

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Anderson County

R. Lawton McIntosh, Circuit Court Judge

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S.C. Supreme Court

BARRY ALLEN EVANS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001863

APPENDIX

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STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF ANDERSON) 10TH JUDICIAL CIRCUIT

THE STATE) TRANSCRIPT OF RECORD

-VS-) 07-GS-04-3493

BARRY ALLEN EVANS,) 07-GS-04-3496

DEFENDANT.) 08-GS-04-1541

OCTOBER 6-8, 2008

ANDERSON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE J. C. BUDDY NICHOLSON, JR., JUDGE; AND
A JURY.

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

SCOTT MCELHANNON, ASSISTANT SOLICITOR

CATHERINE HUEY, ASSISTANT SOLICITOR

ATTORNEYS FOR THE STATE

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CIRCUIT COURT REPORTER

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(SW) - DENOTES STATE'S WITNESS

(DW) - DENOTES DEFENSE WITNESS

(IC) - DENOTES IN CAMERA

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** COURT REPORTER'S NOTE: STATE'S EXHIBIT NUMBERS 1 THROUGH
12 WERE PREMARKED FOR IDENTIFICATION.

1 Monday, October 6, 2008

2 THE COURT: Mr. Fletcher Smith, are you ready to
3 proceed on Barry Evans?

4 MR. SMITH: Yes, sir, Your Honor.

5 THE COURT: Solicitor, you ready to proceed?

6 MR. MCELHANNON: Yes, sir, Your Honor.

7 THE COURT: Okay. Can you bring us the jury in,
8 please, so we can draw this jury.

9 (WHEREUPON, the jury venire enters the courtroom at
10 approximately 11:45 a.m.)

11 THE COURT: Solicitor, you want to call your first
12 case.

13 MR. MCELHANNON: Thank you, Your Honor. The State
14 vs. Barry Allen Evans, indictment 2008-GS-04-1541, assault and
15 battery with intent to kill; 2007-GS-04-3496, possession of a
16 weapon during a violent crime; 2007-GS-04-3493, assault with
17 intent to kill.

18 THE COURT: Thank you, sir.

19 Ladies and gentlemen of the panel, we're getting
20 ready to start the trial of The State vs. Barry Allen Evans.

21 Solicitor, can you give me a witness list, please,
22 sir.

23 Ladies and gentlemen, I'm going to ask you certain
24 questions. Before we -- first thing I'm going to do is call
25 out a list of names. I'm going to ask you the same question

1 about each individual name I call. I'm going to ask you if
2 you're related by blood or marriage, do you know the
3 individual or have you had any contact with the individual at
4 all. And when I say marriage, I'm talking about past
5 marriages as well as present marriages, or if there's a future
6 marriage in your immediate future, future marriages.

7 I had one juror that was divorced from one of the
8 witnesses, didn't want to reveal it. So I do mean when I say
9 marriages, past marriage.

10 The first name is Greg Hayden of the Anderson County
11 Sheriff's Office. Is anybody related by blood or marriage,
12 does anybody know Greg Hayden?

13 If you'll stand and face the jury panel, please.
14 The jury, not me. Turn around. Face the jury. Thank you
15 very much.

16 Is anybody related by blood or marriage, does
17 anybody know or have any contact with Greg Hayden? If so,
18 please stand.

19 (There was no response.)

20 THE COURT: The next name is Craig Holbrooks,
21 Anderson County Sheriff's Office. Anybody related by blood or
22 marriage, or had any contact or know Craig Holbrooks? If so,
23 please stand. He's not in the courtroom, I don't believe.

24 (There was no response.)

25 THE COURT: The next name is J. D. Crawford,

1 Anderson County Sheriff's Office. Anybody related by blood or
2 marriage? Does anybody know or had any contact with J. D.
3 Crawford? If so, please stand.

4 (There was not response.)

5 THE COURT: The next name is Ken Blakely. Is
6 anybody related by blood or marriage to Ken Blakely? Does
7 anybody know or had any contact with Ken Blakely? If so,
8 please stand.

9 (There was no response.)

10 THE COURT: The next name is Tommy Clamp, Anderson
11 County Sheriff's Office. Anybody related by blood or marriage
12 or know Tommy Clamp, or had any contact with Tommy Clamp? If
13 so, please stand.

14 Yes, sir, your name?

15 POTENTIAL JUROR: Glen Hunter.

16 THE CLERK: He's juror number 83, Your Honor.

17 THE COURT: Yes, sir, Mr. Hunter. How do you know
18 Mr. Clamp?

19 MR. HUNTER: I went to high school with him back in
20 1987?

21 THE COURT: Have you seen him much since high
22 school, Mr. Hunter?

23 MR. HUNTER: Just a few times.

24 THE COURT: You see him in passing?

25 MR. HUNTER: Yes, sir.

1 THE COURT: Would it cause you any difficulty in
2 sitting on the jury, assuming he will testify?

3 MR. HUNTER: No, sir.

4 THE COURT: Can you listen to the testimony and base
5 your decision on the testimony you hear in the courtroom?

6 MR. HUNTER: Yes, sir.

7 THE COURT: Can you be fair to both the State and
8 the defendant?

9 MR. HUNTER: Yes, sir.

10 THE COURT: Thank you, Mr. Hunter.

11 The next name is Roger Malone.

12 I'm sorry. Yes, ma'am, your name?

13 POTENTIAL JUROR: I'm Sharon Moss.

14 THE COURT: You know your number?

15 MS. MOSS: It's 125.

16 THE COURT: Yes, ma'am, Ms. Moss.

17 MS. MOSS: I went to high school with Tony Clamp,
18 and he's a good friend of my brother's and friend of the
19 family.

20 THE COURT: How often do you seen him now?

21 MS. MOSS: I run into him about a couple times a
22 year.

23 THE COURT: Were you all in the same class?

24 MS. MOSS: No. He graduated 3 years behind me, with
25 my brother.

1 THE COURT: Would that cause you any difficulty in
2 sitting on the jury?

3 MS. MOSS: I don't think so, no.

4 THE COURT: Can you be fair to both the State and
5 the defendant?

6 MS. MOSS: I could be.

7 THE COURT: Could you base your decision on
8 testimony you hear in the courtroom?

9 MS. MOSS: Yes.

10 THE COURT: Thank you, Ms. Moss.

11 The next name is Roger Malone of the Anderson County
12 Sheriff's Office. Anybody related by blood or marriage? Does
13 anybody know Mr. Malone? He's standing on your right.

14 Thank you.

15 Yes, ma'am, your name?

16 POTENTIAL JUROR: Jennifer Wakefield, number 169.

17 THE COURT: One twenty-nine?

18 MS. WAKEFIELD: One sixty-nine.

19 THE COURT: Yes, ma'am, Ms. Wakefield.

20 MS. WAKEFIELD: Just know Roger. He used to work as
21 a courtesy officer in the apartment complex that I was staying
22 in.

23 THE COURT: How long ago was this?

24 MS. WAKEFIELD: Probably a couple years.

25 THE COURT: A couple years. Have you seen him since

1 then?

2 MS. WAKEFIELD: No.

3 THE COURT: Were you good friends with him or you
4 just knew he worked there?

5 MS. WAKEFIELD: Just knew him.

6 THE COURT: Would it cause you any difficulty
7 sitting on the jury, assuming he will testify?

8 MS. WAKEFIELD: No, sir.

9 THE COURT: Can you be fair to both the State and
10 the defendant?

11 MS. WAKEFIELD: Yes, sir.

12 THE COURT: Can you base your decision on the
13 testimony you hear in the courtroom?

14 MS. WAKEFIELD: Yes.

15 THE COURT: Thank you, Ms. Wakefield.

16 The next name is Chris Scott, Anderson County
17 Sheriff's Office. Anybody related by blood or marriage? Has
18 anybody had any personal contact or know Chris Scott? If so,
19 plea stand.

20 (There was no response.)

21 THE COURT: The next name is Mark Patterson, the
22 Anderson County Sheriff's Office. Anybody related by blood or
23 marriage? Does anybody know Mark Patterson or had any contact
24 with Mark Patterson? If so, please stand.

25 (There was no response.)

1 THE COURT: The next name is Christopher Mark
2 Durham. Is anybody related by blood or marriage to
3 Christopher Durham? Does anybody know Christopher Mark
4 Durham? If so, please stand.

5 (There was no response.)

6 THE COURT: The next name is Kevin Lavoie. Does
7 anybody know Kevin Lavoie? Is anyone related by blood or
8 marriage? He's standing to your right.

9 Thank you, Mr. Lavoie. You may have a seat.

10 Is anybody related by blood or marriage to Kevin
11 Lavoie? Does anybody know Kevin Lavoie? If so, please stand.

12 (There was no response.)

13 THE COURT: The next name is Janice Lavoie. She's
14 standing to your right. Is anybody related by blood or
15 marriage to Janice Lavoie? Does anybody know Janice Lavoie,
16 had any contact with her? If so, please stand.

17 (There was no response.)

18 THE COURT: You may have a seat. Thank you.

19 The next name is Billy Craft. He's standing to your
20 right. Is anybody related by blood or marriage to Billy
21 Craft? Does anybody know Billy Craft? If so, please stand.

22 (There was no response.)

23 THE COURT: Thank you, Mr. Craft. You may have a
24 seat.

25 The next name is Lawson Freeman, Dr. Lawson Freeman.

1 Does anybody know Dr. Freeman? Is anybody related by blood or
2 marriage or been treated by Dr. Freeman? If so, please stand.

3 Yes, ma'am, your name?

4 POTENTIAL JUROR: Twala Andrino, number 5.

5 THE COURT: Number 5. Yes, ma'am?

6 MS. ANDRINO: I've worked with the doctor in the ER
7 at ANMED.

8 THE COURT: You've worked with him?

9 MS. ANDRINO: Yes, sir.

10 THE COURT: How long?

11 MS. ANDRINO: I worked with him for about 3 years.

12 THE COURT: How long ago was that?

13 MS. ANDRINO: Two years ago.

14 THE COURT: You want to come forward, if you would,
15 Ms. Andrino.

16 (WHEREUPON, the following bench conference was
17 reported.)

18 THE COURT: Hey. How you doing?

19 MS. ANDRINO: Hey. How are you?

20 THE COURT: What did you do with him Dr. Freeman?

21 MS. ANDRINO: I was a patient advocate in the
22 emergency room. So I had contact with him.

23 THE COURT: He's an emergency room doctor?

24 MS. ANDRINO: Yes, sir.

25 THE COURT: Would you see him in passing or what?

1 MS. ANDRINO: Just had to speak to him sometimes on
2 behalf of the patient or something like that.

3 THE COURT: So you didn't directly work underneath
4 him?

5 MS. ANDRINO: No, sir.

6 THE COURT: He was working in a separate department?

7 MS. ANDRINO: Yes.

8 THE COURT: All right. Do you have any grudges or
9 biases against him?

10 MS. ANDRINO: No, sir.

11 THE COURT: Would it cause you any difficulty,
12 assuming he will testify in this case?

13 MS. ANDRINO: I don't believe so.

14 THE COURT: Can you be fair to both parties?

15 MS. ANDRINO: I believe so.

16 THE COURT: Can you base your decision on the
17 testimony you hear in the courtroom?

18 MS. ANDRINO: Yes, sir.

19 THE COURT: Does the State have any questions?

20 MR. MCELHANNON: No questions.

21 THE COURT: The defense have any questions?

22 MR. SMITH: No.

23 THE COURT: You may go have a seat. Thank you very
24 much.

25 (WHEREUPON, the bench conference was concluded.)

1 THE COURT: The next name is Teresa Barry, works
2 with Anderson County. Does anybody know Teresa Barry? Is
3 anybody related by blood or marriage? If so, please stand.

4 (There was no response.)

5 THE COURT: The next name is Jessica Trimble, who
6 also works with Anderson County. Is anybody related by blood
7 or marriage? Does anybody know Jessica Trimble? If so,
8 please stand.

9 (There was no response.)

10 THE COURT: The next name is Elizabeth Hunter, who
11 works with Anderson County. Does anybody know Elizabeth
12 Hunter? Is anyone related by blood or marriage? If so,
13 please stand.

14 (There was no response.)

15 THE COURT: The next name is Jason Jones, Medshore
16 Ambulance Service. Does anybody know Jason Jones? Is anybody
17 related by blood or marriage to Jason Jones? If so, please
18 stand.

19 (There was no response.)

20 THE COURT: The next name is Barry Evans.

21 Mr. Evans, if you'll stand and face the jury,
22 please.

23 Thank you, Mr. Evans. Thank you, sir. You may have
24 a seat.

25 Is anybody related by blood or marriage to Barry

1 Evans? Does anybody know Barry Evans? If so, please stand.

2 (There was no response.)

3 THE COURT: The next name is John Johnson. Does
4 anybody know John Johnson? Is anybody related by blood or
5 marriage to John Johnson? If so, please stand.

6 (There was no response.)

7 THE COURT: The next name is Tony Martin. Does
8 anybody know Tony Martin? Is anyone related by blood or
9 marriage to Tony Martin? If so, please stand.

10 (There was no response.)

11 THE COURT: Has any member of the jury panel formed
12 or expressed an opinion about any issue or matter involved in
13 this case? If so, please stand.

14 Yes, ma'am, your name?

15 POTENTIAL JUROR: Hazel McCall.

16 THE COURT: What's your name?

17 MS. MCCALL: Hazel McCall.

18 THE COURT: Do you know your number?

19 MS. MCCALL: One-fourteen, I think.

20 THE CLERK: One-fourteen, Your Honor.

21 THE COURT: You want to come around here, please,
22 ma'am.

23 (WHEREUPON, the following bench conference was
24 reported.)

25 THE COURT: What do you know about the case?

1 MS. MCCALL: You called Chris Scott out?
2 THE COURT: Uh-huh.
3 MS. MCCALL: I'm kin to him.
4 THE COURT: Okay.
5 MS. MCCALL: He's my niece's husband.
6 THE COURT: He's your niece's --
7 MS. MCCALL: He's on the police force.
8 THE COURT: He's your niece's husband. Okay.
9 MS. MCCALL: Yes. I see him about once a month.
10 THE COURT: At your house, or their house, or where?
11 MS. MCCALL: No. At my sister's house. They come
12 around. We have yard sales and stuff.
13 THE COURT: Is he a close friend of yours? Is he
14 close to you?
15 MS. MCCALL: Yeah.
16 THE COURT: How close?
17 MS. MCCALL: He talks and cuts up with us.
18 THE COURT: He talks and cuts up with you. Okay.
19 How would that affect you sitting on this jury, since you are
20 close to him?
21 MS. MCCALL: I was just answering the question. I
22 was just answering the question, that I was kin to him.
23 THE COURT: You think it would affect you at all?
24 MS. MCCALL: No. No.
25 THE COURT: You don't think that since you're real

1 close to him that you would tend to think or believe his
2 testimony over someone else?

3 MS. MCCALL: I don't know about that, no.

4 THE COURT: Well, I mean, see, what I'm trying to
5 determine is whether or not your relationship with him would
6 make any difference to you sitting on a jury, and only you
7 know that. I don't. And that's normal. It's a normal
8 reaction. I tend to believe my friends over people I don't
9 know. That's just human nature.

10 MS. MCCALL: Yeah. The way you put it I guess I
11 would, would believe him, you know.

12 THE COURT: Well, if you did believe him over
13 everyone else how would that affect you as far as viewing the
14 case is concerned?

15 MS. MCCALL: I would try to weigh it out and think
16 the best thing to do is, you know, listen to each one of the
17 circumstances.

18 THE COURT: Which I don't know what he's going to
19 say or what his involvement was at all.

20 MS. MCCALL: I don't either.

21 THE COURT: So I don't even know if he's going to
22 testify. He may not.

23 You got any questions?

24 MR. SMITH: No questions.

25 MS. MCELHANNON: No questions.

1 THE COURT: You may go have a seat.

2 Any motions?

3 MR. SMITH: No motions.

4 THE COURT: Okay.

5 MR. MCELHANNON: None.

6 (WHEREUPON, the bench conference was concluded.)

7 THE COURT: Has any member of the jury panel heard
8 anything about this case other than what's been said in the
9 courtroom today? The solicitor read out the indictment.
10 Other than what was read off of the indictment has anybody
11 heard anybody talking about it, read anything in the paper
12 about it, or heard anything on TV or the radio about this
13 case, or heard anybody talking about it today in the halls?
14 If you have, please stand.

15 (There was no response.)

16 THE COURT: Let me explain the indictment to you.
17 The indictment is not evidence. It's not an indication of the
18 defendant's innocence or guilt. It's merely the means by
19 which the defendant is brought before the Court for trial, and
20 you are not to consider it in any form or fashion as to his
21 innocence or guilt or any form or fashion as to any evidence
22 in the case.

23 Is there any member of the jury panel who is a
24 contributor or a member of any group which has as its primary
25 concern the promotion of law enforcement or victims' rights?

1 These would include MADD, SADD, CAVE, CADRE. If you are a
2 member, contributor to any of those organization, please
3 stand.

4 (There was no response.)

5 THE COURT: Is there any member of the jury panel or
6 member of your immediate family been a victim of a crime? If
7 so, please stand.

8 (There was no response.)

9 THE COURT: Has any member of the jury panel or
10 member of their immediate family been prosecuted by the
11 Solicitor's Office here in Anderson County or in any other
12 county? If so, please stand.

13 (There was no response.)

14 THE COURT: Is any member of the jury panel related
15 or acquainted with any member of law enforcement? If so,
16 please stand.

17 Yes, sir, your name?

18 POTENTIAL JUROR: Ken Lloyd, juror 105?

19 THE COURT: What number?

20 MR. LLOYD: Number 105.

21 THE COURT: Okay, Mr. Lloyd, who?

22 MR. LLOYD: My brother is a law enforcement ranger
23 with purify management.

24 THE COURT: How long has he --

25 MR. LLOYD: He's been in law enforcement for 6 years

1 now.

2 THE COURT: What law enforcement?

3 MR. LLOYD: With the federal law enforcement ranger.

4 THE COURT: Okay. Have you ever had any
5 conversation about his viewpoint on law enforcement?

6 MR. LLOYD: Yes, sir. Actually, I'm going to become
7 a -- going through the law enforcement academy in Waco in
8 March.

9 THE COURT: You want to come forward, please.
10 Sir, what's your name?

11 POTENTIAL JUROR: John Urban, 167.

12 (WHEREUPON, the following bench conference was
13 reported in reference to Juror 105, Kenneth Lloyd.)

14 THE COURT: He works in Greenville, I believe you
15 said; is that correct?

16 MR. LLOYD: No. He works in Twin Falls, Idaho.

17 THE COURT: Twin Falls, Idaho.

18 MR. LLOYD: He works for the Bureau of Land
19 Management.

20 THE COURT: What does he do?

21 MR. LLOYD: He's a law enforcement ranger. He
22 patrols Southern Idaho for -- via land lines.

23 THE COURT: Okay. Would that affect you in any way
24 sitting on this jury?

25 MR. LLOYD: Not him personally. But, like I said,

1 I'm going to be taking the same job he's doing in Grand
2 Junction, Colorado. I should be moving there in December.
3 I'm getting sent down to the academy in March.

4 THE COURT: Going to the academy in March?

5 MR. LLOYD: Yes, sir.

6 THE COURT: How would that affect you sitting on the
7 jury, or would it?

8 MR. LLOYD: Well, I'm pro law enforcement. That's
9 the only thing I can -- I can be objective, but my bias is
10 towards law enforcement.

11 THE COURT: So bias is towards law enforcement?

12 MR. LLOYD: Yes, sir.

13 THE COURT: Okay. You think that would come through
14 with the jury, sitting on jury?

15 MR. LLOYD: I mean, I could be bias. That's part of
16 being law enforcement.

17 THE COURT: Okay. I appreciate it. Thank you, sir.

18 Any motions?

19 MR. SMITH: Yeah, move to strike for cause.

20 THE COURT: You want to make an argument?

21 MR. MCELHANNON: No, sir.

22 THE COURT: All right. I'm going to strike him for
23 cause.

24 Cathy, Number 105 for cause.

25 (WHEREUPON, the bench conference was concluded.)

1 THE COURT: Yes, sir, you want to come around.

2 (WHEREUPON, the following bench conference was
3 reported in reference to Juror 167, John Urban.)

4 THE COURT: Yes, sir. Is it Urban?

5 MR. URBAN: Urban. I just want to state that I'm
6 good friends with an officer at Anderson County Sheriff's
7 Department.

8 THE COURT: Who?

9 MR. URBAN: Mike Benager [ph].

10 THE COURT: Benager?

11 MR. URBAN: Yes.

12 THE COURT: How often do you see him?

13 MR. URBAN: Almost every day.

14 THE COURT: Almost every day?

15 MR. URBAN: His daughter and my daughter are best
16 friends.

17 THE COURT: Does he live close by?

18 MR. URBAN: Yes, sir. Two miles away. His wife and
19 my wife are also best friends.

20 THE COURT: How would that affect you sitting on the
21 jury?

22 MR. URBAN: Probably not at all.

23 THE COURT: Why not?

24 MR. URBAN: I'm a pretty fair person, I guess. I
25 mean, until proven guilty -- I mean --

1 THE COURT: You don't think it would have any
2 influence on you at all?

3 MR. URBAN: I don't think so. I've never done this
4 so -- I'm pretty fair.

5 THE COURT: You think you can be fair to both
6 parties?

7 MR. URBAN: I believe so.

8 THE COURT: Can you set that relationship aside that
9 you have with the Anderson County deputy?

10 MR. URBAN: Yes, sir, I believe so.

11 THE COURT: Any questions?

12 MR. SMITH: No questions.

13 THE COURT: Any questions?

14 MR. MCELHANNON: No questions.

15 THE COURT: Thank you very much. You may have a
16 seat.

17 Any motions?

18 MR. SMITH: No.

19 (WHEREUPON, the bench conference was concluded.)

20 THE COURT: Does any member of the jury know of any
21 reason whatsoever, personal or otherwise as to why they can
22 not serve on this jury? If so, please stand.

23 (There was no response.)

24 THE COURT: Is any member of the jury panel aware of
25 any bias or prejudice towards either the State or the

1 defendant in this case? If so, please stand.

2 (There was no response.)

3 THE COURT: Any further questions from the State?

4 MR. MCELHANNON: None from the State, Your Honor.

5 THE COURT: Any from the defense?

6 MR. SMITH: None from defense, Your Honor.

7 THE COURT: Madam Clerk, let me know when you're
8 ready.

9 MR. SMITH: Your Honor, should we introduce
10 ourselves?

11 THE COURT: Pardon?

12 MR. SMITH: Should we introduce ourselves?

13 THE COURT: Yeah. I didn't ask that question.

14 Solicitor, would you stand and introduce yourself

15 MR. MCELHANNON: Scott McElhannon. I'm an assistant
16 solicitor in Anderson County. Assisting me on this case will
17 be Catherine Huey, also an assistant solicitor.

18 THE COURT: Any member of the jury panel have a
19 close friend that works in the Solicitor's Office, either here
20 or in Oconee County? If so, please stand?

21 (There was no response.)

22 THE COURT: Mr. Smith, you may stand and introduce
23 yourself, please, sir.

24 MR. SMITH: Thank you, Your Honor. May it please
25 the Court.

1 My name is Fletcher Smith. I practice in
2 Greenville, South Carolina, here and in Anderson and Cherokee
3 County. I'm a member of the South Carolina Bar. I'm here on
4 behalf of Mr. Barry Evans. Thank you very much.

5 THE COURT: Has any member of the jury panel been
6 represented by Mr. Smith either presently or in the past? If
7 so, please stand.

8 (There was no response.)

9 THE COURT: Any further questions from the State?

10 MR. MCELHANNON: None from State.

11 THE COURT: Any from the defense?

12 MR. SMITH: None from defense.

13 THE COURT: Thank you very much.

14 Madam clerk?

15 THE CLERK: Yes, Your Honor. Thank you.

16 Ladies and gentlemen, when I call your name out if
17 you'll please come forward. Stand right up here in this open
18 area. We'll ask that you bring any personal belongings that
19 you have with you. If you'll bring them as you come up.
20 Stand right here and we'll ask you to present yourself to the
21 State's table and to the defendant's table, then we'll tell
22 you whether you have a seat in the jury box or to return to
23 your seat. Thank you.

24 Juror number 37, William Davis. Juror number 37.

25 (A white male came forward.)

1 THE CLERK: What say you for the State?

2 MR. MCELHANNON: Please present the juror.

3 THE CLERK: What say you for the defendant?

4 MR. SMITH: Swear the gentleman.

5 THE CLERK: Mr. Davis, if you'll go right over here
6 and have a seat in the jury box, please, sir. Thank you.

7 Number 2, Mark Alexander. Juror number 2.

8 (A white male came forward.)

9 THE CLERK: What say you for the State?

10 MR. MCELHANNON: Please present the juror.

11 THE CLERK: What say you for the defendant?

12 MR. SMITH: Excuse the gentleman for this case.

13 THE CLERK: You may return to your seat. Thank you,
14 Mr. Alexander.

15 Juror number 125, Sharon Moss. Number 125.

16 (A white female came forward.)

17 THE CLERK: What say you for the State?

18 MR. MCELHANNON: Please present the juror.

19 THE CLERK: Say you for the defendant?

20 MR. SMITH: Swear the lady.

21 THE CLERK: Have a seat please, Ms. Moss, in the
22 jury box.

23 Number 155, James Sloan, Jr., number 155.

24 (A black male came forward.)

25 THE CLERK: What say you for the State?

1 MR. MCELHANNON: Please present the juror.

2 THE CLERK: What say you for the defendant?

3 MR. SMITH: Swear the juror.

4 THE CLERK: Have a seat, please, Mr. Sloan in the
5 jury box. Thank you.

6 Number 86, Charles James. Number 86.

7 (A black male came forward.)

8 THE CLERK: What say you for the State?

9 MR. MCELHANNON: Please present the juror.

10 THE CLERK: Say you for the defendant?

11 MR. SMITH: Swear the juror.

12 THE CLERK: Have a seat in the jury box, please,
13 Mr. James.

14 Number 93, Ada King. Number 93.

15 (A white female came forward.)

16 THE CLERK: What say you for the State?

17 MR. MCELHANNON: Please present the juror.

18 THE CLERK: What say you for the defendant?

19 MR. SMITH: Excuse Ms. King from the case, please.

20 THE CLERK: You may return to your seat. Thank you,

21 Ms. King.

22 Number 158, Pamela Smith. Number 158.

23 (A white female came forward.)

24 THE CLERK: What say you for the State?

25 MR. MCELHANNON: Please present the juror.

1 THE CLERK: What say you for the defendant?
2 MR. SMITH: Swear the lady.
3 THE CLERK: Have a seat, please, Ms. Smith, in the
4 jury box.
5 Number 153, James Singleton. Number 153.
6 (A white male came forward.)
7 THE CLERK: What say you for the State?
8 MR. MCELHANNON: Please present the juror.
9 THE CLERK: What say you for the defendant?
10 MR. SMITH: Excuse the gentleman from the case,
11 please.
12 THE CLERK: You may return to your seat. Thank you,
13 Mr. Singleton.
14 Number 101, Randolph Lawton, Jr. Number 101.
15 (A black male came forward.)
16 THE CLERK: What say you for the State?
17 MR. MCELHANNON: Please present the juror.
18 THE CLERK: What say you for the defendant?
19 MR. SMITH: Swear the juror.
20 THE CLERK: Have a seat in the jury box, please,
21 Mr. Lawton.
22 Number 174, Shelia Williams, 174.
23 (A black female came forward.)
24 THE CLERK: What say you for the State?
25 MR. MCELHANNON: Please excuse this juror.

1 THE CLERK: You may return to your seat. Thank you,
2 Ms. Williams.

3 Number 106, Douglas Locke, 106.

4 (A white male came forward.)

5 THE CLERK: What say you for the State?

6 MR. MCELHANNON: Please present the juror.

7 THE CLERK: What say you for the defendant?

8 MR. SMITH: Excuse Mr. Locke from this case, please.

9 THE CLERK: Number 104, Wanda Lee, 104.

10 (A black female came forward.)

11 THE CLERK: What say you for the State?

12 MR. MCELHANNON: Please excuse this juror.

13 THE CLERK: You may return to your seat. Thank you.

14 Juror 84, Robert Ison. Juror number 84.

15 (A white male came forward.)

16 THE CLERK: What say you for the State?

17 MR. MCELHANNON: Please present the juror.

18 THE CLERK: What say you for the defendant?

19 MR. SMITH: Swear the juror.

20 THE CLERK: Have a seat in the jury box, please,

21 sir.

22 Number 9, Botond Batizy. Number 9.

23 (A white male came forward.)

24 THE CLERK: What say you for the State?

25 MR. MCELHANNON: Please present the juror.

1 THE CLERK: What say you for the defendant?
2 MR. SMITH: Swear the gentleman, please.
3 THE CLERK: Have a seat in the jury box, please.
4 Number 6, Thomas Bailey. Number 6.
5 (A white male came forward.)
6 THE CLERK: What say you for the State?
7 MR. MCELHANNON: Please present the juror.
8 THE CLERK: What say you for the defendant?
9 MR. SMITH: Swear the juror.
10 THE CLERK: Have a seat please, sir, in the jury
11 box, Mr. Bailey.
12 Juror number 43, Thomas Dye. Number 43.
13 (A white male came forward.)
14 THE CLERK: What say you for the State?
15 MR. MCELHANNON: Please present the juror.
16 THE CLERK: Say you for the defendant?
17 MR. SMITH: Swear the gentleman.
18 THE CLERK: Have a seat, Mr. Dye, please, in the
19 jury box.
20 Number 83, John Glenn Hunter. Number 83.
21 (A white male came forward.)
22 THE CLERK: What say you for the State?
23 MR. MCELHANNON: Please excuse this juror.
24 THE CLERK: You may return to your seat. Thank you,
25 Mr. Hunter.

1 Number 71, Stanley Henderson. Number 71.
2 (A white male came forward.)
3 THE CLERK: What say you for the State?
4 MR. MCELHANNON: Please present the juror.
5 THE CLERK: Say you for the defendant?
6 MR. SMITH: Excuse the gentleman from the case,
7 please.
8 THE CLERK: You may return to your seat. Thank you,
9 Mr. Henderson.
10 Number 172, Corinthia Williams. Number 172.
11 (A black female came forward.)
12 THE CLERK: What say you for the State?
13 MR. MCELHANNON: Please present this juror.
14 THE DEFENDANT: Say you for the defendant?
15 MR. SMITH: Swear the juror.
16 THE CLERK: Have a seat in the jury box, please,
17 Ms. Williams.
18 Juror 90, Joe Jones. Number 90.
19 (A white male came forward.)
20 THE CLERK: What say you for the State?
21 MR. MCELHANNON: Please present the juror.
22 THE CLERK: What say you for the defendant?
23 MR. SMITH: Swear the juror.
24 THE CLERK: If you'll have a seat in the jury box,
25 please, Mr. Jones.

1 THE COURT: We'll do 2 alternates.

2 THE CLERK: Number 54, Mark Garrison. Number 54.

3 (A white male came forward.)

4 THE CLERK: What say you for the State?

5 MR. MCELHANNON: Please present this juror.

6 THE CLERK: What say you for the defendant?

7 MR. SMITH: Excuse Mr. Garrison in this case,

8 please.

9 THE CLERK: You can return to your seat. Thank you,

10 Mr. Garrison.

11 Juror 141, Kathy Robb. Number 141.

12 (A white female came forward.)

13 THE CLERK: What say you for the State?

14 MR. MCELHANNON: Please present the juror.

15 THE CLERK: What say you for the defendant?

16 MR. SMITH: Swear the juror.

17 THE CLERK: If you'll have a seat on that second row

18 you'll be our first alternate, Ms. Robb.

19 Juror number 139, Kevin Richey. Number 139.

20 (A white male came forward.)

21 THE CLERK: What say you for the State?

22 MR. MCELHANNON: Please excuse this juror.

23 THE CLERK: You may return to your seat. Thank you.

24 Number 157, Odis Smith, 157.

25 (A black male came forward.)

1 THE CLERK: What say you for the State?

2 MR. MCELHANNON: Please present the juror.

3 THE COURT: What say you for the defendant?

4 MR. SMITH: Swear the juror.

5 THE CLERK: If you'll have a seat on the last row
6 you'll be our second alternate, please.

7 THE COURT: All right. Members of the jury, what
8 I'm going to ask you to do is go to the jury room and elect a
9 foreman or a forelady. After you've done that, write the name
10 down on a piece of paper, give it to the bailiff and I'll get
11 you back in the courtroom very shortly thereafter. You may
12 elect anybody except the alternate, Kathy Robb, or Odis Smith.
13 If you'll follow the bailiff he'll show you where to go.

14 (WHEREUPON, the jury leaves the courtroom at
15 approximately 12:23 p.m.)

16 THE COURT: Any motions from the State on the
17 qualification and drawing of the jury?

18 MR. MCELHANNON: None from the State, Your Honor.

19 THE COURT: Any from the defendant?

20 MR. SMITH: None from the defense either.

21 THE COURT: All right. Thank you very much. Let me
22 see the attorneys up here just a second.

23 Solicitor, could I see you up here just a second.

24 (WHEREUPON, a bench conference occurred.)

25 THE COURT: The remaining jury panel, the clerk is

1 going to pass out a sheet, and on that sheet is a phone
2 number. The bailiffs and the clerk is going to pass out a
3 sheet with the phone number, and I'll tell you about the
4 number in just a second.

5 [PAUSE]

6 Is there anybody that does not have the letter?

7 (There was no response.)

8 THE COURT: Is there anybody that does not see the
9 phone number on the letter?

10 (There was no response.)

11 THE COURT: All right. Call that number after 6
12 o'clock tonight and there will be a message for the jury
13 panel. The message may be report in the morning at 9:30, the
14 message may be call back tomorrow night, but follow those
15 instructions.

