

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Honorable Diane S. Goodstein, Circuit Court Judge

RECEIVED

Nov 17 2023

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

POLO K. SALAZAR,

APPELLANT

APPELLATE CASE NO 2022-001066

RECORD ON APPEAL

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INDEX

INDEX	i
PRE-TRIAL MOTIONS HEARING TRANSCRIPT DATED MAY 7, 2021	1
<u>JACKSON V. DENNO HEARING</u>	107
TESTIMONY	
JONATHAN DAVIS	
Direct Examination by Mr. Osborne.....	108
Cross-Examination by Ms. Hubrich	118
Re-Direct Examination by Mr. Osborne.....	140
COLLOQUY.....	145
RULING BY THE COURT.....	153
TRIAL TRANSCRIPT DATED MAY 11-19, 2021	177
PRE-TRIAL MOTIONS.....	196
JURY VOIR DIRE (FIRST PANEL).....	200
JURY VOIR DIRE (SECOND PANEL).....	227
MATTER OF LAW	244
JURY VOIR DIRE (THIRD PANEL).....	254
MOTION TO STRIKE JUROR FOR CAUSE.....	271
RULING BY THE COURT.....	272
MOTION TO STRIKE JUROR.....	273
RULING BY THE COURT.....	273
JURY VOIR DIRE (FOURTH PANEL).....	275
JURY VOIR DIRE (FIFTH PANEL).....	297
MOTION TO QUASH THE JURY PANEL.....	322
RULING BY THE COURT.....	323

JURY SELECTION.....	324
OPENING STATEMENT BY MS. GLOVER.....	346
OPENING STATEMENT BY MS. HUBRICH.....	350
OPENING STATEMENT BY MS. CORNWELL.....	355
TESTIMONY	
LETA BOEHLER	
Direct Examination by Ms. Glover.....	360
Cross-Examination by Ms. Hubrich	369
Cross-Examination by Ms. Cornwell.....	381
Redirect Examination by Ms. Glover	384
Recross-Examination by Ms. Hubrich.....	386
Recross-Examination by Ms. Cornwell	388
CHRISTINA DENSON	
Direct Examination by Ms. Glover.....	389
Cross-Examination by Ms. Cornwell.....	392
MARCUS PORTER	
Direct Examination by Mr. Osborne.....	393
MATTER OF LAW	426
RULING BY THE COURT.....	429
TESTIMONY	
MARCUS PORTER (CONT'D)	
Direct Examination by Mr. Osborne.....	430
MATTER OF LAW	452
MATTER OF LAW	455
TESTIMONY	
MARCUS PORTER (CONT'D)	
Cross-Examination by Ms. Hubrich	461
MATTER OF LAW	476

TESTIMONY

MARCUS PORTER

Cross-Examination by Ms. Hubrich	503
Cross-Examination by Ms. Cornwell.....	526
Re-Direct Examination by Mr. Osborne	538

JAMES GREEN

Direct Examination by Mr. Osborne.....	547
Cross-Examination by Mr. Wehman	563

JOSHUA SCARBOROUGH

Direct Examination by Mr. Osborne.....	565
Cross-Examination by Ms. Hubrich	577

JACOB ANTHONY CRAMER

Direct Examination by Mr. Osborne.....	579
Cross-Examination by Ms. Hubrich	606
Cross-Examination by Ms. Cornwell.....	606

MATTER OF LAW	608
---------------------	-----

TESTIMONY (IN-CAMERA)

RYAN DEWANE

Direct Examination by Mr. Osborne.....	609
Cross-Examination by Mr. Wehman	634
Cross-Examination by Ms. Cornwell.....	646
Re-Direct Examination by Mr. Osborne	653
Recross-Examination by Mr. Wehman.....	656
Direct Examination by The Court.....	658

MATTER OF LAW	662
---------------------	-----

TESTIMONY

VERA MARTINEZ

Direct Examination by Mr. Osborne.....	683
Cross-Examination by Ms. Cornwell.....	688

BETHANY DAVIDSON

Direct Examination by Ms. Glover.....	689
Cross-Examination by Ms. Cornwell.....	694

JACKIE DAVIS

Direct Examination by Ms. Glover	696
Cross-Examination by Mr. Wehman	708
Cross-Examination by Ms. Cornwell.....	714
Re-Direct Examination by Ms. Glover	717
Recross-Examination by Mr. Wehman.....	718

DAVID SWIBAKER

Direct Examination by Mr. Osborne.....	719
Cross-Examination by Ms. Hubrich	737
Cross-Examination by Ms. Cornwell.....	742
Re-Direct Examination by Mr. Osborne.....	747

JAMIE HALL

Direct Examination by Ms. Glover	748
Cross-Examination by Mr. Wehman	754
Cross-Examination by Ms. Cornwell.....	756
Re-Direct Examination by Ms. Glover	758
Recross-Examination by Mr. Wehman.....	759

PHILLIP M. MOY

Direct Examination by Mr. Osborne.....	760
Cross-Examination by Ms. Hubrich	766
Cross-Examination by Ms. Cornwell.....	775
Re-Direct Examination by Mr. Osborne.....	782
Recross-Examination by Ms. Hubrich.....	791
Recross-Examination by Ms. Cornwell	793

MATTER OF LAW	795
---------------------	-----

MATTER OF LAW	826
---------------------	-----

TESTIMONY

MATTHEW ADAM BROOKS

Direct Examination by Mr. Osborne.....	827
Cross-Examination by Ms. Hubrich	882
Cross-Examination by Ms. Cornwell.....	893
Re-Direct Examination by Mr. Osborne.....	901
Recross-Examination by Ms. Hubrich.....	905

SALINA SHEPPARD

Direct Examination by Ms. Glover	907
Cross-Examination by Ms. Cornwell.....	914

RACHEL L. NGUYEN	
Direct Examination by Mr. Osborne.....	915
Cross-Examination by Mr. Wehman	935
Cross-Examination by Ms. Cornwell.....	938
MATTER OF LAW	940
TESTIMONY (IN-CAMERA)	
RYAN DEWANE	
Direct Examination by Mr. Osborne.....	949
Cross-Examination by Mr. Wehman	951
Re-Direct Examination by Mr. Osborne	955
RULING BY THE COURT.....	958
TESTIMONY	
RYAN DEWANE	
Direct Examination by Mr. Osborne.....	962
Cross-Examination by Ms. Cornwell.....	981
Re-Direct Examination by Mr. Osborne.....	983
Recross-Examination by Ms. Cornwell	985
NICOLE HARDIN	
Direct Examination by Mr. Osborne.....	986
Cross-Examination by Mr. Wehman	997
Cross-Examination by Ms. Cornwell.....	1001
Re-Direct Examination by Mr. Osborne	1003
Recross-Examination by Mr. Wehman.....	1009
Recross-Examination by Ms. Cornwell	1011
JONATHAN DAVIS	
Direct Examination by Mr. Osborne.....	1011
MATTER OF LAW	1038
JONATHAN DAVIS (CONT'D)	
Direct Examination by Mr. Osborne.....	1046
Cross-Examination by Ms. Hubrich	1051
Cross-Examination by Ms. Cornwell.....	1091
NICHOLAS I. BATALIS	
Direct Examination by Mr. Osborne.....	1113
Cross-Examination by Ms. Cornwell.....	1127

STATE RESTS	1128
MOTION FOR DIRECTED VERDICT	1129
RENEWAL OF ALL MOTIONS	1129
RULINGS BY THE COURT	1129
MOTION FOR DIRECTED VERDICT	1129
RENEWAL OF ALL MOTIONS	1131
RULINGS BY THE COURT	1131
DEFENSE FOR MR. FORTUNE RESTS.....	1133
DEFENSE FOR MR. SALAZAR RESTS.....	1133
CLOSING ARGUMENT BY MR. OSBORNE	1135
CLOSING ARGUMENT BY MS. HUBRICH	1166
CLOSING ARGUMENT BY MS. CORNWELL	1177
CHARGE ON THE LAW	1193
JURY NOTE	1222
ADDITIONAL CHARGE ON THE LAW.....	1223
ALLEN CHARGE	1228
VERDICT	1231
JURY POLL.....	1233
MOTION TO SET ASIDE JURY VERDICT	1240
RULING BY THE COURT.....	1241
SENTENCING	1253
POST-TRIAL MOTIONS HEARING TRANSCRIPT DATED JUNE 24, 2022.....	1257
ORDER DENYING DEFENDANT’S MOTION FOR A NEW TRIAL.....	1281

INDICTMENTS	1282
SENTENCE SHEETS	1294
CERTIFICATE OF COUNSEL	584

THE FOLLOWING EXHIBIT IS ON FILE WITH THE COURT:

STATE’S EXHIBIT NO. 191 (DISK (FORTUNE INTERVIEW, CLIPPED))

1 STATE OF SOUTH CAROLINA) GENERAL SESSIONS COURT
2 COUNTY OF CHARLESTON) CASE NO.
3 2019-GS-18-0416-0422
2019-GS-18-0437-0443

4 STATE OF SOUTH)
5 CAROLINA,)
6 Plaintiff,) Transcript of Record
7 vs.)
8 MUAHAH FORTUNE & POLO) Date: May 7, 2021
9 SALAZAR,)
Defendant.

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B E F O R E:

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The Honorable Diane Goodstein

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Denise J. Lauder, RPR

22

Ninth Judicial Circuit

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1	I N D E X	
2	WITNESS/EXAMINATION	Page
3	<u>JONATHAN DAVIS</u>	107
4	DIRECT EXAMINATION BY MR. OSBORNE	108
5	CROSS-EXAMINATION BY MS. HUBRICH	118
6	REDIRECT EXAMINATION BY MR. OSBORNE	140
7	CERTIFICATE OF REPORTER	179

8		
9	E X H I B I T S	
10		Page/Line
11	DFT. EXH. 1, Motion to Severe	8 6
12	DFT. EXH. 2, Motion	146 11

13
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19
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1 (The following proceedings were had
2 5/7/21, Dorchester County General Sessions Court,
3 11:50 a.m.)

4 MR. OSBORNE: So before you today, Your
5 Honor, is the State v Muanah Fortune as well as
6 Polo Salazar. And I understand you've heard the
7 facts of this case many times. These are two of
8 four codefendants accused of murder, as well as a
9 number of other charges.

10 There are a number of indictments for
11 both of the two defendants. I can read them into
12 the record if you would like.

13 THE COURT: Yes.

14 MR. OSBORNE: Okay. Mr. Fortune, who
15 is represented by Mrs. Hubrich, has been charged
16 with murder, that's 2019-GS-180146; attempted
17 murder, 2019-GS-180417; burglary, first degree,
18 0418; possession of a firearm during the commission
19 of a violent crime, 0420; ill treatment of animals,
20 0421, and armed robbery, 0422.

21 Most of these are duplicative with the
22 exception of one charge with Mr. Salazar who is
23 represented by Ms. Cornwall. The first charge is
24 murder 2019-GS-180437; burglary, first degree,
25 0438; possession of a stolen vehicle, that's a
 different charge, 0439; attempted murder, 0440;

1 possession of a firearm during the commission of a
2 violent crime, 0441; armed robbery, 0442; and ill
3 treatment of animals, 0443.

4 And, Your Honor, I have spoken to the
5 defense. I think I have it narrowed down. We have
6 about ten pretrial matters; most of them are going
7 to be pretty quick.

8 THE COURT: Okay.

9 MR. OSBORNE: Only a couple of them
10 have any meat to them. I have the State's
11 pretrial. We can enter that into the record if you
12 would like.

13 THE COURT: Sure. Counsel, do you have
14 copies of the trial brief?

15 MS. HUBRICH: Yes, Your Honor.

16 MS. CORNWELL: Yes, ma'am.

17 THE COURT: Thank you. Is there any
18 consent with regard to any of the motions; yes, no,
19 maybe?

20 MR. OSBORNE: I would say Ms. Cornwell
21 and I have already talked. I think it's fair to
22 say we have made some concessions; she has made
23 some concessions on some issues. On other matters
24 we need your help.

25 THE COURT: Okay.

1 MS. CORNWELL: That's correct, Your
2 Honor.

3 THE COURT: How about -- Ms. Hubrich.

4 MS. HUBRICH: Judge, I believe -- so my
5 main motion and I believe my first motion would be
6 a motion to sever in which I'm going to ask you to
7 listen to the arguments, and then -- and hold
8 judgment until you hear the other motions. A lot
9 of what my motion to sever relies on is how you are
10 going to find in the other motions --

11 THE COURT: Okay.

12 MS. HUBRICH: -- regarding statements
13 and DNA. How you find there I think is going to
14 affect whether or not you sever the case. So I
15 would like to argue my severance and give you the
16 heads up as where we are and then go into my
17 motion.

18 As I told Mr. Osborne pretrial, I think
19 a lot of ours are going to be -- and I think I told
20 Your Honor this back in chambers, a lot of these
21 will be resolved as we go through the motions. I
22 don't think I'm going to need to make certain
23 motions. I just needed them to be preserved
24 because I couldn't get a clear answer and I needed
25 the Court to make some findings.

1 THE COURT: Okay. Got it. Good.

2 MR. OSBORNE: With that said, maybe the
3 motion to severe might be the best place to start?

4 THE COURT: Sounds like it.

5 MR. OSBORNE: And Ms. Chelsea Glover, I
6 don't know if you've met her, she's going to
7 handle --

8 THE COURT: I do. I have known Chelsea
9 Glover -- let me think. I have known Chelsea
10 Glover since she was contributing to the brain
11 trust that is the office of a certain judge in
12 Columbia.

13 MS. GLOVER: Yes, Your Honor.

14 THE COURT: Yes, ma'am. Ms. Hubrich.

15 MS. HUBRICH: Thank you, Judge. At
16 this point I would like to proceed on my motion to
17 sever the trial of Muanah Fortune and Polo Salazar.

18 THE COURT: Okay.

19 MS. HUBRICH: I have submitted to the
20 Court --

21 THE COURT: I think I've got it.

22 MS. HUBRICH: Can I make it a
23 Court's --

24 THE COURT: Motion to severe the trial,
25 yes. Let me make sure. Yep.

1 MS. HUBRICH: The facts are exhaustive.
2 I know we have been through these facts on numerous
3 hearings. I have put them into my motion -- may I
4 please make this a Court's exhibit?

5 THE COURT: Yes.

6 (DFT. EXH. 1, Motion to Severe, was
7 marked for identification.)

8 MS. HUBRICH: If the record could
9 reflect, this is Court's Exhibit 1 for the purpose
10 of pretrial motion only.

11 THE COURT: Okay.

12 MS. HUBRICH: Judge, the facts of this
13 case -- there are two witnesses Marcus Porter and
14 David Swibaker. They are going to testify that
15 four armed black males had masks on, kicked in the
16 door to the place where they were living, and
17 robbed them of various things -- drugs, items --
18 shot another occupant, he subsequently died, shot a
19 canine, also died at the scene, and shot
20 Mr. Porter. And those are the facts.

21 The four defendants that were
22 ultimately arrested, two of them are being tried
23 this week, the State has opted to try them
24 together, and two are being tried next week. The
25 State wanted to try all four of them together, but

1 because of COVID-19 regulations they had to, I
2 think, separate it into two. So that's why we're
3 here today.

4 In preparing this case for trial, it
5 became apparent quickly that my client could not
6 have a full and fair trial if his case was tried
7 with Polo Salazar. And it became apparent the more
8 we prepared for court.

9 In this case, my client is accused to
10 have been a passenger in a car. The driver of that
11 car is alleged to be Polo Salazar. The driver of
12 that car led the police on a multi-county chase
13 that lasted, I think, in excess of 30 minutes.

14 And that's why Mr. Salazar is charged
15 with another charge. He's charged with possession
16 of a stolen motor vehicle in addition to what
17 Mr. Fortune has.

18 The police will testify that there were
19 items thrown as they were chasing it. My client
20 gave two statements. The first statement that he
21 gave he denied involvement. The second statement
22 that he gave inculcates both himself and his
23 codefendants. And so we have those issues to deal
24 with.

25 Law enforcement in this case went to

1 retrieve buccal swabs to get DNA. And they went to
2 my client -- they went to all four defendants.
3 They went to my client and my client went along
4 with it and had his buccal swab taken, and that was
5 sent to SLED for DNA results.

6 SLED came back and, to be completely
7 frank with the Court, these DNA results really
8 don't hurt us. We're going to talk about that.
9 Mr. Wehman is going to argue the motion regarding
10 those DNA results.

11 But they don't hurt us in any way,
12 shape, or form from our perspective. They
13 certainly hurt Mr. Salazar much more significantly
14 than Mr. Fortune. But that being said, when the
15 new solicitor David Osborne took this case, he
16 reviewed those search warrants and decided that
17 there was not enough probable cause, and so he
18 advised all of us in a pretrial status conference
19 in April that he was going to review the search
20 warrant -- or he was going to correct the issue.

21 And that was pretty much the last I
22 heard of it until Friday afternoon. And it was
23 Friday, April 2nd. I was actually getting my
24 second COVID vaccination; it was 2021; I was in
25 downtown Charleston getting my second COVID

1 vaccine. I had taken the day off.

2 At 2:59, I received a phone call saying
3 that my client was not complying with the buccal
4 swab, the new buccal swab, and that I should call
5 and advise him it was probably in his best
6 interest.

7 I had no problem advising him it was in
8 his best interest, but I was not in the office.
9 Advised the solicitor that I was protected the
10 following week, that I was going to the Grand
11 Canyon with Boy Scouts. I was leaving at 5:00 a.m.
12 on Saturday and I didn't know how I was going to
13 get to my client in the Berkeley County Detention
14 Center.

15 He's been held in the Berkeley County
16 Detention Center this whole time, and I was in
17 downtown Charleston. I assumed I had a bit more
18 time.

19 On Monday afternoon as I believe I was
20 in Arizona, I contacted my office, my paralegal,
21 and advised her to get word that he should comply
22 with this buccal swab, but by then it was too late.
23 They had tried to get his buccal swab on Friday
24 afternoon, Monday morning, and then they
25 discontinued their efforts.

1 The police officer in his report
2 advised that he had opted not to do a forced swab.
3 My client is in custody. They had a search
4 warrant. So he opted, I guess, not to hold him
5 down and take a buccal swab.

6 Called the State and the solicitor
7 advised, we're not going to try again. My office
8 got word to my client on Monday afternoon to go
9 ahead and comply. And that was pretty much the
10 last I heard of that whole DNA process until I got
11 a search warrant return e-mailed to me, that was on
12 April 27, 2021, that I found out that my client had
13 not complied.

14 And at that point, I didn't -- I didn't
15 know that they hadn't gone back to get it, to do
16 the new DNA results. We did get the DNA results I
17 believe just earlier this week, the new DNA results
18 came back. They are essentially the same as they
19 were before.

20 And I tell you all that to talk a
21 little bit about severance. When criminal
22 defendants are tried -- who are jointly tried, they
23 are not typically entitled to have separate trials.
24 I've been doing this 21 years. I've never seen
25 codefendants that want to be -- if the State wants

1 to try them together, I've never seen them be
2 severed.

3 So I thought really long and hard about
4 what I could say to Your Honor that would make it
5 as apparent to you as it is to me that it just
6 isn't a fair trial as we go forward.

7 I put some of that into the motion
8 that's Court's Exhibit 1. I will say, Your Honor,
9 that the evidence against Polo Salazar is much more
10 significant than the evidence again Muanah. He's
11 the one driving the car. He's the get-away driver.
12 He's the one who admits that he knows the car is
13 stolen. His DNA is all over quite a few of the
14 items in the car.

15 He -- his -- the charges against him --

16 THE COURT: Now, this he is?

17 MS. HUBRICH: Is Salazar. Yes. The
18 evidence against him is much more substantial than
19 the evidence against Muanah Fortune. And Muanah
20 ends up being prejudiced by the fact that the
21 evidence is much more weighty against the
22 codefendant that he's being tried with. And I
23 think that presents confusion for the jury.

24 This ultimately ends up being an
25 attempt to convict my client just by implication.

1 Just by the fact that we can prove this case
2 against Polo Salazar, so why don't you just find
3 Muanah Fortune guilty too.

4 And based on that, it's a due process
5 right for... and I'm asking you to sever it based
6 on that.

7 In addition to that, we have the
8 problem with the DNA analysis. And I know I was
9 exhaustive about the buccal swab and how that all
10 happened. When we started talking about how to try
11 this case, I advised the State -- the State advised
12 me, we want to present to the jury that your client
13 refused to comply with the DNA buccal swab.

14 And I said, well, I don't think I can
15 keep that out. I think it's -- borders on talking
16 about his right to remain silent, but I don't think
17 I can keep that out, as long as I can talk about
18 the fact that he didn't really not comply because
19 he did comply the first time.

20 And then I get to talk about the search
21 warrant return and how his DNA is excluded from all
22 this other stuff you got. And the State advised
23 me, no, you can't do that because the first search
24 warrant is invalid.

25 And I said, but I'm not challenging the

1 first search warrant. And he said, well, that
2 doesn't matter because you're a codefendant.

3 So by virtue of the fact that this case
4 is being tried together, I'm not allowed to get
5 into the DNA evidence that arguably helps my
6 client. So that's where we find ourselves and
7 that's why this case is different than every other
8 case out there where the State tries them jointly;
9 because I think the State and the co-defendant's
10 counsel will consent that that first search warrant
11 is invalid.

12 I think they both think it's invalid.
13 I'm not challenging it. If I was being tried
14 separately, if Muanah Fortune was being tried
15 separately, I don't challenge that the search
16 warrant, the DNA comes in, the jury gets to hear
17 that relevant evidence.

18 Because we're being tried together,
19 Ms. Cornwell is going to challenge that search
20 warrant. The State is going to say, I can't talk
21 about it now because it's -- it's been found to be
22 invalid.

23 THE COURT: Let me be clear, but it
24 would have been -- it would have been a search
25 warrant for your client and then a search warrant

1 for Mr. Salazar.

2 MS. HUBRICH: Correct.

3 THE COURT: Okay.

4 MS. HUBRICH: But the DNA analysis that
5 comes back as a result. Do you understand? It's
6 very convoluted.

7 THE COURT: Well, my -- but this is
8 where -- this is where I'm losing you, and help me.
9 Help me. So two search warrants. You don't care
10 about the first one. Whether it's good, bad, or
11 indifferent with regards to your client, you don't
12 care.

13 MS. HUBRICH: Correct.

14 THE COURT: Right. No objection. So
15 then how does Mr. Salazar object to the search
16 warrant with regards to your client?

17 MS. HUBRICH: Because the search
18 warrant leads to a -- that's what I want to get
19 into, the DNA analysis that happened as a result of
20 the defective search warrant to get buccal swabs.
21 So they went and got the first search warrant, law
22 enforcement did, for all four codefendants.

23 I think the State and Mrs. Cornwell
24 would both argue that that's a defective search
25 warrant. So they get all four and they send it up

1 for a DNA analysis. I want to talk about what that
2 DNA analysis is. For once, it actually helps me,
3 Judge. That never happens, but for once the DNA
4 analysis says, Muanah Fortune excluded from this.
5 Muanah Fortune excluded from that. Muanah Fortune
6 excluded from this.

7 And so I have all of these things where
8 I can say, hey, jury, he wasn't there. Or whatever
9 defense I'm going to make because the DNA shows it.
10 But now I can't get into it because my -- the
11 codefendant's counsel is going to say, that's a
12 defective search warrant. And the State is going
13 to say, you can't talk about the results of that
14 DNA analysis because it's a defective search
15 warrant. And so they're going to preclude me.

16 So what the State wants to do and --
17 what I think the State wants to do, and I
18 understand why they're saying it, because they
19 don't want me to say there's no DNA evidence from
20 Muanah Fortune.

21 They don't want me to be able to argue
22 that there is no DNA evidence. So they want to
23 say, well, we don't have DNA evidence because he
24 refused to comply. But then I want to say, well,
25 he didn't really refuse to comply.

1 He just wanted to talk to his lawyer
2 and you literally gave me like at the close of
3 business, you gave me two hours on Friday and maybe
4 four hours on Monday to get to my client to tell
5 him to comply. And he just wanted to talk to his
6 lawyer.

7 THE COURT: Okay.

8 MS. HUBRICH: And they never went back.
9 So they want to say, you can't talk about the DNA
10 analysis, but we get to say that he refused the
11 buccal swab. Does that make sense?

12 THE COURT: Uh-huh, yeah.

13 MS. HUBRICH: If I wasn't being tried
14 with Polo Salazar, it wouldn't be an issue. We
15 could talk about the -- we could talk about the
16 first search warrant. I am not going to challenge
17 it. I can't imagine that the State wouldn't bring
18 it in if I'm not challenging it.

19 THE COURT: Okay.

20 MS. HUBRICH: So it's a unique
21 circumstance. It's one that I have never seen
22 above and I don't know that it's one that can be
23 corrected unless we severe these trials.

24 We are then going to get into my
25 client's statement which is a whole other issue.

1 We will have a Jackson v Denno hearing today and
2 we're asking this Court to get rid of the statement
3 entirely because it's not voluntary. I'm going to
4 be completely frank; I suspect that you are going
5 to admit the statement into evidence. At that
6 point the Jackson v Denno then moves to another
7 part.

8 The State, because it wants to avoid
9 Bruton, wants to just put little clips in of my
10 client's video confession. And they have given me
11 those clips. I think they sent them to Your Honor.
12 They've given them to everybody what these little
13 clips are.

14 The way this relates to severance now,
15 if I was being tried separately, that whole video
16 comes in front of the jury. We don't have to worry
17 about Bruton. The whole video comes in, and I get
18 to argue to the jury -- because the State has to
19 prove to the jury beyond a reasonable doubt that
20 that statement is voluntary.

21 THE COURT: Right.

22 DEFENSE: And I get to argue, hey,
23 jury, look here. He sat there for three hours
24 without any breaks. Hey, jury, look at how many
25 times they say to the defendant, we'll help you

1 out. Why don't you just erase the mistake you
2 made?

3 Look at how many times -- and I get to
4 argue to the jury that this wasn't voluntary of the
5 length, because of the different statements the
6 police make. I can't do that if we're only going
7 to do little clips. And it precludes my ability to
8 present a full and complete defense.

9 And so that's why some of these issues
10 we have to talk about in the pretrial motions go
11 back to my motion for severance.

12 THE COURT: Uh-huh.

13 MS. HUBRICH: And so what we're really
14 talking about what rights are being affected by
15 this, this joinder we're really talking about the
16 right to due process; the right to a full trial;
17 the right to present a defense.

18 And because of that, I'm asking you to
19 sever these cases, and I would just ask you to hold
20 your judgment on that --

21 THE COURT: I will. You got it.

22 MS. HUBRICH: -- finish pretrial.

23 THE COURT: And do you want to wait
24 until -- how do you want to do this?

25 MR. OSBORNE: I feel like I can deal

1 with the DNA issue easiest, and then the Denno
2 issue and the Bruton issue --

3 THE COURT: Okay.

4 MR. OSBORNE: -- are probably going be
5 a little bit more in the weeds.

6 THE COURT: All right.

7 MR. OSBORNE: The DNA issue, Ms.
8 Hubrich is correct. The initial search warrant
9 upon my review in the case, I didn't think I could
10 make a straight-face argument to you there was PC
11 there. So I asked Detective Davis here, Sergeant
12 Davis here to cure those search warrants. He did.

13 We did have a status conference with
14 Judge Murphy on March -- this is just for the
15 record. This is not really covering what Ms.
16 Hubrich was talking about -- on March 24th of this
17 year. At that status conference, I alerted
18 Ms. Hensley, Ms. Hubrich, Ms. Cornwall, as well as
19 Ms. Gay and Judge Murphy my concern about the
20 search warrants and I would be curing them.

21 Judge Murphy did ask me, well, do you
22 think you can get those done and the results back
23 by May 10th trial. I had already spoken to SLED
24 analyst, Ryan DeWane, and she insured me that they
25 would be done; and they have been done.

1 So the search warrant wasn't executed
2 until I guess it would be about nine or ten days
3 later. I did not -- honestly, I don't remember
4 whether Summerville Police Department notified me
5 of the exact date and time that they would be
6 executing the search warrant on each defendant; I
7 don't know. But I do know that had I been alerted
8 that, you know, Ms. Hubrich, or any of the other
9 defense attorneys wanted to be present or wanted to
10 have some sort of notification, I would have done
11 that.

12 But in reference to the way it all went
13 down. So it is correct they went to go execute the
14 search warrants for all four codefendants. Muanah
15 Fortune was the only one who refused. I then
16 called Ms. Hubrich and we had that conversation.

17 She did tell me that she didn't think
18 she could get to him by then. So I said, well, do
19 you think you can at least notify family members to
20 let him know. Because we both agreed; the DNA
21 result doesn't really hurt him that bad. I mean,
22 he does show up in a proposition, but there is a
23 good argument, the weight. You know, what is the
24 weight to that?

25 She said she would try. Apparently, it

1 didn't happen, or if it did, he still refused the
2 second time. The happy accident that happened here
3 is when Ryan DeWane from SLED analyzed the three
4 new buccal swabs without me asking and I guess this
5 is just SLED protocol, she went ahead and
6 reanalyzed the original buccal swab taken from
7 Fortune. So this result that we have, this DNA
8 report contemplates proposition involving him.

9 So that's why when I sent the e-mail to
10 Mrs. Hubrich earlier, I -- how should I say it? In
11 my mind she has -- they have two options as to this
12 defense. They can either challenge the search
13 warrant and we don't like the DNA. Okay.

14 If that's the case, Ryan DeWane is
15 prepared to testify excluding his DNA. And if
16 that's the case, I think we do have to explain to
17 the jury why we didn't test it. If she doesn't
18 mind the DNA, which would make perfect sense to me,
19 then have Ryan DeWane testify to the proposition
20 with all four defendants.

21 And then Ms. Cornwell -- like you said,
22 Your Honor, I don't believe Ms. Cornwell would have
23 standing to object to the defective first search
24 warrant, and then the jury gets to hear the results
25 of all four codefendants.

1 THE COURT: Okay. How do you feel
2 about that?

3 MS. HUBRICH: Two things. The time
4 period -- if I could just address quickly, the time
5 period between my client refusing to comply, using
6 that language, makes my skin crawl, because I don't
7 think you can refuse to comply with a search
8 warrant when you are in jail. I think that's
9 almost impossible to do. There is a way to make it
10 happen.

11 But it was on -- they tried to do the
12 first buccal swab on a Friday afternoon and did the
13 second buccal swab the following Monday, literally
14 the next business day in the morning. We got word
15 to the family to tell him to go ahead and comply.
16 So there is semantics to that.

17 In regards to using his DNA for the
18 second search warrant, I have no objection to that.
19 We are moving to challenge the DNA entirely. Not
20 based on a defective search warrant. Based on it's
21 more prejudicial than probative 404(b). So Pierce
22 is arguing that. We are moving to get rid of the
23 DNA entirely because it's more prejudicial than
24 probative.

25 THE COURT: Okay.

1 MS. HUBRICH: But not because of the
2 search warrant. And I believe Ms. Cornwell is
3 joining that argument also. I saw her motion that
4 said she is joining that argument based on 404B.

5 THE COURT: Okay.

6 MS. HUBRICH: I assume that she is
7 going to object to the DNA entirely. Ms. Cornwell
8 is going to object to the DNA entirely because they
9 used Muanah Fortune's DNA that was taken by a
10 defective search warrant and put them in these
11 propositions that are now going to be presented to
12 the jury.

13 I'm thinking she is going to object to
14 that. I don't know. I have no problem with it,
15 but I'm assuming cocounsel will object.

16 THE COURT: Got it.

17 DEFENSE: Because they are using
18 evidence that was taken by a defective search
19 warrant, even though I'm not challenging that
20 search warrant.

21 THE COURT: Okay. Got it.

22 MS. HUBRICH: Judge, did you need the
23 two DNA reports?

24 THE COURT: Huh-uh. Okay.

25 Ms. Cornwell, your motion to sever. I

1 think that's where we are.

2 MS. CORNWELL: May I?

3 THE COURT: Have you had your vaccines?

4 MS. CORNWELL: Unfortunately, I have
5 not. I contracted COVID two days before I was
6 supposed to get my vaccine. So I now cannot get it
7 for 90 days, but because I just recently got over
8 it, I think I'm pretty --

9 THE COURT: Oh, you have antibodies.
10 Congratulations, you got them the rough way.

11 MS. CORNWELL: It was frustrating to
12 say the least. My household member tested
13 positive, but we're not going to talk about that
14 because we have finally gotten over that.

15 THE COURT: I'm with you. I
16 understand. Yes.

17 MS. CORNWELL: Your Honor, with the
18 motion to sever for Mr. Salazar, and I talked to
19 Mr. Osborne and Mrs. Hubrich about this, I'm more
20 than happy to argue it now, but it may be better
21 for me to bookend because, like Ms. Hubrich, I'm
22 probably going to pull in parts of other motions as
23 well to build on that motion to suppress.

24 THE COURT: Okay. Okay.

25 MS. CORNWELL: So it may be easy for

1 the Court to hear the first motion to suppress to
2 get a preview, and then have a closing argument on
3 my motion to suppress.

4 THE COURT: I understand. That's fine
5 with me. Absolutely fine with me. Got it. All
6 right. Now --

7 MS. CORNWELL: I will say with the DNA
8 stuff, I can at least touch on that a little bit
9 because I do have those motions --

10 THE COURT: Yeah. I'm a little bit --
11 everybody seems to think you're going to object to
12 Mr. Fortune's DNA that was taken with -- taken the
13 first time, I gather reconfirmed with the second
14 search warrant. Talk to me.

15 MS. CORNWELL: And they are correct in
16 that.

17 THE COURT: Okay.

18 MS. CORNWELL: My basis of objection on
19 that is as Mrs. Hubrich indicated. There is a
20 statement Mr. Fortune gives that implicates himself
21 and my client in all of this.

22 He's the only one that gives that
23 statement. It is in a second interview after hours
24 of talking, after a lot of cajoling and convincing.
25 I would disagree with Ms. Hubrich that there is

1 more evidence against my client.

2 The only thing that really my client
3 has to do with anything is that he's in a car that
4 three other people who were known to be in the
5 house are in throwing evidence out. He admits to
6 being in the car. That's all there's evidence of.

7 And even with the DNA, the evidence
8 doesn't conclusively put my client on any of the
9 DNA. He can't be excluded from I think two items
10 that were in the car, but he can't be identified
11 through DNA by any of that. And we will get into
12 that in the separate motion to suppress the DNA and
13 reliability under 702.

14 When it comes to arguing the DNA from
15 the defective warrant with Mr. Fortune being
16 included in the analysis where we had to get a
17 valid search warrant, the problem comes in that I'm
18 going to continue to argue that this is sort of law
19 enforcement's kind of MO and how they have gotten
20 him to cooperate, for him to do all this.

21 He's not even submitting a second DNA
22 sample so that -- you know, the first sample came
23 back, it was defective; but law enforcement has
24 admitted it was defective. That comes back and
25 doesn't harm him at all. He doesn't submit to a

1 second sample. So they can't retest a solid
2 sample, a validly collected sample against him to
3 try to link him even further to this.

4 But they get my client's second sample,
5 and because of that I think it gives at least an
6 argument of prejudice in showing bias, and showing
7 why he would also be so cooperative in helping law
8 enforcement in trying to implicate my client in
9 things.

10 You know, the fact that my client gives
11 DNA that's inconclusive against him, so they want
12 to then retest the DNA to see if anything comes
13 back, but they don't retest his DNA.

14 THE COURT: I thought they did. I
15 thought they ultimately did get it at the same
16 time, correct?

17 MS. CORNWELL: No, they never got --

18 MS. HUBRICH: Not Mr. Fortune.

19 THE COURT: Oh, okay. I thought you
20 said they came back. Okay.

21 DEFENDANT: No. They came back a
22 second time the following Monday.

23 THE COURT: Right.

24 MS. HUBRICH: And he said, I still
25 haven't spoken to my lawyer. And then they

1 discontinued efforts after that.

2 THE COURT: Okay. So what they did
3 they had the search warrant and they just used the
4 first sample.

5 MS. HUBRICH: Correct.

6 THE COURT: Okay. Go ahead.

7 MS. CORNWELL: And so that is -- and
8 what -- I don't think myself or the State expected
9 is in the new analysis and report that came back
10 that Muanah Fortune, his samples wouldn't have been
11 tested. It wouldn't be in the new report.

12 So the report would be for the three
13 codefendants with the -- what we will say is a
14 buccal swab that was taken through a search warrant
15 that was validly issued by the Court and compared
16 those. We didn't think Muanah Fortune's
17 information from the illegally received sample
18 would have been included.

19 Unfortunately, because it is included
20 in that, I believe that we are going to have to
21 address that issue. And, of course, my position is
22 going to be, and I think I can argue to a jury, is
23 kind of one of those things that make you question
24 policy and procedure and how things are done,
25 what's going on, and why, you know, he gives a

1 first statement that says he's not doing anything.

2 And I believe one of the officers is
3 going to testify that right before they are
4 supposed to take everybody to the jail, that kid
5 looks up at him and looks at the ground, and he
6 just knew that that kid wanted to talk to him.

7 And he brings him back, and two, almost
8 three hours later, we finally elicit this, you
9 know, confession. They get the DNA from an illegal
10 manner and send it off. It doesn't harm him. They
11 are still wanting to help me out, and yet my
12 client, all of a sudden, is getting a second sample
13 done and getting tested again and again.

14 I think it goes to not the weight of
15 the evidence on me arguing they don't really have
16 evidence against my evidence. They have him in a
17 car. And that's all they have, and this is the
18 only way we're convincing this kid of promising him
19 things, by, you know, helping him out as much as
20 they can to get him to identify my client. And I
21 think it goes to credibility. I think it goes to
22 weight, I think. And so I think that --

23 THE COURT: Okay.

24 MS. CORNWELL: That's why I'm objecting
25 to that sample.

1 THE COURT: Are you objecting to the
2 sample or not objecting? Are you objecting to the
3 sample or commenting on the fact that the -- they
4 didn't obtain the second one?

5 It seems to me that --

6 MS. CORNWELL: I think --

7 THE COURT: -- you're not -- that you're
8 not coming from a place where I've got to make a
9 determination in regards to standing. It is just
10 -- what you are saying is, see, there he goes
11 again.

12 MS. CORNWELL: I think I can argue he
13 refuses to comply. And I think Mrs. Hubrich wants
14 to say -- and I understand the argument, you know,
15 that -- of what it is. But I'm going to stand up
16 and say, he refused to comply. And the reason he
17 refused to comply was because, you know, they made
18 all these promises to him and he didn't think he
19 needed to do anything. And, you know, he was
20 already getting helped out.

21 So he's refusing to comply, and then
22 even though they admitted it's a defective warrant,
23 they still include him on the DNA report to show,
24 you know, that he's not included on some of these
25 DNA samples.

1 I will let the Court know nobody is --
2 none of the defendants are conclusively identified
3 by DNA. They're all propositions, but the DNA
4 doesn't say that any of these defendants' DNA is
5 found on these items. They are all speculation
6 propositions.

7 So I'm going to argue that he didn't
8 help out, he refuses to comply and still included
9 on there because they're really just wanting you to
10 see that credibility and they're hoping to bolster
11 that --

12 THE COURT: Okay. Got it.

13 Yeah. Mr. Osborne, let me tell you
14 what I'm hearing. What I'm hearing is that -- and
15 of course it's going to be things that have to
16 occur and they will have to be -- there has to be
17 some sort of testimony for Ms. Cornwell to be able
18 to argue what she's saying she is going to argue,
19 but she is not taking the position that she has
20 standing to object to the admissibility of the DNA
21 of Mr. Fortune.

22 She's not handling it that way. I'm
23 not worrying about that. Now, where it goes into
24 the sever, it's still there. So -- but it's not a
25 standing issue. It's an issue of -- and, quite

1 frankly, I guess -- you know, I guess that worst
2 case scenario is whoever went to collect the second
3 sample is going to say he wanted to talk to his
4 attorney first. He wanted to talk to his attorney
5 first and -- and that would be whatever that is.

6 And, you know, Ms. Hubrich may find
7 herself as a witness which will be uncomfortable,
8 but that's the worst case scenario on that issue as
9 I see it. I'm not -- this is -- this is going to
10 be a do, Ms. Cornwell.

11 Now having said it, it's probably going
12 to come roaring in, but it's going to be a do to
13 have the testimony in this trial that this
14 gentleman didn't comply because -- you gotta get it
15 in here. You can't just go out and make it up.
16 You're not going to do that, so I'm not worried
17 about that.

18 SOLICITOR: Okay.

19 THE COURT: Not worried about it.

20 SOLICITOR: Yeah.

21 THE COURT: And you're not going to say
22 he didn't comply, right?

23 SOLICITOR: No, I don't want to.

24 THE COURT: Okay.

25 MS. HUBRICH: Well --

1 THE COURT: I'm not concerned about it.

2 MS. HUBRICH: -- I guess, you know, the
3 commenting on the right to remain silent, if it's a
4 codefendant's counsel, that's not the State
5 commenting on it. So that argument is now
6 precluded. I was not anticipating Ms. Cornwell.

7 THE COURT: That's what keeps you
8 coming back for me.

9 MS. HUBRICH: But, Judge, that still
10 puts me in the position that the State was going to
11 object to -- and this is what started this whole
12 conversation is when I said, well, okay, if you say
13 he, you know, refused to comply, then I get to get
14 into the fact that, no, he didn't actually. You
15 actually didn't do it the first time.

16 And then he said, well, you can't
17 comment on that. I said, well, after you kick the
18 door open, I'm going to walk right through it.

19 I just want to make sure that I'm
20 allowed to walk through that door.

21 THE COURT: Yeah.

22 MS. HUBRICH: Okay.

23 THE COURT: If the doors get opened,
24 the doors get opened, and then they get shut and --

25 MS. HUBRICH: Absolutely.

1 MR. OSBORNE: That was when I didn't
2 think the SLED's analyst could parse them apart,
3 but now she can parse them apart. So we want to
4 get into the police wanted to do a super good job
5 the right way, I have no problem with that.

6 MS. HUBRICH: But I will say, just in
7 piggy-backing on Ms. Cornwell's argument, can you
8 imagine, Judge, and we're going to have to imagine
9 this next week, explaining this to a jury
10 coherently so that they can make a full and fair
11 decision.

12 It took us an hour and a half with how
13 many law degrees in the room to figure it out?
14 It's taken me a week to do as Mr. Osborne called it
15 the mental gymnastics to get to where we are now.

16 THE COURT: But, see, here's the thing:
17 Between the three of you, you're so absolutely
18 brilliant and fabulous, and it was very clear to
19 me, simple, bada bing, bada boom.

20 So this jury is going to have the
21 brilliance of all of these brilliant minds. I
22 think they're going to be in brilliant shape.

23 MS. HUBRICH: I said all that to say,
24 jury confusion is another part of the motion to
25 sever.

1 THE COURT: This one doesn't concern
2 me. It doesn't mean that some others will not. Do
3 you understand what I'm saying? I have not made a
4 determination with regards to the motion to severe.
5 This one -- this one I think is manageable.

6 Okay. I'm not worried.

7 All right. Next.

8 MR. OSBORNE: This is Ms. Hubrich's
9 motion to suppress evidence of the gunshot residue.

10 MS. HUBRICH: I would ask that we get
11 to do Mr. Wehman's next, which is the motion to
12 suppress DNA because we're already talking about
13 it.

14 THE COURT: Yes.

15 MS. HUBRICH: And I believe Ms.
16 Cornwell has a similar motion too.

17 MS. CORNWELL: I do, Your Honor.

18 MR. WEHMAN: And, Judge, I have had my
19 first vaccine; I haven't had my second dose yet.
20 So I can keep this on or --

21 THE COURT: No. This is really an
22 interesting question and you're going to think,
23 gosh, there she goes, Judge Momma. When are you
24 supposed to get the second one?

25 MR. WEHMAN: Three weeks.

1 THE COURT: Okay. Good. And I don't
2 mind sharing with you the reason for my question is
3 that if it was going to occur during this trial
4 that could be a problem because that second one can
5 put you -- put you in your -- put you on your sofa.

6 MR. WEHMAN: Yes, Judge. And I have
7 arranged to get it on a Friday so hopefully I have
8 the weekend to --

9 THE COURT: Yeah, really. Good for
10 you. I did mine on Wednesday and went to court.

11 MR. WEHMAN: Judge, my motion will be a
12 motion to suppress the introduction of the actual
13 DNA report as it pertains to Mr. Fortune. My
14 argument is going to be based off of Rule 403, so
15 the probative value versus prejudicial effect
16 standard.

17 I believe Ms. Cornwell has a different
18 tactic. I think she might be taking a 702
19 argument. My argument is based on 403. I know
20 you've heard a lot of the facts. There are a
21 couple that will be different. I have provided a
22 memorandum as well.

23 THE COURT: Yes. Yes, I have it.

24 MR. WEHMAN: The facts that are
25 pertinent to this hearing that I don't know were in

1 the previous motion, that the vehicle when fleeing
2 from law enforcement during this chase, there are a
3 number of items that are thrown out of the vehicle
4 along the way and there are a number of items that
5 are recovered from within the vehicle once it is
6 finally stopped by law enforcement and searched.

7 THE COURT: Okay.

8 MR. WEHMAN: The -- a number of these
9 items were collected, swabbed by law enforcement,
10 obviously sent to SLED for analysis. We've heard a
11 lot of about that just a few moments ago, and I
12 actually have a DNA report, a SLED report. I left
13 my other copies that were for you at my office, but
14 I can pass this up.

15 THE COURT: I don't want to take yours.
16 Tannie can copy it.

17 Thank you, Tanda.

18 THE CLERK: Yes.

19 MR. WEHMAN: Judge, I know some of the
20 numbers I'm talking about without the report, and
21 we can review them when we get there.

22 THE COURT: Okay.

23 MR. WEHMAN: And, Judge, the main item
24 of contention that we have would be the only item I
25 believe that Mr. Fortune is included in one of

1 these propositions. So SLED is able to identify, I
2 think, on most if not all of these items that are
3 tested multiple contributors.

4 So we have four DNA profiles, I think
5 is the most common and that they're able to kind of
6 pick apart, and then they determine the likelihood
7 of whether these defendants that they are testing
8 contributed to that mixture.

9 The only one I'm aware of that
10 Mr. Fortune is identified in is a black and orange
11 glove. This glove, I believe, was recovered from
12 within the car. It's not an item that was thrown
13 from the car as the chase is going on, and they
14 were able to scrape the interior of this glove and
15 compare it to the four individuals.

16 And I'm going to present the Court with
17 the second DNA report, the last one that I believe
18 the State would intend to introduce at trial. I
19 guess that's where we are if I kept up earlier.

20 And in that report, two individuals
21 that would be in this case test as contributors --
22 potential contributors to that DNA mix, Mr. Salazar
23 and Mr. Fortune. The -- and this goes into numbers
24 I can't even comprehend, but in the report SLED
25 determined that it was 260 sextillion times more

1 likely that Mr. Salazar and three unidentified
2 individuals contributed to this mixture than just
3 four random people.

4 So they are very confident that
5 Mr. Salazar is made up a part of this, some part of
6 it.

7 The independent analysis on Mr.
8 Fortune, when they compare him to -- and three
9 unidentified people to four, just random people, is
10 much less. It's actually 1 in 130,000 times more
11 likely. So we have the independent on Mr. Salazar
12 where it's sextillion, and Mr. Fortune we're
13 talking about 130,000 times more likely.

14 So they are much less confident in him
15 as an individual than they are in the other
16 individual that's been tested and they come up with
17 a number for.

18 Judge, they do test them together, so
19 they put another proposition set. What they do is
20 they combine Mr. Fortune and Mr. Salazar and two
21 unidentified people with just the random four
22 people. And that number that they come up with
23 goes up to 330 octillion.

24 So that's just a combination of their
25 two individuals sets and whatever magic they do to

1 make up a combined number to get that figure.

2 My motion, Judge, is based in South
3 Carolina and State v. Council has said that while
4 there is a 702 standard that's set for the
5 introduction of scientific evidence, the trial
6 court has the ability to and should review whether
7 there is probative value to that evidence and
8 whether or not that value is substantially
9 outweighed by the prejudicial effect.

10 And in order to determine the probative
11 value, what our courts come to indicate is we need
12 to figure out what issue of facts in this trial the
13 evidence tends to prove. And so what we need to
14 look at is this glove, this scraping from the
15 interior of the black and orange glove. What is
16 that being presented to the jury for? What are
17 they trying to say?

18 THE COURT: Okay.

19 MR. WEHMAN: And, Judge, I will note in
20 my understanding of the reports it is never
21 identified a black and orange glove was used by one
22 of the perpetrators of the crime. It's a glove
23 that's found; they think it's worth testing; they
24 swab the interior.

25 And, Judge, the -- so not only do we

1 not have the glove as identified as part of the
2 crime, but we also have the probative value of
3 including Mr. Fortune as being a contributor to
4 this. What is the probative value of that?
5 Because we determined based on the SLED report and
6 my understanding of the SLED report that his
7 individual likelihood of being a contributor to
8 this DNA profile is much less. We're talking
9 sextillion number of times for the other
10 individual -130, 120,000 for Mr. Fortune.

11 Only one of these individuals could
12 have worn the glove. One person did. And it's
13 obvious to me and my understanding of it, that the
14 major contributor of that DNA profile, the one that
15 was more likely based on the science that they
16 developed, should be the individual that is the
17 most likely to have worn the glove. That would be
18 Mr. Salazar in this case.

19 Judge, after we look at the probative
20 value, what are they trying to say, how can this
21 help their case against Mr. Fortune, we need to
22 look at the prejudicial effects. And, Judge, I
23 think that the main issue that our courts allow us
24 to look at and I think applies here is confusion to
25 the jury.

1 Will this information as it pertains to
2 Mr. Fortune confuse the jury of an issue of fact.
3 This is the only piece of DNA evidence that they
4 would try to suggest to the jury ties Mr. Fortune
5 to the home. One, we don't know if the glove was
6 used because it's not identified. Two, we can't
7 say for sure that he was even wearing it, and he is
8 probably out of the two people that were tested the
9 least likely to wear it.

10 And based on that, I believe that it
11 would confuse the jury. It would try to convince
12 them that scientific evidence, which rightly so,
13 has a lot of weight. I mean, that's why we have
14 the scientific standard, because DNA evidence is
15 rarely challenged.

16 And I think a jury when they hear this
17 will say, oh, it's DNA. It's a pretty heavy piece
18 of evidence to overcome for a defense. And rightly
19 so, it's also tough for us to keep out DNA if they
20 can prove the scientific standard for it.

21 But in this case, as it pertains to
22 Mr. Fortune, that if it is allowed to be presented
23 to the jury that he's a minor contributor on an
24 item that might not have been used in the crime,
25 that it would confuse the jury and we are asking

1 that it be suppressed, at least that part of the
2 report be suppressed for presentation to the jury.

3 THE COURT: Got it. Got it.

4 Yes, sir, Mr. Osborne.

5 MR. OSBORNE: Thank you, Your Honor.

6 So I have and I know that you have too,
7 Your Honor, a case in which prosecutors have
8 recently oversold DNA, especially to the jury, and
9 they have been reprimanded by the courts and
10 opinions. That's not going to be me. I have the
11 SLED DNA witness, I'm going to be doing closing
12 arguments.

13 The issue here really, for me, it comes
14 down to an issue of weight, not admissibility. The
15 weight of this evidence, I would agree with Mr.
16 Wehman, is not particularly strong for the State,
17 but we have to present it to show a thorough
18 investigation.

19 If we don't present it, then the
20 question is quite clear, why did we not -- why did
21 the police not look into Muanah Fortune? Why did
22 we compare it to everybody else and not Muanah
23 Fortune.

24 I do agree with what he's saying, that
25 the propositions -- you're not going to get SLED

1 nowadays -- I found this interesting when I talked
2 to Mrs. Did. I said, if I were to give you a
3 sample of my buccal swab and I were to send it to
4 you, and then a week later I sent you a sample of
5 my buccal swab and ask you to compare the two, and
6 present the second one as an unknown, would you
7 generate a report that said match? And she said,
8 no. We don't do matches anymore. We do
9 propositions.

10 If I were to do that to her, what she
11 would end up reporting back is that it's a
12 single-source DNA contributor. And the proposition
13 -- there would be two propositions. The first
14 proposition would be that the DNA results when
15 compared, the known standard to the unknown
16 standard, would be one in octillion, like Mr.
17 Wehman said, to be to Mr. Osborne.

18 The second proposition would then be
19 Mr. Osborne compared to an unknown individual.

20 So either way you look at it we're
21 stuck with propositions. I don't think that makes
22 it inadmissible. I think we can present it to the
23 jury. And, again, there is case law out there if I
24 over-sell that to the jury, I'm sure the objections
25 are going to be coming and we'll be doing this

1 again. I do not plan on doing this again.

2 THE COURT: I understand.

3 Now, so you would tell me that your
4 concern is that -- you would tell me that the
5 concern is that the results -- the relevancy of the
6 result under 403 is to show that this -- Mr.
7 Fortune, this defendant, Mr. Fortune, was included
8 in the DNA analysis.

9 SOLICITOR: That's correct, Your Honor.
10 And to that point Mr. Wehman brings up -- and at
11 the end of the SLED report, they talk about
12 proposition numbers and what they mean. And I
13 believe for this analysis it is one of the very low
14 proposition.

15 THE COURT: Yeah.

16 MR. OSBORNE: And just -- I might have
17 heard you wrong. This glove for relevance, this
18 glove is a black and orange glove. It was
19 recovered from a jumpsuit, a navy-colored jumpsuit
20 that was found on the side of the road. In that
21 jumpsuit was also a knife. That glove, that black
22 and orange glove is significant. The matching --
23 corresponding matching to that glove is found in
24 the Honda.

25 THE COURT: In where?

1 MR. OSBORNE: It's found in the Honda.
2 The Honda. The vehicle they were fleeing in.

3 THE COURT: Gotcha. In the Honda. I
4 didn't realize it was a Honda. In the vehicle.

5 MR. OSBORNE: It's not going to be
6 Johnny Cochran, if the glove fits and all that
7 stuff, but these are two different gloves, I mean,
8 gloves and they are a set.

9 THE COURT: Isn't it funny how
10 everybody's head goes right there. Got it. Got
11 it. Okay.

12 Now your DNA has a different -- you
13 have a different take.

14 MS. CORNWELL: We do, Your Honor. The
15 only DNA that is linked to my client, one, I'm
16 going to argue it's not linked to my client
17 because, again, these are propositions. They are
18 not saying yes or no. They are saying maybe, maybe
19 not. Could be this. Could be that. Which I think
20 goes under 702 for the reliability of it.

21 As the solicitor indicated, the courts
22 have been fraught ever since SLED switched over to
23 this STR mix analysis thing. I'm not sure how much
24 longer they're going to keep this given the fact
25 that people like me continue to bring up the 702,

1 Daubert, the reliability standard, the prejudicial
2 nature of it.

3 This came in when I was leaving the
4 State's office and I was happy that I was not
5 having to deal with those headaches because it is
6 -- it's unreliable. Previous reports would say,
7 it's a match offer, or inconclusive. One or the
8 other.

9 And that's a lot more understanding to
10 a jury than to give, well, it's this much times
11 that it could be this one, but it's this much times
12 that it could be this one. If you put these two
13 together, it's this much time.

14 It's confusing. It's confusing for
15 anyone. The solicitor himself had to ask, well,
16 what does it mean if you do have a match? Well, We
17 don't have matches. And it's SLED trying to
18 protect themselves in the liability of wrongfully
19 identifying somebody through DNA. If we can't rely
20 on SLED identifying somebody through DNA, how do we
21 expect the jury to understand --

22 THE COURT: Hold on one second. I'm so
23 sorry. We have a problem?

24 (Off-the-record conference.)

25 THE COURT: Let me tell you where my

1 brain left you. When you were talking about when
2 you left the State's office you were delighted you
3 weren't going to have to deal with this new
4 methodology of SLED with using the propositions as
5 opposed to this is a match.

6 MS. CORNWELL: Because under 702 -- and
7 702, the State of South Carolina has specifically
8 stated in admitting scientific evidence under 702,
9 that it has to assist the trier of fact in
10 understanding the purpose of what it is, and that
11 it has to be -- it has to be qualified and that the
12 source is reliable.

13 When we look outside of, say, the US v.
14 Daubert, Daubert goes further and says, it doesn't
15 have to be reliable. It has to be accepted, you
16 know, by the group of people that, you know -- the
17 wording just left me. It has to be widely accepted
18 --

19 THE COURT: Peer review.

20 MS. CORNWELL: -- peer review. Thank
21 you.

22 THE COURT: That is Daubert. That is
23 not counsel.

24 MS. CORNWELL: But I think 702 feeds
25 into that as well because of the reliability

1 standard. When you have seven propositions for one
2 piece of evidence, that's not reliable. And it's
3 confusing to the jury, it doesn't assist the trier
4 of facts.

5 When you look at the evidence that they
6 claim have propositions for my client, there are
7 some that are a weak standard that are under that,
8 you know, it's not going to be likely, yet they're
9 still saying, well, here's a proposition that it
10 could be. And that's -- if it's unlikely, then why
11 are we putting that it could be a possibility it's
12 his DNA?

13 It confuses the jury. It throws up a
14 number of issues for appeal, for all that. And
15 that's what the Court is facing right now with the
16 STR mix.

17 In regards to the 403, is it overly
18 prejudicial or is it more probative than
19 prejudicial? As Mr. Wehman stated, it is
20 incredibly prejudicial to try to link these clients
21 to evidence that was either in a car or on the side
22 of the road back to the crime scene.

23 There is going to be testimony
24 regarding that car and as far as my client goes,
25 all four of these people were in the car. So any

1 items in the car could possibly have DNA. I don't
2 think that that goes any way to whether these
3 people were actually in the house. The stuff is in
4 the car. It's not in the house.

5 None of my client's DNA, I don't
6 believe any of the codefendant's DNA is ever found
7 in the house. There's nothing that puts either one
8 of these individuals in the house based on DNA.

9 There is a proposition, one had a
10 seven-set proposition and one has a three-set
11 proposition, one has a four-set proposition. And
12 all of the propositions that link my client's DNA
13 and one piece that links the codefendant's DNA are
14 found in the pockets of a jumpsuit that is never
15 identified through being at the crime scene.

16 I don't believe the gloves were ever
17 identified as being at the crime scene. There is a
18 pocket knife that there is some inconclusive things
19 on that I don't think is ever identified. So it's
20 incredibly prejudicial and it's 100 percent
21 unreliable based on all the propositions and the
22 what ifs and maybes, all they're doing is educated
23 guesses.

24 And the fact that they can't say what a
25 definitive match is is brought to confuse the jury

1 and confuse the issues and to show the Court that
2 there is not a reliability standard. And if you
3 can't rely on it, then why is it given to the jury
4 and confusing them on asking them to figure out, do
5 you want to rely on it?

6 I understand that Your Honor is going
7 to give a credibility charge and a weight of the
8 evidence charge, but when you hear the word expert,
9 it's indicating that you are going to trust that
10 they know what they are talking about. And they
11 are going to give all these numbers and all these
12 propositions and they are going to show all these
13 things against my client or against the
14 codefendants, and none of them are reliable.

15 They can't get on the stand and say,
16 yes, they contributed to this mixture, or, no, they
17 haven't. And that's what we need them to do. If
18 they're not willing to do that, we need to exclude
19 it completely.

20 THE COURT: I got you.

21 So, Mr. Osborne, this is where I see
22 it. The science of DNA that has stood the test of
23 the Daubert has also stood the test of Council.
24 I'm not concerned about the science of DNA.

25 What I'm hearing from counsel is that

1 the methodologies that is used by SLED to
2 communicate their results is confusing to the jury;
3 and because it is so confusing to the jury, it
4 ought be excluded because it is of no benefit, and
5 when you look at the prejudicial effect to the
6 defendants, the probative value is -- does not
7 outweigh the prejudicial effect.

8 Now, talk to me a little bit about this
9 business of all terms proposition. Talk to me
10 about that and tell me how that is presented,
11 because I gather you do not have the SLED folks
12 here.

13 MR. OSBORNE: Right.

14 So to address the issue of there being
15 a reliability standard. There is a reliability
16 standard. It's listed --

17 THE COURT: I'm not worried about --
18 let me tell you what I'm not worried about.

19 MR. OSBORNE: Okay.

20 THE COURT: DNA is reliable. The
21 science -- Council, Daubert, the science is good
22 science. We are over that. Been over that for
23 decades now. DNA science is reliable.

24 What I'm hearing and it's couched in
25 terms of 403 and it's couched in terms of 702, it's

1 confusing this business of proposition instead of
2 just saying within a reasonable of scientific
3 certainty that being more likely than not, da, da,
4 da, da, da.

5 And what I'm hearing is it may be below
6 that standard where they cannot say most probably
7 and they're saying something about propositions.
8 Let me be clear -- let me be candid with everyone.
9 I've not tried a case where SLED has talked about
10 proposition.

11 I'm -- when last we tried, you know, I
12 tried a murder case, hasn't been that long ago, we
13 weren't doing -- I didn't hear about propositions.
14 I heard about in the words of Gene Dukes, rest his
15 soul, all those squiggly lines. But they would
16 tell you that either it was connected or not
17 connected.

18 So tell me about little bit about the
19 -- this use of propositions.

20 MR. OSBORNE: So this is the way that I
21 understand it. This is the way it was explained in
22 the report. The first thing they do is take an
23 unknown sample and then they run this sample and
24 test it to see how many mixtures of DNA are
25 included in that standard. That's the starting

1 point.

2 So if you look at that first sample and
3 you find and based on the alleles and the
4 chromosomes that they look at that first sample,
5 that we find -- that SLED finds there to be four
6 different contributors to that DNA mixture, it's
7 going to increase your propositions. Because you
8 have four different people contributing to that.

9 So then the next thing they do is they
10 look at how many standards do we have. Then they
11 take these known standards -- in this case we have
12 quite a few. And that's just by nature of the
13 crime.

14 We have Marcus Porter. He's the victim
15 that was shot and lived thankfully. And then we
16 have J. B. Weaver who succumbed to his wounds. He
17 was shot many times. Then we have each of the four
18 defendants. That's six. And I feel like
19 Mr. Swibaker is included in there; although, I
20 could be wrong. I know there were a least six or
21 seven.

22 THE COURT: All right.

23 MR. OSBORNE: So now you have four
24 different contributors to this mixture that need to
25 be compared to each one of those. Then you start

1 looking at, okay, now they look at the known
2 standards and they start eliminating. Who can we
3 look at right off the rip and say their DNA is not
4 anywhere near there that. Then they eliminate
5 them.

6 But then a jury, and you, and anyone
7 else who is evaluating the evidence is going to
8 say, well, what is -- what statistical probability
9 that, for example, Mr. Fortune contributed to
10 mixture? And that's where you come up with the
11 proposition. Because they can come in and say,
12 well, it is very strongly likely.

13 Well, they have that on their chart.
14 That would be greater than one million. If you see
15 a number greater than one million, very strongly
16 likely. That's simply the way that they break it
17 down. I've heard Gayle Heath testify many times,
18 an expert in handwriting analysis. She has five
19 different criteria herself. It happens in
20 fingerprint analysis as well.

21 So, to me, as a prosecutor, sure, you
22 would like to hear the magic words, match. I think
23 it would be easier to present it. That doesn't
24 make it inadmissible because they're putting a
25 statistical number to it, and they are putting

1 words to that number. They're putting analysis to
2 that number.

3 THE COURT: Let me ask you this, as I
4 understand it, based on what you're telling me, the
5 SLED analysis person could say, in my opinion, it
6 is more likely than not that this DNA was present
7 and it shows up in this proposition as being one in
8 whatever number, but there is a more likely than
9 not presence.

10 Let me tell you why I say that.
11 Because that's what is required under 702. They
12 must be -- an expert must be able to testify that
13 it is more likely than not, blah, blah, blah. So
14 that the DNA of an individual is present.

15 MR. OSBORNE: I agree with Ms.
16 Cornwell that I think that the STR mix, this new
17 way of analyzing DNA is a little bit more complex,
18 but I don't think it's beyond being able to explain
19 it to a jury, and I certainly understand your
20 position.

21 THE COURT: That's just rules of
22 evidence.

23 MR. OSBORNE: Right. But I don't want
24 to say what an expert might say. I would ask that
25 we hold off and proffer that testimony.

1 THE COURT: I think it ought to be
2 proffered because in order to testify -- in order
3 to test it they have to say it's more likely than
4 not or it's inadmissible. Remember, there are no
5 magic words as long as the magic words convey
6 within a reasonable degree of scientific certainty,
7 that being more likely than not, X, Y and Z. They
8 don't have to use the magical words, but that has
9 to be in there. It has to be more likely than not
10 or they can't testify to it.

11 Now, I gather there is a strength and
12 weakness to that. So I think that we will have to
13 have some proffering of that evidence. So I think
14 that --

15 MR. OSBORNE: And if I may, I have one
16 other point under Daubert in those cases with the
17 reasonable degree of medical certainty. They are
18 giving, it's my understanding -- I need to bone up
19 on this. It's my understanding that that comes
20 into play when they are giving their opinion on a
21 matter.

22 THE COURT: We are not Daubert and we
23 are not Council. Remember Daubert, it was -- was
24 developed in the federal court system. We did not
25 adopt Daubert. We are not a Daubert state. We are

1 a Council state and there really is a difference.
2 What Daubert said was, that's junk science. Okay.

3 For everyone in the criminal justice
4 world, the moth-eaten brain theory as a defense may
5 or may not pass the Daubert standard. If someone
6 came in and said, let me tell you about the
7 moth-eaten brain that that's really what is going
8 on here. And you come across junk science and
9 Daubert is meant to catch that.

10 So that even if you have an expert that
11 says, I'm an expert in wonkiness, and this is
12 wonky. Then the judge comes in and says, tell me
13 about your peer review. Tell me about your -- what
14 is your percentage of error? Where are your false
15 positives? What are your false negatives?

16 And you really do get into the
17 scientific analysis to determine whether or not
18 this science is one that ought be preserved. And
19 the Court is the gate keeper under Daubert.

20 South Carolina is a little different.
21 We go looking at the experts themselves and does
22 the expert say this is an expertise. We are a
23 little bit different than Daubert, but that's what
24 Daubert says. DNA -- the science of DNA is -- is
25 set. Has been set for decades. Set for decades.

1 It's not Daubert. It's not Council. It's good
2 science. It's good science.

3 This is not Council. This is not
4 Daubert. The only -- here's what is going through
5 my head. It's going through my head, quite
6 frankly, because I'm just -- I have not dealt with
7 the testimony given by SLED not in this format of
8 propositions. So I'm not -- I don't know.

9 What I do know is that in order --
10 under our rules of evidence, I just left -- I just
11 left Daubert and I'm in the rules of evidence.
12 Under our rules of evidence, in order for the
13 testimony of an expert to be admissible, the expert
14 must be able to testify that within a reasonable
15 degree of scientific certainty -- blah, blah.

16 In other words, what the expert must be
17 able to testify is, for example, we are concerned
18 about Mr. Fortune. This expert from SLED has to
19 say more likely than not within a reasonable degree
20 of scientific certainty the DNA is present. Has to
21 be able to say that.

22 MR. OSBORNE: I don't want to put words
23 in her mouth, but I can almost assure you they will
24 never say that. What they will say is -- they will
25 say, the odds of his DNA being present are that odd

1 number. Whatever the odds are, that's what they
2 are going to say.

3 And they are going to say, that's the
4 whole point to this is to give you the trier of
5 facts, the jury, you get to look at this. This is
6 the proposition. These are the chances of -- and,
7 really, to be perfectly frank from a defense point
8 of view, I think you would rather have that than
9 match.

10 We would rather have match. They would
11 rather have this because there is a chance.

12 MS. CORNWELL: Which is what serves to
13 confuse things under that prejudicial standard
14 of --

15 THE COURT: They are -- they are
16 dancing on the edge of the sword because it is not
17 for the jury to make a determination. It's going
18 to be for me to make a determination whether or not
19 they are testifying with regard to the standard,
20 which is required. And an expert must testify that
21 within a degree of scientific certainty, that being
22 more likely than not, such as -- otherwise, it is
23 of no moment.

24 MR. OSBORNE: And, to me, I would kind
25 of correlate it with the handwriting expert where I

1 would ask Ms. Heath, I would say, to a reasonable
2 degree of certainty, are you comparing the known
3 standard and saying that it is a match to the
4 unknown standard? And she would say yes. If she
5 couldn't, then the answer would say, I cannot match
6 those. And she doesn't put a number to it, but
7 these witnesses do put a number to it. So that's
8 --

9 THE COURT: Well, they have to have
10 some really good number that means more likely than
11 not so that you could say, for the purposes of the
12 testimony before this jury, what would be more
13 likely than not? What number is more likely than
14 not? In other words, they can't get away with it
15 because they can't say it's a 10 percent
16 possibility.

17 That's of no help to the jury because
18 they have to be able to quantify it. Now if they
19 want to say it's more likely than not, and it's
20 real likely, super duper likely, oh, my goodness,
21 so likely, maybe not so much.

22 In other words, you cannot place upon
23 this jury the ability to listen to an expert and
24 make that determination I don't think. We shall
25 see.

1 I'm confident that they are not going
2 to leave that. I would be surprised if that's what
3 they've gotten. It may be a little wonky that they
4 are trying to quantify rather than saying the
5 chances of this not being the person is one in 85
6 quadrillion.

7 And I don't think there's a number
8 quadrillion. I mean, maybe that's what they're
9 trying to get away from, but we'll see.

10 MS. CORNWELL: And for the purpose of
11 the record, this has nothing to do with
12 handwriting. The jury gets both sets of
13 handwritings and they can look at it and compare.
14 I can't give the analysis and have a jury be able
15 to look at that and understand it enough.

16 They can look at handwriting samples,
17 and even if they say, well, I can't say it's this,
18 a jury can still make that determination by their
19 own knowledge of handwriting.

