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STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM RICHLAND COUNTY

Diane Schafer Goodstein, Circuit Court Judge

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S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

CURTIS J. SIMMS,

APPELLANT

APPELLATE CASE NO. 2013-001219

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Marque Hall - Cross-Examination by Ms. Walker

1 A You can see it through the window. We were that
2 close to the road.

3 Q With Lauren Coggin sitting on his lap?

4 A Yes, ma'am.

5 Q They looked through the window and saw that?

6 A Yes, ma'am.

7 Q Okay. Now, you also said that Curtis got out of
8 the car and walked up to the victim in this case?

9 A Yes, ma'am.

10 Q And he got in his personal space, those were your
11 words.

12 A Yes, ma'am.

13 Q After Curtis walked up to the victim in this case
14 and got in his personal space, the victim pushed him away?

15 A Yes, ma'am.

16 Q And that's when he was -- and that's when Curtis
17 Simms hit the victim?

18 A Yes, ma'am.

19 Q And he hit him so hard a that you could hear the
20 hit?

21 A Yes, ma'am.

22 Q And it knocked him out?

23 A Uh-huh, yes, ma'am.

24 Q After the hit, he went immediately down to the
25 ground?

Marque Hall - Cross-Examination by Ms. Walker

1 A Yes, ma'am.

2 Q And he was knocked out there on the ground?

3 A Yes, ma'am.

4 MS. WALKER: One moment, Your Honor.

5 THE COURT: All right.

6 MS. WALKER: No further questions.

7 THE COURT: Very well. Redirect?

8 MR. GASSER: No, ma'am.

9 THE COURT: Very well. You --

10 Is this witness free to leave?

11 MR. GASSER: Yes, ma'am.

12 THE COURT: Okay. Any objections?

13 MS. WALKER: No, ma'am.

14 THE COURT: You are free to go.

15 Call your next witness, please.

16 MR. GASSER: The defense would call David bird.

17 DAVID BYRD,

18 having been duly sworn, testified as follows:

19 THE CLERK: Please have a seat. State your full

20 name for the record.

21 THE COURT: Yes, sir, and would you please state

22 your name for the record again.

23 THE WITNESS: David Byrd.

24 THE COURT: All right. Can you move that

25 microphone just a little bit.

David Byrd - Direct Examination by Mr. Harris

1 THE WITNESS: How is this.

2 THE COURT: Say again, your name.

3 THE WITNESS: David Byrd.

4 THE COURT: Perfect.

5 THE WITNESS: Thank you.

6 THE COURT: Your witness.

7 MR. HARRIS: Thank you, Your Honor.

8 DIRECT EXAMINATION

9 BY MR. HARRIS:

10 Q Mr. Byrd, would you please introduce yourself to
11 the jury and tell them a little bit about your background?

12 A Okay. My name is David Byrd. I'm a private
13 investigator here in Columbia, South Carolina. I've been
14 doing private investigative work since 1992. Prior to that
15 I was the police chief in Irmo, South Carolina for
16 approximately eight years. Two years prior to that I was a
17 patrolman out on duty. And in 2008, just for a short
18 period of time, I left the private investigator field and
19 went to work out at SLED as a senior agent. But we were
20 all -- a lot of people were let go because of the budget
21 cuts, so I went back into the private investigator field
22 and here I am today.

23 Q Mr. Byrd, at our request did you go to a particular
24 place in Columbia and take certain measurements?

25 A Yes, sir, I did.

David Byrd - Direct Examination by Mr. Harris

1 Q And would you tell us where you went, first of all
2 to take these measurements?

3 A Down on Shop Road where I understand this accident
4 occurred.

5 Q Measurements rather?

6 A Yes.

7 Q And what types of measurements did you take?

8 A I just took some measurements from where I believed
9 the accident had occurred back to where I was told some
10 witnesses may have seen or said they seen what occurred.

11 Q So you measured distances?

12 A Yes, sir.

13 Q What other types of measurements did you take?

14 A I did a grade measurement from the road back into a
15 parking lot.

16 Q Now, explain that if you would grade. Tell us what
17 you mean by a grade measurement?

18 A A falling of a distance from would be a grade from
19 the roadway down back of the parking lot where water runs
20 out of a roadway to the left or right. I placed a string
21 at the roadway and putted it back with a leveler and
22 therefore you would see the distance in inches.

23 Q Now, let's start with your grade measurements if we
24 can. I'm going ask, if you can first of all to identify --

25 MR. HARRIS: What, Your Honor, we have marked as 14

David Byrd - Direct Examination by Mr. Harris

1 through 20 for exhibit purposes.

2 THE COURT: Yes, sir.

3 BY MR. HARRIS:

4 Q Can you identify these photographs? Don't refer to
5 them, just identify them if you could, please. Tell us how
6 those photographs came to be taken.

7 A Yes, sir, these are photographs that I took.

8 MR. HARRIS: Your Honor, at this time, I would move
9 those into evidence.

10 THE COURT: Have you checked with the State?

11 MS. MCDUFFY: No, I haven't seen those yet.

12 No objection to these.

13 MR. HARRIS: Thank you.

14 THE COURT: Very well.

15 MR. HARRIS: May the witness step down, Your Honor.

16 THE COURT: He may.

17 MR. HARRIS: Thank you, very much.

18 BY MR. HARRIS:

19 Q I want to ask you if you would to take the
20 photographs as I hand them to you and hold it up to the
21 jury and speak loud enough so the court reporter can hear
22 you?

23 A I'll do that.

24 Q And explain to the jury what is depicted in each of
25 the photographs, in the order that I hand them to you?

David Byrd - Direct Examination by Mr. Harris

1 A Okay. This is what I was just explaining about the
2 grade from the roadway to the white line that would be, you
3 know, the white line going off of the roadway. I placed a
4 nail, pulled a string back 17 foot. This little yellow dot
5 is a leveler, just bubble simple leveler and when it's
6 levelled, that would show you the grade distance and the
7 drop of this land from this point to the end point.

8 Q Now, the point of margin, this white line light
9 here, tell us -- is that the white line on what road?

10 A Shop Road.

11 Q And that point where you are at what point is that
12 in term of the relevance to this case?

13 A That the where I could determine by photographs
14 that were given to me from the accident that night of where
15 the accident occurred.

16 Q Is that based on many of the photographs that have
17 been placed into evidence by the State?

18 A Yes, sir.

19 Q Now, if you would step that down, please.

20 A Yes, sir.

21 Q What is the -- what has been marked into evidence
22 adds Defendant's Exhibit 13 depict?

23 A This would be the yellow leveller and I wanted to
24 take a picture so I could show that it was levelled from
25 back here to my left would be the white line to the roadway

David Byrd - Direct Examination by Mr. Harris

1 going back into the parking lot just to show the bubble is
2 in the middle to show level.

3 Q Is that the same yellow bubble that is depicted in
4 this exhibit?

5 A Yes, sir.

6 Q Just close up?

7 A Yes, sir.

8 Q Okay. Defendant's Exhibit 16, Your Honor. Would
9 you identify that photograph and tell us what is depicted
10 in that photograph, please?

11 A This is the same leveler, same string and all I did
12 was go back about 4 foot from the white line back into that
13 parking lot and I laid the ruler, a yardstick on the other
14 side and did measurement from the ground up to the string.

15 Q And what -- would you tell us the distance, the
16 height of the grade from 4 feet from the white line?

17 A Okay. The 4 foot mark it's 4 inches and a quarter.

18 Q Tell us what that means?

19 A Well that would be the grade from the roadway going
20 down, downward. There would be a difference of 4 inches
21 and a quarter.

22 MR. HARRIS: Your Honor, Your Honor, I'm referring
23 to Defendant's Exhibit 17.

24 BY MR. HARRIS:

25 Q If you would can you identify that photograph

David Byrd - Direct Examination by Mr. Harris

1 again, please?

2 A Yes, sir, I took this photo right after this one.

3 All I did was move down the string to the 6 foot mark which
4 would be showing right here. And that measurement was just
5 under 6 inches, 5 inches three quarters.

6 Q And if you would refer to defendant's exhibit 18.
7 Walk us through that one, please.

8 A Same string, same time. I'm at the 8 foot mark
9 back into the parking lot and when I put the yardstick up,
10 I am now at 8 inches, just a hair over 8 inches on this
11 photograph.

12 Q So 8 inches, 8 feet from the white line?

13 A Yes, sir.

14 Q You are 8 inches below the level, the grade level of
15 the road?

16 A At 8 foot back into that parking lot.

17 Q I refer you this time to to defendant's exhibit 19.
18 The same question, sir.

19 A Yes, sir. Same level, same time. This is at the
20 12 foot point from the roadway and this is about 12 inches
21 and, not quite 12 and a half inches would be my
22 determination to the measurement.

23 Q So 12 feet away, the droop is 12 and a half inches?

24 A Yes, sir.

25 Q Defendants Exhibit 20.

David Byrd - Direct Examination by Mr. Harris

1 A Okay. This one is 13 foot back from the roadway
2 and this came up to be about 13 inches and a quarter in
3 grade.

4 Q So 13 feet back, the drop is now 13 and a half
5 inches?

6 A Yes, sir, approximately.

7 Q And the last exhibit, exhibit 21 as to grade, if
8 you would, please, explain that.

9 A All right. This is 17 foot from the roadway. The
10 drop, the grade came up to -- my glasses aren't working. I
11 believe that's right on the 14 inches grade.

12 Q You sure that's not 16 inches?

13 A It is. I blurred and I'm trying.

14 Q All right.

15 A I am not good with seeing this close up. You're
16 right. This says 16.

17 Q 16 inches?

18 A Yes, sir.

19 Q If you would take your seat, please?

20 A (Witness complies).

21 Q So 6 feet from the white line is a drop of 5 and a
22 half inches, is that a fair statement?

23 A That's correct.

24 Q Now, you were also asked, were you not, to develop
25 distance measurements?

David Byrd - Direct Examination by Mr. Harris

1 A I was.

2 MR. HARRIS: Your Honor, may I approach.

3 THE COURT: You may.

4 BY MR. HARRIS:

5 Q This has been marked into evidence as Defendant's
6 Exhibit 1. Can you identify that photograph?

7 A Yes, sir. I took it.

8 Q Tell us what that was, sir?

9 A In is the parking lot area that I was told that
10 some witnesses were pulling out of. I didn't know exactly
11 where they were pulling out going left or right, or
12 straight and that's when I did the four cone distance.

13 Q Okay. There are four cones, who put those cones in
14 that roadway?

15 A I did.

16 Q Now, at the time that you placed the cones in the
17 roadway, did you know where the victim -- where the
18 witnesses were exiting that parking lot?

19 A No, sir.

20 Q Was there another point of reference in terms of
21 measurements that determined?

22 A Yes, sir. The same point of reference on these
23 other photographs I just showed of where the accident
24 occurred.

25 Q And again, how did you come to make, determine that

David Byrd - Direct Examination by Mr. Harris

1 point of reference?

2 A By photographs that were provided from the incident
3 scene that night.

4 Q I want to hand you what has been marked for exhibit
5 purpose. Can you identify this photograph?

6 A Yes, sir.

7 Q And can you identify this photograph?

8 A Yes, sir. I took both of these.

9 Q Okay. May I have them back, please?

10 A You may.

11 MR. HARRIS: Your Honor at this time, I'd move it
12 in as Defendant's Exhibit 12 and 13.

13 MS. WALKER: Without objection.

14 THE COURT: Very well.

15 (WHEREUPON Defendant's Exhibits 12 and 13 were
16 entered into evidence.)

17 MR. HARRIS: Thank you.

18 BY MR. HARRIS:

19 Q Step down again, sir?

20 A Yes, sir.

21 Q If you would --

22 MR. HARRIS: We're referring at this time, Your
23 Honor, to Defendant's Exhibit 13.

24 THE COURT: All right.

25 BY MR. HARRIS:

David Byrd - Direct Examination by Mr. Harris

1 Q Hold that up and tell the jury exactly -- first of
2 all where that is?

3 A This is Shop Road at the accident scene.

4 Q And what does that depict?

5 A This again is that point that I had these other
6 pictures come off of that I could best come up with where
7 the accident occurred and put a cone there and then you
8 would go up to this other parking area where we believe
9 that some witnesses that they were at and there's three
10 cones up here.

11 Q And what particular relevance do the these cones
12 have to Defendant's Exhibit 1?

13 A Well, there were four cones up here and I placed
14 them 10 foot apart, so if you're looking at this picture,
15 that would be this one right here. One, two, three, so I
16 laid out three cones so I would know and be able to explain
17 the three cones on this picture.

18 Q So does this exhibit show the distance between --
19 or the sight between the point of reference come is where
20 the incident occurred with this third cone?

21 A Yes, sir.

22 Q If you would look at the other photograph and I
23 would have the same question about those?

24 A Yes, sir.

25 Q Same question about that photograph. What is

David Byrd - Direct Examination by Mr. Harris

1 depicted in that exhibit?

2 MR. HARRIS: And Your Honor, I'm referring at this
3 time to defendant's exhibit 12.

4 THE WITNESS: This is the same, but this would
5 somehow is distance between the same cone that as stated at
6 this point to the four cones which would be the fourth
7 cone, one, two, three, Curtisest to the right.

8 BY MR. HARRIS:

9 Q Now, there's been testimony that there was a car
10 with passengers somewhere between the third and fourth
11 cones. Do you have an exact distance to between those
12 cones?

13 A If you're dead center between those two cones, you
14 could figure out what the distance is from the third and
15 fourth.

16 Q Okay. If you would take this back to your seat?

17 A All right. Thank you.

18 Q How did you conduct the measurement between the
19 point of reference and the third and fourth cones?

20 A With the tape measurement from the accident scene.

21 Q Do you have it here today?

22 A I do, I brought the same measuring tape.

23 Q What is the distance from the point of reference
24 that you established to the third cone?

25 A The 95 -- it would be -- 105. I wrote it down on

David Byrd - Direct Examination by Mr. Harris

- 1 here. Right. The third cone is 115 foot and the fourth
2 cone is 125.
- 3 Q Okay. Do you have the tape measure?
- 4 A I do.
- 5 Q Would you step down?
- 6 A (Witness complies).
- 7 Q Let me hold on. You walk off 115?
- 8 A 115? Okay. Excuse me. I've got to go out.
- 9 Q Well, how far are you now?
- 10 A 53.
- 11 Q 53? So you're half way there?
- 12 A (Witness nodded head.)
- 13 Q That's 53 feet?
- 14 A Yes, sir.
- 15 Q Come on back.
- 16 Q Again the third cone measurement is?
- 17 A The third one? Where did my paper go. The third
18 cone was 115.
- 19 Q And the fourth cone?
- 20 A 125.
- 21 Q Okay. Were you asked to look at white lines?
- 22 A No, sir.
- 23 Q Mr. Byrd, would you answer any questions the State
24 may have? Thank you.
- 25 A Thank you.

David Byrd - Cross-Examination by Ms. McDuffy

CROSS-EXAMINATION

1
2 BY MS. MCDUFFY:

3 Q Mr. Byrd, when did you go out to take these
4 measurements?

5 A A couple of times. They're dated. The
6 photographs. The time and date on the 29th, January 29th.

7 Q Of what year?

8 A This year.

9 Q So last Tuesday?

10 A Yes, sir -- yes, ma'am.

11 Q So last Tuesday, you went out and took these
12 measurements and also looked at the grading?

13 A That's correct.

14 Q And can you -- on October 9th, 2010, can you
15 testify to what the grade was in the road?

16 A I cannot.

17 Q So you don't know if what you just testified to is
18 accurate on the night of October the 9th 2010?

19 A It's accurate on this date.

20 Q Last Tuesday?

21 A Yes, ma'am.

22 Q And if the victim was standing in the roadway and
23 Curtis Simms was standing on or near the white line, what
24 would the grade in the road have been?

25 A Run that by me one more time.

David Byrd - Cross-Examination by Ms. McDuffy

- 1 Q The victim is standing in the roadway?
- 2 A Yes, ma'am.
- 3 Q And Curtis Simms is standing on or about near the
- 4 white line, what would the grade have been?
- 5 A Little, if any.
- 6 Q No grade?
- 7 A I don't believe so.
- 8 Q And Mr. Byrd, which witness statements -- you said
- 9 on direct examination, Mr. Harris asked you and you said
- 10 that from witness accounts you determined where to place
- 11 the cones. Which witness statements were you referring to?
- 12 A No statements, it was just photographs that were
- 13 taken that night.
- 14 Q So you didn't review any witness statements?
- 15 A That is correct.
- 16 Q And you don't know where any witnesses in the case
- 17 said they were standing?
- 18 A That's correct.
- 19 Q So you just guessed?
- 20 A Where they were standing?
- 21 Q Uh-huh.
- 22 A No, I didn't have to guess. I just took the
- 23 measurements from where the area I knew they were. I did
- 24 not know -- I don't think I would -- I did not know where
- 25 they were. That's why I did the four cones so if they were

David Byrd - Cross-Examination by Ms. McDuffy

1 to come up with a place we would know approximately what --
2 how far they were away from the --

3 Q And you're not aware of where any witness -- where
4 any witness said they were.

5 Q Just that area of the other driveway.

6 Q And who provide id you with that information?

7 A Mr. Gasser. I believe it was Johnny Gasser.

8 Q So you didn't review a single witness statement?

9 A That's correct.

10 Q Didn't call a single witness and ask them to meet
11 you out there so you could be exact in your measurements?

12 A Well, I believe my measurements come up to where
13 the testimony is. I don't know what it is.

14 Q But you don't know?

15 A Correct.

16 Q And so you're relying on -- on -- on Mr. Gasser's
17 assertions to you and not on the witness statements
18 themselves?

19 A Correct.

20 Q And you would agree with me that it's important to
21 be exact in things like measurements?

22 A As close as you can get. It's important, yes,
23 ma'am.

24 Q You're not basing that on any witness account?

25 A No, I'm basing it on where I was told a car was

David Byrd - Cross-Examination by Ms. McDuffy

1 coming out as a witness approximately. Again, that's why I
2 did four different cones, so we would come up with a pretty
3 close footage of how far they were.

4 Q So in all actuality, you have no idea where the
5 witnesses said they were?

6 A I have not been in this courtroom.

7 Q And you're aware that written statements were taken
8 from witnesses in this case, correct?

9 A I would assume, yes, ma'am.

10 Q And none of those were made available to you?

11 A No, ma'am.

12 Q And Mr. Byrd, you were hired by the defendant?

13 A That's correct.

14 Q You're being paid to be here today?

15 A Yes, ma'am.

16 MS. MCDUFFY: No further questions, Your Honor.

17 THE COURT: All right. Redirect?

18 MR. HARRIS: No questions, Your Honor.

19 THE COURT: Very well.

20 Is this witness free to leave?

21 MR. HARRIS: Yes, ma'am.

22 THE COURT: Any objection?

23 MS. MCDUFFY: No, ma'am.

24 THE COURT: You are free to go.

25 Y'all you are next witness, please.

1 **MR. HARRIS:** Your Honor, may I approach, please.

2 **THE COURT:** Sure. (WHEREUPON, there was a bench
3 conference out of the hearing of the jury and the Court
4 Reporter.)

5 **THE COURT:** Ladies and gentlemen, there's a matter
6 that must be taken up outside your presence. Please return
7 to your jury room. Do not discuss the matter or allow
8 anyone to discuss it with you. We'll be with you shortly.

9 (WHEREUPON the jury left the courtroom at 10:19).

10 **MR. HARRIS:** Thank you, Judge. As I informed you
11 at the bench, we had about five minutes. We are to the
12 point where we're either going to call our client --

13 **THE COURT:** Uh-huh.

14 **MR. HARRIS:** If he chooses to testify and we will
15 go forward. If he chooses, if he elects not to testify,
16 however, we will move into the charge conference and
17 probably closing arguments. We would ask that you give us
18 five minutes to speak with him one last time. I don't know
19 if it is your policy or, Your Honor, to discuss again with
20 him his options. I didn't know what --

21 **THE COURT:** Heres what I would do.

22 **MR. HARRIS:** Okay.

23 **THE COURT:** First of all, I'm going to let you make
24 that choice.

25 **MR. HARRIS:** Yes, ma'am.

1 **THE COURT:** I have instructed him I am excited to
2 do it again. I am happy to do it again. If you would
3 think -- if you believe it would be of any assistance of
4 all let me know. If he has any questions, please let me
5 know. And if you believe remotely think I may be of
6 assistance, I'm delighted to do that again. And I will
7 allow you whatever time you need. You said five minutes.
8 We'll take whatever time you need.

9 **MR. HARRIS:** He was crystal clear after your
10 previous instruction, so I think he's fine with that.
11 Obviously, Your Honor, he's also had the weekend to speak
12 and the last few months to discuss these issues with his
13 lawyers. So five minutes, Judge and that's all we need.

14 **THE COURT:** Of course. You take whatever time you
15 need. Feel -- step into the conference room.

16 Very well. We will be at ease for a bit (WHEREUPON
17 a recess was observed.)

18 **THE COURT:** You back?

19 **MR. HARRIS:** Yes, ma'am. Thank you for the time to
20 collect our thoughts.

21 **THE COURT:** Sure.

22 **MR. HARRIS:** Your Honor, we have discussed this
23 case, where we were in the case with our client and with
24 his family and at this time, your client has indicated to
25 us that he would like for us to rest the presentation of

1 our evidence.

2 THE COURT: Very well. I need to hear from your
3 client.

4 Mr. Simms, you have previously been sworn in this
5 case. Is what Mr. Harris telling me correct.

6 THE DEFENDANT: Yes, ma'am, it is.

7 THE COURT: Do you want me to go over the
8 instruction that I went over with you the other day
9 regarding your right to testify or your right to exercise
10 your constitutional rights and Fifth Amendment.

11 THE DEFENDANT: No, ma'am, no thank you.

12 THE COURT: So you feel you understand all of these
13 matters.

14 THE DEFENDANT: Yes, ma'am, you explained them very
15 clearly.

16 THE COURT: Thank you. And do I understand that
17 your decision to testify or not to testify is the decision
18 that the ultimately your decision.

19 THE DEFENDANT: Yes, ma'am, I understand.

20 THE COURT: Very well. And have you decided then,
21 do you wish to testify or not to testify.

22 THE DEFENDANT: To not testify, Your Honor.

23 THE COURT: You wish not to testify.

24 THE DEFENDANT: Yes, ma'am, that's correct.

25 THE COURT: Very well. Thank you.

1 THE DEFENDANT: Yes, ma'am, thank you.

2 THE COURT: All right. Will there be any rebuttal
3 or reply?

4 MS. CAMPBELL: Yes, Your Honor.

5 THE COURT: All right. Very well. And -- and let
6 me just -- obviously, you guys will rest once the jury
7 comes out if you want to go ahead and rest now and then
8 motions or you can reserve them for after the State when do
9 you want to do it.

10 MR. HARRIS: I would prefer to reserve them, Your
11 Honor, if I could.

12 THE COURT: You can.

13 MR. HARRIS: Thank you.

14 THE COURT: All right.

15 Okay. Are you guys ready? Y'all are ready on the
16 reply and rebuttal.

17 MS. CAMPBELL: Your Honor, at this time we would
18 have a motion to pursuant to 14-7-1320 based on the last
19 witness's testimony. It would be in response to that. We
20 would ask that the jury be allowed to be taken to the scene
21 of the crime. We, pursuant to the statute, of course, we
22 would pay for the actually expenses and everything that's
23 required by the statute and at this time -- because they
24 have brought in two questions, something about measurements
25 and distances and ability to see at the scene. We would

1 request that the jury be taken to the scene.

2 THE COURT: Do you all wish to be heard.

3 MR. HARRIS: No, ma'am. It's up to your
4 discretion. I would like for them to go at nighttime. I
5 know that's not practical, but I have no objection. I know
6 it's in your discretion. We have photographs, we have
7 distances that have -- I mean, I don't know if they have
8 gone you know checked, the distances are what they are. I
9 don't think the road strung. There's no evidence that it
10 eroded away as to the grade. I don't know that we need to
11 do that, but...

12 THE COURT: All right. Talk to me a little bit
13 about how you're going to do it because there have been
14 cones and there have been a number of different areas that
15 have been discussed. Tell me specifically what you would
16 and how you would go about this.

17 MS. CAMPBELL: In the past, Your Honor -- and this
18 is just my experience with other judges. I don't mean to
19 presume. But in the past, basically there have been
20 deputies that have been sworn in. They have gone to to
21 scene, depending on what you would rule, Your Honor on
22 allowing the -- both parties, lawyers for both parties to
23 attend. No one is allowed to talk to them while they were
24 at the scene. They aren't allowed to actually talk to each
25 other at the scene. The jurors are not -- everyone is

1 there to observe and the deputies are there to ensure that,
2 you know, everything the properly handled. I don't know
3 what your practice is, Your Honor, but --

4 THE COURT: It seems to me that -- if I was to
5 consider it then a drive down Shop Road would be
6 sufficient. I mean, a drive down for that -- by the scene
7 because the scene is gone on on both sides and I think you
8 would just simply slowly if they have a bus or whatever,
9 that it simply drive by the scene and then drive by that
10 Condominium that's on the right and then come on back.

11 MS. CAMPBELL: That would be sufficient for us.

12 MR. HARRIS: Judge, the more we think about it,
13 Your Honor, we object. I think -- just -- and I apologize.

14 THE COURT: That's okay.

15 MR. HARRIS: I'm not trying to be difficulty, but
16 I've given this more thought.

17 THE COURT: I know.

18 MR. HARRIS: We're talking about a scene that
19 involves a nighttime incident.

20 THE COURT: Yes.

21 MR. HARRIS: You cannot replicate it. The fact of
22 the matter is what the stat is suggesting you do is go look
23 at distances that are in evidence. Grades that are in
24 evidence. You don't need to go to the scene to look at
25 distances that are in evidence. 115 feet is 115 feet. So

1 -- so the only other purpose to go would be for site lines
2 and the time of day just really -- there's no way to really
3 replicate that. The traffic, that can't be replicated and
4 things like that, Your Honor. So I just -- I just don't
5 see that -- I objected to going out there because I think
6 it gives the jury -- even if -- even if your suggestion
7 they just rode out there, it would give them -- it would
8 not give them an accurate depiction of what -- who what
9 people saw and how they saw it that particular evening.
10 We've put it in the distances to grade line. Not for site
11 lines and lighting and things like that. So we object.

12 THE COURT: I understand. Do this for me. I want
13 you both to just go pull the photographs that were used
14 because obviously not had the chance to view the
15 photographs.

16 MR. HARRIS: Okay.

17 THE COURT: You know the law and, of course, in the
18 condemnation, the law really does prefer photographs of
19 things where were they will work. But let me see. Now are
20 these all of the ones that you think are there for which
21 purpose?

22 MS. CAMPBELL: Those are the ones that the defense
23 put in, Your Honor. And that's to be the reasons that we
24 would be requesting, yes, ma'am. And you will notice,
25 there were cones placed in different areas and things of

1 that nature. We would just like -- and, of course, those
2 are daylight photographs as well.

3 THE COURT: And there's some others -- let me see
4 the other photos that were put in just to show the
5 location.

6 MS. CAMPBELL: The ones that were taken that night,
7 Your Honor.

8 THE COURT: Yeah.

9 MS. CAMPBELL: Yes, ma'am. Your Honor, here's some
10 of them and I will look to see if there are more.

11 THE COURT: Thank you so much. I also need State's
12 Exhibit 12, 13, 14 and State's Exhibit 5.

13 MS. CAMPBELL: Your Honor, here's the additional
14 ones and I believe one of those is not in evidence, but
15 just for your review.

16 THE COURT: Okay.

17 (WHEREUPON there was a pause in the proceedings.)

18 THE COURT: Which one of these photos are not --
19 give me the number that is not in evidence.

20 MS. MCDUFFY: No. 15 is not in evidence.

21 THE COURT: Okay.

22 MS. MCDUFFY: I think that's the only one that
23 should not be in there.

24 THE COURT: Okay.

25 MR. HARRIS: That one with the --

1 MS. CAMPBELL: No we substituted.

2 MS. MCDUFFY: 151 not in because it's similar to
3 16.

4 MR. HARRIS: Got it.

5 THE COURT: All right.

6 (WHEREUPON there was a pause in the proceedings.)

7 THE COURT: All right. I just -- let me for the
8 record I'm going put 15 aside for just a moment and I want
9 -- because I want the record to reflect that I have
10 reviewed the defense exhibits 12, 13, 1, 14, 15, 16, 17,
11 18, 19, 20 and 21 and I've also reviewed the State's
12 Exhibits 5, 12, 13, 14, 8, 3, 4, 6, 7, 9 and 11 and 10.
13 Sort of didn't do that in order at all. But I have
14 reviewed them.

15 And this is what I think. I think that -- that --
16 if these jurors were to go out there without the structure
17 of the testimony, I am convinced that it would be
18 confusing. I think that the State that evening did an
19 exceptional job in terms of photographing the angles, given
20 points of reference. I noticed that they even positioned
21 current people in photographs and when you look at that in
22 comparison with where the cones are on the photographs of
23 the defense, it's even helpful. My concern is that what I
24 have before me, I believe, will be helpful to the jury.
25 But if the jury depose out there and what it will be is

1 just a simple ride past and looked at this area, I do not
2 believe that that viewing would be as effective or helpful
3 for this jury as these photographs are in my view. And my
4 concern is that there could be other things changed and I
5 am convinced that if you look at these photographs and the
6 quality of the photographs even with -- even with the
7 photographs that have been done by the defense, I think if
8 anything that they are helpful to the jury on reviewing the
9 photographs from the night and convinced that in viewing
10 will add nothing at all to the jury's ability to make it's
11 determination. My fear is given the fact that there's such
12 a lack of control that it could be a hindrance and so for
13 that reason, I would respectfully deny your motion and your
14 exception thereto but before I absolutely do that, these
15 exhibits now that I have looked at with the exception of
16 15. The defendant's exhibits are in evidence, yes?

17 MS. CAMPBELL: Yes, ma'am.

18 THE COURT: I'm satisfied.

19 All right. Would there then be any rebuttal.

20 MS. CAMPBELL: Your Honor, that would be the only
21 -- we would like to just request that.

22 THE COURT: Would you call any decision that will
23 witnesses.

24 MS. CAMPBELL: No, ma'am.

25 THE COURT: No.

1 MS. CAMPBELL: We would like to -- just that will
2 be the extent of our request for rebuttal.

3 THE COURT: Got it. I got it. So all right. When
4 the jury comes back out then you will -- your reply, you
5 make your motion before the jury and then of course, I
6 think you have you have to be official about it what my
7 opinion will be and at that point, I'm going to tell the
8 jury that there are matters that I must take up outside
9 their presence and the only -- and I just ask the only
10 question is whether or not to send them to an early lunch
11 and then let them come back for argue and charge. What do
12 you think about that from the State? How do you feel about
13 that.

14 MS. CAMPBELL: Your Honor, I'm -- there were
15 many requests to charge submitted by the defense and that
16 could take a while longer than an hour, I think.

17 THE COURT: That's what I'm thinking. So I could
18 send them for an hour and a half and let them go to lunch
19 then they'll return and we'll have argument and charge.
20 Even if we work as long as 45 minutes that would give you
21 guys that time to either prepare or eat or both. .

22 MR. HARRIS: Judge, just so I'm, clear. I would
23 object to them making a motion to take the jury to the
24 scene that you've already ruled on. That puts me in the
25 position that I have to object to something that you've

1 already ruled on that I don't know that that needs to be
2 before the jury. You've ruled. They moved, you ruled, I
3 don't know why I wouldn't rest, Your Honor and that would
4 be the end of it. I'm really in a position where I would
5 have to object to something and that's.

6 THE COURT: You don't have to object.

7 MS. CAMPBELL: I would just request and you would
8 deny it, Your Honor.

9 THE COURT: Don't object.

10 MR. HARRIS: Okay.

11 THE COURT: You will be between the -- I will not
12 turn to you and say how do you feel about it.

13 MR. HARRIS: Thank you, Your Honor. That's
14 perfect.

15 THE COURT: All right. Let me have the jury,
16 please.

17 (WHEREUPON the jury entered the courtroom at 10:50
18 a.m.)

19 THE BAILIFF: All jurors are present, Your Honor.

20 THE COURT: Thank you, so much. All right.

21 MR. GASSER: Your Honor, at this time the defense
22 rests.

23 THE COURT: Very well. All right. Ladies and
24 gentlemen you have now heard the witnesses and received the
25 evidence which you will hear from the defense.

1 To the State will there be any reply?

2 MS. CAMPBELL: Yes, Your Honor, at this time
3 pursuant to South Carolina code 14-7-1320, we request that
4 the jury be allowed to be taken to the crime scene to view
5 it themselves.

6 THE COURT: Thank you. I've looked at the
7 photographs and am satisfied that there's sufficient
8 evidence that would add nothing and I would respectfully
9 deny your motion and your exception thereto.

10 Now, ladies and gentlemen, you have now heard the
11 witnesses and received the evidence which you will in this
12 case. What remains for us are the arguments of counsel and
13 my charge on the law. However, before we reach that point,
14 there are matters, there are things that I must do to
15 prepare for that and that's going to take me a little bit
16 of time so we're going to take a little bit of an early
17 lunch. While you're at lunch I will be doing the work that I
18 must do to prepare.

19 So you, ladies and gentlemen, it's now about eleven
20 o'clock. I'm going to ask you all to be back in your jury
21 room at 12:30. When you return, you will hear the
22 arguments of counsel and then my charge or my instruction
23 on the law. Because you have not heard the instructions on
24 the law or the arguments of counsel, you are not prepared
25 to deliberate. So over our lunch break, please remember do

1 not discuss this matter or allow anyone to discuss it with
2 you. Do not listen to anything, do not read anything about
3 this matter, radio. Television or internet. Do not
4 communicate about this matter whatsoever. You must --
5 again, you must receive all of the information from which
6 you will make up your mind here in court while court is in
7 session and you have not yet received all of that
8 information. You have not heard the arguments of counsel
9 and you haven't received my instruction on the law. Hence
10 do not discuss this matter or allow anyone to discuss it
11 with you. Have a good lunch and I will see you all at
12 12:30.

13 (WHEREUPON the jury left the courtroom at 10:53
14 a.m.)

15 THE COURT: All right. Thank you. Let me -- we
16 are now copping the charges so each of you can have a copy
17 of it. Probably my mistake to put out this many cops of it
18 but a last input. Why don't we do this. You all take a
19 comfort break and I'm in the jury room right back here so
20 meet me back there in about five or ten minutes. The jury
21 room, the --

22 MR. HARRIS: Yes, ma'am.

23 THE COURT: I'll see you in about ten.

24 MR. HARRIS: Judge, may I make a motion.

25 THE COURT: Oh, hello.

1 MR. HARRIS: No, no, I just --

2 THE COURT: Yes.

3 MR. HARRIS: I just from a procedural standpoint if
4 you wanted me to.

5 THE COURT: Absolutely, we'll do it now because you
6 might forget.

7 MR. HARRIS: Judge, I'll start this our by saying
8 that I worked for a Dillon County gentleman as a law clerk
9 many years ago who I'm very fond of and I know that you
10 know who I'm talking about. And at the conclusion of a
11 trial one time when I was his clerk, he dismissed them and
12 he said it was the right thing to do. Without going into
13 the law, without going into is standard without going to
14 the burden of proof without going into light most favorable
15 and he said it was the right thing to do. I was at a
16 seminar 25 years later and Judge Baxley was speaking who
17 adjust dismissed a matter of very importance to the State
18 had under similar circumstances. And he said just about
19 the same thing because after reviewing the evidence, it was
20 the right thing to do.

21 Now, that's just one way of saying that the
22 government, the State has not made the case sufficiently
23 and just take it from the jury. We would ask you do that
24 in this case, Your Honor. I think the evidence has come in
25 consistent in many regards regarding the State's witnesses

1 as well as ours. We would ask at this time that as to
2 involuntary manslaughter that you enter judgment acquitting
3 our client of that conduct.

4 THE COURT: Very well, thank you. I would
5 respectfully deny your motion. I'm noting, of course, your
6 exception. There is evidence on each and every element.
7 It's for the jury to determine what occurred. But
8 particularly, when you consider the evidence of the folks
9 from Kershaw County, there is a side from any of the other
10 evidence and I must determine whether or not there is
11 evidence on each and every element and there you have each
12 and every element in evidence and I respectfully deny your
13 motion and note your exemption thereto.

14 MR. HARRIS: Judge, and at this time we would renew
15 all our prior arguments incorporate all our arguments at
16 the conclusion of the State's case.

17 THE COURT: And likewise the same motions as result
18 of the breach of the peace of a high and aggravated nature
19 as well.

20 MR. HARRIS: That's correct.

21 THE COURT: Very well. For the same reasons, I
22 would respectfully deny your motions. And note your
23 exceptions thereto.

24 MR. HARRIS: Thank you, Your Honor.

25 THE COURT: All right. Take about ten minutes and

1 then come back to the jury conference. Informal.

2 (WHEREUPON a recess was observed.)

3 THE COURT: All right. Thank you all so much for
4 the informal charge conference. And is there anything from
5 the State before we bring the jury out.

6 MS. CAMPBELL: No, Your Honor.

7 THE COURT: The defense?

8 MR. HARRIS: The defense would just note that one
9 objection, Your Honor, having to do with self-defense.

10 THE COURT: Thank you.

11 MR. HARRIS: We submitted a charge, we ask -- we
12 understand the Court's ruling.

13 THE COURT: Thank you so much. Now, I would tell
14 the jury that the State will argue first followed by an
15 argument on behalf of Mr. Simms and then there will be a
16 reply on behalf of the state and I would simply tell the
17 jury that and that once the arguments are concluded there
18 will be a very short break which will be self-explanatory
19 and then I will explain to them the law applicable to this
20 case.

21 There will be another short break in which I tell
22 them when they reach that point and then I will tell them
23 that they will receive this case for their deliberations.

24 Now, Counsel, let me just share this with you. I
25 think in closing arguments of the lawyers are so important,

1 I don't like people -- you're coming in and out of the
2 courtroom. Tell me how y'all feel about that. I really
3 want them to be able to focus on you guys.

4 MS. CAMPBELL: Whatever you think is appropriate,
5 Your Honor.

6 THE COURT: I agree with Ms. Campbell.

7 THE COURT: Okay. Of course again, that doesn't
8 apply to families. If y'all need to step out, you can
9 still be able to help them out, but I'd like to keep the
10 traffic down in and out because I want the jurors to be
11 able to listen to what you have to say and not be
12 distracted.

13 Very well. And you -- welcome.

14 (WHEREUPON there was a pause in the proceedings.)

15 (WHEREUPON the jury entered the courtroom at 12:52
16 p.m.)

17 THE BAILIFF: All jurors present, Your Honor.

18 THE COURT: Thank you so much. Ladies and
19 gentlemen, let me tell you how we are going to be
20 proceeding. The first thing that is going to occur is
21 you're going to hear from one of the solicitors in their
22 closing arguments. Their first closing statement if you
23 will. You are then going to hear from one of the
24 attorneys from the defense in their closing arguments and
25 then you're going to hear reply argument from the State in

1 the solicitor's office from one of the solicitor's. In
2 their reply argument. Once the arguments are finished,
3 there will be a very short break. That will be
4 self-explanatory. Once that short break has ended, then I
5 will explain to you the law that is applicable in this
6 case. There will be another short break which I will
7 explain to you when we reach that point and then, ladies
8 and gentlemen, you will receive this case for your
9 deliberations.

10 At this time, I ask that you draw close as we
11 listen to the closing arguments of our attorneys. On
12 behalf of the State.

13 MS. MCDUFFY: Thank you Your Honor, may it please
14 the Court.

15 THE COURT: Yes, ma'am, Ms. McDuffy.

16 CLOSING ARGUMENTS

17 MS. MCDUFFY: Mr. Foreman, ladies and gentlemen of
18 the jury, I would first like to take this opportunity to
19 say thank you. Thank you on behalf of myself, Luck
20 Campbell and Megan Walker and the State of South Carolina.
21 And thank you on behalf of the family of the deceased
22 victim in this case Allen Martin Gasque.

23 You have all been a tremendously attentive jury and
24 we appreciate your service. I also would like to take a
25 second to apologize if there has been anything that I or

1 Ms. Campbell or Ms. Walker have done that offended you
2 during the course of this trial, I know for the past six
3 days things have gotten heated, there has been tragic
4 testimony, but the nature of these charges tends to bring
5 up that information. But the fact of the matter is, ladies
6 and gentlemen that we all have a job to do. It is your job
7 as the State of South Carolina to be ministers of justice.
8 It is the defense attorney's job to represent their client
9 and it is the judge's job to instruct you, the jury, on
10 what the law is that applies in this case. And just as we
11 each have a job to do, ladies and gentlemen. You also have
12 a job. You have the most important rule in this courtroom.

13 You, ladies and gentlemen, are the judges and
14 finders of fact, individually and when you get back into
15 that jury room to deliberate collectively. You will
16 determine if the defendant committed each and every element
17 of the crimes charged.

18 Ladies and gentlemen, up until now, the most
19 important thing you have done is that you took an oath.
20 You took an oath to set aside all bias and all prejudice
21 that you may have against the State of South Carolina or
22 against the defendant and render your verdict on two
23 things, the evidence and the law. Not guilty on bias,
24 passion, prejudice innuendo, conjecture, special issue but
25 on the evidence and the law.

1 And ladies and gentlemen that evidence has come
2 from two places, from the witnesses on the witness stand
3 and from the physical exhibits introduced in evidence
4 during the trial.

5 Now, what I'm going to do is take a few minutes and
6 instruct you on what the law is that applies in the case.
7 And then I'm going the sit down and Mr. Gasser will present
8 his closing statement on behalf of his client and then
9 after that Ms. Campbell will come and present the final
10 argument for the State in in matter. And after that, it's
11 up to you ladies and gentlemen after you are been
12 instructed on what the law is by judge good to apply the
13 facts, the evidence to the law and to render a verdict.

14 I just want to give you one little caveat. If I
15 say anything that contradicts what the judge says, please
16 take the law as the judge gives it to you because just as
17 you, ladies and gentlemen are the sole triers of facts
18 Judge Goodstein is the social judge of the law. Do not
19 take the law according to Joanna McDuffy or according to
20 Johnny Gasser but according to Judge Goodstein.

21 Ladies and gentlemen, as I said just a minute ago,
22 the evidence in this case has come from two places, the
23 testimony of the witnesses under oath on the witness stand
24 and the physical exhibits.

25 Now, you've heard testimony from people who are eye

1 witness to the case and that evidence, ladies and gentlemen
2 under the law is called direct evidence.

3 Direct evidence is evidence from an eyewitness,
4 from someone who perceived the event. Who saw it, smelled
5 it, touched it, who tasted it. Who use their senses to
6 perceive the event. There's also another type of evidence
7 and the law makes absolutely no -- they do not distinguish
8 between direct or circumstantial evidence.

9 Circumstantial evidence, there are two types of
10 evidence which are generally presented during a trial,
11 direct evidence and circumstantial evidence.
12 Circumstantial evidence is evidence of a person who asserts
13 or claims to have actual knowledge of a fact such as an
14 eyewitness. Circumstantial evidence is proof of a chain of
15 facts and circumstances indicating the existence of a fact.
16 The law makes absolutely no distinction between the weight
17 or value to be given to either direct or circumstantial
18 evidence, nor is greater degree of certainty required of
19 circumstantial evidence than of direct evidence.

20 You should weigh all of the evidence in the case
21 and after making all the evidence if you are not convinced
22 of the defendant's guilty beyond a reasonable doubt, you
23 must find him nothing. If on the other hand, ladies and
24 gentlemen, you are convinced of the defendant's guilt
25 beyond a reasonable doubt, then you must find him guilty.

1 An example of circumstantial evidence, ladies and gentlemen
2 is if you hear on the news before you go to bed that the
3 weatherman's forecasting snow and you go to bed and you
4 wake up and the entire neighborhood is covered in snow.
5 You didn't see it snow, you didn't hear it snow, but you
6 saw the snow the next morning. That is circumstantial
7 evidence that it snowed during the course of the evening.

8 Ladies and gentlemen, we as the State of South
9 Carolina have the burden of proof in this case just as we
10 do in every criminal case. We have to prove that the
11 defendant committed each and every element of the crime
12 charged beyond a reasonable doubt. And ladies and
13 gentlemen in this case, with these facts we welcome that
14 burden. Proof beyond a reasonable doubt is proof that
15 leaves you firmly convinced of the defendant's guilt.

16 There are very few things in this world that we
17 know with absolute certainty and in criminal law -- in
18 criminal case /EUS, the law does not require that proof
19 overcomes every possible doubt. If, based on your
20 consideration of the I have had, you are firmly convinced
21 that is defendant is guilty of the crime charged, then you
22 must find him guilty. If on the other hand there's a real
23 possibility that he's not guilty, then you must give him
24 the benefit of the doubt and find him not guilty.

25 The law does not require us to produce proof that

1 overcomes every possible doubt, ladies and gentlemen and we
2 are not required to produce proof that other comes -- I'm
3 sorry, we're not required to produce proof that makes you
4 absolutely certain whether or not there's reasonable doubt
5 as to the guilt of the defendant. And I submit to you,
6 ladies and gentlemen, in this case with these facts, there
7 is none.

8 We also must prove criminal intent. Ladies and
9 gentlemen, in order to establish criminal liability
10 criminal intent the required. Criminal intent is a mental
11 state, purpose intent knowledge, recklessness, or criminal
12 negligence. Criminal intent must be proven beyond a
13 reasonable doubt and ladies and gentlemen criminal intent
14 can be proven by the circumstances surrounding the event
15 itself. In this case, it's the circumstances surrounding
16 the assault. There's no way to prove intent to a
17 mathematical certainty. We cannot, you know, take the
18 defendant's brain and dissect it and see what he had in his
19 mind. So the law says that criminal intent may be inferred
20 from the circumstances shown to have existed at the time
21 the assault occurred. This is how you make the
22 determination of whether or not criminal intent was
23 present. It's not necessary to establish by direct and
24 positive evidence criminal intent, but it may be
25 established by inferences from the State as the conduct of

1 the defendant, his acts, his works. What he did leading up
2 to the assault, what he did prior to the assault, ladies
3 and gentlemen and I submit to you that we have met that
4 burden in this case.

5 As a result of Curtis Simms actions on October 9th
6 of 2010, he is charged with involuntary manslaughter.
7 Ladies and gentlemen, South Carolina is not like other
8 states. There aren't -- there's not first-degree murder,
9 second degree murder, things of that nature. There's
10 murder, voluntary manslaughter and involuntary
11 manslaughter. And we as the State make decisions as to
12 what people are charged with and in this case, we charged
13 the defendant with involuntary manslaughter which is the
14 unintentional killing, the unintentional killing of another
15 without malice while engaged in unlawful activity that is
16 not a felony and does not naturally tend to cause death of
17 great bodily harm. It is the unintentional killing while
18 engaged in an unlawful activity, an assault that does not
19 naturally tend to cause death or great bodily harm. Or it
20 is the unintentional killing of another without malice
21 while engaging in a lawful activity with reckless disregard
22 for the safety of others. Unintentional means the
23 defendant did not intend for anybody to be killed or
24 seriously injured.

25 Ladies and gentlemen, when Curtis Simms approached

1 the victim in this case, struck him multiple times and left
2 him under a moving car, that is involuntary manslaughter.

3 Criminal negligence also must be proved by the
4 State. And all criminal negligence means, ladies and
5 gentlemen is a reckless disregard for the safety of others.
6 An assault. He knocked him unconscious and you leave him
7 under the tire of a moving vehicle that is the reckless
8 disregard for the safety of others. A reckless disregard
9 for safety of others signifies an indifference to the
10 sequences of one's acts. Recklessness exists where one who
11 is aware that ordinary care or prudence requires him to use
12 certain precautions for the safety of others with unconcern
13 difference fails to use them or who aware of there course
14 of subject or act of negligence with you know concerned
15 indifference follows such course or does such act. This
16 signifies an indifference to the consequences of one act.

17 Recklessness implies the doing of the negligent act
18 knowingly. When the defendant knowingly knocked Allen
19 Martin Gasque unconscious, ladies and gentlemen, that is
20 criminal negligence.

21 We, as the state also must prove that the defendant
22 was a proximate cause of the injury. The law recognizes
23 that there may be more than one proximate cause. The acts
24 of two or more persons may combine and occur together as an
25 official proximal cause of the person. The defendant's act

1 may be regarded as the proximate cause if it is a
2 contributing cause to the death of the deceased. The
3 defendant's acts may not be the social cause of death
4 provide that it may be the proximate cause actually and
5 contributing to the death of the deceased. One who
6 inflicts an injury on another is deemed by law to be guilty
7 of homicide if the injury contributes immediately to the
8 death of the deceased. The fact that other causes also
9 contribute to the death of the deceased does not relieve
10 the defendant from responsibility.

11 But for Curtis Simms knocking Allen Martin Gasque
12 unconscious onto a moving -- onto a moving road into heavy
13 traffic and leaving him there, Allen Martin Gasque would be
14 alive today. But for Curtis Simms acts, Allen Martin
15 Gasque, would be alive. And Curtis Simms is the probable
16 cause of his death. The judge is also going to instruct
17 you on intervening acts. Any cause intervening between the
18 first wrongful cause and a final injury which might have
19 reasonably been you know for seen or you know anticipated
20 by the original wrongdoer is not a sufficient intervening
21 cause and does not -- does not relieve the original role as
22 character in law as an approximate cause of the final
23 death.

24 Ladies and gentlemen an intervening cause will not
25 relief Curtis Simms of his liability of his guilt of his

1 responsibility in the death of Allen Martin Gasque and
2 unless it was unforeseeable and ladies and gentlemen, I
3 submit to you and I told you earlier that we actual believe
4 the bias and prejudice aside, but what question didn't ask
5 you to leave, ladies and gentlemen is your common sense.
6 The defense wants you to believe that it is you know
7 foreseeable that knocking someone unconscious into the
8 roadway under a moving car, it is you know foreseeable that
9 person will get run over.

10 Ladies and gentlemen, that's not reasonable. When
11 you knock someone unconscious onto the roadway under a
12 moving car abdomen they then get run over, that is for
13 foreseeable, ladies and gentlemen.

14 The defendant in this case is also charged with
15 breach of peace of a high and aggravated nature. Breach of
16 peace of a high and aggravated nature means that the
17 defendant knowingly, willfully and intentionally disturb
18 the public order and the the public tranquility through his
19 conduct accompanied by a circumstance of aggravation. And
20 the judge will give you some examples of circumstances of
21 aggravation, ladies and gentlemen. And anything can be a
22 circumstance of aggravation. Serious injury can be a
23 circumstance of aggravation, which I submit to you, ladies
24 and gentlemen, the State's proven in this case. A
25 difference in physical sizes and characteristics of the

1 parties. It can be a circumstance of aggravation and that
2 has been proven in this case.

3 And, ladies and gentlemen, in this case, the breach
4 of peace was not a normal and ordinary breach of peace. It
5 was one of a high and aggravated nature. Because this
6 breach of peace disrupted thousands of individuals, caused
7 Shop Road to be closed down and disrupted the normal
8 ordinary flow that day. He didn't just disrupt it for five
9 minutes or three minutes, but for hours and hours, ladies
10 and gentlemen. Because of the defendant's conduct when he
11 breached the peace in a high and aggravated nature.

12 Ladies and gentlemen, the defendant has raised the
13 defense of -- has raised the issue of self-defense in this
14 case and the burden is on the State to prove that the
15 defendant did not act in self-defense. We, as the State
16 must prove to you that he was not acting in self-defense at
17 the time this occurred. We must prove the defendant was
18 without fault in bringing on incident.

19 Ladies and gentlemen, all four of these elements
20 must be satisfied, or else you cannot find that he was
21 acting in self-defense. Without fault in bringing on the
22 difficulty. He was absolute lie with fault in bringing on
23 the difficulty, ladies and gentlemen. He got out of his
24 car. He approached the victim. He brought on the
25 difficulty and therefore, ladies and gentlemen, I submit to

1 you that he acted in self-/TKREFS.

2 Ladies and gentlemen, he believes he's in imminent
3 danger of losing his life or sustaining serious bodily
4 injury. The testimony from the witnesses, ladies and
5 gentlemen, was that Allen Martin Gasque was sitting in the
6 car when the defendant began to attack him -- or if you --
7 or taking the defendant's witnesses and what they said,
8 ladies and gentlemen, that he -- the victim assumed a
9 defense sieve posture and flinched, or once the defendant
10 entered the victim's personal space that he pushed him back
11 slightly, a person who's 6 inches shorter and weighs a
12 hundred pounds less and that a reasonably prudent person
13 would have entertained the same brief. I submit to you
14 ladies and gentlemen that this is not self-defense.
15 Finally, the defendant had no other probable means of
16 avoiding the danger, which he absolutely didn't do, ladies
17 and gentlemen. He could have walked back the the car. He
18 could have walked back to his car. The victim was
19 approaching him, was not coming after him, ladies and
20 gentlemen. If you believe the witnesses the defense
21 presented, all the victim was doing was standing beside his
22 car.

23 The defendant is the one that was approaching. The
24 defendant is the one who brought on the difficulty and he
25 did probable -- of avoiding the danger. And therefore,

1 ladies and gentlemen, we believe the State's proven beyond
2 a reasonable doubt that the defendant was not acting in
3 self-defense when this occurred.

4 The judge is also going to charge you about the law
5 dealing with mutual combat. Mutual combat, ladies and
6 gentlemen is defined in the law. If the defendant
7 voluntarily planned in mutual combat for purposes other
8 than protection, the killing of the victim would not have
9 be an effect of this.

10 Ladies and gentlemen, and I submit to you that's
11 exactly what happened. When the defendant approached Allen
12 Martin Gasque, he was not doing so to protect himself. He
13 was doing so to fight and therefore, ladies and gentlemen,
14 under the law I submit that he is not entitled to a defense
15 of self-defense. This is true and even during combat the
16 defendant feared death or serious bodily injury. However,
17 before the death was committed, the defendant with draws
18 and tries in good faith to avoid further conflict, either
19 by word or action, ladies and gentlemen, that's not what
20 happened in the in case. He knocked him unconscious.

21 Ladies and gentlemen, he was not going there to
22 protect himself. He was going there to fight and;
23 therefore, he's not entitled to self-defense.