16 Would you bring the juror that's outside inside,
17 please, and give her the letter.

18 All right. The juror that just came in the
19 courtroom, there's a phone number on the letter. Call in
20 after 6 o'clock and there will be a message for the jury
21 panel. Follow those instructions.

22 Does anybody have any questions?

23 Yes, sir?

24 MALE JUROR: You said there will be a message and a
25 message might be to call back tomorrow?

1 THE COURT: Or the message may be to be here
2 tomorrow, okay? Just follow those instructions on the
3 message. It will be for the jury panel. You understand?

4 MALE JUROR: Yes, sir.

5 THE COURT: Okay. Any other questions?

6 (There was no response.)

7 THE COURT: You're welcome to stay, otherwise have a
8 good day.

9 (WHEREUPON, the jury venire was excused.)

10 THE COURT: All right. Juror number 9, Batizy, is
11 the foreman. Juror number 9 is the foreman.

12 You want to bring the jury in, please.

13 (WHEREUPON, the jury enters the courtroom at
14 approximately 12:32 p.m.)

15 THE COURT: All right. We're not going to start
16 this trial until this afternoon at 2:30. So I'm going to
17 excuse you and ask you to be back in the jury room at 2:30,
18 and we'll get started at that time. Please don't discuss the
19 case with anybody. If anybody tries to discuss it with you,
20 please walk away from them.

21 If you'll go with the bailiff he'll show you where
22 to come at 2:30. When you come to the courthouse come
23 straight to the jury room. If you'll follow he'll show you
24 where to come at 2:30. See you at 2:30.

25 (WHEREUPON, the jury leaves the courtroom at

1 approximately 12:33 p.m., and the trial of this case was
2 recessed for lunch.)

3 THE COURT: Is the State ready to proceed?

4 MR. MCELHANNON: Yes, sir.

5 THE COURT: The defense, if we can find Mr. Evans.
6 Can we get Mr. Evans up here.

7 MR. SMITH: Yes, sir, Your Honor. We just have a
8 few motions.

9 THE COURT: What you got?

10 MR. SMITH: Motion number one is the motion to -- in
11 limine.

12 THE COURT: Motion what?

13 MR. SMITH: In limine.

14 THE COURT: Okay. I'll be glad to hear you.

15 MR. SMITH: There are certain -- there's a 911 tape,
16 Your Honor, that we believe that if we stipulate that the call
17 was made to 911 and they dispatched the police officers out
18 there there wouldn't be any need to go through the 911
19 information because we will stipulate that there was a call
20 made to the police department and the police department sent
21 -- dispatched police officers out there.

22 So under those circumstances, the probative value of
23 introducing the 911 tape is outweighed by the prejudicial
24 effect that that 911 tape would have, if it was introduced to
25 the jury. It may inflame the jury if it's heard. And the

1 only interest in that, I would think, would be that they sent
2 the police out.

3 The other two, Your Honor, that we have, motion in
4 limine --

5 THE COURT: Well, let's deal with that one first.

6 MR. SMITH: Okay.

7 THE COURT: What's the State's position on the
8 stipulation? I can't make the State stipulate, I mean.

9 MR. MCELHANNON: No, Your Honor, it's a
10 contemporaneous statement and it's under the excited utterance,
11 803-2. It's very, very probative in this matter.

12 THE COURT: Well, who made the statement?

13 MR. MCELHANNON: There's 2, Your Honor. One is
14 Janice Lavoie, who is an eyewitness; and the other, Mark
15 Durham, who is also an eyewitness.

16 THE COURT: Janice Lavoie?

17 MR. MCELHANNON: Yes, sir.

18 THE COURT: And who is the other one?

19 MR. MCELHANNON: Mark Durham.

20 THE COURT: Mark Durham.

21 MR. MCELHANNON: And they are contemporaneous. They
22 actually were on the phone as it was happening, observing what
23 was going on. So we do believe it's very probative. I have
24 some case law, Your Honor, actually.

25 THE COURT: I was trying to find Mark Durham on your

1 witness list.

2 MR. MCELHANNON: Christopher Mark Durham.

3 THE COURT: Okay. All right. The State's not going
4 to stipulate. What's the basis of your motion to suppress or
5 not allow it into evidence on your motion in limine,
6 Mr. Smith?

7 MR. SMITH: The other issue would be the probative
8 value -- I think it's under Rule 406, I believe. I could be
9 wrong on that. But the probative value is outweighed by the
10 inflammatory nature of the excitement that is expressed on the
11 phone. He has witnesses. They are able to get up on the
12 stand and testify in a cool way without any emotional overlay
13 to try to inflame the jury.

14 THE COURT: Well, there's no way I can rule on that
15 motion without at least hearing the tape. So what we'll do is
16 whenever he's ready to use the tape with the witnesses we'll
17 just listen to it in-camera. I'll make a decision one way or
18 the other at that time. I'm not going to make it now and take
19 the time to listen to the tape. I'll listen to it before you
20 introduce it.

21 MR. SMITH: Thank you, Your Honor.

22 THE COURT: Now, I would instruct both the parties
23 not to mention 911 tape in opening statements, Okay?

24 MR. MCELHANNON: And, Your Honor, just for your
25 information, the first witness will be Janice Lavoie. So it

1 will be rather quick after opening statements.

2 THE COURT: All right. Well, we'll listen to it
3 after you call her and see what groundwork is being laid with
4 her so I can rule on it, okay?

5 MR. SMITH: The other issue, Your Honor, is one of
6 the inflammatory nature of the photos. There will be some
7 photographs that will --

8 THE COURT: Do you have the photos so I can look at
9 them?

10 MR. SMITH: Yes, sir. I think he has a medical
11 doctor coming in and he's going to testify the wounds are not
12 as serious as the photographs may appear.

13 THE COURT: All right. Your basis for excluding the
14 photos, are they inflammatory?

15 MR. SMITH: Yes, sir, inflammatory.

16 THE COURT: And prejudicial?

17 MR. SMITH: And prejudicial, and they tend to make
18 the jury convict a person just based on the fact that they are
19 looking at the photographs.

20 THE COURT: As far as the inflammatory nature of the
21 pictures, that motion is denied. Now, you can make your
22 motion on any other basis and that basis whenever they come up
23 for trial.

24 MR. SMITH: All right, sir. We might want to do a
25 voir dire when the pictures were taken and all that stuff with

1 the witness in proffer, sir.

2 THE COURT: Okay. I understand. But as far as the
3 motion in limine, that's denied.

4 MR. SMITH: All right. The other issue is the one
5 of double jeopardy. He was indicted, Your Honor, for this
6 offense as having committed this offense against a gentleman
7 by the name of Billy Smith on the same day and the same
8 circumstances, and presumably they testified in front of a
9 grand jury that Mr. Evans, in fact, attacked this Billy Smith
10 who they meant was Evans.

11 Well, the prosecution dismissed the charges against
12 Mr. Billy Smith and then re-indicted him about a month ago on
13 July the 22nd for the same charge. We believe that when he
14 dismissed that first indictment with prejudice, I presume,
15 against Billy Smith he under minded --

16 THE COURT: Is this the same victim that we have
17 now?

18 MR. SMITH: Yes, sir. We believe that when the
19 police officers testified before the grand jury they testified
20 that Mr. Evans had an incident involving assault and battery
21 with intent to kill against a Mr. Evans, and yet they signed
22 the indictment as a Billy Smith --

23 (WHEREUPON, the defendant was brought into the
24 courtroom.)

25 MR. SMITH: And then the prosecution came and

1 dismissed that indictment and then re-indicted him under the
2 name of Craft, Billy Craft.

3 We believe that the prosecution has in effect
4 dismissed the charges against Mr. Evans and that he can not
5 come back today and try Mr. Evans on the same charges that
6 he's already dismissed with prejudice.

7 THE COURT: That motion is denied.

8 MR. SMITH: Thank you, Your Honor.

9 THE COURT: Any other motions?

10 MR. SMITH: That's it.

11 THE COURT: Are we ready to bring the jury and start
12 the trial?

13 MR. SMITH: Yes, sir, Your Honor.

14 THE COURT: Anything from the State before we bring
15 the jury?

16 MR. MCELHANNON: Nothing from the State.

17 THE COURT: Anything else from the defendant?

18 MR. SMITH: Your Honor, just out of precaution,
19 there was some sort -- I just don't know because I came on the
20 case late. I have 2 documents indicating that if he would
21 give testimony in a case involving a murder here in Anderson
22 of a person who was different and take a polygraph test then
23 certain of his charges would be dismissed.

24 I think he was under the understanding because the
25 police officers did write a statement and signed it and said

1 that they would do everything they could to see that the
2 charges would be dismissed, and the prosecution drafted
3 documents in that regard but they were never signed by
4 Mr. McElhannon and Mr. Barry Evans, or his lawyer, Tom
5 Dunaway, at the time.

6 THE COURT: What's that have to do with this?

7 MR. SMITH: Well, these were the charges -- I think
8 these charges were part of the process that if he gave
9 testimony in that other case with the murder charge that he
10 would be looked upon with leniency in these charges.

11 THE COURT: He didn't give the testimony, did he?

12 MR. SMITH: No, sir.

13 THE COURT: All right. Well, then what's the
14 problem?

15 MR. SMITH: Well, he did do everything he could for
16 the police officers in terms of even taking a polygraph.

17 THE COURT: I don't think that's got anything to do
18 with this trial. Now, it may have something to do with -- I
19 don't know. You'll just have to deal with that as far as
20 prejudicial with the police officer or however you want to
21 deal with it in the voluntariness of the statement, but what
22 are you asking me to do about it?

23 MR. SMITH: Well, I was going to ask that these
24 charges be --

25 THE COURT: I mean, what are you asking me to do

1 because of that?

2 MR. SMITH: Enforce any agreement that the parties
3 may have had that I don't know about, but enforce that
4 agreement and dismiss the charges, basically.

5 THE COURT: All right. That's denied.

6 MR. SMITH: Thank you, Your Honor.

7 THE COURT: I mean, it may come in on the
8 voluntariness of the statement, or prejudice, or whatever on
9 cross-examination but we'll just have to deal with that at the
10 time.

11 MR. SMITH: Yes, sir.

12 THE COURT: Anything you want to put on the record,
13 Solicitor?

14 MR. MCELHANNON: Yes, sir, Your Honor. Officers
15 approached me about that and I told them unequivocally that I
16 could not offer him any type of leniency for testimony in
17 another case because of the nature and severity of this case.
18 That's why that was never signed, because I refused to let
19 them do it. I said no, I can not promise him anything. So
20 that's to clear that record up, Your Honor.

21 THE COURT: Okay. Thank very much.

22 Anything else?

23 MR. SMITH: That's it, Your Honor.

24 THE COURT: Bring us the jury, please.

25 (WHEREUPON, the jury enters the courtroom at

1 approximately 3:24 p.m.)

2 THE COURT: Madam Clerk, if you'll swear the jury,
3 please.

4 (WHEREUPON, the jury was sworn.

5 THE COURT: Ladies and gentlemen of the jury,
6 whoever wants a notepad or a pen, raise your hand and the
7 bailiff will pass it to you.

8 (WHEREUPON, notepads and pens were passed out to the
9 jury.)

10 THE COURT: Does everybody have a notepad, or pen,
11 or pencil that wants it?

12 All right. Flip to the front page of the pad and
13 write your name. And when you leave the courtroom leave the
14 notepads in your chair. At the end of the trial when you
15 start your deliberations I'll let you take your notepads with
16 you to the jury room, but in the meantime they'll stay in the
17 courtroom. That's why I want you to write your name on the
18 pad, so you can get your notepad back whenever you come to and
19 from the courtroom.

20 Solicitor?

21 MR. MCELHANNON: Please the Court, Your Honor.

22 Ladies and gentlemen, September 14th, 2007 at

23 in Anderson County the victim in this case,
24 Billy Craft, was going out to dinner with a few other people.
25 He just happened to be at visiting --

1 visiting these people. It's about 5:00, a little after
2 5:00 in the evening.

3 As he approached the vehicle they were going to get
4 into to go to Kacey's on 28 to eat that defendant, Barry
5 Evans, came from out of nowhere with a razor blade knife and
6 violently attacked Billy Craft. Billy couldn't defend
7 himself. It was a surprise attack. The attack was so violent
8 he cut him 26 times, from head to toe. Literally, from head
9 to toe.

10 Now, he ran from the scene. The defendant ran.
11 Officers searched for the weapon, the razor blade knife,
12 couldn't find it. They finally apprehended him the next day,
13 September 15th, 2007.

14 The victim, Billy Craft, was taken to the emergency
15 room at the Anderson Hospital. He underwent surgery, sutures,
16 staples to sew up these 26 different lacerations.

17 Now, you are going to hear witnesses from the
18 witness stand up here, that's going to be your best testimony
19 in the case, eye witnesses who actually saw the attack happen.
20 They are going to tell you some things.

21 They are going to tell you that he not only attacked
22 him one time he was chasing other people in the neighborhood
23 and after they would run out of his distance he would come
24 back and whack some more on Billy Craft, turning him over one
25 time and hitting him across the back. What was he trying to

1 do? He was trying to kill Billy Craft. He didn't do it.

2 Billy lost a lot of blood but he survived.

3 Like I said, you're going to hear the witnesses from
4 the stand, one being the neighbor across the street who was
5 watching out her window, watching the whole thing happen. Her
6 husband, who actually came out and was in the yard, and
7 basically was trying to see what was happening, you know, get
8 the whole thing straightened out.

9 Mark Durham, who is going to be a witness and was
10 actually on the scene at had to run
11 into the house there to protect himself from Mr. Evans.
12 You're going to hear from at least those 3 eyewitnesses, and
13 all their testimony is going to be the same, that that
14 defendant came from nowhere without being provoked and just
15 sliced and diced at Billy Craft trying to kill him.

16 Now, when all the evidence -- there isn't a whole
17 lot of physical evidence, like I said, because the defendant
18 ran from the scene. We do have a few pieces and some
19 photographs of the scene that are going to come in and we'll
20 put them up here for you to see.

21 But I do believe that after you hear the testimony,
22 see the evidence that we have you're going to find beyond a
23 reasonable doubt that Barry Evans attempted to kill Billy
24 Craft, and that's why he's charged with assault and battery
25 with intent to kill and possession of a weapon during the

1 commission of a violent crime, that being the knife.

2 Now, he's also got an indictment for assault with
3 intent to kill which he's also standing trial for which is
4 against the nextdoor neighbor, Kevin Lavoie, because he came
5 at him with a knife because Kevin Lavoie came out into his
6 yard trying to break the thing up. So those are the 3
7 indictments that we're going forward on.

8 As I stated, I do believe that once you hear the
9 testimony of these eyewitnesses, hear from the medical
10 personnel who attended to Mr. Craft, EMS and his ER doctor is
11 also going to testify as to the amount of lacerations, amount
12 of blood loss, that type thing, you will find beyond a
13 reasonable doubt that the defendant tried to kill Billy Craft.

14 Thank you very much.

15 MR. SMITH: Your Honor, may it please the Court?

16 THE COURT: Yes, sir, Mr. Smith.

17 MR. SMITH: At the conclusion of my opening
18 statement I ask that the witnesses be sequestered, Your Honor.

19 THE COURT: Okay.

20 MR. SMITH: Has the jury selected a foreperson?

21 Okay. Mr. Foreperson, members of the jury, my name
22 is Fletcher Smith, and I'm here on behalf of Mr. Barry Evans
23 in this case. And right off I want to say that the
24 prosecution went out there, and none of the police officers
25 were out there at the scene on September 14th, 2007. So he

1 doesn't know what happened, and the only person that does know
2 what happened are Mr. Billy Craft and Mr. Barry Evans.

3 And we're going to prove to you in this case,
4 members of the jury, that these are false charges that have
5 been brought against Mr. Barry Evans. We're going to prove to
6 you in this case that he acted in self defense on that day.
7 We're going to prove to you that this man, Mr. Billy Craft,
8 has a known violent history here in Anderson County.

9 We're going to prove to you that he's even drawn a
10 gun on a police officer in this year at his house and that
11 he's been charged with a crime for pointing a gun at a police
12 officer. We're going to prove to you that he owned a box
13 cutter and that he had a box cutter in his pocket that day,
14 and we're going to prove to you that he had no business
15 telling Mr. Barry Evans that he was going to fuck him up that
16 day at the scene.

17 We're also going to prove to you that this man named
18 Lavoie came out of his house with a machete and was going to
19 attack Mr. Barry Evans with a machete which prevented
20 Mr. Barry Evans from retreating from the scene that day.
21 We're going to show you that. They are going to have to
22 testify to that because even in Mr. Lavoie's statement that he
23 came out against him with a machete.

24 And as to the fellow named Mark Durham, this
25 Christopher Durham fellow right here who is Mr. Barry Evans'

1 nephew, he came out of the house with a gun and was going to
2 shoot him. And who do you think told him to shoot Mr. Barry
3 Evans? This man named Billy Craft. It's in his statement
4 that he told this man, Mark Durham, to shoot and kill Barry
5 Evans.

6 And what else happened out there that day? We're
7 going to prove to you -- and I don't know if they are going to
8 call her to the stand, but we're going to prove to you that a
9 Linda Evans ran over Mr. Barry Evans with her car that day and
10 slammed him into a house and continued to run after him with
11 the car. We are going to prove to you, members of the jury,
12 he is not guilty of assault and battery with intent to kill.

13 We're also going to show you when the doctor comes
14 in -- I believe he's going to testify consistent with his
15 medical statement that this Mr. Billy Craft was brought to the
16 hospital, had a considerable amount of blood from all the
17 lacerations. None of the lacerations were deep and did not
18 penetrate toward any vital strictions.

19 He was prepared and taken to the operating room for
20 repair of multiple stab wounds. The fact of the matter is if
21 he wanted to kill this man he could have done it in a much
22 more efficient way than just slashing him with his own box
23 cutter that he drew on him that day.

24 So at the conclusion of this case, members of the
25 jury, we're going to ask you to find Mr. Barry Evans not

1 guilty of the charges that they have lodged against him. That
2 he was out there defending his life against several people who
3 are attacking him. Mr. Mark Durham wasn't a police officer.
4 He had no business of coming out with a gun.

5 This gentleman her, Lavoie, he had no business
6 bringing a machete out to attack someone. You heard what the
7 prosecution said in his opening statement that he came out.
8 Well, what did he come out of his house for with a machete?
9 It wasn't any of his business. He was going to attack and cut
10 this man up. And the lady named Linda Evans who ran over him
11 with the car, he is the victim in this case. And none of them
12 are charged with any criminal offense out there.

13 The other thing too is, who is Barry Evans? We are
14 going to prove to you that Barry Evans served this country,
15 went into the military. Served in the Army, got an honorable
16 discharge. Is married, has a child who's married to
17 Christopher Mark Durham. That they make their home here in
18 Anderson.

19 He hasn't had a perfect life because that man right
20 there, Billy Craft, sells drugs, a cocaine user --

21 MR. MCELHANNON: Objection, Your Honor.

22 THE COURT: What's your legal objection?

23 MR. MCELHANNON: Your Honor, there's no proof that
24 he's a cocaine dealer, or a cocaine user, my victim.

25 THE COURT: Okay. All right.

1 MR. SMITH: If I don't prove it.

2 THE COURT: Okay. That's fine. If he doesn't prove
3 it you can make that argument to the jury, okay?

4 MR. MCELHANNON: Yes, sir.

5 THE COURT: I don't know if he's going to prove it
6 or not.

7 MR. SMITH: We're going to prove to you --

8 THE COURT: Mr. Smith, don't make arguments. Tell
9 them what you're going to prove. Stay away from arguing your
10 case, please, sir.

11 MR. SMITH: Yes, sir. Thank you, Your Honor.

12 We're going to prove to you that he's not guilty.
13 And what the prosecution says, there's always two sides and
14 question. I want you to keep an open mind. Listen to all the
15 facts, and at the conclusion of this case I want you to bring
16 back a verdict that will speak the truth.

17 And I want to thank you for your participation
18 during the course of this trial, and we're going to try the
19 case aggressively and we're going to find out and ferret out
20 the truth from the stand. Thank you very much.

21 THE COURT: Solicitor, call your first witness,
22 please, sir.

23 MR. MCELHANNON: The State calls Janice Lavoie.

24 THE CLERK: Come forward to be sworn, please, ma'am.

25 JANICE LAVOIE, after having been duly sworn,

JANICE LAVOIE - DIRECT BY MR. MCELHANNON

1 testified as follows:

2 THE CLERK: Watch your step. Go around and have a
3 seat in the witness chair, please, ma'am.

4 (WHEREUPON, the witness was seated in the witness
5 stand.)

6 THE CLERK: And if you'll please state your full
7 name and spell your last name for the record.

8 MS. LAVOIE: Janice Lavoie, L-a-v-o-i-e.

9 DIRECT EXAMINATION

10 BY MR. MCELHANNON:

11 Q. Ms. Lavoie, where do you live?

12 A. At

13 Q. And how is that in relation to
14 ?

15 A. Directly across the street.

16 Q. And were you living at on
17 September 14th, 2007?

18 A. Yes.

19 Q. Were you home at that residence about 5 o'clock that
20 evening?

21 A. Yes, I was.

22 THE COURT: Can I interrupt you just a second. Let
23 me see the attorneys up here just a minute...

24 (WHEREUPON, a bench conference was had, and then all
25 witnesses were sequestered.)

JANICE LAVOIE - DIRECT BY MR. MCELHANNON

1 THE COURT: Mr. Foreman, ladies and gentlemen of the
2 jury, what one of the attorneys have asked is to sequester
3 witnesses, which that means the witnesses for each party will
4 be out of the courtroom and they won't hear the testimony, and
5 that's what the attorneys were doing, was asking the witnesses
6 to leave the courtroom because I told them that I would
7 allowed them to sequester the witnesses.

8 Solicitor, you may proceed.

9 MR. MCELHANNON: Thank you, Your Honor.

10 BY MR. MCELHANNON:

11 Q. Again, Ms. Lavoie, on September 14th, 2007 at about
12 5:00 p.m. where were you?

13 A. I was sitting in my chair in front of the windows
14 watching TV.

15 Q. And how do your windows face, towards the road or
16 towards the back?

17 A. The road.

18 Q. And what is directly across the road?

19 A. His house.

20 Q. The defendant's house --

21 A. Uh-huh.

22 Q. -- at ?

23 At about that time on September the 14th, did you
24 observe anything happening at

25 A. Well, as I was watching television my peripheral

JANICE LAVOIE - DIRECT BY MR. MCELHANNON

1 vision caught -- saw Barry running down the street from his
2 nextdoor neighbor in a crouched position.

3 Q. And by Barry you mean the defendant?

4 A. Right.

5 Q. Okay.

6 A. In a crouched position. And I mentioned to my
7 husband, why would Barry be running like that? And he came
8 over and we both were kneeling on the couch looking out the
9 window, and he approached the car that Billy was getting into.

10 Q. Billy Craft?

11 A. Uh-huh.

12 Q. And were other people around that car, too?

13 A. Yeah. Linda Evans was there, a young mother with
14 her little child, and Billy.

15 Q. And did you see anyone else there at that --
16 Mr. Durham, Mark Durham, getting in the car at that residence?

17 A. I didn't notice Mark.

18 Q. Now, you say you saw -- how do you know Barry Evans,
19 the defendant?

20 A. He's a neighbor, across the street.

21 Q. You've known him how long?

22 A. We've been there for 4 years.

23 Q. And was he at one point residing at
24

25 A. Uh-huh. Yeah, off and on.

JANICE LAVOIE - DIRECT BY MR. MCELHANNON

1 Q. I believe you said you saw him crouching?

2 A. Yeah. It was kind of a running, bent-over position.

3 I can show you but I don't know how to really explain it.

4 Q. And what did you observe him do, if anything?

5 A. Went right over to Billy.

6 Q. And what did he do to Billy Craft?

7 A. Started cutting him.

8 Q. Could you tell what he was cutting him with?

9 A. I couldn't.

10 Q. Did you see Billy Craft ever attack Barry Evans?

11 A. No.

12 MR. SMITH: Your Honor, I'd ask that he not lead the
13 witness, that he let her testify.

14 THE COURT: Don't lead your witness. I'll sustain
15 the objection.

16 BY MR. MCELHANNON:

17 Q. What did Billy Craft do when Mr. Evans started
18 cutting him?

19 A. Nothing. He didn't even seem to be able to defend
20 himself.

21 Q. How long do you think this went on?

22 A. Half an hour, anyway.

23 Q. What happened when the defendant started cutting
24 Mr. Craft?

25 A. He ended up laying on the ground and his hand,

JANICE LAVOIE - DIRECT BY MR. MCELHANNON

1 Billy's hand -- Barry's hand would come down and kind of
2 (indicated). Almost like he was picking places to cut. I
3 don't know. That's my opinion, but I mean he kept cutting.

4 Q. What were the other people doing around there?

5 A. Linda got out of her car, ran to the middle of the
6 road, bent way down and was yelling help, help. He's killing
7 him. He's killing him. Call 911.

8 And the little girl, the young girl in the back with
9 her baby got out of the car, ran over to my house and came in
10 my house, and that's one of the reasons my husband had the
11 machete, was to protect all of us.

12 Q. And so you let the young girl with the child into
13 your home?

14 A. Yes.

15 Q. What did you do after the girl, the young girl with
16 the child came into your home?

17 A. I was on the line with 911.

18 MR. MCELHANNON: Your Honor, may I approach?

19 THE COURT: Yes, sir.

20 (WHEREUPON, a bench conference was had.)

21 THE COURT: All right, Solicitor. I understand you
22 want to go into a 911 tape at this time; is that correct?

23 MR. MCELHANNON: That's correct, Your Honor.

24 THE COURT: I assume she'll be able to identify her
25 voice on it?

JANICE LAVOIE - DIRECT BY MR. MCELHANNON

1 MR. MCELHANNON: Yes, sir.

2 THE COURT: It's this witness's tape?

3 MR. MCELHANNON: Yes, sir.

4 THE COURT: Mr. Smith, do you have an objection?

5 MR. SMITH: Yes, sir.

6 THE COURT: And what's your legal objection?

7 MR. SMITH: Basically, I think she's the person
8 that's best able to testify what went on that day, but that's
9 just basically it, Your Honor. I think it's irrelevant
10 because she's already testified to what she did. She
11 contacted the 911 people. The 911 people came out to the
12 scene, and we're going to test her on cross-examination in the
13 next few minutes about what she saw and what she did hear.

14 THE COURT: All right. The objection is overruled.

15 MR. SMITH: Thank you, Your Honor.

16 BY MR. MCELHANNON:

17 Q. Ms. Lavoie, I'm going to show you what's been marked
18 as State's Exhibit Number 1. Can you identify that, please.

19 A. Yes.

20 Q. And how can you identify that?

21 A. I initialed it right here, and the date that it was
22 (indicated).

23 Q. Is that the date you listened to it?

24 A. Yes.

25 Q. And on that, what is that date?

JANICE LAVOIE - DIRECT BY MR. MCELHANNON

1 A. It's 7-30 of this year.

2 Q. And when you listened to that did you positively
3 identify you as being on that tape?

4 A. Yeah, that's me.

5 MR. MCELHANNON: At this time, Your Honor, I'd ask
6 that the 911 tape be admitted.

7 THE COURT: Same objection?

8 MR. SMITH: Same objection, Your Honor.

9 THE COURT: Overruled.

10 MR. SMITH: Thank you.

11 (WHEREUPON, State's Exhibit Number 1, a 911 Tape,
12 was admitted into evidence.)

13 THE COURT: If you need it turned up or down just
14 raise your hand so we can adjust the volume to where you can
15 hear it.

16 (WHEREUPON, State's Exhibit Number 1, the 911 Tape,
17 was played for the jury.)

18 MR. SMITH: Your Honor, may it please the Court.
19 That's the whole point. She's making conclusions now.

20 THE COURT: Is that the end of it?

21 MR. MCELHANNON: Yes, sir.

22 THE COURT: Okay. That's the end of it.

23 MR. SMITH: Thank you, Your Honor.

24 BY MR. MCELHANNON:

25 Q. Ms. Lavoie, after you made the 911 call, and you

JANICE LAVOIE - DIRECT BY MR. MCELHANNON

1 were on there quite sometime, did you do anything after they
2 hung up with you?

3 A. No.

4 Q. You didn't assist in any way?

5 A. No.

6 Q. And that 911 call, is it accurately depicted what
7 happened that day?

8 A. Yeah.

9 Q. Again, I'll ask you one more time, did you see Billy
10 Craft, the victim in the case, at any point try to attack
11 Barry Evans?

12 MR. SMITH: Objection, Your Honor, form of the
13 question.

14 THE COURT: I'll sustain the objection.

15 BY MR. MCELHANNON:

16 Q. Did you see Billy Craft do anything?

17 A. No.

18 Q. Did you see any type of a weapon on Billy Craft?

19 A. No.

20 Q. Did you see him pull a knife out of his pocket?

21 MR. SMITH: Objection, form of the question.

22 THE COURT: Overruled.

23 MR. MCELHANNON: You overruled that?

24 THE COURT: Go ahead.

25 BY MR. MCELHANNON:

JANICE LAVOIE - CROSS BY MR. SMITH

1 Q. Did you see him pull any type of a knife out of his
2 pocket?

3 A. No.

4 MR. MCELHANNON: I have nothing further of this
5 witness.

6 Please answer anything Mr. Smith has.

7 CROSS-EXAMINATION

8 BY MR. SMITH:

9 Q. So, Ms. Lavoie, I take it that you know Mr. Craft
10 pretty well?

11 A. No.

12 Q. So how long have you known -- how long have you
13 known Mr. Craft?

14 A. I didn't know him.

15 Q. All right. You've known Linda Evans, haven't you?

16 A. Uh-huh.

17 Q. As a matter of fact, your husband buys drugs from
18 Linda Evans, doesn't he?

19 A. When he could.

20 Q. When he could. And Linda Evans is not a pharmacist,
21 is she?

22 A. No.

23 Q. So your husband buys illegal drugs from Linda Evans;
24 isn't that a fact?

25 A. Yes.

JANICE LAVOIE - CROSS BY MR. SMITH

1 Q. It's also a fact that Mr. Craft sells illegal drugs,
2 too, isn't it?

3 A. I don't know.

4 Q. Has your husband ever bought any illegal Percocet
5 drugs from Mr. Billy Craft?

6 A. No.

7 Q. To your own knowledge, do you know?

8 A. No.

9 Q. All right. Now, the fact of the matter is Mr. Evans
10 lived at that residence where Linda Evans lived; is that
11 correct?

12 A. Off and on, yes.

13 Q. Right. Off and on. And as far as you know he was
14 living there then?

15 A. Nope. No, he was up at the trailer park then.

16 Q. Well, let me see. So you look out the window 24
17 hours a day to find out everybody who's living in the trailer
18 park there?

19 A. No. No. You can't see the trailer park from my
20 house.

21 Q. All right. Now, the other question, too, is there
22 were several vehicles out at the scene that day, wasn't it?

23 A. No.

24 Q. Well, you said in your testimony that they were
25 going to get into Linda Evans' car and go somewhere.

JANICE LAVOIE - CROSS BY MR. SMITH

- 1 A. Right. Yes.
- 2 Q. Well, that's one vehicle, isn't it?
- 3 A. That's one.
- 4 Q. Was there any other vehicle at the scene?
- 5 A. Not that I noticed.
- 6 Q. Well, it had to be Mr. Craft's because Mr. Craft
- 7 came to that area, didn't she?
- 8 A. No, she picked him up.
- 9 Q. She picked him up and brought him over --
- 10 A. Her house.
- 11 Q. -- to this residence?
- 12 A. Yes.
- 13 Q. So it is your testimony to the jury there was just
- 14 one vehicle?
- 15 A. That's all I noticed.
- 16 Q. That's all you noticed. And you had a view from
- 17 what room of your house?
- 18 A. My parlor.
- 19 Q. Your what?
- 20 A. What do you call it, parlor?
- 21 Q. Parlor.
- 22 A. Parlor.
- 23 Q. Okay. Is that located in the middle of the house or
- 24 on the end of the house?
- 25 A. In the middle.

JANICE LAVOIE - CROSS BY MR. SMITH

1 Q. Where is your phone located?

2 A. Right there, next to my couch.

3 Q. Next to your couch. And when you picked up your
4 phone where did you pick your phone up at?

5 A. On the end table next to the couch.

6 Q. On the end table next to your couch. So when you
7 turned around to pick up your phone you had to -- you could
8 still look out the window and pick it up?

9 A. Exactly.

10 Q. Right. And I noticed in your statement you never
11 mentioned the fact that your husband went outside and tried to
12 attack Mr. Barry Evans with a machete?

13 A. He didn't try to attack. He was afraid. When the
14 girl came over with the baby that he didn't want any trouble
15 over at our house so he just stood there with it.

16 Q. Well, did Mr. Barry Evans cut the baby and the lady
17 with the baby?

18 A. I don't know.

19 Q. But the fact of the matter is your husband went
20 outside of his premises into the yard with a machete after
21 Barry Evans, didn't he?

22 A. No, not after Barry Evans. To protect him --

23 Q. Well, who was he going to use the machete on?

24 A. Barry Evans entered our yard before, before my
25 husband was messing with the machete.

JANICE LAVOIE - CROSS BY MR. SMITH

1 Q. Well, you said Barry Evans was over there cutting up
2 on --

3 A. Yes. He left him and came over to my husband and
4 told him you are next, M-F.

5 Q. Right, and when did Mark Durham bring the gun out?

6 A. After that.

7 Q. And did you hear --

8 A. When Barry went back over, turned the fellow over
9 and was cutting some more on him Mark came out with a gun and
10 said that's enough, Barry.

11 Q. And did you put on the 911 tape where that
12 gentleman, Billy Craft, told the other fellow to shoot him
13 with the gun?