20 DNA is not a known thing. When it
21 comes to odds and saying, the odds -- the house
22 wins a lot, even if the odds are incredibly skewed
23 towards the other side. So if they are going to
24 say, well, the odds are more favorable than not, I
25 don't think that meets --

1 THE COURT: It might. The odds are
2 more likely than not? Yeah, maybe. It depends. I
3 get the point.

4 MR. WEHMAN: Just to tail back to where
5 we started, even if we do get the standard, the
6 more likely than not, the scientific reliability
7 that the Court is comfortable with, we would then
8 circle back to the --

9 THE COURT: Back to 403. I get it.
10 I'm with you. Yeah. Because even it's more likely
11 than not, it's so -- is the quantifying more likely
12 than not would be your point, Mr. Wehman. If
13 they're quantifying more likely than not, and this
14 is right on that precipice, then maybe it ought not
15 me admitted. Because maybe more than one person
16 wore the glove. Right?

17 The other point would be I would think,
18 if they cannot -- if they refuse to say more likely
19 than not that Mr. Fortune's DNA was present, or
20 words to that effect, or an explanation to that
21 effect, it ought not come in both under 702 as well
22 as 403.

23 MR. WEHMAN: Correct. Yes, Judge.

24 THE COURT: I got it. Next.

25 MS. HUBRICH: The gunshot residue

1 motion, Judge, is the same. I'm assuming the State
2 does not have the examiner here for gunshot
3 residue.

4 SOLICITOR: No. Are you challenging
5 the chain?

6 MS. HUBRICH: No, I'm not challenging
7 the chain.

8 Judge, for the purpose of gunshot
9 residue, I think we're going to have to reserve
10 this motion for an in camera hearing. The State
11 does intend, correct me if I'm wrong, to present
12 gunshot residue testimony and the gunshot residue.
13 I have report if you would like me to hand it up,
14 Judge.

15 THE COURT: Do I need it or can you
16 just tell me what I need?

17 MS. HUBRICH: I can read it to you and
18 put it in the record.

19 As it pertains to Muanah Fortune, I
20 think the examiner is going to get up and say, it's
21 more likely than not that he had it on him. I
22 think they are going to say that, which meets the
23 standard that you are concerned about.

24 If that happens, the next question is,
25 is it more prejudicial than probative? I think we

1 have to have that person on the witness stand to do
2 an in camera evaluation. And I make this motion
3 because as I'm reading through the evidence, I'm
4 looking at the gunshot residue and I have never
5 seen this.

6 They actually put as a result,
7 particles characteristic of gunshot primer residue
8 were found in general particles characteristic --

9 THE COURT: You've got to slow down.

10 THE COURT REPORTER: Thank you,
11 Judge.

12 (Off-the-record conference.)

13 MS. HUBRICH: Microscopic molten
14 particles that contain elements lead, barium and
15 antimony. Gunshot primer residue can come from
16 being in the vicinity to the discharge of firearm
17 or coming into contact with the surface that has
18 gunshot primer residue on it; however, no
19 information can be provided as to this -- as to the
20 time frame in which these particles were deposited.

21 So I've never actually seen those
22 results on a gunshot residue finding. Usually it's
23 they had gunshot residue on the sweatshirt. These
24 results lend itself to a question of, is that
25 really more probative than prejudicial?

1 The State is going to argue to the jury
2 they were there when these -- when these guns were
3 firing all over the place and we know that because
4 they have gunshot residue particle on their shirts.
5 At that point, it's so prejudicial. We are now
6 putting these people in the vicinity of this. When
7 you read a little further, it says no, actually, we
8 can't say that at all.

9 So I think the argument is going to be
10 more prejudicial than probative assuming they
11 testify it's more likely than not.

12 THE COURT: I would think that's a --
13 and I understand that language is definitely what
14 you normally hear because you hear they are so
15 fragile that if you don't collect them in two
16 hours, you don't get them. So we'll see.

17 DEFENSE: Right. Right.

18 THE COURT: We will have to see.

19 I mean, you can see the point.

20 MR. OSBORNE: Yeah.

21 MS. CORNWELL: (Inaudible)

22 THE COURT REPORTER: I didn't hear what
23 you said, Ms. Cornwell.

24 THE COURT: She said ditto.

25 MS. CORNWELL: Ditto.

1 THE COURT REPORTER: Thank you.

2 THE COURT: The next motion would be
3 the motion to determine the admissibility of the
4 defendant's prior bad acts.

5 MR. OSBORNE: I'm not aware of any
6 prior bad acts with the exception of Lyle. And I
7 guess I was thinking about -- there is an incident,
8 and this is all over this trial, less than a week
9 prior to this incident, Mr. Swibaker was at the
10 same residence and he was home alone.

11 Mr. Porter, our second victim in the
12 second incident, it's his -- they live together.
13 He wasn't home at the time. At that time, five
14 individuals came in through the back door, kicked
15 in the back door, and committed a home invasion
16 robbery that was very similar in nature to the
17 murder incident.

18 Mr. Swibaker has indicated through my
19 speaking to him as well as what he relayed to the
20 police that he thought there were five individuals
21 in the first incident and four individuals in the
22 second incident. The same four individuals that
23 were in the second incident that committed the
24 murder, the same five -- four of the five guys from
25 the first incident.

1 So there are some things going on in
2 the background here. In the first incident there
3 were five guys. Swibaker believes that one of
4 those five guys, including the same four from
5 before, one of the five is named Jaquavious
6 Washington. He may not have known his name, but he
7 said he was a co-worker.

8 He had met Jaquavious a week or two
9 before, sometime before, and he had introduced
10 Jaquavious to Marcus. Marcus will admit he was a
11 marijuana seller at the time. He sold marijuana to
12 Jaquavious on a couple of occasions.

13 Mr. Swibaker lent some boots to
14 Jaquavious. During that first incident when they
15 came in, he saw those boots. They were masked and
16 armed, same as the second ones, and he saw one of
17 them that he'll say he recognized. Well, that's
18 Jaquavious. I recognized the boots as well.

19 He then in between the first incident
20 and the second incident told, Marcus, hey,
21 Jaquavious is one of those guys. I don't know the
22 other ones, but Jaquavious is one of them.

23 THE COURT: One of the five.

24 SOLICITOR: Yes, ma'am.

25 THE COURT: Okay.

1 MR. OSBORNE: So Marcus then decided
2 that, well, I want to get to the bottom of this.
3 So he takes David and they met up with Jaquavious
4 to confront him. Let's see who's telling the
5 truth. It gets contentious. Jaquavious denies it
6 and David said, no, I think it was him.

7 They end up -- like I said, there was
8 some yelling and it gets contentious. I think
9 Jaquavious may even have had a gun during that
10 incident. But Jaquavious convinces Marcus that he
11 had nothing to do with that first incident.

12 So Marcus continues to do marijuana
13 transactions with Jaquavious. And we actually have
14 a ledger to prove that, Marcus's ledger. He gave
15 marijuana on two different occasions to Jaquavious,
16 \$50 a pop. I think Jaquavious owed him a hundred
17 bucks.

18 So on the night of the incident,
19 Mr. Fortune tells the police that -- one of his
20 stories is that I came down from Beaufort and I was
21 going to meet with my cousin Jaquavious, or friend
22 Jaquavious. And I think he said he might have met
23 Luken, I'm not sure, but that was his intention of
24 coming here. That's how he explains it.

25 He kind of comes off of that later on

1 and says, yeah, I was in fact involved in the
2 robbery. An hour and a half before the home
3 invasion, you have Elijah Green, one of the four
4 codefendants, on his phone. He makes like a
5 14-minute phone call to a phone that we can tie to
6 Jaquavious Washington.

7 The whole point to all of that is to
8 establish a connection between the guys in the car
9 to the victim's house. And in the middle is
10 Jaquavious Washington. Without Jaquavious, they
11 don't even know about that. That's how they get
12 there.

13 So prior bad acts. I have instructed
14 both of these victims -- well, one other issue.
15 When they searched the Honda that the four
16 defendants fled, there were three watches in the
17 Honda, a brown one and two black ones. Swibaker, I
18 showed him a photograph of it. It hadn't been done
19 until we met. I showed him the photograph of the
20 brown watch. He said, yeah, I think that's my
21 watch.

22 I showed Marcus Porter a photograph of
23 the two black watches and he said, yeah, I think
24 those are my watches. Both of them believe that
25 those watches were stolen during the first

1 incident.

2 Now I think we're real close to me
3 getting this in on Lyle, but I don't want to. The
4 only thing that I want to do is I want to just draw
5 the connection to say, these guys didn't just
6 randomly pick this house, they got there through
7 Jaquavious. So that shows from my perspective a
8 complete investigation on their part and ties in
9 the loops.

10 Having said that, if they want to
11 address this footprint that's at the back of the
12 door that doesn't match any of the four
13 individuals, I don't think I need to talk about
14 that previous incident. Just to simply say, was
15 your house burglarized before? Yes.

16 I can stay away from it from there.

17 The watches. I have instructed them,
18 unless I get a ruling from the Court otherwise, to
19 simply say when I show you pictures of the watch,
20 tell the jury if you recognize it as yours or not,
21 but do not say you think it was from a previous
22 burglary. And leave it at that.

23 MS. HUBRICH: I am not going to be
24 popular, I imagine, between the two attorneys on
25 the other side of me right now.

1 THE COURT: You are not.

2 MS. HUBRICH: As long as I'm popular
3 with Your Honor that's really all that matters.

4 So I have no objection to talking about
5 that incident. I have no objection to saying --
6 and I will tell you why. The State didn't tell you
7 a really important fact. The two witnesses, Mr.
8 Porter and Mr. Swibaker, lie about it for like two
9 days before they finally disclose it to the police.

10 And they only disclose it to the police
11 after the police confront them with it and say,
12 hey, did you have a prior break-in because they
13 found some evidence on phones.

14 And only then do they say, oh, yeah, by
15 the way, a week ago five black males kicked in the
16 door, they stole our half pound of weed and two
17 guns and we didn't report it. Oh, and by the way,
18 Mr. Porter says, I think Swibaker is involved and I
19 think he set this whole thing up.

20 So those the State didn't tell you.

21 THE COURT: You mean Washington?

22 MS. HUBRICH: No. Mr. Porter says
23 Mr. Swibaker is involved and set the whole thing
24 up.

25 THE COURT: Okay.

1 MS. HUBRICH: So I have no objection to
2 getting into all of that because it shows that they
3 are not telling the truth. What I don't want is
4 for them to then say, oh, one of those black males
5 in the first incident we believe was Muanah
6 Fortune.

7 I think that's Lyle. That is where
8 we're getting into the Lyle and --

9 THE COURT: That I did not hear.

10 MS. HUBRICH: Right. Well --

11 THE COURT: Did I miss that?

12 MR. OSBORNE: He does. He says --
13 Mr. Swibaker says in the second incidents those
14 four guys he thinks are the same four out of five
15 that did the first one.

16 THE COURT: That's right. He says that
17 in a conversation with --

18 MR. OSBORNE: He doesn't say like, hey,
19 you know, I recognize that guy, but he's like, the
20 way they came in and acting, the same dudes minus
21 Jaquavious.

22 THE COURT: Got it.

23 MS. HUBRICH: So I don't mind talking
24 about all of it. In fact, I would love to talk
25 about all of it and I plan to bring it out. I

1 don't want them saying that Mr. Fortune was
2 involved in the first incident.

3 I think that's impermissible Lyle.
4 Number 1, it doesn't meet the elements of Lyle or
5 404(b) or the rules of evidence. In addition, even
6 if it does, they certainly can't prove it by clear
7 and convincing evidence.

8 This wasn't even reported to the police
9 and the two witnesses lied about it for the first
10 three times they were interviewed. So I don't mind
11 talking about that it happened, but I do mind them
12 trying to connect it to my client. I think it's
13 impermissible.

14 THE COURT: I know what's coming.

15 MS. CORNWELL: It wouldn't be fair if
16 it was easy.

17 THE COURT: Yes, ma'am.

18 MS. CORNWELL: I understand where Ms.
19 Hubrich is coming from. My position is that it
20 doesn't come in, that it shouldn't be talked about.
21 It is confusing the issues. If you're trying to
22 use it on identification where I agree with the
23 State in this is that they can talk about
24 Jaquavious Washington. And what he just put on the
25 record is going to run right into my motion for

1 third-party guilt.

2 THE COURT: I know.

3 MS. CORNWELL: And it is -- and that is
4 fraught right there even -- at this point I don't
5 know that that is proper testimony because he just
6 put the nexus of why I have a right to a
7 third-party guilt claim. So I need all of that
8 information to come in. Not the burglary part of
9 it, not the previous burglary, but Jaquavious
10 Washington is the nexus of all this.

11 Green is on the phone with Jaquavious
12 Washington and Green even gives a statement that
13 says, I went to three white guys' house with
14 Jaquavious that day and we shot guns and we smoked
15 weed.

16 Jaquavious Washington admits that he
17 had been in the house. The victims admit that he
18 had been in the house the night that this incident
19 occurs. The defendants all say it can be linked to
20 Jaquavious Washington.

21 So there is a footprint on the back
22 door that doesn't match any of the four people that
23 were arrested. The door is kicked in. I think
24 that that goes to third-party guilt, especially
25 given all of the Jaquavious Washington stuff.

1 So I don't want to bring in the
2 burglary. I don't mind if they say the watches are
3 mine and keeping out the burglary. You know, if he
4 wants to -- as far as the door being kicked in and
5 saying that you had your -- I mean, that's -- in
6 the grand scheme of things, that's not what I'm
7 worried about.

8 But I do think to say, first it was
9 five and now it's four, and I think that these are
10 the same; I think the same four today are the same
11 from the first time, that I have a problem with.

12 THE COURT: Let me ask you this
13 question. Gregory says the evidence offered by the
14 accused as to the commission of the crime by
15 another person must be limited to such facts as are
16 inconsistent with his own guilt and to such facts
17 has raised a reasonable inference or presumption as
18 to his own innocence.

19 Evidence which can have no other effect
20 than to cast a bare suspicion upon another or to
21 raise a conjectural inference as to the commission
22 of a crime by another is not admissible.

23 Let me tell you what is going through
24 my head. Talking about two people? Oh, yeah.
25 Totally, totally with you. My concern is we're

1 talking about four people. And so the third -- as
2 I understand the third-party guilt -- and help me
3 because I'm sure you have studied it, but as I
4 understand third-party guilt, somebody is in and
5 somebody is out.

6 My client is out. Somebody else is in.
7 So the inclusion of Mr. Washington excludes my
8 client. Does that make sense what I'm saying?

9 MS. CORNWELL: Yes, Your Honor. That's
10 what we're saying, that the inclusion of Jaquavious
11 Washington --

12 THE COURT: I get the inclusion. Tell
13 me about the exclusion.

14 MS. CORNWELL: It excludes Mr. Salazar
15 because everybody says four black males. They can
16 put Devonte Major there based on his shoes; the
17 victims identified Elijah Green based on the
18 height, build, and eyes; they actually give some
19 description of Mr. Fortune's shoes, and of course
20 he puts himself there; and that's all.

21 They can tell you about three of them.
22 We don't know about the fourth. My client in his
23 statement said, I wasn't there, I borrowed the car
24 from Jaquavious. As I'm leaving, these guys go to
25 take them back.

1 So my position, and I think our --

2 THE COURT: Where did he meet up with
3 these other folk?

4 MS. CORNWELL: At Jaquavious's house.
5 I think that I get to argue Jaquavious is the
6 fourth person with them, and the reason that he's
7 in the car with the three with Jaquavious, because
8 he was at Jaquavious's house, he got in the car,
9 then they take off and cops come behind them, and
10 now he's associated with all of them.

11 THE COURT: Okay. Got it.

12 MR. OSBORNE: All right. So I agree he
13 can do that on the stand. I can't prevent him from
14 getting on the stand and saying -- that's not
15 third-party guilt because that's direct evidence.
16 That's saying I didn't do it. He did. That's
17 fine, but what you can't do is ask this guy,
18 detective, well, did you have any other people that
19 you were looking at? No.

20 That's third-party guilt because it
21 could easily be involved with the other guy, with
22 Jaquavious. So if he gets on the stand, I think he
23 does get to do that, and I don't think I can stop
24 him from saying that. I think that's the only way
25 that type of evidence comes in. Other type of

1 evidence that ends up coming in will be third-party
2 guilt.

3 THE COURT: Let me challenge that a
4 little bit. All right. We have four. And you
5 yourself are putting evidence in about Jaquavious
6 Washington, right?

7 MR. OSBORNE: Well --

8 THE COURT: Because you are connecting
9 those dots to Jaquavious Washington.

10 MR. OSBORNE: I guess --

11 THE COURT: And you have four people.
12 Do you see what I'm saying?

13 MR. OSBORNE: Yeah. Well, I guess I'll
14 see how this goes. I reserve the right to pivot.

15 THE COURT: You are too good for me.

16 MR. OSBORNE: I do think that -- but
17 I'm introducing that evidence for an entirely
18 different purpose. That State introducing evidence
19 to explain the connection between the victim's
20 house and the defendant's car and who may have
21 brought them there. Jaquavious may have pointed
22 them out to there.

23 I think detectives did a lot of looking
24 into that. If you point them out to the house,
25 that's much different than the defense saying, he

1 went into the house, not my guy. And they're both
2 going to say that? Devonte's going to -- we Lyle
3 that in, they're all saying, it's not me. It's
4 Jaquavious.

5 Well, that's -- I'm with you on
6 Gregory, and that is third-party guilt when they're
7 introducing it. Like I said, I looked into it. I
8 don't think I can stop them from testifying. If
9 they get on the stand and say that, I will be stuck
10 with that.

11 MS. CORNWELL: I think -- I've lost my
12 train of thought. I think that -- I know where I
13 was going with that. My client has a
14 constitutional right to a complete and meaningful
15 defense. So, at this point, I think the State has
16 admitted this would be a very valid defense. Maybe
17 now I won't bring in any evidence that I wanted to
18 bring in because I don't want them to have that
19 offense. And that's taking away my client's right
20 to present a valid defense based on the evidence.

21 So even if he doesn't bring that nexus
22 in, on cross-examination of the detectives of the
23 victims, I get to bring that in under the
24 third-party defense because it does implicate
25 another person and show that not the guilt of my

1 client and the presumption of innocence to my
2 client by putting that in there.

3 And the jury has the ability to
4 consider that, to look at the credibility of the
5 witnesses, to look at the evidence against the
6 State and make a jury verdict based on all of the
7 evidence and the complete defense including the
8 reasonable doubt that comes into play if they think
9 Jaquavious is involved.

10 THE COURT: Here's what we're going to
11 do. We are going to take lunch because it's time.
12 Unlike me, who thought it was important to pad on
13 for COVID-19 in the event I got it, my court
14 reporter did not. She decided she would lose a lot
15 of weight. She's skinny anyway, but I'm
16 desperately worried about her nutrition. So we're
17 going to take -- but it's going to be short if you
18 don't mind.

19 I would like to start back at 2:00. It
20 gives you time to tell Smitty, where are the nabs?
21 We will take a little bit of time --

22 (A luncheon recess transpired.)

23 THE COURT: Okay. Next.

24 MS. HUBRICH: Judge, I think we left
25 off, I had made a motion under Lyle to determine

1 the admissibility of prior bad acts. The State
2 went into the incident from ten days prior.

3 THE COURT: Yes.

4 MS. HUBRICH: We didn't determine
5 whether we were going to let that in. I think
6 Ms. Cornwell and I have different positions on how
7 that should be admitted, whether it should be
8 admitted. But we segued right into third-party
9 guilt from there without a determination on Lyle.

10 And then I wanted to say, I'm joining
11 in the motion for third-party guilt to admit
12 third-party guilt on behalf of my client also for
13 the same reasons that Ms. Cornwell has brought out
14 to the Court.

15 In addition, you know, I did want to
16 say, and I don't know that this was said -- I tried
17 to listen carefully -- that in this particular case
18 regarding third-party guilt the police officers
19 themselves went to Jaquavious Washington. They go
20 get a statement from him. Then they start getting
21 cellphone records in.

22 They see that his cellphone records put
23 him at the scene of the crime, the tower puts him
24 at the scene of the crime, even though he had told
25 them he was somewhere completely different during

1 the incident. So they go back to him and say, the
2 problem is that the statement you gave us isn't
3 right because your cellphone records put you -- our
4 records put you at the scene of the crime, so tell
5 us how you were involved. We think you were
6 involved; tell us how you were involved. And this
7 is all on video.

8 So the police themselves go back well
9 after -- I think this is months after they've even
10 arrested our clients -- they go back and interview
11 Jaquavious Washington to say, we think you're
12 involved; we think you're part of this crime; your
13 cellphone records put you there.

14 And he tap dances around it, and he
15 says, well, my girlfriend drove me to a gas station
16 down the street and I was trying to get cigarettes,
17 and we were driving all over the place.

18 So when we're talking about whether or
19 not third-party guilt is -- the weight of that
20 evidence, you really have to look at the fact that
21 the police themselves started second guessing, who
22 were those four people that kicked in that door?
23 And Jaquavious Washington was there. We don't know
24 how. We don't know what he did.

25 You add that to the fact that the two

1 witnesses in this case can identify two of the four
2 defendants. They can identify Devonte Major and
3 Elijah Green. They cannot -- as far as the other
4 two people that were involved, the only thing they
5 say is they kind of stood by the door.

6 They wore masks. There's no height,
7 there's no weight, there's no hair, there's no skin
8 tone. There is a mention once of red, blue and --
9 Nike shoes. There's a mention by Mr. Swibaker of
10 somebody wearing red-blue Nike shoes, which my
11 client was wearing that night so -- but that's the
12 only indication -- only indication -- that would
13 even bring up that my client was there.

14 THE COURT: Other than --

15 MS. HUBRICH: Well, so I'm going to
16 argue that his statement, number one, needs to be
17 precluded; and even if you let it in, I'm going to
18 tell the jury it's not voluntary, there should be
19 no weight given to it, and it isn't -- you know, it
20 was coerced.

21 THE COURT: Okay.

22 MS. HUBRICH: And when we get to
23 Jackson v. Denno, you can see -- I mean, Ms.
24 Cornwell alluded to it -- you can see how much
25 pressure they put on my little 21-year-old client

1 that has no prior record after he initially said
2 evidence I had nothing to do with this and then how
3 they lead him and coerce him and suggest to him,
4 isn't this really what happened.

5 THE COURT: Okay. Got it. With you.
6 So you want to know about third-party guilt.

7 MS. HUBRICH: Correct -- no, I want to
8 know about -- there was another incident -- there
9 is an allegation that my client stole the gun that
10 was used in this crime. I want to make sure that
11 the State's not bringing that up, unless I somehow
12 kick the door open.

13 MR. OSBORNE: Well, if he takes the
14 stand, I'm 100 percent going to ask him about the
15 gun.

16 MS. HUBRICH: Fair.

17 MR. OSBORNE: If he doesn't take the
18 stand, then no, I will not.

19 THE COURT: All right. So the prior
20 bad act, the only prior bad act that has arisen
21 would be this business about what occurred a week
22 before.

23 MS. HUBRICH: Correct, that's what I'm
24 understanding, unless I kick the door open.

25 THE COURT: Okay. Got it. All right.

1 Now, so we were at third-party guilt, right?
2 Talked about third-party guilt. And, you know, I
3 think -- this is what I think, I think that -- and
4 I'm going to do some additional work with regards
5 to it, but I don't know that if I can rule in a
6 vacuum.

7 I'm not going to rule in a vacuum. In
8 other words, I will say this: I certainly think
9 that you have, based on your argument and what you
10 have told me, you very well may be a beneficiary of
11 that, I think; but I don't know that I can actually
12 rule in a vacuum.

13 Oh, sure, yes, I think that the trial
14 is going to have to develop; but let me say that
15 your motion is incredibly helpful for -- certainly
16 elucidating because, obviously, in my mind, as you
17 heard, my picture is two people; but the way that
18 you have explained it, you certainly have a viable
19 argument that it is -- it could be excluded. Okay.
20 So there it is.

21 MS. HUBRICH: Thank you, ma'am.

22 THE COURT: Next?

23 MR. OSBORNE: And then with Lyle -- I
24 know there are so many --

25 THE COURT: You know, I don't know how

1 to rule Lyle in a vacuum. I just don't know how to
2 do that. I don't mind doing this, I do not mind
3 sharing the example of Lyle that is in my mind, and
4 it comes from a treatise on evidence that is always
5 helpful to me, and that is there have been a number
6 of robberies all around town at convenience stores
7 at 11:00 the night. That is not Lyle.

8 What then can become Lyle is that they
9 are in a limousine with little American flags, and
10 the person -- the robber who is robing all of the
11 convenience stores gets out at 11:00 at night, and
12 every single time he's wearing a Richard Nixon mask
13 with the same vehicle with the little flags
14 American flags and the Richard Nixon.

15 And in the last robbery, oh, lo and
16 behold, the mask slips off of this person's face or
17 head, you can see the face very clearly, that is
18 admissible Lyle. In other words, it goes to
19 identification because everything else is so odd
20 and different and unusual that they do tie on one
21 to the other, and it would go to identification.

22 So that's what happens in my mind with
23 Lyle. So there's got to be that uniqueness. And
24 there maybe, you know; but, again, little bit in a
25 vacuum, I think.

1 Yes. You wanted to say something.

2 MS. HUBRICH: The second part of that
3 is, if you find it meets one of the elements of
4 Lyle, i.e., identity, then the next thing is can
5 they prove it by clear and convincing evidence, and
6 that was part of my argument.

7 THE COURT: Absolutely. Well, at that
8 point in time you're going to let me know, we're
9 fixing to Lyle it up.

10 MR. OSBORNE: And that was my whole
11 point going into this whole thing, we don't want to
12 Lyle anything up. But if they want to Lyle it up,
13 what I don't want them to be able to do is say,
14 people are breaking into people's houses all the
15 time but I don't want him to say it might have been
16 my guy, and that's what he's going to say.

17 THE COURT: Okay.

18 MS. HUBRICH: I definitely don't want
19 him to say it's my guy.

20 THE COURT: Got it. Got it. All
21 right. Now, I know we've got Jackson v. Denno, and
22 we're going to get to that. Does the State have
23 anything other than Jackson v. Denno?

24 MR. OSBORNE: The only other thing,
25 real quick, that I have, I have a -- I was using

1 that statute that allows me to introduce business
2 records without the necessity of extrinsic
3 testimony. I've worked out with Ms. Cornwell, I
4 think, in reference to the CAD -- I don't plan on
5 moving the CAD in. I understand why she doesn't
6 want me to. I won't. I'm just going to ID it and
7 then publish some times, that's really all that's
8 important to me from that, about three or four
9 times.

10 And the other thing is the 911 call. I
11 don't think that she is arguing that it is a 911
12 call. She wanted to get some testimony out just to
13 indicate that just because the 911 call was placed
14 at that time doesn't mean that's the time of the
15 actual incident, and I think she can get that out
16 through the detective and all of that.

17 And I'm not sure where Ms. Hubrich
18 stands on the business exception that we're trying
19 to bring in under the statute.

20 THE COURT: Okay. Great. First of
21 all, let me finish: Yes? Is that correct? Not
22 correct?

23 MS. CORNWELL: Yes, Your Honor, I
24 wasn't objecting under the business records. It
25 was just the foundational issues, wanting to lay

1 the foundation, but I agree I can get it in through
2 another officer. I think the only other business
3 records that we discussed were the DMV records.

4 THE COURT: Which ones?

5 MS. CORNWELL: DMV records.

6 THE COURT: Oh, DMV, okay.

7 MS. CORNWELL: I think the state is
8 intending on introducing each of the defendants'
9 DMV records to show -- I guess to, I'm assuming,
10 conspiracy, you know, they all know each other,
11 they all are from the same area, they're all
12 together. I think that he gets that through law
13 enforcement.

14 They obviously collect information from
15 each of the defendants to show that. So I would
16 say that by putting in the DMV records and all
17 that, it's unnecessary. I don't know that it's --
18 I mean, I get the business records. I will let
19 Your Honor make the call on that.

20 THE COURT: In other words, there are
21 two prongs, remember, there's authenticity, and
22 then there's relevance. And I think all you're
23 asked at this time moment is will you require them
24 to bring in or will you concede the authenticity of
25 the document; that relevancy is not conceded. Are

1 you okay with authenticity?

2 MS. CORNWELL: They're certified DMV
3 records. I don't have any issue with that.

4 THE COURT: Authenticity as opposed to
5 relevance; two different issues.

6 MS. HUBRICH: Actually, and, Judge, I
7 may be wrong, but I'm seeing three issues. So
8 there's three different documents -- my
9 understanding from the e-mail I got, there's three
10 different -- they're not documents, actually.

11 Three different pieces of evidence the
12 State is attempting to admit. One is the CAD
13 report. I think they've conceded they're not
14 actually admitting that now, so I'm good with that;
15 I have no more objection because they're not
16 admitting that. They're just going to -- testimony
17 will bring that in, the relevant parts.

18 So I have no objection to it in regards
19 to it being authenticated.

20 THE COURT: What's the it?

21 MS. HUBRICH: The CAD report. Because
22 they're not actually putting the physical piece of
23 evidence; we'll have testimonial report about what
24 it said.

25 The second piece of evidence they

1 wanted to admit was the DMV records, and I think
2 that there's three different ways that the State
3 needs to -- three different things -- elements they
4 need to meet. One, they need to authenticate it.
5 And the way it was presented to me was, will you
6 stipulate to it's authenticity because I now have
7 this piece of paper from the records keeper saying
8 that is an authentic report. Am I right?

9 MR. OSBORNE: Yeah.

10 THE COURT: A certified record from the
11 DMV?

12 MS. HUBRICH: Correct. And so it was
13 presented to me, will you go ahead and stipulate to
14 its authenticity because -- under the statute, he
15 kept saying statute, under the statute it's
16 authentic. I think that that's fine. I think that
17 they can do that under the statute for DMV records
18 because it's a business record.

19 THE COURT: It's actually a
20 self-authenticating document.

21 MS. HUBRICH: And then they also said
22 that they were going to redact the portions of it
23 that dealt with, I guess, traffic offenses because
24 they were --

25 THE COURT: Okay.

1 MS. HUBRICH: And I'm fine with that
2 too. I didn't think they needed to go that far,
3 but I'm good with that. So I don't think I have --
4 as far as authenticity of the DMV records, I have
5 no objection to that with that piece of paper that
6 they have that says it's authentic.

7 Whether or not it's hearsay, I think
8 they then bring it in under the hearsay business
9 exception rule, which is a different rule. So
10 we're talking about authenticity under the statute,
11 which is why they have that piece of paper, and
12 then we're talking about a business records
13 exception under hearsay.

14 THE COURT: I think it means both.
15 Because it is a State record, once you have a
16 certified copy, it is a self-authenticating
17 document. You don't need the business records as
18 an exception act because it is a
19 self-authenticating document.

20 Whether or not it's relevant is a whole
21 different program. My question to you is, do you
22 object to the authenticity; does he need to call
23 somebody from across the street and make that line
24 go out the door?

25 MS. HUBRICH: Not for the DMV records.

1 THE COURT: Yes.

2 MS. HUBRICH: The third piece of
3 evidence is the 911 call.

4 THE COURT: Are you good with the --
5 you got it?

6 MR. OSBORNE: Yes. Yes, ma'am. I've
7 got it.

8 MS. HUBRICH: The third piece of
9 evidence is the 911 call itself. I don't think
10 it's a business record. I don't think the statute
11 is applicable. I think they need the dispatcher in
12 here to say, this is what I recorded, and identify
13 it; and then that way it can be played to the jury.

14 I think hearsay then becomes -- it's
15 just not a business record. I've never seen it
16 qualified as a business record. It has subjective
17 opinions in it, which is the whole reason why
18 police reports aren't considered business records.

19 THE COURT: So no stipulation with
20 record to authenticity.

21 MS. HUBRICH: Correct.

22 THE COURT: With regards to the 911.

23 MS. HUBRICH: Correct.

24 MR. OSBORNE: Okay. The DMV
25 custodian --

1 THE COURT: Don't worry about DMV.
2 Worry about 911.

3 MR. OSBORNE: I'm sorry, yes, Christina
4 Denson, the 911 custodian here, submitted an
5 affidavit where she said that the declarant,
6 herself, is a records custody or other qualified
7 person who may provide or -- provide a written
8 declaration regarding the records of regularly
9 conducted law enforcement activity which are the
10 subject of certification.

11 The records of regularly conducted law
12 enforcement activity, hereinafter records, which
13 are the subject of this certification are
14 identified above, that being the 911 call and the
15 CAD report. The records are originals and
16 duplicate copies of 911 auto recordings, audio
17 recordings, and computer assisted dispatch, CAD
18 reports.

19 The records were made at or near the
20 time of the occurrence of the matters set forth by
21 or from information transmitted by a person with
22 knowledge of those matters.

23 The records were kept in the regular --
24 the records were kept in the course of regularly
25 conducted law enforcement activity, and the records

1 were made by regularly conducted law activity and
2 regular practices.

3 And I think that language pretty much
4 tracks with the business record, and she is
5 attesting that that 911 call does meet that
6 requirement.

7 (Brief pause.)

8 THE COURT: All right. I'm going to
9 ask you to bring in the individual for this
10 reason⁶⁵because by necessity we are not going to
11 have the original recording. We're just not
12 because we're not going down there, and we're not
13 going to have the original. We can't. We're going
14 to have a copy of the recording.

15 And I do not believe that it is -- it
16 is unreasonable for the defense to be able to hear,
17 is this the 911 phone call in its entirety, has not
18 been redacted, manipulated, in any form or fashion;
19 and it's for that reason I'm going to ask you to
20 authenticate the recording with a human being.

21 MR. OSBORNE: Okay. Yes, ma'am.

22 THE COURT: Thank you. Next.

23 And let me be clear, just somebody
24 that's familiar with the process, somebody that's
25 familiar with the recording, how it was downloaded

1 and brought to us so that they can testify by their
2 knowledge it is the entire thing.

3 MR. OSBORNE: She's super nice. She's
4 ready, I think.

5 THE COURT: Okay. Yes.

6 MS. HUBRICH: Motion to determine the
7 admissibility of my client's prior convictions.

8 MR. OSBORNE: I'm not aware of any.

9 MS. HUBRICH: Motion to sequester the
10 State's witnesses.

11 MR. OSBORNE: Sequester the State
12 witnesses, so obviously I'm not objecting to that.
13 I just don't understand how we're -- I don't know
14 how we're going to do that. So I guess I just need
15 to get together with Tom and figure out --

16 THE COURT: This is how we will do
17 it -- I'm looking at Lynn. Ms. Goettee has always
18 been beyond spectacular help, and she grabs whoever
19 she grabs to help do that. What we've been talking
20 about is perhaps -- and, you know, we used to keep
21 witnesses that way (indicating).

22 I think this time we're going to keep
23 witnesses maybe in the jury room because it's a
24 larger room, and I think we can keep up to four
25 people -- and I'm looking at Tonda -- safely in

1 that room. We're going to be using the courtroom
2 next to us, that's going to be the jury room.

3 So I think -- and Lynn will be -- you
4 know, she'll just be very careful not to let them
5 cross paths. That's not particularly difficult.
6 They will go out and go in as opposed to going this
7 way (indicating).

8 And, Lynn, you'll probably bring them
9 in, what, from the elevator downstairs and through.

10 MS. GOETTEE: Yes, ma'am. We were kind
11 of waiting to hear what you wanted us to do. We're
12 going to keep them back in the jury assembly room.
13 I would probably be in the courtroom. We would
14 have another staff member, I think that's going to
15 be Rebecca; and she is the one that's going to be
16 actually bringing them in.

17 THE COURT: Okay. That sounds great.
18 And, you know, if you need to kind of hang out in
19 this area, that's fine (indicating).

20 MR. OSBORNE: And while we are on that,
21 just a little housekeeping quick matter, do we have
22 any inclination as to how many victims will be
23 allowed in the courtroom.

24 THE COURT: Thank you. Thank you for
25 asking me. We will need, I'm contemplating, a

1 number of more alternates than we would normally
2 have. And we will talk about that. I want to
3 maximize the number of alternates that we can have.
4 However, having said that, I want to -- you know,
5 we've got to talk about where our victims are going
6 to be, victim's family, where they are going to be.

7 We will not have room for very many
8 victims; unfortunately, we simply will not have a
9 lot of space; however they can rotate in and out.
10 We will be live-streaming downstairs because
11 defendants' family also want to be present.

12 We will have an area for victim's
13 family and an area for the defense, and we will
14 have security because there need not be any kind of
15 communication.

16 It's not ideal, and I am so, so sorry;
17 but that's probably how we are going too to
18 proceed, but we will talk.

19 Probably, I think what we have done in
20 prior trials is the victims have been on the back
21 row sitting with Mrs. Goettee, who is obviously --
22 she does not allow any interaction whatsoever
23 between the victim's family and -- the alleged
24 victim's family, let me say, and the jurors. That
25 would be completely and totally unacceptable.

1 But I try to keep that to a minimum;
2 but, again, they can rotate in. You now, now, this
3 is beside the point, but I will tell you, in so far
4 as I am concerned victims families -- I don't want
5 people moving once we are in and we're set. Other
6 than my lawyers. You all have to move. You all
7 have stuff going on. I don't do that to the
8 lawyers because you have stuff going on. And
9 people who are assisting you.

10 And Ms. Goettee knows after a number of
11 years, there are moments that are tough for a
12 victim's family, alleged victim's family, and they
13 need to leave sometimes, and then they can come
14 back. They have the ability to do that. The only
15 time I shut that down is in openings and closings.

16 Okay. All right. Yes, ma'am.

17 MS. HUBRICH: Motion to determine the
18 admissibility of any identification the State
19 intends to use of my client. Motion to have a
20 pretrial hearing to determine the admissibility of
21 any in court identification.

22 THE COURT: Okay.

23 MS. HUBRICH: I'm asking you to have to
24 have in camera hearing to determine whether or not
25 that would be admissible.

1 THE COURT: Okay.

2 MS. HUBRICH: If the State intends to
3 do it. I don't know that they do.

4 THE COURT: Okay. All right. What
5 else you got?

6 MS. HUBRICH: Jackson v. Denno.

7 THE COURT: Okay. Good. Anything
8 else?

9 MS. HUBRICH: Motion to keep them from
10 talking about victims, which is more prejudicial in
11 regards to Mr. Swibaker.

12 THE COURT: I think you mean alleged
13 victims. And I apologize because I'm -- I guess
14 I'm just every so slightly -- because I'm usually
15 pretty careful about saying alleged victims, but I
16 did correct myself.

17 Yes, ma'am.

18 MS. CORNWELL: Your Honor, we would
19 join all of her motions, the court identification
20 and all that. I believe it is confirmed that my
21 client doesn't have a prior record.

22 THE COURT: No prior record, did you
23 look at that?

24 MR. OSBORNE: No.

25 THE COURT: Okay.

1 MS. CORNWELL: There was indication
2 that the State was going to ask to preclude any
3 evidence of the victim's -- alleged victim's prior
4 bad acts, prior record. I have informed the
5 solicitor I will use those for impeachment purposes
6 under the rules of evidence. I don't know if we
7 need to go through that.

8 MR. OSBORNE: There are just a couple
9 of quick things. Mr. Porter does have some pending
10 criminal charges with our office that's being
11 handled by a different prosecutor. I think that's
12 perfect fodder for cross-examination. He has had
13 those pending charges.

14 But what I -- and I don't think they
15 would, but just so he feels better and Mr. Vannoy
16 who represents him feels better, I would ask that
17 we not get into substance of those charges so he
18 has to plead the fifth and all that.

19 But the fact that he has pending
20 charges is certainly perfectly good for cross. He
21 does have some pending charges. And if you all did
22 want to impeach him on his prior conviction, I'm
23 sorry, then I would like to address that because I
24 don't think it's relevant.

25 THE COURT: Okay.

1 MS. CORNWELL: As far as impeaching him
2 on prior convictions, I think that would go to --
3 toward the inconsistent statement, this impeaching
4 evidence on prior inconsistent statement --

5 THE COURT REPORTER: I can't hear you.
6 I'm sorry.

7 MS. CORNWELL: I believe at one point
8 he tells law enforcement, I'm not a heavyweight,
9 I'm not a big-time dealer. And I know the pending
10 charges -- I want to say that he had a prior as
11 well that would obviously negate or impeach that
12 statement.

13 And I would just -- I think if he's
14 going to say that on the stand, give that testimony
15 on the stand, I can impeach him and say, but
16 weren't you previously convicted of a distribution
17 charge that was within the last ten years an it
18 goes to --

19 THE COURT: I'm with you.

20 MS. CORNWELL: The truthfulness, the
21 veracity, the credibility, and I believe it does
22 come in under the rules of evidence for that
23 purpose.

24 THE COURT: Can't do it in a vacuum.
25 Can't do it in a vacuum. Okay.

1 MS. CORNWELL: Thank you, Your Honor.

2 THE COURT: Got it. And I know you
3 still have your severance.

4 MS. CORNWELL: Yes.

5 THE COURT: Yes. Hold on. Now back to
6 you. I hate to keep doing this. There is some
7 logic. Jackson v. Denno we're going to do in just a
8 moment and we'll do the -- I'm going to do that
9 last is what I'm doing.

10 And then yours about identification.

11 MS. HUBRICH: Correct.

12 THE COURT: You're talking about
13 identification beyond Jackson v. Denno; yes?

14 MS. HUBRICH: Beyond his statement?

15 THE COURT: Yes.

16 MS. HUBRICH: No. I think the State's
17 going to have the witnesses get up and say, that's
18 the person who kicked in our door that night, or
19 that's the person who was in the house that night.
20 I don't think they should be able to do that, and I
21 would ask for a hearing to determine whether or not
22 they can.

23 Although I haven't been able to get an
24 answer as to whether or not they intend to do that.
25 I can object during the course of the trial and we

1 can argue it then.

2 THE COURT: I like it.

3 MS. HUBRICH: I'm good with that. I
4 actually said that I thought that that was what was
5 going to happen.

6 THE COURT: Okay. Great.

7 MS. HUBRICH: We were at Jackson v.
8 Denno.

9 THE COURT: Yes. Okay. But I think I
10 want to do the severance too, because I know you're
11 going to stay for the Jackson v. Denno.

12 Your motion to sever, I would think you
13 would want to do that now. Yes?

14 MS. CORNWELL: I can. I was going to
15 do it after Jackson v. Denno because I think that
16 they're going to show what clips they're going to
17 do for redaction, and I don't think that's going to
18 go to -- you know, my reason for severance or
19 suppressing statements.

20 THE COURT: Thank you. Thank you for
21 that.

22 MS. CORNWELL: Thank you, ma'am.

23 MR. OSBORNE: The State calls Detective
24 Sergeant Jonathan Davis.

25 JONATHAN DAVIS,

1 being first duly sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MR. OSBORNE:

4 Q. All right. Detective Sergeant?

5 A. Yes, sir.

6 Q. Where are you employed?

7 A. Summerville Police Department.

8 Q. And how long have you been there?

9 A. January 2017.

10 Q. Okay. We are going to kind of move
11 this along a little bit, okay?

12 A. Yes, sir.

13 Q. Did you have the occasion on the night
14 of the incident of the arrest of the two -- well,
15 four co-defendants, the four defendants in this
16 case. Were you working that night?

17 A. I was called in to work for this
18 incident.

19 Q. And do you have the occasion to speak
20 to this defendant, Muanah Fortune?

21 A. Yes I did.

22 Q. Okay. And where did you meet with him?

23 A. Interview room number one at the
24 Summerville Police Department.

25 Q. Okay. And at that point when you spoke

1 to him, was he already in custody?

2 A. He was detained from the traffic stop
3 and pursuit, so technically, yes, he was.

4 Q. In all fairness, if he said, I've had
5 enough, I'm ready to go home, that wasn't an option
6 for him?

7 A. No.

8 Q. And was anyone else present during the
9 interview?

10 A. Captain Driscoll.

11 Q. Okay. All right. So when you and
12 Captain Driscoll interviewed Defendant Fortune, was
13 it broken down into two segments, or was it all one
14 interview?

15 A. There were two separate interviews with
16 Mr. Fortune.

17 Q. Okay. So let's talk about the first
18 interview. About how long did that -- did the
19 first segment of the interview last?

20 A. Approximately one hour.

21 Q. And what time did the interview begin?

22 A. I want to say 1:00, 2:00 in the
23 morning, early morning hours.

24 Q. Okay. And was that interview audio and
25 video recorded?

1 A. Yes it was.

2 Q. All right. During Defendant Fortune's
3 interview and your being around him did he appear
4 to be intoxicated or under the influence of drugs?

5 A. No, he did not.

6 Q. Did Defendant Fortune appear to have
7 any physical or mental disability that would have
8 impaired his ability to understand what was being
9 said to him?

10 A. No, he did not.

11 Q. Prior to or during your interview with
12 Mr. Fortune did you offer any breaks, bathroom or
13 otherwise?

14 A. I did.

15 Q. And was the Defendant, Muanah Fortune,
16 denied access to a telephone, food, or drink?

17 A. No.

18 Q. Okay. Were there any threats made to
19 him or promises made to him in exchange for his
20 statement?

21 A. No, there was not.

22 Q. All right. Did you advise him of his
23 Miranda rights?

24 A. I did.

25 MR. OSBORNE: Your Honor, may I

1 approach.

2 THE COURT: You may.

3 BY MR. OSBORNE:

4 Q. I'm showing you what's been previously
5 marked State's Exhibit 192. Can you look at that
6 and tell me if you recognize that?

7 A. I do.

8 Q. What is that?

9 A. It's a Summerville Police Department
10 advisement of rights form, and I recognize my
11 handwriting and signature.

12 Q. Okay. All right. Now, I have shown
13 you before State's 191, and that was, what, clips
14 from the entire interview?

15 A. Yes, sir.

16 Q. Okay. So that wasn't the entire
17 interview, that was clips from the interview; is
18 that fair to say?

19 A. Correct.

20 MR. OSBORNE: At this time I would seek
21 to publish what's going to be our State's 191,
22 which is clips from the interview. It should total
23 about 20, maybe 30 minutes in total.

24 THE COURT: All right. And that's what
25 you all were talking about earlier, you all have

1 seen these clips, probably seen the whole tape,
2 clips, the Miranda form, etc. Yes? Yes?

3 MS. HUBRICH: Yes, ma'am.

4 MS. CORNWELL: Yes, Your Honor.

5 THE COURT: Go ahead.

6 (Video played.)

7 THE COURT: Can't hear.

8 MR. OSBORNE: I'm maxed out over here.

9 THE COURT: Tonda, can you do it?

10 THE CLERK: Yes, ma'am.

11 (Video played.)

12 BY MR. OSBORNE:

13 Q. He said getting a ride to go back to
14 Beaufort?

15 A. Correct.

16 Q. He came here to see Jaquavious?

17 A. Correct.

18 MR. OSBORNE: Clip two.

19 (Video played.)

20 MR. OSBORNE: All right. Clip three.

21 (Video played.)

22 BY MR. OSBORNE:

23 Q. All right. So Clip 2 ended at about
24 3:05, I think, or 3:04, and clip three picks up at
25 3:55. Does that sound right.

1 A. Yes, sir.

2 Q. During that 50 minutes or so does the
3 defendant's story change at all from being dropped
4 off to go see a friend, Jaquavious Washington, and
5 looking for a ride at a gas station?

6 A. No, sir.

7 Q. Does his demeanor change at all?

8 A. No, sir.

9 Q. Is it fair to say that you all -- you
10 and Captain Driscoll did employ various techniques
11 to try to get him to open up?

12 A. Sure, it's fair --

13 Q. Different strategies, interrogation
14 techniques and whatnot?

15 A. Sure.

16 Q. Did any of that have any effect?

17 A. No.

18 Q. All right. So is that the end of the
19 first interview?

20 A. I believe so.

21 Q. And, all right, what happened after
22 that?

23 A. So after that interview's concluded
24 he's escorted to the booking room. We subsequently
25 interviewed Mr. Green for probably an another hour,

1 hour and-a-half. After that walked back into the
2 brooking room, bring Mr. Green back in, I lock,
3 eyes with Mr. Fortune, and he puts his head down.

4 And when he does that, I approached him
5 and said, is there something else you want to talk
6 about. He tells me, he's like, if I say something,
7 they're going to kill me. They will kill me. And
8 I said, let's come on back, let's work through
9 this. So we brought him back in and began a second
10 interview.

11 Q. So his concern was -- was the other
12 people --

13 A. Correct.

14 Q. -- saying something. Or saying
15 something, and that the other people were his
16 concern.

17 A. Correct.

18 Q. Not you and Captain Driscoll? Or was
19 he concerned about you and Captain Driscoll?

20 A. I don't believe he was.

21 MR. OSBORNE: All right. The second
22 interview folder.

23 Beg the Court's indulgence.

24 And, Your Honor, and for your
25 knowledge, I don't trust what I'm looking at here

1 on this hard drive. I'm going to play it directly
2 from the CD.

3 THE COURT: Okay.

4 (Video played.)

5 BY MR. OSBORNE:

6 Q. All right. Detective, and just for the
7 record, you went ahead and re-advised him of his
8 Miranda warnings?

9 A. Correct, due to the time frame.

10 Q. And so we are at 7:18 now, so we're
11 looking at, what, maybe three hours later,
12 something like that?

13 A. Correct. Sir.

14 (Video played.)

15 Q. So at this point had the story changed?

16 A. No.

17 MR. OSBORNE: Clip two.

18 (Video played.)

19 BY MR. OSBORNE:

20 Q. Where did he say he found the 9
21 millimeter?

22 A. He advised it was in the vehicle when
23 he got into it.

24 (Video played.)

25 Q. Did you all recover a Taurus 9?

1 A. We did.

2 MR. OSBORNE: All right. Clip three.

3 (Video played.)

4 MR. OSBORNE: All right. Clip four.

5 (Video played.)

6 Q. Did you all recover the 9 right before
7 the car chase?

8 A. Correct, it was recovered at the
9 completion when they went back and traced steps.

10 Q. Well, I mean like, geographically
11 speaking, would it have been recovered before the
12 car chase was initiated?

13 A. Correct.

14 MR. OSBORNE: Clip five.

15 (Played in open court.)

16 Q. So you told him there were three guys
17 in the house?

18 A. Correct.

19 Q. And how many guys did he say he saw?

20 A. He said they said he only observed two.

21 Q. Did he change it to three once you said
22 three?

23 A. No, sir.

24 Q. He kept it at two?

25 A. Yes, sir.

1 Q. That's all he saw?

2 A. Yes, sir.

3 MR. OSBORNE: All right. Last clip,
4 clip six.

5 (Played in open court.)

6 Q. The first interview was an hour and the
7 second interview was an hour; is that correct.

8 A. Approximately.

9 Q. Did -- we listened for about close to
10 30 minutes. Did the defendant's demeanor change at
11 all during that two hours of you being with him?

12 A. I believe he became more -- his body
13 language changed.

14 Q. Say it begin?

15 A. His body language changed some.

16 Q. In what way?

17 A. More of defeated and -- and open. So
18 on the second interview he seemed to be more
19 truthful, not scared.

20 Q. Okay. And does what we have seen, the
21 clips we've seen fairly and accurately depict his
22 demeanor through the second portion of the
23 interview and how it changed?

24 A. It does.

25 MR. OSBORNE: Okay. No further

1 questions.

2 THE COURT: Cross-examination.

3 CROSS-EXAMINATION

4 BY MS. HUBRICH:

5 Q. His demeanor changed, he became more
6 defeated? Did you just testify he became defeated?

7 A. As far as his body language, like his
8 head's down, and then more open.

9 Q. As if he had been beaten down by
10 interrogation?

11 A. No. As in like a sense of relief, like
12 I'm going to talk about this now.

13 Q. Okay. So you originally -- I want to
14 talk a little bit about what you testified to. You
15 originally said that the interrogation started at
16 1:00 am. I'm assuming that was a misstatement?

17 A. Correct.

18 Q. Okay. When did the interrogation
19 start?

20 A. According to the video, about 3:00 a.m.

21 Q. Okay. Because otherwise that would put
22 us at like four-hour interrogation.

23 A. Correct.

24 Q. And your testimony today is that it was
25 two interrogations.

1 A. Correct.

2 Q. Each one lasting about an hour, a
3 little over an hour.

4 A. Correct, with several hours in between.

5 Q. Muanah Fortune's 21 years old.

6 A. Correct.

7 Q. He has no prior record.

8 A. Correct.

9 Q. You testified that you never denied him
10 access to telephone.

11 A. Correct.

12 Q. You testified to that on direct?

13 A. Correct.

14 Q. So have you watched the entire
15 interrogation, both of them --

16 A. I have.

17 Q. -- before coming here today?

18 A. I have.

19 Q. Okay. Do you remember, so that we
20 don't have to play them for the -- do you remember
21 him asking to talk to his mama twice?

22 A. I do.

23 Q. Did you allow him to leave and go talk
24 to his mama?

25 A. Not at that point.

1 Q. Okay. But you're not calling that a
2 denial of access to telephone.

3 A. Correct.

4 Q. Okay. So you also said, we didn't deny
5 him food or drink.

6 A. Correct.

7 Q. Where, during the course of those two
8 interrogations, because I didn't see it, where
9 during the course of those two interrogations did
10 you say, hey, can I get you a glass of water?

11 A. So it's not played in that clip, but
12 when we bring him back, you know, on the second
13 time after that three-hour gap he did have access
14 to water and toilet at that point. But on that
15 second hour -- at the beginning of the second
16 interview he's in there by himself. I walk in. I
17 asked him if he wants water. He says no. I closed
18 the door. Go back out.

19 Q. Did you offer him food that time?

20 A. I did not.

21 Q. Okay. Was there ever a time where you
22 offered him food?

23 A. No.

24 Q. And so the arrest comes in at about
25 1:00 a.m., he's arrested.

1 A. In Colleton County, he's detained.

2 Q. Taken into custody.

3 A. Correct.

4 Q. Transported to Dorchester County,
5 Summerville.

6 A. To Summerville Police Department,
7 correct.

8 Q. The interrogation starts at 3:00 a.m.

9 A. Correct.

10 Q. So it's two hours there. It lasts --
11 gosh, the second interrogation starts at what,
12 7:00 a.m. I think you said?

13 A. Approximately.

14 Q. Did he get a chance to eat at all
15 during all this time?

16 A. We didn't offer any food, no.

17 Q. Do you know if he made any phone
18 calls?

19 A. That I'm not for sure if he made any
20 phone calls from the booking area.

21 Q. But again, your testimony is that you
22 didn't deny him access to the phone and you didn't
23 deny him food.

24 A. Correct.

25 Q. Okay. The third thing you said is that

1 you made no threats or promises to him.

2 A. Correct.

3 Q. I want to talk first about the Miranda
4 that you had him sign.

5 A. Okay.

6 Q. We marked it as State's 1?

7 MR. OSBORNE: 192.

8 MS. HUBRICH: 192. Is that entered
9 into evidence for the purpose of this hearing?

10 MR. OSBORNE: Say again.

11 MS. HUBRICH: Did you enter it into
12 evidence for the purposes of this hearing?

13 MR. OSBORNE: Yes.

14 BY MS. HUBRICH:

15 Q. Okay. So State's 192 which is entered
16 into evidence for the purposes of this hearing was
17 the Miranda form that he signed.

18 A. Correct.

19 Q. And we saw you read it to him. And
20 part of that is where you say, no threats or
21 promises of leniency have been made to you to get
22 this statement.

23 A. Correct.

24 Q. Okay. And that's before you ever start
25 questioning him.

1 A. Correct.

2 Q. The second time the solicitor mentioned
3 that you read Miranda to him after the, what was
4 it, like three hours, four hours that he was --

5 A. Roughly four hours.

6 Q. In the second one do you remember
7 whether or not you ever said to him, no threats of
8 leniency or promises have been made to you, did you
9 say to him the second time around?

10 A. So at the bottom of that statement is
11 the waiver of rights, so that was read to him the
12 first time. The second time I summarized that and
13 asked him if he was willing to speak with me at
14 that time.

15 Q. Do you ever say to him, no threats or
16 promises of leniency have been made to you?

17 A. No, I did not.

18 Q. Okay. So the only time that was --
19 that portion was ever said to him was at the very
20 beginning.

21 A. Correct.

22 Q. Okay. So let's talk about the promises
23 of leniency.

24 Oh, I wanted -- before I want to get
25 back to -- real quick before we go with promises of

1 leniency, you said that his demeanor didn't change
2 except he became defeated.

3 A. Defeated and more open.

4 Q. Okay. Isn't it true that he actually,
5 as it went on, cried?

6 A. At some points in the interview, yes.

7 Q. And that would be a change in his
8 demeanor.

9 A. In the second interview yes.

10 Q. Okay. Getting back to promises of
11 leniency, your testimony is that you made no
12 promises of leniency.

13 A. Correct.

14 Q. These interrogations each lasted an
15 hour, and you had testified that you had used
16 various tactics.

17 A. Correct.

18 Q. And maneuvers.

19 A. Correct.

20 Q. To secure a confession.

21 A. Correct.

22 MS. HUBRICH: Are we on? Can we
23 connect?

24 Q. Okay. What I'm showing you on the
25 screen is just exactly what we were just looking

1 at, correct? It's his statement to you.

2 A. Correct.

3 (Video played.)

4 Q. Okay. So right there you say, I don't
5 think you're being 100 percent truthful with me.

6 A. Correct.

7 (Video played.)

8 Q. Okay. And you tell him, I can't help
9 you and he can't help you. At that point you're
10 referring to the other detective in the room.

11 A. Correct.

12 Q. And you've gotten yourself into some
13 stuff.

14 A. Correct.

15 (Video played.)

16 Q. We've got to be honest with each other
17 and get to the bottom of this.

18 A. Correct.

19 (Video played.)

20 Q. To make sure that you walk out of hear
21 all right?

22 A. Correct.

23 Q. That's what you told him.

24 A. Correct.

25 Q. You said, I can't help you and he can't

1 help you, right?

2 A. Correct.

3 Q. We've got to be honest.

4 A. Correct.

5 Q. To make sure that you walk out of here.

6 A. Correct.

7 Q. Okay. Four seconds later --

8 (Video played.)

9 Q. You tell him, we already know what

10 happened, or someone tells him that.

11 A. Captain Driscoll.

12 Q. Maybe Driscoll tells him that, right?

13 A. Correct.

14 (Video played.)

15 Q. And we're giving you the opportunity to

16 come forward, is that what you said to him?

17 A. That was Captain Driscoll as well.

18 Q. So Captain Driscoll says to him, we're

19 giving you the opportunity to come forward.

20 A. Correct.

21 Q. What's opportunity for? What's he

22 going to get if he takes the opportunity?

23 A. He gets to tell his version of the

24 events.

25 Q. Not that he gets to walk out of there.

1 A. Correct.

2 Q. But you had just told him he got to
3 walk out of there and that you'd give him an
4 opportunity.

5 A. I think that's misconstrued.

6 Q. Okay.

7 (Video played.)

8 Q. So at that point you say to him, we
9 have cameras in the house -- you said, we're giving
10 you the opportunity to come forward. We have
11 cameras in the house. It's completely up to you if
12 you want to be honest with us. And then you leave
13 an open ended statement, or Captain Driscoll does,
14 you're 21 and you've got no record.

15 A. That was my statement, correct.

16 Q. And that was right on the heels of you
17 saying, we want to make sure you walk out of here.

18 A. I didn't say I want to make sure you
19 walk out of her.

20 Q. What do you think you said?

21 A. I believe the statement is, we need to
22 make sure that you walk out of her.

23 Q. Okay. We need to make sure you walk
24 out of here. So right on the heels of saying: We
25 need to make sure you walk out of here you tell him;

1 we're going to give you an opportunity; it's
2 completely up to you; we want you to be honest with
3 us; you're 21 and you've got no record. And your
4 testimony is that that is not a promise of
5 leniency.

6 A. No, it was not.

7 Q. Okay. Fast-forwarding to 1:20:50 of
8 the same interview.

9 (Video played.)

10 Q. Do you want to spend the rest of your
11 life in prison. That was the next thing that was
12 said to him, correct?

13 A. Not the next thing, but yes.

14 Q. That's the next thing I presented to
15 you.

16 A. Correct.

17 (Video played.)

18 Q. Okay. And again we tell him, this is
19 your opportunity.

20 A. Correct.

21 Q. Did you happen to count how many times
22 either yourself or Captain Driscoll told him, this
23 is your opportunity or used that word?

24 A. I did not.

25 Q. Would it surprise you if you used it in

1 excess of 37 times?

2 A. Could be accurate probably.

3 (Video played.)

4 Q. At this point you now tell him, do you
5 hear -- or someone tells him, I don't know if it's
6 you or Captain Driscoll, do you hear that mumbling
7 next door?

8 A. Correct.

9 Q. That's your buddy next door talking.

10 A. Correct.

11 (Video played.)

12 Q. What I heard was: You're 21; you're
13 the youngest; you're scared; we came to you because
14 we figured your involvement was minute.

15 A. Correct.

16 Q. Are these the tactics that you're
17 trained to use to coerce a confession, elicit a
18 confession?

19 A. Nothing was coerced, but we -- various
20 tactics of interrogation.

21 Q. At some point, and this just might be
22 my opinion, but it becomes frustrating that he is
23 not giving you what you think he should be giving
24 you.

25 A. At that point he's -- there's a lot of

1 silence.

2 Q. In fact -- and I want to follow up on
3 that -- in fact, he says I don't know quite a bit,
4 correct?

5 A. Correct.

6 Q. Yeah. You would ask him a question,
7 where were you in the car? He says, I don't know,
8 everything was confusing. Or you say, where did
9 you go, what gas station? He says, I don't know;
10 I'm not from here. So he says I don't know quite a
11 bit.

12 A. Correct.

13 Q. And that can be frustrating because you
14 all need facts, that's what you're looking for,
15 right?

16 A. (No response.)

17 (Video played.)

18 Q. So when it becomes frustrating, at that
19 point you start giving him things, like maybe
20 you're just there; isn't that what we just said
21 here?

22 A. No. I believe the statement was, what
23 if the other people -- I posed a scenario for him.
24 You're telling me that there's nothing there, but
25 what if one of your friends is telling us something

1 different, that what if they implicate you and say
2 everybody's involved, but you're saying you're not
3 involved, we're going to have conflicting
4 statements.

5 Q. And you suggested to him, well, maybe
6 you were just there?

7 A. I'd have to hear that again.

8 Q. And I might be wrong it's hard to hear.

9 (Video played.)

10 Q. So you're saying that maybe one of the
11 other guys is suggesting that maybe you're just
12 here.

13 A. Correct.

14 Q. Okay.

15 (Video played.)

16 Q. And I don't want you to throw your life
17 away at 21 when you don't even have a criminal
18 record.

19 A. Correct.

20 Q. We're going to fast-forward about ten
21 minutes further, or I'm sorry, six minutes further.

22 (Video played.)

23 Q. Do you believe in second chances.

24 A. Correct.

25 (Video played.)

1 Q. But this is your opportunity to
2 possibly get a second chance.

3 A. Correct.

4 (Video played.)

5 Q. Maybe you're not the trigger man, but
6 you were there.

7 A. Correct.

8 Q. Okay. So this is where we're starting
9 to maybe give him some answers. He hasn't said
10 anything about being a trigger man or being present
11 at this point, correct?

12 A. Correct.

13 Q. Okay. But in the eyes of the Lord and
14 everybody else that makes you just as guilty.

15 A. Correct.

16 (Video played.)

17 Q. At this point you say: You go from
18 being a witness to being a suspect because you
19 don't want to talk.

20 A. Can you play that one more time? I
21 only heard the first part.

22 Q. Yes.

23 (Video played.)

24 BY MS. HUBRICH:

25 Q. So the implication there is if he

1 talks, he goes from being a suspect to being a
2 witness.

3 A. At this point in the interview, we
4 don't know what he is.

5 Q. He's not been charged?

6 A. No.

7 Q. He doesn't have papers that say murder
8 on them?

9 A. Not yet. This is the first interview.

10 Q. We talked a little bit about his
11 demeanor. You said he cried in the second
12 interview.

13 (Video played.)

14 Q. At this point does he start crying?

15 A. I'm not sure. At one point -- at
16 whatever point he does start crying I do remember
17 making note of that verbally to him.

18 Q. Okay. And so it's possible it's right
19 here, just not at this particular spot.

20 Okay. At one point you pick up the
21 pencil in front of him, and we talk about the
22 eraser on the end of the pencil.

23 A. Correct.

24 Q. And we talk about erasing things,
25 correct?

1 A. Correct.

2 (Video played.)

3 Q. And you say, help me help you erase
4 your mistake.

5 A. Correct.

6 (Video played.)

7 Q. Do you want to erase that mistake?

8 A. Correct.

9 (Video played.)

10 Q. So at that point you say, erase that
11 mistake; if he walks out the door I can't help you.

12 A. Correct.

13 Q. Shortly thereafter you all end his
14 first interview, correct?

15 A. Correct.

16 Q. An this is the last -- the closing
17 statements.

18 (Video played.)

19 Q. I thought I had a chance to save you.

20 A. Correct.

21 Q. He then goes out and is who knows where
22 for three hours, approximately?

23 A. He's in a holding cell.

24 Q. Holding cell. And I think the
25 solicitor stated, or maybe you stated, that you see

1 him hanging his head and you approach him again.

2 A. Correct. So he's been -- at that point
3 the interview's ended. He's escorted to the
4 holding cells. We re-interview -- or interview
5 another suspect and as we come back in there he's
6 provided with his paperwork for -- or had already
7 previously been provided with his paperwork with
8 his charges.

9 Q. Okay.

10 A. At that point we lock eyes, like I said
11 before.

12 Q. So at that point he's got -- he's
13 charged with murder?

14 A. Correct.

15 Q. And he comes to you, and he is
16 questioning you, why is murder on this piece of
17 paper.

18 A. In the interview.

19 Q. Right.

20 A. Yes.

21 Q. And that's where this one comes in,
22 he's just said to you, why does it say murder on my
23 piece of paper, right? That's a question he gives
24 to you.

25 A. Right.

1 Q. You reread him his Miranda rights, but
2 you leave out the threats or promises of leniency.

3 A. I just summarized them.

4 Q. So you left that little summary out
5 when you read it to him.

6 A. Yes.

7 Q. But that's one of the parts.

8 A. Correct.

9 (Video played.)

10 Q. So again he had just asked you why does
11 my paper say murder on it.

12 (Video played.)

13 Q. And you respond, we'll go through all
14 that stuff. If things need to be changed, they can
15 be changed?

16 A. Correct.

17 Q. Indicating, if we need to change the
18 murder charge we can change it.

19 A. If he provides information that would
20 prove to us that he wasn't -- that that charge
21 shouldn't be on him, then yes, we would change it.

22 (Video played.)

23 Q. And at that point you're referring to
24 his co-defendants: They're going to jail; they
25 can't hurt you from there?

1 A. Correct. That was in reference to his
2 statements that they're going to kill me, they're
3 going to kill me; arrangements is in regards to
4 being housed separately and things of that nature
5 if we need to do that.

6 Q. You didn't tell him, you're going to be
7 housed separately. You were just saying, they're
8 going to jail; they can't hurt you from there.

9 A. Correct.

10 Q. The implication being, you're not going
11 to jail.

12 A. Not my intent.

13 Q. I want to talk a little bit about what
14 was played in the clips. One of the clips you --
15 he had not mentioned a gun yet, and I believe it
16 was Captain Driscoll who said, was it a revolver?
17 Was it an automatic? And he was suggesting what
18 types of guns.

19 A. Correct.

20 Q. And that was before Mr. Fortune ever
21 mentioned having a gun.

22 A. I don't know where at in the interview,
23 but, yes, I remember the statement.

24 Q. He was suggesting different types of
25 guns that it could have possibly been.

1 A. Correct.

2 Q. At a different part it said, did you
3 have something covering your face? And he said no.
4 Right?

5 A. Correct.

6 Q. Both of the witnesses in this case,
7 Mr. Swibaker and Mr. Porter, say all four people
8 had masks on.

9 A. He later corrects that, Mr. Fortune
10 does, and says he had his hooding up, pulled tight.

11 Q. Well, both of the witnesses said they
12 had -- all four had masks on, and I think they --

13 Was that a yes?

14 A. I believe so.

15 Q. Okay. And all four say they were --
16 and I'm going to mispronounce this. All I can
17 think of is baklava. That's probably not right.

18 A. I believe that's the correct name.

19 Q. It's some sort of full-face covering.

20 A. Yes. I know what you're talking about.

21 Q. Mr. Fortune, when he's asked, did you
22 have something covering your face, he originally
23 says no.

24 A. Correct.

25 Q. And you guys circle back to that and

1 you say, did you have a mask on? And he says
2 again, no.

3 A. Correct.

4 Q. And then you say, did you have a hoodie
5 on. And he says, well, I had a hoodie on. And did
6 you have the hooding pulled tight covering your
7 face? And so at this point, even though he's said,
8 no, I had nothing covering my face, he's going
9 along with what you're saying to him, right?

10 A. Correct.

11 Q. Okay. At one point in the clip Captain
12 Driscoll says, were you standing in the kitchen?

13 A. Correct.

14 Q. And then he says, did you go into the
15 bedroom?

16 A. Correct.

17 Q. And did you throw the mattress on the
18 guy that wasn't hurt?

19 A. That's correct.

20 Q. And that's before Mr. Fortune says
21 anything about a kitchen, a mattress, or a bedroom.

22 A. Correct.

23 Q. It's only after he's given those facts
24 that he says, well, I went into a bedroom, right?

25 A. Four hours later.

1 Q. Yes. Four hours later, after he's
2 given those facts, he then comes back and says,
3 well, I went into a bedroom.

4 A. (No response.)

5 Q. And as those things are being suggested
6 to him, Captain Driscoll says, things are now
7 coming back to you, aren't they?

