let's also let's assume that you are resting. And if that goes through I assume you renew your motion for a directed verdict, Mr.

Smalldone?

MR. SMALLDONE: I do, Your Honor; and I would.

THE COURT: And my reasons stated for denial of your direct -- motion for directed verdict at the close of the State's case will continue and will be my continued respond to that.

Now just for the sake of the record, does the State have any objection to letting that suffice rather than to excuse the jury again and go back through this process. Or ---

MR. SIMPSON: No, Your Honor ---

THE COURT: --- is that sufficient?

MR. SIMPSON: I think that is sufficient.

THE COURT: You stand by that; and just for clarity the record is preserved for purposes of review should that become necessary?

MR. SIMPSON: Agreed.

THE COURT: All right. Any -- other than charging specific intent which I will charge, any other request to charge?

MR. SIMPSON: Yeah, -- yes, Your Honor. And I am sorry, this just occurred to me during the ---

THE COURT: No, no problem.

MR. SIMPSON: --- colloquy we had earlier. I hope I am not making a mistake here, but I do think that State

versus King although it doesn't expressly hold this, the automatic inference of malice by use of a deadly weapon I am going to ask that you not charge that.

THE COURT: Oh, I am not going to charge that.

MR. SIMPSON: Okay. Thank you, Your Honor.

THE COURT: State versus King. But there is also another decision that takes that out. Because whenever self-defense is present you can't use that.

MR. SIMPSON: Okay.

THE COURT: And so I am not -- I am not -- I am not charging that.

MR. SIMPSON: Thank you, Your Honor.

THE COURT: You bet. No, I agree totally with you. The State doesn't take -- and it was an interesting -- and it was interesting. I think it was a Nevada case that they were referencing that talked about the express malice, which is really an interesting connection. I had never really thought about tie it in with specific intent. And they seemed to say, yeah, we agree with that.

But that doesn't -- but they didn't say that that is required. They just simply modified -- as I read it, they modified the Court of Appeals saying that specific intent had to be charged, but otherwise his charge was proper. And I think he charged -- malice may be by

expressed or implied.

So but those reasons. But the State doesn't take a different position on that I would assume.

MR. SIMPSON: No. No, Your Honor.

THE COURT: Okay.

MR. SIMPSON: Just I didn't know ---

THE COURT: No, no. That is fine.

MR. SIMPSON: I didn't want that in there because ---

THE COURT: I understand. And I am not going to put that in there.

Any other charge other than self-defense, Mr. Smalldone, that you want me to have?

MR. SMALLDONE: I would ask for self-defense, prior difficulties between the parties. I believe there was some evidence about that in the interview.

THE COURT: I don't recall between these parties. There was difficulties with somebody -- family members. But prior difficulties -- I don't -- maybe you can correct me. I don't recall specifically with the victim.

MR. SMALLDONE: And, again, Your Honor, as we all know, the audio is a bit difficult.

THE COURT: Well, I understand. But that is what I am saying. I don't -- what is the State's position on prior difficulties?

MR. SIMPSON: I, like Your Honor, I don't recall any evidence to be presented of prior difficulties. Now, prior difficulties between the victim and some people that he might know, maybe. But nothing specific between the two parties.

THE COURT: Not the two parties. I mean I never saw that. In fact, to be honest with you, the first -- the first meeting they grasped hands when he is coming in.

So I mean that just -- that is not consistent with -- to me it is not consistent. No question there was an argument. But I don't know that there is any prior difficulty situation.

MR. SIMPSON: And I think now that I am thinking of it there is a section of the interview where he says he has run into Byas a couple of times maybe in clubs over the years. But that nothing -- in fact said that there was no problems ---

THE COURT: No problem.

MR. SIMPSON: --- with him prior.

THE COURT: I mean he -- he doesn't -- I mean he had an opportunity obviously to say I was concerned because we had had some prior difficulties and I had -- I was -- that is why I thought he might have a gun. But he -- none of that came out. So I decline to charge that, okay. Other -- anything else?

MR. SMALLDONE: I would ask for ABHAN.

THE COURT: I am going to charge -- I am going to charge ABHAN. And am going to charge -- probably charge A&B 1st. Because that is -- although I don't really think it is there. But the statute seems to think it is there as a lesser included to ABHAN. So I will charge that.

But I am not going to go below that because -- and that is only because it seems to say -- ABHAN obviously talks about serious injury. And there is no question we have a serious injury. I guess what brings in A&B 1st is if you do something that could cause a serious injury, as I read that.

Of course it primarily dealt with -- and we should clarify it. I think that was intended for the CSC conduct that generally is covered by the A&B 1st. But that catchall at the end gives me some concern not to charge it especially when they say it is a lesser included offense.

So I will charge that. But I am not going to go below that, okay.

MR. SIMPSON: No objection to those lesser included.

THE COURT: Thank you very much. I appreciate it.

All right. Do you we want to take a few minutes, or are y'all ready to go?

(WHEREUPON, break was had 4/12/18, 10:42 a.m.)
(WHEREUPON, resumed trial 4/12/18, 10:52 p.m., following the court hearing matters unrelated to this trial.)
THE COURT: You know, I have looked at this thing. And there is no distinction if you construe it the way I have in my -- in telling you what I was -- thought was a lesser included offense. I really don't think A & B first is.
Because it -- there is a component there -- it seems to me that -- it says if it injures a person and offers, which it means they tried to do that or had the ability, it didn't have to necessarily to carry through, if they threatened with a gun, that could be A&B 1st because -- and it injured the person, it bruised them or something else. But there has got to be a distinction between -- I mean there would be no reason to have two separate charges.
But I will -- if you want me to charge it, I will charge it. I just don't know you explain the distinction between that.
MR. SIMPSON: I was planning on arguing that, that if there is no -- you know, they can only find anything first if there is no injury. And obviously we have injury here so you can't find ---
THE COURT: But there is injury.

MR. SIMPSON: Correct.
THE COURT: I mean so there is no reason to charge that. There is no question there is injury. And it is serious. I mean -- I am not going to charge it. Do you want me to charge A&B 1st?
MR. SMALLDONE: I would ask that you charge A&B 1st because I think the injury is a matter for the jury to decide the degree of.
THE COURT: Well, but they define serious bodily injury. We know that. And clearly we have -- is there any question in this -- see, the problem I have with that is you charge something as a lesser included if there is some evidence to support it. What evidence is there to support that it was just an injury?
MR. SMALLDONE: Well, it obviously was an injury. The degree is I believe up to the jury.
THE COURT: I think that is where the judge has got to come in. I'm sorry. But I don't want to create a problem for the State on appeal. I just think that they need to frame that issue. That doesn't make any sense to me.
MR. SIMPSON: I agree, Your Honor. And I think, you know, ---
THE COURT: And why ---
MR. SIMPSON: --- to the degree that they do have

that determination on the ABHAN versus a little bit, you know ---

THE COURT: No question about it. Because it says serious injury.

MR. SIMPSON: Sure. And I think as I read A&B 1st, you know, taking away "A" because "A" doesn't apply here, you go to "B" and that is like had he missed.

THE COURT: Exactly. Precisely.

MR. SIMPSON: Had he missed and the guy not been hurt at all ---

THE COURT: Then ---

MR. SIMPSON: --- A&B 1st ---

THE COURT: --- and there is an injury in the sense of being scared, but it is just -- it is just -- to me it is, as I say, it is the offer to do something. And I agree with you.

MR. SIMPSON: Correct.

THE COURT: No, I am not going to charge it. Thank you. Because it will allow me to explain -- while this -- I need to look at this. The distinction typically was -- well, that is all right. I will put that in my charge. That is no problem.

I am going to charge -- I will charge ABHAN and attempted murder. Those are the two. Okay.

(WHEREUPON, court confers with law clerk.)

THE COURT: Thank you very much.

All right. The State is ready?

MR. SIMPSON: Yes, Your Honor.

MR. SMALLDONE: And, Your Honor, I believe as of about 30 seconds ago my client is now considering possibly testifying. So I don't know if we need to go over any ---

THE COURT: All right.

MR. SMALLDONE: --- further colloquy with him or ....

THE COURT: I do. Because we are not going to -- at some point we have to make that call.

Do you plan to testify?

THE JURY PANEL MEMBER: Yeah, I want to just tell y'all a little bit of, you know, what I can remember.

THE COURT: Mr. Porter, you are free to tell whatever -- of course whatever the Rules of Evidence permit, obviously, and answer questions from your lawyer. That is fine.

But understand something. So that we are clear on this, just as you have observed, there is a format for testimony. When you testify your lawyer will call you and you will testify. He will ask you questions and you will answer those questions. You will have a chance to answer fully those questions.

MR. PORTER: Yeah.
THE COURT: And when he is finished the solicitor will have a chance to ask you questions. Do you understand that?
MR. PORTER: Yes. But I only can go as far as my mind let me remember.
THE COURT: Sir, you can answer the question any way you want to. I can't tell you how to answer the question. I just want to tell you that you will be subject to cross-examination.
MR. PORTER: And I am just saying like, you know, a lot of things I remember and a lot of things I don't remember and so.
THE COURT: Listen, I practiced law for 21 years. You either know the answer or you don't know the answer. And that was clearly what I would tell the clients I represented, when you are testifying don't speculate. The law says you can't -- the rules of evidence say you can't speculate. But if you know the answer you have to give the answer.
And of course you take an oath, as everyone has said, to the truth. And that is what you will be doing.
So but if you don't know the answer you can't obviously answer it. And that's fine. But if you stand -- if you take the stand the State has the right to

cross-examine you. Do you understand that?
MR. PORTER: Yes.
THE COURT: Okay.
MR. PORTER: But my -- I am not going to testify then because my mind is not ---
THE COURT: No, sir ---
MR. PORTER: --- where it is supposed to be.
THE COURT: Well, this is something you have to decide. You have to tell me, look, I have given thought to it, I really don't think it is a good idea.
MR. PORTER: Yeah, I don't think it is good idea.
THE COURT: So you have chosen now not to testify?
MR. PORTER: Yes, because that is why I am really on medication to like help me out on ---
THE COURT: Sir, I appreciate all of that. You have just told me your medication helps you, it doesn't hurt you; so ---
MR. PORTER: Yeah, I mean just like -- like concentrate more and things like that it will ---
THE COURT: Do you understand what you are telling me now? Do you understand what you are telling me now?
MR. PORTER: No, because I am just saying the medicine just helps me like concentrate more and things like that. That is what I am saying.
THE COURT: I am asking you do you understand what

you are telling me now when you say, well, I think I want to testify; and then after you said -- I think I understood to say after thinking about it I don't think it is probably a good idea.

MR. PORTER: Yes, I am basically just backing out. Backing out of it.

THE COURT: That's fine. You don't have to testify. But you have the right to, okay? If you have second thoughts, again, you can tell your lawyer and I will tell the jury to go out and we will confirm it.

But -- but I will tell you what we are going to do. If he -- if he -- if he -- when we bring the jury in if he tells you I think I do want to testify, I will take that as your decision. Okay, Mr. Porter?

MR. PORTER: Yes.

THE COURT: And if your lawyer says we don't offer any witnesses, then you have decided to stay with not testifying; okay?

MR. PORTER: Yes.

THE COURT: Do you agree with that?

MR. PORTER: Yes.

THE COURT: But if you tell him you want to testify and he calls you, you have made your decision; okay?

MR. PORTER: Yes.

THE COURT: Okay. Thank you.

Let's bring in our jury.
(WHEREUPON, jury enters courtroom 4/12/18, 11:00 a.m.)
THE COURT: Thank you very much, ladies and gentlemen. We are ready to continue that matter.
And we reached the point where the State rested. And as you recall, I mentioned to you that again that Mr. Porter absolutely had nothing to prove or disprove. He didn't have to present any evidence for your consideration, but he would have the right to do so when the State has completed its case.
So Mr. Smalldone, we are at that point. Does Mr. Porter wish to present any additional testimony for the jury's consideration?
MR. SMALLDONE: The defense rests at this time, Your Honor.
THE COURT: Very well.
Thank you, ladies and gentlemen. That being said, that concludes the evidentiary portion. The motions that we have made have already been made and ruled upon.
We are now moving into the final two phases of this process. It now will be -- the lawyers have their second opportunity to speak to you. And unlike the opening statements you have now heard the evidence and the exhibits have been introduced. You have had a chance to review those as well.

But it is proper for them to discuss this evidence and suggest reasonable inferences that you may draw from that evidence. And I think you will find those remarks helpful when you do begin this process.

So please give them your attention. But please remember the remarks, while extremely helpful, should never be considered evidence by you in any fashion.

Following that I will give you instruction on the law and then you will very shortly decide this case. Thank you for your attention. Give your attention now to the State.

And you may open fully. And reply, sir. Thank you.

MR. SIMPSON: Thank you, Your Honor.

THE COURT: You may proceed.

CLOSING BY MR. SIMPSON:

Ladies and gentlemen, good morning. I will begin as I began opening statements by thanking you for your time. I realize, you know, it wasn't a long trial. But we agree with the defense in one thing, for such horrific and tragic results the actual events and facts were quite brief. And you now know that better than anyone. You have lived them. You have seen them and you have heard them.

So please don’t infer from the brevity of the trial that any sort of a lack of importance. It is a crucially

important case, and we appreciate your time and your deliberation. Thank you.

I have prepared further presentation first to start with you. Again, having lived these events yourself I am going to talk a little bit first about the law that applies.

You are going to hear a charge on the law from the judge. And obviously he is the authority on that. But I get an opportunity to explain a little bit about what I -- some things about the law and the charge you are going to hear that I think are important for you to come to a just and fair verdict in this case.

Derrick Porter sits before you today charged, as you have heard, with attempted murder and another charge of possession of a weapon during the commission of a violent crime.

Attempted murder is, like we talked about in openings, it is what you think it is. It is an intent to kill, a specific intent to kill another person that doesn't for whatever reason carry forward to the death of that person.

I will probably come back to this point. But one of the many questions I want you to ask yourselves in your jury room is why didn't this lead in the death of Fritzgerald Byas.

And I think you know now with 100 percent confidence he didn't survive because of any decision Derrick Porter made. He survived due to the heroic efforts of Dr. Spiotta and his team. And you heard about that this morning in some detail.

Sort of an element of murder and thus an element of attempted murder is this legal term you are going to hear about called malice. And we also hear that with another term together as malice aforethought.

So let's talk a little bit about what that means. It is one of those legal terms that there are hundreds of definitions under the law. You can get confused. But it is a pretty simple concept when you really boil it down.

The idea of malice is an idea of ill will, of intention, of doing something on purpose, an intending to harm somebody. And the harm that attempted murder requires is not just that generalized ill will but a specific intent. And that is an intent to kill as an attempted murder.

Aforethought - and I think this is an important concept for this case particularly. Pay attention to this part. The whole charge. But this is an important part of the charge.

And that is that this idea, this intent to kill another person, sometimes people get confused when they

hear aforethought and they confuse that with a lengthy premeditation like a plan that someone has for a day or an hour. And that is not the law. Aforethought just means that that intention, that intent to do harm, exists at the time the harm was done.

There is no -- you are going to hear the charge. It does not require that it exists for any certain amount of time, five minutes, an hour, a day, a plan; it is just that a person acts with purpose.

So that leads to the question that can be in some cases difficult. I submit to you it is not that difficult in the case at hand, you having heard all the evidence. And that is how do you determine what a person intends to do in their mind. You know, we can't magically look into a person's mind. How do we -- how can we tell what a person intends to do.

And that is what they do and how they do it. And you have a pretty interesting scenario here where you got to watch it and listen to it.

And I submit to you something that almost sounds silly saying it out lout it is so obvious, but when a person pulls a gun and puts it inches away from another human being's head and pulls the trigger it is not hard to determine what that person is intending to do. There is nothing accidental about those motions. There is

nothing unintended about the natural consequences of putting a bullet in another human being's skull.

That leads -- you heard about the prognosis from Dr. Spiotta. That leads to in most circumstances one result, and that result being death. So much so that they had to actually spend some time to consider whether even to operate on Mr. Byas that day.

The other charge you are going to consider is possession of a weapon during a violent crime. Attempted murder is a violent crime.

If you find the defendant guilty of attempted murder I think the evidence proves to you that he obviously possessed a weapon during that violent crime so you should find him also guilty of possessing a weapon during a violent crime.

You are going to have consideration of when we talk about intent of what is called a lesser included. That is an option in the jury room if you so choose to find Mr. Porter guilty not as charged of what the State certainly submits he is guilty of, attempted murder, but also assault and battery of a high and aggravated nature.

And that -- if you find -- and, again, I not being light about it when I say it. I just find this point to be obvious. If you find that putting a gun to another person's forehead and pulling the trigger is not intended

a death, if you find instead that it was just merely intending an injury, you could find him guilty of assault and battery of a high and aggravated nature, which is also a violent crime under our law and would also trigger possession of a weapon during a violent crime.

And so now having reviewed a little bit about what these crimes he is charged with mean and what my version convince you of he did, let's talk really about the heart of the case here, and that is that what he did was justified.

That is that when you go -- the argument the defense makes, that when you go into that jury room and you live this horrible event - again, and as you heard from the judge all of this evidence will be available for your review again should you need it - do you find the actions, as we sit and watch live, the actions of Derrick Porter that day, to be justified.

And in order to justify an event this horrific the law is going to put some requirements on that. You know, it is not just a gut feeling.

It is my burden of disproving self-defense. It is not his burden to prove it. I have to disprove it. But as we are going to review now, we have done that in this case.

And here is an important concept. There's going to

be several elements to self-defense. I have to disprove to you one of them and self-defense doesn't apply.

I had a friend give me a great analogy on this point. Think of a chair, right. If I can -- it is held up by several different legs. If I can knock over one leg that chair doesn't stand. And that is how self-defense works. I have to disprove just one element.

So what are these elements. First, the defendant must be, Derrick Porter on that day during those events you must watched, must be without fault in bringing on this difficulty. He must be blameless.

Second, he must have at the time that he shot Fritzgerald Byas in the head he must have been in imminent danger of death or serious bodily injury. Or if he just believed that he was in imminent danger of death that could apply, but that belief has to be reasonable. And who determines reasonableness? Twelve people that we select from the community.

Finally, you have to -- and, again, you have to find all of these. If you don't think one of these applies in this situation self-defense is off of the table.

You have to find that the defendant had no other probable way to avoid this danger than to carry himself in the manner that you got to watch him carry himself. No other way.

So let's break this down and let's start with the first element of self-defense. Derrick Porter without fault in bringing on the difficulty?

When Derrick Porter sees Fitzgerald Byas goes in -- go into that store and they pass on the video at the entrance way what does he do? Without fault? He waits armed with a firearm for nearly two minutes.

And as we talked about in opening, two minutes doesn't sound like a long time; but count it out live. I don't think I can sit here quietly for two minutes it would seem so long in this courtroom. He is on the phone. He is talking about it. He is waiting.

Without fault in bringing on the difficult? They have a brief conversation there in the breezeway. It looks like something is said. And what if Fritzgerald Byas doesn't like it? But what does Fritzgerald Byas do when in this confrontation?

Watch him. He doesn't have to think about it. He does what society asks him to do and walks away.

And what does Mr. Porter do? Pursues. Pursues him. Without fault in bringing on the difficult? Don't wait for him. Don't pursue him to the car with a gun in your pocket.

Byas tries to leave. Who stops him? Who brought on this difficulty? Fitzgerald Byas or Derrick Porter?