14 A. I didn't hear that.

15 Q. So you didn't hear that?

16 A. No.

17 Q. And you didn't hear any conversation between Barry
18 Evans and Billy Craft that might have gone on --

19 A. No.

20 Q. -- before the incident happened, correct?

21 A. No, I didn't hear.

22 Q. So it could have been, in fact, he told Barry Evans
23 that I'm going to fuck you up, correct, as far as you know?

24 A. As far as I know, I don't.

25 Q. And that's not on your 911 tape, is it?

JANICE LAVOIE - CROSS BY MR. SMITH

1 A. No, because I couldn't hear anything.

2 Q. And the other thing that's not on your tape is that
3 Barry Evans, he did never -- he never attacked Linda Evans,
4 did he?

5 A. No. No.

6 Q. As a matter of fact, Linda Evans ran over him with
7 the car. Did you see that?

8 A. Yeah, she pinned him against the house.

9 Q. Right. She pinned him against the house with an
10 automobile?

11 A. With the front of the car, yes.

12 Q. So he couldn't have been cutting on the man when he
13 was being pinned against the house with an automobile, could
14 he?

15 A. Not at that time.

16 Q. And you didn't put that on your 911 tape either, did
17 you?

18 A. I think it was there.

19 Q. So you were trying to protect your husband who was
20 coming out into the yard with a machete to attack Barry Evans,
21 correct?

22 A. No, he wasn't going to attack him.

23 Q. Well, the drug dealer for your husband was Linda
24 Evans?

25 A. She lived across the street.

JANICE LAVOIE - REDIRECT BY MR. MCELHANNON

1 Q. Right. She was the drug dealer for your husband.
2 So everything you were going to do was to try to protect your
3 husband's supply of drugs, weren't you?

4 A. Oh, no.

5 Q. Well, you never went to the police and said Linda
6 Evans is selling drugs to my husband, would you all please
7 arrest her for putting this poison into my husband's system?
8 You never did that, did you?

9 A. No, I didn't.

10 Q. You didn't think it was appropriate to do that, did
11 you?

12 A. He needed it for pain.

13 Q. So the other thing too is this fellow, Billy Craft,
14 do you know anything about Mr. Billy Craft's background?

15 A. No.

16 MR. SMITH: No further questions for this witness,
17 Your Honor.

18 THE COURT: Okay. Redirect?

19 MR. MCELHANNON: Just two or three, Your Honor.

20 REDIRECT EXAMINATION

21 BY MR. MCELHANNON:

22 Q. Ms. Lavoie, when you saw Mark Durham come out of the
23 house at with a gun, was that before or
24 after he had been cutting on Billy Craft?

25 A. That's after. He was telling him stop, that's

JANICE LAVOIE - RECROSS BY MR. SMITH

1 enough.

2 Q. And when Linda Evans pinned him against the house
3 with the car, was that before or after Billy Craft was laying
4 on the ground with multiple lacerations?

5 A. That was after. She tried to stop him from
6 continuing.

7 Q. And I think it was your testimony that he left at
8 least once and came back and continued cutting on him?

9 A. Uh-huh. When he came to our house and told my
10 husband he was next. He saw that my husband had the machete
11 and he only had the knife and he knew he couldn't beat that,
12 so he went back, flipped him over and started cutting some
13 more.

14 Q. And did Billy Craft ever get off the ground at any
15 time?

16 A. Uh-uh, no.

17 MR. MCELHANNON: That's all I have, Your Honor.

18 THE COURT: Recross?

19 MR. SMITH: One further question.

20 RECROSS-EXAMINATION

21 BY MR. SMITH:

22 Q. The other question I have, did you see a Mazda that
23 was being driven by the young lady that ran into your house
24 over there?

25 A. She was in the back seat of Linda's car.

KEVIN LAVOIE - DIRECT BY MR. MCELHANNON

1 Q. Did you see her drive a Mazda --

2 A. No.

3 Q. -- to that scene?

4 A. No.

5 THE COURT: You may step down. Thank you very much.

6 Call your next witness.

7 MR. MCELHANNON: The State calls Kevin Lavoie.

8 THE CLERK: Mr. Lavoie, would you please come
9 forward to be sworn.

10 KEVIN ROSS LAVOIE, after having been duly
11 sworn, testified as follows:

12 THE CLERK: Go right up there and have a seat in the
13 witness chair, please.

14 (WHEREUPON, the witness was seated in the witness
15 stand.)

16 If you'd please state your full name and spell your
17 last name for the record.

18 THE WITNESS: My name is Kevin Ross Lavoie,
19 L-a-v-o-i-e.

20 DIRECT EXAMINATION

21 BY MR. MCELHANNON:

22 Q. Mr. Lavoie, where do you live?

23 A. I live at

24 Q. And where is that in relation to

?

25 A. Pardon me?

1 Q. Where is that in relation to ?

2 A. It's directly across the street.

3 Q. And were you living there on September 14th, 2007?

4 A. Yes, I was.

5 Q. And who did you live there with?

6 A. Just my wife and I.

7 Q. And that's Janice Lavoie?

8 A. Yes, sir.

9 Q. On September 14, 2007, what were you doing about
10 5 o'clock that afternoon?

11 A. My wife and I were just sitting watching TV, getting
12 ready to have supper, and all of a sudden my wife says, What's
13 Barry running down the road for? So I kind of glanced and
14 looked and he was in, like, an Indian position like he was
15 stalking somebody, and I seen the rest of the people getting
16 into a car. And Barry Evans ran up, reached inside the
17 window. I thought he was punching her at first until I seen
18 the sun reflect and showed the straight razor.

19 Q. And who was he attacking with the straight razor?

20 A. Well, I only seen Billy once, and that was on TV on
21 a gospel channel.

22 Q. So Billy Craft, the victim?

23 A. Right. I never met him before except then.

24 Q. How many people were around this vehicle at

25 A. Let's see. Linda Evans, the son-in-law, Billy.

KEVIN LAVOIE - DIRECT BY MR. MCELHANNON

1 Q. Do you know the son-in-law's name?

2 A. Mark.

3 Q. Okay.

4 A. I don't know his last name.

5 Q. Okay.

6 A. And there was another girl and a young baby.

7 Q. Now, when this happened did you do anything?

8 A. Well, the young lady and the baby, they ran over to
9 my house. So I reached for the first thing I could grab,
10 which I carry a machete, you know, to cut limbs out in the
11 back of my house. It's a pretty wooded area. So I went
12 outside with a machete and stood at my property just incase he
13 had come forward or was chasing anybody else.

14 Q. And what was he doing at this time, the defendant?

15 A. He was carving. He wasn't slashing. He was carving
16 Mr. Billy over there.

17 Q. And what was Mr. Craft doing?

18 A. He -- well, all I seen was he put up his hand to
19 defend himself then he fell to the ground, you know, like in a
20 fetal position, and he just didn't move, didn't try to fight
21 back or anything.

22 Q. Did the defendant, Mr. Evans, stay there the whole
23 time?

24 A. No. His ex-wife, Linda Evans, got into her car and
25 drove -- tried to pin him against her own house and --

KEVIN LAVOIE - DIRECT BY MR. MCELHANNON

1 Q. And when did she do that, after Mr. Craft was on the
2 ground?

3 A. Right. After he had been cut a few times. Linda
4 kept screaming he's killing him, he's killing him. So she
5 jumps in her car and was going to go pin him against the
6 house. The way I guess the position was she didn't hit him
7 hard enough and so he got back up off the ground, and Linda
8 Evans backed her car up and pulled in my driveway. And as he
9 got up, as Barry Evans got up he walked over to Billy, rolled
10 him over and started carving him just like -- it wasn't a
11 slash or a slice. It was like carving. I've never seen --
12 you know, I've seen a lot of movies before, prisoners getting,
13 you know, slashed but I've never seen anything like that.

14 Q. And did Mr. Craft have opportunity to fight back
15 or --

16 A. No. He didn't even try to fight. He just stayed in
17 a fetal position.

18 Q. Did you at any point see any type of a weapon on
19 Billy Craft?

20 A. No, I didn't.

21 Q. Did you ever hear Billy Craft yell anything at Barry
22 Evans?

23 A. No, I didn't.

24 Q. Now, you went outside in your yard with a machete?

25 A. Yes, I did.

KEVIN LAVOIE - DIRECT BY MR. MCELHANNON

1 Q. And that point, what did Mr. Evans do, if anything?

2 A. Well, after that, Linda Evans pinned him against the
3 car, he sliced on Billy a little more, and then he seen me.
4 And I was in the middle of my yard, and there's like -- the
5 road has a hump in it. So he couldn't see the machete from
6 there, where he was at. Well, when he started coming up over
7 the hill he had seen the machete. He said, You're next.

8 So I raised the machete to protect myself, and he
9 walked down the side of the road to my nextdoor neighbor on my
10 left side and he grabbed a pipe. I believe it was about 5 or
11 6 feet long, and started chasing me with that. And he threw
12 it at me, and I just went into the house.

13 Q. Let me show you what's been marked as State's
14 Exhibit 12. Can you identify that?

15 A. I can identify it by the end mark was burnt and
16 smashed, just about the same size.

17 Q. What is that?

18 A. That's a pipe fence, post. I've been a fence man
19 for 30 years, so I know what a pipe post is.

20 Q. And Mr. Evans threw --

21 A. Threw it and it hit my drainage and my siding on my
22 house.

23 Q. What did he do after he threw the pipe?

24 A. At that time, Linda Evans backed her car out and
25 headed down the street. At that time after I got in the house

KEVIN LAVOIE - DIRECT BY MR. MCELHANNON

1 he no longer came at me. He went back after her. And they
2 went down the road, and that was the last I seen of them.

3 Q. Did you see -- ever see Mark Durham go in the house
4 or out of the house?

5 A. Mark came out at one point with a pistol and said
6 cut it, he's had enough. He's had enough. Cut it out.

7 And Mr. Evans chased him. I mean, he chased the guy
8 with a gun out back in the house, swinging the knife at him,
9 and Mark just slammed the door and called 911, I guess.

10 Q. So you saw Mark Durham with a pistol?

11 A. Right.

12 Q. And Mr. Evans chased him back into the house?

13 A. Right.

14 Q. And did Mark Durham come out of the house with a
15 pistol before or after Billy Craft was on the ground?

16 A. After.

17 Q. And did Linda --

18 A. He was one of the people in the car. You know,
19 everybody just ran in different directions. He ran into
20 Linda's house. The girl and the baby ran over to my house.
21 And Linda, she was trying to run him over with the car. In
22 between doing that she was over at my park -- parked in the
23 driveway screaming at the top of her lungs, He's killing him.
24 He's killing him.

25 Q. And you never saw Billy Craft come toward Barry

KEVIN LAVOIE - CROSS BY MR. SMITH

1 Evans that day?

2 A. Never seen him raise a hand to him. It was
3 unprovoked, blind-sided you might call it. I mean, as far
4 away from our house as they are is probably from that back
5 wall to here. That's a clear view.

6 MR. MCELHANNON: That's all questions I have.

7 THE COURT: Cross-examination?

8 MR. SMITH: Yes, sir.

9 CROSS-EXAMINATION

10 BY MR. SMITH:

11 Q. Now, as I understand it, it was raining that day,
12 correct?

13 A. Not during the fight. It started raining
14 afterwards.

15 Q. So it was cloudy that day, wasn't it?

16 A. It was the sun peeking through off and on.

17 Q. So you couldn't see the reflection off of anything
18 because it was cloudy and rainy that day; isn't that a fact?

19 A. You didn't let me finish. I said the sun was
20 peaking in and out before it rained.

21 Q. Now, the other thing, too, sir, is that you buy
22 drugs from Linda Evans, don't you?

23 A. What's that?

24 Q. You buy drugs from Linda Evans?

25 A. Backed her up?

KEVIN LAVOIE - CROSS BY MR. SMITH

1 Q. You buy drugs from Linda Evans?

2 A. I have, yes.

3 Q. And you've just recently bought some from her, too,
4 didn't you?

5 A. No, I haven't.

6 Q. Tell the jury what kind of drugs you buy from Linda
7 Evans.

8 A. Marijuana.

9 Q. What else?

10 A. That's it.

11 Q. Marijuana. You bought cocaine, didn't you?

12 A. No, I don't. I never do cocaine. I never have in
13 my life.

14 Q. Well, you know Billy Craft uses crack cocaine, don't
15 you?

16 A. No, I never met the man. I don't know who he was.

17 Q. Yet, you're going to come out and defend a man you
18 never met with a machete; is that a fact?

19 A. To protect my family, yes.

20 Q. Well, he didn't come into your house and attack your
21 wife, did he?

22 A. No, protecting his ex-wife at the same time.

23 Q. Oh, the woman who supplies you with the drugs,
24 that's who you were protecting?

25 A. Well, she was in my yard.

KEVIN LAVOIE - CROSS BY MR. SMITH

1 Q. Now, the fact of the matter is, sir, there's been
2 bad blood between you and Mr. Evans because he didn't want his
3 wife selling you any drugs; isn't that a fact?

4 A. I wouldn't know that.

5 Q. You wouldn't know that?

6 A. No. We got along. We shot horseshoes together,
7 everything else.

8 Q. Well, here you are smoking drugs in his house,
9 right?

10 A. Not in his house, ho.

11 Q. And your wife approved of you going over there and
12 smoking drugs in that house, too, right?

13 A. Without her knowledge.

14 Q. Without her knowledge. Well, your wife peeps out
15 the window on just about everything.

16 A. Well, we can see just about everything that goes on
17 over there.

18 Q. Well, would you be surprised to know that your wife
19 testified that she knew you were buying drugs over there?

20 A. I believe she would say that I was.

21 Q. So it wasn't without her knowledge, was it, sir?

22 A. No. But sometimes I would, you know, buy it without
23 her knowledge.

24 Q. Right. Right. And on the day in question, you were
25 using drugs on this day, weren't you?

KEVIN LAVOIE - CROSS BY MR. SMITH

1 A. No, I wasn't.

2 Q. You were using drugs on that day as you had been on
3 other days prior to that incident; isn't that correct?

4 A. No, that's not.

5 Q. And it is also a fact, sir, that your perception as
6 to what was going on out there wasn't accurate, was it?

7 A. No, everything was accurate.

8 Q. So you're the kind of drug user whose mental
9 faculties are always intact when they use drugs? Is that what
10 you're telling the jury?

11 A. No, sir. I'd say I'm more or less an alcoholic, and
12 I didn't even have a beer that day.

13 Q. So now you're a pot-smoking alcoholic. Is that what
14 you're telling the jury today?

15 A. I'm saying I'm an alcoholic and not so much in
16 drugs.

17 Q. Not so much?

18 A. And I didn't even have a beer that day because my
19 neighbor came over and wanted to know what was going on, and I
20 says, Boy, I wish I had a beer now.

21 Q. Right. Right. Right.

22 A. That's it.

23 Q. That's it. That's right. And you were going to
24 come out there with that machete because your wife told you to
25 go out there with a machete?

KEVIN LAVOIE - CROSS BY MR. SMITH

1 A. No, she didn't. My wife didn't tell me to do
2 nothing. I picked it up myself.

3 Q. So you all were both peeping out of the window at
4 the same time?

5 A. Oh, yeah. I mean, my windows are open. It's hot.
6 You could hear it echo. People whisper over there you could
7 hear it echo.

8 Q. All right. So let me just see if I can get this
9 straight. You don't smoke marijuana over at Linda Evans'. Do
10 you smoke it at your house?

11 A. My house?

12 Q. Yeah.

13 A. Sure.

14 Q. So your wife would have to know that you are smoking
15 that marijuana in the house, wouldn't she?

16 A. Of course, we've been married 23 years.

17 Q. So you told a lie to the jury that your wife
18 wouldn't know that you smoked marijuana?

19 A. I don't tell my wife necessarily when I'm going over
20 there and when I'm not. My wife is hardly even out of bed by
21 4:00 in the afternoon. So there's no way she would possibly
22 know if I did it.

23 Q. Now, the other curious thing. You said that when he
24 was pinned up against the wall -- he was pinned up against the
25 wall with that car, wasn't he?

KEVIN LAVOIE - CROSS BY MR. SMITH

1 A. Right.

2 Q. That at that time he was slicing Barry -- Barry
3 Evans was slicing Billy Craft at that time?

4 A. No.

5 Q. That's impossible, isn't it?

6 A. No. No. That's not what I said. I said he was
7 slicing Billy. Billy was in a fetus [sic] position. Linda
8 was yelling, He's killing him. He killing him.

9 She jumped in her car and forced him up against the
10 building.

11 Q. Well, did you know Billy Craft was a convicted
12 felon?

13 A. No, I didn't.

14 Q. Did you know he was not supposed to have a gun?

15 A. No, I didn't.

16 Q. Did you know that he drew a gun on a police
17 officer --

18 MR. MCELHANNON: Objection, Your Honor.

19 A. No, I --

20 THE COURT: I'll sustain the objection. Disregard
21 the question about the gun and the convicted felon.

22 MR. SMITH: Thank you, Your Honor. No further
23 questions.

24 THE COURT: Anything on redirect?

25 MR. MCELHANNON: No, sir.

1 THE COURT: All right, Mr. Lavoie. You may step
2 down.

3 Mr. Foreman, members of the jury, what we're going
4 to do is take a short break at this time. Please leave your
5 notepads in the chair. I know you haven't been in the
6 courtroom but we've been in the courtroom since about 2:30,
7 about 2 hours. So we're going to take a break. And leave
8 your notepad in the chair. Don't discuss the case amongst
9 yourselves.

10 If you need anything, let the bailiff know. If you
11 need to take a smoke break he'll take you to the appropriate
12 place. See you in about 15, 20 minutes.

13 (WHEREUPON, the jury leaves the courtroom at
14 approximately 4:30 p.m.)

15 THE COURT: Let me see the attorneys up here just a
16 second.

17 (WHEREUPON, a bench conference was had, and the
18 Court decided to send the jury home and recess for the day.)

19 Tuesday, October 7, 2008

20 THE COURT: Anything from the State before we bring
21 the jury?

22 MR. MCELHANNON: Yes, Your Honor. Yesterday in
23 opening as well as testimony from the witnesses a lot was made
24 of the witness, Linda Evans.

25 THE COURT: I'm sorry, what? What was made of Linda

1 Evans?

2 MR. MCELHANNON: A lot of testimony was made about
3 Linda Evans selling drugs, running over Mr. Evans with the
4 car. Ms. Evans is unable to be here due to --

5 THE COURT: Who is?

6 MR. MCELHANNON: Ms. Evans.

7 THE COURT: Okay.

8 MR. MCELHANNON: She was under subpoena prior to
9 this time, several terms of court. We have a statement from
10 her physician saying she is not capable of testifying in
11 trial. I was wanting to ask the Court to instruct -- not
12 instruct but advise the jury why she is not here. We did try
13 to get her here to testify but she is unable to do so because
14 of mental and physical reasons, because they are going to
15 wonder why she isn't here to testify.

16 MR. SMITH: What's the date on that statement?

17 MR. MCELHANNON: August 4th.

18 MR. SMITH: Your Honor, I think Judge McCaulay had
19 her come in anyway, and had her to be right out there. She's
20 capable of testifying, and if the Court brought her in she
21 would have to testify, I think.

22 THE COURT: My problem with this is -- I mean, all
23 she does is -- I mean, the physician gives his opinion. What
24 are you talking about Judge McCaulay? What transpired with
25 that?

1 MR. SMITH: I think what happened was Judge McCaulay
2 -- Solicitor Chrissy Adams wanted the lady here the last time
3 we were at trial. So she got Judge McCaulay to keep the lady
4 on the second floor ready for trial.

5 THE COURT: Is this your client's wife?

6 MR. SMITH: My client's ex-wife.

7 THE COURT: Ex-wife. Do you want her here? I mean,
8 I don't have any problem bringing her in here and having a
9 competency evaluation whether she can testify or not testify
10 because I don't think the physician can make that
11 determination. He can medically say what's wrong with her.

12 MR. MCELHANNON: May we approach?

13 THE COURT: I mean, she can medically say what's
14 wrong with her, but if you want me to get her in here, make
15 the determination whether she is competent to testify or not,
16 since you got her under subpoena, I'll be happy to do that.
17 It's your call because it's your subpoena. I don't care.

18 MR. MCELHANNON: May we approach?

19 THE COURT: Yes, sir.

20 (WHEREUPON, a bench conference was had.)

21 MR. MCELHANNON: The only other thing, Your Honor, I
22 would have is the 911 call of my next witness, as we did
23 yesterday. He will testify. He's listened to the tape and
24 verified that is him. The tape is 6 minutes long, I think,
25 and he was an eyewitness there at the scene when it was

1 happening. It's contemporaneous with it happening.

2 THE COURT: Who is it?

3 MR. MCELHANNON: Mark Durham. Christopher Mark
4 Durham.

5 THE COURT: You going to call the 911 man?

6 MR. MCELHANNON: I'm going to call Chris Mark Durham
7 and let him testify.

8 THE COURT: Identify?

9 MR. MCELHANNON: Yes, sir.

10 THE COURT: Okay.

11 MR. SMITH: I still have that same objection.

12 THE COURT: Same objection. Same objection

13 overruled.

14 MR. SMITH: All right.

15 THE COURT: Anything else?

16 MR. MCELHANNON: Nothing from the State, Your Honor.

17 MR. SMITH: Your Honor, can I just make my objection
18 so I don't have to make it in front of the jury?

19 THE COURT: Yeah.

20 MR. SMITH: And I object to the photographs of the
21 victim.

22 THE COURT: Well, you've already objected to those.
23 You've already been overruled on the photographs. Do you have
24 an objection on the tape?

25 MR. SMITH: Yes, sir.

1 THE COURT: What's your objection on the tape?

2 MR. SMITH: The objection on the tape, I don't
3 believe that they actually are a true and accurate
4 representation of what was going on at the time since it was
5 all post-event information given to them.

6 THE COURT: Well, I will admit it, assuming it's
7 properly authenticated and identified, okay?

8 MR. SMITH: All right, sir.

9 THE COURT: With that assumption, you know, your
10 objection is overruled.

11 MR. SMITH: Yes, sir.

12 MR. MCELHANNON: We have stipulated, Your Honor, to
13 the photographs of the crime scene. I know he's objecting to
14 the victim photographs.

15 THE COURT: He's talking about the cutting photos,
16 right?

17 MR. MCELHANNON: Right.

18 THE COURT: He's already objected to those.

19 MR. MCELHANNON: But we're stipulating to the crime
20 scene photographs coming in.

21 THE COURT: You got any objection to crime scene
22 photographs?

23 MR. SMITH: No, sir.

24 THE COURT: What numbers are they?

25 MR. MCELHANNON: Seven, 8, 9, 10 and 11.

1 THE COURT: All right, 7, 8, 9, 10 and 11 is
2 admitted without objection; is that correct?

3 MR. SMITH: Yes, sir.

4 THE COURT: Thank you very much.

5 (WHEREUPON, State's Exhibit Numbers 7, 8, 9, 10 and
6 11, Photographs, were admitted into evidence.)

7 THE COURT: Anything else before we bring the jury?

8 MR. MCELHANNON: Nothing from the State, Your Honor.

9 THE COURT: Bring us the jury, if you would, please.

10 (WHEREUPON, the jury enters the courtroom at
11 approximately 10:02 a.m.)

12 THE COURT: Does everybody have their notepad, pen?

13 (All answered in the affirmative.)

14 THE COURT: Call your next witness, please.

15 MR. MCELHANNON: Thank you, Your Honor. The State
16 calls Christopher Mark Durham.

17 THE CLERK: Mr. Durham, if you would come forward
18 and be sworn, please, sir.

19 CHRISTOPHER MARK DURHAM, after having been duly
20 sworn, testified as follows:

21 THE CLERK: If you'd go right around there, please,
22 sir, and have a seat in the witness chair.

23 (WHEREUPON, the witness was seated in the witness
24 stand.)

25 THE CLERK: If you'll please state your full name

CHRISTOPHER MARK DURHAM - DIRECT BY MR. MCELHANNON

1 and spell your last name for the record.

2 THE WITNESS: It's Christopher Mark Durham,
3 D-u-r-h-a-m.

4 DIRECT EXAMINATION

5 BY MR. MCELHANNON:

6 Q. Mr. Durham, how old are you?

7 A. Twenty-three.

8 Q. And where do you reside right now?

9 A. At

10 Q. Are you employed?

11 A. Yes.

12 Q. And where do you work?

13 A. Milliken Company.

14 Q. On September 14, 2007 where were you living?

15 A. Well, I was living just in between places staying
16 with my fiancée, and staying at my mom's and my dad's, my
17 grandparents, just wherever.

18 Q. And where was your fiancée living at this time?

19 A. She was living with her mom.

20 Q. At

21 A. Yeah.

22 Q. And what's your -- wife now, you all are married,
23 correct?

24 A. Yeah, we're married now.

25 Q. What's her name?

CHRISTOPHER MARK DURHAM - DIRECT BY MR. MCELHANNON

1 A. Jennifer.

2 Q. And how is she related, if at all, to the defendant,
3 Mr. Evans?

4 A. It's his daughter.

5 Q. Now, about 5 o'clock on September 14th you were at
6 is that correct?

7 A. Yes, sir.

8 Q. And who was there with you all?

9 A. It was -- well, I had just come up. Linda was
10 there, and a lady named Nickie Scarborough, and then Billy
11 came.

12 Q. Billy Craft?

13 A. Yeah, Billy Craft. Then it was just -- and myself.
14 It was just us 4.

15 Q. Did the Scarborough girl have a baby with her?

16 A. Yeah, yeah. Yes, sir. She had a baby.

17 Q. Okay. She's the one. Okay. And it's about 5
18 o'clock in the evening?

19 A. I'm not sure. It's been so long ago. It was
20 somewhere around about that time, yeah.

21 Q. And what were you all going to do?

22 A. We were about to -- well, I had just got over there
23 and, you know, I was going to go do other plans but they asked
24 did I want to go out to eat with them. I said, Sure, I'll go
25 grab something to eat with you or whatever so.

CHRISTOPHER MARK DURHAM - DIRECT BY MR. MCELHANNON

1 Q. So everybody that you just named, were they all
2 getting in, going to the car?

3 A. Well, we were all in the house at this point, but
4 yeah, when we decided, yeah, then we started heading out the
5 door to go get in the car.

6 Q. And do you know what car you all were going to take?

7 A. Linda's car, Toyota Corolla.

8 Q. When you got out to the driveway did anything
9 unusual happen?

10 A. Well, I wasn't even all the way out to the driveway.
11 I was the last person out the door of the house. Linda --
12 Nickie and the baby had done got in the car, back of the car.
13 Linda was on her side and Billy was walking around to get in
14 the driver's side -- I mean, the passenger side in the front
15 seat, and I was just coming down the steps still when I
16 noticed that I seen Barry coming out of the nextdoor
17 neighbor's house.

18 Q. Okay. And was he by himself or with someone?

19 A. Well, he was with the neighbor that was living
20 there. But he come out on the porch but he didn't follow
21 Barry over there.

22 Q. The neighbor didn't?

23 A. No.

24 Q. Was Mr. Evans living in that house at this time?

25 A. Not to my knowledge. He had been staying with Linda

CHRISTOPHER MARK DURHAM - DIRECT BY MR. MCELHANNON

1 and they had gotten into an argument and she kicked him out
2 probably about 4 to 5 days, maybe a week prior to this event.

3 Q. And so you saw Barry Evans coming down the road?

4 A. Coming out of John's house.

5 Q. Okay. And how far is John's house from

6 A. It's right next door, but there's a fence in between
7 so.

8 Q. Okay. What was the next thing you saw?

9 A. Well, he proceeded to come out to the road and he
10 was just kind of walking at a trot, and Billy was over at the
11 passenger door. And, you know, I assume something was going
12 to happen because, you know, they are both Linda's ex-husband.
13 So I hollered for Billy. I said, Billy, get in the car. Get
14 in the car.

15 He already had the door open and had several chances
16 to go ahead and get in the car and maybe could have got away
17 without anything happening. Then when Barry run up to him
18 they stood up and I don't know -- I don't remember which one.
19 One of them said something. Both of them started hollering
20 then they started fighting. I didn't actually see the fight
21 on the other side of the car happen. All -- I seen it after
22 she backed up.

23 Q. Do you remember making a statement to the police
24 that day?

25 A. Yes, sir.

CHRISTOPHER MARK DURHAM - DIRECT BY MR. MCELHANNON

1 Q. Signing a written statement?

2 A. I didn't write it but, yeah, I signed something.

3 Yeah.

4 Q. You signed it?

5 A. I don't know what it was.

6 Q. Would that help, if you don't know what it was?

7 A. It's just a statement that they had wrote out. I
8 didn't read through it. I just signed off on it. My nerves
9 were so tore up and I was in sock.

10 Q. You didn't read through it?

11 A. Uh-uh. I told them what I thought -- what had
12 happened that day then I signed it after he got done.

13 Q. You didn't -- okay. Would it refresh your
14 recollection if I showed you a copy of that statement?

15 A. I mean, I know basically what I said, yeah.

16 Q. Well, but you said -- you just testified that you
17 didn't read through it; is that correct?

18 A. Yes, sir.

19 Q. You don't remember initialing parts of it that you
20 scratched out?

21 A. No, sir. I mean, it's been a year ago. I don't
22 remember everything.

23 Q. I'm going to let you refresh your memory --

24 A. That's fine.

25 Q. -- with this statement. You see the parts of it

CHRISTOPHER MARK DURHAM - DIRECT BY MR. MCELHANNON

1 that you scratched and initialed, scratched out?

2 A. Yeah, but this is not my handwriting.

3 Q. I understand that. The detective wrote it for you;
4 is that correct, because you told him what happened?

5 A. Yeah.

6 MR. SMITH: Just as a matter of accordance, is there
7 going to be a question that he doesn't remember that he asked
8 him?

9 THE COURT: Do you have a copy of the statement?

10 MR. SMITH: Yes, sir, I have a copy.

11 THE COURT: Do you have a legal objection to what's
12 going on?

13 MR. SMITH: Yes, sir, I have a legal objection.

14 THE COURT: What's your legal objection?

15 MR. SMITH: The legal objection is that there is no
16 statement -- a question been made that he said he doesn't --

17 THE COURT: Overruled. He gave it to him to refresh
18 his memory. He's reading it.

19 MR. SMITH: All right, sir.

20 THE COURT: Okay?

21 MR. SMITH: Yes, sir.

22 A. Yeah. The only part I scratched out of this is
23 where the detective made a misstatement -- made a mistake on
24 the paper. So, no, I did not read through it.

25 Q. Can you go ahead and finish reading it and tell me

CHRISTOPHER MARK DURHAM - DIRECT BY MR. MCELHANNON

1 if that's an accurate description of what you told him.

2 A. It's not completely accurate, some of this on the
3 front page. I'll read this.

4 [PAUSE]

5 Okay. I'm done.

6 Q. Okay. Look back on the first page about in the
7 middle, the sentence that starts with Barry, on the very end.
8 Read that sentence.

9 A. It says Barry and Tony walked out --

10 Q. Well, the one down from that.

11 THE COURT: He's asking you to read it out loud,
12 please, sir. Can you read?

13 THE WITNESS: He said the one down from that.
14 There's another one down from that.

15 THE COURT: Read it out loud, please, sir.

16 THE WITNESS: Barry and Tony walked out of the road
17 and toward the driveway. Barry pulled a knife out of his
18 pocket and yelled something to Billy. I thunk [sic] he asked
19 him was he ready or something like that. Linda was already in
20 the car.

21 BY MR. MCELHANNON:

22 Q. Okay. So Barry pulled a knife out of his pocket and
23 yelled something to Billy?

24 A. Yes, sir. That's what it says here but that's not
25 what I said.

CHRISTOPHER MARK DURHAM - DIRECT BY MR. MCELHANNON

1 Q. Okay.

2 A. I said he ran up to him and punched him in the face,
3 and at that time I did not know if he had a knife or not.

4 Q. Well, let's go on down then. About three lines past
5 that where it starts Barry started running, and read that.
6 It's about three sentences.

7 A. Barry started running toward Billy and at the car.
8 Billy threw up his hands and said, No, no, no. Barry started
9 hitting Billy with his closed fist. I don't know if the knife
10 was hitting Billy or not. After the first couple of licks
11 Billy fell to the ground. Yeah, that --

12 Q. Read the next sentence.

13 A. Barry jumped on top of Billy and just started
14 slicing him with the knife all over his body. Now, I
15 didn't --

16 THE COURT: Hold on a second. He asked you to read
17 it. Now, you've done that. Now, listen to the next question.

18 Mr. Foreman, ladies and gentlemen of the jury,
19 please go to the jury room. I'll get you back very shortly.

20 (WHEREUPON, the jury leaves the courtroom at
21 approximately 10:15 a.m.)

22 THE COURT: Let's go through this testimony
23 in-camera, and let me explain something to you. When he asks
24 you a question respond to it; you understand?

25 THE WITNESS: And say nothing further.

CHRISTOPHER MARK DURHAM (IC) - DIRECT BY MR. MCELHANNON

1 THE COURT: If he asks you a question to read
2 something then read it. I don't know what you're trying to
3 do, but you gave a statement to the police. Now you come in
4 here today and changed your story. I don't know what's the
5 true story, but you listen to the questions. I don't know
6 what kind of game you're trying to play; do you understand?

7 THE WITNESS: Yes, sir.

8 THE COURT: But you listen to the question and you
9 answer him. I'm not going to put up with this mess; do you
10 understand?

