VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Lexington County

Honorable Jessica A. Salvini, Circuit Court Judge

HEIRBERONE H. FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2026-001297

APPENDIX

KATHRINE H. HUDGINS
Senior Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

SYDNEY NICOLE WILLINGHAM
Assistant Attorney General
100 Assembly Street
Columbia, SC 29201
(803) 734-3970

ATTORNEYS FOR RESPONDENT

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then?
A. Yes, that was -- I was there when it happened.
Q. Okay.
MS. ZMROCZEK: I beg the Court's indulgence.
THE COURT: Yes, ma'am.
MS. ZMROCZEK: Nothing further, Your Honor.
THE COURT: Redirect?
MS. PATTERSON: Just briefly.

REDIRECT EXAMINATION

BY MS. PATTERSON:
Q. Troy, do you remember other people being around when Will got shot?
A. To be honest, ma'am, it was -- it was a bunch of us that were there that day.
Q. But at that point you was just talking to Will, correct?
A. Yes, yes, yes.
Q. And when the Defendant came out -- when Mr. Heirbrane came out the door, do you remember him saying anything?
A. To be honest, he was like I told you about fucking with me, then he shot him and shut the door.
MS. PATTERSON: Thank you, Troy. No further questions.
THE COURT: Recross?
MS. ZMROCZEK: Yes.

RECROSS EXAMINATION

BY MS. ZMROCZEK:

Q. Troy, now you remember that Heirbrane was saying something?

A. Say what?

Q. You remember today that Heirbrane was saying something?

A. No, I -- I remember that.

Q. You remember that on that day?

A. I remember that, that moment.

Q. Okay.

A. That particular moment.

Q. And so that particular moment when you gave the statement to the police, they -- they were trying to make sure that you told them everything that you remembered, right?

A. I guess.

Q. And that's why they gave you a copy, they had you initial it?

A. I guess.

Q. Okay. They had you sign it?

A. I guess.

Q. Okay. Is that your signature?

A. If it's on there, it's on there.

Q. Okay. So that's a yes. And you never said anything

about Heirbrane saying any words, did you?
A. I guess.
Q. So no?
A. I guess.
Q. You guess no?
A. I guess.
Q. All right. So when the police were there to get all the information about what happened, you never told them that he had said anything?
A. I guess. I don't know.
Q. Okay. And if you had, it would be written in your statement?
A. I guess so.
Q. Okay. Well, let me hand you your statement one more time and ask you if it's in there?
A. You just read it.
Q. Right. But let me hand it to you again.
A. What you want me to say, no? No, I didn't.
MS. ZMROCZEK: Thank you. No further questions, Your Honor.
THE COURT: Thank you, sir. You may step down.
(Witness excused.)
THE COURT: Call your next witness.
MR. PINCELLI: Your Honor the State calls Keith Sprinkle.

(Whereupon, Keith Sprinkle was duly sworn by the Clerk of Court.)

THE CLERK: Please be seated in the witness stand. Once you are seated, please state your name; spelling your last name for the record.

THE WITNESS: My name is Keith Sprinkle, S-P-R-I-N-K-L-E.

KEITH SPRINKLE,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PINCELLI:

Q. Good morning, Mr. Sprinkle.

A. Good morning.

Q. Mr. Sprinkle, where do you work?

A. I currently am employed with the Federal probation office in Columbia.

Q. Where were you working back in May of 2016?

A. With the Lexington County Sheriff's Department.

Q. And what was your position there?

A. At that time, I was a crime scene investigator.

Q. So as of May 2016, you were a crime scene investigator with Lexington County. How long had you been in that role?

A. At that time, it was about two -- right over two years.

Q. And can you explain -- I'm sorry, what was your title

for that role?
A. Crime scene investigator.
Q. Okay. And what -- what were the duties of a crime scene investigator?
A. As a crime scene investigator, I was centralized at headquarters at Lexington County Sheriff's Department and we responded all throughout the entire county to process any kind of crime scenes, both of violence or any -- anything from burglaries to arsons, suicides, any kind of suspicious deaths, all homicides, sex crimes. So we responded to any kind of crimes that required any kind of processing for evidence and upon -- being called upon to -- to conduct any kind of searches or processing of any kind of crime scene. It was our job to utilize any kind of forensic or scientific methods to identify and collect and process a crime scene.
Q. So you talked about having to use some different methods to collect information through your -- for your investigations. Did you do any special kind of training to be a crime scene investigator?
A. Yes, they put us through a lot of training.
Q. What -- what are some basic types of training or what special knowledge did you need to better conduct your investigations?
A. Well, they initially put you through an FTO or a

training phase. After that, they put you through some basic CSI forensic training classes. And then from there they -- through the years go on, they -- they put you through numerous different classes and trainings. Through my time in CSI I took eleven different classes, over 369 hours of forensic-related training.

Q. And going back to the incident in question, how did you become involved?

A. On that date, on May 10, 2016, I was -- I was called by CSI Shelby Derrick. She advised me of this crime scene. And she was the primary CSI leading that day and she called me for -- to assist because it's per policy that any homicide or apparent homicide or suspicious death that they require two CSI on a scene, so she called me and notified me of the scene and I responded.

Q. And, I'm sorry, you said per policy you needed two CSI's on-scene?

A. Yes, sir.

Q. And so you were one of those two people?

A. Yes, sir.

Q. And you explained your -- I'm sorry, what is the timeline? When does CSI get on-scene for what you might think is a suspicious death or a possible homicide?

A. I mean, I could give you the times that I responded, but typically whenever a call comes out, say 9-1-1 is

called by an individual, the first individual -- the first law enforcement typically on-scene is gonna be your road patrol, a uniformed officer in a marked patrol vehicle. They're the ones that are responding to the 9-1-1 calls. Typically whenever they get on-scene and they assess -- they initially assess what's going on, what happened, and they will notify major crimes and also a supervisor will notify CSI to respond to the scene if need be.

Q. So that was -- you're speaking a little generally there. Can you walk me through that process, how it happened on this day, how you got called. You said Shelby Derrick called and by your protocol you needed to be the second person, second CSI, on-scene?

A. Yes.

Q. How did you receive that call and how long did it take you to get there?

A. Again, I received a phone call from CSI Shelby Derrick. And if you don't mind me taking a look at my notes real quick, I received the call at 17:05, which is 5:05 PM. I arrived on-scene just at 5:45 PM. So forty-nine minutes later it took me to prepare and drive down to that scene. Again, notified by CSI Shelby Derrick, but whenever I responded to the scene there were already Lexington County investigators and deputies on-scene already.

Q. And did you speak with those deputies once you got on-scene?
A. I did.
Q. And what did you learn about the status of the scene? What pertinent information did you gather from them?
A. I was advised that there were some individuals outside of the -- in the yard. An incident occurred where -- I was told that Mr. -- Mr. Heirbrane Foster had shot his son and we had a victim or an individual that was deceased in the yard. At that time whenever we respond, whenever the CSI responds, there's -- at that time no one is inside that crime scene, it is taped off, which it was in this case, and investigators are speaking to witnesses at that time, so. But I was -- I was advised that that was the incident that took place and was told some other facts of the case or -- or at that time what they had discovered and had that one deceased individual in the front yard -- front right part of the yard.
Q. And you described police tape. Would that be to secure the location?
A. Yes, secured by crime scene tape and police presence.
Q. Did you learn anything else about how the location was secured?
A. No, just by crime scene tape and officer presence making sure that there's -- no one that goes in and out of

the crime scene and to do -- to ensure that, we have an assigned deputy that takes a log of any individual, whether it be EMS, fire, law enforcement, coroner's office or any other individual going inside and outside of that crime scene, it's all documented on a log.

Q. And would somebody have swept the inside of the house to make sure it was secure?

A. Yes, that would have been done prior to our response. So whenever deputies first respond on-scene, they have to clear it to make sure that it is secure, meaning that there's no threats in that area. Certainly inside that house should have been cleared, and which I was told, as that's one thing that we ask as CSI's when we respond to the scene, speak to them, the responding deputy, meaning the first deputies on-scene and also the investigators, that the house -- the residence had been cleared, meaning that they went through the house making sure that there's no other dangers and that there's no other threats inside that residence so it's safe for us to go in.

Q. And we've spoken a lot about that residence now. Can you tell me the address that -- the location of that residence?

A. Uh-huh. It was [redacted] Glenn -- Oak Glenn Drive.

Q. And what county is that in?

A. That's in Lexington County.

Q. And so you said that the scene was secure. Can you tell me about outside the police tape what the scene was like?
A. Sure. There were numerous police vehicles, law enforcement vehicles. We had fire and EMS and actually there was a large crowd of people in that neighborhood that were gathering and actually we had a news crew that started showing up and was setting up.
Q. Thank you, Investigator Sprinkle. I'm gonna approach you with some pictures of that scene you were describing.
MR. PINCELLI: I'm sorry. I need to get those marked.
(State's Exhibit Number 19 through 27 were marked for identification.)
MR. PINCELLI: Again, these are gonna -- Your Honor, I believe defense counsel is stipulating to State's 19 through 27 being entered into evidence.
MS. ZMROCZEK: That is correct, Your Honor.
THE COURT: They're in evidence.
(State's Exhibit Number 19 through 27, photographs, were admitted into evidence.)
BY MR. PINCELLI:
Q. Investigator Sprinkle, I'm gonna put a picture up. This is what's marked State's Exhibit 20. Do you recognize that?
A. I do.

Q. And is that the house that you investigated?
A. Yes, that is [redacted] Oak Glenn Drive, the residence at that property.
Q. Is that where you would have gone, through that entrance, to investigate?
A. Yes, that -- that was the -- the door that we entered the residence on this case, yes.
Q. Is there any reason in particular that you went in through that entrance?
A. There were three different doors in this -- on this house. You had a front door, you had a back door, and then the right side door. This door was open and we knew that the incident took place in this area and so whenever we process a crime scene we typically -- we always work our way out and in. So knowing that this is where the incident took place, after we processed the outside, we worked our way into the -- the residence and it makes more sense for that to be the entrance for this case.
Q. Sure. And for purposes of my questions, I might work a little bit backwards with you. I might go kind of inside out.
A. Okay.
Q. Was there anything inside the house that you'd been alerted of that might be of interest to crime scene investigation?

A. Yes, we were advised by the responding deputies that cleared the residence that -- and also through investigators through their investigation and talking to witnesses that a firearm was located inside the kitchen part of the residence, which that door that you showed goes directly into the kitchen, and so --

Q. I'm gonna show you what's marked State's 23. Is that the kitchen you're talking about?

A. Yes. So this right here is the door going from the carport into the kitchen and so as soon as you step into the residence, you have the kitchen and dining area and then off to the left goes down the hall into the living room and into the bedrooms, and right there is the firearm that we were notified of. And that's exactly how we found it once we responded on-scene. It's got the shotgun partially covered by a floral blanket.

Q. I'm gonna show you what's marked State's 24. Can you explain what's going on in that picture?

A. So whenever we identify a piece of evidence, in this case this firearm, we take photographs of it without placards before any kind of manipulation of any kind of evidence; far photographs, medium photographs, and close-up photographs, and then -- before any kind of manipulation, and then we're going to identify it with placards, the yellow ID placards. We identified this firearm as ID

Number 4. This placard is referencing this shotgun. Numbers 5 and 6 are identifying the shotgun shells inside the shotgun. We didn't find it like that obviously. Like I said, we -- we take photographs prior to putting the placards in, but the -- those shotgun shells were located inside the shotgun. There was the one spent shell casing inside the chamber of the shotgun and then three unspent shells.

Q. So those were all ejected from the gun. What was the purpose of that?

A. I'm sorry, can you repeat that?

Q. Why are those shells out of there if you found them inside the weapon?

A. We have to render the -- the firearm safe. We cannot just -- it's unsafe to take a firearm unknown if it's loaded or not for us to be carrying it around and packaging it and turning it into evidence and people handling it in evidence to store. It's just unsafe for that reason and also we have to search and identify if that firearm -- if it's been used, if it has any kind of spent shell casings or spent ammunition, if it's loaded. Those are things that we have to know for the investigation so we're not going to just collect it as is, we're going to go a step further and find out what's -- what's inside the firearm if it's loaded.

Q. And did you -- do those placards indicate that you did collect all that information, all the evidence?
A. Yes, all those were identified and collected.
Q. And did you do any further testing of -- for DNA swabs or fingerprints?
A. We did not in this case. It wasn't required or necessary.
Q. Why do you say it wasn't required or necessary?
A. If we didn't know who or if we didn't have an idea or an identified subject in this -- in this case, then we would more than likely have processed the firearm for DNA or fingerprints, but through investigation we had already been notified that we had a suspect in this case, a shooter, so we had witnesses. We had no reason to further process the firearm for DNA or fingerprints.
Q. And, like I told you, I was gonna work a little backwards than you did that day. I'm going inside out. This is State's 21. Can you explain to the jury what we're looking at there?
A. This right here is the concrete carport. You have the dirt to the right side of the residence. The residence is on the left side. This is the front side of the residence and this is the back side of the residence and right here you have several puddles of blood.
Q. And you said -- you indicated the residence was gonna

be to the left side of this photograph, State's 21?
A. Yes.
Q. And what part of the residence is that?
A. So this is the right side of the residence. The other photograph that we looked at, the kitchen door, is right here and so the kitchen is right in this area.
Q. And through your investigation, do you have any indication of whose blood that was?
A. Yes.
Q. And whose was that?
A. It was the victim, Heirbrane William Foster.
Q. Did you take any DNA evidence of that?
A. I did not.
Q. Okay.
A. Again, in this case it was -- it was not needed. Since we had a -- the starting of a blood pool and drops -- continual blood drops to the victim's deceased body, there was no need to identify whose -- whose blood it was.
Q. You talked about a blood trail and some blood pools.
A. Uh-huh.
Q. I'm gonna show you what's marked State's 22. Is there anything on that picture that indicates the trail you just mentioned?
A. Yes, this is the beginning of the blood trail, this is the blood -- large blood puddles on the concrete, and

then you've got blood trailing all the way -- large -- a large amount of blood drops going into the -- leading into the right side of the yard into the sand directly where the body was found.

Q. And this is State's 19. Can you explain to the jury what we're looking at there?

A. Okay. This is the residence, [redacted]. This is the carport that we were talking about. The kitchen to the -- the door to the kitchen. The initial blood puddle is right here and a trail of blood that leads to the body. And this is the victim's body. This is how we found him. The victim on-scene had been covered up by medical -- EMS.

Q. Okay. So now that you've established the trail and where the body ended, I'm going back to State's -- State's 21. Can you tell me from your crime scene investigation knowledge and experience were you able to determine that was the initial -- that was the start of the blood on-scene?

A. Yes.

Q. And what can you say about the positioning of that blood?

A. The positioning of that blood, it's not blow back or blood spatter from the -- from a gunshot wound. This is heavy blood drops, 90-degree angles, directly right down onto the concrete; this being the largest amount of blood

and then leading to the end source, the victim. There was no other blood located on the scene. We didn't -- this is -- this is the initial source of blood. It being a 90-degree angle, it indicated that the victim whenever he was shot had to have been somewhere in this area. You cannot tell if he was directly on the concrete or right on the sand, but somewhere in this area, and at some point he turned and a lot of blood -- a large amount -- he was losing a lot of blood out of his chest cavity.

Q. And did you take any measurements --

A. Yes.

Q. -- through your investigation?

A. Yes, I did.

Q. Can you explain the purpose of those measurements?

A. The purpose of taking measurements of a crime scene is to have a record of exactly where everything was found. What we call triangulation. We take -- we take two stable objects. In this case, we had -- or fixed objects. In this case, we took the right front corner of the residence and the telephone pole or electric pole. We took those two points as our fixed points and took measurements of certain items of the scene. The victim is always -- always gonna be one of those points -- one of those items that we -- or objects that we take measurements of so that if needed to we can recreate the crime scene.

Q. And it's your testimony that you did take the measurements based on those locations?
A. Yes, we did.
Q. That State's 19 that's up on the -- on the projector there, you indicated that one of them -- one of the points was the front of the house?
A. Yes.
Q. Is that shown on there?
A. Yes, it is. Right there.
Q. So you're indicating that's the bricks on the house, not the carport?
A. Yes, that's correct. The bricks.
Q. And this is State's 11. Is this the telephone pole you're talking about?
A. Yes. That right there.
Q. Okay. Did you take any measurements of any of the blood and where that was in relation to the doors of the house?
A. Yes. I took one -- one measurement. There's no need to take multiple measurements, but just the -- the single largest pooling of blood where it initiated is where we took a measurement of for the pooling of the blood.
Q. And is that where the blood was initiated, is that where you just referenced?
A. Yes.

Q. And what was that measurement?
A. From the center of the blood to -- if you don't mind, let me --
Q. Sure. Yeah.
A. From the -- we took a measurement from the kitchen door. So the center of the kitchen door to the blood is exactly thirteen feet and four inches.
Q. Did you take a measurement from where Will's body was?
A. I did.
Q. And how far was that? What was the reference point? Where did you measure that from?
A. From the body to triangulate. Like I said, that we use two different points. Like the right corner of the house, front right corner, and then the electric pole. And so from the residence of -- the front right corner of the residence to say his -- to his head was thirty feet and one inch. And from the pole, how far away the pole over here was --
Q. Now I'm putting up State's 11. That shows the pole for you.
A. From the pole to his head, the center of his said, was twelve feet four inches.
Q. And was there anything else -- again, I'm working from inside out. So you've shown me the gun, you've shown me the blood, you've spoken about how far the body was.

Was there anything else on the outside that you took note of or collected for evidence?
A. Yes. Whenever we were talking to the investigators at the beginning, and we communicate with them throughout the processing of processing the scene, is that we were notified of a two by four that had been used at some point in an altercation identified right there at the -- near the edge of the yard right at the edge of the road.
Q. I'm gonna show you what's State's 25. Is that the same thing?
A. Yes, it is.
Q. Just a little more focussed on the two by four?
A. Yes. You have the body, the pole and the two by four right there in the roadway.
Q. Okay. Now I'm gonna show you what's marked as State's 26. What is that indicating?
A. We identified that item as Evidence ID Number 1. Again, we work our way out to in. That being the furthest item out from the residence, that's gonna be identified as Number 1. No significance to Number 1 except that's just the first piece of item -- of evidence that we identified, but identified it with that placard, photographed it, and collected that two by four.
Q. What does -- what happens to all this evidence once you collect it from the crime scene?

A. After we are completely through processing a crime scene, it's documented on the search warrant return all the items that we've taken from the -- from the scene and that's provided to the owner of the residence and then the evidence itself is taken by CSI to the sheriff's department and either, if needed, to continue any kind of processing -- further processing or just packaged. A lot of times in homicide cases things are bloody and needs time to dry, so we take it into the crime scene lab at the sheriff's department for either packaging or further processing and eventually it's packaged and submitted into evidence.

THE COURT: Hold on, Mr. Sprinkle.

Ladies and gentlemen of the jury, I'm gonna send you back to the jury room. You've got to keep your eyes open. Everybody needs to be able to stay awake and keep your eyes open, so if you need some caffeine or something, tell the bailiff. Leave you notes. Don't discuss the case.

(Whereupon, the jury retires to the jury room at 11:47 AM.)

THE COURT: Mr. Sprinkle, during the break you're not permitted to discuss your testimony with anyone. You can step down, if you'd like.

(Recess taken at 11:48 AM.)

BAILIFF: All rise. Court's now in session.

THE COURT: Thank you. Be seated, please.

Is the State ready for the jury?

MR. PINCELLI: Yes, Your Honor.

THE COURT: Is the defense?

MS. ZMROCZEK: Yes, Your Honor.

(Defendant's Exhibit Number 20 through 22 were marked for identification.)

(Whereupon, the jury return to the courtroom at 11:59 PM.)

THE COURT: All right. You may continue, Solicitor.

MR. PINCELLI: Thank you.

BY MR. PINCELLI:

Q. Investigator Sprinkle, when we took a short break, you were talking about that two by four and you'd also earlier said that you took some measurements. Did you take a measurement of that two by four?

A. Yes, I did.

Q. And what was the reference point from that -- from that two by four's measurements?

A. The pole right there. The electric pole.

Q. Okay. And what was the measurement on that?

A. From the pole to Item 1 was approximately nine feet eight inches and I also took a measurement from the victim's head to the pole -- I mean, to the two by four.

Q. And how far from the victim?

A. And that was twenty-one feet nine inches.
Q. All right. I'm gonna show you --
MR. PINCELLI: This is an ID only.
MS. ZMROCZEK: You can put it in.
MR. PINCELLI: Okay. Are you gonna stipulate to that?
MS. ZMROCZEK: Go ahead.
MR. PINCELLI: Stipulating?
Your Honor, what's marked as State's ID 3, is gonna be stipulated into evidence.
THE COURT: Mark Number 3 into evidence.
(State's Exhibit Number 3, a photograph, was admitted into evidence.)
BY MR. PINCELLI:
Q. I'm showing you State's 3. Would that be something you observed on-scene, Investigator Sprinkle?
A. Yes, it was.
Q. Did that indicate just the items about your investigative scene?
A. Yes. There were multiple, tools, equipment, lumber. I mean, a lot of different items in the -- in the yard, especially in the backyard around the -- the carport. But, again, no items were indicating -- had blood on it or anything like that. And also in this case where we actually had witnesses that were speaking to investigators

who were relaying information to us that no other items like that were actually used in this scene -- in this incident, so none of those were identified or collected as evidence.

Q. Okay. Now I'm gonna move on to the victim's body. You indicated its location. You indicated what happens -- you told us what happens to the evidence you collect after it's collected. What happened to Will's body?

A. It is a joint effort to investigate the scene pertaining to the body, but after we are through photographing, taking measurements, searching the body itself, seeing what's on the individual, then the body is actually taken into custody by the coroner's office, so Lexington County Coroner's Office took possession of the body and the next day they -- actually in this case the next day an autopsy was conducted, so.

Q. And during the course of that, do you stay involved in the investigative process?

A. Yes, we do.

Q. Were you present to notice anything or take any pictures?

A. Yes.

Q. And I'm showing you what's State's 27. What is that?

A. That is a photograph of a shotgun wadding, the plastic wadding, that actually was found inside the victim's chest

cavity, the gunshot wound cavity in his chest.
Q. And through your time in law enforcement and crime scene investigation, have you had to deal with different gunshot wounds before?
A. Yes.
Q. Have you had to deal with different ammunition before?
A. Yes.
Q. Through your general experience, can you explain the inner workings of a shotgun shell and explain that how that works into there?
MS. ZMROCZEK: Your Honor, we would object. That would be beyond his scope. He has not been qualified as an expert.
THE COURT: Do you wish to be heard?
MR. PINCELLI: I'm sorry, Your Honor?
THE COURT: Do you wish to be heard?
MR. PINCELLI: I don't think he would necessarily need to be an expert in a shotgun shell. I think he's experienced enough through his work as a CSI investigator to explain what that is.
THE COURT: No, he'd have to be qualified as expert.
BY MR. PINCELLI:
Q. Investigator Sprinkle, through your training, you said you've done three hundred and some hours of training and multiple courses with Lexington County through your

work as an investigator. Have you taken any courses to be able to identify firearms or ammunition?

A. I have.

Q. During those courses do you learn the inner workings of ammunition?

A. Yes.

Q. And the parts, what they're made of?

A. Yes.

MR. PINCELLI: Your Honor, at this time I'd like Investigator Sprinkle to be recognized as an ammunitions expert.

THE COURT: Voir dire?

MS. ZMROCZEK: Yes.

VOIR DIRE EXAMINATION

BY MS. ZMROCZEK:

Q. Of this three hundred hours of training, how much of it was ammunition?

A. I have taken through the one -- going back the FTO process, the field training process, we covered different types of ammunition, the structure of a bullet and a shotgun casing, and also through the crime scene technology and evidence collection that I -- that I have taken, that was 32-hour course at a forensic school, and that did cover some on ammunition and firearms.

Q. And when was the last time you received any training

specifically on ammunition and firearms?
A. The last -- the last actual training was back on May 16, 2016.
Q. And do you keep up with -- do you read peer journals and articles?
A. I did whenever I was in CSI.
Q. Okay. Have you written any?
A. I have not.
Q. Okay. Are you a member of any organizations or professional -- have any professional associations with the literature on ammunition and firearms?
A. During the time while I was in CSI and actually while I was at the sheriff's department even before CSI I was a member of IAI, which is the International Association of Identification, and that material is readily available to us in CSI and we did read over material from IAI.
Q. So you're saying that -- that you have an expertise in identifying ammunition?
A. I have not ever been qualified as an expert in ammunition, but I have taken classes and have had real life experience and training experience identifying different parts of ammunition and -- and firearms.
Q. Have you ever been qualified as an expert with anything to do with firearms in a court before?

A. Not in firearms. In crime scene, but not firearms specifically.

MS. ZMROCZEK: Your Honor, that's all the questions that we have. We don't believe that his knowledge is --

THE COURT: Ladies and gentlemen of the jury, please step into the jury room. Do not discuss the case.

(Whereupon, the jury retires to the jury room at 12:07 PM.)

THE COURT: Mr. Pincelli, I want you to proffer what it is you want to elicit from him.

EXAMINATION (In-Camera)

BY MR. PINCELLI:

Q. Investigator Sprinkle, you said you found this wadding as a result of the investigation of the autopsy?

A. Yes.

Q. And where was the wadding located?

A. It was inside of the chest cavity of the victim.

Q. And can you explain what the purpose of wadding is in a shotgun shell?

A. The purpose of the wadding itself is to -- is to actually contain the pellets of the -- which is the -- the trajectory or the ammunition inside the -- inside the shotgun shell. You have the shell and inside the shell you have the wadding, which contains the pellets, in this case the pellets of the shotgun shell, and upon -- upon any kind

of a discharge of a shotgun you have the wadding that comes out of the barrel and after release of the barrel, the wadding falls to the ground while the pellets continue travelling as they're heavier, they're metal, and they -- they travel. That's what the bullet in -- I say the bullet, the pellets are considered in a shotgun. The wadding is just simply the material that's holding the pellets together until release of the shotgun -- out of the shotgun.

Q. So that's part of the interior of a shotgun shell?

A. Yes, it is.

Q. And it's ejected when a shotgun shell is -- is fired?

A. Yes.

Q. And it does not -- are you saying it would not travel as far as the actual lead inside the shotgun shell?

A. Correct.

Q. From your training and experience in investigations and knowledge of ammunition, what -- what does the presence of wadding in a body indicate to you?

A. Close range distance.

MR. PINCELLI: That would be the extent of my questions, Your Honor.

THE COURT: Do you want to keep that out?

MS. ZMROCZEK: No. No, Your Honor. I just didn't know what he was gonna testify to because they didn't

have him --

THE COURT: I didn't see why you would. Bring the jury in.

MS. ZMROCZEK: No, we want to bring that in, Your Honor. We're fine with that.

(Whereupon, the jury returns to the courtroom at 12:09 PM.)

THE COURT: So do you object now to him being --

MS. ZMROCZEK: I withdraw that objection, Your Honor.

THE COURT: All right. Thank you.

The objection is withdrawn. The witness has been tendered without objection as an expert in the field of ammunition and may render opinions in that regard.

You may continue.

MR. PINCELLI: Thank you, Your Honor.

CONTINUED DIRECT EXAMINATION

BY MR. PINCELLI:

Q. Investigator Sprinkle, we were talking about what's up on the board now in State's 29 {sic}. You referred to that as wadding. Can you explain to the jury what wadding in reference to a shotgun is?

A. So the ammunition of a shotgun is a shotgun shell. Inside the shotgun shell you have your primer and inside the tubing, the tube of the shell, you have -- you have the wadding, the plastic wadding, which is kind of -- it's what

houses the pellets, which is the ammunition of the firearm, of the bullet. It's like a plastic flower so to speak that carries -- that houses the pellets through the -- once it's -- the shell is actually discharged, the shell opens up and the wadding containing the pellets travels through the barrel and upon releasing through the barrel the wadding at some distance will fall to the floor, to the ground, and the pellets is what travels as the projectile.

Q. And, again, where was this wadding located during your investigation?

A. The wadding was located inside the chest cavity, which is the gunshot wound location of the -- in the victim, inside the victim's body.

Q. Through your experience and expertise, what does that indicate to you?

A. Close range.

Q. I'm gonna reference you back to what's marked State's Exhibit 21. That's the pool of blood you indicated measuring about thirteen feet from the door opening. Is that what you testified to?

A. Yes.

Q. Would that be a consistent distance that would lead to wadding inside the chest?

A. Yes. Absolutely.

MR. PINCELLI: Thank you, Investigator Sprinkle.

Please answer any questions from the defense.

I'm sorry. I beg the Court's indulgence.

THE COURT: Yes.

MR. PINCELLI: Investigator Sprinkle, please answer any questions from the defense.

THE COURT REPORTER: Can I -- you referred to that photo as Exhibit 29.

MR. PINCELLI: 21.

THE COURT REPORTER: No, the --

MR. PINCELLI: I'm sorry. This is 27.

THE COURT REPORTER: You said 29 though.

MR. PINCELLI: Okay. I need to make a correction. The picture of the wadding is State's 27 and not State's 29.

Thank you very much.

THE COURT: Cross?

MS. ZMROCZEK: Thank you, Your Honor.

And I believe that Defendant's 21, 22, 16, 17, 12, 13, and 20 are in without --

MR. PINCELLI: In without objection, Your Honor.

THE COURT: Say those again.

MS. ZMROCZEK: I certainly will. It is 12, 13, 16, 17, 20, 21 and 22.

THE COURT: Defense?

MS. ZMROCZEK: Correct.

THE COURT: They're in evidence.

(Defendant's Exhibit Numbers 12, 13, 16, 17, 20, 21, and 22, photographs, are admitted into evidence.)

MS. ZMROCZEK: Thank you.

CROSS-EXAMINATION

BY MS. ZMROCZEK:

Q. Agent Sprinkle, you said that being a CSI you received a lot of training?

A. Yes.

Q. And you base your -- and you base your -- you kind of tailor your testing and evidence gathering as to information that you are relayed to while at the scene, right?

A. Yes.

Q. So sometimes you don't have to take DNA if you know that there was only one person that was shot?

A. Yes, sometimes. And especially in this case where we had a lot of information given and witnesses, yes.

Q. Okay. And you would agree with me that part of CSI is fingerprints?

A. That is -- that is one forensic field in -- yes, that's one discipline in the forensic world, yes.

Q. One discipline?

A. Yes.

Q. And so -- and you can get fingerprints off of levels,

like aluminum or metal materials?
A. You can. It's -- nothing's guaranteed to have a latent print on it for transfer or how long it may last on material or an item. But, yes, you can or you might.
Q. Okay. And you didn't collect any metal or aluminum items in this, such as a level or anything like that, did you?
A. No.
Q. Okay. I'm gonna show you what is to be marked as Defendant's 23 --
(Defendant's Exhibit Number 23 was marked for identification.)
Q. -- and ask if you recognize this?
A. Yes, I do.
Q. And does that fairly and accurately represent a piece of evidence that you collected?
A. Yes, it does.
Q. Okay.
MS. ZMROCZEK: Your Honor, at this time we'd move Defendant's 23 into evidence.
THE COURT: Any objection to this?
MR. PINCELLI: No objection, Your Honor.
THE COURT: Mark 23 in evidence, please.
MS. ZMROCZEK: Thank you.
(Defendant's Exhibit Number 23, a two by four, was

admitted into evidence.)
BY MS. ZMROCZEK:
Q. And will you open that and take it out for me.
A. Does anybody have some scissors?
Q. Nobody has any. We can -- we'll move on from that in the meantime if you can't get it open.
THE COURT: I've got a knife.
MS. ZMROCZEK: Oh, you do?
THE COURT: They let me carry one in the building. They don't let others.
MS. ZMROCZEK: They abscond all my sharp objects.
THE COURT: It's not very sharp.
THE WITNESS: Thank you, Your Honor.
BY MS. ZMROCZEK:
Q. Okay. So this item, 23, and I believe -- I'm gonna put up Defendant's 21. That's the same -- that's the same item that you collected, correct?
A. Yes, that's correct.
Q. And you collected this because you were told that it was an important piece of evidence in this case, right?
A. I was told by the investigators at Lexington County Sheriff's Department that that two by four through their investigation had been used at some point during this altercation. It was not necessarily used during the actual shooting incident, but during the altercation

between the son and father that that two by four had been used at some -- some time.

Q. Okay. And when you collect it, you put evidence tape on it to make sure that it's the same thing, right?

A. To make sure that the seal of the packaging of the evidence is -- that it's secured in the packaging, yes.

Q. Okay. And on that day or at any time, were you ever directed to go back and collect any more evidence?

A. After that -- after the 10th?

Q. Yes.

A. No.

Q. And, I mean, from the scene. I know that -- well, we'll talk about the autopsy in a little bit. And I want to show you a few more pictures while I'm here. State's 22, it's kind of a different angle. One thing that you do in crime scene investigations when you get to a scene, like you said, is you work out in, right?

A. Yes.

Q. So you take pictures kind of -- of an overall view of the area in which you were told that was important?

A. Uh-huh. Correct.

Q. And then as you get closer to items, closer to items, you just take closer in pictures, right?

A. Yes.

Q. So this would be what you call a far away or a

distance shot?
A. Yes.
Q. Okay. And it has the house and this is -- and this is the corner that you're using for measurements?
A. Yes.
Q. Okay. And this is the -- Defendant's 23 is the two by four that we just saw?
A. Yes, that is -- that is the two by four right there.
Q. Okay. All right. And then the garage. And you did all of these measurements, right?
A. Yes, we took those measurements.
Q. Okay. And those -- because those were areas of importance?
A. Yes.
Q. So Defendant's 16 you said the -- can you show the thirteen foot measurement on here?
A. Yes. Thirteen feet. The measurement was from the center of this door leading into the kitchen directly to the center -- center area of the blood pool, the initial blood pool.
Q. Okay. And I want to talk about the center area of the blood pool, which is right about there?
A. Yes.
Q. Okay. And you said it was not spatter?
A. No.

Q. And it was not impact?
A. It was not.
Q. Okay. So explain what impact blood would be.
A. Impact blood spatter is whenever you have an object that already has an open wound, an open source of blood, and whatever object, whether it be blunt force or -- whatever object makes contact with that blood pool and upon motion creates -- dries that blood and transfers and so whenever it hits an item, that's called blood spatter.
Q. Okay. So in this case we have someone who was hit, right?
A. Uh-huh.
Q. And we know that they moved and walked, right --
A. Yes.
Q. -- because we have a trail. And so how is it that you came up with where he was standing? Do you know if he was hit and then moved back and the blood came out or do you know that he was there, the blood comes out and then he starts to move back? Do you know when he started to move back?
A. I don't know exact as far as like a timeline goes, but I can look at the blood -- the blood on the ground, the blood pooling, and give a directional travel, yes.
Q. A directional travel, right?
A. Uh-huh.

Q. But -- so you know that when that blood landed there that he was standing off the carport, correct?
A. Whenever he -- the blood on the carport, he had to have been leaning over to where that blood was coming out of the blood source, which was the open chest cavity wound, and pouring onto the blood -- onto the carport.
Q. Okay.
A. So you have the initial blood, the blood drop, the blood pooling on the carport, and then you have a turning, so a turning motion where you have -- you follow the blood trail in which --
Q. This is Defendant's 9.
A. Yes. So you have initial -- I'm sorry, this is not working right. You have an initial and then you have another large area of blood pooling.
Q. Hang on. Let me make it a little less -- I think it might be getting blurry with all of these pictures up here. Let's try it this way. Okay.
A. So you have an initial blood pooling and then a turning of the -- of the blood trail leads out to the victim's body.
Q. Okay.
A. So what that -- what that indicates or what it's consistent with is that if an individual was shot in this case, he leaned forward and you have blood just pouring

out of his chest cavity, you have the blood that's on the concrete, and what the -- the trail indicates is that there was a turning, a continuous pouring out of the chest cavity, and then leading out into the yard where he was -- his final resting spot.

Q. So if there was no blood as soon as there was impact, it's possible that he could have even been up on that carport, right --

A. (Nods head.)

Q. -- gets hit and then starts to back up because of the hit, right?

A. No, there's -- there's no indication of -- nothing would be consistent with the victim moving backwards.

Q. Right.

A. There was one photograph that, as I said, where you have the -- the pooling of the blood. I didn't take any measurement as far as how far the edge of the concrete -- the carport was -- the right side of the carport was to the pooling of the blood, we took the measurement from the house to the blood, but roughly a foot or two. So what I'm -- what I'm getting at is I cannot tell if the victim was shot while standing at the edge of the carport or if he was a foot or maybe even two feet from the carport and took a step or just leaned over. That I cannot tell because there's no blood spatter, which is high impact

blood spatter. You have to have a vertical plane for that and that's not -- I cannot give a point of origin in this case for impact of the gunshot wound. But in this case where you do have that -- that horizontal plane and the 90-degree angle, that indicates and that tells me at some point that that blood source came down at a 90-degree angle to that concrete, travelled as a left turn and then continued into the yard.

Q. Okay. And blood -- and blood obviously can travel. Bullets, they go straight, right?

A. For the most part, yes.

Q. Okay. When is it --

A. Whenever they're travelling through the air, yes.

Q. Sorry. That's what I meant. When the bullet is ejected from the firearm, it travels straight until it hits something?

A. Yes.

Q. Okay. So we could actually see what -- what direction if that were something that was investigated, what direction Defendant's -- or State's 27, at what direction it entered the chest, right?

A. For this -- for a shotgun you cannot because a -- a bullet is a single object and you have a narrow -- a linear path. Say if it enters one -- one object enters one side and out the other, you have two points, an entry

and an exit, you have those two points that you can reference to obtain a trajectory path. On a shotgun you don't really have -- you don't have that. It's a mass spread of multiple pellets, so you cannot obtain an exact trajectory per se.

Q. And the further -- and the further away you are, the more spread out those pellets become, correct?

A. Correct.

Q. And, like you said, this wadding kind of flowers and that's where the pellets come out and then the wadding generally drops, right?

A. Yes.

Q. How far -- how far out of the ejection process from the firearm does that happen?

A. Are you talking about from -- once the wadding and pellets leave the shotgun barrel?

Q. Barrel.

A. The projectiles travel. They're made of metal and they continue travelling until they -- they either land or hit their target. The wadding itself, that varies. It is not very aerodynamic, it's made the plastic. It can travel -- I've seen anywhere from ten yards to fifty plus yards.

Q. And in this case you said that this came out of the chest, right --

A. Yes.

Q. -- indicating a close range?
A. Yes.
Q. Thirteen feet is something that you learned at the basic law enforcement academy is within that zone of danger?
A. Area threat, yes.
Q. An area of threat. Okay. And so -- and we know that because we have those measurements from you, right?
A. Yes.
Q. All right. I want to move on. So you also said you went into the house and we saw some pictures and I just want to go briefly through some of them with you. So, again, we talked about how you kind of go from further to closer to closer, right?
A. Uh-huh.
Q. And so here's Defendant's 17. Yes, Defendant's 17. And are you standing on the carport looking up or are you on a step?
A. That is on the carport. I mean, you can see the steps right there.
Q. Okay. Defendant's 12, now that's a step inside the home?
A. Several steps inside the home, yes.
Q. Okay. And we have the shotgun here. What do you see over here?

A. This is going -- back this way is into the living room, this is the kitchen area and the dining area. This item that you were pertaining to is a small little -- I mean, a standalone freezer.

Q. Okay. And you -- I'll come back to that. And here's Defendant's 20. Did you open up the freezer and take some pictures of it as well?

A. Yes, I did.

Q. Okay. Now we see some grocery bags here. Everything -- you didn't put any groceries in there, that's just how you found it, right?

A. That's correct.

Q. Okay. And this is the same freezer as this picture here?

A. Yes, it is.

Q. All right. You talked about how you -- when you got there you wanted to disarm the firearm. Here's Defendant's 13. What are we looking at here?

A. Looking at just photographs, we have to tell a story with the photographs that we take in CSI. We need to -- we make sure that we document everything that we do from the first time we see that firearm and rendering it safe by ejecting whatever ammunition is out of it and so this is what we're doing at this time. So we take photographs of -- we have already taken out at this point -- at this point

the spent shell casing that was inside the chamber has already been taken out and so you do not see it. That would have normally been in here, but that's already been -- the slide had already been ejected -- ejected out the spent casing, and this is into the tube, the feeding tube, and this is an unspent shell casing inside the -- the tube.

Q. And did you take that one out as well?

A. Yes, all three of them. There were three unspent shells inside the feeding tube.

Q. And you take those out because that's a part of firearm safety, right?

A. Yes, it is.

Q. Because especially with shotguns they have been known to what we call slam fire, fire without pulling the trigger?

A. Not that I'm aware of, but we -- that's a safety thing that we do for all firearms whether it be a small little Derringer, which is actually not too dangerous, to, you know, handguns, shotguns, rifles. We -- we unload every firearm to render it safe before we continue any kind of processing or definitely packaging and submitting into evidence.

Q. Okay. And so -- but why would you need to take the ammunition out if nobody is gonna pull the trigger?

A. Because I don't -- I can't say who is -- who might

pull the trigger or who might get ahold of that firearm because in the process from the collection from the scene to trial definitely, you know, there's -- there's multiple people that have access to that firearm. We may send it off to SLED for testing, we may send -- either side, the defense or the prosecution, may have access to -- you know, to take a look at the -- the evidence and certainly don't want someone to be handling it or us bring it to court, just like I am this piece of wood, and someone mishandle it and it go off.

Q. Okay. And it go off, right. But -- so there's other ways beside pulling a trigger that it can go off?

A. Not to my knowledge.

Q. There's no other way a gun can go off unless you pull the trigger; is that your testimony?

A. To activate the -- the firing pin and the -- in a firearm, the typical -- the method that a firearm is designed for is to pull the trigger, which activates the pin that discharges the firearm -- discharges the bullet of the firearm.

Q. So it's your testimony that unless that trigger's pulled, that firing pin cannot be activated?

A. Yes.

Q. Okay. So if there were fouling or residue, it doesn't matter, a firing pin cannot be activated?

A. I'd say on a standard firearm that's how it is. There are -- there have been, you know, history of either recalls or issues with firearms, a malfunction of some sort, but on a standard -- standard working firearm the only way that that should -- a firearm should be going off is whenever there's activation of the firing pin by pulling the trigger.

Q. But there have been recalls because that's not always the case, right?

A. Correct.

Q. Okay. And there were some other areas of interest you were aware -- or were you aware that there were some other address locations that were pertinent to this case?

A. Yes.

Q. Okay. Did you take any measurements between those two areas?

A. Yes. The residence at [redacted] -- hold on a second. You have the primary residence, which is, like I said, the [redacted] Glenwood Drive, and then two houses down from that to the right is [redacted] -- hang on one second if you don't mind me referencing. I want to make sure I get the address correct.

Q. Can I help you out? Is it [redacted] and [redacted]?

A. It's [redacted] and [redacted], but the [redacted] is Oak Top. Oak Top Drive.

Q. Okay.
A. It's not the same street.
Q. All right. But it's -- you would agree with me that's -- you're talking about two house up?
A. Two houses down to the right is [redacted] Oak Top Drive.
Q. And what were the -- what was the difference between those two addresses?
A. The distance -- the measured difference between the two was 117 feet and four inches.
Q. Okay. So 117 feet and four inches.
MS. ZMROCZEK: Okay. And I believe, Your Honor, without objection we're putting Defendant's 18 in.
THE COURT: Mark 18 into evidence, please.
(Defendant's Exhibit Number 18, a photograph, was admitted into evidence.)
BY MS. ZMROCZEK:
Q. And so this is Oak Glenn Drive, this is the [redacted] maybe Oak Glenn, maybe Oak Top, and so you say the distance is a hundred feet?
A. 117 feet --
Q. 117 feet.
A. -- and four inches.
Q. Okay. So under forty yards?
A. Yes, under forty yards.
Q. Okay. Did you measure any other addresses?

A. No, I did not.
Q. Okay. When you collected -- when you were at the autopsy and you collected the wadding that we saw, you also collected some blood that was drawn?
MR. PINCELLI: Objection, Your Honor.
THE COURT: Yes, sir.
MR. PINCELLI: I'm not sure what the relevance of the contents of the blood would be if that's where this testimony's going.
MS. ZMROCZEK: Okay.
THE COURT: It's too early for me to tell. Overruled. Go ahead.
MS. ZMROCZEK: Thank you.
BY MS. ZMROCZEK:
Q. You collected other items as well?
A. I did not collect the -- the blood from the -- from the victim in the autopsy. That's something that the pathologist collects and this is submitted to my knowledge to SLED.
Q. Okay. But -- and maybe I misspoke. I didn't mean you actually collected the blood, but it's put into vials, correct?
A. Correct.
Q. And then you collect it and it goes into evidence and then goes wherever it goes?

A. Yes.
Q. Okay. Sorry. I should have been more clear.
Okay. You didn't draw any blood, but you received blood that was drawn?
A. Yes.
Q. Okay. And -- and you just take all that into evidence and do you transfer that evidence just like you transferred this board?
A. Yes.
Q. So you package it?
A. It's packaged and -- well, it's -- it's packaged and it is kept in a refrigerator. Whereas an item like a two by four is not gonna be kept in a refrigerator, but because it's bodily fluids it does need to be kept in a refrigerated state.
Q. And you -- and you have protocols so that we can make sure that any evidence received from that is accurate information, right?
A. Yes.
Q. And you absolutely did that in this case as you were trained?
A. Yes.
MS. ZMROCZEK: I beg the Court's indulgence.
THE COURT: Yes, ma'am.
MS. ZMROCZEK: That's all I have, Your Honor. Thank

you.

THE COURT: Redirect?

MR. PINCELLI: Just briefly.

REDIRECT EXAMINATION

BY MR. PINCELLI:

Q. Investigator Sprinkle, we talked about the distance and where the blood pool was and where the door was. This is State's 18. We looked at that. You indicated that was how far from the door?

A. Right under thirteen feet.

Q. And you indicated that you could draw some sort of -- from your experience, you could draw a direction that the victim was travelling right after he was shot?

A. Yes.

Q. And what -- what did you say that was?

A. This is the initial blood pouring, you have a turn, and then a trail that leads out to the victim's body over there, and there's no other blood that was observed on-scene that day.

Q. And because of -- you said that it looked like it poured out, there was no spatter, so you couldn't tell some things, but you could tell maybe where the victim was standing, where Will was standing when he was shot?

A. The general area, very -- when I say general area, this is pretty accurate, but I cannot say exactly which

pinpoint spot he is -- he was standing, but in a -- probably a two or three -- two or three foot radius.

Q. Would you be able to draw a circle with that laser pointer on that picture?

A. Yes. Somewhere in this area he was standing while he -- during the time that he got shot.

Q. Okay. And based on your experience with firearms and in reality based on movies, does a -- does a firearm blow you backwards when you're shot?

A. No.

MR. PINCELLI: I beg the Court's indulgence.

THE COURT: Yes, sir.

MR. PINCELLI: That's all for my questions. Thank you, Investigator Sprinkle.

MS. ZMROCZEK: You can leave that up so the jury can see.

MR. PINCELLI: Okay. Sure.

RECROSS EXAMINATION

BY MS. ZMROCZEK:

Q. So your testimony is then he wasn't going backwards, but that blood came because his -- he was coming forwards?

A. Yes. For that -- for that to -- that blood to be -- to fall at a 90-degree angle, the chest cavity, which is where the blood is originating from, has to be angled for it to be pouring down onto the -- onto the -- onto the

ground. I'm not saying that he was actually -- like I said, if he was -- he could have simply been -- sorry. This isn't working. Great. He could have been standing here and leaned forward, he could have stumbled, he could have taken a couple of steps forward; however, whatever motion, at some point he was bent over and started the blood trail.

Q. And you gave a couple of examples. He also could have been aggressively walking forward?

MR. PINCELLI: Objection, Your Honor. I don't know that he can say that.

THE COURT: Overruled.

A. I'm -- I'm not quite sure as to saying how -- how -- what -- at what pace he was -- could have been walking.

Q. We just know that it was in the forward --

A. It had to -- it had to have been very close as to where the blood -- the blood started, the blood trail started, as to where he was located during the time of the -- during the gunshot, when it was -- occurred.

Q. And leaning forward?

A. And leaning forward.

MS. ZMROCZEK: Thank you. No further questions.

THE COURT: All right. Thank you, sir. You may step down.

(Witness excused.)

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THE COURT: All right. Ladies and gentlemen, we had some backup cases for this week and one of those the person is going to enter a plea and so I -- I have to take that plea and I told them 2:00 today. So I want you back at 2:30. You should be -- we should be well through with that by 2:30.

Don't discuss the case. You're on your own for lunch. I hope you have a pleasant lunch and I need you back in the jury room at 2:30, please. Leave your notes.

(Whereupon, the jury was excused for lunch at 12:43 PM.)

THE COURT: All right. For those of you who were not here earlier in the week when I gave this instruction, I say it in every case, please be careful as you leave that you don't have contact with the jurors. The jurors are gonna come around to the common area, they're probably gonna use the same elevators, they may well go to the same restaurants. Just please be careful that you don't say anything about the case or anybody in it that might be overheard by a juror and that you not have any contact with a juror. The safest thing to do is to wait a few minutes and let them clear out, but don't assume they've gone because people do different things. Some people don't eat lunch, they just kind of hang around.

We're at ease until 2:00, Madam Court Reporter; 2:30

on this case.

Thank you.

(Whereupon, a luncheon recess was taken at 12:45 PM.)

(Defendant's Exhibit Number 24 was marked for identification.)

(State's Exhibit Number 28 was marked for identification.)

(Back on the record at 2:30 PM.)

BAILIFF: All rise. Court is now in session.

THE COURT: Thank you. Be seated.

Is everyone ready?

MS. ZMROCZEK: Your Honor, there is an issue that I think we need to address ahead of time.

THE COURT: All right. Go ahead.

MS. ZMROCZEK: So yesterday when I was trying to find out who they were calling so that I could have my witnesses prepared, Your Honor, so there's one witness that we've been trying to get under subpoena and when they -- when I asked -- yesterday when I asked them to send me finally the rap sheets, they also included driver's licenses, and they were also kind enough to give me his number this morning because it's a fact witness, Your Honor, that you've heard the name Vernon Blanding, and so my investigator tracked him down and my investigator is prepared this afternoon to testify as to the problems

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with that, but the gist of it, Your Honor, is that he said he is not -- and my investigator also went to two locations that he had for his address. He said he is not going to be found, that he met with the solicitor's office, he told them he is not going to testify, he is not coming, they cannot find him. He goes on to say some other stuff, which is hearsay and has nothing to do with anything, but the gist of the matter is, Your Honor, he told us that he had met at some point -- or talked to the solicitor's office, even named Jill, who is an investigator with them, and then -- and said he told them he's not coming, he told us he is in hiding, he is not coming.

And -- and, Your Honor, obviously, you know, at this point he's a witness that we've heard about. He wrote a statement. We need to get that statement into evidence. He is unavailable or he is dodging us and said specifically that he's in hiding is what he told my investigator, and my investigator will come and testify to that on the stand.

So we're at a point where I have the officer who signed that he witnessed the statement under subpoena who can be here at 9 AM so that I can get the statement in through that officer. That is what we intend to do if we can't get this witness, Your Honor. We consider that he's unavailable, specifically since he apparently had told the solicitor's office that he wasn't coming. And, like

I said, we've been trying to serve him and he is specifically in hiding, intentionally dodging our service.

I don't know if they had him under subpoena. I asked the State if they had him under subpoena and they thought that they had had him served, but then they said they weren't sure. Now Ms. Patterson is shaking her head no, but they did give me his -- his number and that was a correct number for him, Your Honor.

So our position is that we would get his -- and we don't necessarily have to put the written statement in. I mean, we can, we're fine with that, but I was intending on having the officer who took the statement verify that he wrote these questions and that these were the answers.

THE COURT: Is there gonna be an issue about that?

MS. PATTERSON: I mean, Your Honor, we did attempt to contact Mr. Blanding. I think he called our office and he did -- and we were unsuccessful with getting him served. He didn't want to testify with either side is my impression, Your Honor. I'm not sure, Your Honor. I don't -- I don't get the right to cross-examine Mr. Blanding if his statement is simply admitted through this officer, so I -- I may have a problem with that, Your Honor. I'm gonna just have to research it and look and see what my options are, but I would certainly, if they're gonna call him, like to cross-examine him. I mean, it's -- it's not our fault

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that he's in hiding. He talked to her investigator for a while, he's even called up here, so I know he's certainly around. We have his last known address. We can provide that to the defense counsel, we can provide that to law enforcement if you want to find a law enforcement officer to go and -- and see if we can, I don't know, take him into custody or what, Your Honor, but I would like to cross-examine Mr. Blanding if he was called as a witness.

THE COURT: Do you know if he has any outstanding charges against him?

MS. ZMROCZEK: His -- from the rap sheet that they provided me, his most recent charge was 2018, he was given a year, and it was a year active time. And I believe actually Your Honor sentenced him and he just was released. So he -- and he maxed out on that year. So from the rap sheet I was provided, I don't see where he has any pending charges. Do you? Because that was -- when we couldn't find him, Your Honor, we -- that's an avenue that we looked at to try to see if I could get a bondsman or an attorney. His last known attorney was Derrick Mobley. I spoke with him who had a bad address, but we have a West Columbia -- we have two. Actually my investigator ran a people search and had two potential addresses come up and he has been at both of those knocking on doors and nobody is answering.

THE COURT: What did he say in his statement that you need to get in?

MS. ZMROCZEK: Your Honor, he says on -- around about 5:30, 6:30 -- well, he said 6:30 and he crossed it out and put 5:30, I, Vernon Blanding, arrived at my sister's house, Latar Blanding, from work. I observed the father and son having words. The son had a board in his hand. I'm sorry, Your Honor. His handwriting is not great. And I ran -- oh, and -- I'm sorry. The son had a board in his hand while something walk on behind the father with the board, I told them to stop and took the board from Will. He said he was not going to stop. The father walk in the house and got the shotgun and stood in the doorway and I -- and shot the son, Will, dead.

There's some questions. So, Your Honor, the point is, is that he obviously took the board and he told Will to stop and in his statement he says Will said he wasn't going to stop, which is -- you know, there's been a whole bunch of testimony about Vernon Blanding taking the board and where he located the board and the timeline of when this happened, Your Honor, and then -- you know, and then he writes this statement.

You know, the rest of the pages are questions and answers, which, I mean, we're not necessarily worried about getting, you know, specific interrogation questions

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in. We don't care, you know, but the gist of what his statement in his handwriting is -- Your Honor, I think is crucial to our defense, and so that's where we are.

THE COURT: Do you know when he gave his statement?

MS. ZMROCZEK: He did, Your Honor. It's given May 10, 2016, so the date of the incident.

THE COURT: What time?

MS. ZMROCZEK: At -- I do not -- oh. Nope. Your Honor, it doesn't have a time on it, but I can certainly hand it up so if maybe I'm not seeing a time.

THE COURT: All right. Rule 804 of the rules of evidence deals with hearsay exceptions where the witness is unavailable. In order for a witness to be declared unavailable, it appears that the only possible applicable subsection is 804(a)(5) and it would have to be -- I'm sorry, 804(a)(2) or 804(a)(5), and (2) would require a court order for the defendant to appear. Then looking at the exception -- exceptions that apply where the witness is unavailable, I don't see any under (b)1, 2, 3 or 4 that apply to the situation here, so we have to go to Rule 803, which is the hearsay exception when it doesn't matter whether the witness is available or not.

Based on what you-all are saying, it appears that the only possibly applicable one is 803, Subsection 1, a presence sense impression; that is a statement describing

or explaining an event or a condition made while the declarant was perceiving the event or condition or immediately thereafter. There would have to be a foundation established as to whether this was sufficiently close in time as to be immediately thereafter.

Now I think there's a provision in the law where you can require to have the witness arrested and taken into custody.

You probably need to mark that as a Court's exhibit.

(Court's Exhibit Number 1 was marked for identification.)

THE COURT: At a minimum it appears to be that somebody is gonna have to try to serve a subpoena on this gentleman.