24 Finally, ladies and gentlemen, I want to tell you a
25 little bit about the curability of witnesses. I submit to

1 you that as jurors, one of the most important jobs is to
2 determine the credibility of each and every witness that
3 takes this witness stand, that comes up here and swears
4 under oath to tell the truth, the whole truth and nothing
5 but the truth. And in determining credibility, all we ask
6 that you use your common sense. In your everyday lives,
7 every day, you make determinations about people's
8 credibility or believability. Use your common sense and
9 your knowledge of human nature to determine whether or not
10 these witnesses are credible. Some of the factors you
11 consider, the demeanor of the witness on the witness stand.
12 Was the witness fourth right or hesitant. Was the
13 testimony of the witness consistent? Was the testimony of
14 the witness corroborated, or does the witness have a reason
15 to be biased or prejudiced, ladies and gentlemen?

16 Think about each and every witness and determine
17 their credibility, their believability using your common
18 experiences and your common sense. What reason did the
19 Echenroths, the couple from Camden that was in the car
20 directly behind the victim have, ladies and gentlemen, did
21 they have bias? Do they have prejudice? Did they know the
22 victim in this case? No, ma'am and no, sir. Did they have
23 any reason not to tell the truth, the whole truth and
24 nothing but the truth.

25 Or let's take the Lindsey twins. The Lindsey twins

1 testified that they had helped the defendant out of trouble
2 in Alabama and they brought him up here to try to help him
3 out and the defendant was like a brother. Did they have
4 reason to be biased or prejudiced or are they just trying
5 to help there friend out again? Use your common sense and
6 determine their credibility and believability of the
7 witnesses in this case.

8 You can believe all of what a witness said, some of
9 what a witness said or none of what a witness said. You
10 can believe one witness against many or many witnesses
11 against one. It is up to you to determine the credibility
12 and believability of the witnesses in this case.

13 Now, ladies and gentlemen, like I said, you have
14 heard all of the evidence in this case and the evidence
15 comes from the testimony of the witnesses and the physical
16 exhibits. What is not evidence in this case are opening
17 statements, questions that we, the attorneys have asked or
18 closing arguments. That is not evidence in this case. The
19 only evidence is the testimony of the witnesses and the
20 physical exhibits. What's also not evidence in this case
21 is innuendo, conjecture, speculation or just plain old wish
22 full thinking.

23 Ladies and gentlemen, the word verdict comes from
24 the Latin term verdicto, which means to speak the truth.
25 All we ask you to do is to take the facts as you determine

1 them and apply them to the law and render a verdict, a just
2 verdict, a verdict this speaks the truth, a verdict of
3 guilty for the charges of breach of peace of a high and
4 aggravated nature and involuntary manslaughter. Thank you.

5 **THE COURT:** Thank you. On behalf of the defense?
6 Mr. Gasser?

7 **MR. GASSER:** Beg the Court's indulgence one moment.

8 **THE COURT:** Certainly.

9 **MR. GASSER:** Thank you, Your Honor, may it please
10 the Court.

11 **THE COURT:** Yes, sir.

12 **MR. GASSER:** Good afternoon, ladies and gentlemen.
13 I too on behalf of Mr. Harris, my law clerk, Curtis Simms
14 and his parents would like to thank you for the attention
15 that you have given this matter over the last five days,
16 from last Tuesday through this morning. When I haven't
17 been asking questions of witnesses in direct examination
18 and cross-examination, I've had the opportunity over at my
19 table to watch each and everyone of you while witnesses
20 came up to this witness stand and testified. Some you
21 heard for a lengthy period of time and some of them for a
22 short period of time. The one thing all fourteen of you
23 jurors, all fourteen of you did was play -- take -- was pay
24 very close attention to each of the witnesses that came
25 before you and that's a sign of respect and you showed all

1 of these witnesses the respect that you knew how important
2 this case was. And regardless of whatever your verdict is,
3 when you reach a verdict, not in the middle of the week,
4 not next week, not a month from now, nobody -- nobody can
5 say that you jurors did not give this case your due
6 diligence and I truly thank you for that. If you recall my
7 opening statement, I told you and asked you that during the
8 course of the witness testimony and evidence presentation,
9 during the course of this trial, that there would be
10 several themes or issues that would be important to pay
11 close attention to. I'm going to talk to you a little bit
12 about that early on in my closing.

13 I told you that you're going to hear significant
14 discrepancies and certain alleged eyewitness accounts of
15 what occurred on October 9, 2010, at approximately 8:30 in
16 the evening on Shop Road at this tailgate spot, that there
17 would be discrepancies. I indicated to you that. I told
18 you that the people that were closest to the situation, to
19 the episode were the individuals that were right there,
20 they had the best vantage point to see clearly what
21 occurred what Mr. Paxton was doing, what Mr. Gasque was
22 doing and what Mr. Simms was doing.

23 And that theme, that issue, that premise has been
24 made clear to you through the testimony of the witnesses.
25 The people closest to the event had the best vantage point

1 to observe clearly and to hear what was going on.

2 I told you ladies and gentlemen that the evidence
3 would indicate and determine that Curtis Simms did not kill
4 anybody and you heard from the pathologist, Mr. Gasque,
5 unfortunately was killed as a result of being run over by
6 the vehicle that Mr. Paxton was driving. Curtis Simms did
7 not kill anybody. If this was a situation between two
8 individuals out of this respective vehicles, a fight
9 occurred between the two of them, Curtis Simms reacted to
10 Martin Gasque's conduct and that conduct between both
11 individuals did not amount to criminal recklessness and
12 that the evidence would indicate that. And I'll get to
13 that later on in my closing.

14 I also introduced to the concept of foreseeability.
15 What you're getting. It's critical. Criminal recklessness
16 and foreseeability are two of the fundamental issues that
17 you jurors are going to have to decide on back in the jury
18 room after the judge charges you on the law later on this
19 afternoon. Did this incident amount -- did Curtis Simms,
20 was he acting with criminal negligence, with recklessness,
21 with that criminal intent, with criminal intent of
22 recklessness? And was it foreseeable? Was it foreseeable
23 to anybody, anybody out there that evening that one friend,
24 admittedly not knowing where his friend was, admittedly
25 knowing that he had a duty of care, not knowing where his

1 friend was -- was it foreseeable that he would veer off the
2 side of the road and run over his own friend? Was it
3 foreseeable at that time and place? Not two years later
4 with the luxury of time.

5 You know, last night was the most watched sporting
6 event, we all know that, in the whole world. The Super
7 Bowl was last night. And there's a phrase and those of you
8 that are fans have heard this phrase and I'm sure the San
9 Francisco 49ers are using it right now. It's the phrase
10 called Monday morning quarterback. It's when the team --
11 when fans of a team that loses on a Sunday, they all get
12 together at the water cooler the next day or their talking
13 to their friends, their buddies and they talk about if only
14 the quarterback did this and if only the quarterback did
15 that, well then it would have been a different result. We
16 would have won that football game.

17 Those individuals, the Monday morning quarterbacks,
18 they have the benefit of hindsight. They have the benefit
19 of cool reflection and of time. They have that benefit to
20 look back and say well that guy was wide open. Why didn't
21 he hit him. They weren't there. This situation was
22 ongoing and it was quick. And what you're going to have to
23 determine based on the facts and circumstances you've
24 heard and based on what you've experienced -- you bring
25 that tool with you. You brought it with you in this

1 courtroom and you're going to have it with you in your jury
2 room. All of your life's experiences, and yes, your common
3 sense.

4 Was it foreseeable at that point in time? Was it
5 foreseeable at that point in time on October 9th?

6 Ladies and gentlemen, just so you know where I am
7 in my closing argument, I'm going to first talk to you a
8 little bit about a few legal principals, then I'm going to
9 discuss with you the witnesses that the State called. Then
10 I'm going to discuss with you the witnesses that were
11 called on behalf of the defendant and Mr. Simms' statement
12 that's in evidence, his version of events that he gave
13 police on October 9th 2010. And then I'll have some final
14 thoughts. That's kind of an outline, so you'll know the
15 flow of where I am during my presentation.

16 As I indicated before, you jurors heard testimony
17 about the conduct of basically three relevant parties that
18 were out there on -- on Shop Road near this area of the
19 tailgate spot, a Mr. Paxton, a Mr. Gasque and of course
20 Mr. Simms, Curtis Simms. You heard from several State
21 witnesses. You heard from James Martin. And let me be
22 clear about something. Let me talk to you a little bit
23 about credibility. Okay.

24 Let me talk to you first before I talk to you about
25 James Martin. Let me talk to you about some of these legal

1 principals which deal with credibility. Before I do that,
2 before I do that, I want to talk to you about the most
3 fundamental principals. The most fundamental principals.
4 Curtis Simms is presumed innocent. Every citizen charged
5 with a crime is presumed innocent. The burden of proof in
6 this case is the same as it is in every criminal case in
7 every state and in every federal district court in your
8 country. The burden of proof lies with the State or a
9 government to prove Curtis Simms guilty beyond each and
10 every reasonable doubt.

11 It is substantial burden as it should be when the
12 State, when a government accuses a citizen of a crime
13 particularly a homicide and the burden stays with the
14 State. It is with Curtis Simms right now. Curtis Simms is
15 an innocent man under the law as he sits there. He is an
16 innocent man as I am talking to you because he is cloaked
17 with the presumption of innocence. He is innocent until
18 and unless such time that twelve jurors find that the
19 prosecution has presented enough evidence to convince those
20 twelve jurors of each and every element of each crime a
21 citizen is accused of.

22 Curtis Simms has to burden. We had no burden. We
23 don't have to prove his innocence. The State has to prove
24 him guilty beyond each and every reasonable doubt. And I
25 submit to you there are significant reasonable doubts for

1 you to consider and I'm going to get to those.

2 Ladies and gentlemen, these two principals,
3 presumption of innocence and burden of proof, they are
4 profound. They are significant. They are extremely
5 important. They are the two most important constitutional
6 principals that citizens have when a government charges
7 them with a crime. Any citizen. Men and women have died
8 defending and protecting these principals. As I stand
9 before you jurors in two foreign lands, today, men and
10 women are dying defending and protecting these principals.
11 They are profound.

12 Curtis Simms is charged, as you know, with
13 involuntary manslaughter, which is the unlawful killing of
14 a human being, the unintentional killing of a human being
15 as a result of criminal negligence. You must find criminal
16 negligence. And the judge will define for you criminal
17 negligence. It is the reckless, the reckless disregard for
18 the safety of others. If one acts merely carelessly or if
19 one acts negligently and somebody ultimately is killed,
20 that is not enough under the law. Recklessness is
21 something more than mere negligent conduct or just careless
22 conduct. It is willful and wanton conduct.

23 Ms. McDuffy talked to you about the concept of
24 proximate cause, because you remember, Curtis Simms has not
25 killed anybody. Curtis Simms did not kill anybody. It was

1 the truck that ran over Mr. Gasque. And one of the most
2 important principals that you're going to be charged on is
3 the law of intervening acts and foreseeability. It is
4 critical in the case, we submit to you because not only has
5 the State not presented sufficient evidence that this --
6 this episode between Mr. Gasque and Mr. Simms right out
7 there two young men, both had been drinking. Mr. Gasque
8 with point 23 blood alcohol level, that was two people
9 outside of their vehicle getting ready to square off for
10 whatever reason. They were both careless. They not only
11 have not presented any evidence of recklessness, there's
12 also intervening cause an intervening act on the part of
13 Mr. Paxton that nobody at that time, not twenty-eight
14 months later, not with the luxury of hindsight, no in the
15 comforts of a courtroom, but at that time, at that place
16 and that short period of time intervening cause that is
17 independent of the conduct of the defendant and it was
18 adequate to cause death is an efficient intervening cause
19 of death and will relieve any wrongful conduct by the
20 defendant of his character in the law as the proximate
21 cause of death. Unless this intervening act was reasonably
22 foreseeable by the defendant.

23 Let's get one thing clear. Ms. McDuffy indicated
24 to you about him punching somebody under a moving vehicle.
25 There's been no evidence, none, that that truck was moving

1 prior to Curtis Simms having contact. None. Just the
2 opposite. Every single witness testified that that truck
3 was stationary. Every one. Intervening cause.
4 Intervening act. An intervening act that's not
5 foreseeable. Mr. Paxton, knowing he had a duty of care,
6 not knowing where his friend is, not waiting for the car in
7 front of him to move forward so he could move forward and
8 avoid Mr. Gasque, not saying put it in park because he
9 couldn't go forward and he couldn't go back. Knowing, not
10 knowing where his friend is, knowing he has a duty of care.
11 Who could ever have foreseen that. That one friend who's
12 been drinking who rode over his friend at that point in
13 time, out on that road and that is -- who could have
14 foreseen that. Every witness asked the question. That's
15 intervening act and foreseeability.

16 She'll charge you on the law of credibility. Just
17 as judge good is the sole judge of the law, you must accept
18 the law that judge good will charge you this afternoon.
19 You must accept that you've sworn an oath to do so. But
20 just as she is the judge of the law, you are jurors are the
21 sole judges of the facts. And with that responsibility,
22 you become the sole judges of the credibility and the
23 believability of the witnesses that have come before you
24 and you have a number of factors that you can use. It's up
25 to you to determine what factors each of you individually

1 and collectively in judging the credibility. One factor
2 that you have is whether or not when a witness told you on
3 this witness stand is corroborated. Is it supported by
4 other witness testimony and by logic? Is it supported by
5 other witness testimony and exhibits? Is it corroborated?
6 Is it supported.

7 Another is the demeanor of the witness when the
8 witness was testifying. Was the witness pleasant to the
9 lawyers? Their demeanor. You have a right to judge
10 people's demeanor. Were they pleasant? Yes, ma'am, no,
11 ma'am. And you saw the witnesses defense how respectful
12 they were of the prosecutors. Really pleasant. What was
13 their demeanor like. And most importantly as I indicated
14 to you in opening statements, one factor to determine
15 whether or not a witnesses testimony was accurate,
16 accurate, whether it was reliability is that witness's
17 opportunity to see what they saw they saw or hear what they
18 say they heard in a word or in a phrase, their vantage
19 point. Their vantage point. Who had the best vantage
20 point. Who had the best vantage point? Someone this far
21 away from where the witness stand is or somebody back at
22 the elevator? Who had the best vantage point, ladies and
23 gentlemen?

24 And one thing's important, this defense is not
25 inferring that Mr. Martin and Mr. Adams and Mr. And Ms.

1 Echenroth are lying. We never said that, we never inferred
2 that. Just the opposite. When I was asking them, when
3 Mr. Harris was asking them if they could be mistaken
4 because just as Investigator Holdorf admitted on the
5 witness stand, witnesses every day and every week and every
6 month in situations in law enforcement agencies across the
7 country, witnesses make mistakes all the time. All the
8 time. That eyewitness testimony can be, particularly at
9 night in a situation that's fast moving, in the dark,
10 eyewitness testimony can be significantly unreliable and
11 that is why particularly at night, the vantage point, we
12 submit to you is critical in your determination. Did that
13 person really see what they think they saw? Did they?
14 Because you heard of the vantage point that Mike Davis had
15 and the vantage point this morning, the vantage point that
16 marquee hall. Mike Davis has only met for the first time
17 only spoke to Curtis for the first time that day, October
18 9, 2010. The first time he ever spoke to him and the
19 second time was last Monday in our office. Mike Davis'
20 vantage point was right there. Marque's vantage point was
21 right there. And they corroborate /TKUS tin /HREUPBD and
22 Jordan Lindsey and Lauren Coggin, who the State called.
23 Their vantage point. They had the closest vantage point.
24 And Mr. Paxton, his testimony was significant and I'll get
25 to that in a minute as far as vantage point because he has

1 one of the best vantage point on one of the most important
2 issue that you're going to decide. The best vantage point,
3 less than 18 inches, but I'll get to that.

4 So those are some of the things, ladies and
5 gentlemen. And remember this is about vantage point and
6 opportunity. Because if you recall, this is not whether or
7 not witnesses came up here and didn't tell you the truth.
8 Because even Investigator Holdorf, even Investigator
9 Holdorf, the chief investigating officer in this case
10 admitted on that witness stand, admitted, we have no
11 evidence that Curtis Simms' witnesses are lying. We have
12 no evidence, the chief investigator. With the sheriff's
13 department, have no evidence that Curtis Simms witnesses
14 are lying. In fact, they put up witnesses to corroborate
15 Curtis Simms statement and the witnesses that we called on
16 Curtis Simms behalf on the must fundamental, significant
17 issue that you jurors will determine whether or not
18 criminal recklessness is present and such issues as
19 foreseeability. So let's get to it.

20 James Martin. James Martin is just simply
21 mistaken. His testimony is not reliable, I submit to you.
22 He's mistaken. Let's think about what he said and use your
23 common sense when you do so. James Martin admitted under
24 cross-examination with Mr. Harris that prior to giving his
25 statement to Richland County, several days after the

1 incident, that he had read about this in the newspaper. He
2 had gone on the internet. He had read people's opinions.
3 He had talked to people about what their opinions were as
4 to what happened. It's just common sense. It's just
5 normal human psychology is that all the information is now
6 in his brain and in his mind. He admitted that. All those
7 things people giving their opinion as to what they say
8 happened or what they think happened. He admitted that,
9 that he had all that in his mind when he went to give his
10 statement. It was dark out, he admits. He was staring
11 into headlights and he says he witnessed about eight
12 seconds worth of the episode. Dark, staring at headlights
13 about eight seconds. After talking with people about their
14 opinions. They're major inaccuracy number one. He was
15 absolutely positive that the vehicle that Curtis --
16 absolutely positive, possibly while sitting here telling
17 everything else that the vehicle Curtis Simms got out of
18 was a white SUV, absolutely positive. A white SUV. And
19 this is the you know contradicted testimony.

20 From Marque Hall, to Mike Davis, of Dustin Lindsey
21 and Jordan Lindsey, this is the vehicle and this is
22 important. Remember this. They asked Curtis Simms -- it's
23 in his statement -- Curtis Simms says he was in the green
24 truck. Before Curtis similars was even charged with breach
25 of trust, I mean breach of the peace. Before he's ever

1 charged, during his statement, one of the first things he
2 says, yeah we were in dusty's green pick-up truck. And
3 then the next morning, everybody that goes down there, the
4 Lindsey twins and then Mike Davis later on and Marque Hall
5 later on, a couple of days after the incident. Ask
6 yourselves this, how would they know that the phrase white
7 SUV would ever be an issue in this case. How would they
8 know that? How would they know that? They don't deny
9 James Martin. They have no idea. They didn't have access
10 at that point in time. We didn't have access to the same
11 thing. Immediately you know why because they were in the
12 green truck and that's something you can determine whether
13 or not Mr. Martin, whether or not his vantage point was
14 reliable. You can't get more off from a white -- from this
15 truck than calling it a white SUV. That's like saying I'm
16 wearing a white suit. Somebody coming into court saying I
17 saw Johnny Gasser giving that closing argument at Curtis
18 Simms trial and I swear to God he's wearing a white suit.
19 Really? White SUV.

20 Major inaccuracy number two. He was absolutely,
21 absolutely positive he was 15 yards away, 45 feet.
22 Absolutely positive. Now we went and did the measurements
23 and we did the measurements not knowing. Certainly we asked
24 our investigator last week. We had no idea which way he
25 was going to say he was going, to the left or to the right.

1 So we put out four cones. You heard our investigate ready
2 testify. Four different cones. And Mr. Harris, he didn't
3 lead him into this. Pick a cone. Mr. Harris -- we had no
4 idea what his response was going to be. Mr. Harris had no
5 idea what his response was going to be. Mr. Martin
6 somewhere between the third and fourth cone. Somewhere
7 between 115 and 110 feet from approximately where the
8 incident took place. Investigator Holdorf was sent out
9 thereby the prosecution team and he even said to here to
10 the end of the railroad thing was 96 feet. 15 yards. He
11 says he was 15 yards and 45 feet. 15 yards? What is 15
12 yards? What is the first down and a half? About here? 15
13 yards maybe? Investigator best of your recollection.
14 Mr. Harris had investigator best of your recollection, 45
15 feet has investigator best of your recollection, he wasn't
16 all the way up to the doors yet. He was standing at the
17 end of that railing, 53 feet. That far away at the end of
18 the railing, 53 feet and he was quoting Investigator
19 Holdorf more than 96 feet away. 53 feet, according to his
20 own -- pointing at between the third and fourth cone. He
21 was almost 40 yards away. He was at least to the
22 elevators. At night. Staring at the headlights. Not
23 expecting something to happen. Do you think he just could
24 be wrong. He could be mistaken?

25 Ladies and gentlemen, the government is asking you

1 to convict somebody of a homicide based on that. Based on
2 white SUV, based on testimony of somebody that really was
3 between 35 and 40 yards away staring into headlights.

4 And then remember what he said in response to
5 Mr. Harris, as my wife says, I've been wrong many, many,
6 many times before. That wasn't Mr. Harris questioning him,
7 that was him just spontaneously telling you jurors, as my
8 wife says, I've been wrong many, many times before. Well,
9 guess what? So have I. So has everybody in this
10 courtroom. That's human nature. We make mistakes.

11 His brother-in-law James Adams. Mr. Adams, if you
12 recall Mr. Adams he had somewhat of a recollection issue.
13 For the first ten to fifteen minutes when Mr. Harris handed
14 Mr. Adams his signed statement and Mr. Adams was looking at
15 it thinking it wuz his own handwriting for almost fifteen
16 minutes with this light, he thought a document in his hand
17 was his own handwriting for almost fifteen minutes and it
18 was Investigator Holdorf's. He couldn't even recognize his
19 own handwriting for almost 15 minutes. Almost -- I don't
20 know midway through his cross-examination, he thought that
21 the game started -- he thought that they were living at one
22 o'clock in the morning. He remembers that the game started
23 at seven o'clock. It was over three hours. I want was a
24 TV game and he stayed there for a couple of hours, it had
25 to be about one o'clock in the morning when we were

1 leaving. Four and a half, five hours after when the event
2 really happened. He's not lying, he's mistaken. There's a
3 difference and all of you jurors know the difference. Of
4 course, you do because you're all reasonable people with
5 common sense. You know the difference when somebody's
6 mistaken and when somebody's knowingly and willfully not
7 telling the truth. These four witnesses are mistaken.

8 He also was dark, dark out as he says, looking into
9 headlights and in a matter, at an incident that he said
10 happened in a split second. And he also, sitting next to
11 the passenger, so he technically was a couple of feet away.
12 The passenger in Mr. Martin's car. So he too was looking
13 through a window from 35 to 40 yards away, looking into
14 headlights in a split second. Is that reliable? Is that
15 enough to convict a citizen of a homicide or are they
16 simply mistaken on what they think they saw. Isn't that
17 more reasonable. And remember, it's reasonable doubt. If
18 you have a doubt. If you have a doubt that they may be
19 mistaken under the law you have to resolve that doubt in
20 the citizen's favor and the judge will charge you that. If
21 there's a doubt -- you know, I'm not sure whether or not
22 it's that far away, now that I look at it looking into
23 headlights as opposed to people up close? You must, under
24 your oath, must resolve all doubts in the favor of the
25 defendant.

1 So two men 35 to 40 yards away, at night, looking
2 into headlights, not expecting an event to happen, through
3 a window, a car window witness something for a matter of
4 seconds, one of which is absolutely positive that the
5 vehicle that Mr. Simms got out of is a white SUV and the
6 other of which could not even recognize his own handwriting
7 in a statement he was looking at in front of you jurors for
8 almost fifteen minutes. And the government wants you
9 citizens to convict one of your fellow citizens of a
10 homicide based on that testimony.

11 Mr. And Ms. Echenroth, again, mistaken. They are
12 simply mistaken. Not one lawyer has called them
13 intentional liars. Not one of us. Mr. Martin, Mr. Adams
14 and Mr. And Ms. Echenroth are merely mistaken. They're
15 mistaken. Mr. Echenroth -- Mr. Echenroth is absolutely
16 positive that this incident occurred at 6:45 about 6
17 o'clock 45 in the late afternoon, he was certain it was
18 light out. In fact, he said no cars even had their
19 headlights on. And you remember it was the State who
20 deputy tailor I believe it was the Richland County deputy,
21 this incident happened at 8:30. Got dispatched at 8:40.
22 Pitch dark out. Pitch dark out. But he was absolutely
23 certain it was light out. Nobody has their headlights on.
24 No question about it. He was listening to the post-game
25 show. He had listening, that issue to deal with inside of

1 his car. He was, of course, the driver of the car. So
2 whatever he says he thinks he saw is on an angle because
3 he's behind the driver of the truck as far as the straight
4 ahead.

5 He indicates that he's absolutely positive that the
6 vehicle that Curtis Simms got out of was either a station
7 wagon or an SUV. A station wagon or an SUV. He's looking
8 at a pick-up truck in front of him and he's got an even
9 better angle of the pick-up truck trying to get out but
10 he's absolutely certain that it's a station wagon or an
11 SUV. And this is critical. He thinks he says he saw. You
12 know what he tells you he saw? He saw Curtis Simms, he
13 says, punch the passenger of the black truck three to four
14 times. Because you remember, Mr. Martin and Mr. Adams
15 merely said that they saw this large man reach into the
16 truck. Reach into the truck. Mr. Echenroth says he saw
17 this large person bunch the passenger three or four times.

18 Now, ladies and gentlemen, okay. We know that Mr.
19 Paxton was driving that car. We all know that. Mr. Paxton
20 behind the wheel, Mr. Gasque in the passenger seat or the
21 better photograph, Mr. Paxton on the other side of this
22 armrest, Mr. Gasque right here. Curtis Simms is 6, 3, 285
23 pounds according to evidence that was brought out. 6, 3,
24 285 pounds. Do you think that a 6 foot, three, 285 pound
25 man walked up to a pick-up truck and punched the passenger

1 in that pick-up truck three to four times. And remember,
2 Mr. Paxton said the horn blew so he was looking at this
3 direction. He was looking at him and I'll get to his
4 testimony in a minute. I'll get to his testimony. Do you
5 think for one minute that the driver of the car, this close
6 to the passenger, looking right there, with a 6 foot 3, 285
7 pound man hitting him three or four times that he wouldn't
8 have seen it? I mean, it's almost comical if this wasn't
9 so serious that I have to sit here and make this argument
10 to you. This close. Mr. Paxton is this close to his
11 buddy. Of course that didn't hoop. He's looking because
12 of a hor blow. The horn blow before Mr. Simms or anyone
13 else gets out of the truck. His testimony, Mr. Paxton and
14 he's looking. Don't you think a 6 if the, 285 pound man is
15 punching this person, you'd know about it? That close. Or
16 could he just be mistaken. All doubts must be decided in
17 favor of the defendant. All reasonable doubts.

18 We knew that he was mistaken because he told you
19 Curtis Simms fled the scene as if he was leaving the scene
20 to get away. He had no idea that he left the scene to go
21 get help. So he was mistaken. Mistaken. They actually
22 believe they think they saw what they saw. If this episode
23 happened at night and nobody was expecting it, it's
24 inherently unreliable.

25 Ms. Echenroth. Ms. Echenroth acknowledged that in

1 her original statement, she never said that she saw any
2 punches. In her original statement, she didn't see the
3 passenger get punched. Now she recalls twenty-seven,
4 twenty-eight months later, she thinks she recalls the
5 passenger getting punched. I'm not going to go through
6 this whole scenario again. But the same argument applies.
7 Common sense. 6, 3, 285, when the driver is sitting there
8 saying that never happened. It never happened. I mean
9 regard -- even all the defense witnesses say that never
10 happened. Even Trevor Brown and I'm getting ready to get
11 to him. And Brian Kern say, that never happened. They're
12 just mistaken. And you remember when I asked her about --
13 on direct examination, do you recall Ms. Echenroth that you
14 indicated to this jury that you veered off -- the car
15 veered -- the truck veered to the right, veered to the
16 right? Because you remember, Mr. Gasque went down the side
17 of that truck and veered to the right. I didn't say that.
18 You're putting words in my mouth, Mr. Gasser. You remember
19 her? She accused me of putting words in her mouth. And I
20 understand lawyers like to put words in people's mouth.
21 But out of respect for her and out of respect for you, do
22 you remember? I walked over to this court reporter. I
23 asked the Judge, Judge Goodstein, I wanted to make sure. I
24 didn't want to put any words in -- it's an important fact
25 for you jurors. I didn't want to put words in her mouth.

1 And we were able -- I was able, using the court reporters
2 screen to tell her, ask her the question and read back to
3 her what the direct examination was in response to the
4 prosecution. Veered to the right. Y'all remember that?
5 The truck veered to the right. But do you know what phrase
6 she actually used in direct examination as well as veered?
7 You remember? She's a math/PH*T teacher. How many of you
8 remember the phrase she used? Acute. You remember that?
9 She referred to that as an acute angle. It's been
10 thirty-five years since I took that type of math. I had to
11 ask my fourteen-year-old son. I had to look it up in the
12 dictionary. Acute, somewhere between several and 90
13 degrees. An acute angle. Those weren't my words. Those
14 were the math teachers words, veering off. Mistaken about
15 punches. Although, Ms. Echenroth did see Curtis Simms --
16 don't you think it's more reasonable that what she saw --
17 remember in her statement, in her original statement she
18 said six to eight punches. Now it's -- I think she told
19 you four five six? But think about all the testimony that
20 you heard that after Curtis Simms, after Martin made the
21 initial contact on Curtis Simms and Curtis Simms rep
22 responded. Curtis Simms responded, he went down. And
23 think about all the testimony you heard as that truck
24 started rolling. He was trying to drag him away, to pull
25 him to safety, but the truck wheels up on his head. So he

1 started banging and banging on the truck. Think about all
2 the testimony you heard. Well, maybe. Don't you think
3 sitting in that car behind -- sitting down, looking through
4 the windshield, looking over the hood of the car.
5 Mr. Gasque is now down on the road. Don't you think what
6 she saw could have possibly been him hitting the truck?
7 Isn't that more reliable? Isn't that more logical based on
8 all the testimony of all the other witnesses that you
9 heard?

10 Trevor Brown. Trevor Brown indicated to you jurors
11 he thought he saw two punches. But the most important
12 thing Trevor Brown did to you jurors, Trevor Brown told you
13 jurors in response to Mr. Harris' question, Trevor Brown
14 said, he didn't see anybody reach in that truck. And he
15 didn't see any punches in that truck. Trevor Brown,
16 State's witness. He didn't see anybody reach in that truck
17 and he didn't see anybody -- no punches thrown. Completely
18 consistent with what Mr. Paxton said and completely
19 consistent with what Lauren Coggin said and completely
20 consistent with what Mike Davis, and Marquee Hall and
21 Dustin Lindsey and Jordan Lindsey and Curtis Simms said.
22 No reaching in. Curtis Simms didn't reach in. Curtis
23 Simms didn't hit anybody and that that truck, as as soon as
24 it started going, veered to the right. That's Trevor
25 Brown's testimony. The State's witness. And then they

1 called Brian Kern right after Trevor brown.

2 Ladies and gentlemen, this is significant what
3 Brian Kern said. You know what Brian Kern told you jurors
4 on direct examination to one of the prosecutors asking him?
5 What did Brian Kern say? Brian Kern said one of the first
6 things he recognized was Curtis Simms out in front of his
7 truck or his vehicle, he wasn't sure what it was. He saw
8 Curtis Simms out in front of his vehicle trying to get his
9 vehicle in traffic and turn left. Those are not my words.
10 Those are not guilty Mr. Harris' words. Those didn't come
11 out in cross-examination. Brian Kern, a State's witness,
12 told you jurors one of the first things he saw was Curtis
13 Simms out in front of his vehicle and what he assumed
14 watching Curtis Simms what he was doing, Curtis was trying
15 to help his vehicle get out in the traffic and turn left.
16 Brian Kern. The same thing that Dustin Lindsey and Jordan
17 Lindsey and Mike Davis told you and the same thing Curtis
18 Simms told the law enforcement what his intentions were.
19 Their witness.

20 He also says he recalls seeing Martin Gasque step
21 out of the vehicle before any punches were thrown. He saw
22 Martin Gasque get out of the vehicle before Curtis Simms
23 was even up to him. He saw the vehicle also veer to the
24 right as as soon as it started moving forward and he told
25 you jurors, he saw Curtis Simms leave to go get help and

1 was back in his mind within thirty-seconds.

2 Adam Paxton. Ladies and gentlemen, from the time
3 that Adam Paxton pulls up and stops in front of the
4 tailgate exit on Shop Road to the time that he starts
5 moving, his testimony to you jurors is wholly consistent
6 and supported and corroborated by Dustin Lindsey's
7 testimony and Jordan Lindsey's testimony and Lauren
8 Coggin's testimony and Mike Davis' testimony and marquee
9 hall's testimony. Remember when I told you one of the
10 tools you have is, is what somebody told you corroborated
11 by other witnesses? To the point in time as far as what
12 was transpiring visually, what Mr. Paxton, Mr. Gasque close
13 friend told you is basically the same thing that the
14 Lindsey twins and the defense witnesses and Lauren Coggin
15 told you. And much of which Trevor Brown and Brian Kern.
16 Because what does he say? He says he pulls up and he
17 remembers hearing the horn. He remembers hearing the horn
18 and he looks to his right. And he recalls, he says, Martin
19 Gasque saying something, sorry buddy. That's what he
20 recalls him saying. I'll get to that. But sorry buddy.
21 So he's looking to the right. And of course, he's looking
22 out the window and looking to the right as he tells you
23 jurors, this is on direct examination and I followed up
24 with him on cross and got him to say is same thing again.
25 He's looking to the right. He says he sees Curtis Simms

1 get out of the passenger side and the driver who we now
2 know is Dustin Lindsey get out on the driver's side and he
3 says -- and then he saw them approaching his truck and
4 getting closer to his truck. And I think the question was
5 then what happened or then what did you see. I saw Martin
6 open the door and step out of the truck. I saw Martin as
7 they were approaching and getting closer to the truck, I
8 saw Martin open the door and step out of the truck.

9 Now this is Martin Gasque's close friend and he
10 went to the game with. They were going to meet their
11 girlfriends back -- or two girls back at their hotel, later
12 on that night. Close friends. I hear the horn, I'm
13 looking and as they're approaching the truck, Martin opens
14 the door. He is the closest one in proximatety. He is
15 sitting right next to him and that's when he says he saw.
16 Closest in proximity.

17 Now why is that critically important? He also says
18 this and I want to make sure it was accurate. He also
19 admitted that when he was talking to Investigator Robinson
20 out at that scene, that night, before he ever left the
21 scene, when it was freshest in his mind, ladies and
22 gentlemen. Before he ever left the scene. And I asked him
23 and he was honest on cross-examination. He was very honest
24 when I asked him, isn't it true that you told Investigator
25 Robinson out at that scene that Martin was actually arguing

1 with the suspect and may have been engaging in a fight?
2 Yes, sir. That Martin was arguing with the suspect Curtis
3 and may have been engaging in a fight. So even he has an
4 outside of the car. Now why is this important? Ladies and
5 gentlemen, why is that significantly important? Because
6 the State has four -- what they say are eyewitnesss and
7 Mr. Martin and Mr. Adams and Mr. And Ms. Echenroth and
8 every other witness that you heard from, Mr. Brown,
9 Mr. Kern, Mr. Paxton, Mr. Coggin from the State, all four
10 of those witnesses. Dustin Lindsey Jordan Lindsey, marquee
11 hall, Mike Davis and the statement of Curtis Simms, nine
12 people, nine people say there's no it will contact
13 whatsoever. The nine people that had the best vantage
14 points. Seven of the nine at least the best vantage
15 points. Mr. Gasque's own close personal friend, no
16 physical contact. And why is that important? Because you
17 have to determine whether or not Curtis Simms was acting
18 recklessly. And certainly somebody walking up to a truck
19 and punching somebody sitting down in the truck, certainly
20 that's reckless behavior. That didn't happen. Nine
21 witnesses sold you that didn't happen. Nine. That didn't
22 happen. But the State wants you to believe that that
23 happened just like all the inconsistencies and all of the
24 factors that I've showed you and demonstrated to show that
25 it's unreliable. They're mistaken. And all doubts must be

1 -- all reasonable doubt resolved in the favor of Curtis
2 Simms. And why is 245 critical? Because two guys, Martin
3 Gasque was a .23 blood alcohol level and Mr. Simms reported
4 to Investigator Holdorf was not drunk. Was not impaired,
5 was not slurring his speech. When Investigator Holdorf met
6 with him out there at the scene, Curtis Simms was not
7 impaired. Not drunk. When Martin Gasque gets out of that
8 truck and according to Mr. Paxton is arguing with Curtis
9 Simms and is engaging in a fight at that point in time, you
10 jurors know what that is. It's two young men after a
11 football game acting carelessly. Two people acting
12 carelessly right next to each other. No physical contact
13 yet. Nothing. No physical contact. It was a fight
14 getting ready to happen, just as Dustin Lindsey said and
15 Martin Gasque was every bit a part of that fight. He's the
16 one with three times the level of blood alcohol. He's the
17 one that was angry according to Mr. Paxton and he's the one
18 that engaged in a fight. That's two people acting
19 stupidly, carelessly.

20 Mr. Paxton then testifies to you jurors that he
21 heard Martin and Curtis Simms exchanging words, he just
22 didn't know what they were and then he lost site --
23 remember he said he lost site of Martin. I knew he was
24 somewhere near my truck and then I heard a punch. A punch.
25 One punch. That's what he hears. That's his friend. And

1 at that point in time, ladies and gentlemen, at that point
2 in time it's a fight between two people sitting outside the
3 car. He didn't have the opportunity to see what Martin
4 Gasque did, Martin Gasque's first move. He didn't have an
5 opportunity to see that. He lost sight. He lost sight.
6 And then what was his state of mind? He said at that point
7 in time, I felt like I needed to do something, but I didn't
8 know where Martin was. I didn't know where he was and he
9 made a decision and a choice, not knowing where his friend
10 was to turn the wheel and accelerate and to go off of the
11 road way and too then run over his friend. That's the
12 testimony from Mr. Paxton. That is the testimony of Mr.
13 Paxton.

14 Now, we know he's been drinking because he said
15 that. One of the things you didn't hear. We have no idea.
16 All those police officers from four different agencies, the
17 high way patrol, Columbia city, Richland County, USC, we
18 have no idea no evidence has been brought before you about
19 field sobriety tests, no evidence about the blood alcohol
20 of Mr. Paxton. We have no idea the extent of what his
21 state of mind was because none of that's been brought to
22 your attention.

23 The defense witnesses, the defense witnesses. I'm
24 not going to go over their names. You know who all of them
25 are again. The four defense witnesses and Miss Coggin who

1 was called by the State. They talk about the move. They
2 were all consistent. Everybody in that pick-up truck, that
3 green pick-up truck was in a great mood. Carolina just won
4 and everybody was in a festive mood. They were going to go
5 out. They were visiting Columbia or they're Gamecock fans
6 or Alabama fans and everybody was in a pretty good mood.
7 Good mood. They're in their green pick-up truck. They saw
8 a black pick up truck pull up and the black pick-up truck
9 pulling -- you heard Mike Davis. You heard Mike Davis.
10 Certainly you heard the Lindsey twins but you heard Mike
11 Davis and you heard marque Hall talk about -- Marque had
12 heard about the hazing that was going on by Mr. Gasque.
13 The taunting of Alabama fans. You heard that from Marque
14 Hall and you heard it from Mike Davis. And you heard it
15 from Dustin Lindsey and Jordan Lindsey corroborated by Mike
16 Davis and marque Hall. That was the state of mind. That's
17 what they saw, that's what they observed. And then you
18 heard the testimony of Martin Gasque initiated the hand
19 gestures the flipping of the Byrd, initiated the profanity
20 and they were even honest enough, they didn't say -- they
21 said at that point in time Curtis Simms responded with
22 profanity of his own. They admitted that. They
23 acknowledged that. That came out on direct examination.
24 He responded and then they indicate at some point in time,
25 they both got out, about the same time. They both get out

1 of their vehicles, right then, right.

2 There. Now, why is that important? Why is that
3 important, ladies and gentlemen? Because at that point in
4 time, that is the version of events of the people that had
5 the best opportunity to see and that is wholly consistent
6 as far as no punches being thrown in the truck, with the
7 version of events of Mr. Paxton and Trevor Brown and
8 Mr. Kern. They are exactly the same when it comes to no
9 punches being thrown. And what else is significant about
10 that? The Lindsey wins and Mike Davis recall Curtis
11 indicating that he's going to go out of the car. The
12 reason why he left -- and one of the issues you all have to
13 discuss, what was Curtis's intention when he got out of
14 that truck? You heard Dustin Lindsey and Jordan Lindsey
15 and Mike Davis. Mike Davis told you Curtis's intent was to
16 get out and help us to get into traffic and Mike Davis
17 specifically told you, you remember, they were all laughing
18 at him because he was wearing an Alabama shirt and how
19 funny it would be that a dude with an Alabama shirt was
20 going to be asking the Gamecock fans to get into the
21 traffic. And Mike Davis told you that's how he remembers
22 that. And I know that Ms. Campbell's going to come up here
23 and might say, well you can't trust these people. You
24 can't trust Mike Davis. Or you can't trust the Lindsey
25 twins or marque Hall. But guess who else told you that

1 same thing in essence? Brian Kern. Their witness who
2 doesn't know Curtis Simms, who /TKUPBLT know Marque Hall,
3 who doesn't know the Lindsey twins, he doesn't know anybody
4 involved in this. And Brian Kern in response to the
5 prosecutors questions told you the jurors, he saw Curtis
6 Simms in the front of his vehicle trying to help his
7 vehicle get out into traffic and turn left. State's
8 witness told you that. Why? Because you jurors know, I
9 submit to you, that his intent was simply to do that, that
10 he had no intent to fight. And whatever Martin Gasque was
11 saying to him, whatever taunting, he turned around and
12 approached him and there's nothing unlawful about that.
13 He's trying to help his vehicle out. Martin Gasque is
14 taunting, Martin Gasque is using profanity. And according
15 to the witnesses, according to Ms. Coggin, Dustin and
16 Jordan Lindsey, according to Marque Hall this morning, the
17 first physical contact was made by Martin Gasque. Now
18 certain he's small. He's 5, 10. Curtis is 4, 3. Curtis
19 is 285, he's 168. Now, even right there. I submit to you
20 if you look in the road way, there's somewhat of an
21 incline. But more importantly, the judge is going to
22 charge you on certain laws related to self-defense. People
23 citizens have a right to act on appearances. In other
24 words people have a right to use force first if they think
25 and if it's reasonable that somebody might be getting ready

1 to hit them. You have a right, no matter how big you are
2 or how much bigger than you are than somebody. You have a
3 right -- if you think you're getting ready to be assaulted,
4 you have the legal right to use force first. You have a
5 right to act on appearances. You remember the testimony
6 about the balled up fists of Mr. Gasque? But most
7 important you heard all of that testimony that what his
8 intent was, including Mr. Kern to get out into the traffic.
9 That's the testimony that you heard.

10 Then you heard the testimony of the defense
11 witnesses that Curtis Simms, that they saw the contact.
12 Curtis Simms reacted. Then what do you see? Which
13 testimony did you hear? You heard immediately Curtis Simms
14 first of all grabbed Mr. Gasque and tried to pull but
15 couldn't because Mr. Paxton had driven forward enough and
16 was to the right enough that he was right there. That that
17 back tire turned when the truck turned and it was right
18 there. And it started rolling and Curtis was trying to
19 pull him and then he's batting. You saw Marque. You saw
20 Marque demonstrate how hard he hit that. Curtis Simms was
21 banging, stop, stop, stop, stop: Pulling somebody to
22 safety, banging on the side of the truck screaming to stop.
23 Are those the actions of a man that's acting recklessly?
24 Then he runs for help and gets law enforcement and he comes
25 back. That's the testimony you heard, ladies and

1 gentlemen.

2 And let me be clear on one point. Every single
3 witness that was asked where did this incident occur, where
4 was Martin Gasque, every witness but one. Every witness
5 that was asked that question, every state's witness, every
6 defense witness has somewhere inside the white line.
7 Somewhere here inside the white line. They even called
8 Casey Radford. She was the second witness or the third
9 witness who was one of the policewomen that was working the
10 tailgate spot across the street that Curtis ran up to. And
11 she was one of the first people there. Other people were
12 coming up. Dustin Lindsey was still there, sitting there
13 watching according to his testimony and she walked up and
14 this -- the witnesses that were standing there, brought her
15 off of the witness stand I believe and she said she was
16 right there right after it happened. She almost was there
17 with his head right in front of her and she pointed to
18 y'all just inside the white line and that's what every
19 witness testified to.

20 Now investigator Smith came up and told you,
21 remember he was there at the football game with family and
22 friends, so he wasn't a part of this investigation, he
23 wasn't part in the scene. At some point in time after all
24 those witnesses who told you where it happened, at some
25 point in time who knows how long after the incident, he

1 comes up and points out where he saw Mr. Gasque. But you
2 heard from the witnesses right after it happened and right
3 while it was happening. Right there, by the white stripe.

4 Curtis Simms statement, I'm almost done. Curtis
5 Simms statement. You know, this was a traumatic event for
6 anybody, clearly. You heard Adam Paxton say that he was
7 almost in a state of shock as anybody would be. But it was
8 a traumatic event. But Curtis Simms agreed to go with the
9 police. He didn't have to. He wasn't arrested. He wasn't
10 in custody. Curtis Simms agreed and let me clarify one
11 point. I know Ms. McDuffy didn't mean to suggest anything
12 bad, but the testimony of Dustin Lindsey was that Curtis
13 Simms was having some financial difficulty because of his
14 job. That's why he came.

15 MS. CAMPBELL: Objection, Your Honor. That's a
16 misstatement.

17 MR. GASSER: That -- she indicated to you in her
18 opening statement that Curtis Simms -- that big guy, Curtis
19 Simms out of trouble. I just want to clarify that that
20 wasn't any kind of in farce trouble.

21 MS. CAMPBELL: Objection, Your Honor.

22 THE COURT: Ladies and gentlemen, you will recall
23 the testimony as you will recall it in this case.

24 MR. GASSER: Thank you, Your Honor.

25 If you recall the testimony, they helped get Curtis

1 a job up here in Columbia because he was having difficulty
2 with a job or financial issues.

3 MS. CAMPBELL: Objection, Your Honor.

4 MR. GASSER: I know what my witness said.

5 THE COURT: You may proceed.

6 MR. GASSER: Thank you.

7 Curtis Simms went down there voluntarily and he
8 did, he told this investigator based on the circumstances
9 he just witnessed. He did as good as he could under the
10 same emotional state that everybody was in that night. He
11 told them what his intentions were to help -- my intention
12 was to get someone's attention so we could get out. He
13 told them that. He told them that there were no punches
14 while Mr. Gasque was seated in his passenger seat. Later
15 on corroborated by all of those witnesses. I'm not going
16 to go through it again. He told them he simply reacted to
17 Mr. Gasque's conduct and he explained why he took off his
18 dark shirt and he lost it because he had a white t-shirt on
19 him and he wanted cars and people to see them when he was
20 running to get help and coming back to the scene.

21 And in his own handwriting, he tells them, yes I
22 admit to hitting him. Though the events that took place
23 after the punch was thrown was not premeditated. It was a
24 very unfortunate event that was not planned. I did
25 everything possible to get him immediate medical attention.

1 In no ship, shape, or form did I have control of the driver
2 pulling forward. I will be permanently scarred for life.
3 I have never encountered anything like this my life. I'm
4 deeply sorry for the victim's family. It could -- it could
5 of have been the other way around. What if I didn't swing
6 first. He could of hit me and I could have fallen forward
7 and out of panic or drunkenness the driver could of have
8 pulled forward and run me over. Before he's ever charged
9 with any crime when he's down there on his own
10 voluntariness, he gives that statement.

11 Now, ladies and gentlemen Judge Goodstein in her
12 initial charge to the jury before opening statements told
13 you something profound. She's told you that a trial is
14 about searching for the truth. A trial is about searching
15 for the truth. If it wasn't foreseeable to Adam Paxton who
16 had been drinking with full knowledge that his friend had
17 exited his vehicle, not knowing where his friend was,
18 knowing he had a duty of care, if it wasn't foreseeable to
19 Adam Paxton that he would run over and kill his friend, how
20 is that foreseeable to Curtis Simms? Why should a system
21 of justice told one person -- it wasn't foreseeable for
22 this person who had control of the vehicle. It wasn't
23 foreseeable for him, but it's foreseeable for the person
24 standing outside of the vehicle with no control over it?
25 Is that fair? Is that just? What do you think, ladies and

1 gentlemen would have happened? For instance when Martin
2 Gasque got out of that car with a .23 blood alcohol level
3 and he was angry and he started exchanging words and Curtis
4 Simms approached him and there standing there on the side
5 of the road and Martin Gasque makes whatever move he makes.
6 He initiates the physical contact and Curtis Simms under
7 the law is allowed to act on appearances and respond with
8 whatever force is reasonable under the circumstances and he
9 hits him and he fathers and mothers down and Mr. Paxton
10 doesn't move his vehicle or waits for the car in front of
11 him to go forward and moves his vehicle thus not turning it
12 to the right and running over Mr. Gasque. What do you
13 think would have happened? He would have gotten back up
14 again. If police after Carolina football game would have
15 even responded, I submit to you they would have gotten
16 Curtis Simms and Marque Hall and all of their statements.
17 They would have gotten Mr. Gasque's and Mr. Paxton's and it
18 would have been two young men, after a football game
19 encountering each other, being careless, being stupid,
20 physical contact between them, one punch, Mr. Gasque gets
21 up, police look at everybody. What do you think would have
22 happened? I submit to you it would have been a wash. And
23 you've got to judge Curtis Simms conduct under the law was
24 reckless at the time that the contact occurred. Was it
25 reckless. Before that car moved. That's what we submit to

1 you reasonable people knew what happened. Two young men
2 just as I told you in my opening statement.

3 Ladies and gentlemen, is verdict of not guilty is
4 not a sign of weakness. It's telling the government and
5 the State they have not met their burden of proof. It's
6 embracing a principal born in our constitution over two
7 hundred years ago, nurtured for two plus sentries that
8 citizens accused of crimes deserve to be judged fairly.

9 A verdict of not guilty in a word is an act of
10 courage. I ask you, ladies and gentlemen, summons the
11 courage to vote not guilty. There are significant
12 reasonable doubts in this case. Summon the courage to vote
13 not guilty. It is the truth. It is justice. And today in
14 this County, in this courtroom, each one of you jurors
15 represent justice.

16 THE COURT: Thank you, Mr. Gasser.
17 Ms. Campbell.

18 MS. CAMPBELL: If you can give me a moment, Your
19 Honor.

20 THE COURT: Certainly. Certainly.

21 MS. CAMPBELL: In every case that comes into the
22 this courtroom when you're preparing for trial, you try to
23 anticipate what the defense may be. And typically in a
24 case involving a homicide and nobody's gotten in here and
25 called this anything but a homicide, you anticipate whether

1 there's an ID issue. We got the wrong guy. He wasn't even
2 there. What eyewitness may have misidentified someone. Or
3 maybe it's just a lesser include offense, but ladies and
4 gentlemen in this case, the State has brought before you
5 the appropriate charge. He's not charge with murder. He's
6 not charged with voluntary manslaughter. He is charged
7 with involuntary manslaughter, based on the actions. The
8 State has given him each and every benefit of the doubt.
9 Even though, I submit for anyone to get up here and
10 characterize Curtis Simms actions as anything but criminal
11 is lewd Chris. His intent was to get out of the car and
12 direct traffic? Curtis Simms, in his own statement doesn't
13 answer that.

14 And when you listen to the defense -- and this
15 case, ladies and gentlemen, isn't about who can Yale louder
16 or who can be more -- he talked about the witnesses being
17 pleasant? It's not about who can be more you know pleasant
18 to the witnesses. It is a search for the truth. It's
19 about credibility, believability, who saw what. And I
20 submit, ladies and gentlemen, when you judge each and every
21 one of these witnesses. And I beg you, Judge is State's
22 witnesses. Judge is defense witnesses. Do they have a
23 bias or prejudice? What could they have perceived from the
24 vantage point where they were. Did they have a God look.
25 Do they have something to gain or lose. Do they want to

1 just simply, and it's understandable, help out their
2 friend?

3 It's kind of like when a car wreck occurs. There's
4 witnesses on different corners. And this case is classic
5 for that. Did they have a vantage point where they could
6 see? Did one witness say the car was tan, one was blue.
7 They want to tell you that they aren't up here saying that
8 these witnesses intentionally lied. Well they sure have
9 pointed out that they're wrong on distance. Just like some
10 people are God with faces. Some people are better with
11 distances. And by the way, the same things that they
12 attacked the State witnesses, the reason you can't believe
13 Mr. Martin was because we heard a lot and be it 96, 105,
14 115, one point it was 128 or 24. Whatever feet, no one's
15 gotten up here and said he didn't have a clear view to be
16 able to see what was seen. So they aren't trying to say
17 that they're lying about what they saw. Even their own
18 witnesses are wrong about the car. Even Curtis Simms
19 thinks it's a different make. That's not a big deal
20 though. We aren't trying to make it into a big deal. Even
21 Mike Davis thought it was around midnight. That's not a
22 big deal because the only part and what the focus needs to
23 be is on is on what happened.

24 So the defense theory is this is a grand conspiracy
25 between these citizens who have come forth and given you

1 what they saw. Independent witnesses. No dog in this
2 fight. They told you what they perceived. And are there
3 perceptions a little different? Yeah and they better be
4 because some believe when they come up and everybody says
5 the exact same thing over and over, then you better be
6 worried. You better be worried because that's rehearsed.
7 Adam one punch, not one single friend of the defendant came
8 up and said anything but one punch over and over and over.
9 The State's witnesses what they perceived, that's what
10 makes them credible because they didn't get together. The
11 Echenroths, Mr. Martin and Mr. Adams, they don't know each
12 other. They didn't get together to say I saw him reach in
13 or saw him try to punch in the window. That's what makes
14 it credible.

15 You heard from Mr. Paxton. He talked to the police
16 right away when it was fresh in his mind. And he told
17 them. Has this been -- and they talked about how he was
18 traumatized? Was he traumatized by this? He's been in
19 counseling since the day it happened: Understandably. Was
20 he traumatized that night, can you -- did he block some of
21 what he saw? Should he have gotten out of the truck when
22 Curtis Simms came up toward to help his friend?