8 A. Correct.

9 MS. HUBRICH: I have no further
10 questions.

11 THE COURT⁶⁵all right. Ms. Cornwell.

12 MS. CORNWELL: I don't have any
13 questions, Your Honor.

14 THE COURT: All right. Thank you. All
15 right. Yes, sir, redirect.

16 MR. OSBORNE: Thank you Your Honor.

17 REDIRECT EXAMINATION

18 BY MR. OSBORNE:

19 Q. So to refresh your memory -- I'm just
20 going to go in order here -- I asked you if you had
21 ever denied food to Mr. Fortune, and you said you
22 had not.

23 A. Correct.

24 Q. Okay. Ms. Hubrich asked if you had
25 ever offered food. It's a little different

1 question, I suppose.

2 A. Correct.

3 Q. If he had asked for food, would you
4 have said, sorry, no food for you?

5 A. No. We would have made arrangements
6 for him.

7 Q. And then Ms. Hubrich asked, did you
8 deny him a phone call, and you said that, no --
9 well, you told her -- I think you said, yeah, you
10 did.

11 A. I didn't deny the phone call. I just
12 told him he couldn't use it at that point.

13 Q. Well, would it help refresh your
14 recollection if I were to show you video, I can get
15 it, at 6:22 where Mr. Fortune, with you standing
16 next to him, called his brother and said I'm --
17 well, tried to make phone calls, I should say, and
18 wasn't able to?

19 A. That would -- if there is video of
20 that, then it happened.

21 Q. Okay. There was some talk about masks.
22 You were saying that -- Ms. Hubrich asked you that
23 the witness indicated that they thought they all
24 had masks. Did you all find a camouflaged mask in
25 the passenger's -- in the front passenger seat of

1 the Honda that was pulled over?

2 A. I believe so.

3 Q. And who was seated in the front
4 passenger seat of the Honda?

5 A. Mr. Fortune.

6 Q. And there was some mention about guns.
7 Do you remember Captain Driscoll first saying, what
8 did you have, the 380? Did you have the 380?

9 A. Correct.

10 Q. And did he admit to having a 380?

11 A. No.

12 Q. What gun did he admit to having?

13 A. He went into more detail and provided a
14 model. He said, I had a -- I had the Taurus 9.

15 Q. Okay. And did anyone suggest to him,
16 prior to him bringing up Taurus 9, there was a
17 Taurus 9 involved in this investigation at all?

18 A. No.

19 Q. In fact, it was a 380 that was
20 mentioned to him, correct?

21 A. Correct, I believe a 38.

22 Q. All right. So let's talk about some of
23 these techniques that you utilized here. Let's
24 talk about the difference between a hope of
25 leniency and a promises of leniency. Are you, as a

1 detective, are you allowed to promise someone
2 leniency, a defendant?

3 A. No.

4 Q. Are you able to tell them, tell me what
5 happened, and I'll make sure that all those charges
6 go away?

7 A. No.

8 Q. That you have the authority to make it
9 go away, did you make that quid pro quo promise?

10 A. No.

11 Q. But I think it is fair to say that you
12 did provide him some hope.

13 A. Correct.

14 Q. When you're doing --

15 Well, let me ask you, how many violent
16 criminals have you interrogated in your career?

17 A. Hundreds.

18 Q. And when you walk in there to an
19 interview, is one of the techniques that you're
20 trained to do, to walk in there to an interview and
21 say, look, pal, I know you just committed a violent
22 murder; now, tell me you did it.

23 A. No.

24 Q. Has that ever worked?

25 A. No.

1 Q. Okay. So what do you do to -- let's
2 just talk about some of those techniques that you
3 utilize. What do you do?

4 A. Try build a rapport. Try to elicit
5 hope. I guess it goes back to that old saying, you
6 catch more flies with honey than you do vinegar;
7 things of that nature.

8 Q. Good cop, bad cop, is that a technique?

9 A. Sometimes.

10 Q. Do you minimize their involvement?

11 A. Yes.

12 Q. Do you sometimes say things like, hey,
13 the other guy is rolling on you.

14 A. Yes.

15 Q. Pitting them against each other?

16 A. Yes.

17 Q. Okay. And just in case it wasn't
18 clear, the comment here of, we need to get to the
19 bottom to make sure that you walk out of here all
20 right, but I can't do that when you're lying to me,
21 that was around 2. I guess that probably would
22 have been pretty early in the interview?

23 A. It's pretty early. At this point we're
24 not -- we don't have everything together. We don't
25 know that he's -- what his involvement is.

1 Q. Okay. Very early. You all are still
2 trying to figure out what happened.

3 A. Yes.

4 Q. And about 20 minutes later, come on,
5 man, do you want to spend the rest of your life in
6 prison.

7 A. Correct.

8 Q. And the first incriminating statement
9 comes three to four hours later.

10 A. Correct. Second interview.

11 MR. OSBORNE: No further questions,
12 Your Honor.

13 THE COURT: All right. Recross?

14 MS. HUBRICH: No, ma'am.

15 THE COURT⁶⁵all right. Very well, you
16 may step down.

17 Any additional witnesses, or call your
18 next witness.

19 MR. OSBORNE: No, Your Honor.

20 THE COURT: All right. Yes, ma'am.

21 MS. HUBRICH: Judge, may it please the
22 Court.

23 THE COURT: Yes.

24 MS. HUBRICH: I have submitted to the
25 Court just this morning a motion to suppress the

1 defendant's statement. Has it been provided to
2 Your Honor?

3 THE COURT: Yes.

4 MS. HUBRICH: May I please have a copy
5 of it marked as a Court's Exhibit?

6 THE COURT: Yes. Of course, both
7 sides -- State has it.

8 MS. HUBRICH: It's been provided to
9 both counsel for the Codefendant and for the
10 State.

11 (DFT. EXH. 2, Motion, was marked for
12 identification.)

13 MS. HUBRICH: Let the record reflect
14 this has been admitted as Court's Exhibit No. 2 for
15 the purposes of pretrial hearing.

16 THE COURT: Yes.

17 MS. HUBRICH: The test for determining
18 the admissibility of a defendant's statement is
19 whether it was knowingly, intelligently, and
20 voluntarily given under the totality of the
21 circumstances.

22 THE COURT: That's right.

23 MS. HUBRICH: The first step for the
24 State is to prove that to you by a preponderance of
25 the evidence.

1 THE COURT: Yes.

2 MS. HUBRICH: If you find that it is
3 knowing and voluntary, it's then admitted before
4 the jury. They then have to prove that it it's
5 knowing and voluntary to the jury beyond a
6 reasonable doubt.

7 THE COURT: Correct.

8 MS. HUBRICH: That's my understanding
9 of the law.

10 THE COURT: Yes.

11 MS. HUBRICH: The totality of the
12 circumstances in this case, Judge, we have a
13 21-year-old who has no prior involvement with law
14 enforcement, no prior record. They say themselves
15 that he's scared. They admit that he cries during
16 the interview.

17 While they testify that they made no
18 promises of leniency, Judge, certainly when you say
19 to someone, I want to see you walk out and make
20 sure you walk out of here all right, there is no
21 doubt certainly in my mind that I get to walk out
22 of here. That means without handcuffs. That means
23 I get to leave by the front door. Not by handcuffs
24 out the back door into the police cruiser.

25 The fact that you -- the fact that you

1 say, I want to make sure you get out of here all
2 right, you then say, let's take your opportunity 37
3 times during the course of that first interview. I
4 want to make sure you get out of here all right,
5 here's your opportunity, let's take this
6 opportunity, we're giving you this opportunity, we
7 came to you first so you could have this
8 opportunity.

9 If you listen to the -- it's through
10 the entirety. It's almost -- I just kept tallies,
11 oh, my goodness, how many times are they going to
12 say this, and that was just during the course of
13 the first interview, which lasted an hour. I
14 didn't even keep tallies for the second part of the
15 interview.

16 So when you have a 21-year-old with no
17 prior record, fairly unsophisticated in terms of
18 the criminal justice system, you tell him, I want
19 to make sure you walk out the door, and let me give
20 you this opportunity.

21 And then you say, let's erase this.
22 What does that mean? It's not a hope. That's a
23 promise. If you do what I'm telling you to do,
24 then we're going to make sure you walk out this
25 door, and I'm going to erase this for you. Let me

1 help you help yourself. Let me save you.

2 The State wants you to take each one of
3 those and say, oh, he's just giving him a hope.
4 This is just another hope. This is just another
5 hope.

6 What I hope I've showed the Court is
7 that you take them all together, the totality of
8 the circumstances, you take it in the context of
9 who Muanah Fortune is and you say, there is no way
10 that's not a promise of leniency. Look at all
11 times you said this to him. Look at how many times
12 you gave him an opportunity, you told him you would
13 erase it, you told him you would save him. Those
14 are just promises of leniency.

15 You then add to, and we touched on it a
16 bit, the suggestiveness of, I'm going to give you
17 the answer, give you a little bit to marinate on
18 it, and then I'm going to come back and ask you
19 about it, at which point I'm going to let you
20 regurgitate the answer back to me.

21 We saw it through some of the State's
22 clips. We saw it again through some of the clips
23 and through the testimony that the officer gave.

24 I will say that it was two hours. It
25 was extensive. It lasts forever. It is

1 consistent. It is nonstop. Constantly, this is a
2 question, Mr. Fortune; we're asking the questions,
3 Mr. Fortune. They don't ever let up on this
4 gentleman. You see that as you watch it, and it
5 becomes exhausting just watching it. The fact that
6 he was beaten down at the end of it is no surprise
7 at all.

8 Because of that I'm asking you to
9 suppress the entirety of the statement. It is not
10 knowing. It is not voluntary. It relies on
11 promises of leniency. It is suggestive just by the
12 fact they're giving facts to him and having him
13 regurgitate them back. And I'm asking you to
14 suppress all of it based on that.

15 I do have a second argument.

16 THE COURT: Okay.

17 MS. HUBRICH: That if you decide to let
18 the statement come in, that you let it come in in
19 it's entirety. It's only fair. If we're going to
20 let the jury -- the State's going to have to prove
21 to the jury beyond a reasonable doubt that this was
22 knowing and voluntary.

23 I get to talk about every -- we get to
24 watch the whole thing, watch this kid get beaten
25 down, watch this 21-year-old without a prior record

1 get beaten down into giving a confession, and then
2 go back to the jury room and decide whether it was
3 knowing and voluntary.

4 They get to watch that. That's only
5 fair. If we're going to give it to them, we've got
6 to give it to them, and I have to be able to
7 present a complete a defense. Thank you, Judge.

8 THE COURT: Thank you. All right.
9 Anything you want to add?

10 MS. CORNWELL: I don't have anything to
11 argue. It would be part of my severance.

12 THE COURT: I know. I'm with you.

13 Yes, sir.

14 MR. OSBORNE: All right. Well, I guess
15 just briefly, Judge, so the test, as I understand
16 it, once we get into it being possibly coercive
17 conduct by the police is whether the defendant's
18 will was overborne in making a statement.

19 And it's actually the defendant who
20 reinitiates the interview, and he's the once that
21 was calling the shots. And I know she's saying
22 that there was regurgitation, but when they tried
23 to push him a certain way, he wasn't going.

24 THE COURT: Let me ask you this
25 question. I get -- I'm with all that. You know,

1 it's a little bit disconcerting that they do say,
2 we want to make sure you walk out of here. That's
3 probably the most difficult part of this, but it's
4 one statement out of many. Why not -- and I think
5 I know the answer.

6 Why not the entire statement? You
7 know, there is that theory and there is that that
8 evidentiary concern with regards to completeness.
9 And again, I think I know what the answer is, but
10 your, on behalf of the State, response would be,
11 why not two, why not the whole statement.

12 MR. OSBORNE: So twofold -- hope I'm
13 tracking with you. The first one would be the rule
14 of completeness, it was a terrible case where the
15 prosecution literally introduced a small portion of
16 an interview that said, I killed the guy, and then
17 they stopped it.

18 Well, in the next part he said, because
19 he had a gun and I had to. Well, the Courts are
20 like, come on, you've got to play the whole thing.

21 We don't have that here. What we have
22 here is we have the story. In the clips I made
23 sure to get his story out. And his story really
24 was pretty simple, and it did take a little bit of
25 while.

1 So now the next part of it, the reason
2 why I didn't want to press play is because I think
3 it will implicate Bruton. You know, but I think we
4 can get there. I think she can cross, I think --
5 he is going to be subjected to cross-examination,
6 so she can depict that atmosphere and that
7 attitude.

8 I don't like the whole clip situation.
9 I mean, I would object to hearsay to that. I mean,
10 it seems like she's trying to impeach him. I think
11 she can ask the question: You said this? You said
12 that? And she can paint the picture. If he denies
13 any of it, then it comes in. That's kind of the
14 way I would handle that.

15 THE COURT: Okay. In other words, in
16 short, it's not necessary to the State's case, to
17 play the whole thing.

18 MR. OSBORNE: Right, right, yes, Judge.

19 THE COURT: Okay. All right. The
20 standard for me is the preponderance of the
21 evidence. More likely than not it's voluntary. I
22 do not believe, using the preponderance standards,
23 that his free will was overcome. It's two hours.

24 It is late, but it is -- it's two hours
25 of interrogation, which is not particularly long,

1 lengthy, particularly given that there is space in
2 between.

3 While the statement, we need to be sure
4 that -- he didn't say, except on cross -- fine
5 cross-examination -- that we need to be sure that
6 you walk out of here, which is what he said on
7 cross-examination. What he says in the tape is, to
8 make sure that you walk out of here.

9 And so while the statement is
10 disconcerting, yes, if I look at the tape in it's
11 entirety, I do not believe that his free will was
12 overcome. But the ultimate -- by a preponderance
13 of the evidence, the ultimate call, though, is
14 beyond a reasonable doubt with regards to the jury.

15 Now, with regard regards to playing the
16 entirety of the tape as supposed opposed to those
17 portions which the State has requested, it could be
18 played in cross-examination and -- if need be. And
19 so I will leave that -- I'll leave that to you on
20 cross. Okay.

21 But however, however, my concern is
22 that while you certainly can ask about the
23 duration, duration, duration, both of the tapes and
24 the duration in between, where was he and what is
25 that space like, all of those things, on

1 cross-examination the tape needs to be played, or
2 portions of it, on cross-examination.

3 MS. HUBRICH: Do I understand, Judge --

4 THE COURT: It could be part of
5 cross-examination.

6 MS. HUBRICH: So I can admit the
7 statement on cross-examination? I can do what I
8 did on cross-exaggeration?

9 THE COURT: I don't know why not. If
10 there's an objection, I guess there will be an
11 objection, and I will deal with it, right? But if
12 it's on cross-examination and it's relevant to you
13 and it's relevant to your cross-examination, what?

14 I'm going to keep -- yes, I'll handle
15 it when it comes up, but I don't think you're
16 thwarted from doing that.

17 MR. OSBORNE: Judge, it seems to me
18 like, if I understand Bruton correctly, it's when
19 the State introduces evidence of a co-defendant's
20 out-of-court statement and implicates another
21 co-defendant, that Bruton is triggered.

22 So -- and I don't think Ms. Hubrich
23 would ever try to try to trigger Bruton to kind of
24 try to get a mistrial. And what I just heard from
25 that, I don't even think Bruton was implicated.

1 This was all about what he said.

2 THE COURT: Without a doubt.

3 MS. HUBRICH: To be clear, I would play
4 the whole thing to the jury. I think the jury
5 needs to hear the whole thing. I would enter it
6 into evidence and I would play the whole thing for
7 the jury.

8 THE COURT: But the State has the
9 Bruton burden, so they can. They've got it. As I
10 understand what you're telling me, in that I have
11 not heard all of it, you are telling me that there
12 are Bruton issues in it and that you have culled
13 those.

14 And I'm satisfied you've culled them
15 because I saw no indication whatsoever of any other
16 implication. However, there you go.

17 MS. HUBRICH: I'm not following you. I
18 would want the jury to hear all two hours.

19 THE COURT: Okay. I got it.

20 MS. HUBRICH: Okay.

21 MR. OSBORNE: Okay.

22 THE COURT: Okay. Meaning you get to
23 cross-examine, so you'll cross-examine.

24 MS. HUBRICH: Right.

25 THE COURT: If there is an objection

1 to playing a portion, I will deal with it at the
2 time. In other words, your client's 6th Amendment
3 right to cross-examination is very, very strong.
4 And so I am not about to sit here and say, you
5 can't cross-examine, you can't use this tape, you
6 can't play a portion of this tape on
7 cross-examination.

8 Now, it may get limited based on an
9 objection. But, Ms. Hubrich, I'm not about to tell
10 you an in limine motion, in a pretrial motion, that
11 you can't -- you can't cross-examine fully when
12 there's no objection to that cross-examination that
13 is challenging your ability to do that. Do you
14 understand what I'm saying?

15 MS. HUBRICH: I think so.

16 THE COURT: Okay.

17 MS. HUBRICH: I believe there will be
18 objections.

19 THE COURT: Well, okay. I'm okay with
20 that. But don't -- in other words, I'm certainly
21 not going to say at this juncture, Ms. Hubrich, you
22 can't cross-examine because, whatever reason, when
23 there is no objection before me with regards to
24 your ability to cross-examine.

25 I'm just not about to do that to you or

1 to your client. I'm not going to do that. You
2 have the 6th Amendment right to cross-examine
3 witnesses on behalf of your client, and when
4 there's not an objection interposed, and at this
5 moment there isn't, so there you go.

6 MS. HUBRICH: Thank you, Judge.

7 THE COURT: See what I'm saying?

8 MS. HUBRICH: I absolutely see what
9 you're saying, and it actually dances us right back
10 to the motion to sever because I believe it
11 implicates Bruton, and it goes towards why I think
12 this case needs to be severed because this wouldn't
13 be an issue. None of this would be an issue if we
14 could sever it.

15 THE COURT: Okay.

16 MS. HUBRICH: Thank you, Judge.

17 THE COURT: Yes. All right. Closing
18 argument.

19 MS. CORNWELL: Your honor, again, with
20 regards to the Denno part of Mr. Fortune's
21 statement, I don't have any argument.

22 THE COURT: I know.

23 MS. CORNWELL: However, I do believe
24 that the Bruton issues are throughout that
25 statement. On even the clips that the State

1 played -- apologize in advance -- the clips that
2 you gave me must have been what you saw on the hard
3 drive before you put them on there because the
4 second interview I only had three clips and so I've
5 got to go through a couple that haven't been
6 released to us.

7 MR. OSBORNE: Okay.

8 MS. CORNWELL: But I would have an
9 issue in clip one, I'm sorry, in interview one,
10 clip three, were you there when your buddy shot the
11 guy. I mean, that's clearly going to implicate
12 Bruton when you've got two people sitting at the
13 table and someone says were you there when your
14 buddy shot the guy. So, I mean, that's going to
15 create an issue just with that.

16 THE COURT: Hold up. What about that?

17 MR. OSBORNE: I mean, Bruton was when
18 the comment makes it clear that you're talking
19 about those individuals. We know -- at that point
20 we're already going to have testimony that there
21 were four people involved in this.

22 So it doesn't implicate either one of
23 them by saying, I know you were there when your
24 buddies -- I mean, that could have literally been
25 anyone. But I'm going to go back and listen to

1 that again. I may just cut that out.

2 THE COURT: Okay. All right.

3 MS. CORNWELL: And, Your Honor, of
4 course I would argue that from Bruton stems a
5 number of cases where our Supreme Court has
6 indicated even pronouns that may implicate somebody
7 violates Bruton and can give an overly prejudicial
8 inference to the person sitting beside him.

9 So if a pronoun does that, your buddy,
10 the person that was sitting next to you in the car,
11 shot the person, I think that gives an overly
12 prejudicial inference that they are talking about
13 Mr. Salazar.

14 THE COURT: Okay.

15 MS. CORNWELL: You know, throughout the
16 clips and in the second clips they make references
17 to again pronouns of, they're going to jail; who's
18 house did you all go to; where did you all walk;
19 where were you all going.

20 So I think those do make some Bruton
21 issues that will be hard to overcome. Even in the
22 clips that the State is playing, if they redact all
23 of that, they can't guarantee that the testimony
24 would be limited in not implicating my client
25 unfairly.

1 The DNA issues we've already discussed
2 and how that's going to play out and what the
3 arguments would be on that for the severance
4 motion.

5 Ms. Hubrich has just indicated and Your
6 Honor has told her that once we get to the juncture
7 she's going to move for the entire statement in, or
8 attempt to. In that entire statement he says that
9 my guy is in that house and that my guy is there.

10 Well, now I have a confrontation issue
11 because I don't have the opportunity to
12 cross-examine Mr. Fortune on why he would say my
13 client was there, what biases, what motives, is he
14 being truthful. I don't have the opportunity to
15 impeach him or his truthfulness because he has the
16 right not to not take the stand and not testify at
17 trial.

18 So that's why Bruton is such a huge
19 issue in this is because Ms. Hubrich has the right
20 to present a complete defense and play that entire
21 tape. My client has a right to confront the
22 witnesses against him and can't do that unless he
23 takes the stand, so that's going to cause the
24 biggest issue.

25 THE COURT: In addition to?

1 MS. CORNWELL: The DNA evidence. We've
2 got to overcome those things, and I guess we're
3 going to get to the GSR and the other DNA stuff
4 later. But I think what happens in this case is
5 you're compounding so many things on top of each
6 other things, things that could negatively impact
7 and be overly prejudicial to my client if he has to
8 be tried alongside Fortune. And I think Fortune
9 would make the same argument.

10 I am with Michelle. In all of the
11 years that I have been in this courtroom and
12 conducting criminal trials, I haven't seen a motion
13 for severance because typically what happens is the
14 State either elects to not use the statement and
15 try co-defendants together to avoid the Bruton
16 issues; or they elect to try them separately and
17 either flip one or do something to get that person
18 on the stand if they want that statement in.

19 For whatever reason, the State does not
20 want to do that in this case. They want to have
21 their cake and eat it too. And I think that makes
22 it fraught with the appellate issues with Bruton,
23 through our right to present a complete defense,
24 through Mr. Fortune's right to present a complete
25 defense.

1 And our Supreme Court has become very
2 cognizant of these severance issues. Recently in
3 2014 in the Hinson case where they specifically
4 said, you know, that they understand that
5 separating trials and severances, it goes to
6 judicial economy, you know, saving State's
7 resources.

8 However, those reasons should in no way
9 put or give precedence over a defendant's right to
10 a fair and impartial trial and the right to present
11 a full and complete defense to a jury; and if it
12 comes down to one of the two, then obviously the
13 Court needs to take every measure into ensuring
14 that the case and the defense gets to present is
15 fair and impartial.

16 And if you can't do that, separating
17 the trials, then the only other option is to
18 suppress the statement. And in my case I would
19 argue also to suppress the DNA because those are
20 going to be the two things, those are going to be
21 the arguments where, while antagonistic defenses is
22 not a reason for severance, in this case when
23 you're trying to move into evidence different --
24 under different rules of evidence and argue those
25 things under the rules of evidence, then I believe

1 you're taking away the opportunity for each
2 defendant to present a full and proper defense, a
3 complete defense.

4 And that's just going to be fraught
5 with all the issues that the Supreme Court has
6 cautioned so much about. So given the abundance of
7 issues that are likely to be presented if these two
8 defendants are tried together, I believe that the
9 most reasonable option is to sever these trials.

10 I'm not saying that because we are
11 trying to avoid trial. My client and I will be
12 happy to proceed on Tuesday. I would prefer to go
13 first by myself. Because I think that my client's
14 rights to a full and complete defense, to a fair
15 and impartial trial, the right to confront the
16 witnesses against him, the right to challenge any
17 evidence, is going to be severely impacted if he
18 has to be tried alongside Mr. Fortune.

19 If Your Honor is inclined to deny the
20 severance, I believe the only other cure in this is
21 to suppress the statement and suppress the DNA.

22 THE COURT: Okay. Yes.

23 MR. OSBORNE: Just briefly, Judge, so
24 the only right that I have heard that could be
25 infringed here is Ms. Hubrich's right to

1 cross-examine Mr. Davis or Detective Davis. She
2 can do that, but there's no rule that allows her to
3 press play on her client's own statement. That
4 would be introducing the statement. She can't do
5 that. I am the party opponent. I can introduce
6 the statement.

7 Now, if she's trying to cross-examine
8 him to create an atmosphere of coercion going on, I
9 think that's fair. I don't even think that's
10 hearsay. So I think you can get some of that in,
11 but I don't think you then get to use that as a
12 vehicle to then trigger Bruton, which it sounds
13 like that's what she's doing.

14 She can get the atmosphere without
15 pressing play. I think she successfully did that
16 just right here. And I think that doesn't infringe
17 her ability to cross-examine Detective Davis, and
18 that's the only thing that I've heard.

19 The DNA to me, I mean, I know we're
20 going to proffer that statement or that testimony
21 later, Forensic Scientist Dwayne explained to me
22 very well, and I'm only slightly above average
23 intelligence, and I got it.

24 THE COURT: All right. Yes, ma'am,
25 anything further?

1 MS. CORNWELL: Your Honor, again, I
2 believe that the confrontation clause is going to
3 become an issue I think that --

4 THE COURT: And with regards to --

5 MS. CORNWELL: Ms. Hubrich intends on
6 putting those clips in.

7 THE COURT: I got you. Well, here's my
8 problem: My problem is I don't know that,
9 obviously, at this point. She certainly was able
10 to do that today. And as I understand her
11 intention, her intention isn't to implicate your
12 client.

13 Her intention is that she wants to be
14 able to express to the jury that her client was
15 worn down, and that's her intention to do that.
16 You know, I would presume that that's certainly
17 available to do so with some cross-examination. If
18 you have an objection to what she proposes, I
19 expect you to bring that it to my attention.

20 MS. CORNWELL: Your Honor, that might
21 not be her intention. My client's name still gets
22 put out there.

23 THE COURT: I understand.

24 MS. CORNWELL: And that is unfairly
25 prejudicial --

1 THE COURT: Well, let me ask you this
2 question: Do you perceive that you are without the
3 ability, if she wants to put in a particular
4 portion of it, do you maintain that you lack the
5 ability to object to that?

6 MS. CORNWELL: No, Your Honor. Once
7 the jury's heard those things, you can't unring
8 that bell. That's where Bruton comes in. Even a
9 curative instruction that says, you are not allowed
10 to consider anything said about the co-defendant in
11 that statement, and that's what Bruton did.

12 THE COURT: I got you. Here's what
13 we'll do: Once the -- there will be a break
14 between direct and cross-examination, and I will
15 simply require you to tell me what it is that you
16 want to put in additionally.

17 And with regards to that then if
18 there's a Bruton concern, you need to let me know.
19 I don't know any other way to -- I think that's a
20 manageable way to allow for you to get in what you
21 need and for you to help me be sure that your
22 clients' rights or protected.

23 MR. OSBORNE: Judge, and to that point
24 I'll just say that -- and I kept saying, remember
25 to say this, remember to say this, and I keep

1 forgetting -- since your ruling was that it was
2 freely and voluntarily given, the statement, then
3 at that point -- I want to be in all candor to
4 you -- at that point in the trial, if I like the
5 way things are going for us, in all fairness, I may
6 not introduce the statement, and I may just seek to
7 use it for impeachment if he takes the stand.

8 And so I did want to throw that out
9 there to let you know that is in the back of my
10 mind too.

11 MS. HUBRICH: Well, that fixes
12 everything if that's your decision.

13 MR. OSBORNE: Well, I'm not going to be
14 handcuffed to that decision.

15 MS. HUBRICH: Judge, I need to be clear
16 on the record.

17 THE COURT: Yes ma'am.

18 MS. HUBRICH: I should have played the
19 entire thing for you during this motion, and I
20 toyed with playing the entire thing. And it was
21 two hours, and it's late, and I didn't because of
22 that.

23 Instead what I did is I stayed up until
24 about 3:00 in the morning last night finding those
25 clips so that we could move forward quickly because

1 I knew we were going to take all day. I shouldn't
2 have done it.

3 I should have played the whole thing
4 because I think it would have enabled you to see
5 maybe that it wasn't voluntary, and I'm questioning
6 now my decision to not play it and to play those
7 clips.

8 The State can say as much as they want
9 that all I'm trying to do by admitting the entire
10 statement is to implicate Bruton. I'm not. If I
11 could take out every reference to it, I would. The
12 problem with this statement is it goes on forever.
13 It goes around in circles.

14 THE COURT: Doesn't go on forever.

15 MS. HUBRICH: Well, two hours.

16 THE COURT: It does not go on forever.
17 Two hours is not forever. It's just not.

18 MS. HUBRICH: Well, good. I'm glad you
19 feel that way because I think we're going to get
20 there next week.

21 THE COURT: It's just not. It's not
22 forever. A two-hour interrogation by law
23 enforcement is not -- breaking it up an hour and an
24 hour is simply not long.

25 MS. HUBRICH: It goes around. There

1 are definite -- where they're taking about the
2 other guys involved and who kicked in the door and
3 who was wearing what and talking about the purple
4 sneakers. Everybody is implicated in the
5 statement.

6 THE COURT: Yes.

7 MS. HUBRICH: So my intent for this
8 hearing was to put the whole thing in, and I
9 decided not and just to go with the clips. My
10 intent for trial is to put the whole thing in.

11 I think the State, by saying, we're
12 going to admit it into evidence, but we're going to
13 redact everything except for these portions; and
14 then say, but you can't do it because you don't
15 have a right to put it in. Because that's what he
16 just said, the defense doesn't have a right to put
17 this in.

18 But what he's saying is, I get to put
19 it in, redact it all down to here, but then you
20 don't have the right to bring in the rest of it.
21 And that's just incorrect. That's not true.
22 That's not an accurate statement of the law.

23 I do have a right to cross-examine. I
24 think what we're having now is it's going to be the
25 right to cross-examine verus the right to confront.

1 We also have a right to present a full and complete
2 defense, which is due process.

3 THE COURT: Here's what's fascinating,
4 now, and here's where I'm really having a very
5 difficult time, defense counsel for the duration of
6 my practice of law has always, always, wanted
7 statements, confessions, to be videotaped and
8 recorded. They are now videotaped and record.

9 Obviously, that's happening every day
10 all day everywhere. And this is it is not a unique
11 trial. It's the most important trial to these
12 people. God knows I know that and I believe that,
13 and they deserve that kind of attention, absolutely
14 does.

15 But it is not unique in that there are
16 codefendants in a murder. It's not unique that
17 there are codefendants in a murder that are tried
18 together with a recorded statement. It's just not.

19 And so to say that our system cannot
20 accommodate a joint -- joint defendants where there
21 is a recorded statement because of Bruton is simply
22 not correct; that the Court cannot fashion the
23 ability for Bruton and a defendant's right not to
24 let that statement harm, overly, and that the
25 ability to cross-examine occur, when your point is

1 to place before this jury the position that the two
2 hours of interrogation was too much and overcame
3 his free will.

4 You're going to ask him, was it two
5 hours? Two hours. You asked him several times.
6 Two hours. I just think it can be fashioned.

7 Having said that, I'll certainly do
8 some research. I may be incorrect that where there
9 are recorded statements there can be no -- there
10 can be no co-defendants tried, but we will take a
11 look.

12 MS. HUBRICH: Thank you Judge.

13 THE COURT: Yes.

14 MS. CORNWELL: -- judicial economy and
15 State resources is, obviously I think the thing to
16 do is to sever it and suppress it and get it done
17 right now, because what you're suggesting is when
18 it comes up, when she starts to cross-examine
19 Captain --

20 THE WITNESS: Sergeant.

21 MS. CORNWELL: Sergeant. Sorry. I was
22 trying to promote you over Driscoll.

23 When it gets to that point, clearly I'm
24 making an objection and I'm moving for a mistrial
25 at that point.

1 THE COURT: No, no, no, no, no, no,
2 no, I'm going to require -- we're going to take a
3 break, and I'm going to require whatever is coming
4 in on cross-examination that I have an opportunity
5 to take a look at that.

6 MS. CORNWELL: I thought you were
7 saying I could object to her --

8 THE COURT: Well --

9 MS. CORNWELL: -- moving things in but
10 at that point --

11 THE COURT: I changed -- you're right,
12 and I changed that little bit. We will take a
13 break, give you an opportunity -- give me an
14 opportunity to fashion it to -- so that the error
15 is on me. If it's a problem, it's my problem.

16 But I have a sneaking suspicion that
17 irrespective of what I do, if you think I could do
18 it better, you're not going to hold it. You will
19 help me.

20 MS. CORNWELL: I've never been one to
21 hold back, Your Honor, on objections on how other
22 thing could be done.

23 THE COURT: I would love to tell you
24 it has always been of assistance.

25 MS. CORNWELL: Well, thank you, Your

1 Honor. And I think that's the only thing is I'm
2 going to preserve my right to move for a mistrial
3 if it ends up coming through and we'll go from
4 there and maybe we'll all be back here in a couple
5 more weeks.

6 THE COURT: That's right. That's
7 exactly right.

8 MS. CORNWELL: Thank you, Your Honor.

9 THE COURT: All right. Anything else?

10 All right. Now, I did want to just
11 talk about a little bit of housekeeping. Did we do
12 what we need to do in talking about the back row
13 and how many people, where we're going to be.

14 MS. HUBRICH: I have not spoken to my
15 client's family yet. I don't know where to tell
16 them to go.

17 THE COURT: Your client's family,
18 downstairs.

19 MS. HUBRICH: Downstairs.

20 THE COURT: Yes. And please let them
21 know that it is our intention to be able to stream
22 it. We are not as sophisticated as I wish we were,
23 and I apologize. I really do apologize for that.
24 You know, you can see the witness testify.

25 I would like it so much better if we

1 looked much more like CNN, but we don't. We kind
2 of look like, you know, do it yourself, and I
3 apologize. But the family hopefully will be
4 certainly able to see the witnesses and hear the
5 witnesses.

6 MS. CORNWELL: And Your Honor, the
7 only -- not trying to be difficult -- I think I
8 will have an objection that the victim's entire
9 family gets to be here and have support and so the
10 jury gets to see the victim's family supported.
11 However, we'll have two individuals whose life is
12 on the line and it will look like nobody is in here
13 to support them.

14 And I think that could also have a
15 prejudicial effect. Where if there's a three,
16 three, three where we have three from the victim's
17 family, three members from the defendants'
18 families, that at least gives equal weight and
19 appearance on at least the support and these aren't
20 two kids that are just being here with no family
21 while the victims have all this love and support in
22 the world.

23 THE COURT: Well, that would be, if the
24 jury was to utilize that, obviously that would be
25 an extraneous matter, which they are not to use in

1 making their determination with regards to whether
2 or not -- one or both or neither -- whether or not
3 the State's met it's burden of proof, that would be
4 an extraneous matter, and so that's my first
5 indication.

6 The second indication is, just tell
7 everyone how sorry I am. It's COVID driven. We've
8 never been here before. We've always been in a
9 place where both sides -- you know, alleged
10 victim's family has been present, defendants'
11 families have been present.

12 If there was a need, I do not
13 marginalize that need, and I get it. It's
14 heartbreaking. It's one of the many, many
15 heartbreaks of COVID, and I am so sorry that it is
16 the way that it is, and it breaks my heart. But we
17 must move forward with trials, and so in the -- I
18 wish it was better. I wish it was different. We
19 have to move forward with trials.

20 These young men, this family of the
21 alleged victim, people must have a resolution. So
22 while we do is it less than perfect, we have to do
23 so, and I am so sorry.

24 MS. CORNWELL: Thank you, Your Honor.

25 THE COURT: Yes. Now, I need to

THE STATE OF SOUTH CAROLINA	) IN THE COURT OF GENERAL SESSIONS
	) 2019-GS-180416; 2019-GS-180417;
COUNTY OF DORCHESTER	) 2019-GS-180418; 2019-GS-180420;
	) 2019-GS-180421; 2019-GS-180422

STATE OF SOUTH CAROLINA	)
	)
VS.	)
	)
MUANAH ARUNA FORTUNE, JR.	)

- AND -

STATE OF SOUTH CAROLINA	) IN THE COURT OF GENERAL SESSIONS
	) 2019-GS-180437; 2019-GS-180438;
COUNTY OF DORCHESTER	) 2019-GS-180439; 2019-GS-180440;
	) 2019-GS-180441; 2019-GS-180442;
	) 2019-GS-180443

STATE OF SOUTH CAROLINA	)
	)
VS.	)
	)
POLO KEOKI SALAZAR	)

B E F O R E:

The Honorable Diane S. Goodstein, Judge, and a jury
Saint George, South Carolina

DATES: Tuesday, May 11, 2021, through Wednesday, May 19, 2021

Reported by: Cathy J. Provost, RPR/RMR

Official Circuit Court Reporter

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1	<u>I N D E X</u>	PAGE:
2	JURY STRIKE SHEET	18
3	JURY VOIR DIRE	25
4	JURY SELECTION	149
5	MOTION FOR SEQUESTRATION	22
6	OATH ADMINISTERED TO JURY.....	177
7	PRELIMINARY INSTRUCTIONS BY THE COURT	186
8	OPENING STATEMENTS:	
9	BY ATTORNEY GLOVER (THE STATE)	196
10	BY ATTORNEY HUBRICH (DEFENDANT FORTUNE)	201
11	BY ATTORNEY CORNWELL (DEFENDANT SALAZAR)	206
12	STIPULATIONS ... none	
13	MATTERS OF LAW ... 20, 69, 96, 147, 171, 280, 308, 313, 334, 470,	
14	524, 661, 692, 806, 813, 904, 908, 995, 1006	
15	DEFENDANT'S 5TH AMENDMENT RIGHTS	999
16	CLOSING STATEMENTS:	
17	BY ATTORNEY OSBORNE (THE STATE)	1009
18	OBJECTION DURING STATE'S CLOSING	1033
19	BY ATTORNEY HUBRICH (DEFENDANT FORTUNE)	1040
20	BY ATTORNEY CORNWELL (DEFENDANT SALAZAR)	1051
21	OBJECTION DURING DEFENDANT SALAZAR'S CLOSING ..	1056
22	CHARGE OF THE COURT	1067
23	VERDICT OF THE JURY	1107
24	SENTENCE OF THE COURT	1143, 1144
25	CERTIFICATE OF REPORTER	1147

INDEX TO WITNESSESWITNESSES:DIRECT: CROSS: REDIRECT: RECROSS:**LETA BOEHLER**

By Attorney Glover	213	---	237	---
By Attorney Hubrich	---	222	---	239
By Attorney Cornwell	---	234	---	241

CHRISTINA DENSON

By Attorney Glover	243	---	---	---
By Attorney Cornwell	---	245	---	---

MARCUS PORTER

By Attorney Osborne	408	---	---	---
By Attorney Hubrich	---	319	---	---
By Attorney Cornwell	---	384	---	---

JAMES GREEN

By Attorney Osborne	408	---	---	---
By Attorney Wehman	---	424	---	---

JOSHUA SCARBOROUGH

By Attorney Osborne	426	---	---	---
By Attorney Hubrich	---	438	---	---

JACOB ANTHONY CRAMER

By Attorney Osborne	440	---	---	---
By Attorney Hubrich	---	467	---	---
By Attorney Cornwell	---	467	---	---

INDEX TO WITNESSES (cont.)WITNESSES:DIRECT: CROSS: REDIRECT: RECROSS:**RYAN DeWANE**

(outside of the jury's presence)

By Attorney Osborne 471 --- 515 ---

By Attorney Wehman --- 496 --- 518

By Attorney Cornwell --- 508 --- ---

Examination by The Court ... 520

VERA MARTINEZ

By Attorney Glover 546 --- --- ---

By Attorney Cornwell --- 551 --- ---

BETHANY DAVIDSON

By Attorney Glover 552 --- --- ---

By Attorney Cornwell --- 557 --- ---

JACKIE DAVIS

By Attorney Glover 559 --- 580 ---

By Attorney Wehman --- 571 --- 581

By Attorney Cornwell --- 577 --- ---

DAVID SWIBAKER

By Attorney Osborne 583 --- 610 ---

By Attorney Hubrich --- 600 --- ---

By Attorney Cornwell --- 605 --- ---

	<u>INDEX TO WITNESSES</u> (cont.)				
	<u>WITNESSES:</u>	<u>DIRECT:</u>	<u>CROSS:</u>	<u>REDIRECT:</u>	<u>RECROSS:</u>
3	JAMIE HALL				
4	By Attorney Glover	612	---	621	---
5	By Attorney Wehman	---	617	---	622
6	By Attorney Cornwell	---	619	---	---
7	PHILLIP M. MOY				
8	By Attorney Osborne	624	---	646	---
9	By Attorney Hubrich	---	630	---	655
10	By Attorney Cornwell	---	639	---	657
11	MATTHEW ADAM BROOKS				
12	By Attorney Osborne	693,748	---	767	---
13	By Attorney Hubrich	---	748	---	771
14	By Attorney Cornwell	---	759	---	---
15	SALINA SHEPPARD				
16	By Attorney Glover	774	---	---	---
17	By Attorney Cornwell	---	780	---	---
18	RACHEL L. NGUYEN				
19	By Attorney Osborne	781	---	---	---
20	By Attorney Wehman	---	801	---	---
21	By Attorney Cornwell	---	804	---	---
22	RYAN DeWANE				
23	(outside of the jury's presence)				
24	By Attorney Osborne	815	---	821	---
25	By Attorney Wehman	---	817	---	---

INDEX TO WITNESSES (cont.)WITNESSES:DIRECT: CROSS: REDIRECT: RECROSS:**RYAN DeWANE**

By Attorney Osborne 829 --- 849 ---

By Attorney Cornwell --- 847 --- 851

NICOLE HARDIN

By Attorney Osborne 853 --- 869 ---

By Attorney Wehman --- 863 --- 875

By Attorney Cornwell --- 867 --- 877

JONATHAN DAVIS

By Attorney Osborne 877, 912 --- ---

By Attorney Hubrich --- 917 ---

By Attorney Cornwell --- 957 ---

NICHOLAS I. BATALIS

By Attorney Osborne 980 --- ---

By Attorney Cornwell --- 993 ---

INDEX TO EXHIBITS

IDENTIFIED: ADMITTED:

STATE'S EXHIBITS:

4	1 - Overhead street map	215	218
5	2 - Disk (911 call)	244	283
6	3 - CAD report	435	---
7	4 - Disk (in-car, clipped - Scarborough)	433	---
8	5 - Disk (in-car - Scarborough)	433	434
9	6 - Disk (in-car - Cramer)	447	---
10	7 - Disk (in-car, clipped - Cramer)	447	448
11	10 - Orange ski mask	458	719
12	11 - Jumpsuit	458	722
13	12 - Wallet with contents	459	460
14	13 - Taurus pistol	413	725
15	14 - S&W pistol	413	725
16	15 - Jimenez Arms pistol	413	725
17	16 - Springfield pistol	413	423
18	17 - Shell casings (fired)	415	423
19	18 - Fired projectiles	415	423
20	19 - Swabs (blood spot; projectile)	561	714
21	20 - Swabs (canine)	561	714
22	21 - Mason jar	709	714
23	22 - Bag of bags	294	714
24	23 - Notepad	709	714
25	24 - Latex gloves	563	714

INDEX TO EXHIBITSIDENTIFIED: ADMITTED:STATE'S EXHIBITS:

25 - Taurus pistol	297	423
26 - Photograph (incident location)	286	287
27 - Photograph (incident location)	697	698
28 - Photograph (incident location)	697	698
29 - Photograph (incident location)	697	698
30 - Photograph (incident location)	697	698
31 - Photograph (incident location)	401	402
32 - Photograph (moped)	258	259
33 - Photograph (incident location)	286	291
34 - Photograph (incident location)	286	288
35 - Photograph (incident location)	697	698
36 - Photograph (incident location)	697	698
37 - Photograph (incident location)	697	698
38 - Photograph (incident location)	697	698
39 - Photograph (incident location)	697	698
40 - Photograph (incident location)	697	698
41 - Photograph (incident location)	697	698
42 - Photograph (incident location)	697	698
43 - Photograph (incident location)	697	698
44 - Photograph (incident location)	697	698
45 - Photograph (incident location)	697	698
46 - Photograph (incident location)	697	698

<u>INDEX TO EXHIBITS</u>			
		<u>IDENTIFIED:</u>	<u>ADMITTED:</u>
3	<u>STATE'S EXHIBITS:</u>		
4	47 - Photograph (incident location)	401	402
5	48 - Photograph (incident location)	697	698
6	49 - Photograph (incident location)	697	698
7	50 - Photograph (incident location)	697	698
8	51 - Photograph (incident location)	697	698
9	52 - Photograph (incident location)	697	698
10	53 - Photograph (incident location)	697	698
11	54 - Photograph (incident location)	697	698
12	55 - Photograph (incident location)	697	698
13	56 - Photograph (incident location)	697	698
14	57 - Photograph (incident location)	697	698
15	58 - Photograph (incident location)	697	698
16	59 - Photograph (incident location)	697	698
17	60 - Photograph (incident location)	697	698
18	61 - Photograph (incident location)	697	698
19	62 - Photograph (incident location)	697	698
20	63 - Photograph (incident location)	697	698
21	64 - Photograph (incident location)	697	698
22	65 - Photograph (incident location)	697	698
23	66 - Photograph (incident location)	287	288
24	67 - Photograph (incident location)	599	599
25	68 - Photograph (incident location)	697	698

INDEX TO EXHIBITSIDENTIFIED: ADMITTED:STATE'S EXHIBITS:

69 - Photograph (incident location)	286	289
70 - Photograph (incident location)	697	698
71 - Photograph (incident location)	697	698
72 - Photograph (incident location)	697	698
73 - Photograph (incident location)	697	698
74 - Photograph (incident location)	697	698
75 - Photograph (incident location)	697	698
76 - Photograph (incident location)	286	290
77 - Photograph (incident location)	697	698
78 - Photograph (incident location)	697	698
79 - Photograph (incident location)	286	289
80 - Photograph (incident location)	286	291
81 - Photograph (incident location)	697	---
82 - Photograph (swabs - Weaver)	560	---
83 - Photograph (wallet)	460	460
84 - Photograph (wallet)	460	460
85 - Photograph (wallet)	460	460
86 - Photograph (wallet)	460	460
87 - Photograph (Honda CR-V)	732	732
88 - Photograph (Honda CR-V)	732	732
89 - Photograph (Honda CR-V)	732	732
89 - Photograph (Honda CR-V)	732	732

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX TO EXHIBITS

IDENTIFIED: ADMITTED:

STATE'S EXHIBITS:

90 - Photograph (Honda CR-V)	732	732
91 - Photograph (Honda CR-V)	732	732
92 - Photograph (Honda CR-V)	732	732
93 - Photograph (Honda CR-V)	732	732
94 - Photograph (Honda CR-V)	732	732
95 - Photograph (Honda CR-V)	732	732
96 - Photograph (Honda CR-V)	732	732
97 - Photograph (Honda CR-V)	732	732
98 - Photograph (Honda CR-V)	732	732
99 - Photograph (Honda CR-V)	732	732
100 - Photograph (Honda CR-V)	732	732
101 - Photograph (Honda CR-V)	732	732
102 - Photograph (Honda CR-V)	732	732
103 - Photograph (Honda CR-V)	732	732
104 - Photograph (Honda CR-V)	732	732
105 - Photograph (Honda CR-V)	732	732
106 - Photograph (Honda CR-V)	732	732
107 - Photograph (Honda CR-V)	732	732
108 - Photograph (Honda CR-V)	732	732
109 - Knit cap and orange glove	568	746
110 - Camo glove	568	746
111 - Watch (unidentified)	301	---

INDEX TO EXHIBITS

IDENTIFIED: ADMITTED:

STATE'S EXHIBITS:

1			
2			
3	<u>STATE'S EXHIBITS:</u>		
4	111A&B - Watches (Porter)	303	304
5	112 - Photograph (evidence from car)	737	738
6	113 - Photograph (evidence from car)	299	738
7	114 - Photograph (evidence from car)	299	738
8	115 - Photograph (evidence from car)	299	738
9	116 - Photograph (evidence from car)	299	738
10	117 - Photograph (evidence from car)	599	599
11	118 - Photograph (evidence from car)	737	738
12	119 - Photograph (evidence from car)	737	738
13	120 - Photograph (notepad)	711	712
14	121 - Photograph (notepad)	398	400
15	122 - Overhead firearm recovery	730	731
16	123 - Photograph (Green's clothing)	737	741
17	124 - Photograph (Green's clothing)	737	741
18	125 - Photograph (Green's clothing)	739	741
19	126 - Photograph (Green's clothing)	739	741
20	127 - Photograph (Green's clothing)	739	741
21	128 - Photograph (Green's clothing)	739	741
22	129 - Photograph (Green's clothing)	739	741
23	130 - Photograph (Green's clothing)	453	455
24	131 - Photograph (Green's clothing)	453	455
25	132 - Photograph (Major's clothing)	739	741

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX TO EXHIBITS

IDENTIFIED: ADMITTED:

STATE'S EXHIBITS:

133 - Photograph (Major's clothing)	739	741
134 - Photograph (Major's clothing)	739	741
135 - Photograph (Major's clothing)	739	741
136 - Photograph (Major's clothing)	739	741
137 - Photograph (Major's clothing)	739	741
138 - Photograph (Major's clothing)	739	741
139 - Photograph (Major's clothing)	739	741
140 - Photograph (Major's clothing)	739	741
141 - Photograph (Major's clothing)	437	438
142 - Photograph (Major's clothing)	437	438
143 - Photograph (Fortune's clothing)	739	741
144 - Photograph (Fortune's clothing)	739	741
145 - Photograph (Fortune's clothing)	739	741
146 - Photograph (Fortune's clothing)	739	741
147 - Photograph (Fortune's clothing)	739	741
148 - Photograph (Fortune's clothing)	453	455
149 - Photograph (Fortune's clothing)	453	455
150 - Photograph (Fortune's clothing)	453	455
151 - Photograph (Salazar's clothing)	739	741
152 - Photograph (Salazar's clothing)	739	741
153 - Photograph (Salazar's clothing)	739	741
154 - Photograph (Salazar's clothing)	739	741

INDEX TO EXHIBITSIDENTIFIED: ADMITTED:STATE'S EXHIBITS:

155 - Photograph (Salazar's clothing)	739	741
156 - Photograph (Salazar's clothing)	739	741
157 - Photograph (Salazar's clothing)	453	455
158 - Photograph (Salazar's clothing)	453	455
159 - Photograph (Salazar's clothing)	453	455
160 - Green's shoes	459	746
161 - Major's shoes	437	438
162 - Fortune's shoes	459	746
163 - Salazar's shoes	459	746
164 - Photograph (jumpsuit)	792	793
165 - Photograph (jumpsuit)	792	793
166 - Photograph (jumpsuit)	792	793
167 - Photograph (jumpsuit)	792	793
168 - Photograph (jumpsuit)	456	457
169 - Photograph (jumpsuit)	456	457
170 - Photograph (ski mask)	456	457
171 - Photograph (ski mask)	456	456
172 - Serology samples	495	836
173 - Mr. Porter's agreement	250	251
174 - DMV paperwork (Salazar)	646	647
175 - DMV paperwork (Fortune)	646	647
176 - DMV paperwork (Major)	646	647

<u>INDEX TO EXHIBITS</u>			
		<u>IDENTIFIED:</u>	<u>ADMITTED:</u>
1	<u>STATE'S EXHIBITS:</u>		
2			
3	177 - DMV paperwork (Green)	647	---
4	178 - DMV paperwork (Washington)	398	400
5	185 - Ammunition (live)	729	---
6	186 - Blood stain (Weaver)	495	834
7	187 - Projectiles from autopsy	415	423
8	188 - Bullet fragments	415	423
9	189 - Autopsy sketch	984	984
10	190 - Disk (Fortune interview)	887	---
11	191 - Disk (Fortune interview, clipped)	613	888
12	192 - Miranda (Fortune)	459	888
13	193 - Jacket (Major)	459	884
14	194 - Jacket (Salazar)	459	654
15	195 - Jacket (Fortune)	459	890
16	196 - Jacket (Green)	459	884
17	197 - Jacket (Green)	459	884
18	201 - Photograph (Major's jacket)	453	455
19	202 - Photograph (Salazar's jacket)	453	455
20	203 - Photograph (Fortune's jacket)	453	455
21	204 - Photograph (Green's jacket)	453	455
22	205 - Photograph (Green's jacket)	453	455
23	206 - Buccal swabs (Porter)	495	834
24	207 - GSR samples	614	---
25			

INDEX TO EXHIBITSIDENTIFIED: ADMITTED:STATE'S EXHIBITS:

208 - GUCCI bag	736	737
209 - Buccal swabs (Salazar)	495	834
210 - Buccal swabs (Major)	495	834
211 - Buccal swabs (Green)	495	834
212 - Photograph (map - chase)	461	461
213 - Photograph (map - chase)	461	461
214 - Buccal swabs (Fortune)	629	834
300 - Statement (Swibaker)	597	---
301 - Projectiles (fired)	715	---
302 - Packaging for jumpsuit and ski mask	721	722
303 - Photograph (couch)	768	768
304 - Photograph (couch)	768	768

DEFENDANT'S EXHIBITS:

1 & 2 - Disks	229	---
---------------	-----	-----

COURT'S EXHIBITS:

1 & 2 - Jury notes	312	---
3 - Jury note	406	---
4 - Jury note	544	---
5 - Jury note	545	---
6 - Jury note	1096	---
7 - Jury note	1100	---
8 - Jury note	1107	---

1	<u>JURY STRIKE SHEET</u>						
2	<u>NAME:</u>	<u>RACE:</u>	<u>SEX:</u>	<u>STE:</u>	<u>DFT:</u>	<u>CRT:</u>	<u>SEATED:</u>
3	1. Shirley E. Obry	W	F		X (F)		
4	2. Thomas E. Saatela	W	M				X
5	3. Christopher Greenhill	W	M				X
6	4. Evelyn Cassidy	A	F		X (S)		
7	5. Carol A. Huggins	W	F		X (F)		
8	6. Davon C. Hunter	B	M				X
9	7. Brandon L. Boykin	W	M				X
10	8. Karen A. Kuykendall	W	F				X
11	9. Alexandria C. Pendino	W	F				X
12	10. Sebastian K. Ford	W	M		X (F)		
13	11. Salvador J. Chaves	W	M				X
14	12. Linda D. Harrington	W	F		X (F)		
15	13. Diania F. Ancrum	B	F				X
16	14. Timothy E. Stewart	W	M		X (F)		
17	15. Christopher S. Tucker	B	M				X
18	16. Paul M. Zoeller	W	M	X			
19	17. Tedd J. Steele	W	M		X (S)		
20	18. Rory M. McColly	A	F		X (F)		
21	19. Jason W. O'Neil-Thomas		M	X			
22	20. Anthony W. Nichols	W	M		X (S)		
23	21. Sheila Summers	B	F				X
24	22. Shari A. Smith	W	F		X (F)		
25	23. Michael J. Rabasco IV	W	M		X (F)		

JURY STRIKE SHEET

(cont.)

<u>NAME:</u>	<u>RACE:</u>	<u>SEX:</u>	<u>STE:</u>	<u>DFT:</u>	<u>CRT:</u>	<u>SEATED:</u>
24. Lyndy E. Carpenter	W	F		X(S)		
25. James P. Foss, Jr.	W	M		X(S)		
26. Alan B. Murray	W	M		X(S)		
27. George A. Webster	W	M		X(S)		
28. Jennifer L. Parvin	W	F	X			
29. Carrie C. Rafferty	W	F				X
30. Donald L. Paro	W	M		X(F)		
31. Joanne L. Smith	W	F				X
32. Christina V. Mills	B	F				X
33. Kristine L. Shifty	W	F		X(F)		
34. Rylie E. Middaugh	W	F				X
35. Nakilya Y. Phillips	B	F				X

1 -- P R O C E E D I N G S --

2 (WHEREUPON, proceedings commenced at 10:08 a.m.)

3 MATTERS OF LAW

4 THE COURT: I'll begin by saying amazing presentations all
5 the way around. Lots to think about. Wonderful work. Thank you
6 all. However -- and maybe this is too hopeful on my part -- but
7 I do believe that we can fashion what we need to as the trial
8 proceeds. I know that you will be here and be making the
9 appropriate objections. That will be of great assistance to me.

10 But I'm not prepared to sever the trial. But I do thank you
11 all for excellent arguments. Again, much to think about, but I
12 do think that the case can be tried and not severed. But there
13 are four codefendants, and I speak of the two defendants here, of
14 course, Mr. Fortune and Mr. Salazar. And so I am prepared to try
15 this case with both of these defendants, noting the exception on
16 behalf of the defense.

17 ATTORNEY CORNWELL: Thank you, Your Honor.

18 THE COURT: Now, with regards to the *Jackson v. Denno*, I
19 think I addressed that on Friday. I think that, with regards to
20 the DNA, I'm going to address that in camera whenever we have an
21 opportunity when SLED appears. And there was one other matter.
22 Y'all help me remember.

23 ATTORNEY OSBORNE: Your Honor, the only other matter that
24 was pertinent to us, I think, was the third-party guilt. So I
25 would just ask that you instruct the defense to not mention

1 anything about third-party guilt in their openings. And then we
2 can then proffer that testimony when they plan on eliciting that
3 as the trial goes on. If I had to guess, it was probably going
4 to be through the first-case agent, Officer Moy, and the
5 second-case agent, Detective/Sergeant Jonathan Davis. They'll be
6 toward the end of the trial.

7 THE COURT: Okay. All right.

8 ATTORNEY CORNWELL: I'd like to get it in through my
9 openings, but ...

10 THE COURT: I understand. I don't think that -- I will ask
11 you to do that. As you know, third-party guilt is a brand new
12 theory.

13 ATTORNEY CORNWELL: Yes, ma'am.

14 THE COURT: I know that I'm asking you to restrict your
15 opening. But if it is in I know that certainly, you know, you
16 will have an opportunity to address it fully in closing.

17 ATTORNEY CORNWELL: Yes, ma'am.

18 THE COURT: Not that openings aren't important to jurors,
19 but certainly they are also in closing.

20 ATTORNEY CORNWELL: And then just to clarify for the record,
21 I understand the motion regarding the *Jackson v. Denno* statement.
22 My motion to sever was that, in the alternative, a motion to
23 suppress the statement for the *Bruton* issues. I understand
24 you're denying the motion to sever. Or do you want to make a
25 ruling on the motion to suppress the statement based on the

1 *Bruton* issues and the denial of the severance?

2 THE COURT: Yes. I'm not going to suppress the statement.

3 ATTORNEY CORNWELL: Thank you, Your Honor.

4 ATTORNEY HUBRICH: Judge, can I go through my laundry list
5 real quick?

6 THE COURT: Sure.

7 ATTORNEY HUBRICH: So that motion to sever is denied. The
8 motion to suppress DNA is going to be addressed during trial.
9 Motion to suppress gunshot residue, also addressed during trial.
10 Motion to preclude the state from eliciting testimony that the
11 defendant refused to comply, that goes with the DNA, so I think
12 that's addressed during trial.

13 THE COURT: We'll address it during trial. But for
14 everybody's edification, I am not going to penalize counsel for
15 needing to communicate with a client. We'll address that in
16 trial, but I'll just share that with everybody.

17 ATTORNEY HUBRICH: We had discussed that *Lyle*, i.e., my
18 motion to determine the admissibility of prior bad acts. The
19 state brought up the prior armed robbery. And I think you also
20 said you were not going to decide that ---

21 THE COURT: Oh, absolutely not yet.

22 ATTORNEY HUBRICH: The motion to determine the admissibility
23 of prior convictions, we decided there were none. Sequestration,
24 granted. Motion to determine admissibility of eyewitness ID, if
25 I object if they try to ID my client in court during trial. And

1 *Jackson v. Denno*. Prejudicial language. You recall the
2 eyewitness's victims.

3 THE COURT: Say it again.

4 ATTORNEY HUBRICH: Motion to preclude the state from using
5 prejudicial language in reference to their witnesses.

6 THE COURT: Oh. In other words, you want to call them
7 alleged victims instead of victims?

8 ATTORNEY HUBRICH: Or just eyewitnesses or just their names.

9 THE COURT: I gotcha. I gotcha.

10 ATTORNEY OSBORNE: I mean, I'm going to try. Unless the
11 evidence is that Marcus shot himself, they're victims of
12 somebody, maybe just not their victims. But I will try.

13 THE COURT: Okay.

14 ATTORNEY HUBRICH: Perfect. The business records, I think
15 we're all in agreement on that. And I think you said
16 Mr. Porter's pending charges and criminal offenses. Did we
17 address that at pretrial?

18 ATTORNEY OSBORNE: I'm sorry, say it again.

19 ATTORNEY HUBRICH: Mr. Porter's prior record.

20 ATTORNEY OSBORNE: Actually, you brought up I point I hadn't
21 considered. So I will concede that if he did say that he's never
22 sold drugs -- I mean, he's been convicted of it, so ...

23 THE COURT: Right. Unless the door gets opened.

24 ATTORNEY HUBRICH: Okay. Thank you, Judge.

25 THE COURT: All right, got it. Good? Good?

1 get a list of the folks on the first panel.

2 CLERK OF COURT: Ys, ma'am. We'll let them know when we're
3 ready.

4 ATTORNEY HUBRICH: Judge, if my client's family is here, I'm
5 sending them downstairs for a live feed. Is that -- no?

6 CLERK OF COURT: Next panel will be coming in.

7 ATTORNEY HUBRICH: I don't believe they're here. One person
8 did say they wanted to be here.

9 THE THE BAILIFF: I can check and see, Your Honor.

10 THE COURT: If we have one. Okay. But, yes, we're ready.

11 CLERK OF COURT: There's no live feed today, though, Judge.

12 THE COURT: Right. We don't have a live feed going today.

13 (WHEREUPON, the Clerk of Court conducted roll call, and the
14 Court conducted exemptions and transfers necessary to qualify the
15 jury panel.)

16 VOIR DIRE OF THE JURY PANEL

17 THE COURT: All right. Now, ladies and gentlemen, I find
18 that the panel is now qualified. And at this time I am going to
19 call on our solicitor. You know, in every other state we call
20 them district attorneys or state's attorneys. Our prosecuting
21 lawyers, we call them solicitors in South Carolina. So.

22 I am going to call on our solicitor, Solicitor Osborne, and
23 ask you to please call our first case for trial.

24 ATTORNEY OSBORNE: Thank you, Your Honor. The matter before
25 you is The State versus Muanah Fortune and Polo Salazar.

1 Mr. Fortune has been charged with murder, that's Indictment
2 No. 2019-GS-18-0416; the next charge is attempted murder, that's
3 2019-GS-18-0417; the next charge is burglary in the first degree,
4 that's 0418; the next one, possession of a firearm during the
5 commission of a violent crime, 0420; next indictment,
6 ill-treatment of animals, 0421; and the last charge, armed
7 robbery, 0422.

8 The next case is State versus Polo Salazar. His charges are
9 very similar with the exception of one. The first charge is
10 murder at 2019-GS-18-0437; burglary in the first degree, 0438;
11 attempted murder, 0440; possession of a firearm during the
12 commission of a violent crime, 0441; armed robbery, 0442;
13 ill-treatment of animals, 0443; and the different charge is
14 possession of a stolen vehicle, and that's 0439.

15 And, Your Honor, I have the indictments, if I may approach.

16 THE COURT: Sure. Now, ladies and gentlemen, I want to tell
17 you what has just occurred. What has just occurred is the
18 solicitor/the prosecutor on behalf of the state, the
19 solicitor/attorney on behalf of the state, has just called to my
20 attention certain indictments.

21 Now, ladies and gentlemen, I want to tell you what an
22 indictment is and what it is not. The first thing I will tell
23 you is that an indictment is a piece of paper, that's the first
24 thing that it is. And each of the charges that the solicitor
25 just mentioned are, each one, they're on separate pieces of

1 papers, or separate indictments. Now, ladies and gentlemen, an
2 indictment contains the allegations against a fellow citizen.
3 And those folks are called defendants.

4 Now, ladies and gentlemen, now I want to tell you what an
5 indictment is not. An indictment is not evidence of any of the
6 allegations it contains.

7 I also want to hasten to tell you that each of these
8 defendants has pled not guilty to each of these indictments. And
9 that places upon the state the burden of proving guilt beyond a
10 reasonable doubt. In other words, they must prove each element
11 of each offense, on each defendant, beyond a reasonable doubt.

12 You will consider these, those of you that serve on the
13 jury, will consider these indictments separate and apart, one
14 from the other, and each defendant separately and independently.

15 Now, ladies and gentlemen, the reason that I have brought up
16 the indictments is because I need to find out whether or not any
17 of you know or think you may know or have you heard or think you
18 may have heard anything about these allegations.

19 So, ladies and gentlemen, I am going to read to you the
20 allegations of these indictments. Now, remember, the question
21 that's going to follow is, Do any of you know or think you may
22 know or have you heard or think you may have heard anything about
23 these allegations, to include today?

24 All right. Now, ladies and gentlemen, my question -- and
25 this is for the sake of time, although I want you to understand

1 that these indictments are separate, these defendants are
2 separate. But I think what I'll do is, I'll go through them for
3 each individual.

4 Indictment 2019-GS-18-0416 alleges that, in Dorchester
5 County, South Carolina, on or about January the 28th, 2019, with
6 malice aforethought, the Defendant Mr. Muanah Aruna Fortune, Jr.,
7 did kill one Joe Weaver by means of shooting the victim. The
8 victim did die as a proximate result thereof, this offense being
9 in violation of the common law and Section 16-3-10 of the South
10 Carolina Code of Laws, as amended.

11 Now, Indictment 2019-GS-18-417 alleges that, in Dorchester
12 County, South Carolina, on or about January the 28th, 2019, the
13 Defendant Muanah Aruna Fortune, Jr., did, with the intent to
14 kill, attempt to kill one Marcus Porter with malice aforethought
15 by shooting the victim, this offense being in violation of
16 Section 16-3-29, South Carolina Code of Laws, as amended.

17 Indictment 2019-GS-18-0422 alleges that, in Dorchester
18 County, South Carolina, on or about January the 28th, 2019, the
19 Defendant Muanah Aruna Fortune, Jr., did, by use of force,
20 threats or intimidation, and while armed with a deadly weapon, or
21 while alleging either by words or action that he was armed while
22 using a representation of a deadly weapon, or any object which a
23 person present during the commission of the robbery reasonably
24 believed to be a deadly weapon, taking, carrying away goods
25 and/or monies from the person or presence of the victim, Joe

1 Weaver, with the intent to permanently deprive the victim of
2 possession of goods or money, such weapon or alleged weapon
3 described as a handgun, this offense in violation of Section
4 16-11-330 of the South Carolina Code of Laws, as amended.

5 Indictment 2019-GS-18-0418 alleges that, in Dorchester
6 County, South Carolina, on or about January the 28th, 2019, the
7 Defendant Muanah Aruna Fortune, Jr., did willfully and unlawfully
8 enter the dwelling of Marcus Porter without consent and with the
9 intent to commit the crime therein and when, in effecting entry
10 or while in the dwelling or in immediate flight, the defendant or
11 another participant in the crime is armed with a deadly weapon or
12 explosive, causes physical injury to a person who is not a
13 participant in the crime, uses or threatens to use the use of a
14 dangerous instrument, displays what is or appears to be a knife,
15 pistol, revolver, rifle, shotgun, machinegun or other firearm
16 and/or the entering or remaining occurs in the nighttime, this
17 offense being in violation of Section 16-11-311 of the South
18 Carolina Code of Laws, as amended.

19 Indictment 2019-GS-18-420 alleges that, in Dorchester
20 County, South Carolina, on or about January the 28th, 2019, the
21 Defendant Muanah Aruna Fortune, Jr., did visibly display or have
22 in his possession a handgun during the commission of a violent
23 crime, as defined by Section 16-1-60 of the Codes of Laws of
24 South Carolina, 1976, as amended; to wit, burglary in the first
25 degree and murder, thereby violating Section 16-23-49 of the

1 South Carolina Code of Laws, 1976, as amended.

2 And Indictment 2019-GS-18-0421 alleges that, in Dorchester
3 County, South Carolina, on or about January the 28th, 2019, the
4 Defendant Muanah Arna Fortune, Jr., did torture, torment,
5 needlessly mutilate, cruelly kill or inflict excessive or
6 repeated, unnecessary pain or suffering upon an animal, or by
7 omission or commission, did cause the acts to be done in that the
8 defendant did cruelly kill a dog by shooting it, this offense
9 being in violation of Section 47-1-40(b) of the South Carolina
10 Code of Laws as, amended.

11 Now, ladies and gentlemen, the allegations that I've just
12 gone over are for the offenses of ill-treatment of animals, in
13 general, torture; possession of a firearm or knife during the
14 commission of a violent crime; burglary in the first degree;
15 armed robbery; attempted murder; and murder.

16 Now, ladies and gentlemen, I'm now going to address the
17 allegations contained in the indictments involving Mr. Salazar.
18 Indictment 2019-GS-18-0437 alleges that, in Dorchester County,
19 South Carolina, on or about January the 28th, 2019, with malice
20 aforethought, the Defendant Polo Keoki Salazar did kill one Joe
21 Weaver by means of shooting the victim. The victim did die as a
22 proximate result thereof, this offense being in violation of the
23 common law and Section 16-3-10 of the South Carolina Code of
24 Laws, as amended. Those allegations are the murder charge.

25 Indictment 2019-G-S-18-0438. Ladies and gentlemen, these

1 allegations are contained in the burglary, first degree,
2 indictment. The allegations are that, in Dorchester County,
3 South Carolina, on or about January the 28th, 2019, the Defendant
4 Polo Keoki Salazar did willfully and unlawfully enter the
5 dwelling of Marcus Porter without consent and, with the intent to
6 commit a crime therein and when, in effecting entry or while in
7 the dwelling or in immediate flight, the defendant or another
8 participant in the crime is armed with a deadly weapon or
9 explosive, causes physical injury to a person who is not a
10 participant in the crime, uses or threatens to use a dangerous
11 instrument, displays what is or appears to be a knife, pistol,
12 revolver, shotgun, machinegun or other firearm and/or the entry
13 or remaining occurs in nighttime, this offense being in violation
14 of Section 16-11-311 of the South Carolina Code of Laws, 1976, as
15 amended.