MS. ZMROCZEK: And my investigator was gonna come here, but I will have him continuing to try to do that and then I will -- because he's been trying to do that, and I will have him continue that throughout the day and have him come testify tomorrow about the length of his efforts to do that. And the officer, the investigator who witnessed that, Your Honor, is out in the field today, but can be here at 9 AM tomorrow as well.

THE COURT: Well you-all need to look up whatever provision there is about taking a witness into custody if he refuses to appear.

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MS. ZMROCZEK: Okay.

THE COURT: I mean, I know a subpoena is one thing if you get a subpoena served and he doesn't show up, but we're gonna be running pretty close on time. He's not on parole and he's not on probation?

MS. ZMROCZEK: No, and I'll have my investigator double check that as well. But according to --

THE COURT: What's his last name? Vernon what?

MS. ZMROCZEK: Blanding, B-L-A-N-D-I-N-G.

THE COURT: Your investigator did talk to him on the phone, right?

MS. ZMROCZEK: Mine, and as Ms. Patterson said, the State's has as well.

THE COURT: All right. Well, let's try to keep moving right now. Is the State ready for the jury?

MR. PINCELLI: We are, Your Honor.

THE COURT: Defense?

MS. ZMROCZEK: We are, Your Honor.

THE COURT: Bring in the jury, please.

(Whereupon, the jury return to the courtroom at 2:55 PM.)

THE COURT: All right. Members of the jury, something came up after I finished with the guilty plea we've been working on and we're now ready to continue.

Call your next witness, Solicitor.

MR. PINCELLI: The State calls Suzanne Cromer.

THE COURT: Come around, please.

(Whereupon, Suzanne Cromer was duly sworn by the Clerk of Court.)

THE CLERK: Thank you. Please be seated in the witness stand. Once you are seated, please state your name; spelling your last name for the record.

THE WITNESS: My name is Suzanne Cromer, C-R-O-M-E-R.

SUZANNE CROMER,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PINCELLI:

Q. Good afternoon, Suzanne. Where do you work?

A. I'm employed by the South Carolina Law Enforcement Division, commonly referred to as SLED.

Q. And what's your title at SLED?

A. I am a firearm and toolmark examiner in the forensic services laboratory.

Q. Do you go by Examiner Cromer?

A. That's fine.

Q. How long have you been working with SLED?

A. I've been with SLED -- it was twenty years this past December.

Q. Twenty years?

A. Twenty years.

Q. And have you always been a firearms and tool examiner?
A. I've always been in the firearms department. I started the train -- in-house training program for firearm and toolmark examiners in February of 2000.
Q. And can you explain for the jury what your job description is?
A. What I primarily do is called firearms identification. I look at ammunition components, bullets, cartridge cases, shotgun shells and unfired ammunition to determine whether it was fired by or loaded into and extracted from a specific firearm. If I don't have a specific firearm, I can look at those ammunition components and give investigators an idea of how many firearms were fired at a scene. I also examine firearms, I also examine toolmarks, bolt cutters on padlocks, I do serial number restorations, I do entry into the National Integrated Ballistic Identification Network, which is a digital database -- searchable digital database for images of cartridge cases. I am the NIBIN program's administrator for South Carolina. Also I'm the representative for the users group for North and South Carolina for that program. I'm also a training officer in the department.
Q. Thank you. You listed a lot of job duties and they sound specialized. Have you received training to perform those duties?

A. Yes, I have. I have a bachelor's degree from Clemson University. I did some graduate work at the University of South Carolina in criminal justice. I have completed SLED's in-house training program, which is a multiyear program for firearm and toolmark examiners where we study under other court-qualified firearms examiners. We take written tests, oral tests, practical exercises, and upon completion of all the modules in our training manual, we are given a comprehensive final exam that includes essay questions, firearm familiarization questions and also mock cases. We are given several mock casework that represents specifically what we do in our job. Those tests are graded by our training officer and our lieutenant before we are allowed to receive casework.

I have taken classes with the Association of Firearm and Toolmark Examiners, which we call AFTE. AFTE is an international organization for our profession. They meet once a year for a week long seminar to discuss current issues in our area. They also offer extra workshops. I've taken such extra workshops as machine gun conversion, barrel making, courtroom testimony, ethics, Hi-Point firearm familiarization with the founder of Hi-Point Firearms just to name a few. I've also taken classes with the South Carolina chapter of the International Association of Identification. The most pertinent being two -- three

different day shooting scene reconstruction workshops. I've taken classes with the Bureau of Alcohol, Tobacco, Firearms and Explosives, commonly referred to as the ATF, in serial number restorations, and the National Integrated Ballistic Network.

Q. Thank you. That sounds like quite a lot of classes. Do you ever have to generate reports for your work?

A. Yes, sir. We --

Q. And -- I'm sorry. Do you -- are those reports peer reviewed?

A. Yes, they are.

Q. Do you have a standard operating procedure of how you generate your reports?

A. We have standard operating procedures for firearms examination, for writing reports, for our technical and peer review, and for our admin review, our micro verification review.

MR. PINCELLI: Your Honor, at this time I'd like this witness qualified as an expert in firearms.

THE COURT: Voir dire?

MR. SCHWARTZ: Yes, Your Honor.

VOIR DIRE EXAMINATION

BY MR. SCHWARTZ:

Q. Agent Cromer, have you ever been qualified as an expert in the specifics of shotguns?

A. No, sir, I haven't. I've been qualified as an expert in firearms and firearms identification.
Q. Okay. And that includes shotguns as well?
A. That includes shotguns as well.
Q. Okay. Have you ever been published?
A. No, I have not been.
Q. Okay. Are you a member of any specialized groups?
A. I am a regular member of the Association of Firearm and Toolmark Examiners.
Q. Okay. Have you ever presented in any CLE's or what we call CLE's?
A. I have presented at the National Advocacy Center before, which is a training program for district attorneys and solicitors. I've presented there.
Q. Okay. You said that you were peer reviewed on, I guess, exams; is that right?
A. Yes. Once we do -- or once we come to a conclusion, whether it's a microscopic conclusion, we have to have another qualified firearms examiner come behind us, look at the same stuff on our microscope and come to the same conclusion before we're allowed to issue that report. We take lots of bench notes. All of our bench notes have to go to another examiner to be technically reviewed for accuracy before those reports or before that bench -- those bench notes can be released, and then they are also

administratively reviewed.
Q. Okay. Have you ever failed one of those peer reviews?
A. No, sir, I haven't.
MR. SCHWARTZ: I've got no further questions of this witness, Your Honor.
THE COURT: Anything --
MR. SCHWARTZ: No objection as well.
THE COURT: She's recognized as an expert in the field of firearms and firearms identification.
MR. PINCELLI: Thank you, Your Honor.

CONTINUED DIRECT EXAMINATION

BY MR. PINCELLI:
Q. Suzanne, how did you become involved in the case we're here for today?
A. I picked up evidence in this case from our evidence control department on November 17, 1917 -- I'm sorry, 2017. November 7th, '17. I then placed it in my evidence locker and I was contacted by Matt Martin from the Lexington County Solicitor's Office through e-mail about this case on January 17th of 2018.
Q. And was this through your professional capacity at SLED?
A. Yes, sir, it was.
Q. And what were you informed was the issue that you would be helping with?

A. Mr. Martin had e-mailed me and said that there was some question as to whether the firearm had accidentally gone off and if I could do extra testing to see if that could have been possible.

Q. And you said that you received the firearm from evidence?

A. Yes, sir.

Q. Can you explain how -- just the stages of how you received it, what condition it was in as far as securing it, and how you stored it while you had it?

A. Yes. So evidence comes into the SLED lab through a submitting agency, and in this case Lexington County. It goes into our evidence control department. They then decide where it's gonna go in our laboratory and place it in a sealed place to wait for an examiner to pick it up. And firearms have to be under an extra special layer of lockdown just due to the nature of a firearm. So once I pick it up from downstairs, we are given -- each piece of evidence that comes into the SLED lab is given a barcode. So that barcode was scanned in. It was created when Lexington County dropped off the evidence, created in our evidence control department, placed on the box, so that when I went downstairs -- because our laboratory is on the second floor. When I went downstairs to pick up the evidence in this case, I then -- I have a personal barcode,

I scanned it to myself, and then I took it upstairs to my evidence locker and placed it there until I was ready to begin my exam.

Q. And did you have any reason to believe that the gun had been tampered with from the time it went into evidence until the time it got to you?

A. No. We take notes on that. When we receive evidence, we look to see if any of the seals are broken, if it's sealed. We did not note any of that.

Q. And can you give me a description of that firearm?

A. What I received was Mossberg Model 500A pump action shotgun, a 12 gauge, and it had a pistol grip.

Q. Okay. And can you describe what a pistol grip on a shotgun is?

A. It is a handheld grip that you would hold it with one hand. When you typically see a shotgun, you see a longer like stock that would go up against your shoulder or under your arm. This did not have that. It just had the pistol grip and then the forearm and the barrel protruding from it.

Q. And did you measure the shotgun?

A. Yes, I did.

Q. And what was the length of the shotgun?

A. Let me check my notes, please. The total length of the shotgun was approximately thirty inches. The barrel

itself was twenty inches long.
Q. And did you take notes of any other metrics or measurements for that shotgun?
A. We take notes of the finish of the shotgun, how it looks, what -- you know, what it's made of. We also measure the magazine capacity and we also measure the muzzle to trigger distance, so that means the distance between the end of the shotgun to the trigger.
Q. How about anything else dealing with the trigger?
A. We measure trigger pull weight after our final testing has been done.
Q. Can you explain to the jury what trigger pull weight is?
A. Trigger pull weight is the amount of pressure that has to be applied to that trigger to cause the firearm to fire. And how we measure that is we have weights that kind of hang from the trigger and then we just pick the gun up and if it -- if it fires, we'll know. Typically I start out very light and we go up in quarter pound increments. So I tested this firearm and found that -- if I may check my notes?
Q. Sure.
A. The trigger pull weight was five and three-quarters to six pounds. So that means whenever I lifted five and three-quarter pounds, it would not fire, but every time I

put on six pounds it would fire.
Q. And is that -- is there a typical trigger pull weight? Does that compare with anything?
A. It felt average. It felt normal to me.
Q. And so you've told us all about that gun now. Did you -- are there any identifiable marks on that gun to let you know about where it's manufactured to make sure it's the same gun?
A. Well, there's a serial number and then I also mark that firearm with my lab number and my item number and my initials, but the serial number on the firearm was P427092.
Q. This has been marked as State's Exhibit 28. I'm gonna walk around behind you so you can --
A. Okay.
Q. And do you observe that to be secure in its present condition?
A. Yes. So there's a trigger lock or cable lock through the action of the firearm.
Q. And is this the firearm that you received in evidence?
A. Again, I'm looking at the markings. Yes, it is. Again, it's marked in several locations with my item number, my initials and my lab number, and also the serial numbers match.
Q. You can put that up if you'd like.
A. (Witness complies.)

Q. You said that was sent to you and it was suggested that -- that the gun might have gone off on accident and that's what your job was to figure out, was to test it from that point?

A. Yes. Whenever we're alerted to something like this, we actually ask for a little more details. I want to know how did they say it went off by accident; were they racking the gun, were they working on the gun, did they drop the gun. So I -- I wrote back to Mr. Martin and asked him for a little bit more detail. He told me that he believed that it was during racking the firearm. And racking the firearm, if I may, means moving this forearm forward.

Q. And what -- what does that do? Just explain to the jury that might not know the function of the gun, what does that do when you do that for a gun?

A. To load this firearm, you can either load -- this is what we call the magazine tube. You can load the magazine tube first or you can actually load one straight into the chamber. To actually chamber an unfired round in your -- in your chamber here, you actually have to pull the forearm, which is this, forward and that completes the action of chambering an unfired shot shell in a chamber, so then it's ready to fire.

Q. So that draws the shell to a place where it can be

fired?
A. It draws the shell out of the -- out of the magazine tube and up into the chamber.
Q. And based on those facts, what did you decide that you should do as someone in your position, an expert and examiner?
A. Well, first I did multiple things. We tested the safety, which is right here, to see if it would fire with the safety on, and it would not. Safety is paramount in our department when we're handling guns all the time, so I wanted to see if it would. So what we did a lot of is dry firing, and dry firing means pulling the trigger without anything -- or any ammo in it. So my thought was, is will it -- will it function right, so we racked it multiple times --
Q. And, again --
A. -- dry fired it multiple times.
Q. Again, I think you just explained it, but just for people that might not be familiar, what does racking it mean?
A. Moving the forearm. Moving it forward and backward.
Q. So like pumping it?
A. Yes, pumping it. So with Mossberg firearms -- and this is not loaded, so I'm gonna hold it up like this. With Mossberg firearms, how they work, is inside the

trigger -- or inside the receiver of the gun there is what's called a disconnector and the disconnector is the part that keeps semiautomatic firearms from firing full auto. So when you pull the trigger, it moves the disconnector, the disconnector turns another part called the seer, the seer is holding the hammer back. Once the seer is moved, that hammer slides forward and hits the firing pin.

How Mossbergs are made is typically the disconnector has to be in an upward position for it to be engaged with the seer. Well, when this forearm is all the way to the back so you can load, that disconnector is pushed down so it's not engaging the seer of the firearm. So once the forearm is pulled all the way forward, the seer's -- the disconnector is disengaged, so it's up higher, it's engaged with the seer. If you pull the trigger, the seer rotates a little bit, releases the hammer, the hammer slides forward and hits the firing pin.

Q. And if you could break it down in very basic terms. I appreciate your technical terms.

A. So what we did because I was trying to figure out if I could get this gun to shoot without having to pull the trigger, so racked it. We racked this gun, moved the forearm back and forth multiple times. So then my other thought was is it possible that the trigger was -- the

shooter actually had his finger on the trigger when he racked the gun and that he racked it hard enough to pull the trigger up against his finger, which I found multiple times I could not make that happen because if the trigger was pulled anywhere except when the forearm was in the foremost distance, I had to let go of the trigger, let it reset, let it gain that tension with the disconnector and the seer, and then pull the trigger, so I could not do that.

I'm a left-handed person. I have a trainee that worked with me on this case. She's right-handed. So I tried multiple times, I made her try multiple times just to see if it could have been a handed issue.

Q. Did you find it was a handed issue?

A. No, it was not. I did everything I could think of to make this firearm fire without pulling the trigger and I could not do it. Again, I can't account for every scenario that could happen, but I could never make this firearm fire without pulling the trigger.

Q. You say you couldn't account for every scenario. You talked a lot about racking or pumping it, holding the trigger down, and I believe you mentioned that it would only work if you pumped it fully, returned the pump all the way forward and then pulled the trigger. Is that my correct understanding?

A. Yes, sir.
Q. Did you check anything else, any other information available to you to see if there was any other possible way the gun could possibly fire?
A. Yes. Again, I said I'm a member of the Association of Firearm and Toolmark Examiners. AFTE has what we call a recall and safety warning list, so I got online and I looked. Mossberg 500 and 600 models did have one of those recall and safety warnings that said if you beat on the plastic portion behind the trigger guard with a mallet, then you could possibly make it fire.
Q. Suzanne, I just want to pause just real quick. Could you explain for members of a jury that might not know what a trigger guard is, could you point that out to them and tell them what -- what that is?
A. This is the trigger guard of the firearm, this is the trigger, so that's the design -- it's designed to protect that trigger from being hit or pulled unintentionally. So that's the trigger guard. And the recall safety warning list, typically for ones that have butt stocks that have a longer gap between the trigger guard and the stock end, that if you hit it with a hammer, then it could potentially go off. That I -- I did check that. Obviously I couldn't hit behind the trigger guard, so I hit it with a mallet on the receiver and I still couldn't make it go off.

Q. You talked about dry firing and you talked about those demonstrations with a mallet. Did you ever use any other kind of ammunition or any other technique to see if the gun worked?

A. Yes. Obviously we had to shoot it to get test specimens to compare against any fired shells that we had, so what I did was we fired normal rounds, normal shot shells through it, and then I also took what we call primed shot shells, that is shot shells that we've taken all of the extra stuff out of the inside so that all that's left is just the shell itself and the primer. So there's no wad, there's no projectile, there's no gunpowder. That way if we could make it go off it wasn't going to hurt anyone.

So we did that multiple times. We did that while we were trying to rack the gun to get it to fire and still could not get it to fire.

Q. And I think you said something about shell analysis and that was part of the reason you used those primer shells. Can you explain what -- what that process is?

A. What I do is I look at my fired ammunition from a case and I -- if I have a suspect weapon like I did in this case, I'll shoot similar ammo to what I received and then I will go back and do a microscopic comparison first of my test to each other to see how the firearm works and then from my test to my evidence or to my unknowns, and I

did that in this case as well.
Q. And I'm gonna back you up just a second. You said you did all those tests trying to make the gun fire?
A. Correct.
Q. What were your findings on the working -- well, did you make findings?
A. Yes. I reported that this firearm was in working order, meaning I could not find any defects. And, again, because I could not find any defects, I did not attempt to take the gun apart and inspect the internal workings just because doing that could affect the function of the firearm, so I did not want to do any of that because it was in working order.
Q. And you talked about the -- you talked about the shell analysis and what were the findings of that?
A. I was -- we render one of four conclusions. Positive; yes, it was fired by that gun. Negative; no, it wasn't; unsuitable for identification; meaning it was too damaged to tell either way. Or inconclusive. And I was inconclusive on this cartridge case versus this gun.
Q. And as an examiner, does inconclusive mean that it's definitely not from that firearm?
A. No, it does not. I could sit here and watch someone shoot into that wall, we could pull the bullet out and I could take it back to my lab and examine it microscopically

against bullets that I fired from that same firearm and it could be inconclusive forensically because what I base factors on for a conclusion is the markings left by the gun, it is not any of the information I'm given about the case.

Q. How common are those inconclusive readings -- findings?

A. Depending on the type of firearm it is and how it marks, it could be common.

MR. PINCELLI: I beg the Court's indulgence.

THE COURT: Yes, sir.

BY MR. PINCELLI:

Q. So just to break down the operation of this gun, you said you found it in working order?

A. That is correct.

Q. Can you describe in pretty basic terms for me and the jury what is the -- what is the working order? How do you correctly fire that firearm?

A. This firearm, safety off, forearm forward, round in the chamber, pull the trigger.

Q. And how would you get the shell into the chamber?

A. If there's not one already, you can pull the forearm forward if there's shells inside the magazine.

Q. So you'd have to pump it fully?

A. Pump it fully, pull the trigger. If there's one

already in the chamber, as long as your forearm's in the most forward position, you can just pull the trigger.

Q. And was that the way -- was that the only way you found that weapon to be able to be fired?

A. Forearm forward, trigger pulled, yes.

MR. PINCELLI: I have no further questions. Please answer anything from the defense.

CROSS-EXAMINATION

BY MR. SCHWARTZ:

Q. Agent Cromer, you created a report in this instance?

A. Yes, I did.

Q. Okay. And you have a copy of that with you, I believe?

A. Yes, I do.

Q. And that report is accurate?

A. To my knowledge, yes, it is.

Q. And it's complete?

A. Yes, sir.

Q. All right. Is there anything you wish to add or change about it at this point?

A. No, sir.

Q. All right. In that report, you list -- and we went over this, I'm not gonna belabor it, it's a Mossberg 500A?

A. Yes.

Q. Pistol grip and twelve gauge, correct?

A. I did not list pistol grip.
Q. Okay. You don't list that, but it is a pistol grip shotgun?
A. It's a pump action shotgun with a pistol grip, yes.
Q. Okay. You can actually buy that firearm the way that it's situated right now. Maybe not with the red dot site, but --
A. That's correct.
Q. Okay. So it has not been modified except for the site on it?
A. That's correct.
Q. Okay. You made some notations here in your report about the condition of the shotgun. Do you want to flip to that page?
A. In my report or in my notes?
Q. It looks like your report. Or your -- it's titled worksheet.
A. Okay.
Q. I'm on page 1 of 2.
A. Okay.
Q. You list the -- the shotgun as having residue inside the barrel?
A. Yes.
Q. Also you list that the shotgun's in fair condition?
A. Yes.

Q. All right. It's got, I believe, some -- some issues with the paint?
A. Yes.
Q. And there's some chipping inside of the -- I believe it was the chamber or the ejection port?
A. Yes, there's some paint missing, there's some chips on the firearm.
Q. Okay. And the reason that you-all list these types of things in a report is because the -- the quality of the firearm or the -- I'm at a loss for words right now. Not the value, but the -- how it presents. What's the word I'm looking for? Sorry. The shape that it's in, right? The shape that it's in. I'm sorry. The shape that's it in could affect the operation of that -- of that firearm, correct?
A. Its condition could affect the operation of the firearm.
Q. Condition. That's what I was looking for. Thank you. And you would agree with me that this -- this firearm was not in good condition?
A. It was in fair condition --
Q. Fair condition.
A. -- meaning it functioned, but there were some cosmetic wear and tear and chips.
Q. Okay. Could a firearm that's in bad shape be

defective?
A. A firearm in poor condition -- yes, there could be instances where a firearm in poor condition could have clogging of the firing pin channel so the firing pin wouldn't move. I've seen that before, yes.
Q. Okay. We're talking about the firing pin. If the firing pen had residue or corrosion on it, that could affect the way that a firearm operates as well?
A. Potentially, yes.
Q. Okay. And you -- I think you said that you had done numerous tests. You racked the firearm with and without ammunition and found it to be in working order?
A. Yes, sir.
Q. But that's not the only way a firearm can -- can actually malfunction or misfire; it that correct?
A. Correct. It could be user error. It could also be wear and tear of the ammunition itself.
Q. Okay. Let's talk about the ammunition. Do you know what type of ammunition was used in this incident?
A. I received one fired Estate brand shot shell.
Q. Okay. And that's a shot shell. What type of shot shell was it? Was it birdshot or buckshot --
A. Number 8 birdshot.
Q. Okay. And that's typically used for hunting some type of bird; a pheasant, dove, whatever?

A. I believe so, yes.
Q. Okay. And that type of shot shell has -- I don't know how many hundreds. I would say a good handful of small pellets of BB's in it?
A. It was labeled one and one-eighth ounce of 8 -- Number 8 birdshot pellets.
Q. Okay. And the function of that type of shotgun shell is when -- when you're shooting a bird, you kind of want a wide pattern, right?
A. Correct. But your patterns can also be determined by the choke of the firearm.
Q. Sure. Well, let's talk about what a choke is. I know what a choke is. Maybe some of the jurors don't. It's a device you put on the end of the firearm to actually control at a certain distance the spread of the BB's, right?
A. Correct. It is something that you can put inside the barrel of your shotgun to control the spread, whether you wanted a tight knit shot pattern or to fly it out.
Q. Okay. And did this firearm have a choke on it?
A. No, this is a cylinder board; meaning no choke.
Q. Okay. And this type of ammunition is typically used for hunting birds, not self-defense, correct?
A. I would believe so.
Q. Okay. And in your training and experience, the

closer -- the closer you get to a target with birdshot, the smaller the -- the spread is gonna be?
A. Again, it depends on the firearm itself.
Q. Okay.
A. It can be.
Q. And you say it depends on the firearm, but barrel length can also change the spread, right?
A. The barrel length, where there's a barrel shot off -- sorry -- sawed off or not, alterations to the firearm, if there's a choke in there, and actual ammunition itself can play a distance in -- or a determination in the pattern.
Q. Okay. But you would agree with me, generally speaking, for shotguns the closer you are, the smaller the spread, the farther you are, the larger the spread?
A. Yes, sir.
Q. Okay. And in a shotgun shell they have the -- what's called the wad?
A. Yes, sir.
Q. And that's a piece of plastic that actually holds the BB's together while it exits the barrel?
A. Wads can be made of plastic or cardboard. There is a shot cup wad, which actually holds the BB's, and then there's over-the-powder wad, which actually protects the BB's from hitting the gunpowder in the shell.
Q. Okay. And when the shell is set off, that wad is

ejected with the BB's and at some point breaks apart and the BB's continue?

A. Correct.

Q. In your training and experience, what would be your estimated -- the average distance that a wad would go?

A. Again, there's so many factors depending on the gun, depending on the ammo, depending on how they're shooting the firearm, so I -- I can't tell that.

Q. How about -- well, what about relative to the BB's, the wad's gonna be much shorter in distance than the BB's?

A. The wad typically falls off before the BB's stop their flight.

Q. Okay. And you had mentioned that ammunition can also cause an issue with firearms. Old ammunition can either go off too early or the primer could be too light?

A. It depends. Not necessarily old, but how it was stored, if it was in contact with water, or there can be multiple things that could mess up ammunition.

Q. Okay. So ammunition that may be manufactured out of spec could be --

A. It could be.

Q. It could be. Okay. So there's more than just the actual mechanics of the firearm that can actually cause a shotgun to -- to prematurely go off?

A. A shot shell or a shotgun?

Q. A shot shell. I'm sorry.
A. A shot shell to go off, yes.
Q. Okay. And we talked a little bit -- I believe you talked a little bit about, you know, slam firing. Do you understand -- do you know what that is?
A. A slam fire is typically when closing the action of a firearm causes it to go off. So like in this case racking the firearm would cause it to go off.
Q. And typically in a slam fire there's a malfunction with the gun and the firing pin, correct?
A. It could be, yes.
Q. Okay. And a slam fire also can happen with -- like we talked about with ammunition?
A. It depends on -- again, it depends on the gun, it depends on the mechanics of that firearm and the ammunition.
Q. Okay. But it is possible?
A. For?
Q. To slam fire if there's faulty ammunition?
A. It depends on the firearm --
Q. Okay.
A. -- and the safety mechanisms built into the firearm.
Q. Okay. You hit on that as well, but I think in your -- in your report you noted that the -- the safety in this firearm was difficult to move?

A. Yes. I believe it was because of the paint job. It looked like it was -- there was some paint around it and it was difficult to move.

Q. Were you able to fire the shotgun with the safety on?

A. No, I was not.

Q. Okay.

MR. SCHWARTZ: The Court's indulgence, Your Honor.

THE COURT: Yes, sir.

BY MR. SCHWARTZ:

Q. For this model firearm, do you -- do you know what the average trigger pull is from the factory?

A. No, I do not.

Q. In your training and experience, is five -- I think it's five and three-quarters to six pounds. Is that normal?

A. That was my testing of this firearm. It did not feel heavy, it did not feel too light. It just felt normal.

Q. Okay. And somebody who's inexperienced with using firearms, if they had their finger on the trigger and they racked it -- I think you called it a full rack, would the firearm go off?

A. The forearm?

Q. Yes, ma'am.

A. On this firearm, no, it could not because the disconnector would not be in -- in the mode in connection

with the seer. It had to be racked all the way, the trigger had to be reset and then pulled the trigger.

Q. Were you able to look at the trigger grip -- trigger group in this firearm?

A. No. Again, I did not disassemble this firearm because I didn't want to make any alterations to it before court.

MR. SCHWARTZ: No further questions, Your Honor.

THE COURT: Redirect?

MR. PINCELLI: Very briefly.

REDIRECT EXAMINATION

BY MR. PINCELLI:

Q. Suzanne, you talked about slam fired. Is that kind of one of those things you tested for?

A. Yes, that's basically what I was testing for with the manipulation of the forearm constantly. That's what we were testing for.

Q. During your testing, did it ever go off in that circumstance?

A. No, it didn't. It only went off when I pulled the trigger.

Q. You also talked about the condition of the firearm. Did any of those cosmetic issues I think you -- you called them, did those have any effect on the functionality of the firearm?

A. No, it did not.

Q. You talked some about user error. Did that affect the functionality of the gun at all? Did it still have the -- you explained the process that had to be done to fire that weapon?

A. Right. No, this one had to be fully loaded or one round in the chamber. The forearm had to be all the way forward for it to fire.

Q. And you talked about -- some about the shell. I know that you said that you got -- you did a shell comparison; is that correct?

A. That's correct.

Q. So you did the comparison to the shell -- at least one shell that was fired out of that firearm?

A. That is correct.

Q. So you had an opportunity to examine that shell?

A. I did so.

Q. Did you observe anything abnormal about that shell?

A. No, I did not.

MR. PINCELLI: No further questions. Thank you.

THE COURT: Anything further?

MR. SCHWARTZ: Just briefly, Your Honor.

RECROSS EXAMINATION

BY MR. SCHWARTZ:

Q. Agent Cromer, a slam fire can be an anomaly; isn't that correct?

A. It can on certain firearms, but I tested this firearm and the safety functions would not allow this one to slam fire when I had it.

MR. SCHWARTZ: No further questions, Your Honor.

THE COURT: Thank you, ma'am. You may step down.

MR. PINCELLI: Your Honor, can we have our evidence custodian put that firearm back?

THE COURT: Is it in evidence?

MR. PINCELLI: It is in evidence, but I don't know how you'd like it stored in evidence.

MR. SCHWARTZ: It was never entered in evidence, Your Honor.

THE COURT: Okay. It's not in evidence?

MR. PINCELLI: Okay.

THE COURT: I'm asking.

MR. PINCELLI: Can we recall her to put it into evidence so it can be stored somewhere in the courtroom?

THE COURT: That's fine with me. Yes, sir.

Have a seat back up here. You're still under oath.

MR. SCHWARTZ: Your Honor, we stipulate to it being into evidence.

MR. PINCELLI: Okay.

THE COURT: All right. You're free to go. Thank you.

(Witness excused.)

THE COURT: Ladies and gentlemen, I'm supposed to tell you something. In any case that has a firearm entered into evidence, there are specific rules that have been implemented by our chief justice and basically what they provide is that the weapon has to be certified to be empty, it has to be certified to be locked, and you saw the trigger lock on it. I do not know if there will be any ammunition offered in the case or not, but the rule is that if they offer ammunition and a weapon, you cannot have both of them at the same time even though it's got the lock on it. So if during your deliberations you want to see -- you have one and you want to see the other, you have to send me a note and we have to take the one you have and give you the other, okay?

We need a ten-minute break. I know you-all have been back there, but we've been working the whole time since 2:00, so give us a ten-minute break, okay? Don't discuss the case.

(Whereupon, the jury retires to the jury room at 3:37 PM.)

THE COURT: Mark that into evidence. I don't what exhibit number it is.

THE COURT REPORTER: No, I've got it.

(State's Exhibit Number 28, a shotgun, was admitted into evidence.

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THE COURT: We're at ease for ten minutes.

(Recess taken at 3:37 PM.)

(Back on the record at 3:45 PM.)

BAILIFF: All rise. Court is now in session.

THE COURT: Be seated, please.

Do you have additional witnesses?

MS. PATTERSON: Your Honor, the State's gonna rest at this time.

THE COURT: All right. Are there any motions?

MS. ZMROCZEK: Yes, Your Honor.

At this time the defense would move for a motion for directed verdict on the charge of murder and possession of a weapon during the commission of a violent crime.

Your Honor, as you know and are familiar with the caselaw, there has to be substantial circumstantial evidence in -- in order for Your Honor to send this case to the jury. What element is lacking we assert in this case is malice. There's been no substantial circumstantial evidence regarding the malice aspect, an element of the murder, and by default if they don't find him guilty of murder, then they can't find him guilty of possession of a weapon during the commission of a violent crime.

We were listening for it, we were listening for any evidence of malice in this case, and -- and this is a case where it's already been introduced through the

witness, the first witness who is now with probation, he was the first officer on-scene, Schirra, I'm sorry, and, Your Honor, he was asked -- there's evidence of self-defense that he was told about that he told the jury that he heard; that he -- have you ever had to shoot someone, I had to, and -- and, Your Honor, because of that and evidence to come, which when we renew our motion it will be a little bit stronger, but because of that we understand that under Belcher that malice can't be inferred from the use of a gun, that that cannot be charged to a jury, that malice can be inferred from the use of a gun, and that's based on the ruling -- Supreme Court ruling in Belcher.

So absent that, Your Honor, we just at this point don't believe that there's any substantial circumstantial evidence regarding malice.

Additionally, one of the things that Your Honor knows that you have to consider is the testimony from the witness stand. In particular, the lay witnesses are the ones that are gonna be able to provide malice because they were the ones there, and so if you look at the lay witnesses that we have, we have Haley, Leeann and Troy, and when you're looking at the consistencies or inconsistencies in their testimony, there are a lot of inconsistencies, but regardless, the one thing that they were consistent on

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was there was no testimony that I heard for malice.

Your Honor, for those reasons we would move for a directed verdict on this charge.

THE COURT: There's evidence that he went -- if the jury believes it, there's evidence he went into the house, he stayed three to five minutes, he armed himself with a shotgun, which he had to take out from a cover, that he came out and stood on the doorway or on the steps and said something to the effect of I told you not to mess with me, and fired a gun. I find there's an abundance of evidence of malice if the jury believes it. The jury would have to find it.

All right. Do you have witnesses?

MS. ZMROCZEK: We do, Your Honor. The first witness that -- so obviously we're --

THE COURT: Your motion is denied. I'm sorry. Go ahead.

MS. ZMROCZEK: Thank you. I do have witnesses, Your Honor. I've spoken to my investigator. I told him not to come here to testify today, to continue to search and serve that person. Officer Watford was here. It's his day off. His video is thirty-four minutes long. I sent him home. He's gonna come back in the morning. We have a couple more that are coming back in the morning, but what I do have today, Your Honor, is the director of

communications for 9-1-1 and so certainly we're gonna call her, Your Honor, and play two calls.

There are -- I want to go ahead and just preempt this so we don't have to -- to deal with it and send the jury out again. There are three other events in her communications system that I intend on asking her about. One is regarding a report from May 15th of 2015, which was within twelve months of this, where the caller is Mr. Foster and he's talking about that there were individuals on his carport -- carport who are refusing to leave.

The second, Your Honor, is a month later, on June 5, 2015. The caller is Cathy Foster. She says that the son told the mother to call the police to get him out of there before he does something wrong and it indicates caller says father and son are present and then caller goes on to say that's her son.

The third call, Your Honor, that we intend to question her about, and certainly not put the reports in, but just question her about, are -- is the one dated from 11-19-2015, which is just a few months before this happened, and it states that the caller is Will and, Your Honor, that they were needing EMS, male threatening S-9. Signal 9, Your Honor, is the signal that refers to death. Also S-10 and S-13, Signal 10 and Signal 13, and there's

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a quote from -- the male caller says please come get me before I hurt someone.

Your Honor, all of this is being introduced in rebuttal because we asked -- and the State actually asked and we also asked several of the witnesses if there -- if Will had ever -- that they know of been violent and aggressive. I think one witness testified only towards Mr. Foster, but this evidence, Your Honor, goes directly to Mr. Foster's knowledge of and needing to call 9-1-1 and asking for assistance and this is evidence that falls specifically under 402(a) and being offered specifically for that purpose, of determining the first aggressor in a homicide case.

MS. PATTERSON: Your Honor, I would object to those specific instances being mentioned. I never opened the door and asked any of the witnesses on direct examination about Will's reputation or propensity to violence. They did that -- some of that on cross-examination. I never opened the door. Again, Your Honor, these would be inadmissible pursuant to State v. McCray. I've mentioned this earlier this week, Your Honor. Testimony about victim's previous violent acts was not relevant where the State did not open the door, which I did not regarding his character, where testimony was either situation specific, unrelated to the victim's state of mind at the time of the

homicide, and was not so closely connected to the homicide to admit it, and it's too prejudicial, Your Honor. We don't even know if these were anything pertaining to the Defendant. Again, it -- it does not show anything about the victim's state of mind at the time of the homicide.

I have copies of State v. McCray if Your Honor wants to look at it, but the victim -- I mean, he has the right to attack the reputation of the victim for violence, but he cannot do this by showing specific instances of violence, Your Honor, or either this -- or either just calls of concern to 9-1-1.

THE COURT: Which version of State versus McCray are you referencing?

MS. PATTERSON: Your Honor, I'll pass a copy up.

MS. ZMROCZEK: And, Your Honor, after reading McCray, we would go ahead and withdraw the 5-15 where it doesn't specifically mention the -- it just says four people under the carport, so we're simply asking to admit the two that involve directly the victim and directly the -- and/or directly the Defendant.

THE COURT: I appreciate you-all trying to move the case along, but I don't know how I can rule on these until there is testimony to establish the necessary link between these incidents and the state of mind of the Defendant. I know you indicated that there was evidence that you -- that

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the witness testified about the victim's propensity to be aggressive, but unless this is something that the Defendant claims he knew, I don't know where it's relevant.

MS. ZMROCZEK: Right. And, Your Honor -- well, Your Honor, on the communication it specifically says father and son and the son saying -- son told the mother to call the police to get them out there before he does something wrong and --

THE COURT: Who's calling?

MS. ZMROCZEK: Cathy Foster is the listed caller.

MS. PATTERSON: Your Honor, there's still no link to the Defendant's state of mind at the time of the homicide.

THE COURT: I don't -- there's no -- there has to be a better foundation than what -- what you-all are telling me. There has to be some evidence to say okay, that's so and so calling, and I don't --

MS. ZMROCZEK: Right. And that's why -- and that's why we intend to get that through the 9-1-1 operator. These are records that are generated and, of course -- and we're not trying to enter the records, but we certainly can. But they're generated in the course of business and that -- what she -- and what I anticipate her testimony to be is that -- to explain how the CAD system works and, Your Honor, this is an event report, so a call comes in, they get the location, which is the address, they get the

caller name, address and telephone number, and then they have the notes, and what she will testify to is the 9-1-1 call -- 9-1-1 calls are routed to the communication center, that people typically call -- I mean, 9-1-1 calls have certainly been entered numerous times because they are a present sense impression and/or excited utterance, the Court has let them in under both, and what these are, Your Honor, since we don't have the calls -- and these were provided to us in discovery, this is not something we went out and searched for, and what they do, Your Honor, is they -- they take the notes and they put them on a report as they're being told to the operator and then they're generated in this report, and so that would be the foundation for them.

THE COURT: So you're not wanting to play the 9-1-1 recording, you're wanting to enter a report?

MS. ZMROCZEK: No, no. I'm playing the 9-1-1 recordings from this incident. These two reports are from previous incidences and I --

THE COURT: I'm not talking about this incident. I'm talking about the two that you're trying to get me to rule on right now.

MS. ZMROCZEK: Okay. I don't have the 9-1-1 calls, Your Honor, because what she will also testify to is that after a certain number of days if they aren't requested,

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they are disposed of, and so the only thing that we have left are the reports that are generated.

MS. PATTERSON: And, Your Honor, I just don't see -- I just don't see how there's any foundation laid before the Defendant testifies about the victim's then state of mind at the time of the homicide. Again, that is the requirement before the victim's character evidence can be shown by specific instances. Again, Your Honor, calls made months before the homicide does not show the victim's state of mind at the time of the homicide and is not so closely connected to admit it.

THE COURT: Well, it -- the victim's state of mind may be one issue. The other issue is whether the Defendant had a reasonable fear for his own safety or the safety of others and the jury is allows to consider prior difficulties. What I'm wrestling with is foundational and evidentiary hearsay. And I may not be understanding you-all correctly, but there are two call reports that are sought to be entered through a 9-1-1 operator who was not present, so somebody is calling in and identifying themselves to a 9-1-1 operator and then the 9-1-1 operator makes a report, which is preserved, but the recording itself is not.

MS. ZMROCZEK: Correct.

THE COURT: And one of these is from Cathy, the

mother, purportedly, and the other is from Will himself?

MS. ZMROCZEK: Yes.

MS. PATTERSON: Your Honor, she can call Cathy. She called Cathy at pretrial. Cathy's available.

THE COURT: It's not a question of whether it might ultimately come in, the question I'm wrestling with is whether they can come in now under this when there's no agreement. If there were an agreement, then fine, but until the Defendant puts one of those issues I just discussed into the case, that is that he was fearful for his safety or that of others, then that issue --

MS. ZMROCZEK: And, Your Honor, we can wait --

THE COURT: There's no relevancy.

MS. ZMROCZEK: Right. And so what we can do if need be then, Your Honor, is I'll go ahead and put -- since this witness is here, I'll put in these 9-1-1 tapes, reserve the right to recall her after evidence of him being afraid for himself or for others has been presented.

THE COURT: I mean, that's not the only way it can come in.

MS. ZMROCZEK: Right.

THE COURT: I'm just -- the second way that you-all have been discussing relates to credibility, impeachment, things of that nature, and then we have to go through the hearsay analysis and determine whether there's an exception

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to the hearsay rule and if it's a double hearsay, triple hearsay, what -- what I'm dealing with. I'm kind of shooting in the dark right here as to what I -- what exactly is before me.

All right. Bring the jury in.

(Defendant's Exhibit Number 25 and 26 were marked for identification.)

(Whereupon, the jury return to the courtroom at 4:10 PM.)

THE COURT: Ladies and gentlemen, after the ten minute break, I was advised that the State is going to rest at this point.

Is that correct?

MS. PATTERSON: Yes, sir, Your Honor.

THE COURT: And so rather than bring you in and send you right back out, I went ahead and dealt with the issues I told you at the outset of the trial when I explained to you that -- how the case would go, that once we reached the stage where the State rests, I have to discuss legal issues with the attorneys, so that's why you've been sitting back there. We've been going through that. I've done that now and the next thing that will happen is that the defense is given an opportunity to present evidence for you to consider. The defense has no obligation to put forth evidence. The burden of proof has not changed.

The burden of proof remains with the State throughout the trial, but the defense is afforded the opportunity to present evidence for you to consider in deciding whether the State has met its burden of proof or whether it has failed to meet its burden of proof.

Now my understanding is that what we're gonna do this afternoon is we'll have one witness and then we'll break for the day and come back tomorrow. And right now I don't know if you're gonna get the case tomorrow, it may be Friday, okay? There's another issue that's kind of come up that could delay us. Hopefully, we can get around that. And it just arose recently.

All right. Again, I'll try to keep you abreast of what's going on. I invite your close attention.

Call your first witness.

MS. ZMROCZEK: Thank you, Your Honor.

We call Nikki Rodgers.

THE COURT: Come around, please.

(Whereupon, Nikki Rodgers was duly sworn by the Clerk of Court.)

THE CLERK: Please be seated in the witness stand. Once you are seated, state your full name; spelling your last for the record.

THE WITNESS: Nikki Rodgers, R-O-D-G-E-R-S.

THE COURT: Spell your first name.

THE WITNESS: Nikki, N-I-K-K-I.

THE COURT: Thank you.

NIKKI RODGERS,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. ZMROCZEK:

Q. Ms. Rodgers, will you please tell the jurors where you're employed?

A. I am employed with Lexington County 9-1-1 communications.

Q. And what is -- what does that mean? Briefly describe your duties.

A. I'm the chief of communications. I run the overall operation as far as the entire department, the budget, the training, complaints, addressing, computers. Everything that's needed to run the 9-1-1 center.

Q. And so explain just a little bit about when someone calls 9-1-1. What happens?

A. When someone dials 9-1-1, of course, it starts -- we start recording it before we actually pick up. The 9-1-1 operator will pick up the phone and transfer that information into the computer and then ask them a series of questions, decide whether they need police, fire or EMS help, and then as they process that call it goes into the computer-aided dispatch and then we dispatch the

appropriate response or resources that that citizen may need.

Q. You said that it actually starts recording before someone picks up?

A. Right.

Q. How does that work?

A. Any cell phone or landline, business phone, once they activate the 9-1-1 by their touchpad on their telephone, it actually rings one time for them and then it actually starts recording in our center. So before we even hear it ring, it's already what they call a ringing seizure on the telephone line.

Q. Okay. And so sometimes before the operator comes on and says Lexington County 9-1-1, there may be speaking before that and that's because --

A. Correct.

Q. -- like you said, that's how it --

A. When you're hearing it ring, it's already recording in our department.

Q. And -- and you said that a report is generated and also that you ask if they need fire, medical or police and that they are dispatched. Explain those things.

A. Correct. We announce the call by saying that you've reached 9-1-1 and we ask for the location of your emergency, then we go through a series of questions to

determine what is going on on the scene and then that information is translated from the caller to the 9-1-1 operator and then typed into the computer and documented on the call card so that the responders will know what is happening and we can give them the appropriate fire, EMS or law enforcement response.

Q. So they -- and so they know what's happening either through the radio, but they also have a computer screen that they can look at as well?

A. Some units do have computers in their vehicles and some do not, so we give that information over the radio and then that's kind of like a double receiving it. So they can read it on the screen if they have an in-car computer. If they don't, they get it over the radio.

Q. And then -- or also what I refer to as a CAD sheet is generated. Tell them what a CAD sheet is.

A. CAD stands for computer-aided dispatch. It's basically your call record log for incoming calls, processing the call and making sure that it goes all the way to completion, keeping up with the units that are responding, when they arrive, when they clear, their times that they ask for additional resources, whatever it may be.

Q. And what other information can you find on a CAD report?

A. So a basic CAD report will have the date that it is

received, the time it's received, the address of the location of where we're sending resources, the caller, the telephone number of the caller, and then a series of questions, answers that we have asked them. It will also have the units that we responded and any of timestamps that -- en route, dispatched, arrived, cleared, that kind of thing.

Q. Okay. And what if someone calls and doesn't want to give their name?

A. They can remain anonymous. They just have to tell us that.

Q. Okay. And does the computer automatically record phone numbers?

A. We have multiple computers. The telephone system automatically -- if your telephone provider provides us that telephone number, it will record that number, and all we have to do is push one button and it dumps the information into our computer, into the fields. If it does not, then we have to ask and verify that information.

Q. And then does it also provide you location information?

A. It does and then it doesn't, okay? If it is a landline phone, that is your grandmother's old-timey landline phone that was on the wall, absolutely 100 percent we know exactly where you're at. If you're calling from

a cell phone, there's three different types of cell phones. There is a -- just a regular wireless cell phone, a wireless phase one cell phone, a wireless phase two cell phone. The initial wireless call gives us absolutely nothing, doesn't tell us where you're at, doesn't give us any kind of approximate location. It gives us no information. It says query caller for all information. Those are some of the older phones, some of the burner phones, some of the phones that can you buy at the gas station, that kind of thing. Your wireless phase one call, that gives us the location of the tower that you're hitting. So depending on your phone carrier and how many slots are available that they have paid for at a certain tower, then you call and it goes to the closest available tower to your location, then it is sent to the closest 9-1-1 center to that location. So we could get calls from Augusta, we could get calls from Atlanta, we could get calls from Sumter, Richland County. You usually get those bounced around a lot. Especially, if you're like on a border. Say you're on I-26 and Richland County's on one side and Lexington County on the other, you know, we get those. Wireless phase two, that actually gives us not only your telephone number, but it also gives us the ability to hit a button on our dispatch console and it will give us a retransmit button or retransmit information

and it gives us your latitude and longitude, but it is not exactly specific. It is about 500 feet all around in a circle, so you could be anywhere within that, which is a lot better than it used to be.

Q. So if you have an address on a CAD report, it's typically because the person or someone probably gave you that?

A. Correct. We have to verify that information.

Q. Okay. And then you said that notes are generated. So are your 9-1-1 operators trained to ask certain questions?

A. They are. They are trained with standard questioning for every caller starting off with the location because the location is the most important thing.

Q. And then -- and then I think you said that there are notes typed in. So when a person responds to the questions from the operator, is that what they're typing in?

A. We type in what the caller says, yes.

Q. Okay. And sometimes are -- sometimes they're in quotes. Do they have to be? How does that work?

A. They don't have to be in quotes. Sometimes depending on how fast you're a typer or what -- your grammatical type. Some people hunt and peck, some people type faster, some people type bullets, some people type full sentences. It just depends. The operators are trained to take the

information that they are receiving from the caller and type it in the call card as fast and as quickly as they possibly can.

Q. So that that information can be dispatched?

A. Correct.

Q. Okay. So I want to talk right now about May 10th of 2016, and I'm certainly not gonna ask you to go off the top of your head. Did you -- are those -- the records that you bring, are those records that you keep in the normal course of business?

A. They are.

Q. Okay. And the records I wanted to ask you about. So these records, these CAD reports, do you ever just dump them and get rid of them?

A. We have approximately ten years -- or ten years' worth of CAD records as far as the paper or computer-generated-type CAD reports. Our recordings are only kept for ninety days.

Q. So the recordings are only kept for ninety days?

A. Correct.

Q. So if -- if I need to get a copy of a 9-1-1 call that was made and I don't request that within ninety days, then I'm likely out of luck?

A. Correct. It is completely reported over. We have a digital recording system and it's automatically recorded

over.
Q. And so in this case though on May 10, 2016 -- and who typically requests those calls from you?
A. Usually investigators, citizens if they've been in an accident, that kind of thing. Anybody can request it.
Q. Anybody can request them, right?
A. Correct.
Q. But typically if it's involved in a case that's going to court, you said an investigator would?
A. Yes.
Q. Okay. And are you familiar with -- for example, Lexington County because that's where you work, do they have a case investigator who's like one investigator assigned to the case and then other people working under them?
A. We actually dispatch for Lexington County Sheriff's Department, eleven municipal police departments, EMS and fire service. So we deal with Lexington PD, every municipality in Lexington County except for Cayce police, West Columbia police, and Batesburg-Leesville PD.
Q. So they have their own?
A. They have their own.
Q. Okay. And so --
A. Everybody else comes through us and then they have multiple investigators and police officers.

Q. And a lot of people doing different jobs?
A. Yes.
Q. Okay. So in this case, on May 10th of 2016, how many calls did you receive and did you provide?
A. Let's see. There were four.
Q. Okay. So we had four 9-1-1 calls and those were requested that they be saved or downloaded, right?
A. Yes.
MS. ZMROCZEK: And, Your Honor, I believe without objection we would move Defendant's 24 into evidence.
THE COURT: Any objection?
MR. PINCELLI: No objection, Your Honor.
THE COURT: Mark it into evidence, please.
(Defendant's Exhibit Number 24, 9-1-1 calls, was admitted into evidence.)
BY MS. ZMROCZEK:
Q. And, Ms. Rodgers, you had an opportunity to actually listen to the calls that were provided?
A. Yes, ma'am.
Q. Okay. And did they -- were they the calls that were recorded by your office?
A. Yes, ma'am.
Q. You said that you had five calls. When did the first call come in?
A. I believe there's four.

Q. I'm sorry?
A. Four calls.
Q. Oh, sorry. My brain.
A. The first call was actually received at 16:54:52, and that would be 4:54 PM, in the afternoon.
Q. 4:54 PM. And do you have a name associated with that call?
A. The first call was a female caller that had stated that someone had been shot and then they disconnected the phone, so there was no other information recorded.
Q. And that was at 4:54?
A. Correct.
Q. When was the second call?
A. The second call was 4:56.
Q. Okay. And who made that call?
A. That was a male that was on the line and he had stated he had just shot his son.
Q. So the second call was at 4:56 and it was a male stating that he had just shot his son?
A. Correct.
Q. And the third call?
A. The third call was also at 4:56 and it was another caller -- hold on one second. I don't have whether the caller was a male or a female, but it says another caller states at [redacted] Oak Top -- hold on one second. Caller

stating someone may hurt the officer.
Q. Okay.
A. There's multiple calls coming in on this call at one time and since they are all coming in at the same time, they use the same CAD report so that they are taking this same information and putting it on one call card for everybody to get the exact same information that's coming in about the call instead of having separate ones.
Q. And so -- and that brings up an interesting question. So are there more than one 9-1-1 operators -- is there more than 9-1-1 operator?
A. Correct. There's anywhere from ten to twelve on duty at a time.
Q. Okay. So you make sure that in their little room there are at least ten to twelve?
A. During our normal busiest hours, yes, there's ten to twelve.
Q. Okay. And then that way when a call comes in, it's just routed to whomever is available?
A. It is. There's separate call-takers and dispatchers during that time. They can all see what types of calls that each other is receiving, so if there is multiple calls coming in from the same street or the same area location, they can -- they get a window that pops up that says possible duplicate call. That way they're pulling up that

same incident report or incident card and they're typing additional information in it. That's why it's got multiple lines from different operators. I'm assuming they get to see the report, but if you don't, every operator's name will be in there and you have to kind of look at that person's name and read all of the information that that one operator is putting in, so that would be one call, and separating out another person's caller and do the same thing. So on this call there's four different callers.

Q. Okay. And then the fourth call, what time was that one?

A. It was also at 16:56.

Q. Okay. And do you have the information from that of who that caller was?

A. The caller is a neighbor.

Q. Okay.

MS. ZMROCZEK: And, Your Honor, may I publish two of the calls?

THE COURT: Sure. They're in evidence.

MS. ZMROCZEK: Thank you.

(Whereupon, Defendant's Exhibit Number 24 was played.)

BY MS. ZMROCZEK:

Q. So how is a call disconnected? Do you-all ever hang up first? Or explain how that works.

A. When a call comes in, if we can't get information

from them and we think that we are having multiple calls, we'll stay on the line and just have an open line. If we -- of course, sometimes we get different calls that are like prank calls, that kind of thing, the caller will disconnect and we'll call them back, so it could happen either way.

Q. Okay. And the second call I'll play.

(Whereupon, Defendant's Exhibit Number 24 was played.)

BY MS. ZMROCZEK:

Q. And so that's a situation where after all the information that you have is confirmed and that you have confirmed that assistance is present, that's a situation where dispatch would then disconnect?

A. Correct.

Q. Okay.

MS. ZMROCZEK: Thank you. Please answer any questions that the State may have.

THE COURT: Cross?

CROSS-EXAMINATION

BY MR. PINCELLI:

Q. Good afternoon, Chief Rodgers. You talked about the information on the CAD reports being date, time, address and everything. You talked about the dates being generated by the computer for the calls. How about the notes that goes into those? You talked about the operators

putting in notes.
A. The notes are also timed stamped at the end. Every time they hit return or enter, it puts a timestamp at the end of it.
Q. And you said ten to twelve operators on duty at a time, correct?
A. Correct.
Q. And you also said that they might type their reports in different fashions because of the operator?
A. Correct.
Q. And would they be faster or slower depending on how they did their report potentially?
A. They could be.
Q. And are the times on their reports stamped based on when they enter the report?
A. Correct. As soon as that call-taker enters the information, like if they were entering a description and hit enter, as soon as they hit enter at the very end of that comment it's gonna have a timestamp. So if they are typing little bullets instead of long sentences, then each bullet would have a timestamp, and then if they were to take the same information and type in a long string, at the end of that it would have a different timestamp, but every time they hit enter for every comment it's got a timestamp.

Q. And you explained to us there were four calls and they came in at different times. You said that first one was 16:54:52; is that correct?
A. Correct.
Q. The next one -- I don't think I got a second time. Can you -- it was 4:56?
A. Okay. So the first call -- the initial call came in at 16:54:52. Then the second call as soon as it came in, the call-taker took that information and her first timestamp is at 16:56 and 16. So the third call I believe is at 16:56. They're all coming in within the same minute or two and it's all the way down to the tenth of a second.
Q. And you said you generate information on the call card and it will tell you -- you're able to say it was a female, it was a male and you couldn't determine the gender. Wasn't there -- where it says the third call, was that the call that you couldn't determine?
A. Well, you should be able to follow each recording with the actual CAD report. Even though there's multiple calls going in, if you take each recording and follow that call-taker and that caller, you should be able to follow those comments up all the way up with different timestamps.
Q. How about that third call that came in?
A. So the third call -- all right. The third call is 16:56 and seventeen-tenths of a second.

MR. PINCELLI: I beg the Court's indulgence.

THE COURT: Yes, sir.

BY MR. PINCELLI:

Q. And based on your call report, you said they were all coming into one -- they're kind of -- all the information is kind of funneling into one report?

A. One report.

Q. And there's a total of how many calls?

A. There were four incoming calls.

Q. We heard two calls here. One was from a male caller and one was from a female caller. In that female caller's audio, do you recognize the voice of the operator on there? Not the person, but you heard two parties. Was one of those people the operator?

A. Correct. Yes.

Q. And would that -- would that be the person that was asking the questions?

A. Yes.

Q. On there, there were some questions about whether or not it was an accident. Did that -- did you think that was the information gathering part of the 9-1-1 call?

A. For the call-taker, yes.

Q. So that was a question posed by your operator?

A. Yes.

MR. PINCELLI: I don't have any further questions

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for you. Thank you, Chief Rodgers.

THE COURT: Redirect?

MS. ZMROCZEK: Nothing further, Your Honor.

THE COURT: Thank you, ma'am. You may step down.

(Witness excused.)

THE COURT: Ladies and gentlemen of the jury, we're gonna recess for the day. I need you back here tomorrow, please, at 9:30. Be in the jury room then. Remember the admonitions. I hope you have a pleasant evening. I look to see you at 9:30 in the morning.