23 And then the defense goes back to the most classic
24 defense in the world because if the facts aren't on your
25 side and it's not looking real good there. Let's do this,

1 trash the victim. Blame the victim. In this case, blame
2 the driver, blame the victim. Everybody is at fault but
3 Curtis Simms, who merely and politely got out of his truck
4 that night to help direct traffic, just like he didn't try
5 to which I think his first reaction to change his
6 appearance after leaving the scene, rip off his shirt,
7 where the hat went as he left the scene. And then he had a
8 change of heart. Well, give him credit, yes. But his
9 first reaction was to get away from that scene.

10 Now it's so he could go get help. His first
11 reaction was to change his appearance. His explanation is
12 it was dark an he was running in traffic. Well, if it was
13 dark and he was going in traffic, why didn't he take off
14 his shirt before he went up to direct traffic? He was
15 going out in the road then and it's dark and he might not
16 be seen. That's his first reaction, to get away. He had a
17 change of heart.

18 And you know what speaks volumes in this case
19 before I talk about anything else? Curtis Simms, he ran
20 from the scene, he changed his appearance because he knew
21 he was guilty. Curtis Simms, when he got back to the scene
22 and we give him credit for this. It doesn't go to guilt or
23 innocence, walks up to the police officer and the first
24 words out of his mouth, I'm the one that punched him. Not
25 I know who ran over him, not that they were responsible,

1 I'm the one that punched him. I punched him. And the
2 reason he said that was because he -- this man, who we've
3 talked about foreseeability, he even knew he was
4 responsible. That speaks volumes.

5 Now, listen to the defense's hoping argument in
6 this case and according to to Mr. Gasser as he reiterated
7 here today over and over, on any weekend, I believe the
8 quote was fistfights occur. Young men drinking at sporting
9 events. You have heard him vilify this victim because his
10 blood alcohol level was high. He was intoxicated. It's
11 okay if you drink ten to fifteen beers that's what he
12 admits to and three jell lo shots. Don't consider that.
13 And will ever carefully to the judge. She's going to tell
14 you voluntary intoxication on the part of the defendant is
15 not a defense. You hold him responsible as if he was
16 sober.

17 And I submit, ladies and gentlemen, as much as
18 Mr. Gasser said that this was careless, that it doesn't
19 rise to wreck less, I submit that any kind of fistfighting,
20 brawling, punching out -- punching someone so hard that
21 even his own witnesses, some of them at least admit he was
22 out cold. But according to Mr. Gasser that's okay. It's
23 not okay if it had been the other way around either. It's
24 not okay if Martin Gasque had gotten out of the car and
25 gone to his vehicle and punched him.

1 And listen here to the judge, she's going the tell
2 you or she won't tell you any kind of jawing off isn't
3 sufficient for a person to get punched. Even the defense
4 didn't get up here and argue that. In his opening argument
5 as today, you don't hear him mention one word about the
6 breach of peace charge other than that's not what's driving
7 this train. He concedes that it was a breach of peace of a
8 high and aggravated nature. Not one word disputing that.
9 It's the oldest defense in the book, concede to one charge
10 and fight the other --

11 **MR. GASSER:** Judge, I hate to interrupt Ms.
12 Campbell, but I believe she's telling the jury that we
13 conceded with Mr. Simms as she well knows nothing.

14 **MS. CAMPBELL:** An objection he's speaking.

15 **THE COURT:** Very well. Let me see you, please.

16 (WHEREUPON, there was a bench conference out of the
17 hearing of the jury and the Court Reporter.)

18 **THE COURT:** Ladies and gentlemen, with regards to
19 the argument that there's been any concession, let me just
20 share with you that the defendant, as I told you when we
21 began has pled nothing to these two indictments and that
22 places is burden on the State of South Carolina to prove
23 each and every allegation of each of these indictments
24 beyond a reasonable doubt. There is no concession, ladies
25 and gentlemen. The State has and maintains the burden of

1 proof as to both of these indictments. Thank you.

2 MS. CAMPBELL: Thank you, Your Honor.

3 THE COURT: Yes.

4 MS. CAMPBELL: Not one word about the breach of
5 peace because the elements of that has been met. It's the
6 oldest defense in the world. Dispute the one charge, the
7 homicide.

8 Then they told you in opening argument and it's
9 weird to me. The defendant got out of the car for two
10 reasons. That were his words. That was his words. Two
11 reasons. The first was to direct traffic, which we've
12 heard a lot about. And then is second was to see what the
13 guys problem was

14 Well, ladies and gentlemen, I submit when you look
15 at the credible testimony in this record, the only reason
16 Curtis Simms got out of that car that day was to go take on
17 some guy he perceived was jawing off at him. They talked
18 about how he took off his shirt while running from the
19 scene so people in traffic could see him, not to change his
20 appearance because he had just committed a crime. And in
21 opening over and over, Curtis Simms never killed anyone.
22 And I submit, ladies and gentlemen, but for Curtis Simms,
23 Martin Gasque doesn't get his head run over by a truck.
24 But for Curtis Simms punching him out cold. But for Curtis
25 Simms doing all these ting things -- remember one of the

1 witnesses, I can't remember Mr. Martin -- once he punched
2 him out, his legs were straddling that tire. It doesn't
3 matter if it goes forward or slightly to the right, he's
4 getting run over. Once he punches him out, according to to
5 his own witness, Dustin Lindsey, he rolls underneath the
6 vehicle. Once he punches him out, there's nobody going
7 like this. (Indication)

8 There's an old joke from law school and it's been a
9 long time for me. In the old joke, it talks about how a
10 preacher and a lawyer are walking down the street and as
11 they walk down the street, the preacher looks down. It's
12 rained the day before. There's a puddle of water and in
13 the bottom of the puddle of water there's a silver dollar.
14 The preacher looks at the lawyer and says look, there's a
15 silver dollar. And the lawyer picks up a stick and he
16 stirs up the water and is silt and muddy, makes it cloudy.
17 You can't see it and he looks at the lawyer and says what
18 silver dollar.

19 Well, ladies and gentlemen, I want to talk to you a
20 little bit about the facts. The cold hard facts that point
21 to the guilt of this defendant on this charge, not a
22 greater charge, but on this charge of involuntary
23 manslaughter. The first people you heard from.

24 You heard from Mr. Adams and Mr. Martin and they're
25 in this vehicle and according to the defense that got up

1 here and argued, it was so dark and it was so far away he
2 couldn't see. I beg you, ladies and gentlemen look at
3 their own pictures. It shows clearly in the pictures they
4 took as well as the ones we took the vantage point from
5 which he would have been able to see what happened. You
6 can see State's -- excuse me, defense exhibit 12. Where
7 the driver is they're pulling in and the view they would
8 have had. And you know it's amazing how dark it was,
9 Mr. Martin couldn't see, Mr. Adams couldn't see and I guess
10 the people directly could see? The great thing was that
11 their were headlights on. And guess what made this into a
12 spotlight situation? Because according to all the
13 testimony, Dustin Lindsey's truck, car, however he was
14 driving, was pulled up directly. It had -- his headlight
15 was pulled up directly. It had his headlights directly on
16 what was happening. It couldn't have been better if they
17 had brought in a spotlight and they argue they couldn't see
18 was it was too dark? It was lit up. They told you that
19 they saw him reach what appeared to be in and what's
20 amazing is that just happens to so corroborate what the
21 Echenroths tell you, that they see from the opposite
22 viewpoint. Remember they're right behind this far behind
23 and it's bumper-to-bumper. But as much as they try, you
24 can still see what's doing on. And what do all four of
25 those people say? Either he reached in towards in the

1 vehicle or he actually tried to throw a punch in the
2 vehicle. And what was the significant? Mr. Paxton, he was
3 so tearful. He wanted to make sure he didn't say anything
4 he didn't remember. He didn't see him and he's
5 traumatized, punching in the car. But he couldn't see what
6 was going on. And he even said it best. I don't know what
7 punches were being thrown that I couldn't see.

8 Mr. Martin, Mr. Adams, what do they get? They come
9 forward to the police. They give them their information
10 independently. Are they off on the distances? Yes.
11 That's what makes it credibility. But what they saw, they
12 know and ironically, it just happens to be corroborated by
13 the Echenroths. And when they got up here and testified,
14 ladies and gentlemen, it didn't go the way Mr. Gasser just
15 said, nobody, Mr. Echenroth and Ms. Echenroth said that
16 they saw him being punched three or four times in the
17 vehicle. That's not what the testimony was. The testimony
18 was that they saw him throw one punch while he was in the
19 vehicle but then Martin Gasque got out and they saw
20 multiple other punches and what appeared to them to be.
21 And then even when Ms. Echenroth was trying to explain why
22 she said it seemed like more, remember Mr. Gasser asked her
23 specifically, what reason to you have that and she said you
24 aren't going to like my answer. And she tried to answer
25 and he objected. A search for the truth. Those two

1 people, from their vantage point -- and then there's been
2 all this talk about you can't convict because somebody said
3 it was an SUV versus -- remember the angles. They're
4 pulled up. The front part of this whole vehicle -- in
5 fact, you couldn't see the very tail end. And look at the
6 fence and the fence line. Does that look like an SUV?
7 It's a full extended cab. And even in this photograph
8 which is State's Exhibit No. 63 and the same ones in for
9 the defense. Look at how the light reflected. Think about
10 all the lights that were out there that night. As much as
11 it illuminated things does it play off the actual shine of
12 the hood? Does it make it appear to have a different cast
13 to it, a different color? These are the pictures they
14 brought in two years later.

15 The facts. Mr. Martin -- remember afterwards, they
16 ran up to the victim. Mr. Martin, I believe his father was
17 a doctor. They were trying to render aid. And Curtis
18 Simms is gone by this point. And remember specifically,
19 too how they made blind witnesses even though they changed
20 out whether or not or not he was beating on it before or
21 beating on it afterwards on the side of the truck. How all
22 of a sudden all they're witnesses talk about how he tried
23 to pull him off and all that. Not one of the independent
24 witnesses saw that. The most that anybody saw was from
25 Peter Mr. Brown or Mr. Kern, I'm not sure which, who said

1 after he had run over him, he banged on the truck. Because
2 remember all this happens quickly and then every one of
3 them say he ran off. You heard from Travis brown. You
4 heard from Mr. Kern and where were they parked? Remember
5 they were two cars back in the parking lot. They were
6 further away. What caught their attention is I believe as
7 I believe Mr. Kern testified that not that he saw the man
8 in traffic, but he actually saw the defendant standing in
9 front of the vehicle was the first time that he noticed him
10 in front of the vehicle with the front vehicle trying to
11 get out going left. At this point is when he saw it and
12 what he remembered was he and Mr. Brown saw at least two
13 punches. He left that out. Two punches. At least that
14 they observed after they had seen the defendant get out.
15 Now, were they paying close attention? Did they have the
16 earshot going on? No. So what caught his attention is
17 once Martin Gasque got out of the truck and the vicious
18 nature of the assault and as much as they want to call it a
19 fight, the only one that landing a punch in this fight was
20 Curtis Simms. Not one witness got up here and said that
21 Martin Gasque even got to pull back his fist.

22 They testified from their vantage point two cars
23 back -- and again, it's lit up, but they weren't able to
24 see it until he got out of the vehicle. And this thing
25 that makes this credible is that they came in and said

1 again, exactly the same thing as every other eyewitness see
2 that's not credible but what is significant about what they
3 saw and the time period that they saw it, they saw the
4 events once Martin Gasque was out of the truck and then
5 they were able to see, each of them at least two punches
6 and they were credible.

7 Who else did you hear from, from the State? You
8 heard from Mr. Paxton who was the driver and it's kind of
9 ironic because in this whole blame the driver and when I
10 first heard about this case was the driver involved. I
11 believe Mr. Gasser talked about how we don't know what his
12 blood alcohol was. And they didn't do a sobriety test. Do
13 you think the police weren't focused on Adam Paxton?
14 Wouldn't he be the easiest person to pursue right there on
15 the scene. There's no dispute he drove the truck that ran
16 over his best friend. If there had been any signs of
17 intoxication, then yeah, his level of culpability arises.
18 You don't think they were looking for that at the scene?
19 You don't think Mr. Robinson, the high way patrol in
20 interviewing him were looking? Because that's the easy
21 thing to do in this case. Not the right thing but the easy
22 thing. Why wasn't the driver charged in this case? His
23 actions were not really at the very least -- were they
24 careless? Yes. Did they rise to the level of a criminal
25 charge like assault? No. No it's kind of like he used as

1 an example, the sub way in New York. One man walks up to a
2 guy who's waiting on the sub way and he punches him and the
3 man falls into the sub way tracks and then the train comes
4 along the sub way and runs him over. It's not the
5 conductor's fault, it's not the person who drives the
6 trains fault. Is that foreseeable that that could happen?
7 It's just as foreseeable as what happened here. And
8 nothing that the train diver did reliefs the person who
9 punched him of the responsibility. The easiest way to
10 plain proximate cause when the judge describes it to you,
11 but for. But for Curtis Simms actions, his aggression, him
12 getting out of the car. And this isn't a case, ladies and
13 gentlemen, where Martin Gasque came to him. Curtis Simms
14 took it to Martin Gasque. Curtis Simms had to get up throw
15 Lauren off his lap, get out of the car and then proceed --
16 depending on which way of the witnesses and again
17 distances, it's understandable. All the way over to the
18 black truck. This didn't happen over at his car. Not
19 response able? Not foreseeable? And it's not about
20 whether or not at the moment he went up there and punched
21 him, wrote Curtis Simms was considering whether or not he
22 was going to go under the truck and get run over. It's
23 whether or not a reasonable person could foresee bad things
24 happening when someone gets knocked unconscious on a road.

25 We heard from the pathologist in this case, the

1 pathologist, doctor nickels. He talked to you about what
2 the cause of death was. He said closed head trauma due to
3 a motor vehicle traffic collision with a pedestrian, due to
4 an altercation. That was his finding. Due to an
5 altercation. Even the pathologist in this case, is it
6 foreseeable that bad things violent things, things that can
7 seriously bodily injury and/or death could occur. One blow
8 was his testimony, is enough to kill a person, depending on
9 the people involved and I submit, ladies and gentlemen
10 Martin Gasque did not have less of a chance when he was
11 confronted all 5 foot 10 and 168 pounds with this hand. He
12 was 6, 3 and at that time 285 pounds. Not foreseeable?

13 You heard from various police officers in this
14 case. Whoop, missed one, Lauren Coggin. Lauren Coggin, we
15 served her with a subpoena abdomen she responded. She came
16 here from Alabama and she told you her version of events
17 and what she recalled happening. It was traumatic to her.
18 She was obviously not happy to be here. I don't blame her.
19 She told you the best she could her account of what she
20 remembered. But there were a few things that were
21 significant about what she said, what she recalled. When
22 asked specifically, by the police that next morning, did
23 the guy attack Curtis? No. He slightly touched Curtis and
24 then Curtis punched him in the face. Where was Dusty
25 during this incident? He got out of the truck at the same

1 time Curtis did to try to get Curtis back in the truck and
2 that speaks volumes. His friend, Dustin knew as soon as
3 Curtis' feet hit the ground, it was going to be bad and he
4 went, he just wasn't quick enough to get to him before the
5 bad happened

6 Question. In your opinion who was the aggressor.
7 Her testimony on the stand, Curtis Simms. Around I felt
8 bad for her. She even looked over at him. She didn't want
9 to do this. And you know, I can't blame her. I don't
10 blame her. If she had to say one, I would say Curtis.

11 This isn't a fight. This is an assault. You heard
12 from police officers Sargent Don Robinson that night
13 interviewed the driver. Tried to get names of people at
14 the scene. You heard from investigator Travis Holdorf.
15 That night he was charged with breach of peace of a high
16 and aggravated nature. Later they were to consider what
17 homicide charge, if any. They gave him the benefit of the
18 doubt. He is charged with an unintentional killing while
19 committing a crime or if it was legal, which I submit it
20 wasn't and ill will get back to that. So reckless for the
21 disregard of the life and safety of others. And I submit,
22 ladies and gentlemen, it doesn't even have to happen in the
23 middle of a highway. If someone punches out another person
24 to the point where they are unconscious, it doesn't matter
25 if it happens in the front yard, in a bar, or on a road.

1 It is foreseeable that bad things happen when that happens
2 and as far as any head injuries, any con conductionings,
3 brain leaks or anything else, we won't know that because he
4 got run over by the car.

5 Investigator Holdorf got in touch with the
6 defendant. This is after he said to the first officer at
7 the scene, I punched him. Give him credit. He may have
8 run from the scene at first and he definitely told people
9 that there was some guy out there that needed help. No
10 dispute about that. We put that testimony before you. And
11 then remember, he said he walked around a little longer.
12 He had to thing about things. And give him credit. He did
13 the right thing at this point. He turned around. He went
14 back to the scene, even though he changed his appearance,
15 gotten rid of his hat, gotten rid of his shirt. I punched
16 him. Not I saw who ran over him. I punched him. They
17 take him down to head quarters and once he gets to
18 headquarters, Investigator Holdorf does the right thing.
19 He advises him of his rights to make sure that his
20 constitutional rights are protected as they should. And
21 Curtis Simms at that point give a statement.

22 And I want to talk a little bit about that
23 statement because even if you don't believe the independent
24 witnesses and even if they want to minimize and make this
25 into one single punch, by Curtis Simms own statement, he is

1 guilty of involuntary manslaughter and breach of peace of a
2 high and aggravated nature. What did he -- he starts
3 talking and you'll have this back in there with you. We
4 got to the football game that day, who he went with,
5 different people. We were in Dustin's green Z71 pick-up
6 truck. When he will he doesn't even know what kind of
7 truck it is. That's not a big deal. Who cares if it's the
8 truck. But he doesn't even know what kind of truck it is.

9 We were tailgating. We talks a little bit
10 drinking. He did have three Jell-O shots. At the end of
11 the game he was in Dustin Lindsey's truck. He was driving,
12 I was in the front passenger seat with Lauren Coggins in my
13 lap. Marque, he didn't know his last name, Jordan Lindsey
14 and Mike Davis were in the back of the truck. Does this
15 dispute someone who says who was in the truck with him?
16 That's not really a big deal either because just what
17 happened in the truck, just like what happened -- what
18 color the truck is, is not the issue in this case.

19 The black truck that was jacked up stopped in front
20 of us. The front passenger had on a yellow shirt and a
21 bald head. He looked at his driver and then looked at me
22 and said, what's up. This is Curtis Simms chance to talk
23 about what happened. To talk about whether he had been
24 yelled at, cussed out. According to Curtis Simms, that
25 night shortly before midnight after this occurred, his

1 thing is all that the victim said to him was what's up.
2 Fighting words? Any kind of legal provocation here?
3 Listen carefully to the judge. That's according to Curtis
4 Simms. We both got out of our cars and bowed up at each
5 other. Bowed up. Doesn't say he touched him. Doesn't say
6 he pushed him. Doesn't say any of that that we later heard
7 from these other witnesses happened. This is Curtis Simms'
8 statement. When he bowed up, I swung and hit him. I hit
9 him in the face with either my knuckles or my elbow. He
10 fell back and to the right. The door of the truck was
11 open. He fell towards the door and hit the door.

12 It goes on. This is his version. When I hit him,
13 I fell too. There's no testimony by any witness that
14 Curtis Simms fell too. But you think he hit him so hard
15 that he actually pushed up against the truck? Because it
16 takes a lot with one punch or two punches or three punches.
17 The testimony is one of the punches took him out. The guy
18 fell to the ground and the guy in the truck took off and
19 the truck ran his head over. I ran up to him and squatted
20 down. I saw the blood coming out of his nose. No mention
21 of how he was down on the ground or standing up depending
22 on which witness you listen to. Pulling him trying to get
23 him out from the truck. No mention of that night when it
24 was all fresh in his memory. No mention of him banging on
25 the truck at that point.

1 I ran down the road and saw a black female officer
2 and a black male officer. Told what had happened and the
3 kid had been ran over. I walked around for a few minutes
4 trying to process what had happened. I walked back up to
5 an officer and told him I knew what happened. And what
6 buzz that, ladies and gentlemen? I punched him.

7 Where is your shirt? When I started running down
8 the road, I took off my shirt because it was dark. That's
9 his explanation. Did you see anything in the guys hands
10 when he got out of the truck. I did not see anything in
11 his hands. I think his hands were already balled up. Why
12 did you hit him? He bowed up and I hit him. Notice he --
13 Curtis Simms got out of his vehicle goes over to the other
14 vehicle approaches the victim, hits him or tries to hit him
15 once with the truck and by his own witnesses, talking about
16 the. The guy had a defensive posture or he's just trying
17 to get him out of his personal space. Those are his
18 witness' testimony. And then and this is the most telling.
19 Foreseeability? I didn't mean for this to happen. I punch
20 him, yes. None of this was supposed to happen this way.
21 But he goes on because he had in his own handwriting. Yes
22 I admit to hitting him, though the events that took place
23 after the punch was thrown was not premeditated and he's
24 right, we're not here on murder.

25 It was a very unfortunate event. I did everything

1 possible to get him immediate medical attention. Then he
2 goes on. I -- he's referring to himself. I will be permly
3 scarred for life. Martin Gasque head has been run over and
4 he ease dead on the ground and he's scarred for life? He
5 at least has a life. I'm deeply sorry for the victim's
6 family and then this is it -- was it foreseeable? What
7 does he write next? It could have been the ore way around.
8 What if it had been Curtis Simms? What if I didn't twinge
9 first? He could have hit me and I could have been --
10 excuse me -- something forward and then out of panic or
11 drunkenness the driver would have run something -- run me
12 over.

13 Curtis Simms that night admits it's foreseeable.
14 He's talking about what if it had hit him. What if it had
15 been the other way around. Curtis Simms acknowledges the
16 foreseeability. What if it had been him. What if he
17 hadn't thrown the first punch?

18 You heard from defense witnesses and the whole
19 reason you heard from Major Smith about where the person
20 was run over because according to one witness, I want was
21 either Mr. Adams or Mr. Martin, he was in the roadway and
22 his legs were actually straddling the back tire. And
23 remember when this truck starts to move, what part of the
24 truck is going to start move first? This isn't a physics
25 thing, but the front end. He's already underneath the

1 truck. According to his own witnesses an where he runs
2 over him is significant because it is in the roadway. You
3 can even see this -- this is plaque and white because of
4 the blood. You can see. You've heard all about this grade
5 that goes down. So right here is where his head was. You
6 don't have to rely on any independent witnesses. You can
7 see the blood. Then you see how the blood runs down the
8 hill off to the side (indication). This shows where his
9 head was. He wasn't off to the side of the road like
10 Dustin Lindsey said. He was in the road.

11 You heard from several defense witnesses, first one
12 was Dustin listened and he's friends with the defendant.
13 And he's done the best he could. But let me back up for a
14 second because what was also significant in the testimony
15 that you heard from Investigator Holdorf was that night
16 after they took the statement from Curtis Simms, he asked
17 to call his mother. And they let him cause his mother and
18 he told his mother his version of what happened that night.
19 He got his story out there that night to his mother. When
20 I asked Mr. Lindsey on cross-examination if he new Curtis'
21 mother that they talked often if she had spoken to him,
22 couldn't it be natch to make a phone call after you've
23 gotten this information from your son?

24 Dustin Lindsey got up here and he sad different
25 versions and aren't disputing what car, what anything

1 that's not an issue. He saw one punch. Remember he
2 changed his story initially and saw him do a chest bump, I
3 think it was and -- if I use the wrong words, please
4 remember the testimony. And then it became a lump, push,
5 hit. . Please remember that. And then he was off the side
6 of the road. And who can blame Dustin Lindsey. He's his
7 friend. He's tried to help him out before. He's trying to
8 help him out this time.

9 You heard from his twin brother who gives virtually
10 the same account. You heard from Mike Davis and what's
11 significant is if you listen to different people as to who
12 was in the front seat, who was in the back seat. Either
13 Jordan was in the middle of the front and Jordan's no small
14 guy, or he's in the back. Regardless, it's not in dispute
15 that Mike Davis was in the back seat. And didn't he have
16 the best vantage point? Did he look up and see the final
17 punch and all of them got up here and talked about how he
18 tried to help him afterwards I'm sure no one in the State
19 doesn't say that Curtis Simms even wanted this to happen.
20 But what significant is in describing the events and I'm
21 talking about the assault. Was he stooped down trying to
22 pull him out or was he standing up banging on the truck?

23 You heard from different witnesses, but the one
24 thing is, ladies and gentlemen, even -- even the best store
25 they could come up with, even if you take their version of

1 what happened with just one punch, according to Marque
2 Hall, he punched him out. It's involuntary manslaughter.
3 No matter how much they talk about how drunk the man was.
4 No matter how much they talk about how drunk the defendant
5 is. No matter how much they talk about the driver
6 shouldn't have pulled over to the side of the road.

7 And I want to talk to you just briefly about the
8 law in this case. The defense -- the judge will instruct
9 you that in certain casings self-defense may apply and
10 there are four prongs to self-defense and he must meet
11 every one of them. And the first one of those prongs is
12 that he's without fault with bringing on any of these
13 problems and I submit ladies and gentlemen even their own
14 version of events, they are at fault. That even if he was
15 without fault that a reasonable person would have acted in
16 the same way and I substantial mitt, ladies and gentlemen,
17 no matter what they talk about hold up everything gets in
18 fistfights over the weekend, it's not reasonable.

19 MR. GASSER: Judge, I hate to interrupt again. We
20 need the approach and I want to be heard.

21 THE COURT: Okay.

22 (WHEREUPON, there was a bench conference out of the
23 hearing of the jury and the Court Reporter.)

24 THE COURT: Ladies and gentlemen, let me explain to
25 you a moment about what is called the self-defense defense

1 and we're going to talk a lot about it when I give you the
2 charge, but just so there is no confusion, once the issue
3 of self-defense is raised and it has been raised, but once
4 it is raised, the burden is on the State to prove that
5 self-defense did not occur beyond a reasonable doubt. In
6 other words the burden, they're burden shifting. The burden
7 is and it remains on the State and once self-defense has
8 been raised, the burden is on the State to prove that
9 self-defense did not occur beyond a reasonable doubt.

10 MS. CAMPBELL: Thank you, Your Honor.

11 THE COURT: Very well.

12 MS. CAMPBELL: The four prongs of self-defense --
13 and the State must prove that self-defense didn't happen.
14 The defendant was without fault in bringing on the
15 difficulty. As you know, Curtis Simms was the one that
16 instigated the difficulty and we have to disprove any one
17 of these and it's not self-defense. Not one of them,
18 although I submit we have. But just one of them. Believed
19 he was in imminent danger of losing his life or sustaining
20 serious bodily injury. I submit Curtis Simms went to the
21 victim in this case. He wasn't concerned about losing his
22 life or sustaining serious bodily injury and a reasonable
23 prudent person of ordinary firmness and courage would
24 entertain the same belief. All Curtis Simms had to do was
25 stay in the vehicle. None of this would have happened.

1 That's it. And he had no other probable means of avoiding
2 the danger. It's called a duty to retreat. Even if Gasque
3 had come to him, he would have had a duty to retreat. That
4 didn't happen. I submit self-defense dud ever does not
5 apply here.

6 Further, the law says that if the defendant
7 voluntarily participated, even if you characterize this as
8 a fight -- in mutual combat for purposes other than
9 protection, the killing of the victim would not be
10 self-defense and this is true even if during the combat the
11 defendant feared death or serious bodily injury. However,
12 if before the death is committed the defendant withdraws
13 and tries in good faith to avoid further conflict and
14 either by word or act makes the fact known, the victim, he
15 would be without fault in bringing on the difficulty.
16 Mutual combat. Even if he went there both of them with the
17 purpose of fighting, it does not afford him the right for
18 self-defense. For mutual combat, there must be a mutual
19 intent and willingness to fight. The intent may be shown
20 by the acts of the parties.

21 Under no theory, ladies and gentlemen, even if
22 their own version of the facts is self-defense. So
23 therefore you must find as far as involuntary manslaughter
24 whether or not one of these two -- and listen carefully to
25 the judge and again she'll tell you what the law is. If I

1 misstate it's not intentional. Take it as she giveses it.
2 Involuntary manslaughter is the unintentional killing of
3 another without malice. That would be murder. While
4 engaged in an unlawful activity and I submit, ladies and
5 gentlemen, assault is an unlawful activity under anybody's
6 book. It is not a felony, it was not naturally tend to
7 cause death or grade bodily harm. Or it can even be the
8 unintentional killing of another without malice while
9 engaged in a lawful activity. Not what we have here but
10 even being when it's a hand of one is the hand of all
11 activity. With reckless disregard to the safety of others.
12 Unintentional means that the defendant did not intend for
13 anyone to be killed or seriously injured. I submit, even
14 if it had been lawful, if it's in reckless disregard for
15 the lack of safety of others -- and I submit, ladies and
16 gentlemen, going up to another person and punching them is
17 unlawful. But even if you were to find it wasn't, it's
18 definitely in reckless disregard for the safety of others
19 when you punch them out.

20 The judge is going to instruct you on proximate
21 cause. And -- in finding the defendant guilty of any
22 charge, you must find that there is what's known as
23 criminal intent. Criminal intent is a mental state, the
24 conscious wrong-doing. It's up to you to determine what
25 the defendant intended to do based on the circumstances.

1 It doesn't mean he had to intend to kill him, just if he
2 intended to do something unlawful or something that the law
3 does not condone.

4 Criminal intent can arise from action or failure to
5 act. It may arise with negligence. Recklessness or an
6 indifference to duty or to consequences that are considered
7 by law to be the equivalent of criminal intent. That's the
8 law on criminal intent.

9 And finally -- proximate cause. The judge will
10 instruct you that approximate malt cause must be efficient
11 means that can in some way this defendant set into motion a
12 series of acts that caused his death. The law recognizes
13 that there may be more than one proximate cause. The acts
14 of two or more persons may combine and occur together as
15 the efficient or proximate cause of the death of a person.
16 Even if what the driver did was unlawful, it doesn't excuse
17 him of his culpability in this whole chain of events. The
18 defendant's act may be regarded as the proximate cause if
19 it is a contributing cause to the death of the deceased.
20 The defendant's act need not be the sole cause of the death
21 provided that it be a proximate cause, actually and
22 contributing to the death of the deceased.

23 But for Curtis Simms getting out of his truck and
24 punching out this victim. No one is dead that night. One
25 who inflicts an injury on another the deemed by law to be

1 guilty of the homicide. If injury contributes immediately
2 or immediately to the death of the deceased. The fact that
3 other causes also contributed to the death of the deceased,
4 does not relieve him from responsibility. Listen to the
5 judge's charge.

6 Curtis Simms made choices. He walked up to Martin
7 Gasque's car, not to check on him, not to direct traffic,
8 by his own words. He got over there and whether it be
9 before or after the first punch is thrown or intended to be
10 thrown, it doesn't matter because the you know controverted
11 testimony in this case is the only person that through any
12 punch was 6 foot three, 285 pound Curtis Simms. The
13 credible testimony in the record is a result of one or more
14 of those punches. Martin Gasque goes down for the count.
15 Unconscious according to our witnesses and their's. And at
16 that point Adam Paxton tries to pull off the road to get
17 out of traffic so he can go to his friend's aid. Not
18 knowing that his friend is unconscious under his vehicle.

19 Ran from the scene; changed his appearance; then
20 did the right thing. Came back and the first words out of
21 his mouth, I punched him. Curtis Simms is not above the
22 law. He drinks from the same cup of justice as any other
23 defendant that walks into this courtroom. His friends
24 maybe, football players, the Lindsey twins, that does not
25 allow him to be above the law.

1 All we ask is once the judge charges you on what
2 the law is in this case, is that you take that law and
3 apply it to this set of facts and find him responsible not
4 only for what he did. The involuntary manslaughter and the
5 breach of peace of a high and aggravated nature. Martin
6 Gasque is gone. But for Curtis Simms, he would be here
7 today. Please hold him responsible. Thank you.

8 THE COURT: Ladies and gentlemen, we are now going
9 to take a break. The first break that I told you about.
10 Here's what we're going to do. I'm going the ask you to
11 step to your jury room in just a moment. You take the
12 break that you need to, no doubt someone of you -- some of
13 you are going to need to take comfort breaks when you have
14 taken your comfort break and everybody has taken a comfort
15 break, then I want you to knock on the door and return to
16 the courtroom. When you return to the courtroom, I ham
17 going to deliver the law applicable to this case phot you.
18 There will be another very short break, which I will
19 explain to you and then you are going the receive this case
20 for your deliberation.

21 So, Mr. Presiding juror, when -- I want you to
22 caucus your jurors and when they have taken their break,
23 finished their break, I want you to knock on the door to
24 return and we will await you this time, ladies and
25 gentlemen. Please, however, you be mindful that you have

1 not had delivered to you the law on this case. You are not
2 prepared to deliberate and for the same admonitions do not
3 discuss this matter or allow anyone to discuss it with you.
4 Take your break. Go with your bailiff.

5 (WHEREUPON the jury left the courtroom at 3:22
6 p.m.)

7 THE COURT: Okay. All right. We'll be at ease
8 until we hear from the jury. Don't go far because I don't
9 want to delay.

10 (WHEREUPON a recess was observed.)

11 THE COURT: All right. Anything from the State
12 before we bring our jury -- jurors out?

13 MS. CAMPBELL: No, ma'am.

14 THE COURT: From the defense?

15 MR. GASSER: No, ma'am.

16 THE COURT: All right. Jury, please.

17 (WHEREUPON the jury entered the courtroom at 3:40
18 p.m.)

19 THE BAILIFF: All jurors are present, Your Honor.

20 JURY CHARGE

21 THE COURT: Thank you so much. Can you all hear my
22 all right. I just -- I guess they got the microphone
23 there, but I like being able to kind of look kind of
24 straight on at you guys. If you can't hear me, please
25 raise your hand.

1 (WHEREUPON there was no answer.)

2 THE COURT: Or do like this (Indicating.) Because
3 obviously, I want you to be able to hear me but I just like
4 being able to look at you more directly.

5 Now, ladies and gentlemen there are two indictments
6 in this case that charge the defendant, Mr. Curtis James
7 Simms, each of them charge him with one crime. One
8 indictment charges him with the crime of breach of peace
9 high and aggravated. The second one charges him with
10 involuntary manslaughter.

11 Now, to each, to both of these indictments,
12 Mr. Simms has pled not guilty. That, of course, places the
13 burden to prove each and every allegation for each of these
14 indictments beyond a reasonable doubt and your duty is to
15 decide whether or not the State has met its burden. And I
16 remind you that the fact that Mr. Simms -- and sometimes
17 you're going to hear me say Mr. Simms and sometimes you're
18 going to hear me say defendant. If I say defendant, I'm
19 meaning, Mr. Simms.

20 I remind you that the fact that the defendant,
21 Mr. Simms, was arrested, charged and indicted in this case
22 is not evidence in this case and it cannot be considered by
23 you as evidence of guilt in this case, nor does it create
24 any presumption of inference of guilt. These indictments
25 are simply pieces of paper, first of all, they were the

1 formal written instruments which contain the charges made
2 against the defendant. It's a notice document. The
3 indictments are the formal by which this case is brought
4 into this court.

5 Now, each indictment charges a separate and
6 distinct offense. You must decide each indictment
7 separately on the evidence and the law applicable to it,
8 uninfluenced by your decision as to the other indictment.
9 Then he can be convicted or acquitted on one or both of
10 these indictments. You are to consider them separately.
11 You have be asked to write a separate verdict of guilty or
12 not guilty for each indictment.

13 Now, ladies and gentlemen, I am going to read to
14 you the allegations of the indictment. Ladies and
15 gentlemen, indictment two thousand 11-GS-40-829, which is
16 the indictment for breach of peace high and aggravated,
17 states and alleges the following: That Curtis James Simms
18 did in Richland County on or about October 9, 2010
19 knowingly, wilfully and intentionally disturb public order
20 and/or public tranquility through his conduct. Accompanied
21 by circumstances of aggravation, which the allegations are
22 fighting in the road way and/or disrupting traffic such as
23 constituting the offense of breach of peace in violation of
24 the common law of South Carolina.

25 Now, ladies and gentlemen, the allegations of

1 indictment 2011-GS-40-831, state in part or allege in part
2 that Curtis James Simms did in Richland County on or about
3 October 9th 2010 unintentionally kill Adam Martin Gasque,
4 without malice, but while engaged in an unlawful activity,
5 not naturally tending to cause death or great bodily injury
6 or while engaged in a lawful activity with reckless
7 disregard for the safety of others, in violation of section
8 16-3-610, South Carolina Code of Laws, 1976, as amended.

9 Now, Mr. Simms has pled not guilty to these
10 indictments. That plea puts the burden on the State to
11 prove the defendant guilty. A person charged with
12 committing a criminal offense in South Carolina is never
13 required to prove himself or herself innocent. The burden
14 is and the burden remains on the State of South Carolina to
15 prove guilt beyond a reasonable doubt. I charge you that
16 it is an important rule of the law that the defendant in a
17 criminal trial, no matter the seriousness of the charge
18 will always be presumed to be innocent of the crime for
19 which the indictment or indictments are issued unless guilt
20 has been proven by evidence satisfying you of that guilt
21 beyond a reasonable doubt.

22 Ladies and gentlemen, this presumption of innocence
23 does not end when you begin your deliberations, but it
24 accompanies the defendant throughout the trial until you
25 reach a verdict of guilt based on evidence satisfying you

1 of that guilt beyond a reasonable doubt. The presumption
2 of innocence is like a robe of righteousness placed about
3 the shoulders of the defendant, placed about the shoulders
4 of Mr. Simms, which remains with him until it has been
5 stripped from him by evidence satisfying you of Mr. Simms
6 guilt beyond a reasonable doubt. Do this analysis now for
7 each of these indictments and you do it separately and
8 independently.

9 The presumption of innocence is not a mere legal
10 theory. It is not just a legal phrase, it is a substantial
11 right to which every defendant is entitled unless you, the
12 jury are satisfied from the evidence of the defendant's
13 guilt beyond a reasonable doubt. What then is reasonable
14 doubt in the law? A reasonable doubt is the kind of doubt
15 that would cause a reasonable person to hesitate to act.
16 The State has the burden of proving the defendant guilty
17 beyond a reasonable doubt and again for each of these
18 indictments. Some of you may have served as jurors in
19 civil cases where you were told that it is only necessary
20 to prove that a fact is more likely true than not true,
21 such as by the greater weight or the preponderance of the
22 evidence.

23 In criminal cases, the State's proof must be more
24 powerful than that. It must be beyond a reasonable doubt.
25 Proof beyond a reasonable doubt is proof that leaves you

1 firmly convinced of the defendant's guilt. There are very
2 few things in this world that we know with absolute
3 certainty and in criminal cases, the law does not require
4 proof that overcomes every possible doubt. If, based on
5 your consideration of the evidence, you are firmly
6 convinced that the defendant is guilty of the crime that
7 you are considering, you must find the defendant guilty.
8 If, on the other hand, you think there's a real possibility
9 that the defendant is not guilty, you must give the
10 defendant the benefit of the doubt and find him not guilty.
11 Do this, ladies and gentlemen, for each of these
12 indictments separately.

13 I remind you that during this trial, you and I had
14 certain duties to perform. As the trial judge, it is my
15 responsibility to preside over the trial of this case and I
16 also had the duty to rule on the admissibility of the
17 evidence offered during this trial. Ladies and gentlemen,
18 you are to consider only the competent evidence before you.
19 If there was any testimony ordered stricken from the record
20 or I gave you instructions, ladies and gentlemen, you must
21 consider my instruction and you would disregard any
22 testimony that I instructed you to disregard. You are to
23 consider only the testimony that has been presented from
24 this witness stand, any exhibits also which have been
25 admitted into evidence. Those exhibits, of course, will be

1 with you in your jury room.

2 Now, I have the additional duty to charge you
3 regarding the law applicable to this case. As the
4 presiding judge, I am the sole judge of the law in this
5 case and it is your duty as jurors to accept and apply the
6 law as I now state it to you. If you already have any idea
7 as to what the law is or maybe what it ought to be and it
8 doesn't agree with what I tell you the law is, you must
9 abandon you're preconceived idea because you are sworn to
10 accept and apply the law exactly as I state it to you. And
11 you might want to have a conversation with your legislature
12 sometime in the future, but for our system to work
13 correctly, ladies and gentlemen, you must accept and apply
14 the law exactly as I state it to you.

15 Now, in every case tried in this court before a
16 jury, the jury, you, become the sole, the only, the
17 exclusive judge of the facts of the case. A trial judge
18 cannot intimate, state, comment or make any statement to a
19 trial jury about the facts in a case. Since you the jury
20 are the sole judges of the facts in this case, you are not
21 to infer from what I have said during the progress of this
22 trial and ruling on the admissibility of evidence or
23 otherwise or anything that I say to you now during the
24 course of this instruction to you that I have any opinion
25 regarding the facts in this case. The law doesn't allow me

1 to have an opinion regarding the facts in this case. I
2 have no opinion. Ladies and gentlemen that is a matter
3 solely for you to determine. And it is you, ladies and
4 gentlemen, who will, through you're duty, determine the
5 effect, value, the weight and the truth of the evidence
6 presented during this trial.

7 Now, we're going to talk about two kinds of
8 evidence that are presented during a trial. The big
9 category. One is called direct evidence and one's called
10 circumstantial evidence. We're going to talk about those
11 two types of evidence.

12 Now, ladies and gentlemen, direct evidence is the
13 testimony of a person who claims to have actual knowledge
14 of a fact, such as an eyewitness. It is evidence which
15 immediately establishes the main fact to be proved.

16 Circumstantial evidence, is proof of a chain of facts and
17 circumstances indicating the existence of a fact. It is
18 evidence which immediately establishes collateral facts
19 from which the main fact may be inferred. Circumstantial
20 evidence is based on inference and not on personal
21 knowledge or observation.

22 How about an example to illustrate the difference.
23 It's February. It is cold. Now, imagine with me that snow
24 is forecast, so along with it being February and being
25 cold, snow is forecast. Now, on your drive home white snow

1 starts pelting you on your windshield and when you get out
2 at your house you get snow on your face. You are an
3 eyewitness to the fact that it is snowing. You can testify
4 directly as an eyewitness that it is snowing.

5 Now, it's February, cold, snow is forecast. You
6 look out before you go to bed about eleven o'clock and you
7 don't see anything but your poor old pitiful brown bunch of
8 grass. You wake up in the morning and low and behold as
9 far as you can see the world is covered with snow. It
10 isn't snowing, but it's covered with snow. Well, here are
11 the facts that you know. Use your chain of facts. You
12 know that it's February, that it's cold, that it's forecast
13 for snow, but when you went to bed there was brown crunchy
14 grass showing, but this morning there's snow everywhere.
15 You know and you can testify regarding those facts as to
16 what you know. One, through inference you can say it
17 snowed overnight. It snowed overnight. That's
18 circumstantial evidence. It's proof of a chain of facts
19 and by inference it is proof of the last fact if you will
20 that it snowed overnight in my example.

21 The law makes absolutely no distinction between the
22 weight or value to be given to either direct or
23 circumstantial evidence. Nor is a greater degree of
24 certainty required of circumstantial evidence and of direct
25 evidence. You should weigh all the evidence in the case.

1 And after weighing all of the evidence, if you are not
2 convinced of the guilt of the defendant beyond a reasonable
3 doubt, you must find the defendant not guilty. And again,
4 you do this for each of the charges.

5 Now, the credibility of the witnesses, we're now
6 going to talk about the credibility of the witnesses. What
7 do we mean by that? Well, ladies and gentlemen,
8 necessarily as you are the -- make your findings of fact,
9 you must determine the credibility of the witnesses who
10 have testified in this case. Ladies and gentlemen,
11 credibility just means believability. It becomes your duty
12 as jurors to annual vise and evaluate the evidence and
13 determine which evidence convinces you of its truth in
14 determining the believability of witnesses who have
15 testified in this case.

16 You may believe one witness over several witnesses
17 or several witnesses or one witness. You may believe a
18 part of a witnesses testimony and you may disregard,
19 meaning disbelieve the remaining part of the testimony of
20 the same witness. You may believe the testimony of a
21 witness in its entirety, or you can reject the testimony of
22 a witness in its entirety. You may consider whether any
23 witness has exhibited to you any interest, bias, prejudice
24 or other motive in this case and you may also consider the
25 appearance and the manner of the witness while on the

1 witness stand.

2 Now, ladies and gentlemen -- ladies and gentlemen,
3 our rules of evidence ordinarily do not permit witnesses to
4 testify regarding their opinions or the conclusions --
5 there is an exception to this rule and that exists for
6 witnesses who are deemed to be expert witnesses. Those are
7 witnesses who by education and experience have become an
8 expert in some art, science, profession, or calling and
9 they may state an opinion as to relevant and material
10 matter in which the witness claims to be an expert. And
11 they may also state the reasons for the opinion or more
12 than one opinion, their opinions.

13 You should consider any expert opinion or opinions
14 received in evidence in this case and like any other
15 evidence, give it the weight you think it deserves. If
16 you decide that the opinion of an expert witness is not
17 based on sufficient education and experience, or if you
18 conclude that the reasons given in support of the opinion
19 are not sound or that the opinion is outweighed by other
20 evidence, you may disregard the opinion in its entirety.
21 An expert witness' testimony is to be given no greater
22 weight than that of other witnesses simply because the
23 witness is an expert. Further, you are not required to
24 accept an expert's opinion even though it is not
25 contradicted.

1 Now, I instruct you and I emphasize, ladies and
2 gentlemen, that the fact that the defendant, Mr. Simms, did
3 not testify is not -- is not a factor to be considered by
4 you in any way in your deliberations and in your
5 consideration on the question of whether or not he is
6 guilty or not guilty as to each of these indictments.
7 Ladies and gentlemen, it must not be considered by you in
8 any manner whatsoever. A defendant has the constitutional
9 right to remain silent and the assertion of this right must
10 not be considered by you in your deliberations. I repeat.
11 Under your oath, you are to draw no conclusion whatsoever
12 from the fact that the defendant in this case did not
13 testify. The fact that this defendant did not testify,
14 ladies and gentlemen should not even be discussed in the
15 jury room.

16 The burden of proof as I have stated to you is and
17 remains on the State. Mr. Simms is not required to prove
18 himself not guilty. The burden of proof is and remains on
19 the State to prove guilt beyond a reasonable doubt as to
20 each and both of these indictments.

21 Now, ladies and gentlemen, in order to establish
22 criminal liability, criminal intent is required. For
23 example, the mental state required to be proven by the
24 State for a particular crime might be purpose, intent,
25 knowledge, recklessness, criminal negligence. Criminal

1 intent must be proven by the state beyond a reasonable
2 doubt. Criminal intent is always a matter that must be
3 determined by the jury from the circumstances surrounding
4 the situation. There is no way to prove intent to a
5 mathematical certainty. There is no way medical science
6 can dissect a person's brain and determine what the person
7 had in mind. So the State -- the law says -- the law says
8 that criminal intent may be inferred from the circumstances
9 shown to have existed. This is how you make a
10 determination of whether or not the element requiring
11 intent was present. It is not necessary to establish
12 intent by direct and positive evidence, but intent may be
13 established by inference in the same way as any other fact
14 by taking into consideration the acts of the parties and
15 all the facts and circumstances of the case. Criminal
16 intent is a mental state. It is up to you to determine
17 what the defendant intended to do based on the circumstances
18 shown to have existed. It is said that criminal intent is
19 a conscious wrong doing. Criminal intent can arise from an
20 action or a failure to act. It may arise from negligence,
21 recklessness or an indifference to duty, to consequences
22 that are considered by the law to be the equivalent of
23 criminal intent.

24 Now, ladies and gentlemen, mere presence at the
25 scene is not sufficient to prove someone guilty of a crime.

1 A defendant's presence where a crime is being committed or
2 mere association with a person who commits a crime does not
3 make the defendant an accomplice or aider and abetter of
4 the person that committed the crime. The burden is on the
5 State to prove every element of the crime charged. If you
6 find after reviewing all of the evidence the State has
7 proved that the defendant was only present at the scene of
8 the crime, but they haven't proved to you by your
9 satisfaction beyond a reasonable doubt of the other
10 elements of the crime, then you must find the defendant not
11 guilty.

12 The law is that proof of -- being at the scene of
13 the crime -- mere proof of being at the scene of the crime
14 is not sufficient to find someone guilty.

15 Now, ladies and gentlemen, there has been presented
16 that witnesses have made prior statements which were not
17 consistent with the witnesses present testimony. You may
18 use this evidence to decide whether to believe the witness.
19 You may also use the evidence of the earlier contradictory
20 statements to determine the truth of these statements. It
21 is up to you to decide whether to believe the earlier
22 statements or the testimony given at trial. If a witness
23 is shown to have knowingly testified untruthfully
24 concerning any material matter, you may consider this in
25 determining whether to trust the witness's testimony as to

1 other matters. You may reject all the testimony of that
2 witness or give all or part of the testimony the weight
3 that you think it deserves.

4 Now, ladies and gentlemen, there has been a
5 statement alleged to have been made by this defendant,
6 Mr. Simms and while the Court has determined that the
7 statement is admissible, I instruct you that you make the
8 ultimate decision of whether or not the defendant made the
9 statement. If the defendant did make the statement, you
10 must determine whether the statement was made by the
11 defendant voluntarily and of his own free will. This means
12 that the statement was not caused by pressure or force or
13 fear, threats, coercion, or intimidation or by hope or
14 promise of leniency or reward of any kind. In determining
15 whether the statement was voluntary, you should consider
16 the characterist ticks of the defendant and the details of
17 the questioning. Some factors that you must consider are
18 the age of the defendant, the defendant's education or lack
19 of edge case, the defendant's mental ability or capacity,
20 the defendant's IQ or intelligence, the defendant's
21 background and environment, the place and length of
22 detention, the nature of the questioning, the advice or
23 lack thereof to the defendant of his constitutional rights
24 including but not limited to the right to remain silent.
25 Any statement could be used against him in a court of law.

1 The right to have a lawyer present, that if he couldn't
2 afford a lawyer, a lawyer would be appointed to represent
3 him without any cost and that he could stop making a
4 statement at any time. You must carefully consider all of
5 the surrounding circumstances before you give any weight to
6 an alleged statement. The State has the burden of proving
7 beyond a reasonable doubt that the alleged statement was
8 voluntary. If you determine it was, you may give the
9 statement any further consideration that you deem proper.
10 You must decide what weight, if any, should be given to the
11 alleged statement. If you determine that the alleged
12 statement was not a free and voluntary statement of the
13 defendant, you should not consider the statement at all.

14 Now, we're going to talk about the two charges.
15 We're going the first talk about involuntary manslaughter,
16 then we're going to talk about breach of the peace high and
17 aggravated.

18 Now, ladies and gentlemen, Mr. Simms is charged the
19 involuntary manslaughter. To prove involuntary
20 manslaughter, the State must prove beyond a reasonable
21 doubt that the defendant unintentionally killed the victim
22 without malice, but while engaged in an unlawful activity
23 not naturally tending to cause death or great bodily harm
24 or that the defendant unintentionally killed the victim
25 malice what time engaged in a lawful activity with reckless

1 disregard for the safety of others.

2 Now unintentional means that the defendant did not
3 intend for anyone to be killed or seriously injured.

4 Reckless disregard for the safety of others is more than
5 mere negligence or carelessness. Mere negligence or
6 carelessness is the failure to use the care that a person
7 of ordinary reason would use under the same circumstances.
8 Recklessness is the con thus failure to use ordinary care.
9 Reckless disregard for the safety of others, means that you
10 are not interested in the sequences of your acts or the
11 rights and safety of others.

12 If a person who knows or should know that ordinary
13 care requires certain precautions be taken for the safety
14 of others when using a dangerous instrumentality such as a
15 gun. If that person fails to use those precautions, the
16 person's actions are considered reckless. The State must
17 also prove beyond a reasonable doubt that the defendant's
18 act was a proximate cause of death. Proximate cause is a
19 direct cause. It is the immediate cause, the efficient
20 cause. It is that cause without which the death of the
21 victim would not have occurred. It could not have
22 resulted. There must be a chain of causation from the time
23 of the injury inflicted by the defendant until the time of
24 the victim's death. Proximate cause does not necessarily
25 mean that it occurred immediately prior to death. There

1 may be more than one proximate cause. The acts of two or
2 more persons may combine together to be a proximate cause
3 of the death of a person. The defendant's act may be
4 regarded as a proximate cause if it is a contributing cause
5 of the death of the victim. The fact that the other
6 clauses also contribute to the death of the victim does not
7 relieve the defendant from responsibility. The defendant's
8 act need not be the sole cause of the death, but must be a
9 proximate cause contributing to the death of the victim.

10 Ladies and gentlemen, another word for proximate
11 cause is a direct cause. It must be a direct cause. In
12 law school, you learn about the but for test and proximate
13 cause went on it for a week. They talked about it so they
14 used the but for test. But for the actions of the
15 defendant, the victim would not have died. Again, there
16 may be more than one proximate cause.

17 Now, ladies and gentlemen, the violation of the
18 statute, if it is the proximate cause of an injury, if it
19 is the proximate cause of injury is evidence of
20 recklessness.

21 Now, I want to talk about another kind of cause.
22 We've talked about that there can be more than one
23 proximate cause, which could cause death. But, there is
24 another cause called intervening cause, an intervening
25 cause. An intervening cause is a cause that is independent

1 of the conduct of the defendant and is adequate to cause
2 death and efficient intervening cause of death will relieve
3 the alleged wrongful proximate conduct of the defendant
4 unless this intervening act was reasonably foreseeable.
5 Any cause intervening between the first cause and the final
6 injury, which might reasonably have been foreseen or
7 anticipated by the original wrongdoer is not such efficient
8 intervening cause.

9 We -- now we'll talk about breach of peace. Ladies
10 and gentlemen, the defendant in this case has also been
11 charged with breach of the peace high and aggravated.
12 Breach of peace is a violation of the public order or a
13 disturbance of the public peace or any act of conduct
14 inciting violence. This includes in violation of any law
15 enacted to preserve peace and God order. Peace means the
16 peace which is enjoyed by the citizens of a community.
17 Whether certain conduct constitutes a breach of the peace
18 depends on the time, place and nearness of other persons.
19 Although a breach of the peace includes acts which are
20 likely to produce violence, the State is not required to
21 prove that actual violence took place or that the peace was
22 actually broken. If what was done was you know justifiably
23 unlawful, tending with sufficient directness to break the
24 peace, then the State has met its burden if it has proved
25 this beyond a reasonable doubt.