11 THE WITNESS: Yes, sir.

12 THE COURT: Do you understand?

13 THE WITNESS: Yes, sir.

14 THE COURT: Okay. You gave a statement, you read
15 it.

16 THE WITNESS: Okay.

17 THE COURT: You're not going to be commenting on
18 what kind of story you want to give today; do you understand?

19 THE WITNESS: I'm not trying to give no other story
20 today.

21 THE COURT: Do you understand?

22 THE WITNESS: Yes, sir.

23 THE COURT: Is there any doubt in your mind what I
24 want you to do?

25 THE WITNESS: No, sir.

CHRISTOPHER MARK DURHAM (IC) - DIRECT BY MR. MCELHANNON

1 THE COURT: You listen to the question, you answer
2 it; do you understand?

3 THE WITNESS: Yes, sir.

4 THE COURT: All right. Let's go through this
5 in-camera.

6 BY MR. MCELHANNON:

7 Q. Go ahead and read after where you put sliced him
8 with knife all over his body. Finish reading that page.

9 A. I hit Barry in the back of the head with my foreman,
10 knocked him off of Billy. So he stood up, swing at me a few
11 times. He actually hit my arm but not with the blade. He
12 then went towards Linda and the car. He hit the windshield
13 with the butt of the knife, also the glass on the side where
14 she was. I told Barry to stop the whole time. He told me he
15 didn't care if he killed him, and he would kill anyone that
16 got in the way.

17 Q. Second page, 12 lines down where it starts with
18 Barry. If you could read --

19 A. Uh-huh. Barry actually walked over to Billy while
20 he was laying on the ground. He was not moving and had not
21 moved. Barry started slicing Billy again while he was laying
22 there lifeless. I hollered at Barry to get off him. He
23 jumped off and chased me toward the house. I ran toward the
24 front door and went inside the house and closed the door.

25 Q. Go ahead and finish that page.

CHRISTOPHER MARK DURHAM (IC) - DIRECT BY MR. MCELHANNON

1 A. I went back and got my knife -- which is also not
2 right but -- and went back out the front door. I opened the
3 door and saw Barry back on top of Billy again. I walked down
4 off the porch to the yard. Barry looked at me and said, Oh,
5 you're going to cut me now?

6 I told him I did not want to but I wanted him to
7 leave Billy alone. He ran at me, and I ran back in the house.
8 He started hitting the front door trying to get in the house.
9 I then called 911.

10 Q. So are you saying the part about getting your knife
11 is not true in that statement?

12 A. No, I went and got my pistol.

13 Q. You went and got the gun?

14 A. Yeah.

15 Q. Okay.

16 A. Because I'm not getting cut by nobody.

17 Q. You're what?

18 A. I said I was going to protect myself from getting
19 cut.

20 Q. I understand. But you went and got a gun not a
21 knife?

22 A. Yes, sir.

23 THE COURT: Any more of the statement you're going
24 to go through with him?

25 MR. MCELHANNON: No, Your Honor.

CHRISTOPHER MARK DURHAM (IC) - DIRECT BY MR. MCELHANNON

1 THE COURT: All right. When he asks you to read it
2 you read it. If you do anything else I'm going to find you in
3 contempt of court and put you in jail; do you understand?

4 THE WITNESS: Yes, sir. I'll say nothing in other
5 words.

6 THE COURT: Okay?

7 THE WITNESS: Yes, sir.

8 THE COURT: You read what he asks you to read and
9 none of this ad-libbing; you understand?

10 THE WITNESS: Yes, sir.

11 THE COURT: All right. Bring us the jury.

12 MR. SMITH: Your Honor, may I, just for the record?

13 THE COURT: Yes, sir.

14 MR. SMITH: I want to object to his testimony on the
15 statement. And can I voir dire him just one second?

16 THE COURT: You'll have him on cross-examination.
17 You can ask him whatever you want to ask him on cross. I'm
18 not going to limit your cross. I'm just not going to let him
19 when the State asks him to read something read it then start
20 ad-libbing.

21 THE WITNESS: I apologize.

22 THE COURT: I'm not going to put up with that.

23 THE WITNESS: Again, I apologize to you and
24 everybody else.

25 THE COURT: You don't have to apologize.

CHRISTOPHER MARK DURHAM - DIRECT BY MR. MCELHANNON

1 THE WITNESS: I'm just nervous and --

2 THE COURT: You understand?

3 THE WITNESS: Yes, sir.

4 THE COURT: That's all I'm telling you to do. You
5 don't have to apologize.

6 THE WITNESS: Well, I'm nervous. I've never been
7 through nothing like this in my life. I ain't committed no
8 crimes and I feel like a criminal up here, and I'm sitting up
9 here shaking and --

10 THE COURT: Well, that may be, but you do what
11 you're asked; you understand?

12 THE WITNESS: Yes, sir.

13 THE COURT: All right. Bring us the jury.

14 (WHEREUPON, the jury enters the courtroom at
15 approximately 10:20 a.m.)

16 THE COURT: Solicitor, please proceed.

17 MR. MCELHANNON: Thank you, Your Honor.

18 BY MR. MCELHANNON:

19 Q. Mr. Durham, if you'll go ahead and read on the first
20 page of the statement after all over his body. Start with
21 that next sentence.

22 A. Where about is that at?

23 Q. About six lines up from the bottom.

24 A. I hit Barry in the back of the head with my forearm,
25 knocked him off of him. He stood up, swung at me a few times,

CHRISTOPHER MARK DURHAM - DIRECT BY MR. MCELHANNON

1 actually hitting my arm but not with the blade. He then went
2 toward Linda in the car. He hit the windshield with the butt
3 of the knife and also the glass on side where she was sitting.

4 I told Barry to stop the whole time. He told me he
5 didn't care if he killed him, and he would kill anyone else
6 that got in the way.

7 Q. And then the second page --

8 A. Uh-huh.

9 Q. -- twelve lines down where it starts with Barry.

10 A. Barry actually walked over to Billy while he was
11 lying on the ground. He was not moving and he had not moved.
12 Barry started slicing Billy again while he was laying there
13 lifeless. I hollered at Barry to get off him. He jumped up
14 and chased me toward the house.

15 I ran toward the front door and went inside and
16 closed the door. I went back and got my knife and went back
17 to the front door. I opened the door and saw Barry back on
18 top of Billy again. I walked down off the porch to the yard.
19 Barry looked at me and said, Oh, you're going to cut me now?

20 I told him I did not want to but I wanted him to
21 leave Billy alone. He ran at me. I ran back in the house.
22 He started hitting the front door trying to get in. I then
23 called 911 from the house phone.

24 Q. I believe you actually went and got a gun; is that
25 correct?

CHRISTOPHER MARK DURHAM - DIRECT BY MR. MCELHANNON

1 A. Yes, sir.

2 Q. Not a knife?

3 A. Yes, sir.

4 Q. Now, why did you get a gun, a pistol?

5 A. Because I was not going to get cut up. I was going
6 to protect myself if necessary.

7 Q. From him?

8 A. From the person who had the knife, Barry.

9 Q. Barry Evans?

10 A. Yeah. I mean, I didn't think he would try to hurt
11 me because I'm his son-in-law now, and I wouldn't believe that
12 he would but that was for protection for myself just incase.

13 Q. I believe you did call 911?

14 A. Yes, sir.

15 Q. I show you what's marked State's Exhibit 2. Can you
16 identify that?

17 A. Yeah, that's the one I just listened to downstairs.

18 Q. And is that your signature on it, that you listened
19 to it?

20 A. Yeah.

21 Q. And is this your voice on this 911 call?

22 A. Yes, sir.

23 MR. MCELHANNON: At this time, Your Honor, I'd ask
24 that State's Exhibit 2 be admitted into evidence.

25 THE COURT: Subject to the previous objection

CHRISTOPHER MARK DURHAM - CROSS BY MR. SMITH

1 admitted into evidence, with objection.

2 (WHEREUPON, State's Exhibit Number 2, a 911 Tape,
3 was admitted into evidence, and played for the jury.)

4 BY MR. MCELHANNON:

5 Q. Mr. Durham, did that tape accurately represent what
6 that was like on the scene that day?

7 A. Yes, sir.

8 Q. At any time on September 14, 2007 did you see Billy
9 Craft with any type of a knife or other weapon?

10 A. I never seen him holding it, no.

11 Q. The only person you saw with a knife or razor blade
12 that day was who?

13 A. Was Barry.

14 MR. MCELHANNON: That's all the questions I have,
15 Your Honor.

16 THE COURT: Cross-examination?

17 MR. SMITH: Thank you, Your Honor. May it please
18 the Court?

19 THE COURT: Yes, sir.

20 CROSS-EXAMINATION

21 BY MR. SMITH:

22 Q. Mr. Durham, it is a fact, is it not, that you
23 dropped charges against him for assault and battery with
24 intent to kill; is that correct?

25 A. Yes, sir.

CHRISTOPHER MARK DURHAM - CROSS BY MR. SMITH

1 Q. And it's also a fact that you were high on drugs
2 that day, too; isn't that a fact?

3 A. Yes, sir.

4 Q. And it's also a fact on that same day you were high
5 on drugs you were getting some of your drugs from this man,
6 Billy Craft; isn't that correct?

7 A. There was a whole bag of drugs there, yes, sir.

8 Q. And it's a fact also that you know Billy Craft and
9 Mr. Barry Evans did crack cocaine together, didn't they?

10 A. When they lived together on Sneed Road, yes, sir.

11 Q. And you also knew that Billy Craft was a supplier of
12 drugs to Linda Evans, too, didn't you?

13 A. That's -- come out every month with a bag full of
14 pills.

15 Q. Now, on that day when this incident happened you
16 were angry at your future father-in-law, weren't you?

17 A. Yeah, for the way he was acting. Yeah.

18 Q. So when we were going through this statement a few
19 minutes ago you were trying to make some statement that this
20 wasn't your true statement; isn't that correct?

21 A. Well, I was just saying that part of it that I don't
22 remember saying that, in one part, about him pulling the knife
23 beforehand.

24 Q. So it is your testimony you don't know who pulled
25 the knife first or whether or not Mr. Evans actually took the

CHRISTOPHER MARK DURHAM - CROSS BY MR. SMITH

1 knife from Billy Craft; isn't that correct?

2 A. That's correct.

3 Q. And it is a fact, is it not, that Billy Craft was
4 known to carry a knife himself? Isn't that a fact?

5 A. That's a fact, and a gun.

6 Q. And he was known to carry a gun as well, correct?

7 A. He's pulled it on me before.

8 Q. And before you walked into that house he asked you
9 to shoot this man over here with your gun, didn't he?

10 A. Yes, sir.

11 Q. And he hollered at you several times to shoot him,
12 didn't he?

13 A. Yes, sir.

14 Q. Now, this man, Craft, has drawn a gun on you?

15 A. It's been several years ago, but he thought I was
16 Barry knocking on his door, but I still don't like having a
17 gun pointed in my face.

18 Q. Now, did you see Lavoie out there that day?

19 A. I seen him come out on his front porch, and at that
20 point I was in the house.

21 Q. Did you see Lavoie with a machete?

22 A. Yes, sir, he did have a machete in his hand.

23 Q. Did Lavoie get his drugs from Craft and from Linda
24 Evans, too?

25 MR. MCELHANNON: Objection, Your Honor, unless this

CHRISTOPHER MARK DURHAM - CROSS BY MR. SMITH

1 witness actually knows about all these drug transactions.

2 MR. SMITH: I'm asking

3 THE COURT: Hold on a second. Lay some foundation
4 about his knowledge. I'll sustain the objection.

5 MR. SMITH: All right, sir.

6 BY MR. SMITH:

7 Q. Do you know whether or not Lavoie uses drugs?

8 A. Yes, sir.

9 Q. Have you seen Lavoie in the presence of Billy Craft
10 and Linda Evans using drugs?

11 A. Yes, sir.

12 Q. Now, do you know anything about the drug Percocet?

13 A. That would have been the main one, yeah.

14 Q. Was Percocet laying on the ground that day?

15 A. I'm not sure. A whole bag of pills was strewed out.

16 Q. Do you know of your own knowledge whose pills were
17 laying out on that ground that day?

18 A. Those were Billy's. He had them in his hand when he
19 was getting in the car.

20 Q. Who would he sell the Percocet to?

21 A. Either Linda or Kevin Lavoie.

22 MR. SMITH: No further questions.

23 THE COURT: Any redirect?

24 MR. MCELHANNON: Yes, sir, Your Honor.

25 THE COURT: Pardon?

CHRISTOPHER MARK DURHAM - REDIRECT BY MR. MCELHANNON

1 MR. MCELHANNON: Yes, sir.

2 REDIRECT EXAMINATION

3 BY MR. MCELHANNON:

4 Q. Mr. Durham, you say Billy Craft pulled a gun on you
5 several years ago?

6 A. Yeah, it's been several years ago now.

7 Q. And that's because he thought that that was Barry at
8 the door?

9 A. Well, I was going over to his house when he lived on
10 Sue Street and checking on him, and when I knocked on door I
11 opened and there was a gun in my face. But him and Barry had
12 had an altercation back then, also, so.

13 Q. But this was several years ago, not any time close
14 to --

15 A. Yeah, it's been -- yeah, three or four years ago.

16 Q. And these drugs that Billy Craft had that day that
17 you said he had in his hand, Percocet or whatever, do you know
18 if that was prescription or not, for him?

19 A. Yeah, I'm sure it was.

20 Q. Okay. So he had a prescription for Percocet?

21 A. Well, I don't know that he does but, yeah, I'm sure
22 it was his prescriptions.

23 Q. And when you went and got your gun and Billy was on
24 the ground, correct?

25 A. Uh-huh.

CHRISTOPHER MARK DURHAM - REDIRECT BY MR. MCELHANNON

- 1 Q. Had he already been cut numerous times?
- 2 A. Yes, sir.
- 3 Q. And he was yelling shoot him, shoot him?
- 4 A. Yes, sir.
- 5 Q. He didn't yell shoot him, shoot him before he got
- 6 jumped on, did he?
- 7 A. No, sir.
- 8 Q. Because you didn't have the gun with you until it
- 9 all started happening, right?
- 10 A. Until after -- yeah. I got afraid, you know.
- 11 Q. When you ran in to protect yourself from Mr. Evans?
- 12 A. Yes, sir.
- 13 Q. Okay. And at that time after he was laying there
- 14 motionless he was yelling shoot him, shoot him to get him off
- 15 of him?
- 16 A. No, he wasn't --
- 17 Q. So he wouldn't come back?
- 18 A. Yeah, just so he wouldn't come back, I guess.
- 19 Q. And while you were there that day did you see
- 20 Mr. Evans come back and slice Billy more than once?
- 21 A. I seen him back on top of him again. I don't know
- 22 that he was hitting him closed fist or with the knife. I'm
- 23 not sure.
- 24 Q. But after he already cut him numerous times he came
- 25 back to him and was either hitting him or cutting him some

CHRISTOPHER MARK DURHAM - REDIRECT BY MR. MCELHANNON

1 more?

2 A. Or on top of him yelling at him. I was inside the
3 house at that point.

4 Q. Did you ever see once Billy Craft got jumped on and
5 hit the ground, did he ever get back up?

6 A. No, sir, he was not able to.

7 Q. And that day drugs weren't -- this wasn't about
8 drugs, was it?

9 A. I wasn't involved with theirs, but I assume that's
10 what, you know, some of it was about, yes. I mean, I wasn't
11 involved with it myself but.

12 Q. With Barry, drugs?

13 A. With Barry, no.

14 Q. So Barry wasn't doing -- I mean, he didn't have
15 anything to do with these drugs?

16 A. No, not to my knowledge.

17 Q. He just jumped on Billy for some other reason?

18 A. Well, because Barry had been living with Linda for a
19 while and they had been trying to rekindle things. And they
20 had got in an argument and she had kicked him out about a week
21 prior, or it may have been a little longer. And then Billy
22 was over -- come over to her house and Barry happened to be
23 next door and seen him over there at his ex-wife's house, you
24 know. I couldn't say I wouldn't do the same thing.

25 Q. Do you know how Billy got to

CHRISTOPHER MARK DURHAM - RECROSS BY MR. SMITH

1 that day?

2 A. No, sir. I think he parked his car at Ingles and
3 maybe Linda went and picked him up, is my guess, but I'm not
4 positive.

5 MR. MCELHANNON: That's all the questions I have.

6 THE COURT: Any recross?

7 MR. SMITH: Yes, sir.

8 RECROSS-EXAMINATION

9 BY MR. SMITH:

10 Q. You said it could have been about drugs between
11 Barry Evans and this man, Craft?

12 A. Yeah. Well, Barry -- you know, Barry gets
13 prescriptions for pain pills, too, but I don't know if, you
14 know, they had any -- somebody owed anybody anything. I have
15 no idea about any of that.

16 Q. Right. But my question to you is, is this, that
17 Billy Craft sells his prescription drugs, doesn't he?

18 A. I would think so, yes.

19 MR. MCELHANNON: Objection, Your Honor, if he
20 doesn't know, if he just thinks.

21 THE COURT: I'll sustain the objection.

22 MR. MCELHANNON: Thank you, Your Honor.

23 MR. SMITH: That's all we have, Your Honor.

24 THE COURT: You may step down. Thank you very much.

25 THE WITNESS: May I be excused from the courtroom?

BILLY CRAFT - DIRECT BY MR. MCELHANNON

1 MR. MCELHANNON: May the witness be excused?

2 THE COURT: Any objection?

3 MR. SMITH: No objection, Your Honor.

4 THE COURT: You may be excused. Thank you very
5 much.

6 MR. SMITH: Your Honor, may I ask. I'll probably
7 try to call him in my case in chief but it won't be but three
8 questions I need to ask him right quick and that will be it.

9 THE COURT: Hang around outside, okay?

10 THE WITNESS: Is it all right if I sit --

11 THE COURT: No, sir. Hang around in the hallway.
12 Call your next witness.

13 MR. MCELHANNON: The State calls Billy Craft.

14 BILLY CHARLES CRAFT, after having been duly
15 sworn, testified as follows:

16 THE CLERK: Go right around there and have a seat in
17 the witness chair, please, sir.

18 (WHEREUPON, the witness was seated in the witness
19 stand.)

20 THE CLERK: If you'll please state your full name
21 and spell your last for the record.

22 THE WITNESS: Billy Charles Craft.

23 DIRECT EXAMINATION

24 BY MR. MCELHANNON:

25 Q. Mr. Craft, how old are you?

BILLY CRAFT - DIRECT BY MR. MCELHANNON

- 1 A. I'm 53.
- 2 Q. And do you live in Anderson?
- 3 A. Yes, sir.
- 4 Q. How long have you lived in Anderson?
- 5 A. Practically just about all my life.
- 6 Q. Do you know the defendant in this case, Barry Evans?
- 7 A. Yes, sir, I sure do.
- 8 Q. How do you know him?
- 9 A. Well, I married his ex-wife.
- 10 Q. So Mr. Evans was married to Linda Evans first?
- 11 A. Yes, sir.
- 12 Q. On September the 14th, 2007, where were you at about
- 13 5 o'clock?
- 14 A. I was over at Linda Evans.
- 15 Q. You were -- pardon me? I didn't get that.
- 16 A. At Linda Evans.
- 17 Q. House?
- 18 A. Yes, sir.
- 19 Q. How did you get there?
- 20 A. It was about 7 o'clock that morning Linda called me,
- 21 and I needed to go and have blood drawn at the hospital
- 22 anyway. And I hadn't took no medicine. And so she called
- 23 me -- and Linda has anxiety attacks and, you know, I help her
- 24 or Barry sometime might help her.
- 25 So she called me and wanted me to go to the hospital

BILLY CRAFT - DIRECT BY MR. MCELHANNON

1 with her because she had to get her medicine filled, and she
2 knowed I had to go and have blood drawn anyway because we talk
3 every day on the phone, you know. And since I hadn't took my
4 medicine yet I said well, it will be a good day, you know,
5 because I'm all the time helping people, okay.

6 And I went. And Linda said will you park your car
7 at Ingles, you know. And we always go in my car but she just
8 got this brand new one. So we went in her car.

9 So when we got back we just coming -- I said, Do you
10 want to go to that new place up there? They fix, like, real
11 food. I call it real food. It's good tasting food, okay.
12 And so that was our intentions, you know.

13 Q. And you're talking about what restaurant? Was it
14 Kayce's?

15 A. Yes, sir.

16 Q. Okay.

17 A. And she said she had to make some telephone calls
18 first and that she had to go to the house. So we went to the
19 house.

20 Q. Okay.

21 A. So she said --

22 Q. Let me ask you this. When you got to the house at
23 who was there, anybody?

24 A. Nobody wasn't there.

25 Q. So you and Linda at this time were there?

BILLY CRAFT - DIRECT BY MR. MCELHANNON

1 A. Yes, sir.

2 Q. Okay.

3 A. And then Mark Durham, he came in about, I guess 5
4 minutes after we were there. And we asked him if he wanted to
5 go, and Mark, yeah. Mark, he likes to eat, too, you know.
6 And Linda called this girl down the road there. She got a
7 little baby, asked her -- invited her to go, you know. It's
8 all right with me, you know.

9 So all of us got together, you know. And the girl
10 down the road, she had done got in the car. And then me and
11 Linda, Mark, we went out and Linda -- Linda -- I think Linda
12 locked her door, you know. And -- but, you know, I was
13 walking out to the car real slow. It wasn't nothing to be
14 scared of or nothing of that nature.

15 And so Linda and Mark, they got in the car before I
16 did. And I looked to my left and 3 men coming down the road,
17 and I noticed one right off the bat. It was Barry Evans. And
18 he said, Hey, Billy.

19 I said, Hey, Barry.

20 And then I turned to my right reaching for the door.
21 I cant remember if I ever got my hand on the door or not.
22 There was gravel there and I heard gravel sliding, and I
23 looked around and Barry Evans was standing up like he had his
24 hand like that right there (indicated).

25 He said, I'm going to kill you.

BILLY CRAFT - DIRECT BY MR. MCELHANNON

1 I looked up and he had a straight razor. I called
2 it a razor knife but it is a straight razor he had in his
3 hand. He come down across my head 3 times, and all I could do
4 -- I couldn't do nothing. All I -- I just went back and I hit
5 up against the automobile.

6 And all I could do is just kick as hard as I could
7 and fast as I could because I was getting cut to death. I
8 thought he would stop, but then I was trying to block it. And
9 he's cutting my hands all to pieces, then hooked me right
10 there and cut all the way through in my mouth.

11 And I tried to tell him that he was killing me, and
12 he was just a snorting and a laughing and just kept on
13 cutting. He did not care. This was death.

14 Q. Do you know --

15 A. Death. This was death. I saw so much stuff on TV
16 but this right here was nothing of a nature of TV.

17 Q. Let me ask you this, Billy. Do you know how many
18 times you were cut?

19 A. It's a bunch. I got cuts that long (indicated).

20 Q. If you can tell the jury where all on your body you
21 were cut.

22 A. All over my stomach. Mark -- the reason Mark a
23 while ago was telling, he took and held my stomach in so it
24 wouldn't fall out. For no reason at all I was done this way.
25 I was done this way for no reason at all. I've been at church

BILLY CRAFT - DIRECT BY MR. MCELHANNON

1 for 13 years.

2 Q. Were you armed that day? Did you have a knife on
3 you that day?

4 A. No, sir, I don't need no reason to tote a knife.

5 Q. Did you have a gun on you that day?

6 A. No, sir, I didn't.

7 Q. Let me show you a couple pictures, Billy. If you
8 can step down and look at the screen up here.

9 A. (The witness complied.)

10 Q. Can you describe what that picture is?

11 A. Yeah, that's Linda Evans' house.

12 Q. Is that

13 A. Yes, sir, it sure is.

14 Q. And where were -- what car were you all going to?
15 Where did you get attacked?

16 A. This car on the left over here (indicated).

17 Q. That's the one you were heading to?

18 A. Yes, sir.

19 Q. That's State's Exhibit 10.

20 Let me show you State's Exhibit 9. What does that
21 show?

22 A. That's the automobile I went up against before I hit
23 the ground.

24 Q. And so you actually hit up against the blue car?

25 A. Yes.

BILLY CRAFT - DIRECT BY MR. MCELHANNON

1 Q. Do you know, is that where you were laying when EMS
2 got there?

3 A. I don't know. I kick so much. That's all I could
4 do is just kick. I mean, that's my shoe laying there.

5 Q. Okay. You can go back and have a seat, Billy.

6 A. (The witness complied).

7 Q. Billy, that day, you did tell Mark Durham to shoot?

8 A. Yes, sir, I sure did.

9 Q. And he had already cut you when you said that?

10 A. He done cut me all to pieces. I had blood squirting
11 in my -- it filled both of my ears, full of blood. I wanted
12 to live. Blood was just coming everywhere and I was -- I
13 mean, cutting a person and just slicing a person up in little
14 pieces it's totally different, plus, plus I saved that man
15 from being tried for murder today.

16 Q. Okay.

17 MR. SMITH: Your Honor?

18 MR. MCELHANNON: Your Honor --

19 THE COURT: Pardon?

20 MR. SMITH: That is beyond pale.

21 THE COURT: All right. Disregard that last
22 statement. I'll sustain the objection.

23 BY MR. MCELHANNON:

24 Q. Billy, at any time did you tell Mark Durham to shoot
25 Barry before he attacked you?

BILLY CRAFT - DIRECT BY MR. MCELHANNON

1 A. No.

2 Q. Did Linda Evans try to run Barry Evans over before
3 he attacked you?

4 A. No.

5 Q. Did Mr. Lavoie come out with his machete before --

6 A. No.

7 Q. -- Billy [sic] attacked you?

8 A. No. No, sir.

9 Q. Barry attacked you. I'm sorry.

10 Some mention has been made of you and guns. You
11 heard that?

12 A. (Nodded).

13 Q. February 22nd of this year, 2008, you were charged
14 with pointing and presenting a firearm; is that correct?
15 You've been charged with that?

16 A. I'm charged with it but it's not true.

17 Q. Okay. And that happened 4 months after this attack,
18 about; is that correct?

19 A. Somewhere in there.

20 Q. What was the nature of that offense? How did it
21 happen?

22 A. Well, my lungs are bad. I got to have a lung
23 transplant. And up above me they got a lab going, and it's
24 about to kill me. And I've done asked the sheriff to stop
25 this. He sent some law out there and they don't get out of

BILLY CRAFT - DIRECT BY MR. MCELHANNON

1 the car. And I go to the narcotics office. I sat down to
2 talk to the narcotics people. They tell me, they said, Billy,
3 if they started up tonight, he said you call 911. You tell
4 them do not send the police, you send the narcotics agents.

5 I said, Okay. So that night they started up, and I
6 called. And I said, The narcotics agent told me do not send
7 the police, send the narcotics. So I waited about an hour.
8 Nobody showed. So I picked the phone up and I called them
9 again. So still don't show. And then the telephone finally
10 rings. It's the police. And they said they sent the police
11 out there.

12 I said, Well, look, somebody get out here, escort me
13 out of here before I get killed because I done heard shotgun
14 breach up above me. And so I had my gun. I ain't going to
15 let nobody kill me, if I ain't able.

16 Q. Who called the police to your apartment?

17 A. I called them.

18 Q. Because they were making drugs upstairs?

19 A. Yeah.

20 Q. So when the police got there what happened? They
21 saw --

22 A. Well, when I seen the police I took my clip and
23 bullets out of my gun, you know, and stuck the clip in my
24 pocket. And I'm standing right at the door, and the table is
25 right at the door. I live in an apartment, you know, and so I

BILLY CRAFT - DIRECT BY MR. MCELHANNON

1 opened the door.

2 I said, Just a minute, and I put my gun up under
3 something on the table. I had it sideways in my hand and
4 going to cover it up with something and get escorted out of
5 there. And when I turned around she had a gun on me telling
6 me she was going to shoot me. I said, No, you ain't. And
7 then I had to start backing up.

8 She said, I'm going to shoot you.

9 I said, No, you ain't.

10 And then when she got in there she must not been too
11 scared. She put her gun up and she grabbed mine that didn't
12 have a bullet in it and said let's go outside. I'm walking
13 outside and she -- put your hands behind your back. I put my
14 hands behind my back.

15 Q. Okay. So that's how the police got there, from your
16 telephone call?

17 A. That's it.

18 Q. Several years ago do you remember pulling out a gun
19 on Mark Durham?

20 A. You know, I remember on Sue Street, but really and
21 truly I really don't remember that. It could be now. I ain't
22 saying that -- because, like, Barry, he beat me with an iron
23 rod and jabbed it in me.

24 Q. Now, on the day this happened, September 14th, 2007,
25 did you have a bunch of pills in your hand, pill bottle?

BILLY CRAFT - DIRECT BY MR. MCELHANNON

1 A. Well, of course. I had my medicine that I always
2 take.

3 Q. Is that prescription?

4 A. Yes, sir, it sure is.

5 Q. I believe one of those pictures you can even see the
6 bag laying there, the prescription bag or bottle?

7 A. See, after I go and they draw blood and all that, I
8 always take my medicine. I can't take it before I go.

9 Q. Were you selling drugs to anybody that day?

10 A. No, sir, I don't sell drugs.

11 Q. Did you in any way provoke Mr. Evans that day?

12 A. No. No. When I looked, 3 men was walking down the
13 road. And Barry said, Hey, Billy.

14 I said, Hey, Barry, and I didn't say nothing else to
15 him. If I of knowed Barry was going to do anything of that
16 nature, you know, I couldn't run from him because I'd of fell
17 over, you know. But I would have tried to pick a rock up to
18 throw at him, or something, but I didn't have the slightest
19 idea.

20 Q. Do you know how long you stayed in the hospital?

21 A. No, sir.

22 Q. Did you go to the emergency room, of course?

23 A. I was admitted in the hospital. I didn't think I'd
24 ever make it to the hospital because I told the paramedics to
25 call my preacher, call my preacher. I didn't think that I

BILLY CRAFT - DIRECT BY MR. MCELHANNON

1 would make it. I was so weak. I done lost 5 pints of blood.
2 I was dying, and I knew it.

3 I was praying, and every time somebody would ask me
4 something I'd stop praying just to answer their question, and
5 start back praying. And when I got to the emergency room Greg
6 come in there and he told me that he was a detective, could I
7 tell him --

8 Q. You talking about Mr. Hayden here, Greg Hayden?

9 A. Yes, sir. He told me that he was a detective, could
10 I tell him who done this, and I told him who done it right
11 quick. And that man made me a promise, made a promise that he
12 would get the person that done it. And when I rolled on
13 through there Preacher Sam walked up -- it's just hard looking
14 at your preacher and you knowing that your heart is going to
15 stop or something at any time. And I looked at Preacher Sam
16 and said, Preacher Sam, I ain't going to make it.

17 He said, Billy, said people at church praying for
18 you right now. He said the mission and the forum is praying
19 for you. You're on that chain of prayer. I believe in
20 prayer. And I asked that lady, I said could she please give
21 me something for pain. She said, Mr. Craft, I'm fixing to
22 give you something for pain.

23 MR. SMITH: Your Honor, I don't know if I can
24 question --

25 THE COURT: What's your legal objection?

BILLY CRAFT - DIRECT BY MR. MCELHANNON

1 MR. SMITH: I object to hearsay. I can't question
2 those people.

3 MR. MCELHANNON: That's fine, Your Honor.

4 THE COURT: I'll sustain the objection.

5 MR. MCELHANNON: May I approach, Your Honor?

6 THE COURT: Yes, sir.

7 (WHEREUPON, a bench conference was had.)

8 BY MR. MCELHANNON:

9 Q. Billy, if you can step off the stand one more time,
10 please.

11 A. (The witness complied).

12 Q. I'm going to ask you to do something. Do you mind
13 showing the jury your scars on your abdomen and your back?

14 A. I've showed everybody else. I don't see why. I
15 wouldn't mind that.

16 (WHEREUPON, the witness stepped down from the
17 witness stand, lifted his shirt and began to show the jury his
18 abdomen and back area.)

19 Q. Okay. So you got them coming 1, 2, 3, 4 on your
20 abdomen there.

21 What you got on your back? One all the way across.
22 Is there one on the other side?

23 A. Up under my arm.

24 Q. Under your arm?

25 A. Yeah.

BILLY CRAFT - CROSS BY MR. SMITH

1 Q. And then can you show them the one on your face
2 again.

3 A. That was the one that went in my mouth and all the
4 way down through here, across here, across here, across here
5 (indicated).

6 Q. And you got some on your legs but we're not going to
7 ask you to show those.

8 A. About that long (indicated).

9 Q. Do you know how many cuts were on your legs?

10 A. About 6, and some on my feet.

11 Q. Your feet, too?

12 A. Yeah, he cut my feet up. He marked me pretty good.

13 Q. Okay. You can have a seat.

14 A. (The witness complied).

15 MR. MCELHANNON: Thank you, Billy.

16 That's all the questions I have, Your Honor.

17 THE COURT: Cross-examination?

18 MR. SMITH: Thank you, Your Honor. May it please
19 the Court.

20 CROSS-EXAMINATION

21 BY MR. SMITH:

22 Q. Mr. Craft, my name is Fletcher Smith. I have an
23 opportunity to ask you some questions. If there are any
24 questions I ask you, you don't understand, then I'll be glad
25 to try to rephrase it so you will understand. Is that fair?

BILLY CRAFT - CROSS BY MR. SMITH

1 A. Yeah.

2 Q. Now, as I understand it, and you were a convicted
3 felon; is that correct?

4 A. No, sir.

5 Q. Were you ever charged with driving under the
6 influence in this State?

7 A. Yeah.

8 Q. Convicted of it, too, weren't you?

9 A. Yeah.

10 Q. Were you also convicted of any drug offense in this
11 State?

12 A. No.

13 Q. Were you charged with possession of a weapon as a
14 convicted felon by a police officers in 1999?

15 A. Well, if I was they give me my gun back, didn't
16 they?

17 Q. My question is were you arrested?

18 A. Yeah, and it was throwed out of court.

19 Q. Okay. You were also arrested in 2008 for possession
20 of a weapon, too?

21 A. That is still pending.

22 Q. My question is were you arrested for possession of a
23 handgun in 2008?

24 A. Yes.

25 Q. And that handgun you drew on a deputy sheriff in

BILLY CRAFT - CROSS BY MR. SMITH

1 this County; isn't that correct?