Without fault?

If you were sitting in the jury box right now and you are thinking in your mind having heard the evidence that Derrick Porter was at fault in bringing on this difficult or shared in the fault of bringing on this difficult the defense of self-defense is off the table.

Like I said, if that leg of the chair gets knocked over, we are done. We don't have to go any farther; self-defense legally does not apply.

But let's continue. Imminent danger. I want to talk about Fritzgerald Byas' hands. And I know I keep walking over here. Because I like to see what you guys see. And do not make a decision, especially on this point, if you are too far away to see. Whatever you need to do to review this evidence, don't hesitate to ask. Send out a note. If you want to rewatch stuff in here you can rewatch it in here. We are going to let you watch -- see all of the evidence.

But when you watch it, especially not in a still shot but live, you see Fritzgerald Byas' right hand for most of the conversation. But most importantly right before he is shot in the forehead, on the steering wheel of his car his right hand is on the steering wheel of his car.

From another angle, an even better look. His right

hand -- his body turned toward the defendant, his right hand on the steering wheel of the car. It is not going for anything. It is not messing with anything. It is not reaching under a seat. It is not reaching to a waistband or a pocket. It is sitting on the steering wheel of the car.

Where is his left hand? Holding his Mike's Hard Lemonade. From the body camera of Officer Norwood. Derrick Porter was not in imminent danger when he shot Fritzgerald Byas in the head.

Derrick Porter's alleged belief that he was in imminent danger was not reasonable when he had a clear-as-day view of both of the victim's hands. Not reaching. Not moving. One holding a beer and one on the steering wheel of the car. Watch the video if you have got any doubts about where his hands are.

If you conclude that the defendant was not in imminent danger at the time he shot Fritzgerald Byas in the head or if you conclude that even if you believe it and said that wasn't reasonable considering what Fritzgerald Byas was doing at the time, our analysis is again, ends here; it is over. We have now kicked over two legs of the chair. I don't have to. I just have to kick over one. But we have now taken care of both.

But let's go on. And this is the one that really

stands out. No other probable way to avoid this situation? Derrick Porter had no other way than to wait for two minutes? Leave. Leave. That is another way. That is a great way to avoid this. Don't wait for him for two minutes.

Second important time. When Fritzgerald leaves that conversation in the breezeway and goes to the car, leave. Just do as he did after the gunshot. Just walk away to your car and leave. That option was there. The entire exchange that option was open to Derrick Porter. He had a very simple probable way of avoiding this difficulty, and it was on the table this entire time.

And so if you sit here in this jury box today thinking to yourself, man, Derrick Porter really could have avoided this, again, your analysis is over; self-defense does not apply.

And so I submit to you that now we don't have to -- we kick over one leg and self-defense is off the table. We kicked over every leg of the chair. Self-defense does not apply to this case. No. No. No. No.

But while we are on this point and now that we know a little bit about self-defense as it legally applies I want to offer you up this. We know from the evidence that the gun was hidden. We know from the evidence that gun was wedged tightly in the waistband on the rear of

Fritzgerald Byas.

But let me offer this to you as just an alternative speculation. Who did have the right to self-defense that day? Who didn't bring on the difficulty? You know, who did have a reason being pursued to his own car that he might be in imminent danger? Who did have no other way to get away from that situation other than knocking someone over with their car door had he just slammed on the gas and backed up?

I submit to you that there is one person who had a legal right to self-defense that day. And it was Fritzgerald Byas, not Derrick Porter.

So now let's get down to the defendant's story and let's talk about that a little bit. Because you heard -- it was difficult to hear, but Detective Jellico I thought was helpful sort of expanding on what Fritzgerald Byas had to say weeks, weeks after the incident, when he turned himself in knowing he was wanted for a serious offense.

I don't say this to insult Mr. Porter. But I am a father of two young girls. And I want to submit to you this phenomenon that any parents know about, and that is the story that is a little too good.

I have seen it many, many times as a parent, the story that just you know they are trying to explain

something away, something that got broken or anything and their details are just a little too good and are so good to be a little bit fishy. Because I think that is sort of the phenomenon that we are dealing with here.

Let me explain to you what I am talking about. The defendant comes in and he says, oh, you know, I had to; he was going for a gun.

And then Detective Jellico, oh, what kind of gun did he have. Man, a good answer right there would have been, I don't know, it was just such a tense moment, I just saw it, you know, he was reaching for it.

But, no, he says, no, he had a nine millimeter. Well, okay, anybody that knows guns knows nine millimeters can be a recognizable shape of a gun, you know.

That is not all he says. What did he say? He said, oh, he had a Hi-Point nine millimeter. Now initially when I stressed that fact some people are like why are you stressing that fact; that sounds like pretty good.

No, it is too good of a story. Because what do we know now sitting where you are sitting? We know that the day after this incident the Post and Courier ran a news article about Derrick Porter with Derrick Porter's name in it.

Now the defense makes a good point, we never say

Derrick Porter reading the Post and Courier. But come on. Imagine your name appears in a major publication. You don't think somebody is going to call you and say, hey, man, you might want to go pick up the paper.

And this is -- you know, we are 2018. You don't think somebody texts you that link and says, hey, is this you; look at this.

And what did that article say, as you heard from Thomas Walters when he took the stand? That article said not that he had a gun -- well, of course that was the headline, the victim had gun. That article fed Mr. Porter a defense.

Because it didn't talk about video. He didn't know there was video. It fed him the defense. It said there was a -- it said the brand name. And when we say Hi-Point -- that came out during the testimony of Detective Jellico. When we say Hi-Point nine millimeter, that is a brand name. That is like you knowing what brand this suit is right now, only we are talking about an even smaller object.

He knew about the gun right down to the brand name, the manufacturer of the gun, because it was in the newspaper the next day.

Now am I just speculating there? No, I am not speculating. I am doing what you guys are sworn to do.

I am taking the type of evidence that you guys are told specifically to consider when you make your decisions in this case. And that is the evidence that you get to see and hear, on the screen, the hands, where his hands were. Not reaching for anything. On the steering wheel there. That is powerful stuff. That is you. That is your perception. And the evidence you here on -- heard from the stand. So let's talked about that real quick.

Pierra Martin, employee of the beauty shop, one of the first ones on the scene to the car., you heard from her. She doesn't know Derrick Porter. She doesn't know Fritzgerald Byas. She doesn't work for the police department. She is not a detective. She doesn't work for my office. She doesn't work for the defense office.

She is just an employee at a beauty shop. And she is one of the first people to get a look inside of that car. She does not see a gun. She said she is right there. She is looking at the body of the person. Yes, it is emotional. Yes, she is freaked out. You heard it on the 911 call. But the first person with no connection, nobody to hurt, nobody to help, that there is no gun in that car. Couldn't see it.

Officer Norwood and the other officers that you see on the video, they are patrol officers. They don't know what has happened. They respond. They are just trying

to clear -- clear a scene. You heard that. Secure a scene. You heard that phrase. What does secure a scene mean? It means make sure there is no gun.

Officer Norwood and the other officers in there, you heard about that. Their job is to look from a gun. And they do. They look through that whole passenger compartment from both the driver's side and the passenger's side and see no gun.

Now of course they don't see a gun. Because the one thing they don't do, because their main job is to preserve life, is they don't move that body. So they don't see the gun.

But they sit there. And you can count on the video. They are there I think for four minutes securing the scene, with one job, to find weapons. And they don't see a gun.

EMS tech Chief Palawasta he reinforces this point. He says they were actually on the scene but they were held back for about three minutes to give the police an opportunity to find the gun. Which they don't. And the police call him in.

And he testifies to you exactly where the gun is. And he stood up and showed you. Under clothing, wedged so far on the rear of the victim that a man of his size and experience could not even -- once taken out of the

clothing couldn't even get it out of the waistband. Had to take his other hand to pull it out. And it is chaotic. And it is crazy. But if you have any doubts about his testimony, it is on -- it is on the body cam that we saw. We heard when he finds that gun and alerts the whole rest of the team. Gun. Gun.

A gun that we know now when we do what you have to do, weigh the evidence that does apply, the videos and the credible evidence, unbiased evidence we have heard from the stand, when we do that we can -- you can conclude beyond a reasonable doubt that that gun did not play -- the gun on Fritzgerald Byas did not play a role in these actions.

And I submit to you that much of the defendant's statement he gave to the police he got from the Post and Courier. But nevertheless in a long conversation there are always some nuggets of truth that seep through.

And so what do we hear? We hear bits of what I submit to you is the real story, which is that Derrick Porter saw Fritzgerald Byas and immediately made the connection that is the guy that has got a connection to one of my people getting hurt.

And we hear a couple of different iterations of it. But the first one out of his mouth is, back in 2011 - I mean how silly is this - back in 2011 something bad

happened to his cousin and he sees a guy that he thinks - and this is his words, not mine - may or may not be responsible, but something happened to his people then something is going to happen back to their people. And it is that cycle of violence that is often so tragic.

And so he waits. I want to take -- I wrote -- I jotted down a couple of comments from the defense during their opening. I would image you will hear something similar to this in the closing, things like Derrick Porter tried to be responsible; he did what he had to do; he did the only thing he could have done that day, Derrick Porter did.

And so that is the distinction that you have to solve -- that you are asked to solve. Was Derrick Porter that day a man who wanted to confront another person, potentially settle a score; or was Derrick Porter, as the defense have you believe, a man of afraid, a man scared of Fritzgerald Byas who was acting out of fear for his own life? That is the distinction.

So walk through it. It is on video. And ask that question every step of the way. Does that look like a good man who is afraid of Fritzgerald Byas? When he waits for nearly two minutes for Fritzgerald Byas to leave a store is that a man who is afraid of Fritzgerald Byas or a man who wants to confront Fitzgerald Byas?

You bring your common sense to this. That is why we picked 12 people from the community, common sense.

Does a man who waits outside of the store instead of leave want a confrontation, or is he afraid?

When Fritzgerald leaves the conversation in the breezeway and tries to leave, is the Derrick Porter who walks up to the car and stands in the driver's -- in the open driver's side door a man who is afraid of Fritzgerald Byas or a man who wants to continue this confrontation with Fritzgerald Byas?

When the victim sits there, one hand with a beer can, the other on -- turned towards in the other on the steering wheel, is Derrick Porter reasonably afraid of Fritzgerald Byas, or is he a man who wants to confront Fritzgerald Byas?

When you try to resolve that dichotomy it is easy and it is common sense. At every single step of this brief intersection between these two men Derrick Porter is a man who wants the confrontation to initiate, wants the confrontation to continue, and brings this conversation by his own act and his own acts alone to its tragic and horrific end.

We are here today under the proper and legal charge of attempted murder. But as I told you in the opening, when you define a murder as the intentional taking of a

human life tragically and sadly for Fritzgerald Byas and his family that is what we are talking about.

Because as you heard from Dr. Spiotta today, the Fritzgerald Byas that existed on April 16th, the whole person, is not with us today. And why is he not with us? Because of the unjustified, inexcusable actions of Derrick Porter who was seeking to settle a score from years before.

I ask you again to consider the evidence. If you need to review something, look at it a little closer, let us know. That can happen.

Take your role seriously. It is a serious job. But after you sit, we are not here to harm somebody or to reward or hurt anyone. It is very human to feel a little bit of empathy for where Derrick Porter sits today. I want you to feel that. That means you are a person.

But when you look at the evidence there is one conclusion, and that is that the defendant is guilty as charged. And I ask you to do what you promised to do and find him guilty.

Thank you.

THE COURT: Thank you, Mr. Simpson.

Mr. Smalldone.

MR. SMALLDONE: Thank you. May it please the court.

THE COURT: Yes, sir.

CLOSING BY MR. SMALLDONE:

Ladies and gentlemen of the jury, good morning.

At the beginning of this case we talked about hindsight. We talked about how much we can talk about what happens in a split second. We have all had the benefit to sit here for about two days. Some of us consider it a benefit; some of us don't.

We have sat here for about two days now, a day-and-a-half, talking about what happened in a split second. We all get that benefit.

Derrick didn't get that benefit. April 16th of 2016 Derrick had a split second to make up his mind. He had a spolit second to make a choice. Derrick saw a gun.

The State would have you believe that Derrick is an avid reader who reads the Post and Courier who got his story from a newspaper article and that is how he found out about it, right? That is what they want you to think.

Does that make sense? Here is why it doesn't make sense. Here is why it doesn't make sense. When Derrick turned himself in -- you have heard -- the audio wasn't good. You have heard a little bit of the audio. And you have heard mainly of Jellico talking.

Derrick didn't have an opportunity to review the surveillance tape, right? Either one. He didn't know --

he didn't review those things. He just knows that he needed to turn himself in.

What does Derrick say, and what do they talk about? He was going for a gun, right? Fritzgerald was going for a gun. Is that the perfect story that the State wants you to consider? He doesn't know anything about the surveillance, right? He doesn't give the perfect story. He doesn't say that he had the gun, waived it around. He doesn't say that he was shot at.

If I thought of the perfect story, I am getting shot at; I am getting a gun waived in my face. He has no way to know that they know that.

That's what happened. What happened was what he said happened. What happened was that he saw Fritzgerald at the store.

Let's back up to that day. He saw Fritzgerald at the store. They had prior difficulties. No question about that. They had a beef, as they call it. As Jellico called it. They had a beef. They had problems. He thought that Fritzgerald -- and, again, whether or not it happened, that is not what we are here for. He thought that Fritzgerald was involved in the death of a loved one.

What is the first thing they do? What is the first thing they do on the video? Watch it. They go up to

each other. They kind of shake hands, right? Man-to-man.

And we can't hear what they said. But you could see their body language. They shake hands. Right away. And they talk a little bit. I think briefly.

You can't see what happened in the store. But you see that they were in the store at the same time. You heard testimony they kind of acknowledge each other again.

So much has been made that Derrick waited outside. They had a lot to talk about. They had a lot to discuss, right? Is that a crime? Is that a crime to talk about something with somebody?

Derrick wasn't aggressing when he was waiting, before he was waiting; even at the car, I submit to you, until he needed to be.

Derrick didn't try to punch him. They didn't push each other. He was waiting to talk. They had a lot to talk about. And tensions were high. They had some dealings that they tried to work out.

And Derrick waits. It is not a crime. He is waiting to talk to him. And what does he do when he gets back? He talks to him. He talks to him. He talks to him for about a little -- I believe a little over two minutes.

He is talking. You don't see Fritzgerald trying to close the door to the car. You don't see anything. They are just talking. The door is open. Gerald is sitting down waving his arms around. You can't see one of the arms. You can see the other. They are just talking.

Split second, the gunshot. There is no aggressive action. You hear some audio. There are some words. They are probably, you know, arguing; yeah.

There is no aggressive action by Derrick. There is nothing. There is no looking around.

Remember, if you watch the video, if you watch -- if you paid close attention to the video I think on both angles - and Jellico even mentioned it - remember when Jellico, the detective, said did you see the Mexican. And they kind of laughed about it. It was right in front of a guy exiting the store.

This was a split-second decision. This was not planned. This was not premeditated. This wasn't what he wanted. That is when he went for his gun. And that is when Derrick had to go for his.

So this notion that Derrick is not without fault in bringing on the difficulty I submit to you that the difficulty is the shooting, the self-defense, the going for the gun, that is when the real conflict started.

The difficulty isn't two guys talking trying to

resolve their differences from years ago. That's not the difficulty that the State wants you to think. That is just people talking.

The difficulty is when the violence started. And the violence started when Derrick had reason to believe this guy was going for a gun.

And what happens? They find him a gun.

Does Derrick say that the gun was in the car? No. All the witnesses say no. So what it has been made that they couldn't see the gun, yeah, it wasn't in the car; exactly like Derrick said.

Does he say that he had the gun out? That would be easy to disprove. You wouldn't have much to deliberate if he said the other gun was out, because it clearly wasn't.

But Derrick doesn't say that. There is no mention about the Post and Courier article saying that it wasn't out. Derrick told his story which was the truth. He had no other way to get it other than seeing that gun that day.

He knew the brand of the gun. Guns look different. I submit to you that you can use your common sense and say guns look different. Maybe you know that. And maybe you don't.

He knew the brand of the gun. And even the State

concedes most -- a lot of guns out there are nine millimeters, they have a distinct look. He knew that. That is all he knew. And that is exactly what he said. He said the truth.

And we are here. We have been here for two days analyzing what happened in that two-minute span. Just in a matter of two minutes, two days, in two minutes.

Derrick was there. And he told the detective what happened. And what happened was -- what happens? Exactly what he said, and not disproved.

You cannot see the other hand. Watch the video. You can see one hand. I submit to you and I agree that hand is on the steering wheel. And I believe the State will make a lot of the other hand ended up at some point holding on a Mike's Hard Lemonade can.

Ask yourself do you see him drinking the Mike's Hard Lemonade. Do you see the Mike's Hard Lemonade in his hand at all during the video? I submit to you that you won't.

Because Derrick thought that he had a gun. You know what? He did. Derrick did what he had to do. I said in the opening - a lot has been made that I said it- he did what he had to do.

Derrick wouldn't have walked away as he did. Sad. I am not happy to be here. No one in this courtroom is

happy to be here. It is a bad situation. But we are here. We are here because Fritzgerald had a gun and Derrick did too.

So, ladies and gentlemen of the jury, in a few minutes the judge will charge you the law. He will charge you with what the law means, what attempted murder means, what assault and battery of a high and aggravated nature means.

But he will charge you on self-defense. He will charge you the State has the burden to disprove one element of self-defense, any element they want. One element.

Derrick was without fault in bringing on the difficulty. Derrick was in imminent danger. Derrick, you heard, told Detective Jellico they say he was going to kill him. And you can't hear the audio on that tape, but Derrick did.

Again, so much in two days we try to analyze what happened in thirty seconds. Derrick was threatened by a guy with a gun. And Derrick had a gun too.

Can't outrun a bullet. Derrick couldn't run away to avoid it. Derrick couldn't do anything. He didn't know that he was confronting this guy with a gun, I submit to you. It just happened in a matter of a split second. No planning. No nothing. A reaction to save his life. And

he very well may have.

So, ladies and gentlemen, when he charges -- when Judge Dennis charges you on the law in a few minutes you will heard self-defense. And you will hear that if they haven't disproved self-defense Derrick is not guilty.

That is because he is not. Derrick is not guilty of this crime, because they haven't disproved self-defense.

And the reason they haven't disproved it is because it is self-defense. It is self-defense. He did that because he had no other thing you could do in that situation.

Yeah, there was an argument. Yeah, there was a conflict. Yeah, they probably don't like each other that much. That is fine. That is life. That is human nature.

Going for a gun isn't. And that is what Derrick reacted to. They talked for two or three minutes. Derrick didn't shoot him right away. Derrick didn't shoot him when he is away -- walking away from him. Derrick didn't shoot him right when he saw him. Derrick shot him in -- very clearly in response to something.

So what was it? It was exactly what Derrick told the detective. Which matches up exactly with what the evidence is. And the reason the Post and Courier wrote an article on it is because that is exactly what

happened.

You can't hold that against Derrick that the Post and Courier wrote an article about what happened, because that is literally what happened.

Does that make sense? You can't hold it against Derrick that the Post and Courier writes the news and then say, oh, he must have know. Even though there is no evidence that he heard about it or didn't. I submit to you that even if he did they are just publishing what happened or what they found. It doesn't really going to change anything. Sure, he knew about it he knew about it because he was there.