(Whereupon, the jury was excused for the day at 4:43 PM.)

THE COURT: Be careful as you leave that you don't have contact with jurors, please. Don't be saying anything about the case or anybody in it that might be overheard by the jurors.

Court's in recess until 9:30 in the morning.

(Whereupon, the proceedings for May 22, 2019, were concluded at 4:43 PM.)

(The following proceedings were held May 23, 2019, beginning at 9:31 AM.)

BAILIFF: All rise. Court's now in session. The Honorable William P. Keesley presiding.

THE COURT: Have a seat. Thank you.

Are there issues that need to be addressed before

the jury comes in?

MS. PATTERSON: Yes, sir, Your Honor. I know yesterday we talked about Vernon Blanding and what the Court could do in assisting the defense attorney in getting Mr. Blanding here. Your Honor, I don't think there's anything the Court can do unless he was properly served. It's our position, Your Honor, that the defense -- they've had time to properly serve Mr. Blanding.

Ms. Zmroczek filed a speedy trial motion on February 25th. This trial was set a date certain sometime in March in my absence, Your Honor. In filing the speedy trial, I would say that you have to be ready -- you need to be ready to call your witnesses. Mr. Blanding wasn't anyone that was hidden. It was -- his name, his statement, was contained in the original discovery that she got in September. It has never been anything that just surfaced all of a sudden; therefore, she had before the week of trial to try to properly serve him in order to get the Court to be able to assist here in getting his presence in court.

Furthermore, Your Honor, after we finished yesterday, me and my co-counsel went back and we was reading over an e-mail that Ms. Zmroczek sent us detailing notes from her investigator that actually spoke to Mr. Blanding. I know I said it yesterday. I would ask that this person be

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here and that the deputy who took his statement not be allowed to just read his statement because I need to be able to cross-examine him and not cross-examine -- and cross-examine him not only on his statement, but the things that he told her investigator, Your Honor, that may be of some concern. And I made Your Honor a copy of the e-mail so you can be fully aware of what Mr. Blanding told Ms. Zmroczek's attorney. And this, I think, Your Honor --

MS. ZMROCZEK: My investigator, Your Honor. Not my attorney.

MS. PATTERSON: I'm sorry. The investigator. Which I think a lot of this would be detrimental to her case, Your Honor, because according to Mr. Blanding, Mr. Foster told him that he actually meant to kill his son, that he told him he had to kill him, he's gonna have to kill him, and that he took his wife, walked her down the street so that he could kill him. I would certainly cross-examine him on that, Your Honor. That shows malice, intent, all the things that I need to be able -- to help me estab -- well, some of the things I need to be able to help me establish that this was an intentional crime. I -- I hope she understands that I certainly would get into that. I would need to get into that. There was some testimony about Mr. Foster putting his arms around his wife and walking away before the shooting occurred and so I would

ask that the deputy not be allowed to read Mr. Blanding's statement, that she should have properly served him.

MS. ZMROCZEK: Well, and if they wanted to cross-examine him or direct examine him, Your Honor, they had the same opportunity, but they also had the same problem that we have had locating him. I have the crime scene log here that the officer signed what time he signed in and what time he signed out. He signed in at 17:10 and he signed out at 19:15. So, Your Honor, that statement was taken at some point during that time. It's certainly a present sense impression. I have had the statement of Mr. Blanding the whole time, which was why I've been asking for redacted statements or, you know, his criminal rap sheet so that I could find him because we did not wait until yesterday to try to start locating him. We have been continuously trying to locate him. So, you know, to say that they want the opportunity to cross-examine him or examine him, they've had the same opportunity to serve him as well.

Your Honor, he is clearly dodging service and his statement that he gave to their investigators, Your Honor, was taken within an hour and a half -- an hour and -- yeah, an hour and forty minutes of the incident and, Your Honor, we believe that it is proper evidence as a present sense impression.

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THE COURT: So what happened since yesterday? I mean, you-all -- you-all seem to assume I know what happened after we left court yesterday. I have not idea what efforts were made to locate him or anything.

MS. PATTERSON: And I don't know either, Your Honor. We was just trying to find a way in order for Your Honor to help us secure his presence here and the only way that we could find is if he had been properly served. We didn't need him as a witness. We didn't desire to call him as a witness. So, therefore, Your Honor, after -- and we did try at first to at least talk to him and then we decided we didn't need him so that our -- we ceased our efforts to even try to even serve him. So it's not our duty to serve a witness that she would like to call because we decided we didn't need him. So, Your Honor, we made no efforts to try to serve him.

We did go back and when I read the e-mail I was a little concerned and I wasn't sure why exactly Ms. Zmroczek wanted to at least try to call him because not only would we cross him on his statement, prior record, impeachment evidence, we would also impeach him on some of the things that he told her investigator about Mr. Foster telling him that he intended to kill his son, so I'm not sure what efforts, if any, her investigator made to contact Mr. Blanding.

MS. ZMROCZEK: He continued -- Your Honor, he had two additional addresses that he went to last night in addition to trying to continue to call back that phone number. That phone number has now -- is now going straight to voicemail every time and there's no voicemail set up, and so he informed me that he had two additional addresses that he would try related with any associates of Mr. Blanding and none of them are fruitful.

THE COURT: All right. Yesterday I mentioned this, and I'm -- I want to make sure I'm clear on it. If you're trying to get evidence in based on the witness being unavailable, under 804, hearsay evidence, I don't see based on what you-all told me so far how that fits within any of those 804 exceptions. 804(b) sets forth that it has to be former testimony, a statement under belief of impending death, a statement against interest or a statement of personal or family history. I don't -- I don't see any of those based on what you-all have told me.

So then we go to the other hearsay exceptions under Rule 803, which are available regardless of whether the declarant is available to come to court or not. You-all mentioned 803, Subsection 1, and perhaps it could fall under that, but you've got to put up evidence for me to make a determination about that.

MS. ZMROCZEK: Thank you. And, Your Honor, we did subpoena Investigator Burt. Is he here yet? He's here, Your Honor, so we can proffer that now.

THE COURT: Okay. Go ahead.

MS. ZMROCZEK: Thank you.

We call Investigator Burt.

THE COURT: Come around, please.

(Whereupon, Nicolas Burt, was duly sworn by the Clerk of Court.)

THE COURT: What's your name, sir?

THE WITNESS: Nicholas Burt, B-U-R-T.

THE COURT: Thank you.

NICHOLAS BURT,

having been duly sworn, testified as follows:

DIRECT EXAMINATION (In-Camera)

BY MS. ZMROCZEK:

Q. Investigator Burt, will you, please, tell the Court where you're employed.

A. I'm employed with the Lexington County Sheriff's Department.

Q. How long have you been employed there?

A. Since March of 2010.

Q. Were you employed in May of 2000 -- May 10th of 2016?

A. Yes.

Q. And did you have occasion to respond to an incident

at [redacted] Oak Glenn Drive?
A. Yes.
Q. And what time did you arrive?
A. Approximately 5:16.
Q. Okay. And did you sign into the -- did you sign in and out of the crime scene log?
A. Yes.
Q. And how are you aware about what time you arrived?
A. I documented it in my report. It was probably off the clock in my truck.
Q. Okay. And so what time -- so you got there at approximately 5:16?
A. Yes.
Q. And what were your duties?
A. I was a property crimes investigator at that time. I heard the call come out and responded to assist.
Q. Okay. And what kind of assistance did you provide?
A. Once I got on-scene, coordinated with other deputies for crowd control and then Vernon Blanding approached and I took a statement from him.
Q. And how soon after you got there had Mr. Blanding approached you?
A. It wasn't that long after I got there.
Q. It was -- I'm sorry?
A. It was not that long after I got there.

Q. Okay. And so as you got there and this -- this incident occurred around 5:00 and you -- you were already in the area?
A. I wasn't in the direct area. I responded, but -- yes, I was in the region.
Q. You were there within fifteen or so minutes, sixteen minutes?
A. Right.
Q. And then not long after you spoke with him and then not only did you speak with him, but you had him write a statement; is that correct?
A. I did take a statement from him.
Q. And I'm gonna show you what's been marked as Court's Exhibit 1. Is that the statement Mr. Blanding wrote for you?
A. It is.
Q. And that was not -- not long after you arrived at the scene?
A. Correct.
Q. And is that your signature at the bottom of the page?
A. It is.
Q. And did you also ask him questions?
A. I did.
Q. And he wrote the answers down?
A. It was in a question and answer format, yes.

Q. And you watched him sign it?
A. Yes.
Q. And -- and he was the -- actually the one who approached you, right?
A. Yes. There was a large crowd of people and he came up to us.
Q. Okay. After you signed that statement, what did you do with it?
A. I took it with me and then eventually turned it over to Investigator Miller.
Q. Okay.

MS. ZMROCZEK: Thank you. Please answer any questions the State may have.

MS. PATTERSON: I beg the Court's indulgence.

THE COURT: Yes, ma'am.

CROSS-EXAMINATION (In-Camera)

BY MS. PATTERSON:

Q. And, Deputy Burt, when you first got on-scene, did you make contact with anybody else before you talked to Mr. Blanding?
A. Not directly as witnesses like. So there was a crowd of people that were coming from 2108 Oak Top and the area.
Q. But did you have any contact with any other officers or anything before speaking with Mr. Blanding?
A. With Sergeant Govan over the radio.

Q. And did you also converse with other officers to ascertain what was going on at the scene at that time?
A. Yes.
Q. And about how long did you converse with these officers?
A. It was just a preliminary to get what was going on as far as what they had seen when they arrived. I can't give you an exact time how long that was.
Q. Okay. And was Mr. Blanding the first -- only person you spoke with witness-wise?
A. I accompanied Sergeant Rawl when he -- after I talked to him to look for other witnesses and he had gotten a statement from another -- I believe a female, Latar, I believe. No, she didn't want to write a statement. It was from Damion.
Q. Okay. And did Mr. Vernon -- did Mr. Blanding provide his address on his written form where he was living?
A. He did. 2108 Oak Top Drive in Gaston.
Q. And about how long did it take him to write his statement; do you remember?
A. It would be a guess. If I had to say how long it took, it didn't -- I don't remember it taking terribly long to write it.
Q. Okay.
MS. PATTERSON: Thank you, Deputy Burt.

THE COURT: Redirect?

MS. ZMROCZEK: No further questions, Your Honor -- oh, just one.

REDIRECT EXAMINATION (In-Camera)

BY MS. ZMROCZEK:

Q. I see that he signed every page.

A. Correct.

Q. Did he have an opportunity to review that statement?

A. Yeah, he was provided a copy of it.

Q. And, in fact, on the first line he actually scratched out the time, initialled it and corrected it?

A. Right.

Q. Okay.

MS. ZMROCZEK: Thank you. No further questions, Your Honor.

THE COURT: Anything else for the witness?

MS. PATTERSON: No, sir.

THE COURT: Let me see that.

THE WITNESS: (Handing.)

THE COURT: Thank you. You may step down.

(Witness excused.)

THE COURT: All right. Do you need to put anything else on the record?

MS. ZMROCZEK: That's all.

MS. PATTERSON: No, sir.

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THE COURT: The 9-1-1 operator yesterday testified that the computer records showed that the first call about the shooting came in at 4:54 and 52 seconds in the afternoon. So the shooting apparently took place sometime shortly before that call was made. The witness today, Investigator Burt, testified that he arrived sometime around 5:16, which would be twenty minutes later, eighteen to twenty minutes later. He then coordinated with crowd control, did not say how long of a time passed between his arrival and his talking with Mr. Blanding other than to say that it did not seem to be a long time.

Rule 803 reads in Subsection 1 a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. Subsection 2 is for excited utterance, but there's nothing in the record related to excited utterance.

I don't see any of the other ones that might possibly fit, so the question is what immediately thereafter means, which I assume is a case by case analysis and it's left to the discretion -- the sound discretion of the presiding judge.

We'll be at ease for a couple of minutes.

(Recess taken at 9:51 AM.)

(Back on the record at 9:56 AM.)

BAILIFF: All rise. Court's now in session.

THE COURT: Thank you. Be seated, please.

This is a difficult thing to review and it probably is stretching the concept of immediately thereafter, but after reviewing it in the context in which it's presented, I believe I have to allow it be entered into the record if the witness isn't here to testify about when the statement was given.

MS. ZMROCZEK: Should we, Your Honor, change to a defense exhibit or just get another copy of it?

THE COURT: I thought you said you weren't gonna enter the --

MS. ZMROCZEK: No, I wasn't gonna enter the statement anyway, but do you have a copy of it?

THE WITNESS: Yes.

THE COURT: Is that the one with the sticker on it?

MS. ZMROCZEK: Right. He has -- he has a copy of it so I can ask him about it, Your Honor.

MS. PATTERSON: Your Honor, the second thing I want to bring to your attention, it seems that the defense attorney is gonna call Deputy Tyler Watford to get into the dash cam video, Your Honor. I would submit to the judge -- I mean, to the Court, Your Honor, that this is self-serving hearsay. That's not allowed, Your Honor, unless -- unless, first of all, the Defendant testifies

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himself and then, Your Honor, after he testifies if it is found that his testimony is inconsistent with his previous statement or, Your Honor, if I allege some type of recent fabrication, and then at that point that it can be admitted, but until the Defendant testifies, Your Honor, his statement cannot be published, Your Honor. That is pursuant to State v. Terry.

In that case, Your Honor, the defense tried to submit the defendant's self-serving statement prior to him testifying without subjecting him to cross-examination and the courts have -- have heavily ruled that that is not acceptable and admissible, Your Honor, as self-serving statements, Your Honor. If he wants to get up and testify about something he says, he surely can do that, Your Honor, and be subjected to cross-examination.

And I have a copy for defense counsel as well as Your Honor for you to consider. And as I stated, if my reading of Rule 801 is correct, 801(d), the statement, which would not be hearsay, Your Honor, but certainly self-serving, can only be admitted at that point if it's inconsistent or, again, violates recent fabrication or improper motive with the statement. Anything else, Your Honor, the State would submit is self-serving hearsay, and I can provide State v. Terry for Your Honor.

THE COURT: What's the defense's position?

MS. ZMROCZEK: Thank you, Your Honor. So I was already familiar with Terry, but -- and especially this line, unless -- it's not admissible. That statement, Your Honor, is very different from this statement. That statement was one that he was taken down to the station, there was some time that had passed in between, and also, Your Honor, it said that the statement was not admissible unless corroborating circumstances clearly indicated its trustworthiness. We find no corroborating circumstances in that case, and they were referencing the Doctor case, Your Honor, which is I think more similar to this case.

Your Honor, this case as we have heard repeated testimony -- in fact, some testimony has already come in of what Mr. Foster said through the investigator or, I guess, at that time Deputy Schirra, but, Your Honor, we had a whole hearing about this and, in fact, Your Honor said that he felt like, you know, we needed to have a Jackson v. Denno hearing. We never challenged this under Jackson v. Denno, which is what they initially did with this statement. Your Honor, this statement was made -- Deputy Watford testified, and I assume will not change that testimony, that he received the call over dispatch, was in the area, and as you saw the video, was actually pulled -- had somebody pulled over on the side of the road, immediately left and went there and was there while

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Mr. Foster was still on the phone with 9-1-1. That's how close in time this was. Your Honor, these are -- and, in fact, he was questioned and he described the utterances, he was just uttering things. Not only is it excited utterance, but certainly a present sense impression that was recorded on his dash cam.

Your Honor, it's certainly admissible under the rules and had it said -- and it's not necessarily self-serving. He says a lot of -- a lot of things in there that he's literally just spouting out, all of which are corroborated by the evidence that's already been put in. He talks about the two by four as well. The two by four's in evidence. He talked about the jack and the vehicle and, Your Honor, we have that -- we have a picture of that in evidence. He talked about the pipe. All of the things that he was saying immediately -- I mean, immediately after this happened, Your Honor, clearly indicates its trustworthiness, and for those reasons we would seek to enter that video in through Deputy Watford.

THE COURT: So your client does not intend to testify or does intend to testify?

MS. ZMROCZEK: He does not.

THE COURT: Mr. Foster, I have to go over some things with you. Would you raise your right hand?

(Whereupon, Heirbrane H. Foster was duly sworn by

the Court.)

THE COURT: Thank you. You can have a seat.

Mr. Watford, you understand that the defense is now given the opportunity to present evidence for the jury to consider?

THE DEFENDANT: Yes, sir.

THE COURT: What did I say, Watford? I apologize.

THE DEFENDANT: Yeah.

THE COURT: Foster. I apologize.

MR. SCHWARTZ: He understands, too, I think.

THE COURT: A senior moment. I apologize.

Mr. Foster?

THE DEFENDANT: Yes, sir.

THE COURT: You understand we're at the stage of the trial where the defense can present evidence for the jury to consider?

THE DEFENDANT: Yes, sir.

THE COURT: In that regard, if you wish to testify you may testify. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: If you choose not to testify, I'm gonna tell the jury that they cannot hold your silence against you in any way at all. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: You have an absolute right not to

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testify. You have an absolute right to remain silent. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: So if you choose not to testify, I will tell the jury they cannot hold your silence against you, they're not to discuss it in their deliberations, it's not to enter their minds in making a decision of whether you're guilty or not guilty. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: The decision about whether you testify or not is your decision to make and yours alone. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: I expect that you might confer with family members, friends, anyone whose opinion you value on important decisions, your attorneys, but ultimately you're the person on trial and it's your decision to make. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Now if he testifies, would he have a record that would subject him to impeachment?

MS. ZMROCZEK: I believe that -- Your Honor, there were those -- the two CDVs that were from 2012, I believe.

THE COURT: CDV what?

MS. ZMROCZEK: HAN, high and aggravated in nature.

MS. PATTERSON: High and aggravated.

MS. ZMROCZEK: And it was a -- we had an issue about that, which we didn't raise previously, but just that it wasn't with this family -- it wasn't even with this family member, any member of this family, Your Honor. Your Honor, it was a completely unrelated paramour.

THE COURT: All right. Rule 609 reads that evidence that a witness has been convicted of a crime is not admissible where the accused is the witness unless the Court determines that the probative value of admitting that evidence outweighs its prejudicial effect to the accused in this situation. This is for crimes which are punishable by imprisonment in excess of a year and generally within ten years and that did not involve dishonesty or a false statement.

Reviewing the matter, I'm unable to make a determination if the probative value of admitting that evidence would outweigh its prejudicial effect to the accused.

What that means, Mr. Foster, is if you take the witness stand, I'm not gonna let the State ask you about those two CVS. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: The only way that would come in is if you open the door in some way. And your attorneys can

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discuss with you what opening the door means, but to give you an example of what's happened in cases over which I've presided, there have been situations where I've ruled that the State could not ask the defendant about certain crimes and then the defendant got on the stand and said I've never been in any trouble with the law, which was just a flat-out lie, they had several convictions, so they opened the door for the State to be able to ask about the convictions. Do you understand what I'm talking about?

THE DEFENDANT: Yes, sir.

THE COURT: That might not be the only way to open the door, but that's an example. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Has anybody exercised any type of undue influence to get you to decide to testify or not testify?

THE DEFENDANT: No, sir.

THE COURT: So whatever decision you make it's your decision and yours alone?

THE DEFENDANT: Yes, sir.

THE COURT: It's made of your own free will?

THE DEFENDANT: Yes, sir.

THE COURT: Today are you under the influence of any type of substance that adversely affects your thinking?

THE DEFENDANT: No, sir.

THE COURT: Do you suffer from any physical or mental

problems that adversely affect your thinking today?

THE DEFENDANT: No, sir.

THE COURT: All right. Mr. Foster, I'm gonna make some findings right now. You can change your mind if you wish, it's up to you, but at this point I'm gonna make a finding that you understand you have a right to testify, you have a right not to testify. If you choose not to testify, I'm gonna tell the jury they cannot hold your silence against you in any way at all. You understand that the decision about whether you testify or not is yours and yours alone and that no one has forced you, threatened you, coerced you, exercised in type of undue influence over you to get you to testify or not testify.

Do you understand my ruling about if you testify you're not going to be subjecting yourself to cross-examination about prior convictions for domestic violence?

THE DEFENDANT: Yes, sir.

THE COURT: So I find that you've made the decision freely, knowingly, voluntarily and intelligently as to whether you testify or not of your own free will and accord.

Now whatever decision you've made at this point, as I mentioned a moment ago you could change your mind until such time as you might actually come up here and start

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testifying. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Okay.

MS. PATTERSON: Your Honor, can I briefly say something else about State v. Terry?

THE COURT: Yes, ma'am.

MS. PATTERSON: Your Honor, his statements are still self-serving. It's not a question of whether or not we have a situation with excited utterance or present sense impression. I think the Court's analysis in this case, the main focus was the Defendant can't make himself unavailable to testify and then submit what I would perceive, Your Honor, is a confession without being subjected to cross-examination, and that's the issue here. The court even stated that that is the basic rule of our adversarial system. To otherwise -- to hold otherwise would permit the criminally accused to set out all of the facts which would fall in his favor without laying himself open to cross-examination.

So, Your Honor, again, we ask that Deputy Watford's dash cam video would not be submitted, Your Honor, without the Defendant, first of all, testifying and then at that time, Your Honor, the Court make a decision whether or not that testimony was inconsistent with what his testimony was or in the alternate if somehow it's alleged

a resent fabrication or motive to lie.

THE COURT: If a defendant asserts the Fifth Amendment privilege against self-incrimination, the defendant is not allowed to take advantage of the unavailability under Rule 804. That's -- that's clear. So the inquiry as to whether it wouldn't be admissible under Rule 804 I think is established. The question then becomes whether it's admissible under some other rule.

All right. Let's be at ease a few more minutes.

(Recess taken at 10:19 AM.)

(Back on the record at 10:25 AM.)

BAILIFF: All rise. Court's now in session.

THE COURT: Thank you. Be seated, please.

Again, this is a very difficult ruling. The situation in Terry was that the -- the killing occurred in May of 1994. In March of 1995, Terry went to the police -- or gave a statement to the police in which he indicated that he was at the victim's residence, he had gone there to have consensual sex with the victim and then lost his temper.

So, again, to reiterate what I said before the break, I think it's clear if we're talking about an 804 analysis for unavailability it's clear that you can't use the Fifth Amendment privilege as a sword and shield to get that type of statement in.

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But we're not dealing with an unavailability issue right now, we're dealing with a situation where -- where there is a proposal to present evidence, which is hearsay under 801, and the question is whether it could come in under some exception to the hearsay rule. And while I think this is a difficult call, and I -- and I hope I'm making the right one, I watched this video the other night and I don't know how it can be construed as anything other than an excited utterance under 803, Subsection 2. It's a statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition. I will allow it.

What else? Anything else?

MS. PATTERSON: I don't have anything else, Your Honor.

MS. ZMROCZEK: Nothing else, Your Honor.

THE COURT: Bring in the jury.

(Whereupon, the jury return to the courtroom at 10:29 AM.)

THE COURT: One other thing just quickly. The 9-1-1 call is in.

Call your next witness.

MS. ZMROCZEK: Thank you. I call Agent Kevin Selinsky.

THE CLERK: Raise you right hand.

(Whereupon, Kevin Selinsky was duly sworn by the Clerk of Court.)

THE COURT: What's your name, sir?

THE WITNESS: Kevin Selinsky.

THE COURT: Spell your last name.

THE WITNESS: S-E-L-I-N-S-K-Y.

KEVIN SELINSKY,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. ZMROCZEK:

Q. Agent Selinsky, will you tell the jury where you're employed?

A. I'm employed by the South Carolina Law Enforcement Division, commonly known as SLED.

Q. And what are your -- how long have you been employed at SLED?

A. Since 2013. May of 2013.

Q. Prior to being employed at SLED, what is your educational background?

A. I have my bachelor's in forensic toxicological chemistry and I have my master's in forensic science.

Q. And have you -- what is forensic toxicology or forensic science?

A. Well, at the lab we break our work into three main things. We do post mortem toxicology for death

investigations to figure out if drugs play a role or not. We do criminal sexual drug facilitated assaults and we also do human performance toxicology for DUIs and things along that line.

Q. Now are you a member of any associations or have you received any special training in this area?

A. Yes.

Q. What is that?

A. I've received -- excuse me. According to SLED, I'm a certified forensic toxicologist. I've gone through several out of state training courses to further my education as well.

Q. Have you ever been qualified as an expert in forensic toxicology?

A. I have.

Q. How many times?

A. I'd say roughly a half dozen times.

MS. ZMROCZEK: Your Honor, at this time I move Agent Selinsky as an expert in forensic toxicology.

MS. PATTERSON: Without objection.

THE COURT: He is so recognized.

BY MS. ZMROCZEK:

Q. Agent Selinsky, you said you work at SLED. How do you typically receive evidence in a case?

A. Well, what would happen is throughout the week

various agencies will come in and will drop off evidence. Some drop off a handful and some can drop off a lot and then it will begin to work its way through our lab. So the first thing that will happen is it will get brought upstairs into our lab after it's dropped off and logged in with our evidence technicians. A technician with our lab will come down, pick it up and inventory it ourselves. That includes taking pictures of it, check the labeling, beginning the chain in our lab just to make sure that we're starting off making sure things are as they should be.

Q. And you say as they should be. When we're talking about bodily fluids, is there a way that -- that they're required throughout the -- the custody process to be maintained?

A. There's some recommendations, but there's really nothing set in stone as to a way. We have our recommendations, but they're certainly not requirements by any means. Typically it will come in two gray-topped tubes which has a preservative and an anticoagulant in it to keep the blood -- the blood kind of in the best state for testing.

Q. And you said chain. You make sure that you know where it's been?

A. Yes. It is done -- the first thing is as it comes

in is each case gets an individual barcode and then everything is scanned in our laboratory information system throughout. So if I'm gonna take it and do testing on it, I'm gonna scan it into my custody and then so on and so forth and scan it back to the fridge and if somebody else is gonna do something until it moves along down the line.

Q. And what evidence did you receive in regards to the case against Mr. Foster?

A. May I look in my report?

Q. Absolutely.

A. For this we received some blood, some urine, some stomach contents, as well as some ocular or eye fluid.

Q. Okay. Now what's the difference between blood and ocular eye fluid?

A. Aside from the obvious, the more -- in terms of the toxicology interpretation of blood --

Q. Yes.

A. -- tends to be more at that given time what is going on in the body, whereas in the ocular fluid or the eye fluid it tends to lag behind a little bit, so you can sort of tell whether somebody is going up or coming down and you get a more rough estimate of when things may have been ingested or if they're at peak levels or whatnot I should say.

Q. So the blood is more at -- at the time of death?

A. Yes. Yes. Specifically, yeah.
Q. So explain that. So if someone passes away, then what happens in their body to make sure that all of the -- the toxicology remains the same in their blood?
A. Things just -- it sort of stops, but there's a big thing, post mortem redistribution. With certain specific drugs that you can kind of get, they can kind of go to the more peripheral portions of the blood. That's why as a toxicologist we ultimately prefer femoral blood coming from the femoral artery because it's further away from the heart and there's less concern for post mortem redistribution with the drugs, so you're getting a more true representation of what is there, but essentially the metabolism will stop other than for that redistribution.
Q. And -- and so you received you said some fluids in this case?
A. Yes.
Q. And tell the jury what you -- what kind of testing you ran on those?
A. Every case that first comes in for the most part we'll get a blood alcohol, so I ran a blood alcohol level, found there to be ethenol in the blood at a level of 0.200 percent. In the ocular fluid there was 0.195. So they're -- those numbers are for all intents and purposes the same, so that means they were essentially -- they

weren't really coming up or coming down, they were sort of what we consider at their peak level, and then there was also a little bit of Alprazolam found as well.

Q. A little bit of what?

A. Alprazolam.

Q. And what's the generic term?

A. Xanax.

Q. When -- how does anybody get a blood alcohol content? What are the ways that people have a blood alcohol content? You say it's blood alcohol, so does that involve alcohol?

A. Yes. The common one -- in this particular case, we do a specific test for ethenol. We do all the tests as well, but this one specifically found ethenol, and the main -- the main way for that is oral consumption of typical alcoholic beverages; beer, wine, hard liquor.

Q. Okay. So beer, wine, or liquor?

A. Yes.

Q. Okay. And can you tell -- are you familiar with what the legal limit is of blood alcohol in South Carolina?

A. Yes.

Q. And what is that?

A. 0.08.

Q. So 0.08?

A. Yes.

Q. And your reading here was 0.20?
A. Yes.
Q. In the -- in the femoral artery?
A. In this case, it was iliac -- iliac vein blood, which is similar, correct.
Q. Okay. And you say that you use toxicology in -- in help understanding death. How do -- how does -- in your studies, how does toxicology play a role? That's a poorly asked question. What does ethenol or a blood alcohol of .20 generally trans -- what generally happens?
A. Okay.
Q. Sorry.
A. It's a fair amount of alcohol for sure. That way you're gonna be sort of a level of -- you're certainly going to have some excitement, but at that level you'll probably be a little bit past the euphoric, excitement level, you're starting to have some more confusion, certainly some decreased inhibitions, things along that line.
Q. Do you see increased aggression?
A. Not necessarily. It doesn't really cause aggression. It can maybe increase emotions.
Q. Increase emotions?
A. Yes.
Q. Okay. And you said -- and there was a combination

of -- you said a little bit of Xanax?
A. Yes. Very little, yes.
Q. What combination -- are there -- what effects do you see if you have a combination of two substances?
A. Depending on what they are, these are very similar, they're both CNS depressants, so what that means is it's gonna depress the central nervous system and essentially it's slowing the system down, putting it to sleep. It's not very much Alprazolam. A drug like that depends on -- if it's your first time taking it, that could very well put you to sleep, but if you take it more often, that's not very much at all.
Q. Okay. And you said -- and they're both kind of the same class of drug?
A. Yes, for sure.
Q. Okay.
MS. ZMROCZEK: I beg the Court's indulgence.
THE COURT: Yes, ma'am.
MS. ZMROCZEK: Thank you. Please answer any questions the State may have.
THE COURT: Cross?
MS. PATTERSON: Yes, sir.

CROSS-EXAMINATION

BY MS. PATTERSON:
Q. Mr. Selinsky, am I saying that, correct?

A. Yes.
Q. It's your testimony that the legal limit in South Carolina is .08, correct?
A. Correct.
Q. Now that is the legal limit to drive, correct?
A. Correct.
Q. Okay. And the results of the Xanax, that was a low level result, correct?
A. Yes. That's on the lower side, yes.
Q. And the alcohol level, you said even if that level being over the legal limit to drive, however, at this level it probably would have caused decreased inhibitions, correct?
A. Most certainly at that level, yes.
Q. And confusion I think you said, correct?
A. Yeah.
Q. And at this point it would have started slowing the system down where the person was about to go to sleep, correct?
A. Maybe not to the point of going to sleep depending on if it's a -- at that level if it's a naive drinker, they very well could be passed out, but if it's somebody that drinks on a regular basis, people are able to function and get learned behaviors, whereas -- you brought up driving. Driving is a very complex task. You're

checking your mirrors, you're checking your speed, checking your lanes, doing all this and that, so it's very -- you can't really learn those behaviors, but where you might be able to carry on a conversation at a very high level and lean on a bench or something like that and appear to be okay.

Q. And you didn't find any other positive results in the samples that you obtained, correct?

A. No, ma'am.

Q. And both -- the Xanax is considered a downer, correct?

A. Yes.

Q. And alcohol is considered a downer, correct?

A. Correct.

Q. And I think you testified that these downers causes the central nervous system to be suppressed, correct?

A. Depressed, yes, but -- yeah, the same word, yes.

MS. PATTERSON: I beg the Court's indulgence.

THE COURT: Sure.

MS. PATTERSON: Thank you.

THE COURT: Redirect?

MS. ZMROCZEK: Just very briefly.

REDIRECT EXAMINATION

BY MS. ZMROCZEK:

Q. Depressed inhibitions meaning that you would do things that you don't normally do?

A. Yes. That's a good way to sum it up, yes.
Q. Okay. And then she asked you about the legal limit to drive. The reason that they set it at .08 is because --
MS. PATTERSON: Objection. Speculation.
THE COURT: Do you wish to be heard?
MS. ZMROCZEK: Well, yes, Your Honor. I mean, he's an expert. I can ask him why they --
THE COURT: You can ask him, but --
MS. ZMROCZEK: Okay.
THE COURT: -- wait a second. I don't --
MS. ZMROCZEK: All right.
THE COURT: Wait a minute. I haven't finished.
MS. ZMROCZEK: Sorry.
THE COURT: You seem to be about to ask a leading question. She didn't object on leading, I understand that, but you seem to be about to ask a leading question. If you ask him and he knows the answer to it, that's fine, but don't lead him.
MS. ZMROCZEK: Thank you, Your Honor.
BY MS. ZMROCZEK:
Q. Do you know why they set the legal limit for driving at .08?
A. It's just that studies have shown at that level or, if anything, even lower levels -- some states are going to an .05, which is where it ultimately probably will be for

most, if not all, states. It's just at that level is where you're, I guess, materially and appreciably impaired and unable to safely operate a vehicle.

MS. ZMROCZEK: Thank you. No further questions.

THE COURT: Recross?

RECROSS EXAMINATION

BY MS. PATTERSON:

Q. And, again, that is if you're operating a -- complex equipment such as a vehicle, correct?

A. Correct.

Q. So it -- it doesn't have anything to do with if you're just walking around in your yard, does it?

A. No.

MS. PATTERSON: Thank you.

THE COURT: Thank you, sir. You may step down.

(Witness excused.)

THE COURT: Call your next witness.

MS. ZMROCZEK: Thank you, Your Honor. We call Nicolas Burt.

THE COURT: Come around, please.

THE CLERK: Raise your right hand.

(Whereupon, Nicholas Burt was duly sworn by the Clerk of Court.)

NICHOLAS BURT,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. ZMROCZEK:

Q. Please tell the -- and it's investigator or deputy? I'm sorry.

A. I'm currently an investigator, yes.

Q. Investigator Burt, please tell the jury were you're employed.

A. I'm currently employed at the Lexington County Sheriff's Department.

Q. How long have you been employed at the Lexington County Sheriff's Department?

A. Since March of 2010.

Q. In order to be employed at the Lexington County Sheriff's Department, what, if any, training did you receive to become a police officer?

A. Well, we go to the criminal justice academy followed by an FTO program, which is a field training officer program.

Q. Were you working on May 10, 2016?

A. Yes.

Q. And in what capacity were you working on that day?

A. I was a property crimes investigator at that time.

Q. A property crimes investigator?

A. Correct.

Q. Did you have an occasion to respond to [redacted] Oak Glenn

Road?
A. I did.
Q. Tell the jury how that happened.
A. The call came out over the radio that there was a shooting and I responded. I was with another investigator and we responded Code 3 to assist, which is lights and sirens.
Q. And approximately what time did you arrive?
A. I arrived at approximately 5:16 PM.
Q. Approximately 5:16?
A. Yes.
Q. And how do you -- is it fairly approximate -- or exact? How do you know or how do you keep track? How does the sheriff's department keep track of where you are?
A. Well, I don't have an MCT, which is what the deputies have, so I take notes and then transfer that into a report. I documented in my report what time I arrived.
Q. And you document that so that when later on down the road you can come and --
A. Testify.
Q. And so you write down in your report about what time you got there. When you got there describe the scene for the jury.
A. It was kind of chaotic. There was a large crowd at 2108 Oak Top, which is an adjoining street to where the

scene was, and when I arrived there was body at the end of [redacted] Oak Glenn Drive.

Q. And what, if anything, were you assigned to do?

A. At first it was crowd control and then a witness had walked up and I took a statement from him.

Q. A witness walked up?

A. Yes.

Q. And who was that witness?

A. It was Vernon Blanding.

Q. And you said you took a statement from him?

A. Yes, a written statement.

Q. And do you have a copy of that statement?

A. I do.

Q. What did -- did Mr. Blanding tell you?

A. Do you want me to read the -- the whole thing verbatim or --

Q. Well, so -- I guess that's a good question. So when a witness walks up to you, you don't just hand them a piece of paper and say start writing, do you?

A. No.

Q. Okay. So explain how that process works.

A. He came up and said that he was family with the Defendant and he said he had arrived at 2108 Oak Top Drive at approximately 4:30 PM.

Q. Okay. And so did he -- do you -- the reason you --

why is the reason you had him write a statement? Did he have information pertaining --

A. He advised that he saw what occurred.

Q. Okay. And so you have him write a statement. What did he say about -- what information did he provide to you about what Will had in his hand?

A. Well, he advised he had got home around 4:30 at 2108 Oak Top Drive and Will, who was the deceased, and his father were arguing back and forth he believed over a grill and that at some point Will had turned the grill over and was cursing at the Defendant and had picked up a two by four board and then following the Defendant around making movements like he was gonna swing it at him. Vernon went over and took the board from Will and then advised that they went back to [redacted] Oak Glenn Drive, the Defendant went into the home and Will went to the side of the home. He thought he was gonna pick up something else at that point.

Q. He thought Will was gonna pick up something else at that point?

A. Uh-huh.

Q. And did he ever tell you about what he removed from Will's hand?

A. He said he removed the -- what he described as a two by four board from Will.

Q. And what did he say to Will?

A. He told him to -- both of them to stop.
Q. And what was Will's response to that?
A. I believe in his statement he wrote that -- that I think -- he didn't write that part in his statement, but he said that Will wasn't going to stop. That's what Will told him. Unless it's in the question and answer part or I'm missing it. Okay. It is in there.
Q. And so when he told Will to stop, what did he say Will -- what did he tell you Will's response was?
A. That Will said he was not going to stop.
Q. Said he was not going to stop?
A. Uh-huh.
MS. ZMROCZEK: I beg the Court's indulgence.
Please answer any questions the State may have.
THE COURT: Cross?

CROSS-EXAMINATION

BY MS. PATTERSON:
Q. Investigator Burt, do you still have a copy of your statement?
A. Yes, I do.
Q. And so after you talked to Mr. Blanding, he gave you this written statement, correct?
A. Correct.
Q. And let's just go through this written statement a little bit. Defense attorney got you to read a little

bit, but let's just go through it in a little more detail.
A. Okay.
Q. And so Mr. Blanding said in his statement that Will said he wasn't gonna stop, correct?
A. Correct.
Q. But he also -- and he advised you that he was cousins with the Defendant, Mr. Foster, correct?
A. He said second or third cousins.
Q. And he told you that they both were arguing, correct?
A. Correct. He believed over the grill.
Q. Over the grill, right. And that the argument occurred between [redacted] Oak Top and [redacted] Oak Glenn? Is that what he -- Oak Top Drive, is what he said in his statement?
A. Yes, the actual address was, I think, [redacted] and [redacted] Oak Glenn, but he wrote Oak Top in his statement because the streets they T into each other at the corner.
Q. Okay. And then he also told you that -- you asked who was all at the [redacted] Oak Glenn Road and he said Will's family, mom, sister and friend, Troy, correct?
A. Yes. I have their names, all that he gave me, that were in the area.
Q. And he stated that he took the board from Will, didn't he?
A. Correct.
Q. And then after he took the board from Will, he said he

saw the Defendant go in the house, correct?
A. Correct.
Q. And Will went to the corner of the house, correct?
A. I believe he said it was at the carport area and he went toward the side of the house.
Q. Okay. And Will was standing on the side of the house according to Mr. Blanding, correct?
A. Correct.
Q. And he also said that the Defendant said didn't I tell you to stop fucking with me, correct?
A. Yes, he said the Defendant said, and he quoted, didn't I tell you to stop fucking with me, and that's when he turned around and saw Will standing at the open side door of the carport of the garage at the steps and that he saw the Defendant with the barrel of the gun pointed at Will from that open door, which he described as a black in color sawed off shotgun, and then he heard one shot.
Q. And then he said after he heard that shot he saw the Defendant run, correct?
A. Yes. Well, he went in the back in the house and then ran and jumped the fence.
Q. And jumped the fence in his backyard, correct?
A. Correct.
Q. And he also told you that at the time Will was shot Will did not have anything in his hand, correct?

A. Correct.

MS. PATTERSON: No further questions.

MS. ZMROCZEK: Just briefly.

THE COURT: Yes, ma'am.

REDIRECT EXAMINATION

BY MS. ZMROCZEK:

Q. He advised that you he didn't have anything in his -- she asked about not having anything in his hands, but Vernon -- what did he tell you that he -- after he took the two by four what he thought Will was gonna do?

A. He said he thought he was getting -- picking up something. He said like a shovel, a pipe, or a stick.

Q. And you were at -- you were at this location?

A. Yes.

Q. And you saw that there were a lot of items that were laying around on the ground?

A. I never went to the carport backyard area. Where I talked to him would have been in the street in front of the home.

Q. Okay. And did you -- did you see the two by four that he had taken from his hand?

A. It was -- yes, it was at the end of the road. Well, at the end of the driveway, I'm sorry, near the road.

Q. And in your experience as a police officer, are you-all trained to recognize that common items can also be

used as weapons?
A. Correct.
Q. Okay. And so he -- even though he took the two by four, he thought he was gonna go pick something up and then -- and he also, like you said, when he told Will to stop, Will's response was?
A. That he wasn't going to stop.
MS. ZMROCZEK: Thank you. No further questions.
THE COURT: Recross?

RECROSS EXAMINATION

BY MS. PATTERSON:
Q. But he never said that Will actually picked up anything else, did he?
A. Correct. He did not see that.
MS. PATTERSON: Thank you.
THE COURT: Thank you, sir. You may step down.
(Witness excused.)
THE COURT: Call your next witness.
MR. SCHWARTZ: The Defendant calls Ms. Nellie Foster.
THE COURT: Raise your right hand.
(Whereupon, Nellie Foster was duly sworn by the Clerk of Court.)
THE CLERK: Have a seat on the witness stand.

NELLIE FOSTER,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SCHWARTZ:

Q. Can you see me, Ms. Foster?

A. Yes.

Q. Okay. Can you hear me?

A. I can hear you.

Q. You have your hearing aids in?

A. Yes.

Q. Okay. Will you state your name for the record?

A. Nellie Foster.

Q. All right. And how do you know Heirbrane Foster?

A. That's my son.

Q. And how do you know Will Foster?

A. That's my grandson.

Q. Okay. You love them both? You love them both?

A. I love them both. They're both very precious to me.

Q. Okay. Let's go back to May of 2016. May 10th. Do you remember that day?

A. Yes.

Q. Okay. What did you do in the morning?

A. My son called me and wanted me to take him to the grocery store. It was the 10th when they get public assistance, food stamps.

Q. Okay.

A. So I picked him up around 10:00, 10:30.

Q. Okay. Did you pick anybody else up as well?
A. No.
Q. Okay.
A. Just me and him.
Q. Okay. So you and -- so you and Heirbrane went grocery shopping about 10:30?
A. Yes.
Q. Where did you-all go?
A. We went to the IGA on 321 and the Food Lion.
Q. Okay. About how long were you-all shopping that day?
A. Around about four hours because --
Q. Four hours?
A. Yes.
Q. Okay. Do you-all do the grocery shopping for the month all at once?
A. For the whole month he does.
Q. Okay. Is that why it takes so long?
A. Yes.
Q. Okay. When you picked up Heirbrane, was anybody else out at his house?
A. Not -- I didn't see nobody when I picked him up.
Q. Okay. And when you dropped him off, about what time was that?
A. That was 2:30 or 3:00.
Q. Okay. When you dropped him off at his house, is that

the [redacted] address?
A. Uh-huh.
Q. Okay. And who was -- did you see anybody outside when you dropped him off?
A. Yes.
Q. Who was out there?
A. My grandson and I don't know the other people.
Q. Okay. Your grandson, Will?
A. Will.
Q. Did you notice anything about Will when you dropped him off?
A. Will always speak to me.
Q. Okay.
A. And that particular day Will come halfway to my car with a Bud Light in one hand, and I don't know how much, and a liquor bottle in one.
Q. Okay. All right. And he talked to you?
A. He just say hey, grandma.
Q. Okay. But you noticed that he had beer in one hand and liquor in the other?
A. Yes.
Q. Okay. Did that concern you at all that day?
A. Yes.
Q. Why's that?
A. Because I know when he's drinking he gets way out of

hand.
Q. He gets out of hand?
A. Uncontrolled.
Q. Okay. About what -- how long did it take to unload the groceries that day?
A. The groceries?
Q. How long did it take? Yes, ma'am.
A. To take it out the car?
Q. Yeah.
A. It took a good while.
Q. Okay.
A. And I -- Will didn't help get it out.
Q. Who did?
A. The guy -- I do remember him yesterday testifying with the dreads.
Q. Okay.
A. I do remember he --
Q. Mr. Floyd?
A. -- was helping, yeah, and Heirbrane. I don't know who else.
Q. Was Bradley out there?
A. I didn't -- Bradley was there and he came to the door, but I didn't see Bradley.
Q. Okay. All right. Why did you -- did you tell Heirbrane anything about Will that day?

A. Yes.
Q. What did you say?
A. When I seen Will with the liquor and the beer, then I told Heirbrane go -- go in the house, don't say nothing to Will. Because I know, you know, he was drinking and it would escalate.
Q. It would escalate?
A. Yes. Yes.
Q. Had Heirbrane been drinking at all when he was with you?
A. No. No.
Q. Do you know about what time you left the property?
A. Around 2:30 or 3:00. I would say about 3:00.
Q. Okay.
MR. SCHWARTZ: Court's indulgence, Your Honor.
THE COURT: Yes.
BY MR. SCHWARTZ:
Q. You don't -- you weren't there at that residence when all this -- this happened?
A. No.
Q. Okay. But you're sure that your timeline from when you got there until when you dropped off Heirbrane is correct?
A. Yes, I'm sure.
MR. SCHWARTZ: No further questions, Your Honor.

THE COURT: Cross?

CROSS-EXAMINATION

BY MS. PATTERSON:

Q. Ms. Foster, I think you stated that the Defendant is your son, correct?

A. Yes.

Q. Yes, ma'am?

A. Repeat that again.

Q. And the Defendant, Heirbrane, is your son, correct?

A. Yes. Yes.

Q. And you've been sitting in court all week listening to the trial against your son, correct?

A. Yes.

Q. Because I think you said you remember Troy being here, correct?

A. Yes.

Q. And you heard Troy's testimony, didn't you?

A. Yes.

Q. Okay. And you say you saw Will with a beer can and you don't know if this beer can was open, do you?

A. No, I don't.

Q. And you don't -- you said you saw him with the liquor bottle and you don't know if this was open, do you?

A. I don't know.

Q. And you never, in fact, saw Will drinking anything,

did you?
A. About Will drinking?
Q. Did you see Will drinking on May 10th when you dropped --
A. No, I didn't see Will drinking.
Q. And you left and you went home, correct? I'm assuming you left the [redacted] address, correct?
A. Uh-huh.
Q. And so you don't know what your son did after you left, do you?
A. No, I don't.
Q. And you don't know what your grandson did after you left, do you?
A. No, I don't. No.
Q. So, in fact, you don't know anything about the way this incident took place after you left, do you?
A. I don't know what -- I know both of them.
MS. PATTERSON: I beg the Court's indulgence.
THE COURT: Yes, ma'am.
MS. PATTERSON: Thank you, Ms. Foster.
THE COURT: Redirect?
MR. SCHWARTZ: Nothing, Your Honor.
THE COURT: Thank you, ma'am. You may step down.
(Witness excused.)
THE COURT: Call your next witness.

MS. ZMROCZEK: Your Honor, we call Tyler Watford.

THE COURT: Come around, please.

THE CLERK: Raise your right hand.

(Whereupon, Tyler Watford was duly sworn by the clerk of Court.)

TYLER WATFORD,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. ZMROCZEK:

Q. Investigator Wat -- or, sorry. Deputy Watford, will you tell the jury where you're employed?

A. I'm employed with the Lexington County Sheriff's Department.

Q. How long have you been employed there?

A. I've been with the sheriff's department since November of 2015.

Q. And prior to joining or after joining the sheriff's department, did you receive any training?

A. Prior to joining?

Q. Yes.

A. Yes.

Q. Okay. Where was that?

A. I went through the criminal justice academy in 2013 when I started with my first agency and after that I went through an FTO program with that agency and then when I

came to the sheriff's department I went through an FTO program with them as well.

Q. Okay. And so once you go through all that training --

A. Uh-huh.

Q. -- you then get put on the road? Is that your job?

A. Yes, that's correct.

Q. Okay. So describe a little bit about what the job of a road deputy is.

A. The duties of a road deputy is to call -- is to respond to any call for service. A hot call for service meaning any crime in progress. Any call for service as far as to take a report for something's that already happened, like if something's broken into or, you know, to take a report for a crime that's already occurred, so we are the first ones to respond to anything.

Q. And so -- so you're kind of the first line of defense, right?

A. Correct.

Q. And you have other duties as well, traffic tickets, DUIs, things like that?

A. Making traffic stops and, yeah, enforcing traffic laws and all that, yes.

Q. Enforcing traffic laws?

A. Yes.

Q. And so -- but on this day, I want to talk about May

10th. Is the county divided into regions?
A. They are. It is.
Q. Okay. And so are you assigned a certain region?
A. Yes, I'm assigned to what's called our south region. It's basically from the -- about the Cayce area all the way down to the Orangeburg, Calhoun, Aiken county lines between I-26 and I-20.
Q. And were you working on May 10th?
A. I was.
Q. And what were your -- where were you?
A. I was in the Dixiana part of the county, which is Charleston Highway and Highway 321, that particular area of the county, the Dixiana, and I was in that area at the time.
Q. And what were you driving?
A. I was driving a Ford Crown Vic.
Q. Okay. And that was a department-issued vehicle?
A. Yes. It was a fully marked county patrol vehicle.
Q. And so what else -- what other features did your county patrol vehicle have in it?
A. My particular vehicle had a dash camera, a camera mounted on the windshield.
Q. And explain how those work.
A. A dash camera is just like any other camera. It's a recording system and it records for -- it records out the

front of the vehicle for when we conduct traffic stops or we have interactions with anybody. Everything is recorded onto a system inside of my car that's mounted to the ceiling and it directly records to a DVD.

Q. And how do we hear interactions on your dash camera? Are there different ways?

A. Well, the camera system has a body mic -- has a body microphone that clips to wherever. I clip it on my belt, some people clip it somewhere on their body, but it's just a wireless microphone that connects to the system to record any interactions that I have.

Q. So even though you -- so you can still be recorded when you're not inside the vehicle?

A. Correct. Right. So some systems have -- well, excuse me, the system -- the particular system I have also has an in-car microphone. It's a microphone that's ran inside the car, usually somewhere to the back where the subject is sitting -- where the Defendant is sitting and I can also unclip my body mic and place it inside the car to get a better audio sound because usually the body mic has a more clearer sound than the inside car mic.

Q. Now do you have body-worn cameras?

A. We do. I did not at the time.

Q. Okay. But you do now?

A. I do now, yes.

Q. Okay. So these -- May 10, 2016, the sheriff's department hadn't acquired those quite yet, right?
A. Correct.
Q. Okay. So how did you know to respond to a call? How does that work?
A. So a call comes in, somebody calls the Lexington County dispatch center, it goes through dispatch, they do whatever they need to do in their system, and then dispatch contacts us. Dispatch calls us on the radio by unit number depending on the call type. If it's a hot call, the radio will tone -- it will do a tone and then that way everybody knows to listen and then dispatch just gives it out and everybody responds. If it's a nonemergent call, dispatch will look at the map typically and see who's the closest units and give it out that way, but dispatch calls us on the radio by our radio number and gives us the call out that way and then we respond.
Q. Okay. So every deputy is assigned a different number?
A. Correct.
Q. All right.
MS. ZMROCZEK: Your Honor, I'm gonna mark this and that's Defendant's 27.
(Defendant's Exhibit Number 27 was marked for identification.)
BY MS. ZMROCZEK:

Q. Let me ask this question. Did you -- when you are -- how is your dash cam activated?
A. My dash cam is activated by my blue lights. When I turn my emergency equipment on, it -- the camera starts recording automatically.
Q. And did that happen in this case?
A. It did.
Q. And what did you do with that recording after your part of this case was finished?
A. Once my -- once the Defendant was moved from my vehicle and turned over to an investigator, I stopped the recording, took the DVD out, gave it to our crime scene investigator that was on-scene at the time for her to enter directly into evidence.
Q. Okay.
MS. ZMROCZEK: And, Your Honor, at this time we would move Defendant's 27 into evidence.
THE COURT: Subject to previous objection?
MS. PATTERSON: Subject to previous objection.
MR. PINCELLI: Also could we approach just for one quick matter?
THE COURT: Yes.
(Proceedings held at the bench; not reported.)
THE COURT: Ladies and gentlemen, the attorneys have asked me to explain to you that this video has been

redacted, it's been shortened. There are long periods in the original video where nothing's happening, somebody's just sitting there, nothing's going on, so to save you from having to watch an hour and something of video, they've shortened it down by agreement. So if you see it -- I haven't seen the redacted version, but if it's chopped up or you see like it jumps from one time or another, the only reason that's being done is because there's nothing happening during those times, okay?

MS. ZMROCZEK: And --

THE COURT: All right. Mark it in evidence subject to previous objection.

(Defendant's Exhibit Number 27, an in-car video, was admitted into evidence.)

BY MS. ZMROCZEK:

Q. And, Deputy Watford, before I publish the video, so you -- and we heard from the judge that there were times -- the video was about fifty-four minutes or so long when you downloaded it, correct?

A. Correct.

Q. And so explain to the jury -- you responded. How did you know where to go and what you did?

A. All right. When the call came out, like I said, I was nearby. I was in the Dixiana area. This incident happened in the Dixiana area not far away. Dispatch gave

out the call, I responded Code 3, lights and sirens. While I'm en route, another unit got on-scene first, said that the subject had fled toward Dixiana Drive, the next road over. While also en route, dispatch was giving out over the radio that they were getting another call in about it saying that our suspect that we were looking for was currently at an address on Dixiana Drive. I was given [redacted] Dixiana Drive. When I responded to Dixiana Drive, I located the address and saw some people standing outside, I'm assuming the homeowners, standing outside, waiving their arms up telling me to come over there, and that's how I got to the address.

Q. Okay. And so -- and so you went -- instead of going to [redacted] Oak Glenn, you basically rerouted to --

A. Correct.

Q. -- to [redacted] Dixiana?

A. Correct.

Q. I'm gonna show you State's 9. I'll let you see it first, so. And I'll stand back here so that way everybody can see it. So what's marked on this map is [redacted] Dixiana Drive, correct?

A. Yes.

Q. And that's where you responded?

A. I believe I went -- actually the address came out as [redacted] Dixiana Drive, but I believe I ended up at [redacted] Dixiana

Drive.

Q. Okay. And then the incident location you had was [redacted] Oak Gland Road, correct?

A. That's correct.

Q. And actually it's a straight -- it's a straight line if you run through the --

A. For the most part, yeah.

Q. And do you know approximately how long that was between the two places?

A. I don't. I don't know how big the backyards are.

Q. Okay. Now you weren't the case agent in this case, right?

A. Correct, I was not.

Q. What's a case agent?

A. The case agent is the -- whether it's the deputy, the investigator, the one that's assigned the case, the one that's over the case. The primary deputy or investigator working the case.

Q. And so what -- when you arrived though because you were the first to get to Mr. Foster?

A. Correct.

Q. And can you describe to the jury what you saw when you got out of your vehicle?

A. When I got out of my vehicle, the Defendant was -- and I made my way around to where they were. The Defendant

was -- there was a metal chair, a metal folding chair, in the driveway. The Defendant was on his knees leaning over onto the chair almost like in a praying position on the chair.