2 A. I didn't draw no gun on nobody.

3 Q. Well, do you know a Lieutenant Deputy L. Finley?
4 You want to see the incident report?

5 MR. MCELHANNON: Your Honor, objection.

6 MR. SMITH: Your Honor, he opened the door.

7 MR. MCELHANNON: Your Honor, objection. I have a
8 legal objection. The incident report is hearsay. This
9 charge --

10 THE COURT: He hadn't offered the document yet. He
11 can ask him questions about it. He hadn't offered the
12 document.

13 MR. MCELHANNON: Okay. Well, I thought he was about
14 to get ready to.

15 THE COURT: Objection overruled.

16 Go ahead.

17 MR. SMITH: Thank you.

18 BY MR. SMITH:

19 Q. Do you recall a Deputy Finley coming out to your
20 residence on February the 22nd, 2008?

21 A. Now, who is that? Is that a woman?

22 Q. I'm asking you the question, sir. Do you recall on
23 February --

24 A. I can't answer that if I don't know if -- that one
25 incident.

BILLY CRAFT - CROSS BY MR. SMITH

1 Q. And the fact is, sir, you talked about there was
2 narcotic activity going on at the scene where you were when
3 she came out there, wasn't it?

4 A. I ain't said a word about no narcotics was going on.

5 Q. Didn't you --

6 A. You said that.

7 Q. Didn't you mention something about the sheriff's
8 office was investigating narcotics?

9 A. That's at my house.

10 Q. Well, sir, you did hear the testimony earlier that
11 you actually do sell drugs?

12 A. And who said that is telling a lie.

13 Q. So that means Mrs. Lavoie is telling a lie,
14 Mr. Lavoie is telling a lie, Mark Durham is telling a lie; is
15 that correct?

16 A. Well, if they said that, yes, sir, they are.

17 Q. Now, the other thing too is she had to draw a gun on
18 you to make you give your gun up, didn't she?

19 A. No. She was outside of my door.

20 Q. Didn't she draw --

21 A. I put my gun on my table covering it up because they
22 come in my room when I'm gone, and I did not want nobody to
23 get my gun. That's a whole object of putting something -- you
24 don't just leave a gun out in the opening, do you?

25 Q. Well, sir, isn't it a fact this police officer took

BILLY CRAFT - CROSS BY MR. SMITH

1 the gun in custody?

2 A. Yes. She pushed my door open and entered my house
3 without me asking her to come in my house.

4 Q. Because you were involved in drug activity out
5 there, weren't you, sir?

6 A. No, because there's a lab going up over the top of
7 me don't mean that I'm involved. I'm trying to get all this
8 stopped. They done run all the people there that was decent
9 people, goes to church, they have run around there with guns
10 and run them off and nobody will not do nothing about it.

11 Q. So you were going to take your gun and you were
12 going to do something about it by shooting a police officer;
13 is that what your testimony is, sir?

14 A. No, that's what you are saying.

15 Q. Well, you drew it on the police officer?

16 A. No, I did not.

17 Q. She had a badge on, didn't she?

18 MR. MCELHANNON: Your Honor, objection.

19 THE COURT: Ask him the question, give him a chance
20 to answer it, okay?

21 MR. SMITH: Yes, sir.

22 THE COURT: Calm down. Ask the question. Please
23 proceed.

24 MR. MCELHANNON: He has asked and answered that
25 question 2 or 3 times, that he didn't do it.

BILLY CRAFT - CROSS BY MR. SMITH

1 THE COURT: I understand. Overruled, at this point
2 in time.

3 MR. SMITH: Thank you, Your Honor.

4 THE COURT: Ask the question, Mr. Smith.

5 BY MR. SMITH:

6 Q. Now, Officer -- I mean, Mr. Craft you had a black
7 handgun in your left hand, didn't you?

8 A. Yeah, my hand that is cut into sideways. Didn't
9 have a bullet in it. I wasn't like Barney Fife, was it?

10 Q. And she advised you to drop that weapon, didn't she?

11 A. No, she did not. I put that gun on the table and
12 covered it up.

13 Q. I'm going to show you this document identified as
14 Defense Exhibit Number 1 for identification and see if this
15 will refresh your recollection. Would you read through that,
16 sir.

17 MR. MCELHANNON: Objection, Your Honor.

18 MR. SMITH: I'm asking if --

19 A. I don't have to read through that because I know
20 what it was.

21 THE COURT: Hold on a second. Mr. Craft, be quiet.
22 Be quiet, Mr. Craft.

23 What is your objection?

24 MR. MCELHANNON: Your Honor, that's an incident
25 report. He didn't write that report. He has --

BILLY CRAFT - CROSS BY MR. SMITH

1 THE COURT: I'll sustain the objection.

2 MR. MCELHANNON: Thank you, Your Honor.

3 MR. SMITH: Thank you, Your Honor.

4 BY MR. SMITH:

5 Q. Now, Mr. Craft, as a convicted felon you were not
6 even supposed to have a gun in your possession, were you?

7 A. I ain't no convicted felony [sic].

8 Q. Now, you were married to Ms. Linda Evans; is that
9 correct?

10 A. No, not really, but a judge said I was. That's the
11 only reason I was, because she was still married to Barry
12 Evans.

13 Q. So you married a woman that was already married?

14 A. I didn't know it. She lied.

15 Q. Now, let me take you out there to this incident
16 location on September 14, 2007. Now, you didn't have an
17 oxygen tank on that day, did you?

18 A. No.

19 Q. And you hadn't had this transplant that you talked
20 about at that time either, did you?

21 A. I ain't had one yet.

22 Q. And the fact of the matter is you were over at her
23 house after she had kicked this man out of his house; is that
24 correct?

25 A. I don't know nothing about that.

BILLY CRAFT - CROSS BY MR. SMITH

1 Q. Now, the fact is, you and Barry Evans had used drugs
2 before on occasion, crack cocaine, hadn't you?

3 A. We did one time. That's been -- that's been many
4 years ago. Now, this been many years ago. We talked about
5 like no time soon. It's been many years ago. I've
6 straightened my life up.

7 The only thing I do today is I start stuff up like
8 different denominations of churches getting together every
9 Friday, and all kind of stuff like that, driving church bus,
10 because I ain't got no time for no old junk. I help -- no,
11 no, no, and then I donate my time at the Haven of Rest working
12 with drug and alcohol because that's where I turned my life
13 around right there.

14 Q. So --

15 A. And I do that a lot.

16 Q. So you sell drugs on the one hand --

17 A. No, I do not.

18 Q. -- and on the other --

19 A. No, I do not.

20 Q. Well, did you ever counsel Barry Evans?

21 A. I go to church and I live right and you ain't going
22 to get up here and try to tell me that I'm a drug dealer
23 because I am not. You see, when you get saved the Lord takes
24 that and throws it in the middle of the ocean, my brother. So
25 that's where it's at and that's where it's going to stay.

BILLY CRAFT - CROSS BY MR. SMITH

1 Q. Did you counsel Linda Evans?

2 A. What?

3 Q. Did you counsel Linda Evans about selling your
4 drugs?

5 A. Counsel?

6 Q. Yeah, you say you counsel people at the Haven of
7 Life Church [sic] but did you counsel her?

8 A. I don't counsel her.

9 Q. Right. And you didn't counsel Mark Durham either,
10 did you?

11 A. I don't counsel Mark Durham.

12 Q. Now, fact is you have been known to carry a knife
13 yourself, hadn't you?

14 A. I used to tote a pocket knife. Can you show me
15 where I cut people?

16 Q. And you been known to carry a gun on your person,
17 haven't you?

18 A. No, sir. I've never in my life toted a gun. I
19 ain't had no reason to.

20 Q. Now, it is your testimony that you were just minding
21 your own business out there that day and you hadn't said
22 anything to Barry Evans like I'm going to fuck you up, and he
23 just --

24 A. I don't cuss to start with. I don't know the reason
25 you want to use cuss words in court.

BILLY CRAFT - CROSS BY MR. SMITH

1 Q. So but you don't use curse words but you told Mark
2 Durham to go and shoot and kill him, didn't you, that day?

3 A. Well, let me tell you something. You know, when it
4 comes to here I am dying and really it's probably saving his
5 life because Mark came out there and got his attention from
6 killing me. Thank you, babe.

7 Q. So my question is you told Mark Durham to shoot --

8 A. Yes, sir, I sure did.

9 Q. And you wanted to kill him that day, didn't you?

10 A. Well, when you get all cut up like I am, you look
11 like a puzzle, I imagine you would say that.

12 Q. Is that a yes?

13 A. You better believe it's yes. Anybody would say
14 that.

15 Q. Right. And you got a little temper, too, don't you
16 Mr. --

17 A. No, sir. You want me to.

18 Q. I see. Now, the fact of the matter is, sir, you
19 were going to fuck this man up that day. You went into your
20 pocket and then he took that blade away from you, didn't he?

21 A. No.

22 MR. SMITH: No further questions.

23 THE COURT: Redirect?

24 MR. MCELHANNON: No, sir.

25 THE COURT: Mr. Craft, you may step down. Be

1 careful stepping down.

2 THE WITNESS: Thank you.

3 THE COURT: Mr. Foreman, ladies and gentlemen of the
4 jury, we're going to take a short break at this time. You've
5 been in the courtroom about an hour and 20 minutes, we've been
6 in the courtroom about 2 hours and 20 minutes.

7 So please don't discuss the case amongst yourselves.
8 If you need a smoke break let the bailiffs know, or if you
9 need anything let the bailiffs know. If you'll follow the
10 bailiff he will take you to the jury room. And leave your
11 notepads in your chairs.

12 (WHEREUPON, the jury leaves the courtroom at
13 approximately 11:18 a.m.)

14 THE COURT: We'll take about a 20-minute break.

15 (WHEREUPON, there was a brief recess.)

16 THE COURT: Anything before we bring the jury?

17 MR. MCELHANNON: Nothing from the State, Your Honor.

18 THE COURT: Anything from the defendant?

19 MR. SMITH: Nothing, Your Honor.

20 THE COURT: Bring us the jury.

21 (WHEREUPON, the jury enters the courtroom at
22 approximately 11:50 a.m.)

23 THE COURT: Does everybody have their notepad? You
24 all are lined up the same way this time I see so you didn't
25 have to swap notepads. Well, you all are getting in the swing

JASON JONES - DIRECT BY MR. MCELHANNON

1 of things.

2 Call your next witness, please.

3 MR. MCELHANNON: Thank you, Your Honor. The State
4 calls Jason Jones.

5 THE CLERK: Mr. Jones, if you'd come around and be
6 sworn, please, sir.

7 JASON LEE JONES, after having been duly sworn,
8 testified as follows:

9 THE CLERK: If you'd go around and have a seat in
10 the witness chair.

11 (WHEREUPON, the witness was seated in the witness
12 stand.)

13 THE CLERK: If you'll please state your full name
14 and spell your last name for the record.

15 THE WITNESS: My name is Jason Lee Jones, J-o-n-e-s.

16 DIRECT EXAMINATION

17 BY MR. MCELHANNON:

18 Q. Mr. Jones, who do you work for?

19 A. I currently work for Abbeville County EMS.

20 Q. And on September 14th, 2007, who were you employed
21 by?

22 A. Medshore Ambulance Service.

23 Q. In Anderson?

24 A. Yes, sir.

25 Q. How long have you worked as an EMS tech, or what is

JASON JONES - DIRECT BY MR. MCELHANNON

1 your title?

2 A. I've been in EMS 14 years this month, been a
3 certified EMT since 1996 and a paramedic since 2002.

4 Q. On September 14th, 2007 were you on duty?

5 A. Yes.

6 Q. And with Medshore?

7 A. Uh-huh.

8 Q. Did you receive a call to go to
9 in Anderson?

10 A. Yes, I did.

11 Q. Do you know what time that call was made?

12 A. It was received by Anderson County dispatch at 17:09
13 or 5:09 p.m.

14 Q. And, of course, you did respond to that call?

15 A. Yes.

16 Q. Were you by yourself or with someone?

17 A. No, I was with my partner, Terry Brown, and a
18 Medshore explorer.

19 Q. When you arrived on scene what was the situation
20 like?

21 A. It was very chaotic. County deputies were there. I
22 had what I thought initially to be 2 victims, but the female
23 was basically okay, and Mr. Craft was lying on the ground with
24 numerous lacerations over his body.

25 Q. And where was he, in the driveway, or do you

JASON JONES - DIRECT BY MR. MCELHANNON

1 remember?

2 A. Yes. He was in the driveway, lying on his left
3 side.

4 Q. Let me show you a picture. See if you can identify
5 this. I show you what's been marked State's Exhibit 9. Can
6 you identify that?

7 A. Yes. That appears to be the driveway that Mr. Craft
8 was lying on.

9 Q. And if you could just step down 1 minute from the
10 stand, please.

11 A. (The witness complied).

12 Q. Can you tell from this picture about where you
13 performed services on Mr. Craft?

14 A. Yes. It would have been just to the -- or just
15 towards the camera from the blue car.

16 Q. So up next to the blue car, or close to it?

17 A. Maybe 2, 3 feet this side of the blue car.

18 Q. Okay. And as you stated, how was Mr. Craft lying?

19 A. On his left side.

20 Q. Thank you. You can return to the stand.

21 A. (The witness complied).

22 Q. Was anyone doing anything for Mr. Craft upon your
23 arrival?

24 A. Best I could recollect there was a male that was
25 holding pressure on Mr. Craft's abdomen.

JASON JONES - DIRECT BY MR. MCELHANNON

1 Q. And did he maintain that pressure until you got to
2 Mr. Craft?

3 A. Yes.

4 Q. What did you observe when you began to look at
5 Mr. Craft?

6 A. Well, I observed that he had, as I said before,
7 numerous lacerations over his entire body. And to be honest,
8 when I first saw him I thought he was dead. And I said, Sir,
9 can you hear me, and he said yes. So I did a quick assessment
10 on him then my partner and I got him on the stretcher into the
11 ambulance and on the way to the hospital.

12 Q. And when you say lacerations over his entire body,
13 what do you mean, literally?

14 A. Yes.

15 Q. Head to toe?

16 A. Uh-huh.

17 Q. Do you know, did you start giving him any type of
18 blood units in the ambulance or did you wait until you got to
19 the hospital?

20 A. No. We don't carry blood units on the ambulance,
21 just normal I. V. fluids is all I was able to give him.

22 Q. So you were able to give him I. V. fluids until you
23 got him to the hospital?

24 A. Right.

25 Q. Then when you got him to the hospital what did you

JASON JONES - CROSS BY MR. SMITH

1 do?

2 A. Transferred care to the doctor on duty. Gave a
3 report, transferred the patient to a bed in critical care room
4 2, and that was pretty much it.

5 Q. When you arrived on the scene what was the weather
6 like, do you remember?

7 A. It was just starting to rain, if I can remember
8 right.

9 Q. Did you see a lot of blood on the scene?

10 A. Yes.

11 Q. And after you turned him over to the ER doctors you
12 then left?

13 A. Not immediately. I filled out my report and
14 completed all my paperwork, necessary paperwork, then left.

15 Q. Did Mr. Craft at any time say anything to you?

16 A. Not a whole lot. I just asked him pretty much what
17 happened. And I asked him if he was hurting anywhere, and he
18 said all over. And asked him how he was feeling. He said
19 well, other than hurting he was feeling okay. He said he was
20 feeling a little bit lightheaded, but that's pretty much it.

21 MR. MCELHANNON: That's all the questions I have.
22 Answer anything Mr. Smith has.

23 CROSS-EXAMINATION

24 BY MR. SMITH:

25 Q. Officer [sic] I'm showing you what I think has been

JASON JONES - CROSS BY MR. SMITH

1 marked as exhibits -- are these some of the cuts that you saw
2 that day? I show you what has been marked as State's Exhibits
3 6, 3, 5 and 4.

4 A. Yes, these are correct.

5 Q. All right. Now, when you took his blood pressure
6 out there what was his blood pressure?

7 A. I didn't actually take his blood pressure because of
8 the lacerations over his entire body, and I was attempting to
9 get him on oxygen and get I. V. fluid's started.

10 Q. So you don't know whether or not he was
11 hypertensive?

12 A.. Well, I do know that he had strong pulses in both
13 wrists and both feet, which indicate that his systolic blood
14 pressure was at least 90.

15 Q. And the other thing, too, is that -- how long did it
16 take you to get him to the hospital?

17 A. From the time we arrived on scene -- I'm sorry.
18 From the time we departed scene to arriving at the hospital
19 was 13 minutes.

20 Q. Officer, I'm going to ask if you could step down for
21 a minute, please.

22 A. (The witness complied).

23 Q. Right. Now, there is the laceration that he had to
24 his head right there?

25 A. Yes.

JASON JONES - CROSS BY MR. SMITH

1 Q. These are 2 lacerations he had on his stomach?

2 A. Uh-huh.

3 Q. This is a laceration that he had on his hand?

4 A. Yes.

5 Q. And this is another laceration that he had on his
6 body?

7 A. Uh-huh.

8 Q. Two lacerations?

9 A. Yes.

10 Q. Now, you may step back up there. I'm not going to
11 keep you long. I know you're busy. But you don't know how he
12 got that laceration on his hand, do you, except that it's a
13 cut; is that correct?

14 A. That's correct.

15 Q. You don't know whether they were fighting over a
16 knife or whatever?

17 A. No, I don't.

18 MR. SMITH: Thank you. No further questions.

19 THE COURT: Any redirect?

20 MR. MCELHANNON: No.

21 THE COURT: You may step down. You may be excused.

22 Thank you very much.

23 Call your next witness.

24 MR. MCELHANNON: The State calls Dr. Freeman.

25 THE CLERK: Doctor, if you'd please come forward to

DR. LAWSON FREEMAN - DIRECT BY MR. MCELHANNON

1 be sworn, please, sir.

2 DR. LAWSON BARRY FREEMAN, after having been
3 duly sworn, testified as follows:

4 THE CLERK: Please go around and have a seat in the
5 witness chair.

6 (WHEREUPON, the witness was seated in the witness
7 stand.)

8 THE CLERK: If you'll please state your full name
9 and spell your last for the record.

10 THE WITNESS: Lawson Barry Freeman. Last name
11 F-r-e-e-m-a-n.

12 DIRECT EXAMINATION

13 BY MR. MCELHANNON:

14 Q. Dr. Freeman, where do you work?

15 A. At ANMED health department -- excuse me, hospital,
16 emergency department.

17 Q. And how long have you worked there?

18 A. Sixteen years.

19 Q. What's your title?

20 A. Attending physician in emergency department.

21 Q. And you've been an ER physician for 16 years?

22 A. Sixteen years.

23 Q. All of it Anderson?

24 A. Yes.

25 Q. Were you working in the ER on September 14th, 2007?

DR. LAWSON FREEMAN - DIRECT BY MR. MCELHANNON

1 A. Yes.

2 Q. And did you have an opportunity to take care of a
3 patient named Billy Craft?

4 A. Yes, sir.

5 Q. When Mr. Craft arrived at the ER what was his
6 condition?

7 A. We had received a radio report from the EMS unit
8 that they were bringing a stab wound victim. And when he
9 arrived he was noted to have multiple lacerations, and he was
10 in what we call distress. He had abnormal vital signs, his
11 blood pressure was low, his pulse rate was fast. He was cool
12 and clammy, basically like what people call shock, hypovolemic
13 shock.

14 Q. Do you know what his blood pressure was?

15 A. Yes. It was 78 over 53.

16 Q. Is that low?

17 A. That's abnormal. Significantly abnormally low.
18 Normal blood pressure is 120 over 80.

19 Q. And his pulse was what?

20 A. Was 104.

21 Q. And what's normal pulse?

22 A. Less than a hundred.

23 Q. So you would have determined that he was either in
24 shock or going into shock?

25 A. Yes.

DR. LAWSON FREEMAN - DIRECT BY MR. MCELHANNON

1 Q. Do you know if he lost a significant amount of
2 blood?

3 A. Yes. By observation when he arrived his clothing
4 was all soaked in blood. He had multiple lacerations that
5 were actively bleeding, and his blood pressure is an indicator
6 of blood loss at 78.

7 Q. Do you know how many lacerations he had?

8 A. Yes. The reason, when he first came in he was
9 basically -- you know, he had lacerations from his scalp,
10 upper, lower extremities, his anterior chest, abdomen, his
11 back, lower extremities. We didn't count them in the ER but
12 later in the operative report there was 26 documented.

13 Q. From head to toe?

14 A. Yes.

15 Q. If you can step down, Doctor.

16 A. (The witness complied).

17 Q. Ladies and gentlemen, I want to apologize for these.
18 I don't mean to just throw these up there. You've already
19 seen them once though, but there's some people that don't like
20 to see pictures like this.

21 Can you identify these photographs?

22 A. Yes, sir. These were taken in the emergency trauma
23 bay.

24 Q. Okay. Can you discuss to the jury what exactly this
25 is showing.

DR. LAWSON FREEMAN - DIRECT BY MR. MCELHANNON

1 A. All right. This is a picture of his anterior chest
2 and abdomen. These were some of the lacerations that were
3 there when he first arrived. This one here is basically the
4 left side of his chest, left abdomen. You can see one here
5 that's more on the kind of the center line of his abdomen.
6 It's not fully shown.

7 This basically would be looking from his feet
8 towards his head. This laceration here was the one on the
9 more of the center area of the abdomen here. This basically
10 is his belly button here, with his head being here, feet being
11 this way.

12 I believe this was a picture of his right hand and a
13 laceration that was on the nodal side of his hand here
14 (indicated).

15 Q. Let me ask you something. In your profession as ER
16 doctor have you testified as to defensive wounds before?

17 A. I have not.

18 And again, a picture of a facial laceration, and
19 also he had lacerations on the scalp that you can't see here
20 because of this dressing basically, but this was on the left
21 side of the cheek, this area here (indicated).

22 Q. Please take the stand again,

23 A. (The witness complied).

24 MR. MCELHANNON: Your Honor, at this time I'd ask
25 that State's Exhibits 4, 5, 6, -- 3, 4, 5 and 6 be admitted.

DR. LAWSON FREEMAN - DIRECT BY MR. MCELHANNON

1 THE COURT: I think they've already been admitted.

2 MR. SMITH: I thought they were already admitted,
3 Your Honor.

4 THE COURT: Haven't they already been admitted by
5 agreement?

6 MR. MCELHANNON: No, sir, not these. These weren't
7 stipulated to.

8 THE COURT: Pardon?

9 MR. MCELHANNON: These were not stipulated to, I
10 didn't think.

11 MR. SMITH: I thought I put them in a few minutes
12 ago.

13 THE COURT: I admitted them at your motion in
14 limine. Admitted with objection a long time ago.

15 MR. MCELHANNON: Okay.

16 (WHEREUPON, State's Exhibit Numbers 3, 4, 5 and 6,
17 Photographs, were admitted into evidence.)

18 BY MR. MCELHANNON:

19 Q. Dr. Freeman, those 4 photographs that we just
20 showed, they were representations of some of his wounds. Were
21 there multiple other wounds than the ones that we just saw?

22 A. Yes.

23 Q. How did you treat Mr. Craft in the ER?

24 A. When he initially arrived the EMS paramedics had
25 already started intravenous fluids. We continued that. We

DR. LAWSON FREEMAN - DIRECT BY MR. MCELHANNON

1 basically bandaged most of his wounds to stop the bleeding.
2 We kept him on oxygen and we ordered a blood transfusion
3 because of his blood loss, and we gave him tetanus
4 immunization. We gave him a dose of I. V. antibiotics and
5 called what we call trauma alert to activate -- have the
6 trauma surgeon come in because he had too many lacerations
7 that were going to need to be repaired. He would have to go
8 to the operating room, which he did, to have these repaired.

9 Q. In your opinion, what would have caused lacerations
10 like this?

11 A. These were well demarcated sharp wounds that's
12 usually a sharp object such as a razor blade, in my
13 experience. And we had also been advised, the EMS told us
14 that they thought the weapon was a box cutter, and these
15 wounds were consistent with a razor or very sharp type
16 instrument.

17 Q. Given the number of lacerations to Mr. Craft could
18 he have died from these wounds?

19 A. Yes, with his blood pressure being as low as it was
20 on presentation. None of the wounds penetrated into a body
21 cavity and penetrated an internal organ or major vein or
22 artery but he had -- you know, the totality of the wounds,
23 they were all actively bleeding. He was in hypovolemic shock,
24 and certainly you can die from that, especially in view if you
25 have other significant medical problems. If you are not a

DR. LAWSON FREEMAN - CROSS BY MR. SMITH

1 healthy person is when that puts you at higher risk.

2 Q. And then did you treat him any further after he went
3 to the surgeon?

4 A. I did not.

5 MR. MCELHANNON: That's all the questions I have,
6 Your Honor.

7 THE COURT: Cross-examination?

8 MR. MCELHANNON: Yes, sir, Your Honor.

9 MR. SMITH: Your Honor, I'd like to have the doctor
10 qualified as a medical expert. I don't think we did that for
11 his testimony.

12 THE COURT: Well, so far he hadn't asked him any
13 opinion.

14 Do you object to that? Do you object to being
15 qualified?

16 MR. SMITH: No. No. I want him qualified.

17 THE COURT: All right. The Court so finds.

18 MR. SMITH: Thank you.

19 CROSS-EXAMINATION

20 BY MR. SMITH:

21 Q. Doctor, I think you said he was in hypovolemic
22 shock; is that correct?

23 A. Yes.

24 Q. And this means that you have a loss of fluid?

25 A. That's correct.

1 Q. But telling from that doesn't mean that you know
2 psychologically what was going on in the mind of either
3 Mr. Craft or Mr. Evans as to whether or not Mr. Evans intended
4 to kill him or not, do you?

5 A. I do not.

6 Q. Right. So you're not here to give an opinion in
7 that regard?

8 A. I am not.

9 Q. What you are is a fact witness telling the jury
10 exactly what you saw in terms of what the wounds were; is that
11 correct?

12 A. That's correct.

13 Q. As I understand it, would you call this that he was
14 somewhat hemodynamically unstable?

15 A. That's correct.

16 Q. Would you tell the jury what hemodynamically
17 unstable means.

18 A. Basically that means that you have aberration of
19 your pulse or blood pressure, usually from loss of fluid.
20 That can be from blood loss, is the most common type,
21 especially in obvious injury with lacerations, where your body
22 loses fluid and to try to make up for it to maintain a
23 profusion pressure for your vital organs and your brain your
24 heart rate increases, and if that doesn't keep the blood
25 pressure up -- once the blood pressure drops you're kind of

DR. LAWSON FREEMAN - CROSS BY MR. SMITH

1 behind the 8-ball, so-to-speak. Your body is not able to
2 maintain its normal circulation, and then that's the treatment
3 we do, is replace fluids initially with what we call
4 crystalloid fluids, which is basically saline, salt and water
5 solutions --

6 Q. Salt water.

7 A. And that's a temporizing measure because that
8 doesn't carry any oxygen capability. And that's what shock
9 is. Basically is by your blood pressure being low your vital
10 organs are not being profused with oxygen carrying blood so
11 you can have damage to the brain, the heart, the kidneys from
12 that. So the next thing we do is we administer blood and
13 oxygen, which we did in this case.

14 Q. All right. And so in order to get his profusion
15 rate, that means circulation of the blood all through the
16 body, you all gave him some salt water?

17 A. Initially.

18 Q. Initially. And then you cross-matched the blood in
19 the hospital so you could give him a transfusion?

20 A. That's correct.

21 Q. And then you transfused him, and then he became
22 stable, vital signs became stable enough so you all could take
23 him to surgery?

24 A. That's correct.

25 Q. And did the surgery and everything was okay at that

DR. LAWSON FREEMAN - CROSS BY MR. SMITH

1 point?

2 A. Well, Dr. Strathern did the surgery.

3 Q. Right. And I think Dr. David Strathern confirmed
4 what you said because he said there was active bleeding while
5 in the operating room. He had several lacerations of his
6 right upper scalp and they were repaired but he said the
7 wounds weren't deep and did not penetrate toward any vital
8 structures?

9 A. That's right.

10 Q. So the jugular vein wasn't cut and the thigh area
11 right down here where you can get a lot of loss of blood, that
12 wasn't cut, anywhere where you could have --

13 A. Well, it was cut. There was no major blood vessel
14 laceration.

15 Q. No major blood vessel was cut and so he didn't lose
16 enough blood to die at the scene or even at the hospital at
17 that point; is that correct?

18 A. Well, he could have.

19 Q. He could have?

20 A. Yes --

21 Q. That's a possibility?

22 A. If he had not been brought in and laid there and
23 continued to bleed, like as when he arrived he had a
24 significantly abnormal blood pressure. That would have
25 continued to drop and in the worse case scenario he could have

DR. LAWSON FREEMAN - CROSS BY MR. SMITH

1 expired from hypovolemic shock.

2 Q. And that's where you don't have the profusion of
3 oxygen throughout your whole system?

4 A. Yes.

5 Q. But the key component here is he didn't die?

6 A. That's correct.

7 Q. You guys saved him and you got him back on his feet,
8 correct?

9 A. I'm assuming he's on his feet.

10 Q. Right. There he is right there.

11 A. Okay.

12 Q. Thank you, Doctor.

13 A. Thank you.

14 THE COURT: Any redirect?

15 MR. MCELHANNON: Nothing, Your Honor. Thank you.

16 THE COURT: All right, Doctor. You may step down.

17 You may be excused. Thank you very much.

18 THE WITNESS: Thank you, sir.

19 THE COURT: Call your next witness.

20 MR. MCELHANNON: We call Craig Holbrooks.

21 THE CLERK: Officer, if you would please come around
22 and be sworn.

23 CRAIG HOLBROOKS, after having been duly sworn,
24 testified as follows:

25 THE CLERK: If you'll go around and have a seat in

CRAIG HOLBROOKS - DIRECT BY MR. MCELHANNON

1 the witness chair.

2 (WHEREUPON, the witness was seated in the witness
3 stand.)

4 THE CLERK: If you'll please state your full name
5 and spell your last for the record.

6 THE WITNESS: Craig Holbrooks, H-o-l-b-r-o-o-k-s.

7 DIRECT EXAMINATION

8 BY MR. MCELHANNON:

9 Q. Deputy, who are you employed with?

10 A. The Anderson County Sheriff's Office.

11 Q. And in what capacity?

12 A. I'm a road patrol deputy.

13 Q. How long have you been road patrol?

14 A. For over 3 years.

15 Q. Were you working on duty on September the 14th,
16 2007?

17 A. Yes, sir.

18 Q. Did you receive a call to proceed to
19 ?

20 A. I did.

21 Q. When was the nature of that call?

22 A. I was advised by dispatch that it was an assault in
23 progress with several subjects fighting.

24 Q. Do you know how long it took you to arrive on the
25 scene after you got the call?

CRAIG HOLBROOKS - DIRECT BY MR. MCELHANNON

1 A. Around 8 minutes.

2 Q. When you arrived on scene what was the situation
3 like?

4 A. There were several people in the yard of the
5 residence, and I observed a male subject laying, what appeared
6 to be on his back, kind of on his side up against a blue car
7 in the driveway.

8 Q. And what did you do when you saw that?

9 A. As soon as I saw him I approached him to -- well, I
10 also observed a white male leaning over the guy laying beside
11 the car. I approached to see what the situation was. I
12 observed numerous lacerations, cuts all over the guy -- the
13 male subject laying on the ground. I called dispatch and
14 advised them to have EMS respond to treat the victim.

15 Q. Okay. And do you know how long it was before EMS
16 actually arrived?

17 A. That I do not. I know it wasn't too long after I
18 got there.

19 Q. Okay. After EMS got to the victim, what did you do
20 on the scene?

21 A. Myself and Jamie -- Deputy Crawford with the
22 sheriff's office put up crime scene tape and used his county
23 issued camera to take photographs of the blood on the car, the
24 damage to the cars. Due to the weather and it raining we
25 wanted to get some kind of photographs prior to the rain

CRAIG HOLBROOKS - DIRECT BY MR. MCELHANNON

1 washing it away.

2 Q. And speaking of that, did it begin to rain?

3 A. It did.

4 Q. Did you see the defendant, Barry Evans, at any
5 point?

6 A. No.

7 Q. Did you take statements from anyone?

8 A. I did not take any statements.

9 Q. Did anyone there tell you what happened?

10 A. I spoke to the victim. I did ask who had done that
11 to him. While the -- I believe it's Christopher, was there
12 with him. I asked who had done it. Both of them stated Barry
13 Evans.

14 Q. How long do you think you stayed on the scene?

15 A. I was on the scene for a little over an hour.

16 Q. And you were the first to arrive?

17 A. I was the first to arrive on the scene.

18 Q. What happened after people told you that the
19 defendant, Barry Evans, had done this?

20 A. After EMS treated and transported Mr. Craft to the
21 hospital for treatment Deputy Crawford had separated the
22 witnesses inside the residence due to the rain so they would
23 not be out in the weather.

24 We were approached by a female who stated she had
25 went by Barry's residence, which is right around the corner

CRAIG HOLBROOKS - DIRECT BY MR. MCELHANNON

1 from where the incident occurred. Myself and Deputy Crawford
2 went to that residence attempting to locate Mr. Evans. We saw
3 that the door was opened. As we were approaching, the wind
4 blew the door the rest of the way open. We did do a
5 protective sweep at a residence and no one was inside.

6 Q. Now, after you left the scene, after about an hour,
7 I believe you said?

8 A. Yes, sir.

9 Q. What transpired throughout the night of September
10 14th?

11 A. The shift that relieved us at 7:00 p.m., they
12 continually received calls of Mr. Evans being in the area.
13 They were in the area trying to locate him. I believe they
14 called out the county bloodhound to also attempt to track
15 Mr. Evans. Mr. Evans was not located.

16 The following day, on the 15th, I received a call
17 that Mr. Evans was at the incident location at

18 I, along with Deputy Williams, responded to that
19 address. We were told that Mr. Evans had jumped -- ran into
20 the backyard and jumped the fence.