If he heard about the article he probably said, yeah, I know, I was there, I know he had a gun, I saw it.

Like I said, it is very clearly a reaction in response to something. Talking for two minutes and then out of the blue a shot doesn't make sense. Doesn't make sense.

A tense situation with a guy you don't like, a guy you think is going for his gun, makes a little bit of sense. What would make it make more sense? How about finding a gun on him. That makes perfect sense. His story is exactly lined up with the facts a hundred percent. A hundred percent.

You can see one hand. One hand you don't see. It

ended up on a can. And Derrick told the detective exactly what happened.

So, ladies and gentlemen, when you go back there and you deliberate and discuss the facts of this case and you discuss the law in this case and how it applies to the facts, I submit to you that when you consider self-defense and when you consider the versions of a story, all true, when you consider that, you have to deliver the only verdict that makes any sense in this case. And that is not guilty of attempted murder. That is not guilty of possession of a weapon during a violent crime. And that is not guilty of the lesser included offense which is assault and battery of a high and aggravated nature.

Because self-defense is a complete defense. It means if he meets it he is not guilty. He is not guilty.

Ladies and gentlemen, because of that that is why I am asking you to return the only verdict that makes any sense. And that is a verdict that lines up with what happens. That is a verdict that lines up with what Derrick said, which is what happens. And that verdict is not guilty.

Derrick Porter is not guilty of any of these offenses. This wasn't planned. He is not happy to be here. But he did the only thing that he could do in that split second.

Thank you.

THE COURT: Thank you, Mr. Smalldone.

MR. SIMPSON: Thank you, Your Honor.

THE COURT: Solicitor.

CLOSING REBUTTAL BY MR. SIMPSON:

Ladies and gentlemen, the law allows me a brief opportunity to do what is called rebuttal which is to address some things that Mr. Smalldone brought up in his closing argument.

I know as lawyers we tend to talk too much. I am going to try to be very -- very brief. I ask you only when you hear and consider -- and please do consider it, but the position that Mr. Smalldone presents to you.

I ask you only to do what you have promised to do which is to calmy and deliberatively review the evidence that we have put into evidence and presented to you in the last couple of days and ask yourselves the difficult but I think obvious questions, and that is to which side of the story comports with what you have seen and with what you have heard.

Ask yourselves if what you see on that video, as Mr. Smalldone says, no aggressive action on the part of Derrick Porter.

Ask yourselves if you believe living and seeing and hearing what happened that day if you believe Derrick

Porter had no other way to avoid this situation.

Ask yourselves if you see, to quote Mr. Smalldone, to a person who is just trying to resolve some issues with another person ask yourself if you think the way he went about resolving those issues was reasonable.

Ask yourself when you see -- and I mean watch it. Watch it more than once. It is not easy. But watch it. When you see him pull that gun and shoot and then walk away calm and cold from that scene if you think that looks to you to be a person harming someone or a person acting in response to something. Ask that question. Mr. Smalldone posed it. Ask it.

And I submit to you that when you do what you have promised to do and without emotion review this evidence, the answer to those questions -- to that -- to those questions will be clear that Derrick Porter was acting with purpose that day.

Mr. Smalldone raised a couple of points in his closing that this didn't appear to be a very well thought out plan. As I explained to you in my closing, that is not what the law requires for malice aforethought.

Malice is only -- and you will hear this from the judge. And he is the authority on this. But that malice only has to exist for an instant. So the lack of a plan does not absolve Mr. Porter in this case.

And then finally as it comes to this gun and to this hand I ask you to consider this question: Mr. Smalldone I believe the phrase he uses, okay, so his other hand ended up on a can. And he says Mr. Porter saw that gun, that is how he knew about that gun.

So I want to bring up just a few medical terms real quick that I want you to consider in the jury room. First from EMT Chief Palawasta whose one of his jobs was to rate the condition of Frtzgerald Byas when he arrived there with a spectrum of 13. Two being the worst. Two being the worst condition a person can be in.

David Palawasta when he sees Fritzgerald Byas has no hesitation in saying he was -- he was -- or maybe it was a three. That he was the worst. Why they would start a range like that at three, I have no idea.

But he was very clear to you all the condition of Mr. Byas when he got there on the scene was the worst of a wide scale. Unresponsive.

And what the defense wants you to believe is that in that sort of condition with chunks of metal as we have seen in his brain and that kind of damage that that left hand ended up on a can as we have seen in the photographs. It was on the can because that is where it was when he was shot in the head.

Secondly, he wants you to think that a person who,

going to another scale by a trained expert neurosurgeon, gave him a 1A. Let's consider another scale. A 1A, the worst condition you can have. That a person in the worst possible living condition that can be somehow recovered that gun and re-concealed that gun so well in that condition that officers who have one job, to look for a weapon, couldn't see it. That Pierra Martin first on the scene didn't see it. And that it wasn't until the body was lifted and moved was the gun found lodged into the belt so hard that it took two hands to remove.

In conclusion, I ask you only to do what you promised everyone here that you would do this week. Consider the evidence. Consider what you see and hear on that video, what you see and heard from that -- from this witness stand, and ask yourself which version of the events comports with that evidence.

And when you do that -- it is never an easy thing to do, to judge another human being. But when you do that, the just, true, and correct answer is that Mr. Porter is guilty as charged.

Thank you for your time this week.

THE COURT: Thank you, Solicitor.

JURY CHARGE:

THE COURT: All right. Ladies and gentlemen, if I could have your attention. Now it becomes my

responsibility as the trial judge to give you the law which you of course have promised to accept and apply fairly and impartially to the facts that you will determine very shortly when you being your deliberations.

And both the State and Mr. Porter expect that you will when instructed conscientiously evaluate the evidence, decide what you believe to be the true facts, and then once you decide those facts take this law and apply it fairly to those facts.

And when you have done that you will honor the commitment that you made when we started and both the State and Mr. Porter will have received and obtained a fair and impartial determination for which they are entitled under our law.

During this instruction I may from time to time use the term defendant. And that term is simply a term of art that we use to designate a party. It is just another way of referring to Mr. Porter.

It means nothing other than a means of identification. You are not to infer anything from that. It simply means the person against whom a claim is made. And that is obviously the situation here.

Because the claims have been made, as I told you when we started, by these documents that will not accompany you to your jury room. They are called

indictments. And they set forth basically very briefly the alleged charges that he is facing. One is attempted murder. And the other possession of a weapon during the commission on a violent crime.

To these indictments Mr. Porter has rendered a plea of not guilty which places upon the State the burden of proving his guilt beyond a reasonable doubt.

And that is not only true in this state but every state in the United States that persons who are accused of committing criminal offenses are never required to prove or disprove anything.

The law says in this state and every state persons so accused are to be presumed innocent. And that is not -- those aren't just words.

That is an active presumption that each of you has to maintain at all times and have maintained throughout. And I would instruct you have to continue to be maintained until you have evaluated the evidence. And at that point, the point that you have determined that the State has met its burden of proof and established each element of one or more of the crimes, and only then may you remove that presumption of innocence.

The State obviously has the sole burden, as I have told you. And because of that obviously the law further states that persons who are accused of criminal offenses

such as Mr. Porter are not required to present any evidence. They are not required to present anything. They are not required to testify.

And I would instruct you that the exercise -- when a person exercises his or her right to not testify in a criminal case a jury is not allowed to consider that in any state.

And so I would instruct you the fact that Mr. Porter did not testify in this case cannot be considered by you at all. It can't even be discussed. If you discuss it in the jury room you will have violated the oath that you have taken. And you won't do that, I am confident.

No, because the sole -- the only party having the burden of proof is the State of South Carolina. And they must establish each of the elements beyond a reasonable doubt.

What is a reasonable doubt? As I told you, a reasonable doubt is a doubt that would make an honest, sincere, conscientious jury who is searching for the truth in a case to hesitate to act or take some action. Prove beyond a reasonable doubt is proof that leaves you firmly convinced of Mr. Porter's guilt.

Now I will tell you that there are very few things in this life and this world that we know with absolute certainty. And our law does not require the State to

prove everything beyond every -- or to overcome every possible doubt.

If based on your consideration of the evidence you are firmly convinced that the defendant is guilty of one or more of these charges then you must return a verdict of guilty.

If on the other hand you think -- you believe there is a real possibility that he is not guilty then you must give him the benefit of that doubt and return a verdict of not guilty.

I would instruct you that reasonable doubt may arise from the absence -- or from the evidence or the absence of evidence or the lack of evidence in a case, and it is up to you to determine whether or not a reasonable doubt exists after considering all of the evidence in this case.

And I charge you that he is entitled to every reasonable doubt arising in the whole case. And what I mean by that is simply this. If upon any issue of fact which would be essential for your returning a verdict of guilty you should have a reasonable doubt as to how that should be resolved I would instruct you that you must resolve it in Mr. Porter's favor.

And when you consider the evidence there are two types of evidence that used in presenting cases.

Sometimes one or other -- one or the other or most of the time both. And they are called direct and indirect evidence. Indirect is more popular. The name is circumstantial evidence.

Direct evidence as the name would imply generally deals with a sensory perception. I saw something. I felt something. I heard something or the like.

And if you are firmly convinced as to that particular fact or circumstances to which a person has testified then it would establish that.

Circumstantial evidence is when a person testifies to a number of facts and you are firmly convinced as to each of those facts. And when you link them either through inductive or deductive reasoning they lead you to a very logical conclusion which -- of which you are firmly convinced then it would establish that particular fact through the use of circumstantial evidence.

And I can tell you that the law makes absolutely no distinction between the weight or the value to be given to either direct or circumstantial evidence, nor is any greater degree of certainty required of circumstantial evidence then direct evidence.

The law says simply this: The party may rely on any of -- either circumstantial or direct but if they are relying on circumstantial evidence to prove a particular

fact or circumstance it has to meet a certain test.

First, the State as to each one of those events or circumstances upon which they are relying has to prove that beyond a reasonable doubt. That means you have to be firmly convinced of that particular fact or circumstance.

Furthermore, the facts must point conclusively to the guilt of Mr. Porter and must be wholly perfectly consistent with each other in every particular respect.

I further instruct you in that regard that the mere fact that circumstances pointed out in a case are strongly suspicious of guilt or that circumstances are such that the defendant's guilt is probable that that would not be enough to sustain a conviction.

Why? Because, as I told you throughout, your conclusion must be that the State has satisfied you beyond a reasonable doubt.

Now the evidence which you are to consider, as we have stated throughout, consists of the testimony of the witnesses and exhibits that were offered and introduced through their testimony. And it is only that that you will analyze.

During this trial you have heard the attorneys speak to you, very properly and very professionally with regard to as officers of this court. And you certainly are

expected to listen to what they have said. And I am sure you will find their remarks helpful as well.

But if they should -- if they have commented or said something that a witness said or didn't say and that differs from your independent recollection of what the witness said, then you are instructed to disregard their remark in its authority.

Why? Because you are the sole judge of the facts in this case and it is your job to determine that.

Also, please, if they have said something that differs from the law as I have given it to you then you are instructed to disregard their remark in that regard because my -- for the purposes of this proceeding today I am the sole judge of the law and you have to take the law as I give it to you.

But I would hasten to add that the fact that I am giving you an instruction or the fact that I may have ruled on a matter during the trial, that likewise should not be considered by you as a suggestion of how you are to resolve a factual issue because that is your sole job.

There is probably the best example and illustration of how we work together, you have heard from time to time there were objections made and sometimes I sustained the objection. Sometimes I overruled the object. If I sustained it then obviously you didn't hear the answer to

the question and you are not to consider that in any fashion because, again, that was for my determination.

But if I overruled it I would urge you you are not -- while I allowed it and it is proper under our rules of evidence it doesn't mean that you have to accept it.

Quite frankly, that is how we work together. I said as a matter of law I would permit the question and answer. Now it shifts to you. You decide whether you believe it or not and if so how strongly you believe it. And that is how we work to resolve this case working together.

Now how do you decide the facts of a case? As I said when we started, you are imminently qualified to do this. Because we have been doing it -- we do it every day of our life. We decide what we believe to be credible and believable. And you will do the same thing when you analyze this evidence in this case.

And there are a number of factors that we may consider from time to time to assist us in making those determinations. I am going to discuss some of them with you now. But if I don't mention a method or factor that you have used in your life and you have found it to be reliable, please use it when you begin your deliberations.

But some of the factors that you may want to consider would be: The appearance of the witness. How did they appear to you, straightforward or hesitant in answering questions. Was the testimony of the witness consistent or inconsistent. Was it strengthened or weakened by other evidence in the case. How did that particular witness know the facts or circumstances that he or she testified too and what was the ability of that witness to know those particular facts or circumstance. Is there a reason for a witness to give testimony which may be detrimental to one side or may be beneficial to one side; in other words, a witness biased or prejudiced in any fashion.

In making the determinations of credibility and believability of witnesses you are given very broad discretions. You have the right to believe many witnesses against one, one witness against many. You have a right to believe all of a witness’s testimony, part of a witness’s testimony, or none of a witness's testimony.

Now you don't make those decisions arbitrarily. But if there is a reason in the record, that is the evidence of this case, for taking that position, you have that prerogative because your objective after taking the oath has been to determine the truth of the evidence or truth

of this case based on your assessment of the facts. And it does not matter the source of evidence. You have to determine what you believe to be the true facts of this dispute.

Now while you are given very broad discretion and wide latitude in determining the facts, you do not enjoy the same when it comes to the law.

And that is important, because, again, that is that separation that we have to observe. I have nothing to do with suggesting how you are to resolve the facts; and you must take the law as I give it to you.

And I respect as we talked about when we were qualifying you earlier when we started this case, we live in a country where we can have laws change. And that is a wonderful part of what we as citizens can do. And you have every right to do that in a proper fashion.

But what you have promised both the State, Mr. Porter, and this court is that you will accept the law as I give it to you and set aside any feelings you have about that law or feelings you had on what you thought the law was or should be and take the law as I give it to you.

Because if you don't then of course you have now, again, stepped into my area of responsibility. And that is, again, we have to keep that -- the two of us working

in conjunction. Our responsibilities do not overlap.

The fact that I give you an instruction on a certain issue is not to be, again, considered by you as a factual -- factual suggestion or determination of a fact. That is your job.

The order of my instruction means nothing. I had to put it in some order and ask you to consider the charge as a whole when you apply it.

Let's look now at the charges the State has made against Mr. Porter. The first one is attempted murder. And that is one of those charges -- and these are -- there re are several in our law. The attempted murder has also included what we call a lesser included offense of assault and battery of a high and aggravated nature.

And I am going to define both of those for you and explain the differences between him. But they accuse him of the crime of attempted murder.

In order to obtain a verdict of guilty for attempted murder the State must prove beyond a reasonable doubt that Mr. Porter attempted to kill another person with malice aforethought, either expressed or implied.

Malice, ladies and gentlemen, is hatred, ill will or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with the intent to inflict an injury or under

circumstances that the law would infer an evil intent.

Malice indicates a formed purpose and a design to do a wrongful act under circumstances that exclude any legal right to do it.

Further, there must be malice aforethought; which means that the malice must have been conceived in the mind of the defendant prior to the act producing the injury or serious result.

The words aforethought are usually understood to refer to the time when the evil is conceived. The law does not require however that malice must exist for any appreciable length of time before the commission of the act. It may be conceived at the very moment the action is taken which results in an injury to another.

Malice aforethought may be expressed or inferred. Now these terms express and inferred do not mean different kinds of malice but merely the manner in which the malice may be shown to exist. That is either by direct evidence or by inference from facts and circumstances which may be established and proved.

Express malice is shown when a person speaks words which express hatred or ill will for another or when a person prepares beforehand to do the act which was later accomplished.

Malice may be inferred from conduct showing a total

disregard for a human's life. If facts are proved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction this inference may be -- would be simply an evidentiary fact to be taken into consideration by you along with other evidence in the case and you may give it such weight as you find it should receive. You as jurors are free to accept or reject the permissive inference depending on your view of the facts.

The State must also prove a specific intent to kill. Now, intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent.

Evidence of the character of the act, the character of the instrument used, the manner which it is used, the purpose to be accomplished, and the resulting wound or injuries may be considered in determining the intent with which an act was committed.

Intent also may be inferred when it is demonstrated that the defendant voluntarily and willfully commits an act that naturally the tendency of which would be to destroy another's life.

Now, if you find the State has not met its burden of proof and establish any of the elements that I just outlined for you for attempted murder, you made then

consider whether or not the State has met the burden of proof as to the lesser included offense known as assault and battery of a high and aggravated nature.

And in that, the State has to prove the defendant unlawfully injured another person and prove that there was great bodily injury to the person resulting from the actions, and the action was accomplished -- or the act was accomplished by means likely to produce death or great bodily injury.

If they prove all of those elements -- and, again, you would consider this only if you have determined the State has failed to meet the burden of proof as to the attempted murder charge. But, again, the State would have to prove each of those elements beyond a reasonable doubt.

Great bodily injury means bodily injury which causes a substantial risk of death or which causes serious permanent disfigurement or protracted loss of impairment of function of a bodily member or organ.

The State has also made the charge -- charged Mr. Porter with the possession of a weapon during the commission of a violent crime.

The State must prove in order to obtain a verdict in that particular situation prove that the defendant was in the possession of a firearm or visibly displayed what

appeared to be a firearm during the commission of a violent crime.

A firearm means any revolver, pistol, or any weapon which is designed to or may be readily converted to expel a projectile.

In order to find the defendant guilty of the possession of a weapon during the commission of a violent crime you must also find that the defendant was guilty of committing a violent crime. And in that regard I would instruct you that attempted murder and assault and battery of a high and aggravated nature are both violent crimes.

Now as you understand, with attempted murder there has to be a specific intent to kill. But as to the assault and battery with -- of a high and aggravated nature and the possession of a violent crime the State still must prove criminal intent which is also a necessary element. And they have to prove that beyond a reasonable doubt.

As I have discussed previously, you determine intent from considering the circumstances which -- that have been shown to exist. And they may be -- it may be those consequences which represent the very purpose for which an act is done or known to be substantially certain to result regardless of one's desire.

Criminal intent is a mental state of a conscious wrong doing. And it is up to you to determine whether or not the defendant -- whether or not the State has established that this defendant had a criminal intent at the time he committed either of those offenses. Assume of course that you are dealing with and considering the assault and battery with intent to kill and the possession of a firearm by a person who in the commission of a violent crime.

The defendant in this case, ladies and gentlemen, has raised the defense of self-defense. And I would instruct you that self-defense is a complete defense and if it is established you must find the defendant not guilty.

The State has the burden of disproving self-defense beyond a reasonable doubt. If you have a reasonable doubt of the defendant's guilt after considering all of evidence, including the evidence of self-defense, then you must return a verdict of not guilty.

On the other hand, if you have no reasonable doubt of the defendant's guilt after considering all of the evidence, including the evidence of self-defense, you must return a verdict of guilty.

Now these are the elements required to establish self-defense:

First, the defendant must be without fault in bringing on the difficulty. If the defendant's conduct was the type which was reasonably calculated to and did provoke a deadly assault the defendant would be at fault in bringing on the difficulty. It would not be entitled to an acquittal based on self-defense.

Also, the second element, the -- of self-defense is that the defendant was actually in imminent danger or death or serious bodily injury or the defendant actually believed he was in imminent danger of death or serious injury.