Q. And did he respond to your commends?

A. He did.

Q. Was he combative?

A. He was not.

Q. Was he polite?

A. He was.

Q. Did he follow all of your commands?

A. He did.

Q. You -- when you approached him, how did you approach him?

A. When I approached him, of course, I was using caution because at the time when I'm en route we don't know exactly what's going on. We're just being told from dispatch what happened. We were just told that someone had just shot somebody and the suspect fled. I don't know where the firearm is, I don't know where the weapon is, if he still has it, so when I'm approaching, I'm approaching with caution. I am ready to do if something were to happen. As I come around the corner, the people are telling me that the firearm -- he doesn't have the firearm, he doesn't have the firearm. I do not see firearm on him and --

Q. So initially you have your hand on your -- on your weapon?
A. Correct. Correct, because at the time I don't know if he still has the firearm or not and if he does I want to be ready.
Q. And you've been trained --
A. Correct.
Q. -- in the academy that there's a zone of danger, right? Kind of?
A. Yeah. Yes.
Q. That you could be -- that twenty-one feet is what they -- they train you to be prepared to defend yourself?
A. Twenty-one feet is a rule involving a weapon, yes.
Q. Okay. And -- and so the dash cam didn't -- even though we can hear you, the dash cam doesn't get to see how you saw Mr. Foster, right?
A. Correct. Yeah, he was on the other side of some vehicles.
Q. Okay. So you had your body mic on?
A. I did.
Q. So when we hear it, that's what you just described to the jury?
A. Yes.
Q. And then -- and then what do you do next?
A. After I approach him, realize that he -- they're

telling me he doesn't have a firearm, I don't see a firearm, but what I'm being told he matches the description. There I place -- I detain him. I ask him to get up, put his hands behind his back, detain him in handcuffs. I walk him over to the front of my patrol vehicle, place him in front of my dash camera, check him for any additional weapons, which I had to take a pocketknife out of his right front pants pocket and place it on the hood of my vehicle, and then he was -- once he was cleared of any other weapons, he was placed in the backseat of my patrol car to await for an investigator to come speak with him.

Q. And I believe that you -- he had told you that he had a knife in his pocket?

A. He did.

Q. Okay. And so you were just detaining him at that point?

A. Correct.

Q. And did you ask him any questions?

A. I did not.

Q. Okay. Did -- but your dash cam did record, so did he make any statements?

A. He spoke -- he spoke freely about the incident, but I did not ask him any questions about the incident, no investigative questions or anything like that. That was

not my job at the time to do.
Q. And about how -- how long after the incident did you get there? You said there was one officer at [redacted]?
A. Uh-huh.
Q. How quickly were you behind?
A. That's hard to say. A matter of a few minutes. Like I was just a few miles down the road. The dash -- you'll see on the dash cam video from the time I activate my lights to go that it's under -- it's within few minutes. I can't give you an exact time.
Q. So it's fairly -- a fairly quick response time?
A. Correct.
MS. ZMROCZEK: And, Your Honor, at this time we would publish Defendant's 27.
BY MS. ZMROCZEK:
Q. And what we're seeing right now, there's no sound; is that correct?
A. That's correct.
Q. It eventually gets activated?
A. Correct. So what that -- what it does is there's -- there's the camera -- I'll explain that. The camera system is set up to when we activate our cameras, the same way with our body cameras, the same way with our dash cameras, is when we start recording, that's when the sound starts recording. So the camera is constantly on standby

doing a live feed constantly recording stuff, so that way when I hit record it actually backs up and will save the prior fifteen seconds, thirty seconds, a minute, a minute and a half, two minutes, whatever we set it to. That way it catches anything beforehand. So if somebody were to do something, run a red light or whatever, then we've potentially got them on camera running that red light before we activated our lights. So that's what this silence is beforehand.

Q. And it looks like you're riding pretty fast. I think you said you were running code?

A. Correct.

Q. Okay. So what does that mean?

A. Running code is running your lights and sirens, your emergency equipment.

MS. ZMROCZEK: And, Your Honor, I'm gonna try to put it up here so it's a little easier to see.

THE COURT: The screen needs to come down.

(Whereupon, Defendant's 27 was played beginning at 11:17 AM.)

(Whereupon, the video was paused at 11:30 AM.)

THE COURT: Ladies and gentlemen, step in the jury room. Don't discuss the case.

(Whereupon, the jury retires to the jury room at 11:31 AM.)

THE COURT: Mr. Watford, don't discuss your testimony with anyone during the break. We're at ease.

(Recess taken at 11:31 AM.)

(Back on the record at 11:40 AM.)

BAILIFF: All rise. Court's now in session.

THE COURT: Be seated. Thank you.

All right. Before we start back, if any of you don't feel like you can control your emotions, aside from the Defendant, I'm not addressing Mr. Foster, if you can't control your emotions and want to leave, you need to leave now.

All right. Bring in the jury.

Mark that as a Court's exhibit. That's the e-mail from earlier.

(Court's Exhibit Number 2 was marked for identification.)

(Whereupon, the jury return to the courtroom at 11:41 AM.)

THE COURT: Okay. You can start it back.

MS. ZMROCZEK: Thank you, Your Honor.

(Whereupon, Defendant's Exhibit Number 27 continued playing.)

BY MS. ZMROCZEK:

Q. Deputy Watford, after -- after your involvement in -- when Mr. Foster was transferred out of your car, what, if

anything, else did you do in this case?
A. Once Mr. Foster was out of my patrol vehicle and in the custody of Detective Miller at the time, I made sure there was nothing else I could do and then I cleared the scene altogether.
MS. ZMROCZEK: Thank you. Please answer any questions the State may have.
THE COURT: Cross?

CROSS-EXAMINATION

BY MR. PINCELLI:
Q. Deputy Watford, before we watched that video, we talked about your training and something came up about a -- being trained on a zone of danger?
A. Yes.
Q. You said something about twenty-one feet. What is that zone of danger training? What's the purpose of that?
A. The 21-foot rule was to show that someone with an object, with a weapon in their hand, could assault a deputy or an officer or whoever fatally, say if it was a knife, within that twenty-one -- it's a reaction -- it's reactionary training is what it is pretty much. Someone within twenty-one feet if they had a knife if they -- by the time it would take to me to react to him moving towards me and getting my gun out of my holster, he would have stabbed me in twenty-one feet.

Q. So that's training that you get as a law enforcement officer?
A. Correct.
Q. And that's pertaining to weapons, situations with weapons --
A. Yes.
Q. -- I believe that's what you testified?
A. Yes.
Q. Going back, you also testified that you're a road deputy and that you're kind of first on-scene?
A. Correct.
Q. So you're the one that first deals with the situation, picks up what's going on; is that correct?
A. Correct.
Q. Does that give you the opportunity throughout your career to be one of the first people to speak with a suspect or subject?
A. Yes.
Q. And over your career, have you heard suspects give their own version of events before?
A. Yes.
Q. Kind of give their own story?
A. They do.
Q. And we saw this video, and I believe you already testified that you didn't ask any of these questions, that

this was kind of just the suspect in the back of your car giving his own version of the events?
A. Correct.
Q. In fact, we heard you seek advice at one point, it was off screen and, I don't know, maybe I need to clarify this with you, did you at one point talk to another officer about asking questions?
A. I did. So what you heard of me stepping off screen speaking with Detective Blake was being -- like this happened in May of 2016. I was new -- I came to the sheriff's department in November 2015, so I was fairly new to the department, so I was still learning the procedures of how they handled major crime incidences, you know, and so I wanted to be sure that I didn't mess anything up for the investigators or anything like that as far as questioning or -- or anything because I was still learning the process of how this department works their major crimes and how they handle things.
Q. So you're being professional and extra careful there?
A. Correct.
Q. And being careful you were asked questions regarding whether or not you should interrogate or try to get any information out of the suspect; is that correct?
A. I didn't ask if I could ask any questions. I asked if -- I let the detective know who had been there longer

than me hey, he's in here talking freely or anything like that, I'm not asking him anything, you know, do I -- do I need to ask him anything or do you just want me to leave it alone.

Q. And you said he was in there talking freely. So you asked for -- you asked other law enforcement members for clarification because he's just in there giving you all sorts of stories, correct?

A. Correct.

Q. And over the course of the video and when he was in your car, you were there, you experienced it in person, not just watching the video like we all did, did he say the word "accident" many times?

A. He did.

Q. Is that -- did you -- do you recall him saying I'm talking to put something in my mind?

A. Yes.

Q. Do you recall him saying I'm gonna get your gun, something along those lines?

A. Yes.

Q. Do you recall him talking about any other weapons?

A. As far as him?

Q. Right.

A. No.

Q. So just you heard him about retrieving a weapon --

or, I'm sorry, a gun specifically?

A. Correct.

MR. PINCELLI: I beg the Court's indulgence.

THE COURT: Yes, sir.

MR. PINCELLI: Thank you very much, Deputy Watford. I don't have any questions.

MS. ZMROCZEK: Very briefly, Your Honor.

THE COURT: Yes.

REDIRECT EXAMINATION

BY MS. ZMROCZEK:

Q. He asked you about -- about him freely talking and -- and you verified that and what -- when you asked -- was it Detective Blake at the time?

A. (Nods head.)

Q. When you asked Detective Blake what you should do, what did he say?

A. Just reassure him that somebody's going to come speak with him and just to relax. The same thing I was already doing.

Q. Yes. And to let him talk if he wanted to talk, correct?

A. Correct.

Q. And then he asked you about were there any mentions of weapons and certainly in the video he talks about the two by four, he talks about a pipe and the jack?

A. Correct.

Q. Okay.

MS. ZMROCZEK: Thank you. No further questions.

THE COURT: Anything else of the witness?

MR. PINCELLI: No thank you, Your Honor.

THE COURT: Thank you, sir. You may step down.

MS. ZMROCZEK: May he be excused?

THE COURT: You're free to go. Thank you.

(Witness excused.)

THE COURT: Any other witnesses?

MS. ZMROCZEK: Your Honor, at this time the defense rests.

THE COURT: Ladies and gentlemen of the jury, please give me your intention. I need to give you an instruction related to the election of the Defendant not to testify. The fact that Mr. Foster elected not to testify is not a fact to be considered by you in any way in your deliberations and in your consideration on the question of whether he is guilty or not guilty. His decision not to testify must not be considered by you in any manner whatsoever against him. An accused has a constitutional right to remain silent and the assertion of that right cannot and must not be used in any way against him in your deliberations. Under your oath, you're to reach no inference and you're to draw no conclusion whatsoever from

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the fact that Mr. Foster elected not to testify. His decision not to testify should not be discussed by you in the jury room, it should not enter your minds in making your decision on the question of whether he is guilty or not guilty. The State has the entire burden of proof and an accused has no obligation to prove anything at all.

Do you anticipate any reply evidence?

MS. PATTERSON: No, sir.

THE COURT: Okay.

All right. Ladies and gentlemen, you now have all the evidence you're gonna have to decide the case and we're at another one of those stages where I have to talk about legal issues with the attorneys. This one takes more time, so what I'm gonna do is give you an extended lunch break. You'll be on your own for lunch. We'll stay here and work. I'm gonna ask you to be back here at 2:30. Hopefully I'll be ready by then. I'm having to put the charge together and I can't put the instructions together until I know what issues have been raised in the trial, so I've been working along but I'm gonna need some quiet time to sit down and put all of this together, so I need you to back at 2:30.

You should get the case this afternoon unless I run into major problems drafting the charge. Don't discuss the case yet. I hope you have a pleasant lunch and I'll

see you around 2:30.

(Whereupon, the jury was excused for lunch at 12:16 PM.)

THE COURT: Motions?

MS. ZMROCZEK: Your Honor, at this time we would just renew our motion for directed verdict. Certainly we understand Your Honor's position before and we understand that those facts haven't changed, but at this time just we would move for a directed verdict on the -- for the showing of a lack of malice.

THE COURT: There's evidence in the record from which the jury could convict the Defendant for both offenses for which he's charged. Your motion's denied.

MS. ZMROCZEK: Thank you.

And, Your Honor, if I can get on the Internet, I can -- I have our proposed charges in Word to e-mail as well once I do that.

THE COURT: All right. So it's murder, voluntary and involuntary?

MS. ZMROCZEK: We would -- we would request that voluntary not be charged, Your Honor. It's specifically for the -- the reason that the motion for directed verdict was denied. We -- I did a lot of reading into legal provocation and heat of passion and it seems to be that all the evidence presented was that there was a sufficient

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cooling off period, so we would ask for murder, voluntary -- or, excuse me, murder, involuntary, accident and self-defense.

THE COURT: I'm gonna charge involuntary. Do you want to be heard? I mean, charge voluntary. Do you want to be heard?

MS. PATTERSON: No, sir.

THE COURT: What about involuntary?

MS. PATTERSON: Your Honor, we would ask that involuntary not be charged, Your Honor. I think it's inappropriate in this case.

I beg the Court's indulgence. I lost my place.

I think it's inappropriate to charge involuntary under these circumstances, Your Honor. He intentionally waived the gun around -- well, he intentionally pointed the gun at someone, Your Honor. Actually it was several people were in the area that he could have shot, but he -- he pointed the gun, Your Honor, in the area of his son. I would think that -- that that is more malicious, Your Honor, and not criminal negligence, and that will also be inconsistent with self-defense if Your Honor is gonna charge self-defense.

THE COURT: I think the law is that he's entitled to a charge on both with the jury issues that have to be determined.

What's the defense's position on involuntary? I assume since you don't want voluntary, you don't want involuntary.

MS. ZMROCZEK: We do want involuntary, Your Honor. We do believe that under these facts, under Mekler, M-E-K-L-E-R, Brayboy, Light and all of those progeny, Your Honor, I think that it does say that you can also -- you can be acting in self-defense or involuntarily -- as well as involuntarily with the negligent handling of a loaded gun, which we assert is what the facts show in this case.

THE COURT: There's evidence in the record that the Defendant could be construed by the jury to -- he could be engaged in criminal negligence related to the handling of a firearm and, therefore, involuntary manslaughter should be charged in my view.

Here's what I want you-all to do. I want you to be back at 2:15. I should have a printed out charge for you then. You can review it. If you've got proposed charges, you need to get them to me because I'm putting this together. Some of these issues have been difficult to rule on. That Terry issue really bothers me a lot. Some of the initial part of that video I don't really have too much concern about allowing. There's some of it toward the end, but we didn't parse that out and because we didn't

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parse it out, I didn't make individual rulings on each of the things the Defendant said and the context in which he said it, but it's done now. I did what I thought was appropriate under the circumstances, but I'm troubled by that ruling.

We're at ease until 2:15.

(Whereupon, a luncheon recess was taken at 12:22 PM.)

(Back on the record at 2:43 PM.)

BAILIFF: All rise. Court is now in session.

THE COURT: Thank you. Be seated, please.

My understanding is that none of you took issue with the language in the charges that were proposed, the draft charge I gave you; is that right?

MR. PINCELLI: No issues from the State, Your Honor.

MS. ZMROCZEK: No issues from the defense.

THE COURT: Well, after I give the charge, you can preserve your objections to me, the charge of the lesser includeds that you objected to.

Is the State ready to argue?

MS. PATTERSON: The State's ready.

THE COURT: Defense?

MS. ZMROCZEK: I am, Your Honor. I just -- I didn't want to go through the State's pictures while they were getting ready for theirs, so I may need just a minute to get some pictures together in between.

THE COURT: Okay. Are you gonna open in full? Which of you is gonna do it?

MR. PINCELLI: Ms. Patterson.

MS. PATTERSON: I thought I had to open in full and then I get an opportunity to reply.

THE COURT: Is she right?

MS. ZMROCZEK: That was my understanding.

THE COURT: Okay.

MS. ZMROCZEK: Thank you.

THE COURT: All right. Bring in the jury, please.

(Whereupon, the jury return to the courtroom at 2:45 PM.)

THE COURT: Members of the jury, we've reached the stage now where there are two remaining phases, the closing arguments and the charge. The charge is -- the charge is what we use as a term to define what the judge tells to the jury.

Now I told you at the outset that in the opening statements the attorneys were not permitted to engage in what we call argument. Well, we've reached the point where they now are permitted to use the art of advocacy in an attempt to get you to see things as they would like you to see them on behalf of their respective positions.

The way this works is the State will go first, will close in full, then the defense will make its only closing

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argument, and since the State has the burden of proof, the State gets to come back and respond. They can't go through the whole thing again, but can respond to what the defense brought out.

Now, ladies and gentlemen, we play these things by ear. I don't limit attorneys on how long they talk. I never have. I always take a break between when they finish and when I start so I can get set up. It's usually a very short break. Sometimes we'll take a break between the arguments to give them an opportunity to set up, so we'll just kind of play it by ear and see how it goes.

I invite your close attention.

Solicitor, you're recognized for your closing argument.

MS. PATTERSON: Thank you, Your Honor. May it please the Court?

THE COURT: Yes, ma'am.

MS. PATTERSON: Good afternoon. It should have been water under the bridge. May 10, 2016, should have been a normal day in the Oak Glenn neighborhood. It should have been a petty argument that ended with everyone going their separate ways, but instead it was a tragic day. It was a deadly day for Will Foster. He was shot and killed in front of his home, in front of his girlfriend, the mother of his child, in front of his sister, in front of his

mother, in front of neighbors in the neighborhood. He was shot and killed by the Defendant, his father, Heirbrane Foster. It was a petty argument, something that should have been done and over, over a barbecue grill.

Now the Defendant is on trial for murder and possession of a weapon during the commission of a violent crime. Now the judge will instruct you on the law later, but now it is my opportunity to give you the law and relate it to the facts that I think we have presented this week.

Murder. The killing of another with malice aforethought, either express or implied. Now malice is defined as ill will or hatred. It doesn't require ill will toward the individual who actually gets hurt, but rather it signifies a general malignant recklessness of the lives and safety of others. It can be expressed, it can be implied. Expressed are like words like the Defendant used, didn't I tell you to leave me the fuck alone. Or you heard that last video that the defense played when he said I'll shoot you with your gun. express malice.

Implied, showing conduct -- by showing conduct of a total disregard for human life. You heard the testimony from that stand. There was other people standing right there next to Will. There were children around, there

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was others around. It was a busy day.

Aforethought. This doesn't require a long period of time. It's just sufficient that malice, that ill will or hatred, occurs right before the act, right before that shooting.

The judge is also going to instruct you on what we call lesser included offenses, and these are just a step under murder. The first one he's gonna instruct you on is voluntary manslaughter. It's the unlawful killing of another in the sudden heat of passion soon after legal sufficient provocation without malice aforethought. Again, we submit to you malice occurred in this case.

Now criminal negligence means doing an act not naturally intended to cause death. I submit to you that pointing a pump shotgun at someone, pumping the gun and pulling the trigger is very likely to cause death.

He's going to also instruct you on involuntary murder -- involuntary manslaughter. Excuse me. Involuntary manslaughter is the unlawful killing of another without malice and with criminal negligence. I apologize. And that criminal negligence, as I stated, pumping a shotgun at someone. That's criminal negligence. You know that's intended to cause death.

And let me go back to voluntary manslaughter. In the sudden heat of passion soon after legal sufficient

provocation without malice aforethought. If there's a sufficient cooling off period, then it's murder, it's not manslaughter. You heard testimony from at least four or five people on this stand that everyone thought it was over; that the Defendant was in the house three to five minutes, maybe longer according to some witnesses. We submit to you that a sufficient cooling off period did exist in this case and if there is a sufficient cooling off period, then it's murder.

The next thing he's charged with is possession of a firearm during the commission of a violent crime. He possessed a firearm. He admitted to that in that video that they showed you with Deputy Watford during the commission of a violent crime, and I submit murder and manslaughter, they're violent offenses.

Now the judge is also gonna talk about self-defense. In order for you to believe that the Defendant was acting in self-defense, these factors must exist. First, the Defendant was without fault in bringing about the difficulty. We submit to you the difficulty was over. They had gone on, started talking, laughing, planning on the rest of their day. You heard that from Haley, you heard from that Leeann, you heard that from Troy. You even heard that from Savanah. She said that Will was attempting to walk away. The Defendant brought about the

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difficulty when he went inside, stayed a few minutes, got that gun, unwrapped it from that fitted sheet, presented himself back outside the door that he knew Will was at and reengaged himself in the difficulty. They both were mutually arguing back and forth across those yards as Leeann testified and Troy testified about. Going back and forth. They both were doing it. It was over. He reengaged and started back up the difficulty.

The Defendant must also believe -- must actually believe he was in imminent danger of losing his life or sustaining serious bodily injury or he was actually -- or he actually was in such imminent danger. And also if the defense is based on the Defendant's actual belief of imminent danger, a reasonable prudent person of ordinary firmness and courage would have entertained the same belief. Or if the Defendant actually was in imminent danger and the circumstances were such as would warrant a person of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm of losing his own life.

You heard the testimony. The Defendant was not in imminent danger. It was over. Will was standing there. Will was not pursuing him in the house. Will did not enter the house. Will did not have anything in his hand at the time of the shooting. He wasn't in any danger.

He -- some testimony said that he had even walked to the edge of the driveway with his wife. It was over.

And the Defendant had no other probable means of avoiding the danger of losing his own life or sustaining a serious bodily injury than to act as he did in this particular instance. Well, we know he was inside his house. He could have locked the door, he could have stayed inside, he could have went out another door. We know he had his cell phone. He could have called for help, but he didn't. There were other probable means of avoiding the danger if he thought he was in danger, which I submit to you he was not.

Now the judge is also gonna tell you that you have the right to judge each witness that sat on this stand, their credibility, their believability, what they have to gain or lose by coming here today. None of these witnesses wanted to be here. Haley didn't want to be here. She loved her daddy and her brother. Leeann, Troy, Savanah, they didn't want to be here to relive this whole hurtful, tragic incident again. They're credible.

And the defense may talk about some of them had prior criminal records. Ladies and gentlemen, that's the reality of the place where these people lived. You heard people describe this is a pretty rough place. They may have criminal records, but you know what, those records

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were old. They were nine, ten years old. Leann even thought that hers had been taken care of. Troy's was nine years old. He's working a steady job. Been at that job for a year and half. These are very credible witnesses that witnessed something tragic, something terrible done to someone they loved. They didn't want to be here.

The judge will also go over reasonable doubt with you, and reasonable doubt is, it leaves you firmly convinced. It doesn't have to be beyond all doubt because there's very little that we know beyond all doubt. Just that leaves you firmly convinced that these offenses happened.

And I thank you for your paying attention, I thank you for your patience, but now this is my time to go over the evidence that was presented. And one of the hardest things that a prosecutor does is get up here and start talking because I know there's gonna be something I forgot, but luckily I will have the opportunity to reply after the defense attorney. So I hope you don't get tired of listening to my voice, but it's my burden of proof, and I've got a job to do. But I just ask you to bear with me just a little while longer and just let me go over what I think are some of the key points that you heard from this stand this week.

Now the first thing I'd like to do is just go over what the defense put up. Yesterday they put up the 9-1-1 communicator -- or director, and she talked about all these 9-1-1 calls and how they're processed and how they come into the office, and she talked about how the first call came in and then two minutes later I think the Defendant may have called. And you may be thinking -- and she also said though that the timestamp is when that particular dispatcher hit enter, so just depending on how fast they are, depending on what they're putting in the system, that's what the timestamp is. And I know you're thinking two minutes is not a lot of time, but I submit to you it's a lot of time. As a matter of fact, let's just sit here for two minutes.

And that's about two minutes. And remember Deputy Schirra testified that he got to the scene in less than a minute, so 9-1-1 had already been called. And you heard Haley's 9-1-1 call. He had already got on his PA system and if you listen carefully at the end of her 9-1-1 call, you can hear Deputy Schirra on that PA system shouting for the Defendant to come out because that was the information he received at the time. I submit to you the Defendant knew that the police were on their way, he knew people were out there, he knew 9-1-1 was called, he knew Deputy Schirra was already on the scene, and then he

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decided to call.

And if you listen to the other 9-1-1 call that they played from his neighbor, it was dispatch asking if it was an accident. He wasn't the first to say it. She asked if it was an accident, he took it, and he ran with it. You have all the 9-1-1 calls. You can re-listen to them and you can even listen to the other call that Leann said her sister Ronita made. Listen to it and you decide if what they're relaying to dispatch sounded like the Defendant's version later on.

They also put up Deputy Burt to read in Vernon Blanding's statement. I guess they wanted to get in that he said that Will said he would not stop, but he did stop. Vernon took the board from him and you saw where he placed it. All the way up here on the edge of the road. He did stop. He may have said it, but he did it. He stopped and he began to have a conversation with Leann and Haley and Troy.

Now Vernon Blanding's statement also said that Will wasn't holding anything at the time of the shooting. He's the Defendant's cousin, Mr. Blanding is, and he saw his cousin walk in the house, shoot Will, and say didn't I tell you to leave me the fuck along. And excuse my language. Those are usually not my words. If you knew me, those are not my words, but those are his words, and

those are his words that he said before he shot and killed his son.

And Vernon also said it was over this grill that was at Leann's house, so he saw that. Then he also said he saw the Defendant leave out of the house, run through the yard and jump the fence.

Now they called in the SLED toxicologist to get in Will's blood alcohol level. And, yeah, it was above legal limit to drive. That don't mean he couldn't walk in his yard. That don't mean he couldn't hold a conversation. Will wasn't driving. He was at his home getting ready for a cookout. The toxicologist also said that even the level Will was at he would have had decreased inhibitions, slowing his system down to the point where he would be sleepy. Same with the low level of Xanax. And I know they're gonna make a big deal out of that. They're both depressants and there was nothing else in his system.

And Nellie Foster, she testified. She's the Defendant's mom. She's been sitting here all week. Things moms won't do for their sons. She knew what she needed to say about Will, but what she also said is he may have had something in his hands, but she didn't see if they were open or not. She didn't see him drinking. She left. She don't know what her -- what the Defendant

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did after she left, she don't know what Will did after she left.

And Deputy Watford's video. Again, I submit he knew the police had been called. He was trying to get away, although he says differently. His own cousin, Vernon, said he saw him running through the yard, jumping over the fence. So by the time Deputy Watford gets there he was running with the accident story. It was his time to give his version of the facts. No one else gave this version, just him. And it's interesting on the video he even says he was hoping to try to put something in his mind. What kind of statement is that? I submit he was trying to come up with a story to save himself and that's exactly what he was doing. Everything he said was self-serving. Did you notice not a tear on that video? He was panting, he was apologizing, he was coming up with excuse after excuse after excuse, but when the deputy would open that door, it would get more intense. At the end of the video, yeah, he asked about his son, but everything else was just a coverup for himself.

Now let's talk about the witnesses that the State put up. Savanah, she don't even live over there. She was over there at her aunt's house looking out the window because she heard arguing from both people. This was not one-sided. She looked out the window and, yeah, she saw

Will with the board, she saw Vernon take the board. Will had nothing in his hand. He was getting ready to walk away she said. She said she saw the Defendant go in the house three minutes and then she saw Will fall to the ground.

Now Leann and Troy, they weren't here the day Savanah testified and they had similar timeframes. Again, yeah, Will drank. He was twenty-four years old. A young man. Even Savanah said it was no big deal. Will wasn't violent or disrespectful to her when he was drinking.

And you heard from Haley. Haley loves both of these people, feels caught in the middle I'm sure, and she said her brother had something in his hand and she couldn't remember what her daddy had, but if you also remember, too, different people can be focussed on different things. You heard how close she said her and Will was. They were close. You heard Leann say they even took up for each other, so her focus, I submit, was on Will. And so she was focussed on Will. She knew that her mom was trying to get something from Will's hand, but she knows ultimately nothing was in Will's hand. She thought it was over.

She talked about her dad's dogs and everybody being scared of those dogs and I even think he said he went and stood by the dogs because he knew Will was scared of those

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dogs. There's one in particular I think they're afraid of.

But, again, everybody said it was over. They were getting ready to go back to Leann's house and continue with the plans of the day of having the party. Again, she said Will never hit her dad, their dad. Listen to her call. Listen to her 9-1-1 call.

And Leann, mother of Will's young child. I think the baby was one month old at the time. She said she felt confused, lost, empty. She even closed his eyes when he died. She told her sister to call 9-1-1. Again, her focus was on her kids. And the defense attorney may make a big deal saying she gave her statement last year to our office, but she explained that. And, yeah, like I said, she had an arrest. I'm not the solicitor. I don't know anything about the case. She has another attorney. But she stated she didn't want to talk that day. She didn't feel like talking. That's understandable. She just had closed Will's eyes upon his death and her children were standing there watching it. She was concerned about them. But she also said she was more than willing to talk when she was contacted and at first she was contacted by a representative that represented the Defendant previously and she said she talked to them and then when we called she talked to us. There's nothing biased by that. She

just didn't want to talk May 10, 2016.

And she told you what happened. She told you she had went to the store, came back. And, yes, her and Will got into an argument at her house because there were some girls over there, but she shut it down. She shut it down, but Will was still angry and kicked over the grill. The Defendant saw it just a house away. Leann's house, their house. He said what Will had did to the grill and that's where the argument went back and forth, back and forth, back and forth. But she says she picked up the grill. She started prepping. She thought, you know, they argue all the time, it will be over soon. But then when she noticed it wasn't, she did go over to tell them not to behave that way in front of her son.

Again, if you notice, she didn't make this one-sided. She said they both were engaged in this verbal altercation. Nothing physical. Neither tried to swing on each other, neither made contact with each other. If she wanted to lie, she would have divulged a little more about the Defendant's involvement, but she didn't. They both were mutually engaged in this verbal altercation. And Vernon took it, the stick or whatever, out of Will's hand. She said she didn't take anything out of his hand, but what they do know is they stood there, and I think defense had her even get up and demonstrate where they were standing,

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which is a little far -- this picture is a little far, so you can look at other pictures that kind of coincide with the same thing to see, but Leeann stood right over here in this corner and demonstrated everything where they were standing for minutes.

And you-all saw how long two minutes is in the reality of things, so just think three to five minutes they stood there. Again, nothing in Will's hand, thinking it was over, saw the Defendant go in the house. Well, he was in the house three to five minutes, but they may have been there longer because she also said she saw him go to the edge of the yard and have his arm around his ex-wife, Cathy. Will with his back towards the door, the Defendant comes out, he hears him, Will turns and gets shot in the center of the chest.

And she described his motion, how he took a step, turned to walk away. If you look at these pictures -- and I know defense will probably, you know, say, yeah, he was standing on the pavement, but Leann, Haley and Troy say he was in the dirt. And this is consistent with what Agent Sprinkle testified because he gave a zone because he said he couldn't be sure if he was on the pavement or the dirt, and that's safe, he couldn't be sure because he wasn't there. But the way Leann described, he took a step, the blood pooled. And if you notice that's where

the path starts, the blood. He's standing, spatter, turns, blood path. And I think Detective Sprinkle said that was thirteen feet away from the door. Thirteen feet. Thirteen feet. And we'll talk about that danger zone that the defense tried to get the law enforcement officers to talk about. I'll get to that in a minute.

Again, they tried to get Leann to say that Will liked to drink. She said she didn't see him drink, but he was drinking. That's okay. But she didn't see it. She had went to the store, she started prepping for the barbecue. She wasn't there up under him the whole time, but she said he wasn't a mean drunk, he was kind of goofy when he drank.

Now Troy, he talked about giving his written statement and he was shaky. He said he was so shaky that the officer had to finish it up for him. He said he was at Vernon's house when it all started. They got his attention because, again, both of them was arguing. So he didn't see Will and Leann start that fight, the first -- not fight, but first verbal altercation at her house. He didn't see Will kick over the grill. His attention, like I said, was when he saw the Defendant and Will arguing. Now he remembers the Defendant saying didn't I tell you leave me the fuck alone, knows Vernon took the stick from Will, and that stick was found twenty-two feet

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from Will's head, remember that, at the edge of the yard. Remembers the Defendant having something in his hand, don't remember what it was. Talking to Will three to five minutes before he was shot. And, again, that would be the area that he described they were at that would still be consisted within that zone that Agent Sprinkle talked about. Doesn't remember the Defendant working on the car. Leann said he never started working the car. That car had been parked in her yard for some time.

Now Agent Schirra, who worked at the sheriff's department, like I said, he got to the scene in less than a minute. Said it was chaotic, people were upset, yelling at him that the Defendant was in the house and he'd just shot his son. So in order to secure the premises so when EMS did arrive there would be no other danger, he had to try to get him out to secure the scene. He just kept talking about securing the scene. And, again, if you listen to Haley's 9-1-1 call, you can hear something over the PA system from Deputy Schirra at the end. He began yelling for him to come out, he didn't come out, then he got information he had ran out the back door, which, again Vernon said he saw him do. He radioed that in and then got confirmation that Watford had detained the Defendant.

He began clearing the house with Deputy Burnett. They made sure no one else was there. They see the gun

laying on the floor in the kitchen partially wrapped. And I submit to you the Defendant was gonna wrap that gun back up and hide it from wherever he got it, but he didn't have time because he knew Schirra was already on the scene. So instead he left it there, opened that back door and took off. They told major crimes about the gun, told CSI Sprinkle about the gun.

Now, again, she talked about this danger zone that the police in the police academy learn about and that's something that officers learn about when someone is approaching them, someone with a weapon I think Deputy Watford said. I submit to you this was no danger zone for the Defendant. Although thirteen feet may be within that twenty-one feet danger zone, it wasn't like he was standing there the entire time. He had went in the house, got the gun from wherever it was, so he had moved away some more, began unwrapping it, doing whatever to get it ready to come back to that door that he knew Will was standing. So I submit to you that doesn't even apply in this situation. The danger zone is when somebody is face to face with somebody and at this point, once again, Will did not have anything in his hand. Will was not trying to go inside that house. Will did not go inside that house.

And I know she's probably gonna try to say because none of these instruments were collected, nothing but the

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two by four, and Sprinkle said the things that was brought to his attention they collected. There was so many people on the scene. People didn't feel like talking at the scene. This information may have not gotten communicated to him at the scene. We know we've got pictures of the things that was just lying in the yard. And I submit to you the Defendant had these things in his hand just like Leann said. Troy said she saw something -- he saw something.

I mean, everything wasn't collected. The grill wasn't collected, but we know it had something to do with this. What was collected -- they were called out because of a shooting, not because of some assault in the front yard, so they didn't collect all that stuff in the front yard. What did they collect? The collected that gun. They collected that gun that was later tested by Suzanne Cromer, and I'll get to her testimony in a minute.

Deputy Schirra -- Agent Schirra also talked about the wadding being close range. The wadding still stuck in his chest. And thirteen feet, that would be consistent with the wadding in his chest. So you don't have to be up -- close up on somebody like this. That thirteen feet would still be consistent just like the witnesses testified that Will was standing.

Tiera Robinson was the paramedic. She got dispatched

to this scene. She testified there was a lot of blood loss and tissue on the ground and she stated she was certain it came from that three-inch hole in Will's chest that was caused by the gunshot. He was pulseless, breathless. His heart had stopped beating. She made the decision to declare him dead and called the coroner's office.

And as I stated, Suzanne Cromer, she was sent this -- at this point they had made sure that there was no more ammunition in the gun. They wanted to render it safe not because it can accidentally go off, but because somebody can pull the trigger, and that's just the precautions they take with firearms because somebody can pull the trigger. And she said she tested this gun and, boy, did she test it. She said she tried her best to make sure that the gun couldn't accidentally go off, but she couldn't do it. She said the only way this gun was gonna go off was have the safety off, pumping the gun, which the Defendant said he did, and then pulling the trigger. And not just gently pulling the trigger. She said it would take six pounds of force to pull that trigger. And there was some kind of recall on a 500 series Mossberg gun, but it didn't pertain to this gun because of the pistol grip. The recall had something to do with if the trigger and it had space here it could be tapped by a mallet that it could

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accidently go off. There wasn't even no space here to do it. But she even tried. She said she tapped it on the side. This gun did not go off. Again, the only way this gun will go off -- this particular gun would go off, safety off, chamber pulled, trigger pulled -- chambered, racked, trigger pulled.

She said it couldn't slam fire. She tried it as a left-handed person. She even had the person that studied under her right-handed try it. She tested many -- testified so many factors can determine the way the wadding would go and multiple things can affect ammunition. She talked about the ammunition, but she didn't have enough markings to make a conclusion, so she rendered it inconclusive. But she also talked about how she could witness you shooting something, test that shell and because it didn't have any markings it would still be rendered inconclusive. So don't let that be a distraction.

Now is it normal for someone to feel remorse or feel sorry after they did something? Sure. We recognize that. It's understandable. And you certainly should after your child is shot, but that doesn't mean that the Defendant didn't mean to commit this offense. They thought it was over. It was a petty argument over a barbecue grill. Everybody's outside, the battle is over. Haley said over, Troy said over, Leann said it was over. The Defendant

chose to go in that house and arm himself.

The defense in their opening said it was about choices, causes and consequences. Yes, it was. The choices he made. And he went -- again, went inside the house, stayed three to five minutes, made the choice to unwrap the gun, not lock the door, not call the police, walk back out that door. Not the backdoor, not the front door, but that particular door. Rack it, pull the trigger while pointing at his son and shooting him in the chest. If he wanted to just scare him, shoot the gun in the air, just point the gun up. Maybe just use that pocketknife that was in his pocket. No, he meant to shoot Will. And, again, it don't have to be a long period of time that he meant to do this. Just right when it happened. He meant to do it. And he did so with malice aforethought and intent.

And, again, I will have the opportunity to respond after Ms. Zmroczek gets up here, but right now I just thank you for your attention and I'll be back before you shortly.

THE COURT: Thank you, Solicitor.

Do you need a few minutes, Ms. Zmroczek?

MS. ZMROCZEK: Yes, sir. Just a few.

THE COURT: Ladies and gentlemen, please step in the jury room, don't discuss the case, and we'll have you back

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out shortly.

(Whereupon, the jury retires to the jury room at 3:31 PM.)

THE COURT: We'll be in recess for five minutes.

MS. ZMROCZEK: Thank you. And, Your Honor -- sorry. One thing that I didn't see because I wasn't looking for it in the charge specifically, but because she said it to the jury I think we need to make sure there's some clarity. She said that -- she submitted to the jury, and I know that yours is the charge on the law, but she submitted to the jury that manslaughter is a violent crime. Involuntary manslaughter is not a violent crime, so I just need to make sure that there's some clarity that we don't get an inconsistent verdict.

THE COURT: I think it's in here.

MS. ZMROCZEK: It may be. I just wasn't looking for it in particularly, but I just wanted to mention that before I forgot. And it may be in there, Your Honor. I just didn't --

THE COURT: (Nods head.)

MS. ZMROCZEK: Thank you.

(Recess taken at 3:32 PM.)

BAILIFF: All rise. Court's now in session.

THE COURT: Thank you. Have a seat.

Are you ready for the jury?

MS. ZMROCZEK: Yes, Your Honor.

THE COURT: Bring them in.

(Whereupon, the jury return to the courtroom at 3:44 PM.)

THE COURT: All right. Ladies and gentlemen, you're gonna hear the defense's closing argument.

Ms. Zmroczek.

MS. ZMROCZEK: Thank you, Your Honor. May it please the Court?

THE COURT: Yes, ma'am.

MS. ZMROCZEK: Good afternoon. This is my last opportunity to tell you what we think the facts show. And the State and I agree on one thing, and one thing only, and that is this. This case is a tragedy. It is a tragedy for Mr. Foster, it is a tragedy for Will Foster, it's a tragedy for every member of the Foster family that has been sitting in here listening to these facts and experiencing these for the last three years, so we, too, thank you for the attention that you've paid.

It's our job as the judge told you to facilitate the evidence and sometimes it's not -- it's not always done as smoothly as we hoped, but your patience and listening and understanding is why we're here. Because you are here to answer a very important question of fact and if you can't answer those questions based on the State's evidence, then

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Judge Keesley will give you the law and the law will be your guide.

And Judge Keesley will tell you that this case can't be based on emotions, and I submit that that's what my colleagues here, the State, have been doing for the last four days. Playing one 9-1-1 call of a wailing daughter, whose call came in after Mr. Foster's, but you get to listen to that evidence. Standing up here for, I don't know, a good minute showing you this picture of Will Foster, twenty-four years old, with a hole in his chest. The State wants to only talk about the consequences and they don't want to talk about the choices and they don't want to talk about the causes because, ladies and gentlemen, until the State got up here in closing every single fact witness that they put up there said Will wasn't drinking. They even questioned his seventy-nine-year-old grandmother that just because you saw him with a bottle of liquor in one hand and a beer in the other that don't mean he was drinking. Ladies and gentlemen, we had to call the toxicologist. We. We have no duty to defend our case, but we had to call the toxicologist because every one of their fact witnesses said that he hadn't been drinking. .20. Oh, that just means he couldn't drive. That's not what that means. He was materially and appreciably impaired and even Haley

resistantly said he got angrier when he was drunk, and there's no question about that. And I am not trying to impugn his character. It's just a fact and it's a terrible fact this alcoholism and the results of alcohol and the effects that they have on people is awful. And that's, unfortunately, how we ended up here today.

But the State paraded witnesses up here that didn't want to admit that he was drinking, questioned his grandmother about his drinking, and they want to call this a stick. This is not a stick. This is a two by four that was wrestled out of Will's hands, not once, not twice, and this is not a petty argument. This is a -- this an object that was being swung at the Defendant, Mr. Foster, it was wrestled from Will, and when you get to go back and you get to review the testimony as you remember it and -- and ask yourself how many people testified that they had to hold Will back, that they were afraid of him escalating it. How many people had to hold Heirbrane back? Not a one.

They want you to believe the testimony of Leann and Troy, which is -- which is why I asked them, well, where were you standing? Troy doesn't remember who was there. Leann remembers where they were standing, but she said she never wrestled anything out of his hand. Haley, I submit, did the best she could in telling the truth and

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that truth is that mom, Haley, Leann and Vernon all had to take objects out of Will's hand. Because if anyone had malice in their heart and murder on their mind, it was Will Foster.

And that's why we had to call -- we, the defense, even though we have no burden, and just because we called witnesses doesn't shift that burden. I never thought as a defense attorney I would be asking my paralegal to get police officers under subpoena so I could put them on the stand, but we did. We did because in order for you to make those very important findings of fact, you have to have all of the information to do that, and that's why we did that, ladies and gentlemen.

The judge is gonna give you a litany of jury charges, and I'm not gonna go through all of them because you'll have them to read, and you have to take those facts that you find and then apply them to that law. And the State charged Heirbrane Foster with murder, malice aforethought. The reason that we played Deputy Watford's video is for one reason only and that is literally within minutes of this happening we have his emotional state, what he said and what -- and what he told him. And you get to take that back there because I submit he doesn't say I'll kill you with your gun. Maybe that's what the State wants to hear, but when you listen to it with your own ears what

you'll hear him say is everybody will tell you around here, I walk off. I run from him. I went by the dog. The dog. If he wasn't afraid of Will, why did he go by the dog? Because he was afraid. Because he knew that Will wouldn't come after him with the dog.

Is there evidence of a metal pipe in here like Haley said, like he said? Look. Look in the evidence. You'll find it. Is there evidence of a two by four? Yes. Is there evidence of a jack that's up under a car that Mr. Foster says he threatened to kick out if he were under the car?

Ladies and gentlemen, those are threats on your life and Heirbrane Foster was acting in self-defense. He went and you heard his own words. He got the gun because he wanted to scare him. And when he pumped it, it went off. The State says oh, but they couldn't reproduce it so that couldn't happen. That's the thing with an anomaly or an accidental discharge. Accidental discharge. You can still be armed in self-defense and negligently or accidentally discharge that gun, and that's what he did. He just wanted him to leave him alone. I told him to leave me alone and he just kept coming and he just kept coming and he just kept coming.

We had to get Vernon Blanding's statement in here because Vernon Blanding, if he's a cousin of the Defendant

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is also a cousin of the victim. It doesn't mean he's not related to both. Vernon Blanding says I told him to stop. Him, Will. I took the two by four and told him to stop and he said he wasn't going to stop. That painful two minutes that we all sat here? He could have gotten another two by four. In fact, Vernon said in his own statement I thought he was going to get something else. You saw the rake, you saw all of the tools that he could have used. And the two by -- it's just incredible to me that they want you to rely on some of the testimony of these fact witnesses when they don't add up, but when you take bits and pieces of them could it be? Could it be that just like Haley said Heirbrane goes out to the dog because he knows that Will won't hurt him? She is wrestling so much with him that his shirt comes off. She says Leann even took the pipe from him. Leann says she doesn't remember that. And that he goes away. Meanwhile, Will goes get a two by four. His mom tries to take it away, she can't take it. Vernon tries to take it away. And they're out by the street. Out by the street. And reluctantly Savanah said that she didn't see Heirbrane and then all of a sudden she said oh, wait, maybe he was running by. Was it him or was it Will? Because Vernon had just taken his stick, but he was still mad because he kept coming and he kept coming and he kept coming.

And, ladies and gentlemen, Judge Keesley is also going to tell you that the State has the burden not only of proving murder, but disproving self-defense. They have to prove that he was not acting in self-defense. And if they haven't proved that to you, their burden of proof has failed.

They want to submit the -- a lesser included, voluntary. Well, if we can't prove murder, then you can find him guilty of voluntary. No, you can't. He wasn't acting in the heat of passion, he was acting in self-defense.

There's another lesser included, involuntary manslaughter. Was he acting negligently by holding the gun? That's certainly a fact for you-all to consider, but before you even get there they have to disprove self-defense.

Ladies and gentlemen, one of the -- the beauties that Judge Keesley is gonna talk to you about in our law, in our country, is the presumption of innocence, and the presumption of innocence -- and he'll say it's like a robe of righteousness wrapped around the Defendant. And those are all very lovely and flowery legal words. It's like an immunity idol, okay? If we were on Survivor, it's like an immunity idol.

You are charged not with trying to find him guilty of

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a crime, you are charged with making them prove it. Not trying to find him guilty of something because the death of Will Foster is sad, but it was caused by drinking, a choice that he made at some point in that day because it got his blood alcohol at 5:00 PM at .20. And the consequences were tragic all the way around. You -- they say that you won't see any tears. Listen to Deputy Watford's video. Listen to Heirbrane Foster's reaction right after this happened. He fled. He went less than a football field straight through his backyard, gets on the phone and calls 9-1-1 and says I shot my son. And you can hear his voice and you can listen to what he was feeling and what he was saying. The State wants you to believe that after watching all of this happen, after being in fear because he just kept coming and he just kept coming, that he then had a moment of clarity to come up with this creative defense hoping that sometime three years down the road I would stand up here and argue it for him.

No, ladies and gentlemen. The reason that I kept asking Mr. Flood about his immediate statement right after this happened and Savanah, who refused to admit that she had written in her own handwriting that Will was swinging the board at Heirbrane, is because as time passes, things change. Your memory changes, things change, but what you'll have back there are the immediate -- immediate

reactions, and you get to listen to them. I submit by only playing the 9-1-1 call where Haley is screaming in sadness and in fear was done so for one reason and one reason only, to play on your emotions. And we are not arguing that this wasn't tragic, it was tragic. The only thing that would be more tragic would be not applying justice and the law to these facts. Making them stand up to their burden, to disprove self-defense.

We called Nellie Foster for one reason and one reason only. Not to find out if Will had beer and wine -- or beer and alcohol in his hand. It was for a timeline because time is very fluid with a lot of these witnesses. And Ms. Foster, who is seventy-nine years old, on the 10th day of every month when the check was received she would pick up her son and they would go shopping. She gave you the time. Between 10:30 and 11:00. They were out for three to four hours because he bought groceries for the whole month. Look in the freezer. Look in the picture that we entered of the freezer. She told you they went to many stores; Food Lion being one of them. See if right there in the freezer there isn't a Food Lion bag right on top with food in it and right next to that freezer is where Will's gun was. So Mr. Foster, who had been in the house less than two hours was putting the meat away for the family, sees the gun and he's being chased around and

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he's being threatened, not with sticks, with pipes, with two by four's, real weapons. Not petit larceny -- not petty arguments, real weapons.

And when he went to that house there's some question as to whether or not Will had anything in his hand and the judge will give you the law on what's reasonable. If the last time he saw Will he had something in his hands, then it's reasonable. Even if Will didn't have anything in his hands, but he said, as Vernon said, he wasn't going to stop, that fear is reasonable, and that's the fear that Heirbrane Foster had to face. And he had a terrible choice to make to pick up that gun. And you heard him in his own words. It was just to scare him. That's not malice. That's not heat of passion. If it's negligence, that's for you to decide, but in order to even get there you have to make them disprove self-defense.

They also have to disprove accident. And they said well, we put the gun person up and they couldn't recreate it and she also reluctantly admitted that it couldn't be recreated at times. And then they put Agent Sprinkle up there who talked about how the wadding was in his chest. And the reason that I had Ms. Leann demonstrate where everybody was, and I kept asking her where Troy was because Troy was supposedly there if you listen to his testimony, she didn't see him, he didn't see them, and on

her testimony she said he wasn't even turned around, he was walking away. How do you get shot in the chest if you're walking away? And I think that she finally realized that, which is why when I started to ask her, that she really started to turn around. No, just like Agent Sprinkle said, that blood was going forward because you know who else was going forward? Will Foster. In a heat of rage and alcohol that boiled over.

She said in her closing to you that oh, he only asked about his son because he felt bad and sure you're gonna feel bad after -- after shooting someone. No. No. Listen, listen to that tape. The first -- within the first two minutes he's asking about his wife, he's saying my son, my baby, I didn't want to do it. I begged him to leave me alone. Leave me alone. He kept picking up two by four's and coming at me. I walk off, I walk off, I walk off and he keeps coming and he keeps coming and he keeps coming. And, ladies and gentlemen, that right there is evidence that when he got that gun and picked it up that he was acting in self-defense.

The question about -- to the officers that we called about the zone of danger is because -- like they said, because within twenty-one feet by the time that you are prepared to defend yourself you can already be attacked.

And the judge is going to give you an instruction,

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a legal instruction on the law, about the right to act on appearances. Heirbrane Foster had a right to act on appearances and from the appearances from the time he got home from that grocery store and was putting away food for that family and Will's blood alcohol level was at least right under a .20 at that time, maybe he hadn't drank anything then, but it was .20 at some point and it only got there through drinking alcohol. I even had to ask the toxicologist is there any other way that that blood alcohol could have been there? No. And, again, it doesn't mean that Will's a bad person and we have never said that because he wasn't until he started drinking. Then he wasn't Will.

Is there evidence to support or corroborate his story that he was acting in self-defense? Look for the weapons, listen to the testimony, look at the close range, listen to Investigator Sprinkle's testimony, listen to his own words immediately after this happened.

Is there evidence that he was walking away? Is that supported by what they showed you? Ladies and gentlemen, you get to be the judges of credibility. That's one of the things that you get to do. And as Judge Keesley said at the very beginning of this case, you don't leave your common sense at the door. You don't leave your common sense at the door and common sense will tell you that

Heirbrane Foster was acting because he was scared just like he says on the video. Listen to it. He'll say it. It's hard to hear, but you-all will have it back there and you get to stop and slow it down, repeat it. The reason that we did put in evidence was so that you could have all of those facts to make your findings.

When I was thinking about this case and thinking about the difficult relationships between fathers and their children, it reminded me of growing up with my father. I'm the oldest of seven and my father was a football star and he wanted boys and he got seven girls. And like some relationships my father's and I were strained, but we had some similarities and one of those things was I was a college athlete. Before I got there, I was planning on getting up at 6:30 every morning to go to the pool. When I was in fifth grade we hatched these little chickens in class and I begged my parents please let me have a chicken. Please, please let me have a chicken. We lived in the middle of East Baton Rouge in a neighborhood. My parents were like you are not getting a chicken. I begged and cried and finally they said okay, you can bring home the chicken, and then they told me, but when your dog eats that chicken, that's on you. Because I had a dog. Her name was Lucy, she was extremely ornery, but I was determined to have that chicken. I

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bring the chicken home. Dad makes a coop for it right under the carport. The doghouse over here. Lucy and Eggbert, who I thought was a boy, but laid one egg every morning so turns out not a boy, Lucy and Eggbert got along. They were friends. Every morning I would get up. My dad would go on his run. I would get an egg, an egg out of the cage, bring it inside and then get ready for swim practice. When I was in eleventh grade going towards the end of my eleventh grade year, at this point Eggbert was so old, and I still called it "he", Eggbert was so old the comb was flopped over and he still laid an egg every morning. But on this morning I get up and I go to the pen and I open it to get the egg and what I see is just blood everywhere in the coop and I'm screaming at the top of my lungs, which our neighbors in the neighborhood did not appreciate at 5:30 in the morning, and my dad comes running back and he's like what in the world is going on and I said dad, dad, it finally happened, Lucy finally killed the chicken, I just -- I can't believe it, I just -- the chicken is in the doghouse and he's dead. It was -- the head was severed, it was in two parts. It was horrible and tragic and my dad is trying to get me stop screaming in the neighborhood at 5:30 in the morning and he looks at me and says Aimee, that's not what happened. He said actually when I came out this morning

for my run Eggbert was in the cage -- and we don't know, a opossum or something, must have gotten through the chicken wire and killed the chicken, and when I came outside and woke up Lucy, she must have gotten the chicken and brought it into the doghouse. And I said that doesn't make any sense. Why, why would she do that, and he said well, because actually they were -- they were friends. And I figured at that time that it was just my dad's way of trying to get me to leave this correct assumption that the dog had killed the chicken and try to make it okay. When I graduated high school, the only gift my father ever gave me was a picture that he had snapped one morning of Lucy and Eggbert sitting in the doghouse. And the one thing that I learned from this is that when we make assumptions without knowing all of the facts that that is improper, and I submit that's what the State is asking you to do.

As Mr. Schwartz told you in our opening, the choice that Will made that day to drink beer and to drink liquor caused his anger to boil over, and that, ladies and gentlemen, is what caused his father, Heirbrane Foster, to be in fear for his life and to get that gun and to make him stop. That's all he wanted.

Ladies and gentlemen, when you individually assess the facts of this case and apply the law as Judge Keesley

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gives it to you, we submit that you will find him not guilty under both accident and self-defense because there was no malice in his heart and this was not a case of murder.

Thank you.

THE COURT: Thank you, Ms. Zmroczek.

Any response?

MS. PATTERSON: Yes, sir.

And who's being dramatic? That's dramatic if I've ever seen dramatic. They don't know what Will was drinking. No one on this stand said that Will wasn't drinking. They said they didn't see him drinking. They wasn't with Will the entire time. But what they also said, he was not a mean, violent drunk. Savanah said he was always nice and respectful to her. Leann described him as goofy. Haley said he wasn't a mean alcoholic -- or mean when he drank.

And this is not a case about some chickens and something killing a chicken. This is a case about an actual person who was killed, who was shot in the chest by his father over a grill, over maybe Will standing up to him in front of all those neighbors finally.

And she wants to say we're being dramatic by playing a wailing daughter's 9-1-1 tape. Seriously? This was a sister who thought everything was over, just witnessed her

father come out of the door, pump a shotgun and kill her brother right there in front of them. Yeah, listen to the 9-1-1 tape. Listen to her. The 9-1-1 director said first the female called. That call came from Haley. Again, you hear the deputy who got there in less than a minute at the end of her call. Listen to Ronita's call. Gauge what their impression was with everything happening. No, we didn't call every witness that we could have. Some of them didn't want to come, but we called those who were close by. There was a lot of officers there. We called the ones who were first responders.

This was no accident. He meant to do it. Again, they're going off his story, his story he told after he knew police was there, after he ran and jumped that fence. Their house, ran through the backyard, jumped the fence, ended up here. He saw those neighbors outside. I submit to you he probably wouldn't have stopped if he didn't see them, but he knew he had to. He heard law enforcement, he knew they probably heard the gunshot, so he stopped. And, again, he said he was trying to get something in his mind. He was trying to come up with a story.

So they all want to blame Will. Blame Will. Leann told you what started it. He got angry because Will kicked that grill. It started with him. And, yeah, I asked grandma about Will drinking. They put her up, I

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have the right to question her, and she -- she didn't see him drinking. She don't know what happened after she left.

Different people focus on different things. Troy said he didn't want it to escalate, but he didn't say escalate because of Will. That was his friend. He was probably trying to protect him. No one said that Will was swinging this. No one put that he was swinging it. He had it in his hand. The Defendant had a shovel in his hand at some point and this was taken from Will. It was put all the way -- so far away from where Will was standing when he was shot. About thirty feet I think.

He had malice. He had malice and, like I said, it don't have to be for a long period of time. Just at the point where he went in and got that gun, stood in that doorway, pumped it and pulled the trigger and yelled out didn't I tell you not to fuck with me. Don't forget those words. Don't forget his words. That's malicious.

And, no, it couldn't have accidentally went off. That's why we had it tested, sent off. We wanted to make sure that it couldn't have accidentally went off and that particular gun that he used could not have accidentally went off. No one saw him go under the car and begin working on it.

He brought about the difficulty because it was over.