21 We started to secure the yard, notified Lieutenant
22 Garrett, who notified the county bloodhound we were going to
23 attempt to track him again using the K9. When we were waiting
24 on Lieutenant Garret to give us confirmation that the
25 bloodhound was in route to the scene we heard a car horn

CRAIG HOLBROOKS - DIRECT BY MR. MCELHANNON

1 coming from the roadway in front of the residence.

2 Myself -- I went around, I believe the left side of
3 the house and Deputy Williams went around the right side of
4 house and there was a black car in the roadway. Ms. Simmons
5 got out of the vehicle and she told us that she had Barry in
6 the car with her. We ordered him out of the car, got him to
7 lay down on the ground then took him into custody.

8 Q. Okay. And once he was in custody what did you do,
9 transport him?

10 A. I transported him to the law enforcement center
11 where investigations spoke to him.

12 Q. So you didn't actually question him about the
13 incident?

14 A. No.

15 Q. Do you remember who you turned him over to?

16 A. It would have been, I believe Investigator Hayden
17 and Hendrix were at the sheriff's office.

18 Q. And after you took him into custody and transported
19 him did you have any further involvement in this case?

20 A. No, sir, I didn't.

21 Q. Did you find -- when you arrived on scene on the
22 14th did you find any weapons of any type?

23 A. I did not locate any weapons on the 14th when I
24 arrived on the scene.

25 MR. MCELHANNON: That's all the questions I have.

CRAIG HOLBROOKS - CROSS BY MR. SMITH

1 Answer anything --

2 THE COURT: Cross-examination?

3 MR. SMITH: Yes, sir, just briefly.

4 CROSS-EXAMINATION

5 BY MR. SMITH:

6 Q. Officer, I take it you have no personal knowledge of
7 what went on at the incident, do you?

8 A. No, sir.

9 Q. And also, Officer, when they took a warrant out on
10 him they charged him with -- doing a knife conviction with a
11 violent on a Billy Smith; is that correct?

12 A. I haven't even seen the warrant, sir.

13 Q. And then somebody erased Billy Smith's name out and
14 put Craft in there. And do you know also, Officer, that they
15 indicted him for cutting a Billy Smith and they dismissed that
16 about a month ago and then re-indicted him on July the 22nd
17 for Billy Craft for the same crime?

18 A. I did not know that, sir.

19 Q. Now, I appreciate your service, Officer. Be careful
20 out there.

21 A. Thank you.

22 THE COURT: Thank you very much. You may be
23 excused.

24 I'm sorry. You got any redirect?

25 MR. MCELHANNON: No, sir.

GREG HAYDEN - DIRECT BY MR. MCELHANNON

1 THE COURT: Thank you. You may be excused.

2 Call your next witness.

3 MR. MCELHANNON: The State calls Investigator Greg
4 Hayden.

5 GREG MICHAEL HAYDEN, after having been duly
6 sworn, testified as follows:

7 THE CLERK: You can have a seat in the witness
8 chair, please, sir.

9 (WHEREUPON, the witness was seated in the witness
10 stand.)

11 THE CLERK: If you'd state your full name and spell
12 your last name for the record, please.

13 THE WITNESS: Greg Michael Hayden. Last name is
14 H-a-y-d-e-n.

15 DIRECT EXAMINATION

16 BY MR. MCELHANNON:

17 Q. Detective Hayden, how long you been with the
18 Anderson County Sheriff's Office?

19 A. I've been employed there for 13 years.

20 Q. How long have you actually been a detective?

21 A. For the past 3 years.

22 Q. And were you acting in that capacity on September
23 14th, 2007?

24 A. Yes, sir, I was.

25 Q. Did you actually go to on the

GREG HAYDEN - DIRECT BY MR. MCELHANNON

1 14th?

2 A. Yes, sir, I did.

3 Q. And what did you observe when you arrived there?

4 A. Everything was already in progress as I arrived on
5 the scene. There were 2 other investigators once I was
6 notified of this incident having taken place. I notified the
7 other investigators that were working along with me for the
8 after hours on-call, and they had first responded to the
9 scene. So they were actually first on the scene. I met them
10 there a while later.

11 Q. Did you collect any evidence at the scene?

12 A. Not at the scene. There were 2 evidence officers,
13 Lieutenant Chris Scott, and I believe Sergeant Mark Patterson
14 with forensics unit that were there on the scene. They
15 collected the evidence there. The only thing I collected
16 would be the pole that you see there, and that was obtained
17 from the Lavoie's residence.

18 Q. And that's State's Exhibit 12, I believe. Yes,
19 State's Exhibit 12. You actually collected that?

20 A. Yes, sir.

21 Q. From where?

22 A. From the Lavoie's residence. I believe that would
23 have been at

24 Q. Is that across the street from

25 A. Yes, sir.

GREG HAYDEN - DIRECT BY MR. MCELHANNON

1 MR. MCELHANNON: Your Honor, at this time I'd ask
2 that State's Exhibit 12 be admitted.

3 THE COURT: Any objection?

4 MR. SMITH: No objection.

5 THE COURT: All right. State's Number 12 admitted
6 without objection.

7 (WHEREUPON, State's Exhibit Number 12, a Metal Pole,
8 was admitted into evidence.)

9 BY MR. MCELHANNON:

10 Q. Do you know how long you remained on scene on the
11 14th?

12 A. I was on scene for at lest an hour and a half,
13 probably going on 2 hours.

14 Q. And after you left I guess forensics wrapped up and
15 you left?

16 A. That's correct.

17 Q. What did you do after you got back to the sheriff's
18 department?

19 A. I met with the other investigators who were on
20 scene, obtained statements they had taken from witnesses and
21 compiled those with the statements I had obtained. Because of
22 the corroborative nature of these statements I had contacted a
23 magistrate to meet me at the summary courthouse to obtain
24 arrest warrants for Mr. Evans.

25 Q. And, as we've already heard, he was not apprehended

GREG HAYDEN - DIRECT BY MR. MCELHANNON

1 the night of the 14th; is that correct?

2 A. That's correct.

3 Q. The day of the 15th, the next day, tell us what
4 happened.

5 A. I was contacted by the road patrol shift supervisor
6 who advised they had received a call advising Mr. Evans had
7 been seen in the area of Way. I advised I would
8 be in route to the Anderson area. Before I actually got to
9 the area I was notified that he was actually -- or had been
10 taken into custody.

11 Q. Let me show you a couple of photographs, if I could.
12 If you could step down, please.

13 A. (The witness complied).

14 Q. Can you describe what that shows? And that is
15 State's 8.

16 A. It is the grassy area. It's actually part of the
17 front yard at which was the incident
18 location. The trailer that you see there across the street
19 would be , which is the Lavoie's
20 residence.

21 Q. State's Exhibit 7?

22 A. And that's a closer view of the Lavoie's residence
23 from the roadway.

24 Q. Can you tell -- and I'm going to show you State's
25 Exhibit 11 in a second, but can you tell us where you found

GREG HAYDEN - DIRECT BY MR. MCELHANNON

1 this metal pole?

2 A. I believe the metal pole was toward the right side
3 of the porch there. You see some stepping stools behind the
4 flag there. It was located over in that area.

5 Q. And is that where you actually found it and
6 recovered it?

7 A. Yes, sir.

8 Q. So that is in that corner by the Lavoie's residence?

9 A. That's correct. Yes, sir.

10 Q. Thank you. You can retake the stand.

11 A. (The witness complied).

12 Q. Mr. Evans was turned over to you?

13 A. As I was notified he had been taken into custody I
14 requested that the transporting officer place him in a holding
15 cell at the sheriff's office until myself and Detective
16 Hendrix could make it to the sheriff's office to speak with
17 him.

18 Q. Okay. Did he give you a statement?

19 A. He did, as Detective Henderson. I met with him.
20 Of course, he was in custody so I advised him of his Miranda
21 rights. He stated that he understood what his rights were,
22 and had no questions about them. He signed the advisory
23 rights form acknowledging that he understood and knew what his
24 rights were.

25 I then advised him that he could waive his rights

GREG HAYDEN - DIRECT BY MR. MCELHANNON

1 and speak with us about what had happened. I advised him of
2 what it states in our advisory of rights. He stated that he
3 understood that, had no questions about it and he signed that
4 agreement that he wanted to speak with us about the incident.
5 And at that time, I did take a statement from him of what he
6 wanted to tell us of the incident.

7 Q. Okay. And were any photographs taken of Mr. Evans?

8 A. Yes, they were. Upon completion of the interview he
9 was placed back in the holding cell. I contacted another one
10 of our forensics officers, John Carpenter, who came over and
11 took photographs of Mr. Evans.

12 Q. And why would you do that?

13 A. I wanted to see if he had any kind of wounds or
14 injuries that could have resulted from this incident.

15 Q. And did you observe any?

16 A. No, sir, I did not.

17 Q. Did you have any further involvement in the case
18 after you photographed him and took his statement?

19 A. I'm sorry?

20 Q. Did you have any further involvement in the case
21 after?

22 A. After speaking to all the parties involved,
23 including the witnesses in the neighborhood, I met with
24 Magistrate Sharpe again and obtained more arrest warrants for
25 Mr. Evans based on the evidence and the corroborative

GREG HAYDEN - DIRECT BY MR. MCELHANNON

1 statements that I had.

2 Q. Did you see Mr. Craft, the victim, at any time?

3 A. Yes, I did.

4 Q. And where was that?

5 A. When I had received the call, that's when I had
6 requested my partners to go to the scene and I responded to
7 the hospital. And when I saw him he was in the trauma bay at
8 the emergency room at the Anderson Hospital.

9 Q. And were you present when those ER photos were
10 taken?

11 A. Yes, I was.

12 Q. And did you have an opportunity to speak with
13 Mr. Craft that night?

14 A. I did, just very briefly. When I first walked in,
15 of course, I saw the injuries that Mr. Craft had sustained as
16 a result of the incident. I went in very quickly. I didn't
17 know his condition. Incase he was to have passed away I
18 wanted to know who did it and why from him. As I asked him if
19 he remembered or if he could tell me what happened he stated
20 that they were getting ready to go out to eat and that Barry
21 attacked him with a knife.

22 MR. MCELHANNON: That's all the questions I have.

23 THE COURT: Cross-examination?

24 MR. SMITH: Yes, sir.

25 CROSS-EXAMINATION

GREG HAYDEN - CROSS BY MR. SMITH

1 BY MR. SMITH:

2 Q. Officer, were you the one who I guess signed this
3 warrant on Billy Smith?

4 A. I would need to see it to verify it, sir.

5 Q. I'm not trying to beat up on you or anything. It's
6 not my intention at all. But anyway, I'll show you this
7 warrant.

8 A. Okay.

9 Yes, I am the affiant on the warrant.

10 Q. Okay. Did you testify in front of the grand jury?

11 A. No, sir, I did not.

12 Q. But it does say Billy Smith, and did you correct it
13 and say Billy Craft? How did that happen?

14 A. As best I can explain it was a typographical error,
15 and the issuing magistrate actually corrected that on the
16 warrant.

17 Q. And when it got to the grand jury it still hadn't
18 been corrected so we waited until July the 22nd of this year,
19 2008, to actually get the right person who was the alleged
20 victim; is that correct?

21 A. I did not make the correction. I can't attest to
22 that.

23 Q. I show you the indictment. July the 22nd on that
24 date, 2008?

25 A. Yes, sir.

GREG HAYDEN - CROSS BY MR. SMITH

1 Q. So any indictment that said Billy Smith before then
2 was incorrect; is that correct?

3 A. I have not seen the previous indictment.

4 Q. And again, Officer, you were not present at the
5 scene when this incident took place, correct?

6 A. That's correct.

7 Q. And you wasn't present at the scene when there was a
8 machete involved in this situation which may have involved
9 this pipe, right?

10 A. No, sir, I was not there is accurate.

11 MR. SMITH: No further questions.

12 THE COURT: Any redirect?

13 MR. MCELHANNON: No, sir.

14 THE COURT: You may step down. Thank you very much.

15 THE WITNESS: Thank you, sir.

16 THE COURT: Call your next witness.

17 MR. MCELHANNON: The State rests, Your Honor.

18 THE COURT: Okay. Let me see the attorneys up here
19 jus a second.

20 (WHEREUPON, a bench conference was had.)

21 THE COURT: Mr. Foreman, ladies and gentlemen of the
22 jury, what we're going to do at this time, the State does not
23 have any further witnesses at this time and I need to hear
24 some motions, so we're going to ahead and take a lunch break.
25 It is now 12:35. If you'll be back in your jury room at --

1 say quarter until 1:00. We'll get started at that time. I'm
2 sorry. Make it quarter to 2:00. Excuse me. Make it quarter
3 to 2:00. See you then. Don't discuss the case. Leave your
4 pads in the chair.

5 (WHEREUPON, the jury leaves the courtroom at
6 approximately 12:36 p.m.)

7 THE COURT: All right. Any motions?

8 MR. SMITH: Yes, sir, Your Honor. I make a motion
9 to dismiss the malicious -- the indictment for malicious
10 damage. Is that one of the indictments?

11 MR. MCELHANNON: I didn't go forward on that charge.

12 THE COURT: Weapons possession during a violent
13 crime, assault with intent to kill, and assault and battery
14 with intent to kill, were the 3 indictments.

15 MR. SMITH: Oh. Okay.

16 THE COURT: You want to look at the indictments
17 while you're making your motion?

18 MR. SMITH: Yes, sir. Your Honor, with regard to
19 the assault and battery with intent to kill with regard to
20 Barry Evans and Lavoie, I think the testimony demonstrates
21 that he didn't assault Mr. Lavoie with any deadly weapon.
22 Mr. Lavoie was the one who came out of his house with a deadly
23 weapon and threatened this man. And under those circumstances
24 I think it is uncontested that he was defending himself and
25 threw that pipe at him to try to get away. So he was in the

1 act of retreating when this man came out of his house with a
2 machete, and we would ask that even looking at the evidence in
3 light most favorable to the State that charge should be
4 dismissed.

5 The other one --

6 THE COURT: What's the State's position on the
7 assault charge?

8 MR. MCELHANNON: Your Honor, I think the testimony
9 clearly was that Mr. Lavoie came out with the machete trying
10 to get the situation under control and to protect himself,
11 that Mr. Evans still had the knife in his hand, came at him
12 and also threw the metal pipe at him. So I think there was
13 evidence that he did assault, not batter assault, but assault
14 with intent.

15 MR. SMITH: Your Honor, the charge could have very
16 well -- why did this man have to come out of his house with a
17 machete? It wasn't his job to be law enforcement in that area
18 with a deadly weapon himself. He could have been charged with
19 assaulting Mr. Evans with a deadly weapon coming out of the
20 house with a machete, even based on what the argument was the
21 State just did.

22 THE COURT: Okay. Motion is denied. Go ahead.

23 MR. SMITH: The other 2, Your Honor, there was a
24 weapon involved. We'll beg the formal motion that based on
25 evidence we don't think that the State has proven that he

1 assaulted this man to kill this man.

2 THE COURT: Motion denied.

3 Anything else?

4 MR. SMITH: That's it, Your Honor.

5 THE COURT: All right. We'll see you all about an

6 hour and 10 minutes.

7 MR. SMITH: Your Honor, with Mark Durham, can I

8 excuse him? I'm not going to use him.

9 THE COURT: If you're not going to use him, excuse

10 him.

11 MR. SMITH: All right, sir.

12 THE COURT: I mean, if you don't need him. The only

13 reason I told him to stay is you said you wanted him.

14 MR. SMITH: Yes, sir. At first I did, and I really

15 don't need him.

16 THE COURT: Send him on his way.

17 You don't need him, do you, Solicitor?

18 MR. MCELHANNON: No, sir.

19 THE COURT: All right.

20 (WHEREUPON, a lunch break was taken.)

21 THE COURT: All right. You ready?

22 MR. SMITH: Yes, sir.

23 THE COURT: All right. Bring us the jury.

24 (WHEREUPON, the jury enters the courtroom at

25 approximately 2:03 p.m.)

JOHN JOHNSON - DIRECT BY MR. SMITH

1 THE COURT: All right. Mr. Smith, call your first
2 witness, please, sir.

3 MR. SMITH: Yes, sir, Your Honor. I call Mr. John
4 Johnson.

5 THE CLERK: Mr. Johnson, if you'd come forward to be
6 sworn, please, sir.

7 JOHN DAVID JOHNSON, after having been duly
8 sworn, testified as follows:

9 THE CLERK: If you'll go right around there and have
10 a seat in the witness chair, please, sir.

11 (WHEREUPON, the witness was seated in the witness
12 stand.)

13 THE CLERK: If you'll please state your full name and
14 spell your last name for the record.

15 THE WITNESS: John David Johnson, J-o-h-n-s-o-n.

16 DIRECT EXAMINATION

17 BY MR. SMITH:

18 Q. Mr. Johnson, you could look over in this area, if
19 you care to. My name is Fletcher Smith. Of course, you know
20 that. And I'll be asking you some questions in front of the
21 jury, and I would like for you to hold your voice up so that
22 everybody in the jury box can hear you, okay?

23 A. Yes, sir.

24 Q. Would you state your name again.

25 A. John David Johnson.

JOHN JOHNSON - DIRECT BY MR. SMITH

- 1 Q. Where do you live?
- 2 A. At
- 3 Q. Here in Anderson, South Carolina?
- 4 A. Yes, sir.
- 5 Q. How long have you lived in Anderson, South Carolina?
- 6 A. All my life, sir, but I lived at that address for a
- 7 little over 2 years.
- 8 Q. Two years. And did you have any type of employment
- 9 before -- what's your employment history?
- 10 A. I do landscaping. I was doing roofing and
- 11 everything before landscaping.
- 12 Q. How long had you done roofing and landscaping?
- 13 A. I done roofing for 16 and a half years, and I've
- 14 been doing landscaping for the last 3 years.
- 15 Q. Are you married?
- 16 A. No, sir.
- 17 Q. Are you divorced?
- 18 A. I ain't never got married, sir.
- 19 Q. Never got married. Do you have any children?
- 20 A. Yes, sir.
- 21 Q. How many children you got?
- 22 A. I got 4.
- 23 Q. Four. Are they grown?
- 24 A. Only 1 of them.
- 25 Q. Only 1 of them?

JOHN JOHNSON - DIRECT BY MR. SMITH

1 A. Only 1.

2 Q. So you still have 3 children that you provide
3 support?

4 A. Yes, sir.

5 Q. Now, with regard to your income, how do you make an
6 income?

7 A. Make it off every day that I work. That's where I
8 turn around and put it back for my young-uns, then I make
9 enough that I can survive off of. My young-uns get more than
10 I do.

11 Q. Now, with regard to this incident on September 14th,
12 I think, 2007, you lived on Way?

13 A. Yes, sir.

14 Q. Is that a trailer park area?

15 A. No, sir. It's a residential area but they got a lot
16 of trailers, double-wides, singles-wides around there.

17 Q. So it's mixed?

18 A. Yes.

19 Q. And you know a Barry Evans?

20 A. Yes, sir.

21 Q. How do you know Barry Evans?

22 A. Barry Evans lives right in front of me.

23 Q. Do you know Linda Evans?

24 A. Yes, sir.

25 Q. How do you know Linda Evans?

JOHN JOHNSON - DIRECT BY MR. SMITH

1 A. We talk, and she lives right in front of me with
2 Barry Evans.

3 Q. Do you know of Mr. and Mrs. Lavoie?

4 A. I just had met them not too long ago. They live
5 right across the street from Barry and Linda Evans. They live
6 right across the street.

7 Q. And do you know a Mr. Billy Craft?

8 A. I've known Billy Craft.

9 Q. How long have you known Mr. Craft?

10 A. A little over 12 years.

11 Q. Do you know Mark Durham?

12 A. Yes, sir.

13 Q. Now, on September the 14th, 2007 your address was
14 what again?

15 A. Was

16 Q. Who was staying at with you at
17 that particular point?

18 A. I was staying -- I would stay there by myself.

19 Q. Did you on that day or any other day give Barry
20 Evans an opportunity to live in your residence?

21 A. Yes, sir. I told him if he didn't have nowhere else
22 to go or couldn't go nowhere else he can be welcome to stay at
23 my house.

24 Q. What day did he move into your residence?

25 A. I couldn't tell you the exact day.

JOHN JOHNSON - DIRECT BY MR. SMITH

1 Q. How close to the incident was it that he moved into
2 your residence, if you can recall?

3 A. It was way before that incident, sir. He stayed
4 with me for about 5 or 6 months.

5 Q. Five or 6 months. And would he travel back and
6 forth from your residence to another residence that he lived
7 at?

8 A. Yes, sir.

9 Q. And who lived at that other residence that he was
10 living at?

11 A. Linda Evans.

12 Q. And did you know Linda Evans and Barry Evans to have
13 been husband and wife at some point?

14 A. Yes, sir.

15 Q. And was your house, and Barry Evans' house and Linda
16 Evans' house next door to yours?

17 A. Yes, sir.

18 Q. And to your knowledge does Barry Evans have a
19 daughter?

20 A. Yes, sir.

21 Q. And do you know her name?

22 A. Jennifer.

23 Q. Jennifer. And she's married to Mark Durham?

24 A. Yes, sir.

25 Q. And on September 14th, 2007, Barry Evans was living

JOHN JOHNSON - DIRECT BY MR. SMITH

1 at your place, correct?

2 MR. MCELHANNON: Objection, Your Honor, just
3 leading. He's leading quite a bit.

4 MR. SMITH: Well, the rules say that you can lead to
5 process --

6 THE COURT: I'll overrule the objection until he
7 gets to somewhere. He's just trying to lay some foundation.
8 I'll overrule. I'll let him do that. When he gets to some
9 crucial questions then you can make your objection, okay?

10 MR. MCELHANNON: Yes, sir.

11 MR. SMITH: Thank you, Your Honor.

12 BY MR. SMITH:

13 Q. Go ahead.

14 A. Now, you were saying?

15 Q. Go ahead.

16 A. I live right next door to Barry and Linda Evans.

17 Q. All right.

18 A. And me and Barry talk quite a bit.

19 Q. Right, but you don't have to volunteer anything.

20 I'm just asking you. Barry lived in your residence at that
21 time, correct?

22 A. Yes, sir. He lived there before this all happened.

23 Q. And when -- on September the 14th, 2007, somewhere
24 around 4 to 5 o'clock, you were present when the incident took
25 place; is that correct?

JOHN JOHNSON - DIRECT BY MR. SMITH

1 A. Yes, sir. I was in my house, and Barry Evans just
2 left from my house before the incident happened.

3 Q. All right. I'm going to let you tell everything but
4 before we get there, was there another man with you and Barry
5 Evans at the time?

6 A. Yes, sir.

7 Q. What's his name?

8 A. Name is Tony.

9 Q. Tony?

10 A. Tony Martin.

11 Q. Tony Martin. He's not here today, is he?

12 A. No, sir.

13 Q. He's in a funeral down in Florida, correct?

14 A. Yes, sir.

15 Q. Now, at a certain point Barry Evans left your house
16 on that day, correct?

17 A. Yes, sir.

18 Q. And where did he go when he left your house?

19 A. Him and Tony was on their way back to Tony's house,
20 you know, just get away from everything that was going on down
21 there. Him and Tony was walking down the road and --

22 Q. Which direction were they going when they were
23 walking down the road?

24 A. When they left from my house they walked straight --
25 the only way to go to Tony's house is go right in front of

JOHN JOHNSON - DIRECT BY MR. SMITH

1 Linda Evans' house.

2 Q. All right. So how many houses down was Tony
3 Martin's house?

4 A. He lived on the next block, sir.

5 Q. So as they were walking down the street did you see
6 or hear anything between Barry Evans and this gentleman over
7 here, Billy Craft?

8 A. I heard -- I heard that they was cussing at each
9 other. And that's when Mr. Craft turned around when he come
10 out the driveway towards Barry Evans, and that's when they
11 started cussing and everything like that. And that's when
12 they got close to each other, and that was it.

13 Q. All right. Now, as far as you could see, who
14 started the incident at that time?

15 A. Billy Craft. He's the one that came out of the
16 yard.

17 Q. And what did Billy Craft say, if anything, to Barry
18 Evans?

19 A. That he was going to get him.

20 Q. And what did -- now, who was Billy Craft with when
21 he said I'm going to get this gentleman over here, Barry
22 Evans?

23 A. He was in Linda -- Linda's yard, and when that all
24 happen.

25 Q. And Linda is the ex-wife of Barry Evans?

JOHN JOHNSON - DIRECT BY MR. SMITH

1 A. Yeah.

2 Q. Now, what, if anything, did you see Barry Evans do
3 when he told him he was going to get him?

4 A. Barry Evans just turned around and asked him what
5 was he going to get him for, and then that's when they locked
6 up to each other. That was all I could tell right there
7 because they was between two vehicles.

8 Q. Now, did you see Barry Evans with a weapon or did
9 you see Mr. Craft with a weapon?

10 A. Mr. Craft had the weapon because Barry Evans did not
11 have one.

12 Q. How do you know that Barry Evans did not have a
13 weapon?

14 A. How did I know Barry Evans didn't have a weapon?
15 Because he was at my house that day and I made sure he did not
16 have none. I always kept that from him.

17 Q. Now, when they got in a fight there was mutual
18 combat between the two of them?

19 A. Yes, sir.

20 Q. Now, did you see Barry Evans take the weapon away
21 from Mr. Craft?

22 A. I couldn't tell when they was right at the Jeep from
23 one side of my porch. I had to go to the other side of my
24 porch to be able the see between the two vehicles.

25 Q. All right. Now, I'm going to show you some

JOHN JOHNSON - DIRECT BY MR. SMITH

1 pictures. Okay. Would you step down, Mr. Johnson, please.

2 A. Yes, sir.

3 (WHEREUPON, the witness stepped down from the
4 witness stand.)

5 Q. Now, Mr. Johnson, this is Exhibit Number 10, State's
6 Exhibit 10. You see there is a blue car there, a Jeep, and
7 another car?

8 A. Yes, sir.

9 Q. All right. How many cars were at the scene?

10 A. There was only the gray car and the Jeep was in the
11 yard. The gray car was where the blue car was at.

12 Q. Okay. Who owned the gray car?

13 A. The gray car was Linda Evans'.

14 Q. Okay. So the line of sight would be between right
15 here, would be where the gray car was?

16 A. Yes, sir.

17 Q. Was there another car behind the gray car?

18 A. Yes, sir. That would be the blue car. It was right
19 behind Linda's car.

20 Q. All right. So it was three cars at the scene at
21 that time, correct?

22 A. Yes, sir.

23 Q. All right. You may step back.

24 A. (The witness complied).

25 Q. Now, you were -- where were you standing when you

JOHN JOHNSON - DIRECT BY MR. SMITH

1 saw the incident taking place?

2 A. I was standing on my front porch.

3 Q. You were standing on your front porch?

4 A. Yes, sir.

5 Q. And how high is your front porch?

6 A. My front porch is average of four foot high. It's
7 concrete.

8 Q. And was it high enough for you to be able to look
9 down and see into there?

10 A. Yes, sir.

11 Q. Now, so you had a line of sight into that area?

12 A. Yes, sir.

13 Q. Did you see Mr. Craft and Mr. Evans fighting?

14 A. Yes, sir.

15 Q. And did you see Mr. Evans cutting him, after a
16 point?

17 A. I couldn't tell if they were cutting or they was
18 hitting each other with fists. All I can go from there is
19 when Barry got up, that's when Linda turned around and hit
20 Barry with the car.

21 Q. All right. Now, would you come back down, because
22 we'd like to see how that was effectuated or created.

23 A. (The witness complied).

24 Q. When she was in the car, show us where she went to
25 pin -- how she hit him with the car and what happened to him.

JOHN JOHNSON - DIRECT BY MR. SMITH

1 A. Her car -- Linda's car is the gray car. That blue
2 car was not in front of Linda's car. Linda caught him between
3 there and the corner of the house with her car (indicated).

4 Q. All right. And then when she caught him between the
5 car and house what was the position of Mr. Barry Evans' body
6 at that point?

7 A. As soon as he got hit he went to the ground and he
8 got back up. He tried to get away from her, and that's when
9 she come down the road and trying to chase him or talk to him
10 or whatever. I didn't stay into it. I couldn't get no more
11 conflict with it.

12 Q. All right. Would you stand back up there.

13 A. (The witness complied).

14 Q. Now, did you have an opportunity to see anyone who
15 may have had a weapon other than Mr. Craft and Barry Evans?

16 A. No, sir.

17 Q. Did you see anyone with a machete?

18 A. That was the neighbor when he came across the
19 street.

20 Q. Who?

21 A. Lavoie.

22 Q. Lavoie. What did Lavoie do?

23 A. Lavoie come out of his house, and he seen everything
24 was over there, fighting and all. That's when he came out of
25 his house, come up his driveway and across the street to come

JOHN JOHNSON - DIRECT BY MR. SMITH

1 over there, I guess get into it or separate it.

2 Q. Okay. And what did Mr. Lavoie have in his hand?

3 A. A machete.

4 Q. A machete. Now, as far as you know, Mr. Lavoie
5 wasn't living at this address with Linda Evans, was he?

6 A. No, sir.

7 Q. Was he living at your address?

8 A. No, sir.

9 Q. He had his own address as far as you know in that
10 area, correct?

11 A. Yes, sir.

12 Q. Now, at a certain point did anyone else have a
13 weapon like a gun or a knife or anything else?

14 A. All I can tell was Mark come out with a gun, and
15 that's when he turned around. He was trying to stop it.

16 Q. Do you know whether or not it took the officer eight
17 minutes to get to the scene after he got a call?

18 A. It took a little -- about as long as that or a
19 little longer.

20 Q. All right. But it was pretty short --

21 A. Yeah.

22 Q. -- or long, whatever you want to look at it?

23 A. Yes, sir.

24 Q. Now, was Barry Evans to your -- from your advantage
25 point attempting to leave the area to get away from everybody?

JOHN JOHNSON - DIRECT BY MR. SMITH

1 A. Yes, sir.

2 Q. What, if anything, did he do to try to get away from
3 all these people with these weapons?

4 A. He tried to run across Linda -- his and Linda's
5 yard, is to go down the street the same way him and Tony was
6 going, back to Tony's house. He tried to get away from
7 everyone.

8 Q. What, if anything, did Linda Evans do with her
9 vehicle as he was trying to get away from the area?

10 A. She backed her car up and she was trying to hit at
11 him again, and it didn't work.

12 Q. So eventually he got away?

13 A. Yeah.

14 Q. Now, neither you nor Mr. Martin -- yeah, Mr. Martin,
15 got involved in this situation, correct?

16 A. I didn't get involved in it. I was on my porch.
17 Barry Evans just left from my house right before everything
18 happened.

19 Q. Well, let's just go and be up front with the jury.
20 You've got a little criminal record in your background,
21 haven't you?

22 A. Yes, sir.

23 Q. And in your background you've had some criminal
24 domestic violence charges, correct?

25 A. Yes, sir.

JOHN JOHNSON - CROSS BY MR. MCELHANNON

1 Q. And some public disorderly conduct, things of that
2 nature?

3 A. Yes, sir, and a couple assault charges.

4 Q. And assault charges. And I think a judge got your
5 attention and said if you ever come back again you can get
6 from 5 to 35 years; is that correct?

7 A. Yes, sir.

8 Q. So you knew you weren't going to get involved in it?

9 A. No, I wasn't going to get involved with it. I
10 couldn't -- I wasn't going like that.

11 Q. So you didn't come out of your house with any weapon
12 or anything of that nature to try to do anything?

13 A. No, sir.

14 Q. That ain't your job, is it?

15 A. No, sir, wasn't on my property.

16 Q. And you're not a police officer, are you?

17 A. No, sir.

18 MR. SMITH: Your witness, Mr. Solicitor.

19 MR. MCELHANNON: Thank you, Mr. Smith.

20 CROSS-EXAMINATION

21 BY MR. MCELHANNON:

22 Q. All right, Mr. Johnson. Let's just go through your
23 criminal record. In 1998 you have a disorderly conduct?

24 A. Yes, sir.

25 Q. In 2000, driving under the influence?

JOHN JOHNSON - CROSS BY MR. MCELHANNON

- 1 A. Yes, sir.
- 2 Q. Driving under suspension?
- 3 A. Yes, sir.
- 4 Q. Open container?
- 5 A. Yes, sir.
- 6 Q. In 2003, simple assault and battery?
- 7 A. Yes, sir.
- 8 Q. In 2003, criminal domestic violence, 2nd offense?
- 9 A. Yes, sir.
- 10 Q. In 2004, public disorderly conduct?
- 11 A. Yes, sir.
- 12 Q. In 2004, a simple assault?
- 13 A. Yes, sir.
- 14 Q. Trespass?
- 15 A. Yes, sir.
- 16 Q. In 2005, violation of A-B-C law?
- 17 A. Yes, sir.
- 18 Q. Possession of marijuana?
- 19 A. Yes, sir.
- 20 Q. In 2006, public disorderly conduct?
- 21 A. I don't remember that one..
- 22 Q. July of 2006?
- 23 A. Yes, sir. I remember that last one. That's 60
- 24 days.
- 25 Q. Okay. So you've had more than a few scrapes with

JOHN JOHNSON - CROSS BY MR. MCELHANNON

1 the law, haven't you?

2 A. Yes, sir.

3 Q. All the way up until 2006?

4 A. Yes, sir.

5 Q. And you say you're sure Barry Evans didn't leave
6 your house with a weapon on September the 14th?

7 A. Yes, sir.

8 Q. Did you pat him down?

9 A. I'm not an officer. I didn't pat him down. He
10 speaks to me, just the way I speak to him. I asked him if he
11 had any kind of weapons or anything on him --

12 Q. Why would you ask him that?

13 A. He don't need to be carrying none of that.

14 Q. Why?

15 A. Because he turned around and talked to me about my
16 problems with my criminal domestics and everything like that.
17 He talked to me and told me to quit carrying a knife, and I
18 made an agreement with him if he'd quit carrying his I'll quit
19 carrying mine.