16 The next indictment is 2019-GS-18-0430. It is the
17 indictment for attempted murder, and it alleges as follows.
18 That, in Dorchester County, South Carolina, on or about January
19 the 28th, 2019, the Defendant Polo Keoki Salazar did, with the
20 intent to kill, attempt to kill one Marcus Porter, with malice
21 aforethought, by shooting the victim, this offense being in
22 violation of Section 16-3-29 of the South Carolina Code of Laws,
23 1976, as amended.

24 Now, Indictment 2019-GS-18-0435, which is the indictment for
25 armed robbery, alleges that, in Dorchester County, South

1 Carolina, on or about January the 28th, 2019, the Defendant Polo
2 Keoki Salazar did, by use of force, threats or intimidation and,
3 while armed with a deadly weapon, or while alleging either by
4 words or actions that he was armed while using a representation
5 of a deadly weapon or any object in which a person present during
6 the commission of the robbery reasonably believed to be a deadly
7 weapon, taking, carrying away goods and/or money from the person
8 or in presence of the victim, Joe Weaver, with the intent to
9 permanently deprive the victim of possession of the goods money,
10 such weapon or alleged weapon described as a handgun, this
11 offense in violation of Section 16-11-330 of the South Carolina
12 Code of Laws, as amended.

13 Now, ladies and gentlemen, bear with me for just one second.
14 Ladies and gentlemen, I need to give a different indictment
15 number. It's Indictment No. 2019-GS-18 -- and, counsel, could
16 you fill in the last three numbers for me.

17 ATTORNEY OSBORNE: Sorry, Judge. What was the charge that
18 you're on now?

19 THE COURT: This is the armed robbery allegations involving
20 Mr. Salazar.

21 ATTORNEY OSBORNE: 0442.

22 THE COURT: 0422. Thank you kindly. Now with regards to
23 Indictment 2019-GS-18-0441, which is the indictment for
24 possession of a firearm or a knife during the commission of a
25 violent crime, the allegations are that, in Dorchester County,

1 South Carolina, on or about January the 28th, 2019, the Defendant
2 Polo Keoki Salazar did visibly display or have in his possession
3 a handgun during the commission of a violent crime, as defined by
4 Section 16-1-60 of the Code of Laws of South Carolina, 1976, as
5 amended; to wit, burglary, first degree, and murder, thereby
6 violating Section 16-22-490 of the Code of Laws of South
7 Carolina, 1976, as amended.

8 Indictment 2019-GS-18-0439, which is the indictment for
9 possess, conceal, sell or dispose of a stolen vehicle where the
10 value is more than two yet less than \$10,000, alleges that, in
11 Dorchester County, South Carolina, on or about January the 28th,
12 2019, the Defendant Polo Keoki Salazar did knowingly and
13 unlawfully possess, receive, conceal, sell or dispose of a
14 vehicle described as a 2007 Honda CR-V with an approximate value
15 of \$6,000 and the defendant was not entitled to possession of the
16 vehicle and had knowledge that the vehicle had been stolen or
17 converted unlawfully, this offense in violation of Section
18 16-21-80 of the South Carolina Code of Laws, as amended.

19 Indictment 2019-GS-18-0443, the ill-treatment of animals, in
20 general, torture, alleges that, in Dorchester County, South
21 Carolina, on or about January the 28th, 2019, the Defendant Polo
22 Keoki Salazar did torture, torment, needlessly mutilate, cruelly
23 kill or inflict excessive or repeated, unnecessary pain or
24 suffering upon an animal, or by omission or commission did cause
25 the acts to be done, in that the defendant cruelly killed a dog

1 by shooting it, this offense being in violation of Section
2 47-140(b) of the South Carolina Code of Laws, as amended.

3 Ladies and gentlemen, as to each of these indictments, the
4 defendant(s) who is mentioned in the indictments, those involving
5 Mr. Fortune, those involving Mr. Salazar, they have pled not
6 guilty.

7 Now, ladies and gentlemen, my question to you is this. Do
8 any of you know or think you may know or have you heard or think
9 you may have heard anything about these allegations? If so,
10 please stand at this time.

11 (No response.)

12 THE COURT: And I find no one standing.

13 Now, ladies and gentlemen, please allow me to introduce you
14 to Mr. Osborne/Solicitor Osborne. And he is going to introduce
15 to you his cocounsel and the members of his office.

16 When he is finished my question to you is going to be this.
17 Do any of you know or think you may know -- excuse me. Are you
18 related by blood or marriage or acquainted with Mr. Osborne or
19 any of the folks that he is going to mention to you? Thank you,
20 sir.

21 ATTORNEY OSBORNE: Thank you, Your Honor. Again, my name is
22 Dave Osborne, I'm the prosecutor/assistant solicitor in the First
23 Circuit. And the First Circuit's Dorchester, Calhoun and
24 Orangeburg Counties. My boss, our boss, is David Pascoe. He's
25 the solicitor here in the First Circuit. Locally our supervisor

1 here is Kelly LaPlante, she's the first assistant. Working in
2 our office is Mike Speers, John Rivers, Baker Allen, Nick Young,
3 Meagan Chinnis, Jillian Frederick, Vergil Deas.

4 Coming in and out you'll be seeing Rebecca Durr, she is my
5 legal assistant. We also have Stacy Cook. She'll be helping
6 rallying in the witnesses, so she might be coming in and out. We
7 have our court coordinator here, Carrie Huff. And also, you may
8 see Investigator Chor (phonetic sp) King. Assisting me is
9 Assistant Solicitor Chelsea Glover. Her hometown is Orangeburg.
10 She's coming down to help.

11 THE COURT: Assistant Glover, if you'd just stand for me,
12 please. Thank you. You may be seated. Thank you.

13 Ladies and gentlemen, are you related by blood or marriage
14 or acquainted with --- and let me define for you my definition of
15 acquainted with, because I'm trying to find out if you have any
16 connection whatsoever with the folks that I'll be asking you
17 about.

18 Let me give you a couple examples. Maybe you went to school
19 with somebody that I mentioned 20 years ago and you haven't
20 thought about that person in 20 years. That relationship, as old
21 and limited as it is, would be encompassed within the very
22 general, expansive definition of an acquaintance. Again, I'm
23 trying to find out if you have any connection with these folks
24 whatsoever. So that's the reason that I'll be -- that's the
25 definition that I use with acquainted with. So be mindful of

1 that.

2 So with that in mind, are you related by blood or marriage
3 or acquainted with Solicitor Osborne or any of the folks from the
4 solicitor's office in the First Circuit? Please stand at this
5 time.

6 (No response.)

7 THE COURT: I find no one standing.

8 Now, ladies and gentlemen, please allow me to introduce you
9 to Mr. Muanah Fortune. Thank you, Mr. Fortune. And this is Mr.
10 Muanah Fortune. Thank you. If you'll just look at our jurors.
11 Thank you so much, sir. And you may be seated.

12 Ladies and gentlemen, are you related by blood or marriage
13 or acquainted with Mr. Muanah Fortune? If so, please stand at
14 this time.

15 (No response.)

16 THE COURT: And I find no one standing. Now, ladies and
17 gentlemen, I am going to call on Ms. Michelle Hubrich, and she is
18 going to introduce you to her co-counsel and the lawyers in her
19 office. The question will be the same just as it was with regard
20 to the other lawyer's office.

21 Yes, ma'am, Ms. Hubrich.

22 ATTORNEY HUBRICH: Thank you, Judge. May it please the
23 Court. My name's Michelle Hubrich. I've gone by other names in
24 the past 10 years, so I'll just introduce you by all of my names.
25 It's currently Michelle Hubrich. It used to be Michelle

1 Williams. Before that, it was Michelle Stubbs (phonetic sp).
2 I'm an attorney with the Dorchester County Public Defender's
3 Office.

4 Sitting with me at counsel table is another attorney in our
5 office by the name of Pierce Wehman. Another attorney
6 accompanying us in court today, her name is Ms. Julie Beeks.
7 Other attorneys in our office include Mark Leiendecker, Mary
8 Lematty, John Loy, Ash Chisholm, Tom Squires, Gina McElhany is
9 our juvenile public defender. I think that's all of the
10 attorneys in our office. And we represent Muanah Fortune.

11 THE COURT: I don't know if you mentioned Vergil Deas. Did
12 you mention Vergil Deas?

13 ATTORNEY HUBRICH: Did you mention Vergil Deas?

14 ATTORNEY OSBORNE: I think I did, Your Honor.

15 THE COURT: Okay, good. I think you did. That's what made
16 me think of it.

17 ATTORNEY HUBRICH: I have Gina McAlhany as our ---

18 THE COURT: Yes, thank you very much.

19 ATTORNEY HUBRICH: Thank you.

20 THE COURT: Now, ladies and gentlemen, are you related by
21 blood or marriage or acquainted with, or have you or any member
22 of your immediate family, to your knowledge, ever been
23 represented by, Ms. Hubrich, Mr. Wehman, or any of the folks at
24 the public defender's office? If so, please stand at this time.

25 (No response.)

1 THE COURT: And I find no one standing.

2 Now, ladies and gentlemen, please allow me to introduce you
3 to Mr. Polo Salazar. And thank you so much, Mr. Salazar. You
4 may be seated.

5 Ladies and gentlemen, are you related by blood, marriage or
6 acquainted with Mr. Polo Salazar? If so, please stand at this
7 time.

8 (No response.)

9 THE COURT: And I find no one standing.

10 Ladies and gentlemen, please allow me to introduce you to
11 Ms. Ashley B. Cornwell. She's going to stand. She represents
12 Mr. Salazar. She is a sole practitioner for the moment.

13 Ladies and gentlemen, are you related by blood or marriage
14 or acquainted with, or have you or any member of your immediate
15 family ever been represented, by Ms. Cornwell? If so, I'm going
16 to ask you to please stand at this time.

17 (No response.)

18 THE COURT: I find no one standing. Thank you so much,
19 Ms. Cornwell.

20 Now, ladies and gentlemen, in just a moment I am going to be
21 reading to you a list of potential witnesses. Lawyers help me in
22 this regard, and they give to me a list of potential witnesses,
23 because this is my chance to ask you all if you know any of these
24 folks. So they have given to me a list of potential witnesses.

25 And my question as to each and every one of these folks is,

1 Are you related by blood or marriage or acquainted with any of
2 these individuals? So please keep that in mind as I go through
3 this list.

4 Now, Leta Boehler, Joshua Scarborough, Jacob Cramer, Dylan
5 Reynolds, Matthew Brooks, Kenneth Driscoll, Phillip Moy, Jonathan
6 Davis, Rachel Nguyen, Ryan DeWane, Nicole Hardin, James Green,
7 David Swibaker, Marcus Porter, Salina Sheppard, Jamie Hall,
8 Bethany Davidson, Vera Martinez, Charlotte Pitts, Daniel Greene,
9 Christina Denson, Marie Wearing, Christopher Flynn, Christopher
10 Hirsch, Taylor Jackson, Megan Wade, Jonathan James, Jaquavious
11 Washington, Wade Rallings, Bernard Seabrook, Shaneka Wright.

12 Are you related by blood or marriage, or acquainted with any
13 of those individuals? Yes?

14 ATTORNEY OSBORNE: Yes, Your Honor. I'm so sorry, I must
15 have left off Dr. Nicholas Batalis off that list.

16 THE COURT: Dr. Nicholas?

17 ATTORNEY OSBORNE: Batalis.

18 THE COURT: Batalis. Dr. Nicholas Batalis, related by blood
19 or marriage or acquainted with Dr. Nicholas Batalis. If so,
20 please stand at this time. Or if you're just like, Ah, I need
21 you to go, you went through too many names too quick, y'all need
22 me to repeat, I don't mind doing that.

23 (No response.)

24 THE COURT: Very well, I find no one standing.

25 Now, ladies and gentlemen, I have a few additional

1 questions. I'm going to ask two questions together. And if you
2 need to respond, I'll have you approach.

3 Have you or any member of your immediate family ever had any
4 criminal charges handled by the First Circuit Solicitor's Office?
5 Don't respond until I ask the second one.

6 And does any member of our jury panel have any personal,
7 political or religious beliefs that would prevent you from
8 sitting in judgment of another person?

9 Now, ladies and gentlemen, if you need to respond to either
10 of those questions, I'm going to ask you to please stand.

11 (Juror No. 68 stands.)

12 THE COURT: Your Juror number?

13 JUROR NO. 68: Sixty-eight.

14 THE COURT: Come forward for me. Yes, ma'am. I'm coming
15 down. Hold on.

16 (WHEREUPON, an in camera colloquy is conducted outside the
17 presence of the jury as follows:)

18 THE COURT: Yes, ma'am?

19 JUROR NO. 68: For criminal charges. My dad went to prison
20 for armed robbery and drugs.

21 THE COURT: And was that prosecuted by the First Circuit?

22 JUROR NO. 68: I'm not sure.

23 THE COURT: All right. Where was that?

24 JUROR NO. 68: This was in Georgia.

25 THE COURT: It was in Georgia. Gotcha. It wasn't in

1 Dorchester County?

2 JUROR NO. 68: No.

3 THE COURT: Okay. Thank you so much.

4 JUROR NO. 68: Yes.

5 THE COURT: All right. Can y'all hear me if I stand here?
6 Anybody have trouble? If you do, just raise your hand. Thank
7 you.

8 Is any member of our jury panel related by blood or marriage
9 are or a close, personal friend -- now, let me tell you what that
10 is, close, personal friend. This close, personal friend is
11 somebody that you are so close to that you probably like this
12 close, personal friend better than you like one of your siblings,
13 if not all your siblings. This is somebody you're really, really
14 close to, they really are a member of your family.

15 So my question is this. Is any member of our jury panel
16 related by blood or marriage or a close, personal friend to any
17 person employed by any law enforcement agency? If so, please
18 stand.

19 (Jurors stand.)

20 THE COURT: And I need your number, your juror number.

21 JUROR NO. 262: 262.

22 THE COURT: And?

23 JUROR NO. 336: 336.

24 THE COURT: Now, my question is, what law enforcement
25 agency?

1 JUROR NO. 262: North Charleston Police Department.

2 THE COURT: Okay.

3 JUROR NO. 336: My father was in law enforcement in
4 (inaudible). My nephew is in law enforcement in New Hampshire.
5 And I served as a SLED agent for Seacoast Church (phonetic sp),
6 so I was good friends with everybody on that team. I'm still a
7 part of the emergency response team, but I'm not currently a SLED
8 agent.

9 THE COURT: Okay, gotcha. Hold on.

10 And your number?

11 JUROR NO. 53: My number is 53. My husband is a former law
12 enforcement with U.S. Air Force.

13 THE COURT: Okay, thank you. Now, the question's going to
14 be yes or no. As a result of your personal involvement or your
15 family member's involvement, do you believe that that would have
16 an affect on your ability to be completely fair and impartial to
17 the state, as well as to these two gentlemen?

18 I need you to answer with your voice.

19 JUROR NO. 262: No, ma'am.

20 JUROR NO. 53: No, ma'am.

21 JUROR NO. 336: No, ma'am. I forgot to mention, my sister
22 works in --

23 THE COURT: No explanation. Just yes or no.

24 JUROR NO. 336: I can be impartial.

25 THE COURT: Now, can you set your affiliation/their

1 affiliation completely aside and make up your mind based upon
2 what you hear while court is in session?

3 JUROR NO. 262: Yes, ma'am.

4 JUROR NO. 53: Yes, ma'am.

5 JUROR NO. 332: Yes, ma'am.

6 JUROR: Yes, sir, you stood. Your number?

7 JUROR NO. 158: Yes, ma'am, 158. Center County Sheriff's
8 Emergency Department as a special deputy (inaudible) in
9 Tennessee. ---

10 THE COURT: We're having trouble hearing, sir.

11 JUROR NO. 158: I'm sorry.

12 THE COURT: Somebody's in Tennessee?

13 JUROR NO. 158: Yes, ma'am. I was in law enforcement in
14 Tennessee in medical and security.

15 THE COURT: Okay. And that was you?

16 JUROR NO. 158: Yes, ma'am.

17 THE COURT: How long ago?

18 JUROR NO. 158: I left in 2016.

19 THE COURT: Might that/could that involvement interfere with
20 your ability to be completely fair and impartial to the state, as
21 well as to Mr. Fortune and Mr. Salazar? Yes or no.

22 JUROR NO. 158: No.

23 THE COURT: Can you set that history aside, that former
24 affiliation/employment aside and make up your mind based upon
25 what you hear in court while court is in session?

1 JUROR NO. 158: Yes, Your Honor.

2 THE COURT: Thank you. Please be seated. And thank you.
3 All right.

4 Is any member of our jury panel employed by, related by
5 blood or marriage to or a close, personal friend of anyone
6 employed by the attorney general, the solicitor or any
7 prosecuting attorney's office? If so, please stand.

8 (No response.)

9 THE COURT: I find no one standing.

10 Has any member of our jury panel ever been employed by any
11 civilian or military law enforcement agency? If so, please
12 stand.

13 (Juror stands.)

14 THE COURT: Anything other than what you just told us?

15 JUROR NO. 336: No. My sister works for Homeland Security.
16 I forgot to mention that earlier.

17 THE COURT: Okay. And would that have an affect on your
18 ability to be fair and impartial?

19 JUROR NO. 336: No.

20 THE COURT: Your number again?

21 JUROR NO. 336: 336.

22 THE COURT: Perfect. Thank you.

23 I'm going to ask these two questions together.

24 (Juror stands.)

25 THE COURT: Oh, I'm so sorry. Your number?

1 JUROR NO. 255: 255.

2 THE COURT: All right. Yes, ma'am?

3 JUROR NO. 255: I served in the Air Force in Security
4 Forces.

5 THE COURT: All right. How long ago?

6 JUROR NO. 255: I retired in 2013.

7 THE COURT: As a result of that former employment, might
8 that/could that interfere with your ability to be completely fair
9 and impartial to the state, as well as to Mr. Fortune and
10 Mr. Salazar?

11 JUROR NO. 255: No, ma'am.

12 THE COURT: Can you set that aside and make up your mind
13 based on what you hear in court while court is in session?

14 JUROR NO. 255: Yes.

15 THE COURT: Thank you.

16 My last two questions are together. Please don't respond to
17 either until I have asked both. And if you need to approach, I
18 will ask you to approach.

19 Have you or any member of your immediate family, to your
20 knowledge, or that close, personal friend, ever been the victim
21 of a violent crime such as burglary or robbery? That's the first
22 question. Don't respond.

23 Second question, Is any member of our jury panel or member
24 of your immediate family, to your knowledge, or close, personal
25 friend, a member of MADD, SADD, CAVE law enforcement. Can

1 describe it that way, would be one way to describe.

2 If this applies to anyone, either one of these questions,
3 you need to respond, please stand and approach.

4 (No response.)

5 THE COURT: And I find no one standing.

6 All right. Now I'm going ask three questions together.

7 This case may involve some testimony regarding the use of alcohol
8 and/or drugs. Does any member of our jury panel have a belief,
9 either moral, religious, whatever belief, and it is so strong, it
10 is so strong, that it would prevent you from being able to listen
11 to the evidence and make up your mind based upon what you hear in
12 court while court is in session? In other words, it would
13 disturb your ability to be impartial. That's question number
14 one.

15 Have you ever sat on a jury before?

16 And, have you ever received assistance from a victim's
17 advocacy program?

18 And I have two more questions. Let me ask these, too, and
19 then you can respond. Have you or any member of your family ever
20 been prosecuted here or anywhere else?

21 And finally, has any member of our jury panel ever been the
22 member of an organization dedicated to the protection of animals
23 such as PETA, ASPCA, SPCA, et cetera?

24 If you need to respond to any of those, I'm going to ask you
25 to please stand. And you may come forward. Your number, please?

1 JUROR NO. 255: 255.

2 THE COURT: 255, okay.

3 THE BAILIFF: Juror no. 255.

4 THE COURT: Thank you.

5 (WHEREUPON, an in camera colloquy is conducted outside the
6 presence of the jury as follows:)

7 THE COURT: Which one? That was a lot of questions. Which
8 one?

9 JUROR NO. 255: The victim assistance. I've been raped.

10 THE COURT: Okay. Now, that is not a topic in this matter.

11 JUROR NO. 255: Well, you said victim's advocate.

12 THE COURT: You're perfect, you're doing exactly what I
13 asked. My follow-up question, because I'm looking at this. Is
14 this a matter that you think you can participate in?

15 JUROR NO. 255: Yeah.

16 THE COURT: Okay. I'm sorry I brought up some sad things
17 and I'm so sorry, and so forgive me for that. But do you believe
18 you can set that aside and make up your mind?

19 JUROR NO. 255: Yes. This is nothing like that.

20 THE COURT: I understand. Thank you so much. You stay with
21 us.

22 JUROR NO. 255: Okay.

23 THE COURT: All right. I find that our panel is now
24 qualified.

25 Ladies and gentlemen, further information. I am going to

1 ask you to please return in the morning at 9:30, in the morning
2 at 9:30. When you return, we will go through our jury selection.
3 Our jury selection is not going to take a particularly long time,
4 so I'll share that with you. It's not going to take a
5 particular -- I don't think. Now I probably just jinxed
6 everything in that I said that, but it should not take us a very
7 long time.

8 Now, ladies and gentlemen, two things. First thing, I'm
9 going to ask you not to discuss this matter. I've given you a
10 little bit of information; I've read you some allegations, so
11 you've got a little bit of information. If you serve on a jury
12 you will be told repeatedly you may not discuss this matter, nor
13 allow anyone to discuss that with you, and that really does begin
14 now. So I'm going to ask you not to discuss this matter or allow
15 anyone to discuss this with you.

16 Now, what does that mean as a practical matter? So when you
17 go home this evening I don't expect you, as you have a
18 conversation with your spouse and they say, Well, how was your
19 day? Fine. What did you do? I can't tell you. Because then I
20 have just put a ripple in the water. So that's not what I'm
21 talking about. I went to Saint George. I have been qualified
22 for the jury. It's a criminal term as opposed to a civil term.
23 And I have to go back tomorrow for jury selection.

24 And the next question's going to be, Well, what kind of case
25 is it? And at that point I'm going to ask you to say that the

1 mean, old judge has asked me not to discuss this specifically, or
2 not allow you to discuss it with me. That's where the
3 prohibition will begin. Now, put it on me. Put it on me. I
4 don't want anybody mad with any of my jurors. You just put out
5 on me.

6 Now there may be those of you who are dashing off to work
7 this afternoon and you need something for your employer. We're
8 happy to get that for you downstairs in the clerk's Office.
9 Clerk's office is all the way on the end, this end of this
10 building. Walk right in there. Don't be -- keeping, of course,
11 social distancing, and they'll be happy to get you something for
12 your employer if you need it.

13 Now, I do need you back at 9:30 in the morning. You'll go
14 to the jury assembly room, and then you'll come on up here. Is
15 that clear? Anybody got any questions about that? Wonderful.

16 It's really, really important, though, that you not discuss
17 this matter with your family, friends, coworkers, and certainly
18 not with anyone involved with this matter.

19 Should somebody try to talk to you about this case, I'm
20 going to ask you to please get their name, if not a description,
21 and let me know, because I'll deal with them, because no one
22 should be discussing this matter with you.

23 And I want to thank you guys for every single, solitary tick
24 of the clock. And can't wait to see you in the morning at 9:30.
25 Thank you so much.

1 ATTORNEY HUBRICH: Judge, can I --

2 THE COURT: Hold on. Hold on. Yes?

3 (WHEREUPON, an off-the-record discussion was had.)

4 THE COURT: Ms. Gadiss (phonetic sp), you know, lawyers are
5 wonderful people. And they said, Oh, Ms. Gadiss is going to
6 think she's got to come back, and you excused her. You do not
7 because you transferred; right?

8 JUROR: Yes.

9 THE COURT: Well, you and your wonderful sparkly mask, we
10 are going to miss you. But you're going to be transferred, just
11 like we talked about, okay. Very well.

12 Thank you, everybody. Six feet apart, please.

13 (WHEREUPON, the first jury panel is excused for the day at
14 11:38 a.m.)

15 (WHEREUPON, the second jury panel is seated in the courtroom
16 at 11:46 a.m.)

17 (WHEREUPON, the Clerk of Court conducted roll call, and the
18 Court conducted exemptions and transfers necessary to qualify the
19 jury panel.)

20 VOIR DIRE OF THE JURY PANEL

21 THE COURT: Yes. Very well. Now, the panel is now
22 qualified.

23 Ladies and gentlemen, let me tell you what happens next.
24 What happens next is I'm going to go call on, in just a moment,
25 our solicitor to call our first case -- one of our solicitors, to

1 call on your first case -- for trial.

2 You know, in most states in the United States the prosecutor
3 is called the state's attorney or the district attorney. South
4 Carolina, we're different. We call our prosecuting attorneys
5 solicitors. I think we are the only state in America that we
6 call our prosecutors solicitors, but we call our prosecutors
7 solicitors.

8 So I am going call on our solicitor's office and ask our
9 solicitor to please call our first case for trial this week.
10 Thank you, solicitor.

11 ATTORNEY OSBORNE: Thank you, Your Honor. May it please the
12 Court.

13 THE COURT: Yes, Mr. Osborne.

14 ATTORNEY OSBORNE: The first matter before you is State
15 versus Muanah Fortune. Mr. Fortune has been charged with several
16 charges. The first is murder, the indictment number is
17 2019-GS-18-0416; the second charge is attempted murder, that's
18 Indictment No. 0417; the next is burglary in the first degree,
19 0418; next, possession of a firearm during the commission of a
20 violent crime, 0420; ill-treatment of animals, 0421; armed
21 robbery, 0422.

22 The next case is State versus Polo Salazar. First charge is
23 murder, 2019-GS-18-0437; next is burglary in the first degree,
24 0438; next, possession of a stolen vehicle, 0439; attempted
25 murder, 0440; possession of a firearm during commission of a

1 violent crime, 0441; armed robbery, 0442; and ill-treatment of
2 animals, 0443.

3 And, Your Honor, I have a copy of the indictments, if I may
4 approach and hand this to you.

5 THE COURT: Thank you, sir.

6 All right. Ladies and gentlemen, let me tell you what's
7 just happened. Solicitor Osborne has just called the first case
8 for trial, and he's just read some numbers and some charges off
9 of what is called an indictment. An indictment. And each
10 charge, each alleged crime, those allegations are contained in an
11 indictment.

12 Now, what is an indictment? Well, let me tell you what it
13 is, and then I'm going to tell you what it is not. First of all,
14 it's a piece of paper, it is a notice document, it is a document
15 that gives a citizen notice that the state alleges that that
16 citizen has violated one of the criminal laws of the state of
17 South Carolina.

18 Let me tell you what it is not. It is not evidence of any
19 of the allegations that it contains. It's a notice document.

20 Now, I want to hasten and tell you that, to each allegation
21 of each of those indictments of Mr. Fortune, Mr. Salazar, who
22 also may be referred to as the defendant or defendants, each of
23 these gentlemen have pled not guilty to each of these
24 indictments. Now, that places upon the state the burden to prove
25 each and every allegation of each indictment beyond a reasonable

1 doubt.

2 Now, ladies and gentlemen, in just a moment I am going to be
3 reading to you some of the allegations of the indictments. Why
4 do I do that? Well, I am trying to find out whether or not any
5 of you know or think you may know or if you have heard or think
6 you have heard anything about these allegations. That's the
7 reason that I'm going to be reading to you some of the
8 allegations of the indictments.

9 Now, ladies and gentlemen, a couple things I want you to
10 keep in mind. First of all, I want you to keep in mind that each
11 of these defendants has pled not guilty and have denied the
12 allegations in these indictments. They pled not guilty.

13 The other thing I want to you keep in mind is, that those of
14 you who are selected on this jury will treat each of these
15 indictments independently and separate, one from the other, and
16 each of these defendants separate and part, one from the other,
17 individually. They are certainly entitled to that under our
18 Constitution.

19 Now, for judicial economy, though, I am going to be reading
20 to you these indictments, and all but one are the same for each
21 of these gentlemen, so I'm going to read them, instead of reading
22 them twice, I'm going to read them once, and I'll read both their
23 names. But please understand that these indictments are to, and
24 these individuals are to, be treated independently, separately.
25 I simply do that for economy.

1 Now, ladies and gentlemen, with regards to Indictments
2 2019-GS-18-0437 and 2019-GS-18-416, the allegations, some of the
3 allegations, are as follows: That, in Dorchester County, South
4 Carolina, on or about January the 28th, 2019, with malice
5 aforethought, the Defendant Muanah Aruna Fortune, Jr., and the
6 Defendant Polo Kioki Salazar did kill one Joe Weaver by means of
7 shooting the victim. The victim did die as a proximate result
8 thereof, this offense being in violation of the common law and
9 Section 16-3-10 of the South Carolina Code of Laws, as amended.

10 Ladies and gentlemen, Indictments 2019-GS-18-0442 and 0417
11 allege -- excuse me, let me give you those numbers again.
12 2019-GS-18-0442 and -- I will get the number correct in just a
13 moment. What I'm looking for is the indictment number for the
14 armed robbery, the two numbers for armed robbery.

15 ATTORNEY OSBORNE: Yes, ma'am. 0422 for Muanah Fortune.

16 THE COURT: And?

17 ATTORNEY OSBORNE: And 0442 for Polo Salazar.

18 THE COURT: Okay, thank you. Ladies and gentlemen, these
19 indictments allege, that in Dorchester County, South Carolina, on
20 or about January the 28th, 2019, the Defendant Muanah Aruna
21 Fortune, Jr., and Defendant Polo Keoki Salazar did, by use of
22 force, threats or intimidation, and while armed with a deadly
23 weapon or while alleging either by words or actions that he was
24 armed while using a representation of a deadly weapon or any
25 object which a person present during the commission of the

1 robbery reasonably believed to be a deadly weapon, taking,
2 carrying away goods and/or money from the person or presence of
3 the victim, Joe Weaver with the intent to permanently deprive the
4 victim of possession of goods or money, such weapon or alleged
5 weapon described as a handgun, this offense in violation of
6 Section 16-11-330 of the South Carolina Code of laws, as amended.

7 Ladies and gentlemen, Indictments 2019-GS-18-0438 and 0418
8 allege that in Dorchester County, South Carolina, on or about
9 January the 28th, 2019, the Defendant Muanah Aruna Fortune, Jr.,
10 and Defendant Polo Keoki Salazar did willfully and unlawfully
11 enter the dwelling of Marcus Porter without consent and with the
12 intent to commit a crime therein, and when, in effecting entry or
13 while in the dwelling or in immediate flight, the defendant, each
14 of them, and remember, one indictment allegations as to one
15 defendant and then an indictment of allegations as to the other,
16 the defendant or another participant in the crime is armed with a
17 deadly weapon or explosive, causes physical injury to a person
18 who is not a participant in the crime, uses or threatened to use
19 the use of a dangerous instrument, displays what it is or appears
20 to be, a knife, pistol, revolver, rifle, shotgun, machinegun or
21 other firearm, and/or the entering or remaining occurs in the
22 nighttime, this offense being in violation of Section 16-11-311
23 of the South Carolina Code of Laws, as amended.

24 Now, ladies and gentlemen, Indictment 2019-GS-18-0440 and
25 Indictment 2019-GS-18-417 allege, that in Dorchester County,

1 South Carolina, on or about January the 28th, 2019, the Defendant
2 Muanah Aruna Fortune, Jr., and Defendant Polo Keoki Salazar did,
3 with the intent to kill, attempt to kill, one Marcus Porter, with
4 malice aforethought, by shooting the victim, this offense being
5 in violation of Section 16-3-29 of the South Carolina Code of
6 Laws, as amended.

7 Ladies and gentlemen, Indictments 2019-GS-18-0441 and 0420
8 allege, that in Dorchester County, South Carolina, on or about
9 January the 28th, 2019, the Defendant Muanah Aruna Fortune, Jr.,
10 also, indictment alleges the Defendant Polo Keoki Salazar, did
11 visibly display or have in his possession a handgun during the
12 commission of a violent crime as defined in Section 16-1-60 of
13 the South Carolina Code of Laws, 1976, as amended; to wit,
14 burglary in the first degree and murder, thereby violating
15 Section 16-23-490 of the Code of Laws of South Carolina, 1976, as
16 amended.

17 Indictments 2019-GS-18-0443 and 0421, which is indictment
18 for ill-treatment animals, in general, torture, allege, that in
19 Dorchester County, South Carolina, on or about January the 28th,
20 2019, the Defendant Muanah Aruna Fortune, Jr., and Defendant Polo
21 Keoki Salazar did torture, torment, needlessly mutilate, cruelly
22 kill or inflict excessive or repeated, unnecessary pain or
23 suffering upon an animal, or by omission or commission did cause
24 the acts to be done, in that the defendant did cruelly kill a dog
25 by shooting it, this offense being in violation of Section

1 47-1-40(b) of the South Carolina Code of Laws, as amended.

2 And with regards to Indictment 2019-GS-18-0439, possess,
3 conceal, sell or dispose of stolen vehicle where the value's more
4 than two but less than \$10,000, this indictment alleges against
5 Mr. Salazar only, that in Dorchester County, South Carolina, on
6 or about January the 28th, 2019, the Defendant Polo Kioki Salazar
7 did knowingly and unlawfully possess, receive, conceal, sell or
8 dispose of a vehicle described as a 2007 Honda CR-V, with an
9 approximate value of \$6,000, and that the defendant was not
10 entitled to possession of the vehicle and had knowledge that the
11 vehicle had been stolen or converted unlawfully, this offense in
12 violation of Section 16-21-80 of the South Carolina Code of Laws,
13 as amended.

14 Ladies and gentlemen, as to each allegation in each
15 indictment against him, each of these defendants has pled not
16 guilty.

17 Ladies and gentlemen, my question to you is this. Do any of
18 you know or think you know or may have heard or think you may
19 have heard anything about these any of these allegation? Please
20 stand at this time.

21 (No response.)

22 THE COURT: And I find no one standing.

23 Now, ladies and gentlemen, in just a moment I am going to be
24 introducing you to some folks. And I use the term acquainted
25 with, are you acquainted with. I want to define that phrase for

1 you, because what I'm trying to find out is if you have any
2 connection with these folks that I am going to be talking about,
3 do you have any connection with them.

4 Now, it may be that you went to school with somebody, who I
5 mentioned, 20 years ago and you have not thought about or seen
6 that person in 20 years, but you know you went to school with him
7 20 years ago. Well, that is a connection, and that would be
8 encompassed with my definition of acquainted with.

9 Perhaps you simply work at the same location with someone
10 and wave at each other occasionally across the parking lot.
11 Well, believe it or not, that limited relationship would be
12 encompassed within my definition of acquainted with. And you can
13 stand and tell me that. So please keep that definition in mind
14 as we go through these next questions.

15 And, ladies and gentlemen, please allow me to introduce you
16 to Solicitor Osborne. He's going to introduce the folks in his
17 office and the folks who will be participating in trial. Yes,
18 sir, solicitor.

19 ATTORNEY OSBORNE: Thank you, Your Honor. Like the Judge
20 said, I work in the First Circuit, I'm assistant solicitor there.
21 My boss, our boss, is David Pascoe, he's the First Circuit
22 solicitor. Kelly LaPlante is the first assistant here in
23 Dorchester. Also in our office is Mike Spears, John Rivers,
24 Baker Allen, Nick Young, Meagan Chinnis, Jillian Frederick,
25 Vergil Deas. And coming from Orangeburg, also a prosecutor or

1 assistant solicitor, is Chelsea Glover.

2 On our team you will see Rebecca Durr, she is my parallel.
3 Stacy Cook will be helping, as well, they'll be helping rallying
4 in witnesses in and out of the courtroom. And then we have
5 Carrie Huff here, who is our court coordinator. You may also see
6 my investigative court team come in and out of the courtroom.

7 THE COURT: Thank you very much. Ladies and gentlemen, are
8 you related by blood or marriage or acquainted with Mr. Osborne,
9 Ms. Glover, or any of the attorneys and the staff that
10 Mr. Osborne just mentioned, or there may be other staff in the
11 First Circuit Solicitor's Office that you know you know. So I'll
12 ask, are you related by blood or marriage or acquainted with any
13 of the attorneys or staff or employees of the First Circuit
14 Solicitor's office, and as well as the First Circuit solicitor?
15 So, please stand at this time.

16 (No response.)

17 THE COURT: I find no one standing.

18 Now, ladies and gentlemen, please allow me to introduce you
19 to Mr. Muanah Fortune. Thank you, Mr. Fortune. And you may be
20 seated. Ladies and gentlemen, are you related by blood or
21 marriage or acquainted with Mr. Muanah Fortune? If so, please
22 stand.

23 (No response.)

24 THE COURT: And I find no one standing.

25 Now, ladies and gentlemen, Mr. Fortune is represented by

1 Ms. Michelle Hubrich and Mr. Pierce Wehman. And Ms. Hubrich will
2 give you the names of the folks in her office.

3 ATTORNEY HUBRICH: Thank you, Judge. My name's Michelle
4 Hubrich. I've been known by a couple of different names over the
5 past couple of years, so if you know me you might also know me as
6 Michelle 3 or Michelle Stubbs. I am assisted in trial today by
7 Pierce Wehman. We are both of the Dorchester County Public
8 Defender's Office. Another attorney present from our office,
9 Ms. Julie Beeks. You might know one of the three of us. Or you
10 might know other attorneys in our office. Other attorneys in our
11 office are Mark Leiendecker, Mary Banate, Ash Chisholm, Tom
12 Squires. We have a juvenile department. The juvenile public
13 defenders are Gina McElhany and John Loy. Thank you.

14 THE COURT: Thank you. Are you related by blood or marriage
15 or acquainted with, or have you or any member of your immediate
16 family, to your knowledge, ever been represented by Ms. Hubrich,
17 Mr. Wehman or any of the folks in her office she just mentioned.
18 If so, please stand.

19 (A juror stands.)

20 THE COURT: All right. Now, tell me your number.

21 JUROR NO. 405: 405.

22 THE COURT: 405. I'm going to ask you some questions. I
23 need you to tailor your response to my question, okay. In other
24 words, I'm not looking for explanations; I'm just looking ---

25 JUROR NO. 405: I forgot to put the shield on.

1 THE COURT: Great, wonderful. Thank you. Now, tell me who
2 you know.

3 JUROR NO. 405: Mark Leiendecker.

4 THE COURT: All right. And would you describe your
5 relationship with Mr. Leiendecker as one that is professional or
6 personal?

7 JUROR NO. 405: Personal.

8 THE COURT: All right. And do you visit in each other's
9 homes?

10 JUROR NO. 405: No.

11 THE COURT: And would you describe that relationship as a
12 friendship or acquaintanceship?

13 JUROR NO. 405: Friendship.

14 THE COURT: A friendship, very well. And it is my
15 understanding that Mr. Leiendecker, while folks in his office
16 will be involved in this trial, it is my understanding that he
17 will not be involved in this trial.

18 However, I will ask you this question. As a result of
19 Mr. Leiendecker being in the office with Mr. Wehman, with
20 Ms. Hubrich, would that/could that/might that interfere with your
21 ability to be completely fair and impartial to the state, as well
22 as Mr. Fortune and Mr. Salazar? Yes or no.

23 JUROR NO. 405: No.

24 THE COURT: Can you set that relationship completely aside
25 and make up your mind based upon what you hear in court while

1 court is in session?

2 JUROR NO. 405: Yeah.

3 THE COURT: Thank you. Please be seated.

4 JUROR: All right.

5 THE COURT: Now, ladies and gentlemen, please allow me to
6 introduce you to Mr. Polo Salazar. Thank you, Mr. Salazar.

7 Ladies and gentlemen, are you related by blood or marriage or
8 acquainted with Mr. Polo Salazar? If so, please stand at this
9 time.

10 (No response.)

11 THE COURT: And I find no one standing.

12 Mr. Salazar is represented by the Cornwell Law Firm, LLC,
13 and this is Ashley Cornwell. Ladies and gentlemen, are you
14 related by blood or marriage or acquainted or have you or any
15 member of your immediate family, to your knowledge, ever been
16 represented by the Cornwell Law Firm or Ms. Ashley B. Cornwell?
17 If so, please stand at this time.

18 (No response.)

19 THE COURT: Thank you. Thank you, Ms. Cornwell.

20 ATTORNEY CORNWELL: Thank you, Your Honor.

21 THE COURT: Ladies and gentlemen, the lawyers help me by
22 giving me a list of potential witnesses, because this is my
23 opportunity to ask whether or not anybody knows anybody. So in
24 just a moment I'm going to be reading to you a list of potential
25 witnesses. My question as to each and every one of these folks

1 is, Are you related by blood or marriage or acquainted with the
2 following individuals? Now, if you need me to go over them again
3 I'm really happy to do that, just let me know. But here are the
4 names.

5 Leta Boehler, Joshua Scarborough, Jacob Cramer, Dylan
6 Reynolds, Matthew Brooks, Kenneth Driscoll, Phillip Moy, Jonathan
7 Davis, Rachel Nguyen, Ryan DeWane, Nicole Hardin, James Green,
8 Dr. Nicholas Batalis, David Swibaker, Marcus Porter, Salina
9 Sheppard, Jamie Hall, Bethany Davidson, Vera Martinez, Charlotte
10 Pitts, Daniel Greene, Christina Denson, Marie Wearing,
11 Christopher Flynn, Christopher Hirsch, Taylor Jackson, Megan
12 Wade, Jonathan James, Jaquavious Washington. Let me spell that.
13 J-a-q-u-a-v-i-o-u-s, Jaquavious Washington. Wade Rallings,
14 Bernard Seabrook, Shaneka Wright.

15 Are you related by blood or marriage or acquainted with any
16 of those individuals? If so, please stand at this time.

17 (No response.)

18 THE COURT: And I find no one standing.

19 All right. Ladies and gentlemen, I have just a few
20 questions additionally to ask of you. And you're going to hear
21 me ask, are you or any member of your immediate family or close,
22 personal friend, and I'll ask a question.

23 I need to describe this close personal friend. This close,
24 personal friend is someone with whom you are so close you
25 probably like this person better than you like one or all your

1 siblings. So please keep that in mind. This close, personal
2 friend is somebody that you are so close to that, if you you're
3 going to talk about relationships, you really ought to include
4 them because you are that close with this particular person.

5 Now, is any member of our jury panel related by blood or
6 marriage, or close, personal friend of a member of any law
7 enforcement agency? If so, please stand.

8 (No response.)

9 THE COURT: I find no one standing.

10 Is any member of our jury panel employed by, related by
11 blood or marriage to, or a close, personal friend to anyone
12 employed by the attorney general, the solicitor or any
13 prosecuting attorney's office or does work or has worked with any
14 attorney general solicitor or any prosecuting attorney's office
15 in the past? If so, please stand.

16 (No response.)

17 THE COURT: I find no one standing.

18 Has any member of our jury panel ever been employed by any
19 civilian or military law enforcement agency? If so, please
20 stand.

21 (A juror stands.)

22 THE COURT: Your number?

23 JUROR NO. 32: I mean, I was former employed with South
24 Carolina State Transport Police.

25 THE COURT: And your number?

1 JUROR NO. 32: 4087.

2 THE COURT: Thank you very much.

3 JUROR NO. 32: That was a long time ago.

4 THE COURT: Your juror number, you gave that to me, I
5 thought. What's your juror number?

6 JUROR NO. 32: Oh, 32. I'm sorry, I thought you were asking
7 me for my law enforcement badge. No, Juror No. 32.

8 THE COURT: That's a first. Wonderful. Thank you so much.
9 I'm going to ask three questions together. Please don't respond
10 to any until I ask all three.

11 Have you or any member of your immediate family, to your
12 knowledge, or close, personal friend ever been the victim of a
13 violent crime such as burglary or robbery? That's question
14 number one.

15 Question number two, Is any member of our jury panel, a
16 member of your immediate family, to your knowledge, a close,
17 personal friend, a member of MADD, SADD, CAVE or any other
18 similar-type organization which has, as its goal, the promotion
19 of law enforcement?

20 And, three, this case may involve some testimony regarding
21 the use of alcohol and/or drugs. Does any member of our jury
22 panel have a moral, religious or otherwise opinion that is so
23 strong that your opinion would interfere with your ability to be
24 fair and impartial to the state, as well as to Mr. Fortune and
25 Mr. Salazar?

1 If you need to respond to any of those three questions, I'm
2 going to ask you, please stand and approach.

3 (No response.)

4 THE COURT: I find no one standing.

5 Now, ladies and gentlemen, I'm going to now ask you four
6 questions together and ask you not to respond until I've asked
7 all four.

8 Ladies and gentlemen, have you ever had occasion to be a
9 member of a trial jury before? That's question one. Question
10 number two, Have you ever received assistance from a victim's
11 advocacy program?

12 Next, Have you or any member of your immediate family, to
13 your knowledge, ever been prosecuted by the First Circuit
14 Solicitor's Office or been prosecuted anywhere?

15 And lastly, Are you a member currently, or have you been in
16 the past, a member of an organization dedicated to the protection
17 of animals such as PETA or the ASPCA or the SPCA?

18 If you need to respond to any of those questions, I'm going
19 to ask you to please stand and approach.

20 (No response.)

21 THE COURT: I find no one standing.

22 Now, ladies and gentlemen, does any member of our jury panel
23 have any personal, political or religious beliefs that would
24 prevent from you sitting in judgment of another person? If so,
25 please stand.

1 (No response.)

2 THE COURT: I find no one standing.

3 Now, ladies and gentlemen, my concluding question is this.
4 Do you know any reason why you ought not/should not be a juror in
5 this matter, being ready, willing and able to listen to the
6 evidence and make up your mind based solely on what you hear in
7 court while court is in session, all the while being fair and
8 impartial, both to the state, as well as to Mr. Fortune and
9 Mr. Salazar? Do you have any concern about your ability to do
10 that? I'm going to ask you to please stand and approach at this
11 time.

12 (No response.)

13 THE COURT: I find no one standing.

14 All right. I find that our panel is now qualified.

15 Now, ladies and gentlemen, let me tell you what happens
16 next. In just a moment I'm going to be dismissing you for the
17 day, for the balance of the day. But I'm going ask you to please
18 be back in the morning at 9:30, at 9:30, for jury selection. You
19 have now been qualified, but weren't selecting a jury in the
20 morning until 9:30.

21 Now, ladies and gentlemen, I do need to ask you and instruct
22 you not to discuss this matter or allow anyone to discuss it with
23 you. Ladies and gentlemen, you know a very little bit about this
24 matter. I introduced you to the folks and I've read some
25 allegations to you. But you do have a little bit of information.

1 And those that are selected for tomorrow's jury will be told that
2 they cannot discuss the matter or allow anyone to discuss it with
3 them. And that now applies to you with regards to this matter.

4 Having said that, you're going to go home, you're going to
5 work this afternoon, and someone's probably going to be curious
6 about what you have been doing today. When you go home for
7 dinner I don't expect family members to ask you, Well, what did
8 you do today?, and you say, I can't tell you. That can cause
9 some discomfort with your family members. You can certainly say
10 that you reported for your jury duty; that you've been qualified;
11 that it's a term of General Sessions, or criminal court; and that
12 you're going to report back in the morning for the selection of
13 the jury.

14 The next question is going to be, What kind of case is it?
15 Ladies and gentlemen, that's where you have to tell them that
16 you've been instructed by me -- put the blame all on me, I'm
17 completely at ease and comfortable with that, but you must
18 tell -- that you've been instructed not to discuss the matter or
19 allow anyone to discuss it with you. Let them get mad with me
20 but not with you. So please, please keep that in mind.

21 Now, those of you who are dashing off to work and need
22 something for your employer, we're happy to get that for you in
23 the clerk's Office which is located directly below the courtroom.
24 When you go to the front, when you get to the first floor, just
25 go all the way to the parking lot end of the building, and

1 they'll be happy to get that for you.

2 Now, is anybody going to go to work all night tonight?

3 Good. I was going to tell you not to. Very well.

4 Ladies and gentlemen, please remember to keep your
5 cellphones or other communication devices somewhere other than
6 the courthouse in the morning in 9:30. I know it's hard not to
7 have your cellphone with you every moment of the day, but I am
8 going to ask you to please leave your cellphone in your vehicle
9 or at home tomorrow morning. If you're selected to sit on the
10 jury, you cannot have your cellphone with you while you're
11 serving on the jury. So please keep that in mind, as well.

12 Again, tomorrow morning again, please be here at 9:30.
13 Report to the general assembly room where you did, just same
14 manner that you did, same drill that you did this morning. And I
15 look so forward to seeing you in the morning. And I thank you
16 for every single, solitary click of the clock. And I will see
17 you in the morning at 9:30.

18 Any questions from anybody? Wonderful. Thank you so much.
19 Remember to keep your social distancing as you leave.

20 (WHEREUPON, the second jury panel is dismissed for the day
21 at 12:54 p.m.)

22 (WHEREUPON, court recessed at 12:55 p.m. and reconvened at
23 1:20 p.m.)

24 MATTERS OF LAW

25 ATTORNEY CORNWELL: One of the indictments, the armed

1 robbery indictment against my client, when I received the
2 indictments prior to trial I assumed that it was just a scanned
3 error on the scanner.

4 However, in looking at the clerk's file of the original
5 indictment, the front of Docket No. 2019-GS-18-0442, which is The
6 State versus Polo Salazar, indictment for armed robbery, that is
7 what the front and the face of the indictment says.

8 However, when you turn it over, on the back it states that
9 it's Indictment No. 2019-GS-18-0435, and it identifies Devonte
10 Major in the body of the indictment.

11 It does say that it was presented to a grand jury and
12 presented as a true bill. However, at this point if this is what
13 was presented to the grand jury and true billed I believe there's
14 going to be an issue with whether or not they believe that Polo
15 Salazar, they presented evidence against Polo Salavar, and the
16 armed robbery and they true billed it, or whether they presented
17 evidence that Devonte Major with the armed robbery and they true
18 billed it.

19 So at this point I would move to dismiss the armed robbery
20 indictment against my client based on the fact that we don't know
21 what a grand jury heard and who they presented a true bill
22 against.

23 THE COURT: Yes, sir.

24 ATTORNEY OSBORNE: Your Honor, I'd say a classic scrivener's
25 error, and we would move, per Section 17-19-100, to amend the

1 indictment. And the grounds that has been provided in case law
2 for us to allow us, the state, to do that, as long as the
3 indictment has a sufficient information to place the defendant on
4 notice.

5 And in this case the facts that are alleged here are all the
6 same facts. There isn't anything new to one indictment to the
7 next, they're all intertwined, and there were 25 indictments that
8 were submitted to the grand jury. All were indicted. This is
9 nothing more than a scrivener's error. I'm more than certain
10 Mr. Salazar is very aware of the indictment and charges that were
11 presented against him.

12 THE COURT: Let me ask you this question. If you looked at
13 all the original indictments, are there two where the body is for
14 Major?

15 ATTORNEY OSBORNE: Yes. So what you're looking at here, and
16 I think Ms. Cornwell is correct, there is, of the 25 indictments,
17 you have a body for Major that has been duplicated onto, or the
18 indictment number and the name, or scrivener's error. I mean,
19 that's certainly possible.

20 But either way you look at it, there is one indictment, one
21 armed robbery, for Polo Salazar which says 042 on the front. It
22 has been presented; it has been indicted. And then on the back,
23 there appears to be a scrivener error that is duplicative for the
24 indictment for Devonte Major.

25 ATTORNEY CORNWELL: Your Honor, my issue with that is it

1 would be different if it were the back that was the incorrect
2 thing. But what the solicitor is now saying is that the grand
3 jury heard two armed robberies with Devonte Major and the facts
4 of that case and not the facts as it relates to Polo Salazar on
5 the armed robbery, because the body of, now two, indictments have
6 Devonte Major.

7 So it's more than just a scrivener's error. It's got the
8 indictment number for Devonte Major on the back of this. This is
9 the factual basis that they would have true billed on. So I
10 don't know if the state is going to be able to show that a grand
11 jury heard any evidence of an armed robbery against Polo Salazar
12 to true bill it. And, therefore, it has not been presented to a
13 grand jury in a manner that would allow it to go forward to trial
14 today, or this week, which is why I believe the only remedy at
15 this point is going to be to dismiss the armed robbery or, in the
16 alternative, continue our case and have the grand jury hear the
17 armed robbery and try them altogether.

18 ATTORNEY OSBORNE: Well, to follow that logic you would have
19 to assume then the grand jury indicted Devonte Major for two
20 counts of armed robbery for the same victim, Joe Weaver. Joe
21 Weaver is who is listed as the victim. It's not multiple
22 victims; it's Joe Weaver.

23 And I would argue exactly the opposite, obviously. The fact
24 that it was signed on the cover is more probative than the actual
25 narrative itself. We have a signature here by the grand jury,

1 individual, indicting Polo Salazar for armed robbery. Or the
2 foreman, as it were.

3 And then, Your Honor, I would also bring to your attention
4 *State v. Means*, that's 367 SC 374. The state may move to amend
5 an indictment once the case is called for trial as long as the
6 amendment does not change the nature of the offense charged.

7 This would not change the nature of the offense charged.
8 Armed robbery is listed as Joe Weaver being the victim in every
9 indictment for armed robbery for all four defendants.

10 THE COURT: All right. Let me see the best case. You just
11 pulled it up on your computer, is that what you did? *Means*, you
12 think, is your best?

13 ATTORNEY OSBORNE: Well, I'm going fast. I mean, quick
14 reference, seems like *State v. Means* seems like a good one,
15 367 SC 374.

16 ATTORNEY CORNWELL: Your Honor, I will also say the language
17 in *Means* states that, When a defendant timely objects to the
18 sufficiency of the indictment, before the jury is sworn, a ruling
19 that an indictment is not sufficient will result in the quashing
20 of the indictment unless the defendant waives presentment to the
21 grand jury and pleads guilty. And, of course, we are not
22 intending on doing that, Your Honor.

23 And, Your Honor, *State v. State* and *State v. Tabory* says,
24 Likewise, a defective caption would not invalidate an otherwise
25 perfect indictment, but the state may not rely upon a caption to

1 the exclusion of the language contained into the body of the
2 indictment. And that is *State v. Tabor*.

3 THE COURT: You got it up? Let me see.

4 ATTORNEY OSBORNE: What's the cite for that, Ashley?

5 ATTORNEY CORNWELL: 262 SC 136.

6 ATTORNEY OSBORNE: I have another decent one, Judge, *State*
7 *v. Gentry*, since we're rocket-firing you.

8 THE COURT: Yes, great.

9 ATTORNEY OSBORNE: Your Honor, in *State v. Gentry*, this is
10 from 2005, a Supreme Court case, there are two levels that a
11 defendant goes through, or requirements, for an indictment to be
12 found sufficient. A defendant's right to question the manner in
13 which the accusation has been presented, and the Court's
14 determination of whether the offenses stated with sufficient
15 certainty and particularity to enable the defendant to know the
16 charges being brought against him.

17 It would be hard for Mr. Salazar to argue that he had no
18 idea what was coming this week.

19 THE COURT: 262 SC 136, I'm troubled by it. I'm troubled by
20 it. Let me tell you what troubles me about it, and here's my
21 problem. My problem is, is that does it change the nature of the
22 offense? You think? It goes from no charge to a charge in the
23 body. And the body is what you've got to look at. I mean, you
24 can't look at the caption of an indictment to be able to prepare
25 to defend it; you've got to look at the body of it. And the

1 body's got the wrong name.

2 Here's what worries me. Do I think -- here's the real
3 dilemma, is that I believe that Mr. Salazar's lawyer is probably
4 prepared. But what happens on the next lawyer if, for whatever
5 reason, looks at the body of the indictment and doesn't look at
6 the other side, just looks at the body of the indictment and
7 says, Armed robbery, maybe I should but it isn't in the
8 indictment, but I'm not going to worry about it, I'm going to
9 worry about whatever else.

10 And the case law does not talk about -- I can't find one
11 where they changed the name of the defendant in the body of the
12 indictment. Anybody got one of them?

13 ATTORNEY OSBORNE: No.

14 THE COURT: It's too easy to fix. It's too easy not to have
15 this problem. That's my problem, you know, that's what's got me
16 really concerned. Because when this, when the Supreme Court
17 looks at it, they'll go, They didn't name the guy in the
18 indictment. How is he supposed to know? He isn't named. So how
19 in the world could I make a determination that the character of
20 the charge isn't different? He's going from not being charged
21 with armed robbery to being charged with armed robbery.

22 And I don't think -- I think the body of the indictment is
23 what you've got to look at.

24 ATTORNEY OSBORNE: Well, I'll tell you what, Judge. We're
25 not going to lose this case on that indictment, so we just won't

1 go forward on either armed robbery.

2 THE COURT: Okay. Okay.

3 ATTORNEY OSBORNE: And if we do, then I stand corrected.

4 ATTORNEY CORNWELL: I want to just get on the record that
5 he's willing to dismiss the charges with prejudice, that he can't
6 bring them back at a later date and try them just on the armed
7 robbery at a later date.

8 ATTORNEY OSBORNE: I think you've got a double jeopardy
9 attached once we swear this jury.

10 ATTORNEY CORNWELL: Just want to make sure we're clear on
11 that.

12 ATTORNEY OSBORNE: That's basic law. Yeah.

13 ATTORNEY HUBRICH: No, I don't think it is.

14 THE COURT: I think it is. When we swear that jury in, it's
15 open.

16 ATTORNEY CORNWELL: That's right. As long as --

17 THE COURT: Unless it's a mistrial. Unless it's a mistrial.
18 But he's going to live with it.

19 ATTORNEY CORNWELL: Thank you, Your Honor.

20 THE COURT: Okay. Okay. And then we have Ms. Hubrich. Do
21 you have any problem with that?

22 ATTORNEY HUBRICH: No, Your Honor. My understanding is that
23 the state is dismissing, with prejudice, assuming we don't have a
24 mistrial, the armed robbery against Muanah Fortune.

25 THE COURT: Correct. Correct.

1 ATTORNEY HUBRICH: Thank you.

2 THE COURT: Now, can we have our jury?

3 ATTORNEY HUBRICH: Judge, we probably need to do some sorted
4 of curative instruction to the first two panels.

5 THE COURT: You know, interesting, I was just thinking about
6 it. It happens all the time, what ends up going to the jury and
7 what starts with the jury. And I'm inclined not to call
8 attention to it ---

9 ATTORNEY HUBRICH: That's right.

10 THE COURT: --- because you even tell them, you charge, I'll
11 explain that to you later. Lesser-included offenses are
12 not talked to the jury.

13 ATTORNEY HUBRICH: Yeah. Directed verdicts. If it happens
14 with a directed verdict, you wouldn't cure it that way, either.
15 That's correct.

16 THE COURT: I absolutely just went through that thought
17 process. I'm actually not that concerned about it. We do that
18 to them all the time.

19 ATTORNEY HUBRICH: Then I have no objection to it. I'm
20 sorry I brought it up. Thank you, Judge.

21 THE COURT: No. And don't say sorry because, guess what? I
22 just want to went through that mental exercise myself.

23 ATTORNEY HUBRICH: Well, I didn't. Actually, Ms. Cornwell
24 mentioned it to me, and then I'm a big mouth.

25 ATTORNEY OSBORNE: We may not be going forward with another

1 charge. We'll have to see.

2 ATTORNEY HUBRICH: Why? Which one is that?

3 (WHEREUPON, the third jury panel is seated in the courtroom
4 at 1:58 p.m.)

5 (WHEREUPON, the Clerk of Court conducted roll call, and the
6 Court conducted exemptions and transfers necessary to qualify the
7 jury panel.)

8 VOIR DIRE OF THE JURY PANEL

9 THE COURT: Thank you for being here today. All right. I
10 find that our panel is now qualified.

11 Ladies and gentlemen, we'll call the first trial for this
12 week. Ladies and gentlemen, I want to explain to you that most
13 states around the country the prosecuting attorney for the state
14 is called the district attorney, or perhaps the state's attorney.
15 We, in South Carolina, are unique. We call our prosecuting
16 attorneys for the state solicitors.

17 So I'm going to call on our solicitor's office. I'm going
18 to ask the solicitor's office, and I see Solicitor Osborne is
19 ready to stand up and call the first case for trial. Yes, sir.

20 ATTORNEY OSBORNE: Thank you, Your Honor. May it please the
21 Court.

22 The matter before you, Your Honor, the first case is State
23 versus Muanah Fortune. He has been charged with murder, the
24 indictment number is 2019-GS-18-0416; he's been charged with
25 attempted murder, 0417; burglary in the first degree, 0418;

1 possession of a firearm during the commission of a violent crime,
2 0420; ill-treatment of animals, 0421.

3 And the second case, Your Honor, is State versus Polo
4 Salazar. He's been charged with murder, Indictment Nos.
5 2019-GS-18-437; burglary in the first degree, 0438; possession of
6 a stolen vehicle, 0439; attempted murder, 0440; possession of a
7 firearm during the commission of a violent crime, 0441; and
8 ill-treatment of animals, 0443.

9 And, Your Honor, may I approach with a copy of the
10 indictments?

11 THE COURT: Thank you, yes. Now, ladies and gentlemen, let
12 me tell you what just happened. What just happened is the
13 solicitor has called the first case for trial. And what he's
14 been referring to, he's been referring to indictments. Those
15 numbers that you heard him reading, those are called indictments.

16 I want to tell you what an indictment is and what it is not.
17 First of all, it's a piece of paper, it's a notice document. It
18 is the document that is used by the state of South Carolina to
19 give notice to a citizen that the state of South Carolina
20 maintains, alleges, that that individual, that person, has
21 violated one of the criminal laws of the state of South Carolina.
22 Now, ladies and gentlemen, we have an indictment for each of the
23 alleged crimes.

24 Now, ladies and gentlemen, I want to hasten and tell you
25 that to each of these indictments, to each of the indictments

1 naming him, each of these defendants, Mr. Fortune for the
2 indictments directed at him and Mr. Salazar for the indictments
3 directed at him, that each of these defendants has pled not
4 guilty. And that places the burden of proof on the state to
5 prove each and every allegation of each of these indictments.

6 And those of you who serve on the jury will receive an
7 instruction on the law by me, and I'm going to say that you treat
8 each of these indictments independently and separate, one from
9 the other, and you treat each of these defendants independently,
10 separately.

11 And I mention that to you because, ladies and gentlemen, in
12 a moment I am going to read to you some of the allegations of the
13 indictments. I'm not going to read all of the language, but I'm
14 going to go read to you some of the allegations in the indictment
15 that I believe would be responsive, or be helpful, for you to
16 tell me, Do you know anything or think you know anything about
17 this matter?; do you think you've heard anything, including
18 today?. You haven't heard anything about this matter. Well, the
19 only way for me to do that is to read you some of the allegations
20 for that purpose. And that's going to be the purpose that I'm
21 going to be reading to you some of the allegations of these
22 indictments. That's the reason why.

23 But I do need to you keep in your mind that to these
24 allegations, these defendants, each of them, have pled not
25 guilty. I simply need to find out whether or not any of you know

1 or think you know or have heard or think you've heard anything
2 about these allegations.

3 Now, ladies and gentlemen, as to each of the crimes charged,
4 there's a separate indictment. And in the interest of judicial
5 economy, to be efficient, I am going to read the indictments a
6 little bit together. And I do that really for efficiency
7 reasons. But do know that there is a separate indictment for
8 each of these gentlemen, for each of these offenses. There's one
9 additional one for Mr. Salazar, I'll go over that.

10 But I do need you to know that these gentlemen will be
11 treated independently, they will be treated separately. I simply
12 will combine a little bit for efficiency purposes at this time.

13 Now, ladies and gentlemen, with regards to Indictments
14 2019-GS-18-0416 and 2019-GS-18-0437, which is, these are the
15 indictments for murder, they allege, that in Dorchester County,
16 South Carolina, on or about January the 28th, 2019, with malice
17 aforethought, the Defendant polo Keoki Salazar and Defendant
18 Muanah Aruna Fortune, Jr., did kill one Joe Weaver by means of
19 shooting the victim. The victim did die as a proximate result
20 thereof, this offense being in violation of the common law in
21 Section 16-3-10 of South Carolina Code of Laws, as amended.

22 Ladies and gentlemen, Indictments 2019-GS-18-0418 and 0438,
23 the indictments for burglary in the first degree allege, that in
24 Dorchester County, South Carolina, on or about January the 28th,
25 2019, the Defendant Muanah Aruna Fortune, Jr., and the Defendant

1 Polo Kioki Salazar did willfully and unlawfully enter the
2 dwelling of Marcus Porter without consent and with the intent to
3 commit a crime therein and when, in effecting entry or while in
4 the dwelling or in immediate flight, the defendant or another
5 participant in the crime is armed with a deadly weapon or
6 explosive, causes physical injury to a person who is not a
7 participant in the crime, uses or threaten to use the use of a
8 dangerous instrument, displays what is or appears to be a knife,
9 a pistol, revolver, rifle, shotgun, machinegun or other firearm,
10 and/or the entering or remaining occurs in the nighttime, this
11 offense being a violation of Section 16-11-311 of the South
12 Carolina Code of Laws, as amended.

13 Ladies and gentlemen, Indictment 2019-GS-18-0417 and 440,
14 which are the indictments for attempted murder allege, that in
15 Dorchester County, South Carolina, on or about January the 28th,
16 2019, the Defendant Polo Kioki Salazar and the Defendant Muanah
17 Aruna Fortune, Jr., did, with the intent to kill, attempt to
18 kill, one Marcus Porter, with malice aforethought, by shooting
19 the victim, this being in violation of Section 16-3-29 of the
20 South Carolina Code of Laws, as amended.

21 And bear with me just a moment. With regards to Indictment
22 2019-GS-18-0420 and 0441, possession of a firearm or a knife
23 during the commission of a violent crime, the indictments allege,
24 that in Dorchester County, South Carolina, on or about January
25 the 28th, 2019, the Defendant Muanah Aruna Fortune, Jr., and the

1 Defendant Polo Kioki Salazar did visibly display or have in his
2 reach/his possession a handgun during the commission of a violent
3 crime, as defined by Section 16-1-60, Code of Laws of South
4 Carolina, 1976, as amended; to wit, burglary in the first degree
5 and murder, thereby violating Section 16-23-490 of the Code of
6 Laws of South Carolina 1976, as amended.

7 And Indictments 2019-GS-18-0443 and 2019-GS-18-0421,
8 ill-treatment of animals, in general, torture, allege, that in
9 Dorchester County, South Carolina, on or about January the 28th,
10 2019, the Defendant Polo Kioki Salazar and the Defendant Muanah
11 Aruna Fortune, Jr., did torture, torment, needlessly mutilate,
12 cruelly kill or inflict excessive or repeated, unnecessary pain
13 or suffering upon an animal or by omission or commission did
14 cause the acts to be done, in that the defendant did cruelly kill
15 a dog by shooting it, this offense being in violation of Section
16 47,140(b) of the South Carolina Code of Laws, as amended.

17 And then, ladies and gentlemen, Indictment 2019-GS-18-0439,
18 this indictment alleges possession -- it is, the indictment
19 states possession, conceal, sell or dispose of a stolen vehicle
20 with a value more than two yet less than \$10,000, and it alleges,
21 that in Dorchester County, South Carolina, on or about January
22 the 28th, 2019, the Defendant Polo Keoki Salazar did knowingly
23 and unlawfully possess, receive, conceal, sell or dispose of a
24 vehicle described as a 2007 Honda CR-V with an approximate value
25 of \$6,000, and the defendant was not entitled to possession of

1 the vehicle and had knowledge that the vehicle had been stolen or
2 converted unlawfully, this offense in violation of Section
3 16-21-80 of the South Carolina Code of Laws, as amended. And,
4 ladies and gentlemen, this indictment is against Mr. Salazar.

5 Ladies and gentlemen, to each indictment that is directed
6 towards each of these defendants, they have each pled not guilty.
7 Now, ladies and gentlemen, my question to you is this. Do you
8 know or think you may know, have you heard or think you may have
9 heard, to include today, anything about these allegations? If
10 so, please stand at this time.

11 (No response.)

12 THE COURT: And I find no one standing.

13 Now, ladies and gentlemen, allow me to introduce you to
14 Solicitor Osborne who's going to introduce folks who are with him
15 at counsel table. And he's going to talk a little bit about
16 folks in the office. And then I'll follow up with a question.
17 Yes, sir.

18 ATTORNEY OSBORNE: Thank you, Your Honor. My name's David
19 Osborne. I'm an assistant solicitor in the First Circuit, that
20 is Dorchester, Calhoun and Orangeburg Counties. My boss, our
21 boss, is David Pascoe, he is the solicitor in the First Circuit.
22 In my office is First Assistant Kelly LaPlante, Mike Spears, John
23 Rivers, Baker Allen, Nick Young, Meagan Chinnis, Jillian
24 Frederick and Vergil Deas. Throughout the trial you'll see my
25 assistant, Rebecca Durr, my legal assistant, she'll be helping

1 with witnesses. Stacy Cook, they'll kind of tag-team, Stacy will
2 be bringing in witnesses, as well. My investigator, Chor King,
3 might be in and out helping with evidence. And then we have
4 Chelsea Glover here, she is a prosecutor from Orangeburg County
5 who has come down to help out.

6 THE COURT: Thank you. Ladies and gentlemen, are you
7 related by blood or marriage or acquainted with Mr. Osborne,
8 Ms. Glover or any of the attorneys in the solicitor's office, or
9 the solicitor or any of the employees that Mr. Osborne has just
10 introduced you to or any other employee that you would know or
11 associated with the First Circuit Solicitor's Office? If so,
12 please stand at this time.

13 (No response.)

14 THE COURT: Let me define for you acquainted. I'm trying to
15 find out if you have any connection with the folks that I'll be
16 asking you about. For example, perhaps you went to school with
17 someone 20 years ago, you haven't thought about that person in 20
18 years, hadn't seen him in 20 years, but you know you went to
19 school with him. It may be that you work out at the same
20 location with someone that I'll mention, maybe you occasionally
21 wave at each other across the parking lot and that is the extent
22 of your relationship. Well, believe it or not, those
23 relationships, as limited as they are, would be encompassed
24 within my definition of acquainted with. I'm trying to find out
25 if you have any connection with these folks at all.