If the defendant was actually in imminent danger it must be shown that the circumstances which have warrant -- would have warranted a person of reasonable and ordinary firmness and courage to take the actions taken by the defendant in this case to prevent the death or serious bodily injury.

In deciding whether the defendant actually was or believed he to be was in imminent danger or death or serious bodily injury you should consider all of the facts and circumstances surrounding the crime including the physical condition and characteristics of the defendant and the victim.

The defendant does not have to show that he was actually in danger. It is enough if the defendant

believed he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief.

The defendant has the right to act on appearances even though the defendant's belief may be -- may have been mistaken. It is for you to decide whether or not the defendant's fear of imminent danger or death or serious bodily injury was reasonable and would have been felt by an ordinary person in the same situation.

Another element is there -- no other way to avoid the danger. The defendant -- and that means simple this. The defendant had no other probable way to avoid the danger or death or serious bodily injury than to act as he did in this particular instance.

And I would instruct you, ladies and gentlemen, if you find the State has not -- has disproved -- has not disproved one or more of those elements then you must return a verdict of not guilty because the State would have failed to meet its burden of proof of disproving it.

However, if the State has disproved any one of those elements then you -- then you must not consider self-defense. You would then consider whether or not the State has met the burden of proof as to the charge or charges which you have considered.

Throughout this matter, ladies and gentlemen, you

have been selected to be a judge with me. And we as judges do not have any friends to reward nor do we have any enemies to punish.

We aren't partisans or advocates for either side. We are expected to be fair and impartial in performing a task of being a judge.

And in order to do that we have to acknowledge our humanity. Because we all have feeling. We all have concern for each other in varying degrees.

But one thing about it, there is no place in this proceeding for any sympathy. There is no place for any anger. There is no place for any aspect of it.

You have to set aside all human emotion and perform this task that you have accepted methodically, deliberately, and very cautiously and carefully.

Analyze the evidence which you find which you will consider very shortly. Decide what you believe to be the true facts. And once decided take the law as I have given it to you. Apply it fairly and impartially to those facts and report that decision, whatever it may be.

And when you have done that you will have fulfilled and honored in every respect the oath that you have taken.

To assist you, Mr. Presiding Juror, in reporting the verdict I have prepared two verdict forms which I will be

sending back with you.

You will note that they both are captioned. That -- don't -- that doesn't mean anything. That is just to facilitate the filing of the document.

And they are similar in some respects. One of them has three options. The other has two. The first one that I will discuss with you is the one for attempted murder.

And the order in which they are placed means absolutely nothing. I had to put them in some order.

The first says guilty. The second, guilty of the lesser included offense of assault and battery of a high and aggravated nature. And third, not guilty.

What will you be saying -- well, first before we get to that, it says we the jury by unanimous consent. And that is the thing on the other one.

What is unanimous consent? It means all 12 of you. All of you have to agree. Because if one doesn't, then it is not unanimous consent.

Find the defendant, Derrick Lamar Porter, on the charge of attempted murder. The first choice, guilty. What will you be saying? You will have said that you had analyzed the evidence, you have considered the elements of attempted murder which I have given to you and you find the State has met its burden of proof as to each of

those elements and therefore as instructed you are returning a verdict of guilty.

Guilty of the lesser included offense of assault and battery of a high and aggravated nature, what would you be saying there? Well, first you would be saying that you have analyzed the evidence and you are not convinced beyond a reasonable doubt the State has met it burden of proof as to one or more elements of attempted murder but you as instructed you are considering the lesser included offense.

If it is guilty of that then you state, I have analyzed it; while he is not guilty of attempted murder then -- but he is guilty and the State has met its burden of proof as to guilty of the offense of assault and battery of a high and aggravated nature; and, therefore, that would be your verdict.

Not guilty, what will you be saying? One of two. You would be saying that, well, you have met your burden of proof as to one of those crimes but the State failed to disprove self-defense and therefore you are returning a verdict of not guilty or the State failed to meet its burden of proof as to one or more of the offenses of each of those crimes and that would be a not guilty verdict also. So there are two options that that would be saying.

The next verdict -- and whichever one it is, if you will check it and circle it and sign it. We will know that is your verdict.

The next one is possession of a weapon during the commission of a violent crime. And your options are guilty or not guilty. Guilty would be that you found him guilty of one or more -- one of the crimes, either assault and battery of a high and aggravated nature or attempted murder. And then if that be the case then you have to consider whether he was in possession of a firearm during the commission of that crime. And if you find that he was then you return a verdict of guilty.

Not guilty would mean that you found him not guilty on one or more of those crimes; and, therefore, you have to return a verdict of not guilty, because he has to be guilty of a violent crime. Or you could find him not guilty if you found that he was not in possession of a firearm. That would be another basis for a not guilty verdict, whichever -- whatever your view of the evidence.

And whatever your verdict, again, it has to be unanimous. Ask you to check the box, circle it, and sign it.

I know you are anxious to get started. And you are almost there. I need to discuss my charge with the lawyers. And in order to do that I have to excuse you.

And it might be necessary to return you to the courtroom to give you some additional instruction.

But if there aren't any additions or corrections that need to be given then we will -- we will gather the exhibits and the verdict form and deliver them to you. When you receive your exhibits then you may commence your deliberations.

The only restriction that I place on the deliberations - Mr. Presiding Juror, you have heard this before - is that when you -- once deliberations commence you -- if any juror has to leave the table for any reason, you have to stop deliberating until all 12 of you are together. Other than that, folks, you proceed as you deem see fit and proper.

Thank you very much for your attention. I know you are anxious to get started. You may retire to your jury room. But do not begin your deliberations until the exhibits are delivered to you.

Oh, one other thing before you leave. The videos that you have, you have every right rehear and replay any of those. That will have to be accomplished in this courtroom. So if you need to hear any of that just write me a note and tell me what it is you need to do. We will cue it up and have it ready for you.

Unless we hear from you we will assume that you

don't need those played for you. Thank you so much. You may retire.
(WHEREUPON, jury exits courtroom 4/12/18, 12:20 p.m.)
THE COURT: Exceptions or additions from the State?
MR. SIMPSON: None from the State, Your Honor.
THE COURT: Exceptions or additions from Mr. Porter?
MR. SMALLDONE: None from the defense.
THE COURT: Thank you all. I appreciate that. We will be at ease. And if you leave, just give us how we can get in touch with you, please.
(WHEREUPON, sent to jury 4/12/18 at 12:25 p.m.)
(WHEREUPON, Court's Exhibit 2, juror note, marked for identification.)
(WHEREUPON, jury enters courtroom 4/12/18, 12:55 p.m.)
(WHEREUPON, State's Exhibit 17 replayed for jury.)
THE COURT: All right, Mr. Presiding -- I will ask you to return to your jury room. Or we can -- or does anybody need that replayed?
(WHEREUPON, presiding juror conferred with jury.)
PRESIDING JUROR: Thank you, Your Honor.
THE COURT: If you need something further just let us know, Mr. Wain. We will be right here for you. Thank you.
(WHEREUPON, jury exits courtroom 4/12/18, 1:04 p.m.)
THE COURT: Exceptions or additions from the State?

MR. SIMPSON: No, Your Honor.
THE COURT: Exceptions or additions from the defendant?
MR. SMALLDONE: No, Your Honor.
THE COURT: Thank you. We will be at ease again.
(WHEREUPON, recess 4/12/18, 1:04 p.m.)
(WHEREUPON, resumed trial 4/4/18, 1:20 p.m.)
THE COURT: I understand the jury has reached a verdict. But let me -- to all the persons in the audience I thank you for your attendance and certainly appreciate you being here. I am sorry you have to be here under all of these circumstances. They are not pleasant for any side.
And I appreciate your being as courteous and observing the decorum, proper decorum in this courtroom throughout this process. I know at times it has to be -- it had to be tough. And I understand that.
But I am going to ask that we continue to observe that. When the jury's verdict is published I don't want any outbursts or any reaction to it.
These persons have been selected to do something that they didn't choose to do, and we respect them and respect their efforts.
So thank you very much again. And I appreciate you observing that. And if you can't, I appreciate that and

I would ask you to leave. Because if there is any outburst then I will have to deal with that as direct contempt of court.

Okay. Let's bring in our jury, please.

(WHEREUPON, jury enters 4/12/18, 1:21 p.m.)

THE BAILIFF: The jurors are all present, Your Honor.

VERDICT:

THE COURT: Thank you very much, ladies and gentlemen. Thank you very much. Mr. Wain, as I understand it the jury has reached a verdict, sir.

PRESIDING JUROR: Yes, sir.

THE COURT: If you would pass the verdict form, please, to the bailiff, please.

(WHEREUPON, presiding juror complied.)

THE COURT: Thank you, sir.

The verdict forms have been properly completed. You may publish the verdict. I would ask the defendant to please rise.

(WHEREUPON, defendant complied.)

THE CLERK: Case Number 2016-GS-10-06124, State of South Carolina versus Derrick Lamar Porter. Indictment for attempted murder, signed Matthew Wain, foreperson of the jury, dated April 12th, 2018.

THE COURT: The verdict is what?

THE CLERK: We the jury by unanimous consent find the defendant Derrick Lamar Porter on the attempted -- or the charge of attempted murder, guilty.

Case Number 2016-GS-10-06125, State of South Carolina versus Derrick Lamar Porter, we the jury by unanimous consent find the defendant Derrick Lamar Porter on the charge of possession of a weapon during the commission of a violent crime, guilty. Signed by Matthew Wain. Dated April 12th, 2018.

THE COURT: Thank you very much.

Ladies and gentlemen, if the clerk has accurately published your verdict in both cases please indicate by raising your right hand.

(WHEREUPON, all jurors complied.)

THE COURT: Thank you. You may put them down. Thank you very much, ladies and gentlemen. Be seated. I am going to let you go back to your jury room for just a few moments. I will be in there in just a moment. Thank you. You may retire to your jury room.

(WHEREUPON, jury exits courtroom 4/12/18, 1:25 p.m.)

THE COURT: Are there any motions from the State regarding the verdict?

MR. SIMPSON: No, Your Honor.

THE COURT: Any motions from the defendant?

MR. SMALLDONE: No, Your Honor.

THE COURT: You renew your motion I think don't you?
MR. SMALLDONE: I do -- I do renew motions for ---
THE COURT: And you are asking for a motion for a new trial?
MR. SMALLDONE: I do ask for a motion for a new trial.
THE COURT: Okay.
MR. SMALLDONE: Renew all objections, motions, and motions for directed verdict.
THE COURT: Thank you, sir. Based -- I think I articulated. But there is certainly a sufficient basis to support both decisions. The evidence considered, as I am required to do at this stage, clearly supported the verdict.
There is no evidence of any caprice or anger or anything, or motion, passion that has entered into that. It rather reflects really a fair and -- fair determination and consistent with the law and the evidence. And I deny your motions.
Thank you.
We will be -- I assume you want a sentence now?
MR. SMALLDONE: Yes, Your Honor.
THE COURT: All right. I will be back in just a moment. I want to dismiss the jury. Thank you. We will be at ease until I can come back.

(WHEREUPON, break was had 4/12/18 1:26 p.m.)
(WHEREUPON, resumed 4/12/18, 1:36 p.m.)
SENTENCING:
THE COURT: Do you have a sentencing sheet?
MR. SIMPSON: We do, Your Honor.
THE COURT: All right. I will be happy to hear from your further, Mr. Simpson. Is there anything else you want to add?
MR. SIMPSON: Just briefly, Your Honor.
THE COURT: Does he have a record?
MR. SIMPSON: He does.
THE COURT: I note that he had a charge that was dismissed for attempted murder because the witness was not reachable or I assume just didn't show up or whatever.
MR. SIMPSON: That is what my notes reflect. I did not have any personal involvement in that case. So I can't really attest to that.
THE COURT: I understand.
MR. SIMPSON: Convictions, previous convictions, we have a 2007 possession of marijuana, 2009 possession of crack cocaine, 2010 disorderly conduct, 2010 domestic violence first offense, and a 2013 assault and battery in the third degree.
THE COURT: Okay. All right.

Mr. Smalldone, I will be happy to hear from you now, sir.

MR. SIMPSON: Your Honor, I apologize. At the appropriate time the victim's mother would like to speak.

THE COURT: Oh, excuse me. I beg your pardon.

MR. SIMPSON: That is my fault.

THE COURT: I will be delighted to hear from her. And thank her for being here. And thank you for what you have been through.

And I just told that jury that the miracle that we all have witnessed and we all -- I asked them and I solicited their prayers for your son and for some continued miracle of recovery.

But I just wanted you to know they also feel the same way about that. But anyway, I will be happy to hear from you, ma'am.

MOTHER OF VICTIM: Of course I am the mother of Curtis Fitzgerald Byas. And I am really happy about the decision that was made today.

We all have sons and daughters and hope that they make the right decision in life. We are not with them always. But behind actions there are consequences that we have to face in life. And I am just asking that when you make your decision that the decision that you make today is to the full extent of his punishment that can be

given today.

THE COURT: Thank you, ma'am.

MOTHER OF VICTIM: And I appreciate everything that was done today.

THE COURT: Thank you very much.

All right. Anything else, Solicitor?

MR. SIMPSON: No, Your Honor.

THE COURT: I will be happy to hear from you now, Mr. Smalldone.

MR. SMALLDONE: Thank you, Your Honor. Your Honor, I respect the jury's verdict and thank you for their -- I thank them for their service even though they are not here.

THE COURT: Right.

MR. SMALLDONE: But, Your Honor, we -- you know, this is obviously a terrible tragic situation. No getting around that. Even, you know, no matter what side of events you view.

I think it is pretty clear that no one intended for any harm -- at the beginning of that day no one intended for any harm to happen. And we hate that this happened, Your Honor.

I have spoken with my client many times, and he agrees -- although he has a clearly different version of the facts he agrees that he hates that it happened. And

he hates that what happened that day and wish -- obviously wishes this situation never would have presented itself and would have made a different choice.

Your Honor, just a little bit of background. Earlier in the trial during the colloquy Your Honor heard a little bit about -- Mr. Porter referenced something about his brain condition.

THE COURT: Right.

MR. SMALLDONE: Just a little bit about that, Your Honor. Mr. Porter turned himself in May of 2016. That night he was placed in general population.

Unfortunately, there was someone in general population affiliated with the individual who was shot. And, Your Honor, Mr. Porter was attacked at the jail.

And I originally got this case to navigate through some kind of legal waters because the issue was he was attacked before he was booked so we couldn't get a bond on him because he wasn't -- he wasn't booked even though he was in jail. So I navigated that.

He was attacked. He was a vegetable for a while. They didn't know if he would live or die. They didn't know if he would have any brain function. And he recovered a lot faster than they thought. I have already showed counsel this. This is kind of a synopsis of -- may I approach?

THE COURT: Sure.

MR. SMALLDONE: Okay. This is a synopsis from some caregivers about the condition that Mr. Porter was in afterwards. And I say that because it is difficult -- it has been a little difficult -- I will let Your Honor read it.

THE COURT: I understand.

MR. SMALLDONE: Okay. Well, Your Honor, it has been a little difficult representing Mr. Porter because his memory is skewed and his memory it not what it used to be. He has trouble remembering things.

He has always been pleasant to deal with, but he has not given me sometimes what I need. And now I did file a motion for a mental evaluation. Just for the record. I filed it. He was evaluated. And he was competent. But competent doesn't mean easy.

So, Your Honor, he will live with this -- with this injury for the rest of his life.

THE COURT: Okay.

MR. SMALLDONE: And I certainly say that with full awareness that someone else was involved in this case too, Your Honor.

So, Your Honor, he -- you have heard his record. He has never been to prison before. All of those charges were magistrate level or I believe the one General

Sessions was the drug possession.

So we ask Your Honor for as much leniency as Your Honor wants -- as Your Honor is inclined to provide. And we just ask the court for some level of mercy. And I know Mr. Porter has expressed his sympathies to me in the past.

THE COURT: Sure. I appreciate that. All right. Thank you.

Is there anything that Mr. Porter wishes to say?

Anything you want to say, sir?

MR. PORTER: Honestly, I am guilty and to the Byas family I am very sorry for what I did. But I felt like I had to protect myself, you know.

But whatever was going on with, you know, my family and him or whatever that happened. You know what I am saying. But I mean things just happened. So I don't have no choice but to accept my consequences.

THE COURT: Okay.

MR. PORTER: But it is all over and done with now, you know.

THE COURT: Absolutely, you are correct. And I just shared this with the jury, because one of the things that we see in sometimes in fashioning sentences when we do guilty pleas you don't see the whole case and you don't see all aspects of it. In this case I am glad I got to

see all of that. And I am glad that you exercised your right to have a jury consider what your version was. And the jury confirmed what if I had been sitting on that jury would have been my version.

Because I appreciate your statement you are sorry, but you had the golden opportunity on that day to do what we all are supposed to do if we have a beef with somebody. You went to your car. He was in the store. You just get in your car and you go where you are going.

But you stood. And you stayed. And because of -- and it wasn't a matter or just happenstance getting -- having to confront him again. You approached him as he came out, which showed again there was something going on.

My observations -- I don't know who the phone call was with. But, again, body language speaks. You were agitated about something. In that phone call you could tell by your motions, your gestures. You couldn't hear anything.

But then the second part is when you follow him to his car. There is just no reason for that other than you had -- you had something you wanted to do.

And it is hard for me to imagine that somebody wanted to shoot somebody in the head. I just can't understand a thought that that even crosses your mind.

But it is obvious to me from looking at that video that that is precisely what you intended to do. Why, I will never know.

And I will tell you what confirms that. If you had just shot somebody in self-defensive, you are on the ground screaming and hollering get some help, call the police, I had to do something I don't -- didn't want to do.

But that is not what you did. You looked at him and then just sort of nonchalantly turned, walked away, stuck the gun in your pants, got in your car. And didn't speed off. Just drove off. Like no big deal.

I as a judge have to guard society from that type of callousness. And I wish I could think that where you are going is going to correct that. It won't.

So my options are to protect it as long as it can -- that I can. And that is what I am going to attempt to do with this sentence.

The sentence of the court -- and this will be the first one, the controlling one. Because it is a day-for-day sentence. And I want to throw that to the Department of Probation and Parole because I don't know how you effect a consecutive sentence if you are getting any credit on the second one until you finish the day-for-day sentence because you have got to serve five

years.

So the sentence of the court on the possession of a weapon during the commission of a violent crime is five years. The sentence of the court on 2016-6124, that is the attempted murder, is 30 years. It is consecutive. I give you credit for time serviced since May 2016.

Good luck to you, sir. And God bless you.

THE COURT: Anything further?

MR. SIMPSON: Nothing from the State, Your Honor.

THE COURT: Thank you.

MR. SMALLDONE: Thank you.

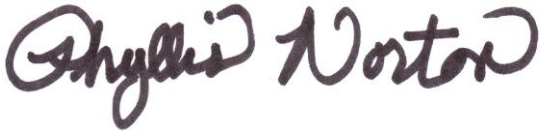
(WHEREUPON, concluded trial 4/12/18, 1:46 p.m.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.*)*

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on April 11, 2018 to April 12, 2018.

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



PHYLLIS NORTON, CVR

Date: May 22, 2018

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK LAMAR PORTER,

APPELLANT.