He reengaged the difficulty. There was no self-defense. They were both engaged in a verbal altercation. At some point they both had objects in their hands, but at the time of Will's shooting no one did until the Defendant armed himself with that pump action shotgun. And no one said that was Will's gun. No one said that.

And she talked about that painful two minutes we sat here. I think it helped demonstrate to you that two minutes just ain't two minutes, and especially three to five minutes, and I think Haley said she thought he stayed in the house longer than that. But, again, their focus was on different things, on different people. They knew where they were. Nobody said anything about them chasing each other around or threatening each other. They both were just cursing each other out. Both of them.

And, again, they're giving you his version, his version of what happened after he knew police was called, after he knew those neighbors were standing in the yard and he needed to stop. And I didn't say when I stood up that he said he was going to kill Will, but he did say in that video I'm gonna shoot you with your gun and he shot him and he killed him and I submit to you he murdered him.

And you know what doesn't add up that she talked about that it didn't add up? If he meant to scare him,

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if it was an accident or whatever, he didn't drop the gun when it went off. He didn't run and see about Will when he went off -- when it went off. He didn't call for help for Will right there at the house. He didn't stay there at the house to tell law enforcement he was scared. Instead, yeah, he ran and ran. He ran to get away. He ran so he didn't have to face the consequences. And I submit he only stopped because he saw those neighbors out there and knew. And after jumping that fence I imagine he probably knew he couldn't get far. He talked about -- complained about his back on that video. It probably started bothering him, he knew he couldn't get far, so he decided to stop right where he was and began to give his version.

I submit to you we have met our burden of proof. You heard from the people that were right there. You heard from the expert who tested that gun. You heard all his expressed malicious statements. Don't get distracted.

Again, I ask you to use your common sense, too. Re-listen to those 9-1-1 calls. Listen -- listen to Leann's sister's call, listen to Haley's call, listen to his call. Find him guilty. Guilty of murder. Guilty of possession of a weapon during the commission of a violent crime. Don't send him back out of another door.

MS. ZMROCZEK: Objection, Your Honor.

THE COURT: Yes, ma'am. What's your objection?

MS. ZMROCZEK: Your Honor, I object to the statement don't send him back there -- out there into the community.

THE COURT: Ladies and gentlemen, your job is gonna be to decide whether the Defendant has been proven guilty or not been proven guilty and your job has nothing to do with sentencing. That's my job.

All right, folks. That's everything now except the charge. It's my guess that you're gonna get this case a little after 5:00. The charge is pretty long, so if you need to make phone calls to tell people, then please do them during this break. Tell the bailiff you need to make a phone call. If there is something going on in your life that is gonna cause a major problem if we stay on additional time, and how long you stay is completely up to you at this point, if you've got something going on major in your life that's gonna create a real problem for you stay tonight, please send me a note so I know about it. I can't make everybody happy, but I can decide whether we'll just have you come back tomorrow or what we'll do, so send me a note.

All right. If you would, don't discuss the case. Follow the bailiff. Leave your notes here right now.

(Whereupon, the jury retires to the jury room at 4:24 PM.)

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THE COURT: We're at ease for a few minutes.

(Recess taken at 4:24 PM.)

(Back on the record at 4:35 PM.)

BAILIFF: All rise. Court's now in session.

THE COURT: Thank you. Be seated, please.

Do you need to put something on the record?

MS. ZMROCZEK: Oh, sorry. Thank you, Your Honor.

I think just reading the recent cases and watching the recent arguments, I know that a lot of times arguments aren't preserved and I wanted to make sure that -- that I did. I know that I objected and that I believe you sustained -- sustained the objection and -- and made some clarifying remarks to the jury, but, Your Honor, again, we would object to the -- to the last statement by Ms. Patterson saying, you know, turning -- putting him in the community or something to that effect.

THE COURT: She said don't let him walk back out the door I think she said because he went out one door, and that was the extent of it.

MS. ZMROCZEK: Oh, okay. And so we just wanted to make sure that we've covered ourselves on that objection, Your Honor. Thank you.

THE COURT: So what is it you want me to do?

MS. ZMROCZEK: Oh, sorry. Your Honor, and we would move for a mistrial based on that remark.

THE COURT: I've instructed the jury it's not their job to deal with sentencing, that's my job. I expect them to follow that instruction and I don't see this is grounds for a mistrial.

MS. ZMROCZEK: Thank you.

THE COURT: My law clerk gave you the proposed verdict form and my understanding is that the State was requesting I reverse the order of these. The options on murder would be not guilty, guilty of the lesser included offense of involuntary manslaughter, guilty of the lesser included offense of voluntary manslaughter or guilty of murder, and the State wants me to put not guilty, guilty of murder and then do the manslaughters below that.

Is that right?

MS. PATTERSON: Yes, sir, Your Honor.

THE COURT: There's some law that if you require it I think I have to do separate verdict forms for each one of these possible forms of verdict, but in all my experience I've always done it where we just list all four on the same sheet of paper. So you don't object to doing it this way, you just object to the order?

MS. PATTERSON: Yes, sir. I just think having guilty of murder all the way at the bottom is just kind of confusing. If we can just have it listed right up under not guilty.

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THE COURT: I don't think it's confusing. I'm not gonna change it.

Anything else?

MS. PATTERSON: No, sir.

THE COURT: I'll explain it to them.

All right. Bring the jury in.

(Whereupon, the jury return to the courtroom at 4:39 PM.)

THE COURT: Members of the Jury, all the evidence has been presented, you've heard the arguments of counsel, and now it's time for me to instruct you on the law that applies to these cases. Please continue to pay close attention during the next stage, but first you need to understand some basic ground rules.

You, the jury members, are the sole judges of the facts. You decide all the issues of fact, the truth of the evidence, its effect, its value and its weight. You alone judge the credibility of the witnesses. In other words, whether or not a witness's testimony is believable. Now in evaluating the testimony of the witnesses, you may believe all that a witness said or none of it. You may believe part of what a witness said and not believe the balance. You may believe one witness against many or many against one. You may consider any interest, bias or prejudice that you feel that a witness has in the case.

You may consider the demeanor and the appearance of the witness and the opportunity for knowledge that the witness has. You're not to exercise these considerations arbitrarily. What I want you to do is to use your common sense, your sense of logic and reason and your good judgment.

Now the rules of evidence allow for opinion testimony to be given under certain circumstances. One area where that's allowed is where someone by virtue of education, training or experience is permitted to testify as an expert witness. The mere fact that an expert is allowed to give opinions under our rules does not mean that you must accept the opinions given if you choose not to do so. You may accept or reject the opinion or the testimony of an expert witness just as you may with any other witness, in whole or in part.

It's not proper for me to give you a charge on the facts of the case. I cannot discuss the facts with you or even convey to you an impression as to what personal opinions, if any, I might have about the facts of this case. If you develop an impression that I have a personal opinion about the facts, you are to remove that belief totally from your mind. You're the sole judges of the facts.

I am the judge of the law that applies to the case.

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Under your oath, you must accept and apply the law as I tell it to you. You have to abandon any conflicting ideas you may have as to what the law is or what it should be. I give you the law, you apply it to the facts as you determine them to be, and in that way you reach your verdicts.

It's also my job to decide what evidence is admissible. If I rule something inadmissible or instruct you to disregard something, you're not to consider those things in arriving at your verdicts. Base your verdicts on the competent evidence before you. Consider the testimony of the witnesses and the exhibits admitted.

I need to explain to you that there are two types of evidence that are generally presented during a trial. There's direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain. It's proof of a chain of facts and circumstances indicating the existence of a fact. Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct evidence or circumstantial evidence; however, to the extent that the State relies on circumstantial evidence, all of the circumstances must be consistent with each other and when taken together point conclusively to

the guilt of the accused beyond a reasonable doubt. If the circumstances merely portray the Defendant's behavior as suspicious, then the proof has failed. The State has the burden of proving the Defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Now the Defendant in this case, Mr. Foster, is presumed to be innocent. This is no mere legal theory. It's a fundamental and substantial right to which all citizens are entitled. It's been described as being like a robe of righteousness that's placed around an accused and it remains with him through every stage of the trial. It continues with him after you go back to your jury room to deliberate and continues to exist so that he is presumed innocent unless and until you, the jury, determine that the State has proved his guilt beyond a reasonable doubt.

A defendant is not required to prove his innocence, he's not required to prove anything. The burden is on the State to prove the guilt of the Defendant beyond a reasonable doubt and it's required that every essential element of an offence charged be proven by the State beyond a reasonable doubt. The State is not required to prove the guilt of the Defendant beyond all doubt or beyond every doubt. The appropriate standard is proof

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beyond a reasonable doubt.

Some of you may have served as jurors in civil court, and if you have, you know the burden of proof there requires establishing that something is more likely than not. That's called the greater weight or preponderance of the evidence. But in criminal court, such as we're in now, the standard is much higher and the proof must be much stronger than what is required in civil court. The burden of proof in a criminal case such as this is proof beyond a reasonable doubt.

So what do I mean by that term? Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the Defendant's guilt. There are few things in the world that we know with absolute certainty and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the Defendant is guilty of a crime, then you are to find him guilty of that crime. If, on the other hand, you think there's a real possibility that he is not guilty, you must give him benefit of the doubt and find him not guilty of that crime.

There's no obligation on the part of the Defendant to raise any doubt or any other possibility. He is presumed to be innocent and the State has the entire

burden of proof and has to prove that the Defendant is guilty to the exclusion of any other real possibility.

I remind you of the instruction I gave you earlier that the fact that the Defendant elected not to testify is not a factor to be considered by you in any way in your deliberations and in your consideration on the question of whether he is guilty or not guilty. An accused has the constitutional right to remain silent and the assertion of that right cannot be considered by you in your deliberations. Under your oath you are to reach no inference, you are to draw no conclusion whatsoever from the fact that the Defendant elected not to testify. His decision not to testify should not be discussed by you in the jury room. It's not to enter your minds in making your decisions. The State has the entire burden of proof and the accused has no burden to prove anything at all.

Now I need to go through you -- with you the law related to statements. Evidence has been presented about statements allegedly made by this Defendant. In evaluating such statements, the first thing you need to determine is whether the State has proven that the Defendant made the statement. If not, then you do not consider it in any manner against the Defendant. If the Defendant made the statement, you then need to look at

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whether the statement was given in response to police interrogation or whether it was a spontaneous statement made by the Defendant not prompted by police interrogation.

When a person is in police custody officers may ask basic information about that person, such as identifying information, but if the police are going to be interrogating a person it's different. If the police are not interrogating a person under custody or not engaged in the functional equivalent of interrogation, the police do not have to stop the person from spontaneously making statements on his own, but before the police may question a defendant about an incident when he's in custody, the State has to prove that the defendant was properly warned of his constitutional rights prior to the questioning and the giving of the statement.

When an individual is taken into custody or otherwise deprived of his freedom of action in any significant way by a law enforcement officer, he must be warned of his constitutional rights before any custodial interrogation or custodial questioning, and those rights are that he has the right to remain silent, that any statement that he does make can and will be used against him in court, that he has a right to an attorney, and if he does not have the resources to hire a lawyer, the court will appoint one for him at no expense, that he has the right

to consult a lawyer before answering any questions or making any statements, that he has the right to have a lawyer present with him at all times during all interviews and all interrogations, and that he may stop answering questions at any time.

These are commonly called Miranda warnings. And while the exact words do not have to be used, the substantial equivalent must be. If the State proves that the Defendant -- excuse me. If the State proves that it gave Miranda warnings prior to interrogating the Defendant, the State then would have to prove that the Defendant knowingly and intelligently waived his constitutional rights and made the statement to police.

And the final requirement relating to statements is that the statement in question must have been given voluntarily. The State has to prove to you beyond a reasonable doubt that the statement was the expression of the Defendant's own free will and was not improperly induced by compulsion, duress, force or fear, or by the promise of some reward or hope of reward. Unless the statement was given freely and voluntarily, you may not consider it.

Now with regard to the alleged statements of this Defendant to a law enforcement officer in response to any interrogation by the officer, I instruct you that the

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State must prove every requirement about which I've just instructed you and such proof must be beyond a reasonable doubt before you may use any statement against the Defendant.

All right. Now we're gonna turn to the specific charges that are alleged here; murder and possession of a firearm during the commission of a violent crime. I read the indictments to you at the beginning of the trial. As you recall, it's alleged that Mr. Heirbrane Foster, with malice aforethought, shot Will Foster in Lexington County on or about May 10, 2016, proximately resulting in Will Foster's death. In a separate indictment it's also alleged that during the commission of that alleged murder, which is a violent crime under the law, that Heirbrane Foster possessed a firearm. I remind you that indictments are not evidence. They are charging papers and you may not accord any evidentiary value to the fact that the Defendant has been charged with these crimes.

Now I need to explain to you the concept of criminal intent. You need to understand that a person is guilty of a crime only if he has the necessary criminal intent for that particular crime. Intent is a mental state. The State has to prove to you, it has to establish, criminal intent beyond a reasonable doubt in order for the Defendant to be convicted of a crime. So if something occurs as a

result of an accident as that term is defined in the law, it is not a crime. And act is excused on the grounds of accident if the act was unintentional provided that the Defendant was acting lawfully and using reasonable care. A person who is lawfully armed does not commit a crime if he is using reasonable care concerning a weapon and it accidentally discharges. If a person is acting lawfully and is using reasonable care in the operation of a dangerous instrumentality and harm to another person results accidentally and unintentionally, that is not a crime. The burden is on the State to prove beyond a reasonable doubt that the act was not an accident.

Now Mr. Foster is charged with murder. Murder is the unlawful killing of another person with malice aforethought, either expressed or inferred. So to convict the Defendant of murder, the State has to prove to you beyond a reasonable doubt that on the date and at the time and place alleged in the indictment the Defendant unlawfully killed Will Foster and that the killing was done willfully and with malice aforethought. Willfully means that something is done consciously and intentionally, not by accident or involuntarily.

Now criminal intent may be shown by acts and conduct of the Defendant and other circumstances from which you may naturally and reasonably infer intent, but the State

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has to prove beyond a reasonable doubt that the Defendant acted with malice.

Malice is a term that imports wickedness and it excludes a just cause or a legal excuse. It is something that springs from wickedness, depravity, a depraved spirit, from a heart devoid of social duty and fatally bent on mischief. It connotes hostility and ill will towards another. It is the intentional doing of a wrongful act without just cause or excuse with the intent to commit -- or inflict an injury or under circumstances such that the law will infer an evil intent.

Malice may be expressed or inferred, which is to say that the element of malice may be shown by direct evidence or by inference. Now these terms "expressed" and "inferred" do not mean different kinds of malice, but merely the manner in which the malice may be shown to exist. So malice may be proven by direct evidence or by inference from the facts and circumstances that are proved by the State. Malice may be inferred from conduct showing a total disregard for human life. Malice is an essential element of murder and has to be proven beyond a reasonable doubt by the State.

Now whether the malice is expressed or inferred, the malice must be aforethought. It must exist in the mind of the accused just before and at the time of the commission

of the act. It is not required that the malice exist for any particular length of time, but there has to be a combination of the previous evil intent and the act that produces the fatal result. To constitute murder, the killing must be unlawful; meaning that the killing was not justified or warranted under the law. So that's murder.

Now with regard to the charge of murder, the law recognizes that certain crimes have within them lesser offenses. Now we call them lesser included offenses. If you find that the State has failed to prove beyond a reasonable doubt that the Defendant committed murder, you may consider whether the State has proved voluntary manslaughter.

Voluntary manslaughter involves taking the life of another in the sudden heat of passion based on sufficient legal provocation. So both heat of passion and sufficient legal provocation must be present at the time of the killing to constitute voluntary manslaughter. Malice is not a required element of voluntary manslaughter. The law recognizes that sudden heat of passion may for a time affect a person's self-control and temporarily disturb a person's reason. The sudden heat of passion must be the type that would make an ordinary person unable to cooly reflect on his actions and would produce an uncontrollable impulse to do violence. Sufficient legal provocation must

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be the type that would make a person of ordinary reason and caution to become enraged and lose control temporarily. The provocation needed for voluntary manslaughter must come from some act of or related to the person who is killed. Words alone, however vulgar or insulting, are not enough to constitute legal provocation. Where death is caused by the use of a deadly weapon, the words must be accompanied by some overt threatening act which produced the heat of passion.

Now the exercise of a legal right no matter how offensive it is to another is never sufficient legal provocation for voluntary manslaughter. So while the law recognizes a lesser offense to murder when a defendant is acting under sudden heat of passion, the law does not reduce murder to voluntary manslaughter if the heat of passion had cooled or if there was enough time between any provocation and the killing for the passion of a reasonable person to cool. If there was sufficient cooling off or if there was enough time that the accused should have cooled off, the killing would not be voluntary manslaughter.

In deciding whether a reasonable person would have had enough time to cool off, you would consider all the circumstances surrounding the killing. You may consider the nature of the provocation, if any, the Defendant's

mental and physical state and the circumstances and the relationships between the parties.

Now below the crime of voluntary manslaughter, so this is a lesser included offense of voluntary manslaughter and it's a lesser included offense of murder, below those two is a crime called involuntary manslaughter. If you find that the State has failed to prove beyond a reasonable doubt that the Defendant committed murder or voluntary manslaughter, you may consider whether the State has proved involuntary manslaughter.

Involuntary manslaughter is an unintentional killing of another person without malice but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm, or, it's an unintentional killing without malice while engaged a lawful activity with the reckless disregard of the safety of others.

Unintentional means that the Defendant did not intend for anyone to be killed or seriously injured. Reckless disregard for the safety of others is more than mere negligence or carelessness. Mere negligence or carelessness is the failure to use the care that a person of ordinary reason would use under the same circumstances. Recklessness is a conscious failure to use ordinary care. Reckless disregard for the safety of others involves not

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being interested in the consequences of one's acts or the rights and safety of others. If a person who knows or should know that ordinary care requires certain precautions for the safety of others, but that person fails to use those precautions without concern, the person's actions are considered reckless.

The State has to prove to you beyond a reasonable doubt that the Defendant's act was the proximate cause of death. Proximate cause is a direct cause -- is the direct cause. The direct, immediate and efficient cause of death. There must be a chain of causation from the time of the injury inflicted by the Defendant until the time of the victim's death.

Okay. Now I need to talk to you about self-defense. An issue has been raised concerning self-defense. If a person is acting in self-defense, he is acting lawfully. Self-defense is a complete defense. If a defendant was acting in self-defense that -- and that act caused the death of another, he is not guilty of a crime. The law recognizes the right of every person to defend himself from death or serious bodily harm. To do so a defendant may use such force as is reasonably necessary or apparently so even to the extent of taking the life of the assailant.

Now the elements of self-defense includes the following things. First, the Defendant must have been

without fault in bringing on the difficulty. If the Defendant was at fault or jointly at fault in bringing on the difficulty, he is not protected by self-defense even though the initial disagreement escalated beyond what may have been or reasonably envisioned. The only way that someone who is at fault in bringing on the difficulty can be restored to the protections of self-defense is where before the shooting occurred he had withdrawn from the conflict and tried in good faith to avoid further conflict and by his actions had made it known that he was discontinuing and withdrawing from the dispute.

The second element of self-defense is if the Defendant was without fault in bringing on the difficulty or had withdrawn from the conflict and communicated that to the other party. The next requirement for self-defense is that the Defendant must have actually believed that he was in imminent danger of using losing his life or sustaining serious bodily injury, or, he must have actually been in such danger of -- imminent danger of loss of life or serious bodily injury. If he was actually in imminent danger, the circumstances facing the Defendant must have been such that would warrant a person of ordinary prudence, firmness and courage to strike back in the manner that the Defendant did. If he believed he was in imminent danger, the circumstances must have been such that a reasonably

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prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness and courage to use deadly force in order to save himself from serious bodily harm or losing his life.

And the fourth element is that the Defendant must have had no other probable means of avoiding the danger of serious bodily injury or death except to act as he did. However, as I'll explain to you in a moment, a person in his own home has no duty to retreat and may stand his ground against the assailment. Now if the Defendant acted in self-defense, you must find him not guilty of any crime. The State has the burden of proof of disproving self-defense beyond a reasonable doubt. In other words, the State has to prove to you that the Defendant was not acting in self-defense. If you have a reasonable doubt of the Defendant's guilt after considering all of the evidence, including the elements of self-defense, then you must find the Defendant not guilty.

In assessing the issue of self-defense, you look at all the facts and circumstances. In evaluating the Defendant's perception of danger, a Defendant may act on appearances and he is not required to have actually been in danger. It is enough if the Defendant believed that

he was in imminent danger and a reasonably prudent person of ordinary firmness and courage would have had the same belief. The Defendant has the right to act on appearances even though the Defendant's beliefs may have been mistaken.

Generally if a person has a means of escape, he is required to use it. He must leave if he has a means of escaping the danger unless by doing so the danger of being killed or suffering serious bodily injury would increase. However, as I mentioned a moment ago, one attacked by use of a deadly weapon -- I'm sorry. I apologize. I haven't gotten to that one yet. One attacked by the use of a deadly weapon has no obligation to retreat. Someone in his own home has no obligation to retreat.

Now a person -- a defendant who is acting in self-defense has the right to use the amount of force apparently necessary to avoid death or serious bodily harm. The force used does not have to be limited to the agree or amount of force used by the assailment. A defendant has the right to use so much force as appeared to be necessary for complete protection and which a person of ordinary reason and firmness would have believed to be needed to prevent death or serious bodily harm. Once a defendant is justified in acting in self-defense in defending himself, he is justified in continuing to use force until it is apparent that the danger of death or

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serious bodily injury to himself has completely ended. When a defendant is operating under a reasonable belief of his impending death or serious bodily injury, he's not required to wait until the perceived assailant gets the drop on him before he acts in self-defense.

All right. The other indictment charged Mr. Foster with possessing a firearm during the commission of a violent crime. It's a separate criminal offense to have in one's possession a firearm during the commission of a violent crime. I charge you that a shotgun is a firearm under this law and that the offense of murder and voluntary manslaughter are defined as violent crimes under South Carolina law. Involuntary manslaughter is not a violent crime. So in order for you to convict Mr. Foster of this offense, you must determine that the State has proven him guilty of either murder or the lesser included offense of voluntary manslaughter because the possession of a firearm has to be during the commission of a violent crime.

You must then determine if the State has proven beyond a reasonable doubt that Mr. Foster possessed a firearm during the commission of that violent crime as alleged in the indictment. If upon reviewing the entire case you have a -- an entire case you have a reasonable doubt as to whether the Defendant had been proven guilty of an offense, he's entitled to that doubt and a verdict

of not guilty as to that charge. On the other hand, if upon reviewing a case you find that the State has proven every essential element of its case against the Defendant beyond a reasonable doubt, it's equally your duty to find the Defendant guilty of that charge. If you have a reasonable doubt as to whether the Defendant has been proven guilty of a greater crime charged or a lesser included offense, you must give him the benefit of the doubt and find him guilty only of the lesser included offense, but you cannot find him guilty of any offense, greater or lesser, unless you're satisfied that the State has proved every essential element of that offense beyond a reasonable doubt. That's the law.

Ladies and gentlemen, when you go back to your jury room, you're going to have with you all of the exhibits that's been admitted in the trial. Hopefully they've made arrangements to have something for you to play these electronic media on and you're gonna have with you this verdict form. Actually there are two separate pieces of paper. There's one for each charge. Now before I go over these with you, I want to make sure that I covered the things about the firearms.

I mentioned to you the other day that we have standard rules that apply to every case related to firearms. One that I didn't mention is you're not to

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point it at anybody, okay? So if the firearm's back there with you, it should have the lock on it. It's -- it's not loaded, but the rule states you're not to point it at anybody. I don't think they introduced any ammunition, so I don't have to cover that with you.

All right, folks. You've got two verdict forms; one for each indictment. On the charge of murder, you have four possible forms of verdict. Now I'm supposed to tell you that you're not to infer from the order in which I state these that I'm trying to tell you one is over the other. I've got to list one first, one second, one third and one fourth. The truth is I did most of these forms at a computer school in the National Judicial College in 1993 or '94, so I just changed names and case numbers. So long before I ever knew any of these folks basically this form was done.

Now what I've done on it is I'm listing it from lowest to highest on this one. So it reads we, the jury, unanimously find the Defendant, and you can check one of the options. You may find him not guilty, you may find him guilty of the lesser included offense of involuntary manslaughter, you may find him guilty of voluntary manslaughter, a lesser included offense of murder, or you may find him guilty of murder.

The other verdict form reads as to the charge of

possession of a firearm during the commission of a violent crime, we, the jury, unanimously find the Defendant; two options on this one. You may find him not guilty or you may find him guilty of possession of a firearm during the commission of violent crime.

Now obviously, and I hope you picked up on it, the only way you can find him guilty of possessing a firearm during the commission of a violent crime is if you have first found that he's guilty of a violent crime. So those two would be murder or voluntary manslaughter, it would not be involuntary manslaughter, and obviously it would not include a not guilty verdict on the murder indictment.

How you go about your votes, how you go about taking your -- doing your deliberations, that's all in your discretion subject to this requirement. Your verdict has to be unanimous. All twelve of you must agree before the verdict can be recorded.

Mr. Foreman, part of your job is to record the verdicts. I think you'll find these forms self-explanatory. You should -- you should consider the murder charge first because obviously that effects how you would deal with the second one, and just choose the option chosen by the jury, sign your name on the signature line, and then deal appropriately with the next charge, the possession of a firearm.

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I've told you a dozen times or more not to discuss the case until I tell you to. It's not time yet. The law says that I have to go over with the attorneys what I've covered with you, and that's just common sense. We don't want you back there deciding the case using the wrong law. Now the truth is that during that long lunch break you had I stayed here and I printed out a charge for them and they've already read it and we've been over it and this shouldn't take very long now, but some -- I never read these things verbatim and sometimes I say things I don't even know I said, so they have to be given a chance to point it out me if I made a mistake.

Here's the signal you need to be looking for. If I'm satisfied with what I've told you, I'm gonna send the exhibits and the verdict form into the jury room. The bailiffs are gonna bring the two alternates out. I'm also going to give each of you the same copy I gave the attorneys. In other words, you're gonna have a copy of the charge. Now this needs to be destroyed at the end of the trial, so don't take it home with you, but each of you will have that to look over, it's about twenty-one pages, I think, while you deliberate. Don't talk about it until you have the exhibits and the verdict form in jury room and the two alternates are out, but once that happens you don't need to wait one more second. You start talking about the

case.

When you've reached your verdict, knock on the door, the bailiff will respond to your knock. You can take your notes with you. Remember the admonitions about the notes.

Thank you so much for your attention. Follow the bailiff, please.

(Whereupon, the jury retires to the jury room at 5:14 PM.)

THE COURT: Stacy, I always mark as a Court's exhibit, the charge.

THE COURT REPORTER: Okay.

(Court's Exhibit 3 was marked for identification.

THE COURT: All right. Exceptions, additions, objections to the charge from the State?

MR. PINCELLI: No objection to the charge, Your Honor.

THE COURT: All right. Do you want to maintain your objection to charging involuntary?

MR. PINCELLI: Yes, Your Honor.

THE COURT: Okay.

MS. ZMROCZEK: And we would just -- the only exception we would have, Your Honor, would be the same argument that we argued about voluntary.

THE COURT: Okay. So subject to previous objections, I'm gonna stick with the charge I've got. Now what I'm gonna do is I'm gonna send back this draft to the jury.

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I've made a Court's exhibit of a copy of what's going back to the jury, so any reviewing court would be able to see it. Here's the verdict forms. You-all check the exhibits.

Do you-all have the means for them to play the electronic media?

MS. ZMROCZEK: Yes, Your Honor, we do.

MR. PINCELLI: Your Honor, we've agreed that's a clean computer. They can take that back and they can also take the speaker that we've been using in the courtroom.

MS. ZMROCZEK: And I believe we already -- I know we went through the exhibits. Do you-all need to go through them again? Or you can go through them again if you need to, but --

(Pause in proceedings.)

(Whereupon, the evidence and the verdict forms were sent back to the jury at 5:18 PM.)

THE COURT: Bring the alternates out.

You-all don't leave until I discharge the alternates.

(Whereupon, the alternate jurors return to the courtroom.)

THE COURT: Alternates, Ms. Rauch, Ms. Sickle, we made it through the trial without having to use one of you folks. I do have to use -- in about half of the cases, I have to use an alternate, so I hope you understand I had to have you over there. That double jeopardy you

hear about once a jury gets sworn, that's when jeopardy attaches, and I have to keep going forward, so that's why we had you sitting there.

I want to thank you very much for your service and tell you that you're through with jury duty. You're disqualified for a year at the state court level and then for three calendar years, so 2019, '20, '21 you do not have to serve if you wish not to. They're supposed to -- the computers are supposed to purge you from the list, but it doesn't always work that way. You're welcome to stay if you want to stay, but you're free to do if you wish to go. If you need a slip for work or something --

THE CLERK: I've got those.

THE COURT: But thank you so much. You're discharged.

(Whereupon, the alternate jurors were discharged from service.)

THE COURT: Ladies and gentlemen, I appreciate everybody's hard work. Both sides were well prepared. It's been a pleasure being with you folks. The jury has the most difficult job in the courthouse. We put it in their hands and see what they decide.

We're at ease pending a verdict.

MS. ZMROCZEK: Thank you.

MR. PINCELLI: Thank you, Judge.

(Recess taken at 5:22 PM.)

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(Back on the record at 7:34 PM.)

BAILIFF: All rise. Court's now in session.

THE COURT: Thank you. Be seated, please.

I've been informed the jury has a verdict. Obviously I have no way of knowing what they decided. I say this in every case, so please don't think I'm singling anyone out. Please don't show any sign of approval or disapproval. Whether the verdict to you is good, bad or indifferent, I expect you to stay still or stay quiet. Don't shake your head in agreement or disagreement. Don't make any sounds, please.

Bring the jury.

(Whereupon, the jury returns to the courtroom at 7:37 PM.)

THE COURT: Mr. Foreman, has the jury reached a verdict?

FOREPERSON: Yes, sir.

THE COURT: Would you pass it to the bailiff, please?

FOREPERSON: (Handing.)

BAILIFF: (Handing.)

THE COURT: Thank you.

Case Number 2016-CP -- I'm sorry, 2016-GS-32-03022, the State versus Heirbrane Heava Foster. As to the charge of murder, we, the jury, unanimously find the Defendant guilty of murder. Signed by the foreman.

Indictment 2016-GS-32-03340, as to the charge of possession of a firearm during the commission of a violent crime, we, the jury, unanimously find the Defendant guilty of possession of a firearm during the commission of a violent crime.

Ladies and gentlemen, if I've accurately stated your verdict of guilty of murder and guilty of possession of a firearm during the commission of a violent crime, please signify by raising your right hand.

All twelve hands are raised. The verdict forms are signed by the foreman.

Any matters to take up prior to the jury being discharged from the State?

MS. PATTERSON: Nothing from the State, Your Honor.

THE COURT: From the defense?

MS. ZMROCZEK: We would just ask that they be individually polled, Your Honor.

THE COURT: All right. As to each charge or just to the overall verdict?

MS. ZMROCZEK: As to each charge.

THE COURT: Okay. Madam Clerk --

MS. ZMROCZEK: Well, I guess as to the first charge, Your Honor. The overall case is fine, Your Honor.

THE COURT: Do you have list?

THE CLERK: I do.

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THE COURT: All right. Ladies and gentlemen, what's gonna happen is the clerk is going to call your name in no order and as she calls your name if you'd raise your hand so she'll know who to look at. Then you can put your hand down. She's going to basically ask you these questions. Was this your verdict, is it still your verdict, okay? And just answer her truthfully.

THE CLERK: And I'm gonna call the numbers instead of the names if I can.

THE COURT: Do you know your numbers? Okay.

THE CLERK: Juror Number 108, was this your verdict?

THE COURT: Wait a minute. Who was that? Okay. Thank you.

JUROR: Yes.

THE CLERK: Is this still your verdict?

JUROR: Yes.

THE CLERK: Juror Number 139, is this your verdict?

JUROR: Yes.

THE CLERK: Is this still your verdict?

JUROR: Yes.

THE CLERK: Number 169, is this your verdict?

JUROR: Yes.

THE CLERK: Is this still your verdict?

JUROR: Yes.

THE CLERK: Number 144, is this your verdict?

JUROR: Yes.
THE CLERK: Is this still your verdict?
JUROR: Yes.
THE CLERK: Number 190, is this your verdict?
JUROR: Yes.
THE CLERK: Is this still your verdict?
JUROR: Yes.
THE CLERK: Number 86, is this your verdict?
JUROR: Yes.
THE CLERK: Is this still your verdict?
JUROR: Yes.
THE CLERK: Number 132, is this your verdict?
JUROR: Yes.
THE CLERK: Is this still your verdict?
JUROR: Yes.
THE CLERK: Number 128, is this your verdict?
JUROR: Yes.
THE CLERK: Is this still your verdict?
JUROR: Yes.
THE CLERK: Number 24, is this your verdict?
JUROR: Yes.
THE CLERK: Is this still your verdict?
JUROR: Yes.
THE CLERK: Number 9, is this your verdict?
JUROR: Yes.

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THE CLERK: Is this still your verdict?

JUROR: Yes.

THE CLERK: Number 134, is this your verdict?

JUROR: Yes.

THE CLERK: Is this still your verdict?

JUROR: Yes.

THE CLERK: Number 171, is this your verdict?

JUROR: Yes.

THE CLERK: Is this still your verdict?

JUROR: Yes.

THE CLERK: Thank you.

THE COURT: All right. Thank you.

Anything further to take up with the jury prior to being discharge?

MS. ZMROCZEK: Nothing from the defense.

THE COURT: Ladies and gentlemen of the jury, I want to thank you very much for your jury service. You were an exemplary group. You were always attentive. I appreciate it.

Mr. Foreman, I need you to stay back there if you would. I need you to sign the original indictments. I've got some things to attend to out here.

You have an exception for three calendar years for jury service and you're disqualified for one year. If you need a slip for work, you just stay back there. The clerk

will bring you a slip for work. They'll mail you your checks. It takes about ten days from the end of the term to get those to you. Don't plan much with it.

All right. Follow the bailiff, please.

(Whereupon, the jury was discharged from service at 7:41 PM.)

THE COURT: Any motions?

MS. ZMROCZEK: Your Honor, at this time we would ask to set aside the verdicts. Obviously there was a lot of -- of evidence presented. The jury was out by my calculations about two hours and especially based on -- just on the -- the numerous charges that were requested in addition to the evidence that was presented, it didn't seem like that was certainly enough time to go through all of those matters, and that's all we have for now, Your Honor.

THE COURT: There was evidence to support each element of each offense charged. The jury was out -- I was very impressed with the jury throughout the case. It was obviously a very emotional matter and I'm convinced they approached it seriously and diligently and -- and I didn't listen to what was going on, but I could hear them playing the videos. They -- they approached it in my view very seriously. The motion is respectfully denied.

Do you-all have sentence sheets?

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MS. PATTERSON: Your Honor, if you'll just give me a few minutes, I'll run --

THE COURT: All right. We're at ease.

MS. PATTERSON: Thank you.

(Recess taken at 7:43 PM.)

THE COURT: I think we can probably go ahead.

Does the State have anything on sentencing?

MS. PATTERSON: Your Honor, obviously you heard the facts of the case, you heard how tragic, senseless it was. The family is torn, Your Honor. That's why they're -- they're not here. Cathy couldn't -- couldn't bear to be here, Your Honor.

He does have a prior record. I know you've already heard about some of the things on his record, but from 1998 he has an assault and battery of a high and aggravated nature. In 2009, he has a criminal domestic violence first offense. In 2012, he has two criminal domestic violence of a high and aggravated nature. I would like to point out that doesn't even involve his wife, that involves someone else, Your Honor, so it's like he has a trail of victims and violent offenses, Your Honor.

THE COURT: All right.

From the defense, anything on sentencing?

MS. ZMROCZEK: Thank you, Your Honor.

Any statement -- I mean, any sentence at this point is a life sentence for -- for our client. One of the frustrating things I think in this case that -- obviously I didn't get involved until later on, but the public defender's office had this case for years and were ready to try it and -- and then because of some late disclosures from the State that involved a witness that they represented ended up conflicting out that office and, you know, we end up here maybe not being able to find all the witnesses or, you know, changes in witnesses' statements.

This is certainly, you know -- and I said it in closing and I stand by it, you know, it is a tragedy. We felt like this was a very strong case of involuntary manslaughter and certainly the jury, you know, disagreed with us for whatever reasons, but I know that his mother who is a family member of both Will and of Heirbrane would like to speak.

THE COURT: Yes.

What's your name again, ma'am? Tell me your name again.

NELLIE FOSTER: Nellie Foster.

THE COURT: All right. What would you -- what would you like to say, Ms. Foster?

NELLIE FOSTER: I just want to say that I know it

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was an accident. I know he didn't intend to do that. He's not guilty. I know Will from day one and I know my son from day one. I know Will's actions when he's drinking, I've seen it too many times, and my son has tried to protect Will from a lot of stuff to keep from him being -- going to jail. He did not intend to do that. That was self-defense. Who know it better than me? I know Will not three years ago. I know Will all my life -- all his life. So it was an accident. He did everything he could do to protect Will. When Will got sentenced for three years, my son come into this court and went up with Will and the judge told Will I can give you fifteen years, but my son said -- told the judge he acts out, but it was some of my fault that he act out. I wasn't home with him all the time. So the judge say, you know what, I could give you fifteen years, but I'm gonna give you three. And, like I say, who know Will better than I do? Will's been -- stayed in my home a long time. I know his actions and everything and I tried to protect him, too. And I know my son did. He loved his son. He always have. I've got his back and he got mine, and that's the way it was. It was an accident. I'm sure -- I'm sure it was an accident. He did not intend to murder his son. It was an accident.

And if I may speak a little bit more, my oldest son

was an alcoholic and he died four years ago. He acts out like Will when he's drinking. Nobody could rest, he got knocked upside the head because he picks at people when he's drinking, but he was good when he wasn't drinking, and it's by the grace of God that I didn't hurt him because he wouldn't let me sleep, in and out the door all night long, up and down. So I say that to say this about Will when he drinks. I know what he do when he drinks, I know how he act. So if you would have -- the Court would have mercy on my son because he did not intend to do that, and that's basically all I've got to say.

THE COURT: Thank you, ma'am.

Did you say anybody else?

MS. ZMROCZEK: No, Your Honor. Obviously his other sister is just too distraught to speak. You know, in speaking with Cathy, who obviously is not here today, even days before the trial, Your Honor, she was calling my office telling me that she did not want this to go to trial, that she did not want him to go to jail, which is precisely, you know, why she's not here. She didn't want to be a part of this. This is something that the State decided to go forward with for -- for whatever reason, and that's certainly their prerogative, Your Honor, but we would just ask that the Court give the minimum sentence, which, again, is a life sentence in this case, so it's --

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I don't think it turns either way. He has to do it day for day.

Thank you.

THE COURT: Mr. Foster, do you want to say anything?

THE DEFENDANT: No, sir.

THE COURT: Any appeal that you might wish to file from these proceedings has to be done in writing. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And there's a very short timeframe in which to file that, so you need to tell your lawyers to file your appeal. Do you understand that?

THE DEFENDANT: Could you please file an appeal, Ms. Zmroczek?

MS. ZMROCZEK: We're doing that, Your Honor.

THE COURT: Okay. All right. So you understand?

THE DEFENDANT: Yes, sir.

THE COURT: All right, Mr. Foster. The jury has convicted you of murder and possession of a firearm during the commission of a violent crime. Murder is a violent offense. It's a felony which bars you from in the future of transporting, shipping, receiving or possessing a firearm or ammunition, and I'm making that specific finding on the record.

The mandatory minimum on murder is thirty years,

and that's your sentence, thirty years in the Department of Corrections, plus costs and assessments.

The sentence on the gun charge is five years, plus costs and assessments, concurrent. You're given credit for jail time under Section 24-13-40 to be calculated and applied by the Department of Corrections.

Do you understand your sentence?

THE DEFENDANT: Yes, sir.

THE COURT: Good luck to you, sir.

Court's adjourned. Sine die.

MS. ZMROCZEK: Thank you, Your Honor.

(Whereupon, the proceedings were concluded at 8:01 PM.)

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C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the trial of the captioned case in Circuit Court on May 20th-23rd, 2019.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

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

October 28, 2019

/s/ Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

WITNESSES

787 Lexington County Sheriffs Department

B Miller

Law Enforcement Case #: 16009412

RWP

ARREST WARRANT NUMBER

2016A3210200790

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: 12-12-16 L. Scott Vito

VERDICT

GUILTY

Mir E Mir Jr.

Foreperson of Petit Jury
Date: 5/23/2019

DOCKET NO. 2016GS3203022

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

DECEMBER TERM 2016

THE STATE
vs.

Heirberone Heava Foster
A/K/A HEIRBRANE#

CDR #: 0116

Indictment for

MURDER

§ 16-03-0010

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	MURDER
COUNTY OF LEXINGTON	)	
	)	§ 16-03-0010

At a Court of General Sessions, convened on DECEMBER 2016, the Grand Jurors of Lexington County present upon their oath:

That **Heirberone Heava Foster** a/k/a Heirbrane * did in Lexington County on or about May 10, 2016 willfully, feloniously, and with malice aforethought, either express or implied, shoot the victim, Heirbrane Will Foster and the victim died as a proximate result thereof, in violation of §16-3-10, Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

ASSISTANT SOLICITOR

* AMENDED WITHOUT OBJECTION AT BEGINNING OF TRIAL, ON THE RECORD, TO CORRECT A SCRIVENER'S ERROR.

William P. Keesley May 20, 2019
WILLIAM P. KEESLEY
JUDGE

WITNESSES

789 Lexington County Sheriffs Department

B Miller

Law Enforcement Case #: 16009412

RWP

ARREST WARRANT NUMBER

2016A3210200791

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: 12-12-16 [signature]

VERDICT

GUILTY

[signature]
Foreperson of Petit Jury
Date: 5/23/2019

DOCKET NO. 2016GS3203340

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

DECEMBER TERM 2016

THE STATE
vs.

Heirberone Heava Foster
A/K/A HEIRBRANE *

CDR #: 0549

Indictment for

Possession of a Weapon During the Commission of a Violent Crime

§ 16-23-0490

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA	)	INDICTMENT FOR
	)	Possession of a Weapon During the
COUNTY OF LEXINGTON	)	Commission of a Violent Crime
	)	
		§ 16-23-0490

At a Court of General Sessions, convened on December 2016, the Grand Jurors of Lexington County present upon their oath:

That **Heirberone Heava Foster** A/K/A HEIRBRANE * did in Lexington County, South Carolina on or about May 10, 2016 knowingly and willfully possess a firearm during the commission of a violent crime or attempt to commit a violent crime, to wit: murder, such weapon described as a firearm in violation of § 16-23-490 of the Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

ASSISTANT SOLICITOR

* AMENDED WITHOUT OBJECTION AT BEGINNING OF TRIAL, ON THE RECORD, TO CORRECT A SCRIVENER'S ERROR.

William P. Keesley MAY 20, 2019
WILLIAM P. KEESLEY
JUDGE

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS

COUNTY OF Lexington)
STATE VS.)
Heirberone Heava Foster)
AKA:)
Race: Black Sex: M Age: 58)
DOB: [redacted]-1961 SS#: [redacted])
Address: [redacted] Oak Glenn Rd)
City,State,Zip: Gaston, SC 29053-9549)
DL#: [redacted] SID#: [redacted])
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐)

INDICTMENT/CASE#: 2016GS3203022
A/W#: 2016A3210200790
Date of Offense: 5/10/2016
S.C. Code § : 16-03-0010
CDR Code #: 0116

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐PLEADS
TO: Murder / Murder

in violation of § 16-03-0010 of the S.C. Code of Laws, bearing CDR Code # 0116
☐ NON-VIOLENT ☒ VIOLENT ☐SERIOUS ☒MOST SERIOUS ☐ Mandatory GPS ☐§17-25-45
(CSC w/minor 1st or CSC w/minor 3rd)

The charge is: ☒As Indicted, ☐Lesser Included Offense, ☐Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☒Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor | 15969 SC Bar# | Defendant | Attorney for Defendant | SC Bar#

WHEREFORE, the Defendant is committed to the ☑ State Department of Corrections, ~~☐ County Detention Center,~~
for a determinate term of 30 days/~~months~~/years or ☐ ~~under the Youthful Offender Act not to exceed _____ years~~
~~and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment~~
~~of $ _____~~; plus costs and assessments as applicable*; ~~the balance is suspended with probation for _____~~
~~months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of~~
~~probation, which are incorporated by reference.~~
☑ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☑ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the SCDOC.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.
Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso (Public Def/Probation)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114 (BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$ 125.00

☐ Appointed PD or appointed other counsel, §Proviso requires $500 be paid to Clerk during probation and shall be collected before any other fees.

Presiding Judge William P. Keesley
Judge Code: 2050
Sentence Date: May 23, 2019
Clerk of Court/ Deputy Clerk Lisa Comer
Court Reporter: Staci Simon

SCCA217 (04/2018) FINDING MADE ON RECORD THAT THIS IS A VIOLENT CRIME AND CRIME THAT BARS THE DEFENDANT FROM FIREARMS/AMMUNITION.

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STATE OF SOUTH CAROLINA)
COUNTY OF Lexington)
STATE VS.)
Heirberone Heava Foster)
AKA:)
Race: Black Sex: M Age: 58)
DOB: [redacted]-1961 SS#: [redacted])
Address: [redacted] Oak Glenn Rd)
City,State,Zip: Gaston, SC 29053-9549)
DL#: [redacted] SID#: [redacted])
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2016GS3203340
A/W#: 2016A3210200791
Date of Offense: 5/10/2016
S.C. Code § : 16-23-0490
CDR Code #: 0549

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐PLEADS
TO: Weapons / Poss. weapon during violent crime, if not also sentenced to life without parole or death

in violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549
☒ NON-VIOLENT ☐ VIOLENT ☐SERIOUS ☐MOST SERIOUS ☐ Mandatory GPS ☐§17-25-45 (CSC w/minor 1st or CSC w/minor 3rd)

The charge is: ☒ As Indicted, ☐Lesser Included Offense, ☐Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☒Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor | 15969 SC Bar# | Defendant | Attorney for Defendant | SC Bar#

WHEREFORE, the Defendant is commited to the ☑ State Department of Corrections, ~~☐ County Detention Center,~~
for a determinate term of 5 ~~days/months/years~~ or ~~☐ under the Youthful Offender Act not to exceed _____ years~~
~~and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment~~
~~of $ _____~~; plus costs and assessments as applicable*; ~~the balance is suspended with probation for _____~~
~~months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.~~
☑ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☑ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the SCDOC.

☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.
Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso (Public Def/Probation)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114 (BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$
TOTAL		$

☐ Appointed PD or appointed other counsel, §Proviso requires $500 be paid to Clerk during probation and shall be collected before any other fees.
Presiding Judge William P. Keesley
Judge Code: 202
Sentence Date: May 23, 2019

Clerk of Court/ Deputy Clerk: Lisa Comer PBS
Court Reporter: Stacy Johnson

SCCA/217 (04/2018)

FORM 5 793

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
County of Lexington)
Heirberone H. Foster #353381)
Full name and prison number (if any) of Applicant)
) 2022CP3201641
v.)
) APPLICATION FOR
State of South Carolina) POST-CONVICTION RELIEF
)

FILED
2022 MAY 12 PM 3:16
LISA M. COMER
CLERK OF COURT
LEXINGTON S.C.

INSTRUCTIONS – READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution, 4460 Broad River Rd, Columbia, S.C. 29210

2. Name and location of Court which imposed sentence Lexington County General Sessions Court, 205 East Main St Suite 423, Lexington, S.C. 29072

3. Name(s) of co-defendant(s) (if any) _____

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2016-GS-32-03022-Murder

(b) 2016-GS-32-03340 - Firearms Provision

794 (c)

5. The date upon which sentence was imposed and the terms of the sentence:

(a) May 23, 2019 - 30 years

(b) May 23, 2019 - 5 years

(c)

6. Check whether a finding of guilty was made:

(a) after a plea of guilty

(b) after a plea of not guilty X

(c) after a plea of nolo contendere

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. S.C. Court of Appeals

ii.

iii.

(b) the result in each such Court to which you appealed:

i. Appeal Dismissed

ii.

iii.

(c) the date of each such result:

i. December 8, 2021

ii.

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. 2021-UP-433

ii.

iii.

9. If you answered "no" to (7), state your reasons for not so appealing:

(a)

(b)

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Trial Counsel

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) _____

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

iv. _____

796

(c) the disposition thereof: N/A

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? YES

(b) your trial, if any? YES

(c) your sentencing? YES

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

_____

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Aimee J. Zmroczek, P.O. Box 11961 Columbia, S.C. 29211/ Ryan Schwartz, Esq, 6A Carriage Lane, [redacted] Charleston, S.C. 2940

ii. Robert Dudek, Chief Appellate Defender, 1330 Lady St. Columbia, S.C. 29201

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Trial and Sentencing

ii. Direct Appeal

iii. _____

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19. State clearly the relief you seek in filing this application:

New Trial

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Richland)

I, Heirberone H. Foster, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Heirberone H. Foster

SWORN to and subscribed before me this 29 day of December, 2022.

Notary Public (L.S.)

My Commission Expires: 8/30/2026

Revised 3/2003

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Heidberone H. Foster, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Applicant

SWORN or affirmed to and subscribed before me this 29 day of November 2022.

Notary Public

My Commission Expires: 8/30/2026

Revised 3/2003

800

FILED
2024 JUL 18 AM 8:04
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Heirberone H. Foster, #353381, Applicant, v. State of South Carolina, Respondent.	CASE NO. 2022–CP–32–1641 **RETURN TO THE APPLICATION FOR POST-CONVICTION RELIEF AND MOTION FOR A MORE DEFINITE STATEMENT** (Counsel Retained)

In response to the post-conviction relief (PCR) action commenced by Heirberone H. Foster (Applicant) on May 12, 2022, the State makes this return. On June 22, 2022, the Clerk of Court of Lexington County was advised that Tommy A. Thomas was retained to represent the Applicant. The Respondent, through this Return, makes requests that Applicant, through appointed counsel, file an amended application for post-conviction relief with specific allegations and supporting facts for those allegations in compliance with the Uniform Post-Conviction Procedures Act (S.C. Code Ann. § 17-27-10 *et seq.*) and the South Carolina Rules of Civil Procedure, prior to an evidentiary hearing being schedules in this matter. In support of this return, Respondent offers the following:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. During its December 2016 term, the Lexington County Grand Jury indicted Applicant for murder (2016-GS-32-3022); possession of a weapon during a violent crime (2016-GS-32-3340); and possession of a firearm by a violent felon (2016-GS-32-3023). Upon information and belief, Applicant was initially represented by Assistant Public Defender Walt Whitmire, Esq., Ola Johnson, Esq., and John D. Delgado, Esq., prior to trial. Applicant was represented by Aimee J. Zmroczek, Esq., and

Ryan Schwartz, Esq., represented Applicant at his trial. This case was prosecuted by Assistant Solicitor Rhonda Patterson and Assistant Solicitor Luke Pincelli.

The Applicant proceeded to a trial by jury on May 20-23, 2019, in Lexington County before the Honorable William P. Keesley. At the conclusion of the trial, Applicant was found guilty as indicted on all charges. He was sentenced to 30 years for murder, five years for possession of a weapon during a violent crime, and six months for possession of a weapon by a violent felon. The sentences to be served concurrently.

Direct Appeal

On May 30, 2019, a notice of intent to appeal was filed on the Applicant's behalf by Aimee Zmroczek, Esq. Applicant was represented by Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, who raised the following issues on appeal on Applicant's behalf:

> I. Whether the court erred by ruling appellant could not be found immune from prosecution, pursuant to S.C. Code § I 6-l l-440(A) or the stand your ground provision of § 16-l l-440(C), because he grabbed a shotgun from his kitchen to defend himself against the decedent, who was in appellant's backyard and was attempting to harm appellant with a dangerous object, since obtaining a firearm from his kitchen to protect his home, himself, and his family from a dangerous criminal should not have disqualified appellant from invoking Castle Doctrine immunity given the intent of the General Assembly in enacting it?

Following submission of the case upon the briefs, the Court of Appeals dismissed the Applicant's pro se briefs and granted counsel's motion to be relieved as counsel. *See State v. Foster*, Appellate Case No. 2019-000892, 2021-UP-433 (S.C. Ct. App. Filed Dec. 8, 2021). The Remittitur was sent on January 5, 2022.

ATTACHMENTS TO THE RETURN

The Respondent attaches the following documents to the Return from the direct appeal:

1. *State v. Foster*, Appellate Case No. 2019-000892, *Anders* Brief of Appellant, August 31, 2020.
2. *State v Foster* - Pro Se Response, received by Clerk October 8, 2020.
3. *State v Foster* - Second Pro Se Response, received by Clerk October 23, 2020.
4. *State v Foster* - Record on Appeal – Vol. I.
5. *State v. Foster*, Record on Appeal, Vol. II.
6. *State v. Foster*, Appellate Case No. 2019-000892, 2021-UP-433 (S.C. Ct. App. Filed Dec. 8, 2021).
7. *State v Foster*, Remittitur Letter, dated January 5, 2022.

These additional items are also included:

8. Records from the Clerk of Court for Lexington County.
9. Pertinent inmate records from the South Carolina Department of Corrections.

#3.

II. Summary of Facts Giving Rise to the Conviction

On May 10, 2016, law enforcement was called to the home of Cathy and Heirberone Foster after receiving a call about a shooting incident in the Gaston area of Lexington County. (R. p. 285, line 4-10). Upon arrival, police declared an individual, later identified as Will Foster, deceased from an apparent gunshot wound. (R. p. 508, lines 4-18). Police located the suspect, Heirberone Foster, and detained him. (R. p. 236, lines 5-14). In the initial investigation, Crime Scene Investigator Keith Sprinkle concluded an incident had occurred between the Applicant and Will which resulted in the Applicant shooting Will. (R. p. 508, lines 4-18).

Prior to the jury trial, a *Castle Doctrine* hearing was held followed by a *Jackson v. Denno* hearing. During the *Castle Doctrine* hearing, Applicant testified numerous times that the shooting was an accident and that he was only trying to scare Will and "make him stop" before he (Will) hurt somebody. (R. p. 117, lines 4-10; R. p. 128, lines 2-17; R. p. 115, lines 9-20). Applicant further

testified during the hearing that when he pumped the shotgun "it went off." (R. p. 14, lines 14-17). Judge Keesley found that defense counsel failed to establish the requisite elements for immunity from prosecution for murder. (R. p. 275, lines 11-13).

Following the *Castle Doctrine* hearing, a *State v. Denno* hearing was held to determine the admissibility of the Applicant's statements made to police on the incident date. (R. p. 293, lines 19-23). During the hearing, testimony from Brandon Miller of the Lexington County Sheriff's Department and the Applicant was given. Sergeant Miller was one of the first officers to interact with the Applicant after he had been detained. (R. p. 285, lines 11-21). Judge Keesley found that the State met their burden of proof and established that the Applicant had been properly advised of his rights and voluntarily and intelligently waived those rights. (R. p. 298, lines 10-24).

Testimony was given by the Applicant's daughter, Haley Foster, who was present at the incident location on the day of the murder. (R. p. 324, lines 16-19). Haley Foster explained that prior to the shooting, Will and Applicant were arguing with each other. (R. p. 330, lines 3-7). During the argument, Will picked up the item in photo marked State Exhibit 6 (Item). (R. p. 332, lines 14-20). Haley then began "tussling" with Will to prevent him from getting into an altercation with Applicant. (R. p. 335, lines 15-23). Haley and Will's girlfriend, Leann Cotton, pulled Will away from Applicant. (R. p. 224, lines 2-8). Shortly after getting the "item" away from Will, his girlfriend, Leann Cotton, and Haley began "[] talking, joking, and just standing there." (R. p. 227, lines 17-19). Haley explained that she thought the argument between Applicant and Will was over. (R. p. 225, lines 13-17). Foster explained that Will, Leanne, and her were about to walk over to Leanne's house when Applicant walked outside with the shotgun. (R. p. 338, lines 10-24).