1 So with that in mind, let me ask again, are you related by
2 blood or marriage or acquainted with Ms. Glover, Mr. Osborne or
3 any of the attorneys or folks in the First Circuit Solicitor's
4 Office? If so, please stand.

5 (Juror stands.)

6 THE COURT: All right. Yes, ma'am, your number?

7 JUROR NO. 34: 349.

8 THE COURT: 349. Now, I need you to answer just the
9 questions that I ask, okay.

10 JUROR NO. 349: Okay.

11 THE COURT: And I have a reason for wanting your responses
12 to be limited, because I just need information that I need.
13 First of all, who do you know?

14 JUROR NO. 349: Kelly LaPlante.

15 THE COURT: And would you describe your relationship with
16 Ms. LaPlante as one that is more of an acquaintanceship, a
17 professional relationship or friendship?

18 JUROR NO. 349: Acquaintanceship.

19 THE COURT: Acquaintanceship?

20 JUROR NO. 349: Uh-huh.

21 THE COURT: Do you visit at each other's homes?

22 JUROR NO. 349: No.

23 THE COURT: And as a result of the fact that Ms. LaPlante is
24 in the office as a solicitor, might that/could that, in any way,
25 interfere with your ability to be completely fair and impartial,

1 both to the solicitor, as well as to Mr. Fortune and Mr. Salazar?

2 JUROR NO. 349: No.

3 THE COURT: Can you set that relationship completely aside
4 and make up your mind based on what you hear in court while court
5 is in session?

6 JUROR NO. 349: Yes.

7 THE COURT: Thank you. Please stay with us. Now, ladies
8 and gentlemen, please allow me to introduce you to Mr. Fortune.
9 If Mr. Fortune can please stand and face our jury. Thank you,
10 Mr. Fortune.

11 Ladies and gentlemen, are you related by blood or marriage
12 or acquainted with Mr. Fortune? If so, please stand.

13 (No response.)

14 THE COURT: And if I find no one standing. Now, ladies and
15 gentlemen, please allow me to introduce to you Ms. Michelle
16 Hubrich and to Mr. Pierce Wehman. They represent Mr. Fortune,
17 and they will introduce the folks in their Office. Ms. Hubrich,
18 thank you so much.

19 ATTORNEY HUBRICH: Thank you, Judge. Hi, my name's Michelle
20 Hubrich. I've been married a couple times, so I have some other
21 names if you know me. I've been known as Michelle Williams and
22 Michelle Stubbs. I represent Muanah Fortune today. At counsel
23 table with me is Attorney Pierce Wehman. We are both attorneys
24 with the First Circuit Public Defender's Office for Dorchester
25 County.

1 Other lawyers in our office, and also a companying us today,
2 is Ms. Julie Beeks, she's the newest employer in our Office. We
3 have Mark Leiendecker, who is the chief public defender, John
4 Loy, Mary Lematty. Gina McAlhany is one of our juvenile public
5 defender. Ash Chisholm, who is an adult public defender. Tom
6 Squires is an adult public defender. We have an investigator,
7 John Chisdale is our investigator, for the Dorchester County
8 Public Defender's Office.

9 THE COURT: Thank you so much. Ladies and gentlemen, are
10 you related by blood or marriage or acquainted with or have you
11 any member or your immediate family, to your knowledge, ever been
12 represented by Ms. Hubrich, Mr. Wehman or any of the folks in
13 their office? If so, please stand at this time.

14 (No response.)

15 THE COURT: And I find no one standing. Now, ladies and
16 gentlemen, allow me to please introduce you to Mr. Salazar.
17 Thank you, Mr. Salazar. And you may be seated.

18 Ladies and gentlemen, are you related by blood or marriage
19 or acquainted with Mr. Salazar? If so, please stand at this
20 time.

21 (No response.)

22 THE COURT: And I find no one standing. Now, ladies and
23 gentlemen, Mr. Salazar is represented by Ashley Cornwell. She is
24 the Cornwell Law Firm, LLC. Ladies and gentlemen, are you
25 related by blood or marriage or acquainted with or have you or

1 any member of your immediate family, to your knowledge, ever been
2 represented by Ms. Cornwell or anyone at the Ashley Cornwell Law
3 Firm? If so, please stand.

4 (No response.)

5 THE COURT: Thank you. Thank you very much. All right.
6 And I find no one standing.

7 Now, ladies and gentlemen, the attorneys help me, and they
8 give me the names of potential witnesses so that I can ask you if
9 you know any of these folks. And so in just a moment I am going
10 to be going over those names with you.

11 My question to each and every one of those individuals is,
12 Are you related by blood or marriage or acquainted with any of
13 these individuals? Leta Boehler, Joshua Scarborough, Jacob
14 Cramer, Dylan Reynolds, Matthew Brooks, Kenneth Driscoll, Phillip
15 Moy, Jonathan Davis, Rachel Nguyen, Ryan DeWane, Nicole Hardin,
16 James Green, Dr. Nicholas Batalis, David Swibaker, Marcus Porter,
17 Salina Sheppard, Jamie Hall, Bethany Davidson, Vera Martinez,
18 Charlotte Pitts, Daniel Greene, Christina Denson, Marie Wearing,
19 Christopher Flynn, Christopher Hirsch, Taylor Jackson, Megan
20 Wade, Jonathan James, Jaquavious Washington, wade Rallings,
21 Bernard Seabrook, Shaneka Wright.

22 Are you related by blood or marriage or acquainted with any
23 of those individuals? If so, please stand at this time.

24 (No response.)

25 THE COURT: And I find no one standing.

1 Now, ladies and gentlemen, I have a few additional questions
2 that I will ask of you. I'll ask two together. Please don't
3 respond to the first until you've heard both.

4 Have you or any member of your immediate family, to your
5 knowledge, ever had any criminal charges handled by the First
6 Circuit Solicitor's Office? That's the first question.

7 Second question, Does any member of the jury panel have any
8 personal, political or religious beliefs that would prevent you
9 from sitting in judgment of another person?

10 If you need to respond to either of those questions, I'm
11 going to ask you to please stand and approach.

12 (No response.)

13 THE COURT: I find no one standing.

14 Ladies and gentlemen, you're now going to hear me talk about
15 a close, personal friend, I've got to describe who that is. A
16 close, personal friend is someone that is so close to you that
17 you really can't differentiate between this person and a family
18 member. In fact, this close, personal friend is so close to you
19 that you might like them better than you do your own siblings.
20 That's the level of relationship that I'm referring to.

21 Is any member of our jury panel related by blood or marriage
22 or a close, personal friend to any member of a law enforcement
23 agency? If so, please stand.

24 (Juror stands.)

25 THE COURT: And your number?

1 JUROR NO. 349: 349.

2 THE COURT: Thank you so much. You may be seated.

3 Is any member of our jury panel employed by or related by
4 blood or marriage to or a close, personal friend of anyone
5 employed by the attorney general, the solicitor or any
6 prosecuting attorney's office, or does work for any of those
7 agencies? If so, please stand.

8 (No response.)

9 THE COURT: And I find no one standing. Has any member of
10 our jury panel ever been employed by any civilian or military law
11 enforcement agency? If so, please stand.

12 (Juror stands.)

13 THE COURT: Your number?

14 JUROR NO. 50: Fifty.

15 THE COURT: All right.

16 JUROR NO. 50: I work for the U.S. Navy. And I previously
17 worked for the U.S. Army.

18 THE COURT: Thank you. All right. I'm going ask two
19 questions together. Please don't respond to either until I've
20 asked both.

21 Have you or any member of your immediate family or close,
22 personal friend ever been the victim of a violent crime such as
23 burglary or robbery? That's the first question.

24 Second question, Has any member of our jury panel or member
25 of your immediate family, to your knowledge, or close, personal

1 friend, a member of MADD or SADD or CAVE or any other similar
2 type of organization which has, as its goal, the promotion of law
3 enforcement?

4 If you need to respond to either of those questions, please
5 stand and come forward.

6 (No response.)

7 THE COURT: I find no one standing.

8 Two questions again. Please don't respond to either until
9 you've heard both.

10 Ladies and gentlemen, this case may involve some testimony
11 regarding the use of alcohol and/or drugs, illegal drugs. Do you
12 maintain a moral, a religious or other belief that is so strong
13 that it would interfere with your ability to be fair and
14 impartial, both to the state, as well as to Ms. Fortune or
15 Mr. Salazar? That's question number one. Question number two,
16 Has any member of our jury panel ever sat on a jury before?

17 If you need to respond to either of those questions, I'm
18 going ask you to please stand and approach.

19 (No response.)

20 THE COURT: I find no one standing.

21 Now, ladies and gentlemen I'm going ask three questions
22 together. Please do not respond until I've asked all three.

23 Has any member of our jury panel ever received assistance
24 from the victim's advocacy program? That's question number one.

25 Question number two, Have you or any member of your

1 immediate family ever been prosecuted in the First Circuit
2 Solicitor's Office or anywhere else?

3 And, third question, Has any member of the jury panel, have
4 you ever been a member of an organization dedicated to the
5 protection of animals such as PETA or the SPCA or the American
6 SPCA?

7 If you need to respond to any of those questions, if you'd
8 please stand and approach.

9 (No response.)

10 THE COURT: I find no one standing.

11 Ladies and gentlemen, this will be my concluding question,
12 is this. Do you know any reason why you ought not/should
13 not/could not be a juror in this case, being ready, willing and
14 able to listen to the evidence and make up your mind based solely
15 on what you hear in court while court is in session, while being
16 completely impartial and fair to the state and to Mr. Fortune and
17 to Mr. Salazar?

18 If you have any concern about your ability to do that,
19 listen to the evidence, make up your mind based solely on what
20 you hear in court while court is in session, being fair and
21 impartial to these parties, if you have any concern, for whatever
22 reason, I'm going to ask you to please stand and come forward at
23 this time.

24 (No response.)

25 THE COURT: I find no one standing.

1 All right. I find that our panel is qualified.

2 Now, ladies and gentlemen, I'm going to ask you to please
3 return tomorrow morning at 9:30. Just like you did this morning,
4 you'll come into -- well, you may come into the jury assembly
5 room but you may not. We're going to have three different areas
6 set up to receive our qualified jurors. And at 9:30 in the
7 morning we are going to begin the process of selecting the jury
8 for our trial.

9 Ladies and gentlemen, once folks are selected to serve, then
10 we're going to get right into the trial of the case.

11 Now I need to give some instruction. Primarily I'm going
12 instruct you, do not discuss this matter or allow anyone to
13 discuss it with you. You're thinking, Well, I haven't heard
14 anything, I'm not even a juror in this case. Well, the reason
15 for that is that you've got a little bit of information, and
16 jurors in a case cannot discuss a matter, they can't allow anyone
17 to discuss it with them while they're sitting on the jury.
18 Because you have a little bit of information, because I have read
19 to you some allegations, it's very important that you not discuss
20 this case with anyone. That's your family, your friends,
21 certainly anyone that has anything do with this case.

22 Should anyone try to talk to you about this case, it's
23 really important that you get their name; if you can't get their
24 name get a description, and report it to me upon your return to
25 the courthouse, and I will tend to the matter.

1 Ladies and gentlemen, I'm going to ask you to leave your
2 cellphone or other communication device somewhere other than the
3 courthouse tomorrow morning, because you cannot have a cellphone
4 with you while you're serving on the jury. And so please be
5 mindful of that in the morning.

6 Finally, those of you that are dashing off for what might be
7 another hour or so of work, if you need something for your
8 employer, I'd be happy to get that for you in the clerk's office,
9 which is directly below where we are. And when you get to the
10 first floor, if you'll go all the way down to the building on the
11 parking lot side of the building, they'll be happy to get that
12 for you.

13 Now, does anyone plan on going to work tonight? Good. I
14 was going to say, no, not tonight, because I need you all rested
15 and fresh. For those of you who will be selected to sit on the
16 jury tomorrow, you need to be rested.

17 Now, ladies and gentlemen, other than to thank you for your
18 time, your precious and dear time, we've taken a lot of it this
19 afternoon, I'm certainly grateful for every single, solitary tick
20 of the clock, and I thank you for it.

21 If you'll be mindful of the social distancing as you leave.
22 Just know that I'll look forward to seeing all of you in the
23 morning at 9:30. Do you have any questions about that? 9:30.
24 9:30. 9:30. Yes?

25 JUROR NO. 229: What if you have to work in the morning?

1 Because I have to work tomorrow. Or do I have to be here?

2 THE COURT: Yes, ma'am.

3 JUROR NO. 229: Okay. I'll have to have my boss find
4 somebody to take my place.

5 THE COURT: Yes, ma'am. That happens with every single
6 juror every day all over this country. And that's why we talk
7 about sacrifice, it is a sacrifice. And I so appreciate that,
8 yes. So tell your boss, Appreciate me greatly, even greater than
9 you did before. Yes. Thank you. All right, anything else?

10 Thank you so much. I'll see you in the morning at 9:30.
11 And thank you so, so much. And I need to have your juror number,
12 please, ma'am, just so our record can reflect.

13 JUROR NO. 229: 229.

14 THE COURT: 229, perfect. Thank you so much. Have a
15 wonderful evening, all of you.

16 (WHEREUPON, the fourth jury panel is excused for the day at
17 3:02 p.m.)

18 MATTERS OF LAW

19 ATTORNEY CORNWELL: Your Honor, Juror 349, her husband is a
20 Summerville Police Department detective. This case was
21 investigated by the Summerville Police Department. So I think
22 there are obviously concerns about her husband being a member of
23 the investigating agency.

24 THE COURT: Okay.

25 ATTORNEY CORNWELL: Juror 349, her husband was a ---

1 THE COURT: Okay. So you're raising to strike for cause?

2 ATTORNEY CORNWELL: Yes, Your Honor.

3 THE COURT: Position of the solicitor?

4 ATTORNEY OSBORNE: We don't take one, Your Honor.

5 THE COURT: All right. I have no problem with that. 349,
6 out. Got it?

7 ATTORNEY CORNWELL: Juror 145, she was a fire and rescue
8 ambulance clerk. She indicated that she worked for the old
9 courthouse here in Saint George. That is also where the
10 solicitor's office also is now, so I don't know. I know when we
11 say you work in the courthouse, so there's not a lot of overlap
12 between the prosecuting agency, the clerk's office, all that.
13 And with her working in the same ---

14 THE COURT: Solicitor?

15 ATTORNEY OSBORNE: I'm still learning my way around that
16 office, but what I can tell you is, we don't have access to their
17 office; they don't have access to ours. I didn't even know they
18 had an office, to be honest with you.

19 THE COURT: And now you do. All right. I'm sorry.
20 Ms. Hubrich?

21 ATTORNEY HUBRICH: I'll join in the motion.

22 THE COURT: You okay with that?

23 ATTORNEY HUBRICH: I'm okay with striking her.

24 THE COURT: We'll scratch her.

25 ATTORNEY HUBRICH: What number was that?

1 ATTORNEY CORNWELL: That was 145.

2 THE COURT: Okay.

3 ATTORNEY CORNWELL: The last one, I think it's -- I mean, I
4 don't know how much of an issue this is. Juror 184 has, I've got
5 notes that she's got three prior DUIs out of California for which
6 she got three years' probation. So I believe that is actually a
7 disqualifying conviction.

8 THE COURT: DUI first?

9 ATTORNEY OSBORNE: It's one DUI. I mean, it doesn't bother
10 me.

11 ATTORNEY CORNWELL: It doesn't actually bother me. I don't
12 want it to come back, like, where she's on the jury panel and
13 like, oh, yeah.

14 THE COURT: And she should have been disqualified.

15 ATTORNEY CORNWELL: And she didn't bring up the fact that
16 she's been prosecuted. That is certainly a question, Have you
17 ever ---

18 THE COURT: Yeah.

19 ATTORNEY CORNWELL: I think that ---

20 THE COURT: Yeah, I'm going take her out. Out.

21 ATTORNEY OSBORNE: Okay.

22 ATTORNEY HUBRICH: Which one is that? My position is that
23 she has she passes the mustard. I don't think she's required to
24 disclose it, and I don't think it matters.

25 THE COURT: Didn't I ask her if she was prosecuted by this

1 solicitor's office or anyone else?

2 ATTORNEY HUBRICH: It was in California. Right?

3 THE COURT: Or any other prosecutor office.

4 ATTORNEY HUBRICH: I didn't know that was your question.

5 I'm sorry, Judge. That might have actually been my question.

6 THE COURT: It was your question.

7 ATTORNEY HUBRICH: Okay. I'll withdraw that.

8 (WHEREUPON, the fourth jury panel is seated in the courtroom
9 at 3:16 p.m.)

10 (WHEREUPON, the Clerk of Court conducted roll call, and the
11 Court conducted exemptions and transfers necessary to qualify the
12 jury panel.)

13 THE COURT: Ladies and gentlemen, I find that you are
14 qualified to serve. And at this time I am going call on the
15 solicitor, the prosecutor on behalf of the state. Solicitor
16 Osborne, if you'll please call the first case for trial.

17 ATTORNEY OSBORNE: Thank you, Your Honor. The matter before
18 you is State versus Muanah Fortune. Mr. Fortune has been charged
19 with murder. the indictment number's 2019-GS-18-0416; been
20 charged with attempted murder, that's 417; of burglary in the
21 first degree, 0418; possession of a firearm during the commission
22 of a violent crime at 0420; and ill-treatment of animals, 0421.

23 The next case is State versus Polo Salazar. He also has
24 been charged with murder, the indictment number's
25 2019-GS-18-0437; burglary in the first degree, 0349; possession

1 of a stolen vehicle, 0439; attempted murder, 0440; possession of
2 a firearm during the commission of a violent crime, 0441; and
3 ill-treatment of animals, 0443.

4 THE COURT: Thank you. Now, ladies and gentlemen, I want to
5 describe for you what has just occurred. Ladies and gentlemen,
6 Mr. Osborne is representing the state, he's a prosecutor with the
7 first circuit solicitor's office. He has just called the first
8 case for trial. And what he has done, he has called my attention
9 to indictments.

10 Now, what is an indictment? Well, I'm going to describe for
11 you what an indictment is and what it is not.

12 Ladies and gentlemen, an indictment, first of all, is a
13 piece of paper, it is a notice document. It notifies a citizen
14 that the state alleges that the citizen has violated one of the
15 criminal laws of the state of South Carolina. And because the
16 state is alleging that each of these folks has violated more than
17 one crime, there's more than one indictment. But it holds true
18 that an indictment is simply a notice document.

19 Let me tell you what an indictment is not. It is not
20 evidence of any of the allegations that it contains.

21 I want to hasten to tell you that, to each of the
22 allegations of each one of these indictments, that these
23 defendants, each of them, have pled not guilty. And that places
24 upon the state of South Carolina the burden to prove each
25 allegation of each indictment beyond a reasonable doubt.

1 Now, ladies and gentlemen, those of you that serve on the
2 jury will be told and will learn that each of these indictments
3 is to be considered separately and independently of each other.
4 Each of these defendants is to be considered separately and
5 independently. These matters are not intertwined. And so it is
6 important that I tell you that and that you understand that.

7 Now, ladies and gentlemen, in just a moment I am going to
8 read you some of the allegations of these indictments. The
9 reason I'm going to be doing that is to find out whether or not
10 any of you know or think you may know or if you've heard or think
11 you've heard anything about these allegations. The way that I'm
12 going to be doing that is to read to you some of the allegations
13 in the indictments.

14 Now, ladies and gentlemen, for judicial, economy purposes I
15 am going to be combining these two gentlemen, their names, and
16 I'm doing that only for efficiency reasons. And it is important,
17 that because you are potential jurors in this matter, that you
18 understand that although I'm doing that for judicial, economic
19 reasons, these charges are considered separately, these
20 individuals are considered individually and independently. All
21 right.

22 Now, ladies and gentlemen, give me just a moment, and then I
23 am going to be reading to you some of these allegations in the
24 indictment.

25 Now, ladies and gentlemen, Indictment 2019-GS-18-0437 and

1 0416, which are the indictments for murder, allege as follows:
2 That in Dorchester County, South Carolina, on or about January
3 the 28th, 2019, with malice aforethought, the Defendant Muanah
4 Aruna Fortune, Jr., and the Defendant Polo Keoki Salazar did kill
5 one Joe Weaver by means of shooting the victim. The victim did
6 die as a proximate result thereof, this offense being in
7 violation of the common law and Section 16-3-10 of the South
8 Carolina Code of Laws, as amended.

9 Indictments 2019-GS-18-0440 and Indictment 2019-GS-18-417,
10 which are indictments for attempted murder, allege that in
11 Dorchester County, South Carolina, on or about January the 28th,
12 2019, the Defendant Polo Kioki Salazar and the Defendant Muanah
13 Aruna Fortune, Jr., did, with the intent to kill, attempt to
14 kill, one Marcus Porter, with malice aforethought, by shooting
15 the victim, this offense being in violation of Section 16-3-29 of
16 the South Carolina Code of Laws, as amended.

17 Indictments 2019-GS-18-0438 and 2019-GS-18-0418 are
18 indictments for burglary in the first degree, allege that in
19 Dorchester County, South Carolina, on or about January the 28th,
20 2019, the Defendant Muanah Aruna Fortune, Jr., and the Defendant
21 Polo Keoki Salazar did willfully and unlawfully enter the
22 dwelling of Marcus Porter without consent and with the intent to
23 commit a crime therein and, when, in effecting entry or while in
24 the dwelling or in the immediate flight, the defendant or another
25 participant in the crime is armed with a deadly weapon or

1 explosive, causes physical injury to a person who is not a
2 participant in the crime, uses or threatens the use of a
3 dangerous instrument, displays what is or appears to be a knife,
4 pistol, revolver, rifle, shotgun, machinegun or other firearm
5 and/or the entering or remaining occurs in the nighttime, this
6 offense being in violation of Section 16-11-311 of the South
7 Carolina Code of Laws, as amended.

8 Indictment 2019-GS-18-0441 and Indictment 2019-GS-18-0420
9 alleges that in Dorchester County, South Carolina, on or about
10 January the 28th, 2019, the Defendant Muanah Aruna Fortune, Jr.,
11 and the Defendant Polo Keoki Salazar did visibly display or have
12 in his reach, possession, a handgun during the commission of a
13 violent crime as defined by Section 16-1-60, Code of Laws of
14 South Carolina, 1976, as amended; to wit, burglary in the first
15 degree and murder, thereby violating Section 16-23-490 of the
16 Code of Laws of South Carolina, 1976, as amended.

17 Ladies and gentlemen, Indictment 2019-GS-18-0443 and
18 2019-GS-18-0421, which are the indictments for ill-treatment of
19 animals, in general, torture, allege that in Dorchester County,
20 South Carolina, on or about January the 28th, 2019, the Defendant
21 Polo Keoki Salazar and the Defendant Muanah Aruna Fortune, Jr.,
22 did torture, torment, needlessly mutilate, cruelly kill or
23 inflict excessive or repeated unnecessary pain or suffering upon
24 an animal, or by omission or commission did cause the act to be
25 done, in that the defendant did cruelly kill a dog by shooting

1 it, this offense being in violation of Section 47-1-40(b) of the
2 South Carolina Code of Laws, as amended.

3 And as to Indictment 2019-GS-18-0439, which is indictment
4 for possession, concealing, selling or disposing of a stolen
5 vehicle where the value is more than two yet less than \$10,000,
6 with regards to the Defendant Polo Keoki Salazar, the state
7 alleges that in Dorchester County, South Carolina, on or about
8 January the 28th, 2019, the Defendant Polo Keoki Salazar did
9 knowingly and unlawfully possess, receive, conceal, sell or
10 dispose of a vehicle described as a 2007 Honda CR-V, with an
11 approximate value of \$6,000, and the defendant was not entitled
12 to possession of the vehicle and had knowledge that the vehicle
13 had been stolen or converted unlawfully, this offense in
14 violation of Section 16-21-80 of the South Carolina Code of Laws,
15 as amended.

16 Now, ladies and gentlemen, again I hasten to tell you that,
17 to each of these indictments and to each of the allegations
18 within indictments, each of these defendants plead not guilty.

19 Now the question, ladies and gentlemen, Do any of you know
20 or think you may know, have you heard or think you may have heard
21 anything about these allegations? If so, please stand at this
22 time.

23 (No response.)

24 THE COURT: And I find no one standing.

25 Now, ladies and gentlemen, please allow me to introduce you

1 to Solicitor Osborne. And he is going to introduce the attorneys
2 in his office and his co-counsel. Yes, sir.

3 ATTORNEY OSBORNE: Thank you, Your Honor. Again, as you
4 know, I'm David Osborne, Assistant Solicitor. I work in the
5 First Circuit. The First Circuit is Dorchester, Calhoun and
6 Orangeburg. My boss, the solicitor here, is David Pascoe. In my
7 office is First Assistant Kelly LaPlante, Mike Spears, John
8 Rivers, Baker Allen, Nick Young, Meagan Chinnis, Jillian
9 Frederick and Vergil Deas.

10 Rebecca Durr is my legal assistant. She'll be helping out,
11 along with Stacy Cook, she's also a legal assistant, bringing in
12 witnesses and whatnot. My investigator, Chor King, may also be
13 around. And Chelsea Glover is a prosecutor, she is from
14 Orangeburg County, and she has come down to help out in
15 prosecuting this case.

16 THE COURT: Thank you so much. You're going to hear me use
17 the term acquainted with, and I want my describe my definition of
18 acquainted with. I am trying to find out if you have any
19 connection with these folks at all. Let me give some examples.

20 It may be that you went to school with someone that I
21 mention 20 years ago and you hadn't thought about this person,
22 you hadn't seen him in 20 years, but you know you went to school
23 with them. Believe it or not, that relationship, as limited as
24 it is, would be encompassed in my definition of being acquainted
25 with.

1 Maybe you work in the same location as someone that I'll ask
2 you about, maybe you wave at each other across the parking lot.
3 Believe it or not, that relationship, as limited it is, will be
4 encompassed within my definition of acquainted with. I am trying
5 find out if you have any connection with the folks I'm going to
6 be asking you about.

7 With that in mind I ask, Are you related by blood or
8 marriage or acquainted with Mr. Ms. Glover, Mr. Osborne or any of
9 the folks in the First Circuit Solicitor's Office? If so, please
10 stand at this time.

11 (No response.)

12 THE COURT: And I find no one standing.

13 Ladies and gentlemen, please allow me to introduce you,
14 please, to Mr. Fortune. If you'd stand. Mr. Fortune, thank you
15 so much. And you may be seated.

16 Are you related by blood or marriage or acquainted with
17 Mr. Muanah Fortune? If so, please stand at this time.

18 (No response.)

19 THE COURT: I find no one standing. Now, ladies and
20 gentlemen, Mr. Fortune is represented by Ms. Hubrich and
21 Mr. Wehman. Ms. Hubrich is going stand -- unless she wants to
22 have Mr. Wehman to do it at this time. She's going to call and
23 describe you, tell you whose lawyers are, the folks in her
24 office.

25 ATTORNEY HUBRICH: Hi. My name's Michelle Hubrich. I've

1 also been known as Michelle Williams and Michelle Stubbs, but I
2 go by Michelle Hubrich now.

3 Sitting with me at counsel table is another attorney in my
4 office, Pierce Wehman. We both work for the Dorchester County
5 Public Defender's Office, which is part of the First Circuit
6 Public Defender's Office. Also present in trial today is
7 Ms. Julie Beaks, she's the newest lawyer in our offers. Our
8 chief public defender is Mark Winedecker. Other lawyers you may
9 know in our office would be Mary Lematty, Ash Chisholm, Tom
10 Squires. We have some juvenile public defenders, Gina McElhaney,
11 John Loy. Our investigator is John Tilsdale. And the public
12 defender's office represents Muanah Fortune.

13 THE COURT: Thank you. Are you related by blood, marriage,
14 or acquainted with or have you or any member of your immediate
15 family, to your knowledge, ever been represented by Ms. Hubrich,
16 Mr. Wehman or any of the folks in their office? If so, please
17 stand at this time.

18 JUROR NO. 272: Can I ask a clarifying question?

19 THE COURT: Can you ask a clarifying question? You can
20 approach. Why don't you meet me down there. And you are Juror
21 No?

22 JUROR: 272.

23 THE COURT: Juror no?

24 THE THE BAILIFF: No. 272.

25 THE COURT: Yes, ma'am?

1 JUROR NO. 272: You mentioned Mark Leiendecker. I believe
2 Mark Leiendecker is married to a personal friend of mine.

3 THE COURT: Okay. And who is your personal friend?

4 JUROR NO. 272: Cindy Leiendecker.

5 THE COURT: Yes, he is.

6 JUROR NO. 272: That's what I thought. Okay. I don't know
7 what if that qualifies as acquaintance.

8 THE COURT: Yes, it does. And do you visit in each others
9 homes?

10 JUROR NO. 272: Yes.

11 THE COURT: Do you visit in his home?

12 JUROR NO. 272: Yes.

13 THE COURT: How often?

14 JUROR: Probably a couple times a year.

15 THE COURT: All right. As a result of that relationship,
16 might that/could that interfere with your ability to be
17 completely fair and impartial to the state, as well as to the
18 state and the defendants?

19 JUROR NO. 272: I don't think so.

20 THE COURT: Well, let me ask this question. Can you set
21 that relationship completely aside and make up your mind based
22 upon what you hear in court while court is in session?

23 JUROR NO. 272: Yes.

24 THE COURT: All right, setting that relationship completely
25 aside?

1 JUROR NO. 272: Yes.

2 THE COURT: Very well. Please stay with us.

3 All right. Anyone else?

4 (No response.)

5 THE COURT: Very well. Now, ladies and gentlemen, allow me
6 to introduce you to Polo Salazar. Thank you, Mr. Salazar. This
7 is Mr. Polo Salazar. You may be seated.

8 Are you related by blood or marriage or acquainted with Mr.
9 Polo Salazar? If so, please stand.

10 (No response.)

11 THE COURT: And I find no one standing.

12 Now, ladies and gentlemen, Mr. Salazar is represented by the
13 Cornwell Law Firm, LLC, and Ashley Cornwell, and this is
14 Ms. Cornwell. Ladies and gentlemen, are you related by blood or
15 marriage or acquainted with or have you or any member of your
16 immediate family ever been represented by the Cornwell Law Firm
17 or Ms. Ashley Cornwell? If so, please stand at this time.

18 (No response.)

19 THE COURT: And I find no one standing.

20 Now, ladies and gentlemen, I have additional questions to
21 ask of you at this time. And I'm going to ask these first two
22 together. Please don't respond to either until I've asked both.

23 Number one, Have you or any member of your immediate family,
24 to your knowledge, ever had any criminal charges handled by the
25 First Circuit Solicitor's Office? That's question number one.

1 Question number two, does any member of our jury panel have
2 any personal, political or religious beliefs that would prevent
3 you from sitting in judgment of another person?

4 Now, if you need to respond to either of those questions,
5 I'm going ask you to please stand and approach.

6 (No response.)

7 THE COURT: I find no one standing.

8 Now, ladies and gentlemen, are you -- well, I need describe
9 for you close, personal friend. You're going to hear me talk
10 about a close, personal friend. This person is so close to you
11 that you probably like this close, personal friend maybe even
12 better than you like one of your siblings. This is someone that
13 is so close to you, even though they're not related to you they
14 are like a family member. These are just folks who are genuinely
15 quite close like a family member.

16 Now, ladies and gentlemen, are you or any member of your
17 immediate family or close, personal friend a member of any law
18 enforcement agency? If so, please stand at this time.

19 (Juror stands.)

20 THE COURT: And your number, sir?

21 JUROR NO. 203: 203.

22 THE COURT: All right. And what law enforcement agency?

23 JUROR NO. 203: It was my father in-law. He's a retired
24 police officer from Elmhurst, Illinois.

25 THE COURT: In Illinois?

1 JUROR NO. 203: Yes, ma'am.

2 THE COURT: Thank you. And your number?

3 JUROR NO. 386: 386.

4 THE COURT: And what law enforcement agency?

5 JUROR NO. 386: My nephew's a corrections officer in
6 Summerville.

7 THE COURT: Correctional officer in Summerville?

8 JUROR NO. 386: Yes.

9 THE COURT: All right. Thank you very much. One more.

10 Thank you. Your number, please?

11 JUROR NO. 221: 221.

12 THE COURT: Yes.

13 JUROR NO. 221: My son is a corrections officer at Lieber.

14 THE COURT: Thank you.

15 JUROR NO. 221: You're welcome.

16 THE COURT: Now, are you employed by or related by blood or
17 marriage to or have a close, personal friend who is employed by
18 the attorney general, the solicitor or any prosecuting attorney's
19 office or does work with the attorney general or any prosecuting
20 attorney's office? If so, please stand.

21 (Juror stands.)

22 THE COURT: And your number?

23 JUROR NO. 272: 272.

24 THE COURT: And all right. And is it you or?

25 JUROR NO. 272: So prior to being a stay-at-home dad, my

1 husband was employed by the Berkeley County Solicitor's Office
2 for seven years.

3 THE COURT: Thank you very much.

4 Have you ever been employed by any civilian or military law
5 enforcement agency? If so, please stand.

6 (Juror stands.)

7 THE COURT: And your number?

8 JUROR NO. 287: To 287.

9 THE COURT: 287. Okay, you want to put your mask on -- I
10 mean, take your mask off, put your shield on. Thank you so much.
11 All right. And was the law enforcement agency?

12 JUROR NO. 287: Public defense.

13 THE COURT: Okay. How long ago?

14 JUROR NO. 287: Two years.

15 THE COURT: Thank you. You may be seated.

16 Now, ladies and gentlemen, these lawyers help me, and they
17 give me a list of potential, potential witnesses. In just a
18 moment I am going to be asking you whether or not you are
19 related, either by blood or marriage or acquainted with, and then
20 I'm going to give you a list of folks. If you are related by
21 blood or marriage or acquainted with any of these individuals,
22 I'm going to ask you to please stand.

23 Here is the list of individuals. Leta Boehler, Joshua
24 Scarborough, Jacob Cramer, Dylan Reynolds, Matthew Brooks,
25 Kenneth Driscoll, Phillip Moy, Jonathan Davis, Rachel Nguyen,

1 Ryan DeWane, Nicole Hardin, James Green, Dr. Nicholas Batalis,
2 David Swibaker, Marcus Porter, Salina Sheppard, Jamie Hall,
3 Bethany Davidson, Vera Martinez, Charlotte Pitts, Daniel Greene,
4 Christina Denson, Marie Wearing, Christopher Flynn, Christopher
5 Hirsch, Taylor Jackson, Megan Wade, Jonathan James, Jaquavious,
6 let me spell it, J-a-q-u-a-v-i-o-u-s, Jaquavious Washington.
7 Wade Rallings, Bernard Seabrook, Shaneka Wright.

8 Are you related by blood or marriage or acquainted with any
9 of those individuals? If so, please stand.

10 (Juror stands.)

11 THE COURT: All right, yes, sir. Now, listen. I need to
12 you answer just the questions that I ask. I do not need a
13 colloquy or a narrative. Let me ask the questions, okay.

14 JUROR NO. 264: I just had a question about Christopher
15 Flynn, the name that you mentioned.

16 THE COURT: Yeah.

17 JUROR NO. 264: He's very close to me if that's the
18 Christopher Flynn that I'm thinking of.

19 THE COURT: Okay. Christopher Flynn, all right. Put on
20 your shield, take your mask down. If it's helpful, this
21 gentleman, Christopher Flynn, is a Summerville police officer.

22 JUROR NO. 264: Yes, ma'am.

23 THE COURT: And I gather y'all are friends?

24 JUROR NO. 264: Yes, ma'am.

25 THE COURT: Do you visit in each other's homes?

1 JUROR NO. 264: No, ma'am.

2 THE COURT: Now, as a result of Mr. Flynn's involvement in
3 this matter, would that have any affect on your ability to be
4 fair and impartial to the state, as well as to Mr. Fortune and
5 Mr. Salazar? Ask that's a yes or no.

6 JUROR NO. 264: No.

7 THE COURT: It would not?

8 JUROR NO. 264: It would not.

9 THE COURT: And can you evaluate his testimony as you would
10 any other witness?

11 JUROR NO. 264: Absolutely. Yes, ma'am.

12 THE COURT: All right. And can you set your relationship
13 aside and make up your mind based upon what you hear in court
14 while court is in session?

15 JUROR NO. 264: I'm sorry?

16 THE COURT: That's okay. Can you set your relationship with
17 Mr. Flynn aside and make up your mind based upon what you hear
18 while court is in session?

19 JUROR NO. 264: Yes, sir.

20 THE COURT: Thank you. Please stay with us. And your
21 number again, was?

22 JUROR NO. 264: I'm sorry. I'm blind. 264.

23 THE COURT: Thank you.

24 Ladies and gentlemen, I am going to ask three questions
25 together. Please don't respond until I've asked all three.

1 Number one, have you or any member of your immediate family,
2 to your knowledge, or close, personal friend ever been the victim
3 of a violent crime such as burglary or robbery? That's question
4 number one.

5 Question number two, Is any member of our jury panel or
6 member of your immediate family, to your knowledge, or close,
7 personal friend, a member of MADD or SADD or CAVE or any other
8 similar organization which has the goal which is the promotion of
9 law enforcement?

10 And then, three, Is there anything about the nature of the
11 allegations in this case that would present, for you, a concern
12 with being an impartial juror?

13 If you need to respond to any of those question, I'm going
14 ask you to please stand and come forward.

15 (No response.)

16 THE COURT: All right. I find no one standing.

17 Now, ladies and gentlemen, I'm going to ask you three
18 questions together. Please don't respond until I've asked all
19 three.

20 This case may involve some testimony regarding the use of
21 alcohol and/or illegal drugs. Does any member of our jury panel
22 have any moral or religious or otherwise beliefs that would
23 impact your ability to be a fair and impartial juror in this
24 case? If so, please stand and come forward. That's question
25 number one. Don't stand yet. Two more.

1 Question number two. Has any member of our jury panel ever
2 sat on a jury before? That's question number two.

3 And, question number three. Has any member of our jury
4 panel ever received assistance from the victim's advocacy
5 program?

6 If you need to respond to question number one, question
7 number two or question number three, please stand and come
8 forward.

9 (Juror stands.)

10 THE COURT: Just come on forward. Yes. Juror number?

11 THE BAILIFF: No. 192.

12 (WHEREUPON, an in camera colloquy is conducted outside the
13 presence of the jury as follows:)

14 THE COURT: All right. I need just enough volume for my
15 court reporter to hear and you and no one else. So come on
16 forward.

17 JUROR NO. 192: I have a case pending. Lynn Goettee has
18 been in correspondence with me as my victim advocate for a
19 burglary that occurred at my house in Summerville.

20 THE COURT: All right. And it's being prosecuted by the
21 First Circuit Solicitor's Office? Unless you're in Berkeley
22 County. Are you in Berkeley County?

23 JUROR NO. No, ma'am. I'm in Summerville. I'm in
24 Dorchester County.

25 THE COURT: In Dorchester County. It's going to be

1 prosecuted by this office. I'm going to ask you to sit this one
2 out because of that. I just think it's appropriate.

3 JUROR NO 192: All right.

4 THE COURT: I'm going to excuse you then. And if you'd be
5 so kind to not discuss this. You're not going to, but just don't
6 discuss this with anyone.

7 JUROR NO. Absolutely.

8 THE COURT: But hang with me, because I need to give you
9 some further instructions.

10 JUROR NO 192: Yes, ma'am.

11 THE COURT: Actually, let me do this. I'm going to ask you
12 to call back to the juror information line. You were given ---

13 JUROR NO 192: The card?

14 THE COURT: After 6:00 tomorrow -- not tonight, but tomorrow
15 night after 6:00. Okay.

16 JUROR NO 192: All right. Yes, ma'am.

17 THE COURT: Thank you. All right.

18 Can y'all hear me if I stay down here? Yes. Yes, great,
19 thanks. Now I'm going to ask you two questions together. If you
20 need to respond, I'm going to ask you to stand and come forward.

21 Have you or any member of your immediate family, to your
22 knowledge, ever been prosecuted by the First Circuit Solicitor's
23 Office or anywhere else? That's the first question.

24 Question number two. Has any member of our jury panel ever
25 been a member of an organization dedicated to the protection of

1 animals such as PETA or the SPCA or the American SPCA, ASPCA, et
2 cetera?

3 If you need to respond to either of those two questions, I'm
4 going to ask you to please in forward.

5 (No response.)

6 THE COURT: No one's coming forward; no one's standing.

7 My last question is this. Do you know any reason why you
8 ought not/should not/could not be a juror in this case, being
9 ready, willing and able to listen to the evidence and make up
10 your mind based upon what you hear in court while court is in
11 session, being completely unaffected by -- the case law talks
12 about -- matters extraneous, meaning matters outside the court?

13 In other words, you will listen to the evidence, you will
14 make up your mind based upon what you hear in court while court
15 is in session, being completely fair and impartial to the state,
16 as well as to Mr. Fortune and Mr. Salazar.

17 If you have any concern whatsoever, for whatever reason, I'm
18 going to ask you to please stand and come forward at this time.

19 (No response.)

20 THE COURT: All right. No one is standing.

21 Ladies and gentlemen, I find that you are now qualified as a
22 potential juror in this case.

23 I need to give you some further instruction. Ladies and
24 gentlemen, we're going to select a jury in this case at 9:30
25 tomorrow morning, 9. 30 I'm going to ask you please report back

1 to the courthouse for jury selection tomorrow morning at 9:30, at
2 9:30.

3 I'm going to ask you not to discuss this matter with anyone,
4 with your family, your friends, or certainly anyone associated
5 with this matter. In fact, should anyone try to talk to you
6 about this case, please get their name, if not a description, and
7 report that to me upon your return.

8 Now, you'd think, why would I give that you instruction at
9 this juncture. The reason is that those that are selected to
10 serve on the jury will receive an instruction every time we leave
11 each other, do not discuss this matter or allow anyone to discuss
12 it with you. You have a little bit of information. I've
13 introduced you to some folks; I've read you some allegations, so
14 you have a little bit of information and, therefore, it is
15 required that I instruct you not to discuss this matter or allow
16 anyone to discuss it with you.

17 Now you're going to be going home. I don't expect you to go
18 home as your person at dinner asks, Ah, what did you do today? I
19 can't discuss it. Oh, my goodness, that would cause you
20 terrible, terrible drama. You can certainly say you were
21 qualified for jury selection, and that it is a criminal term as
22 opposed to civil term, it's General Sessions as opposed to any
23 other term of court, and that you have to report tomorrow morning
24 for the selection of the jury.

25 Next question is going to be, Well, tell me all about it

1 what did you learn, what, about the case? I have to ask you to
2 put it on the Judge and not discuss it. I have to ask you to do
3 that. But I don't want anybody upset with you. Let them be
4 upset with me.

5 Now, does anybody normally got to work at night?

6 (Juror responds.)

7 THE COURT: Not tonight. Not tonight. Let me tell you why.
8 If you were selected in the morning to serve on this jury, you'll
9 be exhausted. It's unreasonable to ask you to do that, work at
10 night, and be able to give the proper attention to these matters.
11 So I'm going to ask you not to go in tonight, because we're going
12 to go right into the trial of this case.

13 Now, if anybody asks you about that, put it on the Judge.
14 If anybody wants to talk to me about it, I'm happy to speak with
15 whomever. You just get me a name and a number, and I'm delighted
16 to give a call, because I want you to rest, you must rest. You
17 cannot be at work all night and then give the proper attention to
18 these matters.

19 Very well. All right. Any questions about that? Yes, sir,
20 any questions about that, about working this evening? Mr. Juror,
21 red shirt? Got it?

22 JUROR: Yeah.

23 THE COURT: Thank you kindly. All right. Now, if any of
24 you need something for your employers -- it's getting, it's
25 almost 5:00, but if anybody's dashing off because you want to get

1 that last two and a half minutes in and you need something for
2 the employer, be happy to get that for you down in the clerk's
3 office, which is directly below where we are. So when you go
4 downstairs, if you go into the clerk's office, which is the
5 closest room part of the building next to the parking lot,
6 they'll be happy to get that four.

7 I'm going to ask you to please leave your cellphones
8 somewhere other than the courthouse. Please leave it in your car
9 or leave it at home tomorrow. If you're selected to serve on a
10 jury, you cannot have a cellphone or other communication device
11 with you. So please keep that in mind, as well.

12 And, ladies and gentlemen, that will conclude the work that
13 we will be doing with you today. I just ask you to please
14 remember to report in the morning at 9:30 for our jury selection.
15 Will not take particularly long. And those of you who are
16 selected to serve, we'll get right into the trial of this case.

17 And thank you so much. Have a good evening. Remember,
18 social distancing on the way out.

19 (WHEREUPON, the fifth jury panel is excused for the day at
20 4:21 p.m.)

21 (WHEREUPON, the Clerk of Court conducted roll call, and the
22 Court conducted exemptions and transfers necessary to qualify the
23 jury panel.)

24 VOIR DIRE OF THE JURY PANEL

25 THE COURT: I find that our jury panel is now qualified.

1 Ladies and gentlemen, let me share with you, that across the
2 United States most prosecutors of the states are called district
3 attorneys or state's attorney. We're a little different in South
4 Carolina. Our prosecuting attorneys are called solicitors. And
5 I am going to call on our solicitor's office, and I am going to
6 ask our solicitor's office to please call the first case for
7 trial. Mr. Osborne.

8 ATTORNEY OSBORNE: Thank you, Your Honor. The matter before
9 you is State versus Muanah Fortune. Mr. Fortune has been charged
10 with murder. The indictment number's 2019-GS-18-0416; some other
11 charges are attempted murder at 0417; burglary in the first
12 degree, 0418; possession of a firearm during the commission of a
13 violent crime, 0420; and ill-treatment of animals, 0421.

14 The state also calls Polo Salazar. Mr. Salazar has also
15 been charged with murder, the indictment number's
16 2019-GS-18-0437; burglary in the first degree, 0438; possession
17 of a stolen vehicle, 0439; attempted murder, 0440; possession of
18 a firearm during the commission of a violent crime, 0441; and
19 ill-treatment of animals, 0443.

20 THE COURT: All right. Ladies and gentlemen, what has just
21 occurred is that the solicitor has called the first case for
22 trial this week, and he's read out numbers from what are called
23 indictments.

24 I want to tell you what an indictment is and what it is not.
25 An indictment, first of all, is a piece of paper, it is a notice

1 document. It is the means by which the state of South Carolina
2 gives notice to a citizen that the state alleges that that
3 citizen has violated one of the criminal laws of the state of
4 South Carolina. And there is an indictment for each of the
5 alleged offenses, for each of the alleged crimes, there is an
6 indictment. And that is true with regards to each of these
7 defendants.

8 Let me tell you what an indictment is not. An indictment is
9 not evidence of any of the allegations that it contains.

10 I want to also hasten, I want to quickly tell you that, to
11 each and every allegation of each of these indictments, each of
12 these gentlemen has pled not guilty. And that places upon the
13 state the burden to prove each of these gentlemen guilty beyond a
14 reasonable doubt. The state maintains that burden.

15 Now, ladies and gentlemen, the reason that I mentioned that
16 to you -- oh, and let me also say that those of you that serve on
17 this jury will be told more than once that each of the
18 allegations exist independently, each of these indictments exist
19 independently, and these gentlemen, these defendants, are to be
20 treated independently from each other, and individually and
21 independently from each other.

22 Now, in just a moment, however, I am going to be reading to
23 you some of the allegations of these indictments. The reason I'm
24 doing that is I need to find out whether or not any of you know
25 or think you may know or if you've heard or think you may have

1 heard anything about these allegations. The best way to do that
2 is to read to you the allegations.

3 In the interest of time and judicial economy, I am going to
4 be reading to you the indictments that these gentlemen have in
5 common. And I'll read the allegations and both of their names
6 rather than reading each indictment for each of them. It will
7 save some time. Please, however, be mindful that these gentlemen
8 and these indictments are all separate, individual, independent,
9 one from the other.

10 Now I'm going to read to you some of the allegations. And
11 my question to you is going to be, Do any of you know or think
12 you may know or have you heard or think you may have heard,
13 through to today, or think you may have heard, anything about
14 these allegations? That will be my question once I have read to
15 you some of these allegations.

16 Now, ladies and gentlemen, Indictment 2019-GS-18-0416 and
17 0437, which are indictments for murder, allege that in Dorchester
18 County, South Carolina, on or about January the 28th, 2019, with
19 malice aforethought, the Defendant Muanah Aruna Fortune, Jr., and
20 the Defendant Polo Keoki Salazar, did kill one Joe Weaver by
21 means of shooting the victim. The victim did die as a proximate
22 result thereof, this offense being in violation of common law and
23 Section 16-3-10 of the South Carolina Code of Laws, as amended.

24 Indictment 2019-GS-18-0417 and 0440, charging indictments
25 for attempted murder, allege that in Dorchester County, South

1 Carolina, on or about January the 28th, 2019, the Defendant Polo
2 Kioki Salazar and the Defendant Muanah Aruna Fortune, Jr., did,
3 with the intent to kill, attempt to kill, one Marcus Porter, with
4 malice aforethought, by shooting the victim, this offense being
5 in violation of Section 16-3-29 of the South Carolina Code of
6 Laws, as amended.

7 Indictment 2019-GS-18-0418 and 0438, are indictments for
8 burglary in the first degree, allege that in Dorchester County,
9 South Carolina, on or about January the 28th, 2019, the Defendant
10 Muanah Aruna Fortune, Jr., and the Defendant Polo Keoki Salazar
11 did willfully and unlawfully enter the dwelling of Marcs Porter
12 without consent and, with the intent to commit a crime there and,
13 when, in effecting entry or while in the dwelling or in immediate
14 flight, the defendant or another participant in the crime is
15 armed with a deadly weapon or explosive, causes physical injury
16 to a person who is not a participant in the crime, uses or
17 threatens to use a dangerous instrument, displays what is or
18 appears to be a knife, pistol, revolver, rifle, shotgun,
19 machinegun or other firearm and/or the entering or the remaining
20 occurs in the nighttime, this offense being in violation of
21 Section 16-11-311 of the South Carolina Code of Laws, as amended.

22 Indictment 2019-GS-18-0420 and 0441 alleges that in
23 Dorchester County, South Carolina, on or about January the 28th,
24 2019, the Defendant Polo Keoki Salazar and the Defendant Muanah
25 Aruna Fortune, Jr., did visibly display or have in his possession

1 a handgun during the commission -- and this is as to each of
2 them, during the commission -- of a violent crime as defined by
3 Section 16-1-60 of the Code of Laws of South Carolina, 1976, as
4 amended; to wit, burglary in the first degree and murder, thereby
5 violating Section 16-23-490 of the Code of Laws of South
6 Carolina, 1976, as amended.

7 And Indictment 2019-GS-18-421 and 0443 alleges that in
8 Dorchester County, South Carolina, on or about January the 28th,
9 2019, the Defendant Muanah Aruna Fortune, and the Defendant Polo
10 Keoki Salazar did torture, torment, needless mutilate, cruelly
11 kill or inflict excessive or repeated, unnecessary pain or
12 suffering upon an animal, or by omission or commission did cause
13 the acts to be done, in that the defendant did cruelly kill a dog
14 by shooting it, this offense being in violation of Section
15 47-1-40(b) of the South Carolina Code of Laws, as amended.

16 And as to Polo Keoki Salazar, Indictment 2019-GS-18-0439, an
17 indictment for possessing, concealing, selling, disposing of a
18 stolen vehicle, with a value of more than two yet less than
19 \$10,000 alleges that in Dorchester County, South Carolina, on or
20 about January the 28th, 2019, the Defendant Polo Keoki Salazar
21 did knowingly and unlawfully possess, receive, conceal, sell or
22 dispose of a vehicle described as a 2007 Honda CR-V, with an
23 approximate value of \$6,000, and the defendant was not entitled
24 to possession the vehicle and had knowledge that the vehicle had
25 been stolen or converted unlawfully, this offense in violation of

1 Section 16-21-80 of the South Carolina Code of Laws, as amended.

2 Again, to each of these indictments, each of the allegations
3 contained therein, each of these defendants has pled not guilty.

4 Ladies and gentlemen, do you know or think you may know,
5 have you heard or think you may have heard, anything about these
6 allegations? If so, please stand.

7 (Juror responds.)

8 THE COURT: Come forward, please.

9 THE BAILIFF: Juror 209.

10 (WHEREUPON, an in camera colloquy is conducted outside the
11 presence of the jury as follows:)

12 THE COURT: Thank you. All right, come right here. Now,
13 let me tell you what I need you to do. I need enough volume for
14 my court reporter, and I don't need the rest of the jury panel to
15 be able to hear.

16 JUROR NO. 209: Okay.

17 THE COURT: Don't worry about anybody else hearing but my
18 court reporter. We'll all gather around.

19 JUROR NO. 209: I work for Key West Boats, and my lady that
20 works with me said this sounds like the case that her cousin or
21 nephew -- not nephew, uncle was killed.

22 THE COURT: Some association with that?

23 JUROR NO. 209: It all sounds exactly like.

24 THE COURT: Very familiar?

25 JUROR NO. 209: Yes.

1 THE COURT: Now, does she still work at Key West Boats?

2 JUROR NO. 209: Yes.

3 THE COURT: And how recently did y'all have this
4 conversation?

5 JUROR NO. 209: Last week when I said ---

6 THE COURT: Gotcha.

7 JUROR NO. 209: She said his trial's coming up. She said
8 more than likely that's it.

9 THE COURT: Very well. Here's what I'm going to ask you to
10 do. I'm going to ask you to just go stand back there at the
11 gate. Let me talk with these lawyers. I'll be right with you.

12 (WHEREUPON, a sidebar discussion is held on the record as
13 follows:)

14 THE COURT: We have plenty of jurors. Is there any reason
15 not to excuse him?

16 ATTORNEY HUBRICH: There's more coming.

17 THE COURT: All right. Come here. Come forward for me.
18 I'm going to ask you to sit this one out. We have plenty of
19 jurors, so I'm going to ask you to sit this one out. I need you
20 to call the juror information number after 6:00 tomorrow night.
21 Follow whatever the instructions are.

22 JUROR NO. 209: All right. Thank you very much.

23 THE COURT: Thank you very much. Excused, he's excused.

24 Now, ladies and gentlemen, please allow me to introduce you
25 to Solicitor Osborne. He is going to introduce you also to his

1 co-counsel, Ms. Glover, Solicitor Glover, who is an assisting.
2 And he will also introduce you to the folks in his office.

3 ATTORNEY OSBORNE: Thank you, Judge. My name's David
4 Osborne, I'm an assistant solicitor, I work in the First Circuit.
5 That is Dorchester County, Calhoun County, Orangeburg County. My
6 boss is First Circuit Solicitor David Pascoe. In my office here
7 in Dorchester is First Assistant Kelly LaPlante. Other
8 prosecutors, Mike Spears, John Rivers, Baker Allen, Nick Young,
9 Meagan Chinnis, Jillian Frederick and Vergil Deas.

10 And throughout the trial you'll see me assistant, or legal
11 assistant, Rebecca Durr, she's going to be helping bringing in
12 the witnesses and whatnot. Stacy Cook is also a legal assistant.
13 They'll be tag-teaming those efforts. My investigator, Chor
14 King, might be in and out, bringing up evidence and whatnot. And
15 Chelsea Glover is a prosecutor who was brought down from
16 Orangeburg to help me with the case.

17 THE COURT: Ladies and gentlemen, are you related by blood
18 or marriage or acquainted with Solicitor Osborne, Solicitor
19 Glover, or any of the folks who he has mentioned who are in the
20 First Circuit Solicitor's Office, or anyone else that perhaps
21 works in the First Circuit Solicitor's Office? Related by blood,
22 marriage or -- you know what I need you to do, though.

23 Let me define for you acquainted with, acquainted with, by
24 my definition. Because I am trying to find out if you have any
25 connection with these folks at all. It is very, very general.

1 For example, if you went to school with someone 20 years ago and
2 I mention him and you hadn't thought about him, you hadn't
3 visited him in 20 years but you know him, that relationship would
4 be encompassed within my definition of acquainted with. If you
5 work at the same location with someone whose name I will mention
6 and maybe you just recognize each other, maybe you wave to each
7 other across the parking lot, that relationship, as limited as it
8 is, would be encompassed within my definition of acquainted with.
9 So please keep in that in mind.

10 With that in mind let me again ask this question. Are you
11 related by blood or marriage or acquainted with Solicitor
12 Osborne, Solicitor Glover, or any of the folks in the First
13 Circuit's Solicitor's Office? If so, please stand at this time.

14 (Juror stands.)

15 THE COURT: Yes, sir. Your number?

16 JUROR NO. 366: 366.

17 THE COURT: 366. Now, I need to limit your communication,
18 so I want just to answer what I ask, okay. Who do you know?

19 JUROR NO. 366: Vergil Deas.

20 THE COURT: Vergil Deas. And, of course, he's the juvenile
21 prosecutor. I don't anticipate he will be involved in this
22 matter.

23 ATTORNEY OSBORNE: No, ma'am.

24 THE COURT: And do you know Mr. Deas, Solicitor Deas, do you
25 know him, are you acquainted as friends or do you know him in

1 some professional facility?

2 JUROR NO. 366: Just family friends.

3 THE COURT: Family friend. Y'all visit each other's homes?

4 JUROR NO. 366: No.

5 THE COURT: As a result of that relationship, do you think
6 that would interfere with your ability to be completely fair and
7 impartial to the state, as well as to the defendants?

8 JUROR NO. 366: Yes.

9 THE COURT: Can you set that relationship aside and try this
10 case based on what you hear in court while court is in session?

11 JUROR NO. 366: Yes, ma'am.

12 THE COURT: Thank you. Please stay with us.

13 Now, ladies and gentlemen, allow me, please, to introduce
14 you to Mr. Muanah Fortune. This is Mr. Fortune. Thank you,
15 Mr. Fortune. And you may be seated.

16 Ladies and gentlemen, are you related by blood or marriage
17 or acquainted with Mr. Muanah Fortune? If so, please stand.

18 (No response.)

19 THE COURT: And I find no one standing. Now, Mr. Fortune is
20 represented by Mr. Hubrich and Mr. Wehman. And one of them, they
21 will introduce themselves, as well as the folks in their office.
22 Thank you, Ms. Hubrich.

23 ATTORNEY HUBRICH: Thank you, Judge. May it please the
24 Court.

25 THE COURT: Yes.

1 ATTORNEY HUBRICH: My name is Michelle Hubrich. I've also
2 been known in past lives as Michelle Stubbs and Michelle
3 Williams, so if you know me you may know me by those other names.
4 I'm an attorney with the Dorchester County Public Defender's
5 Office. We are part of the First Circuit Public Defender's
6 Office. Sitting with me at counsel table is Attorney Pierce
7 Wehman and Julie Beaks, the newest attorney in our office.

8 Some other attorneys in our office that you may know would
9 be Mark Leiendecker, who is the chief public defender; Mary
10 Banate, she's our magistrate public defender; Tom Squires, Ash
11 Chisholm, they are both General Session attorneys; we have
12 juvenile public defenders, Gina McElhany and John Loy; we have an
13 investigator by the name of John Rivers.

14 THE COURT: Thank you. Ladies and gentlemen, are you
15 related by blood or marriage or acquainted with or have you or
16 any member of your immediate family, to your knowledge, ever been
17 represented by Ms. Hubrich, Mr. Wehman or any of the folks in
18 their office? If so, please stand at this time.

19 (No response.)

20 THE COURT: And I find no one standing. Ladies and
21 gentlemen, please allow me to introduce to you Polo Salazar.
22 Mr. Salazar, if you would stand. And thank you so much.

23 Ladies and gentlemen, are you acquainted by blood or
24 marriage or acquainted with Mr. Polo Salazar? If so, please
25 stand at this time.

1 (No response.)

2 THE COURT: I find no one standing. And Mr. Salazar is
3 represented by Cornwell Law Firm, LLC, and Ashley B. Cornwell,
4 and this is Ms. Cornwell. Ladies and gentlemen, are you related
5 by blood or marriage or acquainted with or have you or any
6 immediate family, to your knowledge, ever been represented by the
7 Cornwell Law Firm or Ashley Cornwell? If so, please stand at
8 this time.

9 (No response.)

10 THE COURT: And I find no one's standing.

11 Now, ladies and gentlemen, the lawyers help me at this
12 juncture by giving to me the list of potential witnesses, because
13 this is my time to ask if anyone knows anyone. And so I have a
14 list of potential witnesses. I am going to go over that list of
15 potential witnesses. My question as to each and every one of
16 these, folks, on this list is, Are you related by blood or
17 marriage or acquainted with any of these individuals? And I will
18 begin and go through the list now.

19 Leta Boehler, Joshua Scarborough, Jacob Cramer, Dylan
20 Reynolds, Matthew Brooks, Kenneth Driscoll, Phillip Moy, Jonathan
21 Davis, Rachel Nguyen, Ryan DeWane, Nicole Hardin, James Green,
22 Dr. Nicholas Batalis, David Swibaker, Marcus Porter, Salina
23 Sheppard, Jamie Hall, Bethany Davidson, Vera Martinez, Charlotte
24 Pitts, Daniel Greene, Christina Denson, Marie Wearing,
25 Christopher Flynn, Christopher Hirsch, Taylor Jackson, Megan

1 Wade, Jonathan James, Jaquavious Washington, Wade Rallings,
2 Bernard Seabrook, Shaneka Wright.

3 Are you related by blood or marriage or acquainted with any
4 of those individuals? If so, please stand.

5 (No response.)

6 THE COURT: And I find no one standing.

7 Now, ladies and gentlemen, just a few additional questions.
8 I'm going to ask these two questions together. If you need to
9 respond to either, let you know, I'll have you approach.

10 Have you or any member of your immediate family or close,
11 personal friend -- now this close, personal friend is somebody
12 that's so close to you they're like a family member, you probably
13 like them better than you like your siblings, that's how close
14 this close, family member is. Have you or any member of your
15 immediate family, to your knowledge, or close, personal friend,
16 ever had any criminal charges handled by the First Circuit
17 Solicitor's Office or any other prosecution in the prosecutor's
18 office? That's question number one.

19 Question number two, Does any member of our jury panel have
20 any personal, political or religious beliefs that would prevent
21 from you sitting in judgment of another person? That's question
22 number two.

23 If you need to respond to either of these questions, please
24 stand and come forward at this time.

25 (Juror stands.)

1 Yes, ma'am. Just come forward.

2 THE COURT: All right. Yes, juror no?

3 THE BAILIFF: Juror 156.

4 THE COURT: All right. Yes, ma'am, come on forward.

5 (WHEREUPON, an in camera colloquy is conducted outside the
6 presence of the jury as follows:)

7 THE COURT: Hi. Yes.

8 JUROR NO. 156: I was raised a Jehovah's witness, so their
9 beliefs are that we can't judge others and only Jehovah the God
10 can judge. And I still believe a lot of what I was taught. I
11 just wanted to be upfront with that.

12 THE COURT: Sure. And so you don't believe that you could
13 be a juror in this matter because of that?

14 JUROR NO. 156: I believe so. Just even hearing some of it,
15 I just don't believe I have the right to judge anyone or make
16 that call. I'm sorry.

17 THE COURT: Okay. All right. I am going to ask you to go
18 stand, if you will, back by Mr. Jenkins and let me talk about
19 you.

20 JUROR NO. 156: Yeah. That's fine.

21 THE COURT: If you'll go over there and stand, and let me
22 talk to these lawyers. All right.

23 (WHEREUPON, a sidebar discussion is held on the record as
24 follows:)

25 THE COURT: I mean, my normal policy is to make them stay

1 and listen to the proceedings anyway. But, I mean, if she can't
2 sit and judge, she can't sit in judgment. So I'll have to excuse
3 her.

4 ATTORNEY HUBRICH: She couldn't be fair and impartial? I
5 couldn't hear.

6 THE COURT: No, she can't do it. She said I've heard -- she
7 said, based on the allegations that I've already heard, I know I
8 can't, I don't believe I can, sit in judgment because I've been
9 raised as a Jehovah's witness. Okay. All right.

10 All right. Yes, ma'am, if you'd come back forward for me.
11 All right. Given your responses, I'm going to have to excuse you
12 from this matter. Okay.

13 JUROR NO. 156: Okay.

14 THE COURT: Okay. Thank you.

15 JUROR NO. 156: Thank you.

16 THE COURT: She is out. Can you all hear me if I stand
17 here? It will save a little bit of time.

18 Are you or any member of your immediate family or close,
19 personal friend related -- well, are you or any member of your
20 immediate family or close, personal friend a member of any law
21 enforcement agency? Do y'all need me to ask it again? Nope,
22 okay. No one? If so, please stand.

23 (No response.)

24 THE COURT: No one is standing.

25 On are you employed by or related by blood or marriage to or

1 close, personal friend of anyone employed by the attorney
2 general, the solicitor or any prosecuting attorney's office? If
3 so, please stand.

4 (Juror stands.)

5 THE COURT: All right. And your juror number is?

6 JUROR NO. 151: 151, ma'am.

7 THE COURT: Yes, sir. And tell me who you're speaking of.

8 JUROR NO. 151: Very close, personal friend with Brice Ash.
9 He worked for Wigger Law Firm.

10 THE COURT: That is not a prosecutor ---

11 JUROR NO. 151: Oh, okay.

12 THE COURT: --- or an attorney general. They are a private
13 law firm. Thank you.

14 JUROR NO. 151: Uh-huh (yes).

15 THE COURT: Has any member of our jury panel ever been
16 employed by any civilian or military law enforcement agency? If
17 so, please stand.

18 (No response.)

19 THE COURT: I find no one standing.

20 Have you or any member of your immediate family or close,
21 personal friend ever been the victim of a violent crime such as
22 burglary? That's question number one.

23 I'm going to ask another question. Question number two, Is
24 any member of the jury panel, a member of your immediate family,
25 to your knowledge, or that close, personal friend a member of

1 MADD or SADD or CAVE or any other similar type organization which
2 has, as its goal, the promotion of law enforcement?

3 If you need to respond to either of those questions, please
4 come forward.

5 (Jurors stand.)

6 THE BAILIFF: Juror 60.

7 THE COURT: Sixty. Yes, sir. Hi. Come forward.

8 (WHEREUPON, an in camera colloquy is conducted outside the
9 presence of the jury as follows:)

10 THE COURT: Yes, sir.

11 JUROR NO. 60: I was burglarized. My home was burglarized,
12 broken into, when I was living in Goose Creek.

13 THE COURT: How long ago was that?

14 JUROR NO. 60: Five or six years ago.

15 THE COURT: Five or six years ago. As a result of that
16 experience ---

17 JUROR NO. 60: No, ma'am.

18 THE COURT: --- would it have an affect?

19 JUROR NO. 60: No.

20 THE COURT: No. In other words, you believe you can set
21 that experience aside and make up your mind based on what you
22 hear in court while court is in session?

23 JUROR NO. 60: Yes, ma'am.

24 THE COURT: Thank you.

25 JUROR NO. 60: You're welcome.

1 THE BAILIFF: Juror 6.

2 THE COURT: All right.

3 (WHEREUPON, an in camera colloquy is conducted outside the
4 presence of the jury as follows:)

5 THE COURT: Hello. Yes, ma'am?

6 JUROR NO. 6: I was robbed at Coca Cola at gunpoint.

7 THE COURT: Okay. How long ago?

8 JUROR NO. 6: Back in 2007.

9 THE COURT: Okay. And as a result of that experience do you
10 think that that might or could interfere with your ability ---

11 JUROR NO. 6: Yes, ma'am.

12 THE COURT: Okay, thank you so much for your candor. Now,
13 I'm going excuse you for the balance of this week, because I
14 would think it is going to be a criminal offense. Do you know
15 what I mean? It probably would be your response, don't you
16 think, if it's any criminal offense, it would be tough for you;
17 do you think?

18 JUROR NO. 6: No. Just this one, talking about is making
19 me ---

20 THE COURT: You think, okay. Well, then call back in
21 tomorrow after 6:00 at night, your juror information number.

22 JUROR NO. 6: Thank you, ma'am.

23 THE COURT: Thank you so much.

24 All right. She's out for this one, Juror 6. All right.

25 All right. And I'm going to ask three questions together.

1 Please don't respond to any of them until I ask all three.

2 This case may involve some testimony regarding the use of
3 alcohol and/or illegal drugs. Does any member of our jury panel
4 have any moral, religious or other feeling with regards to
5 alcohol and/or illegal drugs such that it would make it
6 inappropriate for you to be a juror in this case? In other
7 words, your reaction's just going to be so strong it's going to
8 be difficult for you to listen to all the evidence, make up your
9 mind based on all the evidence that's presented? That's question
10 number one.

11 Question number two, Has any member ever our jury panel ever
12 been on a jury panel before?

13 And question number three, Has any member of our jury panel
14 ever received assistance from the victim's advocacy program?

15 If you need to respond to any one of those three questions,
16 please come forward at this time.

17 (Jurors stand.)

18 THE BAILIFF: Juror 154.

19 THE COURT: Okay.

20 (WHEREUPON, an in camera colloquy is conducted outside the
21 presence of the jury as follows:)

22 THE COURT: Hi. Yes, ma'am?

23 JUROR NO. 154: I was a juror back in 1998, long time ago.

24 THE COURT: Was it civil or criminal? If you remember.

25 JUROR NO. 154: Criminal.

1 THE COURT: Thank you so much. Thank you.

2 JUROR NO. 154: Thank you.

3 THE BAILIFF: Juror 304.

4 (WHEREUPON, an in camera colloquy is conducted outside the
5 presence of the jury as follows:)

6 THE COURT: Okay. Yes, sir?

7 JUROR NO. 304: Back in, I think, 2002, I served as a juror.

8 THE COURT: Was it civil or criminal? Do you remember?

9 JUROR NO. 304: I don't remember. It was right downtown
10 central.

11 THE COURT: Thank you so much.

12 JUROR NO. 304: All right.

13 THE BAILIFF: Juror 60.

14 (WHEREUPON, an in camera colloquy is conducted outside the
15 presence of the jury as follows:)

16 THE COURT: Yes.

17 JUROR NO. 60: My father was an alcoholic. Destroyed the
18 family, and caused a lot of grief. But that's kind of where it
19 stands on that whole issue. So I have strong feelings towards
20 alcohol because of that.