APPELLATE CASE NO. 2018-000770

BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the circuit court err in denying Porter's request to give additional instructions on self-defense, including (1) "the right to act on appearances," (2) "the relevance of prior difficulties," and (3) "that a person does not have to wait before acting in self-defense?" State v. Nichols, 325 S.C. 111, 117, 481 S.E.2d 121 (1997).

STATEMENT OF THE CASE

In November 2016, a Charleston County grand jury indicted appellant for attempted murder and a weapons charge. R. 340 – 343. On April 11, 2018, appellant was tried before the Honorable R. Markley Dennis and a jury. R. 1. Benjamin Chad Simpson and Daniel Cooper represented the State and Grant Smalldone represented appellant. R. 1. The jury convicted appellant. R. 328, ll. 1 – 9. Judge Dennis sentenced appellant to consecutive terms of thirty years' imprisonment for attempted murder and five years' imprisonment on the weapons charge. R. 338, ll. 2 – 6. This appeal follows.

STANDARD OF REVIEW

"If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the [circuit court's] refusal to do so is reversible error." State v. Williams, 400 S.C. 308, 314, 733 S.E.2d 605, 609 (Ct. App. 2012) (internal quotations omitted).

ARGUMENT

The circuit court erred in denying Porter's request to give additional instructions on self-defense, including (1) "the right to act on appearances," (2) "the relevance of prior difficulties," and (3) "that a person does not have to wait before acting in self-defense?" *State v. Nichols*, 325 S.C. 111, 117, 481 S.E.2d 121 (1997).

After turning himself in, appellant gave a video recorded statement to the police during which he described being forced to shoot Fritzgerald Byas ("Byas") in self-defense. R. 185, l. 6 – 197, l. 1. (Def's Ex. 1). Appellant believed that Byas and his family were involved in the death of appellant's cousin. (Def's Ex. 1). The detective in the interview described it as a "beef." (Def's Ex. 1).

The shooting was captured on two surveillance videos, but the angles of the videos do not capture Byas reaching for a gun because the view is obscured by Byas's car. (State's Ex. 16, 17). R. 185, l. 6 – 197, l. 1. (Def's Ex. 1). Appellant is outside of a convenience store in North Charleston. (State's Ex. 16, 17). Byas arrives in a red car. (State's Ex. 16, 17). Byas and Appellant greet each other with a hand gesture, seemingly friendly. (State's Ex. 16, 17).

Byas enters the store and appellant remained outside talking on the phone. (State's Ex. 16, 17). When Byas leaves the store, he and appellant begin talking. (State's Ex. 16, 17). Byas eventually gets into the driver's seat of his car with the door open. (State's Ex. 16, 17). Appellant leans on the door and they continue talking. (State's Ex. 16, 17). Appellant then suddenly draws a gun and shoots Byas in the head. (State's Ex. 16, 17). Appellant leaves the scene and bystanders call 911. (State's Ex. 16, 17). Byas survived the wound. R. 246, ll. 4 – 14.

In his recorded interview, appellant admitted shooting Byas, but only in response to Byas reaching for a gun. R. 185, l. 6 – 197, l. 1. (Def's Ex. 1). Byas was trying to pretend he was

playing with a cell phone. R. 185, l. 6 – 197, l. 1. (Def's Ex. 1). Appellant correctly identified the caliber and brand of Byas's gun. R. 185, l. 6 – 197, l. 1. (Def's Ex. 1).

The State attempted to show that appellant could not have seen the gun. R. 114, l. 13 – 123, l. 24. The EMT who treated Byas said he did not see a gun when he first arrived and examined Byas. R. 114, l. 13 – 123, l. 24. The EMT said he did not find the gun until he leaned into the passenger's side and grabbed Byas by the belt to move him. R. 114, l. 13 – 123, l. 24. He then felt a gun on Byas's posterior. R. 114, l. 13 – 123, l. 24. The EMT said he needed to pull up two shirts, a button-down and a t-shirt, that were tucked into Byas's pants to remove the gun. R. 118, l. 18 – 119, l. 7.

Problematically for the State, the surveillance video clearly shows Byas's attire and he is not wearing a button-down shirt, but an untucked t-shirt. (State's Ex. 16, 17). The EMT also said when he first looked into the car, Byas's hands were on his lap. R. 123, ll. 21 – 24. This testimony conflicted with that of a bystander who saw an alcoholic beverage in one of Byas's hands. R. 90, ll. 8 – 21.

At the charge conference, appellant requested a charge on prior difficulties in addition to the court's standard self-defense charge. R. 257, ll. 12 – 16. Defense counsel cited appellant's statements in the recorded video interview. R. 257, ll. 12 – 16. The trial judge refused to give the charge because any alleged prior difficulties were between family members and not directly between Byas and appellant. R. 257, l. 17 – 258, l. 25.

The court erred in so narrowly construing the prior difficulties charge. The law to be charged is determined from the evidence presented at trial. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). Reversible error is committed if the trial court fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 262, 433 S.E.2d

848, 849 (1993). Moreover, when determining whether the evidence requires a charge on a lesser included offense, the court views the facts in the light most favorable to the defendant. See Knoten, 347 S.C. at 302, 555 S.E.2d at 394 (requiring the trial court to view facts in the light most favorable to a defendant when determining whether to charge involuntary manslaughter).

Furthermore, a trial judge has the responsibility to craft a self-defense charge tailored to the facts of a case. State v. Brandt, 393 S.C. 526, 549, 713 S.E.2d 591, 603 (2011); State v. Fuller, 297 S.C. 440, 444-45, 377 S.E.2d 328, 331 (1989). As recognized in Fuller, there is a "body of common law self-defense" and trial judges must "consider the facts and circumstances of the case at bar in order to fashion an appropriate charge." Fuller at 443, 377 S.E.2d at 330.

A deep understanding of Fuller demonstrates the trial court's error. In Fuller, the defendant was black. Id. at 441, 377 S.E.2d at 329. He solicited a white prostitute. Id. The prostitute took him to her trailer for sex, but the trailer was occupied and the defendant left. Id.

The defendant later returned to the prostitute's trailer and a car driven by a white woman was blocking the road. Id. The defendant asked her to move her car. Id. At this point, two men approached the defendant's car and asked him "what he was 'trying to do to that white lady.'" Id. One of the men used a racial slur and grabbed the defendant by the throat. Id. at 441, 377 S.E.2d at 329-30.

The defendant fired a warning shot which temporarily allowed him to drive away, but the street was a dead end. Id. at 442, 377 S.E.2d at 330. The two assailants tried to block the defendant's car from leaving and the defendant ultimately crashed and pinned his car against a steel rail. Id. The two men yelled, "'we're going to take care of you.'" Id. The defendant thought he saw something shiny in one of the men's hands and fired four shots at them, killing them both. Id. No gun was found on the assailants. Id.

Relying on State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984), the trial judge in Fuller only instructed the jury on the basic elements of self-defense. Id. This Court held it was error to only give the general charge from Davis when the defendant "repeatedly requested additional charges." Id. at 443, 377 S.E.2d at 330. The trial judge erred by not giving three specific charges on self-defense that further explained the principles in the general charge. First, the trial judge failed to charge the jury that a defendant has the right to act on appearances from State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). Id. at 443-44, 377 S.E.2d at 330-31. Second, the trial judge failed to charge the jury that "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense" from State v. Harvey, 220 S.C. 506, 68 S.E.2d 409 (1951). Id. Finally, the trial judge failed to charge that an individual has no duty to retreat "if by doing so he would increase his danger of being killed or suffering serious bodily injury" from State v. Hardin, 114 S.C. 280, 103 S.E. 557 (1920). Id. For each of these charges, this Court explained the specific facts necessitating the additional, illuminating instruction.

Here, appellant requested a charge on prior difficulties to which he was entitled under Fuller. See State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997). Had the jury received the prior difficulties charge, they would have been able to apply the legal principle of self-defense that appellant was entitled to judge Byas's conduct "more harshly" because of the "prior bad blood between the two men." State v. Hendrix, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978). Self-defense and appellant's perception of Byas reaching for a gun were the critical issues in the case.

This Court should also reverse because of the trial judge's error in refusing to give a full and complete self-defense charge as required by Fuller. While the trial court gave an abbreviated charge on the right to act on appearances, it did not give the full explanation as required by Fuller and State v. Jackson, 227 S.C. 271, 278, 87 S.E.2d 681, 684 (1955). A full explanation

would have included that a defendant does not have to wait for an assailant to attack before acting in self-defense. State v. Nichols, 325 S.C. 111, 117, 481 S.E.2d 118, 121 (1997). The court was required to tell the jury that a defendant does not have to wait until his attacker "gets the drop on him." State v. Rash, 182 S.C. 42, 188 S.E. 435, 438 (1936). Had the trial judge given a complete charge on self-defense, the outcome of the trial would have been different. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand for a new trial.

This 23rd day of April, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 23, 2020.

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SC Court of Appeals

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DERRICK LAMAR PORTER,

APPELLANT.

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Brief of Appellant in the above-referenced case has been served upon William Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Brief of Appellant have been served on Derrick Lamar Porter, 376002, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 23rd day of April, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable R. Markley Dennis, Circuit Court Judge

Appellate Case No. 2018-000770

THE STATE, Respondent,

v.

DERRICK LAMAR PORTER, Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge did not err in failing to give additional instructions on self-defense, including (1) "the right to act on appearances," (2) "the relevance of prior difficulties," and (3) "that a person does not have to wait before acting in self-defense," when Appellant, although not entitled to a self-defense charge, was given one, the issue was not preserved, nor were additional instructions requested.

STATEMENT OF THE CASE

Appellant was indicted in November of 2016 for attempted murder and possession of weapon during the commission of a violent crime. Appellant proceeded to a jury trial April 11-12, 2018, in Charleston County before the Honorable R. Markley Dennis. The State was represented by Assistant Solicitors Benjamin Chad Simpson and Daniel Cooper. Grant Smaldone, Esq. represented the Appellant. The jury convicted Appellant. He was sentenced to consccutive terms of thirty years' imprisonment for attempted murder, and five years' imprisonment for the weapons charge. He will serve an aggregate term of 35 years in prison. This appeal follows.

STATEMENT OF FACTS

On April 16, 2016, Appellant Derrick Porter shot Fitzgerald Byas outside a Quick Mart in North Charleston. (R. 60). Before the shooting, Byas had gone into the Quick Mart, while Appellant waited outside the store for two minutes, until Byas came out of the store. (R. 60, State's Exhibit 16). The confrontation began during what appeared to be a friendly conversation that escalated quickly into an argument. (R. 60-61, State's Exhibit 16). Byas attempted to leave by walking to his car, however Appellant followed. (R. 61, State's Exhibit 16). The argument continued ending with Appellant pointing a gun at Byas and pulling the trigger. (R. 61, State's Exhibit 16). Appellant casually walked away from the scene. (R. 61, State's Exhibit 16).

On the day of the incident, Pierra Martin was working at the Unique Beauty Supply which is connected to the Quick Mart. (R. 86). Martin heard a gunshot, went outside, saw Byas and called 911. (R. 87). She approached the car, saw that Byas wasn't moving and blood was coming from his head. (R. 89). She leaned into the car to let the 911 dispatcher know whether Byas was breathing. (R. 89). She testified that Byas was in the front seat with the door open. One of his hands was holding an alcoholic beverage and the other hand was empty. (R. 90-91). Martin did not see a gun in Byas's car or on his person. (R.89-100).

Patrick Norwood, an officer at the North Charleston Police Department, was the first officer on scene. (R. 129). Upon arrival Officer Norwood observed Byas suffering from a gunshot wound. (R.129). Byas was breathing, but only making groaning sounds. (R. 129). Norwood testified that the scene was secured by making sure no weapons were present while waiting for EMS to arrive. (R. 130). Norwood testified that he looked over

the car thoroughly and found no weapons there. (R. 131). EMS arrived on scene a few minutes later. (R. 132).

David Palawasta, a paramedic for Charleston County EMS, arrived on scene, approached the driver's side door and was advised that the scene had been secured. The victim had a pulse and was still breathing. (R.111). EMS decided it was best to get Byas out of car and into ambulance as quickly as possible. (R. 114). Palawasta testified that he assisted from inside the vehicle in moving Byas out of the vehicle. (R.117). Palawasta did not observe a firearm in the car when entering the car. (R. 117). Both of Victim's hands were in his lap. (R. 123). When Palawasta reached for the belt to assist in getting Victim out of the car, he felt a gun and advised those around him. (R. 118). Officer Norwood told Palawasta to remove the gun and place it in the driver's seat under the victim. (R. 121,133, State's Exhibit 7). Palawasta testified that victim was wearing two shirts, both of which were tucked in to his pants and covering the gun. (R.118). Palawasta further stated that it was not until he lifted both shirts that he was able to see the butt of the handle and trigger aspect of the gun. (R. 118). The gun was positioned in the posterior aspect of victim's hip or waist area. (R.119). It took three attempts for Palawasta to remove the gun from the victim's pants after first having to untuck the two shirts. (R. 120).

Surveillance footage from the Quick Mart was collected by Officer Sean Reiter. (R.142-143). Sergeant Ryan Terrell of the North Charleston Police Department gathered surveillance footage from the Unique Beauty Supply. (R.148).

An article was published in *The Post and Courier* on April 17, 2016, with a headline stating that the victim had a gun. (State's Exhibit 35, R. 210-11). The article also

contained information about the type of gun found and named Appellant as the suspect. (R. 211-12).

Appellant turned himself in May 9, 2016. (R. 168). Jerry Jelico, an investigator with the North Charleston Police Department, interviewed Appellant. (R. 172). Jelico testified that during the interview, Appellant confessed to firing his 9mm gun once at ~~victim~~. (R. 185). Appellant claimed it was self-defense, that he saw a gun on the victim and gave further details about the type of gun it was. (R. 185-186). Jelico testified that even with his knowledge of guns, there would be no way to identify the type of gun by just the butt of the gun. (R. 203-204).

At trial, Appellant claimed self-defense and the jury was charged on self-defense with no objections to the charge by defense counsel. (R. 325). The jury found Appellant guilty of both attempted murder and the weapons charge. (R. 327-328).

STANDARD OF REVIEW

"In reviewing jury charges for error, [the Court of Appeals] must consider the circuit court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Adkins, 353 S.C. 312, 318, 557 S.E.2d 460, 463 (Ct. App 2003). "When reviewing a jury charge for error, an appellate court considers the charge as a whole; the charge must be prejudicial to the appellant to warrant a new trial." State v Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016). "But an instruction must be erroneous and prejudicial to warrant reversal" State v. Bowers, 428 S.C. 21, 28, 832 S.E.2d 623, 627 (2019). "'An appellate court will not reverse the trial [court's] decision regarding a jury charge absent an abuse of discretion.'" State v. Washington, 424 S.C. 374, 394, 818 S.E.2d 459, 469 (Ct. App 2018) (citing State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)). "The law to be charged to the jury is determined by the evidence presented at trial." State v. Gaines, 380 S.C. 23, 31, 66 S.E.2d 728, 732 (2008). "If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the [circuit court's] refusal to do so is reversible error." State v. Day, 341 S.C. 410, 416-417, 535 S.E.2d 431, 434 (2000). "In charging self-defense, the trial judge should consider the facts and circumstances of the case and fashion an appropriate charge." State v. Santiago 370 S.C. 153, 160, 634 S.E.2d 23, 27 (Ct. App. 2006).

ARGUMENT

The trial judge did not err in failing to give additional instructions on self-defense, including (1) "the right to act on appearances," (2) "the relevance of prior difficulties," and (3) "that a person does not have to wait before acting in self-defense," when Appellant, although not entitled to a self-defense charge, was given one, the issue was not preserved, nor were additional instructions requested.

Appellant argues the trial judge erred in denying Porter's request to give additional instructions on self-defense, including (1) "the right to act on appearances," (2) "the relevance of prior difficulties," and (3) "that a person does not have to wait before acting in self-defense." The trial judge did not and cannot err in denying Appellant's request because no request for the additional instructions was made. Initially, the State notes that this issue is almost entirely unpreserved for appellate review because the only charge requested by Appellant on which the trial judge could rule was the prior difficulty charge. Second, even if this issue was preserved, the trial judge did not err by not giving additional instructions on self-defense because additional instructions were not requested and Appellant was not entitled to a self-defense charge. Further, even if Appellant was entitled to a self-defense charge, he was not entitled to the additional jury charges.

Error Preservation

In order for an issue to be preserved for appellate review, it must have been: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). "Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003). "If a party fails to properly object, the

party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "All requests for legal instructions to the jury shall be submitted at the close of the evidence or at such earlier time as the trial judge shall reasonably direct. All requests must include accurate citation to authorities relied upon." Rule 20(a), SCRCrimP. "Notwithstanding any request for legal instructions the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule shall constitute a waiver of objection." Rule 20(b), SCRCrimP. When discussing jury charges, the defense attorney asked for self-defense charge of prior difficulties. (R. 257). The trial judge ruled that he would not charge prior difficulties based upon the fact that nothing was presented during trial about prior difficulties between Appellant and victim. (258). He did however, give a self-defense charge to which defense counsel made no objections, therefore depriving the trial judge of the opportunity to rule on the issue and rendering it improper for review by this court. (R. 325). Defense counsel stated that there were no exceptions or additions to the jury charge when asked, therefore because there was no objection, the argument was not preserved for appellate review.

Appellant was not entitled to a self-defense charge.

A self-defense charge is only required when the evidence supports it. State v. Slater, 373 S.C. 66, 69, 644 S.E.2d 50, 52 (2007). A person is justified in using deadly force in self defense when (1) defendant is without fault in bringing on the difficulty, (2) the defendant actually believed he was in imminent danger of losing his life of sustaining

serious bodily injury, or he was actually in such imminent danger, (3) if the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief; and (4) the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984). Although the trial judge gave a self-defense charge here, the evidence in this case did not warrant it. "Upon request a defendant is entitled to a jury instruction on self-defense if had produced evidence tending to show the four elements." State v. White, 425 S.C. 304, 311 821 S.W.2d 523, 527 (Ct. App 2018). "An accused who provokes or initiates an assault cannot claim self-defense unless he both withdraws from the conflict and communicates his withdrawal by word or act to his adversary." State v. Bryant, 336 S.C. 340, 345, 520 S.E.2d 319, 322 (1999). The court in State v. Williams, held that the defendant was not "without fault" in bringing on the difficulty, and could not assert the defense of self-defense with respect to a murder charge. State v. Williams, 427 S.C. 246, 830 S.E.2d 904 (2019). The court in State v. Santiago held that a self-defense charge was not warranted because defendant was not on his property, therefore he had a duty to retreat. State v. Santiago, 370 S.C. 153, 162, 634 S.E.2d 23, 28 (Ct. App 2006). Further, the court held that the trial judge did not err in refusing to charge self-defense because there were many opportunities to retreat resulting in the absence of at least one of the elements of self-defense. Id. At a minimum this case lacks two elements of self-defense. There was evidence introduced that Appellant waited for Byas outside of the Quick Mart for two minutes. (R. 60, State's Exhibit 16). The confrontation began by what appeared to be a friendly conversation that

escalated into an argument. (R. 60-61, State's Exhibit 16). Byas attempted to leave by walking to his car, however Appellant followed. (R. 61, State's Exhibit 16). The evidence proves the Appellant was not without fault and that he had the means to avoid the danger, the first and fourth elements of self defense.