20 Q. So you didn't check his pocks that day?

21 A. No, sir. I don't check nobody's pocket.

22 Q. Just took his word that he didn't have a knife on
23 him?

24 A. Yes, sir.

25 Q. And you were all the way over on your porch staying

JOHN JOHNSON - CROSS BY MR. MCELHANNON

1 out of this?

2 A. Yes, sir.

3 Q. But you swear you saw Billy Craft with the knife?

4 A. Billy Craft, come out of his pocket. Anybody knows
5 if he'd of come out he's always got a knife or a gun.

6 Q. So you're going on past history. You're not going
7 on what you saw that day?

8 A. I seen him come out of his pocket.

9 Q. You said you saw him come all the way down the
10 driveway?

11 A. Yes, sir. They was -- from where the blue car is
12 sitting at he was over halfway in the driveway. Barry was
13 walking down the road.

14 Q. And Barry Evans is a good friend of yours, isn't he?

15 A. Yes, sir.

16 Q. You don't want to see him get in trouble, do you?

17 A. No, sir.

18 Q. Did you ever come forward to law enforcement and
19 tell them anything like this?

20 A. No, sir.

21 Q. Didn't give them a statement?

22 A. No, sir.

23 Q. Why not?

24 A. They never come to my house or anything.

25 Q. They didn't?

JOHN JOHNSON - CROSS BY MR. MCELHANNON

1 A. I stayed on the front porch the whole time.

2 Q. They didn't come knock on your door?

3 A. No, sir.

4 Q. They didn't leave a card saying they wanted to talk
5 to you?

6 A. No, sir.

7 Q. As a witness?

8 A. No, sir. I sit right there on my front porch, and
9 all they had to do is pull up in my yard. I was there close
10 to them.

11 Q. You stay there every day?

12 A. Yes, sir. I have been for the last year anyway.

13 Q. But you didn't want to get involved, so you didn't
14 hide in your house when they came to ask you for a statement?

15 A. No, sir. I didn't have no reason to hide from the
16 police.

17 Q. And all you saw was them get into a fight and you
18 didn't know if anybody was being cut or not?

19 A. No. I didn't know he was being cut until somebody
20 hollered he was bleeding.

21 Q. You didn't hear all of the screaming going on?

22 A. I heard the vulgar language that went on between
23 them when they met right there in the driveway, when they got
24 between the cars. That's all I remember.

25 Q. You didn't hear the lady screaming?

JOHN JOHNSON - REDIRECT BY MR. SMITH

1 A. I heard Linda holler, after she turned around and
2 seen what was going on.

3 Q. And Mark came out of that house with a gun to try to
4 get Barry off of Billy, didn't he?

5 A. He just turned around and come out the door. He
6 wanted it stopped because his mother-in-law was stressed out
7 and everything.

8 Q. Well, how did you see all this if you didn't really
9 come down and get involved in it?

10 A. From my front porch I could see their house clear.

11 Q. Even between the cars?

12 A. Yes, sir. On my front porch -- see, I live higher
13 up than what they do.

14 Q. Okay.

15 A. There's two terraces between the edge of my fence to
16 the top of my porch.

17 Q. And your testimony is that Barry Evans had been
18 staying with you for five or six months?

19 A. Yeah. He stayed with me because she turned around
20 and kicked him out and he didn't have anywhere to go.

21 MR. MCELHANNON: That's all the questions I have,
22 Your Honor.

23 REDIRECT EXAMINATION

24 BY MR. SMITH:

25 Q. Where does Barry Evans stay now?

JOHN JOHNSON - REDIRECT BY MR. SMITH

1 MR. MCELHANNON: Objection, Your Honor, that's not
2 recross.

3 THE COURT: Overruled.

4 Q. You may answer.

5 A. He was staying at Linda Evans' house since he got
6 out of jail.

7 MR. SMITH: No further questions.

8 THE COURT: Any recross?

9 MR. MCELHANNON: No, sir.

10 THE COURT: You may step down. Thank you very much.
11 Call your next witness, Mr. Smith.

12 MR. SMITH: Your Honor, may we approach?

13 THE COURT: Yes, sir.

14 (WHEREUPON, a bench conference occurred.)

15 MR. SMITH: At this time we call Mr. Barry Evans.

16 BARRY ALLEN EVANS, after having been duly
17 sworn, testified as follows:

18 THE CLERK: Go right around and have a seat in the
19 witness chair.

20 (WHEREUPON, the defendant was seated in the witness
21 stand.)

22 THE CLERK: State your full name, spell your last
23 name for the record, please, sir.

24 THE DEFENDANT: Barry Allen Evans.

25 DIRECT EXAMINATION

BARRY EVANS - DIRECT BY MR. SMITH

1 BY MR. SMITH:

2 Q. Where do you live, Mr. Evans?

3 A. At

4 Q. And who do you live there with?

5 A. My wife, Linda Evans.

6 Q. And do you have a child?

7 A. Yeah, Jennifer Evans.

8 Q. And she's married to Mark Durham?

9 A. That's right. They just got married in Tennessee
10 and they just had them a house built on Harbin Lane.

11 Q. Now, I think you have a sister. She's seated in the
12 courtroom right there; is that correct?

13 A. Yes. Annette Simmons.

14 Q. Are you gainfully employed?

15 A. No, sir. I'm disabled.

16 Q. I'm going to have to ask you to hold your voice up,
17 okay, sir?

18 A. No, sir. I'm disabled.

19 Q. And so you collect disability?

20 A. Yes, sir.

21 Q. Now, Mr. Evans, what type of occupation did you have
22 before you became disabled?

23 A. I was -- I did power line work.

24 Q. Power line work?

25 A. Yes.

BARRY EVANS - DIRECT BY MR. SMITH

1 Q. What company?

2 A. Contracted for Duke Power, South Carolina Electric
3 Gas, work contracted.

4 Q. How long did you do contracting work for South
5 Carolina power and gas and Duke Power, in total?

6 A. Approximately 25, 30 years.

7 Q. And did you have an opportunity to serve your
8 country in the United States military?

9 A. Yes, sir. I made a mistake and dropped out of high
10 school and went in the military and stayed 3 years in the
11 Army.

12 Q. Did you receive an honorable or dishonorable
13 discharge?

14 A. Honorable.

15 Q. When you came back to Anderson and came back --
16 where were you stationed in the military?

17 A. I went through basic and A-I-T in Fort, Bliss Texas;
18 El Paso, Texas. Then I went from there to Germany. I stayed
19 32 months in Germany.

20 Q. Now, you got married at a certain point?

21 A. Right, after I come back from the Army and was
22 working and all.

23 Q. Now, Mr. Evans, on September the 14th, 2007, you had
24 a conflict with Mr. Billy Craft; is that correct?

25 A. Yes, sir.

BARRY EVANS - DIRECT BY MR. SMITH

1 Q. Where were you living at the time that you had this
2 conflict with Mr. Billy Craft?

3 A. At the time I had -- me and Linda was on the in and
4 outs so I had a trailer up on Cherokee Circle there.

5 Q. Okay. Now, were you ever divorced from Ms. Linda
6 Evans?

7 A. Yes, at one -- yeah, one time.

8 Q. And was Mr. Craft someone who may have married her
9 or not married her at a certain point?

10 A. I think he married her but I think that he married
11 her -- when they got married I think we were still married.

12 Q. And at the time of this incident on September the
13 14th, 2007, of course, you weren't married at that time but
14 you all were living together?

15 A. Right. Yes, sir.

16 Q. Now, on the evening of September the 20 -- September
17 14th, 2007 were you living with Mr. John Johnson?

18 A. I had a place, another trailer around the corner but
19 I was hanging out with John, yeah. I was in and out staying
20 with him.

21 Q. Were you in his house on that day?

22 A. Yes, sir.

23 Q. Who else was in the house with you?

24 A. Tony Martin.

25 Q. At a certain point did you leave the house?

BARRY EVANS - DIRECT BY MR. SMITH

1 A. Yes, sir. We were going to walk to Tony's house.

2 Q. And where did Tony live?

3 A. Tony lived down on -- I think that's Cherokee Circle
4 goes on down around the bend and around the curve down there.

5 Q. When you were living -- or when you were at
6 Mr. Johnson's house did you form an intention at any time
7 during that time to kill Mr. Billy Craft?

8 A. I never even knew Billy Craft was there. I never
9 even was concerned with over there, you know. I was over
10 John's house. I didn't even know Billy Craft was over there.

11 Q. When you found out that Billy Craft was over there
12 did you form an intention at this time to kill him?

13 A. Like I said, I didn't know Billy Craft was there
14 until we happened to be walking down the road.

15 Q. What happened -- did Billy Craft or anyone say
16 anything to you that stopped you in your tracks where you have
17 some sort of conversation with Billy Craft?

18 A. Billy spoke up.

19 Q. What did he say?

20 A. He said, Hey, Barry, what -- and he used some curse
21 words.

22 Q. Tell us the exact words he said.

23 A. He said, What the hell you doing around here?

24 I said, I'm walking to Tony's and I want to see what
25 my daughter, Jennifer, is doing. I said, What time she gets

BARRY EVANS - DIRECT BY MR. SMITH

1 off of work? And he started at me.

2 Q. What you mean he started at you?

3 A. He started -- from the yard I drove he started
4 toward me, and I started walking towards him and he pulled a
5 knife on me. And then we started struggling and I hit him,
6 and we were struggling and he hit me. And some way I got the
7 knife and I guess that's when the knife cut his hand.

8 Q. So --

9 A. And then I was trying -- I was trying to get away,
10 then Linda hit me with the car. Well, I couldn't go this way
11 because Kevin, this guy across the street, was coming with a
12 machete. I started to go that way and then Mark started to
13 come out with a gun then, and then Linda run over me with the
14 car, and then Billy was stomping me while I was on the car.
15 Then when I got out from under the car I just started cutting.
16 And I hate that he got cut like that but I was just trying to
17 get free so I could flee.

18 Q. At a certain point did you flee?

19 A. Yes, I flee.

20 Q. And when did you turn -- did you or did you not turn
21 yourself in to the police?

22 A. Yes, sir. The next day I turned myself in. I
23 called my sister and asked her to call them and turn myself in
24 to get it straightened out, and asked them would they take me
25 to the hospital because I was bleeding from the wreck where

BARRY EVANS - DIRECT BY MR. SMITH

1 the car had hit me. And they said they would take me to the
2 hospital but they never did.

3 Q. Now, is this the sister whose car the officer was
4 talking about?

5 A. Yes, sir.

6 Q. Driving you?

7 A. Yes, sir.

8 Q. She was the one who was blowing the horn? Was she
9 blowing the horn at the officer?

10 A. Well, she was letting them know -- yeah, she was
11 there with he.

12 Q. And they took you into custody the next day?

13 A. Yeah. I got down and laid down in the road. They
14 handcuffed me and put me in the car.

15 Q. Do you feel sorry about what happened at the
16 incident that day?

17 A. Yes, sir. I'm sorry that any of it happen. I'm
18 sorry for anybody getting hurt.

19 Q. Now, Billy Craft, do you know his reputation or do
20 you know for a fact that he carries a knife?

21 A. Yeah. He's always been known as bad ass Billy, told
22 me. And he cut Ralph Woods up real bad.

23 Q. Who is Ralph Woods?

24 A. Ralph Woods is a guy that used to do a lot of
25 messing with cows. Do a lot of cattle work, then done a lot

BARRY EVANS - DIRECT BY MR. SMITH

1 of trash work, done some pulpwood.

2 Q. And so he cut this man?

3 A. Billy cut Ralph Woods. He's always talking about
4 Ralph Woods thought he was such a bad ass. I showed him when
5 I cut him up.

6 Q. And did you and Billy have this on and off again
7 conflict because he was going with your wife and you was going
8 with his wife?

9 A. Well, we had some conflict but we had some
10 friendship too to try to resolve things.

11 Q. So were you all friends when you all were doing
12 crack cocaine together?

13 A. Well, we were acquaintances. I don't know if you'd
14 call friends doing crack cocaine.

15 Q. So did he use crack cocaine?

16 A. Yeah, we were both using crack cocaine.

17 Q. Did he on any occasion ever, besides this incident,
18 draw a weapon on you?

19 A. Yes. Over on Sue Street he drew a weapon on me
20 over there.

21 Q. What kind of weapon?

22 A. A nine millimeter that he stole from his brother,
23 Alton.

24 Q. What kind of weapon did he draw on you then?

25 A. Nine millimeter.

BARRY EVANS - DIRECT BY MR. SMITH

1 Q. Now, what about any drug dealing? Do you know
2 anything of your own knowledge whether or not Mr. Craft was
3 involved in drug dealing with Linda?

4 A. Billy has always been involved in drug dealing.

5 Q. How do you know that?

6 A. Because I been around him. Him and Linda sling
7 crank for years. We went to Georgia and got it, slung
8 cocaine. He used to shoot it, test it. I done it. He done
9 it. It's the truth.

10 Q. Now, Mr. Evans, you, yourself, have a prior criminal
11 record as well, don't you?

12 A. Yes, sir, I do.

13 Q. And you're not proud of that?

14 A. No, sir, I'm not.

15 Q. At some point in your life you got hooked on drugs,
16 didn't you?

17 A. Yes, sir.

18 Q. And I think your criminal record will reflect that
19 you wrote some bad checks, a lot of them, didn't you?

20 A. I wrote some bad checks but them checks that I
21 wrote, I had money in the bank. Thadis Norrison stole my
22 checkbook and wrote checks because I filled out the affidavits
23 of forgery for them.

24 Q. So somebody cheated you out of some money that you
25 got charged with?

BARRY EVANS - DIRECT BY MR. SMITH

1 A. Exactly, yes.

2 Q. So you got charged with fighting on occasion,
3 correct?

4 A. Yes.

5 Q. Drugs on occasion?

6 A. I've never had a drug charge.

7 Q. No drugs but fighting?

8 A. Yes, sir.

9 Q. Now, do you know anything as to whether or not Linda
10 Evans ever called the police on Billy Craft for any incident?

11 A. One time she told me she had called when --

12 MR. MCELHANNON: Objection, Your Honor, hearsay.

13 THE COURT: I'll sustain the objection.

14 BY MR. SMITH:

15 Q. Okay. You weren't present?

16 A. I wasn't present at the time.

17 Q. All right. The other thing too, did Mr. Craft on
18 any occasion call you about these pending charges against you
19 right now?

20 A. Yes.

21 Q. What did he say to you?

22 A. He called and he wanted to -- he says just a bad
23 happening and he wanted some money. If he can get some money.
24 I think he had gotten in that situation with the police where
25 he pulled the gun on the police and he had bonds and stuff and

BARRY EVANS - DIRECT BY MR. SMITH

1 he had situations of his own and he just wanted to kind of
2 leave it all alone.

3 Q. Did you have the money to give him?

4 A. No, I didn't have the money to give him.

5 Q. Now, these are some pretty bad wounds right there,
6 Mr. Evans. You see? Come down here.

7 A. (The witness complied).

8 Q. When you were cutting him you were angry at him,
9 weren't you?

10 A. I was scared. I wasn't angry. I was scared.

11 Q. And you cut him in each one of those spots? You
12 deny that or you admit it?

13 A. I'll not disdeny [sic] that I didn't cut him. I cut
14 him. I was cutting at him to try to get away.

15 Q. Now, you may sit back in the stand. Sit back up
16 there.

17 A. (The witness complied).

18 Q. Did you fear for your life?

19 A. Yes, sir.

20 Q. If he hadn't had that knife on you that would be
21 your cuts, wouldn't it?

22 A. Yes, sir. Sure. And I also thought that he had --
23 I figured he'd have a gun, plus Linda has shot me before and
24 then when she hit me with the car I thought she was going to
25 back up and run over me and kill me because when Linda shot me

BARRY EVANS - CROSS BY MR. MCELHANNON

1 before I died twice in the hospital. They had to cut me all
2 the way down, do exploratory surgery, and I was in a comma 8
3 days then. So with all of it coming at me at once I was just
4 trying to get away.

5 MR. SMITH: Your witness, Solicitor.

6 MR. MCELHANNON: Thank you, Mr. Smith.

7 CROSS-EXAMINATION

8 BY MR. MCELHANNON:

9 Q. Mr. Evans, your criminal record -- we'll just start
10 in 2000, I guess. Criminal domestic violence?

11 A. What year?

12 Q. In 2000?

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

14 Q. Driving under the influence, 2001?

15 A. (There was no response).

16 Q. Prowling in 2006?

17 A. Yes, sir. I cut through a backyard, somebody's
18 backyard.

19 Q. Now, you gave a statement the 15th, didn't you? You
20 say you turned yourself in.

21 A. Yeah, I turned myself in.

22 Q. That's not exactly true, is it?

23 A. No, that's exactly true. There's my sister. She
24 can verify it.

25 Q. They were looking for you over on Way,

BARRY EVANS - CROSS BY MR. MCELHANNON

1 weren't they, and you just happen -- and your sister talked
2 you into --

3 A. No. I called my sister. I called my sister. You
4 can ask her. Put her on the stand and ask her.

5 Q. I don't need to do that, sir. But you gave a
6 statement on the 15th, did you not?

7 A. I talked to the officers.

8 Q. And you signed the statement? You waived your
9 rights and signed a statement?

10 A. I don't remember signing a statement.

11 Q. You didn't sign a statement?

12 A. I said I don't remember signing a statement. I
13 talked to the officer.

14 Q. Can I show it to you?

15 A. Yes, sir.

16 Q. Is that your signature right here?

17 A. Yes, sir, it is.

18 Q. And on this waiver of rights, advice of rights form,
19 is that your signature?

20 A. Yes, sir, it is.

21 Q. Okay. So this was a voluntary statement on your
22 part, correct?

23 A. Yes, sir.

24 Q. You want to -- here, just keep it. I'm going to let
25 you read it. If you would, just start at the beginning and

BARRY EVANS - CROSS BY MR. MCELHANNON

1 read your statement for the jury.

2 A. At the beginning?

3 Q. Yes, sir.

4 A. September the 15, 2007. Statement of Barry Allen
5 Evans. I don't know what that W-M means.

6 Q. Well, you can just actually, Mr. Evans, start where
7 it says I was walking.

8 A. Okay. I was walking down the road. I was with Tony
9 Martin. My ex-wife was with Billy Craft in the driveway. I
10 walked up and asked where Jennifer, my daughter, was. Linda
11 cussed me and Billy cussed me.

12 I started around the car to the porch, knocked on
13 the door. I was wanting to see my daughter. I stayed there
14 half the time. Linda ran into me with the car, knocked me
15 down with the car and she had my leg pinned under the car, and
16 she backed up and pulled up like she was going to run over me
17 again. I tried to roll out from under the car and the car
18 caught me on the upper chest.

19 Billy jumped out and started kicking and stomping
20 me. I got out from under the car and started fighting back.
21 I hit him with my fist. He had a knife, and when I punched
22 him he fell. I took the knife from his hands. He was on the
23 ground and he was still fighting -- we was on the ground still
24 fighting. We were tussling over the knife.

25 I remember the knife was a box cutter knife but I

BARRY EVANS - CROSS BY MR. MCELHANNON

1 don't remember no color. I remember that the knife -- Mark,
2 Jennifer's boyfriend, come out of the house because I was
3 hurting Billy at the time. Mark had a gun. It looked like a
4 Glock 9 or something. I don't really know. I told Mark to
5 either pull the trigger or take the gun back in the house.
6 Mark put the gun back in the house, and I left.

7 I went down to the creek and was headed to my
8 sister's house. I ended up hitchhiking and got a ride from
9 some guy and he took me to my ex-brother-in-law's house but he
10 wasn't there, then I got a ride back to Oak Trail Drive.

11 I turned myself in so we could get this thing
12 straightened out. I think she's tried to run over me because
13 I told her that I was going to turn her in for selling drugs.

14 Q. Now, you heard Mr. Johnson's testimony, didn't you,
15 the fellow that says he made sure you didn't have a weapon
16 when you left his house?

17 A. Yes, sir.

18 Q. And you heard him say that he saw you walking and
19 immediately in front of Billy Craft, that Billy Craft came
20 down and met you at the end of the driveway, close to the end
21 of the driveway. Did you hear him say that?

22 A. Heard him say right at the driveway right there near
23 the cars.

24 Q. But in your statement you say Linda Evans ran over
25 you first and you got up and then Billy jumped out of the car

BARRY EVANS - CROSS BY MR. MCELHANNON

1 and he confronted you..

2 A. She did run over me with the car. She did hit me
3 with the car. She hit me with the car twice.

4 Q. But Mr. Johnson didn't see that?

5 A. I don't know if he did or not. I told you she tried
6 to run over me again. I got it in the statement.

7 Q. She ran over you with the car because you were
8 cutting Billy up so bad she wanted you to stop from killing
9 him; isn't that right?

10 A. That may be your opinion --

11 MR. SMITH: Wait a minute. Objection. Hold on.
12 Objection, Your Honor. He's asking what's going on in Linda
13 Evans' mind.

14 THE COURT: Overruled. Overruled.

15 A. I don't know what was in her mind.

16 Q. I mean, she didn't run over you until after you were
17 already cutting on Billy, didn't she?

18 A. No. I took the knife from Billy. Billy was cut in
19 the hand when I took the knife from him but it wasn't just for
20 cutting him.

21 Q. And she had already run over you at this time?

22 A. She run over me as I ran around the car right there,
23 yes.

24 Q. Before you jumped on Billy or after?

25 A. I wasn't jumping on Billy then. I was taking the

BARRY EVANS - CROSS BY MR. MCELHANNON

1 knife away from Billy.

2 Q. And --

3 A. There's a difference between assaulting somebody and
4 trying to keep from being assaulted.

5 Q. If you were trying to keep from being assaulted you
6 wouldn't of had to go up to that house, would you?

7 A. I couldn't run because Kevin was coming across there
8 with a machete and I was going to run into a machete?

9 Q. He wasn't coming across with the machete until he
10 saw you butchering Billy Craft, didn't he?

11 A. No, that's a lie.

12 Q. Is it?

13 A. Yeah, that's a lie.

14 Q. And Mark, your own son-in-law, pointed a pistol at
15 you to try to get you to quit cutting Billy. He didn't to do
16 that until after you had come back twice to cut some more on
17 Billy, did he?

18 A. Mark come out of the house -- I don't know how long
19 he was in the house while the fight was going on, then he come
20 out with the pistol, then that's when I got free.

21 Q. And you didn't hear him yelling stop, you were going
22 to kill Billy?

23 A. It was stopped and I was trying to flee then.

24 Q. And you came back and flipped Billy over --

25 A. No.

BARRY EVANS - CROSS BY MR. MCELHANNON

1 Q. -- and cut him some on the back, didn't you?

2 A. No.

3 Q. You didn't make those cuts on the back?

4 A. When I come out from under the car getting up is
5 when the cutting was done.

6 Q. You had the knife under the car?

7 A. Yeah. Yeah. I held onto the knife when I got hit
8 by the car. What did you want me to do, hand it back to him
9 and then run?

10 Q. What did you do with the knife once you ran?

11 A. I threw it.

12 Q. Where did you throw it?

13 A. I slung it down the road when I was running down the
14 road.

15 Q. So it's your testimony that all these people were
16 after you and you were just defending yourself from four
17 different people, the neighborhood, basically?

18 A. Well, that's not my testimony. My testimony is that
19 Billy had the knife. My testimony is that there was a gun.
20 My testimony is that Kevin come across the street with a
21 machete, and Linda run over me with a car. If you don't
22 believe that ask him. It's in the statements.

23 Q. And it is in the statements?

24 A. Yes. Yes.

25 Q. And they are inconsistent with yours?

BARRY EVANS - CROSS BY MR. MCELHANNON

1 A. They are all inconsistent.

2 Q. They say you were run over by the car after you cut
3 on Billy, that you came back two more times --

4 A. What I told you is when I took the knife away from
5 Billy he possibly got cut in the hand.

6 THE COURT: Mr. Evans?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Don't interrupt him. Let him finish the
9 question, you understand?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Don't interrupt him. Listen to the
12 question and answer the question.

13 Please proceed, Solicitor.

14 MR. MCELHANNON: Thank you, Your Honor.

15 BY MR. MCELHANNON:

16 Q. But you were continuing to cut on Billy Craft for
17 the second time when Mark Durham came out of the house with
18 the pistol and told you to stop and you said go ahead and
19 shoot me, and he wouldn't do it and he ran back in. You
20 chased him back in the house with the knife.

21 A. No, sir.

22 Q. You didn't do that?

23 A. No, sir. I asked him put to put the gun up.

24 Q. You didn't chase him back and bang on the front
25 door --

BARRY EVANS - REDIRECT BY MR. SMITH

1 A. No, sir.

2 Q. -- when Mark ran back in and locked --

3 A. No, sir.

4 Q. -- the door and made that 911 call?

5 A. No, sir. No, sir. I fled.

6 MR. MCELHANNON: No further questions, Your Honor.

7 THE COURT: Redirect?

8 MR. SMITH: Yes, sir, just one question.

9 REDIRECT EXAMINATION.

10 BY MR. SMITH:

11 Q. On September the 14th, 2007, did you have any intent
12 to kill this man --

13 MR. MCELHANNON: Your Honor, that's outside of the
14 scope.

15 THE COURT: I'll sustain the objection.

16 MR. MCELHANNON: Thank you, Your Honor.

17 MR. SMITH: Thank you.

18 THE COURT: Anything else?

19 MR. SMITH: That's it, Your Honor.

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

21 Mr. Evans.

22 Call your next witness.

23 MR. SMITH: That's it, Your Honor. That's the
24 defense's case.

25 THE COURT: Do you have any rebuttal?

GREG HAYDEN - DIRECT BY MR. MCELHANNON

1 MR. MCELHANNON: I was two brief witnesses, Your
2 Honor.

3 THE COURT: Okay. Call your witness.

4 MR. MCELHANNON: I call Greg Hayden to the stand,
5 Your Honor.

6 (WHEREUPON, the witness was seated in the witness
7 stand.)

8 THE COURT: Solicitor?

9 MR. MCELHANNON: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MR. MCELHANNON:

12 Q. Detective Hayden, in your investigation of this case
13 did you attempt to get a statement or talk to John Johnson?

14 A. Yes, sir, I did.

15 Q. And what steps did you take to do that?

16 A. The day of the incident I went over to the house,
17 which is the trailer he was residing in. The front of it
18 actually faces the side of Linda Evans' trailer where the
19 incident location was. I went over there, knocked on the
20 door. I got no answer, left a card. I had no response back.
21 And several days after that I went back on several occasions
22 again in attempt to make contact, leaving cards, knock on the
23 door, didn't get no response from Mr. Johnson.

24 Q. So you actually did try to get a statement from him?

25 A. Yes, sir. I attempted to but he did not ever

GREG HAYDEN - CROSS BY MR. SMITH

1 contact me back in regards to the case.

2 MR. MCELHANNON: That's all I have, Your Honor.

3 THE COURT: Any cross?

4 MR. SMITH: Just a wee bit, yes. Not much. I know
5 the hour is late.

6 THE COURT: Well, you're going to keep it to what
7 was brought out on reply.

8 MR. SMITH: Yes, sir.

9 THE COURT: We're not going to do recross all over
10 again. Just on his efforts here, okay?

11 MR. SMITH: Yes, sir, Your Honor.

12 THE COURT: Okay. Please proceed.

13 CROSS-EXAMINATION

14 BY MR. SMITH:

15 Q. Now, Officer, he wasn't at home?

16 A. I'm not sure if he was or not. I knocked on the
17 door and nobody answered.

18 Q. Right. And from 2007 until today you never made
19 another attempt to talk to him, did you?

20 A. I attempted several days after the incident had
21 occurred, and no responses made back to me.

22 Q. Yeah, but from those several days that you talked to
23 him after the incident you made no attempt after then to talk
24 to him, correct?

25 A. Not after those several times, no, sir.

BILLY CRAFT - DIRECT BY MR. MCELHANNON

1 Q. And the other gentleman named Mr. Martin, you never
2 talked to him either?

3 MR. MCELHANNON: Objection, Your Honor. I didn't go
4 into that.

5 THE COURT: I'll sustain the objection. That
6 doesn't have anything to do with reply.

7 MR. SMITH: All right. Thank you, Your Honor.

8 THE COURT: Any redirect?

9 MR. MCELHANNON: No.

10 THE COURT: Detective Hayden, you may step down.
11 Thank you very much.

12 Do you have any further witnesses on reply?

13 MR. MCELHANNON: Just one, Your Honor, Billy Craft
14 for one quick question.

15 THE COURT: Okay.

16 (WHEREUPON, the witness was seated in the witness
17 stand.)

18 DIRECT EXAMINATION

19 BY MR. MCELHANNON:

20 Q. Mr. Craft, did you after this incident call
21 Mr. Evans and discuss this incident and ask him for money?

22 A. When, after he cut me up?

23 Q. Yes, sir.

24 A. No. I had no reason.

25 MR. MCELHANNON: Thank you. Thank you. That's all

1 I have.

2 THE COURT: Cross-examination?

3 MR. SMITH: No further.

4 THE COURT: Thank you very much, Mr. Craft. You may
5 step down.

6 Any further testimony?

7 MR. MCELHANNON: No.

8 THE COURT: All right. Mr. Foreman, ladies and
9 gentlemen of the jury, I've got to hear some motions, and what
10 we'll do is take our afternoon break at this time. If you
11 need to take a smoke break, let the bailiffs know. We'll take
12 about 20 minutes, 20 to 30 minutes. Don't discuss the case.
13 Leave your notepads in the chair.

14 (WHEREUPON, the jury leaves the courtroom at
15 approximately 2:55 p.m.)

16 THE COURT: Any motions?

17 MR. SMITH: We renew our motion for directed verdict
18 on each and every indictment that has been lodged against him
19 and move that they be dismissed and he be set free, as a free
20 man.

21 THE COURT: Okay. Denied.

22 MR. SMITH: Thank you, Your Honor.

23 THE COURT: Do you all want to look at the charge
24 before you go to closing arguments?

25 (WHEREUPON, a bench conference was had, and then a

1 brief recess was taken.)

2 THE COURT: Anything from the State before we bring
3 the jury?

4 MR. MCELHANNON: No, Your Honor.

5 THE COURT: You all ready for closing arguments?

6 MR. SMITH: Yes, sir.

7 THE COURT: All right. Bring us the jury, please.

8 (WHEREUPON, the jury enters the courtroom at
9 approximately 3:50 p.m.)

10 THE COURT: Mr. Smith?

11 MR. SMITH: Thank you, Your Honor. May it please
12 the Court?

13 THE COURT: Yes, sir.

14 MR. SMITH: Mr. Foreman, members of the jury, it now
15 comes my time to discuss the law and facts of this case with
16 you, and at the beginning of this trial I told you what we
17 were going to prove and I think we proved it, going away.

18 But first of all, I'm going to tell you some of the
19 things the Judge is going to charge. He's going to charge you
20 all on assault and battery with intent to kill, he's going to
21 charge you on assault and battery of a high and aggravated
22 nature, and he's going to charge you on mutual combat, and
23 he's going to charge you on self defense. And the reason why
24 he's going to charge you on that is because wherever you come
25 out in your deliberations you could come out on any of those

1 standards.

2 We're going to tell you why we believe that he is
3 not guilty of any of the criminal offenses that he's been
4 charged with, and the Judge is going to tell you that the
5 indictments are not evidence and that you have to base your
6 decision based on what came from the witness stand.

7 First of all, every citizen in this Country is
8 entitled to what they call the standard of reasonable doubt.
9 We didn't hide behind the standard of reasonable doubt. We
10 didn't hide behind the standard of presumption of innocence.
11 Mr. Evans got up on the stand, like some criminal defendants
12 they won't get up on the stand and testify, but he got up on
13 the stand and testified to you to let you know what he did on
14 that day in question.

15 It is undisputed that that man, Billy Craft, was cut
16 that day. It's undisputed that he was a drug dealer. It's
17 undisputed that he and Linda Evans both sold drugs and they
18 sold drugs not only to Linda Evans but he sold drugs to Mark
19 Durham, and he also sold drugs to the Lavoies, who lived
20 across the street.

21 And the fact of the matter is it is undisputed that
22 at least 3 people had weapons out against Mr. Barry Evans.
23 It's undisputed there was a gun that Mark Durham had. It's
24 undisputed that Linda Evans ran him over with a car, and it's
25 undisputed that someone came after him with a machete. And

1 under all those circumstances it only happened within an
2 8-minute period of time.

3 And how do you know it only happened in an 8-minute
4 period of time? Because when the police officer got up there
5 and testified he said that he was at the scene within 8
6 minutes. So 8, maybe 10 minutes all of this took place.

7 Some of these people who were being supplied by this
8 man with drugs came after this man who used to do drugs with
9 him. I mean, this wasn't no angel going to church counseling
10 people on the one end not to use drugs and on the other end
11 selling drugs to people within another community.

12 As you heard, he left his car at an Ingles. As you
13 heard, he drew his gun on a police officer who was
14 investigating narcotics at his residence. So this man is a
15 drug dealer. And as you saw when I cross-examined him he
16 showed anger at me when I started asking him questions, if you
17 recall.

18 And then one of the telling things is when he almost
19 fell off of there. You saw how he was able to get his balance
20 very quickly and he didn't fall. I'm glad he didn't fall but
21 it shows you how agile he is. And the fact is, on that day in
22 question he wasn't wearing an oxygen tent.

23 And on that day in question, it was raining that
24 day. So when the Lavoies say he saw the twinkle of a knife in
25 Barry Evans' hands you know that's a lie because the officer

1 said it was raining out there, and you know if it's raining
2 there's clouds and the clouds are covering the sun so he
3 couldn't have seen the twinkle of the knife.