1 The State must also prove beyond a reasonable doubt
2 circumstance of aggravation. Circumstances of aggravation
3 are things such as use of a deadly weapon, infliction of
4 serious bodily injury, great disparity between the ages or
5 physical conditions of parties, a difference in the genders
6 of the parties, purpose full imbleaching of shame and
7 disgrace, resistance of lawful authorities. These are
8 merely examples of circumstances of aggravation.

9 Now, ladies and gentlemen, there has been raised in
10 this case by the defense what is called self-defense.
11 Self-defense is a complete defense and if it is -- and
12 ladies and gentlemen, once it is raised, then the State has
13 the burden of proving that self-defense did not occur
14 beyond a reasonable doubt. Ladies and gentlemen, if you
15 find self-defense in this case, you must find the defendant
16 not guilty because self-defense is a complete defense.

17 Now, ladies and gentlemen, if you have a reasonable
18 doubt of the defendant's guilt after considering all of the
19 evidence, including the evidence of self-defense, then you
20 must find the defendant not guilty. On the other hand, if
21 you have no reasonable doubt of the defendant's guilt after
22 considering all of the evidence, including the evidence of
23 self-defense, then you must find the defendant guilty. The
24 following elements are the elements of self-defense. And
25 again, the State must disprove the defense of self-defense.

1 Now, here are the elements of self-defense. The
2 defendant must be without thought in bringing on the
3 difficulty. If the defendant's conduct was the type which
4 was reasonably calculated to and did provoke an assault,
5 the defendant would be at fault in bringing on the
6 difficulty and would not be entitled to an acquittal based
7 on self-defense. Self-defense is not available to a
8 person who uses language which is so contentious that a
9 reasonable person would expect it to bring on a physical
10 encounter and which did actually contribute to the physical
11 encounter. If the defendant voluntarily participated in
12 mutual combat for purposes other than protection, then the
13 death of the victim would not be self-defense. This is
14 true even if during the combat, the defendant feared death
15 or serious bodily injury. However, if before the death
16 occurs, the defendant withdraws and tried in God faith to
17 avoid further conflict and either by word or act makes that
18 fact known to the victim he would be without fault in
19 bringing on the difficulty.

20 For mutual combat, there must be mutual intent and
21 willingness to fight. This intent may be shown by acts and
22 conduct of the parties and the circumstances surrounding
23 the situation.

24 Now, ladies and gentlemen, the second element of
25 self-defense is that the defendant was actually in imminent

1 danger of death or serious bodily injury or that the
2 defendant believed that he was in imminent danger of death
3 or injury. If the defendant was actually in imminent
4 danger it must be shown that the circumstances would have
5 warranted a person of ordinary firmness and courage to
6 strike the blow to prevent death or serious bodily injury.
7 If the defendant believed he was in imminent danger of
8 death or serious bodily injury, it must be shown that a
9 reasonably prudent person of ordinary firmness and courage
10 would have had the same belief.

11 In deciding whether the actually was or believed he
12 was in imminent danger of death or serious bodily injury,
13 you should consider all the facts and circumstances
14 surrounding the crime or surrounding the circumstances,
15 including physical conditioning and characteristics of the
16 defendant and the victim.

17 Now, ladies and gentlemen, a defendant does not
18 have to show that he was actually in danger and it is
19 enough if the defendant believed he was in imminent danger
20 and a reasonably prudent person of ordinary firmness and
21 courage would have had the same belief. A defendant has
22 the right to act on appearances even though the defendant's
23 beliefs may have been mistaken. It is for you to decide
24 whether the defendant's fear of immediate danger, death or
25 serious bodily injury was reasonable and would have been

1 felt by an ordinary person in the same situation.

2 Words accompanied by hostile acts may, depending on
3 the circumstances, establish self-defense. Now the
4 relevance of sizes, ages and weights of the defendant and
5 the victim may be considered in deciding the apparent or
6 need for force in self-defense and the amount of force
7 needed. Threats made by the victim may be considered in
8 determining whether the defendant acted with reason to believe he
9 was in imminent danger.

10 I further charge you that a person who voluntarily
11 renders himself intoxicated is no less responsible for his
12 acts than someone who is sober. The final element of
13 self-defense is that the defendant had no other probable
14 way to avoid the danger of death or serious bodily harm of my
15 knowledge than to act as a defendant acted in this
16 particular instance.

17 Now, ladies and gentlemen, I further charge you
18 that a person cannot be required to make an exact
19 calculation as to the degree or amount of force which may
20 be needed to avoid death or serious bodily harm; therefore,
21 in self-defense a defendant has the right to use force
22 needed to avoid death or serious bodily harm. The force
23 used in self-defense does not have to be limited to the
24 degree or amount of force used by the victim. The
25 defendant has the right to use so much force as appeared to

1 be necessary for complete self-protection and come a person
2 of ordinary reason and firmness would have been needed to
3 prevent death or serious bodily harm.

4 Now, ladies and gentlemen, if the defendant is
5 justified in defending himself or others, or taking the
6 first act, then the defendant is also justified in
7 continuing to defending himself until it is apparent that
8 the danger of death or serious bodily injury has completely
9 ended.

10 Now, ladies and gentlemen, we are going to go over
11 the verdict forms.

12 Ladies and gentlemen, before I do that with you
13 though, I want -- two things I want to say. The first
14 thing that I want to tell you is that your verdict must be
15 unanimous. This must be the verdict of each and everyone
16 of you. This must be the verdict of all of you. This is
17 not the verdict of if majority, this is not the verdict of
18 any one of you, but this must be the verdict of each and
19 everyone of you.

20 And, Ms. Frederick and Mr. Day saw, that should be
21 a hint that when my jury leaves me on this next occasion, I
22 want you to remain with me. All right. Because you are my
23 alternates. Okay? (Witness nodded head.)

24 **THE COURT:** Very well. Now, ladies and gentlemen
25 the next thing that I want to say to you is that there are

1 two charges. You know that. I will tell you that there
2 are two possible verdicts as to each of these two charges
3 and I have put these two possible verdicts on this piece of
4 paper as to each of these two charges. They're in a
5 certain order.

6 Ladies and gentlemen, I could have just as easily
7 put them in the other order. You know, it's just reality
8 if you're going to put two things on a piece of paper,
9 one's got to be first and one's got to be second and I want
10 you to know that I could have just as easily put the one
11 that I put second first and the one that I put first
12 second. The reason that I'm saying this to you is there's
13 no hidden meaning in the order in which these matters have
14 been placed on the paper. Please don't take any hid
15 opinion meaning in the order in which these two possible
16 verdicts have been placed on paper. It's just reality if
17 you're going to put two on the paper one's got to be first
18 and one's got to be second.

19 Now, we're going to go over the possible verdicts.
20 I'm coming down there so we can look at it.

21 Mr. Presiding juror, it's going to be your duty to
22 write the verdict or circle the verdict, which ever is the
23 unanimous verdict of this jury once you finish your
24 deliberations, it's going to be your responsibility to
25 circle it. I don't want there to be any question about

1 what is the verdict of the jury, the unanimous verdict of
2 the jury. So circle it God but it can only be one as to
3 each of these two.

4 Now, ladies and gentlemen, this is simply called
5 the caption, it's the title of the case. This is just the
6 title of the case and it's just -- oh, you know you're in
7 South Carolina and in the County of Richland. And the
8 caption says State of South Carolina versus Curtis Simms,
9 the defendant. Now, and these are the indictment numbers
10 and you had them read to you now twice and that's here.
11 And this is the Court of general sessions. You know that.
12 And you're the fifth judicial circuit. I'm from the first
13 circuit. And it says verdict form. Now, it says please
14 circle the appropriate verdict below and follow the
15 accompanying instructions carefully.

16 Number one, as to the charge of breach of peace
17 high and aggravated, we the jury unanimously -- my children
18 think I'm mad, y'all are going to be mad too. We, the jury
19 unanimously, just as a reminder, find the defendant -- and
20 there are two possible verdicts. And they're written here,
21 guilty and not guilty. I could have just as easily put not
22 guilty, guilty. Please take no hidden meaning.
23 Irrespective of what is the unanimous verdict of the jury
24 which of these two verdicts, I want you to circle it so
25 there isn't any question.

1 Now, number two says as to the charge, we the jury
2 unanimously find the defendant -- and there are two
3 possible verdicts, not guilty and guilty, which ever is the
4 unanimous verdict of this jury, I want you to just circle
5 it so there's no question as to what is the unanimous
6 verdict of the jury.

7 Now, once you have concluded your deliberations and
8 you've filled out your verdicts, it says stop and end your
9 deliberations. And then you will sign here presiding juror
10 and you know who you are. And you'll date it. For your
11 reference, today is February the 4th, but that's just for
12 your reference purposes. But you will date it too, 2013.

13 All right. Now, when you have finished your
14 deliberations and you've filled out your verdict form.
15 You'll knock on your door and then we'll return to the jury
16 room. You will pass the verdict forms to one of your
17 bailiffs who will pass that to me. You do not publish the
18 verdict.

19 Now, ladies and gentlemen, in just a minute, I'm
20 going to ask you to step back to your jury room except for
21 my two alternates and I'm going to give you this
22 instruction. It's going to be this: Do not discuss this
23 matter or allow anyone to discuss it with you. You ought
24 at this point go, well wait a minute. Wait a minute.
25 We're supposed to be deliberating now, based on what you've

1 been telling us. But I'm going to tell you exactly what
2 I'm going to do. When you return to your jury room on this
3 next occasion, I'm going to turn to these lawyers. I'm
4 going to ask them two questions. Have I given this jury
5 all of the law that they need for their deliberations and
6 have I stated it for them correctly. And these lawyers
7 help me know whether or not I have given you all the law
8 that you may need for your deliberations. And in the event
9 that I haven't -- in the event that I have failed to give
10 you some part of the law that you may need, I ask one of
11 the bailiffs to have you return so that I can then give you
12 that piece of the law. I ask you in advance, please do not
13 consider that instruction with any emphasis. It's just my
14 chance to get it right and give you the law that you may
15 need for your deliberations.

16 Now, in some instances, I've done this for a long
17 time, but sometimes something will just come out wrong.
18 Goodness knows I don't mean for it to. And these lawyers
19 help me know that and they'll say, Judge, I don't mean to
20 say it this way, but this is what came out and it came out
21 wrong. So I'm going to ask you in advance, in the event
22 that I need to bring you back out because I have stated
23 something incorrectly, I ask you in advance, please allow
24 me to correct my error in your minds, understanding this is
25 my one chance to get this right, give you all the law that

1 you may need for your deliberations and state it for you
2 correctly.

3 Now, in the event that I do not need to bring you
4 back out, you will be brought your exhibits, the verdict
5 form and an instruction to begin your deliberations.

6 Now, I believe that you'll been given an
7 instruction to begin your deliberations specifically, but
8 you won't have the verdict form and the exhibits unless
9 it's time to begin your deliberations.

10 Now, all twelve of you must be present for you to
11 deliberate. So if you -- if somebody needs to take a
12 comfort break, just stop deliberations, take your comfort
13 break and then you just start back reconvene, start back
14 when all twelve of you are together again. Just remember
15 that all twelve of you must be present for you to
16 deliberate.

17 Now, ladies and gentlemen, I'm going to conclude
18 with this last thought and I think it's been brought up to
19 you, but it's by both sides, but I likewise will do so
20 because it is a good place for me to conclude and it is
21 this. You know, the word verdict comes from the Latin
22 phrase veredicto which means to speak the truth. To speak
23 the truth, which is now your task.

24 Please step to your jury room. Do not discuss this
25 matter or allow anyone to discuss it with you. We'll be

1 with you shortly, except for my alternates.

2 (WHEREUPON the jury left the courtroom at 4:34
3 p.m.)

4 THE COURT: All right. Now, let me tell you what
5 I'm going to ask y'all to do for me. You know we've come a
6 long way. Here's what I believe. I believe if something
7 happens to one of our jurors in the first 15 minutes of the
8 deliberations we could stop the deliberations, seat one of
9 our alternates and then begin the deliberations anew. I
10 don't think anyone will do that in after 15 minutes. I
11 think I can do it early. So you've given me so much more
12 of your time, I'm going to ask you for 15 more minutes.
13 I'm going to ask our bailiff to put you somewhere other
14 than with the jurors. You got your own little space. But
15 y'all can be together. But put you in your own space and
16 you will please watch your watch and I'm going to ask you
17 for about 15 more minutes then you can certainly be
18 dismissed after that. So if you'll go with our bailiff.

19 Put them somewhere other than of course than with
20 the juror. Thank you.

21 (WHEREUPON the alternate jurors left the
22 courtroom.)

23 THE COURT: All right. On behalf of the State,
24 additions exceptions.

25 MS. WALKER: None, Your Honor.

1 THE COURT: And other than what was mentioned
2 earlier.

3 MR. HARRIS: Yes, ma'am and we didn't catch this.

4 THE COURT: Uh-huh.

5 MR. HARRIS: It's a small matter but I think it is
6 important matter.

7 THE COURT: Sure.

8 MR. HARRIS: On page 20?

9 THE COURT: Uh-huh. Okay. Go ahead.

10 MR. HARRIS: In the middle of that page, Your
11 Honor.

12 THE COURT: Uh-huh.

13 MR. HARRIS: There is a part of your charge that
14 states violation of statute it is the proximate cause of an
15 injury is evidence of recklessness and that's the matter in
16 which it was charged. That almost attaches a slickly to
17 the standard to the circumstance where there is nothing --
18 I believe -- quite frankly I wish I had raised it before
19 your charge that the is should be may.

20 THE COURT: Okay. That's the law -- as I
21 understand the law that is the law.

22 MR. HARRIS: And judge, I --

23 THE COURT: Yeah.

24 MR. HARRIS: If that is the state of the law, we
25 accept that that is a proper charge. It just jumped out at

1 me.

2 THE COURT: I understand.

3 MR. HARRIS: And I was listening to Your Honor, it
4 appears to be to me a standard that is not consistent with
5 what is before this jury. It says strict liability than
6 anything else which is generally not guilty the standard in
7 a criminal case.

8 THE COURT: You wouldn't have me come back out and
9 say that simply the the violation of a statute it may be
10 evidence -- maybe considered by you as evidence of
11 recklessness. Yes?

12 MR. HARRIS: Yes, Your Honor.

13 THE COURT: Okay. I'll do that. Great. Yeah.
14 I got to have my alternates too. Quick, quick.

15 MR. HARRIS: But I would ask you to say that the
16 previous charge said is evidence. I charge that that's not
17 -- okay.

18 THE COURT: In order do a little clean up.

19 MR. HARRIS: Yes, ma'am.

20 THE COURT: All right.

21 (WHEREUPON the jury entered the courtroom at 4:38).

22 THE BAILIFF: All all jurors present, Your Honor.

23 THE COURT: Thank you so much.

24 Now, ladies and gentlemen, I told you the lawyers
25 help me in the event something just comes out wrong. Well,

1 something came out wrong. So I'm going to ask you to
2 please allow me to correct my error in your minds. I'm
3 going the tell I what the error was and I'm going the
4 correct it. I gave you an instruction that staid said that
5 the violation statute, if it is a proximate or the
6 proximate cause of the injury is evidence of recklessness.
7 What I should have said to you is this, the violation of a
8 statute, if it is the proximate cause of an injury may be
9 considered by you as evidence of recklessness. Please
10 allow me to correct my error in your minds. Ladies and
11 gentlemen, alternates hold up right here for me.

12 Ladies and gentlemen, my twelve if you will please
13 retire to your jury room. The verdict form and the
14 evidence will be presented to you in just a little while
15 and then you'll begin your deliberations.

16 Please retire to your jury room.

17 (WHEREUPON the jury left the courtroom at 4:40
18 p.m.)

19 THE COURT: All right. Any additions or exceptions
20 from the State?

21 MS. CAMPBELL: No, Your Honor.

22 THE COURT: From the defense?

23 MR. HARRIS: No, ma'am, thank you.

24 THE COURT: Now, here's what I need you all to do
25 for me, please. I need you to please all of you look at

1 this evidence that's going to jury. Please look at the
2 verdict form to be sure that all is in order. I am the
3 judge that had to here -- it has been my policy to ask my
4 lawyers please look at the evidence and make sure what's
5 going to the jury and what's not going to the jury.

6 And I need the substitute this one.

7 (WHEREUPON the evidence was gone through by the
8 attorneys with the court reporter.)

9 THE COURT: Okay.

10 (WHEREUPON the jury began their deliberations.)

11 THE COURT: Now, they said that they do not need to
12 come in right now.

13 MR. HARRIS: Oh. Are you all satisfied with that
14 or you want me to bring them out.

15 MS. CAMPBELL: (Witness nodded head.)

16 THE COURT: Y'all okay?

17 MR. GASSER: (Witness nodded head.)

18 THE COURT: All right. Let me just for the record
19 --- State's fine?

20 MS. WALKER: State's fine, Your Honor.

21 THE COURT: And defense is fine.

22 MR. HARRIS: I have no objection to doing nothing.

23 THE COURT: Okay. All right. We will continue the
24 be in recess. Y'all don't go far.

25 (WHEREUPON a recess was observed.)

1 **THE COURT:** All right. Ladies and gentlemen you
2 know it is my policy for a number of reasons whenever the
3 jury is deliberating not to keep court personnel and
4 everyone here very late and so I am going to bring the jury
5 out and I am going the excuse them and let them begin anew
6 in the morning. And so that's why I brought everybody out.
7 So if you will bring me my jury.

8 (WHEREUPON the jury entered the courtroom at 5:39
9 p.m.)

10 **THE BAILIFF:** All jurors are present, Your Honor.

11 **THE COURT:** Thank you so very much.

12 Ladies and gentlemen, in just a moment I'm going to
13 dismiss you for the day. And the reason is, is that you've
14 worked very long and very hard. And there just it just
15 gets to be a point that it -- it just -- I need to send you
16 all home and let you come back and begin anew in the
17 morning with your deliberations. So that's why I brought
18 you back out for that purpose. And so in just a moment, I
19 am going the be excusing you for the evening and I'm
20 looking still 9:30?

21 (Juror nodded head.)

22 **THE COURT:** All right. And so here's what will
23 occur in the morning at 9:30. You all will go to your jury
24 room. What will happen over the balance of this evening is
25 that the exhibits and the verdict form will be secured but

1 they will be put in in your room before you arrive in the
2 morning at 9:30 and when you know all 12 of you are
3 present, then you begin your deliberations. Just don't
4 start your deliberations until all twelve of you are
5 present. But you don't need to wait for -- you know, for
6 any signal from the the Court.

7 Mr. Presiding juror, when you count ten folk -- I
8 mean twelve folk, not ten -- twelve folk -- I'm tired. I
9 need to go home. When all twelve of you are present, then
10 you may begin your deliberations and your exhibits and the
11 verdict form will be there for you.

12 Let me, just again, you know, I can only imagine
13 the curiosity at this point must be through the roof. So I
14 so hope that you all remembering to tell whoever is curious
15 about that please, you know, it's this judge. Put it on
16 the judge because I don't want any one upset with you. At
17 all. And are we continue to get you your documents that
18 you need (Juror nodded head).

19 **THE COURT:** Very well. Of course, do not read
20 anything, do not listen to anything about this matter, not
21 the radio, the television no reading in the newspaper,
22 nothing on the internet, no investigation now particularly
23 now to include any kind of definitions. You must not go to
24 the internet. You must not do anything to investigate, you
25 now have the information from which you will make up your

1 mind and you must not add to it. And that means no
2 internet. Don't visit any sites, don't do anything. You
3 must now be very mindful that the information which you
4 will make up your mind, you now have. You must not go to
5 the internet, you must not add to that. You must not do
6 any kind of investigations.

7 Same admonition about bringing cell phones or
8 communication devices in the morning. If you forget,
9 please let us know and we will take good care of your cell
10 phone or communication device what time you are serving on
11 the jury when you take your morning break if you need to
12 and no doubt will you can take it to your car at that
13 point.

14 Very well. Ladies and gentlemen, my recommendation
15 to you is just over the we could put this matter to the
16 side. Rest have a very pleasant evening and then you will
17 begin your deliberations in the morning at 9:30. Thank you
18 very much have a good evening.

19 (WHEREUPON the jury left the courtroom at 5:44
20 p.m.)

21 THE COURT: All right. Anything from the State
22 before we take leave.

23 MS. CAMPBELL: No, Your Honor, not from the State.

24 THE COURT: All right.

25 MR. HARRIS: No, ma'am.

1 THE COURT: All right. Now, your client will still
2 be on GPS monitoring.

3 MR. HARRIS: He's going home and he'll be back in
4 the morning.

5 THE COURT: Going home and back. No where are
6 else.

7 MR. HARRIS: Yes, ma'am.

8 THE COURT: Home and back. Does he still have his
9 GPS monitor.

10 MR. HARRIS: Yes, ma'am.

11 THE COURT: Yes?

12 MS. CAMPBELL: Judge, if I could just take up one
13 thing. And this is from the victim's family. Just ask the
14 family to stay for a few minutes while the jury exits the
15 courthouse.

16 THE COURT: All right.

17 MS. CAMPBELL: Just a few minutes to get out so
18 they're --

19 THE COURT: -- not crossing paths. And I know
20 they'll cooperate. Thank you for that.

21 MS. CAMPBELL: Thank you.

22 THE COURT: All right. See you all in the morning
23 at 9 o'clock.

24 (WHEREUPON court was in recess until the following
25 morning.)

1 TUESDAY, FEBRUARY 5, 2013

2 THE COURT: Okay. We have a matter of law.

3 MR. HARRIS: Yes, ma'am.

4 THE COURT: Okay. Wait a minute now. Does the
5 solicitor's office know what that is.

6 MR. HARRIS: No, ma'am.

7 THE COURT: Then they may need -- they may need or
8 wish to have the victim's family present. I just --

9 MR. HARRIS: Okay. I'll wait.

10 MS. CAMPBELL: If he knows what it is I can tell
11 them.

12 MR. HARRIS: We have information that one of their
13 witnesses, Mr. Paxton has been arrested twice for driving
14 related offenses, alcohol related driving offenses. Since
15 he testified, I just want to know when they knew that, if
16 they knew that and if they have any bread material or
17 information related to those arrests. His testimony, Your
18 Honor was that he had two beers that night and he wasn't
19 drinking that night because he doesn't drink and drive.
20 They opened the door if they have that information it
21 should are been provided to us.

22 THE COURT: Okay. Well, I got all that. I think
23 you probably do want to have the victim's family come down.
24 Don't you think before we hear that I think we might want
25 to have them.

1 MR. HARRIS: If they didn't know, Judge.

2 MS. CAMPBELL: We didn't.

3 MR. HARRIS: Then they didn't know.

4 THE COURT: Okay.

5 MS. MCDUFFY: Our paralegal ran the records of all
6 the witnesses. The only one that had a record was an Allen
7 James, he had DUI's on his record. We didn't turn that
8 over because they -- I mean, he wasn't call as a witness,
9 sew that was the only one we knew about. Ms. Walker texted
10 me on the State paper last night and that was the first we
11 had.

12 THE COURT: I got you. Come here.

13 MR. HARRIS: Okay.

14 THE COURT: Come here.

15 (WHEREUPON, there was a bench conference out of the
16 hearing of the jury and the Court Reporter.)

17 THE COURT: Good morning. Let's just -- if you
18 will just ask her to come around and we'll take -- if y'all
19 can swear this young lady in.

20 DANA OUTEN,
21 having been duly sworn, testified as follows:

22 THE CLERK: Please have a seat and state your full
23 name for the record.

24 THE WITNESS: Dana Outen.

25 MS. CAMPBELL: Did you want me to make the inquiry

1 or are you going to make it?

2 THE COURT: It doesn't matter, you can do it.

3 MS. CAMPBELL: I just as soon you do it.

4 THE COURT: Very well.

5 And you're Ms. Alton?

6 THE WITNESS: Outen. O-u-t-e-n.

7 THE COURT: Outen. Thank you so much. Ms. Outon.
8 Thank you so much. Ms. Outen tell me where you are
9 employed.

10 THE WITNESS: At the Richland County solicitor's
11 office.

12 THE COURT: How long have you been employed at the
13 Richland County solicitor's office.

14 THE WITNESS: 17 years.

15 THE COURT: Tell me what your position is.

16 THE WITNESS: I'm a paralegal.

17 THE COURT: You're a paralegal. And are you a
18 paralegal for the office or for particular lawyers error --

19 THE WITNESS: I'm there for particular lawyers.
20 We're broken down the a certain amount of lawyers.

21 THE COURT: Like a team.

22 THE WITNESS: Yes.

23 THE COURT: Okay. And for -- and I know that there
24 probably isn't a job description for what you do because of
25 the number of different tasks that you do, right.

1 THE WITNESS: Right.

2 THE COURT: And I will just share with you what I
3 have learned and I have just recently learned this. I have
4 recently learned that in your solicitor's office that there
5 are certain people in the office who have the training and
6 the -- and maybe you can give me more information but have
7 the training and the permission for lack of a better word
8 to access the NCIC and the SLED data base for criminal
9 records.

10 THE WITNESS: That's correct.

11 THE COURT: Is that right?

12 THE WITNESS: Yes, ma'am, we're certified. We have
13 to go lieu the certification and we are recertified every
14 two years.

15 THE COURT: There is a certification.

16 THE WITNESS: Yes, ma'am.

17 THE COURT: Well you tell me or you where he
18 fleshed my recollection or you've even taught me a little
19 bit more. Are you certified in that regard?

20 THE WITNESS: I am.

21 THE COURT: All right. Have you been working on
22 this particular case?

23 THE WITNESS: Yes, ma'am.

24 THE COURT: I've noticed that you've been here
25 throughout the trial and coming and going probably doing

1 different tasks.

2 Now, my question to you is did you have occasion to
3 run the criminal background checks on any or all of the
4 potential witnesses in this case.

5 THE WITNESS: Yes, ma'am, all.

6 THE COURT: All of them?

7 THE WITNESS: (Witness nodded head.)

8 THE COURT: All right. And I've already. -- I
9 filed the witness list, in this file, but did you have
10 occasion to run the records check, the background check,
11 the records check for the driver in the -- that was driving
12 the black truck in this case whose name is Mr. Backseat
13 ton.

14 THE WITNESS: Yes, ma'am.

15 THE COURT: All right. Now, when you ran the
16 records check, did you -- tell me -- tell me what that is
17 when you do that. What records are you checking.

18 THE WITNESS: When -- in order to run a criminal
19 history of the person, you need the name, date of birth,
20 black male, white mail, whatever their race is and you put
21 that information into the system and once you get that
22 information from NCIC will send you a SID number, or FBI
23 number which is their actual FBI number and then we have to
24 go to another screen and put the FBI number in and that
25 would bring up his record, the he has a record. If they

1 have no record it will indicate no record.

2 THE COURT: I understand.

3 THE WITNESS: And if it's --

4 THE COURT: And so that record is what -- what is
5 your understanding is displayed? What record.

6 THE WITNESS: Anything he has as far as any
7 criminal things that he's done in his life.

8 THE COURT: Okay. Like you were if you were
9 arrested is on there.

10 THE WITNESS: Yes, ma'am.

11 THE COURT: And if you were arrested like in
12 Georgia is on there.

13 THE WITNESS: We'll get the South Carolina record
14 first and then if they have any out of state records it
15 might take a minute to come back or it might even take a
16 day or so to come back but we will eventually get from each
17 state where they have a record from and if it's on there or
18 -- it should come back.

19 THE COURT: I understand and on the system that
20 you're looking through, is someone's driving record on
21 there as well.

22 THE WITNESS: As far as tickets or --

23 THE COURT: Or is there a difference. I
24 particularly don't know. Is it like if you --

25 THE WITNESS: A speeding ticket or something

1 probably won't be on your NCIC record.

2 THE COURT: What now?

3 THE WITNESS: A speeding ticket.

4 THE COURT: Okay. I got you.

5 THE WITNESS: Anything --

6 THE COURT: Yes.

7 THE WITNESS: -- traffic related to that nature.

8 No and sometimes SLED is kind of, if you will SLED is
9 really behind on stuff and if it's not on there, maybe they
10 haven't updated their record or whatever the case may be
11 but if it's on there, then we'll have it.

12 THE COURT: Or driving under the influence, are
13 those arrests typically on those --

14 THE WITNESS: Yes, ma'am.

15 THE COURT: In other words, those would be on
16 there.

17 THE WITNESS: Yes, ma'am.

18 THE COURT: In other words if he had like a
19 speeding or following too closely or bad equipment on your
20 car or something like that, that's not going to be on
21 there.

22 THE WITNESS: Sometimes they are, sometimes they
23 are not.

24 THE COURT: But under your experience, typically if
25 you have a driving under the influence for example or a DUI

1 of some sort that's typically on there.

2 THE WITNESS: It should be, yes, ma'am.

3 THE COURT: It should be. All right. So, do --
4 when you did the records check on Mr. Paxton, tell me what
5 you found, if anything.

6 THE WITNESS: On him particularly, it was nothing.
7 I mean I put his name and date of birth in, what will
8 typically come up if it's something that's close to his
9 name, if it's close to his date of birth not his date of
10 birth but if it's close to his name it will show something
11 but if it's not directly on like the dates of birth don't
12 match up, if I have a social, I check against that. But if
13 it's nothing on it, then I'll or or for the most part. I
14 have to make that decision if that's the actual person and,
15 you know go from dates of birth matching whether it's a
16 black male, white male or again if I have a social, I'll
17 match that up.

18 THE COURT: Sure. And did you -- and you said you
19 ran those check for all of the witnesses.

20 THE WITNESS: Yes, sir.

21 THE COURT: Including Mr. Paxton.

22 THE WITNESS: Yes, ma'am.

23 THE COURT: And what did you find when you put his
24 information in, if anything.

25 THE WITNESS: I must not have found -- nothing.

1 Because if I had found I would run it and had it.

2 THE COURT: Okay. In other words, when -- if you
3 found nothing did you do anything.

4 THE WITNESS: No, I just advise the attorneys -- I
5 gave them the ones that had rap sheets. Everybody else had
6 none.

7 THE COURT: I understand. In other words, if there
8 was a rap sheet you printed the rap sheet.

9 THE WITNESS: Yes, ma'am.

10 THE COURT: If there wasn't a rap sheet you moved
11 on.

12 THE WITNESS: Exactly.

13 THE COURT: Okay. Are you -- are you certain that
14 you checked specifically Mr. Paxton for his record.

15 THE WITNESS: Yes, ma'am. I ran all of them.

16 THE COURT: That's all I can think. Anybody else
17 have any questions.

18 MR. HARRIS: Yes, just a few questions. First of
19 all I would ask that she run one this morning just so the
20 record is correct.

21 THE COURT: Okay.

22 MR. HARRIS: If she would run one for us and I
23 would like that to be made a court's exhibit, please, Your
24 Honor.

25 THE COURT: Okay.

1 **MR. HARRIS:** Just a couple of questions Ms. Outen,
2 doesn't something always print out no matter what? Don't
3 you have to print out whenever you check the record.

4 **THE WITNESS:** It does and it don't. If it's a no
5 record, I will get a thing is that says no record. But if
6 it's something -- again I say if it was something that was
7 close to it it will print out. It would show me everything
8 that was close to it. It and then I would have to compare
9 the dates of birth and the socials and make sure if it's
10 a/k/a or something else that will else that will or will
11 not match.

12 **MR. HARRIS:** Is it your testimony that you don't
13 recall what result was or that you actually specifically
14 recall running Adam Paxton's rap sheet at all.

15 **THE WITNESS:** I don't recall -- I don't recall if
16 there was anything that was close to it or anything that
17 was -- but I know that I ran all of them.

18 **MR. HARRIS:** Okay.

19 **THE WITNESS:** And I gave the attorneys the ones
20 that had records like Travis brown and all the other ones.

21 **MR. HARRIS:** Do you have a specific recollection
22 salute 100 percent specific recollection of having run Adam
23 Paxton's come up with a negative result.

24 **THE WITNESS:** I know I ran all of them on my list
25 and his name was on my list.

1 MR. HARRIS: Thank you that's all.

2 THE COURT: Okay.

3 MS. MCDUFFY: Your Honor, I just want to clarify
4 what she said. When I said earlier when I said that the
5 only record that was shown to me was that of Allen James,
6 it seems to me did also give a Travis Brown. It was a
7 fraudulent check charge with no disposition and we give
8 that -- I did not give them that since it was from 1995.

9 THE COURT: Okay. Okay. Very where he will very
10 well. If you would do that for us we would be so grateful
11 just run it as you did before.

12 THE WITNESS: Okay. Am I dismissed?

13 THE COURT: You are dismissed.

14 THE WITNESS: Absolutely.

15 MR. HARRIS: Thank you, Judge.

16 THE COURT: All right. We're at ease. Y'all stay
17 close. Thank you.

18 (WHEREUPON a recess was observed.)

19 THE COURT: Thank you Ms. Campbell.

20 MS. CAMPBELL: Please the Court, Your Honor. As
21 Ms. Outen indicated she did run this. She didn't actually
22 print this screen out. We have had her print this out
23 which indicates he has no record. I shared this with
24 defense counsel and he has reviewed it as well. I don't
25 think there's any question about it.

1 THE COURT: Lets mark that as a Court's Exhibit and
2 let me review it. I'm going to seal it because it probably
3 has personal and identifying information on it.

4 Very well. Let me ask you this question. On
5 behalf of -- I know that you all have seen this and I no
6 Mr. Gasser has seen this printout. If you need a copy of
7 it for your files, you certainly may have a copy of it but
8 it would be my order that you protect the personal
9 identifying information on it. In fact, I would want you
10 to get together with the solicitor's office if you want it
11 and just redact that. You don't need to have it.

12 MR. HARRIS: Judge, we don't need it for our file:
13 Our inquiry has been done and we are satisfied with the
14 record.

15 THE COURT: Very well. And I'm going the review
16 this record.

17 MR. HARRIS: May we show it to our client, Your
18 Honor.

19 THE COURT: I think you should. I think you
20 should.

21 THE COURT: Absolutely.

22 MR. HARRIS: Thank you.

23 (WHEREUPON there was a pause in the proceedings.)

24 THE COURT: Very well. I'm going the hand the -- I
25 will make a finding on the record based upon my review that

1 just as Ms. Outen said she did, the record was run of
2 Mr. Paxton and there is no record and it says there is no
3 record at all. I don't see anything that indicates any
4 arrest in the like. So having made the finding, I am going
5 to seal that record because of the identifying information
6 and it is ever needed to be unsealed by order of the Court
7 but not without order of the Court.

8 MR. HARRIS: Thank you, Judge, appreciate it.

9 THE COURT: Thank you. And we took care of that
10 matter for the jury?

11 THE BAILIFF: I did.

12 THE COURT: Thank you so kindly. Very well.

13 Anything further at this time?

14 MS. WALKER: No, Your Honor.

15 MR. HARRIS: No thank you, Your Honor.

16 THE COURT: We will continue in recess then until
17 we hear from our jury.

18 (WHEREUPON a recess was observed.)

19 THE COURT: All right. Ladies and gentlemen --

20 All right. We'll wait just a moment.

21 All right. Anything from the State before we bring
22 the jury out? I understand the jury has reached its
23 verdicts.

24 MS. CAMPBELL: No, ma'am.

25 THE COURT: Anything from the defense?

1 MR. HARRIS: No, ma'am, thank you very much.

2 Ladies and gentlemen, we have a number of folks
3 that are in the courtroom. I want to reiterate to the
4 alleged victim's family and to the defendant's family again
5 that I am well aware that these matters are heartbreaking.
6 I'm aware of that. However, this jury has listened very
7 attentively and has worked very diligently and they're
8 about to render their verdict. It is important that this
9 jury is able to render verdict without expressions of
10 emotions. And so of course, I do not know what that
11 verdict is. I have no idea at this moment. And it is
12 absolutely imperative that there be no outbursts whatsoever
13 when the jury renders it's verdict.

14 Now, I understand the emotions associated with it,
15 I do. But it is absolutely essential that the decorum and
16 the order of this court be maintained when the jury renders
17 its verdict.

18 Now, having said that, if anyone violates my
19 instruction, I'm going to have an incredibly you know happy
20 task of dealing with that individual and I certainly don't
21 want to do that. I don't want to add to anyone's upset.
22 But I will do that. So in the -- if you think you are
23 going to have difficult maintaining your emotions, no
24 patter what the verdict might be. I'm going to ask you at
25 this time to take your leave and then once the verdict is

1 rendered and you have yourself an you know what it is. You
2 certainly may return. But I'll give you that opportunity.
3 If you remain, you must keep our emotions in check. Very
4 well.

5 Let us have our jury.

6 (WHEREUPON the jury entered the courtroom at 2:11
7 p.m.)

8 THE COURT: Very well.

9 Mr. Presiding juror, it is my understanding that
10 the jury has reached its verdict. Is this correct Mr.
11 Foreman Mr. Foreman we have, Your Honor.

12 THE COURT: Pass it to our bailiff.

13 I find the verdict is in proper form. Madame Clerk
14 if you would please publish it.

15 VERDICT

16 THE CLERK: Indictment number two thousand
17 11-GS-40-829, the State of South Carolina vs. Curtis James
18 Simms. It's an indictment for breach of peace high and
19 aggravated nature. As to the charge of breach of peace
20 high and aggravated nature, we the jury unanimously find
21 the defendant guilty.

22 Indictment 2011-GS-40-831, State of South Carolina
23 versus Curtis James Simms, this is an indictment for
24 involuntary manslaughter. As to the charge of involuntary
25 manslaughter, we the jury unanimously find the defendant

1 nothing.

2 This is signed by the foreperson Michael Garret.
3 February 5th, 2013.

4 Mr. Foreman is this your verdict -- are these your
5 verdicts and the verdicts of the entire jury?

6 THE FOREMAN: Yes, ma'am.

7 THE COURT: All right. Anything further from the
8 State at this time.

9 MS. CAMPBELL: No, Your Honor.

10 THE COURT: From the defense?

11 MR. HARRIS: No, ma'am, thank you.

12 THE COURT: Very well.

13 Ladies and gentlemen, I want to thank you for your
14 service on this jury. You have obviously given to our
15 system of justice an awful lot of your time and I am great
16 full to you for it. You are now at liberty to talk about
17 this case if you choose. If you choose. And that is a
18 matter for you and you alone to determine.

19 I have always -- and it has been my practice that
20 when I've had the opportunity to work jurors, I always tell
21 the jury should someone persist in talking to you about
22 this case and you've told them that you do not want to talk
23 to them about it, if y'all contact the clerk of court, they
24 will contact me and I'll be happy to intercede on your
25 behalf. Obviously, those of you who need something for

1 your employment so the folks will know where you have been
2 and what you have been up to we'll be happy to get that for
3 you if you'll just return to you to your jury room my clerk
4 will assist you in that regard.

5 Ladies and gentlemen be mindful that -- really two
6 things. Number one that you -- you now are not eligible to
7 serve on a jury in a court of record for the balance of
8 2013. Keep that in mind. And likewise in accordance of
9 our law you have an exemption for your jury service for the
10 years 2014 and 2015 in a court of record should you choose
11 to exercise that exemption.

12 Ladies and gentlemen, in just a few moments we will
13 proceed to sentencing proceedings and post trial motions
14 proceedings. You are now returned to your status as
15 members of the public. Sometimes jurors want to know if
16 they're allowed to remain for that portion and the answer
17 is yes. It's completely up to you. However, again, you
18 have given us so much of your time some of you may be ready
19 to leave. If you are that is perfectly fine. You just
20 take with you on what have of all of the Court personnel of
21 all of us our gratitude for all the time that you have
22 given to our system of justice and with that thank you.
23 You're welcome to remain and likewise you are welcome to
24 leave at this time if you wish.

25 (WHEREUPON the jury left the courtroom at 2:16

1 p.m.)

2 THE COURT: . Yes?

3 MR. GASSER: Your Honor, I know that you just told
4 the jury that you want to proceed to sentencing, we would
5 respectfully request since this has been an incredibly
6 emotional trial and I think everybody's nerves kind of on
7 the end right now, especially with the verdict we've had.
8 We would respectfully request just a couple of days, maybe
9 Thursday morning to proceed with boast motions and
10 sentencing hearing. That would give us a moment to reflect
11 our thoughts and make a presentation to you as to -- by way
12 of allocution.

13 Also to collect our thoughts and maybe present curt
14 to you in the light differently than what has been
15 presented to you in the last seven days in this courtroom.
16 I know we want to speak with his family so they can
17 articulate clearly to you the things they want to say and
18 we were respectfully request an adjournment today and hold
19 up motions and sentencing until Thursday.

20 THE COURT: From the State, I will hear from you in
21 response. Yes?

22 MS. MCDUFFY: Your Honor, we would request that you
23 proceed at this time. Our victims are from out of town and
24 have been away from their lives for the past seven days.
25 We would ask that you proceed at this time.

1 **THE COURT:** Very well, thank you.

2 Mr. Harris, you're not telling me you're not
3 prepared, you're just saying that you would appreciate very
4 much some time.

5 **MR. HARRIS:** That's correct. In fairness to the
6 Court, we've had a long time to get ready for this moment
7 and I'm just asking for the Court's indulgence. I have a
8 matter that certainly does not in any way take precedence
9 over this.

10 **THE COURT:** I understand.

11 **MR. HARRIS:** And Your Honor, I'm just asking for
12 your indulgence as to that extra two days.

13 **THE COURT:** You know --

14 **MR. HARRIS:** One day.

15 **THE COURT:** If I could accommodate you, I would.
16 Here are the realities. The reality today is that I'm
17 actually supposed to be in Orangeburg and there are many
18 matters that are awaiting my arrival in Orangeburg in
19 general sessions there. And they've now had to wait while
20 we finished yesterday and today and they have been most
21 gracious in doing that, but I have matters that I must
22 attend to there.

23 I have also, at this point victims family need to
24 begin to bring closure and -- and, I believe that while I
25 feel a lot of emotion, certainly for your client and his

1 family. I feel a lot of empathy for these folks from out
2 of town and it is time for them to begin to bring closure
3 to these matters.

4 I do not, though -- having said that, if you wish
5 to take a break right now for a few moments and just speak
6 with your clients parents or whoever might want to speak to
7 have a moment to collect your thoughts as you make that
8 presentation, I certainly have no problem at all with that.

9 I am not going to make it to Orangeburg this
10 afternoon and we do have some time and if that will be of
11 assistance to you. I certainly want you to take that.

12 MR. HARRIS: Thank you, Your Honor. If we may take
13 ten minutes, Your Honor.

14 THE COURT: Most surely.

15 MR. HARRIS: Thank you.

16 THE COURT: Do you need your client also in that
17 regard?

18 MR. HARRIS: We'll probably do it right here,
19 judge, so I don't they -- he could stay right here.

20 THE COURT: Very well, that will be fine. We'll
21 take ten minutes.

22 (WHEREUPON a recess was observed.)

23 SENTENCE

24 THE COURT: All right. I want to hear any record
25 the defendant has, please.

1 MS. MCDUFFY: Your Honor, the defendant has no
2 prior record.

3 THE COURT: I'll hear from the solicitor's please.

4 MS. MCDUFFY: Your Honor, at this time, if you
5 would, we would like to hear from the victim, Ms. Jennie
6 Gasque. She is the mother of Allen Martin Gasque. And she
7 has a statement prepared on behalf of the entire family for
8 the court.

9 THE COURT: Very well.

10 You're a long way away. I just need you to be able
11 to keep your voice up so I can hear you and please identify
12 you for our record, please.

13 VICTIM: Regina Gasque.

14 THE COURT: Yes, ma'am.

15 VICTIM: Mother of the victim.

16 THE COURT: Yes, ma'am.

17 VICTIM: Your Honor, we the parents, brother,
18 sister-in-law nephew, grandmother, uncles, aunts, cousins
19 and friends would like the Court to try and understand what
20 we've lost. Martin has just turned 20 years old on
21 September 5th. Thirty-four days later someone would decide
22 that marten's life was no longer worth living. When you
23 become a parent, your children become your life and there
24 dreams become your dreams. Martin left our house Friday
25 night, October 8th, so excited about going to one of the

1 most exciting football games in Columbia. Before he left,
2 he sit on my bed, smiled at me and acted like he had all
3 the time in the world for his mom. He told me and his
4 daddy that he loved us and he walked out of the door.
5 Martin and I were texting all the next day. All during the
6 game. Then the phone rings and a deputy from the sheriff's
7 department is telling me that Martin has been in an
8 accident and that his family needs to come to the hospital
9 in Columbia. Being a mother my mother's intuition kicked
10 in and I knew something was wrong. I knew it wasn't good.

11 Martin began playing baseball when he was four
12 years old. He excelled at baseball. He played baseball
13 and football at the reck creation department and for the
14 swamp foxes for the JV and varsity teams. Martin continued
15 to play baseball for Coker College in Hartsville as a
16 catcher.

17 Martin also began racing go carts when he was
18 twelve years old. He was a natural driver. His brother,
19 his dad and he worked on the go cart together. When we
20 went to the race, we went as a family. Martin one several
21 races and enjoyed every minute of racing. Martin's brother
22 and his wife were expecting their first baby. Martin was
23 the one who told me they were going to have a baby. He was
24 just grinning. He was so excited. Martin never got to see
25 that precious baby. He never got to see his nephew William

1 Martin Gasque. Little Martin will never know his uncle.
2 He will never get to meet him. He will never see that
3 presentation smile of his. And we'll never get to see the
4 grin and the twinkling of Martin's eyes in Martin's
5 children.

6 I cannot begin to tell you the lives that Martin
7 touched. Martin touched so many lives that we have a hard
8 time grasping the multitude of the people that let us know
9 what a wonderful kid he was and they're all grieving with
10 us. Martin had the most precious smile that you could
11 imagine. He had a sneaky little grin that would light up a
12 room. He quickly learned how to use that sneaky little
13 grin to his advantage too.

14 Martin will never again lie in my bed and grin up
15 at me with his precious smile. We'll never have those
16 quiet conversations about things that are happening in
17 his life. His face will never light up our house again or
18 our hearts. He will never know his brother's baby and that
19 baby will never know the love of his uncle. He will never
20 play another baseball game or ever drive in another race.
21 Martin will never again get to laugh with his grandmother
22 over something silly that she said. He will never sit in
23 the den with his daddy and talk about every race that
24 they've ever seen before. He'll never confide in Ashley
25 about some secret that she's told him or he's told her.

1 He'll never ever get to talk with his Beth friend, his big
2 brother. He'll never be able to graduate from college and
3 teach. Martin will never get to marry the girl of his
4 dreams. He will never have children of his own and will
5 never see this light shining in their faces. I will never
6 ever be able again to wrap my arms around my baby and tell
7 him how much I love him. We as parents now cry every day.
8 We have to go to to cemetery to be with our child, a baby
9 who was twenty years old when we buried him.

10 William has lost his brother and his best friend.
11 One day our son walks out the door to go to a ball game and
12 the next time we see him, he's no longer breathing. But
13 not only are all his hopes and dreams gone, but our dreams
14 for him are also gone. No longer -- he -- not only is he
15 no longer breathing, but the breath has been taken from all
16 of us. Someone decided our sons life meant nothing. Our
17 son was 5 foot ten and weighed 165 pounds. This man is 6-3
18 and over 2 hundred pounds. What could our child have done
19 that would have caused him to lose his life? He was in a
20 truck, stuck in traffic exuberant about the Carolina win.
21 I just don't understand why people get into trouble. But
22 when they get into trouble, they never learn their lesson
23 and never have to pay for their crime. We learn in
24 kindergarten, that if you mess up, you clean it up. If you
25 get in trouble, you have to pay the consequences for that

1 trouble. I feel that if Mr. Simms had taken responsibility
2 and paid for his previous actions, my son would be alive
3 today.

4 But please do not let another parent have to go
5 through the hell that we go through every day. We'd like
6 to thank the solicitor's office. They have been wonderful
7 to our family and have done a great job on this case. We
8 just want to say thank you. We would also like to that I
9 think the victim's advocate office who has also been caring
10 thoughtful and supportive to all of us.

11 Your Honor, we ask that you please give Mr. Simms
12 the maximum sentence allowed for his crime. When he gets
13 out, he'll be able to go home to his family, you know like
14 Martin, who will never be able to come home again. Thank
15 you.

16 THE COURT: Thank you.

17 VICTIM: From the Gasque family.

18 THE COURT: All right. Yes -- anything else from
19 the solicitor I should say first.

20 MS. MCDUFFY: No, Your Honor.

21 MR. GASSER: Judge, would you like us to approach?

22 THE COURT: I would.

23 MR. GASSER: Thank you, judge.

24 MR. GASSER: Please the Court, Your Honor?

25 THE COURT: Yes, sir.

1 **MR. GASSER:** Judge, as Mr. Harris had indicated
2 shortly after the verdict was published, this defendant is
3 obviously extremely emotional. Twenty-eight months quite
4 frankly and it's been a very emotional six days of trial
5 for many different -- for both families quite frankly.
6 What occurred on October 9th, 2010, there's not anybody
7 that's been involved in this process that doesn't wish they
8 could turn back the clock and redo things. But as we are
9 before you here right now, we're here on sentencing on an
10 aggravated breach of peace.

11 We understand that the jury has found Mr. Simms
12 nothing. He's been acquitted of causing the death of
13 Mr. Gasque. However, the jury has found him guilty of an
14 aggravated breach of peace. And we understand that with
15 that guilty verdict are the facts that were contained in
16 the indictment and the allegation which is that Curtis was
17 involved in a fight in the road way and he is now getting
18 ready to be sentenced and punished for his role in that
19 particular fight in the road way and we understand that.

20 And we also understand and know that the Court will
21 take into consideration and to take into consideration the
22 jury's verdict on both indictments. With that, Your Honor,
23 Curtis is 27 years old. As Ms. McDuffy says he has no
24 prior record, no prior criminal record. He is single,
25 although he is engaged to be married. His fiance has been

1 here throughout the whole trial. His mother, Nancy Simms
2 and Jake Simms, they are from Mobile, Alabama. Curtis, as
3 you heard this morning was raised in Mobile, Alabama and
4 started working in Mobile for a period of time and things
5 just didn't work out financially with his employment there.

6 As a result of that, Dustin and Jordan Lindsey has
7 an uncle that owns a company here, Palmetto Utilities of
8 the Midlands. He's a well known businessman. He has an
9 excellent company, employs a good number of individuals and
10 Curtis was offered a job at the bare minimum entry level to
11 start off with the bare pay, the bare entry level, three
12 years ago this month. He has been able in the three years
13 that he's worked for Palmetto Utilities to obtain four
14 different promotions throughout the company.

15 Not knowing what was going to happen this week, his
16 -- the owner of the company hold Curtis that, regardless of
17 what that jury does, I want you to know that you have a job
18 here at Palmetto Utilities, regardless of what happens
19 during the course of the trial. And so he has been
20 gainfully employed, which I have always thought, Your
21 Honor, my 36 years of practicing law, one of the ways that
22 I was trained and that I look at judging -- a good way of
23 judging somebody's station as far as the community when
24 you're picking a jury, or even in dealing with people in
25 general, what is that person's work history? Is that

1 person a worker? Is that person someone who gets up every
2 morning and contributes to society and do they work. And I
3 can tell you that the three years that Curtis has been a
4 citizen of Richland County, he has been a contributing
5 citizen through his employment at that Palmetto Utilities.

6 He has no siblings. Curtis is the only child of
7 Nancy and Jake. He goes to work and he comes home and he
8 stays with his fiance. This incident and the affects of
9 this incident, you know, obviously, shook Curtis as well.
10 And, Your Honor, one of the things I would like to point
11 out is, you have heard published twice, once during the
12 course of trial, once in my closing argument, the page
13 three of Curtis' statement when like anyone in his shoes
14 down at the police department being questioned about a
15 situation, not knowing what's going to happen, you're in a
16 state of shock, you're in disbelief, you were just involved
17 in an incident and one of the first things he did when he
18 wrote his written statement is apologize and say how sorry
19 he was that -- for the victim and the victim's family. And
20 that's not lawyer talk.

21 You heard that yourself, published twice is that
22 before he was -- before he ever thought that he was going
23 to be charged with anything, he, in his own words, when
24 given the opportunity that night, wrote down how sorry he
25 was and how much he felt sorry for the person that at that

1 point in time had been injured because he didn't know that
2 he was deceased at that time.

3 I just wanted to point that out because now we've
4 reached a point in time in which you've got to make a
5 monumental decision on what the appropriate sentence should
6 be and certainly, you have sentenced hundreds and hundreds
7 of people and one of the things you have to gauge is just
8 how sincere the apology is at the sentencing, after the
9 fact and I want to point out, Your Honor, that you also
10 have another independent piece of evidence that I would
11 submit to you is a very credible piece of evidence was the
12 sincerity in Curtis' heart and in his sole that evening at
13 the sheriff's department on Saturday night 2010.

14 I know that Mr. Harris would like to say a few
15 words and I would like for you to briefly hear from Curtis'
16 mom very briefly before Curtis makes his remarks.

17 **MR. HARRIS:** Judge, I too, have known Curtis now
18 for 28 months. I can speak to his character. I can speak
19 to his remorse. I can speak to the fact that a lot of what
20 Mr. Gasser says is absolutely 100 percent true. Curtis is
21 a food guy. That was a bad night and I hate for the family
22 that has had to come in every day and relive that night. I
23 mean Mr. Gasque's family, Your Honor. And I -- Mr. Gasque,
24 I hope that nothing that I or the defense has said and curt
25 hopes this too, has caused them anymore pain than they've

1 already felt. And we've had that conversation during this
2 trial and he has expressed that to Mr. Gasser and myself in
3 those conversations. Yes, this has been a horrible process
4 for them and I hope that at some point for them that they
5 can find some small built of solace.

6 Curtis has been a hard worker and, you know, just
7 as a person though, Judge, he says, yes, sir, and no, sir,
8 every time I ask him questions. I mean, that's -- that's
9 -- these days that's no small feat. He's an on time that's
10 -- these days that's no small feat. We're standing before
11 you in such weighted circumstance and the lawyer says he's
12 on time, he says yes, sir, you know, maybe 20 years ago,
13 that wouldn't be a big deal, but, Judge, Mr. Gasser says
14 Judge somebody by whether they show up on time and get to
15 work. I judge people by how they interact with me and how
16 they interact with their mother and how they interact with
17 other people; and, you know, he has check marks on all of
18 those boxes.