In denying defense's motion for directed verdict the judge stated:

> I further would find that there is specific evidence that shows the reasonable inference to be drawn which would defeat and disprove, which the state is required to do, self-defense; and that is who brought on the harm or who brought about the altercation. Clearly we note that there was an argument. But clearly the victim left. And it was in a matter of -- and we know there is – they are not on somebody – they are not on—he is not on his own property, so there is a duty to leave if you can do so safely. There was no threat of anything at that particular point. All he had to do was turn around and walk back to his car. So those two elements are clearly established as to who brought on the altercation and therefore would defeat self-defense.

(R. 249).

The only evidence introduced concerning Appellant's belief that he was in imminent danger was Appellant statement in the interview with Jelico that he saw a gun at victim's side and fired in self-defense. (R. 191-192). No evidence was produced toward the third element of self-defense regarding an objective standard for imminent danger. In fact, the State produced three witnesses who testified no firearm could be seen in the car or on the victim, leading to the conclusion that a reasonable person in the same situation would not have felt they were in imminent danger. (R. 89-131). None of the elements of self-defense were met, therefore Appellant was not entitled to a self-defense charge.

Appellant was not entitled to the additional self-defense charges.

Despite the fact that Appellant was not entitled to a jury charge on self-defense, the trial judge gave the jury charge anyway. (R. 318-319). Even if Appellant was entitled to the self-defense charge, he was not entitled to the additional charges.

In State v. Fuller, the court held that it was error to charge the Davis charge of self-defense as an exclusive charge when defendant's counsel repeatedly asked for additional charges. State v. Fuller 297 S.C. 440, 377 S.E.2d 328 (1989). The Davis charge is as follows:

> Self-defense is a complete defense. If established you must find the defendant not guilty. There are four elements required by law to establish self-defense in this case. First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a 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. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury that to act as he did in this particular instance. If however, the defendant was on his own premises he had no duty to retreat before acting in self-defense. These are the elements of self-defense.

State v. Davis 282 S.C. 45, 317 S.E.2d 452 (1984). The current appeal can be distinguished because unlike Fuller, where additional charges were repeatedly requested, only a prior difficulties instruction was requested and no objection was made later when the charge was presented to the jury without the prior difficulties instruction. (R. 325).

Right to Act on Appearances

In regards to the right to act on appearances, although not requested by defense counsel, it was charged to the jury. "The defendant has the right to act on appearances even though the defendant's belief may be -- may have been mistaken. It is for you to decide whether or not the defendant's fear of imminent danger or death or serious bodily injury was reasonable and would have been felt by an ordinary person in the same situation." (R. 319).

Prior Difficulties

In this case, defense counsel only requested prior difficulties as an additional charge. "A self-defense charge is only required when the evidence supports it." State v. Slater, 373 S.C. 66, 69, 644 S.E.2d 50, 52 (2007). The trial judge ruled that no evidence was presented to the issue of prior difficulties between Appellant and Victim. (R. 249). Appellant also relied on the decision in State v. Nichols, where the court held that the trial judges self-defense charges were inadequate because he only instructed common law self-defense and refused to give further instructions on (1) the right to act on appearances (2) relevance of prior difficulties (3) that a person does not have to wait before acting in self-defense. State v. Nichols, 325 S.C. 111, 481 S.E.2d 121 (1997). The current case can be distinguished from Nichols. First, in Nichols, three additional instructions were requested by defense counsel. Id. Here, only prior difficulties was requested. Further in Nichols, the prior difficulties were between the victim and the appellant including victim previously pointing a rifle at appellant. Here, although there was some discussion of

someone in victim's family having issues with someone in Appellant's family, no evidence was presented at trial of difficulties between victim and Appellant.

Right Not to Wait

"[The accused doesn't have to wait until his assailant gets the drop on him, he has the right to act under the law of self-preservation and prevent his assailant (sic) getting the drop on him." State v. Rash, 182 S.C. 42, 50, 188 S.E. 435, 438 (1936). "Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000). The current case is distinguished because the right to fire in self-defense never arose. Pierra Martin, who called paramedics, testified that she was in the car and never saw a gun. (R. 89-100). Patrick Norwood, the first officer on scene, testified that he searched the entire vehicle to secure the scene and never saw a gun. (R. 117). David Palawasta, the paramedic who removed victim from the car, testified that he did not see a gun anywhere upon entering the vehicle. (R. 117). He testified that it wasn't until he assisted in removing the victim from the car by picking victim up by the belt that he felt the gun in victim's pants, and only saw the gun after untucking two shirts from victim's pants. (R. 118-119). Further, Victim tried to leave multiple times, while Appellant continuously followed him. Victim walked away from Appellant by going into the Quick Mart, while Appellant waited for him for two minutes outside the store. (R. 60). Victim then tried to leave again by walking to his car, but Appellant followed. (R. 61). The right to fire in self-defense never arose because Appellant was the aggressor and brought the situation on himself.

Accordingly even if the issue were properly preserved, the trial judge did not err in failing to give additional charges on self-defense because Appellant was not entitled to a basic self-defense charge much less the additional self-defense charges of the right to act on appearances, prior difficulties, and right not to wait. Therefore, this court should affirm the sentence.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

July 21, 2020

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable R. Markley Dennis, Circuit Court Judge

Appellate Case No. 2018-000770

THE STATE, Respondent,

v.

DERRICK LAMAR PORTER, Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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Assistant Attorney General

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
The Honorable R. Markley Dennis, Circuit Court Judge

Appellate Case No. 2018-000770

THE STATE, Respondent,

v.

DERRICK LAMAR PORTER, Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Brief of Respondent on counsel of record for the Appellant by electronic mail to the address listed for counsel in AIS, and subsequently by depositing one copy of the same in the United States mail, postage prepaid, addressed to David Alexander, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.
This 21st day of July, 2020.

Anne Mueller

Anne A. Mueller
Legal Assistant

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THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Derrick Lamar Porter, Appellant.

Appellate Case No. 2018-000770

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Unpublished Opinion No. 2022-UP-173
Heard February 15, 2022 – Filed April 20, 2022

AFFIRMED

Appellate Defender David Alexander, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Ambree Michele Muller, both of Columbia, and Solicitor Scarlett Anne Wilson, of Charleston, all for Respondent.

PER CURIAM: Derrick Lamar Porter appeals his convictions for attempted murder and possession of a weapon during the commission of a violent crime,

arguing the circuit court erred in refusing to charge the jury on prior difficulties between Porter and the victim, Fitzgerald Byas. We affirm.

We agree with the circuit court that the evidence presented at trial did not support an instruction on prior difficulties between the parties. First, the evidence relevant to this issue—the video of Porter's interview and Detective Jerry Jellico's testimony about the interview—concerned past difficulties between Porter's family and Byas's family, not between the two men themselves. Detective Jellico testified that Porter admitted he and Byas had a history, and Jellico noted Porter believed Byas "was somehow or another involve[d] in his cousin's death." When he interrogated Porter about the shooting, Detective Jellico summarized his understanding of the past family difficulties by stating: something happened "years ago," Byas's "younger brother did something to one of [Porter's] cousins," "that's been boiling all this time, since 2011," and any disagreement "was all over that thing from 2011." These vague statements were insufficient to support a jury charge on prior difficulties between Porter and the victim. *See Cook v. State*, 415 S.C. 551, 556, 784 S.E.2d 665, 667 (2015) ("The trial court must determine the law to be charged based on the evidence at trial." (quoting *State v. Smith*, 363 S.C. 111, 115, 609 S.E.2d 528, 530 (Ct. App. 2005)); *but see State v. Nichols*, 325 S.C. 111, 117, 481 S.E.2d 118, 121 (1997) (holding the circuit court erred in refusing to charge the jury on the relevance of prior difficulties between the defendant and the victim because the evidence established the defendant had an affair with the victim's wife and the victim previously pointed a gun at the defendant).

Moreover, State's Exhibit 16, the surveillance video footage from a nearby beauty store, primarily shows Porter and Byas shaking hands and talking. The entire video is approximately seven minutes long. About one minute and thirty seconds into the video, Porter pulls into the parking lot, and Byas pulls up about one minute later. Around the three-minute mark, Porter exits the store and waits for Byas. When Byas exits the store, the men approach each other, grasp hands, and begin talking. Porter then follows Byas to his car and the two continue to talk; Byas leaves his driver's door open during this exchange. The conduct of the two men in the video provides further support for the circuit court's finding that neither party presented evidence to support a charge on prior difficulties between Porter and the victim. *See State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016) ("An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." (quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010)); *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."). Therefore,

we find the circuit court did not abuse its discretion in declining to instruct the jury on prior difficulties between the parties.

AFFIRMED.

THOMAS, MCDONALD, and HEWITT, JJ, concur.

STATE OF SOUTH CAROLINA)
COUNTY OF Charleston)
Derrick Porter)
Plaintiff(s))
vs.)
State of South Carolina)
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2022 -CP- 10 - 3583

FILED
2022 AUG -9 PM 3:05
JULIE J. ARM
CLERK OF COURT

Submitted By: Derrick Porter
Address: 990 Wisacky Hwy
Bishopville S.C.
29010

SC Bar #:
Telephone #:
Fax #:
Other:
E-mail:

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

☐ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/ Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199) _____

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20___-NI-_____

- ☐ Notice/ File Med Mal (230)
- ☐ Other (299) _____

Torts – Personal Injury
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399) _____

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499) _____

Inmate Petitions
- ☑ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599) _____

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899) _____

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799) _____

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999) _____

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699) _____
- ☐ Sexual Predator (510)
- ☐ Permanent Restraining Order (680)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)

Submitting Party Signature: _____ **Date:** _____

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

380

FORM 5

2022-CP-10-3583

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
County of Charleston)

Derrick Porter # 376002
Full name and prison number (if any) of Applicant

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

FILED
2022 AUG -9 PM 3:05
JULIE J. ARMSTRONG
CLERK OF COURT

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee Correctional Institution
990 Wisacky Hwy, Bishopville S.C. 29010

2. Name and location of Court which imposed sentence Charleston County
Court of general Session, Charleston, South Carolina

3. Name(s) of co-defendant(s) (if any) N/A

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2016-GS-10-06125 Poss. Weapon during violent Crime
(b) 2016-GS-10-06124, Attempted murder

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) _____

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty _____

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

_____

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. The South Carolina of appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Denide

ii. _____

iii. _____

(c) the date of each such result:

i. 4-20-2022

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Counsel failed to object

(b) Counsel failed to investigate

(c) Counsel failed to present defense

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Counsel failed to make timely objections

(b) Counsel did not investigate crime scene

(c) Counsel presented an invailed defense

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? _____

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____

(d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. N/A

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. N/A

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____ N/A

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____ N/A

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____ N/A

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

_____

_____

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____ N/A

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____ N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____

(b) N/A

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? NO

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

NO

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Smledone Grant

ii. David Alexander

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Trail an Sentance

ii. Direct Appeal

iii. _____

19. State clearly the relief you seek in filing this application:

Vacate conviction

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Charleston)

I, Derrick Porter, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

X Derrick Porter

SWORN to and subscribed before me this 3 day of Aug, 2020.

Debra Easterling (L.S.)
Notary Public

My Commission Expires: 3/3/2024

Revised 3/2003

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Derrick Dorf, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:.

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

X Derrick Dorf
Applicant

SWORN or affirmed to and subscribed before me this 3 day of Aug., 2020.

Debra E
Notary Public

My Commission Expires: 3/3/2024

ALAN WILSON
ATTORNEY GENERAL

2023 APR 28 PM 3:55

April 25, 2023

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401

Re: Derrick Porter, #376002 v. State of South Carolina
Case No.: 2022-CP-10-03583

Dear Ms. Armstrong:

Please substitute undersigned counsel as counsel of record for the State in this post-conviction relief case and remove former Assistant Attorney General Lauren T'Coya Mims, who is no longer with our office, as counsel of record for the State. Thank you for your consideration of this request, and please contact me at (803) 734-3737 if you have any questions or concerns.

Sincerely,

Danielle Dixon
Assistant Attorney General
SC Bar No. 73999

DD/vh

cc: Denise G. Swope, Esquire

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS IN THE NINTH JUDICIAL CIRCUIT
Derrick L. Porter, #376002, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2022–CP–10–03583 **RETURN AND MOTION FOR A MORE DEFINITE STATEMENT** (Counsel already appointed)

2025 APR 28 A 10:

In response to the application for post-conviction relief filed by Derrick Porter (Applicant) on August 9, 2022, Respondent, the State of South Carolina, makes the following Return.[1]

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving a thirty-five-year sentence. During its November 2016 term, the Charleston County Grand Jury indicted Applicant for Attempted Murder (2016-GS-10-06124), and Possession of a Weapon During the Commission of a Violent Crime (2016-GS-10-06125). On April 11, 2018, Applicant proceeded to a jury trial before the Honorable R. Markley Dennis, Jr. Grant Smaldone, Esquire, represented Applicant. Assistant Solicitors Benjamin Chad Simpson and Daniel Cooper prosecuted the case. The jury found Applicant guilty as indicted. On April 12, 2018, Judge Dennis sentenced

[1] Respondent's Return was due to be filed within ninety days of receipt. See Rule 12(a), SCRCP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial.") Now, having completed the Return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, Respondent respectfully asks this Court to accept this Return as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application"); Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court).

Applicant to consecutive terms of thirty years' imprisonment for Attempted Murder, and five years' imprisonment for Possession of a Weapon During the Commission of a Violent Crime.

Applicant filed a timely notice of appeal. Appellate Defender David Alexander perfected the appeal by filing an Anders[2] brief and a petition to be relieved as counsel with the Court of Appeals on the following issue:

> I. Did the circuit court err in denying Porter's request to give additional instructions on self-defense, including (1) "the right to act on appearances," (2), "the relevance of prior difficulties," and (3) "that a person does not have to wait before acting in self-defense?" State v. Nichols, 325 S.C. 111, 117, 481 S.E.2d 121 (1997)

The South Carolina Court of Appeals denied the motion to be relieved as counsel and directed the parties to brief the issue. Following briefing and without oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction on the merits. State v. Porter, Op No. 2022-UP-173 (S.C. Ct. App. filed April 20, 2022). The Remittitur was sent on May 13, 2022.

CURRENT APPLICATION

On August 9, 2022, Applicant filed this current PCR application alleging he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a. Counsel failed to make timely objections.
   b. Counsel did not investigate crime scene.
   c. Counsel presented an invalid defense.

Applicant requests relief in the form of the vacation of his conviction.

Attached herewith and incorporated herein are the records of the Charleston County Clerk of Court regarding the underlying convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, and the records of this post-conviction

[2] Anders v. California, 386 U.S. 738 (1967).

relief action. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. .115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C at 117, 386 S.E. 2d at 635 (quoting Strickland, 366 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. At 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C at 117-18, 386 S.E.2d at 625.

Here, the record likely does not refute or disprove Applicant's claims; therefore, Respondent requests an evidentiary hearing once Applicant files an amended application. See Sharper, 279 S.C. at 265, 305 S.E.2d at 248 (providing an evidentiary hearing shall be held when a PCR application "alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record").

MOTION FOR A MORE DEFINITE STATEMENT

Respondent moves for a more definite statement on allegation (1a) of the application, as set forth above. The PCR Act requires Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985). When a PCR applicant fails to adequately set forth the grounds upon which he seeks relief, the Court may at any time prior to the entry of judgment "issue orders for amendment of the application or any pleading or motion." S.C. Code Ann § 17-27-70(a); see also Rule 12(e), SCRCP (permitting the Court to order a more definite statement if a pleading "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading"). The Court, may in its discretion, fix the time for which a more definite statement shall be made. Rule 12(e), SCRCP. Appointed counsel "shall insure that all grounds for relief are included in the application and shall amend the application if necessary." Rule 71.1(d), SCRCP.

Here, Applicant has failed to state with specificity the facts giving rise to allegation (1a) of his application, as set forth above. Specifically, Applicant has not set forth *what* portions of trial counsel allegedly failed to object to. Thus, Respondent moves to have Applicant, through counsel, file an amended application prior to any hearing scheduled in this matter that provides facts to support this allegation. Respondent reserves the right to move for summary dismissal of this claim should Applicant not file an amendment application setting forth the facts giving rise to this

allegation.

ANY FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY PROCESS

Respondent requests Applicant specify any claims he intends to raise at the PCR evidentiary hearing in advance of the hearing. Respondent reserves the right to either request a continuance or request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. Respondent further requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State in advance of the hearing, and Applicant provide the names of any witnesses he intends to call at the hearing and provide any evidence he intends to introduce at the hearing in advance of the hearing. Respondent reserves the right to request a continuance and/or oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State.

OTHER ALLEGATIONS DENIED

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

[CONCLUSION AND SIGNATURE PAGE FOLLOWS]

CONCLUSION

WHEREFORE, Respondent respectfully requests this Court grant its motion for a more definite statement and thereafter convene an evidentiary hearing on Applicant's claims.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General

DANIELLE DIXON
Assistant Attorney General

KYLEE KANEALEY
Assistant Attorney General

By: Kylee Kanealey
Kylee Kanealey

ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

April 21, 2025

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS IN THE NINTH JUDICIAL CIRCUIT
Derrick L. Porter, #376002, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2022-CP-10-03583 Certificate of Service by Mail

2025 APR 28

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the Return and Motion for a More Definite Statement in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Denise Grainger Swope, Esquire
The Swope Law Firm, P.A.
1525 Sam Rittenberg Blvd., Ste. 208
Charleston, SC 29407

DATED this 21st day of April, 2025.

Vickie Hall

Vickie Hall, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS IN THE NINTH JUDICIAL CIRCUIT
Derrick L. Porter, #376002, Applicant, V. State of South Carolina, Respondent.	)	CASE NO. 2022-CP-10-03583 **ORDER GRANTING MOTION FOR A MORE DEFINITE STATEMENT**

2025 MAY -1 PM 01

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Derrick L. Porter (Applicant) on August 9, 2022. Respondent filed a return and moved for a more definite statement.[1] After consideration, Respondent's motion is **GRANTED.**

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving a thirty-five-year sentence. During its November 2016 term, the Charleston County Grand Jury indicted Applicant for Attempted Murder (2016-GS-10-06124), and Possession of a Weapon During the Commission of a Violent Crime (2016-GS-10-06125). On April 11, 2018, Applicant proceeded to a jury trial before the Honorable R. Markley Dennis, Jr. Grant Smaldone, Esquire, represented Applicant. Assistant Solicitors Benjamin Chad Simpson and Daniel Cooper prosecuted the case. The jury found Applicant guilty as indicted. On April 12, 2018, Judge Dennis sentenced

[1] Respondent's return was due to be filed within 90 days of service. See Rule 12(a), SCRCP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial."). Now, having completed the return required in this matter, and in light of no demonstrable prejudice to Applicant, this Court accepts this return as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing the Court may fix the time in which the State must respond); Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the time limit prescribed by the statute is not mandatory but discretionary with the circuit court, and the circuit court may extend the time for filing).

Applicant to consecutive terms of thirty years' imprisonment for Attempted Murder, and five years' imprisonment for Possession of a Weapon During the Commission of a Violent Crime.

Applicant filed a timely notice of appeal. Appellate Defender David Alexander perfected the appeal by filing an Anders[2] brief and a petition to be relieved as counsel with the Court of Appeals on the following issue:

> I. Did the circuit court err in denying Porter's request to give additional instructions on self-defense, including (1) "the right to act on appearances," (2), "the relevance of prior difficulties," and (3) "that a person does not have to wait before acting in self-defense?" State v. Nichols, 325 S.C. 111, 117, 481 S.E.2d 121 (1997)

The South Carolina Court of Appeals denied the motion to be relieved as counsel and directed the parties to brief the issue. Following briefing and without oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction on the merits. State v. Porter, Op No. 2022-UP-173 (S.C. Ct. App. filed April 20, 2022). The Remittitur was sent on May 13, 2022.