Additional testimony was given by Savanah Smith, a friend of Will's brother, Bradley Foster. (R. p. 353, lines 2-5). At the time of the incident, Savanah was staying at his aunt's house

across the street from the incident location. (R. p. 353-54, lines 15-1). Savanah was looking through a window and witnessed Will's actions leading up to his murder. (R. p. 354, lines 13-16). Savanah explained that she heard people arguing and yelling from across the street. (R. p. 355, lines 16-23). From the window, she saw someone take away a 2x4 sized board out of Will's hands and throw it to the ground. (R. p. 356, lines 5-7). Savanah then saw the Applicant go inside for "several minutes" before returning outside with a shotgun, at which point he heard a gunshot. (R. p. 356, lines 12-18).

Testimony was given by Agent Suzanne Cromer of the South Carolina Law Enforcement Division where she was qualified as an expert in the field of firearms and firearms identification. (R. p. 568, lines 8-9). Agent Cromer's testimony explained that the weapon used, a Mossberg Model 500A pump action shotgun, was tested multiple times for any defects in the firing mechanism. (R. p. 578). Specifically, she tested the firing mechanism and safety mechanism and found them to be in working order and void of any defects. (R. p. 574, lines 4-15; R. p. 579, 5-13; R. p. 580, lines 13-15). Agent Cromer admitted that she did not attempt to take apart and inspect the internal workings of the weapon because doing so could affect the function of the weapon. (R. p. 579, lines 5-13). As to the physical condition of the weapon, Agent Cromer explained that the weapon was in fair condition, meaning the weapon functioned but had cosmetic imperfections. (R. p. 583, lines 18-24). In her report, Agent Cromer noted that the safety mechanism on the weapon was difficult to move. (R. p. 588-9, 23-3). She attributed this to the paint around the safety mechanism. (R. p. 588-9, 23-3).

Agent Cromer explained that the only way the weapon could be fired would involve pulling the trigger. (R. p. 581, lines 3-5). She tested the weapon to see if it would fire without the user pulling the trigger, a concept known as a "slam fire," and the weapon did not fire without pulling

the trigger[1]. (R. p. 591-592, lines 24-3). Agent Cromer testified that would be possible for a slam fire to occur because of faulty ammunition or a malfunction with the gun and firing pin but such an occurrence would be dependent on the weapon. (R. p. 588, lines 9-21). She compared the shotgun shell found at the crime scene with shells gathered during testing and was unable to observe anything abnormal about the shotgun shell found at the crime scene. (R. p. 591, lines 8-18).

Agent Cromer conducted further tests to see if the gun would fire without the trigger being pulled. Upon investigation, she discovered that the particular weapon used had a recall and safety warning. (R. p. 577, lines 2-9). The recall indicated the weapon could fire if the plastic portion behind the trigger guard was hit with a mallet, the weapon would fire. (R. p. 577, (lines 2-11). Agent Cromer testified that she tested the weapon by hitting the receiver with a mallet several times to see if the weapon would fire and it did not. (R. p. 577, lines 12-25).

III. Current Application

In his current PCR application, Applicant alleges he is being held unlawfully based on the following (excerpted verbatim):

> "Ineffective Assistance of Counsel"

No specifications or facts are presented in support of the pro se application. Applicant requests relief as follows: "New Trial."

The Applicant, though counsel Thomas filed a *Motion for Discovery* dated March 22, 2023. In that motion, the Applicant stated:

> Applicant alleges that he did not pull the trigger of the gun, that the gun was bumped and went off." He asserts that he has retained a forensic expert to inspect the weapon

[1] "[Slam Fire]: A condition in which the shotgun fires as the action closes. This may occur with the trigger pulled or not pulled. In an autoloading shotgun this condition will usually cause the shotgun to continue to fire in a full automatic mode where such a mode was not intended." U.S. Department of Justice, NIJ Standard-0113.00, National Institute of Justice: Technology Assessment Program, at 2 (1989).

that was introduced into evidence as State's Exhibit 28. The weapon is currently held in the Lexington County Court of General Sessions.

IV. Motion for More Definite Statement

Applicant fails to list any specific allegations or any facts to support his allegation. *See* PCR Application (question #10 and #11). Therefore, Respondent submits it is impossible to adequately respond to Applicant's allegations.[2]

Under the Uniform Post-Conviction Procedure Act, applicants for post-conviction relief must "specifically set forth the grounds upon which the application is based . . . ." S.C. Code Ann. § 17-27-50. On its own, an allegation of ineffective assistance of counsel that is void of any supporting evidence or assertions will not justify a new trial. *See Coardes v. State*, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974) ("[The] mere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the [applicant] that he was deprived of adequate and effective assistance of counsel is insufficient."

Respondent moves pursuant to Rule 12(e), SCRCP, to require Applicant, through his appointed counsel, to provide a more definite statement of his allegations by filing an amended application before the scheduling of any hearing(s) in this matter.

Accordingly, Respondent moves for Applicant, through counsel, to submit a more definite statement of his allegations. If Applicant fails timely submit a responsive amended application, Respondent reserves the right to dismiss the application. *See* Rule 12(e), SCRCP.

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[2] As noted previously, the Applicant now apparently claims he did not pull the trigger of the gun, that the gun was bumped and went off. Motion For Discovery, p. 1. In a letter to Respondent's counsel dated June 6, 2024, counsel Thomas indicated he had retained David Collins as a ballistic expert to examine the weapon. Respondent notes that at trial the Applicant sought and received jury instructions on voluntary manslaughter, involuntary manslaughter, and self-defense. The jury was also instructed on accident. R.p. 756-757.

V. General Denial

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

VI. Conclusion

WHEREFORE, the State respectfully requests this Court grant its motion for a more definite statement as set forth in section IV.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General
S.C. Bar 5758

By: _____
ATTORNEYS FOR THE STATE
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29212

July 1, 2024

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON HEIRBERONE FOSTER, # 353381 Applicant, vs STATE OF SOUTH CAROLINA, Respondent,	IN THE COURT OF COMMON PLEAS 2022-CP-32-1641 CERTIFICATE OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. Tommy Thomas, Esquire
Thomas Law
P.O. Box 88
Irmo, South Carolina 29063

DATED this the 2nd day of July 2024

William Corbett Jr.
Legal Assistant For Respondent

FILED

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)	ELEVENTH JUDICIAL CIRCUIT
	DOCKET NO.: 22-CP-32-01641
HEIRBERONE FOSTER,)	
#353381,)	
)	
Applicant,)	AMENDMENT TO
)	POST CONVICTION RELIEF APPLICAITON
vs.)	
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	
)	

The Applicant above named in the aforementioned matter, through his Attorney, Tommy A. Thomas, respectfully re-alleges those allegations as contained in the original Application for Post Conviction Relief and moves to amend his original Post Conviction Relief Application.

That the Applicant believes that Counsel was ineffective for the following reasons:

a) Failure to adequately present evidence and argument in the Stand Your Ground Hearing prior to the Applicant's Jury Trial.

b) Failure to adequately present and preserve issues for Appeal of the Stand Your Ground Hearing.

c) Failure to present the Applicant as a witness during his Jury Trial.

d) Failure to call the Pathologist who performed the autopsy on the victim to counter testimony that the victim was in the process of leaving with his back turned toward the Applicant at the time of the shooting.

e) Failure to move before the Court for a direct verdict for the State's failure to prove cause of death through the forensic pathologist.

Respectfully submitted,

Tommy A. Thomas
Attorney for the Applicant
Post Office Box 88
Irmo, South Carolina 29063
(803) 732-5507

September 10, 2025
Irmo, SC

FILED
2025 SEP 15 AM 11:18
LISA BOMER
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)	ELEVENTH JUDICIAL CIRCUIT
)	
HEIRBERONE FOSTER,)	DOCKET NO.: 22-CP-32-01641
#353381,)	
)	
Applicant,)	CERTIFICATE OF SERVICE
)	
vs.)	
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	
)	

I, Jacquelyn E. Miller, Paralegal to Tommy A. Thomas, Attorney for the Applicant hereby certify that I emailed an Amendment to Post-Conviction Relief Application to Sydney Willingham, Esq. with the office of the Attorney General at:

Office of the Attorney General
Sydney Willingham, Esq.
P.O. Box 11549
Columbia, SC 29211-1549
sydneywillingham@scag.gov

Jacquelyn E. Miller, Paralegal
Tommy A. Thomas, Attorney for Applicant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Irmo, South Carolina
September 10, 2025

FILED
2025 SEP 15 AM 11:15
LISA ... SUTHER
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)	ELEVENTH JUDICIAL CIRCUIT
)	
HEIRBERONE FOSTER,)	DOCKET NO.: 22-CP-32-01641
#353381,)	
)	SECOND
Applicant,)	AMENDMENT TO
)	POST CONVICTION RELIEF APPLICAITON
vs.)	
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	

The Applicant above named in the aforementioned matter, through his Attorney, Tommy A. Thomas, respectfully re-alleges those allegations as contained in the original Application for Post Conviction Relief, the first Amendment to Post Conviction Relief and moves to amend his Post Conviction Relief Application.

That the Applicant believes that Counsel was ineffective for the following reasons:

a) Failure to introduce or present evidence of Notice of Trespass of real property regarding the victim Heirberone Will Foster.

b) Failure to move for a mistrial regarding a sleeping juror.

c) Failure to request a Direct Verdict for the State's failure to prove cause of death.

d) Failure to raise the issue of Defense of Habitation at the stand your ground hearing.

Respectfully submitted,

Tommy A. Thomas
Attorney for the Applicant
Post Office Box 88
Irmo, South Carolina 29063
(803) 732-5507

September 11, 2025
Irmo, SC

FILED
2025 SEP 15 AM 11:15
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
COUNT OF LEXINGTON	)	CASE NO.: 2022-CP-32-01641
Heirberone H. Foster #353381,	)	
Applicant,	)	CERTIFICATE OF SERVICE
Vs.	)	
State of South Carolina,	)	
Respondent.	)	

I, Jacquelyn E. Miller, paralegal to Tommy A. Thomas, Attorney for the Applicant hereby certify that I emailed, a copy of a Second Amendment to Post Conviction Relief Application of the Attorney General's Office, at:

Sydney Willingham, Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549
Sydney.willingham@scag.gov

Jacquelyn E. Miller
Paralegal to Tommy A. Thomas
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Irmo, SC
September 11, 2025

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE SOUTH CAROLINA CIRCUIT COURT
C.A. NO.: 2022-CP-32-01641

HEIRBRANE H. FOSTER

PLAINTIFF,

vs.

STATE of SOUTH CAROLINA

DEFENDANT,

H E A R I N G
BEFORE THE HONORABLE JESSICA ANN SALVINI

DATE: SEPTEMBER 16, 2025
LOCATION: SOUTH CAROLINA CIRCUIT COURT 11

TRANSCRIBED BY: KRISTEN PRIMM

LEGAL EAGLE
Post Office Box 5682
Greenville, South Carolina 29606
864-467-1373
depos@legaleagleinc.com

APPEARANCES:

SYDNEY WILLINGHAM, ESQUIRE
SOUTH CAROLINA ATTORNEY GENERAL'S OFFICE
1000 ASSEMBLY STREET
COLUMBIA, SOUTH CAROLINA 29201

ATTORNEY FOR THE PETITIONER

TOMMY ARTHUR THOMAS, ESQUIRE
TOMMY A. THOMAS, ATTORNEY and COUNSELOR at LAW
7588 WOODROW STREET
IRMO, SOUTH CAROLINA 29063

ATTORNEY FOR THE RESPONDENT

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(NONE MARKED)

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

P R O C E E D I N G S

MS. WILLINGHAM: May it please the court, Sydney Willingham on behalf of the State. This is a post-conviction relief matter of *Heirbrane Foster vs. the State*, case number 2022-CP-32-01641. The applicant is presently confined in the South Carolina Department of Corrections.

During its December 2016 term, the Lexington County grand jury indicted applicant for murder, indictment number 2016-GS-32-3022, possession of a weapon during the commission of a violent crime; indictment 2016-GS-32-3340; and possession of a weapon by a violent felon.

That's indictment 2016-GS-32-3023. The applicant was represented at the trial by Aimee Zmroczek and Ryan Schwartz. The case was prosecuted by assistant solicitors Rhonda Patterson and Luke Pincelli of the 11th circuit solicitor's office.

He proceeded to a jury trial before the Honorable William Keesley on May 20th through 23rd of 2019. The applicant was found guilty as indicted on all charges. Judge Keesley sentenced him to the mandatory minimum of 30 years for the murder and five years for possession of a weapon during the commission of a violent crime, and six months for the possession of a weapon by a violent felon, all to run concurrently.

The applicant then filed a notice of appeal on May 30, 2019. He was represented by chief appellate defender, Robert Dudek. Following submission of the case upon the briefs, the court of appeals dismissed the applicant's pro se brief and granted counsel's motion to be relieved as counsel.

A (indiscernible) was sent on January 5, 2022. On May 12, 2022, the applicant filed this PCR application, and then on June 22, 2022, the Lexington County Clerk's office received notice that Mr. Tommy Thomas was retained to represent the applicant.

He has since filed two amended applications. The first amendment to post-conviction relief was signed by Mr. Thomas on September 10, 2025, raising several allegations, and those are failure to adequately present evidence and argument in the stand your ground hearing prior to the applicant's jury trial, failure to adequately present and preserve issues for appeal of the stand your ground hearing, failure to present the applicant as a witness during his jury trial, failure to call the pathologist who performed the autopsy on the victim to counter testimony that the victim was in the process of leaving with his back turned toward the applicant at the time of the shooting, and failure to move before the court for a direct verdict for the State's (indiscernible) to prove cause of death through the forensic pathologist.

And then the next day, September 11, 2025, he submitted,

through counsel, a second amendment to post-conviction relief application alleging failure to introduce or present evidence of notice of trespass of real property regarding the victim, Heirbrane Will Foster, failure to move for a mistrial regarding a sleeping juror, failure to request a direct verdict for the State's failure to prove cause of death, failure to raise the issue of defense of habitation at the stand your ground hearing.

And at this time I will turn it over to Mr. Thomas to address any additional allegations or what he plans to move forward on today. And Your Honor, I forgot to address, in the additional PCR application, the only allegation was ineffective assistance of counsel.

THE COURT: Okay. All right. Thank you. All right. Yes, sir.

MR. THOMAS: Your Honor, if it please the court -- I apologize. I'm still trying to get connected to the virtual courtroom. We have amended the post-conviction (indiscernible) application. We have intended to pretty much follow the guidelines.

THE COURT: Okay.

MR. THOMAS: Just kind of in summary, and this will kind of explain a little bit about Bradley Foster, who is Mr. Foster's son, who is in federal detention. His testimony, one of our allegations is that counsel should have called Mr.

Foster to the stand to testify.

Maybe an over-simplification of it is that the story has to be told. There was a stand your ground hearing. Mr. Foster testified, and the story pretty much is told about what happened. To use a term, it may have been a situation, somewhat of mutual combat, and I think that is extremely important for the jury to hear.

And I don't believe that without calling Mr. Foster, or Mr. Bradley Foster, to testify, who was present at the time, that story was told, and I think it prejudiced my client, and I think counsel was ineffective for failure to do that.

THE COURT: Okay.

THE COURT: If you're going to call Mr. Bradley Foster first as your first witness, I'm just going to have you all come up to the bench, and I'm going to have Daniel, my law clerk, turn his computer around. Or I'll turn my computer around so he can still see me.

MR. THOMAS: Your Honor, we are calling him out of turn.

THE COURT: Yeah.

MR. THOMAS: I would prefer to call my client first and lay a foundation, trying to help out the detention center and everything else. I'm just going to call him first.

THE COURT: That's fine.

MR. THOMAS: He'll be a short one.

THE COURT: okay. Y'all can come to the bench because

you're not going to get on.

MS. WILLINGHAM: I believe we were going to, if it's okay with Mr. Thomas, call Ms. Aimee Zmroczek next, because I believe she needs to be in Richland County.

THE COURT: Okay.

MR. THOMAS: That's fine, Your Honor.

THE COURT: Okay. All right. I will go ahead and have Madam Clerk swear Mr. Bradley Foster, and then I'll let you all approach the bench, and that way you can use my laptop to question. Sorry, I know, so awkward.

(WITNESS IS SWORN IN UNDER OATH)

THE COURT: Feel free to approach so that he can see you and hear you. Otherwise, we probably won't be able to hear you.

(DIRECT EXAMINATION)

BY MR. THOMAS:

Q. Mr. Foster, good morning. Thank you for being here.

A. Good morning, Mr. Thomas.

Q. Yes, sir. You are currently in federal detention?

A. Yes, sir, I am.

Q. You have charges pending against you?

A. No, sir.
Q. Oh, you don't?
A. No, sir.
Q. So why are you still in detention?
A. I'm in federal custody for a federal charge.
Q. Okay. All right. And those are still pending?
A. Yes, sir. Yes, sir. I apologize. I thought you was talking about any other charges.
Q. And in all honesty, you have a prior record?
A. Yes, sir.
Q. You've been in trouble before?
A. Yes, sir, I've been in trouble before.
Q. Have you served time?
A. County -- Lexington County. I've never been to prison, no, sir. I've served, you know, overnight for driving under suspension and a few months in juvenile detention, and that's about it.
Q. All right. You're here regarding an incident that happened that pertained to your brother and to your dad?
A. Yes, sir, I am.
Q. Okay. The victim in this case, Will Foster, was your brother?
A. Yes, sir.
Q. And Heirbrane Foster is your dad?
A. Yes, sir.

Q. Okay. Now you understand you're not here to reward anybody?
A. Absolutely. Absolutely.
Q. You're here to tell the truth?
A. Yes, sir.
Q. And there are certain punishments for taking the stand and not telling the truth, which is perjury?
A. Yes, sir.
Q. So you understand that there are some consequences if you don't tell the truth today?
A. Absolutely.
Q. And you intend to tell the truth?
A. Yes, sir.
Q. Okay. Mr. Foster, were you present the day that your brother got shot?
A. Yes, sir, I was.
Q. And do you remember what day that was?
A. May the 10th, 2016, if I'm not mistaken.
Q. Okay. And where did this happen?
A. It happened at the Glenn (phonetic) Village, the neighborhood we stayed at our residence. I cannot remember the exact number, but it was on Black Road (phonetic).
Q. And that was your home?
A. Yes, sir.
Q. How old were you at the time?
A. I was 20 -- I was either -- I think I was 20.

Q. Okay. Tell me a little bit about your relationship with your brother Will. How was that?

A. Me and my brother had a good relationship growing up. He wasn't -- he wasn't the easiest person to always get along with, you know, growing up with a brother, I'm not sure (indiscernible) you know, having an older brother, he want to see me on the right track, so he's -- he gave me a lot of tough love.

You know, the typical brother/brother relationship, not perfect, but you know, it was -- I know he loved me and I loved him. That was my brother, so you know.

Q. And were there incidences that you were afraid of him?

A. Absolutely, yes, sir.

Q. Could you tell us just a little bit about that?

A. Yeah, my brother -- my brother had anger issues growing up all the time. But you know, we've -- we've gotten physical a few times growing up, and recently, before -- before all of this took place, you know, he's pulled a knife out on me, or my dad had to intervene, and, you know, let my brother know like, you know, calm down, or whatever.

And it's been times to where he was triggered from his past relationship with -- his past relationships, where he would get mad at his girlfriend at the time, and he would come to the house and would get mad at them.

He would try to take his anger out on me, you know, on

my dad, you know. And sometimes he would even argue with my mom, you know. Never went to the further extent of actually getting, you know, physical with my mom.

But he had jerked off (phonetic), or, you know, but, yeah, he was -- he was -- he was pretty aggressive. He was aggressive. When emotion was involved, he was very aggressive.

Q. Did he drink?

A. Yes, sir.

Q. And what was his demeanor or attitude when he was drinking?

A. I mean, he had his ups and downs. I mean, it depended on what was going on at the time. You know, he, like I said -- he was another person sometimes, you know, but sometimes he was a tough cookie.

So when he drank, he was -- he got -- it was -- it was a few times he's got to fighting, you know, fighting with his own family for a literally nothing, I would say.

Q. All right. Now, you mentioned his girlfriend. Is that Leanne (phonetic)?

A. Yes, sir, that was his girlfriend at the time before all of this took place. Yes, sir.

Q. What was her last name? I'm sorry. I don't remember.

A. If I'm not mistaken, I think it was Leanne Cotton, C-o-t-t-o-n.

Q. I think that's right. And what was his relationship with

Leanne?

A. His relationship with Leanne was weird. He was in love with her. He was in love with her. But my personal opinion is that I don't think that she was in love with him the way that he was in love with her, because, you know, she -- before they had gotten into a relationship, she was in a relationship with someone else.

And I think that he was like the fall guy for that relationship, you know, and it was -- that was a rocky situation as well. I didn't -- I didn't condone their relationship. I didn't condone their relationship because I knew it was toxic.

And I also had to try to have a few conversations with him, you know, that this is not gonna turn out good, because she always having him in trouble. She's always having him in an upset mood, you know. And we as family, me, my dad, my father, my sister, we would always have to deal with the backlash of them. So their relationship was -- was bogus. It was -- it wasn't no good at all.

Q. So you said you had to deal with that backlash. What was that?

A. Can you repeat that?

Q. You said you had to deal with the backlash from Leanne. What was that backlash?

A. That backlash from Leanne was, like I said, they would --

they would get into an altercation, and he would come to the house -- for instance, he would kick the refrigerator, where he's had kicked the refrigerator. And, you know, we was -- we wasn't -- we wasn't (indiscernible).

So we worked hard for everything we got, so for him to come in and kick the refrigerator, tear up what little we did have, you know, my dad as being the man of the house, he would tell him, like, hey, man, calm down. Whatever's going on, just calm down.

You can talk to me about it. You know, don't come over here, tear up the little that we do have, just because you you and Leanne is into it, or whatever. So, you know, I don't know. His and her relationship was -- was terrible, man. It was -- it was bad.

Q. Let me ask you this. Let's move up to the day that this happened. Tell us a little bit about that. Were you there for the whole thing, or what was going on?

A. I remember the day vividly. My dad was -- I'm gonna start here. My dad was changing his oil or transmission fluid, something. He was doing something for my brother's girlfriend, Leanne. Her aunt, she had a van, and she had asked my dad to change the oil or the transmission fluid.

I'm not exactly sure. It's been a while, so he was underneath the hood -- underneath the van, and he was doing -- he was working on the van, and I was playing basketball

like two houses down on the street, so I can see what was going on.

So I looked over, and I hear a commotion going on, and my brother was trying to drop the jack on my brother -- on my dad, while he was underneath the van. So I ran over there. I grabbed my brother. I said, hey, man, what are you doing?

Calm down. Calm down. He had heard something from underneath the van and he told Leanne's aunt that, you know, he couldn't do the work on her van because my brother was being crazy, so dad went home May the 10th. We had got our food stamps.

We had got our food stamps. My grandmother had came over, my dad and my mom, and I'm not sure if my brother was with him or not, but they had did a little grocery shopping. Came back home. Well, when they came back home, my brother wasn't there.

He went to his girlfriend's house, Leanne. She stayed one house -- two houses down from beside our house, and we had a carport. It's an open garage. Basically, it's a garage with no doors, no walls.

It's an open carport. So my brother -- my brother had asked to use the grill. We had worked -- me, my brother, and my dad used to do construction work. So we had did somebody's house -- garage. We had did their garage. We had poured concrete in the garage.

We had a slab of concrete, and part of our payment was, the man, if we did the job, he gave us a grill, a brand new grill. My dad loved to cook on the grill all the time. He cooked on the grill. So we had got a brand new grill, and we got paid a few dollars or whatever.

So we had a grill. My brother had asked to use the grill for an event that Leanne had going on, something Leanne had going on. My dad was like, yeah, you can use the grill, but just don't tear it up or whatever.

So he went over there, got the grill, and went to Leanne's house. (Indiscernible) on the grill. And my brother and Leanne had got into an argument, and I think I -- don't quote me, because I'm not exactly sure.

But he had an argument, I think it was, that Leanne had invited her maybe father or ex-boyfriend to her house for the event. And my brother wasn't too fond of that, so they got to arguing about that.

And my brother had kicked the grill over. So we was like, man, don't tear the grill up. You know, we just got the grill or whatever. So one thing led to another. So I defused the situation, and I had walked out to the neighbor's front yard.

With my mom being over there, I grabbed my brother by his arm, because my dad was trying to walk back across to our house. He was trying to walk back to our house, and my

brother had grabbed the -- I think it was an 11 -- or some type of -- a two-by-four.

It was a big -- it was a big utensil (phonetic), and he was walking to my dad with it, and my dad said, man, go ahead. Leave me alone. Calm down. Just leave me alone. So my dad had kept walking.

He kept walking, and kept telling him, leave me alone. Leave me alone. So my mom had grabbed my brother's arm, and my brother had (indiscernible) up on my mom's arm. My mama fell to the ground. So my dad turned around and looked. He said, man, don't put your hands on my wife.

Man, you know what I'm saying? And my brother, he started back again. And my brother, he picked up the stick again, and was coming at my dad again. So my dad went in the house, in the back door, and shut the door. Our brother came from the back.

He was following all the way to the back door, and when he went to the back door, he went to the carport, which -- and that's why I was -- I was in front yard near the carport, so -- so my brother was still trying to pull up to my dad.

My dad came to the carport, to the side door, and told him to leave. He said, just leave, man, leave the yard. So my brother had taken his shirt off. He took his shirt off, and he was coming towards my dad, and my dad was like, man, just leave, just leave, and the gun had went off in the midst

of him talking.

The gun had went off. And to me, looking at the whole scene, you know, when the gun went off, he was still talking like in disbelief, like what in the world? Like, you know, the gun just went off. The gun just went off. So that's when my brother had took a few steps back and -- and he hit the ground, man.

And it was -- it was, yeah -- that was ---

Q. Did you see your dad? Your dad went into the house and got the gun?

A. I didn't see him get the gun.

Q. You didn't see it, okay. But you saw the gun go off and Will get struck?

A. Right.

Q. And at that time, what was Will doing right before the gun went off?

A. Will had taken his shirt off, and he was still trying to attack my dad with the gun in his hand, because my dad was telling Will to just leave off the property because, like I said, he had just struck my mother to the ground. So I guess he didn't want my mother to come back over there.

You know what I'm saying? Will was angry, and past experience of him being angry, like I said, just -- just prior to that, my friend had came in the house with a knife at me, and my dad had grabbed him and told him, man, you

gotta leave. You gotta leave.

And my brother kept trying to take me, so my brother, it was a -- it was a gamble dealing with my brother, because we would always try to be humble towards them. And, you know, Will, just chill out, chill out. But he was always, you know -- and I love my brother dearly, you know, that's my blood brother.

We grew up together. We took baths in the same tub together. I'm not trying to slander his name at all, you know. But he -- when he was angry, he was aggressive. You know, he was very aggressive. And a lot of times that he was angry, he didn't -- he didn't have to be. You know what I mean?

Q. Right.

A. So honestly, man -- honestly, you know, my dad's back was against the wall, man, and I really feel like anybody -- anybody in his shoes -- anybody in his shoes would try to protect themselves and their family, you know. I don't -- I don't know, man. It was -- I don't know.

Q. I know. I appreciate it. I know it's hard for you, Bradley, and I appreciate your testimony today. Did you go the day that your dad's jury trial started?

A. No, I went to the courthouse and Ms. Aimee Zmroczek lied to me and told me that his trial date wasn't the day that it was supposed to be. And she told me that they didn't need me.

So I left, and come to find out, she -- if I'm not mistaken, that was the trial date.

Q. Okay. But you were willing to testify?

A. Yes, sir. Because I know, you know -- I know the truth. I was there.

Q. Did you get a chance to testify?

A. No, sir, not at all. I didn't speak to nobody. I never spoke to nobody. And I wanted to -- and I wanted to because, you know, it was, like I said -- it was a -- it was a situation to where, you know, my dad didn't get -- and please forgive me.

I'm not trying to be, you know, that person to (indiscernible). I'm just on the outside looking in, and I just feel like it wasn't fair. It wasn't fair to not be able to tell, you know -- tell the whole -- not the whole truth. You know what I'm saying?

People got a perspective of my brother, of the situation that happened, but they didn't get a perspective of the whole, you know, individual person like, you know what I mean? My dad was a great person. He raised us -- he raised us since we were kids.

He was always involved in our life, and he took care of us, my brother too. He took care of us. He did what he can do. And, you know, for him to have to wear a charge of murder, murdering his son, you know, I just -- I know that

the situation is a rough situation.

I know that the case -- I'm not trying to belittle the situation, but, you know, my dad is a great man. He's a great man. He wouldn't just have raised all of us up just to, you know, do that to his firstborn son. And like I said, he loved us all.

He made sure that we have a roof over our head at all times. We -- he made sure that we kept food in our refrigerator. He was trying to raise us to be working men, you know. And it was, just like I said, my brother was a tough person to deal with, man. He was very tough to deal with.

Q. I just want to ask you one more time. You're telling the truth of what happened today?

A. Yes, sir.

Q. Okay.

MR. THOMAS: Your Honor, if I can beg the court's indulgence.

THE COURT: Okay. Take your time.

MR. THOMAS: Yes, ma'am. Your Honor, that's all the questions we have.

MS. WILLINGHAM: Just briefly, Your Honor.

(CROSS-EXAMINATION)

BY MS. WILLINGHAM:

Q. Hello, Mr. Foster. Your testimony is that you were present when this all happened in May 2016?

A. Yes, ma'am.

Q. Were you present when law enforcement arrived on the scene?

A. No, ma'am.

Q. Okay. And this case happened in 2016. The trial was in 2018; is that correct? Two years later?

A. I'm not exactly -- I don't remember exactly the date, to be honest with you.

Q. You don't recall when the trial was?

A. I think I remember the date. The exact date, no, ma'am, I don't.

Q. So you never gave a statement to law enforcement about what happened?

A. Say that again.

Q. You never gave a statement to law enforcement about what happened that day?

A. No, ma'am.

Q. Okay. And whenever you were there, did you hear your dad say, leave me the fuck alone? Excuse my language. To your brother?

A. Yes, ma'am.

Q. And how long was your dad in the house before he came outside with a gun? Do you recall?

A. I don't recall, no, ma'am. Everything happened -- I mean, it happened so fast, I don't recall.

MS. WILLINGHAM: Nothing further, Your Honor.

THE COURT: Any re-direct?

MR. THOMAS: Your Honor, just one question.

THE COURT: Okay.

(RE-DIRECT EXAMINATION)

BY MR. THOMAS:

Q. Mr. Foster, you remember giving a statement to his defense attorney, Aimee Zmroczek?

A. I don't recall, no, sir. I don't want to tell you I did. I don't recall.

Q. Just don't recall.

A. No, sir.

Q. Thank you.

THE COURT: All right. Thank you. May Mr. Bradley Foster log off? Y'all need him for any other reason?

MR. THOMAS: No, ma'am, I don't.

THE COURT: Okay.

MS. WILLINGHAM: No, Your Honor.

THE COURT: Thank you, Mr. Foster, for being here with us.

MR. FOSTER: You all have a great day.

THE COURT: Thank you. All right. Yes, sir. Gonna call your next witness, or we're gonna take counsel out of order?

MR. WILLINGHAM: Yes, Your Honor, and we may call Aimee Zmroczek.

THE COURT: No problem.

MS. WILLINGHAM: May it please the court.

THE COURT: Yes, ma'am.

(DIRECT EXAMINATION)

BY MS. WILLINGHAM:

Q. I'll just start off with general questions. How long have you been practicing?

A. I graduated from the Charleston School of Law in 2008, so since then.

Q. And how much of your practice has been criminal law?

A. Ninety-five percent.

Q. Okay. And do you recall representing Mr. Foster?

A. I do.

Q. Were you appointed or retained to represent?

A. Well, so there was a conflict in the public defender's office, but they had been looking for private counsel. So technically, I was retained. They never did pay the full fee, though.

Q. And roughly how long before this (indiscernible)?
A. I want to say, almost a year. When I went back to look through my notes, it looks like I came on in September of 2018.
Q. And in the course of your representation, did you receive discovery (indiscernible) in writing from the State?
A. I did.
Q. Did you review those materials with your client?
A. And not only did I receive that, the public defender's office had also hired someone to analyze the gun, so I had received all of that information as well. There was no report done because the information was not favorable to the case.
Q. And have you had time to review the record in this case prior to this hearing?
A. I have.
Q. And are you aware of the allegations against you?
A. I am.
Q. And I will go through the allegations (indiscernible) were, but for the sake of everything, I will address the allegations regarding calling Bradley Foster to the scene first. Do you recall discussing potential witnesses with Mr. Foster?
A. I mean, I do. I recall having an incredibly difficult time getting family members to come and testify. In fact, I had even asked the State to help us, but we were having a really

hard time getting people, when it came down to getting on the stand and testifying. We were having a really hard time with that.

Q. Did you subpoena those witnesses?

A. All the ones that I could find, I subpoenaed.

Q. And do you recall specifically speaking to Bradley at all?

A. I do not.

Q. Did you try to speak to him?

A. I know we tried to speak to, I mean, everyone. I had co-counsel with me, and we spent massive amounts of time trying to get people into the courtroom, into our office, just anywhere.

Q. And you were present for Mr. Foster's testimony today?

A. I was.

Q. Do you recall what he testified to, that he was present?

A. I do not. I have no recollection that he was present in a courtroom and that I would ever send a witness home, especially when I was trying to get witnesses.

Now, I don't know if there was a sequestration order or not, but that would have been the only issue about having him not be in the courtroom.

Q. Okay. And that leads me to my next question. Did you inform him of the trial as he was present?

A. Oh, I mean, I informed the entire family. This was a very tragic situation where it was father accused of killing a

son, so, yeah. I mean, we were trying to get everybody's.

Q. Okay. And some of this testimony leads me to the next allegation. Regarding the stand your ground hearing, he alleges that you failed to adequately present evidence and argument at that stand your ground hearing. Can you first just give a brief overview of what you recall the State's evidence in this case to be?

A. Sure. Well, I mean, the State's evidence was that there was a dead son at the hands of his father. The problem is that throughout this entire case, Mr. Foster maintained that he never pulled the trigger, that the gun went off accidentally, and that there had been a fight, and that he, the decedent, had asked to borrow the grill.

Mr. Foster said yes. Then he needed help bringing it over there, because apparently he was intoxicated. And then they go to the grocery store, he and his mother. They come back. A fight ensues.

And then this is where the testimony got a little murky, but there was a period of time that the fight had ended, and that's when Mr. Foster went into the house, and then claims that when he came out, the gun went off, accidentally killing him, which made the stand your ground really difficult, because you have to fire in self-defense in order to use stand your ground, and he would never admit that he fired that gun.

And so that was the hardest part, was trying to mold that into a stand your ground. The other most difficult part was that the records and the prior bad acts of a lot of these people, including the Defendant, he was out on bond for a domestic violence against the wife, but wife had let him back in the house, and so there was some murky ground as far as that went.

Q. Okay. Do you recall roughly how many witnesses you presented as a part of that stand your ground hearing?

A. I know I presented Mr. Foster, his mom, his wife. At the time, I know for sure that I presented those.

Q. Okay. So you did present (indiscernible)?

A. Yes.

Q. Okay. And did Mr. Foster at that time request that you present any additional witnesses?

A. No.

Q. At that time, do you recall having any discussions with him presenting Mr. Bradley as a witness?

A. No. In fact, when I was reviewing the record, I went back and looked at the pro se Anders brief that Mr. Foster had done, and it wasn't even mentioned. Like not calling Bradley, and Bradley being available and ready to testify, the first time I heard about that was two days ago.

Q. And then the next allegation is, failed to adequately present issues for the appeal, which he just kind of discussed that.

And I don't have any questions for you on that.

A. Sure. I mean, as with every trial, we try to anticipate what the issues will be, and we try to preserve them. One of the things Bob Dudek -- sorry, was a very good friend of mine, and he ran appellate defense. He actually did the appeal in this case, and one thing that I would do is always call Bob before trial and make sure that I outlined with him the issues that we were going to have.

Q. I guess my question would be, do you think you (indiscernible) the issues you put up?

A. Absolutely.

Q. Made objections where you could have?

A. I did.

Q. And then the next allegation is in regards to the applicant being a witness during his jury trial.

MS. WILLINGHAM: And this is reflected in the record, pages 638 through 643, for reference, Your Honor.

BY MS. WILLINGHAM:

Q. Judge Keesley, do you recall him and Mr. Foster had a colloquy on the record regarding, you know, his rights to testify, that it's ultimately his decision?

A. I do, and we had spent -- and when I say, we, I meant Ryan Schwartz, who tried the case with me. He and I had spent hours -- I mean, hours upon hours upon hours, preparing Mr. Foster to testify, and one of the great things about the

stand your ground is that it's really a free opportunity. You see how the client will testify and present on the stand.

The biggest thing that we told him is, don't get combative with her. Don't get combative with her. And Ms. Patterson is very skilled, and I tried to warn him of that. And as you read the stand your ground testimony, you can see that he was answering questions with questions.

He was incredibly combative. We had told him that certainly he has the last right -- as Judge Keesley told him, he has the right to decide whether or not he's going to testify, but after the performance that was given at the stand your ground hearing, I think the jury would have come back a lot faster than they did.

Q. So in addition to Judge Keesley having that conversation with him on the record, you let him know that it was his decision. You had those conversations. You prepared him ---

A. Yes.

Q. --- to testify?

A. Yes. And he did testify in the stand your ground hearing, so.

Q. And ultimately, was it his decision whether or not to testify in front of the jury?

A. It was.

Q. Okay. And do you think that was a reasonable decision under the circumstances?

A. Oh, certainly. After the stand your ground hearing, it was, yes. Interestingly, when I was preparing for this, I always send out jury questionnaires at the end of cases, and they don't always respond, but we actually got at least one back. And one of the questions I asked was, did you feel like you needed to hear from him, and at least this juror said that that didn't influence them at all, so.

Q. Okay. The next allegation is in reference to the pathologist. He performed the autopsy on the victim to counter testimony that the victim was in the process of leaving, his back turned towards the accident, at the time of the shooting. Did you have a chance to review the autopsy prior to the trial, or do you recall the autopsy?

A. I don't recall it off the top of my head. But I mean, those are -- you know, pathologists are very scientific in what they present. They're up there to talk about the injuries. We all knew that this was the son of the Defendant.

And, you know, typically, they don't assist. I've called them a few times in cases, but if they're not going to be assisting, I don't call.

Q. Do you recall that a majority of the witnesses testified that he did have his back turned or partially turned?

A. I do, yes.

Q. So do you think that it would have been beneficial to counter that specific testimony?

A. No, I don't think that that would have helped at all.
Q. Okay. In regards to the next allegation, failed to (indiscernible) for a directed verdict for the State, failure to prove cause of death through the forensic pathologist. Do you recall making any motions for a directed verdict in this case?
A. I mean, I typically do, and I don't ever -- I don't know that I've ever made one that specific for the cause of death and that was -- I mean, there was no question that this poor young man was dead.
Q. So you did not make a motion on that ground?
A. I did not.
Q. Do you recall the paramedic testifying as to the cause of death?
A. I mean, I do believe so. This is a case that, I mean, he had bullet holes in him and he was dead on the ground. It wasn't a question of how he died.
Q. Okay. The next allegation is, failure to produce or represent evidence of Will Foster's trespass on (indiscernible) property regarding the victim Heirbrane Will Foster. And I think you testified to this earlier regarding the (indiscernible).
A. Yeah, one of the things that made it also very difficult to navigate was that the pending domestic violence charges that Mr. Foster, the Defendant, had, there was, unfortunately, a

lot of character evidence that could have come in had we chosen to open the door, especially in Lexington County.

Q. So was that ultimately a strategic decision?

A. That was something we discussed and decided as a strategy, that we weren't going to pursue that avenue.

Q. The next allegation is failure to move for a mistrial regarding a sleeping juror.

MS. WILLINGHAM: And this is on page 521 of the transcript, for reference, Your Honor.

BY MS. WILLINGHAM:

Q. Do you recall during Investigator (indiscernible) testimony (indiscernible) retired the jury to the jury room? Made a comment regarding (indiscernible).

A. We did, and I remember it as clear as day because we were in a courtroom right next to this one. So we were in a smaller courtroom than usual, so we were kind of all on top of each other -- typically -- when I say, than usual.

Typically we try cases on the fourth floor, where it's a much bigger area. But for whatever reason, they had us in the 3A courtroom, which was really -- or 3C, which is really small, and so we all had noticed the issues, and I think the judge did what he could to appropriately address it at that time.

Q. Is it your practice to move for mistrial on those grounds?

A. No.

Q. Do you think it would have affected the outcome of the trial?
A. I do not, and I know Judge Keesley would not have granted it, just based on that.
Q. And then the next allegation, failure to request a direct verdict for the State for the cause of death. We kind of touched on this earlier. To your recollection, and sorry for repeating, what was the victim's cause of death in this case?
A. Well, he bled to death. He was shot.
Q. Do you recall the paramedic testifying to that?
A. Yes.
Q. And then this is another, failure to raise the issue of defense habitation at stand your ground hearing. Why did you not raise that defense?
A. It was definitely another trial strategy. At the beginning, when we did the stand your ground hearing, one of the issues that the State was really harping on was that he was not in a place that he had the right to be.

Judge Keesley ultimately did find, for the purposes of the stand your ground hearing, that that was a non-issue. My fear was bringing that up and having that come out in front of the jury. Also, one of the things that the State harped on, and then again, that the juror reminded me of in the juror questionnaire, is that there was never -- and Judge Keesley addressed it in his order on 267, or something. There was never anybody that testified that the decedent was

making forcible entry into the house.

Q. So do you think that would have been fruitful to raise that?

A. I do not, no. I think it would have been very thin ice to tread, because I think that it would have opened the door to a lot of bad character evidence.

MS. WILLINGHAM: Nothing further for this witness, Your Honor.

THE COURT: Okay. Yes, sir?

(CROSS-EXAMINATION)

BY MR. THOMAS:

Q. Good morning.

A. Good morning.

Q. Thanks for being here. I apologize. This is a lengthy case.

A. Yes.

Q. A lot of moving parts. Let's kind of start from the beginning. So you were basically retained by indigent defense or whatever for representing?

A. No, sir, the family was supposed to retain me.

Q. Oh, okay. And how long did you have to work on this case?

A. Like I said, going back to my emails, we did bond hearings and everything beginning in September of 2018.

Q. Okay. And so you had, what, a year or longer?

A. At least, yeah.

Q. At least a year, okay. And your procedure in regards to preparing a case like this for trial -- I know you've tried a lot of them, would be? Where do you start with that?

A. Obviously, I start with the discovery. I read every piece of discovery that we have. I read requests, much to the solicitor's chagrin, and I make requests for things that I think we should have. I kind of outlined that.

In this case, I had a little bit extra because, like I said, that he had had a public defender for so long, and they had sent the weapon to be examined by Chris Robinson (phonetic) in Georgia to talk about if it could have accidentally discharged, or if it accidentally discharged. So we had a lot of that information.

So then the next thing I do is talk to any available witnesses, go to the scene, take pictures, do all of the things to prepare for a case.

Q. And correct me if I'm incorrect. He didn't remember pulling the trigger. Is that what was going on?

A. Never. Yes, that was always his position. He said the gun discharged accidentally.

Q. But obviously, after the expert examined the gun, he had to have pulled the trigger.

A. Had to have.

Q. Because that would have been the position then, was that it didn't really ---

A. Right.
Q. He just didn't remember pulling the trigger.
A. Right.
Q. Okay. And how did you prepare for that?
A. How did I prepare for?
Q. For the fact, you said that was a problem that he raised.
A. Well, it became a non-issue. I mean, it's just something that we had to put to rest. I mean, there's nothing we could do at that point. I can't challenge a gun expert, but that was something that they wanted to keep doing, you know. We looked, we went out, we -- not we, because this was done before I got involved.

But they hired, you know, somebody, and he examined it. Did test fires. He did all kinds of tests, and they got the funding for that, and when that did not come back helpful to the case, I mean, you just have to move on. There's nothing you can do to change that.

Q. Sure. And I guess the procedure would also be identifying potential witnesses?
A. Oh, absolutely.
Q. And how are you able to do that? You identified everybody, or were you able to identify everybody that was there?
A. I was. Everybody that I was told that was there, and based on the body cams and based on any witness statements. So I had a list of, I think, potentially, 19 witnesses. A lot of

them refused to cooperate with me.

In fact, I recall Judge Keesley doing something unusual in that case. We had definitive proof that one witness that we were trying to call who was the brother or somebody of the girlfriend of the decedent, he refused to cooperate. He was actively avoiding service, so Judge Keesley actually let his testimony through the body-worn camera come in through that, so.

Q. Okay. So in identifying those witnesses, you identified that Bradley Foster was there?

A. I did not identify that he was there, but I had him down as a witness because he -- I had him down as a potential witness because he knew of his brother's proclivity to get angry when he drank.

The problem, again, is that Mr. Bradley Foster and the decedent frequently broke into cars and committed crimes together, and so one of the fears, again, was having that kind of character evidence in front of a jury.

Q. Okay. And you had a private investigator?

A. Yes, I have one on staff, so, yeah, six on staff, but yes.

Q. I assume that the private investigator would have spoken to everybody on your potential witness list?

A. Everybody that would have cooperated. Again, that was the biggest thing, Mr. Thomas was, you know, even on the day of the stand your ground hearing, I have emails from his mom,

Ms. Nellie (phonetic) Foster, going, this is what I did, but I don't want to get on stand.

Now, eventually, she did, but it just -- even when they got on the stand, they didn't want to speak ill of a family member, and it was -- I understand, and I feel badly for the position that they were in. But when you have witnesses that you don't know what they're going to say, you're not going to put them up there.

And then when you have witnesses that say they're going to say one thing, and then back off of that, it makes it very difficult to continue with your presentation.

Q. So potentially, your private investigator would have spoken with Bradley Foster?

A. Correct.

Q. Okay. And so then, if your private investigator spoke to Bradley Foster, there would have been some sort of report about that?

A. Right.

Q. But you never followed through and spoke with Bradley?

A. I do not recall him ever wanting to speak with me.

Q. How about the girlfriend, Leanne Cotton?

A. She definitely did not want to speak with me. She was a witness for the State.

Q. Yeah, okay. And so you did sit down and go through the timeline and his factual recitation of what happened that

day?

A. I did.

Q. Okay.

A. And again, the biggest challenge is that he didn't remember firing the gun. So one of the things that you have to say is, I fired the gun in self-defense because I was afraid for my life, and we couldn't get that testimony in.

But the other thing that was incredibly challenging was, just like I said, having everybody testify to what they needed to testify to, and we just couldn't seem to get that testimony to come across.

Q. I'm interested more in -- and I kind of, for my purposes, broke this whole thing into kind of like part one, part two, part one being stand your ground. And so in stand your ground, you would have been thinking, I assume, that this is a situation where his life was being threatened?

A. Right.

Q. And that this was an unfortunate incident, but he met the standards for stand your ground and had the ---

A. That was always my position. And then when he got on the stand, he refused to -- I don't think he ever said he was in fear for his life, which I think was something that was really challenging. And then the other thing that Judge Keesley and the jury focused on was that Mr. Foster, the younger Mr. Foster, Will, was not trying to gain entry into

the house.
Q. Okay. Well, let me ask you this. I would assume that in that timeline, you would have spoken to Heirbrane Foster ---
A. Oh, absolutely.
Q. --- about how this whole incident kicked off with the grill?
A. Yes.
Q. And that Will had gotten into an argument with Leanne?
A. Right.
Q. And had kicked the grill over, and that kind of started the whole thing.
A. Correct.
Q. And it was Heirbrane's grill.
A. And he had given permission to Will to use that day. And he even -- I think he even testified to, even at that time, he had trouble getting -- this little mobile home park where they lived, they kind of lived like all very close to each other.
Q. A couple houses down.
A. Right. Right.
Q. They could actually see each other.
A. Correct.
Q. Okay. So you would also have been aware, and I think you mentioned that, Will's propensity for violence?
A. Right.
Q. And that when he was drinking, that that propensity

increased?
A. That's what my whole case was based on. In fact, even in the closing, I remember clear as day using a demonstrative of baking soda and whatever vinegar to make it boil over, because that's exactly how we were describing it.
Q. And you put Will's grandmother's, Heirbrane's mom, on the stand?
A. I did.
Q. She said earlier that day that she had seen Will with a bottle of alcohol in one hand and a beer in the other.
A. Correct.
Q. Now, you were aware of the fact that when Heirbrane was found there and the grill got knocked over, that Will knocked his mom down to the ground?
A. Yes.
Q. And that Mr. Foster, Heirbrane, picked her up and helped and carried her, escorted her, I guess, back to their house?
A. Correct.
Q. And you are also aware of the fact that Mr. Foster was helping Leanne's ---
A. Somebody with a car, and it was on the jack, yes. Yes.
Q. Under the car?
A. Yes.
Q. And you were also aware of the fact that Will had moved towards, or it was interpreted that Will was going to kick

the jacks out from under the car?
A. That's what we were trying to tell the jury, yes.
Q. Right. Exactly. And then this whole situation escalated to the dad's house?
A. Right.
Q. And you are aware of the aluminum level that Will had in his hand and had swung at Mr. Foster?
A. There were -- yeah. There were two-by-fours, there were levels, there were different descriptions of different weapons, but yes.
Q. They were two separate levels, right?
A. Yes.
Q. And you're also aware of the fact that Will Foster entered the house and threatened Bradley with a knife?
A. That was not -- that was a completely different scenario. Yeah, that was not this day. That had nothing to do with this incident. Yes.
Q. Correct me if I'm wrong, I think that Will Foster entered the house with a level, the aluminum level?
A. Yeah, I don't -- not on the day of the incident. On the day of the incident, there was never any testimony that Will entered the house.
Q. Okay. But were you also aware that your client was asserting that he entered the house and then he tried to turn the refrigerator over?

A. I was aware of that, but there was nobody else that would testify to that.
Q. And then chased his dad out of the house?
A. Right.
Q. And that it was after that that Will Foster picked up the two-by-four?
A. Right.
Q. And threatened him with a two-by-four ---
A. In the yard, yes.
Q. --- in the yard. And that somebody had to take it out of his hand?
A. Yes. In fact, that was the testimony that I had to get in through body-worn camera, because that person who took it out of his hand refused to be served.
Q. Okay. And it kind of jumps forward to Leanne's testimony that they're still under the carport and that Heirbrane Foster goes into the house ---
A. Right.
Q. --- and that she and Will were jumping and laughing, and in the process, (indiscernible)?
A. That's what she testified to you. And then I'll tell you, that's what the jury -- or at least in this one questionnaire, said, was that they felt like the fight was over at that point.
Q. How did you in your cross address that issue, because, and I

don't put words in your mouth, but I would assume that you were thinking that that was not true?

A. Right. I mean, I just kept trying to attack the inconsistencies that were being presented.

Q. Okay. But Leanne Cotton goes further and testifies that they're in the process of leaving. The argument is over. Mr. Foster comes out of the house and Will starts to turn.

A. Right.

Q. And then the gun goes off.

A. Right.

Q. Wasn't it important to have some sort of evidence, and that's why it piqued my attention about the pathologist, if he was in the process of leaving and turning, then wouldn't he have been shot in the side?

A. So he was shot in the back, unfortunately. So that didn't necessarily help our position. But here's what I've learned with pathologists, especially the ones from Newberry Pathology, which are the ones that have these cases, they testify to the very same thing: Bullets go straight.

Okay. Well, if somebody was turning into -- bullets go straight. That's all they will testify to. They will not testify to any speculation outside of that.

Q. But in your mind, was there any dispute or concern that it wasn't a full chest shot?

A. I mean, obviously that's always a concern, and I think that

it went to the credibility of the witnesses. But again, these happened so fast. And the problem is that obviously he -- you know, according to the expert, it did not go off accidentally.

But the problem was, that was kind of the starting base, is that either he didn't remember, or he always maintained he didn't pull the trigger, so it was opening a dangerous -- it was definitely dangerous to open that door as to, you know -- and I do believe that he even asked us, and we did try to bring in whether the gun could have gone off accidentally. But again, that takes away from stand your ground and self-defense, so it's very difficult to navigate that.

Q. I would assume that it was difficult for Mr. Foster, being the dad ---

A. Oh, certainly.

Q. --- to admit that he shot and killed his son.

A. It was a terrible tragedy for this family. That's the one thing that I fully believe, is that this family has gone through it, and it was awful that they had to go through it.

Q. And you heard Bradley Foster testify this morning that he was there, that Will took his shirt off, and was approaching his dad, and was that consistent with what you had heard from Mr. Foster?

A. No.

Q. And had you called Bradley Foster, he could have testified to

that?

A. Again, two days ago was the first time that I heard that he was available, so I don't know.

Q. And kind of I going back to part one, stand your ground, you did put Mr. Foster on the stand?

A. I did, yes.

Q. So you had some understanding, and there was some testimony and cross-examination of him in regards to what happened?

A. There was, and the problem was with that cross-examination, because in stand your ground cases, in self-defense cases, you know, people -- when I say people, I mean jurors, automatically, you know, they understand that, right.

And so that's something that should be like brought -- they feel like, they, the jurors, feel like that's something that, you know, if somebody's acting in self-defense, they immediately say that to the police, and then they immediately want to hear from the person about how they were scared and how they were, you know -- they only fired because they were in fear for their life, those kinds of things.

And it takes, I think, you know -- for them to be credible, they have to not be combative. And the wheels fell off the bus during cross- examination. There were questions with questions -- he was answering questions with questions. He was very snarky.

He was very angry. And I understand, but I had drilled

into his head, if you do that, it's done. And I really think in Judge Keesley looking at him, weighing the evidence, I believe that's one of the areas that really was lacking.

Q. So Keesley determines that both Will had the right to be there, because he said that he lives there sometimes, and that Mr. Foster also had the right to be there, even though there was some sort of restraining ---

A. From the bond, yes.

Q. How about this trespass? I know you mentioned the trespass and stand your ground, that there was some sort of trespass order against Will from Mr. Foster, the dad.

A. Right.

Q. What did you do with that?

A. Well, candidly, I don't believe that once we got past the stand your ground, that I did anything with it, because, again, it was a strategy of, I think that it would open the door to some other bad character evidence that I really just was trying to get in.

I know that Judge Keesley had ruled in the stand your ground hearing that he had a right to be there, but I still think that the State would have fought me had we brought that up again in front of the jury. And so that was a strategy at that point, I think, to just let it go.

And the problem was, is, I believe, like you said, that they had let him in earlier that day and then had agreed to

let him have the grill, I fear that it was a slippery slope that could have opened a lot of doors that would have, again, hurt the case.

Q. So you did not use the ---

A. I did not.

Q. --- restraining order in part two?

A. Correct.

Q. Okay. Let me ask you this. I don't know the answer to this question. Judge Keesley ruled that, despite the domestic violence charge, that he had the right to be there. That being the ruling of the case, were you concerned to raise that, or?

A. I was. I mean, because I think that it was uncharted. It was for that specific hearing in front of him, and what I what I feared is that that was going to be another challenge in front of the jury, and if any of that happened to come out, I just think that would have hurt the case even more.

Q. Okay. So you did hire an investigator, and the expert was Mr. Robinson?

A. Right. Well, I have my own private investigator, so, yeah.

Q. Okay. Now, plea offers, were there any?

A. There were. It was to plead to voluntary.

Q. I'm sorry. What was that?

A. To plead to voluntary.

Q. And what was the amount of time? Was it open?

A. Open, yes.
Q. Open?
A. Yes.
Q. Did you discuss that with mr. Foster?
A. Of course. Of course.
Q. And he made the decision not to accept the plea offer?
A. That's correct.
Q. And when he went to trial, you spoke with him about the risk?
A. Oh, of course.
Q. Yeah. And, matter of fact, I think there was a number of things in regards to the charge -- we've kind of jumped to the end of the case, with the charges, and the court charged murder, voluntary, involuntary, and self-defense?
A. Yes.
Q. And accident?
A. Yeah, we got the full range of charges, which is great, but also challenging, because if you don't -- Mr. Foster, when we were brought on to try this case, was always self- defense, self-defense, self-defense. When you get in front of a jury, you say, well, this is what we believe.