19 You know, I hadn't met Nancy, his mother, until
20 this week. I've spoken with her and I met her briefly
21 before but them interacting together, what I've seen with
22 he and his mother because I'm a father and that means a
23 lot. And there's no way I can express to you accurately
24 what I've seen, but I can tell you that he is a good son
25 and I think that counts for something. His mother Nancy

1 would like to address the Court, Your Honor. We don't want
2 to take up too much time, but I think we want to take up
3 enough time if we can define Curtis for you a little more
4 than has been defined for you up to this point. So at this
5 time, if you would here from Nancy Simms.

6 THE COURT: Okay. Sure. Yes, ma'am?

7 DEFENDANT'S MOM: Your Honor?

8 THE COURT: Yes, ma'am.

9 DEFENDANT'S MOM: I'm Nancy Simms. I'm Curtis'
10 mother. This is his father, Jake and our family, his
11 friends and his fiance is back there and on behalf of the
12 Simms family, we have prayed for the Gasque's. We are
13 sincerely sorry for their loss. We would have just never
14 imagined. I just hope that our prayers have helped them in
15 some way with comfort at this time. Curtis has been an
16 exceptional child. He's loving, he's been good. He's
17 never given us any problems. He's a hard worker and I'm
18 proud of that. And I thank you and again, I'm so sorry.

19 THE COURT: Thank you, so much, Ms. Simms, thank
20 you.

21 MR. HARRIS: Your Honor, a couple of more comments
22 that I'd like to make a little bit after at the conclusion
23 as would Mr. Gasser.

24 THE COURT: Sure.

25 MR. HARRIS: Again, we appreciate the time you've

1 given us. I think right now, you don't even need to hear
2 from the lawyers. And I know that somebody wants to
3 address the Court and some other people in the courtroom,
4 Your Honor.

5 THE COURT: Yes, sir?

6 THE DEFENDANT: I just want to take the time to
7 apologize to Mr. And Ms. Gasque for the loss of their son.

8 And to my mom and dad, I want to say I love you.
9 Thank you for your support and having my back. I just
10 thank y'all so much for making the trip up here, not just
11 me but for everybody involved in this. Some of you are
12 family and my friends, I am just thankful for everything.
13 Thank y'all so much.

14 And thank you, Your Honor.

15 MR. GASSER: Judge, just the last comment I want to
16 make before Mr. Harris closes this out is that -- is that
17 this was just a confluence of a number of people making bad
18 choices that evening, at that location and it's just a sad
19 tragedy that so many people's lives have been altered as a
20 result of the number of individuals out there at that point
21 in time that were quite frankly just making bad decisions
22 and Curtis was one of them. And we're here now and I just
23 ask you to show whatever mercy that you can given the
24 jury's verdict, given all the circumstances that you've
25 heard and also during the course of our presentation here

1 during this sentencing period.

2 THE COURT: Thank you.

3 MR. HARRIS: Thank you, Your Honor, in conclusion

4 --

5 THE COURT: Yes, sir.

6 MR. HARRIS: One of my idols, judge used to tell
7 young lawyers that came before him, tell me what you want.
8 Tell me what you want. So often lawyers come before the
9 judge and that's the part that they leave out. And, Judge,
10 I think the verdict in this particular case, as well as the
11 25 years and the way this man lived his life before, the
12 worse 15 seconds of his life -- he's being judged here,
13 Your Honor, for 15 seconds of his life, I think that we
14 would can I so take into consideration of how he lived his
15 life up to that point, the way he has lived his life since
16 that point and you allow him to go back to work, you allow
17 him to go back to his family and that you give him a
18 sentence that allows him to continue to be a productive
19 citizen -- the productive citizen that he's been for 27
20 years.

21 THE COURT: Thank you.

22 MR. HARRIS: Thank you.

23 (WHEREUPON there was a pause in the proceedings.)

24 THE COURT: All right. Anything further before I
25 pass sentence on Mr. Simms?

1 MS. MCDUFFY: None from the State, Your Honor.

2 THE COURT: Very well. All right. Mr. Simms, I'm
3 going to commit you to the State Department of Corrections
4 for a period of ten years, which I'm going to suspend on
5 the service of five years active prison time and probation
6 to follow for three years. As special conditions of your
7 probation period, I want you to receive substance abuse
8 counseling, random drug and alcohol testing.

9 You are to have no contact with the victim or the
10 victim's family except as may be required in other judicial
11 proceedings or legal proceedings. There is to be zero
12 tolerance for drugs and alcohol and you must successfully
13 complete an anger management counseling during the period
14 following your incarceration. And you are to be given
15 credit for the time that you have served.

16 THE DEFENDANT: Yes, ma'am, thank you very much.

17 MS. MCDUFFY: Thank you, Your Honor.

18 THE COURT: Uh-uh. Anything further from the
19 solicitor's office at this time?

20 MS. MCDUFFY: No, Your Honor, nothing further.

21 THE COURT: Very well, then this term will be
22 adjourned.

23 MS. MCDUFFY: Thank you, Your Honor. Very well.

24 * * * * * END OF TRANSCRIPT * * * * *

25

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF AIKEN) CERTIFICATE OF TRANSCRIPTION
3
4
5

6 I, THE UNDERSIGNED, Brenda J. Sigwald, do hereby
7 certify that I transcribed the proceedings in the captioned
8 case that were reported by Crystal Holmes, Circuit Court
9 Reporter for the State of South Carolina, in the Court of
10 General Sessions in and for the State of South Carolina on
11 the 30th day of January through the 5th day of day of
12 February.

13 I FURTHER CERTIFY that the foregoing 1048 pages,
14 constitute a true, accurate and complete transcript of said
15 hearing.

16 I FURTHER CERTIFY that I am neither kin, counsel,
17 nor of interest to any party hereto.

18 IN WITNESS WHEREOF, I have hereunto set my hand and
19 seal at Aiken County, this 22nd day of November, 2013.
20
21

22 Brenda J. Sigwald,
23 Court Reporter and
24 Notary Public for the
25 State of South Carolina
My commission expires
January 4, 2020

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STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS

COUNTY OF RICHLAND

2011-GS-40-00829

2013-GS-40-01219

THE STATE of SOUTH CAROLINA

-VS-

CURTIS J. SIMMS,

Defendant.

TRANSCRIPT OF RECORD

March 12, 2013

Columbia, South Carolina

Ordered: May 15, 2013

Delivered: July 16, 2013

BEFORE:

THE HONORABLE DIANE SCHAFFER GOODSTEIN, Presiding Judge.

APPEARANCES:

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Ms. Joanne McDuffie, Esquire
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Attorneys for the Defendant

Pamela Faucette
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PAMELA FAUCETTE, CVR - 864-574-9534 or 336-260-2864

I N D E X

State's Exhibits:	Marked:	Received:
(None)		

Defendant's Exhibits:	Marked:	Received:
(None)		

Court's Exhibits:	Marked:	Received:
1 - (Sentencing Grid)	3	3

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March 12, 2013

1:35 P.M.

(Off-The-Record Comments)

(Whereupon, Court's Exhibit Number 1 was marked for identification and admitted without objection.)

THE COURT: All right. And this is — as I understand it, this is Mr. Simms' motion to reconsider. So I am listening to you, okay?

MR. GASSER: May please the court, Your Honor?

THE COURT: Mr. Gasser, yes.

MR. GASSER: Just so that the record is clear, from the ----

THE COURT: There is a motion for a new trial. And, in the alternative, a motion for a judgement of acquittal.

MR. GASSER: Yes.

THE COURT: And a motion to set aside the sentence or, in the alternative, to reduce sentence.

MR. GASSER: That's correct , Your Honor.

THE COURT: And I think those are all the motions, yes?

MR. GASSER: Yes, ma'am.

THE COURT: Okay. Great.

MR. GASSER: Okay. And I talked with Mr. Harris. We -- we were going to start with the motion to set aside the sentence first.

THE COURT: Okay.

MR. GASSER: Simply because that may be dispositive of all the other motions.

THE COURT: Okay.

MR. GASSER: Depending on how the Court rules.

1 **THE COURT:** Sure.

2 **MR. GASSER:** Let me start by saying, Your Honor, we've done a
3 significant amount of research on these -- the statutory -- not only the
4 statutory interpretation of 22-3-560 but also how it interplays with Section
5 22-5-150, as well as the historical -- the history, the statutory history, of
6 22-3-560, which is significant in this matter.

7 We stand before you, all the lawyers, Your Honor. Quite frankly, this is
8 a case of first impression on the statutory interpretation and the legislative
9 history, and the intent of the legislature, on 22-3-560.

10 No Chief Justice of the Supreme Court, no Associate Justice, no
11 Appellate Court Judge, and no Circuit Court Judge has had to address these
12 issues quite frankly because the set of circumstances and the facts did -- did
13 not merit it; this is -- we stand before you on one individual, one person, one
14 Defendant, convicted by a jury solely of the charge of breach of peace high
15 and aggravated.

16 **THE COURT:** Which in and of itself is a very unusual charge.

17 **MR. GASSER:** It is an extremely unusual charge. And it is and
18 that it is a case of first impression. We have searched and searched and
19 discussed and made calls and we can't find an ex-solicitor, elected solicitors,
20 attorney general's staff.

21 I contacted the General Counsel's Office in the South Carolina
22 Department of Corrections and spoke to a lawyer there, who at my request
23 ran the database search and had his top -- the top IT individual with the
24 South Carolina Department of Corrections --- currently as we speak, in every
25 single institution in the State of South Carolina, including work release

1 centers, there is no inmate within the corridors of the South Carolina
2 Department of Corrections serving time on a breach of peace high and
3 aggravated other than Mr. Simms.

4 And that is — I tell you that has an officer of the Court. I have had
5 three different: phone call conversations. They've run the — they've done the
6 — the IT search. He is the only individual.

7 So this issue has never had to go up before; quite frankly, has never
8 had to even be argued at the trial level, at any of your colleagues at the trial
9 — at the Circuit Court level, let alone the Appellate Court level or at the — or
10 at the Supreme Court level, particularly — and when I'm talk about this
11 issue, I'm talking about the changes that the Legislature, our General
12 Assembly, made in 22–3–560 beginning in 1997, again in 2008, and, then,
13 again in 2010 with the — with the omnibus crime bill.

14 So I — I just — we are all — it is -- it is -- it is there's nothing out there
15 that we can point to because this is truly the case of first impression on this
16 type of statutory analysis.

17 So, when you look at it — and I want to start there with the legislative
18 history and the legislative intent. When you look at -- and you've got to start
19 off by looking at 22–3– 560 prior to the 1997 amendment. And that's as it
20 was from at least 1981 according to the legislative history.

21 So from 1981 up until the 1997 amendment — and I've provided
22 copies of this to both the Court and to the solicitor's office when I provided
23 them my copy of the — of our memorandum of law on Friday, February the
24 15th.

25 But, when you look at that, it states that "Magistrates may punish by a

1 fine not exceeding \$200 or imprisonment in the jail or house of correction not
2 exceed 30 days.

3 "All assaults and batteries and other breaches of the peace, when the
4 offense is not of a high and aggravated nature, require in their judgment
5 greater punishment."

6 And, of course, the greater punishment of high and aggravated nature,
7 for assault and batteries during — prior to 1997. And, for breaches of the
8 peace, because there was no penalty, judges and lawyers before — arguing
9 before the Court, both prosecutors and criminal defense attorneys, had to
10 look to in the language of 17-25-30, which is the — that we all well know of —
11 in sentences where no punishment is provided. And it was the most widely
12 used, 99.9% of the time, in assault and battery of a high and aggravated
13 nature.

14 And so that's where we were prior to the 1997 amendment as far as
15 the language. When you look at what happened then, what the Legis — our
16 General Assembly did with that statute, 22-3-560, starting in 1997, it did a
17 number of things that are — that are critical to this legal analysis.

18 They — now that statute, then, starting in 1997, read, "Magistrates may
19 punish by a fine not exceeding five hundred dollars (\$500) or imprisonment
20 for a term not exceeding thirty (30) days or both.

21 "All assaults and batteries and other breaches of the peace, when the
22 offense is neither an assault battery against school personnel pursuant to
23 Section 16-3-612, nor an assault and battery of a high and aggravated nature
24 requiring, in their judgement or by law, greater punishment."

25 Now, what was significant about that change that our General

1 Assembly made was that they added another crime. They created another
2 crime, which is the 16-3-612, which is irrelevant for why we're here. But that
3 was one of the changes.

4 But it did something very profound. When it says that the sentence
5 should be greater, it still included the language that was in the 1981 statute,
6 between 1981 and 1997. It included the language for assault and battery of a
7 high and aggravated nature requiring, in their judgement or by law, greater
8 punishment.

9 And, of course, they've added the phrase "or by law" because they
10 needed, quite frankly, to add that phrase, "or by law," because "or by law"
11 what they're referencing is the 17-3 -- or 17-25-30, which is, when there is
12 no law, it's the 10-year maximum penalty. But what is so significant and what
13 is so important, and why these led off our motion, is the legislative -- our
14 General Assembly excluded it.

15 They literally proverbially surgically removed the language that said
16 that it was their intent that breaches of the peace of a high and aggravated
17 nature require a greater punishment than what's stated in that.

18 Because prior to that, the language read, in 22-3- 560, "All assault
19 and batteries and other breaches of the peace, when the offense is not of a
20 high and aggravated nature, requiring in their judgment a greater
21 punishment."

22 Now that simply reads, "Nor assault and battery of a high and
23 aggravated nature requiring in their a judgment or by law greater
24 punishment." They excluded breaches of the peace of a high and aggravated
25 nature requiring greater punishment.

1 Now, you know, we can sit here and argue, you know, all of these
2 intricacies and languages and verbiage and all of that, but, at the end of the
3 day, the Legislature, from 1981 to 1996, said – intended — their intent was
4 that breaches of the peace of a high and aggravated nature needed to be
5 punished outside of that statutory language.

6 And, then, when they made that change in 1997, they excluded
7 breaches of the peace of a high and aggravated nature requiring greater
8 punishment. But they kept in the language that assault and battery of a high
9 and aggravated nat — nature requires greater punishment.

10 So the question that everybody here must ask themselves is, what
11 was the Legislative intent when they excluded it?

12 They had it in here; they removed it. It was their language to begin
13 with and they removed the language that said that breaches of the peace of a
14 high and aggravated nature require a greater punishment.

15 I would submit, Your Honor, if they had that language in there, clearly
16 their intent was that breaches of the peace, like aggravated assaults of a high
17 and — like assault and batteries of a high and aggravated nature, require a
18 greater punishment.

19 To keep the language in the 1997 amendment that assault and
20 batteries of a high and aggravated nature required greater punishment, but to
21 remove and to exclude the fact that breaches of the peace of a high and
22 aggravated nature require a greater punishment, there is only one answer;
23 there is only one interpretation.

24 It doesn't take a Harvard law professor or somebody of — of — of this
25 great philosophical mind, if they had the language in there, their clear intent

1 was that both assault and battery and breaches of the peace of a high and
2 aggravated nature require a greater punishment.

3 By keeping assault and batteries of a high and aggravated nature
4 language requires a greater punishment, but removing breaches of the peace
5 of a high and aggravated nature requires greater punishment, can only mean
6 one thing: The Legislative intent was that breaches of the peace of any kind
7 need to be sentenced within that sentencing apparatus; within that sentencing
8 regime.

9 Their intent changed, or else why would they have excluded and
10 removed that language? And that is just — that really is the crux.

11 If a — a strict interpretation of the statute I would submit is that really,
12 at that point in time, all of us — and I mean everybody to the extent that any
13 Circuit Court Judge or any -- any Appellate Court Judge or any Supreme
14 Court Justice, in which none of them have had to do it because it never —
15 nobody has ever had to look at this closely at the changes in that statute
16 because never before, until Mr. Simms' case, has any — has — has
17 anybody's determination as to whether or not they were going to be
18 incarcerated or not based solely on that statute and its interpretation.

19 So there was no reason for a solicitor's office or a criminal defense
20 lawyer or for a Circuit Court Judge to conduct their own analysis on this
21 statute because never before has just that statute — just that statute and just
22 this one case where a defendant was facing potential incarceration on a
23 conviction or a guilty plea with just that statute.

24 And so that's why it's such a case of first impression. But the — the
25 answer to the question is what was the legislative intent if they had the

1 language in, prior to the 1997 change that breach of peace of a high and
2 aggravated nature required greater punishment, and, then, they removed the
3 fact that breach of peace of a high and aggravated nature requires a greater
4 punishment.

5 We submit it can only — there can only be one. I mean, the only
6 logical thing is they don't believe that breach of peace of a high and
7 aggravated nature require — requires a greater punishment outside that
8 sentencing regime.

9 And so it really begin in 1997. And, from a strict perspective, at that
10 point in time, the law changed I would submit to you. And no one has ever
11 caught it because no one has ever had to because it just has never been
12 brought before any — anybody's attention before until now being brought
13 before your attention, this Court's attention.

14 And, then, we — we talked about later on, even when you look at the
15 2008 amendment, they had an opportunity, Your Honor, to add that language
16 back; to — to "Wait a minute, wait a minute, they're going to need any
17 clarification," and — and — and they could have added that language back.

18 But really the 2008, that really says the same. They just added
19 another section that talks about sports officials. But it still stayed the same
20 that, "Magistrates..." and, again, I'm referring to 22-3-560, "Magistrates may
21 punish by fine not exceeding five hundred dollars (\$500) or in prison for a
22 term not exceeding thirty (30) days or both.

23 "All assaults and batteries, and other breaches of the peace, when the
24 offense is neither an assault and battery to school personnel..." again,
25 pursuant to 16 -3-612, "... nor an assault and battery of a high and

1 aggravated nature requiring in their judgement or by law a greater
2 punishment."

3 Again, they could have added that, the language prior to the 1997
4 amendment; that breaches of the peace of a high and aggravated nature
5 requires a greater punishment outside this regime of five hundred dollars
6 (\$500) or thirty (30) days, but they didn't.

7 They could have and they didn't, which, again, reaffirms the fact that
8 their intent and their only intent was that breach of peace of a high and
9 aggravated nature must be sentenced within this same sentencing regime.
10 Meaning that, if it's a regular a breach of peace, a fine.

11 If it's a breach of peace of a high and aggravated nature, you need to
12 look at the thirty (30) days or the maximum fine. But it's somewhere in
13 between zero (\$0.00) dollars and five hundred dollars (\$500.00) and zero (0)
14 days and thirty (30) days.

15 But that's clearly what the legislative intent was or they never would
16 have removed, prior to the 1997 — they never would have removed, from the
17 1997 change, the language that said aggravated breach of peace requires a
18 higher sentence. They removed that language for a new purpose. They had
19 an intent.

20 And — and, then, when they could have added it back, they didn't in
21 2008. And, then, just from a Court clarification perspective, the statute now
22 reads, as of 2010, "Magistrates may punish by an amount not exceeding five
23 hundred dollars (\$500.00) or imprisonment..."----

24 **THE COURT:** Let's slow down.

25 **MR. HARRIS:** Oh, I'm sorry. "...for a term not exceeding thirty

1 (30) days or both all breaches of the peace.”

2 And — and that would — the significance of that really goes on later on
3 in my memorandum of law which talks about looking at all these statutes
4 together. And is there a sentencing scheme when you look at the — the
5 legislative intent and statutes — what the legislative intent was?

6 You know, cases occur all the time in which somebody may be
7 charged with a burglary third or second or first and a petit larceny and it's
8 brought up into General Sessions Court, but at the end of the day, if the
9 person has convicted of petit larceny, or any other Magistrate Court — any
10 other offense, you still are bound and restricted, a Circuit Court judge, by the
11 sentencing parameters of what that would be even if that case was in
12 Magistrate's Court , thirty (30) days for petit larceny.

13 Somebody might be charged with the offense of simple possession
14 of marijuana and you're still bound by that. So they certainly had a choice --
15 they had the choice, pursuant to 22-5 -650, to bring the breach of peace
16 charge up into General Sessions Court because the statute says you can.

17 But they're still bound by, if the person is convicted or pleads guilty to
18 that in General Sessions Court by the — by the — by the — by the sentencing
19 regime that the Legislature has placed by verbiage and by intent.

20 So, when you look at what the intent is, clearly our Legislature, our
21 General Assembly, with quite frankly a lot of advice and input from lawyers
22 and judges, have been codifying and moving to codify most of the common-
23 law offenses in — in — in — in criminal courts.

24 And virtually all of the assault charges have been codified now. And
25 their legislative intent, when you look at it, is that breaches of the peace and

1 all breaches of the peace — you know it's interesting, when you look — when
2 you're trying to determine what certain words mean, we submit to you that
3 "all" means "all."

4 And I'm not trying to be fancy or flippant, but all means all. "All
5 breaches of the peace," that is the sentencing apparatus; that's the
6 sentencing regime that the Legislature has placed in that statute.

7 And, if you look at the history from 1981 to the 1997 change, to the
8 chance to go back to, in 2008 and in 2010, to make aggravated breaches of
9 the peace a stricter sentence, outside that sentencing regime, they didn't do
10 it. They removed the language that says it required a greater sentence in
11 1997.

12 **THE COURT:** Let me ask you this question: Isn't it also a
13 reasonable interpretation that what the Legislature is saying is that, while it
14 may be assault and battery of a high and aggravated — or excuse me,
15 breach of the peace of a high and aggravated nature, that we — all we are
16 removing is the requirement that it be more than thirty (30) days or five
17 hundred dollars (\$500)?

18 That if, within the Court's discretion, that even though it's high and
19 aggravated, that we will allow you to sentence down to and including zero (0)
20 to thirty (30) days and zero — or one dollar (\$1.00) to five hundred dollars
21 (\$500) up to and including the — the general catch-all statute under the
22 common law that takes them up to ten (10) years?

23 **MR. GASSER:** I — I don't believe so. And I think the reason why
24 is because we still got to — you got to — there's got to be a reason why what
25 they had prior to the 1997 amendment, when they had the language in there

1 that assault and batteries and breaches of the peace of a high and
2 aggravated, if it's in the same sentence —

3 **THE COURT:** Uh-huh (affirmative).

4 **MR. GASSER:** — of assault and batteries and breaches of the
5 peace that are of a high and aggravated nature require a greater punishment.

6 **THE COURT:** What that means to me is it's got to be something
7 more than would be available at the Magistrate Court level; in other words, it's
8 got to be more than thirty (30) days. If it's high and aggravated nature, it's got
9 to be more than thirty (30) days and more than five hundred dollars (\$500).

10 **MR. GASSER:** I do.

11 **THE COURT:** But — but, when the statute changed and they
12 took out breach of the peace high and aggravated, what they're saying is, you
13 know, "Court judges, if you believe, based on the facts and circumstances,
14 even if it's high and aggravated, you can drop down to the Magistrate Court
15 level and include that as well."

16 But — and let me tell you the reason. The — the — and — and I want
17 you to address this because what concerns me is that why bother, then, with
18 the language high and aggravated?

19 In other words, if they didn't intend to include the catch-all up to ten
20 (10) years, why did they maintain high and aggravated when they could just
21 say "We're doing away with high and aggravated; we only have breach of the
22 peace. We don't have breach of peace high and aggravated."

23 "We just have breach of the peace. It's just a Magistrate Court
24 offense." Why is it — because I am, as you know, charged with the
25 responsibility of making it all work.

1 And, so, when I look at that, and they — and the Legislature chose to
2 maintain the offense, albeit not the most common offense of — of breach of
3 the peace high and aggravated, there's some discussion as you — as you
4 know, there has been some discussion about whether or not breach of the
5 peace high and aggravated is going to fill in that little niche, then, of assault
6 and battery of a high and aggravated nature fit. And it will be interesting to
7 see what happens in that regard.

8 But my question is, is if I am charged with the responsibility of giving
9 meaning to all of it, is it a reasonable interpretation to say that, when that
10 removal occurred, what I, then, have the option to do, although it was a
11 conviction for breach of the peace high and aggravated, I could still do thirty
12 (30) days or five hundred dollars (\$500) or something less?

13 **MR. GASSER:** That's a good question. And I —

14 **THE COURT:** Now tell — and help me with that one.

15 **MR. GASSER:** And my response would be this ---

16 **THE COURT:** Yes?

17 **MR. GASSER:** — think about all the sentences in sentencing in
18 the criminal statutes ----

19 **THE COURT:** Yes.

20 **MR. GASSER:** — in which the Legislature puts the language in
21 there "The Court may."

22 **THE COURT:** Yes.

23 **MR. GASSER:** They could have put in the language there that in
24 cases of — of assault and battery — I mean, breach of peace of a high and
25 aggravated, "The Court may sentence within — within the parameters of the

1 statute or may look outside.”

2 They could have simply — think how many times the word "may" is
3 used in the criminal statutes. And they could have done that, if their intent
4 was that breach of peace — but their intent clearly was that assault and
5 battery of high and aggravated nature needed to be sentenced outside of that
6 sentencing regime clearly.

7 We can — I think — I think everybody agrees with that. And assault
8 and battery ----

9 **THE COURT:** You think that earlier?

10 **MR. GASSER:** Earlier.

11 **THE COURT:** Uh-huh (affirmative).

12 **MR. GASSER:** Earlier, prior to 1997, I think — I think the
13 legislative intent, prior to 1997 — prior to the 1997 change, was that both
14 assault and batteries and breaches of the peace of a high and aggravated
15 nature must be, clearly needed to be sentenced outside that sentencing
16 regime, okay?

17 When they made the change in 1997, the legislative intent on assault
18 and batteries of a high and ag – aggravated nature was still ----

19 **THE COURT:** Uh-huh (affirmative).

20 **MR. GASSER:** ---- clearly needed to be sentenced outside of that
21 sentencing regime.

22 **THE COURT:** Right.

23 **MR. GASSER:** But that breaches of the peace of a high and
24 aggravated nature needed to be sentenced within that sentencing scheme
25 because, if they — if — if — if they — all they needed to do was simply add a

1 phrase that, "Breaches of the peace of a high and aggravated nature may be
2 sentenced within this regime or..." however the language reads ----

3 (Brief Pause)

4 MR. GASSER: — "or in their judgement or by law," that
5 language, "or by law a greater punishment."

6 So they could have said that maybe within the sentencing if that was
7 their intent. But I -- I think there's a difference between assault and batteries
8 and breaches of the peace.

9 Assault and batteries involve -- and I'm talking -- we're just talking
10 about statutory interpretation here.

11 THE COURT: Uh-huh, uh-huh (affirmative).

12 MR. GASSER: Assault and batteries by their nature involves an
13 individual, two people, an Individual being victimized; somebody being
14 harmed.

15 There is an assault, so, there's a threat. And there's a battery, which
16 means there's an unlawful physical touching as we all know.

17 And so breaches of the peace are like charges like it -- it falls under,
18 the disorderly conduct type; the public urination, the -- I mean, breaches of
19 the peace both Ms. McDuffie and I found -- we found the same two cases on
20 it when we were looking.

21 And that's because that's the only two cases I think the two of us could
22 find. And they were the only two cases within the last fifty (50) or sixty (60)
23 years that the Courts have even addressed on it.

24 And one of them involved a noise violation, a noise ordinance. And
25 one of them involved whether or not it was appropriate or not to serve papers

1 on Sunday. That's how old those cases were.

2 But they involved — they did not involve the — the — the — the — they
3 weren't assaults against — you know how textbooks and whatnot to
4 substantive criminal offense per se; break it down into assaults against
5 property or crimes against property, crimes against persons.

6 Assaults and batteries, of course, are crimes against persons. And so
7 there's a — there's a — there's a — there's a characterization difference
8 between them.

9 But bottomly (phonetic) we submit that in 1997 — starting in 1997 and
10 then even into 2008 and in 2010, where we are today, that a breach of the
11 peace is a breach of the peace. It is — if it's — if it is a regular breach of the
12 peace, it requests a fine.

13 If it's a breach of peace and it's high and aggravated, meaning it's
14 something more significant than that, you may need to do thirty (30) days in
15 jail.

16 You know, we kind of are flippant about thirty (30) days in jail because
17 of all the major crimes that we all — that — that we are all used to in all of our
18 careers. But, you know, until you're the — you know, until you're the receiver
19 of that, thirty (30) days in jail is thirty (30) days in jail.

20 And, so, when you look at it, our Legislature I would submit was like an
21 — an aggravated breach of the peace is — the most significant punishment
22 should be a five hundred dollar (\$500) fine and court costs and thirty (30)
23 days in jail.

24 **THE COURT:** Well, let me ask you this question: Isn't that still
25 the punishment, though, for just regular old vanilla breach of the peace non-

1 aggravated?

2 **MR. GASSER:** I think it is, but I think that a judge —

3 **THE COURT:** Right.

4 **MR. GASSER:** — a Summary Court Judges or General Sessions
5 Court Judges if that crime is brought up with another General — attached to
6 another General Sessions Court offense, a defense lawyer would be — well
7 actually both, the prosecutor, if it was a aggravated breach of peace ----

8 **THE COURT:** Yeah.

9 **MR. GASSER:** — would want that thirty (30) days and, you know,
10 the most significant fine or close to it.

11 **THE COURT:** Yeah.

12 **MR. GASSER:** And, of course, if it was a regular breach of peace
13 and not an aggravated breach of peace, the Court and the parties involved in
14 that particular matter, would be looking at and probably evaluating something
15 less than that; something more of a fine, at the lower end of the fine or at the
16 lower end of that thirty (30) days.

17 But there is a — between zero (0) and thirty (30) days is a — there's a
18 scale between zero (\$0) and five hundred dollars (\$500) is a scale.

19 And, so — but, when you look back on it again, it is a — by — by — by
20 definition it's a victimless crime. Whether it's a regular breach of peace or an
21 aggravated breach of peace, it's a victimless crime.

22 Assault and batteries have never been a victimless crime. So the
23 legislative intent, when they made the change in 1997, reflected that.

24 They still — they still kept the language in that assault and batteries of
25 a high and aggravated nature require greater punishment, outside the

1 sentencing regime, because it involves an assault against a person and it's
2 high and aggravated.

3 But that they removed that with breach of peace because, at the end of
4 the day, a breach of a peace is a breach of a peace. I mean, when we think
5 about a most significant crime, our Legislature looked at it and said it's just
6 not worth giving anything more than thirty (30) days or a five hundred dollar
7 (\$500) fine. A breach of the peace is what it is; it's a breach of a peace.

8 It reminds me -- and I don't know if you recall, all of us are old enough
9 to remember and -- and veterans enough to remember that failure to stop for
10 a blue light used to be ten (10) years. You know, then, they dropped it down
11 to -- to -- to -- to three (3) years. And -- which was a significant change.

12 I mean, they have dropped it. And they made significant changes in --
13 in -- in -- in assault and batteries second degree now. The maximum penalty
14 is three (3) years, but it's really, quite frankly, the same -- it's the same facts
15 as the old aggravated assault and battery or assault and battery of a high and
16 aggravated nature, which was ten (10) years.

17 And so they have -- it's not unusual for our Legislature to change
18 things. And I think everybody would agree that -- that running from the police
19 at high speed chases -- it was on the front page in the paper this week that
20 an officer in the Casey Department of Public Safety (phonetic) was cleared of
21 the unfortunate death of that -- that gentleman that worked in the governor's
22 office.

23 I mean, I could not proclaim to figure out why they dropped that -- that
24 charge because running from the police is -- is dangerous. I mean, it is a
25 crime -- it is a crime against people.

1 But, at the end of the day, breaches of the peace, starting in 1997, our
2 Legislature, their intent -- it's really when you -- when you -- I just -- you got
3 to come to a reason why they pulled out the language of aggravated breach
4 of the peace requires a greater punishment outside that sentencing regime.

5 And the sim -- I believe the clear intent would be they just don't believe
6 it. And whether -- you know, whether we all agree -- some people in this
7 room might think that breach of the peace is -- requires a greater
8 punishment.

9 But, at the end of the day, when you really look at the legislative intent
10 it is, at that point in time, their intent was that breaches of the peace, whether
11 it be high and aggravated or regular, has to fall within that sentencing regime.

12 And it's up to a Court, be it a Magistrate Court Judge or a General
13 Sessions Court Judge, if the matter is brought into General Sessions Court, to
14 determine on that sliding scale of zero (0) to thirty (30) days or \$0-\$500 what
15 is the most appropriate.

16 Your Honor, when you look at the -- the -- again, and I -- I -- we rely
17 on the legislative intent. We also rely on the fact that -- that -- that the --
18 that the language that our Legislature has so chosen is -- is -- is clear when
19 it talks about all breaches of the peace.

20 That's the first time they ever phrased it in that manner, that all
21 breaches of the peace. I mean, that is -- in 2010 when they were -- when
22 they were codifying the old ABHAN and when they were making assault and
23 batteries first-degree and brand new; assault and batteries second degree,
24 assault and batteries third degree.

25 When they were making all those codi -- codifications on old common

1 law, they also decided to be absolutely just direct in what they meant by
2 breaches of the peace, "all breaches of the peace."

3 I don't know -- I can't imagine any other interpretation or any other
4 intent of "all breaches of the peace." It's simply -- if they had just meant
5 regular breaches of the peace and not breaches of the peace of a high and
6 aggravated nature, they wouldn't have used the word, "all," "all breaches of
7 the peace."

8 And so that is what we mean by the strict construction of -- of -- of
9 legislative -- of legis -- legislative intent.

10 Your Honor, one of the things also is, of course, that the statute -- that
11 works to -- or a forfeiture inflicts a penalty will be strictly construed against
12 the State.

13 **THE COURT:** Right.

14 **MR. GASSER:** The -- the case law is clear on that.

15 **THE COURT:** It is. I think ----

16 **MR. GASSER:** I think if there is -- if there is any call on the
17 matter, when there is a -- a difference in interpretation and ambiguities all of
18 our Courts have always been consistent that those should -- those
19 ambiguities of the legislative intent always favor the citizen.

20 **THE COURT:** Yes, yes.

21 **MR. GASSER:** Always. And one of the great things about our
22 State, when it comes to dealing with issues such as this, particularly a matter
23 of a breach of a peace, again, by definition all -- always has been a victimless
24 crime, always has been a misdemeanor, always has been non-violent, always
25 has been not -- not -- not a felony.

1 All of those things, when you look at it and, when the Legislature -- we
2 submit to you — in 1997 had an opportunity to make those changes, they
3 realized, "You know what, aggravated breach of the peace is so much more
4 — so much significantly more different that an aggravated assault and battery
5 on a human being.

6 And so we believe that the legislative intent as been clear, when you
7 really look at it and track the language from the '81 statute to the 1997
8 change to the 2008 to the 2010 and "all" means "all."

9 We submit, Your Honor, that the — that the — the — the maximum
10 penalty for this crime is — is thirty (30) days and/or a five hundred dollar
11 (\$500) fine plus court costs.

12 Today, including the two more days that Mr. Simms has served, the
13 day of his arrest on the — on the breach of peace charge; he served a day in
14 jail and got out on a P.R. bond.

15 The first night when the case was called for trial he served a day or
16 night in jail. He has served now thirty-five (35) days in jail because we — we
17 — it was five (5) weeks ago today — actually this afternoon — where he was
18 sentenced.

19 He has served thirty-seven (37) days in jail. And we submit that the
20 time that he has served now has been — has surpassed that thirty (30) day
21 maximum.

22 And I truly respect the questions that you ask and I'm here to answer
23 any other questions on this issue. This is my issue. Mr. Harris has all the
24 other motions.

25 **THE COURT:** I got it. Now let me ask you this question: On the

1 Omnibus (phonetic) bill, the — the statute, what is the statutory number of
2 that? You were talking about where the language changed to say that “all
3 breaches of the peace...”

4 **MR. GASSER:** That’s — that’s — that’s 23-3-560 effective June 2,
5 2010.

6 **(Brief Pause)**

7 **MR. GASSER:** And — and — and, you know, we anticipated,
8 then, that they would — they may talk about the fact it talks about
9 Magistrates.

10 But you’ve got to remember, again, even if a case of a petit larceny or
11 a simple possession of marijuana is brought up into General Sessions Court,
12 you know, General Sessions Judges, as we all know, have jurisdiction over
13 every single Summary Court offense;

14 Every one, every single Summary Court offense the General Sessions
15 Court — could be brought up to General Sessions Court, if the — if the parties
16 so please or if the — the moving party or the — the prosecution entity so
17 pleases.

18 And so, at the end of the day, you can’t change the fact that 22-5-150
19 still says, “If found guilty, they may be punishment within the limits prescribed
20 in 22-3- 560.” It does go on to say that it can be brought up to General
21 Sessions Court, but the language is clear that they might be punished within
22 the limits prescribed by 22-3-560 wherever the case is tried.

23 And, within the limits of 22-3-560, effective June 2, 2010, all breaches
24 of the peace. So that is our position on that issue, Your Honor.

25 **THE COURT:** Okay. And you told me two things; 22 and 23. Is

1 it 22 or 23?

2 MR. GASSER: I'm sorry, 22—

3 THE COURT: Okay.

4 MR. GASSER: —3-560 ----

5 THE COURT: Okay.

6 MR. GASSER: — is the sentencing ----

7 THE COURT: Got it.

8 MR. GASSER: ---- regime.

9 THE COURT: Okay. Yes, ma'am?

10 MS. MCDUFFIE: Thank you, Your Honor. May it please the Court?

11 THE COURT: Yes, ma'am.

12 MS. MCDUFFIE: Your Honor, we've handed up motion — the ---

13 THE COURT: Yes, you have. Yes, you have.

14 MS. MCDUFFIE: Your Honor, I'd like to -- to start with that breach
15 of peace and breach of peace high and aggravated are two separate and
16 distinct offenses.

17 They were both separate and distinct offenses at the common law, and
18 the Common Law of England, as Your Honor is well aware, has been adopted
19 by South Carolina.

20 And further, Your Honor, in *The State versus Carson* (phonetic), which
21 is 274, South Carolina 316, which says that — that, "When a crime is covered
22 by England's Common Law, it is adopted by the State of South Carolina
23 unless it's repugnant to the Constitution or the Laws of this State," (phonetic)
24 which this — this case is not.

25 Your Honor, it also says that the common law cannot be repealed by

1 implication, which is exactly what the Defense is arguing has happened in this
2 case. In this case breach of peace of a high and aggravated nature, the
3 General Assembly has not either enacted, modified, or repealed the common
4 law offense of breach of peace of a high and aggravated nature.

5 It is still the law of South Carolina, Your Honor. And that is as
6 recognized by the Supreme Court and Court Administration, which still lists it
7 as a distinct and separate CDR code and they still list it as an offense which
8 is punishable under 17-25-30, which says that, "Because no penalty has
9 been provided by statute it is punishable as it was in common law," which is
10 zero (0) to ten (10) years, as this Defendant was sentenced.

11 Your Honor, he was sentenced appropriately on the case and
12 appropriately based on the facts and appropriately based on the statute.

13 The purpose of statutory construction is to determine the legislative
14 intent, but Courts are supposed to give words their plain and ordinary
15 meaning, Your Honor.

16 Section -- and statutes are supposed to be looked -- or schemes of
17 statutory -- or statutes are supposed to be looked at as a whole, Your Honor.
18 And we would ask that you read them as a whole and read 22-5-150, which
19 in pertinent part says that, "A Defendant may be punished within the limits of
20 22-3-560 or when the offense is of a high and aggravated nature and may --
21 may be bound over for trial before the Court of General Sessions," Your
22 Honor. It is two separate and distinct offenses.

23 Mr. Gasser has argued that, because Section 22-3-560 says, "A
24 Magistrate may punish by five hundred dollars (\$500) or thirty (30) days all
25 breaches of the peace," he wants you to expound that language to include

1 breaches of the peace of a high and aggravated nature, which has never
2 been done before.

3 Your Honor, while this — the statutory language saying “all breaches of
4 the peace,” has not been made or passed (phonetic), the statutory language
5 saying “all assault and batteries” was there. And the Courts have looked at
6 that numerous times, Your Honor.

7 While it exempts assault and battery is of a high and aggravated
8 nature under the 1997 version of the statute, it doesn't exempt more
9 significant assault and batteries. And it doesn't, for example, exempt assault
10 with intent to kill. And the Courts have looked at that statute, Your Honor.

11 Under Mr. Gasser's reading of the statute where it says, “all assault
12 and batteries,” Your Honor, that would encompasses all assault and
13 batteries.

14 **THE COURT:** You have to slow down just a little bit.

15 **MS. MCDUFFIE:** I apologize.

16 **THE COURT:** I'm following — following you, but I don't know if
17 my Court reporter is following you.

18 **COURT REPORTER:** Thank you.

19 **MS. MCDUFFIE:** Your Honor, his reading or his interpretation of the
20 statute in 1997 where it says “all assault and batteries,” would be all assault
21 and batteries;

1 Your Honor, assault and battery with intent to kill, assault with intent to
2 kill. And the Courts have looked at assault with intent to kill and said that, that
3 is a common law crime punishable by zero (0) to ten (10) years because
4 there's no other separate statutory provision that delineates the appropriate
5 response.

6 So, Your Honor, under his reading of the case, assault with intent to kill
7 would also have to carry zero (0) to thirty (30) days, which is not what — what
8 the Courts have held and things of that nature.

9 The 1997 version only talks about things like high and aggravated
10 nature. And, under his reading, that would encompass all crimes as he has
11 read it. And, Your Honor, I don't think that's the legislative intent, nor is it
12 what the legislative — or nor it is what the legislature intended to do.

13 When they enacted 22-5-150, and they made a distinction that
14 Magistrates can punish up to thirty (30) days and five hundred dollars (\$500)
15 or, when the offense is of a high and aggravated nature, be bound over for
16 trial in the Court of General Sessions.

17 Your Honor, if both offenses carried zero (0) to thirty (30) days, there
18 would be absolutely no need for the distinction. A Magistrate cannot bind
19 over a crime that carries zero (0) to thirty (30) days. And that was litigated in
20 2009 in *State versus Ramsey* (phonetic), Your Honor.

21 In that case, the South Carolina Supreme Court said that Magistrates
22 have no jurisdiction to hold preliminary hearings on matters within their
23 original exclusive jurisdiction.

24 Your Honor, that was a CDV case which carried zero (0) to five
25 hundred dollars (\$500) or thirty (30) days in jail.

1 (Document handed up.)

2 MS. MCDUFFIE: They said preliminary hearings cannot be granted,
3 Your Honor. The statute clearly intends for breach of peace of a high and
4 aggravated nature to carry more than thirty (30) days, Your Honor. And
5 intends for it to be punished at — at common-law because the Legislature
6 hasn't changed that in any way, shape, or form.

7 Your Honor, we don't agree that the term, "all breaches of the peace"
8 encompasses all forms of that statute. It encompasses all offenses that are
9 breaches of the peace, not breach of the peace high and aggravated just as
10 assault — under the 1997 version, all assaults didn't include all assaults with
11 intent to kill and things of that nature, Your Honor. Those were not included
12 when the Court interpreted those statutes.

13 Further, Your Honor ----

14 THE COURT: You think that the removal of the inclusion that Mr.
15 Gasser argued — in other words, do you think that the language that "It must
16 be punished at higher or greater amount of time," that the removal of that
17 language where it involved breaches of the peace high and aggravated and
18 taking it out, do you think that what the Legislature was intending was to give
19 the Court the ability, if the Court believed that it was appropriate, then, in fact,
20 the Court could sentence anywhere, if you will, from zero (0) to thirty (30) up
21 to ten (10) years?

22 In other words, it just — by removing it, it said to the Court, "Even if it's
23 high and aggravated, based upon your view, Judge, you can — you can do —
24 you don't have to give more than thirty (30) days; you can give zero (0) —
25 what would be, in fact, a day to ten (10) years"?

1 **MS. MCDUFFIE:** Your Honor, I think where it says that if it's of a
2 higher — which the law still says if it's of a high and aggravated nature, it's to
3 be bound over to the Court of General Sessions ----

4 **THE COURT:** Yes.

5 **MS. MCDUFFIE:** — when it carries more than thirty (30) days, Your
6 Honor.

7 **THE COURT:** Yeah.

8 **MS. MCDUFFIE:** And, if it carries less, it cannot be bound over to
9 the Court of General Sessions. So I think that they just removed repetitive
10 and conflicting language, Your Honor.

11 **THE COURT:** Okay.

12 **MS. MCDUFFIE:** I don't — there is still, to this day, no statute
13 prescribing a sentence for breach of peace of a high and aggravated nature,
14 Your Honor.

15 **THE COURT:** Other than ----

16 **MS. MCDUFFIE:** 17-25-30 that says that there's — if there's no
17 punishment provided by law is when it's to be punished, but there is no
18 specific statute that says breach of peace high and aggravated is punishable
19 by ---

20 **THE COURT:** Right.

21 **MS. MCDUFFIE:** Your Honor, that's why it falls under 17-25-30,
22 which is what Court Administration ----

23 **THE COURT:** Which is zero (0) to ten (10)?

24 **MS. MCDUFFIE:** Correct, Your Honor, which would include thirty
25 (30) days ---

1 THE COURT: Right.

2 MS. MCDUFFIE: ----- or up to ten (10) years, Your Honor.

3 THE COURT: Right.

4 MS. MCDUFFIE: And anything between. Your Honor, I also want
5 to point out that just because there's a statute that — that codifies similar
6 conduct for a common-law crime, it doesn't mean that the common-law crime
7 itself is abrogated.

8 Your Honor, there's many examples that have been — been litigated
9 numerous times where there's both the common-law crime and a statutory
10 crime, Your Honor, but the statutory crime doesn't abrogate the common-law
11 crime.

12 For example, escape; escape was codified under the law. It carries
13 zero (0) to fifteen (15) years consecutive to the sentence, Your Honor, but
14 that didn't abrogate common-law escape.

15 Common-law escape is still a crime. It's still on the books. And it also
16 doesn't dictate the punishment for common-law escape. Common-law
17 escape is still sentenced under 17–25–30, which carries zero (0) to ten (10)
18 years.

19 So, Your Honor, you know, that's one example. Another is misconduct
20 in office. There's a — Your Honor, the exact section escapes my mind, but I
21 know it's under Title VIII. Your Honor, there's a — a statute that makes
22 misconduct in office a codified crime.

23 Your Honor, common-law misconduct in office still exists. Statutorily it
24 carries up to a year and in common law it carries ten (10). And, Your Honor,
25 those are — are just a few examples.

1 But the presumption is that the common-law remains in full force. And
2 the Legislature, if they wanted to outlaw breach of peace of a high and
3 aggravated nature, could have done so.

4 They took the time, when they codified the Omnibus Crime Bill in 2010
5 to specifically state in Act (7)(a) that they were repealing assault and battery
6 of a high and aggravated nature, simple assault and battery, assault with
7 intent to kill, assault and battery ----

8 **THE COURT:** Again, I'm going to ask you to slow down just a
9 little bit.

10 **MS. MCDUFFIE:** I apologize, Your Honor.

11 **THE COURT:** I'm following you, it's just -- it's just you're brilliant
12 and your -- you know, your -- your brain is zooming and your mouth is
13 talented and it's zooming with your brain. And I'm with you, and we're with
14 you. It's just our court reporter can't.

15 **MS. MCDUFFIE:** I apologize, Your Honor.

16 **THE COURT:** No, don't -- don't apologize because ----

17 **MS. MCDUFFIE:** But they specifically repealed ----

18 **THE COURT:** --- it comes from your intelligence.

19 **MS. MCDUFFIE:** They specifically repealed assault and battery with
20 intent to kill, assault and battery of a high and aggravated nature, simple
21 assault and battery, assault and battery -- assault and battery with intent to
22 kill.

23 Those were all repealed by statute. And the Legislature chose not to
24 repeal breach of peace of a high and aggravated nature.

25 And, Your Honor, the case law is clear that common-law remains in

1 effect. There's no sentencing provision to dictate the sentence for breach of
2 peace of a high and aggravated nature.

3 And while I understand Defense is arguing that 22----

4 **THE COURT:** Five (5).

5 **MS. MCDUFFIE:** — 5—

6 **THE COURT:** No ----

7 **MS. MCDUFFIE:** I'm sorry, 22-3-560 ----

8 **THE COURT:** — three (3). I'm sorry. I did that to you.

9 **MS. MCDUFFIE:** — where it says, "all breaches of the peace," now
10 encompasses every breach of peace crime, Your Honor, I don't think that
11 that's giving the language of the statutory a plain or clear meaning.

12 There is a separate crime that is breach of peace. And, then, there is
13 one that is breach of peace of a high and aggravated nature.

14 I think the words of the Legislature are clear: All breaches of the
15 peace. It doesn't say "all breaches of the peace, aggravated and non-
16 aggravated." It does not, in any way, in the plain language, purport to be a
17 sentencing provision for breach of peace high and aggravated.

18 And the Legislature clearly left in the provision that says that, if it is of a
19 high and aggravated nature, it is to be bound over to the Court of General
20 Sessions, meaning that it carries a — a penalty which is outside the
21 jurisdiction of a Magistrate's Court, Your Honor.

22 And, again, I would also like to point out that currently Court
23 Administration and the Supreme Court through Court Administration lists as
24 the penalty section for breach of peace of a high and aggravated nature
25 17–25–30, which is zero (0) to ten (10) years.

1 And it has it under a separate CDR code from breach of peace, Your
2 Honor.

3 There is no provision of South Carolina law which repeals the
4 common-law crime of breach of peace of a high and aggravated nature. And
5 the common law cannot be repealed through abrogation, which is exactly
6 what the Defense is asking you to do today.

7 **THE COURT:** Okay.

8 **(Pause)**

9 **THE COURT:** Let me ask you this question because I do — I do
10 not know the answer to — to this question. There was — there is proposed
11 legislation to amend 22–3-560.

12 A, do you know whether or not --- as we are here today, whether or not
13 it has, in fact, been amended. Do we know that?

14 **MS. MCDUFFIE:** Your Honor, it hasn't. I have spoken to David
15 Ross (phonetic), from the South Carolina Commission on Prosecution
16 Coordination, who actually testified at the hearing before the Legislature. And
17 — and brought up the fact that — that there shouldn't be any ambiguity in the
18 law that breach of peace is a separate offense.

19 And what he told me is that the Legislature never — didn't even know
20 there was an offense called breach of peace high and aggravated and didn't
21 intend to modify that in any way.

22 They're — they were looking at breach of peace and did not have it in
23 their mind that they — what they were doing to modify that in any way.

24 And he testified before the Committee on that issue, Your Honor.

25 **THE COURT:** Okay.

1 **MS. MCDUFFIE:** And from him he relayed to me that it is not the
2 intent of the Legislature to modify breach of peace of a high and aggravated
3 nature.

4 **THE COURT:** And the only reason that I asked obviously if there
5 was — if — if there was an amendment — because there is a proposed
6 amendment pending before the Legislature for 2013. And, obviously, if they
7 did that and affected his sentence, it's something I would need to know.

8 And very well. Got it. I got that one.

9 **MS. MCDUFFIE:** Thank you, Your Honor.

10 **THE COURT:** All right.

11 **MR. GASSER:** Just very briefly, Your Honor.

12 **THE COURT:** Yeah.

13 **MR. GASSER:** All right. First of all, the reason we have — Court
14 Administration's code is that way is because it's never been challenged
15 before. That's what we're doing before you. This is the first time there has
16 ever been a challenge to it. So this — this issue has never been addressed.

17 **THE COURT:** Okay.

18 **MR. GASSER:** I guess I'll just — and — and very, very short, if
19 you look at the statutory interpretation, what you are required -- which I know
20 you're doing right now, and will do, if you look at the change made in 1997
21 was that the Legislature went through the language that breaches of the
22 peace of a high and aggravated nature required a greater punishment.

23 They went through that from 22- 3- 560, which is the sentencing
24 regime that you're looking at right now ----

25 **THE COURT:** Uh-huh (affirmative).

1 **MR. GASSER:** — for purposes of — or — or one of the things
2 you're looking at.

3 They kept in the statute 22– 5–150, which is the procedural statutes of
4 arrests of persons, threatening, breach of peace, trial, or binding over; the
5 one that's listed in the indictment, the one that Ms. McDuffie referred to.

6 But the one thing that she referred to that -- that is -- that is a bit --
7 that's really important, she indicated that breaches of the peace of a high and
8 aggravated nature currently must be bound over to General Sessions Court.
9 And that's not accurate.

10 When you look at the statute, it clearly states that, "When the offense
11 is of a high..." --- meaning breach of the peace --- "...when the offense is of a
12 high and aggravated nature, they may be committed or bound over for trial
13 before the Court of General Sessions Court; not must.

14 They may, which means there's only — we all know there's only one
15 meaning of that. If they — they — if the Legislature said they must be they
16 would have said, "They must be..." — meaning breach of peace of a high and
17 aggravated — "...must be bound over to General Sessions Court." They didn't
18 say that.

19 And there's a reason why they didn't say that. They kept this language
20 in there, in 22–5-150 because, when they made the change in 1997, they
21 excluded the language that high and aggravated breach of peace require a
22 greater punishment than thirty (30) days or five hundred dollars (\$500).

23 And so, Your Honor, breach of peace of a high and aggravated nature
24 can be tried in a Magistrate's Court, thus why else would they say – our
25 Legislature say that they may be committed or bound over for trial? That

1 means that — that it's not required. They can be tried in Magistrate's Court.

2 And the reason why they can be tried in Magistrate's Court is because
3 the maximum penalty is five hundred dollars (\$500) and/or thirty (30) days or
4 else they couldn't be tried in Magistrate's Court.

5 And, so, our Legislature — and she cited this and I agree with her; this
6 is the law currently in South Carolina. So the statute they cited on the
7 indictment and is currently the law, our Legislature says that breaches of the
8 peace of a high and aggravated nature may be committed or bound over; not
9 must be, but may be.

10 Of course, we all know what that means; maybe or maybe not. And if
11 they're — that means if they're not committed or bound over, that's because
12 the maximum penalty you can give, whether it's in General Sessions Court or
13 Magistrate's Court, is thirty (30) days or five hundred dollars (\$500) or else
14 the Magistrate's Court and the Summary Courts of South Carolina wouldn't
15 have jurisdiction.

16 (Brief Pause)

17 MR. GASSER: Because Magistrates and Municipal Court Judges
18 can't give somebody ten (10) years or five (5) years or two (2) years; they just
19 can't.

20 And — and — and so that's why we put in our — in our memorandum
21 of law, you've got to look at all of the statutes together. In 22- 5-150,
22 looking at it, breaches of the peace high and aggravated may be tried in
23 General Sessions Court and they may be tried in Magistrate's Court.