CURRENT APPLICATION

On August 9, 2022, Applicant filed this current PCR application alleging he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a. Counsel failed to make timely objections.
   b. Counsel did not investigate crime scene.
   c. Counsel presented an invalid defense.

Applicant requests relief in the form of the vacation of his conviction.

[2] Anders v. California, 386 U.S. 738 (1967).

JM/2

Attached herewith and incorporated herein are the records of the Charleston County Clerk of Court of the underlying convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, and the records of this post-conviction relief action.

MOTION FOR A MORE DEFINITE STATEMENT

Respondent moved for a more definite statement on Applicant's allegation 1(a). The PCR Act requires applicants to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. § 17-27-50 (1985). When an applicant fails to adequately set forth the grounds upon which he seeks relief, the Court may "issue orders for amendment of the application or any pleading or motion." S.C. Code Ann § 17-27-70(a); see also Rule 12(e), SCRCP (permitting the Court to order a more definite statement if a pleading "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading"). The Court may, in its discretion, fix the time for which a more definite statement shall be made. Rule 12(e), SCRCP, appointed counsel "shall insure that all grounds for relief are included in the application and shall amend the application if necessary." Rule 71.1(d), SCRCP. This Court finds Applicant has failed to state with specificity the facts giving rise to this allegation. Specifically, Applicant has not set forth *what* portions of trial counsel allegedly failed to object to. Thus, Respondent's motion for a more definite statement is granted.

[CONCLUSION AND SIGNATURE PAGE FOLLOWS]

JM/3

CONCLUSION

Based on the foregoing, Respondent's motion for a more definite statement is **GRANTED.** Applicant, through counsel, shall file an amended PCR application within sixty days of service of this order. Applicant is cautioned that failure to comply with this order may results in such orders at this Court deems just, including the evidentiary hearing being continued, or dismissal of this action for PCR.

IT IS THEREFORE ORDERED:

1. Within sixty days from the date of service of this Order, Applicant, through counsel, shall amend his PCR application to set forth specific facts to support his claims; and

2. Once the application is amended, an evidentiary hearing shall be set.

AND IT IS SO ORDERED this 23 **day of** April **, 2025.**

JENNIFER B. MCCOY
Chief Administrative Judge – Common Pleas
Ninth Judicial Circuit

Charleston, South Carolina

JM/4

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Derrick Porter, #376002, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2022-CP-10-03583 **ORDER OF CONTINUANCE**

This matter comes before the Court by way of post-conviction relief application filed by Applicant Derrick Porter. An evidentiary hearing into this matter was scheduled to be held on Tuesday, August 5, 2025, at the Charleston County Courthouse, before the Honorable Marvin H. Dukes, III. Applicant's Counsel requested a continuance due to illness.

Based on the foregoing, I find good cause to continue this hearing. This matter shall be set for a hearing during the October 2025 PCR term of court in the Ninth Judicial Circuit.

AND IT IS SO ORDERED this 27th **day of** August**, 2025.**

THE HONORABLE MARVIN H. DUKES, III
Presiding Judge
Ninth Judicial Circuit

Beaufort, South Carolina

FILED
2025 SEP -1 AM 11:04
JULIE J. ARM...
CLERK OF COU...
BY

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Derrick L. Porter, #376002	)	Case No.: 2022-CP-10-3583
Applicant,	)	
v.	)	**AMENDED POST CONVICTION RELIEF APPLICATION**
State of South Carolina,	)	
Respondent.	)	

The Applicant, by and through his undersigned attorney, hereby amends his PCR application filed on or about August 9, 2022, to add the following allegations:

1. There was ineffective assistance of counsel trial counsel, Grant Smalldone in the following respects:

(A) Failure to adequately negotiate and/or explain any and all plea offers in this case, including but not limited to, all possible benefits of said plea offers and the consequences of rejecting same.

(B) Failure to preserve the appellate issue that the trial judge erred in denying Applicant's request to give additional instructions on self-defense, including (1) "the right to act on appearances," and (2) "that a person does not have to wait before acting in self-defense." While the trial court gave an abbreviated charge on the right to act on appearances, it did not give the full explanation as required by Fuller and State v. Jackson, 227 S.C. 271, 278, 87 S.E.2d 681, 684 (1955). A full explanation would have included that a defendant does not have to wait for an assailant to attack before acting in self-defense. State v. Nichols, 325 S.C. 111, 117, 481 S.E.2d 118, 121 (1997). The court was required to tell the jury that a

defendant does not have to wait until his attacker "gets the drop on him." State v. Rash, 182 S.C. 42, 188 S.E. 435, 438 (1936). Had the trial judge given a complete charge on self-defense, the outcome of the trial would have been different. These issues were not preserved for review as no request for the additional self defense instructions was made. When discussing jury charges, the defense attorney asked for self-defense charge of prior difficulties. (R. 257). The trial judge ruled that he would not charge prior difficulties based upon the fact that nothing was presented during trial about prior difficulties between Appellant and victim. (258). He did however, give a self-defense charge to which defense counsel made no objections. (R. 325). Defense counsel stated that there were no exceptions or additions to the jury charge when asked, therefore because there was no objection, the argument was not preserved for appellate review.

In order for an issue to be preserved for appellate review, it must have been: (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). "Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar 356 S.C. 138, 142, 587 S.E.2d 691, 693-694 (2003). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005). "All requests for legal instructions to the jury shall be submitted at the close of the evidence or at such earlier time as the trial judge shall reasonably direct. All requests must include accurate citation to

authorities relied upon." Rule 20(a), SCRCrimP. "Notwithstanding any request for legal instructions the parties shall be given the opportunity to object to the giving or failure to give an instruction before the jury retires, but out of the hearing of the jury. Any objection shall state distinctly the matter objected to and the grounds for objection. Failure to object in accordance with this rule shall constitute a waiver of objection." Rule 20(b), SCRCrimP.

Trial counsel's ineffective assistance of counsel as set forth prejudiced the Applicant entitling him to a new trial. Furthermore, the Applicant requests that he be permitted to amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

THE SWOPE LAW FIRM, P.A.

S/Denise Grainger Swope

DENISE GRAINGER SWOPE
PO Box 80355
Charleston, South Carolina 29416
(843) 852-4925
Attorney for Applicant

Charleston, South Carolina

Dated: October 15, 2025

STATE OF SOUTH CAROLINA	**IN THE SIXTEENTH JUDICIAL**
COUNTY OF CHARLESTON	**CIRCUIT COURT**
DERRICK PORTER	**TRANSCRIPT OF RECORD**
	CASE NO: 2022-CP-10-03583
APPLICANT	
-VS-	**October 16, 2025**
STATE OF SOUTH CAROLINA	
RESPONDENT	

B E F O R E:

HONORABLE WILLIAM THOMAS MCGEE III, JUDGE

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

DENISE GRAINGER SWOPE, ESQUIRE
SWOPE LAW FIRM
ATTORNEY FOR THE APPLICANT

DANIELLE DIXON, ESQUIRE
KYLEE KANEALEY, ESQUIRE
S.C. ATTORNEY GENERAL'S OFFICE
ATTORNEY FOR THE RESPONDENT

TRANSCRIBED BY:

Sandra Allen
LEGAL EAGLE
Post Office Box 5682, Greenville, South Carolina 29606
864-467-1373 depos@legaleagleinc.com

I N D E X

WITNESSES	PAGE
PROCEEDINGS	3
DIRECT OF DERRICK PORTER	5
DIRECT OF GRANT SMALDONE	10
CROSS OF GRANT SMALDONE	14
CERTIFICATE OF TRANSCRIBER	

E X H I B I T S

NO.	DESCRIPTION	ID.	EV.
NONE			

MS. KANEALEY: May I please the court?

THE COURT: Yes, ma'am.

MS. KANEALEY: Kylee Kanealey on behalf of the State. This is the post-conviction relief matter of Derrick Porter versus The State. Case number 2022-CP-10-3583 out of Charleston County. Applicant is presently confined in the South Carolina Department of Corrections, serving a 35-year sentence. During its November 2016 term, the Charleston County Grand Jury indicted applicant for attempted murder. That's 2016-GS-10-6124, in possession of a weapon during the commission of a violent crime. That's 2016-GS-10-6125. And on April 11th, 2018, applicant proceeded to a jury trial before the Honorable R. Markley Dennis, Jr. Grant Smaldone, Esquire represented applicant. Assistant Solicitor's Benjamin Simpson and Daniel Cooper prosecuted the case. The jury found applicant guilty as indicted. And on April 12th, 2018, Judge Dennis sentenced applicant to consecutive terms of 30 years imprisonment for attempted murder and 5 years imprisonment for the weapons charge. Applicant filed a direct appeal, and the remitter was sent on May 13th, 2022. On August 9th, 2022, applicant filed his current PCR application allegedly he's being held in custody unlawfully, based on an ineffectiveness of counsel, that counsel failed to make timely objections, counsel did not investigate the crime scene, and counsel presented an invalid defense. And then, last night around 9

pm, he raised two additional allegations. One regarding an appellate issue, and then failure to explain the benefits and consequences of accepting the plea. At this time, I'll turn it over to opposing counsel to just state which allegations she's proceeding forward on today.

THE COURT: All right. Ms. Swope, if you could tell me -- I've got the three that are in the initial PCR.

MS. SWOPE: May I approach, Your Honor?

THE COURT: Oh, sure.

MS. SWOPE: I've got it all written out. So, it's all clear.

THE COURT: Thank you.

MS. SWOPE: I learned from Monday.

THE COURT: No, that's fine. I just want to make sure that I keep this in my notes here.

MS. SWOPE: Yes, Your Honor. I believe that the second issue on the amended is encompassed in the application in that there were failures to make objections. But I just wanted to clarify what I thought he was aiming at in terms of page numbers and so forth, and failure to explain plea offers and the consequences of not accepting them, or also accepting them. He had also raised that issue in the appellate case, so I don't think that's news to anybody. But there was apparently a 20-year plea offer, and I wanted to discuss with him what his understanding of that offer before trial. So,

pretty simple stuff.

THE COURT: Okay. So, just -- the two new ones and examples I guess, were grounds under the ineffectiveness of assistance of trial counsel would be failure to adequately negotiate and or explain any and all plea offers in the case, including but not limited to all possible benefits of such offers and the consequences to project the same. And then the next one pertains to failure to preserve appellate issue that the trial judge erred in denying applicant's request to get additional instructions on self-defense.

MS. SWOPE: Right.

THE COURT: Okay. All right. You are going – you may call your first witness?

MS. SWOPE: I would call Mr. Derrick Porter to the stand please?

THE COURT: All right. Yes, sir.

MR. DERRICK PORTER SWORN IN TO TESTIDY AS FOLLOWS:

CLERK: Now, please state your full name and spell your last name for the court record.

MR. PORTER: Derrick Porter. Last name Porter, P-o-r-t-e-r. First name, Derrick, D-e-r-r-i-c-k.

DIRECT EXAMINATION OF MR. PORTER BY ATTORNEY MS. SWOPE:

Q. Good morning, Mr. Porter.

A. Good morning.

Q. We are here today on your PCR. And let me just look

back at your application, and we'll move on to the ones that I raised as well. Well, let's do the failure to object. The first one you listed was failure to object, and I clarified that in the amended in that there were questions regarding jury instructions about self-defense and additional instructions on self-defense. And one of your allegations is that he -- your trial counsel, did not adequately preserve that issue for review, is that right?

A. Yes.

Q. Okay. And you also spoke with me about your plea offer. Can you explain that to the court?

A. Yes. They gave me a 20-year plea. Me not understanding because I'm dealing with brain issues from another case.

THE COURT: You are dealing with what?

A. Some brain injuries.

THE COURT: Some injuries?

A. Yes. Brain injuries. I was a vegetable for 4 years. Had to (inaudible) had to walk and all that again. I wasn't really competent myself to get the full understanding of what was going on. So, before trial, I thought about it, and I said you know, I talked with him and asked him to take the 20-year plea. But he said he can not do that. Because I guess him and (inaudible) negotiated it. I'm on the trial docket.

Q. So what they told you was that the previous plea offer was no longer available?

A. Yes.

Q. Okay. If you had understood that if you rejected the plea offer that they wouldn't give you a chance to change your mind, would you have behaved differently?

A. Yes.

Q. In what way? You would have accepted the plea?

A. Yes.

Q. If you knew you couldn't get it later?

A. Yes.

Q. And that plea was for 20 years?

A. Yes.

Q. And you were sentenced to 35, is that right?

A. Yes.

Q. Okay. So, there's a 15-year difference on that. Now, you said something about your injuries and your understanding. Can you explain to the court just so they understand what you are talking about? I want to make sure we are all clear about ---

A. From my understanding from what Mr. Smaldone was telling me, there was two different cases. So, when I turned myself in to clarify this self-defense case with (inaudible). They put me in the same room in the county jail with their stepbrother. Him and 3 guys ganged me. So, that caused my

brain injuries. Knocked out my teeth, etc., so that put me in a coma for 4 months. I was a vegetable. So, as soon as I got out or whatever, I got locked up. I was out on bond. So, kind of -- I was trying to confide in him until I didn't feel comfortable with him. You know, I was coming back to my common senses. He said something about he have to go back in front of the judge to do that.

Q. Okay. So, you didn't feel like you were communicating well with your lawyer?

A. No, not at all.

Q. In what way did he meet with you to discuss your case?

A. No. Not as supposed to be done.

Q. Did he go over the discovery with you, the police reports, and the evidence they had against you?

A. A piece at a time. Piece at a time.

Q. And do you ---

A. But knowing that my memory is so in and out.

Q. Did you tell trial counsel you were having difficulty remembering things?

A. No, I'm pretty sure I just stayed in there. (Inaudible).

Q. Okay.

A. So he told me, don't take the stand, that's the best thing not to do.

Q. And so you believe that your counsel was aware of your physical situation and your injuries?

A. Yes, I'm pretty sure he do.

Q. Okay. And so make sure -- is there anything else we have not covered other than preserving the objections for the jury instructions, your plea issue, and you don't feel like he met with you enough or explained things with you. Is there anything else that you want the court to be aware of?

A. I mean, it's a lot that I feel like he should have -- if I had a different counsel member, I think the results would turn out a whole lot different.

Q. And you feel like if you had taken the plea, obviously, things would have been different as well?

A. Yes. I couldn't get anything no better versus the victim versus me. I don't understand like.

Q. After the sentencing, did you ever ask your trial counsel to appeal the sentence?

A. No.

Q. Did you understand that you could?

A. Once they convicted me (inaudible), my appeal.

Q. I'm sorry. I wasn't trying to cut you off. Did you understand that you could ask for an appeal of the sentence?

A. No.

MS. SWOPE: Your Honor, I don't think I have anything further.

THE COURT: All right. Yes, ma'am.

MS. KANEALEY: No questions from The State, Your Honor.

THE COURT: All right. Mr. Porter, you may step down, sir. Thank you. All right, Ms. Swope call your next witness?

MS. SWOPE: No further witnesses for the applicant, Your Honor.

MS. KANEALEY: The State would call Grant Smaldone.

THE COURT: All right. Mr. Smaldone.

MR. GRANT SMALDONE SWORN IN TO TESTIDY AS FOLLOWS:

CLERK: Please be seated. All right. Please state your full name into the microphone, spell your last name for the court record.

MR. SMALDONE: My name is Grant Smaldone. Last name is spelled S-m-a-l-d-o-n-e.

THE COURT: All right. Yes, ma'am.

DIRECT EXAMINATION OF MR. SMALDONE BY ATTORNEY MS. KANEALEY:

Q. How are you doing today, Mr. Smaldone?

A. I'm doing all right.

Q. So, how long have you been practicing law?

A. I think about 13 years.

Q. And how much of that has been criminal?

A. Well, all of it.

Q. All right. And how many times approximately did you

meet with applicant?

A. At least 9. In my file, it said -- I know I have 9 pages of jail notes. So, I believe 9 times approximately.

Q. And did you communicate in any other ways?

A. Definitely, yes. I wrote -- this was when I first moved to Charleston, I had more, I guess, time on my hands. There was extensive written correspondence.

Q. Okay. And do you feel as if you had adequate time to meet with him before trial?

A. Yes.

Q. Okay. And could you give us a brief overview of the evidence The State had against applicant?

A. Yes. And it has been about I think 8 maybe -- between 7 and 9 years since the trial. So forgive me if I'm adding or missing something. I'm doing it to the best of my ability. Briefly, from what I recall, I know there was a video, a surveillance video of the not really a gas station, more of a quicky mart type place, of the parking lot that captured the incident pretty well. The video did not have audio. Video only. There was a -- there was a statement by Mr. Porter given to Detective Jellico from North Charleston Police. The statement was very difficult to hear, but he did give a statement. I don't believe a gun was ever found. Victim never really gave a statement because I think he was basically incapacitated. And there was a newspaper article

that was kind of an important part of The State's case, unfortunately, about the shooting. In the newspaper article, it mentioned that the victim had a gun on him, and that was kind of a pivotal piece for both sides. Mainly The State. But that's the evidence that I recall.

Q. And did you discuss the indictments and what the State needed to prove the applicant?

A. Yes.

Q. And did applicant have any defenses?

A. Yes. We -- I raised self-defense at trial.

Q. And did you discuss this with him ahead of time, your trial strategy, and the defense?

A. Yes.

Q. And did you engage in plea negotiations with the State?

A. Yes.

Q. And can you just tell us a little bit about that?

A. And I might not be as -- I might not remember these as well as the trial itself because the timeline is a little fuzzy. I know at one point -- I know there was an offer of 20 years at one point. I think that was as low as it ever got. I think the offer was 23 at some point. It might have been at the very beginning of the case, and it might have resurfaced towards the end of the case. But at all times it was between 20 and 23 years.

Q. And did you thoroughly explain to him the plea and benefits and consequences of accepting or rejecting that plea?

A. In my opinion, yes.

Q. And whose decision was it to go to trial?

A. Well, the State's really.

Q. Let's see. Just briefly, because this was barred from direct. Did you have any concerns with his cognitive ability at any point?

A. I did at the beginning of the case. And if you want a longer explanation, I can give it to you, or I can just say that I did at the beginning of the case.

Q. You can elaborate.

A. Okay. At the very beginning of the case, before I was even officially his attorney, Ashley Pennington, who is a former Circuit Public Defender, called me and said and at the time I was on the conflict panel. Called me and said we have some kind of explained that there was someone that was arrested for attempted murder, and either the night of his booking or the night after, basically, there early on in his incarceration, he was beaten severely, I think with you know fists, and I think a chair maybe. And at the time, it sounded like he might be a permanent you know, might be in a permanent vegetative state. So, I -- of course I took the case. Can't remember what exactly I did afterwards, waited a little while. I think he was at MUSC for a while, and then one of the first

things I did, and it might even have been the Public Defender's Office that did it before me. Someone, I think it was me, but maybe not. Someone filed for a mental evaluation for competency after that.

Q. Okay. What was the result of the competency evaluation?

A. He recovered -- in their opinion, he recovered more quickly than I expected. So he was deemed competent to stand trial.