21 THE COURT: I understand. And, as a result, do you believe
22 that that could impact your ability to listen to the evidence and
23 make up your mind, being able to hear everything that is
24 presented, or do you think that's going to override, that one
25 element will override?

1 JUROR NO. 60: I don't think so. I think I will be fine.

2 THE COURT: You think so, you're concerned?

3 JUROR NO. 60: I think I'll be fine. I can be impartial.

4 THE COURT: Oh, you think you'll be fine. In other words,
5 as a juror, you are required to listen to all of the evidence,
6 make up your mind based upon what you hear in court while court
7 is in session, and you cannot be swayed by matters extraneous to
8 the Court, in other words, you cannot be swayed by the fact that
9 your own personal tragedy with regards to alcohol cannot drive
10 your decisions. Does that make sense, what I'm saying?

11 JUROR NO. 60: I think. I think I can perform my duty.

12 THE COURT: And do you believe that you can set that
13 completely aside and make up your mind based on what you hear in
14 this courtroom while court is in session, unaffected by that?

15 JUROR NO. 60: I feel I can.

16 THE COURT: You can?

17 JUROR NO. 60: Yes.

18 THE COURT: Very well. Stay with us.

19 (WHEREUPON, a sidebar discussion is held on the record as
20 follows:)

21 ATTORNEY CORNWELL: I believe Juror 154 must have
22 misunderstood, because she walked out of the courtroom. Juror
23 154.

24 ATTORNEY HUBRICH: She came up to say that she sat on a
25 criminal trial back in '98, and then she just walked out of the

1 courtroom.

2 THE COURT: She walked out of the courtroom.

3 ATTORNEY HUBRICH: I think she thought she was excused.

4 THE COURT: Okay, she thinks she's excused. The juror that
5 just walked out, she wasn't excused.

6 ATTORNEY HUBRICH: 154.

7 THE COURT: One of them was a victim.

8 ATTORNEY HUBRICH: 154, Juror 154?

9 THE COURT: Go back and look at what happened with 154.

10 ATTORNEY CORNWELL: Victim was No. 60.

11 THE COURT: What did I do?

12 THE REPORTER: She was a juror.

13 THE COURT: A juror. Yeah, go find her. See if you can
14 buzz them downstairs.

15 All right. All right. Ladies and gentlemen, have you or
16 any member of your immediate family, to your knowledge, ever been
17 a member of an organization dedicated to the protection of
18 animals such as PETA, the SPCA or the American SPCA, or like
19 organizations? If so, please stand at this time.

20 (No response.)

21 THE COURT: And I find no one standing. Ladies and
22 gentlemen, this would be my concluding question, is this. Do you
23 know of any reason why you ought not/should not/could not be a
24 juror? You must be ready, willing and able to listen to the
25 evidence, and to make up your mind based solely on what you hear

1 in court while court is in session, being completely unaffected
2 by matters which are extraneous matters outside the court.

3 If you have any concern about your ability to do that, I'm
4 going to ask you to please stand and come forward. It can be for
5 any reason.

6 And 154, I've got to ask you two questions.

7 JUROR NO. 154: Sure.

8 THE COURT: Have you or any member of your family been a
9 member of SPCA, PETA, American SPCA?

10 JUROR NO. 14: No.

11 THE COURT: And do you know any reason why you ought
12 not/should not be a juror in this case, being ready, willing and
13 able to listen to the evidence and make up your mind based upon
14 what you hear in court while court is in session, being
15 completely unaffected by matters extraneous, matters outside, the
16 court, being completely fair and impartial to the state, as well
17 as to the defendants? If you have any concern, I'm going to ask
18 you to come forward.

19 And that with regards to the rest of the panel, if you have
20 any concerns regarding your ability to do that, I'm going ask you
21 to come forward at this time.

22 (No response.)

23 THE COURT: No one is standing, no one is coming forward.
24 Therefore, our jury panel is qualified.

25 Ladies and gentlemen, I'm going to ask you to please report

1 tomorrow morning at 9:30, just as did you this morning, at 9:30.
2 At 9:30 we will select the jury in this case. And those of you
3 who are selected, we're going to go right into the trial, so you
4 need to be prepared to go forward and go into the trial of this
5 case.

6 Now, ladies and gentlemen, I have given you some
7 information, it's not a lot, but gave you a little bit of
8 information, I've introduced you to some people and I've read you
9 some allegations, you have a little bit of information regarding
10 this matter. Therefore, I must instruct you, do not discuss this
11 matter and do not allow anyone to discuss it with you. And that
12 means your family, your friends, and certainly anyone that has
13 anything to do with this matter. In fact, should anyone try to
14 talk to you about this case, please get their name, if you can't
15 get a description, and report that to me upon your return to the
16 courthouse.

17 Now, when you go home it's perfectly fine to tell your
18 members who's curious about what you've been up to. You can say
19 that you reported for jury selection. You can say that it is a
20 General Sessions, a criminal term, as opposed to a civil term.
21 Next question is going to be, What kind of case? Please do not
22 respond, because I don't want to you discuss the matter or allow
23 anyone to discuss it with you. So please be mindful of that, do
24 not discuss this matter.

25 Please leave your cellphones or other communication devices

1 somewhere other than the courthouse because if you are selected
2 to serve on a jury you cannot have a cellphone with you. So
3 please do not bring it with you in the morning to the courthouse.

4 Now, does anybody typically/normally work at night, go in at
5 night? Not tonight. I need you rested. If you're selected to
6 serve on this jury, you're going to be exhausted. And it's not
7 fair to you, it's not fair to these litigants. You need to be
8 rested. So let whoever is expecting you that I've instructed you
9 not to go in to work. If they're upset, concerned, let them be
10 mad at me. Give me a number and name, and I'll be happy to talk
11 to them tomorrow morning. Let me know. I certainly don't want
12 them upset with you; let them be upset with me. I need you
13 rested.

14 Now, ladies and gentlemen, you know, the clerk's office is
15 now closed. I don't believe any of you would need an excuse for
16 work. I don't want -- if you were going to go off and go to
17 work, I would not want you to do that, I want you to go home and
18 rest. This has been a long day. You've been so patient with us.
19 And I need you back here 9:30 in the morning, rested and prepared
20 to listen if you're selected to serve on this jury.

21 I think that concludes everything. As you exit the
22 courtroom, please be mindful of the social distancing. And you
23 will be in one of three places tomorrow for the jury selection.
24 We are going to, some folks will be in this room, some folks will
25 be in the courtroom next-door, and some folks will be in the jury

1 assembly room downstairs. And we intend to continue the
2 now-current three feet instead of six feet, so we'll be a little
3 bit closer. Those are the new CDC guidelines. We will be
4 implementing those so that we can have ample spaces for our
5 jurors.

6 And when we select our jury, those of you who do not serve
7 on the jury, I'll give you some instruction about how we'll stay
8 in contact with each other over the balance of the week.

9 Have a great evening. I look forward to seeing you tomorrow
10 morning at 9340. Thank you.

11 (WHEREUPON, the fifth jury panel is excused for the day at
12 5:40 p.m.)

13 MATTERS OF LAW

14 THE COURT: From the state, anything before tomorrow?

15 ATTORNEY OSBORNE: No, ma'am.

16 THE COURT: On behalf of Mr. Fortune, anything before
17 tomorrow?

18 ATTORNEY HUBRICH: Judge, I have a motion to quash the jury
19 panel and the jury in this case, just to put on the record. I
20 can do it now or I can do it in the morning.

21 THE COURT: Do it now, because we're going to be busy
22 tomorrow.

23 ATTORNEY HUBRICH: Thank you, Judge. May it please the
24 Court. Judge, at this point I have a motion to quash the jury in
25 this case and draw from a new panel.

1 What the case law is telling me -- and that's because I
2 think my client's being denied the right to a fair trial of a
3 jury of his peers. The state law instructs that you have a
4 distinctive group, you have to show that there is a distinctive
5 group, that is being represented. In this case, it would be
6 African American, or black, after identifying on the jury
7 questionnaire. It doesn't, there is not a reasonable relation to
8 the numbers in the community.

9 The demographics in Dorchester County right now show that it
10 is at 25.08 percent black community, 71.05 percent white
11 community. Our jury today, the panel that we have and the jury
12 that we have to choose from tomorrow, there are 12 black members,
13 68 white members, 2 Asian, that identified as Asian. What that
14 puts us at is 14 percent black, 82 percent white and 2 percent
15 Asian. That's a statistically relevant deviation from what the
16 demographics are in Dorchester County, and it is inherently
17 unfair.

18 And we would just ask this Court to quash this panel and we
19 draw from another panel.

20 THE COURT: Do you want to weigh in?

21 ATTORNEY CORNWELL: Your Honor, I would join in that motion.

22 THE COURT: Very well. You know, that's not evidentiary,
23 the fact that you just want to give me numbers. You have to be
24 prepared to show me demographics and to show that the strike was
25 a deviation from the demographics. You can't just walk in and

1 say those numbers are wrong; I don't like the way it works.

2 That's not the way it works.

3 You all were kind enough to tell me your concerns, which is
4 why we went through the entire number. Originally I had told you
5 all that we do as we do in a capital case, when we get enough
6 folks, we qualify enough people, to get enough to draw a jury.
7 You all told me your concerns, so we've just done the entire
8 panel. So the entire panel, the entire strike, has been
9 qualified. And there is nothing that deviates, that you showed
10 me that has deviated, from my normal strikes for selection of the
11 jury.

12 So I thank you for it, and I respectfully deny your motion,
13 both of you. Anything the state needs to add?

14 ATTORNEY OSBORNE: No, Your Honor.

15 THE COURT: All right, thank you so much. Anything further
16 from the state?

17 ATTORNEY OSBORNE: No, ma'am.

18 THE COURT: Mr. Fortune?

19 ATTORNEY HUBRICH: No, ma'am.

20 THE COURT: Mr. Salazar?

21 ATTORNEY CORNWELL: No, Your Honor.

22 (WHEREUPON, court recessed for the day at 5:45 p.m., and
23 reconvened at 10:21 a.m. on Wednesday, May 12, 2021.)

24 JURY SELECTION

25 THE COURT: Good morning. Thank you all so much for being

1 present this morning. We also have a group up here in Courtroom
2 D, and we have folks in Courtroom C, and we have people in the
3 jury assembly room. I am so grateful to each and every one of
4 you for being here this morning. You have responded back today
5 pursuant to my instruction, and I am truly grateful.

6 In just a moment we are going to begin the jury selection.
7 And in just a moment you're going to be hearing numbers called.
8 And if your number is called, then I'm going to ask you, if
9 you're in the courtroom here with me, Courtroom D, just to stand
10 in place. If you are in Courtroom C -- what? I can hear you.
11 Courtroom C, we want you to stand ---

12 CLERK OF COURT: And go to the mark.

13 THE COURT: In Courtroom C, stand and go to the mark. The
14 bailiffs and the clerk's office will help you do that, just so
15 the attorneys who are here in the courtroom with me, Courtroom D,
16 know exactly who you are. And just stand there. And I'll tell
17 you what will happen in just a moment.

18 With regards to those of you who are in the jury assembly
19 room, likewise if you stand and go to the mark, you can then be
20 seen by the attorneys upstairs and folks upstairs.

21 Now, to everyone, you're first going to hear madam clerk,
22 our esteemed clerk of court, who I know you had a chance to get
23 to know yesterday, Ms. Graham, who is remarkable, but you're
24 going to hear her say, What sayeth the state? And the state will
25 say two things, one of the two attorneys for the state will say

1 two things, either, Present the juror, or, Excuse the juror.

2 You are then going to hear madam clerk turn to Mr. Fortune,
3 Defendant Fortune, and she will say, What sayeth Defendant
4 Fortune? And you will hear one of the attorneys for Mr. Fortune
5 say, Either present the juror, or, Seat the juror, or, Excuse the
6 juror. And then you will hear madam clerk say, What sayeth
7 Defendant Salazar? And then you will hear Ms. Cornwell either,
8 Say seat the juror, or, Excuse the juror.

9 Now, if you hear, at any point in that process, Excuse the
10 juror, then just go have a seat back where you were. If you
11 hear, Seat the juror, which will be from Ms. Cornwell, then you
12 will, again, just take your seat back where you were and you'll
13 be given a juror badge. But you'll just stay seated until we're
14 finished with our process.

15 Is that clear to everyone? The bailiffs know what we're
16 doing to be doing, so you're going to have lots of help.

17 So if you hear, Excuse the juror, let me tell you that there
18 are hundreds at least, if not thousands, of considerations that
19 go through these attorneys' minds as they select the jury. Let
20 me tell you a consideration that doesn't go through their mind,
21 and that is to cause you any discomfort or embarrassment
22 whatsoever. That is not a consideration. So please understand
23 if you're excused, just take your seat back out, it has to do
24 with -- this is an ancient process. There are hundreds and
25 hundreds, if not thousands, of considerations that go through

1 their minds. I promise you one that does not is to cause you any
2 discomfort or embasement at all.

3 Now, without further ado, I am going to turn jury selection
4 process over to our esteemed clerk of court. Before I do that,
5 the state has 10 strikes; each of the defendants has 10 strikes.
6 We're going to have three alternates, one for the state and two
7 for each defendant.

8 MADAM CLERK (Cheryl L. Graham): Give us one second, Judge.
9 As we are getting ready, I just want to make sure my employees in
10 Courtroom C and jury assembly room can hear me.

11 CLERK OF COURT OFFICER: Yes. This is Courtroom C.

12 CLERK OF COURT OFFICER: Yes, we can hear you here.

13 MADAM CLERK (Cheryl L. Graham): And as I call the juror
14 number and name, I'm also going to say what location they're at
15 just to help, help my team keep up with what's going on.

16 THE COURT: And finally, your shields, mask down, shields,
17 so the lawyers can just recognize or remember you all from
18 yesterday.

19 MADAM CLERK (Cheryl L. Graham): Thank you, Judge.

20 THE COURT: Yes.

21 MADAM CLERK (Cheryl L. Graham): As I call your name, please
22 stand.

23 Juror 262, Shirley Obry. And she is in the jury assembly
24 room. And if someone could escort her to the mark.

25 CLERK OF COURT OFFICER: She's in the jury assembly room.

1 MADAM CLERK (Cheryl L. Graham): Please go to the X. I
2 thought it was Amanda. We see Amanda. There we go. All right.

3 262, Shirley Obry. What sayeth the state?

4 ATTORNEY OSBORNE: Please present this juror.

5 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

6 ATTORNEY HUBRICH: Please excuse this juror.

7 MADAM CLERK (Cheryl L. Graham): Ms. Obry, you may have a
8 seat back in the audience.

9 Juror No. 312, Thomas Saatela, jury assembly room. What
10 sayeth the state?

11 ATTORNEY OSBORNE: Please present this juror.

12 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

13 ATTORNEY HUBRICH: Please seat this juror.

14 MADAM CLERK (Cheryl L. Graham): And the defense,
15 Mr. Salazar?

16 ATTORNEY CORNWELL: Please seat the juror.

17 MADAM CLERK (Cheryl L. Graham): Mr. Salazar, you're seated
18 as a juror.

19 Juror 126, Mr. Christopher Greenhill. Mr. Greenhill is in
20 the assembly room. What sayeth the state?

21 ATTORNEY OSBORNE: Please present this juror.

22 CLERK OF COURT: The defense, Mr. Fortune?

23 ATTORNEY HUBRICH: Please seat the juror.

24 MADAM CLERK (Cheryl L. Graham): And the defense,
25 Mr. Salazar?

1 ATTORNEY CORNWELL: Please seat the juror.

2 MADAM CLERK (Cheryl L. Graham): Mr. Greenhill, you are
3 seated as one of our jurors.

4 Juror No. 53, Evelyn Cassidy. What sayeth the state?

5 ATTORNEY OSBORNE: Please present the juror.

6 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

7 ATTORNEY HUBRICH: Please seat the juror.

8 MADAM CLERK (Cheryl L. Graham): And the defense, Salazar?

9 ATTORNEY CORNWELL: Please excuse in juror.

10 MADAM CLERK (Cheryl L. Graham): Excused from the trial in
11 this case.

12 Juror No. 150, Carol Huggins. Ms. Huggins is located in the
13 jury room assembly room. What sayeth the state?

14 ATTORNEY OSBORNE: Please present this juror.

15 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

16 ATTORNEY HUBRICH: Please excuse this juror.

17 MADAM CLERK (Cheryl L. Graham): Ms. Huggins is excused from
18 the trial of this case.

19 Juror no. 153, Davon Hunter, in Courtroom C. What sayeth
20 the state?

21 ATTORNEY OSBORNE: Please present the juror.

22 MADAM CLERK (Cheryl L. Graham): The Defendant Mr. Fortune?

23 ATTORNEY HUBRICH: Please seat this juror.

24 MADAM CLERK (Cheryl L. Graham): And the defense,
25 Mr. Salazar?

1 ATTORNEY CORNWELL: Please seat this juror.

2 MADAM CLERK (Cheryl L. Graham): Mr. Hunter, you're seated
3 as one of our jurors.

4 Juror No. 28, Brandon Boykin. Mr. Boykin is in Courtroom C.
5 Mr. Hunter, you may be seated.

6 We are now on Juror No. 28, Brandon Boykin. And Mr. Boykin
7 is in Courtroom C. What sayeth the state?

8 ATTORNEY OSBORNE: Please present the juror.

9 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

10 ATTORNEY HUBRICH: Please seat the juror.

11 MADAM CLERK (Cheryl L. Graham): And the defense,
12 Mr. Salazar?

13 ATTORNEY CORNWELL: Please seat the juror.

14 MADAM CLERK (Cheryl L. Graham): Mr. Boykin is seated as one
15 of our jurors.

16 Juror 189, Karen Kuykendall. In Courtroom D here. What
17 sayeth the state?

18 ATTORNEY OSBORNE: Please present the juror.

19 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

20 ATTORNEY HUBRICH: Please seat the juror.

21 MADAM CLERK (Cheryl L. Graham): And the defense,
22 Mr. Salazar?

23 ATTORNEY CORNWELL: Please seat the juror.

24 MADAM CLERK (Cheryl L. Graham): You're seated as one of our
25 jurors.

1 Juror No. 276, Alexandria Penino, Courtroom C.
2 ATTORNEY OSBORNE: Please present the juror.
3 MADAM CLERK (Cheryl L. Graham): What sayeth the state?
4 ATTORNEY OSBORNE: Please present the juror.
5 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?
6 ATTORNEY HUBRICH: Please seat the juror.
7 MADAM CLERK (Cheryl L. Graham): And the defense,
8 Mr. Salazar?
9 ATTORNEY CORNWELL: Please seat the juror.
10 MADAM CLERK (Cheryl L. Graham): Seated as one of our
11 jurors. Thank you.
12 105, Sebastian Ford, in the jury assembly room. What sayeth
13 the state?
14 ATTORNEY OSBORNE: Please present the juror.
15 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?
16 ATTORNEY HUBRICH: Please excuse the juror.
17 MADAM CLERK (Cheryl L. Graham): Excuse the juror?
18 ATTORNEY HUBRICH: Yes, please.
19 MADAM CLERK (Cheryl L. Graham): Mr. Ford is excused from
20 this trial.
21 Juror No. 57, Salvador Chaves, in the jury assembly room.
22 What sayeth the state?
23 ATTORNEY OSBORNE: Please present the juror.
24 MADAM CLERK (Cheryl L. Graham): What sayeth the Defendant
25 Mr. Fortune?

1 ATTORNEY HUBRICH: Please seat the juror.

2 MADAM CLERK (Cheryl L. Graham): And the defense,
3 Mr. Salazar?

4 ATTORNEY CORNWELL: Please seat the juror.

5 MADAM CLERK (Cheryl L. Graham): Mr. Chaves is seated as one
6 of our jurors.

7 Juror 133, Linda Harrington. And she is in the jury
8 assembly room. What sayeth the state?

9 ATTORNEY OSBORNE: Please present the juror.

10 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

11 ATTORNEY HUBRICH: Please excuse the juror.

12 MADAM CLERK (Cheryl L. Graham): Ms. Harrington is excused
13 from this trial.

14 Juror No. 4, Diana Ancrum. Ms. Ancrum is in the jury
15 assembly room. What sayeth the state?

16 ATTORNEY OSBORNE: Please present the juror.

17 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

18 ATTORNEY HUBRICH: Please seat the juror.

19 MADAM CLERK (Cheryl L. Graham): And the defense,
20 Mr. Salazar?

21 ATTORNEY CORNWELL: Please seat the juror.

22 MADAM CLERK (Cheryl L. Graham): Mrs. Ancrum is seated as
23 one of our jurors.

24 Juror 345, Timothy Stewart. Mr. Stewart is in our jury
25 assembly room. What sayeth the state?

1 ATTORNEY OSBORNE: Please present the juror.

2 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

3 ATTORNEY HUBRICH: Please excuse the juror.

4 MADAM CLERK (Cheryl L. Graham): And the defense,

5 Mr. Salazar?

6 THE COURT: She was excused by Ms. Hubrich.

7 ATTORNEY HUBRICH: Please excuse the juror.

8 MADAM CLERK (Cheryl L. Graham): Juror 366, Mr. Christopher

9 Tucker. Mr. Tucker is in Courtroom C. What sayeth the state?

10 ATTORNEY OSBORNE: Please present the juror.

11 MADAM CLERK (Cheryl L. Graham): Mr. Fortune?

12 ATTORNEY HUBRICH: Please seat the juror.

13 MADAM CLERK (Cheryl L. Graham): And Mr. Salazar?

14 ATTORNEY CORNWELL: Please seat the juror.

15 MADAM CLERK (Cheryl L. Graham): Thank you. Mr. Tucker is

16 seated as one of our jurors.

17 Juror 405, Paul Zoeller. Mr. Zoeller is in the jury

18 assembly room. What sayeth the state?

19 ATTORNEY OSBORNE: Please excuse in juror.

20 MADAM CLERK (Cheryl L. Graham): Mr. Zoeller is excused from

21 this trial.

22 Juror 342, Ted Steele. Mr. Steele is in Courtroom C. What

23 sayeth the state?

24 ATTORNEY OSBORNE: Please present this juror.

25 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

1 ATTORNEY HUBRICH: Please seat this juror.

2 MADAM CLERK (Cheryl L. Graham): And Mr. Salazar?

3 ATTORNEY CORNWELL: Please excuse the juror.

4 MADAM CLERK (Cheryl L. Graham): Mr. Steele is excused from
5 this trial.

6 Juror No. 221, Rory McColly, in the courtroom here. What
7 sayeth the state?

8 ATTORNEY OSBORNE: Please present this juror.

9 MADAM CLERK (Cheryl L. Graham): Mr. Fortune?

10 ATTORNEY HUBRICH: Please excuse this juror.

11 MADAM CLERK (Cheryl L. Graham): And defense, Mr. Salazar?

12 THE COURT: He was just excused.

13 MADAM CLERK (Cheryl L. Graham): Oh, I'm sorry. I was
14 having trouble hearing you.

15 ATTORNEY HUBRICH: I'll talk louder. I'm sorry.

16 MADAM CLERK (Cheryl L. Graham): Juror No. 260, Jason
17 O'Neil-Thomas, in this courtroom. What sayeth the state?

18 ATTORNEY OSBORNE: Please excuse this juror.

19 MADAM CLERK (Cheryl L. Graham): Juror is excused from this
20 trial.

21 Juror 258, Anthony Nichols, in this courtroom. What sayeth
22 the state?

23 ATTORNEY OSBORNE: Please present this juror.

24 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

25 ATTORNEY HUBRICH: Please seat this juror.

1 MADAM CLERK (Cheryl L. Graham): And the Defendant
2 Mr. Salazar.

3 ATTORNEY CORNWELL: Please excuse this juror.

4 MADAM CLERK (Cheryl L. Graham): Juror is excused from this
5 trial.

6 ATTORNEY HUBRICH: No. 258?

7 MADAM CLERK (Cheryl L. Graham): 258, Anthony Nichols.

8 Juror No. 353, Shelia Summers. Ms. Summers is in this
9 courtroom. What sayeth the state?

10 ATTORNEY OSBORNE: Please present this juror.

11 MADAM CLERK (Cheryl L. Graham): Mr. Fortune?

12 ATTORNEY HUBRICH: The Court's indulgence.

13 MADAM CLERK (Cheryl L. Graham): Thank you.

14 ATTORNEY HUBRICH: Please seat this juror.

15 MADAM CLERK (Cheryl L. Graham): And defense, Mr. Salazar?

16 ATTORNEY CORNWELL: Please seat this juror.

17 MADAM CLERK (Cheryl L. Graham): You are seated on this
18 trial. Juror 338, Shari Smith. Ms. Smith is in the jury
19 assembly room.

20 What sayeth the state?

21 ATTORNEY OSBORNE: Please present this juror.

22 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

23 ATTORNEY HUBRICH: Please excuse this juror.

24 CLERK OF COURT: Juror's excused from this trial.

25 Juror 287, Michael Rabasco. Mr. Rabasco's in the jury

1 assembly room. What sayeth the state?

2 ATTORNEY OSBORNE: Please present this juror.

3 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

4 ATTORNEY HUBRICH: Please excuse this juror.

5 MADAM CLERK (Cheryl L. Graham): Mr. Rabasco is excused from
6 this trial.

7 Juror 51, Lyndy Carpenter. Ms. Carpenter is in this
8 courtroom. What sayeth the state?

9 ATTORNEY OSBORNE: Please present this juror.

10 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

11 ATTORNEY HUBRICH: Please seat there juror.

12 MADAM CLERK (Cheryl L. Graham): And the defense,
13 Mr. Salazar?

14 ATTORNEY CORNWELL: Please excuse this juror.

15 MADAM CLERK (Cheryl L. Graham): Juror is excused from this
16 trial.

17 Juror 107, James Foss. Mr. Foss is in Courtroom D. What
18 sayeth the state?

19 ATTORNEY OSBORNE: Please present this juror.

20 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

21 ATTORNEY HUBRICH: Please seat this juror.

22 MADAM CLERK (Cheryl L. Graham): And the defense,
23 Mr. Salazar?

24 ATTORNEY CORNWELL: Please excuse this juror.

25 MADAM CLERK (Cheryl L. Graham): Thank you.

1 Juror 252, Alan Murray. Mr. Murray's in Courtroom C. What
2 sayeth the state?

3 ATTORNEY OSBORNE: Please present this juror.

4 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

5 ATTORNEY HUBRICH: Please seat this juror.

6 MADAM CLERK (Cheryl L. Graham): And the defense,
7 Mr. Salazar?

8 ATTORNEY CORNWELL: Please excuse this juror.

9 MADAM CLERK (Cheryl L. Graham): The juror is excused from
10 this trial.

11 Juror 386, George Webster. Mr. Webster's in the jury
12 assembly room. What sayeth the state?

13 ATTORNEY OSBORNE: Please present this juror.

14 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

15 ATTORNEY HUBRICH: Please seat this juror.

16 MADAM CLERK (Cheryl L. Graham): And the defense,
17 Mr. Salazar?

18 ATTORNEY CORNWELL: Please excuse this juror.

19 MADAM CLERK (Cheryl L. Graham): Mr. Webster is excused from
20 this trial.

21 Juror 272, Jennifer Parvin. Ms. Parvin's in this courtroom.
22 What sayeth the state?

23 ATTORNEY OSBORNE: Please excuse this juror.

24 MADAM CLERK (Cheryl L. Graham): Ms. Parvin has been excused
25 from this trial.

1 Juror 289, Carrie Rafferty, in the jury assembly room. What
2 sayeth the state?

3 ATTORNEY OSBORNE: Please present this juror.

4 MADAM CLERK (Cheryl L. Graham): I'm sorry?

5 ATTORNEY OSBORNE: Please present this juror.

6 MADAM CLERK (Cheryl L. Graham): Thank you. The defense,
7 Mr. Fortune?

8 ATTORNEY HUBRICH: Please seat this juror.

9 MADAM CLERK (Cheryl L. Graham): And Mr. Salazar?

10 ATTORNEY CORNWELL: Please seat this juror.

11 MADAM CLERK (Cheryl L. Graham): The juror is seated on the
12 jury.

13 Juror 271, Donald Paro, Courtroom C. What sayeth the state?

14 ATTORNEY OSBORNE: Please present this juror.

15 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

16 ATTORNEY HUBRICH: Please excuse this juror.

17 MADAM CLERK (Cheryl L. Graham): Mr. Paro is excused from
18 this trial.

19 Juror 335, Joanne Smith. Ms. Smith is in the jury assembly
20 room. What sayeth the state?

21 ATTORNEY OSBORNE: Please present this juror.

22 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

23 ATTORNEY HUBRICH: Please seat this juror.

24 MADAM CLERK (Cheryl L. Graham): And the defense,
25 Mr. Salazar?

1 ATTORNEY CORNWELL: Please seat the juror.

2 MADAM CLERK (Cheryl L. Graham): Ms. Smith is seated as one
3 of our jurors.

4 THE COURT: Now to alternates. Just to review, one strike
5 for the state, two each for each defendant.

6 MADAM CLERK (Cheryl L. Graham): Juror 240, Christina Mills.
7 Ms. Mills is in the jury assembly room. What sayeth the state?

8 ATTORNEY OSBORNE: Please present this juror.

9 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

10 ATTORNEY HUBRICH: Please seat this juror.

11 MADAM CLERK (Cheryl L. Graham): And the defense,
12 Mr. Salazar?

13 ATTORNEY CORNWELL: Please seat the juror.

14 MADAM CLERK (Cheryl L. Graham): Juror is seated.

15 Juror No. 324, Kristine Shifty. Ms. Shifty is in the jury
16 assembly room. What sayeth the state?

17 ATTORNEY OSBORNE: Please present this juror.

18 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

19 ATTORNEY HUBRICH: Please excuse this juror.

20 MADAM CLERK (Cheryl L. Graham): The juror is excused from
21 this trial.

22 Juror 238, Rylie Middaugh. Ms. Middaugh is in this
23 courtroom. What sayeth the state?

24 ATTORNEY OSBORNE: Please present this juror.

25 MADAM CLERK (Cheryl L. Graham): Mr. Fortune?

1 ATTORNEY HUBRICH: Please seat this juror.

2 MADAM CLERK (Cheryl L. Graham): And Mr. Salazar?

3 ATTORNEY CORNWELL: Please seat this juror.

4 MADAM CLERK (Cheryl L. Graham): Juror is seated on this
5 case.

6 Juror No. 279, Nakilya Phillips, is in the jury assembly
7 room. What sayeth the state?

8 ATTORNEY OSBORNE: Please present this juror.

9 MADAM CLERK (Cheryl L. Graham): The defense, Mr. Fortune?

10 ATTORNEY HUBRICH: Please seat this juror.

11 MADAM CLERK (Cheryl L. Graham): And the defense,
12 Mr. Salazar?

13 ATTORNEY CORNWELL: Please seat this juror.

14 MADAM CLERK (Cheryl L. Graham): Juror seated on this trial.
15 Thank you, Judge.

16 THE COURT: Thank you very much. Are there any objections
17 with regards to the qualifications and selection of the jury from
18 the state?

19 ATTORNEY OSBORNE: None, Your Honor.

20 THE COURT: From Ms. Fortune?

21 ATTORNEY HUBRICH: No, ma'am.

22 THE COURT: And from Mr. Salazar?

23 ATTORNEY CORNWELL: No, Your Honor.

24 THE COURT: Very well. Thank you all so much.

25 Now, here's what I am going to ask that we do. With regard,

1 service animals and I do believe in service dogs, as long as they
2 are certified and that he's got proof that this service dog is
3 certified and pertains to a specific disability that he has. And
4 I'm assuming that the state looked into that and found that out.

5 The state indicated to Your Honor that the dog -- and I
6 apologize if I'm misstating this, this was my interpretation,
7 that it was a small dog, that it was a terrier-type dog.

8 And we're here in court now. At the time that we had this
9 discussion I also believed that the witnesses and victims in this
10 case would be sitting in a room outside of the courtroom, that
11 they would be sitting in a room next-door, which would be
12 audio-video feed. So that was what I was relying on when I
13 informed the Court that I really had no issues with the service
14 dog being involved.

15 The reason why it's even an issue is because the charge in
16 this case is cruelty to animals. There's an allegation that my
17 client shot a dog that actually belonged to this same person.
18 And that's one of the reasons why that's even an issue in this
19 case, because that is the charge.

20 Here we are here now, as we stand, getting ready to pick our
21 jury, is that the jury is going to sit in the lobby, or the
22 audience, of the courtroom. Literally less than 10 feet away
23 this eyewitness/alleged victim of this case is going to be
24 sitting with his service dog. The dog actually looks more like a
25 black Lab to me, medium- to large-sized dog. As we were standing

1 in the courtroom, he's laying with his head in the walkway of the
2 courtroom. The jurors will have to walk past the face of the dog
3 to get to their seat, and they'll be sitting within 10 feet of
4 this dog.

5 I think that accommodations can be made to have this service
6 dog present if this alleged victim needs him, and it certainly
7 doesn't include prejudicing the jury in a case where the charge
8 is cruelty to animals. Thank you.

9 ATTORNEY CORNWELL: And, Your Honor, we would just join in
10 that motion.

11 THE COURT: Okay. Yes, sir.

12 ATTORNEY OSBORNE: Judge, if it would be okay -- we're
13 looking at the seating right now, I'm not -- for the record, I'm
14 not buying into all that. But if we can have the dog switch,
15 Mr. Porter switch with Swibaker, then he wouldn't be right in the
16 hallway.

17 And I've already talked to him. He's prepared to testify
18 and leave the dog with the girlfriend, and then when he comes
19 back, the dog will be there.

20 THE COURT: Very well. I see he has his vest on. You know,
21 service dogs, in my experience, you don't know they're there.
22 He's been in here now for about 20 minutes. But for the fact
23 that his nose has been out in the hall, he'll go anyplace you
24 tell him to go and nobody will know he's there.

25 Also, we have a marvelous victims' advocate. I'm sure

1 she'll just add that to her tasks, to just help the service dog
2 be where he can be. And the fact that he doesn't need him whne
3 he can testify, which means walk out, come up here, it should not
4 be an issue.

5 So thank you, I think we've got an accommodation worked out.
6 Any objection given that we're going to make this switch?

7 ATTORNEY HUBRICH: No objection, Your Honor.

8 THE COURT: Okay. All right. Now, anything from the state
9 before we bring our jury in, swear them in, go right into opening
10 statements?

11 ATTORNEY OSBORNE: No, ma'am.

12 THE COURT: All right. Anything from Mr. Fortune before we
13 do that?

14 ATTORNEY HUBRICH: I'm sorry, Judge. We're swearing and
15 then going right into opening?

16 THE COURT: Yes, ma'am.

17 ATTORNEY HUBRICH: No objection.

18 ATTORNEY CORNWELL: None from me.

19 ATTORNEY OSBORNE: Judge, just in case you make an
20 announcement as to who's doing the opening, Ms. Glover is going
21 to do the opening for the state.

22 THE COURT: Great. Wonderful. Thank you.

23 ATTORNEY HUBRICH: Who starts first for us? Who decides
24 ttat? Flip a coin? Rock paper scissors?

25 ATTORNEY CORNWELL: I just assumed we were going to continue

1 version of the facts.

2 What they say is very important. Give them your undivided
3 attention. But please remember that what the attorneys say is
4 not evidence. That comes from the testimony and exhibits which
5 are admitted into evidence.

6 Ladies and gentlemen, in order to preserve everyone's
7 rights, it is necessary that I ask the attorneys whether or not
8 there are matters additionally which I need to explore with you
9 and to ascertain if there are any objections. From the state?

10 ATTORNEY OSBORNE: None, Your Honor.

11 THE COURT: Mr. Fortune?

12 ATTORNEY OSBORNE: None, Your Honor. But may we approach at
13 the appropriate time?

14 THE COURT: Sure.

15 ATTORNEY CORNWELL: No, Your Honor.

16 THE COURT: That would be right now.

17 ATTORNEY HUBRICH: Thank you, Judge.

18 (WHEREUPON, an off-the-record discussion is held at
19 sidebar.)

20 THE COURT: Now, did y'all hear that noise? Go to the
21 beach; go to the ocean? Oh, come on, it sounded like the ocean
22 to me. That literally is to cover up, again, what I'm doing to
23 let me do the work that I must do. So you will hear that when
24 the attorneys approach.

25 What the attorneys concerned about? They want you to have a

1 cushion. They said, Your Honor, the jurors need a cushion. So
2 we will try to get you some cushions, okay. All right, so lunch
3 and cushions. We're working on it; I got it. So hang tight.
4 Comfort is on the way, hopefully.

5 Now, also, my gentleman who is on the front row, I want to
6 make sure you can hear. Anybody can hear? 'Anybody have any
7 difficulties? How you doing? You want earphones?

8 JUROR: It was good. Now I can barely hear you. What
9 happened?

10 THE COURT: That's because I turned off my microphone.

11 JUROR: Oh, okay. That's much better.

12 THE COURT: Perfect. I might put you in charge of, Turn on
13 the microphone, Judge. Wonderful, okay. Never well. Again, if
14 you have any difficulty, let us know.

15 JUROR: Okay.

16 THE COURT: We're going to be in tune to you, as well. Now,
17 does anybody -- let me just ask everybody to stand up, because I
18 know those benches are -- and just wiggle around. That's okay.
19 If you do, stand up, wiggle around, sit back down.

20 Now, ladies and gentlemen, at this time I'm going to ask you
21 to please draw close as we listen to the opening statements.
22 Ms. Glover.

23 OPENING STATEMENT ON BEHALF OF THE STATE

24 ATTORNEY GLOVER: May it please the Court.

25 THE COURT: Yes, ma'am.

1 ATTORNEY GLOVER: Thank you, Your Honor. Malice, a depraved
2 heart, one void of social responsibility. These are the elements
3 necessary to commit a murder. These are what the codefendants,
4 Muanah Fortune, Jr., and Polo Salazar, are charged with doing on
5 the night of January 27th, going into the morning of
6 January 28th, 2019.

7 On that particular night they broke into the home of
8 Mr. Marcus Porter; they shot him in the chest; and they shot his
9 visiting friend eight times before leaving him in a puddle of his
10 own blood.

11 Ladies and gentlemen of the jury, my name is Chelsea Glover,
12 I'm assistant solicitor here with the First Judicial Circuit. I
13 will be prosecuting this case, along with Solicitor David
14 Osborne.

15 Seated at our table you will also see Sergeant Davis and
16 Ms. Rebecca Durr. Seated behind you is Mr. Joe Weaver's family,
17 Mr. Marcus Porter and Mr. David Swibaker.

18 Ladies and gentlemen of the jury, all we ask is that you
19 listen carefully to the evidence that we'll present over the
20 course of the next few days, and that you hold Muanah Fortune,
21 Jr., and Polo Salazar responsible for this horrendous act.

22 Jury service is perhaps one of the most important duties
23 that you can ever perform for your country. It is not only the
24 state's day in court, it is not only must one Fortune's day in
25 court, it is not only Polo Salazar's day in court, but it is also

1 Joe Weaver's day to seek justice, and his family appreciates you
2 being here.

3 Let's talk about the charges briefly. As Judge Goodstein
4 previously stated, the defendants are charged with murder,
5 attempted murder, possession of a weapon during the commission a
6 violent crime, ill-treatment of animals, and his burglary in the
7 first degree. Additionally, Polo Salazar is charged with
8 possession of a stolen vehicle.

9 Now let's talk about murder, briefly. Murder is one of the
10 most heinous crimes and one of the most oldest crimes in the
11 books. Murder is simply defined as the unlawful killing of
12 another, with malice aforethought. The unlawful killing of
13 another with malice aforethought.

14 Malice has numerous definitions. Hardness of heart,
15 reckless disregard, a void of social responsibility. But how
16 much more heinous can you get besides breaking into someone's
17 house in the wee hours of the morning, shooting them in their
18 chest and leaving their guest dead after being shot eight times
19 and kicked in the face, literally kicked in the face?

20 On January 27th of 2019, Polo Salazar and Muanah Fortune,
21 Jr., along with their friends who will later get their day in
22 trial, wanted some marijuana, so they drove from Beaufort right
23 here in Saint George to Marcus Porter's house to get them some.

24 Now, Marcus Porter, he's no saint, he's been known to sell a
25 few drugs in his home to make a couple extra bucks. But that

1 does not give anyone the right to break into his home. It
2 doesn't give anyone the right to take away his expectation of
3 privacy in his home. It doesn't give anyone the right to gun
4 down one of his guests and take things that do not belong to
5 them.

6 Ladies and gentlemen of the jury, marijuana is never worth a
7 person's life. And those are just some of the facts.

8 You'll hear about, later in this jury, later in this trial,
9 about a high-speed chase that took place four minutes after this
10 home invasion took place. This high-speed chase lasted about 30
11 minutes, a full half an hour, before the assailants were
12 captured, before they were arrested. Before that happened, stop
13 strips had to be deployed, their tires literally had to be
14 flattened to get that getaway car to stop, a getaway car that was
15 stolen.

16 Along that drive, that 30-minute drive that these defendants
17 took, officers circled back around and, like Hansel and Gretel,
18 if anyone remembers the old childhood story, they left
19 breadcrumbs of the crime that they had just committed. They left
20 an orange ski mask, they left a jumpsuit, they left four
21 handguns, four, and, most important, they left Joe Weaver's
22 wallet.

23 Later in this trial you'll hear about Marcus Porter, the
24 owner of that home. You'll hear about David Swibaker, who is
25 Marcus's roommate. Who you won't hear from is Joe Weaver, J.B.

1 Had he left five minutes earlier, he would be alive to testify in
2 this trial; he would be alive to hug his mother one more time; he
3 would be alive to ride his beloved moped.

4 But because of some marijuana, he's unable to do that today.
5 So we're here to give him justice. We're here to seek justice on
6 his behalf.

7 ATTORNEY HUBRICH: Objection, Your Honor. Improper burden
8 shifting.

9 THE COURT: Just be mindful.

10 ATTORNEY GLOVER: Thank you, Your Honor. Over the course of
11 the next few days numerous individuals are going to come over
12 here, they're going to state the stand, they're going to testify
13 about the events that took place on the night of January 27th,
14 2019, going into the morning of January 28th of 2019.

15 No one individual is going tell you everything that happened
16 on that dreaded night, but we ask that you view each testimony as
17 a piece of a puzzle. And at the conclusion of this trial that
18 puzzle will have painted a bigger picture where only one
19 conclusion can be drawn.

20 Just as in any criminal case, the state has the burden of
21 proof. That proof is beyond a reasonable doubt. It is up to us
22 to prove beyond a reasonable doubt that both Polo and Muanah are
23 guilty of murder, guilty of attempted murder, guilty of
24 ill-treatment of animals, guilty of possession of a weapon during
25 the commission of a violent crime, guilty of burglary first, and

1 Polo guilty of possession of a stolen vehicle.

2 Ladies and gentlemen of the jury, there is no class that
3 prepares you on how to be a good juror, there's no class that you
4 can take that teaches you how to do that. But many of you have
5 been preparing your whole life for this moment, as teachers, as
6 program coordinators, as nurses, as engineers. So we ask that
7 you listen attentively to all the evidence, and that you use your
8 diversity of experience and knowledge during your deliberations
9 to aid you in rendering a verdict.

10 And we ask that you hold these defendants responsible for
11 the acts that took place on January 27th, going into the morning
12 of January 28th. Thank you.

13 THE COURT: Thank you. Ms. Hubrich.

14 OPENING STATEMENT ON BEHALF OF DEFENDANT FORTUNE

15 ATTORNEY HUBRICH: May it please the Court.

16 THE COURT: Yes, ma'am.

17 ATTORNEY HUBRICH: Judge, may we move freely about the
18 courtroom, or do you need me to stay at the podium?

19 THE COURT: Let me tell you what my concern is. My concern
20 is is that our court reporter's able to hear. As long as there's
21 sufficient volume -- that's why we put the microphone at the
22 podium. But you're certainly free to move about. If you go away
23 from the podium, lots of volume.

24 ATTORNEY HUBRICH: Thank you, Judge. Ladies and gentlemen
25 of the jury, you know, the funny thing about the truth is that

1 it's easy to remember. It's usually the first story you tell.
2 It's always the one that makes the most sense. That's the funny
3 thing about the truth.

4 And this is what I need you to keep in mind over the course
5 of this week as the state tries to bring pieces of evidence and
6 testimony before you. I need you to keep in the back of your
7 mind that the funny thing about the truth is that it's easy to
8 remember and it's usually the first story you tell. I need you
9 to think about that as you hear the evidence in this case.

10 The reason why we're here today is because the state, we
11 call them the solicitor, they brought us here. They brought me
12 here; they brought the Judge here; they brought you here; they
13 brought my client, Muanah Fortune, here.

14 And what they did is they levied some of the most serious
15 charges that you can levy against a human being against these
16 men. Murder, burglary, cruelty to animals, possession of a
17 weapon during a violent crime. These are some of the most
18 serious charges you can levy against another human being. And
19 they brought us all here today and they said, We promise you we
20 can prove these people guilty beyond a reasonable doubt.

21 There are four men charged with these crimes. Some have
22 more than others. Mr. Salazar has another crime, he's got
23 possession of a stolen motor vehicle. Muanah is not charged with
24 that because he never had possession of a stolen vehicle. But
25 there are four men. Two of them are on trial this week. My

1 client, Muanah Fortune, Jr. Want to stand up, Muanah? This is
2 my client, this is who I have the honor of representing this
3 week. There is another defendant. His name is Polo Salazar.
4 There are two other people that have been charged by the state,
5 Elijah Green, Devonte Major.

6 The solicitor, in her opening statement, she told you that
7 those two, they're going to be tried some other time; that those
8 are older gentlemen; they're going to be tried, I think, maybe
9 next week or the week after. And that's for another jury; that's
10 not for this jury; that's not for you.

11 Your job -- and the Judge is going to tell you this, and
12 she's going to tell you this better than I can tell you this --
13 your job is to consider the evidence separate against each
14 person. So what that means is that the state has to prove to
15 each and every one of you beyond a reasonable doubt that my
16 client, Muanah Fortune, committed these crimes. That means each
17 of you has to decide that they've done that; that you don't have
18 a reasonable doubt about every element of the crime.

19 And that then you have to decide that same thing about Polo
20 Salazar, independently, independently of how you are deciding the
21 case against Mr. Fortune. And the Judge is going to say that
22 much more eloquently than I can ever tell you that, but that's
23 what your job is today and this week.

24 I want you to think about proof beyond a reasonable doubt.
25 Reasonable, I want you to think what that means. When you think

1 about it I want to you think like a welder, like a welder, think
2 about a chain, a metal chain, that you would weld together. And
3 think about those links. I want you to think about each piece of
4 evidence of links, linking them together. That's what the state
5 has to do, right, they have to take these links and they have to
6 link them together.

7 And if you have a weak link, if you come to a link that is
8 weak, you can't rely on, you can't put it in the chain, and so
9 you have to take it and you have to set it aside. And if you
10 have to set it aside and the chain isn't complete, it's not a
11 strong chain, it's not proof beyond a reasonable doubt, then you
12 to find Muanah Fortune not guilty. That's what reasonable doubt
13 is. That's the most basic way we can explain it. Every one has
14 to be strong, every one has to be substantial, and every link,
15 you can't doubt it.

16 What would you do with this chain that they've given you?
17 If you have a doubt, you can't use it to tie the link in the
18 chain. That's what proof beyond a reasonable doubt is.

19 There's two types evidence, and the Judge is going to tell
20 you this and I think the state's probably going to talk to you
21 about, it's called direct and evidence, and we call it
22 circumstantial evidence.

23 Direct evidence is the good evidence, that's the evidence
24 that has the most weight, it's the most reliable. An example of
25 direct evidence would be an eyewitness saying, I saw that man

1 commit that crime. That's direct evidence.

2 The evidence in this case is going to show you that there is
3 no eyewitness saying that they saw Muanah Fortune commit this
4 crime or any crime.

5 Another piece of direct evidence would be fingerprint
6 evidence. Fingerprint evidence would say, I saw or I tested this
7 house and there is a fingerprint on the gun, on the kitchen table
8 there's a fingerprint. That would be direct evidence. It's
9 pretty weighty.

10 The evidence in this case is going to show you there is no
11 fingerprints that puts Muanah Fortune at the scene of the crime.
12 There's no fingerprints linking him at all.

13 Although piece of direct evidence would be, for example,
14 DNA, DNA, evidence that shows that a man was at the house where
15 this happened, ■ Myrtle Place, the place where this whole crime
16 is alleged to have happened. The DNA evidence, we found DNA
17 evidence on the kitchen table, on the gun; we found DNA testified
18 in the dog's mouth, something like that, that would be direct
19 evidence, because that's pretty weighty.

20 The evidence in this case is going to show you there is no
21 DNA evidence that puts Muanah Fortune at the scene of the crime
22 at all.

23 So then the state's going to talk to you about
24 circumstantial evidence. Circumstantial evidence is the kind of
25 evidence that you really have to question, the kind of evidence

1 that you have to put pieces together to maybe infer guilt. And
2 you don't have to listen to me, you don't even have to trust me,
3 because the Judge is going to tell you, circumstantial evidence
4 has to be held to a greater weight, it's got to be substantial.

5 If it's not substantial, you can't rely on it. There's a
6 reason for that. There's a reason why the Judge is going to tell
7 you that if the state is asking you to put little tiny pieces
8 together to create a strong link, then you have to test that
9 evidence much, more stronger, it has to be substantial. And it's
10 not, if you can question it, if you doubt it, if you don't think
11 that chain is strong enough to wrap around a man and send him to
12 prison, then you to find that man not guilty.

13 And I trust that, at the conclusion of this trial, you will
14 find Muanah Fortune not guilty. Thank you.

15 THE COURT: Thank you. Yes, ma'am, Ms. Cornwell.

16 OPENING STATEMENT ON BEHALF OF DEFENDANT SALAZAR

17 ATTORNEY CORNWELL: May it please the Court.

18 THE COURT: Yes, ma'am.

19 ATTORNEY CORNWELL: Counsel. Solicitor. As human beings we
20 have an enate tendency to jump to conclusions, to make judgments
21 and render people, criminals and victims, without knowing all the
22 facts, the circumstances of the situation.

23 In psychology, to jump to a conclusion means to render a
24 judgment without knowing all the facts. If you ever heard the
25 term, when you hear hoofbeats think horse is not needed, that is

1 an example of jumping to a conclusion because while, yes, the
2 most common hooved animal that people think of is a horse, just
3 because you hear hoofbeats coming doesn't mean that it's
4 automatically a horse creating that sound, because to do that
5 eliminates the possibility of any other animal that could create
6 hoofbeats, zebras, donkeys, cows, goats, elk, antelope, moose,
7 buffalo.

8 And by eliminating all of those possibilities and making an
9 assumption based on what seems to be the obvious answer,
10 oftentimes we find ourselves making rash decisions that lead to
11 more harm than good. And that's exactly what law enforcement did
12 on the early morning of January 28th, 2019, and, as a result,
13 Polo Salazar was charged with crimes that he did not commit.

14 Now, throughout the course of this trial the state is going
15 to try to get you to buy into those same assumptions and render
16 an unwarranted verdict based on an ediant (phonetic sp) that
17 doesn't look at all the possibilities, that doesn't examine all
18 of the evidence critically. Don't let them do that.

19 Because as Polo Salazar and Muanah Fortune sit here today,
20 they are presumed innocent. They are presumed innocent
21 throughout this entire trial, and as you go back to your jury
22 room to render a verdict, they are presumed innocent unless and
23 until the state can prove to you, beyond a reasonable doubt, each
24 and every element of each and every crime independently and
25 separately for each and every person they've accused beyond a

1 reasonable doubt.

2 So what is a reasonable doubt? Well, a reasonable doubt is
3 the type of doubt that would cause a reasonable person to
4 hesitate to act. In other words, it's one of those things you
5 just, makes you go, Uhm, you're not sure. Proof beyond a
6 reasonable doubt is proof that must leave you firmly convinced of
7 a person's guilt.

8 Now, as jurors, you are a part of our criminal justice
9 system and in holding the state accountable for meeting that
10 burden of proof and proving this case beyond a reasonable doubt.

11 And while our criminal justice system may not be perfect, it
12 is the best criminal justice system in the world because of our
13 jurors, because the law requires that, as jurors, you make sure
14 that law enforcement and the state meet that burden, that they
15 prove guilt beyond a reasonable doubt.

16 Because the last thing that anybody wants, including law
17 enforcement and the state, is for an innocent person to be
18 wrongfully convicted based on assumptions that have not proven a
19 case beyond a reasonable doubt.

20 And, as jurors, you are going to get to hold them to that
21 standard. And sometimes that is a hard thing to do as a juror,
22 because you hear charges that seem awful, murder, attempted
23 murder, burglary, torturing an animal, and your emotions want you
24 to seek justice and wants you to find some sort of guilt
25 somewhere.

1 But as the law instructs and, as the Judge is going to tell
2 you, the only way that you can find somebody guilty is if the
3 state has proven every element of every charge beyond a
4 reasonable doubt, because we need assurances in our criminal
5 justice system that you are sending someone who has firmly been
6 convicted, someone who you firmly believe has committed a crime,
7 not someone you think might have done it or maybe or more
8 probably than not, you have to be firmly convinced beyond a
9 reasonable doubt.

10 And if you are not firmly convinced beyond a reasonable
11 doubt, then the only jury verdict you can render is not guilty.

12 And oftentimes in this courtroom the most just verdict will
13 be not guilty because, in that verdict, you are telling law
14 enforcement and you are telling the state, You've got to do more;
15 you can't just assume; you can't jump to conclusions; you can't
16 guess, because young men's lives are at stake.

17 So when you go back and you consider the evidence and the
18 testimony in this case and you look at it through the standard of
19 reasonable doubt, what are you considering? Well, as the Judge
20 is going to tell you and as you've heard a few times already,
21 you're going to look at a number of things. You're going to
22 judge the credibility of the witnesses, and you're going to be
23 told about different types of evidence and the weight that should
24 be given to those types of evidence.

25 But the most important thing that the Judge is going to tell

1 you is that, in considering each of these charges and weighing
2 the testimony and the evidence of each of these charges, you must
3 do so for each of these young men independently and separately,
4 not just from each other but also from the other two men that are
5 not in this courtroom today, that are not on trial today. And
6 you have to independently and separately consider their actions,
7 as well.

8 And once you've done that, and once you've seen and heard
9 the testimony and the evidence, or the lack thereof, I am
10 confident that you are going to do your duty and that you are
11 going to tell the state that they have not met their burden of
12 proof, they have not left you firmly convinced beyond a
13 reasonable doubt that these young men are guilty.

14 And when you go back and you consider the crime that they
15 have charged my client with, you are going to see that they have
16 no evidence, that the testimony doesn't make sense, and there are
17 going to be those little things that make you go, Uhm.

18 And when they do, I need to you hold firm to your conviction
19 to seek the just thing and to find Polo Salazar not guilty
20 murder, not guilty of attempted murder, not guilty of burglary,
21 not guilty of possessing a firearm, not guilty of torturing an
22 animal, and definitely not guilty of knowing or possessing a
23 stolen vehicle.

24 THE COURT: Thank you. All right. Ladies and gentlemen,
25 I'm trying to find out if lunch is here. Because if it is, it's

1 you have your first witness ready to go? Excellent.

2 (WHEREUPON, the jury is seated in the courtroom at
3 2:08 p.m.)

4 (WHEREUPON, an off-the-record-discussion is held in open
5 court.)

6 THE COURT: I hope you all had a very pleasant lunch. And
7 at this time we are going to begin with the state's case. If you
8 would call your first witness, please.

9 ATTORNEY GLOVER: Your Honor, the state calls Leta Boehler.

10 CLERK OF COURT: Ms. Boehler, if you'll please raise your
11 right hand and state your full name for the record.

12 THE WITNESS: Leta Boehler.

13 LETA BOEHLER,

14 having first been duly sworn, was examined and testified as
15 follows:

16 THE COURT: If you would spell your last name, please.

17 THE WITNESS: Boehler. It's B-o-e-h-l-e-r.

18 THE COURT: And your first name?

19 THE WITNESS: Leta, L-e-t-a.

20 THE COURT: Thank you. Your witness.

21 ATTORNEY GLOVER: Thank you, Your Honor.

22 **DIRECT EXAMINATION**

23 BY ATTORNEY GLOVER:

24 Q Officer Boehler, could you tell us, what is your place of
25 employment.

1 A Right now I'm at Dorchester County Sheriff's Office.

2 Q Could you tell us a little bit about your law enforcement
3 background.

4 A I've been with Dorchester County since about September of
5 last year. Before that, I worked for Summerville Police
6 Department. I worked there from September until November of
7 2014. Before that, I worked for Consolidated Dispatch from like
8 2007 to '14.

9 Q And how about assignments?

10 A I've been on patrol as long as, from '14, once I went to the
11 academy, from there until now, work on patrol, on the road.

12 Q And what was your assignment back on January 28th of 2019?

13 A I was working on the street on night shift.

14 Q And what was your rank?

15 A At the time, I was corporal.

16 Q Did you have the occasion to respond to [REDACTED] Myrtle Place?

17 A Yes.

18 Q And is that in the city of Summerville?

19 A Yes.

20 Q County of Dorchester?

21 A Yes.

22 Q What was the nature of the call for service?

23 A It was referenced to a shooting. They advised that someone
24 had kicked in the back door and someone was shot.

25 Q Were you the first officer to arrive on scene?

1 A Yes, at the house.

2 ATTORNEY GLOVER: Your Honor, may I approach the witness?

3 THE COURT: You may.

4 Q Officer Boehler, could you tell us what you're looking at?

5 A This is an overview of the area, I guess like a Google image
6 of the neighborhood.

7 ATTORNEY GLOVER: If the record could reflect, we're going
8 to mark this for State's Exhibit 1. I'll get to that in just a
9 second.

10 (WHEREUPON, State's Exhibit 1 is marked for identification.)

11 Q Did you go directly to ■ Myrtle Place?

12 A When I arrived on scene I first parked my vehicle a little
13 further -- it's a cul de sac, so I parked it up a little.

14 And as I was approaching, I ended up going to the house that
15 was actually to the right of it where one of the victims was. I
16 had gotten flagged down.

17 Q When you got flagged down can you recall which address you
18 were at?

19 A ■.

20 Q And when you got to ■ Myrtle Street, what did you see?

21 A There was the victim, Mr. Porter, was outside, standing near
22 the driveway with, I'm assuming, the owner of the house at the
23 time. And he said he had been shot. I could see that he was
24 injured. And he said where his house was at ■, and pointed to
25 it, and he said his friend was there and his dog, also, and they

1 were deceased.

2 Q So Mr. Porter was able to speak and relay what happened to
3 him?

4 A Yes.

5 Q And how many suspects were you looking for?

6 A He had advised that it was four. He thought it was four.

7 Q And after talking to him what did you do?

8 A After I spoke with him I saw his injury was to, like, the
9 upper part of his chest/shoulder area. Told him to stay there
10 and wait for EMS, and that I was going to the house. And then I
11 approached at house at [REDACTED].

12 Q And is this an accurate depiction of [REDACTED] Myrtle Place?

13 A Yes.

14 Q Did you see [REDACTED] Myrtle Place on this map?

15 A Like where it's at, yes.

16 ATTORNEY GLOVER: Your Honor, at this point in time the
17 state would like to submit this overhead as State's Exhibit 1.

18 THE COURT: Any objection? First, Mr. Fortune?

19 ATTORNEY HUBRICH: Judge, I just don't know that it's been
20 depicted as a fair and accurate representation.

21 THE COURT: So there is an objection?

22 ATTORNEY HUBRICH: Yes, ma'am.

23 THE COURT: Very well.

24 ATTORNEY GLOVER: Your Honor, if I could briefly lay more
25 foundation.

1 THE COURT: Please.

2 ATTORNEY GLOVER: May I approach the witness?

3 THE COURT: Yes.

4 Q Officer Boehler, tell us again what you're looking at.

5 A This is an overhead view of the Robynwyn neighborhood. On
6 it you can see the streets. Shamrock. And the first cul de sac
7 off of it is where Myrtle Place is at.

8 Q And how exactly do you know that?

9 A Because I've worked that area during my time on shift with
10 Summerville Police Department for several years.

11 Q So it's safe to assume that you are able to point on that
12 map that you're looking at ■■■ Myrtle Place, as well as ■■■
13 Myrtle Place?

14 A Yes.

15 Q And I believe you mentioned Shamrock, as well?

16 A Yes. That's the road that comes in off of Maple.

17 Q And you covered this area for quite some time?

18 A Uh-huh (yes).

19 THE COURT: That's a yes?

20 A Yes, ma'am.

21 Q Does that seem like an accurate and fair depiction of the
22 area of ■■■ Myrtle and the area surrounding it?

23 A Yes.

24 ATTORNEY GLOVER: Your Honor, at this point in time we'd
25 like to offer the overhead as State's Exhibit 1.

1 THE COURT: Very well.

2 ATTORNEY HUBRICH: No objection.

3 ATTORNEY CORNWELL: No objection.

4 THE COURT: Very well.

5 ATTORNEY GLOVER: Thank you, Your Honor.

6 (WHEREUPON, State's Exhibit 1 is admitted into the record.)

7 ATTORNEY GLOVER: Thank you, Your Honor. Your Honor, if
8 possible, we would like to display this for the jury.

9 THE COURT: Sure. You mean publish it. Go right ahead.

10 ATTORNEY GLOVER: Thank you, Your Honor.

11 THE COURT: And that's Exhibit?

12 ATTORNEY GLOVER: State's Exhibit 1, Your Honor.

13 Beg the Court's indulgence.

14 THE COURT: Okay.

15 ATTORNEY GLOVER: May it please the Court. Thank you, Your
16 Honor.

17 Q Officer Boehler, I know this is a bit blurry, but if you can
18 recall from our previous conversations, our previous
19 conversations about the picture, I am going to point out what you
20 stated was Shamrock. Could you let me know. And Shamrock is
21 written on the map, but could you let me know if I am in the
22 general vicinity of Shamrock Road? Does this seem familiar?

23 A Yes. That's where it meets North Maple.

24 Q Now, if we're looking for [REDACTED] Place on this map, do I need
25 to go up or down?

1 A From there, you would take Shamrock across.

2 Q Okay.

3 A And then almost where your pen is, that is the cul de sac
4 right there. And then right where your pen is now.

5 Q Okay. So this would be Robynwyn Place?

6 A That's Myrtle Place.

7 Q Myrtle Place. So this would be the location of the
8 incident, [REDACTED] Myrtle Place?

9 A Yes.

10 Q Thank you, Officer Boehler. All right. When you got to [REDACTED]
11 Myrtle, tell the jury what you saw.

12 A When I approached, the glass door was closed but the front
13 door was open. I looked through and could see one victim on the
14 ground right inside the door, in the living room area.

15 And then there was another gentleman that was with him, and
16 he was trying to assess him and trying to render aid. I went
17 into the door. He then advised me that Mr. Weaver was the victim
18 on the ground, and that he had been shot several times. I asked
19 if he was okay. He said that he was -- it was Mr. Swibaker. He
20 said that he was not injured.

21 There was -- whenever I approached Mr. Weaver, he was laying
22 on his back on the ground. He had several gunshot wounds to,
23 like, his upper chest area. He had some blood coming from his
24 mouth, and he wasn't breathing very well, his breathing was
25 obstructed because of the blood.

1 So I tried to assess if he had any other injuries to him
2 that I could see, any other exit wounds or anything like that. I
3 had asked Mr. Swibaker to grab me some towels. And I started CPR
4 on Mr. Weaver.

5 Q Could you assess what type of injuries it appeared as though
6 Mr. Weaver was suffering from?

7 A It appeared to be gunshot wounds. He had said he had been
8 shot -- Mr. Swibaker had said that he had been shot, and it was
9 consistent with gunshot wounds.

10 Q Was EMS called?

11 A Yes. They usually stage for incidents like that, so they
12 wait for us to get inside and secure it. So once I was inside
13 the house and I could let them know it was secure for EMS, they
14 could come on in.

15 Q All right. And what did you do then?

16 A I did CPR on Mr. Weaver until they got there. I believe
17 they first assessed Mr. Porter outside in the driveway, and then
18 sent EMS, and the head person came inside. When they came inside
19 I told them what I had with Mr. Weaver.

20 And then I had Mr. Swibaker step outside. I did a quick
21 sweep of the house to make sure there weren't any other victims.

22 While I was waiting, I had been talking to him, kind of
23 asking, if there was anyone else in the house, and he said no,
24 the dog was in the back room. So I did a quick sweep. The
25 canine in the back room was deceased. There was no other people

1 in the house.

2 So I had him outside, and had him go out and meet with some
3 other officers out there to do a statement on what he saw. And I
4 just secured it and didn't let anyone else in.

5 Q Did you locate any of the suspects in the residence?

6 A No. There was not anyone inside.

7 Q Did you take any statements?

8 A I didn't take any written statements. Some of the other
9 officers that had arrived on scene, they were handling that. I
10 had other duties I was doing.

11 ATTORNEY GLOVER: Beg the Court's indulgence.

12 THE COURT: All right.

13 Q Officer Boehler, if you could stand and show to the jury
14 where you saw with your own eyes where Mr. Porter was shot.

15 A Mr. Porter, it appeared that he was shot in the
16 chest/shoulder area. I could see that he was favoring that side.
17 So I'm not a medical professional, and he had a shirt on, but it
18 appeared that it was to the chest/shoulder.

19 Q Thank you. Officer Boehler, please answer any questions the
20 defense may have.

21 THE COURT: Yes. On behalf of Mr. Fortune?

22 ATTORNEY HUBRICH: Thank you, Judge. May it please the
23 Court.

24 THE COURT: Yes.

25

CROSS-EXAMINATION

BY ATTORNEY HUBRICH:

Q Officer Boehler, you were the first one on the scene; right?

A Yes, ma'am.

Q And it was unusual because you were the only person there, there was no -- you had no back-up?

A When I first arrived on scene, yes.

Q And so you went by yourself into this house where there was alleged to have been a shooting?

A Uh-huh.

Q And that's an unusual circumstance. Typically there's other officers or there's other back-up there. Correct?

A Usually there's other officers, but we had gotten information that the suspects had left.

Q So you go into this house. First you come up, and you testified, I think you testified, you spoke to Marcus Porter.

A Uh-huh.

Q Throughout the course of your investigation and coming onto the scene, I want to talk about the people that are involved. There was Marcus Porter; right? We're going to call him Porter. He lived in the house. Right?

A Uh-huh.

Q There were a David Swibaker. We're going to call him Swibaker. He lived in the house. Right?

A Yes.

1 Q And you spoke to both of them on scene?

2 A Yes.

3 Q And then there was a Joe Weaver, and he was the one that you
4 said was on the floor and had been shot when you came in?

5 A Yes.

6 Q So we have Weaver, Porter, Swibaker; right?

7 A Yes.

8 Q Other than the 911 dispatcher, the person who took the 911
9 call, you were the first to talk to both witnesses Swibaker and
10 Porter?

11 A Yes, the first officer on the scene.

12 Q And you specifically asked Mr. Porter, Who shot you? Right?

13 A I do not recall.

14 Q Did you have a body camera on that night?

15 A Yes.

16 Q And that body camera, would that record everything that
17 happened that night?

18 A It should.

19 Q And if you were to hear that body camera, clips from that
20 body camera, would that refresh your recollection as to what was
21 told to you that night?

22 A Yes.

23 Q I'm going to play for you from your body camera.

24 ATTORNEY GLOVER: Objection. Your Honor, she's publishing
25 it now and she has not thoroughly refreshed Officer Boehler's

1 memory.

2 THE COURT: It's not in evidence at this point. You can,
3 however, authenticate it and it can be placed into evidence.

4 ATTORNEY HUBRICH: Judge, I'm not moving it into evidence.
5 I'm just using it to refresh her recollection.

6 THE COURT: All right. Are you going to have the ability
7 for her to see it and not publish it to the jury?

8 ATTORNEY HUBRICH: No, ma'am. It's just a body camera.

9 THE COURT: Okay. Well ...

10 ATTORNEY HUBRICH: It was provided to me in audio form. I
11 can play it for her in audio form to refresh her recollection.

12 THE COURT: I understand. But the problem is you'll be
13 publishing that to the jury. Do you have a transcript of it,
14 perhaps?

15 ATTORNEY HUBRICH: No, ma'am.

16 THE COURT: Okay.

17 ATTORNEY HUBRICH: I have notes from what her in-car camera
18 says that I created.

19 THE COURT: I understand. And tell me what you intend to
20 play it on?

21 ATTORNEY HUBRICH: The computer that was -- it was provided
22 to me digitally by the state. And I just intend to play it on
23 the computer, or connect it to the court system.

24 THE COURT: Okay. And is what you have, is it a thumb drive
25 or a CD? How is it that you have it? Or is it just an audio

1 file?

2 ATTORNEY HUBRICH: It was provided to me as an audio file.

3 THE COURT: As an audio file.

4 ATTORNEY HUBRICH: It's actually video. It's the in-car
5 camera.

6 THE COURT: I'm sorry, I'm thinking about the words. Yes?

7 ATTORNEY GLOVER: Your Honor, if I may, we have no objection
8 to Attorney Hubrich refreshing Officer Boehler's memory with her
9 notes, as long as it is used to actually refresh her memory.

10 THE COURT: Okay. Have you seen the notes?

11 ATTORNEY GLOVER: No, Your Honor.

12 THE COURT: Why don't you take a look at the notes and
13 satisfy yourself.

14 ATTORNEY GLOVER: Thank you, Your Honor.

15 THE COURT: Counsel, let my see you aside just a sec.

16 (WHEREUPON, an off-the-record discussion is held at
17 sidebar.)