24 And, the fact of the matter is, the only way that could be done is if the
25 legislative intent in 1997 and the current intent of all breaches of the peace, in

1 22-3-560, all breaches of the peace must be set in stone at a five hundred
2 dollars (\$500) or thirty (30) day maximum, added with the change in 1997
3 where they excluded the language that high and aggravated breach of peace
4 required a greater punishment.

5 And, when you look at all those statutes, the procedural statutes, and
6 22-3-1 — 22-5-150 and the subsequent sentencing regime for 22-3-560,
7 clearly, both from an intent perspective and from a practical perspective, limits
8 the sentence.

9 **THE COURT:** Got it.

10 **MR. GASSER:** Thank you.

11 **THE COURT:** Okay.

12 **MS. MCDUFFIE:** If I can briefly respond?

13 **THE COURT:** Sure.

14 **MS. MCDUFFIE:** Your Honor ---

15 **THE COURT:** You would tell me that the "may" goes to the
16 commitment not to the — the binding order?

17 **MR. GASSER:** Exactly, Your Honor. It would take away a
18 Magistrate's ability to determine whether there is probable cause. If it's a
19 "must," then, there would be no right to a preliminary hearing and no right to a
20 — a pre-trial determination of probable cause.

21 **THE COURT:** Okay. Got that one. Next, Mr. Harris?

22 **MR. HARRIS:** Judge, we have a change of scenery. I have civil
23 stuff here and Johnny's stuff there. May I move the podium?

24 **THE COURT:** Well ---

25 **MR. HARRIS:** Thanks

1 THE COURT: — absolutely.

2 (Off-The-Record Comments)

3 MR. HARRIS: And, Your Honor, this is brief. First of all, we
4 would obviously ask the Court to consider all of the prior motions, the prior
5 discussions we had with the Court ---

6 THE COURT: Sure.

7 MR. HARRIS: — regarding a new trial. And, quite frankly, as to
8 the judgment of acquittal, you know, we've -- we've made -- we had that
9 discussion with the Court. We had that after the State presented their
10 evidence.

11 We made the motion after we presented our evidence at the
12 conclusion of the case. And I would stand on the record as it is.

13 THE COURT: Absolutely.

14 MR. HARRIS: I would -- I would ask that you hear from me
15 briefly, Your Honor, however, as to a motion for a new trial based on, as we
16 filed in our motion, comments made by the prosecutor in their closing
17 statements.

18 THE COURT: Okay.

19 MR. HARRIS: You know, as a young lawyer many, many, many,
20 many years ago, as a young prosecutor, Varney Germanders (phonetic), and
21 some of the people that were kind of walking me through the system and
22 telling me what not to do, started talking about the Golden Rule.

23 I really had no earthly idea of what the Golden Rule was because they
24 don't teach you what the Golden Rule as -- as -- as it pertains to the law in
25 law school.

1 And what I quickly learned, after having made one argument to a jury
2 that, "The Defendant never testified in this case, did he?" And he stands up,
3 jumps up, and I learned the hard way.

4 And, then, there was some conversation about — you know, I said —
5 and this is one of my first fights when I was a prosecutor — some
6 conversation about why you don't do that and how improper that is and how
7 that's most likely going to get you reversed nine times out of ten, maybe —
8 maybe even ninety-nine (99) out of a hundred (100) depending on the facts
9 and circumstances and egregiousness ---

10 **THE COURT:** I would say a hundred (100) out of a hundred
11 (100) ----

12 **MR. HARRIS:** A hundred (100) out of a hundred (100).

13 **THE COURT:** — it would do that — it would do that for you.

14 **MR. HARRIS:** You know, in this case, Your Honor, I believe that,
15 that happened ----

16 **THE COURT:** Okay.

17 **MR. HARRIS:** — square maybe even acute.

18 **THE COURT:** Okay.

19 **MR. HARRIS:** Because I don't even think that what happened in
20 this case is burden shifting; I think it was, quite frankly, worse than burden
21 shifting.

22 And this Court addressed it as the — the State has — has mentioned in
23 their — in their motions. But — but I think the — the Court — I don't know
24 that it was a bell ring that it was presented to the jury could be un-rung. And
25 let me tell you why.

1 THE COURT: Okay.

2 MR. HARRIS: Curtis Simms, the day that he was first seen by
3 law enforcement, pro -- professed his innocence. We know that because
4 that's what the officers testified. And that's what Mr. Simms testified. That
5 was what was in his statement. He professed his innocence.

6 Next, at the Richland County Sheriff's Office, some two hours, three
7 hours after this incident. Again, in a written statement that was presented to
8 an officer, who testified in court and has subsequently testified to in court at
9 least three times at the station, he professed his innocence.

10 He later appeared for arraignment. And, as this Court is aware,
11 although arraignments in the state are more perfunctory by and large, the
12 arraignment process is a statutory right of a defendant to enter a guilty plea or
13 a plea of not guilty before a Court.

14 And he did that. He stood before a jury at the jury selection and this
15 Court informed the jury that he had to be presumed innocent, that he had, in
16 fact, professed his innocence.

17 But before that, Your Honor -- and this was a two-year time period
18 between the time that he was arrested and charged and indicted. And, then,
19 came a trial.

20 • So, on at least four to five occasions, Curtis Simms came into this
21 courtroom, in roll calls, and professed his innocence. And, again, at trial in an
22 opening statement, Mr. Gasser stood before the jury, after the Court had
23 instructed the jury that he, Mr. Simms, had professed his innocence, and Mr.
24 Gasser told that jury that Mr. Simms was not only presumed innocent, but that
25 he had, in fact, professed his innocence.

1 And throughout the trial, witness after witness after witness told this
2 jury, through direct and through cross examination, through the State's
3 portion of the trial, that Mr. Simms had, in fact, professed his innocence.

4 During the Defense presentation of the evidence, again, witness after
5 witness, on direct examination and, then, on cross examination, Mr. Simms,
6 through the witnesses, professed his innocence.

7 At the conclusion of the case the Court again -- and -- and throughout
8 the trial, this Court gave the instruction that -- the Mr. Simms was guilty --
9 was innocent until proven guilty. Please strike that.

10 **THE COURT:** (Laughs)

11 **MR. HARRIS:** He was innocent until proven guilty.

12 **THE COURT:** You know, interestingly enough -- interesting that
13 you would say "innocent" because it's actually not guilty, is -- I think there is
14 -- I really do think there's a difference between not guilty and innocence. And
15 -- because I think it's easier -- I think it's easier. And I think the Defendant
16 -- a Defendant is entitled to that.

17 So you need to try to say "not guilty" as opposed to "innocence"
18 because -- because I think there's -- I think there's a difference in the
19 language and maybe there isn't. But in my mind it -- it's more to have to --
20 the -- it's -- it's a greater piece to have to go to innocence than not guilty. So
21 I always try to say "not guilty."

22 **MR. HARRIS:** And I'm glad you said that because I am mis-
23 speaking it as I am making my argument because, quite frankly, the way
24 you're thinking now was the way that I want you think because ---

25 **THE COURT:** That 's because ----

1 **MR. HARRIS:** — the comment that was made — and you are
2 correct; that statement of law is absolutely a hundred percent (100%) correct.

3 **THE COURT:** Right.

4 **MR. HARRIS:** I should have been saying every time he
5 professed ----

6 **THE COURT:** That he was not guilty.

7 **MR. HARRIS:** — that he was not guilty.

8 **THE COURT:** And that's what I told the jury, that he pled not
9 guilty.

10 **MR. HARRIS:** And — and — and I apologize, Your Honor.

11 **THE COURT:** Well, you don't have to apologize. I just — but I
12 never — and I may be wrong, but I see — I see a difference. And, so, I
13 always try to tell juries "not guilty" as opposed to "innocent" because I think
14 there's a difference.

15 **MR. HARRIS:** And there are two words, "not guilty" and "guilty."

16 **THE COURT:** Right.

17 **MR. HARRIS:** And, Your Honor, and my — and Mr. Gasser, in
18 his closing, told this jury that our client was not guilty.

19 **THE COURT:** And he may have said "not guilty" and "innocent."

20 **MR. HARRIS:** He may have said — he probably said a lot
21 because it was a long closing.

22 **THE COURT:** Yes.

23 **MR. HARRIS:** — but — but clearly the point, Your Honor, was
24 that, during this entire two and a half (2 ½) year saga of arrest to
25 appearances before judges, pretrial conferences, pretrial hearings, he always

1 professed that he was not guilty of this offense.

2 And, in closing, the State made what I believe, again, to be a larger,
3 more egregious error than burden shifting. The State said that Mr. Gasser --
4 Mr. Gasser -- in his closing statement, had conceded guilt on the second
5 charge; had conceded guilt.

6 Now, you know, from this statement the Golden Rule -- and the State
7 brought it up -- the Golden Rule is the comment that I had made earlier,
8 "Where's -- where's the testimony, X, Y, and Z?" "Why didn't the Defendant
9 tell you A, B, and C?"

10 That's the Golden Rule. And -- and we believe that we -- that the
11 State in this case went well beyond that, by not only saying that Mr. Simms
12 had conceded guilt, but that Mr. Gasser -- Mr. Gasser -- had conceded guilt,
13 when we know historically -- because we know the background of this case.

14 And we know there were, you know, at least ten (10) different separate
15 appointments with the court, ten (10) different -- ten (10) separate
16 appearances before the solicitor's office, and numerous times throughout the
17 trial where nothing further from the truth could be the fact; the fact being that
18 he had always professed that he was not guilty of this offense.

19 That 's a bell, Judge, I don't think could be un-rung. You know, the
20 interesting thing about the State's discussion with the jury, at that particular
21 point, was -- you know, lawyers watch jurors.

22 And lawyers watch -- it's our job to kind of watch what's going on.
23 The re -- there was a powerful reaction from the jury when the State made
24 that comment.

25 Eyes were -- eyebrows were raised, heads were moved. It was an

1 interesting dynamic that occurred when that comment was made throughout
2 the jury.

3 I can't tell you, Your Honor, if it was six; I can't tell you if it was eight.
4 But I know this: I know that as soon as a I saw it -- and the record I think will
5 reflect this -- I jabbed Mr. Gasser and said, "Hang on. Did you hear what she
6 just said?"

7 And we approached the Court. And as Ms. McDuffie's motion --
8 response to our motion points out, we approached the Court and the Court
9 gave a curative instruction on the comments that she had made.

10 Judge, our point, in wrapping this up, is that it was not only burden
11 shifting; it was a misstatement of fact in a part of the trial that is critical. I
12 mean, any psychologist, any jury consultant, any book that you read will tell
13 you that the statements of the attorneys are critical to any trial.

14 You know, that's why we -- we work on what we're going to say, in the
15 opening statement. And we talk about how is that going to play out with the
16 evidence and -- and what's going to happen if -- if the evidence makes a
17 turn; can we tie that together with our closing statements?

18 And, quite frankly, this case is not any different from any other case
19 that Mr. Gasser and I try together. Usually I open and he closes. It didn't
20 happen that way in this -- in this particular case, but -- but there was a
21 cohesion with everything that he said to that jury.

22 And never, not once, was there a concession; nor was there even a
23 implicit concession as to the second count. Again, Your Honor, we believe
24 that not only did she shift the burden by making that comment to the jury that
25 we believe was affected by that comment, but also she crossed the boundary

1 in terms of a misstatement of facts — of fact.

2 And we believe that because of that Mr. Simms is entitled to a new
3 trial.

4 **THE COURT:** Got it.

5 **MR. HARRIS:** Thank you, Judge.

6 **THE COURT:** Yes, yeah. Yes?

7 **MS. CAMPBELL:** May it please the Court?

8 **THE COURT:** Absolutely.

9 **MS. CAMPBELL:** Your Honor, if I may approach with a case?

10 **THE COURT:** Certainly.

11 **MS. CAMPBELL:** Okay.

12 **(Documents handed up)**

13 **(Off-The-Record Comments)**

14 **THE COURT:** Certainly.

15 **MS. CAMPBELL:** Your Honor, I just handed up *State versus*
16 *Patterson* (phonetic) and *State versus Dunlap* (phonetic). And I need to get a
17 copy for the Defense. I don't have an extra copy of *Dunlap*. I do have one
18 for ----

19 **THE COURT:** Okay. I got it.

20 **MS. CAMPBELL:** And this is *Parson*. And I do have

21 **THE COURT:** Okay.

22 **MS. CAMPBELL:** — some pages highlighted.

23 **(Documents handed up.)**

24 **THE COURT:** Okay.

25 **MS. CAMPBELL:** Your Honor, I — I believe —

1 THE COURT: Which one do you want me to look at first?

2 MS. CAMPBELL: If you could look at *Patterson*
3 right now, Your Honor.

4 THE COURT: Sure. Do you all have *Patterson*?

5 MS. CAMPBELL: It's on this page.

6 THE COURT: Because I can -- because I can get --

7 (Off-the-Record Comments)

8 MR. HARRIS: Yes, ma'am. Thank you.

9 THE COURT: All right.

10 MS. CAMPBELL: Your Honor, respectfully, Your Honor, if I may, I
11 believe I agree with the majority of what Mr. Harris said as far as the scenario
12 of events and when his client pled not guilty and things of that nature, all the
13 way up and to leading into trial.

14 Your Honor, I have handed up two cases. My argument in closing
15 argument was in response, Your Honor. It's sometimes referred to as an
16 invited response to appellant argument.

17 In opening argument, Mr. Gasser put on the record and stated -- he
18 mentioned the breach of peace of the high and aggravated nature. And, then,
19 he made a comment.

20 And the comment --- and, Your Honor, and our position would be he
21 basically laid out the strategy at that point which would be relevant to their
22 points to argue at a later date.

23 And his strategy was that's not the charge that is driving this charge or
24 there was some reference to that. Basically saying that may have happened,
25 but that's not the major charge which we are here on today.

1 That is a strategy that is chosen by the Defense in this case, as is their
2 — you know, absolute right to do.

3 In my closing argument, the only thing I was commenting on was that
4 this is a defense that is commonly used. The strategy is, is not to dispute the
5 one charge, but to fight vigorously on the other charge, which can be
6 successful as far as defending cases in certain cases.

7 The Defense, in their opening argument, Your Honor --- and up until
8 that point we wouldn't have been able to argue anything like that, but once
9 they put that argument out there, basically saying this case is totally about the
10 involuntary manslaughter charge; you know, the breach of peace, don't even
11 worry about that was basically the inference that was made from him. And he
12 even made a gesture when he said it.

13 At that point, Your Honor, we, then, were able to address his strategy.
14 In other words, his strategy was this. Your Honor, that is further bolstered by
15 immediately after the —

16 **(Brief Pause)**

17 **MS. CAMPBELL:** — the trial, the State newspaper did publish an
18 article which quoted Mr. Gasser. And Mr. Gasser said, "Our primary goal was
19 to get Simms acquitted of the manslaughter charge." So that strategy was
20 successful.

21 My argument --- and I believe it will be — when we approached the
22 bench, Your Honor, their objection was to me saying he conceded; the use of
23 the word "concede," not to the argument itself.

24 At that point, Your Honor, even if you were to assume that since —
25 even if he hadn't put it out there, pursuant to *Patterson* and those, if he did

1 concede that in opening argument, even if you were to say that, that was
2 error, at that point, at that point you, then, charged the jury that they weren't
3 to consider that. You gave a curative instruction. And, at that point, they
4 didn't request any further curative instruction.

5 They didn't request a mistrial. They didn't request anything like that.
6 And Mr. Gasser luckily he does understand and notes everything and he felt
7 that, that was adequate at the time because, if he hadn't, he would've, being
8 the trial lawyer he is, requested further instruction and/or a mistrial if he did
9 not think that, that was necessary in this case.

10 Your Honor, our position is based on his opening argument and his
11 closing argument, taken in combination, that we then had the right to argue,
12 as we did before the jury.

13 But, even if you assume that the use of the word "concession" was
14 wrong or "concede" was wrong, that, that was adequately cured by your
15 instruction to the jury. And that no further instructions were requested.

16 **THE COURT:** Got it. Okay.

17 **MS. CAMPBELL:** Thank you.

18 **(Brief Pause)**

19 **MS. CAMPBELL:** Oh, I've just been reminded I need to make our
20 motions — our response to their motions as part of the record too.

21 **THE COURT:** Absolutely. Of course, of course.

22 **(Documents handed up.)**

23 **(Brief Pause)**

24 **THE COURT:** Okay. Oh, yeah, now, let me tell you in my head
25 where we are. Motion for new trial?

1 **MR. HARRIS:** Yes, ma'am.

2 **THE COURT:** And we've done the — so, what we haven't done
3 — we haven't done the motion for acquittal. That — that remains and then
4 the motion to reduce sentence, yes?

5 **MR. HARRIS:** No. Your Honor, the motion for acquittal I
6 addressed at the beginning of my remarks. I stated that we would stand on
7 the record that had been previously made as to that —

8 **THE COURT:** I'm with you.

9 **MR. HARRIS:** — charge (phonetic).

10 **THE COURT:** Got it.

11 **MR. HARRIS:** I think we're three fourths of the way through.

12 **THE COURT:** Just — I understand. I just want to be sure.

13 **MR. HARRIS:** Yes, ma'am.

14 **THE COURT:** I don't — I don't want to cut anybody off.

15 **MR. HARRIS:** Okay.

16 **THE COURT:** I want to go over everything for the record. That's
17 why I'm going through this. I'm with you.

18 **MR. HARRIS:** Okay.

19 **THE COURT:** No question that you made motions for acquittal
20 throughout the trial.

21 **MR. HARRIS:** Yes, ma'am.

22 **THE COURT:** No question about that. Okay.

23 **MR. HARRIS:** Thank you.

24 **THE COURT:** All right.. Got that. All right. Now, in the motion
25 — let me ask you this question: The motion to reduce the sentence, is there

1 anything additional that -- that you want to argue with regards to the motion
2 to reduce the sentence other than the sentence ought to be reduce inside the
3 thirty (30) days or five hundred dollars (\$500)?

4 **MR. GASSER:** Yes, ma'am.

5 **MR. HARRIS:** Yes, ma'am.

6 **THE COURT:** We've done that?

7 **MR. HARRIS:** No, we have not.

8 **THE COURT:** Okay.

9 **MR. HARRIS:** I'd like to be heard if I could, Your Honor. You
10 know, the way that -- if I may, Your Honor?

11 **THE COURT:** You absolutely may.

12 **MR. HARRIS:** It seems to me that this Court has, depending on
13 how it rules on -- on the first two -- three motions --

14 **THE COURT:** Right.

15 **MR. HARRIS:** has --

16 **THE COURT:** Well, let me just tell you, I -- I'm going to do --
17 here's what I -- just so you know, I'm -- I -- I'm not -- I want to hear it all.
18 And I'm going to percolate with it.

19 And the other thing that I want -- that I want you to do, if you haven't
20 already done this for me -- and let me tell you why. Let me be clear why.

21 And I'm a little amazed that Counsel is -- was/is up on the
22 amendment. I'm very impressed because I thought I was going to have a
23 haha on -- on you all, but I should've known better with these lawyers.

24 But I want to be absolutely certain because there is legislation pending
25 before the Legislature; it says 2013. I want to see that too.

1 The reason that I want you — and I hope you all understand the
2 reason I think it's important is that when it comes — if it comes to sentencing
3 and it's relevant as to sentencing, it's something I have to know.

4 And I think it's — and I'm not going to rule until I get that. In other
5 words, I'm not going to put you in the position — let me be — let me be even
6 clearer.

7 **MR. GASSER:** Yes, ma'am.

8 **THE COURT:** I'm not going to put Defense Counsel in any
9 position where you have argued and received a determination with regards to
10 the sentencing, while there is something pending before the Legislature that
11 could have an effect on sentencing. All right?

12 **MR. GASSER:** Yes, ma'am.

13 **THE COURT:** Because it — under the law is impossible for me
14 to go more; it can only go less. So, if there's a change in the legislation and
15 there some sort of downward do, I have to know that; I would want to know
16 that. It's important for me to know that. And I must know that before I rule on
17 these motions. So that's what I'm saying.

18 **MR. GASSER:** Yes, ma'am. Thank you.

19 **THE COURT:** All right. So together you can find out what that is.
20 But it's on Westlaw. And I don't know what that means, but I need to know
21 what the status is. I know somebody testified, but I — but I don't know what it
22 is.

23 **MR. GASSER:** Thank you, judge.

24 **THE COURT:** All right. I'm listening.

25 **MR. HARRIS:** Your Honor, at this point, I would like to address

1 our specific request that you reduce the sentence.

2 THE COURT: Okay.

3 MR. HARRIS: You know, we've all had a month for reflection.

4 THE COURT: Right.

5 MR. HARRIS: Obviously we have had the opportunity to think it
6 over.

7 THE COURT: Lots.

8 MR. HARRIS: I was going to say at least a thousand (1000)
9 times.

10 THE COURT: Yes.

11 MR. HARRIS: And, you know, one of the things that I asked for
12 was a couple of days to kind of get our thoughts together. And I would like to
13 think that, with a couple of days, I could have made a lot of these points to the
14 Court and I hope some of them would have had some effect. And I hope they
15 were ----

16 THE COURT: I hope — yes, but I thought your remarks were
17 extraordinary.

18 MR. HARRIS: Well, thank you, Your Honor. I appreciate that.

19 THE COURT: Yeah, very extraordinary.

20 MR. HARRIS: Well, thank you, Judge. What I — what I'm going
21 to do is, I'm not going to rehash any of that.

22 THE COURT: I know. Okay.

23 MR. HARRIS: What I'd like to do —

24 THE COURT: You can if you want to.

25 MR. HARRIS: Well, I don't know that I need to.

1 **THE COURT:** Okay.

2 **MR. HARRIS:** I know that — first of all, I appreciate the time
3 you've given Mr. Simms and the time you've given Counsel here today. And
4 — and we know you're in the middle of a trial, but we thank you for your time.
5 And the last thing I want to do is put you out, Your Honor, so I'm not going to
6 rehash anything.

7 I do want to focus on three primary areas. And my — my comments
8 are going to deal with sentencing in general; some of the things you see on
9 the sentencing sheet for instance every time that a General Sessions Court
10 Judge sentences a citizen to — to imprisonment or to probation.

11 From there I'd like to move my comments to the guidelines, the
12 guidelines that — that have — are not propagated as law, Your Honor,
13 but —

14 **THE COURT:** Yay.

15 **MR. HARRIS:** — but have been — and I get that. But — but
16 the guidelines that have been described as advisory, that have been
17 described as tools. I've done a lot of reading on the guidelines and I did a lot
18 of guideline work in my other life, which is federal court. So I would like to
19 address that if I could —

20 **THE COURT:** Sure.

21 **MR. HARRIS:** — briefly. And then — and, then, I'd like to
22 follow up with my third — a few thoughts on just sentencing in general.

23 And this is not the brick house (phonetic) on sentencing. I know that
24 that's — that would be a little warped based on my background and what I do
25 now, but I think it's things I've read, things that I've talked with other judges

1 that I think they consider.

2 So, with that as a backdrop, Your Honor, I'd like to talk about first the
3 sentencing sheet. You know, a sentencing sheet has a lot of boxes to be
4 checked off. A sentencing sheet has a lot of categories.

5 It has a lot of statutory factors. It has things that, absent the lawyers
6 participation, absent the victims, absent the — the defense lawyers, it's things
7 for judges to consider.

8 For instance, sentencing sheet informs the Court if the charge is a
9 felony or a misdemeanor. The sentencing sheet informs the Court if
10 something is a most serious offense, a serious offense, or doesn't even
11 register; violent or nonviolent, parole eligible/not parole eligible, 65/85.

12 You know, these are all factors that — you know, before you put your
13 name on something, Judge Goodstein —

14 **THE COURT:** Uh-huh (affirmative).

15 **MR. HARRIS:** — you're looking at.

16 **THE COURT:** Right.

17 **MR. HARRIS:** Sentencing sheets talk about mandatory
18 minimums. They talk about twenty-five (25) year maximums, and they talk
19 about ten (10) year maximums. They talk about one year — you know, it just
20 says zero to one or whatever the sentence is.

21 They talk about victim related and — and whether it is a — it is a
22 offense that involves a victim. And — and I just use those six areas just as a
23 framework for this discussion, Your Honor, because in all six of those areas,
24 the result points dispositively I believe in favor of Mr. Curtis Simms.

25 You know, this was a — a misdemeanor. So check that box. It is

1 neither a violent — it is not a violent crime, not a violent crime. It is not
2 neither a most serious offense nor is it a — even a serious offense.

3 It is paroleable. It is not a non-paroleable offense. There is no
4 mandatory minimum associated with it. The sentence arguably, from the
5 State's position, is ten (10) years, from the Defense's position it's thirty (30)
6 days.

7 So we're not talking about an offense that is a crime of violence or non-
8 paroleable; you know, all of the things that you see so often in -- in
9 courtrooms throughout the State of South Carolina.

10 So every box that we just talked about — talked about, points we
11 believe in favor of a more lenient sentence quite frankly, Your Honor. And
12 that's — I mean, I don't know any other way to put it. That's what I'm asking
13 for. And, you know, that's — that's why we're here today.

14 You know, that's the first point I want to make, Judge, is that all those
15 boxes I believe suggest or we would hope suggest maybe a more lenient
16 sentence, with thirty (30) days of reflection.

17 Moving on to the — the guideline aspect of this, Your Honor, you
18 know, I saw your face when --- when I was introducing the guidelines. And I
19 hear you clearly. You don't need to say much about it; I think "thank gosh"
20 says enough.

21 However, I think that it would be — it wouldn't be responsible of us that
22 we didn't I think bring, at least to the Court's attention, the — and I have
23 marked as a Court's exhibit the grid. Obviously I've provided that to the
24 solicitor's office. And that's the only exhibit that I'm speaking from here today.

25 Your Honor, you know, what the State of South Carolina attempted to

1 do, with good intention in 1998 and 1999, was to bring some uniformity to
2 sentencing in South Carolina, not unlike what the federal sentencing
3 guidelines did because, you know, there was a recognition, amongst the
4 solicitors' office and the defense bar that, you know, what happens in
5 Cherokee County may be different than what happens in -- in Beaufort
6 County.

7 And what happens in Orangeburg County might be different than what
8 happens in Dillon County.

9 And, so, they endeavored to hire people much smarter than I to take a
10 look at the possibility that guidelines could be put in effect for our sentencing
11 courts throughout the state of South Carolina.

12 Now it is crystal clear -- it is crystal clear that in 2002, they were not
13 enacted as law. And I am not here certainly to tell this Court today that, "By
14 gosh, I've got a grid and you got to stick to it," because that would be
15 ridiculous.

16 What I am asking the Court, however, to do is bear with me for a
17 moment while I suggest to this Court how the Commission would have
18 addressed this case, in the light most favorable to the State, because while
19 this grid is certainly not controlling over this court's actions, we would hope
20 that is somewhat persuasive.

21 While it is not something you have to do, we would hope that it is
22 advisory. And while it may be something that you don't care to consider, we
23 would ask that you use it at least as a tool in fashioning the appropriate
24 sentence in Curtis Simms' case.

25 Now, Judge, before you is a two-dimensional grid which is based on

1 the number and severity of Mr. Simms', or any defendant's, current
2 convictions. His conviction or -- or sentence would be aggravated breach of
3 peace is also based in part on the number and severity of -- of Mr. Simms'.
4 prior criminal history.

5 So, once you determine what that sentence is -- or what the offense
6 is, then, you go to his criminal history. And what we know and what was
7 presented to you by the State is that he has none.

8 **THE COURT:** Uh-huh (affirmative), right.

9 **MR. HARRIS:** He has no prior arrests. So, as for the grid, he
10 would be at the top in point one (.1). Now we also see that there are three
11 sentencing ranges on this grid. And there is an aggravating range, a
12 presumptive range, and a mitigating range.

13 This method was -- was based, in large part, on the North Carolina
14 method that is currently actually law.

15 If you look at the grid and you go to the middle of that grid, Your Honor,
16 it says "Maximum ten (10) years." Now the reason I am directing the Court to
17 that particular range, within the three ranges, is because that is the only range
18 on our guideline grid that addresses a ten-year offense.

19 Now this addresses a ten-year felony offense, Your Honor. So, to be
20 clear, Mr. Simms was convicted of a ten-year --

21 **THE COURT:** Yes.

22 **MR. HARRIS:** -- proceeding in point, Your Honor, --

23 **THE COURT:** Right.

24 **MR. HARRIS:** -- but he was convicted on what this Court
25 sentenced him for, on a ten-year misdemeanor.

1 **THE COURT:** Right.

2 **MR. HARRIS:** Within that particular range, Your Honor, you'll
3 notice that there — again, I pointed this out -- there are three ranges;
4 aggravating, presumptive, and mitigating. I would suggest to this Court that
5 he would fit into the aggravating part of that range.

6 I think that it would be ridiculous of me to stand before you and argue
7 that he's in the presumptive range and even more ridiculous for me to stand
8 before you, regardless of whether it is a felony or a misdemeanor, but based
9 on the facts, based — argue that he's in the mitigating range.

10 I guess where that leaves us, Your Honor, is that our Sentencing
11 Commission would suggest to this Court that with someone having been
12 convicted of this offense, with his criminal history category, would be
13 sentenced in an intensive monitored supervision level.

14 That is what IMS stands for, Your Honor. "Intensive monitored
15 supervision would be recommended by the Commission as a non-residential
16 sentence."

17 So, Your Honor, just having walked through the way that the guidelines
18 would be computed, in this particular case, taking into consideration the
19 aggravating circumstances that the jury found, taking into consideration the
20 statutory maximum, as this Court — this court sentenced under, taking into
21 consideration his prior criminal history, or lack thereof, our Commission, in
22 determining what was persuasive, what they would advise, would advise that
23 Mr. Simms receive a non-residential sentence.

24 Your Honor, moving on to category of — of what Greg Harrison
25 (phonetic) read over the last ten years, and what I know from having had

1 numerous discussions about the judges to say, "What do you — I mean, what
2 is important to you and what do you want to hear about my people?"

3 You know, "What are you considering?" Because that's just kind of what we
4 do when we try to figure out exactly the right thing to say.

5 You know, I know that everybody that I've spoken with, everything I've
6 read, wants to know about the history and the characteristics of the
7 defendant.

8 And, you know, a guilty plea most of the time I'm going to file a
9 sentencing memorandum that introduces the Court to my client. And Curtis
10 Simms is 27 years old. Curtis Simms is engaged to be married to the young
11 lady that's in the courtroom here today. Curtis Simms works.

12 And a lot of the people that you see are people that — that couldn't be
13 here during the trial, Judge, that have come to see Curtis today and — and —
14 and to give him what level of support they can give him.

15 And those are the kind of things about Curtis Simms that you know.
16 And — and, Judge, there is nothing about Curtis Simms, other than the worst
17 one hour of his life, or even kind of like we said — I will rehash this — he's
18 being judge for the worst eight seconds of his life.

19 There is absolutely nothing about Curtis Simms, nothing. He pays
20 taxes. He works. He went to high school. He's a — he's a family man.

21 There's nothing about his — his life, his history, and his characteristics
22 that would — that would lead one to believe that he shouldn't be sentenced I
23 believe more consistently with that grid we talked about; where he shouldn't
24 be more consistent with those factors that are on the sentencing sheet that —
25 that this Court considers every day.

1 Now the next thing is the nature and the characteristics of the offense,
2 what happened. You know, what — what are the facts of the offense? That's
3 — that's what, you know, the Court wants to know. But usually with regard to
4 a guilty plea, more so than a trial because in a trial the Court has heard the
5 facts.

6 **THE COURT:** Yes, right.

7 **MR. HARRIS:** You've heard — you've heard more facts than the
8 jury, Your Honor, you know, so — so it's easier for you to figure out what the
9 right thing is because you've heard the facts and the characteristics of the
10 offense.

11 And in this offense he was charged with a fight that resulted in traffic
12 disruption. Those are the nature and characteristics of this offense.

13 There was more to it than that. I get that. But that is the offense and
14 conviction, Your Honor. That is what he was convicted of by twelve (12)
15 people.

16 So, when determining whether — — when fashioning the appropriate
17 sentence, this Court conceded that — not conceded; poor choice of words —
18 this Court acknowledged —

19 **THE COURT:** Did that get in the record (phonetic)?

20 **MR. HARRIS:** No, you acknowledged --- you answered that you
21 acknowledge that, that was — that was what you would consider and other
22 things that you would consider.

23 Now the next area is — is kind of the same — same aspect is that, you
24 know, the need for the sentence to reflect the seriousness of the offense.

25 The sentence ought to be about what somebody deserves.

1 I mean, that's really kind of somebody's own impression. But, you
2 know, that's a category where the question would be, again, you know,
3 breach — if this was a breach of peace, Your Honor, with aggravating
4 circumstances.

5 And, again, we would just ask that, you know, as to arguments one
6 and two —

7 **THE COURT:** Uh-huh (affirmative).

8 **MR. HARRIS:** — these areas that we've talked about, we would
9 suggest that the need for the sentence to reflect the seriousness of the
10 offense.

11 He's already served a sentence that reflects — Curtis is not the same
12 Curtis we saw. The sentence that he has served already, Your Honor, is
13 significant. Mr. Gasser touched on that.

14 You know, so often we walk in and our clients go off to jail. And —
15 and, "It's just 30 days. Do the best you can." And, you know, it's — it's
16 profound. It is — it is extremely profound.

17 To -- you know, to provoke and respect the law, that's another — that's
18 another thing that I know that judges — they say, "Listen, I need — you
19 know, people have to read the newspaper the next day," and — or "People
20 need to be able to walk into a courtroom and they need to know that, if you do
21 this, it -- you're going to pay."

22 And it --- and it kind of dovetails into the next argument, which is the
23 term value. So, I mean, really to protect the integrity of the law, to stop
24 people from doing this again, you know, the sentence reduction, Your Honor,
25 the reduction of the five-year sentence would — would certainly, no matter

1 how much — I don't think there's anyone out there that's going to read a
2 newspaper article or see it on the newspaper or even hear it in courtroom
3 conversation that is going to say, "That — that a sentence that he's already
4 done doesn't respect the law," Your Honor, based on the facts and
5 circumstances of this case and based on the Defendant's conviction. I — I
6 just feel very strongly about that, Your Honor. I think the Sentencing
7 Commission did.

8 And, finally, the — the one thing — and I probably think this is the
9 most important thing, and — and all judges are different in everything recent.
10 But, you know, there's a sense that you have to protect the public, you know.
11 That to me — I think if I was the judge of all judges, I mean, that's kind of
12 where it would — it would fall out for me, you know?

13 One of the things you — you can protect the public from somebody
14 that keeps breaking the law. You know, I always said if I was a judge, if
15 somebody came in front of me, I would be Frank Eppes.

16 You know, I would be — I would be the guy that said, "No, no, no, not
17 this time." Especially a third and fourth time, you know, or if it was a crime of
18 violence first offense.

19 You know, next door I watched a moment ago a — a horrific — I mean,
20 it was — it was beyond horrific.

21 And you get the sense that, that Court was protecting the public in
22 fashioning a sentence that was probably going to make sure that a citizen
23 doesn't get out for the rest of his life because of what he did and because the
24 public most likely needs to be protected from him.

25 That's not Curtis Simms. That's not Curtis Simms. I mean, you know,

1 Curtis Simms is 27-year-old guy that is over there shaking and has been
2 shaking since he left that day and was shaking before he left that day. Curtis
3 Simms is somebody that has -- has learned a profound lesson from this.

4 Curtis Simms is — is somebody that I don't think the public needs
5 protection from.

6 And with those comments, Your Honor, I would respectfully request
7 that you grant mercy; that you allow Mr. Simms, at some point — I'm not
8 suggesting the amount of reduction.

9 I certainly know that they were motions pending before you that might
10 even moot this issue based on — on your ruling, based on your decision —

11 **THE COURT:** I understand.

12 **MR. HARRIS:** ---- Your Honor.

13 **THE COURT:** Yeah.

14 **MR. HARRIS:** But we would — we would certainly — you know, I
15 just hate to hear --- I hear people say they're begging, but, you know --- and I
16 generally don't like that, Your Honor, but this one — this one is important.

17 I know it's important for the victim's family, for them. I know that is why
18 we're here. And I know it's important to the State, but it's extremely important
19 to the other folks sitting over here in the courtroom.

20 **THE COURT:** Thank you so much, Mr. Harris.

21 **MR. HARRIS:** We had only one point left. And I have ----

22 **THE COURT:** Absolutely, absolutely.

23 **MR. HARRIS:** — Mr. Gasser breaking it down.

24 **THE COURT:** Absolutely.

25 **(Brief Pause)**

1 **MR. HARRIS:** He — he — Your Honor, it's very important by Mr.
2 Gasser and this was unfortunately left out of my notes in my presentation to
3 the Court.

4 You know, the — the Commission members from David Wilkins to
5 Jean Toal to Casey Manning to Ernest Kinard to Thomas Moore to — to
6 many of the defense bar, Doug Jennings, Leroy Nettles, Professor Makaviech
7 (phonetic), Charlie Conard (phonetic), Randy Murdoch, Chief Stuart, Ashley
8 Pennington, Steve Benjamin;

9 I mean this — this is a list, again, of people much smarter than I. And
10 — and so is not a list of law clerks. This is a list of substantial people.

11 And — and, again, to make the last point that Mr. Gasser just brought
12 up, nobody in the last ten years has received the amount of time for this
13 sentence, which would be consistent, Your Honor, with what our guidelines
14 Commission told us two years ago.

15 **THE COURT:** Thank you.

16 **MR. HARRIS:** Thank you.

17 **THE COURT:** Thank you so much. I'm listening.

18 **MS. MCDUFFIE:** Just briefly, Your Honor.

19 **THE COURT:** Yeah.

20 **MS. MCDUFFIE:** Your Honor, in the Defense's motion to reduce
21 sentence, with the exception of — of the legal arguments which we've already
22 gone through at length, they have presented no information to the Court that
23 was not presented at the time of sentencing.

24 There's been no new information presented about mitigation of their
25 client, any mitigation or aggravation, Your Honor, for which we would believe

1 is a basis to reduce the sentence.

2 All they have done is to tell Your Honor that, you know, you need to
3 consider these things that judges take into consideration every single day in
4 fashioning every single sentence, whether it be at the end of the trial or a
5 guilty plea.

6 Everything that — that he, Mr. Harris, listed that, you know, the
7 Sentencing Commission laid out is absolutely not law, Your Honor, but it
8 encompasses things that judges do every single day in fashioning a
9 sentence.

10 And, when you fashioned a sentence in this case, the State's position
11 is that was proper. It was absolutely proper. It was within the limits of the
12 law, which is a maximum penalty of ten (10) years in prison, Your Honor, for
13 this offense.

14 And you took into account his lack of prior record and all the facts that
15 you know because you sat through the six-day trial, the same — the same as
16 all of us in this courtroom, Your Honor.

17 There has been no information presented by the defense that wasn't
18 presented on the day of sentencing and in the trial leading up to that. Or that
19 couldn't have been presented on that day.

20 Your Honor, we would submit that the sentence you imposed was both
21 within the limits prescribed by law and there's been no showing by the
22 Defense of any extenuating information that the Defendant had presented at
23 that time or that your sentence was a result of partiality, prejudice,
24 oppression, corrupt motive, or anything that — that should have a sentence
25 changed, Your Honor.

1 Under these circumstances in this case, Your Honor, we would submit
2 that your sentence was not unreasonable but appropriate. And we would ask that
3 Your Honor deny their motion for — to reduce sentencing.

4 Further, Your Honor, Mr. Harris made the statement that — that no
5 person in the last ten (10) years has been sentenced to jail time in a breach of
6 peace of a high and aggravated nature.

7 And, Your Honor, that's patently false. Fifty-three (53) individuals have
8 pled to breach of peace of a high and aggravated nature in my office. Some
9 of those were sentenced to jail time.

10 I don't know whether they are currently serving a sentence. I don't
11 want to — Your Honor, if — if — if DOC said no one was currently serving a
12 sentence, I have no reason to object to that. But, Your Honor, if you would
13 like a list of those individuals, I'll be happy to provide that to the Court and Mr.
14 Harris and Mr. Gasser.

15 But people have been sentenced. People have received jail time in my
16 office on this charge.

17 Your Honor, I would also refer you to *State the Kodell* (phonetic), 273,
18 South Carolina 563, and *State v. Prince* (phonetic). Let's do *Prince* (phonetic)
19 first, Your Honor.

20 In that case, *State v. Price* was a case where solicitation, which is also
21 a common-law charge — sorry, *Prince* -- was also a case where
22 solicitation, which is a common-law charge, was used for the first time in 50
23 years. And that's under 316 South Carolina 57.

24 They said that just because an offense hasn't been used doesn't mean
25 that it's still not the law and it's not appropriate. And there they upheld the

1 sentence in that case, Your Honor. And we'd ask you to do the same.

2 **THE COURT:** Thank you very much.

3 **MR. HARRIS:** Your Honor?

4 **THE COURT:** Yes?

5 **MR. HARRIS:** If — if I misspoke, my understanding is solely on
6 breach of peace with aggravating circumstances, Judge. That's the way that I
7 understand it. Nobody is currently doing time for -- solely on that offense, no
8 plea bargain, not, you know, charges in addition to it, but solely on that. And I
9 apologize if — if my comments were — were mistaken.

10 **THE COURT:** Very well. All right. Here's what I'm going to ask
11 for: I am going to ask for information about the pending legislation.

12 And the reason for that is because obviously this is the — this is the
13 time for the Defendant to make — to make his motion for — for a reduction in
14 sentence I know. And I know that there's -- that there is legislation pending.
15 And I don't know what it is.

16 And I need to know what it is because obviously sometimes legislation
17 has sentences that are anticipated that they will be used retroactively. So it's
18 important that I have that. And, since I know that it's pending, I'm going to
19 ask for that.

20 And, then, I'm going to ask for proposed orders. And because ---
21 because every day that goes by, where you're talking about a person who is
22 incarcerated, I'm -- normally — my normal practice is to tell lawyers, "You all
23 together and figure it out," because I know how busy everyone is. But, in that
24 he is currently incarcerated, I'm going to ask for that information and the
25 orders in ten (10) days, ten (10) business days.

1 **MR. HARRIS:** Well, Your Honor, will that be in order on Mr.
2 Gasser's argument?

3 **THE COURT:** Yes.

4 **MR. HARRIS:** I don't know how —

5 **THE COURT:** Yeah, if you give it to me in word, I can — you
6 know, I can piece things together.

7 **MR. HARRIS:** Or — or a reduction in sentence, that — you
8 wouldn't be requesting — or would you be? Are you requesting an order on
9 — on our request for a reduced sentence, Your Honor?

10 **THE COURT:** Um ---

11 **MR. HARRIS:** I mean, I —

12 **THE COURT:** I — I know what you're asking me. Yeah, I think I
13 am.

14 **MR. HARRIS:** Okay.

15 **THE COURT:** And I think that the reason that I would be doing
16 that is because, in the event that, that occurs, there's got to be a basis for it
17 because you can't just say, "I woke up one morning and felt different --
18 differently." And — and so I think that I would ask for that as well.

19 So I don't — and I don't mean to telegraph anything. Don't telegraph
20 me anything.

21 **MR. HARRIS:** Oh, no, no, no.

22 **THE COURT:** But — but obviously is got to go in an order.
23 Leave that blank.

24 **MR. HARRIS:** Yes, ma'am. I — I — yes.

25 **THE COURT:** But there's --- but --- but there would be a basis for

1 it. You know, and I would put that separately in the order.

2 **MR. HARRIS:** Okay.

3 **THE COURT:** Okay? Very well. Yes? Yours is going to tell me
4 — yours will be easy. Yours is going to take thirty (30) seconds. Yours is
5 basically a, "Thank you so much for the share and no." So yours is going to
6 be very easy.

7 You all's is going to be much more complicated.

8 **MR. HARRIS:** Okay.

9 **THE COURT:** All right. Thank you all.

10 **MR. HARRIS:** Thank you, judge.

11 **THE COURT:** Thank you.

12 **MS. MCDUFFIE:** Thank you, judge.

13 **(Whereupon, the proceeding concluded at 3:15 p.m.)**

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REPORTER'S CERTIFICATE

I, the undersigned **PAMELA S. FAUCETTE**, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that I acted as the Court reporter at the foregoing proceeding; that the foregoing pages, numbered 1 through 70, were transcribed by me and represent a complete and accurate transcription of said proceeding to the best of my knowledge and belief.

I do further certify that I am not of counsel for or in the employment of either of the parties to this action, nor am I interested in the results of this action.

July 8, 2013

A handwritten signature in cursive script, reading "Pamela S. Faucette", written over a horizontal line.

Pamela S. Faucette
Official Court Reporter
Seventh Judicial Circuit

State of South Carolina

Court of General Sessions

County of Richland

2011-GS-40-00829

2011-GS-40-00831

The State of South Carolina :

:

-VS-

:

TRANSCRIPT OF RECORD

:

Curtis Simms :

January 28, 2013

Columbia, South Carolina

B E F O R E:

The Honorable Diane S. Goodstein, Judge.

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

Kathryn "Luck" Campbell, Esquire

Joanna McDuffie, Esquire

Meghan Walker, Esquire

Attorneys for the State

Johnny Gasser, Esquire

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Circuit Court Reporter

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Travis Holdorf (in camera)

Direct Examination by Ms. McDuffie.....12

Cross-Examination by Mr. Gasser.....24

1 **The Court:** Well, we're ready to go?

2 **Ms. McDuffie:** The State's ready, Your Honor.

3 **The Court:** Wonderful. Are you ready to go, too?

4 **Mr. Gasser:** Yes, ma'am, we're ready to go.

5 **The Court:** Wonderful. All right. On behalf of the
6 State, are there any motions?

7 **Ms. McDuffie:** Your Honor, I believe that before we get
8 started the defense is requesting a hearing under Jackson v.
9 Denno.

10 **The Court:** All right. Very well. Anything other than
11 Jackson v. Denno?

12 **Mr. Gasser:** I don't believe so, Your Honor.

13 **The Court:** All right.

14 **Mr. Gasser:** I beg the Court's indulgence.

15 **The Court:** Okay.

16 (An off-the-record discussion takes place between the
17 attorneys.)

18 **Mr. Gasser:** May I approach, Your Honor?

19 **The Court:** Sure.

20 **Mr. Gasser:** This is just for tomorrow morning.

21 **The Court:** Now, have you all had a chance to go through
22 each other's voir dire?

23 **Ms. McDuffie:** Your Honor, we just got Mr. Gasser's. I
24 haven't submitted ours to him yet. I'll do that by the end
25 of the day.

1 **The Court:** That's fine. If y'all will do that -- if
2 y'all will do this for me: Just look at each other's voir
3 dire and if you have any concerns with each other's, just let
4 me know. And finally, Mr. Gasser, I want you to read the
5 indictment because if you have any concerns about any of the
6 language in the indictment, I want you to let me know because
7 that's how I ask the jury if they know anything or have heard
8 anything about the particular matter, so -- and you do not
9 have to do that right now, right this minute, but sometime
10 between now and tomorrow morning before the jury is selected
11 I want you to have a chance to go through it, if we need to
12 do any amending or change anything so that I don't just read
13 it. We're going to copy it and redact it so I don't just
14 read it.

15 **Mr. Gasser:** Yes, ma'am.

16 **The Court:** Okay?

17 **Mr. Gasser:** Okay.

18 **The Court:** Great.

19 **Ms. McDuffie:** Your Honor, for the record, it's two
20 charges. It's involuntary manslaughter and breach of peace
21 of a high and aggravated nature.

22 **The Court:** Got it. Very well. Thank you. All right.
23 And are you ready on your Jackson v. -- every time I think of
24 it, I think of Judge Cottingham, your Jackson v. Denno.

25 **Ms. McDuffie:** The State's ready, Your Honor.

1 **The Court:** Very well. Call your first witness, please.

2 **Ms. McDuffie:** The State would call Officer James
3 Heywood.

4 James Heywood, after being duly sworn, testified as
5 follows in camera:

6 **The Clerk:** Please have a seat. State your full name
7 for the record.

8 **The Court:** All right. Would you state your full name
9 for us?

10 **The Witness:** James Heywood, Your Honor.

11 **The Court:** And spell your last name.

12 **The Witness:** H-E-Y-W-O-O-D.

13 **The Court:** Your witness.

14 **Ms. McDuffie:** Thank you, Your Honor.

15 Direct Examination

16 By Ms. McDuffie:

17 Q. Officer Heywood, where are you currently employed?

18 A. Columbia Police Department.

19 Q. And where were you employed on October the 9th of 2010?

20 A. Columbia Police Department.

21 Q. And what are your duties with the Columbia Police
22 Department?

23 A. Police officer, respond to calls of service.

24 Q. And on October the 9th of 2010 were you working in your
25 official capacity as an officer with the Columbia Police

1 Department?

2 A. Yes, ma'am, I was.

3 Q. And please tell the Court what you were doing that
4 evening.

5 A. I was working out at the south region which is that area
6 that I was assigned to, the Rosewood area, just outside the
7 stadium.

8 Q. And did you have occasion to end up around 2050 or 2030,
9 I'm sorry, on Shop Road?

10 A. Yes, ma'am.

11 Q. And is that in Richland County?

12 A. Yes, it is.

13 Q. And please tell the Court why you were there.

14 A. We got called out there in reference to an individual I
15 believe who was run over by a vehicle. I was the first
16 officer on the scene. EMS was already on the scene. As I
17 pulled up, made contact with Mr. Simms, he made a statement
18 to me that he had hit the individual that fell under the
19 vehicle. At that time I placed him into handcuffs, put him
20 in the back of the patrol car, and he stayed there until the
21 Richland County deputy showed up.

22 Q. Eventually it was determined that it was Richland County
23 jurisdiction and not the City of Columbia Police Department?

24 A. Yes, ma'am.

25 Q. And when Mr. Simms -- did you approach him or did he

1 approach you?

2 A. I'm really not sure. I would imagine he came up to me,
3 just because of everything that was going on. There was a
4 lot of people out there.

5 Q. And did you question him in any way?

6 A. No, no. I knew I wasn't going to be working it. If
7 anything, it would be highway or traffic. So at that time I
8 placed him in the back of the patrol car.

9 Q. And when he made the statement to you that he hit the
10 victim and then the victim fell under the truck, you didn't
11 question him any further.

12 A. No, ma'am, I didn't.

13 Q. You didn't Mirandize him at any point in time?

14 A. No, I didn't.

15 Q. You placed him in the back of your patrol car and then
16 eventually turned him over to the Investigator Holdorf with
17 the Richland County Sheriff's Department?

18 A. Yes, ma'am.

19 Q. And Curtis Simms, the individual that came up to you and
20 said that he---

21 **The Court:** You're going to have to slow down for me---

22 **Ms. McDuffie:** I apologize, Judge.

23 **The Court:** ---a little tiny bit.

24 By Ms. McDuffie:

25 Q. Curtis Simms, the individual who approached you and said

1 that he hit the victim, do you see him in the courtroom
2 today?

3 A. Yes, ma'am, I do.

4 Q. Can you please point him out for the Court?

5 A. The gentleman in the black coat over here.

6 **Ms. McDuffie:** Your Honor, please let the record reflect
7 he's identified the defendant.

8 **The Court:** All right.

9 **Ms. McDuffie:** I have no further questions for this
10 witness.

11 **The Court:** Cross-examination.

12 **Mr. Gasser:** Briefly, Your Honor.

13 **The Court:** Sure.

14 Cross-Examination

15 By Mr. Gasser:

16 Q. Officer Heywood, when you got to the scene, were there
17 any other law enforcement officers present?

18 A. I don't recall if anybody was there. I would imagine
19 there would be since there was several officers that were
20 working the USC football game. I do believe that EMS was
21 already on the scene. I don't recall if there were any other
22 law enforcement on the scene at that time.

23 Q. And you indicated that Mr. Simms approached you. Isn't
24 that what really happened? He came up to you to tell you
25 something; correct?

1 A. Yes, sir.

2 Q. And did he -- do you recall him telling you, "I know
3 what happened"? Do you remember him telling you those words:
4 "I know what happened"?

5 A. Verbatim? No, I can't say for sure if that was said or
6 not. He did briefly describe what I had mentioned earlier,
7 the incident that occurred. At that point I didn't have any
8 more conversation as far as the incident at hand.

9 Q. If you were Curtis Simms, can you tell the judge exactly
10 -- you're Curtis Simms. What exactly did he say to you?

11 A. I could not tell you verbatim what was said. I mean, he
12 just give me a brief rundown on what had happened. At that
13 point he was placed in the patrol car.

14 Q. What do you recall him saying?

15 A. He did state that he had hit the individual that was --
16 that EMS was working on under the vehicle.

17 Q. Okay. So he made the comment, "I hit the guy that EMS
18 is working on"?

19 A. Yes, sir.

20 Q. You had just -- are you then adding the phrase "under
21 the vehicle:

22 A. Well, I'm trying to be precise as to the individual he
23 was speaking of.

24 Q. So that just describes the person that he was -- that
25 doesn't describe what he said. It just describes what

1 ultimately happened to the person.

2 A. He -- there was no mistake in who he was referring to.

3 Q. Let me -- let me rephrase that. You understand the
4 purpose of this hearing is so the judge will know exactly
5 what -- what you're going to tell the jury possibly what my
6 client told you. Do you understand that's what the purpose
7 of this hearing is?

8 A. Yes, sir.

9 Q. So I'm assuming that what you would tell a jury that you
10 recall him saying is he came up to me and he indicated to me
11 -- he identified himself as the person who hit the
12 individual, that he came up to me and said I hit whomever; I
13 hit the person.

14 A. Yes, sir.

15 Q. And that's it.

16 A. He never pointed to that individual that I can remember.
17 He just stated that he did hit the individual.

18 Q. So you're referencing -- for purposes of questioning on
19 direct examination or for purposes of the judge, you just
20 assumed that he was talking about the person that EMS was
21 working on who had been run over by a vehicle.

22 A. Yes, sir.

23 Q. He didn't get into all those details.

24 A. I didn't ask him about any of the details to it.

25 Q. I just want to be sure that basically he came up to you

1 and said -- you're saying he came up to you and said: I hit
2 the individual; I hit the person.

3 A. Yes, sir.

4 Q. I mean, most people wouldn't use the word individual,
5 would they?

6 A. Probably not. No, not necessarily.

7 Q. He approaches you and says, "Officer, I just want you to
8 know that I hit the person."

9 A. Pretty much, yes, sir.

10 **Mr. Gasser:** Judge, that's all we have.