But if you don't believe us, then go here and then go here. So we got all the charges. But I think that that hurt us, obviously, because ---

Q. You were actually against the charge of voluntary?
A. Yes. Well, because, I mean -- and I appreciate him charging

it, because there were facts to support each one, but it required a little bit of jury gymnastics in order to get there, and I think that that ended up hurting us when they have all of these things to choose from.

Q. Okay.

A. You know.

Q. So kind of going back to part one, after the judge's decision in the stand your ground, you were left with self-defense?

A. Yes.

Q. Okay. So moving into part two, the trial, you were trying to set that up through testimony of the witnesses, that he acted in self-defense?

A. Correct. Every witness that I had an opportunity to talk about Will's violent nature while drinking, I made sure to bring that out. I mean, that was the crux of the case.

Q. And you were unable to get any of that in through his girlfriend, Leanne?

A. Yeah, she was not cooperative with me.

Q. She talks about roses and, you know, flowers and all. I mean, she just sanitizes the whole thing.

A. Yes, and it was not like that at all. I mean, I don't know how much the jury believed of that, because, I mean, we had a lot of pictures out of the scene, so.

Q. I read it.

A. Yeah.

Q. I just went, oh, you know.
A. Yeah.
Q. Had that same reaction.
A. But it became important, going into the trial, that self-defense, because that's really what you were claiming was that, for whatever reason, stand your ground with self-defense, the trigger had to be pulled.
A. Right.
Q. Okay. And which witnesses did you use to support the self-defense argument?
A. I mean, every witness that was there, I tried to get them to say that. Even Mr. Foster on the stand would not say that he pulled the trigger because he couldn't remember. He would just say, well, you know, the gun went off.

Just would answer a question with a question. And so, you know, we did the best that we could with the restraints that we had.

Q. Did you admit the audio of Mr. Foster speaking with the police officer sitting in the police car?
A. Yep, and that was where he was telling the officer -- he was kind of -- he wasn't being questioned. He was just kind of venting, really.
Q. He was in shock.
A. Right. And he just kept saying, you know, he was going to kill me, and it was a way to get that testimony in without

having to put Mr. Foster on the stand, to have Ms. Patterson, again, cross-examine him in a way that wouldn't have been beneficial.

Q. Do you think that was effective?

A. I mean, it's the best that we could do.

Q. Yeah. And you make a motion for a directed verdict after the State's case, and I think that was on failure to show intent.

A. Right.

Q. And that was denied.

A. It was.

Q. The sleeping juror, did you ask for the alternate to be ---

A. I didn't recall. Like I said, it was something that we were all in that very small room, so I think after the judge addressed it, we didn't have an issue with it.

Q. And kind of going into the State's closing and Ms. Patterson talking about kind of a summary of the witnesses' testimony, she says that Mr. Foster was (indiscernible) not under the car?

A. Not where?

Q. Not under the car.

A. Right.

MR. THOMAS: And Your Honor, just for the court's information, that is page 742, and it's lines 22 to 21.

BY MR. THOMAS:

Q. And then she says, there's no testimony of Will Foster

chasing the Defendant, chasing Heirbrane Foster.

A. Right.

MR. THOMAS: And Your Honor, that's page 743, lines 13 through 16.

BY MR. THOMAS:

Q. And then there was some confusion about -- there was some testimony about when he fired the gun, his reaction was that he just dropped the gun and ran?

A. Yes.

Q. Okay. And she said that he didn't drop the gun. There's no testimony of him dropping the gun.

MR. THOMAS: Your Honor, that's 744, lines one through two.

BY MR. THOMAS:

Q. What makes me concerned at that point was that, telling the story. We've both been doing this for a long time, and unless we tell the story somehow or another, it's hard for this judge, any judge, or any jury, to understand kind of what we're talking about.

You told the story in the stand your ground because you put Mr. Foster on the stand. Did you have any concern at that point in time that you really hadn't told the story?

A. I told the story the best that we could to the jury without putting Mr. Foster on the stand, because he was not going to help his case, so, yeah, but I do feel like cross-examining

every witness, talking about his anger problems, talking about how he got when he was intoxicated, and how combative he was, I mean, I felt like that they had that understanding.

The biggest problem was we couldn't have anybody, even Mr. Foster, testify that he was trying to come into the house, or coming into the house, when he shot him, and that testimony wouldn't have come if we put him on the stand or not, so, because he had never testified.

Q. He had never testified he was trying to come in the house?

A. He never testified to that. He never -- that was never -- that was a big issue, is that a lot of people felt like the fight was over and that Mr. Foster's the one who went into the house and got the gun and came back out, and there was nobody that would testify that Mr. Will Foster was trying to get into the house.

Q. Other than Bradley's testimony this morning.

A. Right, other than Bradley's testimony this morning. Right.

Q. Yeah. Wasn't it Mr. Heirbrane Foster's intention that Will was advancing towards him, that it wasn't over?

A. That's what his contention was, yes. And again, if I had known, I mean -- when I heard about this Bradley Foster thing, that's why I went back and pulled all of the Anders briefs to see where that had ever been said before, and even in Mr. Heirbrane Foster's own Anders briefs, it was never

mentioned that Bradley would have testified to all this. So that was just a shock to me because I didn't obviously have that information.

Q. Right. And you know, we have a number of different weapons, so-called weapons, involved, the aluminum level ---

A. Right.

Q. And two-by-four.

A. Right.

Q. But nothing was ever really collected by the police other than two-by-fours?

A. Correct. And we don't know where that was. Obviously, it was a chaotic scene. There were a lot of people, which I think that the jurors got to see some of that from the body cams, but yeah. I mean, we deal with problems with police not collecting evidence all the time.

Q. Yeah. Did you have a plan to address that, or did you know that was coming, or?

A. No. And honestly trying to -- I mean, I always have a plan to challenge the police on how they collect evidence and things like that, but I can tell you that in this county, jurors don't care.

If you attack the police, they look bad on you, and you know, that's just something that, as a defense attorney, you're aware of. Some counties are more conservative than others, and this would be one of the most conservative in the

state, so.

Q. So that wasn't going to get you anywhere?

A. No.

MR. THOMAS: Your Honor, if I could beg the court's indulgence for a second.

THE COURT: Take your time.

BY MR. THOMAS:

Q. In making the decision to not call Mr. Heirbrane Foster, what kind of process did you go through with that?

A. Well, like I said, I mean, we prepped him for hours and hours and hours on how to prepare for cross-examination, so much so that, I mean -- because that's what I do for a living, is I cross-examine.

Q. So that prep was also for part one?

A. Of course. Well, it's part one and part two, because -- but like I said, part one is a kind of a free preview of how they're going to do without having the jury, you know, see that. I mean, I told him that, you know, it did not go well. I don't think that he presented well.

I don't think that the jury would have been responsive, but ultimately, it's not my decision. The client has three things that they can decide: Plea or go to trial, testify or not to testify, and have a lawyer and not have a lawyer.

And so that's why Judge Keesley goes through that colloquy and makes sure that they understand that this is

their decision and their decision only. Obviously, we had given our two cents at that point.

Q. Right.

A. But you know, I mean, if he would have gotten on the stand, I would have directed him just like I did in the stand your ground, so.

Q. And you gave him your advice, what you just testified to ---

A. Right.

Q. --- the problems associated with him taking the stand?

A. Yes.

Q. At that point, you had heard of the State's case?

A. Yes.

Q. And was there a concern about telling the story, his side of the story?

A. Again, I was concerned about how he would have presented. His demeanor, I know it doesn't come across on the paper. You can kind of see it, but imagine that with gasoline and kerosene all lit on fire, because his voice was aggressive, and he was a smart behind.

Ms. Patterson was very good, and she would say something, and he would just come right back at her. It showed a short temper, which I didn't want the jury to see. I think the jury would have considered that and the way that he reacts to people that make him angry. And so I had great concerns. So that's what my advice was based on.

Q. One thing, were you aware that when you were putting things up on the screen, that Mr. Heirbrane Foster couldn't see it?
A. I was not aware of that.
Q. Not aware.

MR. THOMAS: I beg the court's indulgence.

THE COURT: Take your time.

MR. THOMAS: Your Honor, if it please the court, we have no further questions.

THE COURT: Any follow-up?

MS. WILLINGHAM: Nothing on redirect, Your Honor.

THE COURT: Thank you. All right. You ready to call Mr. Foster?

MR. THOMAS: I'll call Mr. Heirbrane Foster.

(WITNESS IS SWORN IN UNDER OATH)

THE WITNESS: Heirbrane Foster, H-e-i-r-b-r-a-n-e. Foster, F-o-s-t-e-r.

MR. THOMAS: If it please the court, Your Honor.

THE COURT: Yes, sir.

(DIRECT EXAMINATION)

BY MR. THOMAS:
Q. Mr. Foster, you're serving time in the South Carolina Department of Corrections?

A. Yes, sir.
Q. And what are you serving time for?
A. Murder.
Q. And when were you arrested? I don't need the date, but just roughly.
A. 2016.
Q. '16. And you were charged with murder and possession of a weapon and possession of a fire arm by a felon?
A. Yes, sir.
Q. And you went to a jury trial?
A. Yes, sir.
Q. And did they find you guilty?
A. Yes, sir.
Q. And what kind of sentence do you have?
A. Thirty years, plus five, plus six months, running concurrent.
Q. All running concurrent?
A. Yes, sir.
Q. What's your (indiscernible)?
A. Thirty years. I stopped counting after ten.
Q. Okay. You did a direct appeal?
A. Yes, sir.
Q. And you were represented by appellate defense?
A. Yes, sir.
Q. And they raised issues of your stand your ground defense?
A. Yes, sir.

Q. Okay. And you and I talked about this. You understand that today the court made a decision and affirmed the lower court on stand your ground?
A. Uh-huh.
Q. We're not going to go into that part of it.
A. Yes, sir.
Q. But you still feel that Ms. Zmroczek was ineffective in preparation and presenting that on your behalf?
A. Yes, sir.
Q. And do you know, briefly, why you think she's ineffective?
A. Her adversarial process, as in what the prosecution was saying, what the judge was saying, she kind of like let it just ride. She never objected to quite a few things.
Q. Okay. And you think that affected your outcome?
A. Yes, sir.
Q. Did you make bond? You were arrested, and were you bonded out?
A. No, sir.
Q. And how long were you in the detention center?
A. Three years.
Q. How long?
A. Three years.
Q. Three years, okay. During that period of time, when was Ms. Zmroczek retained to represent you?
A. I want to say August of '18.

Q. Okay. And you had an attorney prior to that?
A. Yes, sir.
Q. Who was that?
A. Mr. Walt Whitmire.
Q. Okay. Did Ms. Zmroczek come and meet with you?
A. Yeah, a couple times.
Q. Do you remember how many times she came?
A. About four or five.
Q. Okay. And you filed a post-conviction?
A. Yes, sir.
Q. You understand that what you're asking for today is that your sentence is set aside?
A. Yes, sir.
Q. And you and I talked about that. There is certain exposure that you have.
A. Right.
Q. If you are successful with your post-conviction and your sentence is set aside, the State could decide to retry you.
A. Right.
Q. And they could ask for life without parole. I mean, you could potentially get more than you already have.
A. Yes, sir.
Q. And based upon that knowledge, you want to go forward today?
A. Yes, sir.
Q. Okay. Now, when you met with your attorney, you went over

your discovery?
A. Somewhat.
Q. Somewhat. Video? Audio?
A. No video, no picture, nothing.
Q. Okay. Did you see any of that?
A. No, sir.
Q. Did you discuss any of that?
A. No videos, no pictures, nothing.
Q. But it was used at trial?
A. Yes, sir.
Q. And you stated to me that you were concerned that you couldn't see what was going on?
A. The screen was right there, and I was sitting right there, and every time they'd point to something, I couldn't never see it.
Q. Because you were behind it?
A. I might as well have been totally behind it.
Q. All right. Did you talk to Ms. Zmroczek about that?
A. Yes, sir.
Q. Did they move you?
A. No, sir.
Q. Now, kind of using a legal term, (indiscernible) defense, did you and Ms. Zmroczek talk about how she was going to defend you?
A. No sir.

Q. What did you think?
A. I wrote -- I wrote the judge, and I wrote her a letter for self-defense of accident, to defend me with that. And she said, you know, I'm going to an immunity eligibility hearing. But as far as the strategy, that was it.
Q. Let me ask you this. There's been testimony about you not pulling the trigger. Has this been difficult for you?
A. That's an understatement. That's an understatement.
Q. So your son Will was shot and killed by you?
A. Yes, sir.
Q. By a gun that you were holding?
A. That I was holding, in my hand.
Q. What was your intent at the time?
A. To make him stop, just to scare him, shoot up in the air, just to shoot up in the air, because I know -- I knew he was drunk. I knew -- I knew if I shot up in the air, he would he would stop. He would run. But when I pumped the gun, the gun went off. That's ---
Q. That's been difficult for you.
A. (Indiscernible).
Q. So let's talk about what happened. You and I have talked about that.
A. Yes, sir.
Q. And I don't want to belabor the court's time, but can you kind of walk us through? You need my notes?

A. No, you go ahead.
Q. I've got what you and I talked about. Can you do it without using the notes?
A. I can do it.
Q. All right. Walk us through that day.
A. That morning, I got up to do the monthly grocery shopping with my grandmother, because I do -- I do most of the cooking. I do all the shopping. We get our food stamps on the 10th. That's when I called my grandmother. She said she'd take me and my daughter -- she'd take her to work. She took us -- when we got up, my grandma was outside.

Will come to the car with his bottle of liquor in his hand, his Bud Light in his hand. We got ready to go, and my mama told me, said, don't pay him no attention. You know how he is. I said, I'm not gonna pay him no attention.

We went to three different grocery stores. He called her and said, could he borrow the grill? I told him, yeah. We got back. The grill was still in the yard.

Q. This grill was (indiscernible)?
A. Yes. The grill was still in the yard. It wasn't where I had it, so I knew he must have messed with it. So I didn't say nothing. I went in the house, unload the groceries. Me, Bradley, Will, Troy, and Cathy unloaded the groceries.
Q. Cathy's your wife?
A. Cathy's my wife. We unload the groceries, then Will come

over there and asked about the grill. And I told him, I already done told you, you could borrow it, and he said that his mama told him he couldn't get it because he had to wait till I got home, which is fine, but when I told him to get it, they couldn't take it over there.

He was too drunk to take it over there. So I took the grill over -- over (indiscernible). I come back. Go in the house. Come back outside. They got there, and Leanne's sister pulled up with the van.

Q. Who was Leanne?

A. Leanne was Will's girlfriend. Her sister is Ronita (phonetic). She pulled up in the van, and the tire was going flat. They was going to the store, get stuff for the cookout. I told her, I said, well, where you gonna go out on that flat tire? She said, is it flat?

I told her, yes, the tire's flat. She come about six houses down, so by the time she realized it was flat, she was (indiscernible), so while I was talking to her in the driveway, the hose bust in the transmission. Fluid just flew out.

She put it in gear to pull it in Leanne's yard, but it wouldn't -- the car wouldn't go nowhere. So I got me and the guys to push it into the yard. And I told her, I said, let me look at it. I said, let me get under it, and I got under it.

And I said, I can fix the hose. You got to get five quarts of transmission fluid. She went to the store, her and Leanne and somebody else, got the transmission fluid, and come back, and I told her -- I told Will to call her and tell her to go get four clamps and a hose to go on the transmission line.

Will said he wasn't doing that. That wasn't his exact words, but it was more vulgar. He said he wasn't doing that. They come back. She had to go back to the store, and they come back from the grocery store.

I had done jacked up the van, took the tire off, and took the hose up -- took the hose and the clamps off where the hole was at. Me and Will sitting there, he fussing about a (indiscernible) grill that Faith had, that Faith told -- thought that he took, but he didn't take it.

So I told him, if he got it, though, to go give it back to her. Then Leanne pulled up. Leanne pulled up and started raising sand with Will about the grills being in the yard. They get in a fight. I go to the house.

I go to the house. Leanne and Will kicked the grill. Will kicked the grill. I said, man, bring my -- bring my grill to the house. He didn't bring the grill to the house. He come to the house. He come to the house raising sand, kicking in the door.

He got -- he coming in here. He gonna kill me. He

gonna kill everybody. Trying to turn the refrigerator over. Knock a hole in the sheet rock. I'm sitting there laying on the couch. I said, I'm not messing with you. I'm not messing with that, period.

Q. This wasn't the first time, was it?

A. No, not at all. I told him -- I told my wife, I wasn't messing with that. You deal with that. She tried to get Will out of the house. Will wouldn't go out the house. Will went in the kitchen, picked up the level, and come around the table at me with the level.

I go out the back door, he come behind me out the back door, underneath the carport, around the table, to the backyard where the dog is at. I went behind the dog because I know you couldn't get to the dog.

Q. He was afraid of the dog?

A. Yeah, nobody could get to the dog, nobody except for me. So I just stood back there. He swinging the level. He hit me on the back of the leg with the level. I said, go ahead on. Leave me alone. He didn't want to do that. Haley (phonetic), his mom, Leanne, tried to take the level from him.

Haley finally took the level from him. Leanne took it from her. He go and grab the two-by-four. By that time, I see Leanne coming, Leanne's sister coming, Ronita, coming from the store with the parts in the back.

I go to walk up there, but by the time I'm walking up there, he chasing me. Cathy trying to take the two-by-four from him in the middle of the yard. I'm up underneath the van with Leanne's sister. She tells me, you better get out from under there.

He gonna knock that jack over. I get out from under there. Now he's sitting in the middle of the yard there, done swing Cathy down, which is his mama. And I pick Cathy up, and I said, I'll fix it. I'll fix it.

I go in the house to get the shotgun, and I said I'm gonna shoot up in the air, and that's gonna stop it. When I pump the shotgun, the shotgun went off. Why I had my hand on the trigger, I don't know. But I know it wasn't intentional. To this day, I can't (indiscernible).

Q. Let me get a little more information from you. You said that he tried to kick the jacks out from under the car that you were under?

A. Uh-huh.

Q. And then knocked his mom down?

A. Uh-huh.

THE COURT: Say yes or no.

THE WITNESS: I'm sorry. I apologize.

MR. THOMAS: I'm sorry.

THE COURT: That's okay.

BY MR. THOMAS:

Q. And so what happened then when you picked this guy's mom up off the ground and y'all walked back to your house? What happened then?
A. He was behind me with the two-by-four. He's behind me while I had his mama and holding her up, taking her in the house. She wouldn't go in the house. I said -- that's when I went in the house and got a shotgun.
Q. All right. Did somebody try to take the two-by-four away from him?
A. I didn't know that. I was in the house.
Q. So you did not know that?
A. Yeah. I didn't know what was going on.
Q. But obviously ---
A. I found out later that somebody took the two-by-four from him while I was in the house. I didn't know that.
Q. Now, you went into the house, and there was a gun in the house?
A. Yeah, behind the freezer. When we unloaded the groceries, the gun was -- I don't know where the gun was. I told Will two weeks ago to get the gun out of the house.
Q. It was his gun?
A. Yeah, it was his gun. I told him to get the gun out of the house two weeks before this happened. When we loaded the groceries in the freezer, I saw the sheet the gun was wrapped in behind it.

That's when the gun came into my head when we was outside and I was unloading groceries. That's when it came into my head, shotgun back there. Go get the shotgun.

Q. Did Will ever tell you that he was gonna kill you?

A. He said it about four times that day, he's gonna kill me and Bradley.

Q. He's gonna kill Bradley?

A. He's gonna kill me and Bradley. Everything is me and Bradley's fault. It's all our fault.

Q. What is he mad at Bradley for?

A. I don't know. Because he does that. That's what he does when him and Leanne gets into a fight. He come over there and he gets on me, or Bradley, Haley, his mama. That's what he does.

Q. And did you intentionally shoot him?

A. No. No, I would not. That's my firstborn son. That's my baby. He couldn't do no wrong. Even in the midst of that, he couldn't do no wrong.

Q. Were you in fear?

A. I was scared because he was coming at me. He had the two-by-four, swinging the two-by-four at me. He had the level, chasing me with the level. And then when Ronita said he gonna kick the jack over, I got frustrated, and I said, I'll just stop him.

Q. So when you went into the house and you came out with the

gun, what was Will doing then?

A. He had both his arms around his mama and Haley. He stepped up on the carport and came towards me and said, what the fuck you gonna do? Excuse me. I'm sorry.

THE COURT: That's okay.

BY MR. THOMAS:

Q. Fine. Was he going towards you?

A. Yeah.

Q. Was he trying to leave?

A. No.

Q. Was the altercation over?

A. No, not in my -- it wasn't to me.

Q. And you had a stand your ground hearing?

A. Yes, sir.

Q. Did you testify?

A. Yes, sir.

Q. And you told that story?

A. Yes, sir.

Q. Okay. But you didn't testify at trial?

A. No, sir.

Q. But you were there?

A. Yes, sir.

Q. You heard Leanne's testimony?

A. Yes, sir.

Q. In your opinion, was Leanne's testimony truthful?

A. Not a bit. She said I didn't jack the van up, I wasn't working on the van, I never worked on the van.
Q. And did you get a chance to talk to Ms. Zmroczek about things?
A. Yes, sir.
Q. About these inconsistencies?
A. Yeah.
Q. What did she tell you?
A. She said she's gonna impeach her.
Q. Did that happen?
A. No. I don't know, sir.
Q. And the witnesses that testified for the State, do you feel like they made the situation as it was, they downplayed the situation, or what do you think it was?
A. A couple of them, like my daughter, I think she went along with what Leanne was saying, I think out of fear and confusion, because she -- I can't -- I can't -- I'd be speculating.

THE COURT: I was gonna say, Mr. Thomas, I mean, this is all speculation. I say, get to the meat, because I'm trying to determine whether or not trial counsel is ineffective, and I understand that you're laying the foundation of the story, but he's commenting on other witnesses, and the trial transcripts speaks for itself, you all, and I read everything, and I have read many for this.

MR. THOMAS: (Indiscernible).

THE COURT: It does, and I want to give him a chance to tell me everything, but he's told me what happened, but I don't want him to comment on other witnesses. If you want to ask him about talking to his trial counsel about that, he said that she was going to impeach him.

I'm giving you some leeway and some latitude, but you know, none of this is going to go to whether or not trial counsel was ineffective, his opinion about witnesses. It's okay.

MR. THOMAS: Laying the foundation.

THE COURT: I know you're laying the foundation, yeah.

BY MR. THOMAS:

Q. Okay. So let's get to the meat of it. Your testimony, you testified?

A. Yes, sir.

Q. Did you talk to Aimee about you testifying?

A. Yeah, that I was emotional. I told her I was emotional. I mean, I didn't hear -- after three years being locked up, then everything comes out at trial, I grieved then, at trial.

I was totally blown away, because everything came back right then, and then for -- no disrespect, Ms. Patterson to say, you murdered your son, you did this here, yeah, I was defensive. Yeah, I was upset. Yes, I was emotional. Yes, I

was combative, yeah. That was -- I didn't -- I don't do this every day.

Q. Were you truthful?

A. Yes. Yes, truthful as I know how.

Q. And what conversations, if any, did you have with Ms. Zmroczek about you taking the stand or not taking the stand?

A. She said she wasn't gonna put me on the stand because how I testified during the immunity hearing. But the whole time, I was always saying that I want to testify. I want to tell the truth. I want to tell it. I know I'm emotional now. I'm -- I want to cry now, but I got to tell it.

I have to tell it. I got to tell the truth. I can't -- I can't have you going around, this saying I'm a murderer, I murdered my own son. I needed to do this.

Q. So tell us about making that decision. That decision to testify or not to testify, that was based on what?

A. What she said, that she wasn't gonna put me up there.

Q. And you're talking about Ms. Zmroczek?

A. Yes.

Q. Is that how that decision was made?

A. Yes, sir.

Q. Now, you went in front of Judge Keesley ---

A. Yes.

Q. --- who asked you some questions?

A. Yes, sir.

Q. And he told you that this was your decision?
A. Yes.
Q. Somebody else couldn't make this decision for you?
A. That's what he said.
Q. But given that, your decision was still based upon what Ms. Zmroczek told you?
A. I trusted her. I don't do this. This is not -- this is -- I feel she's a professional. She know what she doing.

MR. THOMAS: Your Honor, I beg the court's indulgence.

THE COURT: Take your time.

MR. HUNSUCKER: Your Honor, is it possible that I could be called as a witness? I was very close to Foster while he was incarcerated in Lexington, and I know the whole story very clearly. I was at the trial. If I could be called as a witness on his behalf, I would appreciate it.

THE COURT: No, sir, you can't, but I appreciate you being here and saying that you're here to support him. It means a lot that y'all are present. This is a very terrible situation, a very horrible situation, that happened, and I feel -- I feel for you, Mr. Foster, that ---

MR. FOSTER: Thank you.

THE COURT: --- that this resulted in the death of your son, but thank you for being here. It means a lot to the court.

THE COURT: All right. Will you please tell me your

name, sir?

MR. HUNSUCKER: I'm sorry. I can't hear you.

THE COURT: Will you tell me your name, sir?

MR. HUNSUCKER: I'm Kelly (phonetic) Hunsucker.

THE COURT: Will you spell your last name for the court reporter?

MR. HUNSUCKER: H-u-n-s-u-c-k-e-r, Hunsucker. I'm a volunteer chaplain at the county jail when he was there and we became very close, and I know his story very well.

THE COURT: I appreciate you being here. Thank you.

MR. HUNSUCKER: Okay.

MR. THOMAS: Your Honor, if it please the court.

THE COURT: Yes, sir.

BY MR. THOMAS:

Q. Mr. Foster, last question. We've talked about this. You've been waiting a long time for this appearance in court.

A. Yes, sir.

Q. And I'm not suggesting that I have forgotten something, but I could have. So is there anything that I have forgotten to raise on your behalf, or is there anything that you feel that's important, briefly, that you would like to tell the court?

A. As far as ineffective assistance of counsel?

Q. I'm sorry. Yeah, anything in your case that I have forgotten to raise or you feel that's important to be noted.

A. Can I get my notes?

THE COURT: Can you look at his notes, is what he's asking, and I don't have an objection if he wants to go back and look at his notes to make sure he is ---

THE WITNESS: The yellow envelope.

MR. THOMAS: Your Honor, may I approach?

THE COURT: Yes, sir. I don't mind him double-checking to make sure that he testified to everything that he wanted. Take your time, sir.

THE WITNESS: I can read this?

THE COURT: I don't want you to read the whole thing, Mr. Foster. Just tell me if there's something that he didn't ask you about, as opposed to reading it into the record.

THE WITNESS: All right. When the judge stated -- I'm looking for the page. He stated that I had the right to stand my ground, he said, but I changed -- I changed my ground. I went inside.

I said counsel should have objected to that, because I didn't change my ground. My ground is still my property, the dwelling in the curtilage of my home.

THE COURT: Okay. All right. What else? Let me go back and look at my notes. I've taken lots of notes. Just so y'all know, I'm going to take this under advisement. I've been taking lots of notes to go back to the trial transcript, back to the stand your ground hearing transcripts, so I can

re-look at it, because I know that this is your last bite at the apple, Mr. Foster.

So let me just -- I don't know. I think you're talking about the judge's ruling. And if the judge was just ruling at that point in time, it may not have been appropriate for counsel to object.

If he was just stating that was his finding on the record, because there is a rule that says, once he rules, that's it. Okay. What's your next one?

THE WITNESS: Counsel's failure to discover and present significant mitigating evidence in reference to (indiscernible) and curtilage.

THE COURT: Okay. I have that down on my notes. I will look at that transcript portion. What else? Because I made a note about what she said when she testified, and then I'll double-check that in the transcript, although I thought that she made an appropriate record, but what else?

THE WITNESS: For not motioning for mistrial and preserving the following issues: Not applying the adversary process to the judge's knowledge of the legislature's intent, by the judges own admittance of not understanding, not knowing what the legislature meant, nor what they intended, and he didn't know what the legislation intended in a statute by, an unlawful act is occurring.

THE COURT: Are you speaking with respect to the jury

instructions, the fact that, as counsel stated, that he ended up giving every single instruction, which does make it difficult on an argument to the jury. But is that what you're talking about? I don't remember reading that in the transcript.

THE WITNESS: Transcript, page, 267, 270, and 276.

THE COURT: Okay. Let me make a note. I'll look at that. Okay. What else?

THE WITNESS: In other words, what he said, he didn't know what legislature meant by, unlawful act is occurring or has occurred. He also says that -- he conceded to the fact that I was attacked in a place where I had the right to be.

THE COURT: Okay. Let me go back and look at it to see if counsel was ineffective, because I don't think you raised any other issues. But let me look at that. I don't remember that from reading the transcript.

THE WITNESS: All right. That's good.

THE COURT: Okay. Those are the two things. I don't remember reading that in the transcript, but I will look at it, Mr. Thomas.

MR. THOMAS: Yes, ma'am. We have no further questions.

THE COURT: Okay. Do you have any questions for him?

MS. WILLINGHAM: No questions for this witness, Your Honor.

THE COURT: All right. Mr. Foster, you can step down.

You did an excellent job, by the way.

THE WITNESS: Thank you very much.

THE COURT: You did. You did an excellent job testifying.

THE COURT: Yes, sir. Anything further?

MR. THOMAS: Nothing further.

THE COURT: Okay. This is a pretty lengthy record. This is one of the trial transcripts I think I need to go back and just look at. I've written down a lot. Every allegation, I tried to write down what trial counsel testified to, what you've alleged that she failed to do. So let me go back and look at it.

MR. THOMAS: Your Honor, if it pleases the court, I might make just a very brief ---

MS. WILLINGHAM: Your Honor, we do have one more witness.

THE COURT: Oh, I'm sorry. I'm sorry. I didn't know you had an additional witness. I'm so sorry.

MS. WILLINGHAM: Yes, Your Honor, and this should be very brief. We will call Rhonda Patterson, the solicitor in this case.

THE COURT: Okay. Yes, Ms. Patterson. I'm so sorry.

(WITNESS IS SWORN IN UNDER OATH)

(DIRECT EXAMINATION)

BY MS. WILLINGHAM:

A. Good afternoon. My name is Rhonda Patterson, P-a-t-t-e-r-s-o-n.

Q. Good afternoon, Ms. Patterson.

A. Good afternoon.

Q. Have you had time to review the record in this case prior to the hearing?

A. Somewhat. I just kind of got it yesterday, but I did my best.

Q. Okay. And were you present for the testimony today?

A. Yes.

Q. Okay. And do you recall any evidence the State has that contradicts the testimony in this hearing today (indiscernible)?

A. Not only did I look at the transcript, even before I got the transcript, I did look at the discovery that I had in my system, and because I wanted to be certain that my memory was correct, and I don't have anything in my discovery that stated Bradley Foster was present at the scene.

None of the witnesses placed him there, not even his mother, not even his sister. Leanne doesn't place him there. Vernon doesn't place him there. None of the witnesses in their statement place him there. He never gave a statement

to law enforcement afterwards.

And this case was pending for two years. He never came to my office and gave me a statement. I never heard any mention of Bradley being there, I think, until maybe Mr. Foster brought it up.

But we had no evidence. We had no indication that we need to follow up with him, because no one placed him at the scene at the time of the murder.

Q. And do you recall questioning Ms. Leanne Cotton at the trial with regards to Bradley Foster's presence? If not, I can ---

A. I don't.

MS. WILLINGHAM: Your Honor, may I approach the witness?

THE COURT: Yes, ma'am.

MS. WILLINGHAM: And this is page 199 of the record.

BY MS. WILLINGHAM:

Q. If you will look at your question 18, if you'll just read that. (As read) I questioned Ms. Cotton. I said, okay, and did you see Bradley out there that day? And her response was, no, I didn't.

Q. And do you have any reason to believe that Ms. Cotton would have been untruthful in her testimony?

A. No.

Q. Okay. So you believe she was credible in that statement?

A. Yes. Because, like I said, no one else had placed him there.

Q. Thank you. And there were some allegations regarding a

forensic pathologist, and y'all did not call the forensic pathologist as far as your case. Do you recall why that is?

A. Just strategically, everyone that was there that saw the shooting testified that Will was dead instantly. He had a three-inch hole in his chest.

The paramedic testified when she got to the scene that she saw blood and tissue on the ground, and she was the one that called -- she said he was dead, and she is the one that called the coroner, so I didn't think I needed to call the pathologist with such an obvious death.

Q. And is it your recollection, did the paramedic testify as part of y'alls' case?

A. She did. I think her name was Tierra Robinson (phonetic).

Q. And did that also lead to y'alls' decision not to call the pathologist?

A. Yes, we just didn't think it was necessary. I mean, we wouldn't have been able to get any pictures or anything. That would have been prejudicial. So we just was trying to keep it clean and simple, and we just called the paramedic.

Q. Okay. And do you think any of your statements that you made in your closing argument were improper against Mr. Foster in any way?

A. I don't. But you know, I've tried many, many cases over the years, and I will tell you, you know, and the judge instructs the jury, the closing arguments are just summation, is what,

you know, the attorneys believe was presented in trial, and it is not evidence in the case, and they only are to consider evidence.

And you know, you get compassionate. You get emotional. You know, this is days of just going -- going full in, so I don't think I said anything inappropriate, but again, the judge always tells the jury to recall what they heard from the stand and the evidence that was presented.

Q. Do you recall what the courtroom configuration was, if Mr. Foster would have been able to see pictures that were presented, or how they were presented on a projector, or anything?

A. I can't remember. I do know we were in a smaller courtroom, what we refer to as 3C. I don't remember any mention or that he complained about not being able to see any of the evidence, and Judge Keesley certainly would have made us make sure that he could view anything that we were putting up, if it was brought to his attention.

Q. Okay. And there was a mention of his statement coming in, even though he did not testify. Do you recall that happening?

A. Yes. So he did testify in stand your ground. He was combative. I reserved myself because I did want him to testify in front of the jury because I did want them to see his demeanor. I guess strategically, that's what Ms.

Zmroczek and her co-counselor agreed to.

Mr. Foster was questioned by Judge Keesley about it being his decision not to testify. He decided not to testify. I do remember, against my objection, Judge Keesley did allow Ms. Zmroczek to enter in Mr. Foster's statement that he made while sitting inside one of the officer's cars.

I objected to that wholeheartedly because I did want my opportunity for him to tell his story, and for me to be able to cross him in front of the jury because of the way he testified in the stand your ground, but she persuaded Judge Keesley to allow that testimony in.

So it was my position that he got his testimony in without being subjected to cross-examination, which hardly ever happens.

Q. Do you think that was effective (indiscernible)?

A. I do. I do.

MS. WILLINGHAM: No further questions for this witness, Your Honor.

MR. THOMAS: I beg the court's indulgence.

THE COURT: Take your time.

MR. THOMAS: Your Honor, if it please the court.

THE COURT: Yes, sir.

MR. THOMAS: Ms. Patterson, I just want to say it's good to see you.

MS. PATTERSON: Good to see you, also.

MR. THOMAS: And I don't have any questions for you.

MS. PATTERSON: Thank you.

THE COURT: Hold on. My notes are a little jumbled. Give me one second just to look, and then I'll hear brief. This is for counsel. Okay. I don't have any additional questions about the record. Okay. Yes, sir, briefly.

MR. THOMAS: If it please the court.

THE COURT: Yes, sir.

MR. THOMAS: We stand on (indiscernible), but I've just taken one of the issues that I think is most important or very important, and it's telling his story.

THE COURT: So I'm making a note here to go back and look. I mean, didn't what Ms. Patterson just told me, that he effectively got to tell his story without being cross-examined, because he was in the patrol car, he was recorded with his statements about what happened, doesn't that give him the ability to tell his story?

MR. THOMAS: It appears that way.

THE COURT: Doesn't it?

MR. THOMAS: It appears that way. But if you read the transcript, the difference between (indiscernible) Leanne, I think, is untruthful. That's just not ---

THE COURT: But isn't that a credibility determination for the jury, not trial counsel's ineffectiveness?

MR. THOMAS: But see, I don't think they were given an

opportunity. I think that counsel made the attempt to get in Mr. Foster's, what they call utterances. He's in shock. He's saying, you know, I didn't pull the trigger, blah, blah, blah, kind of goes back to (indiscernible).

But the full story about Will's aggressiveness doesn't come out. That picture is not painted. Now, it is painted in the stand your ground. And I think the comparison is part one and part two. This is a long transcript. If you read part one, and Judge Keesley does a really good job, very thorough.

Mr. Foster, my client, gets the chance to testify and to paint that picture of Will's aggressiveness. You know, what doesn't come out in the second portion is, he chased me in the house. They mentioned the aluminum level, which is a long level, and swinging it at him.

They mention it, but that's about it. Not really sure they talk about going through the house and chasing him out, trying to turn the refrigerator over. All of these incidences of aggression is not in the trial. And when you read the State's witness list, it's really kind of sanitized.

It's kind of, well, you know, this is what happened, and that's what happened, but it doesn't show the meat of the aggression of Will. Leanne testified, oh, we (indiscernible).

THE COURT: Talk to me about the fact that, I mean, Mr. Foster made the decision not to testify. I read the record of that portion, and I know he said that he based it on his trial counsel's advice.

But I mean, explain to me or argue to me, persuade me, how that's ineffective, considering she saw how he was during stand your ground. You just heard Ms. Patterson, you know, corroborate her statement. He was combative, aggressive, short-tempered.

And trial counsel basically made the decision of, hey, Mr. Foster, this is your choice. But you know, that didn't go so well, and the jury sees that, they're going to think you shot him, that you committed murder, in the heat of passion, even.

MR. THOMAS: I think that, for one, my observation -- of course, I'm reading the written word.

THE COURT: Me too.

MR. THOMAS: --- is that the stand your ground was not that aggressive. There is a couple of things where he challenges Ms. Patterson, but it didn't jump out to me as, oh, he's a horrible witness. Standing in front of Judge Keesley and asking, you know, this is your decision, nobody can make this for you, I think the uneducated Defendant is going to rely on their attorney.

And Aimee took the stand and testified that she told him

she wasn't going to put him on the stand. I think her decision was wrong, and I think it was ineffective, and I think he went along with what she told him to do, and he did, and he answered Judge Keesley's questions.

You know, this is my decision, based upon what she told me. I think if you look at part one and part two, I've learned a long time ago, and I always try, even in post-conviction, is that if I can't tell the story, the judge can't make a decision.

And I think that Aimee didn't tell the story about Will's aggressiveness and what happened that day, and the jury couldn't make an informed decision. I think she was ineffective for doing that. And I think it is -- to me, it jumped out as an issue when I was reading the transcript. It's not even (indiscernible).

And I just think she should have put him on stand, even if he was going to be combative, because what she did is seal his fate by not putting him up. And I don't think they had the information to make a decision.

THE COURT: Okay. I gotta go back and read it. I've gotta look. Do you want to ---

MS. WILLINGHAM: Just briefly, I would just say that the whole night and day analogy is because -- and it's in the transcript, that Ms. Zmroczek was worried about opening the door to certain parts of his record, and this is all in the

record.

So I'll just let the record speak for itself. And while the facts of this case are sad and unfortunate, I don't think that the *Strickland* standard has been met here. I don't think that her performance was deficient, and I don't think in any way that he's been prejudiced by her counsel in the trial. That's all I have to say.

THE COURT: Okay. Let me go back and look at it. This was one of the lengthier transcripts, and I don't want to just skim it. I want to read sort of the meat of it to see, and then I'll let y'all know.

It may take me a little bit. Usually, I try not to sit on these. So between 10 and 14 days, you'll have something while it's fresh in my mind. I took a lot of notes.

MR. THOMAS: Thank you.

MS. WILLINGHAM: Thank you, Your Honor.

(THERE BEING NOTHING FURTHER, THE HEARING CONCLUDED.)

CERTIFICATE OF TRANSCRIBER

I, Kristen Primm, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Lexington County, South Carolina, on the 16th day of September 2025.

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

December 10, 2025



Kristen Primm
Certified Transcriber

FILED
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LISA M. COMES
CLERK OF COURT
LEXINGTON, SC

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Heirberone H. Foster, #353381, Applicant, v. State of South Carolina, Respondent.	CASE NO. 2022-CP-32-01641 **ORDER OF DISMISSAL WITH PREJUDICE**

Presiding Judge:	Hon. Jessica Ann Salvini
Applicant's Attorney:	Tommy A. Thomas, Esq.
Respondent's Attorney:	Sydney N. Willingham, Esq.
Plea Counsel:	Aimee J. Zmroczek, Esq.
Date of Hearing:	September 16, 2025
Court Reporter:	Trinita Brown, DCRP

This matter comes before the Court pursuant to an application for post-conviction relief ("PCR") filed by Heirberone H. Foster ("Applicant") on May 12, 2022. Respondent filed its Return, requesting that an evidentiary hearing be held on the allegations. On September 16, 2025, an evidentiary hearing was held at the Lexington County Courthouse before the Honorable Jessica Ann Salvini. Applicant was present and represented by Tommy A. Thomas, Esquire (PCR Counsel). Assistant Attorney General Sydney N. Willingham represented Respondent. In support of his claims, Applicant testified on his own behalf and presented testimony from Bradley Foster. Respondent presented testimony from Aimee J. Zmroczek, Esq. (Trial Counsel), and Assistant Solicitor Rhonda Patterson (Solicitor Patterson).

Following a thorough review of the record, along with the testimony and evidence presented at the hearing, this Court finds Applicant has failed to establish any constitutional

violations or deprivations entitling him to relief and, accordingly, **DENIES** and **DISMISSES** this action with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. During its December 2016 term, the Lexington County Grand Jury indicted Applicant for murder (2016-GS-32-3022); possession of a weapon during a violent crime (2016-GS-32-3340); and possession of a firearm by a violent felon (2016-GS-32-3023). Upon information and belief, Applicant was initially represented by John D. Delgado, Esquire, as the Public Defender's Office was conflicted due to their representation of Applicant in another criminal matter. Applicant then hired Aimee J. Zmroczek, Esquire, and Ryan Schwartz, Esquire, to represent him at trial. Eleventh Circuit Assistant Solicitors Rhonda Patterson and Luke Pincelli prosecuted the case.

Applicant proceeded to a trial by jury on May 20-23, 2019, in Lexington County before the Honorable William P. Keesley. At the conclusion of the trial, Applicant was found guilty as indicted on all charges. He was sentenced to concurrent terms of 30 years for murder, five years for possession of a weapon during a violent crime, and six months for possession of a weapon by a violent felon.

Direct Appeal

On May 30, 2019, a notice of intent to appeal was filed on the Applicant's behalf by Aimee Zmroczek, Esq. Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, perfected Applicant's appeal by filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967), and a petition to be relieved as counsel. The South Carolina Court of Appeals dismissed Applicant's appeal in an unpublished opinion and

granted counsel's motion to be relieved. State v. Foster, Op. No. 2021-UP-433 (S.C. Ct. App. filed Dec. 8, 2021). The Remittitur was returned on January 5, 2022.

SUMMARY OF FACTS GIVING RISE TO THE CONVICTION

On May 10, 2016, law enforcement was called to the home of Cathy and Applicant after receiving a call about a shooting incident in the Gaston area of Lexington County. (R. p. 285, line 4-10). Upon arrival, police declared an individual, later identified as Will Foster, deceased from an apparent gunshot wound. (R. p. 508, lines 4-18). Police located the suspect, Applicant, and detained him. (R. p. 236, lines 5-14). In the initial investigation, Crime Scene Investigator Keith Sprinkle concluded an incident had occurred between the Applicant and Will, which resulted in the Applicant shooting Will. (R. p. 508, lines 4-18).

Prior to the jury trial, a Stand Your Ground hearing (SYG hearing) was held, followed by a Jackson v. Denno hearing. During the SYG hearing, Applicant testified numerous times that the shooting was an accident and that he was only trying to scare Will and "make him stop" before he (Will) hurt somebody. (R. p. 117, lines 4-10; R. p. 128, lines 2-17; R. p. 115, lines 9-20). Applicant further testified during the hearing that when he pumped the shotgun, "it went off." (R. p. 14, lines 14-17). Judge Keesley found that defense counsel failed to establish the requisite elements for immunity from prosecution for murder. (R. p. 275, lines 11-13).

Following the SYG hearing, a State v. Denno hearing was held to determine the admissibility of the Applicant's statements to police regarding the incident. (R. p. 293, lines 19-23). During the hearing, Brandon Miller of the Lexington County Sheriff's Department and the Applicant testified. Sergeant Miller was one of the first officers to interact with the Applicant after he had been detained. (R. p. 285, lines 11-21). Judge Keesley found that the State met its burden

of proof and established that the Applicant had been properly advised of his rights and had voluntarily and intelligently waived them. (R. p. 298, lines 10-24).

Testimony was given by the Applicant's daughter, Haley Foster, who was present at the incident location on the day of the murder. (R. p. 324, lines 16-19). Haley Foster explained that prior to the shooting, Will and Applicant were arguing with each other. (R. p. 330, lines 3-7). During the argument, Will picked up the item in the photo marked State Exhibit 6 (Item). (R. p. 332, lines 14-20). Haley then began "tussling" with Will to prevent him from getting into an altercation with Applicant. (R. p. 335, lines 15-23). Haley and Will's girlfriend, Leann Cotton, pulled Will away from Applicant. (R. p. 224, lines 2-8). Shortly after getting the "item" away from Will, his girlfriend, Leann Cotton, and Haley began "[] talking, joking, and just standing there." (R. p. 227, lines 17-19). Haley stated that she believed the argument between Applicant and Will had ended. (R. p. 225, lines 13-17). Foster explained that Will, Leanne, and she were about to walk over to Leanne's house when Applicant walked outside with the shotgun. (R. p. 338, lines 10-24).

Additional testimony was given by Savanah Smith, a friend of Will's brother, Bradley Foster. (R. p. 353, lines 2-5). At the time of the incident, Savanah was staying at his aunt's house across the street from the incident location. (R. p. 353-54, lines 15-1). Savanah was looking through a window and witnessed Will's actions leading up to his murder. (R. p. 354, lines 13-16). Savanah explained that she heard people arguing and yelling from across the street. (R. p. 355, lines 16-23). From the window, she saw someone take away a 2x4-sized board out of Will's hands and throw it to the ground. (R. p. 356, lines 5-7). Savanah then saw the Applicant go inside for "several minutes" before returning outside with a shotgun, at which point he heard a gunshot. (R. p. 356, lines 12-18).

Testimony was given by Agent Suzanne Cromer of the South Carolina Law Enforcement Division, who was qualified as an expert iu the field of firearms and firearms identification. (R. p. 568, lines 8-9). Agent Cromer's testimony explained that the weapon used, a Mossberg Model 500A pump-action shotgun, was tested multiple times for any defects in the firing mechanism. (R. p. 578). Specifically, she tested the firing and safety mechanisms and found them to be in working order and free of defects. (R. p. 574, lines 4-15; R. p. 579, 5-13; R. p. 580, lines 13-15). Agent Cromer admitted that she did not attempt to disassemble and inspect the weapon's internal workings because doing so could affect its function. (R. p. 579, lines 5-13). As to the physical condition of the weapon, Agent Cromer explained that it was in fair condition, meaning it functioned but had cosmetic imperfections. (R. p. 583, lines 18-24). In her report, Agent Cromer noted that the weapon's safety mechanism was difficult to engage. (R. p. 588-9, 23-3). She attributed this to the paint around the safety mechanism. (R. p. 588-9, 23-3).

Agent Cromer explained that the only way the weapon could be fired would involve pulling the trigger. (R. p. 581, lines 3-5). She tested the gun to see if it would fire without the user pulling the trigger, a concept known as a "slam fire," and the gun did not fire without pulling the trigger[1]. (R. p. 591-592, lines 24-3). Agent Cromer testified that it would be possible for a slam fire to occur because of faulty ammunition or a malfunction with the gun and firing pin, but such an occurrence would be dependent on the weapon. (R. p. 588, lines 9-21). She compared the shotgun shell found at the crime scene with shells gathered during testing and was unable to observe anything abnormal about the shotgun shell found at the crime scene. (R. p. 591, lines 8-18).

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[1] "[Slam Fire]: A condition in which the shotgun fires as the action closes. This may occur with the trigger pulled or not pulled. In an autoloading shotgun this condition will usually cause the shotgun to continue to fire in a full automatic mode where such a mode was not intended." U.S. Department of Justice, NIJ Standard-0113.00, National Institute of Justice: Technology Assessment Program, at 2 (1989).

Agent Cromer conducted further tests to see if the gun would fire without the trigger being pulled. Upon investigation, she discovered that the weapon used was subject to a recall and had a safety warning. (R. p. 577, lines 2-9). The recall indicated that the weapon could fire if the plastic portion behind the trigger guard were struck with a mallet. (R. p. 577, (lines 2-11). Agent Cromer testified that she tested the weapon by striking the receiver with a mallet several times to see whether it would fire, but it did not. (R. p. 577, lines 12-25).

CURRENT APPLICATION

In his *pro se* application for post-conviction relief, Applicant alleges he is entitled to relief based on the following (excerpted verbatim):

"Ineffective Assistance of Trial Counsel"

The Applicant, through PCR Counsel, filed a "Motion for Discovery" with the Clerk of Court's office on March 27, 2023. In that motion, the Applicant stated:

> Applicant alleges that he did not pull the trigger of the gun, that the gun was bumped and went off." He asserts that he has retained a forensic expert to inspect the weapon that was introduced into evidence as State's Exhibit 28. The weapon is currently held in the Lexington County Court of General Sessions.

An "Order for Discovery" was filed with the Clerk's office on October 7, 2024, permitting Applicant the ability to examine the Mossberg 500 shotgun firearm at the Lexington County Sheriff's Department.

On September 10, 2025, Applicant, through PCR counsel, amended his application to include the following allegations:

1) Failure to adequately present evidence and argument in the Stand Your Ground Hearing prior to the Applicant's Jury Trial.
2) Failure to adequately present and preserve issues for Appeal of the Stand Your Ground Hearing.
3) Failure to present the Applicant as a witness during his Jury Trial.
4) Failure to call the Pathologist who performed the autopsy on the victim to counter testimony that the victim was in the process of leaving with his back turned toward the Applicant at the time of the shooting.

5) Failure to move before the Court for a direct verdict for the State's failure to prove cause of death through the forensic pathologist.

On September 11, 2025, Applicant, through PCR counsel, amended his application a *second* time to include the following allegations:

6) Failure to introduce or present evidence of Notice of Trespass of real property regarding the victim Heirberone Will Foster.
7) Failure to move for a mistrial regarding a sleeping juror.
8) Failure to request a Direct Verdict for the State's failure to prove cause of death.
9) Failure to raise the issue of Defense of Habitation at the stand your ground hearing.

Applicant raised the following additional allegations at the evidentiary hearing:

10) Failure to call Bradley Foster as a witness at the Stand Your Ground Hearing.
11) Failure to object. (PCR Tr. pp. 53-54; 78).
12) "Failure to discover and present significant mitigating evidence in reference to curtilage." (PCR Tr. p. 79)
13) "For not motioning for mistrial and preserving the following issues: not applying the adversary process to the judge's knowledge of the legislature's intent, by the judges own admittance of not understanding, not knowing what the legislature meant, nor what they intended, and he didn't know what the legislations intended in a statute, by an unlawful act is occurring." (PCR Tr. p. 79)
14) Failure to properly ensure Applicant could see all portions of his jury trial. (PCR Tr. p. 63).

Applicant requested relief in the form of a "new trial."

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[2] (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2) That the court was without jurisdiction to impose sentence;
3) That the sentence exceeds the maximum authorized by law;
4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

[2] S.C. Code Ann. §§ 17-27-10 to -160.

5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord. Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that

"[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).

Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the

burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S.at 112.

Finally, the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not

whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRCP (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of fact and conclusions of law as required by § 17-27-80 of the South Carolina Code:

INITIAL FINDINGS

This Court finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant, she rendered adequate assistance and exercised reasonable

professional judgment in his representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

Allegation 1:	**Failure to adequately present evidence and argument in the Stand Your Ground Hearing prior to the Applicant's jury trial.**
Allegation 10:	**Failure to call Bradley Foster as a witness at the Stand Your Ground Hearing.**

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to present evidence and argument in the SYG hearing prior to the Applicant's jury trial. This Court finds this allegation is without merit.

"No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Strickland 466 U.S. at 688-89. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. Strickland therefore established the rule that in proving a claim of ineffectiveness, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id.

Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546,

419 S.E.2d 778 (1992). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

"The circuit court is in the best position to assess witness credibility and make the necessary findings of fact." State v. McCarty, 437 S.C. 355, 878 S.E.2d 902 (2022); see generally State v. Glenn, 429 S.C. 108, 838 S.E.2d 491 (2019) ("The circuit court is the fact-finder in immunity hearings, and we are reluctant to infer findings of fact which do not appear in the record.").

PCR Evidentiary Hearing

A "Motion and Order for Virtual Testimony" was signed by the Honorable Debra McCaslin and filed on September 15, 2025, to allow Bradley Foster to testify via WebEx.[3] Bradley testified he was present the day his brother, Will Foster, got shot. (PCR Tr. 10). Bradley testified that his brother had anger issues growing up and would try to take his anger out on him and his dad. (PCR Tr. 11-12). Bradley also testified to his brother's drinking and to his brother's allegedly tumultuous relationship with his prior girlfriend, Leanne Cotton. (PCR Tr. 11-14). Bradley testified that Will grabbed a two-by-four and approached Applicant with it. (PCR Tr. pp. 16-17). Bradley testified that his brother, Will, was still trying to attack Applicant right before the gun "went off." (PCR Tr. p. 18). Bradley testified that he did not attend Applicant's jury trial because Trial Counsel told him it wasn't that day and they didn't need him. (PCR Tr. p. 19). However, he would have been willing to testify at the trial. (PCR Tr. p. 20).

On cross-examination, Bradley testified that he was not present when law enforcement arrived on the scene. (PCR Tr. p. 22). Further, Bradley testified that he never gave any statements

[3] Mr. Foster is currently being held in the Lexington County jail for a federal offense.

to law enforcement about what happened that day. (PCR Tr. p. 22). On redirect, Bradley testified that he did not recall giving a statement to Trial Counsel. (PCR Tr. p. 23).

Trial Counsel testified that she recalled discussing potential witnesses with Applicant. (PCR Tr. p. 25). Trial Counsel testified that she had an incredibly difficult time getting family members to come and testify on Applicant's behalf. (PCR Tr. p. 25). Trial Counsel subpoenaed the witnesses she could find to testify. (PCR Tr. p. 26). Trial Counsel testified that she did not recall specifically speaking to Bradley Foster; however, she attempted to talk with everyone and spent significant time getting people into court and the office. (PCR Tr. p. 25). As far as Bradley Foster's presence on the day of trial—Trial Counsel testified she has no recollection that he was present in a courtroom and that she would not send a witness home, especially when she was trying to get witnesses to testify. (PCR Tr. p. 26). Further, Trial Counsel testified that she informed the entire family of the trial. (PCR Tr. p. 26).

Trial Counsel testified that her primary concern regarding the SYG Hearing was that Applicant maintained throughout the case that he never pulled the trigger. (PCR Tr. p. 27). Specifically, Trial Counsel testified that Applicant claimed that the gun went off, accidentally killing Will, which made the defense of stand your ground difficult because you must fire in self-defense to be granted immunity, and Applicant would never admit that he fired the gun. (PCR Tr. p. 27). Trial Counsel testified she also had difficulty at the SYG hearing with the records and prior bad acts of Applicant, as he was out on bond for domestic violence against his wife, but she had let him back into the home. (PCR Tr. p. 28). Trial Counsel testified that Applicant did not request that she present any additional witnesses, and she did not recall any discussions with him regarding the presentation of Bradley as a witness. (PCR Tr. p. 28). Trial Counsel testified that the first time

she learned Bradley was available and ready to testify was two days before the PCR evidentiary hearing. (PCR Tr. p. 28).

On cross-examination, Trial Counsel testified that she did not identify Bradley Foster as present but instead listed him as a potential witness. (PCR Tr. p. 38). However, she does not recall Bradley ever wanting to speak with her. (PCR Tr. p. 39).