18 Q So, Officer Boehler, you had a body camera on that night,
19 and you also had an in-car camera. Right?

20 A Yes, ma'am.

21 Q And that was recording what was being said and what was
22 being done on the night in question?

23 A Yes, it should be.

24 Q Did you have a chance to review those before you came to
25 testify today?

1 A No, ma'am.

2 Q When you approached Marcus Porter did you ask him, Who shot
3 you; do you know who it was? Do you remember?

4 A I don't recall.

5 Q You don't remember. If I showed you notes from the in-car
6 camera that recorded everything that was said that night, would
7 that refresh your recollection?

8 A If you have it.

9 ATTORNEY HUBRICH: May I approach?

10 THE COURT: You may.

11 Q I'm going to hand you some notes. At the top of those notes
12 it says L. Boehler. Is L. Boehler your name?

13 A Yes, ma'am.

14 Q In-car camera video notes?

15 A Yes.

16 Q The first one says, Leta Boehler, Question:

17 THE COURT: You're publishing it. Just hold on, just let
18 her see if it refreshes her recollection. You can ask her.

19 Q In regards to the first, I guess, dot, that would be.

20 A The first dot?

21 Q Yes.

22 A Okay.

23 Q Do you recall now if you asked him, Who shot you; do you
24 know who it was?

25 A I asked him if he knew who it was.

1 Q And his answer to you was, No, I don't know?

2 A Correct.

3 Q If you refer to the third one, I'm going to ask you, you
4 asked again when you went in to talk to Mr. Swibaker. He was in
5 the house; right?

6 A Yes.

7 Q And you asked him, Who shot him? You were referring to
8 Mr. Weaver. Right?

9 A Yes.

10 Q And he advised you, I don't know, there's two or three black
11 guys came through the back door.

12 A Yes.

13 Q So your testimony on direct was that there were four black
14 males that were involved. But what Mr. Swibaker told you was
15 that there were actually two or three black guys that came
16 through the back door. Right?

17 A I believe it was during questioning him further and asking
18 him while I was doing CPR and other things that he indicated it
19 was four.

20 Q If you could watch your bodycam and listen to your bodycam
21 would it refresh your recollection that, actually, he never
22 corrected that statement to you?

23 A Okay.

24 Q Do you know whether or not he ever corrected that statement
25 to you?

1 A Not off the top of my head. I do not recall.

2 Q Would it surprise you to know that he actually never
3 corrected that statement to you, Mr. Swibaker? Would that
4 surprise you? Yes? No?

5 A I don't recall what all was going on at the time. This was
6 several years ago, so I don't ...

7 Q Would it help you to listen to the in-car video to refresh
8 your recollection?

9 A I can listen to the in-car video. If you're saying that
10 that's what it says, then okay.

11 Q Would it help you, to answer the question, to listen to your
12 in-car video?

13 A I can listen to it.

14 Q I just need a yes or a no.

15 A Yes.

16 Q Yes.

17 ATTORNEY HUBRICH: Judge, at this point I'd ask for a recess
18 so that she can listen to her in-car video to refresh her
19 recollection.

20 THE COURT: All right. Very well. Counsel, any objection?

21 ATTORNEY GLOVER: Beg the Court's indulgence.

22 THE COURT: Sure, absolutely. And do you have it --

23 Ms. Hubrich, do you have it on your computer? Is that where it
24 is?

25 ATTORNEY HUBRICH: I have it loaded on my computer and

1 burned to a disk, Judge, that my investigator burnt to a disk.

2 THE COURT: So your laptop is with it loaded?

3 ATTORNEY HUBRICH: Do I have it? Not currently. Is yours
4 loaded? Not currently. I can.

5 THE COURT: Well, yeah. If you want her to listen to it, we
6 better get it on something. Yeah.

7 ATTORNEY GLOVER: Your Honor, at this point in time we'd
8 like to object and make the argument that this is hearsay. At
9 the point in time when David Swibaker takes the stand,
10 Ms. Hubrich will have the opportunity to impeach him then.

11 THE COURT: I gotcha. You know, if Ms. Hubrich thought it
12 would refresh this witness's recollection, she can hand her the
13 Manhattan phone book to see if it will refresh her recollection.

14 ATTORNEY GLOVER: Yes, Your Honor.

15 THE COURT: Which she's entitled to do. So on your laptop,
16 what kind of plug? Do you have a typical ear, you know, little
17 stick plugs as opposed to like --

18 ATTORNEY HUBRICH: Headphones. I do. Can I have the
19 Court's indulgence for one second? I might be able to fix it.

20 THE COURT: Sure. Counsel, are you all trained in the
21 computer that we're talking about?

22 ATTORNEY HUBRICH: I'd like these marked Defendant's Exhibit
23 1, and both of these as Exhibit 2.

24 (WHEREUPON, Defendant's/Fortune Exhibits 1 and 2 are marked
25 for identification.)

1 ATTORNEY HUBRICH: I can try to correct it, Judge. If we
2 can continue?

3 THE COURT: Sure.

4 Q So, Deputy Boehler, on the night in question you went out to
5 the scene and you had a body camera on; correct?

6 A Correct.

7 Q And you also had an in-car camera?

8 A Correct.

9 Q And that records everything, both audio and video; right?

10 A Yes.

11 Q And at the end of your shift you turned those over into
12 evidence and they were taken into evidence; right?

13 A Usually we have -- for something like that, yes, we have to
14 make sure that it would be put into evidence.

15 Q And that would have been done in this case?

16 A Yes.

17 Q And that would have been provided to me. And would you be
18 able to identify that if I was to show it to you?

19 A What was provided to you, or that it's my body camera?

20 Q That it's your in-car camera.

21 A I would have to see if it has my name on it.

22 ATTORNEY HUBRICH: Judge, permission to show Deputy
23 Boehler's in-car camera so that she can identify it?

24 THE COURT: To her.

25 ATTORNEY HUBRICH: Sure, Judge. I don't know how to do that

1 in these parameters. Do you want me to use the red computer?

2 THE COURT: Yes. And do you need to have the audio, as
3 well?

4 ATTORNEY HUBRICH: Yes, ma'am.

5 THE COURT: Okay. We are looking for headphones to go
6 with -- if that's what you need to do, we need to be able to do
7 it and not publish to the jury. But that ought to be doable. Do
8 you know -- oh, here comes the calvary. Those are the ones I was
9 sending for. Thank you. Here, we go, Ms. Hubrich.

10 (WHEREUPON, an off-the-record discussion is held at
11 sidebar.)

12 (WHEREUPON, the witness privately watches/listens to disk.)

13 ATTORNEY HUBRICH: Judge, may we approach?

14 THE COURT: Sure.

15 (WHEREUPON, an off-the-record discussion is held at
16 sidebar.)

17 Q So what I've shown you, was that a copy of your video, ---

18 A Yes.

19 Q --- Deputy Boehler?

20 A Yes.

21 Q And if I was to show you clips from that video, would it
22 refresh your recollection as to statements that were made to you
23 that night? If I was to have you individually listen to clips
24 from this video, would that refresh your recollection as to what
25 was said to you that night?

1 A Yes.

2 (WHEREUPON, the witness privately listens to a video.)

3 Q Can you hear it?

4 A Yes.

5 Q So you asked Mr. Porter, Who shot you; do you know who it
6 was?, do you remember what the answer was?

7 A He said, No, I don't know.

8 Q Okay. When you asked Mr. Swibaker, Who shot him?, isn't it
9 true he answered you, I don't know, there's two or three black
10 guys that came through the back door.

11 A Yes.

12 Q That's important information; isn't it?

13 A Yes.

14 Q After you came to the scene, you took Mr. Swibaker to talk
15 to another police officer so that they could get a written
16 statement. Correct?

17 A Correct.

18 THE COURT: Let me just, at this point, the witness can be
19 seated. And, Ms. Hubrich, she's able to answer without needing
20 her recollection refreshed.

21 ATTORNEY HUBRICH: Perfect.

22 THE COURT: So you certainly may be seated at this point.
23 Thank you. And you may proceed.

24 Q And when you took him to the other officer to have him give
25 a statement, you continued to interview Mr. Swibaker; correct?

1 A I believe I asked him some questions. Yes.

2 Q And you asked him, Is it anyone you know?, and he answered,
3 No?

4 A Correct.

5 Q And he said, I don't know their names?

6 A Correct.

7 Q And then he told you, I don't know anything about them?

8 A Correct.

9 Q You also interacted with Marcus Porter on the scene; right?

10 A Yes.

11 Q Did either one of them tell you that they knew who the
12 perpetrators were?

13 A They did not tell me.

14 Q Did either one of them tell you that they recognized any of
15 the perpetrators?

16 A Not that I recall; no.

17 Q Did either of them tell you that they knew they were being
18 robbed for drugs?

19 A Not specifically, no.

20 Q Isn't it, in fact, true that Mr. Swibaker told you, We have
21 no idea why they were robbing us?

22 A He didn't.

23 Q And neither of them told you a story about how they had been
24 robbed 10 days prior?

25 A It was not any prior knowledge to me.

1 Q So, no, neither of them told you that they had been robbed
2 10 days prior?

3 A No.

4 ATTORNEY CORNWELL: Your Honor, I am going to object to
5 that. Lyle.

6 THE COURT: It's already been asked and answered. So do you
7 intend to go into it again?

8 ATTORNEY HUBRICH: I'm complete with my questions.

9 THE COURT: Okay.

10 ATTORNEY HUBRICH: Thank you, Deputy Boehler. And I
11 apologize, you have one more attorney you have to deal with. I'm
12 sorry.

13 THE COURT: All right. Yes, ma'am?

14 ATTORNEY CORNWELL: Thank you, Your Honor.

15 **CROSS-EXAMINATION**

16 BY ATTORNEY CORNWELL:

17 Q Deputy Boehler, you indicated that you were the first to
18 arrive on scene when you were dispatched?

19 A Yes.

20 Q About what time was that?

21 A I do not recall what time that was. It was two years ago.

22 Q If I told you that it was after midnight, would that sound
23 accurate?

24 A Possibly, yeah.

25 THE COURT: Keep up your voices just a little bit. I'm

1 having trouble hearing you. And I'm so sorry.

2 ATTORNEY HUBRICH: I apologize, Your Honor.

3 THE COURT: I'm hoping some of the jurors are having
4 difficulty hearing, because I am.

5 Q And when you're dispatched to a call, that simply means
6 that's when the call came in; correct?

7 A It's what time the call is. Sometimes it's what time the
8 call is received into the center and when 911 is answered. Then
9 they have like a dispatch time, that's what time they tell us to
10 go to it.

11 Q But in no way are you saying the time that you were
12 dispatched is necessarily the time that the incident occurred?

13 A That's just what time it's told to me.

14 Q And we just went through some of the dialogue that you had
15 with Mr. Porter and Mr. Swibaker. But suffice it to say, you
16 were told by Mr. Swibaker two to three guys came in the back
17 door; correct?

18 A Yes.

19 Q And you do an incident report anytime you respond to a
20 scene; correct?

21 A Yes.

22 Q And the purpose of that incident report is to reflect
23 accurate information for instances like this when it's years
24 later and you're having to testify about something that happened
25 years ago?

1 A Yes.

2 Q So it's important to get that information in your incident
3 report correct?

4 A Yes.

5 Q And you did your incident report the night that this
6 occurred? When did you do your incident report?

7 A I believe it was that night before I left. Actually, it was
8 probably at like 6:00 a.m., so ...

9 Q Have you had a chance to review your incident report?

10 A Not recently, no.

11 Q When you spoke to Mr. Swibaker, he told you two to three
12 suspects; correct?

13 A That's what is in there.

14 Q So if you then put in your report subsequently that he told
15 you four people, that would be wrong; correct?

16 A I don't know if there was other video that has more
17 information. That's what I've heard.

18 Q Based on what you've heard.

19 A Based on what I've heard from my body camera video that has
20 been shown to me in here. I have not heard him say four.

21 Q So your incident report would be wrong if that were the
22 case?

23 A If that was the case based on the body camera that you
24 showed me.

25 Q Did you speak to anybody else on scene that night?

1 A As far as?

2 Q Did you speak to other witnesses?

3 A I don't believe I spoke to the neighbors, because there was
4 other officers that were on the scene that spoke to them. I
5 attended to Mr. Weaver. EMS arrived on the scene. Relayed that
6 information. Made notifications to my command staff.

7 I don't recall right now speaking to anyone else from the
8 scene.

9 Q And so at no point did you ever go door to door to speak to
10 neighbors to see if anybody else heard anything/saw anything?

11 A Again, this was two years ago. So not that I recall.

12 Q Thank you.

13 ATTORNEY CORNWELL: No further questions, Your Honor.

14 THE COURT: All right. Redirect?

15 ATTORNEY GLOVER: Yes, Your Honor.

16 **REDIRECT EXAMINATION**

17 BY ATTORNEY GLOVER:

18 Q Just briefly, Officer Boehler. So you stated that both
19 Marcus and David don't know who shot them; is that correct?

20 A That's what they advised.

21 Q Marcus told you four black males?

22 ATTORNEY HUBRICH: Objection, Your Honor. Leading.

23 THE COURT: Sustained. Please don't lead.

24 ATTORNEY GLOVER: Thank you, Your Honor.

25 THE COURT: Yes.

1 Q And could you state for the jury how many individuals Marcus
2 told you were at the incident location?

3 A Four.

4 Q And what was their nationality?

5 A Black males.

6 Q Is it accurate to say that David originally stated two or
7 three, maybe four ---

8 ATTORNEY HUBRICH: Objection, Your Honor. Leading.

9 THE COURT: Let me hear the rest of the question. And don't
10 answer it. Let me rule on it. So let me hear the question.

11 ATTORNEY GLOVER: Thank you, Your Honor.

12 Q Is it or is it not true that you previously stated David
13 said two or three, maybe four?

14 THE COURT: No objection; right?

15 ATTORNEY HUBRICH: No objection.

16 THE COURT: You may answer.

17 Q I'll repeat the question.

18 A Okay, thank you.

19 Q Yes or no, David said he believed it was two or three, maybe
20 four?

21 ATTORNEY CORNWELL: Your Honor, I'm going to object to this
22 because it's an inaccurate reflection of what is in her body cam.
23 That's not in evidence.

24 ATTORNEY GLOVER: It was previously stated on the stand,
25 Your Honor.

1 THE COURT: Overruled.

2 ATTORNEY CORNWELL: No, that is not what was previously
3 stated on the stand, Your Honor.

4 THE COURT: Overruled.

5 ATTORNEY GLOVER: Beg the Court's indulgence.

6 THE COURT: Sure.

7 Q Yes or no, David said it was two or three, maybe four,
8 individuals?

9 ATTORNEY CORNWELL: Objection. Your Honor, if we need to
10 have her refresh her recollection and play the clip, then she
11 should do that. But the testimony ---

12 ATTORNEY GLOVER: The state withdraws that question, Your
13 Honor. No further questions from us.

14 THE COURT: All right. Very well. All right. Recross?

15 ATTORNEY HUBRICH: Thank you, Judge.

16 **RECROSS-EXAMINATION**

17 BY ATTORNEY HUBRICH:

18 Q Your bodycam, you refreshed your recollection, right, with
19 the clips?

20 A That was the in-car.

21 Q In-car, you refreshed that with the clips. Can you testify,
22 did David Swibaker tell you that night, I don't know, there's two
23 or three black guys came through the back door, period?

24 A He did make that statement.

25 Q And that's the only statement that you heard today?

1 A That's the only statement I heard today.

2 Q Do you remember, when you came into the house David Swibaker
3 was standing there, and Joe Weaver was on the ground?

4 A Yes.

5 Q David Swibaker was smoking a cigarette. Do you remember
6 that?

7 ATTORNEY GLOVER: Objection, Your Honor. This is beyond the
8 scope.

9 THE COURT: It certainly does appear to be that way. Will
10 you tie it in?

11 ATTORNEY HUBRICH: No, ma'am, I cannot tie it in.

12 THE COURT: All right. Then sustained.

13 Q Do you remember walking into the house? You testified on
14 direct that you walked into the house and David Swibaker was
15 there.

16 A Yes.

17 Q And Joe Weaver was on the ground. You testified to those
18 things on direct. Correct?

19 A Yes.

20 Q And is there anything further that you remember David
21 Swibaker doing when you walked into that house?

22 A Today, no.

23 ATTORNEY HUBRICH: I have no further questions.

24 THE COURT: All right. Any further cross?

25

RECROSS-EXAMINATION

BY ATTORNEY CORNWELL:

Q Ms. Boehler, Officer Boehler, we've gone over the statement, David Swibaker stated it was two or three suspects. What was he doing when he gave you that statement?

A What was?

Q What was Mr. Swibaker doing as he's giving you this statement?

A I don't recall.

Q Where were you when you took that statement from him, what were you doing when you got the statement from him?

A When I came into the house, I started attending to Mr. Weaver on the floor. So as far as what's going on, my attention is doing other things, so I'm paying attention to this, as well. So as far as what he was physically doing, I don't know.

Q Again, would it help refresh your recollection if you were to look at the clip of your camera?

A If you have the body camera. I don't.

ATTORNEY CORNWELL: Your Honor, I'm going to move on.

THE COURT: All right.

Q Officer Boehler, when you walked in and you saw Mr. Weaver on the ground and you started rendering aid, what is your recollection of Mr. Swibaker's demeanor when you walked into the house?

1 A He seemed nervous and upset.

2 Q Do you recall that he was smoking a cigarette?

3 A Today, no, I don't recall that.

4 Q Do you recall that he was talking on the phone and taking
5 phone calls?

6 A I do not recall.

7 Q And if that were on your body camera, obviously that is a
8 more accurate reflection of what happened that night?

9 A If it's on the body camera, then that's what happened.

10 ATTORNEY CORNWELL: Nothing further, Your Honor. Thank you.

11 THE COURT: Very well, thank you. You may step down.

12 THE WITNESS: Thank you.

13 THE COURT: Call your next witness, please.

14 ATTORNEY GLOVER: Thank you, Your Honor. The state calls
15 Christina Denson.

16 CLERK OF COURT: If you'll please raise your right, and
17 state your full name for the record.

18 THE WITNESS: Christina Nicole Denson.

19 CHRISTINA N. DENSON,

20 having first been duly sworn, was examined and testified as
21 follows:

22 THE COURT: And would you please state your full name again,
23 and spell your first name and then your last name, please.

24 THE WITNESS: Christina Nicole Denson. First name is
25 C-h-r-i-s-t-i-n-a. Last name, D-e-n-s-o-n.

1 THE COURT: Thank you. Your witness.

2 ATTORNEY GLOVER: Thank you, Your Honor. May it please the
3 Court.

4 THE COURT: Yes.

5 **DIRECT EXAMINATION**

6 BY ATTORNEY GLOVER:

7 Q Ms. Denson, how are you today?

8 A Good, how are you?

9 Q Good. If you could remove your mask just a bit so the jury
10 can hear all of your answers. I promise I won't keep you long.
11 Where are you currently employed?

12 A Summerville Police Department.

13 Q What is your current position with Summerville Police
14 Department?

15 A I am the records custodian.

16 Q How long have you been employed there?

17 A Seven years.

18 Q Have you had any other jobs with law enforcement and/or 911
19 dispatch?

20 A I was a 911 dispatcher with Summerville before this position
21 I have now.

22 Q What are your current duties as records custodian?

23 A I maintain discovery records, and I disseminate those
24 records when it's requested.

25 Q What kind of records?

1 A Arrest records, police bodycam video, in-car video and
2 telephone audio.

3 (WHEREUPON, State's Exhibit 2 is marked for identification.)

4 Q I'm showing you an item that has been marked State's Exhibit
5 2 for identification purposes.

6 ATTORNEY GLOVER: Your Honor, may I approach the witness?

7 THE COURT: You may.

8 Q Do you recognize this, Ms. Denson?

9 A Yes, ma'am, I do.

10 Q What is it?

11 A It's a CD disk with an audio.

12 Q What type of audio?

13 A It's the 911 phone call.

14 Q And this was received from Summerville Police Department?

15 A Yes, ma'am. It was received through our dispatch center, a
16 request from law enforcement.

17 Q How do you know?

18 A I listened to it previously.

19 Q Did you create it?

20 A I did.

21 Q How often did you create these?

22 A I create these files on a weekly basis.

23 Q Are these records kept in the ordinary course of business?

24 A Yes, ma'am, they are.

25 Q Were these recordings captured at or near the time the 911

1 call was originally placed?

2 A Yes, ma'am, it was.

3 Q Are your initials on that disk?

4 A Yes, ma'am, they are.

5 Q And when did you put your initials on that disk?

6 A This morning.

7 Q After?

8 A Listening to it.

9 ATTORNEY GLOVER: Beg the Court's indulgence. No further
10 questions, Your Honor.

11 THE COURT: All right. Cross-examination, Mr. Fortune?

12 ATTORNEY HUBRICH: No questions, ma'am.

13 THE COURT: Cross-examination, Mr. Salazar?

14 **CROSS-EXAMINATION**

15 BY ATTORNEY CORNWELL:

16 Q Ms. Denson, when a call comes into 911, is that the time the
17 incident actually occurs or is that just the time that somebody
18 called in an incident?

19 A I'm sorry. Can you repeat the question?

20 Q Sure. When you received a call from 911, that's just when
21 the caller called about the incident, correct; that's not
22 anything reflecting on when the incident may have actually
23 occurred?

24 A Yes, ma'am.

25 Q And as a 911 operator, have you had occasion where people

1 have called hours, if not days, after an incident occurred?

2 A Yes, ma'am, I have.

3 ATTORNEY CORNWELL: Nothing further, Your Honor.

4 THE COURT: All right. Redirect?

5 ATTORNEY GLOVER: Nothing from the state, Your Honor. If I
6 may approach to get State's Exhibit 2?

7 THE COURT: You may. Thank you. You're free to go. Your
8 next witness, please.

9 ATTORNEY GLOVER: State calls Marcus Porter.

10 CLERK OF COURT: Mr. Porter, if you'll please raise your
11 right and state your full name for the record.

12 THE WITNESS: Marcus Porter.

13 MARCUS PORTER,

14 having first been duly sworn, was examined and testified as
15 follows:

16 THE COURT: And if you would state your full name for the
17 record once you get seated, and spell your name, please.

18 THE WITNESS: It's Marcus Porter. M-a-r-c-u-s P-o-r-t-e-r.

19 THE COURT: Your witness.

20 **DIRECT EXAMINATION**

21 BY ATTORNEY OSBORNE:

22 Q All right, Marcus. How many guys broke into your house?

23 A Four.

24 Q All right. Let's get started with -- any doubt about that?

25 A No doubt.

1 Q All right. Where are you from?

2 A Originally?

3 Q Yeah.

4 A Iowa.

5 Q How old are you?

6 A Forty-three.

7 Q I'm just going to ask you some background questions to get
8 you used to talking, get people used to listening to you, okay.
9 You got any kids?

10 A Yes, sir. I have two.

11 Q How old are they?

12 A One is 18 and one is 20.

13 Q If you don't mind, can you move the microphone to you, or
14 maybe scoot up a little bit. Just kind of speak up a little bit,
15 okay. All right. So when did you move to South Carolina?

16 A In 2015.

17 Q What brought you here?

18 A My family.

19 Q You work?

20 A Yes, sir.

21 Q What type of work do you do?

22 A I own my own tree service.

23 Q I'm going to be a pest. Can you move the mic up a little
24 bit closer to you and speak up a little bit more. You're kind of
25 soft-spoken. You said you own your own tree-cutting business?

- 1 A Yes, sir.
- 2 Q Okay. Thanks, that's better. All right. So let's get a
3 couple things out of the way, I'm sure it's going to come up.
4 You got yourself in a little bit of pickle with some pending
5 charges. Is that fair to say?
- 6 A Yes, sir.
- 7 Q All right. I'm going to go through some of them. And if I
8 miss some, I'm sure it will come up. You've got a possession of
9 a pistol charge. You've got distribution of a controlled
10 substance charge within close prox. And I think both of those
11 charges might have stemmed from this incident right here. Is
12 that right?
- 13 A Yes, sir.
- 14 Q You've got, after that, okay, after that, you picked up a
15 PWID, possession with intent to distribute a drug; right?
- 16 A Yes, sir.
- 17 Q Schedule I, II, III?
- 18 A Yes, sir.
- 19 Q Trafficking meth?
- 20 A Yes, sir.
- 21 Q The list keeps going. You've got distribution of meth?
- 22 A Yes, sir.
- 23 Q Distribution of a Schedule I through IV, some kind of, drug?
- 24 A Yes, sir.
- 25 Q All right. Then you got picked up again after that.

1 Stuff's kind of getting bad for you; is that right?

2 A Yes, sir.

3 Q You get a possession of a meth or a cocaine base?

4 A Yes, sir.

5 Q I'm not asking which one. And then you got unlawful
6 carrying of a pistol, I think maybe two guns or something, the
7 allegation?

8 A Yes, sir.

9 Q And that's from November of last year, about right when you
10 were arrested?

11 A On the pistol?

12 Q Yeah. If you don't remember, that's fine. It doesn't
13 matter.

14 A I don't remember.

15 Q Okay. And I don't even know what all those charges add up
16 to, but you're looking at a lot of time.

17 A Yes, sir.

18 Q Is that fair to say?

19 A Yes, sir.

20 Q All right. So, in preparation for trial, you met with two
21 assistant solicitors; is that correct? Well, maybe three,
22 counting Ms. Glover.

23 A For this trial?

24 Q Yeah.

25 A Yes, sir.

1 Q Your first meeting was with Don Sorenson; is that correct?

2 A Yes, sir.

3 Q And you're represented on your charges; you have an
4 attorney?

5 A I do.

6 Q Brady Benoit?

7 A Yes, sir.

8 Q So you, your attorney, Mr. Benoit, and Mr. Sorenson, the
9 former assistant solicitor who had this case ---

10 ATTORNEY HUBRICH: Objection, Your Honor. Leading.

11 THE COURT: Let me hear the whole question.

12 Q You, Mr. Benoit, Assistant Solicitor Don Sorenson, y'all got
13 together and talked about this case on one occasion; is that true
14 or wrong, or am I wrong?

15 A Yes, sir.

16 Q About November the 4th of 2020?

17 ATTORNEY HUBRICH: Objection, Your Honor. Continuing to
18 lead.

19 THE COURT: Don't lead.

20 ATTORNEY OSBORNE: Your Honor, may I approach?

21 THE COURT: You may.

22 (WHEREUPON, State's Exhibit 173 is marked for
23 identification.)

24 Q I'm showing you what's been marked as State's Exhibit 173.
25 Can you take a look at that and tell me if you recognize that.

1 A Yes, sir.

2 Q Did you or did you not enter into an agreement with
3 Mr. Sorenson and Mr. Benoit regarding your testimony in this
4 case?

5 A Yes, sir.

6 Q And does that document encapsulate the contents of that
7 agreement?

8 A Yes, sir.

9 ATTORNEY OSBORNE: Your Honor, at this time I'd seek to
10 admit and publish State's 173.

11 THE COURT: Any objection from Mr. Fortune?

12 ATTORNEY HUBRICH: Just relevance, Your Honor.

13 THE COURT: Mr. Salazar?

14 ATTORNEY CORNWELL: Same objection, Your Honor.

15 THE COURT: Relevance?

16 ATTORNEY CORNWELL: Yes, Your Honor.

17 THE COURT: Overruled.

18 (WHEREUPON, State's Exhibit 173 is admitted into the
19 record.)

20 Q So let's just see if we can attach the way it is and talk
21 about what y'all agreed to. I know that is going to be tough to
22 read. Can you see it?

23 A Yes, sir.

24 Q You can see it? Okay, you've got better eyes than me. Can
25 you read that?

1 A I believe.

2 Q Okay. Well, what if I read it? I can see it. Would that
3 be okay?

4 A Yes, sir.

5 Q The following constitutes the agreement between the
6 attorneys of the government and Marcus Porter, hereinafter
7 referred to as the client. Right?

8 A Yes, sir.

9 Q The agreement. The purpose of this agreement is to provide
10 the government with ---

11 THE COURT: You know you're going to have to slow down,
12 because I really want my court reporter to come back tomorrow.

13 ATTORNEY OSBORNE: I've got a lot I want to get through.
14 Thank you, Judge.

15 THE COURT: You're welcome.

16 Q The purpose of this agreement is to provide the government
17 with an opportunity to assess the value, extent and truthfulness
18 of your information.

19 A Yes, sir.

20 ATTORNEY HUBRICH: Objection, Your Honor. Improper
21 bolstering of this witness.

22 THE COURT: Overruled.

23 Q This is not a cooperation agreement; is that correct?

24 A Correct.

25 Q Client has agreed to provide the government with statements

1 and information and to respond to questions so that the
2 government may evaluate the client's statement and other
3 information in making prosecutive decisions.

4 A Yes, sir.

5 Q Provided client is truthful and described above, remaining
6 terms of the agreement are as follows. So now we're getting into
7 it meat of it. No statements made or other information provided
8 or information derived therefrom by you will be used against you
9 in any matter. Right?

10 A Yes.

11 Q You, Marcus Porter, is hereby informed and understands that
12 this agreement does not extend to any statements or other
13 information involving the client being involved in a homicide or
14 other acts of extreme violence.

15 A Yes, sir.

16 Q What is your understanding of the agreement that you entered
17 into with Mr. Sorenson, which I've said -- all right, we'll keep
18 it going -- and your attorney?

19 A That that right there gives the state the information that
20 they need, and whatever I say here can get used against me later
21 on down the road. So whatever I say here can be used against me.

22 Q In reference to your drug charges?

23 A Yes, sir.

24 ATTORNEY HUBRICH: Objection, Your Honor. Leading.

25 THE COURT: Don't lead.

1 Q Well, what would be used against you?

2 A I can't think of anything else. Judgment.

3 Q Okay. Or could information be used against you to prosecute
4 you for those drug charges?

5 A Since I have pending charges?

6 Q Right.

7 A Yes, sir.

8 Q Okay. All right. So let's get into January of 2019. Where
9 were you living then, what was your address?

10 A [REDACTED] Myrtle Place.

11 Q What subdivision was that in?

12 A It's in Robynwyn.

13 Q And did you have a roommate back then?

14 A I did.

15 Q And who was that?

16 A David Swibaker.

17 Q All right. How did you meet David?

18 A Through his girlfriend.

19 Q Do you remember her name?

20 A Jamie Middleton.

21 Q Okay. And so y'all were roommates. It was just you and
22 him?

23 A Yes, sir.

24 Q Okay. So this happened in January of 2019. So about when
25 did David move in?

- 1 A I believe it was June of 2018.
- 2 Q Okay, so we're looking at about six or seven months?
- 3 A Yes, sir.
- 4 Q All right. Let's talk about Joe Weaver. Did you know
- 5 him -- did you have a nickname for him?
- 6 A J.B.
- 7 Q J.B. How would you describe your relationship with J.B?
- 8 A J.B. was a genuine friend. There's not many out there.
- 9 Q And how and when did you first meet J.B?
- 10 A He was one of the first people I met when I moved here in
- 11 2015.
- 12 Q Okay. How is it that you came about meeting J.B?
- 13 A Through his son, Steven.
- 14 Q Were you and Steven on the same age level, or were you and
- 15 J.B., or how did that work out?
- 16 A J.B.'s just a few years older than me, and so obviously
- 17 Steven's a little younger than I am. But J.B. and I had, we
- 18 clicked just like that, anyway.
- 19 Q Was he the type of friend that you'd just kind of talk to
- 20 and run into every now and then, or did he actually come to your
- 21 house and hang out with you?
- 22 A No, he'd come to the house and hang out.
- 23 Q Do you know if J.B. carried a pocketknife?
- 24 A I believe he did. I don't know for a fact.
- 25 Q Okay. Had you ever you seen him with one before?

1 A Yes, sir.

2 Q All right. So, and, I mean, this kind of comes to the
3 agreement and the questions that I'm going to ask you here. Is
4 it fair to say, that back in 2019, that you were involved in
5 selling marijuana?

6 A Yes, sir.

7 Q Now, were you like, you know, some kind of big, heavy
8 pusher, pounds?

9 A No, sir. I'd say penny pusher, if that. Just for extra
10 cash.

11 Q All right. Let's get right into why we're all here. Going
12 back to the night of January 27th, going into the night or the
13 early morning hours of January 28th, 2019, were you home that
14 night?

15 A Yes, sir.

16 Q And who else was with you?

17 A J.B. and David Swibaker.

18 Q J.B. and David?

19 A Yes, sir.

20 Q And did you have a dog at that time?

21 A Yes, sir.

22 Q Was your dog there, too?

23 A My dog was with me.

24 Q All right. So about your dog, how long had you had him?
25 Or, was it a boy or girl?

1 A It was a boy.

2 Q And how long had you had him it?

3 A Four to six months.

4 Q How did that come about?

5 A He was a stray that took a liken to me and I couldn't get
6 rid of him, I couldn't shake him. Fell in love with him.

7 Q Did he just show up one day, or did you pick him up on the
8 side of the road?

9 A He just showed up.

10 Q Well, I mean, I guess we might as well go ahead and get this
11 out there. What was the dog's name?

12 A It was -- pardon the Court -- it was motherfucker.

13 Q That's quite an enduring name. How did he get that name?

14 A Like I said, I was trying to shake the dog. I like dogs,
15 right, but I wasn't at a point in my life where I needed a dog.
16 So I'm like, Get out of here, motherfucker; come on,
17 motherfucker; let's eat, motherfucker. Next thing I know, he
18 started responding to it.

19 Q Was he an inside dog or was he an outside dog?

20 A He was an inside dog.

21 Q At one point did you even try to call animal control to get
22 rid of him?

23 A Yes, sir.

24 Q And what happened then?

25 A They showed up, and I couldn't. I couldn't. He hung out.

1 Q He wouldn't leave?

2 A Uh-uh.

3 Q All right. You said he was an inside dog. Where did he
4 sleep?

5 A In my bed.

6 Q All right. Going back to the night of the incident, you
7 said J.B. came by. Why was it that he came by?

8 A Main reason, I mean, to hang out and to show off his moped.

9 Q Okay. You said show off his moped. Was he particularly
10 happy about it?

11 A Quite. Yes, sir.

12 Q Was it a new purchase, or something he had for a while?

13 A It was a new purchase.

14 Q And this was a normal occasion, for him to come by?

15 A Yes, sir.

16 ATTORNEY OSBORNE: Your Honor, may I approach?

17 THE COURT: You may.

18 (WHEREUPON, State's Exhibit 32 is marked for
19 identification.)

20 Q All right. I'm showing you what's been marked as State's
21 32. Can you take a look at that and tell me if you recognize
22 that.

23 A Yes, sir. That's J.B.'s moped.

24 Q And did you see it that night?

25 A Yes, sir.

1 ATTORNEY OSBORNE: Your Honor, at this time we'd seek to
2 admit State's 32, and publish for the jury.

3 THE COURT: All right. Counsel, have you seen it, and is
4 there any objection?

5 ATTORNEY HUBRICH: Can I take a look at it real quick.

6 ATTORNEY OSBORNE: Your Honor, for the record, we have
7 provided both defense attorneys a copy of all of the exhibits
8 that we plan on introducing.

9 THE COURT: All right. Any objection, Ms. Hubrich?

10 ATTORNEY HUBRICH: No objection, Judge.

11 THE COURT: Ms. Cornwell?

12 ATTORNEY CORNWELL: No objection, Your Honor.

13 THE COURT: All right. Exhibit is in evidence.

14 (WHEREUPON, State's Exhibit 32 is admitted into the record.)

15 ATTORNEY OSBORNE: And, your Honor, I'd also request, if I
16 can go off my computer here, I can move through a lot of these
17 pictures a lot faster fighting the ELMO.

18 Q Okay, so that's 32. State's 32 is what I'm showing you now.
19 That's J.B.'s moped?

20 A Yes, sir.

21 Q And where is that parked?

22 A It's in my driveway at [REDACTED] Myrtle Place.

23 Q All right. So I'm going to ask you to sort of provide the
24 jury with sort of like a visual layout of what your house looks
25 like, okay. When I'm going through the front door and I first

1 walk in through the front door, what am I looking at there?

2 A It's, right when you walk in, there's a fish tank on the
3 left. And it's an open concept, living room, dining room and
4 kitchen all in one. Right when you walk in, there would be a
5 fish tank right when you walk in. And the living room would be
6 like a sofa, loveseat and a coffee table. And that's all
7 carpeted. And then there's like a linoleum floor separating the
8 dining room from the kitchen.

9 Q Okay. So when you walk in through the front door, you're in
10 the living room. Couch is on the right?

11 A Yes, sir.

12 Q And then you keep going straight, you get into the kitchen?

13 A Yes, sir.

14 Q Is there a back door to the kitchen?

15 A There is, and the back laundry room.

16 Q And then I assume there's a hallway?

17 A Yes, sir.

18 Q All right. When you go down the hallway what rooms or doors
19 do we have going down the hallway?

20 A So when you come in, there's only, you can only turn left or
21 go straight in towards the kitchen and the back door. You go
22 down the hallway, and the first room on the left would be where
23 David Swibaker was staying. And then the next door would be on
24 the right, and that's the bathroom.

25 Q Okay.

1 A And then keep going to the end of the hall, be the right, it
2 would be the master bedroom. And the left would be like an
3 office/storage area.

4 Q Okay. Going down the hallway, Swibaker's the first room on
5 the left?

6 A Yes, sir.

7 Q Right across, the bathroom?

8 A Yes, sir.

9 Q Keep going, your room is to the right?

10 A Yes, sir.

11 Q And then just a spare room to the left?

12 A Yes, sir.

13 Q All right. Well, let me ask it like this. Let's get into
14 the incident now. Just prior to the individuals making entry
15 into your home, where were you, your dog and David and J.B.
16 positioned in the home?

17 A I was sitting on the couch with the dog. J.B. was standing
18 up in the living room putting on his clothes, or his gloves and
19 stuff, because it was chilly that night. And David was in the
20 kitchen working on something, on some wood, a piece of wood.

21 Q You said J.B. was putting on his gloves. Was he getting
22 cold or was he about to leave?

23 A J.B. was on his way out the door.

24 Q Okay. Y'all were sitting there, you told us where you're
25 all at. Tell the jury what happened.

- 1 A Roughly around 12:00 I heard a big old boom, and that's when
2 some guys started coming in.
- 3 Q Okay. Where did the boom come from?
- 4 A The boom came from the back door by the, behind the,
5 kitchen.
- 6 Q Okay. The kitchen and then the back door?
- 7 A Yes, sir.
- 8 Q And the back door leads to the back of the house?
- 9 A To the backyard.
- 10 Q Okay. You heard a boom and they started coming in?
- 11 A Yes, sir.
- 12 Q How many people came in?
- 13 A Four.
- 14 Q Were they armed?
- 15 A Yes, sir.
- 16 Q All right. What happened when the four individuals -- and
17 when I say armed, what were they armed with?
- 18 A They were armed, they were all armed, with pistols.
- 19 Q All right. When the four subjects came in what did they do?
- 20 A They started screaming for us to get down on the ground.
- 21 Q Okay. They come in, telling everybody, screaming, Get down
22 on the ground. What do y'all do?
- 23 A I was still in a shocked stage. And the dog took -- the dog
24 didn't hesitate.
- 25 Q What did the dog do?

1 A The dog did his job and tried warning them off. He started
2 barking and sniffing. And I don't know if he got at them, but he
3 got -- he got shot.

4 Q Okay. He was going after them?

5 A Yes, sir.

6 Q How many shots went off, I guess, that shot the dog?

7 A Probably two.

8 Q Or ---

9 A Two.

10 Q And I'm going to ask this follow-up question a lot, okay.

11 A Yes, sir.

12 Q You believe it was two or you know it was two?

13 A I believe it was two.

14 Q All right. The first two -- well, did they all come in, you
15 know, was it all four at the same time, or were they staggered in
16 some way?

17 A I mean, all four can't go through the doorframe at once so,
18 I mean, they all came in one at a time, single file.

19 Q Okay. So it wasn't like there was a gap in between them?

20 A No, sir.

21 Q Together? Yes?

22 A Yes, sir.

23 Q Okay. And were you able to ascertain, or do you know, of
24 the four individuals -- and we'll just go one, two, three,
25 four -- do you know which one of the four shot the dog?

1 A No, sir.

2 Q Okay. Could have been the second guy?

3 A Yes, sir.

4 Q Could have been the first guy?

5 A Yes, sir.

6 Q Third guy?

7 A Yes, sir.

8 Q Maybe even the fourth guy?

9 A Yes, sir.

10 Q Okay. All right. So they come in. The dog attacks them.
11 The dog is shot. What does the dog do?

12 A He ---

13 Q After being shot?

14 A After being shot, he crawled off into a bed, our bed.

15 Q Went to your bed?

16 A Yes, sir.

17 Q All right. Well, what happened then?

18 A Then I could tell, whenever -- I don't know, it just seemed
19 like everything changed then after the gunshots went off. I
20 mean, everything happened fast anyway, so I really didn't get a
21 feel on what was going on. However, when the guns went off, it
22 just changed everything.

23 I mean, then they started asking for weed. I don't know who
24 it was, but one of them, maybe even all of them, were screaming,
25 Where's the weed; where's the weed?

1 Q Where's the weed; where's the weed?

2 A Yes, sir.

3 Q Okay. So we've got the four guys in there, everybody's
4 screaming, Don't know; Where's the weed. The dog's shot. What
5 happens with you? What happens then?

6 A With me? Can I get a glass of water, please?

7 THE COURT: Yes, you can get water. Hold on. We'll get you
8 some water.

9 THE WITNESS: Thank you.

10 (WHEREUPON, an off-the-record discussion was held in open
11 court.

12 Q All right, Marcus. Okay. So did they peel off in any way?
13 Were there some guys with you; some guys doing other things?

14 A Yes, sir. I lost track of David. I mean, I seen him right
15 when the door got kicked and I knew he was in the kitchen. After
16 that, I didn't, he went somewhere else, I didn't know where he
17 went.

18 And J.B. was the closest to them guys, and they were
19 screaming, Get on the ground. And I believe I was still on the
20 couch whenever they come in, shocked, basically. And like I
21 said, J.B. was right in front, front row with them. And they had
22 him get down on the ground.

23 Q Okay. Did J.B. get on the ground?

24 A He complied. Yes.

25 Q Okay. Did he ever get back up?

- 1 A No, sir.
- 2 Q Okay. At a certain point did J.B. make any attempts to
3 try -- well, we'll go from there. All right. So he's on the
4 ground. What happens then?
- 5 A He got kicked in the face.
- 6 Q Okay. Prior to being kicked in the face did J.B. do
7 anything to try to diffuse the situation?
- 8 A Yes, sir, he did.
- 9 Q What did he do?
- 10 A He tried -- J.B.'s a big guy so he's, I don't know, kind of,
11 you know, he's intimidating size. And I guess he just tried to
12 make them feel at ease, tried to tell them, Hey, I can get you
13 some; I don't know about any weed that's here, but I can get you
14 some. You know. But he just tried to diffuse the situation.
- 15 Q In what way? What did he do then?
- 16 A By offering up whatever he had in his wallet, whatever weed
17 he had, and told them he would make some phone calls for them and
18 he can get them some if they needed some weed that bad.
- 19 Q How was that received amongst the guys that were in there
20 doing the burglary?
- 21 A They accepted his wallet. They took the wallet, so.
- 22 Q Did that appease them?
- 23 A No, sir. No, sir.
- 24 Q Okay. Was J.B. doing anything to close the gap between
25 him ---

1 A Yes, sir. As he was speaking he was, like, easing forward,
2 I suppose.

3 Q He was getting closer to them?

4 A Yes, sir.

5 Q What was going on through your mind when you saw J.B., as
6 big as he was, inching toward them?

7 A I just knew J.B. was going to get them. Big boy. I just
8 knew he was going to save the day if he would have got his hands
9 on them.

10 Q Was there something that stopped him from saving the day?

11 A Yes, sir.

12 Q And what was that?

13 A A gunshot.

14 Q How many times was he shot the first time?

15 A He was shot one time the first time.

16 Q And do you know if the same guy that shot your dog was the
17 same guy that shot J.B?

18 A No, sir.

19 Q After J.B. was shot did you hear any comments that were made
20 from the crowd in reference to J.B. being shot?

21 A Yes, sir. The timeline, I'm not 100 percent on because
22 everything happened so fast, but I know I heard -- like -- sorry.

23 Q It's okay.

24 A They, as in them four, whoever came in, it was like -- I
25 can't even recall at this moment. I'm sorry.

1 Q That's okay, that's okay. When J.B. was on the ground --
2 and I want to make sure that I got -- You know, as you remember
3 it, was it him being shot that put him on the ground?

4 ATTORNEY HUBRICH: Objection, Your Honor. Leading.

5 Q Or did he get on the ground on his own accord?

6 THE COURT: You may answer.

7 A He got shot. That's all I know.

8 Q And again, I'm going to say this again. I know I already
9 said it once. If you don't remember ---

10 A Yes, sir.

11 Q --- say you don't remember, okay. Don't let me or anybody
12 else put words in your mouth.

13 A Yes, sir. Can I go back and say I don't remember?

14 Q What do you want to correct?

15 A I would like to correct, I don't know if it was the first
16 gunshot that put him down or if he complied that put him down.

17 Q Okay. Okay.

18 A Sorry.

19 Q No, don't be. So at some point he's on the ground. Now,
20 you had said that he had got kicked, and then I interrupted you.

21 A Yes, sir.

22 Q How did that go down?

23 A Like I said, he's big. When he's on the ground you better
24 keep him on the ground, and I guess they knew it. So I can't
25 recall, like I said, if it was the gunshot or him being

1 compliant, but someone kicked him in the face and knocked him out
2 cold.

3 Q One of the guys kicked him in the face while he was on the
4 ground?

5 A Yes, sir.

6 Q Did they say anything after they kicked him?

7 A Yes, sir.

8 Q What did they say?

9 A Said, I know it hurts, I know that shit hurts.

10 Q I know that shit hurts?

11 A Yes, sir.

12 Q All right. So is it fair to say you don't you know, you
13 mentioned earlier that you don't know, what David was doing ---

14 A Yes, sir.

15 Q --- or words such as that? Do you know how many individuals
16 were with you at that time with J.B. on the ground and you in the
17 living room?

18 A No, sir.

19 Q What happened next with you?

20 A With me? With J.B. on the ground, it felt like he was
21 knocked out forever. But with J.B. on the ground, someone
22 snatched me up and led me back the hallway to the master bedroom.

23 Q Okay. So you end up going into your master bedroom?

24 A Yes, sir.

25 Q Is one individual escorting you? Two? All four? Three?

1 A One in front and one behind me.

2 Q Okay, so they kind of had you sandwiched?

3 A Yes, sir.

4 Q One in front, one behind?

5 A Yes, sir.

6 Q All right. When you end up getting into your room, what

7 happens?

8 A Well, I see my dog on the bed shot, dying. And they were

9 screaming, Where's the weed; just give us the fucking weed.

10 Excuse my language. And I still kind of kept telling them, Well,

11 there is none, there is no weed.

12 But I kept it in a jar and I had the jar, and it had, you

13 know, it was empty, basically, maybe some crumbs. And that's

14 what I handed them. And they got pissed about it.

15 Q All right. So where were the crumbs kept?

16 A In the jar.

17 Q In a mason jar?

18 A Yes, sir.

19 Q And you said you handed it to them?

20 A Yes, sir.

21 Q Okay. Now let's see if we can get a little bit of a

22 description here, as best you can remember.

23 A Yes.

24 Q There's two guys in the room with you at this point?

25 A Yes, sir.

1 Q And you hand them a mason jar?

2 A Yes.

3 Q Of the two individuals, can you tell me anything about them
4 so that we can kind of understand who did what while y'all are in
5 the room? Description-wise.

6 A Description-wise, it was the light-skinned guy that was in
7 there, he was kind of like the take-charge guy. And then the
8 dude with the purple shoes, he was the one I handed the jar to.

9 Q Okay. The guy with the purple shoes that you handed the jar
10 to ---

11 A Yes, sir.

12 Q --- was he skinny? Was he fat?

13 A He was fat.

14 Q He was fat?

15 A Yes, sir.

16 Q He was a fat guy, and you said he had purple shoes.

17 A Yes, sir.

18 Q Did you notice if he had anything covering his hands or not?

19 A I believe he had gloves on. Actually, I know he had gloves
20 on.

21 Q How do you know that?

22 A Because I distinctively remember it being kind of comical,
23 him digging his fat gloves in the jar and then trying to hold his
24 coat pocket out. And he was just flimsy with it.

25 Q Okay. So he was trying to empty it into his jacket pocket?

1 A Yes, sir.

2 Q And you said fat gloves. So these weren't like, you know,
3 like Isotoner gloves or something, they weren't real skinny; they
4 were like fat, heavy gloves?

5 A Yes, sir. Yes, sir.

6 Q Okay. I mean, you had more marijuana than that, but that's
7 what you told them you had; is that right?

8 A Yes, sir.

9 Q Okay, okay. So, all right, and they're not happy. What
10 happens then?

11 A So after that, like you said, they're not happy, and they
12 start pushing me towards, back towards, the living room. And
13 they shoved, and one of them tripped me up as I was going down
14 the hall.

15 And I had just, I had just had a cast put on my wrist so I
16 was kind of one-handed at the time. Whenever I was going down, I
17 was going down fast.

18 So I got pushed to the ground and landed basically
19 face-to-face with J.B. And that's when they started getting
20 pissed, and said, If someone don't come up with some weed I'm
21 going to start killing motherfuckers in here.

22 Q Okay. Now, when you were in that back room and there were
23 two guys with you ---

24 A Yes, sir.

25 Q --- do you know what the other two guys that broke in your

1 house were doing?

2 A No, sir.

3 Q Do you know what David was doing at that time?

4 A No, sir.

5 Q When you left the room and then you were pushed down, you
6 said that you fell down and you were literally face-to-face with
7 J.B.

8 A Yes, sir.

9 Q Was he conscious at that time? Was he talking?

10 A He was incoherent but he was alive. He was trying to say
11 something, but I couldn't understand what he was saying.

12 Q All right. So the threat is made. Do you know who made the
13 threat, Y'all give it up or we're going to start shooting mf'ers
14 in here?

15 A No, sir.

16 Q When that's said, I mean, you then go back in the room and
17 get the weed; right?

18 A Sir?

19 Q When that's said, you then go back into that master bedroom
20 and get your weed and bring it back out to them; right?

21 A No, sir.

22 Q No, you didn't; did you?

23 A No, sir.

24 Q What did you say?

25 A Do what you gotta do.

- 1 Q What happened then?
- 2 A They shot J.B.
- 3 Q While he was on the ground?
- 4 A While he was on the ground.
- 5 Q Do you know how many times they shot him?
- 6 A I know they shot him one more time. So that would have been
- 7 the second gunshot at that point.
- 8 Q What happens then?
- 9 A Then they started just ransacking the place, just tearing
- 10 shit up and just looking all over the place. I don't know what
- 11 they were doing exactly. I know I was trying, trying to figure
- 12 out -- like, I was stunned.
- 13 Q Were you about ready to make your exit?
- 14 A Yes, sir.
- 15 Q What were you doing?
- 16 A I was kind of inching my way towards the front door, trying
- 17 to stay out of their way. Like I said, they was tearing the
- 18 house up.
- 19 Q And then what happened?
- 20 A Then it was, I kept hearing people in the background saying,
- 21 We gotta go, we gotta go; let's go, let's go. Then ...
- 22 Q Let me stop you right there for one second.
- 23 A Yes.
- 24 Q Okay. You said you heard people in the background saying,
- 25 Let's go, let's go?

1 A Yes.

2 Q Do you know if that was, you know, the fat guy who was
3 making that comment?

4 A Do I know if it was him?

5 Q Yeah.

6 A No, sir.

7 Q Do you know if it was the -- how did you describe the other
8 one, light-skinned dude?

9 A Yes, sir.

10 Q Do you know if either one of them were the ones that were
11 making the comments?

12 A I don't believe so. No, sir.

13 Q You don't ---

14 A I don't know if they were.

15 Q Say it one more time. I'm sorry?

16 A Sorry.

17 Q I'm interrupting you. I'm sorry. What did you say?

18 A I said no to the light-skin.

19 Q No to the light-skin?

20 A Yes, sir. He was the one who was going rapid.

21 Q And was it more than one person that was saying, Let's go,
22 let's go, or did it sound like one person?

23 A No, it was more than one person.

24 Q Okay. And you said the light-skinned guy was, you know,
25 kind of ramping up. What happened then?

1 A He tripped. He tripped coming down the hall, and tripped
2 over J.B. coming down the hall. And I think it pissed him off,
3 because he shot him again and then just opened fire, unloaded the
4 clip.

5 Q Was he the only one who was firing, or do you know?

6 A No, he wasn't.

7 Q He was not?

8 A He was not.

9 Q Again, you don't know, you don't know. Do you know how --
10 you know it was more than one, but do you know if there was more
11 than two?

12 A No, sir.

13 Q Okay, so it might have been two? I mean, it might have just
14 been two?

15 A It might have just been three. Yes.

16 Q Might it have been four?

17 A Might have been four.

18 Q You just don't know?

19 A I just don't.

20 Q Okay. All right. What happened then? I mean, you've got
21 to be pretty close to the door at this point. Right?

22 A Yes, sir. I made my way up, got to my feet, and they
23 started shooting. And somewhere in there I took a bullet in the
24 chest. As is -- sorry, let me go back. Well, before I took the
25 bullet, I was watching, I was getting, you know -- I don't know,

1 everything was happening fast.

2 But the same one, the same person, who shot J.B. the three
3 times that I mentioned at that moment, three shots, locked eyes
4 on me and started shooting. But they was all making their way
5 out the back door, and I was making my way out the front door.
6 And I got out, I got out, with only one bullet in me.

7 Q Okay.

8 A And they went out the back.

9 Q They went out the back?

10 A Yes, sir.

11 Q All right. Where were you shot?

12 A I was shot in the chest.

13 Q Okay. Do you want -- can you please stand up and show the
14 jury where you were shot.

15 A Yes, sir. I was shot right here (indicating).

16 Q All right. After you were shot, what did you do?

17 A I made it out the front door, and I ran to my neighbor's
18 house and pounded on their door and finally woke them up, told
19 them to call 911.

20 Q Okay. And when you ran out of your house and you were
21 running to your neighbor's, did you hear any cars leaving?

22 A Yes, sir. Well, before then, before the cars, when I was
23 getting -- there was a fence dividing my house and the neighbor's
24 house, and there's woods behind my house. I heard guys jumping
25 the fence, the chain-linked fence. So I didn't know if they were

1 jumping into the neighbor's yard or behind my house, but I heard
2 all four of them, you know, jumping the fence.

3 Q Okay, so you heard the people jumping the fence, but did you
4 hear a car leaving?

5 A Yes, sir.

6 ATTORNEY OSBORNE: All right. Your Honor, may I approach?

7 THE COURT: You may.

8 Q I'm showing you State's Exhibit 2. Marked for ID before.
9 Can you take a look at that and tell me if you recognize that.

10 A Yes, sir, I do.

11 Q And what is that?

12 A It's the 911 call, a CD of the 911 call.

13 Q That your neighbor made for you?

14 A Yes, sir.

15 Q First, how do you know that's a CD of the 911 call?

16 A Because of my initials, after I listened to it.

17 Q So you actually listened to that CD?

18 A Yes, sir.

19 Q And those are your initials?

20 A Yes, sir.

21 Q And how do you know that that's the 911 call from the night
22 of the incident? Did you or did you not hear your voice on the
23 911 call?

24 A Yes, sir.

25 ATTORNEY OSBORNE: Your Honor, at this time I'd seek to

1 admit and publish State's 2 into evidence.

2 ATTORNEY HUBRICH: Objection, Your Honor. Hearsay in
3 regards to the actual caller.

4 THE COURT: Double hearsay?

5 ATTORNEY HUBRICH: Correct.

6 THE COURT: Sustained.

7 ATTORNEY OSBORNE: You said sustained?

8 THE COURT: Yes.

9 ATTORNEY OSBORNE: Can we approach?

10 THE COURT: Sure.

11 (WHEREUPON, an off-the-record discussion is held at
12 sidebar.)

13 THE COURT: Good time to take our afternoon break. Yes.
14 Ladies and gentlemen, we will take our afternoon break. We will
15 take about 15 minutes. Please remember your social distancing.
16 We're going to take 15 minutes. Step to your jury room.

17 (WHEREUPON, the jury is escorted out of the courtroom at
18 3:59 p.m.)

19 THE COURT: All right. We will take a very short break, and
20 then we'll come back and we will argue the matter.

21 Just be mindful not to discuss your testimony with anyone,
22 because you're on the stand. But you certainly can take a break,
23 as well. Is that clear?

24 THE WITNESS: Yes.

25 THE COURT: Thank you. Very well. We'll take about, I

1 don't know, seven minutes, and then we'll come back. And you'll
2 pull that case for me. Mr. Osborne, you didn't offer it as a
3 business record.

4 ATTORNEY OSBORNE: State that one more time?

5 THE COURT: You didn't offer it as a business record.

6 ATTORNEY OSBORNE: Oh, okay.

7 THE COURT: You did not. Because you had that opportunity
8 because -- but if you have a case, let me see it, okay.

9 ATTORNEY OSBORNE: Okay.

10 THE COURT: Very well.

11 (WHEREUPON, court recessed at 4:00 p.m. and reconvened at
12 4:12 p.m.)

13 MATTERS OF LAW

14 THE COURT: Thank you so much. Please be seated. All
15 right. You got any case?

16 ATTORNEY OSBORNE: Yes, Your Honor. In *State v. Thompson*,
17 420-SC-386 ---

18 THE COURT: Okay.

19 ATTORNEY OSBORNE: --- in that case right there, the
20 prosecutor -- well, actually, the defense said you haven't done
21 enough. They wanted someone to get on the stand and, under 901,
22 authenticate the voice, which is the extra step that I was going
23 to. Not only did we bring it in under, was it 806, the business
24 records, 8036, I thought, Well, since we've been getting a lot of
25 objection let's go above and beyond, let's authenticate that

1 voice, too. So that's why we went ahead and did it on that
2 level.

3 THE COURT: Got it.

4 ATTORNEY OSBORNE: If it's admissible then, then it's
5 admissible now. It doesn't become inadmissible later because
6 we've extra-authenticated it.

7 THE COURT: All right. Anything, Ms. Hubrich?

8 ATTORNEY HUBRICH: Judge, if they're going to identify a
9 voice, it needs to be the person that actually called. If you
10 listen to the 911 call, it's not Marcus Porter, it's another
11 woman, it's the neighbor who called. And so that would be the
12 hearsay objection.

13 THE COURT: Sure.

14 ATTORNEY HUBRICH: I don't know if you noticed, when we went
15 through the 911 dispatcher and you asked if there were any
16 questions, I just sat here because I didn't know what to say at
17 that point. I was a little befuddled why they didn't try to
18 enter it under that person, and that was why I was confused.

19 THE COURT: Sure.

20 ATTORNEY HUBRICH: But at this point now we've got another
21 human being that's actually on this that we don't have a right to
22 cross. I need to bring her here so we can cross her on the 911
23 call. Thank you, Judge.

24 THE COURT: Thank you so much. And you would say the same?

25 ATTORNEY CORNWELL: Yes, Your Honor.

1 THE COURT: Very well. You know, I'm not going to be
2 critical one way or the other. And it is clear that, either it
3 was intended or unintended but it's being offered as a business
4 record, that a 911 tape is a business record. And I gather that
5 there isn't anything other than that.

6 And I suppose, quite frankly, my mind went somewhere like,
7 Okay, so what are we doing; has it been altered in some way; has
8 it been augmented in some way; is there some sort of problem?
9 Apparently there isn't.

10 And it certainly could have been offered as a business
11 record as an exception, as is typically done, and apparently
12 there was no other issue with it. So it's admissible. I'm going
13 to let it in.

14 ATTORNEY OSBORNE: Thank you, Judge.

15 THE COURT: That will teach you to be creative. Just
16 kidding.

17 ATTORNEY OSBORNE: I'm learning the Dorchester flavor.

18 THE COURT: Yes, you are, slowly.

19 ATTORNEY OSBORNE: Thank you, Judge.

20 THE COURT: Very well. Let's have the jury back, please.
21 And we need our witness.

22 (WHEREUPON, the jury is seated in the courtroom at
23 4:18 p.m.)

24 THE COURT: All right. Ladies and gentlemen, at this time
25 we will continue with the state's case and the direct examination

1 of Mr. Porter. Mr. Osborne, you may continue.

2 ATTORNEY OSBORNE: Thank you, Your Honor.

3 THE COURT: You're going to move in the tape?

4 ATTORNEY OSBORNE: Yes, Your Honor. At this time we'd seek
5 to admit and publish State's 2.

6 THE COURT: Very well. Over the objection of the defense,
7 it is admitted.

8 (WHEREUPON, State's Exhibit 2 is admitted into the record.)

9 (WHEREUPON, State's Exhibit 2 is published to the jury.)

10 Q All right, Marcus. So we heard you give a description of a
11 light-skinned guy, and then I think you even testified another
12 guy being heavysset, with purple shoes. Can you tell us anything,
13 anything, about the other two guys?

14 A I remember a pair -- something camo, camouflage.

15 Q In regards to what, clothing or shoes?

16 A Clothing. Yes, sir.

17 Q What about, let's talk about -- I'm going to ask you some
18 questions. Again, don't let me put words in your mouth.

19 A No, sir.

20 Q What about height? The light-skinned guy, was he tall?
21 Short?

22 A He is taller than six foot, I believe, so he is taller than
23 me.

24 Q And how tall are you?

25 A I'm five-foot nine.

1 Q Okay. Thin? Medium? Heavy build?

2 A He was a medium build.

3 Q Okay. And black male?

4 A Yes, sir.

5 Q What age would you put him at, about 20s? Thirties?

6 Forties?

7 A Older 20s.

8 Q Can you tell me anything about his clothes?

9 A Yeah.

10 Q And if you don't know, you don't know. But go ahead.

11 A Wore a pair of black-and-white Nikes. That's about it.

12 Q Okay.

13 A And his eyes.

14 Q And his eyes. What did his eyes look like?

15 A They were a different color. They weren't brown.

16 Q Were they lighter?

17 A Yes.

18 Q Darker?

19 A Lighter.

20 Q Light?

21 A Yeah.

22 Q And what about this heavysset guy, how tall was he?

23 A He was about my height, maybe a little bit taller.

24 Q How tall are you?

25 A Five-foot nine.

1 Q Okay. And you said he was large?

2 A Yes, sir.

3 Q Large guy. Twenties? Thirties? Forties?

4 A Say mid 20s.

5 Q Okay. Anything about his -- you said he had purple shoes
6 on?

7 A Purple Nikes on.

8 Q Anything else that you can remember?

9 A Bulky gloves.

10 Q Bulky gloves.

11 A Coat.

12 Q Okay. And what about the other two, anything?

13 A I remember one of them had camouflage on.

14 Q Okay, I've already asked you that. I'm sorry.

15 A Yes, sir.

16 Q Height?

17 A I don't recall.

18 Q Okay. Do you recall anything about height, weight, anything
19 like that?

20 A No, sir.

21 Q You said on the 911 they were all masked.

22 A Yes, sir.

23 Q Anything about the masks that you can remember, colors or
24 anything like that?

25 A No, sir.

1 ATTORNEY OSBORNE: May I approach?

2 THE COURT: You may.

3 (WHEREUPON, State's Exhibits 26, 33, 34, 69, 76, 79 and 80
4 are marked for identification.)

5 Q All right. I'm going to show you -- well, sorry. I'm going
6 show you 26, 33 and 34, 69, 76, 79 and 80. You just hang on to
7 those.

8 And we're going to kind of take them, so I don't have to
9 keep coming back and forth, we're going to take them one by one,
10 okay. So looking at that, do you see the number that's at the
11 top up there?

12 A The bottom.

13 Q Or the bottom, okay.

14 A Twenty-six.

15 Q Okay. Let's start with, then, State's 26. Do you recognize
16 what that photo depicts?

17 A Yes, sir.

18 Q And what is that?

19 A It's the front of my house.

20 Q It is the front of your house?

21 A At [REDACTED] Myrtle Place.

22 Q Does it appear to you by looking at that photograph that
23 that photograph accurately depicts your residence at [REDACTED] Myrtle
24 Place on the night of the incident?

25 A Yes, sir.

1 ATTORNEY OSBORNE: Your Honor, at this time we'd seek to
2 admit State's 26 into evidence.

3 THE COURT: Any objection?

4 ATTORNEY HUBRICH: No, objection.

5 ATTORNEY CORNWELL: No, Your Honor.

6 THE COURT: Very well. It's admitted.

7 (WHEREUPON, State's Exhibit 26 is admitted into the record.)

8 (WHEREUPON, State's Exhibit 66 is marked for
9 identification.)

10 Q What's the next one you're looking at, is that State's 66?

11 A State's 66.

12 Q All right. States' 66, what are we looking at there?

13 A Back door, the back door, as it was locked.

14 Q The back door to your residence?

15 A Yes, sir.

16 Q Is that door in which the subjects made entry?

17 A Yes, sir.

18 Q Does that photo fairly and accurately depict your back door
19 as you remember it on the night of the incident?

20 A Yes, sir.

21 ATTORNEY OSBORNE: Your Honor, at this time we'd seek to
22 admit State's 66 into evidence.

23 THE COURT: Any objection?

24 ATTORNEY HUBRICH: No objection.

25 ATTORNEY CORNWELL: No, Your Honor.

1 (WHEREUPON, State's Exhibit 66 is admitted into the record.)
2 THE COURT: In fact, any objection to any of those photos?
3 ATTORNEY HUBRICH: Some of them, Judge.
4 THE COURT: Okay, very well.
5 Q All right. State's 34, is that what we've got next?
6 A Yes, sir.
7 Q And what are we looking at in 34?
8 A That would be the view coming in the front door, going into
9 the kitchen of my ---
10 Q Fairly and accurately -- I'm sorry, go ahead.
11 A Of my house.
12 Q Okay, your house. Fairly and accurately depict your house
13 on the night of the incident?
14 A Yes, sir.
15 ATTORNEY OSBORNE: Your Honor, at this time we'd seek to
16 admit State's 34 into evidence.
17 ATTORNEY HUBRICH: No objection.
18 ATTORNEY CORNWELL: No objection, Your Honor.
19 THE COURT: Very well.
20 (WHEREUPON, State's Exhibit 34 is admitted into the record.)
21 Q All right. Next is State's 69.
22 A Yes, sir.
23 Q Okay. What are we looking at here?
24 A That would be a picture of my master bedroom.
25 Q Fairly and accurately depicted as it was that night?

1 A Yes, sir.

2 ATTORNEY OSBORNE: Seek to admit State's 69 into evidence.

3 ATTORNEY HUBRICH: No objection.

4 ATTORNEY CORNWELL: No objection, Your Honor.

5 THE COURT: So admitted.

6 (WHEREUPON, State's Exhibit 69 is admitted into the record.)

7 Q Seventy-nine.

8 A Yes, sir.

9 Q What is that?

10 A It would be the dresser inside the closet of the master
11 bedroom.

12 Q Fairly and accurately depict your dresser on that night?

13 A Yes, sir.

14 ATTORNEY OSBORNE: Seek to admit 79.

15 THE COURT: Any objection?

16 ATTORNEY HUBRICH: No objection.

17 ATTORNEY CORNWELL: None, Your Honor.

18 THE COURT: All right.

19 (WHEREUPON, State's Exhibit 79 is admitted into the record.)

20 Q Seventy-six, what are we looking at there?

21 A That would be a jacket that was in my closet.

22 Q The jacket had something in it; didn't it?

23 A Yes, sir.

24 Q Okay, we'll get to that. Fairly and accurately depict, the
25 photograph, the way it was on that night?

1 A Yes, sir.

2 ATTORNEY OSBORNE: Seek to admit State's 76 into evidence.

3 ATTORNEY HUBRICH: No objection.

4 ATTORNEY CORNWELL: No objection, Your Honor.

5 THE COURT: Very well.

6 (WHEREUPON, State's Exhibit 76 is admitted into the record.)

7 Q All right. Now we get into 80. What is 80 showing?

8 A Eighty shows a picture coming in the master bedroom.

9 Q What else is in that picture?

10 A My bed. My dog.

11 Q Okay. And what state is your dog in at that point?

12 A The dog is dead right there.

13 ATTORNEY OSBORNE: Your Honor, at this time we'd seek to
14 admit State's 80 into evidence.

15 ATTORNEY HUBRICH: Judge, objection. More prejudicial than
16 probative.

17 ATTORNEY CORNWELL: Same objection, Your Honor.

18 THE COURT: All right. Let me see it.

19 (WHEREUPON, State's Exhibit 80 is published to the Court.)

20 THE COURT: All right. Counsel, let me see you at sidebar,
21 please.

22 (WHEREUPON, an off-the-record discussion is held at
23 sidebar.)

24 THE COURT: All right. With regards to Exhibit 80, it is
25 admissible over the objection of the defense.

1 (WHEREUPON, State's Exhibit 80 is admitted into the record.)

2 THE COURT: And I'll put a little more of that on the record
3 forward.

4 ATTORNEY OSBORNE: Thank you, Judge.

5 Q Next you have State's, the one after 80, I think, is going
6 to be 33.

7 A Yes, sir.

8 Q And what are we looking at there?

9 A It's a picture of the living room, like, right when you walk
10 in the door.

11 Q Does that fairly and accurately depict your living room as
12 it was on the night of the incident?

13 A Yes, sir.

14 ATTORNEY OSBORNE: All right. Your Honor, at this time we'd
15 seek to move 33 into evidence.

16 ATTORNEY HUBRICH: No objection.

17 ATTORNEY CORNWELL: No objection, Your Honor.

18 THE COURT: Very well.

19 (WHEREUPON, State's Exhibit 33 is admitted into the record.)