11 **The Court:** Okay. Redirect?

12 **Ms. McDuffie:** No, Your Honor.

13 **The Court:** All right. Thank you.

14 **The Witness:** Thank you, Your Honor.

15 **The Court:** Uh-huh.

16 **Ms. McDuffie:** Your Honor, may I ask that the witness be
17 excused for today?

18 **The Court:** Absolutely. Any objection, Mr. Gasser?

19 **Mr. Gasser:** No, ma'am.

20 **The Court:** Very well. Are there any additional
21 witnesses?

22 **Ms. McDuffie:** Yes, Your Honor. We would call
23 Investigator Travis Holdorf.

24 **The Court:** Travis?

25 **Ms. McDuffie:** Holdorf.

1 Travis Holdorf, after being duly sworn, testified
2 as follows in camera:

3 **The Clerk:** Please have a seat and state your full name
4 for the record.

5 **The Court:** And if you would state your full name for
6 the record.

7 **The Witness:** Yes, ma'am. It's Travis Holdorf,
8 H-O-L-D-O-R-F.

9 **The Court:** Thank you. Your witness.

10 **Ms. McDuffie:** Thank you, Your Honor.

11 **The Court:** Uh-huh.

12 Direct Examination

13 By Ms. McDuffie:

14 Q. Investigator Holdorf, where are you currently employed?

15 A. The Richland County Sheriff's Department.

16 Q. And what are your duties with the sheriff's department?

17 A. I'm an investigator with the sheriff's department and
18 have been for the last 15 years.

19 Q. And on October the 9th of 2010, were those your duties
20 at that time?

21 A. Yes, ma'am.

22 Q. And were you called out to Shop Road in Richland County
23 on October the 9th of 2010?

24 A. Yes, ma'am.

25 Q. And please tell the Court what happened when you

1 responded to that location.

2 A. I was notified by Sergeant Robinson to respond; our
3 shift was on call. Currently we'd go on call every six
4 weeks. I'm the primary for homicides or any serious crime.
5 I arrived there. They had Shop Road blocked off so no other
6 vehicles could access it except for law enforcement. I
7 actually had to use my blue lights to get close to the scene.

8 When I got there, I just got a very brief rundown and
9 then decided the best course of action was to take Mr. Simms
10 to our headquarters to get him away from the scene - it was
11 pretty chaotic at the time - and talk to him and see what
12 happened.

13 Q. And where was Mr. Simms when you first encountered him?

14 A. He was in the back of a patrol car.

15 Q. Richland County or C.P.D.?

16 A. I believe it was C.P.D.

17 Q. And when you encountered him, please describe that
18 encounter for the judge.

19 A. It would have been just very -- "I'm Investigator
20 Holdorf with the Richland County Sheriff's Department. Do
21 you want to come with me and talk to me and tell me what
22 happened?" We go to our headquarters; he voluntarily came.
23 At that point in time he was not under arrest. He got in the
24 front seat. I drive an unmarked -- it's a blue pickup truck,
25 looks just like a regular F-150 pickup truck.

1 Q. Was he handcuffed?

2 A. No, ma'am.

3 Q. And he was not under arrest?

4 A. No, ma'am.

5 Q. At that point in time did you advise him of his Miranda
6 rights?

7 A. I did on the way to headquarters. I verbally did it as
8 we were driving or, excuse me, as I was driving.

9 Q. And when you advised him of his Miranda rights, please
10 tell the judge how you did that.

11 A. Verbally. It was off of memory. I did go to
12 headquarters and we have a form that was used to make sure
13 that it's done with all of them, but I advised him he had the
14 right to remain silent, that anything he said could and would
15 be used against him in a court of law. He had the right to
16 have an attorney with him during any questioning. If he
17 could not afford an attorney, one would be appointed before
18 any questions if he wished.

19 I also told him that if he decided to answer questions
20 now without an attorney present, he could stop answering
21 questions at any time until he had an attorney. And I asked
22 -- it's a standard line. If I ask you a question you don't
23 like, you have to answer it. He said no.

24 Q. And did he indicate to you in any way that he understood
25 what you were saying to him?

1 A. Very much so, yes, ma'am.

2 Q. And please tell the Court how he indicated that to you?

3 A. He said he understood. He wanted to talk to me. He was
4 actually naming the rights off with me as we were driving
5 down the road.

6 Q. And once you got to headquarters, please describe what
7 you did at that time for the judge.

8 A. At that point in time we went to my office or my
9 cubicle. I filled out or pulled out the --
10 interrogation/advice of rights is what it's labeled as on
11 this form. It has the same rights that I just read off to
12 him.

13 Q. And is that what is in State's Exhibit 1?

14 A. That is correct.

15 Q. And please tell the judge what happened when you arrived
16 at the sheriff's department in filling out this form.

17 A. I got his information, his name. I put my name at the
18 top, the date and the time that we started which is 10:40.
19 It's going to be 10:40 p.m. And as I'm reading off each
20 right to him, I'm checking them off. I asked him if he
21 understands these rights. At the bottom there's what's
22 called a waiver. Again, I read that off to him.

23 There's a thing at the bottom that says, "I've read this
24 statement of my rights. I understand what my rights are.
25 I'm willing to talk and answer questions. I understand and

1 know what I'm doing. No promises have been made to me, and
2 no pressure or coercion of any kind has been used against
3 me." If someone -- I ask them if they understand what
4 pressure and coercion is. If they say they do not understand
5 either one of those, I'll underline it. It is not underlined
6 on this one, so he did indicated that he did understand what
7 those were. He signs it on two spots, the waiver and then
8 the one stating he understands his rights, and then I
9 witnessed it.

10 **Ms. McDuffie:** Your Honor, may I approach and hand up
11 State's Exhibit 1 for I.D. purposes?

12 **The Court:** Show it to Mr. Gasser.

13 **Ms. McDuffie:** I've already shown it to Mr. Gasser.

14 **The Court:** Okay.

15 **Mr. Gasser:** No objection.

16 **The Court:** Very well. Exhibit 1 in evidence for this
17 hearing without objection.

18 By Ms. McDuffie:

19 Q. And he signed that form in two places?

20 A. Yes, ma'am, he did.

21 Q. And please tell the judge what those signatures
22 indicate.

23 A. Curtis Simms'?

24 Q. The first one being that he was advised of his rights?

25 A. Yes, ma'am.

1 Q. And the second one being that he waived his rights?

2 A. Yes, ma'am.

3 Q. And at any point in time did he appear not to understand
4 what was going on?

5 A. No, ma'am.

6 Q. Did he appear to be unsure of what was going on?

7 A. No, ma'am.

8 Q. Did he appear to understand your questions?

9 A. Very much so.

10 Q. And if he wouldn't have understood your questions, what
11 would you have done?

12 A. Proceeded slower. Being an investigator, sometimes you
13 come across people of different intellectual capacities. If
14 they didn't understand it, we'd take it step by step with
15 each right. He's a smart person; he understood it. I had no
16 question in my mind that he knew what he was doing, why we
17 were where we were which was at our headquarters, and what we
18 were talking about.

19 Q. And, again, he was not under arrest at this point.

20 A. No, ma'am.

21 Q. And was he handcuffed?

22 A. No, ma'am.

23 Q. And you mentioned you were in a cubicle in the sheriff's
24 department?

25 A. Yes, ma'am.

1 Q. And the room that you were in is a room with 60 or so
2 cubicles?

3 A. Yes, ma'am.

4 Q. And he indicated that he wanted to speak with you.

5 A. Yes, ma'am. He wanted to get his side out. He was very
6 excited and eager to talk with someone.

7 Q. And he proceeded to give you a statement.

8 A. Yes, ma'am.

9 Q. Was that done in writing at the beginning or was it done
10 orally first?

11 A. Orally at first. I type it up, what he's saying. I try
12 to get as close to as exact as he's saying it. I'm not a
13 professional typist; I'm pretty good. But after that, we'll
14 print it out and we'll proofread it, make sure there's no
15 corrections or changes that need to be made and then they'll
16 sign it. I explain to them that once it's signed it's an
17 official document.

18 Q. And Mr. Simms gave you a three-page written statement on
19 October the 9th of 2010?

20 A. That is correct. Yes, ma'am.

21 Q. I show you State's Exhibit 2. Do you recognize that
22 document?

23 A. Yes, ma'am, that's the original document.

24 Q. This is the statement he gave to you on October the 9th
25 of 2010?

1 A. Yes, ma'am.

2 Q. The date and time on the statement, are those correct?

3 A. No, ma'am. We use a template when we take statements.

4 On this one I did not change the date and the time, so on the
5 top it says the 28th of September at 13:54 hours. On the
6 advice of rights, my notes, and also on the witness at the
7 bottom -- this would have started on October 9th of 2010. We
8 actually finish it on October 10th of 2010. It was past
9 midnight, so the date would have been to the 10th.

10 Q. And these are his words in this statement?

11 A. Yes, ma'am.

12 Q. And after you typed up this statement of his words, you
13 gave it to him and he was allowed to review it?

14 A. Yes, ma'am.

15 Q. And did he, in fact, on the second page of the statement
16 make changes?

17 A. Yes, ma'am.

18 Q. And he handwrote those changes next to what you had
19 typed?

20 A. Yes, ma'am.

21 Q. And on the third page he wrote an additional paragraph
22 narrative?

23 A. Yes, ma'am.

24 Q. And that's his handwriting?

25 A. Yes, ma'am.

1 Q. And on the bottom of each page, please tell the Court
2 what it says.

3 A. On the bottom of each page it's got two basic spots.
4 The first one is going to state, "I have made this foregoing
5 statement freely and voluntarily, without fear, threat,
6 promise of reward or hope of reward of any kind." The next
7 part is, "This is a certify that I have read or read to me
8 the foregoing statement consisting of three pages." You can
9 fill in the different number of pages. "And a true copy has
10 been given to me the 28th of September 2010." Again, that
11 just was not changed by me when I printed the document out.

12 Q. And he again signed acknowledging that he had received a
13 copy and he had read it?

14 A. That is correct. Yes, ma'am.

15 Q. And at any point in time did you threaten him in any
16 way?

17 A. No, ma'am.

18 Q. Coerce him?

19 A. No, ma'am. He's much bigger than me.

20 Q. Promise him anything?

21 A. No, ma'am.

22 Q. Did you hold out any hope or promise of reward?

23 A. No, ma'am. I explained to him we want to find out what
24 happened, that it was very important that we talk and get
25 down what happened, and it was the first step to a process to

1 get together what happened.

2 Q. And at any point in time did he tell you that you wanted
3 an attorney?

4 A. No, ma'am.

5 Q. That he didn't want to speak with you anymore?

6 A. No, ma'am.

7 Q. And if he had done that, what would you have done?

8 A. All questions would have stopped.

9 Q. And while he was out at the sheriff's department, did
10 you withhold creature comforts, food, rest room, things like
11 that?

12 A. No, ma'am.

13 Q. Did he have access to food or a rest room?

14 A. We have a canteen. I believe there were several cups of
15 water. I don't recall if there were -- if I bought Coke for
16 him or not. That's not unusual.

17 Q. If he would have asked you for something, would you have
18 provided that?

19 A. Absolutely.

20 Q. And in this case you don't recall whether he did or not?

21 A. No, ma'am, it's not -- not noted in my notes whether or
22 not I did, so I can't say I did or not.

23 Q. And he gave a three-page statement to you?

24 A. Yes, ma'am.

25 Q. And the narrative is his and then the questions are

1 yours, and the responses are the---

2 A. Are his.

3 Q. ---responses he gave you?

4 A. Yes, ma'am.

5 **Ms. McDuffie:** Your Honor, I'd like to have the officer
6 publish it or if I could approach and hand up...

7 **The Court:** Have you seen this?

8 **Mr. Gasser:** Yes, ma'am.

9 **The Court:** Very well. Any objection?

10 **Mr. Gasser:** No objection. I mean, I don't see the need
11 for---

12 **The Court:** For purposes of this hearing.

13 **Mr. Gasser:** Right. From a procedural perspective,
14 we're not challenging any of the substance of the statement
15 so...

16 **The Court:** Very well.

17 By Ms. McDuffie:

18 Q. And, again, what's contained in State's Exhibit 2 is the
19 statement that he gave you on October the 9th, going into the
20 early morning hours of October the 10th of 2010?

21 A. Yes, ma'am.

22 **Ms. McDuffie:** Your Honor, would you like the officer to
23 publish it or...

24 **Mr. Gasser:** Judge, we're not -- we're not challenging
25 the substance of the statement from a Jackson v. Denno

1 perspective.

2 **The Court:** Okay.

3 **Mr. Gasser:** If we were, I'd agree it would need to be
4 published. I mean, if you want to publish it, I don't care.
5 It's just -- we're not -- let the record reflect we're not
6 challenging anything that's in the statement.

7 **The Court:** It's in evidence for purposes of this
8 hearing. I'm just going to head it.

9 **Mr. Gasser:** Okay.

10 **The Court:** I can do that.

11 **Mr. Gasser:** I don't know. When you get to Page 3, I
12 don't know if you can read his handwriting.

13 (Pause in proceedings while the Court reads the
14 document.)

15 **The Court:** Okay. I have read it.

16 By Ms. McDuffie:

17 Q. Investigator Holdorf, Mr. Simms indicated to you that he
18 had consumed alcohol earlier that day?

19 A. Yes, ma'am.

20 Q. He indicated he consumed quite a bit of alcohol?

21 A. Yes, ma'am.

22 Q. Did he appear not to understand what was going on?

23 A. No, ma'am.

24 Q. He appeared to understand what was going on?

25 A. Very clearly, yes, ma'am.

1 Q. Any doubt in your mind about that?

2 A. None.

3 Q. And at the time you spoke with him, he did not appear to
4 be impaired?

5 A. No, ma'am.

6 Q. And the individual, Curtis Simms, who gave you that
7 three-page statement, is he in the courtroom today?

8 A. Yes, ma'am.

9 Q. Please identify him for the Court.

10 A. In the blue blazer next to the attorney.

11 **Ms. McDuffie:** Your Honor, please let the record reflect
12 he's identified the defendant.

13 **The Court:** Okay.

14 **Ms. McDuffie:** No further questions for this witness,
15 Your Honor.

16 **The Court:** All right. Cross-examination?

17 **Mr. Gasser:** May it please the Court, Your Honor?

18 **The Court:** Yes.

19 Cross-Examination

20 By Mr. Gasser:

21 Q. Good afternoon, Investigator Holdorf.

22 A. How are you, sir?

23 Q. Regarding the issue of how much Curtis Simms had to
24 drink, Ms. McDuffie was asking you about at the end of her
25 questions -- he -- you actually asked him about that in the

1 written statement, State's exhibit Number 2, did you not?

2 A. Yes, sir.

3 Q. And he had indicated to you how many beers he had had
4 and how many Jello shots he had all before half-time of the
5 football game? Is that correct?

6 A. Yes, sir.

7 Q. And are you aware that this was a 3:30 nationally
8 televised game between South Carolina and Alabama? You knew
9 that?

10 A. Yes, sir.

11 Q. And so most college football games last about three
12 hours, maybe three and a half hours; correct?

13 A. Yes, sir.

14 Q. So this game would have -- half-time would have been
15 somewhere in the neighborhood of close to around 5:30.

16 A. Yes, sir.

17 Q. And Curtis had indicated to you that he had -- they had
18 gotten the tailgate spot sometime before noon, and that's
19 when he and his friends started drinking and eating food and
20 tailgating; correct?

21 A. Yes, sir.

22 Q. And this incident happened sometime around 8:30 in the
23 evening, according to the incident report. Is that a fair
24 approximation?

25 A. Yes, sir.

1 Q. Therefore, in what Mr. Simms had indicated to you, it
2 had been at least or approximately three hours since he had
3 consumed any alcohol; correct?

4 A. From the time of the incident to the time I start
5 talking to him, it's going to be even more than that. If I'm
6 not talking to him 'til about 10:40, you've got five hours or
7 so.

8 Q. Well, I'll get to when you start talking to him. I'll
9 talking about from the time he indicated that he stopped
10 drinking around half-time until the time of the incident was
11 approximately three hours.

12 A. Yes, sir.

13 Q. And -- but you didn't talk -- nobody has provided you
14 with any information that Mr. Simms appeared to be under the
15 influence or impaired at the time of the incident, have they?

16 A. Nothing that I recall, no, sir.

17 Q. And when you came into contact with him out there in
18 Officer Heywood's vehicle, he, in no shape or form, appeared
19 to be under the influence of alcohol or even impaired with
20 alcohol; correct?

21 A. Not to the point to where I would be worried about him
22 not understanding what's going on, no, sir.

23 Q. You even put that down in your case notes, did you not?

24 A. Yes, sir.

25 Q. You put in your case notes when you got to -- when you

1 put him in his truck, his speech wasn't slurred; correct?

2 A. No, sir.

3 Q. And he did not appear to be under the influence of
4 alcohol, and those are your words; correct?

5 A. Yes, sir. Well, they're -- if I can qualify that. He's
6 not to the point where I feel he's impaired in not
7 understanding what's going on.

8 Q. Let me be...

9 A. I said he did not seem drunk at the time. His answers
10 to my questions were clear, and his speech was not slurred.

11 Q. Okay. He did not seem drunk at the time and he had --
12 he understood everything you were saying, and his speech was
13 not slurred. That -- is that a fair assessment when you came
14 into contact with him?

15 A. Yes, sir.

16 Q. And during the time that you were in contact with him
17 that evening.

18 A. Yes, sir.

19 Q. Okay. In fact, you were very respectful to Mr. Simms at
20 that point in time, were you not?

21 A. Yes, sir. He was excited, but I mean, there was no
22 reason not to be.

23 Q. And you yourself, having just gotten to the scene, you
24 had no idea what had transpired out there during this
25 episode; correct?

1 A. I knew the very basics.

2 Q. That was simply by what somebody had told you.

3 A. Yes, sir.

4 Q. And -- but you would agree with me that standing by and
5 watching somebody literally feet away get run over by a car
6 would be a pretty shocking experience, would it not, for
7 anybody?

8 A. Yes, sir.

9 Q. And Curtis was -- Simms was in an excitable mode when
10 you came into contact with him, was he not?

11 A. Very. Yes, sir.

12 Q. Adrenaline was kind of flowing?

13 A. Yes, sir.

14 Q. He appeared to be not in medical shock but just stunned
15 by the whole situation.

16 A. Disbelief at what happened, yes, sir.

17 Q. Do you know why he was placed in the Columbia Police
18 Department back seat of a car handcuffed behind his back? Do
19 you know what legal reason why they did that?

20 A. Officer safety maybe? He's a large person. He'd be
21 pretty intimidating if you look at Mr. Simms compared to the
22 officer. I can only speculate. I can't tell you why they
23 did what they did. It's not an uncommon thing sometimes,
24 especially when you have a situation that's going to be large
25 and is still developing.

1 Q. So the lawyers -- the lawyers are in the courtroom.
2 Would you say it's commonly referred to as what appeared to
3 be investigative detention?

4 A. Yes, sir.

5 Q. I just want to be clear; I know the jury is not here.
6 Nobody indicated that Mr. Simms was intimidating to any
7 police officer or anybody out there on the scene.

8 A. No, sir. No, sir, and I wasn't trying to imply that he
9 was---

10 Q. I know you weren't. I just wanted the record to be
11 clear on that and for the judge to understand that.

12 A. Yes, sir.

13 Q. But when you -- when you came into contact with him, you
14 made them take the cuffs off from behind his back and give
15 the Columbia police officers the handcuffs back, did you not?

16 A. Yes, sir.

17 Q. And I believe since you were going to allow Mr. Simms to
18 ride in the front seat of your -- you were in your personal
19 Ford 150 pickup truck?

20 A. It's the county's.

21 Q. County? Ford 150 pickup truck; correct?

22 A. Yes, sir.

23 Q. And you allowed Mr. Simms to ride in the front seat of
24 your pickup with you.

25 A. Yes, sir.

1 Q. And you're trained again for officer safety. He was
2 cuffed, but you cuffed his hands in front of his -- in front
3 of his -- in front of his body?

4 A. I do not recall cuffing him. He was not under arrest.

5 Q. So when you came into contact with him, he's in the back
6 seat of a Columbia police car with his hands cuffed behind
7 his back and you asked him if he wanted to voluntarily come
8 to the Richland County Sheriff's Department.

9 A. Yes, sir. I had run into Major Smith when I arrived on
10 the scene. We both agreed that the first course of action
11 was to get him out of -- away from the scene and talk to him
12 at headquarters. We felt it was vital to our investigation
13 to talk with him. A lot of times at the scene it's just not
14 a conducive place to have any type of interviews.

15 Q. And it's your testimony if Mr. Simms would have said,
16 "Actually, I want to talk to my mom and dad," or, "I want to
17 talk to my friends," or, "I want to talk to a lawyer before
18 going down to the sheriff's department," he would have been
19 able to just simply walk away and join his friends wherever
20 they were?

21 A. He did talk to his mom at the sheriff's department.
22 That wasn't said, so I never crossed that bridge.

23 Q. Well, you're saying that he was free to leave. I
24 believe you said that in your direct examination.

25 A. He was not under arrest. If he had said he wanted to

1 leave, we would have crossed that bridge when we got there,
2 but that never came up.

3 Q. And that's the point I'm trying to make. To a lay
4 person, a non-law-enforcement person or a non-prosecutor or a
5 non-defense attorney, being placed in the back of a police
6 car, cuffed with your hands behind your back, is a pretty
7 intimidating experience, is it not?

8 A. Yes, sir.

9 Q. And then when somebody comes up to him and indicates,
10 you know, we would like for you to come down to Richland
11 County Sheriff's Department, particularly after what he had
12 just witnessed and observed, it can be a pretty intimidating
13 process, can't it?

14 A. Yes, sir.

15 Q. But he -- he was willing to do that for you, was he not?

16 A. Yes, sir.

17 Q. And he answered every question that you asked of him.

18 A. Yes, sir.

19 Q. Signed whatever documents that you asked him to sign or
20 read whatever documents that you asked him to read.

21 A. Yes, sir.

22 Q. And he cooperated with you to the best he could under
23 the circumstances that he had just experienced.

24 A. Yes, sir.

25 Q. And the entire time that he was at the sheriff's

1 department throughout the taking of the written statement,
2 Curtis Simms was not under arrest and not charged with any
3 crime at that point. Correct?

4 A. No, sir.

5 **Mr. Gasser:** Beg the Court's indulgence.

6 **The Court:** All right.

7 (An off-the-record discussion takes place between Mr.
8 Gasser and Mr. Simms.)

9 **Mr. Gasser:** Thank you, Your Honor, for giving me the
10 time to confer with my client.

11 **The Court:** Sure.

12 **Mr. Gasser:** And that's all we have at this point.

13 **The Court:** Very well. Redirect?

14 **Ms. McDuffie:** No further questions on this issue, Your
15 Honor.

16 **The Court:** And is this witness free to leave for now?

17 **Ms. McDuffie:** Free to go.

18 **Mr. Gasser:** No objection.

19 **The Court:** All right. Very well. You're excused. All
20 right. Very well. Any additional witnesses?

21 **Ms. McDuffie:** Not on this issue, Your Honor.

22 **The Court:** Very well. Mr. Gasser, would there be any
23 witnesses on behalf of the defense on this issue?

24 **Mr. Gasser:** No, ma'am.

25 **The Court:** All right. All right. Motions?

1 **Mr. Gasser:** Judge, for the record, I have explained to
2 my client that there are a number of legal issues involved in
3 the taking of a statement when the State attempts to
4 introduce either an oral or a written statement before a
5 jury. He understands all of those -- what all his legal
6 rights are.

7 I specifically explained to him, for the record, that
8 during this process a judge would determine whether or not
9 with regard to the written statement that's before the Court
10 whether or not he was in custody, would be one issue that
11 might be an issue that a judge would consider at a Jackson v.
12 Denno hearing, and he understands that that whole concept of
13 being in custody is critical because it triggers the
14 requirements that law enforcement read to him and explain to
15 him his Miranda rights thoroughly and that he understands his
16 rights and waives his rights.

17 He has concurred with me that the issue as to whether or
18 not he was legally in custody or not, both at the scene at
19 Shop Road and down at the Richland County Sheriff's
20 Department, is really not the relevant issue before the Court
21 and the Court really need not make a determination on that,
22 in my view, because it is clear that Investigator Holdorf
23 followed his training procedures, advised him of his
24 constitutional rights, verbally en route to the sheriff's
25 department had a full discussion with him about his

1 constitutional rights, and that Mr. Simms was willing to
2 waive his rights and have brief discussions with him not only
3 in the car after he told him he understood his rights but,
4 more importantly, when Investigator Holdorf advised him of
5 his rights in writing. Mr. Simms acknowledges that he was
6 advised of his rights in writing and that he waived his
7 rights for purposes of this hearing and that he gave a
8 voluntary statement.

9 I just wanted to put all that on the record because I
10 want the Court to be clear that I felt it appropriate for Mr.
11 Simms to hold this hearing to get it out in the open under
12 oath both with Officer Heyward and the investigator so that I
13 as his lawyer could ask him if what had just transpired by
14 the two officers was fair and accurate. I've been able to do
15 that, and I appreciate the Court's time in allowing us to
16 hold this hearing.

17 So, quite frankly, whether or not he was in legal
18 custody or not at the scene is really irrelevant for purposes
19 of introducing the statement, so... It might be something
20 that the lawyers could talk over over a cup of coffee or an
21 adult beverage, and a law school class could debate whether
22 he was in custody, whether a reasonable person would think
23 you're in custody when you're handcuffed in a police car with
24 your hands behind your back, but that's neither here nor
25 there because Investigator Holdorf resolved all those issues.

1 **The Court:** Very well. Thank you. All right. And with
2 all of that, there must be a determination and, of course,
3 the ultimate determination would be for a jury, but I
4 certainly find that the State has met its burden, that the
5 statement was given freely and voluntarily, looking at all
6 the circumstances, and, as you say, he was, in fact, in
7 custody. Miranda was given. He indicates that he understood
8 Miranda, wished to waive Miranda and give a statement which
9 he did and, of course, I think that the State has met this
10 burden appropriate at this juncture and would be allowed to
11 offer it at the trial in this case. All right.

12 **Mr. Gasser:** Very good.

13 **The Court:** Very well. Anything further from the State
14 at this time?

15 **Ms. McDuffie:** No, Your Honor.

16 **The Court:** All right. Anything further---

17 **Mr. Gasser:** No, ma'am.

18 **The Court:** ---on behalf of the defense? Now, I just
19 remind you: Read the indictments. Read both of them. And
20 if we need to talk about any portion of them that needs to be
21 redacted before I read them to the jury -- again, the reason
22 that I read them to the jury is to find out whether or not
23 the jury -- if they know or think they know or if they have
24 heard or if they think they've heard anything about this
25 particular matter. And so I need you to look at it to see if

1 it needs to be redacted on that particular basis.

2 Also, please let me tell this voir dire. If you have
3 any objection to either's voir dire, I need to know. I will
4 -- the jury is coming in here in the morning at?

5 **Ms. McDuffie:** Your Honor, I don't know what time the
6 clerk has told them. I would assume 9:30.

7 **The Clerk:** 9:30.

8 **The Court:** Oh, wonderful. Wonderful. I would like to
9 see you all about 9:15 just in the event that there are any
10 objections to each other's voir dire, and we'll address it at
11 this point. All right?

12 **Mr. Gasser:** Thank you, Your Honor.

13 **The Court:** All right. And behalf of the solicitor,
14 anything further we can do in any other matters this
15 afternoon?

16 **Ms. McDuffie:** Your Honor, we have the physical evidence
17 here and the photographs for Mr. Gasser to look at at his
18 convenience, and if there are any objections, I don't know if
19 we want to take that up now or...

20 **The Court:** I gather you've asked for and received
21 discovery prior to this point. Yes?

22 **Mr. Gasser:** Yes, ma'am.

23 **The Court:** All right. Do you want to take another
24 gander just to be sure nothing has---

25 **Mr. Gasser:** Well, I wasn't exactly sure which

1 photographs they're going to -- you know, they submitted --
2 they provided us about 140 photographs, so... Some of them
3 obviously are not admissible depending on---

4 **The Court:** I understand that and I'd like -- do you
5 know which photos you intend to offer?

6 **Ms. McDuffie:** Yes, Your Honor, I do. I'll make those
7 available to Mr. Gasser.

8 **The Court:** Okay. That would be good. I'm probably
9 going to -- why don't you do that first and then you can look
10 at the rest of it at your leisure?

11 **Mr. Gasser:** Okay.

12 **The Court:** Because if I need to rule on any of the
13 photos in camera, I'd like to do that now.

14 **Ms. McDuffie:** Okay. Thank you, Your Honor.

15 **The Court:** Okay. So y'all go ahead and take a look at
16 those now.

17 (Pause in proceedings while the attorneys review the
18 photographs.)

19 **Mr. Gasser:** Judge, we have no objection to any of the
20 photographs that are described, any of the photographs of the
21 truck on the side of the road, the pickup truck that actually
22 ran over Mr. Gasque on the side of the road, nor do we have
23 any pictures (verbatim) of the pickup truck that was
24 processed back at the Richland County Sheriff's Department
25 lab nor do we have any objection to the photographs of the

1 roadway, the scene. There may be two or three -- I want to
2 confer with my law partner, Greg Harris, who will be
3 co-counsel. That's the reason why we couldn't start today.
4 He had a previously-scheduled guilty plea in Pickens County
5 before a circuit court judge that was set some three and a
6 half months ago where people had to come in from out of
7 state.

8 And so I just would like to confer with him on the
9 possibility of objecting not to the actual photograph itself
10 but determining whether or not we have a reasonable argument
11 to make a black-and-white copy as opposed to a color because
12 of the closeness and, quite frankly, the blood involved. I
13 understand the importance of the -- or maybe why they may
14 think the importance of the location -- why that may or may
15 not be an issue, but I believe we may be in a better position
16 to argue that in the morning.

17 It would not take but a few minutes to determine whether
18 or not would a black-and-white picture offer up that -- you
19 know, provide them with the same opportunity to get into
20 evidence what they want - I understand the burden of proof is
21 on the State - without any potential for prejudice. So I'm
22 not objecting to what photograph they want to put in. It's
23 just whether it should be a color or a black-and-white.

24 **The Court:** I understand. Since you've looked at those
25 and since there are a number of other ones, for clarity

1 purposes, if they have not already been marked for
2 identification purposes, let's do that.

3 **Ms. McDuffie:** Your Honor, the court reporter gave me
4 the stickers. I just didn't have time prior to---

5 **The Court:** I understand. Go ahead and mark those for
6 identification purposes. That way there won't be any
7 question but that those are the ones that you have looked at.

8 **Mr. Gasser:** Okay.

9 **Ms. McDuffie:** Your Honor, I've also informed Mr. Gasser
10 that at this point in time we don't seek to -- I don't
11 foresee us putting in pictures of the body. If that becomes
12 changed, we'll let him and the Court know immediately.

13 **The Court:** All right.

14 **Mr. Gasser:** And we appreciate that, Your Honor.

15 **The Court:** Okay. Good.

16 **Ms. McDuffie:** Your Honor, could we approach about a
17 scheduling issue?

18 **The Court:** We can. And -- yeah. Let me ask you this
19 question: Is Mr. Simms' family present or the victim's
20 family?

21 **Mr. Gasser:** Mr. And Mrs. Simms are here.

22 **The Court:** The alleged victim's family.

23 **Ms. McDuffie:** They are present and their attorney is
24 present as well, Your Honor.

25 **The Court:** Very well. Very well. Let me -- let me

1 just speak to the families, if you will. Obviously these
2 matters are heartbreaking - they are - and they are
3 emotionally charged. And one of the two things that I must
4 do to be sure that justice is done vis a vis you -- the first
5 thing that I must do is I must be sure that the emotions
6 which are heightened in any matter like this, that they are
7 controlled, because it is inappropriate for the jury to be
8 motivated by anything other than the facts as they find them
9 to be as will be presented during the course of this trial
10 and the law that I will instruct them on.

11 Because these matters are heartbreaking and emotionally
12 charged for both sides, this is, if you will, the rule. When
13 the lawyers are examining witnesses, particularly when
14 they're doing their openings and their closings, nobody
15 moves. When witnesses are being examined, nobody moves.

16 Now, in between if folks want to come and go, that's
17 okay. The reason that I don't like people coming and going
18 while the lawyers are examining witnesses or when they're
19 having their openings and their closing and certainly when
20 I'm charging the jury on the law is because I need the jury
21 to be able to focus on the testimony and on the lawyers and
22 then on the Court when I'm giving them the instruction. If
23 somebody is walking in and out, obviously that's going to
24 take the jury's attention away and they're going to be
25 watching that.

1 There is an exception, and the exception is this: My
2 families, alleged victim's family here and certainly the
3 defendant's family, if you feel yourself becoming
4 overwhelmed, it is perfectly fine for you to leave. The
5 rules that apply to everybody else on those instances do not
6 apply to you. If you feel yourself being overcome with
7 emotion, get up and leave. It's fine. When you have had an
8 opportunity to compose yourself again, you come back in. Am
9 I clear about that? In other words, y'all have got a
10 different set of rules. Okay? And the reason for that is
11 that if -- is you're human beings. If you get overwhelmed,
12 take your leave, compose yourself, and then return because I
13 certainly have empathy for you. So everybody else has got a
14 different set of rules than you guys do.

15 Now -- and you just heard there may be some photographs.
16 That oftentimes is hard for folks. If you feel or hear that
17 coming and you want to take your leave, you take your leave
18 and then come back when you have been able to compose
19 yourself. What I cannot allow is I cannot allow emotional
20 outbursts in front of this jury. This jury must be motivated
21 by the facts as they hear them and will find them to be based
22 on the evidence presented and on the law as I would charge
23 it.

24 Does anybody have any questions about that? I think
25 you've got a victim's advocate here and your lawyer. You can

1 ask -- I'm happy to go into that further if I need to, and
2 certainly, Mr. Gasser, if you all have any questions, please
3 ask me and I'll be happy to address that. All right. Very
4 well. Very well. All right. Anything further? Any
5 objections, I guess I should say, to my comments just now
6 from the State or from the defense?

7 **Ms. McDuffie:** No, Your Honor.

8 **Mr. Gasser:** No, ma'am.

9 **The Court:** Any questions about that from the State or
10 from the defense?

11 **Mr. Gasser:** No.

12 **Ms. McDuffie:** Your Honor, we would just ask that our
13 staff be allowed to come in and out, our paralegals, our---

14 **The Court:** Oh, yeah. Yeah, I'm with you. Try to keep
15 that to a minimum.

16 **Ms. McDuffie:** We will. Thank you, Your Honor.

17 **The Court:** In between I don't care, you know, but try
18 to keep it to a minimum only because I want the jury to -- I
19 need the jury to be able to focus. Very well. All right.
20 Now, somebody wanted to talk about scheduling.

21 **Ms. McDuffie:** Yes, Your Honor. I just wanted to make
22 sure that we were not having court on Wednesday.

23 (Pause in proceedings while unrelated matters were
24 discussed.)

25 **The Court:** I will see you all in the morning at 9:30.

1 I gather they will send a panel up. Is that... Tell me what
2 you're going to do.

3 **The Clerk:** If that's -- if you want them up here at
4 9---

5 **The Court:** Oh, no, you tell me what you -- you tell me.

6 **The Clerk:** Well, if they're not going to report 'til
7 9:30i, if you'll give them a little time.

8 **The Court:** Sure.

9 **The Clerk:** Do you want them in the courtroom about
10 9:45?

11 (An off-the-record discussion takes place between the
12 clerk and the Court.)

13 **The Court:** I'll probably see y'all a little bit closer
14 to 9:30 if the jury is not going to be here until about 9:45.
15 I don't think that will take us long in the morning if we
16 have any issues. Great. I think that will conclude
17 everything in this matter. I will see you all in the morning
18 about 9:30.

19 **Ms. McDuffie:** Thank you, Your Honor.

20 (Whereupon, the trial concluded for the day at 3:17 p.m.
21 and resumed the following day, January 29, 2013, with a
22 different court reporter present for those proceedings.)
23
24
25

I, the undersigned Daphne D. Helms, official court reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the circuit court for Richland County, South Carolina, on the 28th of January, 2013.

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

December 3, 2013

Daphne D. Helms, court reporter

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND)
STATE OF SOUTH CAROLINA,) INDICTMENT NO.: 2011-GS-40-0829
vs.)
CURTIS JAMES SIMMS,)
Defendant.)

JEANETTE W. McBRIDE
C.C.P. & G.S.

13 FEB 15 AM 10:45

RICHLAND COUNTY
CLERK

**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SET ASIDE
SENTENCE, OR IN THE ALTERNATIVE, TO REDUCE SENTENCE**

The Defendant, Mr. Curtis James Simms, by and through undersigned counsel, Gregory P. Harris and Jonathan S. Gasser, hereby requests an immediate hearing on his Motion to Set Aside the Sentence, or in the Alternative, to Reduce the Sentence. As of today's date of filing, February 15, 2013, Mr. Simms has been incarcerated for eleven days. In support of his previously filed Motion, the Defendant respectfully submits this accompanying Memorandum of Law.

I. INTRODUCTION

Curtis James Simms was indicted for Involuntary Manslaughter and Breach of Peace, High and Aggravated, under S. C. Code Ann. § 17-25-30 and § 22-5-150 (1976), as a result of a fight after a football game in Columbia, S.C. on October 9, 2010. A Richland County jury acquitted Mr. Simms of the Involuntary Manslaughter charge, but convicted him of Breach of Peace, High and Aggravated. Mr. Simms was sentenced to ten years in prison, suspended upon the service of five years incarceration, under a misapplication of state sentencing law.

In this case, the state mistakenly informed the court that Mr. Simms was facing a maximum of ten years imprisonment. As a result, the court applied the old common law sentencing regime of zero to ten years for Mr. Simms' conviction for Breach of the Peace, High and Aggravated. However, current South Carolina law limits the sentence for all breaches of the peace to a fine not exceeding five hundred dollars and/or thirty days imprisonment. *See* S. C. Code Ann. § 22-3-560, 2010 Act No. 273, § 8, eff June 2, 2010. This legislative change was one of a series of revisions to § 22-3-560, culminating in the South Carolina Omnibus Crime Reduction and Sentencing Reform Act of 2010. Today, § 22-3-560 codifies the maximum punishment that may be imposed for all breach of peace crimes. Accordingly, the ten-year sentence imposed on Mr. Simms is invalid as a matter of law. This Honorable Court should re-sentence Mr. Simms to a punishment within the legal maximum of five hundred dollars and/or thirty days imprisonment.

II. ANALYSIS

A. The June 2010 Omnibus Crime Bill codified sentences for all breach of the peace offenses within §22-3-560, and imposed a maximum punishment of \$500 and/or 30 days in prison.

Traditionally, breach of the peace was a common law crime in South Carolina. *State v. Poinsett*, 250 S.C. 293, 297-98, 157 S.E.2d 570, 571-72 (1967). And, in years past, courts had discretion to provide greater punishment for high and aggravated breaches of the peace. *Consider* S.C. Code Ann. § 17-25-30 ("In cases of legal conviction when no punishment is provided by statute the court shall award such sentence as is conformable to the common usage and practice in this State, according to the nature of the offense, and not repugnant to the Constitution.") Pursuant to § 17-25-30, courts were free to craft a sentence for aggravated breach of the peace in a range of up to ten years

imprisonment. Such sentencing freedom was possible because of the way the old statutes treated aggravated breaches of the peace. For example, the 1981 version of § 22-3-560 stated:

“Magistrates may punish by fine not exceeding two hundred dollars or imprisonment in the jail or house of correction not exceeding thirty days, or both, all assaults and batteries and other breaches of the peace when the offense is not of a high and aggravated nature requiring, in their judgment, greater punishment.”

S.C. Code Ann. § 22-3-560, 1981 Act No. 76, § 8 (emphasis added).

However, beginning in 1997, § 22-3-560 underwent a series of legislative changes. In 1997, pursuant to Act No. 80, § 4, the legislature eliminated the language that allowed greater punishment for high and aggravated breaches of the peace. The 1997 version of § 22-3-560 referenced a magistrate’s authority to punish assaults and batteries “and other breaches of the peace and exception thereto, so as to increase the penalties for violation and provide that an assault and battery on school personnel shall be punished as provided in Section 16-3-612.” The law remained silent as to what sentence, specifically, could be imposed for breach of peace offenses of a high and aggravated nature, but the legislature made clear that greater punishment for aggravated breach of peace no longer existed.

Later, in 2008, pursuant to Act No. 346, § 1, the legislature again amended § 22-3-560 “so as to increase the magistrates courts’ jurisdiction for all assault and battery offenses against sports officials and coaches....” In both the 1997 and 2008 amendments to § 22-3-560, the legislature explicitly mandated the maximum punishment that could be imposed for assaults and batteries on school personnel, sports officials, and coaches. However, in neither of those amendments did the legislature clarify the maximum

punishment for aggravated breaches of the peace, even though the legislature removed the explicit reference to aggravated breaches of the peace requiring greater punishment. It was only in 2010, pursuant to the Omnibus Crime Reduction and Sentencing Reform Act, that the legislature explicitly amended § 22-3-560 to apply the statutory maximum punishment to "all breaches of the peace." Today, S.C. Code Ann. §22-3-560 states:

"Breaches of the peace. Magistrates may punish by fine not exceeding five hundred dollars or imprisonment for a term not exceeding thirty days, or both, **all breaches of the peace.**"

2010 Act No. 273; S. 1154 (emphasis added).

This 2010 amendment is significant, because South Carolina law makes clear that, once a statutory limit is created for punishment of a crime, the courts no longer have discretion to sentence beyond the maximum punishment set forth in the law. *See, e.g., State v. Sidell*, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974) ("...broad discretion is allowed the trial judge in imposing sentence within the legal limits.") In other words, once a sentencing limit is defined by statute, the courts are bound by the statutory punishment.

This statutory limitation on punishment for all breaches of the peace is supported by the language in S.C. Code Ann. § 22-5-150. According to § 22-5-150, anyone found guilty of breach of peace is subject to punishment "within the limits prescribed in Section 22-3-560." Although a court still retains some discretion in sentencing a defendant within the limits of § 22-3-560, that sentence now cannot exceed the statutory maximum of \$500 or thirty days. *Consider* S.C. Code Ann. § 17-27-20(a)(3) (Law. Co-op. 1976) (authorizing post-conviction proceedings for any person who has been sentenced for a crime where the sentence exceeds the maximum authorized by law).

In the present case, Mr. Simms was charged with breach of the peace, of a high and aggravated nature. He was tried before a court of general sessions, pursuant to § 22-5-150. However, the State mistakenly believed it could pursue a common law sentence for Mr. Simms under the old sentencing rules that existed prior to enactment of the Omnibus Crime Reduction and Sentencing Reform Act of 2010. Evidence of the State's approach is apparent on the face of the Indictment. The Indictment references S.C. Code § 17-25-30 C/L, which grants a court discretion, under the common law, to craft an appropriate sentence "[i]n cases of legal conviction when no punishment is provided by statute." But, since June 2, 2010, the legislature has provided statutory punishment for all breach of peace offenses within the language of § 22-3-560. When the State sought to prosecute Mr. Simms under S.C. Code § 22-5-150, it became bound by the statutory sentencing limits of § 22-3-560. Common law sentencing discretion no longer exists for Mr. Simms' crime. Accordingly, the maximum sentence that may be imposed on Mr. Simms is \$500 and/or thirty days imprisonment.

B. South Carolina's Rules of Statutory Interpretation bind the Court to the sentencing limits set forth in §22-3-560.

1. Statutory Interpretation: The Supremacy of Legislative Intent

The cardinal rule of statutory interpretation is to adhere to the intention of the legislature.¹ The "courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine . . . the intention of the Legislature." *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 395, 134 S.E.2d 206, 209 (1964). In ascertaining legislative intent, the courts must consider the plain meaning of the text, as written. "The legislature must have intended to mean what it has plainly

¹ See Thomas R. Haggard, The South Carolina Rules of Statutory Interpretation, South Carolina Lawyer, Nov.-Dec. 1991 at 11.

expressed... Where the words of a statute are plainly expressive of an intent, not rendered dubious by context, the interpretation must conform to and carry out that intent.” *Beaty v. Richardson*, 56 S.C. 173, 180, 34 S.E. 73, 76 (1899); *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008)(“We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.”)

Applying the “plain language” rule of statutory construction, it is uncontroverted that § 22-3-560 limits sentencing for all breach of peace offenses. The language “all breaches of the peace” is written directly into the statute. S.C. Code Ann. § 22-3-560. The statute now unambiguously states that punishment for any level of this offense may not exceed a \$500 fine and/or thirty days imprisonment.

However, the statutory analysis does not end with the plain language. The words of a statute also must be considered within the context of the law’s enactment. *Abell v. Bell*, 229 S.C. 1, 5, 91 S.E.2d 548, 550 (1956). “The search for [legislative] intent may range beyond the borders of the statute itself; for it must be gathered from a reading of the statute as a whole in light of the circumstances and conditions existing at the time of its enactment.” *Id.* This need to consider a statute in the context of its enactment is especially important when a statute has been tweaked, and only some sections of the law adjusted.

The legislative decision in 2010 to limit the punishment for all breaches of the peace is consistent with the purposes of the Omnibus Crime Reduction and Sentencing Reform Act of 2010. One of the goals of this legislation was to bring clarity and fairness to sentencing, and to ensure that sentences would be consistent with the nature of the

offense. In the 2010 Omnibus Crime bill, the legislature chose not to repeal the crime of breach of peace, high and aggravated. *See* § 22-5-150 (“...when the offense is of a high and aggravated nature, they may be committed or bound over for trial before the court of general sessions.”) Instead, the legislature changed the sentencing framework so all breaches of the peace would fall within the limitations of § 22-3-560. This new language is clear, unambiguous, and binding on the courts.

2. The legislature created one sentencing regime for all breaches of the peace, regardless where the case is tried.

Just as the statutory language of § 22-3-560 binds the courts, the state also is obliged to enforce the laws, as written. However, the state may seek to oppose this Motion by arguing that § 22-3-560 is limited to sentencing by a magistrate. The state might seek to cross-reference the language of § 22-5-150: “...If found guilty [persons threatening breach of peace] may...be punished within the limits prescribed in Section 22-3-560, or when the offense is of a high and aggravated nature, they may be committed or bound over for trial before the court of general sessions.”

However, neither the legislative history nor the plain language of §§ 22-5-150 and 22-3-560 support the notion that sentencing within these statutes is limited to magistrate’s court. A statute must be read as a whole, and a court may not parse words, clauses, or parts of a statute to create ambiguous meaning. *City of Spartanburg v. Leonard*, 180 S.C. 491, 186 S.E. 395, 396 (1936). In addition, statutory language “must be construed in the light of the intended purpose.” *Lewis v. Gaddy*, 254 S.C. 66, 71, 173 S.E.2d 376, 378 (1970).

Section 22-5-150 sets forth the arrest and trial options for persons threatening breach of peace, and indicates when the offense should be tried before a court of general

sessions. Section 22-5-150 also directs the courts to apply § 22-3-560 for punishment.

The statute does not direct courts of general sessions to impose a common law sentencing scheme different from that set forth in § 22-3-560. To the contrary, the law mandates that persons found guilty under §22-5-150 should be punished within the limits prescribed in § 22-3-560.

It would be illogical to parse § 22-3-560 to create an ambiguity in sentencing for breach of peace offenses. Although the 1981 version of § 22-3-560, now repealed, once allowed two different sentencing regimes, depending on the severity of the offense, the new law limits punishment for "all breaches of the peace" to \$500 or thirty days imprisonment. This clearly stated limitation on punishment is not modified by the location of the trial. *All breaches of the peace* are limited to the punishment set forth in § 22-3-560. Any attempt to confuse the language of § 22-3-560 by limiting it only to magistrate's court fails as a matter of straightforward statutory construction.

3. The captions for §§ 22-3-560 and 22-5-150 cover all breaches of the peace, whether in magistrate court or in a court of general sessions.

A court also may consider the title or caption of legislation as an aid of construction. *Lindsay v. S. Farm Bureau Cas. Ins. Co.*, 258 S.C. 272, 277, 188 S.E.2d 374, 376 (1972); *see also*, *University of South Carolina v. Elliott*, 248 S.C. 218, 149 S.E.2d 433 (1966) (construing a statute as applying only to "public" funds because that term was used in the caption). In this case, the captions for both §§ 22-3-560 and 22-5-150 are inclusive of *all* breaches of the peace. Neither provision limits breaches of the peace only to those tried in magistrate's court. Both provisions govern, in their entirety, all breaches of the peace, regardless where the prosecution takes place. It would be illogical to twist the language of §§ 22-3-560 and 22-5-150 to eliminate the sentencing

limits only for cases tried in a court of general sessions. The legislature certainly could have written the law in such a way, but there is simply no textual support for such an interpretation.

4. South Carolina favors strict construction of Penal Statutes.

Any statute that works a forfeiture or inflicts a penalty will be strictly construed against the state. *Lund v. Gray Line Water Tours, Inc.*, 277 S.C. 447, 289 S.E.2d 404 (1982); *Gaddy*, 254 S.C. at 71, 173 S.E.2d at 378. This is a basic rule of fundamental fairness and simple due process. Thus, even if the state could persuade this Honorable Court that some ambiguity existed in the drafting of either § 22-5-150 or § 22-3-560, the Court still must construe any ambiguity against the state and in Mr. Collins' favor.

Fortunately, in this case, there is no ambiguity. The South Carolina legislature has made itself very clear. Punishments for all breaches of the peace are now codified in § 22-3-560. Thirty days imprisonment and/or \$500 is now the maximum punishment for every breach of peace crime in South Carolina, whether that breach of peace is simple or high and aggravated.

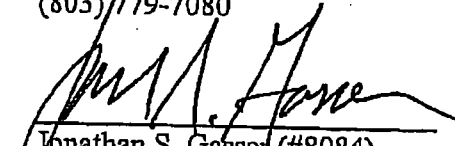
CONCLUSION

Because South Carolina law now codifies sentencing for all breaches of the peace within § 22-3-560, Mr. Simms' sentence of ten years, with five years suspended, must be

vacated in accordance with the law. Mr. Simms respectfully requests a new sentence within the legal range of \$500 and/or thirty days in prison.



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Attorneys for Curtis James Simms

Columbia, South Carolina
February 15, 2013

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STATE OF SOUTH CAROLINA)

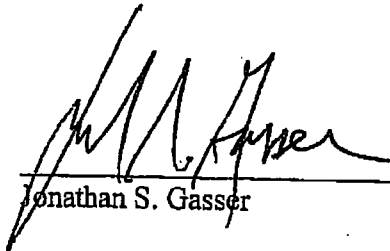
COUNTY OF RICHLAND)

CERTIFICATE OF SERVICE

RICHLAND COUNTY
FILED
13 FEB 15 AM 10:45
JEANETTE M. MCBRIDE
C.C.P. & G.S.

The undersigned, Jonathan S. Gasser, hereby certifies that he is an attorney for the defendant, with offices at 1529 Laurel Street, Columbia, South Carolina; and that on the _____ day of February 2013, he delivered via hand delivery, a copy of a Memorandum in Support of Defendant's Motion to Set Aside Sentence, or in the Alternative, to Reduce Sentence, in the matter of State v. Curtis James Simms, to the following named person at her address, to wit:

Luck Campbell
Assistant Solicitor, 5th Judicial Circuit
1701 Main Street
Columbia, South Carolina 29201


Jonathan S. Gasser

CRIMES—ASSAULT AND BATTERY UPON SCHOOL..., 1997 South Carolina...

1997 South Carolina Laws Act 80 (H.B.3240)

**SOUTH CAROLINA 1997 SESSION LAWS
REGULAR SESSION**

Additions and deletions are not identified in this document.
Vetoed provisions within tabular material are not displayed.

Act 80
H.B. No. 3240

CRIMES—ASSAULT AND BATTERY UPON SCHOOL PERSONNEL—DETENTION AND PUNISHMENT

AN ACT TO ENACT "THE SOUTH CAROLINA SCHOOL SAFETY ACT OF 1997" INCLUDING PROVISIONS TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 16-3-612 SO AS TO PROVIDE THAT IF A STUDENT COMMITS AN ASSAULT AND BATTERY THAT IS NOT AGGRAVATED ON SCHOOL GROUNDS OR AT A SCHOOL-SPONSORED EVENT AGAINST ANY PERSON AFFILIATED WITH THE SCHOOL IN AN OFFICIAL CAPACITY, THE STUDENT IS GUILTY OF THE CRIME OF ASSAULT AND BATTERY ON SCHOOL PERSONNEL AND TO PROVIDE PENALTIES FOR VIOLATION; TO AMEND SECTION 20-7-7210, AS AMENDED, RELATING TO JUVENILE DETENTION PROCEDURES, SO AS TO AUTHORIZE A CHILD TO BE DETAINED IN A SECURE JUVENILE DETENTION FACILITY IF THE CHILD IS CHARGED WITH ASSAULT AND BATTERY OR AN ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE ON SCHOOL GROUNDS OR AT A SCHOOL-SPONSORED EVENT AGAINST ANYONE AFFILIATED WITH THE SCHOOL IN AN OFFICIAL CAPACITY; TO AMEND SECTION 22-3-560, RELATING TO A MAGISTRATE'S AUTHORITY TO PUNISH ASSAULTS AND BATTERIES AND OTHER BREACHES OF THE PEACE AND EXCEPTIONS THERETO, SO AS TO INCREASE THE PENALTIES FOR VIOLATION AND PROVIDE THAT AN ASSAULT AND BATTERY ON SCHOOL PERSONNEL SHALL BE PUNISHED AS PROVIDED IN SECTION 16-3-612; TO ADD SECTION 59-63-370 SO AS TO REQUIRE THE DEPARTMENT OF JUVENILE JUSTICE, THE DEPARTMENT OF CORRECTIONS, OR THE DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES WHEN A STUDENT IS ASSIGNED TO IT, TO NOTIFY THE SENIOR ADMINISTRATOR OF THE SCHOOL IN WHICH THE STUDENT IS ENROLLED OF A STUDENT'S CONVICTION OF CERTAIN CRIMES, TO PROVIDE FOR OTHER TYPES OF NOTIFICATION TO THE STUDENT'S SCHOOL DISTRICT WHEN THE STUDENT IS NOT INCARCERATED UPON CONVICTION FOR THESE OFFENSES, TO PROVIDE FOR NOTIFICATION TO EACH TEACHER IN WHOSE CLASS THE STUDENT IS ENROLLED OF SUCH CONVICTIONS, AND TO PROVIDE FOR THE INCLUSION OF THIS INFORMATION IN THE STUDENT'S PERMANENT RECORD; TO ADD SECTION 59-63-380 SO AS TO GRANT CIVIL AND CRIMINAL IMMUNITY TO PERSONS AFFILIATED WITH A SCHOOL IN AN OFFICIAL CAPACITY MAKING A REPORT OF A SCHOOL-RELATED CRIME IN GOOD FAITH; AND TO ADD SECTION 59-63-390 SO AS TO REQUIRE THE SENIOR ADMINISTRATOR OF EACH SCHOOL TO INCLUDE A SUMMARY OF THE SCHOOL CRIME REPORT ACT AND THE PROVISIONS OF SECTION 16-3-612 IN THE SCHOOL'S STUDENT HANDBOOK EACH YEAR.