Assistant Solicitor Rhonda Patterson testified that she reviewed the discovery in this case and found no document stating that Bradley was present at the scene. (PCR Tr. p. 82). She testified that none of the witnesses placed Bradley there, including his mother, sister, and Leanne Cotton. (PCR Tr. p. 82). Further, Solicitor Patterson testified that Bradley never made any statements to law enforcement or her office during the two years this case was pending before trial. (PCR Tr. p. 82).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra.* This Court finds that the record is clear that Trial Counsel made a commendable attempt to secure immunity for Applicant. In fact, a full hearing was held on the stand-your-ground defense, and Trial Counsel presented several witnesses. Immunity was denied not because of any fault of Trial Counsel, but because the facts presented at the hearing did not warrant immunity. Trial Counsel *credibly* testified about her strategy at the SYG hearing, with a primary concern being whether there was a self-defense claim being made by Applicant since he claimed the shooting was accidental.

Further, the record of the SYG hearing supports a finding that Trial Counsel presented evidence and made appropriate arguments based on trial strategy. Additionally, Applicant presented no competent evidence to substantiate his claim that Trial Counsel did not properly handle the SYG hearing. Thus, Applicant failed in his burden of proving deficiency or prejudice. See Glover, *supra.*

This Court further finds Bradley's testimony to be, at best, cumulative to the testimony presented at the SYG hearing. This Court does not find that Bradley's testimony would have changed the outcome of Applicant's proceedings. Thus, Applicant has failed to prove deficiency or prejudice.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonable, effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation is **DENIED** and **DISMISSED.**

Allegation 2: Failure to adequately present and preserve issues for the appeal of the Stand Your Ground hearing.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to adequately present and preserve issues for appeal of the SYG hearing. This Court finds this allegation is without merit.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Rivers, 411 S.C. 551, 553, 769 S.E.2d 263, 265 (Ct. App. 2015).

In order to preserve issues at trial for appellate review, the issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." Id. at 142, 587 S.E.2d at 694.

To show prejudice where counsel fails to preserve an issue, applicant must show the trial court would have sustained an objection, and the unpreserved issue would have been successful on appeal. Milledge v. State, 422 S.C. 366, 811 S.E.2d 796 (2018). A PCR court must view the trial court's ruling on an issue through the same lens applied on appeal, giving appropriate deference to the trial court's findings. Id. at 380, 811 S.E.2d at 804.

PCR Evidentiary Hearing

Trial Counsel testified that she anticipates with every trial what the issues will be and tries to preserve them. (PCR Tr. p. 29). Trial Counsel testified that she believes she preserved the issues she raised and made objections where she could. (PCR Tr. p. 29).

Findings

This Court finds that Applicant has failed to overcome the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* Applicant failed to present any credible evidence that there were any issues not adequately preserved for appeal. Trial Counsel *credibly* testified that it is her practice to anticipate what the issues will be prior to trial and to try to preserve them [for appeal]. Notably, Applicant did not provide this Court with what objections Trial Counsel should have made, or what issues Trial Counsel failed to preserve.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render adequately effective assistance of counsel under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation is **DENIED** and **DISMISSED.**

Allegation 3: Failure to present the Applicant as a witness during his Jury Trial.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to present him as a witness during his jury trial. This Court finds this allegation is without merit.

"The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. On the other hand, if a defendant chooses to testify, he subjects himself to cross-examination . . . ." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner during its deliberations." Id. "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Id.

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). "In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's

case." Speaks v. State, 377 S.C. at 399, 660 S.E.2d at 514 (2008). Deficiency "is measured by an objective standard of reasonableness." Taylor, 404 S.C. at 359, 745 S.E.2d at 102.

To establish prejudice, an applicant must show that "but for counsel's error, there is a reasonable probability the result of the proceedings would have been different." Id. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland, 466 U.S. at 700. "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Weldon v. State, 436 S.C. 69, 81, 870 S.E.2d 183, 189 (Ct. App. 2021). Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010)). "[W]here trial counsel admits the testimony of a certain witness *may have made the difference in obtaining an acquittal*, the Court may find ineffective assistance." Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998) (emphasis added).

Jury Trial

The following colloquy occurred with Applicant and the trial court regarding his right to testify:

THE COURT:	So your client does not intend to testify or does intend to testify?
MS. ZMROCZEK:	He does not.
THE COURT:	Mr. Foster, I have to go over some things with you. Would you raise your right hand?

(Whereupon, Heirbrane H. Foster was duly sworn by the Court.)

THE COURT: Thank you. You can have a seat. Mr. Watford, you understand that the defense is now given the opportunity to present evidence for the jury to consider?
THE DEFENDANT: Yes, sir.
THE COURT: What did I say, Watford? I apologize.
THE DEFENDANT: Yeah.
THE COURT: Foster. I apologize.
MR. SCHWARTZ: He understands, too, I think.
THE COURT: A senior moment. I apologize. Mr. Foster?
THE DEFENDANT: Yes, sir.
THE COURT: You understand we're at the stage of the trial where the defense can present evidence for the jury to consider?
THE DEFENDANT: Yes, sir.
THE COURT: In that regard, if you wish to testify you may testify. Do you understand that?
THE DEFENDANT: Yes, sir.
THE COURT: If you choose not to testify, I'm gonna tell the jury that they cannot hold your silence against you in any way at all. Do you understand that?
THE DEFENDANT: Yes, sir.
THE COURT: You have an absolute right not to testify. You have an absolute right to remain silent. Do you understand that?
THE DEFENDANT: Yes, sir.
THE COURT: So if you choose not to testify, I will tell the jury they cannot hold your silence against you, they're not to discuss it in their deliberations, it's not to enter their minds in making a decision of whether you're guilty or not guilty. Do you understand?
THE DEFENDANT: Yes, sir.
THE COURT: The decision about whether you testify or not is your decision to make and yours alone. Do you understand?
THE DEFENDANT: Yes, sir.
THE COURT: I expect that you might confer with family members, friends, anyone whose opinion you value on important decisions, your attorneys, but ultimately you're the person on trial and it's your decision to make. Do you understand?
THE DEFENDANT: Yes, sir.
THE COURT: Now if he testifies, would he have a record that would subject him to impeachment?
MS. ZMROCZEK: I believe that -- Your Honor, there were those -- the two CDVs that were from 2012, I believe.
THE COURT: CDV what?
MS. ZMROCZEK: HAN, high and aggravated in nature.
MS. PATTERSON: High and aggravated.

MS. ZMROCZEK: And it was a -- we had an issue about that, which we didn't raise previously, but just that it wasn't with this family -- it wasn't even with this family member, any member of this family, Your Honor. Your Honor, it was a completely unrelated paramour.

THE COURT: All right. Rule 609 reads that evidence that a witness has been convicted of a crime is not admissible where the accused is the witness unless the Court determines that the probative value of admitting that evidence outweighs its prejudicial effect to the accused in this situation. This is for crimes which are punishable by imprisonment in excess of a year and generally within ten years and that did not involve dishonesty or a false statement. Reviewing the matter, I'm unable to make a determination if the probative value of admitting that evidence would outweigh its prejudicial effect to the accused. What that means, Mr. Foster, is if you take the witness stand, I'm not gonna let the State ask you about those two CVS. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: The only way that would come in is if you open the door in some way. And your attorneys can discuss with you what opening the door means, but to give you an example of what's happened in cases over which I've presided, there have been situations where I've ruled that the State could not ask the defendant about certain crimes and then the defendant got on the stand and said I've never been in any trouble with the law, which was just a flat-out lie, they had several convictions, so they opened the door for the State to be able to ask about the convictions. Do you understand what I'm talking about?

THE DEFENDANT: Yes, sir.

THE COURT: That might not be the only way to open the door, but that's an example. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Has anybody exercised any type of undue influence to get you to decide to testify or not testify?

THE DEFENDANT: No, sir.

THE COURT: So whatever decision you make it's your decision and yours alone?

THE DEFENDANT: Yes, sir.

THE COURT: It's made of your own free will?

THE DEFENDANT: Yes, sir.

THE COURT: Today are you under the influence of any type of substance that adversely affects your thinking?

THE DEFENDANT: No, sir.

THE COURT: Do you suffer from any physical or mental problems that

adversely affect your thinking today?

THE DEFENDANT: No, sir.

THE COURT: All right. Mr. Foster, I'm gonna make some findings right now. You can change your mind if you wish, it's up to you, but at this point I'm gonna make a finding that you understand you have a right to testify, you have a right not to testify. If you choose not to testify, I'm gonna tell the jury they cannot hold your silence against you in any way at all. You understand that the decision about whether you testify or not is yours and yours alone and that no one has forced you, threatened you, coerced you, exercised in type of undue influence over you to get you to testify or not testify. Do you understand my ruling about if you testify you're not going to be subjecting yourself to cross-examination about prior convictions for domestic violence?

THE DEFENDANT: Yes, sir.

THE COURT: So I find that you've made the decision freely, knowingly, voluntarily and intelligently as to whether you testify or not of your own free will and accord. Now whatever decision you've made at this point, as I mentioned a moment ago you could change your mind until such time as you might actually come up here and start testifying. Do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: Okay.

. . . .

THE COURT: Ladies and gentlemen of the jury, please give me your intention. I need to give you an instruction related to the election of the Defendant not to testify. The fact that Mr. Foster elected not to testify is not a fact to be considered by you in any way in your deliberations and in your consideration on the question of whether he is guilty or not guilty. His decision not to testify must not be considered by you in any manner whatsoever against him. An accused has a constitutional right to remain silent and the assertion of that right cannot and must not be used in any way against him in your deliberations. Under your oath, you're to reach no inference and you're to draw no conclusion whatsoever from the fact that Mr. Foster elected not to testify. His decision not to testify should not be discussed by you in the jury room, it should not enter your minds in making your decision on the question of whether he is guilty or not guilty. The State has the entire burden of proof and an accused has no obligation to prove anything at all.

(ROA pp. 638–644; 695–696).

PCR Evidentiary Hearing

Trial Counsel testified that hours were spent preparing Applicant to testify. (PCR Tr. p. 29). Trial Counsel testified that the SYG hearing provided an opportunity to see how Applicant would testify on the stand. (PCR Tr. pp. 29-30). Trial Counsel testified that Applicant was combative and angry on the stand at the SYG hearing. (PCR Tr. pp. 30; 47). Further, Trial Counsel testified she believed it was a reasonable decision for Applicant not to testify at trial, but confirmed it was Applicant's decision to make. (PCR Tr. p. 31).

Applicant testified his decision not to testify was based on what Trial Counsel told him because he trusted her as a professional. (PCR Tr. p. 75).

Solicitor Patterson also testified that Applicant was combative at the SYG hearing and that she wanted him to testify before the jury so they could see his demeanor. (PCR Tr. p. 85). Further, Solicitor Patterson testified that Trial Counsel obtained a statement from Applicant over her objection, which she believed was effective because it allowed Applicant's testimony without subjecting it to cross-examination. (PCR Tr. p. 86).

Findings

This Court finds that Applicant has failed to overcome the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court finds Applicant's testimony on this matter *not credible*. Trial Counsel *credibly* testified that although she advised Applicant not to testify, she left the decision for him to make. Further, this Court finds that Trial Counsel's advice was based on Applicant's testimony at the SYG hearing. Trial Counsel *credibly* testified that Applicant did not present well, was combative, short-tempered, and, despite hours of

preparation, Trial Counsel did not believe that the jury would find Applicant credible.

Solicitor Patterson also *credibly* testified that she had hoped Applicant would take the stand and testify because she believed the jury would be able to observe his short temper. Trial Counsel had legitimate concerns that the jury would find that Applicant had a short temper and was quick to anger, which would have hurt his defense at trial. Additionally, the record shows that Applicant freely and voluntarily waived his right to testify after the trial court conducted a thorough colloquy.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render adequately effective assistance of counsel under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation is **DENIED** and **DISMISSED.**

Allegation 4: **Failure to call the Pathologist who performed the autopsy on the victim to counter testimony that the victim was in the process of leaving with his back turned toward the Applicant at the time of the shooting.**

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to call the Pathologist who performed the autopsy on the victim to counter testimony that the victim was in the process of leaving with his back turned toward the Applicant at the time of the shooting. This Court finds this allegation is without merit.

To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing, or their testimony must otherwise be presented, consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540

(1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). "In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis— and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. See, e.g., Smith v. State, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); Edwards v. State, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); Glover, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was not deficient by failing to call alibi witnesses when two witnesses who testified at PCR hearing did not establish the alibi).

PCR Evidentiary Hearing

Trial Counsel testified that in her opinion, pathologists usually do not assist the defense and therefore, she does not typically call them as a witness. (PCR Tr. p. 31). Further, Trial Counsel recalled most of the witnesses at trial testifying that the victim had his back turned or partially turned. (PCR Tr. p. 31). Trial Counsel testified she did not believe it would help the defense's case to call the pathologist. (PCR Tr. p. 31). On cross-examination, Trial Counsel testified that the

victim was shot in the back rather than the side and that the pathologist would not testify to any speculation. (PCR Tr. p. 45).

Solicitor Patterson testified that the State did not call the pathologist because everyone who was present at the scene who saw the shooting testified that the victim was dead instantly. (PCR Tr. p. 84). Further, the paramedic testified that the victim was dead and therefore, they did not believe it was necessary to call the pathologist. (PCR Tr. p. 84).

Findings

This Court finds that Applicant has failed to overcome the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court additionally finds that Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra.* Applicant failed to provide the forensic pathologist to support his claim at the evidentiary hearing. Moreover, Applicant did not articulate what the forensic pathologist would testify to that would have aided his defense.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to establish that Trial Counsel was deficient in failing to call the Pathologist who performed the autopsy on the victim to counter testimony that the victim was in the process of leaving with his back turned toward the Applicant at the time of the shooting. It follows that Applicant cannot prove resulting prejudice.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation is **DENIED** and **DISMISSED.**

Allegation 6: **Failure to introduce or present evidence of Notice of Trespass of real property regarding the victim Heirberone Will Foster.**

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to introduce or present evidence of Notice of Trespass of real property regarding the victim Heirberone Will Foster. This Court finds this allegation is without merit.

Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such a strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

PCR Evidentiary Hearing

Trial Counsel testified Applicant had pending domestic violence charges that made the case difficult to navigate because of possible character evidence coming in had they decided to "open the door" by introducing evidence of the trespass order against the victim. (PCR Tr. p. 33). Trial Counsel testified it was a strategy not to pursue introducing the Notice of Trespass regarding the victim. (PCR Tr. p. 33). Trial Counsel again testified on cross-examination that it was a strategy not to do anything with the trespass order against the victim because of the risk of opening the door to other bad character evidence. (PCR Tr. p. 48).

Findings

This Court finds that Applicant has failed to overcome the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court additionally finds that

Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra.* This Court finds Trial Counsel's decision to leave the Notice of Trespass of real property regarding the victim out of evidence to be part of a trial strategy that falls within the scope of reasonable representation. Trial Counsel *credibly* testified that it was a strategy to leave the Notice of Trespass out of evidence to prevent opening the door to character evidence of Applicant that would potentially hurt his defense. Thus, Applicant failed in his burden of proving deficiency or prejudice. See Glover, *supra.*

It is essential to highlight that, prior to the shooting incident, the Applicant faced charges of Domestic Violence–1st Degree against his wife. At that time, he was released on bond, which explicitly prohibited him from returning to their residence. Consequently, the Applicant was in clear violation of a court order when he shot his son, being on property he was legally barred from entering. Moreover, addressing any trespass notice regarding the victim would have inevitably allowed this critical evidence to be introduced, significantly undermining his defense. Trial Counsel's strategy was sound and within the scope of reasonable representation.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonable effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation is **DENIED** and **DISMISSED.**

Allegation 7: Failure to move for a mistrial regarding a sleeping juror.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing

to move for a mistrial regarding a sleeping juror. This Court finds this allegation is without merit.

A "defendant has a constitutional right to be tried by competent jurors," which "implies a tribunal both impartial and mentally competent to afford a hearing." Tanner v. United States, 483 U.S. 107, 134 (1987) (Marshall, J., dissenting) (citing Jordan v. Massachusetts, 225 U.S. 167, 32 (1912)). Consistent with these principles, "a juror who has not heard all the evidence in the case or the court's instructions as to the applicable principles of law is grossly unqualified to render a verdict." People v. Valerio, 141 A.D.2d 585, 529 N.Y.S.2d 350, 351 (1988).

Juror misconduct discovered post-trial is not properly considered as newly discovered evidence; instead, it is a separate basis for a new trial. McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013). Misconduct of a juror is "a fact to be determined by the trial judge from the circumstances" of each case. 23A C.J.S. Criminal Law § 1437 at 381; see also State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999) (trial court has broad discretion in assessing allegations of juror misconduct); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), cert. denied, 525 U.S. 107 (1999). The general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence. See 23A C.J.S.Criminal Law § 1437 at 381. Indeed, the great majority of courts in other states considering the sleeping juror question have utilized this approach. See 59 A.L.R.5th at 42 (because harm to defendant does not automatically follow a determination that a juror was sleeping, most states require a defendant to show prejudice such as the juror "failed to follow some essential part of the proceedings"); People v. Bradford, 15 Cal.4th 1229, 65 Cal.Rptr.2d 145, 939 P.2d 259 (1997).

Jury Trial

THE COURT: Hold on, Mr. Sprinkle. Ladies and gentlemen of the jury, I'm gonna send you back to the jury room. You've got to keep your eyes open. Everybody needs to be able to stay awake and keep your eyes open, so if you need some caffeine or

> something, tell the bailiff. Leave you notes. Don't discuss the case.

(ROA p. 521)

PCR Evidentiary Hearing

Trial Counsel testified she believed Judge Keesley did what he could to appropriately address the issue of the alleged sleeping juror. (PCR Tr. p. 33). Further, Trial Counsel testified that it is not her practice to move for a mistrial on these grounds. Trial Counsel testified she did not believe it would have affected the outcome of the trial. (PCR Tr. p. 34). Trial Counsel testified in her opinion that Judge Keesley would not grant a mistrial on the ground of a sleeping juror. (PCR Tr. p. 34). On cross-examination, Trial Counsel testified she did not think there was an issue after Judge Keesley addressed it on the record.

Findings

This Court finds that Applicant has failed to overcome the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court finds that Trial Counsel was not ineffective for deciding not to move for a mistrial based on an alleged sleeping juror. Applicant relies on Judge Keesley's statement on the record to support this allegation, but failed to provide any evidence at the evidentiary hearing of how a motion for mistrial on the basis of the alleged sleeping juror would have affected the outcome. Trial Counsel *credibly* testified that once Judge Keesley addressed the issue, the problem was resolved. Under these circumstances, Trial Counsel's decision was reasonable and well within the wide range of competent professional judgment. Thus, Applicant failed in his burden of proving deficiency or prejudice. See Glover, *supra.*

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonable effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation is **DENIED** and **DISMISSED.**

Allegation 8: Failure to request a Directed Verdict for the State's failure to prove the cause of death.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to request a Directed Verdict for the State's failure to prove cause of death. This Court finds this allegation is without merit.

When considering a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Larmand, 415 S.C. 23, 30, 780 S.E.2d 892, 895 (2015) (citing Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). The role of the trial court is only to determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). If there is any direct or circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). "In deciding motions for a directed verdict. . . the evidence and all reasonable inferences which may be drawn from it must be viewed in the light most favorable to the non-moving party. If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury." Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 611, 518 S.E.2d 591, 597 (1999).

"[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict . . . must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) (citing State v. Fogle, 256 S.C. 149, 181 S.E.2d 483 (1971)). The trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007).

Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. at 693, 104 S. Ct. at 2067. Where counsel articulates a valid strategic reason for his action or inaction, based on an objective standard of reasonableness, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1990); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

PCR Evidentiary Hearing

Trial Counsel testified she recalled the paramedic testifying as to the cause of death, and there was no question of how the victim died. (PCR Tr. p. 32).

Solicitor Patterson testified that every witness who was present at the scene and saw the shooting testified that the victim was dead instantly. (PCR Tr. p. 84). Solicitor Patterson testified that, because the paramedic testified that the victim was dead, the State did not believe it was necessary to call the pathologist. (PCR Tr. p. 84).

Findings

This Court finds that Applicant has failed to overcome the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court finds Trial Counsel was not ineffective for deciding not to move for a directed verdict based on the State's alleged failure to prove cause of death. Trial Counsel *credibly* testified that the paramedic testified to the victim's cause of death, and there was no question as to the cause of death. (PCR Tr. p. 32). Based on the record before this Court and the testimony provided, this Court finds that even if Trial Counsel had moved for a directed verdict as Applicant contends, the trial court would not have granted it.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonable, effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation is **DENIED** and **DISMISSED.**

Allegation 9: Failure to raise the issue of Defense of Habitation at the Stand Your Ground hearing.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to raise the issue of defense of habitation at the Stand Your Ground hearing. This Court finds this allegation is without merit.

Protection of Persons and Property Act[4] (the Act) provides the following:

[4] S.C. Code Ann. § 16-11-410 to -450.

A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
   1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
   2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

B) The presumption provided in subsection (A) does not apply if the person:
   1) against whom the deadly force is used has the right to be in or is a lawful resident of the dwelling, residence, or occupied vehicle including, but not limited to, an owner, lessee, or titleholder; . . . .

C) A person who is not engaged in an unlawful activity and who is attacked in another place where he has a right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

The General Assembly enacted the Act to codify the common law Castle Doctrine. State v. Curry, 406 S.C. 364, 372, 752 S.E.2d 263, 267 (2013). "Consistent with the Castle Doctrine and the text of the Act, a valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 371, 752 S.E.2d at 266. "This includes all elements of self-defense, save the duty to retreat." Id.

"[T]he legislature intended defendants be shielded from trial if they use deadly force as outlined under the Act." State v. Duncan, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). Thus, upon motion, the issue of immunity under the Act must be decided prior to trial. Id. A party seeking immunity under the Act must show entitlement to immunity by a preponderance of the evidence. Id. at 411, 709 S.E.2d at 665. Moreover, the Act is predicated on the absence of

aggression or fault on the defendant's part in bringing on the difficulty. State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013), citing State v. Grantham, 224 S.C. 41, 45, 77 S.E.2d 291, 292 (1953). Notably, the Act is a procedural provision that "does not contain any substantive provisions of law"; thus, it "is not relevant to the work of a jury." State v. Marin, 404 S.C. 615, 625, 745 S.E.2d 148, 154 (Ct. App. 2013).

PCR Evidentiary Hearing

Trial Counsel testified that it was trial strategy not to raise the defense of habitation. (PCR Tr. p. 34). Trial Counsel testified that at the SYG hearing, the State emphasized that Applicant was not in a place he had the right to be at the time of the shooting, and she did not want that coming out in front of the jury. (PCR Tr. p. 34). Further, Trial Counsel testified that no one testified that the victim was making a forcible entry into the home. (PCR Tr. pp. 34-35). Trial Counsel testified that she did not believe it was a fruitful defense, as it could have opened the door to substantial bad-character evidence against Applicant. (PCR Tr. p. 35). On cross-examination, Trial Counsel again testified that there was no evidence to support the assertion that the victim entered the house. (PCR Tr. p. 43).

Findings

This Court finds that Applicant has failed to overcome the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court additionally finds that Applicant has failed to overcome his burden in proving that Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra.* This Court finds Trial Counsel's decision not to raise the issue of defense of habitation at the SYG hearing to be part of a trial strategy that falls within the scope of reasonable representation. Trial Counsel

credibly testified that it was a strategy not to use the defense of habitation at the SYG hearing. Thus, Applicant failed in his burden of proving deficiency or prejudice. See Glover, *supra.*

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonable effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation is **DENIED** and **DISMISSED.**

Allegation 11a: Failure to object to Judge Keesley's statement at the SYG hearing.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to object to Judge Keesley's statement at the SYG hearing. (PCR Tr. p. 78). This Court finds this allegation is without merit.

"An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Vieux v. Pepe, 184 F.3d 59, 64 (1st Cir. 1999) (finding "counsel's performance was not deficient if he declined to pursue a futile tactic.") (applying Strickland, 466 U.S. at 688, 694 (explaining that, in order to succeed on a claim of ineffective assistance, defendant must demonstrate both deficient performance and cognizable prejudice)); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable

argument for exclusion of the evidence). Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3rd Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland.") cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot).

Trial

At the SYG hearing, the trial judge addressed the law and his findings as follows:

> First of all, the Defense of Persons and Property Act is a law which our Supreme Court has encouraged the legislature to revisit. It is a law which the courts have tried to interpret as best they can and -- and there are some issues that arise in trying to interpret it as to -- as to exactly what the legislature intended or what was meant. The law does have a preamble and states a purpose and included in that is that it's proper for law abiding citizens to protect themselves, their families and others from intruders.
>
> . . . .
>
> Now as to the unlawful and forcible act occurring, the Court find that the greater weight of the evidence establishes that basically the difficulty had resolved. It -- I'm not saying people were not upset and people were not angry, but the threat, if you will, was over. There -- there was no unlawful and forcible act taking place by the victim at the time that seems to be significant. The language that's troubling is has occurred. An unlawful and forcible act has occurred. I don't know what the legislature intended for that, but logically and in any real world setting if you're going to tie an act to self-defense law, you have to incorporate those principles and self-defense law establishes that once the difficulty has ended, once the threat is over, you don't get to jump back in and say well, he did this a while back. It's -- it's

> just not -- in my view it's not the purpose of the law just if -- it's not the purpose of the law to grant immunity from prosecution based on something that had occurred previously. There would have to be some nexus to a current existing threat.
>
> . . . .
>
> Mr. Foster may have an excellent defense to the charge of murder. He may well have an excellent defense that entitles him to a not guilty verdict or the lowest of the lesser included defenses. It's a tragic, tragic situation, but to sum it all up I'll say what I said at the beginning. I don't think this is a situation that the legislature intended to prevent the State from prosecuting. I think this is a situation where it's a prototypical jury case. There's a whole bunch of dispute about exactly what happened out there, there's a whole bunch of concurrence about what happened out there; who was drunk, who said what, when. But I think that the State is within its rights to prosecute the Defendant and he's not entitled to immunity.

(Trial Tr. pp. 267; 270, 276).

PCR Evidentiary Hearing

On direct examination, Applicant testified that he believed Trial Counsel should have objected to Judge Keesley's statement at the SYG hearing. (PCR Tr. p. 78; l. 14-20).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance of counsel and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court finds there was no legal basis for an objection to Judge Keesley's statement during the SYG hearing. It is clear from the record that Judge Keesley was merely walking through the law as required and making the findings of fact required by the law.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonable, effective assistance under prevailing professional norms. Furthermore, Applicant has failed to

present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation is **DENIED** and **DISMISSED.**

Allegation 11b: Failure to object to the Solicitor's comments in closing.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to object to statements made by the Solicitor in closing. (PCR Tr. pp. 53-54). This Court finds this allegation is without merit.

"An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Vieux v. Pepe, 184 F.3d 59, 64 (1st Cir. 1999) (finding "counsel's performance was not deficient if he declined to pursue a futile tactic.") (applying Strickland, 466 U.S. at 688, 694 (explaining that, in order to succeed on a claim of ineffective assistance, defendant must demonstrate both deficient performance and cognizable prejudice)); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney and will very seldom constitute objectively deficient

representation." United States v. Nguyen, 379 F. App'x 177, 181 (3rd Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland.") cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot).

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its contest should stay within the record and reasonable inferences to it." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998) (finding the solicitor's misstatement of the law concerning parole considerations that were not cured by the judge's instructions were improper); See Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 698, 610 (2004) ("A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony.") "On appeal, the appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624-625 (1996).

"The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); See Randall, 356 S.C. at 643, 591 S.E.2d at 610-11) (finding the solicitor's analogy comparing the defendant to a "dirty cockroach" did not infect the trial to make the resulting conviction a denial of due process, noting the objected argument encompassed ten lines of the transcript and was repeated, but an isolated reference).

Trial

In closing, the Solicitor presented the following:

> We wanted to make sure that it couldn't have accidentally went off and that particular gun that he used could not have accidentally went off. No one saw him go under the car and begin working on it.
>
> . . . .
>
> Nobody said anything about them chasing each other around or threatening each other. They both were just cursing each other out. Both of them.
>
> . . . .
> And you know what doesn't add up that she talked about that it didn't add up? If he meant to scare him, if it was an accident or whatever, he didn't drop the gun when it went off.

(Trial Tr. pp. 742; 743, 744).

PCR Evidentiary Hearing

Solicitor Patterson testified she did not believe any of her statements during the closing argument were improper against Applicant. (PCR Tr. p. 84).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance of counsel and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court finds there was no legal basis for an objection to the Solicitor's closing argument. However, assuming *arguendo* that an objection should have been made, this Court finds that any error was cured by the jury instruction to only consider the evidence.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonable, effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation is **DENIED** and **DISMISSED.**

Allegation 12: Failure to discover and present significant mitigating evidence in reference to the curtilage.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to discover and present mitigating evidence in reference to the curtilage. (PCR Tr. p. 79). This Court finds this allegation is without merit.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). The applicant must further present evidence demonstrating how the discoverable matters or defenses would have resulted in a different outcome. Id. Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

PCR Evidentiary Hearing

Trial Counsel testified to her recollection of the State's evidence in this case, which was that Applicant had shot his son. (PCR Tr. pp. 27-28). Trial Counsel testified Applicant never would admit to the shooting and maintained it was an accident, which made the SYG hearing difficult to prevail on. (PCR Tr. pp. 27-28). Trial Counsel testified that another challenge was the records and prior bad acts of a lot of the witnesses, including Applicant. (PCR Tr. p. 28).

Trial Counsel testified it was a strategy not to bring in evidence of the notice of trespass against the victim, Will Foster, or use the defense of habitation, to prevent "opening the door" to character evidence against Applicant. (PCR Tr. p. 33; 34). Trial Counsel testified that at the SYG hearing, the State emphasized that Applicant was not in a place he had the right to be at the time of the shooting, and she did not want that coming out in front of the jury. (PCR Tr. p. 34). Further, Trial Counsel testified there was no one who testified that the victim was making a forcible entry into the home. (PCR Tr. pp. 34-35). On cross-examination, Trial Counsel again testified that there was no evidence to support the claim that the victim entered the house. (PCR Tr. p. 43).

On direct examination, Applicant testified that Trial Counsel failed to discover and present mitigating evidence in reference to the curtilage. (PCR Tr. p. 79).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* Applicant failed to present any competent evidence that he now claims Trial Counsel was constitutionally ineffective for failing to investigate mitigating evidence regarding the curtilage. This Court finds that this allegation was further addressed in the Findings section of Allegation 9, *supra.*

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonable, effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation is **DENIED** and **DISMISSED.**

Allegation 13: Failure to motion for a mistrial and preserving issues at the SYG hearing.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to motion for a mistrial and preserving issues. (PCR Tr. p. 79). Applicant refers to the record to support his allegation. (ROA pp. 267; 270; 276; PCR TR. p. 80). This Court finds this allegation is without merit.

PCR Evidentiary Hearing

Applicant testified at the hearing that he believed Trial Counsel was ineffective for:

> "not motion[ing] for mistrial and preserving the following issues: not applying the adversary process to the judge's knowledge of the legislature's intent, by the judges own admittance of not understanding, not knowing what the legislature meant, nor what they intended, and he didn't know what the legislation intended in a statute by, an unlawful act is occurring."

(PCR Tr. p. 79).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* The record does not reflect any grounds for a motion for a mistrial arising from Judge Keesley's ruling at the pre-trial SYG hearing. (ROA pp. 267-276). As the record reflects no fruitful grounds for a mistrial at the *pre-trial* immunity hearing, there can be no Strickland error or prejudice in counsel's representation at this stage of Applicant's criminal proceedings. Further, the Court of Appeals previously addressed the statutory intent of S.C. Code § 16-11-440 and its application in this case; Applicant improperly reasserted the issue in his post-conviction proceedings.

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonable effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation is **DENIED** and **DISMISSED.**

Allegation 14: Failure to properly ensure Applicant could see all portions of his jury trial.

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to ensure Applicant could see all portions of his jury trial. (PCR Tr. p. 63). This Court finds this allegation is without merit.

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). "In order to establish a claim for ineffective assistance of counsel, the applicant must show that: (1) counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) counsel's deficient performance prejudiced the applicant's case." Speaks v. State, 377 S.C. at 399, 660 S.E.2d at 514 (2008). Deficiency "is measured by an objective standard of reasonableness." Taylor, 404 S.C. at 359, 745 S.E.2d at 102.

To establish prejudice, an applicant must show that "but for counsel's error, there is a reasonable probability the result of the proceedings would have been different." Id. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland, 466 U.S. at 700. "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of

counsel." Weldon v. State, 436 S.C. 69, 81, 870 S.E.2d 183, 189 (Ct. App. 2021). Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010)).

PCR Evidentiary Hearing

Applicant testified that he could not physically see the screen used for presenting evidence during his trial; Applicant testified he asked to be moved to no avail. (PCR Tr. p. 63).

Solicitor Patterson testified she did not recall any mention or complaint by Applicant that he was unable to see any of the evidence at trial. (PCR Tr. p. 85). Solicitor Patterson opined that Judge Keesley would have made sure that Applicant was able to view any evidence introduced. (PCR Tr. p. 85).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra.* This Court finds Applicant's testimony on this matter not credible. This Court further finds Applicant failed to present any competent evidence that his alleged inability to see was due to any error of Trial Counsel or how it affected the outcome of his trial. Thus, Applicant failed in his burden of proving deficiency or prejudice. See Glover, *supra.*

Based on the foregoing, this Court finds Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonable effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.

Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel or any prejudice flowing therefrom. Thus, this allegation is **DENIED** and **DISMISSED.**

|CONCLUSION & SIGNATURE PAGE FOLLOWS|

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE.**

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

JESSICA ANN SALVINI
Presiding Judge
Eleventh Judicial Circuit

2/18/2024
Greenville, South Carolina

FILED
LISA H. COMER
CLERK OF COURT
LEXINGTON, SC

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)	ELEVENTH JUDICIAL CIRCUIT
)	DOCKET NO.: 22-CP-32-01641
HEIRBERONE FOSTER, #353381,)	
)	
Applicant,)	MOTION TO ALTER OR AMEND
)	
vs.)	
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	

The above-captioned matter came before the court via an application for post-conviction relief filed by Applicant on May 12, 2022. This court convened an evidentiary hearing into the matter on September 16, 2025. Applicant was present at the hearing and represented by Tommy A. Thomas, Esquire. Sydney N. Willingham, Esquire of the South Carolina Attorney General's Office, represented Respondent.

An Order of Dismissal in this matter was signed February 18, 2026, and filed on February 24, 2026. Applicant now moves before this court pursuant to SCRCP Rule 59(e) for reconsideration of the Court's decision. The Applicant respectfully requests reconsideration of the following issue.

1. Order of Dismissal, Allegation 10 – Failure to call Bradley Foster as a witness

Mr. Bradley Foster, Applicant's son, appeared virtually due to being detained on Federal Charges and being held in the Lexington County Detention Center. He testified at the Post Conviction Relief hearing that he was present the day that his brother was shot. (PCR T. p.10) He testified that he and his brother (Will) had a good relationship; however, there were incidents where he was afraid of him. (PCR T. p. 11) and that his brother had anger issues. On one

occasion, he had pulled a knife on Bradly Foster and his Dad. There were also occasions when he would take his anger out on both Bradley and his father and that he could be particularly violent when he had been drinking. (PCR T. p. 10-11)

Bradley Foster testified more specifically about the day in question. His father was changing engine oil and transmission fluid for his brother's girlfriend's sister. Will tried to kick the jack out from under the van while his dad was underneath the car. Bradley ran over and grabbed his brother to intervene. There was an altercation regarding Will's borrowing of his father's barbecue grill. Will kicked the grill over and damaged it. (PCR T. p. 14-15) Will picked up a 2x4. An attempt was made by his mom to take the 2x4 away. She was knocked to the ground. Will then picked up what he called a stick again and was coming for his dad. His Dad went into the house through the back door and shut the door. His brother followed him all the way to the back door. Mr. Foster asked Will to leave, but Will was again coming towards his dad, and that is when he heard the gun go off. Bradley further testified that Will had taken his shirt off and was still trying to attack his dad (PCR T. p. 16-17).

Bradley testified that he went to Court and Aimee Zmroczek told him that the trial was not going to happen that day and that he did not need to stay. Bradley stated that he was willing to testify and that "people got a perspective of my brother, of the situation that happened, but they didn't get the perspective of the whole, you know, individual person, like you know what I mean." (PCR T. p. 19-20)

The Applicant would ask that the Court reconsider the importance of Bradley Foster's testimony in light of the other witnesses who testified at trial. Especially the testimony of Applicant's daughter, Haily Foster, who gave a very sanitized version of what happened that day. Although she testified that there was an argument, and that Will picked up 2x4. She

concludes with the statement that she and Will's girlfriend, LeAnne Cotton, pulled Will away from the Applicant and got the item away from Will. Hailey then testified that she, LeAnne Cotton, and Will began talking, joking, and just standing there, and that she believed that the argument was over.

LeAnne Cotton's testimony at trial was very self-serving, and she attempted to present a picture that was completely different from what actually happened.

Trial Counsel testified that she recalled discussing potential witnesses with the Applicant. However, she further testified that she had no recollection of specifically speaking to Bradley Foster. She had no recollection that he was in the Courtroom. She also testified that she had no recollection of her Private Investigator talking with Bradley or taking a statement from him. (PCR T. p. 25-26)

1 (a). The importance of Bradley arises again in the allegation 11(b) – Failure to object to the Solicitor's comments in closing.

In the signed Order on page 41, second paragraph, Solicitor's closing argument, the Solicitor states that "nobody said anything about them chasing each other around or threatening each other. They were both just cursing each other out: Both of them." (Order p. 41)

Bradley Foster, in his testimony could have presented to the Jury, through his testimony what he witnessed that day. His testimony would have shown that Will was chasing his Dad around. That Will threatened his Dad and they were not just cursing each other out. That Will was very aggressive, had been drinking, and had made numerous threats and actions against his Dad.

This issue is highlighted again in the Post Conviction Relief testimony regarding presenting the story of what happened to the Jury. This included the issues of the victim trying to

enter the house just before he was shot. Bradley's testimony disputes the testimony that there was a belief that the altercation was over and that Mr. Foster was the one who went into the house, got the gun, and shot his son for no reason. Only Bradley's testimony could have answered these questions.

Trial Counsel was clearly ineffective for failing to use such an important and readily available witness.

2. Allegation 3 – Failure to present the Applicant as a witness during his Jury Trial

Applicant testified that his decision not to testify was based on what Trial Counsel told him, because he trusted her as a professional. (PCR Tr. p. 75) Trial Counsel testified that the biggest concern about Mr. Foster testifying was his propensity to be combative on the stand. Further stating that she was concerned after his testimony at the stand your ground hearing (PCR Tr.p. 30) Mr. Foster was able to calmly present his testimony at the PCR hearing regarding what had happened that day. He was able to discuss the issue of working on the van, which Will Foster had attempted to knock the jack out from under him while he was under the van, the issue about damaging the grill, and the issue about him drinking and being highly intoxicated. Had the Applicant testified, he would have been able to present evidence regarding LeAnne Cotton's testimony before the Jury. He would have been able to testify about Will's threats; threats that Will was going to kill him and the picking up of the two weapons, the 2x4 and the aluminum level. He could have also testified about the fear that he had, that Will was going to harm or kill him.

In the Trial Court's colloquy about Mr. Foster's right to take the stand and testify, he specifically addresses Rule 609, about evidence of a conviction of a crime. The Court

specifically states regarding the domestic violence, "I am not going to let the State ask you about the two CVS', do you understand that." (Order. p. 21). Therefore, there was no concern that his prior record of domestic violence could have been brought before the Jury. I do not believe that this opened the door to any other issues and the Defense failed to be able to present a concise story about what actually happened.

3. Allegation 6 – Failure to Introduce or Present Evidence of Notice of Trespass regarding the victim Heirberone Will Foster

Trial counsel acknowledges that there was a Restraining Order. However, Trial Counsel testified at Post Conviction Relief that it was her strategy not to pursue introducing the Notice of Trespass regarding the victim. (PCR T. p. 48) In this Court's findings, the Court finds that the Applicant faced charges of Domestic Violence 1st Degree against his wife. At the time, he was out on Bond which explicitly prohibited him from returning to his residence, and consequently, the Applicant was in clear violation of a Court Order when the victim was shot. That he was on property that he was legally barred from entering. That admission of the Trespass Notice regarding the victim would have allowed this critical evidence to be introduced, and that Trial Counsel's strategy was sound. (Order, page 28)

However, Judge Keesley, in his ruling on the Stand Your Ground, found that both Will Foster and Heirberone Foster had the right to be at the residence. Judge Keesley clearly rules that both the Applicant and his son, Will, had the right to be at his residence. "The Defendant has failed to establish by the greater weight of the evidence that the victim was not a resident." (Trial Tr. p 271, Lines 10-12) "The Bond issue does not prevent him (the Defendant) from being present. (Trial Tr p. 273, lines 2-6) Trial Counsel testified that she did not use the Trespass Order. Clearly, she was ineffective in her failure to present this evidence to the Jury.

4. Trial Counsel's failure to raise the issue of defense of habitation at the stand your ground hearing

Trial Counsel testified that it was a trial strategy not to raise the Defense of Habitation (PCR Tr, page 34) She goes further to say that the State emphasized that Applicant was not in a place that he had the right to be at the time of the shooting and she did not want that issue coming out in front of the Jury (PCR Tr. p.34) She also stated that no one testified that the victim was making a forceable entry into the home. (PCR Tr. p. 34-35)

The Applicant would respectfully request that this court reconsider its decision based upon Judge Keesley's ruling that both the victim and the Defendant had the right to be at the residence in question. Therefore, any strategic decision made based upon the issue that he did not have the right to be at the place where he was at the time would be nonexistent.

5. Issue 5 – Failure to object to the Solicitor's comments in closing.

This issue is addressed in Paragraph 1.

Conclusion

To oversimplify this argument, trial counsel failed to tell the story to the Jury. Without a clear presentation of all of the facts, the Jury was unable to make a proper decision. This could have been rectified by the testimony of Bradley Foster, the testimony of the Applicant, the entry of evidence of the restraining order against the victim, and the other issues as set forth in this motion.

Respectfully submitted,

Tommy A. Thomas
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

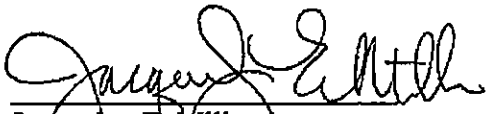
March 5, 2026

STATE OF SOUTH CAROLINA)	THE COURT OF COMMON PLEAS
)	
COUNT OF LEXINGTON)	CASE NO.: 2022-CP-32-01641
Heirberone H. Foster #353381,)	
)	
Applicant,)	
)	CERTIFICATE OF SERVICE
Vs.)	
)	
State of South Carolina,)	
)	
Respondent.)	
)	

I, Jacquelyn E. Miller, paralegal to Tommy A. Thomas, Attorney for the Applicant hereby certify that I emailed, a copy of a Motion for Reconsideration to the Attorney General's Office and The Honorable Jessica Ann Salvini, at:

Sydney Willingham, Esq.
Attorney General's Office
P.O. Box 11549
Columbia, SC 29211-1549
Sydney.willingham@scag.gov

The Honorable Jessica Ann Salvini
305 E. North Street
Greenville, SC 29601
jsalvinisc@sccourts.org



Jacquelyn E. Miller
Paralegal to Tommy A. Thomas
Attorney for Applicant
P.O. Box 88
Irmo, SC 29063
(803) 732-5507

Irmo, SC
March 5, 2026

FILED
2026 MAY -8 PM 2:40
CLERK OF COURT

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Heirberone H. Foster, #353381, Applicant,	CASE NO. 2022–CP–32–01641
v.	**RETURN TO APPLICANT'S SUPPLEMENT TO MOTION TO ALTER OR AMEND**
State of South Carolina, Respondent.	

This matter comes before the Court by way of Applicant's "Supplement to Motion to Alter or Amend." Respondent, making its return to the motion, would respectfully show this Court:

PROCEDURAL HISTORY

On September 16, 2025, an evidentiary hearing was held at the Lexington County Courthouse before the Honorable Jessica Ann Salvini. Applicant was present and represented by Tommy A. Thomas, Esquire (PCR Counsel). Assistant Attorney General Sydney N. Willingham represented Respondent. In support of his claims, Applicant testified on his own behalf and presented testimony from Bradley Foster. Respondent presented testimony from Aimee J. Zmroczek, Esq. (Trial Counsel), and Assistant Solicitor Rhonda Patterson (Solicitor Patterson).

On February 18, 2026, an Order of Dismissal was signed by the Honorable Judge Salvini and filed on February 24, 2026. Applicant filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, on March 9, 2026. The Court filed an Initial Order Regarding Motion to Reconsider on March 31, 2026, allowing additional written submissions by the parties.

Applicant requests that this Court reconsider the denial of relief pursuant to Rule 59(e), SCRCP. Specifically, Applicant argues this Court should reconsider its Order concerning the allegations regarding Bradley Foster (Allegation 10), failing to present the Applicant as a witness

(Allegation 3), failing to present evidence of Notice of Trespass regarding the victim (Allegation 6), and failing to raise the Defense of Habitation (Allegation 9). Respondent submits that this Court properly ruled on all the issues and considered all relevant facts, law, and arguments.

RESPONSE TO MOTION TO RECONSIDER BASED ON THE TESTIMONY OF BRADLEY FOSTER

Applicant requests this Court reconsider its denial of relief based on the erroneous assertion that this Court failed to make findings that Counsel was ineffective under *Strickland* for failing to call Bradley Foster as a witness. *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Applicant alleges that Trial Counsel was constitutionally ineffective for failing to call Bradley Foster as a witness to corroborate his version of events as testified to at the PCR hearing. However, in Applicant's Motion, he misinterprets the testimony presented at the PCR hearing and fails to consider the record in its entirety.

On cross-examination, Bradley Foster admitted he did not call the police following the incident and that he was not present when the police arrived on the scene.[1] (PCR Tr. p. 22). Importantly, Bradley Foster acknowledged on cross-examination that he did not tell the police or Trial Counsel his brother attacked his father until his testimony at the PCR hearing. (PCR Tr. pp. 22-23). This testimony was corroborated by Trial Counsel, who stated that she first learned that Bradley was available and ready to testify two days prior to the PCR hearing. (PCR Tr. p. 28). Solicitor Patterson's testimony also corroborated that Bradley Foster never made any statements to law enforcement or her office during the two years this case was pending before trial. (PCR Tr. p. 82). Solicitor Patterson testified that none of the witnesses placed Bradley at the scene, including his mother, sister, and Leanne Cotton. (PCR Tr. p. 82).

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[1] One of the Lexington Count Sheriff Department deputies Daniel Schirra, who arrived on the scene of the crime testified at trial that he arrived to the scene within *one minute*. (ROA p. 369, l. 14-18).

As this Court properly determined, Applicant failed to prove the substance of Bradley Foster's testimony would have had a reasonable probability of changing the outcome of the trial. Respondent reiterates that Bradley Foster's testimony is, at best, cumulative to the testimony presented at the SYG hearing. Thus, Applicant's motion to alter or amend the Order of Dismissal on this basis should be denied.

RESPONSE TO MOTION TO RECONSIDER BASED ON FAILURE TO PRESENT APPLICANT AS A WITNESS

Applicant requests this Court reconsider its denial of relief based on the erroneous assertion that this Court failed to make findings that Counsel was ineffective under *Strickland* for failing to present the Applicant as a witness during his jury trial. *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Applicant alleges in his motion that he testified "calmly" at the PCR hearing. This is a baseless argument. The PCR hearing occurred over *six years after* Applicant's trial; whether Applicant was calm at the PCR hearing is irrelevant to his demeanor at trial. Both Trial Counsel and Solicitor Patterson testified that Applicant was combative at the SYG hearing. (PCR Tr. pp. 30, 47, 85). Trial Counsel testified that she believed it was a reasonable decision for Applicant not to testify at trial, but confirmed it was his decision to make. (PCR. Tr. p. 31). This Court found that both Trial Counsel and Solicitor Patterson credibly testified as to the combative demeanor of Applicant *at the time of trial*. Solicitor Patterson testified at the PCR hearing that she wanted Applicant to testify so the jury could see his demeanor. (PCR Tr. p. 85). Additionally, the record shows that Applicant freely and voluntarily waived his right to testify after the trial court conducted a thorough colloquy. (ROA pp. 638-644; 695-696).

As this Court properly determined, Applicant failed to prove that his testifying in front of the jury would have had a reasonable probability of changing the outcome of the trial. Thus, Applicant's motion to alter or amend the Order of Dismissal on this basis should be denied.

RESPONSE TO MOTION TO RECONSIDER BASED ON THE USE OF NOTICE OF TRESPASS AGAINST WILL FOSTER

Applicant requests this Court reconsider its denial of relief based on the erroneous assertion that this Court failed to make findings that Counsel was ineffective under *Strickland* for failing to introduce or present evidence of Notice of Trespass regarding the victim Will Foster. *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Applicant alleges that Judge Keesley ruled at the Stand Your Ground hearing both the Applicant and victim had a right to be in the home and therefore, there was no basis for Trial Counsel's reluctance to bring up the issue in front of the jury.

Applicant's argument misinterprets Judge Keesley's ruling at the SYG hearing and its bearing on the trial. An immunity hearing functions as an independent proceeding designed to determine only whether a defendant is entitled to immunity from prosecution. *See State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). "In that respect, there is nothing decided at an immunity hearing that will later dictate how the parties may or may not conduct themselves at trial." *State v. Dennis*, 447 S.C. 323, 332, 926 S.E.2d 250, 255 (2026). For instance, if immunity is denied, a defendant can freely present or abandon his or her self-defense claim at trial without limitation. *See State v. Cervantes-Pavon*, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019) ("Of course, at the conclusion of any given hearing, if the circuit court determines the movant has not met his burden of proof as to immunity, the case will go trial, and the issue of self-defense may—depending upon the evidence presented at trial—be presented to the trial jury.").

Trial Counsel testified at the evidentiary hearing that Applicant had pending domestic violence charges and did not want to risk possible character evidence coming in front of the jury. (PCR Tr. p. 33). Further, this Court found Trial Counsel *credibly* testified that it was a trial strategy to leave the Notice of Trespass out of evidence to prevent opening the door to character evidence of Applicant that would potentially hurt his defense.

As this Court properly determined, Applicant failed to prove how introducing the Notice of Trespass against Will Foster would have had a reasonable probability of changing the outcome of trial. Respondent reiterates that prior to the shooting incident, Applicant faced charges of Domestic Violence, 1st degree against his wife and was out on bond, which explicitly prohibited him from returning to their residence (where this shooting took place). Therefore, Applicant was in clear violation of a court order, introducing the Notice of Trespass regarding the victim would have inevitably allowed this evidence to be introduced. Trial Counsel articulated a valid trial strategy at the PCR hearing as to this allegation. Thus, Applicant's motion to alter or amend the Order of Dismissal on this basis should be denied.

RESPONSE TO MOTION TO RECONSIDER BASED ON THE ISSUE OF DEFENSE OF HABITATION

Applicant requests this Court reconsider its denial of relief based on the erroneous assertion that this Court failed to make findings that Counsel was ineffective under *Strickland* for failing to raise the defense of habitation. *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Applicant alleges that Trial Counsel's strategy was flawed because it was contrary to the Trial Judge's ruling that both parties had the right to be in the home.

As previously mentioned, Applicant's argument misinterprets Judge Keesley's ruling at the SYG hearing and its bearing on the trial. An immunity hearing functions as an independent proceeding designed to determine only whether a defendant is entitled to immunity from prosecution. *See State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011). "In that respect, there is nothing decided at an immunity hearing that will later dictate how the parties may or may not conduct themselves at trial." *State v. Dennis*, 447 S.C. 323, 332, 926 S.E.2d 250, 255 (2026). For instance, if immunity is denied, a defendant can freely present or abandon his or her self-defense claim at trial without limitation. *See State v. Cervantes-Pavon*, 426 S.C. 442, 451, 827

S.E.2d 564, 569 (2019) ("Of course, at the conclusion of any given hearing, if the circuit court determines the movant has not met his burden of proof as to immunity, the case will go trial, and the issue of self-defense may—depending upon the evidence presented at trial—be presented to the trial jury.").

This Court found that Trial Counsel credibly testified that it was a strategy not to use the defense of habitation. Trial Counsel testified at the PCR hearing that she did not believe it would be a fruitful defense and could have potentially opened the door to bad-character evidence against Applicant. (PCR Tr. p. 35).

As this Court properly determined, Applicant failed to prove how introducing a defense of habitation would have had a reasonable probability of changing the outcome of trial. Trial Counsel articulated a valid trial strategy at the PCR hearing as to this allegation. Thus, Applicant's motion to alter or amend the Order of Dismissal on this basis should be denied.

I.

Based on the foregoing, Respondent submits that this Court properly ruled on all the issues, and considered all relevant facts, law, and arguments. Therefore, Respondent respectfully requests that this Court deny Applicant's Motion to Alter or Amend.

[SIGNATURE PAGE TO FOLLOW]

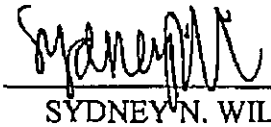
Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

D. RUSSELL BARLOW, II
Senior Assistant Deputy Attorney General

SYDNEY N. WILLINGHAM
Assistant Attorney General
SC Bar No: 106466
sydneywillingham@scag.gov

By: 
SYDNEY N. WILLINGHAM

P.O. Box 11549
Columbia, South Carolina 29211-1549
803-734-4437

May 5, 2026
Columbia, South Carolina

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Heirberone H. Foster, #353381, Applicant, v. STATE OF SOUTH CAROLINA Respondent.	)	CASE NO. 2022-CP-32-01641 **CERTIFICATE OF SERVICE BY MAIL**

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the Return to Applicant's Supplement to Motion to Alter or Amend in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. Tommy A. Thomas, Esquire
PO Box 88
Irmo, SC 29063

DATED this 5th day of May, 2026.

Jensen Helgerson
Legal Assistant for Respondent

FILED
2026 MAR 31 AM 11:55
ISA H. GOMER
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
Heirberone Foster, #353381, Plaintiff,	)	
vs.	)	INITAL ORDER REGARDING MOTION TO RECONSIDER
State of South Carolina, Defendants.	)	Case No.: 2022-CP-32-01641

A motion to reconsider or to alter or amend has been filed with the Court on March 9, 2026, and was emailed to the Court on March 5, 2026. Pursuant to Rule 59(f), SCRCP, the Court, in its discretion, may decide this motion based on briefs without oral argument. The Court will decide this motion on written submissions. Written submissions are not required by the non-moving party, but will be considered. The moving party may rely upon what has been filed or may supplement.

No additional briefs are required, and Counsel may rely on the current record, however the deadline to file written submissions **from the movant regarding this motion is 4:00 PM on Tuesday, April 14, 2026.** Any submissions in **reply must be filed by 4:00 p.m. on Tuesday, May 5, 2026.** A copy of any documents filed must be forwarded immediately to the undersigned judge and to opposing counsel. The copies to the judge shall be sent via US Postal Service to 305 E. North Street, Greenville, SC 29601, and/or by electronic mail to jsalvinisc@sccourts.org and jsalvinilc@sccourts.org.

AND IT IS SO ORDERED.

3/24, 2026
Greenville, SC

Judge Jessica A. Salvini

FILED
2026 MAY 20

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
Heirberone Foster, #353381, Plaintiff, vs. State of South Carolina, Defendants.	FINAL ORDER REGARDING MOTION TO RECONSIDER Case No.: 2022-CP-32-01641

FILED
2026 MAY 19 AM 9:15

A motion to reconsider or to alter or amend has been filed with the Court on March 9, 2026, and was emailed to the Court on March 5, 2026. As previously explained to the parties, pursuant to Rule 59(f), SCRCP, the Court, in its discretion, may decide the motion based on briefs without oral argument. The Court indicated to the parties in the Initial Order Regarding Motion for Reconsideration that it would decide the issues on written submissions. Further, the Court informed the parties that written submissions were not required by the non-moving party, and that the moving party could rely upon its filings or supplement. The deadlines for filing written submissions regarding this motion have now passed.

After careful consideration of the able arguments and filings and review of the record, the Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or fact not appropriately considered.

Accordingly, the Motion for Reconsideration[1] is respectfully DENIED.

IT IS SO ORDERED.

5/13, 2026
Greenville, SC

Judge Jessica A. Salvini

[1] The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.