20 Q All right. I'm starting off by showing you State's 26.
21 What are we looking at here?

22 A My watch.

23 Q No, no, no. Look up there on the screen.

24 A Oh, I'm sorry. Twenty-six is a picture of the front of my
25 house at [REDACTED] Myrtle Place.

1 Q And earlier you had stated that this moped over here in the
2 driveway, that belonged to?

3 A It belonged to J.B.

4 Q All right. Now we're showing you State's -- okay, let's
5 take a second here. So we're showing you State's 66 now. And
6 you said this was the back door?

7 A Yes, sir.

8 Q Okay. And this was the back door that entry was made by the
9 four suspects?

10 A Yes, sir.

11 Q Okay. Is the frame of your door damaged?

12 A Yes, sir. Well, it appears, in the picture it appears it
13 is. I don't believe it was.

14 Q Let me show you exactly what I mean. Talking specifically
15 about this area right here of the frame. And I'm pointing next
16 to the deadbolt lock.

17 A Yes, sir.

18 Q Does this seem splintered or damaged in any way?

19 A Yes, sir.

20 Q This seems splintered to you?

21 A I mean, it don't look 100-percent correct.

22 Q Was this deadbolt turned and locked at the time when they
23 made entry?

24 A I'm not sure.

25 Q You're not sure. Okay, fair enough. This door, that door,

1 yes or no, yes or no, has that door been kicked in before?

2 A Yes, sir.

3 Q Okay. All right. Now I'm showing you State's 34. What are

4 we looking at here?

5 A It's a picture of my kitchen and the entryway into my house.

6 Q Say it again? I'm sorry.

7 A I'm sorry. It is a picture of my kitchen and entry, like if

8 you were standing at the front door, looking in.

9 Q Okay, so my back is to the front door?

10 A Yes, sir.

11 Q And then is the door that we just looked at, is that off to

12 the left?

13 A Yes, sir, where the person is.

14 Q Okay. Showing you now State's 69. What are we looking at

15 here?

16 A My master bedroom.

17 Q Do you normally keep your bed in that position?

18 A No, sir.

19 Q Okay. Who did that?

20 A It was not me. It was the guys that came in the house.

21 Q Okay. Okay. Now I'm showing you State's 79.

22 A Yes, sir.

23 Q That's the drawer in your master bedroom?

24 A Dresser drawer.

25 Q Dresser drawer, okay.

1 A Yes, the dresser that was in my master bedroom closet.
2 Q A little bit of weed in there?
3 A Yes, sir.
4 Q Okay. That wasn't the bulk of it; was it?
5 A No.
6 Q All right. Showing you now State's 76.
7 A Yes, sir.
8 Q That was what -- that's your weed right there; right? Or at
9 least that's what was there that night?
10 A Yes, sir. That was there that night. Yes, sir.
11 ATTORNEY OSBORNE: May I approach, Your Honor?
12 THE COURT: You may.
13 (WHEREUPON, State's Exhibit 22 is marked for
14 identification.)
15 Q I'm showing you State's 22. Can you take a look at that and
16 tell me if you recognize that.
17 A It looks like cannabis.
18 Q Yours?
19 A Yes, sir.
20 Q Is this what was in your closet?
21 A I believe so. Yes, sir.
22 Q And this is what you did not tell them was there; right?
23 A I did not tell them. No.
24 ATTORNEY OSBORNE: Okay. I'll go ahead and move it in.
25 Your Honor ----

1 ATTORNEY HUBRICH: Objection, Your Honor. Chain.

2 ATTORNEY OSBORNE: That's fine.

3 Q Now I'm showing you State's 80. What are we looking at?

4 A Master bedroom.

5 Q And?

6 A Picture of my dog.

7 Q This was after he was shot?

8 A Yes, sir.

9 Q Okay. Showing you State's 33. When you testified that
10 after you left your room you were pushed and then you fell, when
11 we're looking at this photograph right here, where would J.B.'s
12 head have been positioned? If you can just describe it.

13 A It would be, it's probably just on the other side of that
14 fish tank.

15 Q Okay.

16 A That's the hallway.

17 Q So he would have been almost in the hallway?

18 A Yes.

19 Q Okay. Would part of his body, or would it not have, been
20 draped across the carpet, too, there?

21 A Yes, sir.

22 Q So are the feet toward the carpet and the head toward ---

23 A Yes, sir.

24 Q Okay. You testified -- well, I don't know if you did, but
25 we heard it on the 911 call -- all four had handguns.

1 A Yes, sir.

2 Q All right. You spoke to the police. And after all of that
3 happened, at some point did you watch the news and hear
4 individuals had been arrested?

5 A Yes, sir.

6 Q Did you see who had been arrested?

7 A Yes, sir, on Channel 5 News.

8 Q Say it again.

9 A Channel 5 news had their faces on there.

10 Q Channel 5 news. Did you recognize anyone from the Channel 5
11 news report of this murder as someone that may or may not have
12 been involved in the incident?

13 A Yes, sir.

14 Q And who was that?

15 A Well, I just recognized -- so let me tell you how I
16 recognized it. It was just from that night. And prior to
17 this I've never seen them before, but I recognized that one I now
18 know as Elijah Green, and then one that I now know as Major.

19 Q Okay. So you kind of said this, but I want to make sure we
20 are clear. You don't know these guys?

21 A No, sir.

22 Q So when you say Elijah Green and Major, you're saying what
23 the news said ---

24 ATTORNEY HUBRICH: Objection, ---

25 A Yes, sir.

1 ATTORNEY HUBRICH: --- Your Honor. Leading.

2 THE COURT: Don't lead.

3 ATTORNEY OSBORNE: Okay.

4 Q Did you know their names prior to that night?

5 A No, sir.

6 Q How did you learn their names?

7 A Through the news.

8 Q Okay. And those were the only two that you recognized?

9 A Yes, sir.

10 Q And when you were telling the story, you had two
11 descriptions. You had a light-skinned guy and you had a large, I
12 think you might have said, fat guy.

13 A Yes.

14 Q Which was Elijah Green?

15 A He was the light-skinned.

16 Q And which was Major?

17 A The fat one.

18 Q With the purple shoes?

19 A With the purple shoes, yes, sir.

20 Q And just a little bit of housekeeping.

21 ATTORNEY OSBORNE: Your Honor, may I approach?

22 (WHEREUPON, State's Exhibit 25 is marked for
23 identification.)

24 Q I don't want to approach too far. I'm just showing you
25 State's 25. Do you recognize that?

- 1 A Yes, sir.
- 2 Q And what is that?
- 3 A It's a .380.
- 4 Q It's a .380?
- 5 A Yes, sir.
- 6 Q Is it your gun?
- 7 A Yes, sir, it was.
- 8 Q And where was this pistol on the night of the incident?
- 9 A In the back of my closet.
- 10 Q Does it work?
- 11 A No, sir.
- 12 Q Did you have the -- well, it doesn't work.
- 13 A No, sir.
- 14 Q So I guess you didn't go for it or anything?
- 15 A No, sir.
- 16 Q What's wrong with it?
- 17 A We took the firing pin out of it.
- 18 Q Oh, so that's one of the reasons why you got charged?
- 19 A Yes, sir.
- 20 Q Housekeeping matters. Did you have surveillance cameras in
- 21 your home?
- 22 A I did.
- 23 Q Were they functional?
- 24 A They were.
- 25 Q I mean, but were they activated?

1 A They were not activated.

2 Q And what are they, are they motion detectors?

3 A Yes, sir.

4 Q So you say not activated. I suppose if they were activated
5 it would have been going off all the time?

6 A Yes, sir.

7 Q So that's why you turned it off?

8 A Yes, sir.

9 (WHEREUPON, State's Exhibit 113 is marked for
10 identification.)

11 Q Do you have State's 113?

12 A I do.

13 Q So what are you looking at in State's 113?

14 A My watch.

15 (WHEREUPON, State's Exhibits 114, 115 and 116 are marked for
16 identification.)

17 Q And State's 114, what is that?

18 A My watch.

19 Q 113 and 114, can you tell, is that the same watch or is it
20 two different watches, or do you know?

21 A Two different watches.

22 Q What about 114, do you recognize 114?

23 A I believe I've seen it.

24 Q Believe you've seen it?

25 A Yes, sir. I can't really tell. I'm not real certain.

1 Q 113 is yours?

2 A Yes, sir.

3 Q You think you've seen 114 but not sure?

4 A Yes, sir.

5 Q What about 115 and 116?

6 A 115 was my old watch.

7 Q And what about 116?

8 A 116 is the same watch, backside of it.

9 Q So just for clarification, 113 is yours; '15 and '16 is
10 yours, is front and back ---

11 A Yes, sir.

12 Q --- and '14, you've seen before, but not yours?

13 A Yes, sir.

14 Q Do you want to see the watches, or are you sure? I mean,
15 I'll show you the watches. You want to see them?

16 A I mean, I'm sure. Of the ones I told you, yes, sir, I'm
17 sure those are mine.

18 Q Okay. I know I'm showing you pictures.

19 ATTORNEY OSBORNE: I'll go ahead and try to move them in
20 now. 113. Your Honor, at this time we'd seek to admit 113
21 through 116 into evidence.

22 THE COURT: Any objection?

23 ATTORNEY HUBRICH: Yes, ma'am.

24 THE COURT: All right.

25 ATTORNEY HUBRICH: One, lack of foundation. No identifying

1 features made of this particular watch at all. Make, model, no
2 way to identify it. These are fungible items.

3 Two, he can't identify 114 at all, he just calls it a watch.

4 And, three, as far as entering the physical watch into
5 evidence, we're missing chain.

6 ATTORNEY OSBORNE: Your Honor, may I approach the witness?

7 THE COURT: You may.

8 Q You mind putting those gloves on right there.

9 (WHEREUPON, State's Exhibit 111 is marked for
10 identification.)

11 Q I'm going to show you State's 111. So in reference to 111,
12 I want you -- you can go ahead and open it, it's only/just a
13 piece of Scotch tape holding it.

14 The watches that are in there, can you take a look at those.
15 And get a good, close look at them. What are the colors of the
16 watches, for everyone else, for later?

17 A Looks like, like a smoke gray, jet black, analog watch.

18 Q You said a smoke gray, black watch. And what's the other
19 one?

20 A Same. It's just a different shade of black, like a shiny
21 black or silverish.

22 Q Two sort-of-black watches?

23 A Yes, sir.

24 Q What color is the other one?

25 A It's a brown leather.

1 Q Which two did you say were yours?

2 A The two black-colored ones.

3 Q I mean, yours like those were your watches?

4 A Yes, sir.

5 Q Like you wore them?

6 A Yes, sir.

7 Q And how long did you have them? And I'm not asking for
8 exact dates. I guess what I'm getting at is like approximations,
9 like, I've had this watch for two days, or, I've had it for a
10 year.

11 A I probably had it six months, roughly. I had it for a
12 little while.

13 Q Both of them?

14 A Yes, sir.

15 Q Do you remember where you bought them from?

16 A This one was given to me. And I'm not exactly sure where
17 the other dialog (sic) came from. But I remember the person who
18 gave me that one.

19 Q Who gave it to you?

20 A His name was Michael Grooms.

21 Q Okay.

22 ATTORNEY OSBORNE: All right, Your Honor. We'll lay the
23 foundation of where they came from later.

24 Q Do you mind kind of putting them all back into bag as best
25 as you can.

1 ATTORNEY OSBORNE: Or, you know what? I'll go ahead and
2 seek that into evidence now, State's 111.

3 ATTORNEY HUBRICH: Same objection, Judge. No identifying
4 features. Lack of foundation. These are fungible objects. And
5 two, chain.

6 THE COURT: Very well. The watches, here's my concern. Two
7 of these watches he knows are his watches. And certainly you had
8 the pictures of the two watches, and now you have the two
9 watches. They're all tossed into 111, right, the watches
10 themselves. His watches, he's identified his watches.

11 I'm not clear about whatever else is in 111, quite frankly.

12 ATTORNEY OSBORNE: Yes, Your Honor. And we can lay the
13 foundation through later testimony on that.

14 THE COURT: All right.

15 ATTORNEY OSBORNE: I just wanted to flush out the objection
16 to the weight, not the admissibility, of the watches.

17 THE COURT: Well, that's correct. But what I'd like to do
18 is go ahead -- so we don't revisit, I would like to move ahead.
19 But you have offered them in evidence. We will call those 111A
20 and 111B. So why don't you pull those.

21 (WHEREUPON, State's Exhibits 111A and 111B are marked for
22 identification.)

23 THE COURT: Put your gloves on and pull those two. And
24 let's mark those as 111A and 111B.

25 ATTORNEY OSBORNE: All right, Your Honor. We may need to

1 get a bag, but I'll make that happen.

2 THE COURT: So we don't slow down, I'm going to give you
3 these cups until you get your bags.

4 ATTORNEY OSBORNE: Thank you, Judge.

5 THE COURT: Be sure you don't publish to the jury the ones
6 that are not in evidence. The two that are in are fine, they are
7 now in.

8 ATTORNEY OSBORNE: Your Honor, I've separated them. We'll
9 put one of the brown watches in a cup, we'll label that as 111C.
10 And then 111A - 111B will be the two black watches that he
11 identified as his.

12 THE COURT: Very well.

13 ATTORNEY OSBORNE: At this time we'd offer them into
14 evidence.

15 THE COURT: Over the objection of the defense.
16 Ms. Cornwell, I just presumed that you would join in the
17 objection. Is that correct or not?

18 ATTORNEY CORNWELL: I have no objection, Your Honor.

19 THE COURT: Very well, you have no objection. Very well.

20 (WHEREUPON, State's Exhibits 111A and 111B are admitted into
21 the record.)

22 ATTORNEY OSBORNE: No further questions.

23 THE COURT: Very well. Ms. Hubrich, cross-examination?

24 ATTORNEY HUBRICH: Yes, ma'am. With the Court's indulgence.

25 THE COURT: All right.

1 just ask, as you leave the courtroom, just be mindful of the
2 social distancing.

3 I'm going to ask everyone else who's in the courtroom to
4 please remain seated while our jurors exit the courtroom and then
5 the courthouse. So have a very good evening. And I look forward
6 to seeing you in the morning at 9:30.

7 (WHEREUPON, the jury is dismissed for the day at 5:08 p.m.)

8 THE COURT: Now, Mr. Porter.

9 THE WITNESS: Yes, ma'am.

10 THE COURT: You are the stand; you are testifying. It is
11 very important that you not discuss your testimony with anyone
12 over the evening.

13 THE WITNESS: Yes, ma'am.

14 THE COURT: Any questions about that?

15 THE WITNESS: No.

16 THE COURT: All right. You can talk about the Yankees, you
17 can talk about the Braves. You just can't talk about your
18 testimony. All right?

19 THE WITNESS: All right.

20 THE COURT: All right. Very well. And you're free to come
21 down.

22 THE WITNESS: Thank you.

23 MATTERS OF LAW

24 THE COURT: Now, I wanted to talk a little bit about the
25 photograph and tell you what I observed and, for the record, why

1 I allowed that photograph.

2 First of all, it is important to observe that the photograph
3 does not show any blood. It's, in terms of the, you know, one of
4 the items that's talked about, the concerns that are talked about
5 in the case are the gruesomeness of the photographs, autopsy
6 photographs, or lots of blood or lots of exposure to bodies, and
7 the things that can happen to folks.

8 With regard to this photograph, it is not a gruesome
9 photograph. It is a photograph of a dog. The dog has made its
10 way to the bed. The dog clearly has died. What is, I think,
11 important about the photograph, understanding that the statute
12 under which this charge was brought, under which this indictment
13 was brought, is 47-1-40(b), and it really is a statute that
14 encompasses torture, torment. And it says, A person who
15 tortures, torments, needlessly mutilates, cruelly kills -- not
16 just kills but cruelly kills -- or inflicts excessive or
17 repeated, unnecessary pain or suffering upon an animal, or by
18 omission or commission, et cetera, causes this to be done.

19 So there would be an argument if the shooting, if there was
20 an instantaneous death, would this statute apply. That's not, as
21 I understand the state's case, that's not their position. And at
22 sidebar we had some discussion about that.

23 What was testified to was that the dog was shot twice, and
24 then the dog crawled into the bedroom, got up on the bed, and
25 that is where the dog died. The dog has shoved himself in

1 between the mattress and the metal, the metal railing of the bed,
2 and his neck is hanging over the metal railing. And I think that
3 there's -- and it is not a gruesome photograph.

4 There is certainly some indication that this animal's death
5 was neither quick, nor pleasant. And so that's the reason I
6 allowed the photograph, because that, because this statute
7 requires torture, torment, et cetera. And so that's the reason I
8 allowed that photograph in.

9 So for the record, I put that on. Anything that the state
10 needs to add to that or that defense counsel needs to?

11 ATTORNEY OSBORNE: No, Your Honor.

12 ATTORNEY HUBRICH: No.

13 THE COURT: Okay.

14 ATTORNEY CORNWELL: Your Honor, there is one thing I need to
15 clarify about.

16 THE COURT: Sure.

17 ATTORNEY CORNWELL: When it came to the watches and you
18 asked me if I had no objection and I said no, I have an objection
19 to your ruling on Michelle's objection; I didn't have an
20 additional objection.

21 I just wanted to note that for the record just so we can
22 preserve the record on appeal. I was just trying not to object
23 to your ruling on the objection.

24 THE COURT: Yes, I understand.

25 ATTORNEY CORNWELL: Thank you, Your Honor.

1 ATTORNEY OSBORNE: No, Your Honor.

2 THE COURT: From the defense?

3 ATTORNEY HUBRICH: No, ma'am.

4 THE COURT: Ms. Cornwell?

5 ATTORNEY CORNWELL: No, Your Honor.

6 THE COURT: All right. I will see you all in the morning at
7 9:30.

8 (WHEREUPON, court recessed for the day at 5:17 p.m., and
9 reconvened at 10:13 a.m. on Thursday, May 13, 2021.)

10 MATTERS OF LAW

11 THE COURT: Yes, ma'am.

12 ATTORNEY HUBRICH: Thank you, Judge. May it please the
13 Court.

14 THE COURT: Yes.

15 ATTORNEY HUBRICH: Judge, I wanted to put something on the
16 record outside the presence of the jury quickly this morning.
17 I've got my client's family who is seated downstairs in the jury
18 assembly room. They are not present in the courtroom.

19 I know that we had -- I think Ms. Cornwell had made a
20 pretrial motion on Friday asking for the families of the
21 defendants to be present in the courtroom since the families of
22 the victims in this case are present in the courtroom.

23 And that pretrial motion was denied and it was denied
24 because there is a statute that requires the Court to allow the
25 victims in the courtroom.

1 The way it was set up yesterday, because of COVID, we've got
2 jurors sitting in the audience; we've got the victims' family, I
3 think, which exceeds between 12 to 15 people sitting on the right
4 side behind the jury. The left side is open. I know that I
5 asked the Court yesterday if my client's family could come up and
6 sit on the left side to show their support, and the Court denied
7 that request.

8 During opening argument/during opening statement yesterday,
9 Ms. Glover, for the state, indicated to the jury that the
10 victim's family was present in the back of the courtroom. They
11 could turn around and look and see the victim's family sitting
12 there. It certainly put in the jurors' minds, Well, the victim's
13 family is here; Where is the defendant's family, would obviously
14 be the next question they would ask themselves. It was
15 prejudicial to my client.

16 And at this point we would again request that this Court
17 allow my client's family, that is present downstairs in the jury
18 assembly room, to be present physically in the courtroom to
19 observe the proceedings and to show their support of my client.

20 THE COURT: All right. I will put on the record, and I'll
21 hear from the state. So here's what we have done specifically
22 for the benefit many of the defendants' family. We had a live
23 feed that is being sent down to the jury assembly room, and that
24 way we do not have to limit, in any regard, the numbers of folks
25 from the defendants' family. And we heard originally numbers

1 like 12 and perhaps more. And that allowed us to be able to
2 accommodate those folks in that regard.

3 Now, obviously there are other folks. Counsel for the case
4 next week wanted to be present. But I certainly accommodated the
5 one lawyer that wanted to be present, up here.

6 But we certainly, the primary concern was to allow the
7 defendant's family the opportunity to hear the proceedings.
8 We've got a camera on the witness stand so that they can hear the
9 witness. I am working the computer up here in addition to the
10 other matters that I am doing so that the sound and the cameras
11 can be activated so that they can see and they can hear.

12 Yesterday I was asked whether or not we could connect you,
13 Ms. Hubrich, onto the teams so that your client could see them
14 because that was a comfort to him, and I'm certainly happy to
15 accommodate your joining onto the team's technology so that he
16 could see his family members and be comforted. And I was
17 certainly happy to do that, as well.

18 I've asked for any authority, there is no authority, for
19 requiring that the defendants' families be present in the
20 courtroom.

21 Now, let me say this, also, and then I'll hear from the
22 state. I wish we never had COVID in this country. There are
23 about 600,000 family -- or, family members of about 600,000
24 people that wish we had never had COVID in this country. We have
25 COVID in this country.

1 And we have the unhappy task of accommodating as best we
2 can. I wish that we had sufficient space to accommodate these
3 defendants' family members being present. It's just simply not
4 practical.

5 And, yes, there are statutory definitions that do
6 differentiate between the family of defendants and the family of
7 alleged victims, without a doubt, and so I am certainly mindful
8 of that. But I'm also mindful that, when defendants are charged
9 with crimes, there are family members that suffer. I certainly
10 get that, and I'm not not empathetic to that.

11 It is simply the reality that, with COVID, we have to make
12 accommodations. And I reached out to the fire marshal for
13 Dorchester County so that we could put more folks in the
14 courtroom. But I am satisfied that we have as many people in
15 this room as we can accommodate appropriately and safely.

16 So I am really sorry for that. And we certainly have
17 accommodated as best we can. And I do apologize that it is the
18 way that it is. But I am happy and excited that our wonderful
19 court staff has been able to do the live feed over the teams;
20 that they've obtained the equipment from the county; and I'm
21 grateful to Dorchester County for providing us with additional
22 equipment so that we can connect the jury assembly room here.

23 I'm so grateful to all of the work of the clerk's office to
24 be sure that the cameras are trained on the witnesses. And I'm
25 so, so grateful that they've been able to do all that they have

1 done so that we can connect the jury assembly room to the
2 courtroom.

3 Anything that the state needs to add to that?

4 ATTORNEY GLOVER: No, Your Honor.

5 THE COURT: Very well. I'll note your exception for the
6 record.

7 ATTORNEY HUBRICH: Thank you, Judge.

8 THE COURT: Yep, thank you. All right.

9 ATTORNEY CORNWELL: Judge, we're just renewing our objection
10 in joining in, just for purposes of the record.

11 THE COURT: Absolutely. And I hadn't had a specific request
12 from you to join the team.

13 ATTORNEY CORNWELL: And we are, your Honor. We got there.
14 And my client's family is able to see.

15 THE COURT: That's wonderful. You're just more geeky than I
16 am.

17 ATTORNEY CORNWELL: Thank you, Your Honor.

18 THE COURT: Okay. Very well. All right. Anything further
19 from the state where we bring the jury out?

20 ATTORNEY OSBORNE: No, Your Honor.

21 ATTORNEY CORNWELL: No, Your Honor.

22 THE COURT: From the Defendant Mr. Fortune?

23 ATTORNEY HUBRICH: No, ma'am.

24 THE COURT: Thank you so much. And we need our witness
25 back, please. Thank you. Mr. Porter, come on back. Marvin, you

1 need to get Mr. Porter some water, please.

2 (WHEREUPON, the jury is seated in the courtroom at
3 10:23 a.m.)

4 THE COURT: All right. Good morning, ladies and gentlemen.
5 (Jury responds.)

6 THE COURT: We are about to continue with the state's case
7 with the cross-examination of Mr. Porter. But I did want to just
8 explain to you, I know you've been in your jury room longer than
9 we all anticipated this morning. There were matters that I
10 needed to handle outside your presence, which is what we've been
11 doing. We haven't been in here telling jokes and having a big
12 time; we've been working. And the hope is that, as we can do
13 pretrial matters, it does help us be more efficient when we
14 begin. And so that's what we've been about.

15 Now, at this time we will continue. And we will continue
16 with the cross-examination of Mr. Porter. On behalf of
17 Mr. Fortune, Ms. Hubrich.

18 ATTORNEY HUBRICH: Thank you, Judge. May it please the
19 Court.

20 THE COURT: Yes.

21 MARCUS PORTER,

22 having previously been duly sworn, retakes the witness
23 stand, was examined and testified as follows:
24
25

CROSS-EXAMINATION

BY ATTORNEY HUBRICH:

Q Mr. Porter, I want to ask you some things that you testified to yesterday. You talked a lot about a light-skinned guy with light-colored eyes and black-and-white shoes. Right?

A Yes.

Q And he was the guy who shot Joe Weaver, that was your testimony. Correct?

A Is that a question?

Q Yes.

A Yes.

Q So the light-skinned guy with the light-colored eyes and the black-and-white shoes, that was the gentleman that shot Joe Weaver; right?

A He shot him three times. Yes.

Q And that was the guy that locked eyes with you?

A Yes.

Q And that was Alijah Green, that was your testimony yesterday; correct?

A Yes.

Q Elijah Green's not on trial today?

A No.

Q You talked a lot about the fat -- and I put that in parenthesis because I think that was your word exactly -- dark-skinned guy with purple shoes. Right?

- 1 A Yes.
- 2 Q And he was the first or second guy in the door, that was
3 your testimony yesterday; correct?
- 4 A Correct.
- 5 Q And that was Devonte Major, that was how you identified him;
6 right?
- 7 A Yes.
- 8 Q And Devonte Major is not on trial here today?
- 9 A No, ma'am.
- 10 Q So the first two guys in the door, you said, were Elijah
11 Green, Devonte Major?
- 12 A Yes, ma'am.
- 13 Q The other two guys, you don't remember anything about other
14 than yesterday you testified one was wearing camo, maybe. Right?
- 15 A Correct.
- 16 Q I'm going to talk to you about some other things you
17 testified to yesterday. You testified about pending charges.
18 Right?
- 19 A Yes.
- 20 Q And, wow, did I hear it right that you've got a possession
21 of drugs charge pending?
- 22 A Yes.
- 23 Q A distribution of drugs charge pending?
- 24 A Yes.
- 25 Q And a trafficking of drug charge pending?

1 A Yes.

2 Q Trafficking's about how much weight you have; right?

3 A I don't know the code.

4 Q Trafficking is a much more serious offense, you do know
5 that?

6 A Yes.

7 Q It means you had a bunch of drugs?

8 ATTORNEY OSBORNE: Objection, Your Honor. She's asking him.
9 He needs to invoke the fifth.

10 THE COURT: I understand. It is cross-examination. You may
11 continue.

12 Q Trafficking means you had a bunch of drugs. Right?

13 ATTORNEY OSBORNE: Objection, Your Honor. Can she just
14 rephrase it to, You are alleged to have had?

15 ATTORNEY HUBRICH: Sure, I can do that.

16 THE COURT: All right.

17 Q Trafficking means you are charged with a crime that alleges
18 that you had a bunch of drugs. Correct?

19 A I don't know the definition of a bunch.

20 Q It's a lot of weight.

21 A I didn't have a lot of weight.

22 Q It's a serious offense?

23 A Yes.

24 Q Carries a lot of time, ----

25 A Yes.

1 Q --- you do know that? Are you familiar with the terminology
2 violent offense?

3 A I've heard it.

4 Q Is trafficking a violent offense?

5 A I'm not sure.

6 Q When did you get charged with that?

7 A Last year.

8 Q So this is 2020. You were charged with that in 2020?

9 A I believe so.

10 Q A year after these allegations here that we're here for
11 today?

12 A Yes, ma'am.

13 Q What did you get charged with first, the possession, then
14 the distribution, then the trafficking? Is that the order it
15 came in?

16 A I'm not sure.

17 Q I think the testimony yesterday was you were out on bond for
18 the charges you picked up from the gun and the drugs you had in
19 your house January of 2019. Right?

20 A I didn't say it yesterday but, yes, I was out on bond.

21 Q Okay. So you get charged from January of 2019 for all this
22 stuff you got in your house, and you're out on bond?

23 A Correct.

24 Q And then you pick up another charge while you're out on
25 bond. Right?

1 A Correct.

2 Q What was that charge?

3 A I don't recall right at the moment.

4 Q It's some sort of drug charge, either distribution or
5 trafficking, and you get out on bond on that; right?

6 A Yes, ma'am.

7 Q And then you pick up another charge?

8 A Yes, ma'am.

9 Q Right? And you get out on bond on that, because you're not
10 in jail today; are you?

11 A No, ma'am. Ankle monitor.

12 Q Would you agree with me, just from your personal experience
13 with the criminal justice system, that a person who keeps getting
14 charged typically ends up in jail with a bond revocation?

15 A I was.

16 Q So you're familiar with the concept of bond revocation?

17 A I am.

18 Q And that means that you violated your bond so you sit in
19 jail until, I don't know, your case is disposed of. You're
20 familiar with that concept; right?

21 A It doesn't necessarily have to be that long.

22 Q But you're familiar with the concept of when you're out on
23 bond and you pick up a new charge you could get your bond revoked
24 and end up in jail?

25 A Yes.

1 Q But that didn't happen to you, because you're sitting here
2 today.

3 A Actually, it did.

4 Q How did you get out?

5 A COVID.

6 ATTORNEY OSBORNE: I'm sorry, I did not hear that. Could he
7 repeat that?

8 THE COURT: The answer?

9 ATTORNEY OSBORNE: Yes, ma'am.

10 THE COURT: The answer was COVID.

11 A COVID.

12 ATTORNEY OSBORNE: Oh, COVID.

13 Q So, did a judge let you out or did the solicitor agree to
14 let you out of jail?

15 A The judge did.

16 ATTORNEY HUBRICH: The Court's indulgence.

17 THE COURT: Yes.

18 Q So you're out on bond on a charge, right, I think it was the
19 charges you got in 2019. And you have an attorney, Brady Benoit.
20 I think that was your testimony yesterday. Right?

21 A Yes, ma'am.

22 Q He's a good attorney; right?

23 A Yes, ma'am.

24 Q And you get your bond revoked. The state says, You messed
25 up so we're going to put you back in jail. Right?

1 A Yes, ma'am.

2 Q And your testimony is you got out of jail because of COVID?

3 A I don't know the particulars of everything.

4 Q Would it surprise you to know that the state ---

5 A I understand that I was, it was me being a nonviolent
6 offender, I fit the criteria.

7 Q Would it surprise you to know that the state actually
8 consented to let you out of jail?

9 A I wasn't aware. I don't know. I don't know the details
10 behind it.

11 Q And yet after you got out of jail you picked up another
12 charge again. Right?

13 A I did.

14 Q And then they didn't move to revoke your bond at that time;
15 did they?

16 A They have not yet.

17 Q And yet your testimony is that the state didn't promise you
18 anything to get you to come here and testify?

19 A That's correct.

20 Q I want to talk to you a little bit more about your testimony
21 yesterday. Would you agree with me that your testimony yesterday
22 was substantially different than your first story on January 28th
23 of 2019?

24 A I'm not sure.

25 Q Could be substantially different?

1 A I'm not sure.

2 Q I want to talk to you about the oath you took yesterday.

3 A Yes, ma'am.

4 Q You said that, you swore to tell the truth; right?

5 A Yes, ma'am.

6 Q You said yesterday you swore to tell the whole truth; right?

7 A Yes, ma'am.

8 Q Yesterday you swore to tell nothing but the truth?

9 A Yes, ma'am.

10 Q The whole truth, doesn't that mean that you wouldn't leave

11 anything out?

12 A I'm not sure of the definition, but I --

13 Q What do you think it means?

14 A I told Mr. Osborne ---

15 Q No. I'm just asking a simple question.

16 A --- everything as I recall it.

17 Q When you say, I swear to tell the whole truth, doesn't that

18 mean that you don't leave anything out?

19 A I'm not sure, but I believe I answered every question.

20 Q What does the whole truth mean to you?

21 A It means just what I said. I mean, I ---

22 Q Does it mean you tell everything, is that what it means?

23 When you say, I'm going to tell you the whole truth, it means I'm

24 going to tell you everything?

25 A Everything that happened. Yes, ma'am.

1 Q Did you want to tell the whole truth to the officers when
2 you spoke to them after this incident?

3 A Did I want to?

4 Q Yes.

5 A Yes.

6 Q Did you want to tell the whole truth to the officers who
7 came to the hospital and spoke to you the night that this
8 incident happened?

9 A I want to.

10 Q And the whole truth means you don't leave anything out;
11 right?

12 A Understand, I was just shot.

13 Q So that's a yes?

14 A My life has not been -- has not been right since, so.

15 Q I understand, my friend.

16 A Thank you.

17 Q The whole truth means you don't leave anything out?

18 ATTORNEY OSBORNE: Objection, Your Honor. Asked and
19 answered.

20 ATTORNEY HUBRICH: Judge, I can't get an answer, a yes or
21 no.

22 THE COURT: Well, one of the things is that you're talking
23 over each other, and so I'm surprised that Cathy hadn't run out
24 of the courtroom as though her hair was on fire. So I'm going to
25 ask you to please allow the question to be asked; and then

1 answered; and don't step on each other. It makes it very
2 difficult for the court reporter.

3 But, yes, please. Cross-examination. You may ask the
4 question again.

5 ATTORNEY HUBRICH: Thank you, Judge.

6 Q So the whole truth, when you spoke to the officer at the
7 hospital, meant that you didn't want to leave anything out;
8 correct?

9 A Correct. It's not that I didn't ---

10 Q I'm sorry?

11 A Excuse me. Correct, I did not want to leave anything out.

12 Q And the whole truth, when you spoke to the officers at the
13 station, meant that you didn't want to leave anything out.
14 Correct?

15 A I was forthcoming. I was forthcoming with everything I
16 knew.

17 Q It's a yes-or-no question.

18 A Could you repeat the question.

19 Q The whole truth, when you talked to the officers at the
20 police station, meant that you didn't want to leave anything out.
21 Correct?

22 A I don't believe I did.

23 Q It's a yes-or-no question.

24 A It's really not, though. Sorry.

25 Q You didn't want to leave anything out when you spoke to the

1 officers at the police station. Correct?

2 A Correct.

3 Q Okay, thank you. You have spoken to law enforcement at
4 least seven times in preparation for this case. Correct?

5 A I'm not sure that's accurate.

6 Q Well, you spoke to Deputy Boehler at the scene, we heard
7 that yesterday. You were in the courtroom yesterday; right?

8 A I was.

9 Q So you spoke to Deputy Boehler at the scene, right, on
10 January ---

11 A I don't recall. I don't remember her.

12 Q Were you present in the courtroom yesterday to hear
13 testimony?

14 A I was.

15 Q And your testimony now is you don't remember talking to her?

16 A To her?

17 Q Right.

18 A That's correct.

19 Q Okay. If I played you audio of you speaking to her, would
20 that refresh your recollection?

21 A I don't know. I don't know, I haven't seen it, you haven't
22 played the audio.

23 Q Are you testifying that you did not listen to all of your
24 prior statements prior to getting on the witness stand and
25 testifying yesterday?

1 A I would say that. Yes.

2 Q I didn't understand your answer. Did you listen to all of
3 your prior statements before getting on the witness stand to
4 testify to this jury today?

5 A No, I didn't.

6 Q No, you did not listen to all of the prior times you spoke
7 to law enforcement?

8 A No.

9 Q Okay. So maybe you spoke to Boehler at the scene. The
10 testimony yesterday was that you did. Right?

11 A From her, yes.

12 Q You then spoke to your neighbor that was related to 911,
13 right, and you heard that yesterday?

14 A Yes.

15 Q You do remember that?

16 A Yes.

17 Q You then were interviewed at the hospital ---

18 A Yes.

19 Q --- by Deputy Jackson and Detective Moy. Right?

20 A I'm not sure who they were.

21 Q But you were interviewed twice at the hospital, two
22 different officers asked you questions, at least. Right?

23 A That night was fuzzy. I remember speaking to someone.

24 Q Okay. So you remember only one, or do you remember two?

25 A I don't know. It could have been one or two, but ---

1 Q Okay.

2 A --- that whole night bled into itself.

3 Q You then went to the police station on February 4th and were
4 interviewed, videoed and gave a third written statement.

5 Correct?

6 A Correct.

7 Q And then you testified yesterday, I think on direct, that
8 you spoke to the solicitor's office on at least three occasions.

9 Correct?

10 A No. I believe it's two.

11 Q Two, okay. So that makes seven.

12 A Okay.

13 Q So I'm going to go back to my first question. So you have
14 spoken to law enforcement at least seven times in preparation for
15 this case today?

16 A I have spoken to them not in preparation but in just
17 answering questions for them.

18 Q Okay. So you've spoken to law enforcement seven times, at
19 least?

20 A Yes.

21 Q You heard Boehler testify yesterday that you told -- that
22 her initial report was that it was two to three black males that
23 were involved. Did you hear that yesterday?

24 A I heard her say Swibaker said that.

25 Q Two to three black males were involved?

1 A Yes, but she said Swibaker told her.

2 Q So, yes, that was what you heard yesterday; right?

3 ATTORNEY OSBORNE: Your Honor, I'm going to object. Those
4 facts weren't in evidence. What Boehler said was that Swibaker
5 said there were two to three, not him. The question is, You
6 heard Boehler say that you said two to three. Well, he never
7 said that. Those facts aren't in evidence.

8 ATTORNEY HUBRICH: That was not my question, but ---

9 ATTORNEY OSBORNE: That's the way I heard it.

10 ATTORNEY HUBRICH: I can repeat it, if you need me to.

11 THE COURT: That would be great.

12 Q So you were present yesterday for Boehler's testimony;
13 right?

14 A Correct.

15 Q And you heard her say that, the initial report, there was
16 two to three black males that were involved?

17 A No. I heard her say it was four.

18 Q You were in here to hear the 911 call?

19 A I was.

20 Q And in the 911 call you were asked, Did you know who did
21 it?, and you answered, No.

22 A Correct.

23 Q And in the 911 call you were asked to describe the men that
24 were involved, and you answered, One was fat with purple Nikes,
25 and one was light-skinned, and that's who shot him. Isn't that

1 correct?

2 A Those are the two I could identify at the moment.

3 Q Did I correctly say what you told the 911 call -- the 911
4 dispatcher?

5 A I never talked to the 911 dispatch.

6 Q But you were here yesterday to hear the 911 call.

7 A I was.

8 Q And in the 911 call you said, One was fat with purple Nikes
9 on, and one was light-skinned, that's who shot him. Isn't that
10 what you told the 911 dispatcher?

11 A No. I never spoke to the 911 dispatcher.

12 Q That's what you said, and that was what was recorded on the
13 911 call that was admitted into evidence yesterday. Right?

14 A I'd have to listen to it again.

15 Q Okay. I'm going to go play you a clip from the 911 call
16 that was admitted into evidence yesterday by the state.

17 (WHEREUPON, State's Exhibit 1 is published.)

18 Q And that's where you said, One was a light-skinned male,
19 that's who shot him. Did I correctly interpret that? Is that a
20 yes?

21 A Can you repeat that original question.

22 Q And that's where you said, That was a light-skinned male,
23 and that's who shot him.

24 A Yes. I believe that -- yeah, that's me talking in the
25 background.

1 Q Thank you. You were asked what they were wearing in the 911
2 call, and you stated you weren't sure, they just all had masks
3 on. Right?

4 A If that's what I said that night, that's what I told them.

5 Q Never once did you mention that any of them had gloves on.
6 Right?

7 A I did not mention that. No.

8 Q Not once did you mention that someone took Joe Weaver's
9 wallet. Right?

10 A Correct.

11 Q Never once --

12 ATTORNEY HUBRICH: Judge, may we approach?

13 THE COURT: Yes.

14 (WHEREUPON, an off-the-record discussion is held at
15 sidebar.)

16 THE COURT: Ladies and gentlemen, I'm going to ask you to
17 please step to your jury room. Please remember, do not discuss
18 this matter; do not allow anyone to discuss this with you. There
19 is a matter that I'm going to take up outside of your presence.

20 (WHEREUPON, the jury is escorted out of the courtroom at
21 10:45 a.m.)

22 MATTERS OF LAW

23 ATTORNEY HUBRICH: Judge, if I may.

24 THE COURT: Hold on one second. I wanted to get the rule in
25 front of me. Okay. Yes.

1 ATTORNEY HUBRICH: Judge, my next question to this
2 particular witness is, Never once did you mention that your house
3 was robbed of drugs and guns ten days prior?

4 I'm going to continue that theme throughout my
5 cross-examination because he never mentions it until he's
6 actually confronted with that information. It's certainly a lie
7 of omission. It goes to his credibility.

8 It is the only reason I'm bringing that in, is because the
9 jury has to determine whether or not he is a credible individual.
10 And the fact that he doesn't tell the police and law enforcement
11 this very relevant information is a lie of omission, and it
12 impeaches his credibility. And because of that, I think I get to
13 ask him that.

14 I do not think it kicks open the door for the state to then
15 argue that my client was somehow involved in the original
16 burglary. I'm not asking about the facts of the original
17 burglary. I'm just bringing it in to impeach his credibility.

18 And I stopped my questioning because I knew that that was
19 going to be objectionable.

20 THE COURT: Let me just say that you did as I asked you to
21 do in chambers, so everyone just be apprised that Ms. Hubrich is
22 following my instructions, because we had talked about this in
23 pretrial motions and she was instructed to do as she has done.
24 So that's really important that that be on the record. So, first
25 of all, thank you for doing that, Ms. Hubrich. And I think our

1 record does need to reflect that you were told to stop before you
2 went here so we can do exactly what we're doing.

3 Now, so you are impeaching him. Tell me why you think this
4 is impeachment, because you must attack his credibility for
5 truthfulness or bias ---

6 ATTORNEY HUBRICH: Right.

7 THE COURT: --- et cetera.

8 ATTORNEY HUBRICH: Part of being truthful is to tell the
9 whole truth. He took an oath to tell the whole truth. He wanted
10 to tell the police officers the whole truth.

11 THE COURT: Okay. What else you got?

12 ATTORNEY HUBRICH: And so, you know, Judge, in a case like
13 this ---

14 THE COURT: Because the whole truth -- your whole truth may
15 not be his whole truth.

16 ATTORNEY HUBRICH: Well, in a case like this, Judge --- and
17 you'll see it ---

18 THE COURT: Let me be clear.

19 ATTORNEY HUBRICH: Right.

20 THE COURT: There may come a time, there may come a time ---

21 ATTORNEY HUBRICH: Right.

22 THE COURT: --- and I don't know this to be true, I don't
23 know whether law enforcement asked him ---

24 ATTORNEY HUBRICH: And that's where I'm going.

25 THE COURT: --- that question.

1 ATTORNEY HUBRICH: At the very next interview, Does anybody
2 have a beef with you? No. Has anybody been to your house, do
3 you sell out of your house? No, everybody likes me. Have you
4 had any prior issues?

5 Because the police can't figure out why they were picked.
6 So specifically it's to get more clear as I go on. As I said,
7 this is a theme that continues. The notes I have, Judge, is that
8 officers at the hospital specifically asked him ---

9 THE COURT: Hold on a second.

10 ATTORNEY HUBRICH: The officers at the hospital specifically
11 asked him, Does anybody have a beef with you? And he said, No.
12 They want to know, Has anybody, has anything like this ever
13 happened before? And he says, I've lived my whole life here,
14 nothing's ever happened like this before. David Swibaker says
15 the same thing.

16 You know, it's definitely, right now, a lie of omission. As
17 we move forward through his interrogation, or his statements to
18 the police, we find that it's actually a lie. He starts
19 physically, actively lying to the police about this prior
20 robbery. I think.

21 Do I actually think a prior robbery happened? No, I don't.
22 I think that that's probably something he makes up.

23 But I think the jury gets to weigh his credibility based on
24 the lie of omission and his actively deceiving police during
25 their investigation. So that's why I want to bring that up.

1 And I don't know if you want me to compound this, but right
2 after that when we talk about the officers bringing him to the
3 station on February 4th I'm then going to ask, May I also ask you
4 about a gentleman by the name of Jaquavious Washington? That's
5 something that you never volunteered to them before.

6 And that's also, that's actually more of a lie of omission,
7 from my perspective, because he then says, Oh, yeah, well,
8 there's this Jaquavious Washington, and I sell drugs to him.

9 And I'm only bringing that in at this point because he's
10 omitted it from every prior interaction with law enforcement
11 until they confront him.

12 But I think that Ms. Cornwell's going to argue that I'm now
13 kicking the door open for -- or, no, the state's going to argue
14 I'm kicking the door open for third-party guilt that they don't
15 want us to get into.

16 THE COURT: All right. Yes, sir.

17 ATTORNEY OSBORNE: Okay. Anybody got a beef with you?
18 Somebody breaks into my house and burglarizes me, I don't have a
19 beef with them. I mean, I don't understand that question. I
20 mean, what they're looking for, which is what I would have asked
21 in my previous life, Do you have arguments with somebody,
22 disagreements with somebody, that somebody would come in here and
23 kill your buddy? That's what they're talking about, that's the
24 question. He doesn't have any.

25 The second thing, Anything like this happen to you before?

1 Well, he's saying, No, nothing like this has happened to me
2 before. They're investigating a murder, they're investigating
3 somebody getting shot right in front of his face, and he's never
4 seen anything like that before. So, no, nothing like that's ever
5 happened to me before.

6 And then I'm getting a little bit confused because I don't
7 know if I would have answered it any differently. I don't know,
8 if I was in his shoes, that I would have been listing every
9 individual that I had sold marijuana to in the past when they're
10 investigating murder.

11 Now, if he said at any point -- I don't know where these
12 questions are going, but if he said at any point -- I don't sell
13 marijuana, game on, impeach away on that.

14 But what I'm hearing for this is nothing more than she's
15 using this as an opportunity to try to bring in evidence that
16 five people burglarized his house before. And let's make no
17 mistake, the argument's going to be it's the same five that did
18 it this night. And that's where she's going with this.

19 I haven't heard anything here that is a lie or an omission.
20 Maybe it's going to come. I haven't heard it with those
21 questions.

22 THE COURT: Let me ask you this question, because here's the
23 get-to. She's going to ask, Were you asked by law enforcement
24 whether or not you had been burglarized in the recent past? I
25 bet you dollars to doughnuts that's coming, right. I think she

1 told me it's coming.

2 ATTORNEY HUBRICH: No. I don't think they ever asked him
3 that specific question, Judge. They asked him if he ever had a
4 beef with anybody. He said no. They asked him, Do you have
5 reason to believe anybody would want to do this to you? He said
6 no.

7 They then asked David Swibaker -- and so this is coming when
8 David Swibaker comes up -- Why would this happen to you? And he
9 says, Nothing like this has ever happened to me before, which,
10 that is definitely inconsistent, so definitely coming up when
11 Swibaker comes up.

12 ATTORNEY OSBORNE: And to that point, this is why -- I think
13 that's close, and I think she could do that, I think that's okay.
14 You told police that nothing like this has ever happened to you
15 before? Yes, I did. But, in fact your house has been
16 burglarized before; hasn't it? Yes, it is. Okay, inquiry's
17 over.

18 ATTORNEY HUBRICH: That's all I want to ask. That's all I
19 want to ask, Judge.

20 ATTORNEY OSBORNE: Well, my issue with it was there were
21 five people that came in here before; somebody was kicked in the
22 face before. Now we're getting into this, why do you get into
23 that? You only get into that to say, Same guys before, same guys
24 now.

25 ATTORNEY HUBRICH: No.

1 ATTORNEY OSBORNE: And if we're doing that, then Swibaker
2 then gets to say, I think it's the same guys that did it before.

3 But if you simply want to say, Police asked you if anything
4 like this ever happened to you before, and you said no but, in
5 fact, your home has been burglarized before, I mean, I think that
6 is impeachment, I think that's game.

7 But it's where that leads, where that argument opens up --
8 again, sandbox, I'm happy to play in. I just don't want to tip
9 my toe in, I want to get dirty. If we're going in that sandbox,
10 let's bring it all out.

11 ATTORNEY HUBRICH: No, ma'am. We're in agreement then.
12 This is moot. I'm not asking about the facts of the prior
13 burglary. I don't want them in. I don't want him to say my
14 client broke into this house prior.

15 All I want is, They asked if you had a beef with anybody,
16 and you said no. You actually then, later on, say, Actually
17 somebody broke into my house earlier and stole drugs and guns.
18 That's all.

19 I don't want to get into the facts. I definitely don't want
20 to know there was five guys and they were all black males and
21 then, low and behold, we think it was the same people. I don't
22 want any of that.

23 If you want me to limit it to -- I mean, I think my question
24 literally ends with this. I think we're all on the same page
25 then.

1 Never once do you mention that your house was robbed of
2 drugs and guns 10 days prior? And then I literally move on to
3 the hospital statement. And that is the exact question I asked
4 three times.

5 And then when he finally admits it, I ask, They asked you if
6 your house had been robbed a couple days before, they tell you to
7 be honest about it. Why do you think they have to caution you to
8 be honest? At this point you finally concoct a story about being
9 robbed 10 days earlier. Now you tell them that your house was
10 robbed of a half pound of weed and two guns. And that is it.

11 And then it goes into, They confront you about a phone
12 number they found in your phone, a phone number for Jaquavious
13 Washington. And that's when he finally mentioned that he sold
14 drugs to Jaquavious Washington.

15 I mean, the thing that -- and then he confronts Jaquavious
16 Washington with, Hey, are you part of this robbery before? If I
17 was to say that, I'd object to that part, because I think that is
18 what -- they don't want us to talk about third-party guilt,
19 because this was actually Jaquavious Washington.

20 ATTORNEY OSBORNE: Again, I don't care.

21 ATTORNEY HUBRICH: Okay. Well, then I can ask all of that.

22 ATTORNEY OSBORNE: If you want to tell that story, I want to
23 tell the whole story. Well, there's a bit of evidence here that
24 I knew was going to be a problem for the state coming into this,
25 and there is a footprint on the back of the door that doesn't

1 come back matching any of the shoes of the four individuals.

2 So how do we explain that? Well, we had a burglary that
3 just occurred 10 days earlier where the door was kicked in.
4 We've got that, I'm satisfied with that. That's how that is
5 explained.

6 I didn't really want to cover it, but we got into it, no big
7 deal. I don't know that any of that really introduces any
8 issues. I don't think we get into third-party guilt with any of
9 that. It's, if we limit it to that, there was a burglary
10 earlier, you didn't mention it. But I'm not sure about that
11 whole beef thing, I don't that really covers, that's not
12 impeachment. Having a beef and then somebody breaking into our
13 house are two totally different things.

14 ATTORNEY HUBRICH: Judge, I don't know what I'm responding
15 to at this point.

16 THE COURT: Hold on a minute, just breathe a second.

17 All right. Review for me the questions that you have that
18 you want to ask.

19 ATTORNEY HUBRICH: Yes, ma'am. I'm sorry, I lost my
20 thought.

21 THE COURT: That's okay.

22 ATTORNEY HUBRICH: The very next question was, Never once do
23 you mention that your house was robbed of drugs and guns 10 days
24 prior.

25 THE COURT: Okay, all right. What is the ---

1 ATTORNEY HUBRICH: Then we go on to his statement at the
2 hospital.

3 THE COURT: Let me stop you. What is the prior inconsistent
4 statement?

5 ATTORNEY HUBRICH: It's omission.

6 THE COURT: Okay.

7 ATTORNEY HUBRICH: He just never tells them that.

8 THE COURT: Okay.

9 ATTORNEY HUBRICH: Then I ask him, Just tell them everything
10 you know. So in the hospital my question is, Again, never once
11 did you mention your house was robbed of drugs and guns 10 days
12 prior.

13 The specific -- and I don't know, this is the problem. He's
14 not reviewed any of his statements to these officers. So I have
15 to get him to say whether or not he said it, and then I have to
16 bring the officer in in my case in chief to bring in their bods
17 to say that he said it.

18 So I've got to confront him with it and get him to say
19 whether or not he said it, and then I have to call the officers
20 in my case in chief, by extrinsic evidence, to show it by
21 extrinsic evidence.

22 I mean, that's one of the reasons why I fashioned my cross
23 this way, because I suspected, and I think I told Your Honor in
24 the very beginning I suspected, this was going to be his
25 testimony, that he hadn't reviewed any of it and he didn't know.

1 And so I was going to need to bring it in with the officers
2 during my case in chief, which is why I scrambled to get them all
3 under subpoena last night.

4 ATTORNEY OSBORNE: The problem with crowbarring that rule
5 into this is that rule envisions a situation where you allowed
6 the witness to either acknowledge or deny a prior statement.

7 THE COURT: That's right.

8 ATTORNEY HUBRICH: Right.

9 ATTORNEY OSBORNE: Well, he wasn't asked that question.

10 THE COURT: That's right.

11 ATTORNEY OSBORNE: So we're talking about an omission. Now,
12 if he was asked, then that's different. But I don't believe he
13 was ever asked.

14 ATTORNEY HUBRICH: Well, he can review the whole thing then,
15 Judge. I mean, he's not my witness, so I didn't have him review
16 everything, but he can review the whole thing, he can review all
17 the stuff he said.

18 ATTORNEY OSBORNE: If she can produce where the detectives
19 asked, Has your house ever been burglarized before?, and he denied
20 it, she can bring that in through extrinsic evidence.

21 But the omission of an answer to which he was never
22 questioned isn't impeachment.

23 THE COURT: So here's the way the impeachment will work.
24 You can ask him, Did you make this statement; Were you asked; Did
25 you say? I'm looking at 613, the witness's prior statement. You

1 do not have to prove it by extrinsic evidence, in fact, you
2 cannot prove it by extrinsic evidence, unless you've given him an
3 opportunity to ---

4 ATTORNEY HUBRICH: Review it.

5 THE COURT: Well, yes.

6 ATTORNEY HUBRICH: That's right.

7 THE COURT: It says, When examining a witness about a
8 witness's prior statement, a party need not show it or disclose
9 its contents to the witness, but the witness must, on request,
10 show it or disclose its contents to an adverse party's attorney.

11 Extrinsic evidence of a witness's prior inconsistent
12 statement is admissible only if the witness is given an
13 opportunity to explain or deny the statement and an adverse party
14 is given an opportunity to examine the witness about it, or if
15 justice so requires.

16 ATTORNEY HUBRICH: Absolutely, Judge, you're absolutely
17 right. And that was the intent. I mean, I can't -- I don't know
18 what he's reviewed prior to coming here to testify. I'm shocked,
19 frankly, that the state didn't have him review it.

20 But, so I have to ask him. And that's why I keep saying,
21 it's a yes or. It's not an I don't know; it's a yes or no.

22 If he says, I don't know, then I have to refresh his
23 recollection with it, which is going to be ridiculous because
24 it's audio, so I have to do what I did with Boehler and take my
25 computer up there and let him listen to it, and the jury is going

1 to be sitting here, you know, kind of waiting, and then I have to
2 ask him isn't that what he said.

3 ATTORNEY OSBORNE: Well, it's not what he said; it's what he
4 didn't say. That's what she wants to get in.

5 ATTORNEY HUBRICH: No. Let me finish my argument.

6 THE COURT: No. No.

7 ATTORNEY OSBORNE: If he asks -- I'll just say, I mean, this
8 is the way to impeach people. If the detective asked the
9 question, Has your house ever been burglarized?, and on his prior
10 statement he did not say that his house was burglarized, then
11 that's impeachment.

12 But I think you alluded to that earlier, and I would agree,
13 I mean, you can't then say, Well, you didn't mention your house
14 was burglarized, therefore, I'm going to impeach you with it,
15 unless he was asked that.

16 I mean, because then how far back are we going to go? Well,
17 I mean, you never mentioned when you were a child that you stole
18 a cigarette. Okay, well, I mean, why not impeach him on that?
19 That's the whole truth, is it not, Mr. Porter, that you're a
20 liar, you're a thief? I mean, where does that end? They're
21 asking him about what happened that night.

22 Now, if she has something, show him that. Mr. Porter, have
23 you ever stole candy before?, and he denied it and she can prove
24 it, then she can impeach him with that and bring in that
25 extrinsic evidence. But the fact that he did not mention that,

1 that's not impeachment, because he was never asked, he never
2 lied.

3 THE COURT: What you're saying is it's not a prior
4 inconsistent statement, is what you're saying.

5 ATTORNEY OSBORNE: That's right.

6 THE COURT: Okay. Yes?

7 ATTORNEY HUBRICH: May I go now?

8 THE COURT: Yes. That's why I made that comment. You can
9 ask him if, in fact, law enforcement specifically asked him, Was
10 your home broken into two weeks ago? and he says no, and that is
11 untrue, that's a prior inconsistent statement.

12 But it's not this business about the whole truth, you've got
13 to tell the whole truth. No, no, no, it's got to be a specific
14 statement that is a prior inconsistent statement. You got one of
15 those?

16 ATTORNEY HUBRICH: Yes, ma'am. That's actually what I was
17 addressing before the state cut me off. I was addressing your
18 question to me about how to impeach prior inconsistent
19 statements. I'm well aware of how to do it. Thank you, though,
20 for the instruction, Mr. Osborne. Yes, there are ---

21 THE COURT: Lower the snark, you two. Go right to it, let
22 me hear it.

23 ATTORNEY HUBRICH: So, yes, there are statements that I will
24 impeach. I know how to do it. It's going to be a mess because
25 it's audio and I'm going to have to ---

1 THE COURT: Tell me what it is, what is the statement? And
2 if you want him to be sequestered while you tell me ---

3 ATTORNEY HUBRICH: At this point he already knows every
4 question I'm going to ask because I put it on the record in front
5 of him. Specifically he said, I didn't have any gloves; I didn't
6 see any gloves.

7 THE COURT: You already did that.

8 ATTORNEY HUBRICH: I know how to impeach him. It goes on.
9 He talks to people seven times, so it goes on, it's going to be a
10 while.

11 THE COURT: You did the gloves.

12 ATTORNEY HUBRICH: I will do specific statements.

13 THE COURT: Not worried about gloves. I'm worried about the
14 prior burglary. Go.

15 ATTORNEY HUBRICH: Are we still arguing about the prior
16 burglary?

17 THE COURT: Yes.

18 ATTORNEY HUBRICH: Because I thought I heard the state
19 consent to me asking him, You never mentioned the prior robbery
20 where they took drugs and guns? They, in fact, already brought
21 it up to some degree in their direct by asking about the prior
22 burglary.

23 THE COURT: So was your house burglarized in the past? Yes.
24 End of discussion.

25 ATTORNEY HUBRICH: Right.

1 THE COURT: You're talking about prior inconsistent
2 statement with law enforcement. That's where I'm laser-focused.

3 ATTORNEY HUBRICH: Okay.

4 THE COURT: Tell me about that now, how are you going to
5 handle that?

6 ATTORNEY HUBRICH: And my argument is going to be that.

7 THE COURT: And I'm not so much concerned about him as I am
8 you. Go. Tell me what it is. I'm worried about ---

9 ATTORNEY HUBRICH: You want me to tell you about prior
10 inconsistent statements?

11 THE COURT: Yes.

12 ATTORNEY HUBRICH: Okay. There's gloves. There's a wallet.
13 There's --

14 THE COURT: Okay. Burglary, prior burglary.

15 ATTORNEY HUBRICH: No, there isn't one, Judge. He was never
16 asked, and I think I said that, he was never asked, Did you
17 commit a prior burglary? Or, Was there a prior burglary?

18 THE COURT: Okay. Then there's not a prior inconsistent
19 statement.

20 ATTORNEY HUBRICH: But I don't think there is an objection
21 now that the state has already brought in that there was a prior
22 burglary, during Boehler's testimony. I don't think there's an
23 objection to me asking him, You never told them that there was a
24 prior burglary?

25 Is the Court now saying I'm not allowed to ask that

1 question?

2 THE COURT: Okay, we're somewhere else.

3 ATTORNEY HUBRICH: Right.

4 THE COURT: It's not a prior inconsistent statement.

5 ATTORNEY HUBRICH: Okay.

6 THE COURT: I sent the jury out because of impeachment,
7 prior inconsistent statements. And now we're somewhere else.

8 ATTORNEY HUBRICH: My understanding of why we sent the jury
9 out was the state was then going to try to say that five black
10 males broke in 5 to 10 days earlier and kicked in the door. And
11 they wanted to get into the facts.

12 And I think that was Ms. Cornwell's concern, she didn't want
13 the *Lyle* in. And back in chambers we talked about it, we did it
14 pretrial, and I said, I'm not asking about *Lyle*; I'm just asking,
15 You didn't mention a prior burglary to the police, that's it,
16 where they stole drugs and guns? No. The state's already asked
17 that question. That's already in front of the jury. They
18 already got Deputy Boehler to say, Was there a prior burglary?
19 Yes. So that was the only reason why we stopped.

20 And then the state gets up and says, Well, we don't want to
21 talk about the five previous black males that kicked in the door
22 and robbed them and somehow they think that that was our clients.
23 Now they're saying they don't want to talk about that.

24 So I don't think there's an issue anymore. That's why I
25 said I think we're all now in agreement.

1 ATTORNEY OSBORNE: Your Honor, the only problem with the one
2 question that I heard her just say, You never told the police
3 about a prior burglary?, he did, he told them all about it, what
4 he knew. So that's not impeachment. He did talk about that when
5 he was asked.

6 ATTORNEY HUBRICH: Okay. When they confronted him with it.
7 I'm getting there. He didn't say it in the 911 call.

8 THE COURT: But you moved on from impeachment.

9 ATTORNEY HUBRICH: I still think that it would be admissible
10 under impeachment.

11 THE COURT: Okay. Why? Because it's not a prior
12 inconsistent statement.

13 ATTORNEY HUBRICH: I believe it to be impeachment of his
14 credibility. Very relevant in a case where someone gets their
15 door kicked in by four black males, robbing them of drugs, if
16 someone -- if that happens to you and the police say, Who did
17 this?, and you don't say, I don't know but 10 days prior five
18 black males kicked in my door and stole drugs and guns.

19 And then they say, Do you have any reason to think this
20 would happen to you? No. Wouldn't you then say, But 10 days
21 prior five black males broke in and stole guns and drugs.

22 And then when they asked you, Does anybody have a beef with
23 you? So when does he then say, Well, 10 days prior five black
24 guys broke in my house and stole drugs and guns from me.

25 THE COURT: I do not think it is impeachment.

1 ATTORNEY HUBRICH: Okay.

2 THE COURT: It may be -- it may be -- so we need to move
3 from impeachment. It's not a prior inconsistent statement. It
4 doesn't attack his credibility in terms of ---

5 ATTORNEY HUBRICH: How about, do you want me to say, Judge,
6 the state -- You were here for Deputy Boehler's testimony, and
7 the state asked Deputy Boehler whether or not there had been a
8 prior burglary at your house, and Deputy Boehler said yes. Did
9 you ever tell the police that there had been a prior burglary at
10 your house? No.

11 How about that, can we do that?

12 ATTORNEY OSBORNE: The answer to that would be, Yes, I did,
13 when I was asked I did tell them.

14 ATTORNEY CORNWELL: Your Honor, I'm sorry, it's very hard
15 for me to stay quiet over here for long. But, if I may, my
16 issues are also going to be along with *Bruton*. I think that he
17 has testified that there was a prior burglary.

18 ATTORNEY HUBRICH: He hasn't yet.

19 ATTORNEY CORNWELL: Well, I think David asked, Your home's
20 been burglarized before, and he said yes. Correct?

21 ATTORNEY OSBORNE: Yes. Yes or no, and he said yes.

22 ATTORNEY CORNWELL: So I Think that the way that we get
23 around all of this is, you know, When law enforcement asked you,
24 You know, they're trying to figure out who broke into your house,
25 at that time you failed to mention that your house had been

1 burglarized prior. And he said, Yeah, I didn't say it at the
2 time. He didn't ---

3 THE COURT: That's not impeachment. That's just a
4 confrontation, that's just a Sixth Amendment right to
5 confrontation. It's not impeachment. That's where I'm locking
6 up. Now, it may be/it might be -- and I'm talking to you and
7 worrying about you and what is going on.

8 ATTORNEY CORNWELL: I think if he says no -- I think if she
9 says, You didn't tell law enforcement about the prior
10 burglary ---

11 THE COURT: We're not there; we're not there; we are not
12 there. It is not a prior -- you impeach with prior inconsistent
13 statement, showing bias, character, of prior convictions. This
14 is not impeachment.

15 However, don't forget about the good old Sixth Amendment
16 right to cross-examine and confrontation of witnesses. That's
17 where I think we've gone into, just simply the confrontation of
18 witnesses, is it relevant? Is it *Lyle*? Is it *Bruton*?

19 That's why I sent the jury out, because I want to get to
20 that. In other words, the rubicon has approached, we have
21 approached the rubicon.

22 ATTORNEY CORNWELL: I'm going to give you my argument right
23 now before we get into all of it.

24 THE COURT: That's fine.

25 ATTORNEY CORNWELL: So I don't think that any of the facts

1 of the prior burglary are relevant because I think it's prior bad
2 acts, I don't think it's clear and convincing, and I don't think
3 it meets any of that.

4 If you want to say that there was a prior burglary, cool,
5 leave it on that, no facts. When we talk about Jaquavious
6 Washington and how we bring that in ---

7 THE COURT: I'm not doing Jaquavious Washington.

8 ATTORNEY CORNWELL: But it kind of all ties in to where ---

9 THE COURT: I'm not doing Jaquavious Washington right now
10 unless you tell me you want to ask him about ---

11 ATTORNEY HUBRICH: I actually did say that, Judge. That's
12 the compound issue that I have, is that I'm now going to ask him,
13 You didn't mention Jaquavious Washington?

14 ATTORNEY CORNWELL: Here is Jaquavious Washington. He's
15 directly asked in the hospital by law enforcement about him
16 selling out of his home. He says he does not sell from his home.
17 And then later on he admits to selling to Jaquavious Washington
18 at his home.

19 ATTORNEY HUBRICH: Right.

20 ATTORNEY CORNWELL: That has nothing to do with the
21 burglary. And so I don't see how we're trying to tie Jaquavious
22 Washington to a previous burglary. The impeachment on that is,
23 You told law enforcement you never sold out of your home at the
24 hospital, and then later on when you were confronted about a
25 person named Jaquavious Washington, you do admit that you sold to

1 Jaquavious Washington at your house, he's been at your house.

2 I don't see what that has to do with the burglary so I don't
3 know how we're trying to intertwine that, but it doesn't work.

4 So if you want to bring up a prior burglary without talking
5 about the facts of the burglary, that's one thing. You can't tie
6 Jaquavious Washington into the burglary. You impeach Jaquavious
7 Washington on the, I never sold weed from my house; just kidding,
8 sold from my house, sold to Jaquavious Washington.

9 THE COURT: I'm not there.

10 ATTORNEY CORNWELL: I think she was trying to tie it in with
11 the burglary. And I'm saying five people and ---

12 ATTORNEY HUBRICH: No.

13 ATTORNEY CORNWELL: --- they thought that Jaquavious was one
14 of the five people, and that that's how ---

15 THE COURT: Not there, I'm not there. I'm not there.
16 Here's where we are. We're cross-examination. If you want to
17 ask him ...

18 Cross-examination, you want to ask, You never told law
19 enforcement about a prior burglary? And there's no -- is there
20 objection to that question from the state?

21 ATTORNEY OSBORNE: No, Your Honor, since your ruling was
22 that is not an impeachment question. Since it's not an
23 impeachment question, then I'm going to be razor-focused on where
24 we're going from here and whether a door is going to be opened.

25 ATTORNEY HUBRICH: That's the problem, Judge. Because when

1 we said in chambers and I said, I'm going to ask him whether or
2 not he told police about the prior burglary, the state informed
3 all of us in chambers, That kicks the door open and I'm willing
4 to go play in that sandbox about the five males and David
5 Swibaker saying -- I then get to talk to David Swibaker about
6 saying that these two guys, he thinks these two guys, were part
7 of that prior burglary.

8 And so that's why I stopped and said, No -- I just want to
9 make sure I ask this question, we're not kicking the door open,
10 because it's not right. I couldn't figure out why the state kept
11 saying, You're going to kick the door open and now I get to talk
12 with David Swibaker, the next witness, about the fact that he
13 thinks these two guys were part of that. Because that's what he
14 tells Marcus Porter, and that's what he tells police, I think
15 these two guys, I recognize their voices, I think it was all the
16 same guys.

17 So that was why I stopped, because the state kept saying,
18 You're kicking the door open. And I kept saying, No, I'm not,
19 I'm just asking about the prior burglary and that he didn't tell
20 the police that. So that's why I stopped.

21 And then the state stood up and said, As long as she doesn't
22 say about the five black males and it was the same black males.
23 I was like, Oh, well, then we're all in agreement, I'm not
24 kicking the door open, and so now there's no objection.

25 That was the whole argument pretrial, and that was what we

1 stated back in chambers, and that was why I stopped. I do not
2 intend to argue third-party guilt with Jaquavious Washington.

3 But when I said in chambers, I plan to say, You never
4 mentioned Jaquavious Washington, the state then said, You can't
5 get into third-party guilt. I'm not. I'm in agreement with
6 Ms. Cornwell 100 percent. That's not where I'm going with this
7 right now. I'm just saying, You said you were a small-time drug
8 dealer; you told them you didn't sell out of your house; later on
9 you then say, Oh, wait, I did sell to Jaquavious Washington out
10 of my house.

11 The problem is that Jaquavious Washington is the crux of the
12 third-party guilt. And I believe that Ms. Cornwell would like
13 to, at some point, argue that it wasn't her client as part of
14 these four black males, it was Jaquavious Washington. And I know
15 that the state ---

16 THE COURT: I know that. I mean, I know that. That's
17 something I'm going to have to deal with.

18 ATTORNEY HUBRICH: I don't want the state to then argue I
19 have kicked the door open with Jaquavious Washington by asking
20 him about the fact that he didn't disclose that. And so, because
21 that was what the state was saying pretrial, that that was going
22 to kick the door open and they wanted to be able to go, walk in
23 through that door. And that's why I stopped.

24 THE COURT: Okay. So this is what we're going to do.

25 ATTORNEY HUBRICH: Yes ma'am.