Be it enacted by the General Assembly of the State of South Carolina:

Citation

SECTION 1. This act is known and may be cited as the "South Carolina School Safety Act of 1997".

Assault and battery against school personnel

SECTION 2. The 1976 Code is amended by adding:

CRIMES—ASSAULT AND BATTERY UPON SCHOOL..., 1997 South Carolina...

<< SC ST § 16-3-612 >>

"Section 16-3-612. (A) For purposes of this section:

(1) 'Student' means a person currently enrolled in any school.

(2) 'School' includes, but is not limited to, a public or private school that contains any grades of kindergarten through twelfth grade, public or private colleges, universities, and any vocational, technical, or occupational school.

(B) A student who commits an assault and battery, other than one that is aggravated, on school grounds or at a school-sponsored event against any person affiliated with the school in an official capacity including, but not limited to, administrators, teachers, faculty, substitute teachers, teachers' assistants, student teachers, custodial staff, food service staff, volunteers, law enforcement officers, school bus drivers, school crossing guards, or other regularly assigned school-contracted persons is guilty of assault and battery against school personnel which is a misdemeanor and, upon conviction, must be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

Detention authorized

SECTION 3. Section 20-7-7210(B) of the 1976 Code, as added by Act 383 of 1996, is amended to read:

<< SC ST § 20-7-7210 >>

"(B) A child is eligible for detention in a secure juvenile detention facility only if the child:

(1) is charged with a violent crime as defined in Section 16-1-60;

(2) is charged with a crime which, if committed by an adult, would be a felony other than a violent crime, and the child:

(a) is already detained or on probation or conditional release in connection with another delinquency proceeding;

(b) has a demonstrable recent record of wilfull ¹ failures to appear at court proceedings;

(c) has a demonstrable recent record of violent conduct resulting in physical injury to others; or

(d) has a demonstrable recent record of adjudications for other felonies; and:

(i) there is reason to believe the child is a flight risk or poses a threat of serious harm to others; or

(ii) the instant offense involved the use of a firearm;

(3) is a fugitive from another jurisdiction;

(4) requests protection in writing under circumstances that present an immediate threat of serious physical injury;

(5) had in his possession a deadly weapon;

(6) has a demonstrable recent record of wilfull ² failure to comply with prior placement orders including, but not limited to, a house arrest order;

(7) has no suitable alternative placement and it is determined that detention is in the child's best interest or is necessary to protect the child or public, or both; or

(8) is charged with an assault and battery or an assault and battery of a high and aggravated nature on school grounds or at a school-sponsored event against any person affiliated with the school in an official capacity.

A child who meets the criteria provided in this subsection is eligible for detention. Detention is not mandatory for a child meeting the criteria if that child can be supervised adequately at home or in a less secure setting or program. If the officer does not consent to the release of the child, the parents or other responsible adult may apply to the family court within the circuit for an ex parte order of release of the child. The officer's written report must be furnished to the family court judge who may establish conditions for the release."

Punishment authorized; penalties increased

SECTION 4. Section 22-3-560 of the 1976 Code is amended to read:

<< SC ST § 22-3-560 >>

CRIMES—ASSAULT AND BATTERY UPON SCHOOL..., 1997 South Carolina...

"Section 22-3-560. Magistrates may punish by fine not exceeding five hundred dollars or imprisonment for a term not exceeding thirty days, or both, all assaults and batteries and other breaches of the peace when the offense is neither an assault and battery against school personnel pursuant to Section 16-3-612 nor an assault and battery of a high and aggravated nature requiring, in their judgment or by law, greater punishment."

Notification required; inclusion in records

SECTION 5. The 1976 Code is amended by adding:

<< SC ST § 59-63-370 >>

"Section 59-63-370. Notwithstanding any other provision of law:

(1) When a student who is convicted of or adjudicated delinquent for assault and battery against school personnel, as defined in Section 16-3-612, assault and battery of a high and aggravated nature committed on school grounds or at a school-sponsored event against any person affiliated with the school in an official capacity, or a violent offense defined in Section 16-1-60 is assigned to the Department of Juvenile Justice, the Department of Corrections, or to the Department of Probation, Parole and Pardon Services that agency is required to provide immediate notice of the student's conviction or adjudication to the senior administrator of the school in which the student is enrolled or intends to be enrolled. These agencies are authorized to request information concerning school enrollment from the students convicted of or adjudicated delinquent for assault and battery against school personnel or a violent offense.

(2) When a student convicted of or adjudicated delinquent for assault and battery against school personnel or assault and battery of a high and aggravated nature against school personnel is not sentenced to incarceration or probation, the presiding judge shall as part of his sentence order the clerk of the municipal, magistrate, or general sessions court to provide, within ten days, notification of the student's sentence to the appropriate school district for inclusion in the student's permanent record. If the student is under the jurisdiction of the family court and is not referred to the Department of Juvenile Justice, the prosecuting agency must provide notification within ten days to the appropriate school district.

(3) An administrator notified pursuant to this section is required to notify each teacher or instructor in whose class the student is enrolled of a student's conviction of or adjudication for assault and battery against school personnel, assault and battery of a high and aggravated nature against school personnel, or a violent crime as defined in Section 16-1-60. This notification must be made to the appropriate teachers or instructors every year the student is enrolled in school.

(4) If a student is convicted of or adjudicated delinquent for assault and battery against school personnel, assault and battery of a high and aggravated nature against school personnel, or a violent crime as defined in Section 16-1-60, information concerning the conviction or adjudication and sentencing must be placed in the student's permanent school record and must be forwarded with the student's permanent school records if the student transfers to another school or school district."

Immunity granted

SECTION 6. The 1976 Code is amended by adding:

<< SC ST § 59-63-380 >>

"Section 59-63-380. A person affiliated with a school in an official capacity is granted immunity from criminal prosecution and civil liability when making a report of school-related crime in good faith, to the extent that the exposure to criminal prosecution or civil liability arises from the same report of school-related crime."

Summary required

SECTION 7. The 1976 Code is amended by adding:

<< SC ST § 59-63-390 >>

§ 22-3-560. Breaches of the peace., SC ST § 22-3-560

Code of Laws of South Carolina 1976 Annotated
Title 22. Magistrates and Constables
Chapter 3. Jurisdiction and Procedure in Magistrates' Courts
Article 5. Criminal Jurisdiction

Code 1976 § 22-3-560

§ 22-3-560. Breaches of the peace.

Effective: June 2, 2010
Currentness

Magistrates may punish by fine not exceeding five hundred dollars or imprisonment for a term not exceeding thirty days, or both, all breaches of the peace.

Credits

HISTORY: 1962 Code § 43-64; 1952 Code § 43-64; 1942 Code § 924; 1932 Code § 924; Cr. P. '22 § 20; Cr. C. '12 § 21; Cr. C. '02 § 13; G. S. 824; R. S. 12; 1870 (14) 402; Const. Art. 5, § 21; 1981 Act No. 76, § 8; 1997 Act No. 80, § 4; 2008 Act No. 346, § 1, eff June 25, 2008; 2010 Act No. 273, § 8, eff June 2, 2010.

Notes of Decisions (2)

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Code 1976 § 22-3-560, SC ST § 22-3-560
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§ 22-3-560. Assaults and batteries and other breaches of the peace.

Magistrates may punish by fine not exceeding two hundred dollars or imprisonment in the jail or house of correction not exceeding thirty days all assaults and batteries and other breaches of the peace when the offense is not of a high and aggravated nature requiring, in their judgment, greater punishment.

MAGISTRATES—INSURANCE—CRIMINAL PROCEDURE, 2008 South Carolina Laws...

2008 South Carolina Laws Act 346 (S.B. 577)

SOUTH CAROLINA 2008 SESSION LAWS
REGULAR SESSIONAdditions and deletions are not identified in this document.
Vetoed provisions within tabular material are not displayed.Act 346
S.B. No. 577

MAGISTRATES—INSURANCE—CRIMINAL PROCEDURE

AN ACT TO AMEND SECTION 22-3-560, CODE OF LAWS OF SOUTH CAROLINA, 1976, RELATING TO JURISDICTION AND PROCEDURE IN MAGISTRATES COURTS IN ASSAULT AND BATTERY AND OTHER BREACH OF THE PEACE OFFENSES, SO AS TO INCREASE THE MAGISTRATES COURTS' JURISDICTION FOR ALL ASSAULT AND BATTERY OFFENSES AGAINST SPORTS OFFICIALS AND COACHES TO PROVIDE FOR A FINE NOT EXCEEDING ONE THOUSAND DOLLARS OR IMPRISONMENT FOR A TERM NOT EXCEEDING SIXTY DAYS, OR BOTH; BY ADDING SECTION 17-15-90 SO AS TO CREATE THE OFFENSE OF WILFUL FAILURE TO APPEAR AND PROVIDE PENALTIES BASED ON THE UNDERLYING CHARGE; TO AMEND SECTION 38-53-50, RELATING TO SURETY RELIEVED ON BOND AND SURRENDER OF A DEFENDANT, SO AS TO PROVIDE PROCEDURES WHEN A BENCH WARRANT MAY BE ISSUED FOR ARREST OF A DEFENDANT AND TO PROVIDE THAT NONPAYMENT OF FEES ALONE DOES NOT WARRANT IMMEDIATE INCARCERATION OF THE DEFENDANT; TO AMEND SECTION 38-53-70, AS AMENDED, RELATING TO THE ISSUANCE OF A BENCH WARRANT AND THE REMISSION OF JUDGMENT, SO AS TO INCREASE THE PERIOD OF TIME BEFORE THE BOND IS FORFEITED FOR FAILURE TO APPEAR FROM THIRTY TO NINETY DAYS FROM THE ISSUANCE OF THE BENCH WARRANT AND TO PROVIDE THAT THE BENCH WARRANT MUST BE AVAILABLE FOR PICKUP BY THE SURETY WITHIN SEVEN DAYS OF ISSUANCE; AND TO AMEND SECTION 22-5-110, RELATING TO MAGISTRATES' POWERS TO CAUSE THE ARREST OF CERTAIN OFFENDERS, SO AS TO REQUIRE THE ISSUANCE OF A COURTESY SUMMONS TO PERSONS CHARGED WITH A MISDEMEANOR OFFENSE REQUIRING A WARRANT SIGNED BY NONLAW ENFORCEMENT PERSONNEL.

Be it enacted by the General Assembly of the State of South Carolina:

Magistrates courts' jurisdiction, assault and battery offenses of sports officials

SECTION 1. Section 22-3-560 of the 1976 Code is amended to read:

<< SC ST § 22-3-560 >>

Section 22-3-560. (A) Magistrates may punish by fine not exceeding five hundred dollars or imprisonment for a term not exceeding thirty days, or both, all assaults and batteries and other breaches of the peace when the offense is neither an assault and battery against school personnel pursuant to Section 16-3-612 nor an assault and battery of a high and aggravated nature requiring, in their judgment or by law, greater punishment.

(B) Magistrates may punish by fine not exceeding one thousand dollars or imprisonment for a term not exceeding sixty days, or both, all assaults and batteries against sports officials and coaches when, in committing an assault and battery, the offender knows the individual assaulted to be a sports official or coach at any level of competition and the act causing the assault and battery to the sports official or coach occurred within an athletic facility or an indoor or outdoor playing field or within the

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immediate vicinity of the athletic facility or an indoor or outdoor playing field at which the sports official or coach was an active participant in the athletic contests held at the athletic facility. For the purposes of this subsection, "sports official" means a person at an athletic contest who enforces the rules of the contest, such as an umpire, referee, scorekeeper, and "coach" means a person recognized as a coach by the sanctioning authority that conducted the athletic contest.

Wilful failure to appear, penalties

SECTION 2. Chapter 15, Title 17 of the 1976 Code is amended by adding:

<< SC ST § 17-15-90 >>

Section 17-15-90. A person released pursuant to the provisions of Chapter 15, Title 17 who wilfully fails to appear before the court as required must:

- (1) if he was released in connection with a charge for a felony or while awaiting sentencing after conviction, be fined not more than five thousand dollars or imprisoned for not more than five years, or both; or
- (2) if he was released in connection with a charge for a misdemeanor for which the maximum possible sentence was at least one year, be fined not more than one thousand dollars or imprisoned for not more than one year, or both.

Surety, bond, bench warrants

SECTION 3. Section 38-53-50 of the 1976 Code is amended to read:

<< SC ST § 38-53-50 >>

Section 38-53-50. (A) A surety desiring to be relieved on a bond for good cause shall file with the clerk of court a motion to be relieved on the bond. A copy of the motion must be served upon the defendant, his attorney, and the solicitor's office. The court then shall schedule a hearing to determine if the surety should be relieved on the bond and notify all parties of the hearing date. At the time of the filing of the motion, a fee of twenty dollars must be paid to the clerk of court to be retained by the clerk for use in the operation of the clerk's office. The fee will cover the cost of copies of the motion required by the surety.

(B) If the circumstances warrant immediate incarceration of the defendant to prevent imminent violation of one of the specific terms of the bail bond, or if the defendant has violated one of the specific terms of the bond, the surety may take the defendant to the appropriate detention facility for holding until the court orders that the surety be relieved. The surety, within three business days following recommitment, must file with the detention facility and the court an affidavit clocked in with the clerk of court on a form provided by the Division of Court Administration stating the facts to support the surrender of the defendant for good cause. Nonpayment of fees alone is not sufficient cause to warrant immediate incarceration of the defendant. When the defendant and the affidavit are presented at the appropriate detention facility, the facility shall take custody of the defendant. When the affidavit is filed with the court, the surety also shall file a motion to be relieved on the bond pursuant to subsection (A). A surety who surrenders a defendant and files an affidavit which does not show good cause is subject to penalties imposed for perjury as provided for in Article 1, Chapter 9, Title 16.

(C) If the defendant is incarcerated by the surety or a law enforcement agency as a result of a bench warrant, the surety shall file an affidavit with the court stating that the defendant is incarcerated in the appropriate detention facility as a result of the bench warrant as well as the violation of the specific term or terms of the bail bond stated in the bench warrant. Once the affidavit pursuant to the provisions of this subsection has been filed, the surety is relieved of all liability on the bail bond by the court.

(D) After the surety has been relieved by order of the court, a new undertaking must be filed with the appropriate court in order to secure the subsequent release of the defendant. The undertaking must contain the same conditions included in the original bond unless the conditions have been changed by the court.

Surety, bench warrants

SECTION 4. Section 38-53-70 of the 1976 Code, as last amended by Act 329 of 2002, is further amended to read:

<< SC ST § 38-53-70 >>

MAGISTRATES—INSURANCE—CRIMINAL PROCEDURE, 2008 South Carolina Laws...

Section 38-53-70. If a defendant fails to appear at a court proceeding to which he has been summoned, the court shall issue a bench warrant for the defendant. The court shall make available for pickup by the surety or the representative of the surety who executed the bond on their behalf, a true copy of the bench warrant within seven days of its issuance at the clerk of court's office. If the surety fails to surrender the defendant or place a hold on the defendant's release from incarceration, commitment, or institutionalization within ninety days of the issuance of the bench warrant, the bond is forfeited. At any time before execution is issued on a judgment of forfeiture against a defendant or his surety, the court may direct that the judgment be remitted in whole or in part, upon conditions as the court may impose, if it appears that justice requires the remission of part or all of the judgment. In making a determination as to remission of the judgment, the court shall consider the costs to the State or a county or municipality resulting from the necessity to continue or terminate the defendant's trial and the efforts of law enforcement officers or agencies to locate the defendant. The court, in its discretion, may permit the surety to pay the estreatment in installments for a period of up to six months; however, the surety shall pay a handling fee to the court in an amount equal to four percent of the value of the bond. If at any time during the period in which installments are to be paid the defendant is surrendered to the appropriate detention facility and the surety complies with the recommitment procedures, the surety is relieved of further liability.

Magistrates courts' powers, courtesy summons

SECTION 5. Section 22-5-110 of the 1976 Code is amended to read:

<< SC ST § 22-5-110 >>

Section 22-5-110. (A) Magistrates shall cause to be arrested all persons found within their counties charged with any offense and persons who after committing any offense within the county escape out of it, examine into treasons, felonies, grand larcenies, high crimes and misdemeanors, commit or bind over for trial those who appear to be guilty of crimes or offenses not within their jurisdiction, and punish those guilty of such offenses within their jurisdiction.

(B) Notwithstanding another provision of law, a person charged with any misdemeanor offense requiring a warrant signed by nonlaw enforcement personnel to ensure the arrest of a person must be given a courtesy summons.

Severability clause

SECTION 6. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Savings clause

SECTION 7. The repeal or amendment by this act of any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.

Time effective

SECTION 8. This act takes effect upon approval by the Governor.

Ratified the 10th day of June, 2008.

Vetoed by the Governor—6/16/08.

Veto overridden by Senate—6/25/08.

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Veto overridden by House—6/25/08.

SC LEGIS 346 (2008)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF RICHLAND	)	
	)	INDICTMENT NO.: 2011-GS-40-0829
STATE OF SOUTH CAROLINA,	)	
	)	
vs.	)	
	)	ORDER
CURTIS JAMES SIMMS,	)	
Defendant.	)	

This matter is before the Court pursuant to the Defendant's February 8, 2013 Motion to Set Aside the Sentence that was imposed on the Defendant on February 5, 2013.

The Defendant was indicted during the February 2011 grand jury term for Involuntary Manslaughter and Breach of Peace, High and Aggravated, under S.C. Code 17-25-30 and 22-5-150, as a result of an incident that took place on October 9, 2010. On February 5, 2013, a Richland County jury acquitted the Defendant of the Involuntary Manslaughter charge, thus determining that the Defendant was not factually and legally responsible for the decedent's death. The jury also convicted the Defendant of Breach of Peace, High and Aggravated. The State alleged in that indictment that the Defendant disturbed the public order and/or disrupted traffic during a fight that occurred after a football game in Columbia, South Carolina on October 9, 2010. Breach of Peace, High and Aggravated is a misdemeanor and is classified as a nonviolent crime. The Defendant was sentenced to ten years, suspended upon the service of five years incarceration with three years probation to follow.

The Defendant submits that the proper sentencing range should be a fine not exceeding five hundred dollars or imprisonment for a term not exceeding thirty days, or

both. A hearing on the Defendant's motion was held before this Court on March 12, 2013. The Defendant and his attorneys, Jonathan S. Gasser and Gregory P. Harris were present. The State was represented by Assistant Solicitors Luck Campbell, Joanna McDuffie and Meghan Walker.

I. SUMMARY

Curtis James Simms was indicted for Involuntary Manslaughter and Breach of Peace, High and Aggravated, under S. C. Code Ann. § 17-25-30 and § 22-5-150 (1976), as a result of a fight after a football game in Columbia, S.C. on October 9, 2010. A Richland County jury acquitted Mr. Simms of the Involuntary Manslaughter charge, but convicted him of Breach of Peace, High and Aggravated. The Court sentenced Curtis Simms to ten years in prison, suspended upon the service of five years incarceration, with three years probation to follow.

In this case, information was provided to the Court that mistakenly informed the court that Mr. Simms was facing a maximum of ten years imprisonment. As a result, the court applied the old common law sentencing regime of zero to ten years for Mr. Simms' conviction for Breach of the Peace, High and Aggravated. However, current South Carolina law limits the sentence for all breaches of the peace to a fine not exceeding five hundred dollars and/or thirty days imprisonment. *See* S. C. Code Ann. § 22-3-560, 2010 Act No. 273, § 8, eff June 2, 2010. This legislative change was one of a series of revisions to § 22-3-560, that began in 1997 and culminated in the South Carolina Omnibus Crime Reduction and Sentencing Reform Act of 2010. Today, § 22-3-560

codifies the maximum punishment that may be imposed for all breach of peace crimes. Accordingly, the current sentence imposed on Mr. Simms is invalid as a matter of law.

II. ANALYSIS

A. The June 2010 Omnibus Crime Bill codified sentences for all breach of the peace offenses within §22-3-560, and imposed a maximum punishment of \$500 and/or 30 days in prison.

Traditionally, breach of the peace was a common law crime in South Carolina. *State v. Poinsett*, 250 S.C. 293, 297-98, 157 S.E.2d 570, 571-72 (1967). And, in years past, courts had discretion to provide greater punishment for high and aggravated breaches of the peace. *Consider* S.C. Code Ann. § 17-25-30 (“In cases of legal conviction when no punishment is provided by statute the court shall award such sentence as is conformable to the common usage and practice in this State, according to the nature of the offense, and not repugnant to the Constitution.”) Pursuant to § 17-25-30, courts were free to craft a sentence for aggravated breach of the peace in a range of up to ten years imprisonment. Such sentencing freedom was possible because of the way the old statutes treated aggravated breaches of the peace. For example, the 1981 version of § 22-3-560 stated:

“Magistrates may punish by fine not exceeding two hundred dollars or imprisonment in the jail or house of correction not exceeding thirty days, or both, all assaults and batteries and *other breaches of the peace when the offense is not of a high and aggravated nature requiring, in their judgment, greater punishment.*”

S.C. Code Ann. § 22-3-560, 1981 Act No. 76, § 8 (emphasis added).

However, beginning in 1997, § 22-3-560 underwent a series of significant legislative changes. In 1997, pursuant to Act No. 80, § 4, the legislature eliminated the language that allowed greater punishment for high and aggravated breaches of the peace.

The 1997 version of § 22-3-560 referenced a magistrate's authority to punish assaults and batteries "and other breaches of the peace and exception thereto, so as to increase the penalties for violation and provide that an assault and battery on school personnel shall be punished as provided in Section 16-3-612." The law remained silent as to what sentence, specifically, could be imposed for breach of peace offenses of a high and aggravated nature, but the legislature made clear that greater punishment for aggravated breach of peace no longer existed.

Later, in 2008, pursuant to Act No. 346, § 1, the legislature again amended § 22-3-560 "so as to increase the magistrates courts' jurisdiction for all assault and battery offenses against sports officials and coaches...." In both the 1997 and 2008 amendments to § 22-3-560, the legislature explicitly mandated the maximum punishment that could be imposed for assaults and batteries on school personnel, sports officials, and coaches. However, in neither of those amendments did the legislature clarify the maximum punishment for aggravated breaches of the peace, even though the legislature removed the explicit reference to aggravated breaches of the peace requiring greater punishment. It was only in 2010, pursuant to the Omnibus Crime Reduction and Sentencing Reform Act, that the legislature explicitly amended § 22-3-560 to apply the statutory maximum punishment to "all breaches of the peace." Today, S.C. Code Ann. §22-3-560 states:

"Breaches of the peace. Magistrates may punish by fine not exceeding five hundred dollars or imprisonment for a term not exceeding thirty days, or both, **all breaches of the peace.**"

2010 Act No. 273; S. 1154 (emphasis added).

This 2010 amendment is significant, because South Carolina law makes clear that, once a statutory limit is created for punishment of a crime, the courts no longer have

discretion to sentence beyond the maximum punishment set forth in the law. *See, e.g., State v. Sidell*, 262 S.C. 397, 398, 205 S.E.2d 2, 3 (1974) (“...broad discretion is allowed the trial judge in imposing sentence within the legal limits.”) In other words, once a sentencing limit is defined by statute, the courts are bound by the statutory punishment.

This statutory limitation on punishment for all breaches of the peace is supported by the language in S.C. Code Ann. § 22-5-150. According to § 22-5-150, anyone found guilty of breach of peace is subject to punishment “within the limits prescribed in Section 22-3-560.” Although a court still retains some discretion in sentencing a defendant within the limits of § 22-3-560, that sentence now cannot exceed the statutory maximum of \$500 or thirty days. *Consider* S.C. Code Ann. § 17-27-20(a)(3) (Law. Co-op. 1976) (authorizing post-conviction proceedings for any person who has been sentenced for a crime where the sentence exceeds the maximum authorized by law).

In the present case, Mr. Simms was charged with breach of the peace, of a high and aggravated nature. He was tried before a court of general sessions, pursuant to § 22-5-150. The State believed it could pursue a common law sentence for Mr. Simms under the old sentencing rules that existed prior to enactment of a series of changes in § 22-3-560 culminating in the Omnibus Crime Reduction and Sentencing Reform Act of 2010. Evidence of the State’s position is apparent on the face of the Indictment. The Indictment references S.C. Code § 17-25-30 C/L, which grants a court discretion, under the common law, to craft an appropriate sentence “[i]n cases of legal conviction when no punishment is provided by statute.” But, since June 2, 2010, the legislature has provided statutory punishment for all breach of peace offenses within the language of § 22-3-560. When the State sought to prosecute Mr. Simms under S.C. Code § 22-5-150, it became bound by

the statutory sentencing limits of § 22-3-560. Common law sentencing discretion no longer exists for Mr. Simms' crime. Accordingly, the maximum sentence that may be imposed on Mr. Simms is \$500 and/or thirty days imprisonment.

B. South Carolina's Rules of Statutory Interpretation bind the Court to the sentencing limits set forth in §22-3-560.

1. Statutory Interpretation: The Supremacy of Legislative Intent

The cardinal rule of statutory interpretation is to adhere to the intention of the legislature.¹ The "courts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine . . . the intention of the Legislature." *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 395, 134 S.E.2d 206, 209 (1964). In ascertaining legislative intent, the courts must consider the plain meaning of the text, as written. "The legislature must have intended to mean what it has plainly expressed...Where the words of a statute are plainly expressive of an intent, not rendered dubious by context, the interpretation must conform to and carry out that intent." *Beaty v. Richardson*, 56 S.C. 173, 180, 34 S.E. 73, 76 (1899); *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 609, 663 S.E.2d 484, 488 (2008)("We will reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.")

Applying the "plain language" rule of statutory construction, it is uncontroverted that § 22-3-560 limits sentencing for all breach of peace offenses. The language "all breaches of the peace" is written directly into the statute. S.C. Code Ann. § 22-3-560. The statute now unambiguously states that punishment for any level of this offense may not exceed a \$500 fine and/or thirty days imprisonment.

¹ See Thomas R. Haggard, The South Carolina Rules of Statutory Interpretation, South Carolina Lawyer, Nov.-Dec. 1991 at 11.

However, the statutory analysis does not end with the plain language. The words of a statute also must be considered within the context of the law's enactment. *Abell v. Bell*, 229 S.C. 1, 5, 91 S.E.2d 548, 550 (1956). "The search for [legislative] intent may range beyond the borders of the statute itself; for it must be gathered from a reading of the statute as a whole in light of the circumstances and conditions existing at the time of its enactment." *Id.* This need to consider a statute in the context of its enactment is especially important when a statute has been tweaked, and only some sections of the law adjusted.

The legislative decision in 2010 to limit the punishment for all breaches of the peace is consistent with the purposes of the Omnibus Crime Reduction and Sentencing Reform Act of 2010. One of the goals of this legislation was to bring clarity and fairness to sentencing, and to ensure that sentences would be consistent with the nature of the offense. In the 2010 Omnibus Crime bill, the legislature chose not to repeal the crime of breach of peace, high and aggravated. *See* § 22-5-150 ("...when the offense is of a high and aggravated nature, they may be committed our bound over for trial before the court of general sessions.") Instead, the legislature changed the sentencing framework so all breaches of the peace would fall within the limitations of § 22-3-560. This new language is clear, unambiguous, and binding on this Court.

2. The legislature created one sentencing regime for all breaches of the peace, regardless where the case is tried.

Neither the legislative history nor the plain language of §§ 22-5-150 and 22-3-560 support the notion that sentencing within these statutes is limited to magistrate's court. A statute must be read as a whole, and a court may not parse words, clauses, or parts of a statute to create ambiguous meaning. *City of Spartanburg v. Leonard*, 180 S.C. 491, 186

S.E. 395, 396 (1936). In addition, statutory language “must be construed in the light of the intended purpose.” *Lewis v. Gaddy*, 254 S.C. 66, 71, 173 S.E.2d 376, 378 (1970).

Section 22-5-150 sets forth the arrest and trial options for persons threatening breach of peace, and indicates when the offense should be tried before a court of general sessions. Section 22-5-150 also directs the courts to apply § 22-3-560 for punishment. The statute does not direct courts of general sessions to impose a common law sentencing scheme different from that set forth in § 22-3-560. To the contrary, the law mandates that persons found guilty under §22-5-150 should be punished within the limits prescribed in § 22-3-560.

It would be illogical to parse § 22-3-560 to create an ambiguity in sentencing for breach of peace offenses. Although the 1981 version of § 22-3-560, now repealed, once allowed two different sentencing regimes, depending on the severity of the offense, the new law limits punishment for “all breaches of the peace” to \$500 or thirty days imprisonment. This clearly stated limitation on punishment is not modified by the location of the trial. *All breaches of the peace* are limited to the punishment set forth in § 22-3-560. Any attempt to confuse the language of § 22-3-560 by limiting it only to magistrate’s court fails as a matter of straightforward statutory construction.

3. The captions for §§ 22-3-560 and 22-5-150 cover all breaches of the peace, whether in magistrate court or in a court of general sessions.

A court also may consider the title or caption of legislation as an aid of construction. *Lindsay v. S. Farm Bureau Cas. Ins. Co.*, 258 S.C. 272, 277, 188 S.E.2d 374, 376 (1972); *see also*, *University of South Carolina v. Elliott*, 248 S.C. 218, 149 S.E.2d 433 (1966) (construing a statute as applying only to “public” funds because that term was used in the caption). In this case, the captions for both §§ 22-3-560 and 22-5-

150 are inclusive of *all* breaches of the peace. Neither provision limits breaches of the peace only to those tried in magistrate's court. Both provisions govern, in their entirety, all breaches of the peace, regardless where the prosecution takes place. It would be illogical to twist the language of §§ 22-3-560 and 22-5-150 to eliminate the sentencing limits only for cases tried in a court of general sessions. The legislature certainly could have written the law in such a way, but there is simply no textual support for such an interpretation.

4. South Carolina favors strict construction of Penal Statutes.

Any statute that works a forfeiture or inflicts a penalty will be strictly construed against the state. *Lund v. Gray Line Water Tours, Inc.*, 277 S.C. 447, 289 S.E.2d 404 (1982); *Gaddy*, 254 S.C. at 71, 173 S.E.2d at 378. This is a basic rule of fundamental fairness and simple due process. Thus, even if one could argue that some ambiguity existed in the drafting of either § 22-5-150 or § 22-3-560, this Court still must construe any ambiguity against the state and in Mr. Simms' favor.²

Fortunately, in this case, there is no ambiguity. The South Carolina legislature has made itself very clear. Punishments for all breaches of the peace are now codified in § 22-3-560. Thirty days imprisonment and/or \$500 is now the maximum punishment for every breach of peace crime in South Carolina, whether that breach of peace is simple or high and aggravated.

² A bill is currently pending before the General Assembly to further amend § 22-3-560 to read: "Section 22-3-560. Magistrates may punish breaches of the peace by a fine not exceeding five hundred dollars or imprisonment for a term not exceeding thirty days, or both, ~~all breaches of the peace.~~" This language clearly indicates that the legislature's intent is to clarify further any issue regarding the potential penalties for breaches of the peace. The potential penalties for breaches of the peace in South Carolina are a fine not to exceed five hundred dollars and/or imprisonment for a term not exceeding thirty days.

CONCLUSION

Because South Carolina law now codifies sentencing for all breaches of the peace within § 22-3-560, the Defendant's Motion to Set Aside the Sentence is granted. Mr. Simms' sentence of ten years in prison, suspended upon the service of five years incarceration, with three years probation to follow is hereby vacated. The Court sentences Mr. Simms to a fine of \$500.00 and a period of incarceration of thirty days in prison.

AND IT IS SO ORDERED.

The Honorable Diane Schafer Goodstein

Columbia, South Carolina
March _____, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF RICHLAND	)	
	)	INDICTMENT NO.: 2011-GS-40-0829
STATE OF SOUTH CAROLINA,	)	
	)	
vs.	)	
	)	ORDER
CURTIS JAMES SIMMS,	)	
Defendant.	)	

This matter is before the Court pursuant to the Defendant's February 8, 2013 Motion to Reduce the Sentence that was imposed on the Defendant on February 5, 2013.

The Defendant was indicted during the February 2011 grand jury term for Involuntary Manslaughter and Breach of Peace, High and Aggravated, under S.C. Code 17-25-30 and 22-5-150, as a result of an incident that took place on October 9, 2010. On February 5, 2013, a Richland County jury acquitted the Defendant of the Involuntary Manslaughter charge, thus determining that the Defendant was not proximately and therefore not legally responsible for the decedent's death. The Defendant has requested that the Court reduce the sentence currently imposed. A hearing on the Defendant's motion was held before this Court on March 12, 2013. The Defendant and his attorneys, Jonathan S. Gasser and Gregory P. Harris, were present. The State was represented by Assistant Solicitors Luck Campbell, Joanna McDuffie, and Meghan Walker.

The Defendant urged the Court to consider a number of reasons that would justify a reduction in Defendant's sentence. Defendant urged the Court consider his history and character which he depicted as being 27 years old with no prior criminal record. He represented that he is engaged to be married and has a full-time job with benefits available to him upon his release. He is described as an only child and one who has

substantial support amongst his friends and co-workers who live and work in the Columbia area.

A second factor Defendant states the Court may consider is the nature and characteristics of the offense, and the need for the sentence to reflect the seriousness of the offense. Defendant urges that Breach of Peace, High and Aggravated is characterized as a nonviolent misdemeanor. It is neither a "most serious" or "serious" offense as defined by section 17-25-45 of the S.C. Code.

Another factor argued to the Court to consider is the need for the sentence to promote respect for the law and to afford an adequate deterrence to criminal conduct. He states any period of incarceration on a breach of peace conviction sends a message of deterrence to the community.

Finally, Defendant argues this Court may consider the need to protect the public when framing an appropriate sentence. Defendant reiterates he has no prior history of unlawful behavior other than the breach of peace conviction for which he now stands convicted. The Court has considered the arguments of the Defendant and the arguments propounded by the State.

As a beginning point the Court must acknowledge the family of Mr. Gasque and their absolute heartbreak and devastation over the loss of their loved one. While the Court empathizes with and for this family and the terrible circumstances of this case, this Court cannot and must not sentence the Defendant on that which the jury has exonerated. The jury found this Defendant not guilty of Involuntary Manslaughter. The jury however did convict the Defendant on the charge of Breach of Peace, High and Aggravated. The State alleged in the indictment on this offense that the Defendant disturbed the public

order and/or disrupted traffic during a fight that occurred after the football game in Columbia, South Carolina on October 9, 2010. Given the evidence presented to the jury, it was clearly within the jury's purview to convict Defendant of Breach of the Peace, High and Aggravated. The Defendant's conduct could be described as being devoid of even the slightest regard for peace and order that is sought after and required in our communities and in our society.

In addition to those areas urged by the Defendant, the Court has also considered the character of Defendant's conduct and its effect on the community and the peace of the community on October 9, 2010. The Court must consider that we often find ourselves in close proximity to one another for the purpose of congregating for any number of reasons. In a world where people spend so much of their time involved in the day to day stresses, the opportunity to come together for the simple pleasure of watching a football game ought not be disrupted by the kind of hubris of this Defendant. For this Defendant to believe he could obfuscate the orderly flow of traffic because he had decided that it was his turn to enter the roadway (if one takes the Defense witnesses' version of events); or that Defendant became enraged with Mr. Gasque, a complete stranger, and exited his vehicle to confront and strike Mr. Gasque, a man much smaller and younger than he (which while this was the State's version of the event, the altercation was uncontroverted), the Defendant's conduct is intolerable in a civilized world.

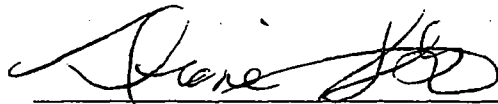
The question for the jury turned on whether the state had proved beyond a reasonable doubt that Mr. Gasque died as a proximate result of Defendant's conduct. We now know the jury found the Defendant's conduct was not the proximate cause of the Mr. Gasque's death.

The Court has reconsidered the sentence of the Defendant. In doing so, the Court has focused on whether, considering the Defendant's conduct is striking Mr. Gasque and the ensuing disruption which that conduct would cause but not including the disruption which was exacerbated by the death of Mr. Gasque, the Court gave much consideration regarding whether a lesser sentence would accomplish those goals for which a greater one was imposed. The intention of the Court was to fashion a sentence which met the characteristics of the offence on October 9, 2010 as described above, and to dissuade by example this kind of conduct, and also give credence to Defendant's lack of a criminal record.

The Court in considering all these matters believes and finds that a sentence of commitment to the South Carolina Department of Corrections for a period of ten years suspended based upon the service of three years' service to be followed by a period of probation of three years with the same conditions of probation previously imposed, giving Defendant credit for the time he has served, will accomplish the Court's intention.

Thus, based on the above-stated reasons, the Court grants the Defendant's Motion to Reduce the Sentence and hereby imposes a sentence of ten years suspended upon the service of three years, to be followed by a probationary term of three years with the identical conditions of probation previously imposed and incorporated herein as if set forth verbatim. Defendant is to be given credit for the time that he has served.

AND IT IS SO ORDERED.


The Honorable Diane Schafer Goodstein

St. George, South Carolina
April 25, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND	)	
STATE OF SOUTH CAROLINA,	)	INDICTMENT NO.: 2011-GS-40-0829
vs.	)	
CURTIS JAMES SIMMS,	)	ORDER
Defendant.	)	

This matter is before the Court pursuant to the Defendant's February 8, 2013 Motion to Set Aside the Sentence that was imposed on the Defendant by this Court on February 5, 2013.

In light of this Court's order regarding Defendant's Motion to Reduce Sentence, the Defendant's Motion to Set Aside the Sentence is hereby denied.

AND IT IS SO ORDERED.

St. George
Columbia, South Carolina
April 25, 2013

Diane Schafer Goodstein
The Honorable Diane Schafer Goodstein

2013 MAY -3 PM 3:21
JANETTE W. McBRIDE
C.C.P. & G.S.

RICHLAND COUNTY
FILED

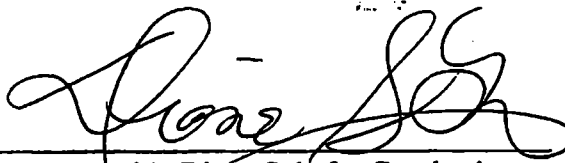
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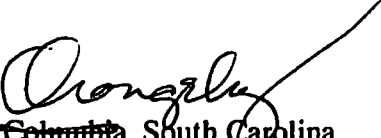
STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND)
STATE OF SOUTH CAROLINA,)
INDICTMENT NO.: 2011-GS-40-0829
vs.)
ORDER
CURTIS JAMES SIMMS,)
Defendant.)

This matter is before the Court pursuant to the Defendant's February 8, 2013 Motion for a New Trial, or in the Alternative, Motion for a Judgment of Acquittal.

In light of this Court's order regarding Defendant's Motion to Reduce Sentence, the Defendant's Motion for a New Trial, or in the Alternative, Motion for a Judgment of Acquittal is hereby denied.

AND IT IS SO ORDERED.


The Honorable Diane Schafer Goodstein


Columbia, South Carolina
April _____, 2013

May 13

RICHLAND COUNTY
FILED
13 MAY 31 PM 3:42
JEANETTE W. McBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND	)	
 The State	)	
	)	STATE'S RESPONSE TO DEFENSE'S
-vs-	)	MOTION TO REDUCE SENTENCE
	)	
	)	Indictment Numbers: 2011-GS-40-829
Curtis Simms	)	
	)	
Defendant.	)	
	)	
	)	
	)	

This matter comes before the Court pursuant to Defense's Motion to Reduce Sentence. Defendant, through his counsel, has opined that the June 2010 Omnibus Crime Bill codified sentences for all breach of the peace offenses with S.C. Code of Laws §22-3-560, and imposed a maximum punishment of \$500 and/or 30 days in jail. However, Defendant fails to recognize and apply all of the relevant law in this matter. As a result, the State respectfully request this Court deny Defendant's motion as his positions and arguments are contrary to State law.

Applicable Statutes and Rules of Statutory Construction

Three provisions of the South Carolina Code are relevant in this matter, §22-5-150; §22-3-560 and §22-5-320; and provide the following:

SECTION 22-5-150. Arrest of persons threatening breach of peace; trial or binding over.

Magistrates may cause to be arrested (a) all affrayers, rioters, disturbers and breakers of the peace, (b) all who go armed offensively, to the terror of the people, (c) such as utter menaces or threatening speeches and (d) otherwise dangerous and disorderly persons. Persons arrested for any of such offenses shall be examined by the magistrate before whom they are brought and may be tried before him. If found guilty they may be required to find sureties of the peace and

be punished within the limits prescribed in Section 22-3-560 or, when the offense is of a high and aggravated nature, they may be committed or bound over for trial before the court of general sessions.

SECTION 22-3-560. Breaches of the peace.

Magistrates may punish by fine not exceeding five hundred dollars or imprisonment for a term not exceeding thirty days, or both, all breaches of the peace.

SECTION 22-5-320. Defendant's demand for preliminary investigation; appearance by attorney.

Any magistrate who issues a warrant charging a crime beyond his jurisdiction shall grant and hold a preliminary hearing of it upon the demand in writing of the defendant made within twenty days of the hearing to set bond for such charge; provided, however, that if such twenty-day period expires on a date prior to the convening of the next term of General Sessions Court having jurisdiction then the defendant may wait to make such request until a date at least ten days before the next term of General Sessions Court convenes. At the preliminary hearing, the defendant may cross-examine the state's witnesses in person or by counsel, have the reply in argument if there be counsel for the State, and be heard in argument in person or by counsel as to whether a probable case has been made out and as to whether the case ought to be dismissed by the magistrate and the defendant discharged without delay. When such a hearing has been so demanded the case shall not be transmitted to the court of general sessions or submitted to the grand jury until the preliminary hearing shall have been had, the magistrate to retain jurisdiction and the court of general sessions not to acquire jurisdiction until after such preliminary hearing. Provided, however, that the defendant shall not be required to appear in person at the appointed time, date and place set for the hearing if he is represented by his attorney.

In construing the above provisions, a number of rules of statutory construction are applicable. The Cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. *Hodges v. Rainey*, 341 S.C.79, 533 S.E.2d 578, 581 (2000). Courts "will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation." *Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 673 S.E.2d 423, 425 (2009). The best evidence of legislative intent or will is what the Legislature sets forth in the text of a statute. *Hodges*, 533 S.E.2d at 581. The language must be read in a sense which harmonizes with its subject matter and accords with its general purpose.

Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843, 846 (1992). A court should not consider a particular clause in a statute in isolation, but should read it in conjunction with the purpose of the entire statute and the policy of the law. *Peake v. South Carolina Dept. of Motor Vehicles*, 375 S. C. 589, 654 S.E.2d 284, 290 (Ct. App. 2007).

Statutes must be read as a whole, and sections which are part of the same general statutory scheme must be construed together and each one given effect, if reasonable. *State v. Thomas*, 372 S.C. 466, 642 S.E.2d 724, 725 (2007). In the construction of statutes, the dominant factor is the intent, not the language of the Legislature. A statute must be construed in light of its intended purposes, and, if such purpose can be reasonably discovered from its language, the purpose will prevail over the literal import of the statute. *Spartanburg Sanitary Sewer Dist. V. City of Spartanburg*, 283 S.C. 67, 321 S.E.2d 258, 262 (1984). "Words ought to be subservient to the intent, and not the intent to the words." *Greenville Baseball v. Bearden*, 200 S.C. 363, 20 S.E.2d 813, 816 (1942). In construing a statute, the presumption is that the Legislature did not intend to do a futile thing. *Gaffney v. Mallory*, 186 S.C. 337, 195 S.E. 840 (1938).

Breach of Peace of a High and Aggravated Nature is a Separate and Distinct Offense from Breach of Peace

Any statute must be interpreted with common sense to avoid absurd consequences or unreasonable results. *United States v. Rippetoe*, 178 F.2d 735 (4th Cir. 1950). A sensible construction, rather than one which leads to irrational results, is always warranted. *State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 136 S.E.2d 778 (1964). In the case at hand, an absurd and unreasonable result is exactly Defendant is asking this court to reach. Defendant is seeking the Court to find that the common law offense of Breach of Peace has been abrogated by implication. Defendant is asking the Court to read the language "all breaches of the peace" to

include the separate and distinct offense of Breach of the Peace High and Aggravated in Nature. The Defendant's interpretation would result in an illogical finding by this Court that Breach of Peace High and Aggravated in Nature is a general session's offense, not triable in magistrate's court, which carries a maximum penalty of \$500 and/or 30 days.

Defendant fails to acknowledge South Carolina Code of Laws §22-5-150 which clearly states that "...If found guilty they may be required to find sureties of the peace and be punished within the limits prescribed in Section 22-3-560 or, when the offense is of a high and aggravated nature, they may be committed or bound over for trial before the court of general sessions." It is abundantly clear, when reading the statutes as a whole that the Legislature intends for Breach of Peace of a high and Aggravated Nature to carry a penalty which exceeds the jurisdiction of a magistrate.

In general, magistrates have criminal jurisdiction "of all offenses which may be subject to the penalties of either fine or forfeiture not exceeding five hundred dollars or imprisonment in the jail or workhouse not exceeding thirty days." S.C.Code Ann. § 22-3-550 (2007). For crimes outside magistrates' jurisdiction, magistrates are authorized to conduct a preliminary examination. *See Rule 2, SCRCrimP* ("Any defendant charged with a crime not triable by a magistrate shall be brought before a magistrate and shall be given notice of his right to a preliminary hearing."). The South Carolina Supreme Court held in *State v. Ramsey*, 381 S.C. 375, 673 S.E.2d 428, (2009), that magistrate courts do not have the ability to conduct a preliminary hearing on offenses within their jurisdiction. Reading these statutes together, as a whole, it is explicitly clear that the legislature intends to differentiate between breach of peace, and breach of peace high and aggravated in nature. Furthermore it is equally as clear that the sentencing scheme in §22-3-560 applies to "all breaches of the peace;" not all breaches of the

peace high and aggravated in nature, which are only triable in General Sessions court and not subject to the jurisdiction of magistrate court.

Presumption that the Common Law Remains in Full Force

It is well recognized in South Carolina that there is a presumption that the common law remains in full force, absent a clear change by an unambiguous statute. *State v. McAteer*, 344 S.C. 644, 532 S.E.2d 865 (2000). "Common law offenses are not abrogated simply because there is a statutory offense proscribing similar conduct. Rather, it is presumed that no change in common law is intended unless the Legislature explicitly indicates such an intention by language in the statute." *See State v. Prince*, 316 S.C. 57, 66, 447 S.E.2d 177, 182 (1993). In the Omnibus Crime Bill under 2010 Act No. 273, § 7.A, eff June 2, 2010 the Legislature repealed numerous Common Law offenses, but failed to repeal Breach of Peace of a High and Aggravated Nature. Section 7A of the Act clearly states "Sections 16-3-612, 16-3-620, 16-3-630, and 16-3-635 of the 1976 Code are repealed. The common law offenses of assault and battery with intent to kill, assault with intent to kill, assault and battery of a high and aggravated nature, simple assault and battery, assault of a high and aggravated nature, aggravated assault, and simple assault are abolished for offenses occurring on or after the effective date of this act." The intent of the Legislature is clear in exempting Breach of Peace of a High and Aggravated Nature from the repeal.

Further, even the South Carolina Supreme Court through Court Administration recognizes Breach of Peace of a High and Aggravated Nature as a separate and distinct offense for which no sentence is provided by statute and thus, sentencing governed by §17-25-30.

Conclusion

The Common Law offense of Breach of Peace of a High and Aggravated Nature was neither impacted nor addressed by the Omnibus Crime Bill of 2010. As a result, it is clear that the Legislature has chosen and demonstrated its intent not to codify a penalty and thus, sentencing is governed by §17-25-30. Based on the foregoing arguments, the State requests that Defendant's Motion to Set Aside or Reduce Sentence be DENIED.

Respectfully Submitted,

Joanna McDuffie

Joanna McDuffie
Assistant Solicitor, Fifth Judicial Circuit

This 13th day of March, 2013

1464

WITNESSES

(S) Travis Holdorf - Richland County Sheriff

ARREST WARRANT NUMBER

M720628

ACTION OF GRAND JURY

Mena H. Gardner
Foreperson of Grand Jury

Date:

FEB 09 2011

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2011-GS-40-0829

The State of South Carolina

County of

Richland

COURT OF GENERAL SESSIONS

February TERM 2011

154

THE STATE

vs.

CURTIS JAMES SIMMS

Indictment for
BREACH OF PEACE - HIGH AND
AGGRAVATED

SC Code: 17-25-30C/L, 22-5-150

CDR Code: 0955

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

Defendant

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

Defendant

Witness:

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

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on February 9, 2011, the Grand Jurors of Richland County present upon their oath:

BREACH OF PEACE - HIGH AND AGGRAVATED

CDR: 0955 C/L, 17-25-0030, 22-05-0150

That Curtis James Simms did in Richland County on or about October 9, 2010, knowingly, willfully and intentionally disturb public order and/or public tranquility through his conduct, accompanied by circumstances of aggravation, fighting in the roadway and/or disrupting traffic such acts constituting the offense of Breach of Peace in violation of the Common Law of South Carolina.

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



DAN JOHNSON, SOLICITOR

CERTIFIED TRUE COPY
OF ORIGINAL FILED
JAN 10 2011
C.C. CHREES,
RICHLAND COUNTY
SOUTH CAROLINA

1466

STATE OF SOUTH CAROLINA

COUNTY OF
STATE*Richland*

VS.

Curtis James Simms

AKA:

Race:

White

Sex:

Male

Age:

27

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

2011

INDICTMENT/CASE#:

- GS -

*40**0829*

A/W#:

M720628

Date of Offense:

10-9-10

S.C. Code §:

17-25-30 & 22-5-150

CDR Code #:

0 / 9 / 5 / 5☐ CASE RESTORED

SENTENCE SHEET

☐ PLEA☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: *Breach of Peace - High and Aggravated*in violation of § *17-25-30* of the S.C. Code of Laws, bearing CDR Code # *0 / 9 / 5 / 5*☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS (CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Juanita McBride
Solicitor*Curtis Simms*
Defendant*John Harris*
Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of *10* days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of *5* days/months/years and/or payment of
\$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for *3* months/years
and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which
are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the
State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

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

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

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

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

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

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

\$35-13 (Public Def/Prob) \$500 \$ _____

\$72-3, 1B TP (Law Enforce. Funding) \$25 \$ _____

\$307-1B TP (Drug Court Surcharge) \$100 \$ _____

\$50-21-114 (BUI Breath Test Fee) \$50 \$ _____

\$56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% County (if paid in installments) \$ _____

TOTAL: \$ _____

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp. *if needed*

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other: *NO contact with**victims or victim's family**Next as I.O. of the District**in judicial/legal**proceedings. Zero dollars*☐ Appointed PD or appointed other counsel, \$35.13 TP

Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

Clerk of Court/Deputy Clerk *Holmes, Cummins, Holmes*

Court Reporter

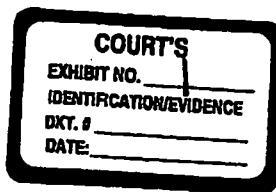
drug and alcohol; must successfully
complete anger management program.

Oct 11 10 04:30p

Mike James

803 736-1062

1467
P. 1466-A



TO: WHOM IT MAY CONCERN

My name is Alan James and I worked all day Saturday October 9 2010. I watched the game at work in between customers and was pleased with the outcome. I decided to go down to the stadium and celebrate the victory with some friends who had been there all day. It was about 7:20 PM when I left and I got caught in terrible traffic about four miles outside the stadium. It took over an hour to get that last four miles. I followed directly behind a black full sized truck for most of the way. I noticed the kids inside yelling at fans walking up the road. They were nice to the gamecock fans but not to the Alabama fans. They almost got into a couple of fights and had people flipping them off or cussing at them. I also noticed the passenger getting out and going to the bathroom. They also were revving up the engine with loud mufflers and cutting people off so they could not get into the road. I saw a lot of drivers that were cut off getting angry about their aggressive driving. Less than a mile away and I let a car in front of me and so I was one car separated from the black truck the rest of the way in. I got a couple of hundred yards from our tailgate spot when I noticed someone approaching the black truck and I vaguely knew him. As he gets to the truck a fight starts. I was limited on my view being that I had a car in between us and them and I was on the drivers side and they were fighting on the passenger side. Because of my view I am not sure if there were any punches thrown before the passenger got out but it looked like they both swung at the same time when he got out of the vehicle. From my view the passenger fell down were I could not see him anymore. Then suddenly the truck pulled over and I noticed people standing around freaking out about something. A few moments later I had a bystander tell me that the kid had been run over by the truck he got out of.

Sworn to before me this _____

day of _____, 2010.

NOTARY PUBLIC FOR S.C.

Commission Expires: _____

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 27th, 2013



Robert M. Dudek
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Richland County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

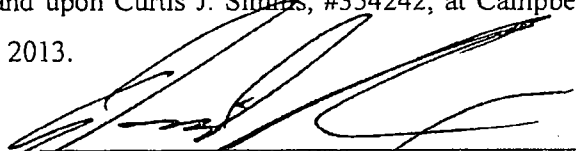
CURTIS J. SIMMS,

APPELLANT

APPELLATE CASE NO. 2013-001219

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Appellant and Record on Appeal in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and to selliott@scag.gov, and upon Curtis J. Simms, #354242, at Campbell Work Center, this 27th day of December, 2013.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of December, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023