MS. KANEALEY: No further questions, Your Honor.

THE COURT: All right. Ms. Swope?

CROSS EXAMINATION OF MR. SMALDONE BY ATTORNEY MS. SWOPE:

Q. Good morning Mr. Smaldone, thank you for being here. I appreciate that.

A. Yes.

Q. The first thing I wanted to cover was the issues regarding the plea agreement.

A. Yes.

Q. You heard Mr. Porter testify that he didn't understand that if he said no, that they might not give it to him again.

A. Right.

Q. Do you remember specifically discussing that with him?

A. Honestly, I do not recall specifically. It's

something that I could say that I probably did it, but I don't have a specific memory of it, no.

Q. And in your discussions with Mr. Porter, did you notice any deficits in terms of his communication with you or his understanding when you were speaking with him?

A. Honestly, I didn't.

Q. And obviously, if he had accepted a 20-year plea or a 22-year plea or whatever it was, possibly 24, that's less than the 35 he got, correct?

A. Yes.

Q. Okay. And secondly, and it's a technical issue, but it was fully briefed in the appellate court; you had asked for a self-defense instruction, which you received. But appellate court counsel had asked -- had stated regarding that he has a right to act on appearances, and he had the right to wait -- didn't have to wait until the other person got the drop line, so to speak, to defend yourself. You don't have to wait for them to shoot at you?

A. Right.

Q. And it was alleged by the State that those two issues were not preserved because when they gave the charge -- discussing the charges, you discussed a prior difficulties charge which he refused to give.

A. Right.

Q. Because there was apparently a history between our

client and the victim's family, right?

A. Right.

Q. You refused that, and then he gave the charge on self-defense, or rather a cursory charge less in detail, and he asked if there were any exceptions or additions to that in the record at page 325, and you said no.

A. Right.

Q. So, the appellate state took the position that the two additions of appearances and not having to wait until your attacked were not preserved and in fact they weren't discussed by the appellate court, presumably because they agreed with that?

A. Right.

Q. Let me check. Courts indulgence.

MS. SWOPE: Your Honor, there's a letter from the defense, or excuse me from defense counsel to the applicant during representation regarding the 20-year offer that's part of the court packet.

THE COURT: Right.

MS. SWOPE: Do I need to ask defense counsel about that for it to be part of the record or is it part of the record?

THE COURT: I mean I think it's part of the record that I've been sent. If you want to question him on it and introduce it as an exhibit to this proceeding you certainly

can do so.

MS. SWOPE: I believe that we've covered the issue I just want to make sure that the correspondence where he set forth that the offer was 20 years. Hold on just one second and I'll see what page that's on.

THE COURT: I'll find it in here and I'll ---

MS. SWOPE: Mr. Porter, they had originally filed an Anders brief, and Mr. Porter, as requested by the appellate court, wrote in why he didn't feel like it ought to be dismissed under Anders, and that's where he discussed the plea offer and the order -- the letter was submitted at that time.

THE COURT: I just want to make sure that ---

MS. SWOPE: I just want to make sure that it's in the record. It's in the court packet that I had.

THE COURT: Yeah. I just want to lay eyes on it and make sure I've got it here.

MS. SWOPE: It's in the court packet. Let me see if I can find the page. I think that's the one thing I didn't put in was the page on that. But it was further down in the packet. I think it's after the Anders brief. See if I can find a page.

THE COURT: Yes. I've got it as page 110 out of 476 to what I've been presented.

MS. SWOPE: Thank you, Judge.

THE COURT: It appears it's a letter from Grant B.

Smaldone, dated May 23, 2017, to Mr. Porter. It says I've enclosed a paper copy of the written discovery in your case that we had previously gone over.

MS. SWOPE: That's it.

THE COURT: As we have discussed the Solicitor's Office will not offer you anything that does not include a prison sentence of some sort. To date their offer is 20 years. To stay out of prison we will have to go to trial and secure a verdict of not guilty.

MS. SWOPE: That's exactly it, Your Honor. Thank you. You were quicker than me locating it. Your Honor, I don't believe I have any other questions.

THE COURT: All right. Any re-direct?

MS. KANEALEY: Nothing from the State, Your Honor.

THE COURT: All right. Mr. Smaldone, you may step down.

MR. SMALDONE: All right.

THE COURT: All right. Anything further from the State?

MS. KANEALEY: No further witnesses, Your Honor.

THE COURT: All right. I'll be glad to hear any parting words that you might have in summary or anything.

MS. SWOPE: Yes, Your Honor. I believe that my amended application lays forward the charges and the legal support for that. But as stated, if Mr. Porter had accepted

the 20-year plea, obviously that's very different from 35 years, and he testified that he didn't understand that he couldn't change his mind and do it before trial. And he tried to do that and was told no. At the additional instructions on the self-defense or the right to act on appearances, and that a person doesn't have to wait before acting in self-defense, those are the Fuller case and State versus Jackson and State versus Nichols, and that's all listed in my paperwork. So I won't belabor the court on that. And those issues could not be reviewed because they weren't preserved for appellate review under State v Rogers, State v Dunbar, and Rule 20A of the Criminal Procedure Rules. I think that given that those issues were not preserved and the court didn't have the opportunity to look at those, I think they could have made a difference because the whole question of the case is what occurred. And while there was a video, there wasn't a video inside the car. You can't really tell what anyone was saying, what was happening. So the credibility of the witnesses as well as the surrounding actions of the parties and whether or not those could be explained are very, very important, and lastly, Your Honor, the Defendant also states that -- excuse me, applicant in this case also stated that he didn't have knowledge that he could have raised an appeal regarding of the sentence. So I feel like I need to add that, but I will let me amended post convictional brief application speaks for

itself in terms of the legal presence and so forth.

THE COURT: All right. Thank you, Ms. Swope. Ms. Kanealey?

MS. KANEALEY: Yes, Your Honor. Sorry. As far as conveying the plea as the letter shows, counsel told him the offer, that if he didn't accept it, he had to go to trial. As far as the appellate issue, pursuant to Strickland, the applicant must prove deficiency and prejudice. For prejudice applicant must prove but for a trial counsel's alleged deficiency. There is a (inaudible), the outcome of the trial would have been different. Here, the outcome of the trial would have not been different. Applicant was not entitled to a basic self-defense charge, much less the additional self-defense charges of the right to act and appearances, prior difficulties, and the right not to waive. The right to act and appearances was in fact, charged to the jury. The trial Judge ruled that no evidence was presented to the issue of prior difficulties between applicant and victim. And as far as the right not to wait, three witnesses who respond to the scene testify they saw no gun. The paramedic who removed the victim from the car testified he only saw the gun after untucking two shirts from the victim. And as far as the self-defense charge goes, applicant waited for -- waited two minutes for the victim outside the gas station for him and followed him to his car and shot him and this was all on

video. And so, regardless of the actual -- the additional instructions applicant was not prejudiced because there was nothing to support these instructions. Thank you.

THE COURT: All right.

MS. SWOPE: Your Honor, just extremely briefly. The video also shows the victim in an untucked t-shirt at one point. So, the issue of whether his clothing was tucked in at the time they were speaking is not clear because you can't see inside the car.

THE COURT: All right. Thank you, ma'am. Again, y'all have cited specific parts of the transcript that I want to make sure that I review before I rule. So I'm going to take this under advisement. I'll give y'all a decision by the end of next week.

MS. SWOPE: Thank you, Your Honor.

MS. KANEALEY: Thank you, Your Honor.

THE COURT: Thank you, Mr. Porter.

CERTIFICATE OF TRANSCRIBER

I, **SANDRA ALLEN**, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and evidenced introduced in the trial of the captioned case, relative to appeal, in the **Circuit Court**, **Charleston County**, **South Carolina**, **on the 16th day of October 2025.**

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

February 16, 2026

Sandra Allen

Sandra Allen, Transcriber

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS 425
County of ☒ Charleston ☐ Berkeley)
) Case No. 2022-CP-10-03583
Derrick Porter)
Applicant / Petitioner)
vs.) **ORDER**
)
State of South Carolina,)
)
Respondent.)

2025 OCT 16 AM 11:28

This post-conviction relief case came before the court for a hearing. Having now heard this matter, the court orders as indicated herein.

X 1. The application for post-conviction relief is hereby: _____denied _____granted X under advisement; a formal order will be filed (see below - No.6)

_____ 2. Motion(s) was/were heard in this case and the court orders:
The motion to dismiss and/or for summary judgment is hereby _____granted _____denied _____under advisement, based upon the _____statute of limitations and/or _____the successive nature of the application or _____other reason as follows:

_____

_____.

_____ 3. A conditional order of dismissal was previously filed in this case. Upon review of the matter, the court finds:
_____ Good cause as to why the case should not be dismissed has been shown in response to the order of dismissal; therefore, a hearing on the merits of the application shall be scheduled.
_____ The court has considered the response to the conditional order of dismissal and finds that good cause has not been shown or _____no response has been filed to the conditional order of dismissal; therefore, the application is hereby dismissed.

_____ 4. The application was freely, voluntarily, and intelligently withdrawn as indicated on the record; therefore, this case is dismissed _____ with prejudice _____ without prejudice.

____ 5. Other: _____

_____

_____.

_____ 6. The court further orders:
_____ The _____Attorney General _____Applicant's counsel is directed to submit to the court a proposed order and to serve the order on opposing counsel within _____days.

_____ Both sides are directed to submit proposed orders to the court and to serve the orders on each other within _____days.

_____ The court does not request proposed orders.

IT IS SO ORDERED.

Date: 10/16/25
Charleston, S.C.

Presiding Judge 2726

Court Reporter: **Maria-Emanuel Klein**
Attorney for State: **Kylee Kanealey**
Attorney for Applicant: **Denise G. Swope**

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Derrick L. Porter, #376002,	)	CASE NO. 2022-CP-10-03583
Applicant,	)	**ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of Derrick L. Porter's (Applicant's) application for post-conviction relief (PCR) filed on August 9, 2022. On October 16, 2025, an evidentiary hearing was held at the Charleston County Courthouse before the Honorable Thomas William McGee, III. Applicant was present and represented by Denise Swope, Esquire. Assistant Attorney General Kylee Kanealey represented Respondent.

Following a thorough review of the record, along with the testimony and evidence presented at the hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving a thirty-five-year sentence. During its November 2016 term, the Charleston County Grand Jury indicted Applicant for Attempted Murder (2016-GS-10-06124) and Possession of a Weapon During the Commission of a Violent Crime (2016-GS-10-06125). On April 11, 2018, Applicant proceeded to a jury trial before the Honorable R. Markley Dennis, Jr. Grant Smaldone, Esquire, represented Applicant. Assistant Solicitors Benjamin Chad Simpson and Daniel Cooper prosecuted

the case. The jury found Applicant guilty as indicted. On April 12, 2018, Judge Dennis sentenced Applicant to consecutive terms of thirty years' imprisonment for Attempted Murder, and five years' imprisonment for Possession of a Weapon During the Commission of a Violent Crime.

Applicant filed a timely notice of appeal. Appellate Defender David Alexander perfected the appeal by filing an Anders[1] brief and a petition to be relieved as counsel with the Court of Appeals on the following issue:

> I. Did the circuit court err in denying Porter's request to give additional instructions on self-defense, including (1) "the right to act on appearances," (2), "the relevance of prior difficulties," and (3) "that a person does not have to wait before acting in self-defense?" State v. Nichols, 325 S.C. 111, 117, 481 S.E.2d 121 (1997)

The South Carolina Court of Appeals denied the motion to be relieved as counsel and directed the parties to brief the issue. Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction on the merits. State v. Porter, Op No. 2022-UP-173 (S.C. Ct. App. filed April 20, 2022). The Remittitur was sent on May 13, 2022.

CURRENT APPLICATION

On August 9, 2022, Applicant filed this current PCR application alleging he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
   a. Counsel failed to make timely objections.
   b. Counsel did not investigate crime scene.
   c. Counsel presented an invalid defense.

Applicant requested relief in the form of the vacation of his conviction.

On October 16 at the evidentiary hearing, Applicant presented an unfiled amended PCR application alleging:

1. Ineffective Assistance of Counsel

[1] Anders v. California, 386 U.S. 738 (1967).

a. Failure to adequately negotiate and/or explain any and all plea offers in this case, including but not limited to, all possible benefits of said plea offers and the consequences of rejecting same;
b. Failure to preserve the appellate issue that the trial judge erred in denying Applicant's request to give additional instructions on self-defense, including the right to act on appearances and that a person does not have to wait before acting in self-defense.

Ineffective Assistance of Counsel

In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). To prove ineffective assistance of counsel, the applicant must show counsel was deficient, and the deficiency prejudice applicant. Strickland v. Washington, 466 U.S. 668 (1984). When evaluating deficiency, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C at 117, 386 S.E. 2d at 635 (quoting Strickland, 366 U.S. at 690). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to received relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. To prove prejudice, an applicant must prove counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 117-18, 386 S.E.2d at 625.

Failure to Make Timely Objections

Applicant failed to present any evidence, testimony, or legal authority regarding these allegations at the evidentiary hearing. "When a party provides no legal authority regarding a particular argument, the argument is abandoned, and the court will not address the merits of the issue." Palmer v. State, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019) (citing State v.

Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011). Therefore, the Court deems this allegation abandoned.

Failure to Investigate Crime Scene

Applicant failed to present any evidence, testimony, or legal authority regarding these allegations at the evidentiary hearing. "When a party provides no legal authority regarding a particular argument, the argument is abandoned, and the court will not address the merits of the issue." Palmer v. State, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019) (citing State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011). Therefore, the Court deems this allegation abandoned.

Failure to Present a Valid Defense

Applicant failed to present any evidence, testimony, or legal authority regarding these allegations at the evidentiary hearing. "When a party provides no legal authority regarding a particular argument, the argument is abandoned, and the court will not address the merits of the issue." Palmer v. State, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019) (citing State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011). Therefore, the Court deems this allegation abandoned.

Failure to Communicate Plea Offers

Applicant alleged counsel was ineffective for failing to explain all plea offers in this case and the benefits and consequences of the pleas. This Court finds Applicant did not prove this ground. Counsel testified that he engaged in plea negotiations and received a 20-year offer. Counsel testified that he thoroughly explained the offer to Applicant, and he had no concerns with Applicant's understanding.[2] Counsel testified he met with Applicant at least nine times and had

[2] Included in the record is a letter from counsel dated May 23, 2027, to Applicant conveying the 20-year plea offer.

extensive written correspondence with Applicant. This Court finds counsel's testimony *credible.* Based on the record and counsel's credible testimony given at the PCR hearing, this Court finds counsel was not deficient. Counsel relayed and discussed the plea offer to Applicant, and Applicant chose to reject the plea offer and roll the dice and proceed to trial. Applicant has failed to prove deficiency and prejudice and thus, this claim is denied.

Failure to Preserve Appellate Issue

Applicant alleged counsel was ineffective for failing to preserve the appellate issue that the trial judge erred in denying Applicant's request to give additional instructions on self-defense, including (1) "the right to act on appearances," and (2) "that a person does not have to wait before acting in self-defense." This Court finds Applicant did not prove this ground. First, although not requested by counsel, the right to act on appearances *was* charged to the jury. (Tr. 319). Therefore, the record directly refutes Applicant's allegation.

Second, counsel was not deficient for failing to request the additional charge "that a person does not have to wait before acting in self-defense" because Applicant was not entitled to the additional jury charge. "Once the right to fire in self-defense arises, a defendant is not required to wait until his adversary is on equal terms or until he has fired or aimed his weapon in order to act." State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000). Here, the right to self-defense never arose because Applicant was the aggressor and brought the situation on himself. The victim tried to leave multiple times while Applicant followed him. First, the victim walked away from Applicant by going into the Quick Mart, and Applicant proceeded to wait for him for two minutes outside of the store. (Tr. 60). The victim then tried to leave again by walking to his vehicle, and Applicant followed him to his vehicle. (Tr. 61). Although instructed, Applicant was not entitled to the basic self-defense charge, much less any additional self-defense instructions. Critically, no evidence

showed the victim ever approached or threatened Applicant. This Court finds counsel was not deficient in failing to request this charge because there was no evidence to support it. Further, Applicant did not prove that had counsel requested the instruction and it had been given, there is a reasonable probability the outcome would have been different and thus, failed to prove prejudice. See Cherry at 117-18, 386 S.E.2d at 625. Applicant has failed to prove deficiency and prejudice and thus, this claim is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post–conviction relief is **DENIED and DISMISSED WITH PREJUDICE**.

Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The Application for Post–Conviction Relief is denied and dismissed with prejudice; and

2. Applicant shall be remanded to and remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 24 **day of** November, **2025.**

2766

THOMAS WILLIAM MCGEE, III
Presiding Judge
Ninth Judicial Circuit

Columbia, South Carolina

SM/0318756
WITNESSES

North Charleston Police Department

AGENCY CASE NUMBER

2016-011303

ARREST WARRANT NUMBER

2016A1010201705

DATE OF ARREST

05/09/2016

ACTION OF GRAND JURY

TRUE BILL NOV 15 2016

Foreperson of Grand Jury *Date:*

VERDICT

Foreperson of Petit Jury *Date:*

DOCKET NO. 2016-GS-10-06124

The State of South Carolina

County of Charleston

FILED
11/22/2016 5:06:04 PM
JULIE J. ARMSTRONG
CLERK OF COURT

COURT OF GENERAL SESSIONS

NOVEMBER TERM 2016

THE STATE

VS.

DERRICK LAMAR PORTER
B/M DOB: [redacted]-1987

Indictment for

ATTEMPTED MURDER

SC Code: § 16-03-0029
CDR Code: 3410

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

INDICTMENT

At a Court of General Sessions, convened November 2016, the Grand Jurors of Charleston County present upon their oath:

ATTEMPTED MURDER

That in Charleston County, South Carolina, on or about April 16, 2016, the Defendant, Derrick Lamar Porter, did, with intent to kill and malice aforethought, attempt to kill Fritzgerald Byas. This is in violation of Section 16-3-29 of the South Carolina Code of Laws (1976) as amended.

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

Geoff Scott Maynor

GEOFFREY SCOTT MAYNOR
ASSISTANT SOLICITOR

SM/0318756
WITNESSES

North Charleston Police Department

AGENCY CASE NUMBER

2016-011303

ARREST WARRANT NUMBER

2016A1010201706

DATE OF ARREST

05/09/2016

ACTION OF GRAND JURY

TRUE BILL

NOV 15 2016

Foreperson of Grand Jury *Date:*

VERDICT

Guilty

4/12/18

Foreperson of Petit Jury *Date:*

DOCKET NO. 2016-GS-10-06125

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

NOVEMBER TERM 2016

THE STATE

VS.

DERRICK LAMAR PORTER
B/M DOB: [redacted]-1987

Indictment for

POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

SC Code: § 16-23-0490
CDR Code: 0549

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

INDICTMENT

At a Court of General Sessions, convened November 2016, the Grand Jurors of Charleston County present upon their oath:

POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

That in Charleston County, South Carolina, on or about April 16, 2016, the Defendant, Derrick Lamar Porter, did possess a firearm or did visibly display what appeared to be a firearm or did visibly display a knife during the commission of or attempted commission of a violent crime, to wit: attempted murder; in violation of Section 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.

Geoff Scott Maynor

GEOFFREY SCOTT MAYNOR
ASSISTANT SOLICITOR