4 And you also know that Mr. Lavoie's wife is telling
5 a lie because you know there was more than one vehicle out
6 there and she said it was only one vehicle. So she wasn't in
7 a position to see everything. So some of you who may have
8 taken notes with regard to that issue, but those are small
9 issues but they have big consequences because of the fact that
10 this man, Barry Evans, was defending himself against this man,
11 Billy Craft.

12 And, of course, Billy Craft got cut on his hand.
13 And if he hadn't had that weapon in his hand he wouldn't have
14 gotten cut on his hand. But he had that weapon in his hand
15 and they struggled over it and he took it. If Billy Craft
16 hadn't been the big man in front of Billy Evans that day after
17 she had kicked him out of his house he wouldn't have been in
18 the condition he's in.

19 We are sorry that this incident happened, and you
20 heard Mr. Evans say that he was sorry, but the fact is and the
21 fact remains, ladies and gentlemen of the jury, he had a right
22 to defend himself. If someone draws a weapon on you or if
23 someone goes in their pocket and you think they've got a gun
24 in their pocket or if they come after you with a knife you
25 have a right to defend yourself to the fullest extent of the

1 law. Barry Evans had a right to defend himself on September
2 the 14th, 2007, otherwise there wouldn't be any dispute here
3 and the Judge would not have to charge self defense.

4 Now, in this State, and the Judge is required to
5 charge reasonable doubt. He is required to tell you that if
6 there is any doubt, then you resolve that doubt in favor of
7 the defendant, Barry Evans, irrespective of how you may feel
8 about it.

9 Now, you may have seen the pictures and they may
10 have inflamed you, but you can't make your decision based on
11 the pictures. You've got to place yourself in the position as
12 it happened out at that scene that day, and you know from your
13 common sense that somebody is just not going to run from one
14 house where they had a friendship with two other guys and
15 you're going over to somebody else's house with another guy
16 and you're going to run up to somebody and cut them for
17 nothing. That doesn't make common sense in the world.

18 You got to ask yourself then what provoked the
19 incident. What happened out there that provoked this conflict
20 between these two men? If you think that Billy Craft is not
21 at fault in this and he's an angel, just a Christian angel out
22 there then find in favor of the State. But if you find out
23 that he is a man who is capable not only of shooting someone
24 but of injuring someone with a knife then I ask you to find
25 him not guilty.

1 And it's undisputed even from Billy Craft's own
2 mouth that he carries a knife, and it's undisputed even from
3 Billy Craft's own mouth that he had a gun a convicted felon
4 who is not supposed to even be in possession of a gun in our
5 society yet he wants to come in here and tell you he's a
6 Christian angel. Maybe he is, but he only found religion when
7 he got up on this stand.

8 He didn't have any religion on that day out there
9 when they were out there on Drive. I can tell
10 you that. And he didn't have any religion when he was going
11 with another man's wife, and he didn't have any religion when
12 he was doing crack cocaine with this man.

13 Now, he had an opportunity when they put him up here
14 for that rebuttal to say well, no, I didn't do no crack
15 cocaine and I didn't cut Ralph Wood, when he's cut somebody
16 before, himself, and he didn't deny it. This man cut Ralph
17 Wood and he knows he cut Ralph Wood, and he didn't even
18 dispute it. The only thing he got up here and disputed was
19 some amorphous issue. The fact of the matter is if you do
20 something in the dark it's going to come out in the light.

21 Why is he going to hide his car at Ingles with
22 another man's woman who is living with that man? He had known
23 something about the relationship of Linda Evans. And where is
24 Linda Evans today? I mean, she ran this man over with a car.
25 She ran over with a car, and then he was being boxed in by two

1 other people, one with a machete and one with a gun.

2 Using your common sense what would you do? How do
3 you get away? How do you get away when you are being boxed in
4 by three or four druggies. Three or four druggies. How do
5 you get away from three our four druggies? They know he's a
6 supplier so they're going to do it. The guy says go get the
7 gun, Mark. And he says come back, shoot him. Now, who had
8 the intent to kill? He had an intent to kill.

9 And the fellow across the street with the machete
10 when this man was trying to get away. Yes, he threw this at
11 him to try to get away, and did get away.

12 But you see, ladies and gentlemen of the jury, even
13 when they charge Mark Durham -- I mean, Mark Durham charged
14 him with assault and battery with intent to kill or whatever.
15 They dropped that charge because Mark Durham dropped it.

16 Linda Evans, no question that she was attacked --
17 she attacked him. All these people should have gone to jail
18 out there that day because they had no law enforcement
19 authority to do anything.

20 Now, we're going to prove to you and we have proved
21 to you that mere words is not sufficient. We agree with that,
22 that, you know, you curse me out I can't come bothering you
23 but if you pull out a gun or knife and start attacking me with
24 it then I have a right at that point.

25 And once we begin to send a message that you have a

1 right to defend yourself no matter where you are in this
2 community you're going to stop a lot of these drug dealers
3 from intimidating people out here.

4 Narcotic dealers in his own house and police
5 officers are having to come out there to investigate, but he
6 said he didn't even want the police officer and then he kept
7 trying to lie about drawing the gun on the police officer,
8 then he said she arrested him.

9 Well, if you don't think a police officer would have
10 arrested him if he just put the gun on the table. She had to
11 order him to put the gun down and took him to jail. He didn't
12 have an oxygen tent on then. He wasn't acting like a
13 Christian then when he drew it on a police officer. Now, if
14 he would draw a gun on a police officer just think what he
15 would do to someone who is not a police officer.

16 Now, we didn't try to hide anything in this case.
17 We told you up front that he had a criminal record. He hadn't
18 been a good boy. We're not bringing Barry Evans in here and
19 saying he's an angel of mercy. We're not saying he's the best
20 guy in the world, but we are saying he does have a right to
21 defend himself.

22 So His Honor is going to charge you on the law of
23 self defense. And if you get in a struggle with someone and
24 you take the weapon from them you have a right to use it. You
25 have a right to use the weapon if someone draws it on you.

1 Do you remember what Mr. Barry Craft said? He said,
2 What you thought I was supposed to do when the police officer
3 drew the gun, give it back to her, or something he said.

4 The fact of the matter is, sir, you cannot threaten
5 a police officer.

6 MR. MCELHANNON: Your Honor --

7 THE COURT: Yes, sir. What's your legal objection?

8 MR. MCELHANNON: Mr. Smith is addressing the victim
9 in his closing.

10 THE COURT: I'm sorry? What's your legal objection?

11 MR. MCELHANNON: He is addressing the victim in his
12 closing instead of the jury.

13 THE COURT: Okay. I'll overrule the objection.

14 Go ahead, Mr. Smith.

15 MR. SMITH: Thank, Your Honor.

16 Now, His Honor is going to charge you that
17 reasonable doubt is a doubt for which you can give a reason.
18 He's going to tell you that he's presumed innocent. He's
19 going to tell you that the man has a right to defend himself.

20 He's going to tell you on these issues like assault
21 and battery high and aggravated nature, it's kind of like
22 manslaughter. Like, if there's a heat of the passion and you
23 kill somebody under the law that would be manslaughter. You
24 know, if you get angry at somebody in the heat of the passion,
25 you don't form an intent to kill them then that's

1 manslaughter.

2 Well, assault and battery of a high and aggravated
3 nature is the same thing. If you form a -- if you don't form
4 a premeditated way of wanting to hurt someone and you get
5 angry then it's assault and battery of a high and aggravated
6 nature. That's about the only way I can explain it.

7 But in, like, murder, if you form in your mind, you
8 sit there and say okay, I'm going to kill so and so and you
9 premeditate the murder but you don't kill them, but you
10 premeditate it, then that's assault and battery with intent to
11 kill. We're saying he did none of that, that he intended to
12 defend himself under these circumstances and we're asking for
13 a not guilty verdict on all charges.

14 And you will notice that if Mr. Lavoie had thought
15 his charges were serious he would still be in the courtroom,
16 but I don't believe I see him anywhere in here, or Ms. Lavoie.
17 I think they left, because they knew that he is not guilty of
18 the charges in the indictment that they have allowed to be
19 lodged against Mr. Barry Evans.

20 Also, we can't make the prosecution make their own
21 case stronger. They have a right to question Mr. Martin over
22 a year. They had a right to question Mr. Johnson for over a
23 year. But he went to his house, he didn't see him. Well, he
24 could have gone back. I mean, they found the criminal record
25 that Mr. Johnson had from prior occasion.

1 Of course, if they really wanted to know some
2 disconfirming information about what went on out there they
3 would have gone to Mr. Johnson, or anyone else Mr. Barry Evans
4 told them that had disconfirming information that he was
5 guilty of the offense of assault and battery with intent to
6 kill.

7 And the other thing about it, too, is the doctor
8 can't tell you anything about it just by looking at the mere
9 wounds any more than anybody else can because you can't say --
10 I can't know what's in your mind, and we can't know what's in
11 anybody's mind because we are not mind readers.

12 We are not people who, like on the -- I think they
13 got a new show called Mentalest. Well, I can't look at people
14 and know what they are about, but I do know in the factual
15 situation in this case you got two versions. You got a
16 version of a man who's selling drugs out there and doesn't
17 want to get caught and leaves his car at Ingles, and then he
18 supplies the drugs, like the Percocets that were on the ground
19 that he doesn't even take but sells to the people, or you got
20 this gentleman over here, Mr. Barry Evans, who was walking
21 down the street with his friend to go to another friend's
22 house when he was accosted by this man.

23 Ladies and gentlemen of the jury, I want to thank
24 you for your participation in this trial, and if there's
25 anything I've done during the course of this trial which would

1 reflect badly on my client and the man I'm standing up here
2 for I ask you to hold it against me and not against Mr. Barry
3 Evans. I ask you to give the same attention that you've given
4 to me to my fellow -- the prosecutor in the case. And I ask
5 you at the end of this case because you have no enemies to
6 punish or friends to reward to come back with a verdict that
7 will speak the truth called not guilty. Thank you very much.

8 THE COURT: Solicitor?

9 MR. MCELHANNON: Thank you, Your Honor. May it
10 please the Court.

11 Ladies and gentlemen, I appreciate your
12 attentiveness during this trial. I've been watching you from
13 the table and you all have really paid attention. Mr. Craft
14 appreciates that because this is his two days in court. He's
15 been waiting for this for over a year.

16 Billy Craft is not a drug dealer. This is not a
17 case about drugs being dealt or someone going with someone's
18 wife, ex-wife. This is a case about one man trying to kill
19 another man.

20 Now, grant it, the witnesses in this case, some of
21 them did have criminal records, but plots conceived and held
22 do not have angels as witnesses, and that's what we've got
23 here. Barry Evans conceived this plot. He saw Billy Craft
24 getting in a car to go to dinner, something as innocent as
25 going to dinner with a few people.

1 He ran out of that house crouched down, as you heard
2 the Lavoies say, in an Indian couch or like he was running
3 down the road to hide. He was trying to be deceptive so that
4 no one would see him until it was too late, and he succeeded.

5 He came all the way up to the car where Billy Craft
6 was getting in the car already and struck him in the back of
7 the head to knock him to the ground and then began cutting on
8 him, just slashing him. And as Kevin Lavoie said, he was
9 actually like carving on him. Not just trying to hit him but
10 carving on him.

11 Now, Mr. Smith talks about how can a Lavoie see this
12 flash of a razor blade or a knife, it was raining. It was not
13 raining. It wasn't raining until after the attack, after he
14 was laying there. If you remember the 911 call Ms. Lavoie
15 made she said oh, now it's starting to pour down rain and this
16 poor fellow is dying out there in the rain. It wasn't raining
17 when this happened. These are all smoke screens.

18 The drugs being sold, the gun being pulled on a law
19 enforcement officer, let me talk about that for a minute.
20 There's been no testimony about any gun being pulled on a law
21 enforcement officer. All Mr. Smith had was an incident
22 report, which is hearsay. That's not -- someone has to be
23 tried before you can say that they actually did something.

24 And you heard Mr. Craft deny that he pulled that gun
25 on that officer. Also, they didn't arrive at his apartment

1 because he was dealing drugs. He called the police. You
2 heard him say that. He called the police because there was a
3 meth lab upstairs. He was trying to get it busted.

4 Why would he draw his weapon on the officer who's
5 coming to his call? Now, that's going to pan out to be a big
6 mistake when it all is said and done. He didn't draw his gun
7 on an officer, and he's not a convicted felon, is not allowed
8 to have a gun. Another smokes screen.

9 The cut on his hand that you saw, and it was a
10 severe cut. I mean, it was almost filleted open. Instead of
11 that being a cut that was caused when the knife was taken from
12 him I submit to you that it's a defensive wound when he's on
13 the ground trying to stop him from whacking him on the other
14 cheek, and it sliced his hand open. And he said he was on the
15 ground trying just to do whatever he could to keep him off of
16 him. That's where that cut came from.

17 Billy Craft never had a knife in this incident. He
18 never had a knife in his hand. I don't care what John Johnson
19 said. John Johnson, Mr. Evans' own witness, doesn't even
20 match up with Mr. Evans' own statement that he gave the next
21 day. Barry Evans said Linda Evans ran over him first. That's
22 the first thing she did, was run over him. He got back up.
23 Billy Craft jumps out of the car and then attacks him.

24 John Johnson said no, I was watching it. I heard
25 some arguing and Billy Craft ran down the driveway and met

1 Barry Evans as he got to the driveway. Now, those two
2 statements are not consistent at all. At all. And I'm going
3 to submit to you that they are not true.

4 He says that the defendant was not trying to hide
5 anything. He's not trying to hide anything except the truth
6 of what actually happened, that Barry Evans went to

7 with the intention of slashing Billy Craft to
8 death. That's what he was intent on doing, and he almost did
9 it. You heard the doctor say a little bit longer laying out
10 there in the rain and yeah, he probably would have bled out.
11 He would have been dead.

12 Now, I think one of the most telling things in this
13 case are on the 911 calls that you heard. Janice Lavoie was
14 on that call for 10 minutes, roughly. She's watching out her
15 window and she gives a play-by-play.

16 She hears everything, sees everything, hears Linda
17 screaming at the end of the driveway, sees him slashing. Says
18 oh, my gosh, he's going back and doing it again. She sees him
19 chase Mark Durham into the house, by the way, which he denies
20 doing. But you heard Mark Durham, his own son-in-law now, who
21 didn't want to testify against his father-in-law. I think you
22 could tell that but he said yeah, he chased me into the house.
23 I shut and locked the door and got my gun and came back out to
24 protect myself.

25 And when I said protect yourself from whom, he said

1 Barry Evans. Now, why is that? Because Barry Evans was the
2 aggressor in this case. Mark Durham saw what was going on.
3 He saw Barry Evans attack Billy Craft for no reason, and he
4 said that. And he saw him keep coming back and cutting him
5 some more. He would chase somebody off and come back and cut
6 on him some more.

7 And Mark Durham's 911 call, I don't think it can get
8 any plainer than that. You all listen to that and he said,
9 you know, Barry Evans just cut up Billy Craft really bad. I
10 don't know why he did it. I don't know why he's acting like
11 this. You all heard it. That was contemporaneous. That was
12 when it was happening. That's when he's inside and too scared
13 to go back outside because he thinks Barry Evans is still out
14 there and Barry might attack him, and he testified to that,
15 his own son-in-law. So what is the truth?

16 They put up John Johnson, and John Johnson is a good
17 friend of Barry Evans and he testified he didn't want him to
18 get in trouble, and he claimed that nobody ever tried to talk
19 to him. Well, Detective Hayden on rebuttal came back up and
20 said yeah, I went by his house. He either didn't answer the
21 door or wasn't there. I left my card in the door, my phone
22 number telling him to get in touch with me.

23 Common sense to me would be if your best friend, one
24 of your best friends who's lived with you for five or six
25 months, if he is charged with assault and battery with intent

1 to kill wouldn't you go to the police and say look, I know he
2 didn't do this? I know it was in self defense. I want to
3 give a statement. But yet he held back just thinking oh,
4 nobody needs to get a statement from me. I'm not going to get
5 involved, when it's his good friend. That's why he's not
6 credible, because they did try to get a statement from him.
7 He didn't want to get involved because he knew that Barry
8 Evans was guilty of this crime.

9 Now, as far as the other two offenses, the assault
10 with intent to kill on Kevin Lavoie, the testimony was that --
11 and you heard it again when Janice Lavoie's 911 call was going
12 on, that he came after Kevin Lavoie into their yard with the
13 knife. Kevin Lavoie did have a machete and Barry Evans picked
14 up this fence post and threw it, and you heard the clank. You
15 could hear it hit the side of the house. Kevin Lavoie was in
16 fear of his life because he saw what Barry Evans had just done
17 to Billy Craft. That's assault with intent to kill.

18 Now, the possession of a weapon charge, which is
19 part of another indictment -- and the Judge will charge you on
20 that, is if you commit a violent offense, which assault and
21 battery with intent to kill is, and you have a weapon and use
22 it in that offense then you can be found guilty of that as
23 well.

24 The whole notion that this was a plot against Barry
25 Evans to turn him into the victim in this case, and it was all

1 about these drug -- because Billy Craft had been supplying
2 these three people with prescription drugs is ludicrous. And
3 they didn't attempt -- they didn't say hey, there's Barry
4 Evans coming down the road. Now is our chance to kill him.

5 The only reason that Linda Evans ran over him was to
6 try to get him away from Billy Craft so he wouldn't kill him.
7 The only reason Kevin Lavoie came out of the house with a
8 machete was to try to break it up and get him off of Billy
9 Craft so he wouldn't kill him.

10 And the only reason that Mark Durham went inside the
11 house and armed himself with a weapon was to get him off of
12 Billy Craft to keep him from killing him, and Billy Craft said
13 shoot him, shoot him, shoot him, while he was being cut to
14 pieces, and he didn't want to be cut anymore.

15 And you saw the scars on him. This was not
16 something where he just did it a few times. He came back over
17 and over and actually flipped him over and cut him on his
18 back. This is not a case of self defense, it's not a case of
19 mutual combat. This is a case of an attack on an innocent
20 person, and by innocent I mean innocent on this day that he
21 was not doing anything.

22 Of course, he'll tell you. Billy Craft told you
23 he's not an innocent man. I mean, you know, everybody has
24 sinned, but this isn't about church. This is about someone
25 paying for what they did.

1 Now, I submit to you that through all of the
2 testimony from the witness stand, from the 911 calls we have
3 proven our case beyond a reasonable doubt that Barry Evans
4 intended to kill Billy Craft on that day, that he assaulted
5 with intent to kill Kevin Lavoie, and that he did have a
6 weapon in the commission of a violent crime. I do hope you'll
7 find that. Thank you.

8 THE COURT: Now, Mr. Foreman, members of the jury,
9 the State of South Carolina charges the defendant, Barry Allen
10 Evans, with one count of assault and battery with intent to
11 kill, the lesser included charge of assault and battery high
12 and aggravated nature, one count of assault with intent to
13 kill, one count of possession of a weapon during the
14 commission of a violent crime.

15 I will give you a copy of these instructions in
16 written form. During your deliberations you may refer to
17 these instructions to guide your decision making. You must
18 consider the instructions as a whole and not follow some and
19 ignore others.

20 Please return to instructions to the Court after
21 you've reached a verdict, Mr. Foreman.

22 Now, as to these indictments the defendant is
23 entering a plea of not guilty, which places upon the State the
24 burden of proving the defendant guilty. A person charged with
25 committing a criminal offense in South Carolina is never

1 required to prove himself innocent.

2 I charge you that is a vital important rule of law
3 of evidence that a defendant in a criminal trial no matter how
4 great or serious may be the offense with which he is charged
5 must always be presumed innocent until this guilt has been
6 proven beyond a reasonable doubt.

7 This presumption of innocence remains with the
8 defendant at all times, from the moment of his appearance in
9 this court throughout the trial and until you, the jury, have
10 upon the testimony and evidence presented reached a verdict of
11 guilty beyond a reasonable doubt.

12 For it is the solemn duty of the jury if not clearly
13 convinced of his guilt beyond a reasonable doubt to acquit the
14 defendant. So the burden of proof is upon the State to
15 establish by evidence to your satisfaction the guilt beyond a
16 reasonable doubt.

17 Now, what is reasonable doubt? Reasonable doubt is
18 the kind of doubt that would cause a reasonable person to
19 hesitate to act. If you have such a doubt as to the guilt of
20 the defendant he'll be entitled to a verdict of not guilty.

21 Reasonable doubt may arise from evidence which is in
22 the case or from the absence or lack of evidence in the case.
23 You alone must make the determination of whether or not
24 reasonable doubt exists as to the guilt of the defendant.

25 The term reasonable doubt should be given its

1 everyday plain and ordinary meaning. Proof beyond a
2 reasonable doubt is proof that leaves you firmly convinced of
3 the defendant's guilt.

4 There are very few things in this world that we know
5 with absolute certainty and in criminal cases the law does not
6 require proof that overcomes every doubt. If based upon your
7 consideration of the evidence you are firmly convinced that
8 the defendant is guilty of the crime charged you must find him
9 guilty. If on the other hand you are not firmly convinced the
10 defendant is guilty you must give him the benefit of the doubt
11 and find him not guilty.

12 The evidence in which you will decide the facts
13 consists of the sworn testimony of witnesses both on direct
14 and cross-examination, regardless of who called the witnesses,
15 the exhibits that have been received into evidence and any
16 facts which the lawyers have agreed or stipulated.

17 Certain things are not evidence and you may not
18 consider them in deciding what the facts are. I will list
19 them for you. Arguments and statements by lawyers are not
20 evidence. The lawyers are not witnesses. What they've said
21 in opening statement, closing arguments and other times is
22 intended to help you interpret the evidence but it is not
23 evidence. If the facts as you remember them differ from the
24 way the lawyers have stated then your memory controls.

25 Questions and objections by lawyers are not

1 evidence. Attorneys have a duty to their clients to object
2 when they believe a question is improper under the rules of
3 evidence. You should not be influenced by the objection or by
4 the Court's ruling on the objection.

5 Testimony that's been excluded or stricken that
6 you've been instructed to disregard is not evidence and must
7 not be considered.

8 Anything you may have seen on television or read in
9 the newspaper or heard from others when the Court was not in
10 session is not evidence. You decide this case solely on the
11 evidence received in the courtroom at this trial.

12 Under the constitution and code of laws only you,
13 the jury, can make the findings of facts in this case. I'm
14 not permitted to indicate to you how I may feel about the
15 testimony and evidence which has been presented throughout
16 this trial. It's been my intention to be fair and impartial
17 towards each of the parties involved.

18 To determine the facts in this case you will have to
19 evaluate the credibility which means the believability of each
20 witness. Some of the things you may consider as you decide
21 whether or not to believe a witness's testimony about a
22 particular matter include what was the manner and appearance
23 of the witness who testifies? Was he or she straightforward
24 or hesitant in answer? Was the testimony of the witness
25 consistent or inconsistent? How did the witness come to know

1 the facts that he or she testified to? Was the person present
2 during the incident or did it happen on the scene after it
3 occurred? Is there some reason a witness would want to give
4 testimony which would help or hurt one side or the other? In
5 other words, was the witness bias or prejudice? Was the
6 testimony of the witness strengthened or weakened by other
7 testimony or evidence? You can believe as much or as little
8 of each witness's testimony as you think proper.

9 You may believe the testimony of a single witness
10 against that of many witnesses or just the opposite. Of
11 course, you do not determine the truth by merely counting the
12 number of witnesses presented by each side. Throughout this
13 process you have but one objective, to seek the truth,
14 regardless of its source.

15 There are two types of evidence which are generally
16 presented during a trial, direct evidence and circumstantial
17 evidence. Direct evidence is the testimony of a person who
18 asserts or claims to have actual knowledge of a fact such as
19 an eye witness. Circumstantial evidence is proof of a chain
20 of facts and circumstances indicating the existence of a fact.

21 The law makes absolutely no distinction between the
22 weight or value to be given to either direct or circumstantial
23 evidence, nor is a greater degree of certainty required of
24 circumstantial evidence than of direct evidence.

25 You should weigh all of the evidence in the case.

1 On a contested factual issue you may have some direct and some
2 circumstantial evidence. To determine the facts the case in
3 the case you will have to evaluate the credibility which means
4 the believability of each witness.

5 Rules of evidence ordinarily do not permit witnesses
6 to testify to opinions or conclusions. An exception, however,
7 to this rule does exist to those whom we call expert
8 witnesses. Expert witnesses are witnesses who by education
9 and experience have become expert in some art, science,
10 profession or calling.

11 These witnesses may state their opinion as to
12 relevant material matter in which they profess to be an expert
13 and may also state their reason for the opinion. In this case
14 we heard testimony from a medical doctor.

15 You may consider expert opinion received in evidence
16 in this case and give it such weight as you may think it
17 deserves. If you should decide the opinion of an expert
18 witness is not based upon sufficient education and experience
19 or if you should conclude the reasons given in support of the
20 opinion are not sound or if you feel it's outweighed by other
21 evidence you disregard the opinion entirely.

22 Now, the same constitution and laws which designate
23 and make you the finders of fact, as I just explained, also
24 make me the sole instructor of the law. You should accept
25 statements of law as I give them to you. The attorneys are

1 not instructors on the law. Please base your decision making
2 on what the law is not what you think the law should be.

3 Assault and battery with intent to kill and assault
4 and battery of a high and aggravated nature. I am going to
5 explain to you the difference between the two. I want to tell
6 you the difference between assault and battery with intent to
7 kill and assault and battery of a high and aggravated nature.

8 Before I get into any of that I will tell you that
9 there is a difference. It's a slight difference by definition
10 but it's a large difference in actuality between assault and
11 battery with intent to kill as opposed to assault and battery
12 of a high and aggravated nature. And that slight difference
13 by definition is assault and battery with intent to kill has
14 an element of malice, whereas assault and battery of a high
15 and aggravated nature has the element of aggravating
16 circumstances and it may also but does not necessarily have
17 the element of malice.

18 Malice is not a required element of assault and
19 battery of a high and aggravated nature however the presence
20 of malice does not prevent an assault and battery from being
21 classified as aggravated because of circumstances of making
22 assault and battery of a high and aggravated can also give
23 rise to an inference of malice. In other words, the presence
24 or absence of malice alone will not determine whether the
25 defendant is guilty of assault and battery of a high and

1 aggravated nature.

2 Assault is defined as an attempt or an offer to do
3 violence or bodily injury to the person of another where there
4 is the ability to complete the attempt or to offer by a
5 battery. Assault is often defined as an attempt to do
6 violence to the person of another in a rude, angry or
7 resentful manner. There may be an assault without a battery
8 or without any bodily injury. We'll give you an example of
9 assault as if I walk up to you, I'm within arms reach and I
10 draw back to hit you, that is an assault.

11 What is a battery? A battery is the unlawful
12 touching of the person of another by the party committing the
13 assault himself or by any object put in motion by the party
14 committing the assault. A battery may further be defined as
15 the carrying into effect an assault by using and applying
16 force to the person of another, however slight, in a rude,
17 angry or resentful manner. The example I gave you concerning
18 assault, if I draw back my arm to hit you and then follow
19 through with the punch then the punch is the battery.

20 Assault and battery with intent to kill. Therefore,
21 let me explain to you what is meant by assault and battery
22 with intent to kill. Assault and battery with intent to kill
23 is an unlawful act of a violent nature to the person of
24 another with malice aforethought, either express or implied.
25 So, you see, malice is a necessary element for assault with

1 intent to kill.

2 So now let me explain to you what is meant by
3 malice. Malice is an essential element of the crime. Malice
4 is a term of art, a technical term importing wickedness and
5 excluding just cause or legal excuse.

6 Malice in any form designed for doing mischief
7 whether it arises from hatred, ill will or otherwise still
8 malice. Malice springs from the depravity from a heart devoid
9 of social duty and fatally bent on mischief.

10 Malice may be afterthought. The law does not
11 require that malice should exist for any particular time
12 before the commission of the act, but malice must exist
13 aforethought, that is malice must exist in the mind of the
14 accused just before and at the time of the commission of the
15 act. There must be a combination of the previous evil intent
16 and the act producing a fatal result.

17 Malice afterthought may be express or inferred.
18 These words malice afterthought express or inferred do not
19 mean sufficient kinds of malice but merely the matter in which
20 the only kind of malice known to the law may be shown to
21 exist. That is either by direct or by necessary inference
22 from the facts of circumstances which are proved.

23 Express malice is shown when one by word of mouth
24 expresses his hatred or ill will for another or where the State
25 shows that he has made preparation beforehand to do the deed

1 which was later accomplished, lying in wait for a person or
2 other acts of preparation going to show that the deed within
3 his mind would be express malice.

4 What is inferred malice? The implication of malice
5 may arise when the deed is done with a deadly weapon such as a
6 knife, pistol or dagger, or some other weapon of that nature
7 which when used with intent to injure another is calculated to
8 produce death or serious bodily harm.

9 If facts are proved beyond a reasonable doubt
10 sufficient to raise an inference of malice to your
11 satisfaction this inference would be simply an evidentiary
12 fact to be taken into consideration by you, the jury, along
13 with other evidence in the case. You may give it such weight
14 as you determine it should receive.

15 I instruct you that a specific intent to kill is not
16 essential. It's not an element of assault and battery with
17 intent to kill but there must be some intent, a general
18 intent, a wrongful intent to injure another or a general
19 malignant recklessness of the safety or safety of another is
20 sufficient to support a finding of general intent. As there
21 is intent to commit grievous bodily harm or injury such that,
22 had death occurred, the offense would have been murder.

23 Now, ladies and gentlemen of the jury, before the
24 defendant can be convicted and found guilty of assault and
25 battery with intent to kill the jury must be satisfied beyond

1 a reasonable doubt that if the party assaulted had died as a
2 result of the injuries inflicted upon him the defendant would
3 have been guilty of murder. Therefore, ask yourself this
4 question. If the person assaulted had died as a result of
5 injury would the defendant have been guilty of murder? If
6 your answer to this question is yes the defendant is guilty of
7 assault and battery with intent to kill.

8 If you should conclude that the State has failed to
9 satisfy the jury beyond a reasonable doubt that the defendant
10 would have been guilty of murder had the person assaulted died
11 as a result of the injury the defendant would not be guilty of
12 assault and battery with intent to kill, and then you would
13 consider the lesser included offense of assault and battery of
14 a high and aggravated nature.

15 Now, let me tell you about assault and battery of a
16 high and aggravated nature. Assault and battery of a high and
17 aggravated nature is defined as the unlawful and intentional
18 infliction of a violent injury on the person of another
19 accompanied by circumstances of aggravation, such as the use
20 of a deadly weapon or the infliction of serious bodily harm,
21 the intent to commit a felony.

22 Neither serious bodily harm nor the use of a deadly
23 weapon is an essential element of assault and battery high and
24 aggravated nature but there are circumstances of aggravation.
25 Malice in not a required element of assault and battery of a

1 high and aggravated nature.

2 However, presence of malice does not present an
3 assault and battery from being classified as aggravated
4 because the circumstances that make an assault and battery
5 aggravated can also give rise to any inference of malice. In
6 other words, the presence or absence of malice alone will not
7 determine whether the defendant is guilty of assault and
8 battery of a high and aggravated nature.

9 If you, the jury, should find that the defendant is
10 not guilty of assault and battery with intent to kill but the
11 State has proven beyond a reasonable doubt that the defendant
12 committed an assault and battery and circumstances of
13 aggravation exist then the defendant would be guilty of
14 assault and battery of a high and aggravated nature.

15 If you find the defendant guilty but you have a
16 reasonable doubt whether or not this defendant is guilty of a
17 greater crime charged, assault and battery with intent to
18 kill, or a lesser crime, assault and battery of a high and
19 aggravated nature, then you would resolve the reasonable doubt
20 in favor of the defendant and write a verdict of guilty only
21 as to the lesser charge, whichever one you determine it to be
22 based upon the facts. You should write a verdict of guilty to
23 any charge or less as to any particular charge if you find all
24 the elements of the charge have been proved by the State
25 beyond a reasonable doubt.

1 Criminal intent is a necessary element of each
2 crime. It must be proved by the State beyond a reasonable
3 doubt. Criminal intent is always a matter that must be
4 determined by the jury from the circumstances surrounding the
5 situation. There's no way medical science can dissect a
6 person's brain and determine what he had in mind, so the law
7 states that criminal intent may be inferred from the
8 circumstances shown to have existed. This is how the jury
9 makes the determination of whether or not the element
10 requiring an intent is present.

11 Criminal intent is a state of mind which operates
12 jointly with an act in the commission of a crime. Criminal
13 intent is a mental state, a conscious wrongdoing. So it's up
14 to you, the jury, to determine what the defendant intended to
15 do based on the circumstances shown to have existed. I tell
16 you that the State must prove criminal intent as it must prove
17 every other element beyond a reasonable doubt.

18 Possession of a weapon during the commission of or
19 attempt to commit a violent crime. The defendant is charged
20 with possession of a weapon during the commission of or
21 attempt to commit a violent crime. The State must prove
22 beyond a reasonable doubt that the defendant visibly displayed
23 a knife during the commission of a violent crime.

24 A knife means an instrument or tool with a sharp
25 cutting blade, whether or not fastened to a handle which can

1 be used to inflict a cut, slash or wound.

2 In order to find the defendant guilty of possession
3 of a weapon during the commission of a violent crime you must
4 find the defendant guilty of either committing a violent crime
5 or attempting to commit a violent crime. Assault and battery
6 with intent to kill is a violent crime.

7 The defendant has raised the defense of self
8 defense. Self defense is a complete defense, and if it is
9 established you must find the defendant not guilty. The State
10 has the burden of disproving self defense by proof of a
11 reasonable doubt.

12 If you have a reasonable doubt that the defendant is
13 guilty after considering all the evidence, including the
14 evidence of self defense, then you must find the defendant not
15 guilty. On the other hand, if you have no reasonable doubt as
16 to the defendant's guilt after considering all the evidence,
17 including the evidence of self defense, then you must find the
18 defendant guilty.

19 There are four elements required by law to establish
20 what is referred to as self defense in this case. First, the
21 defendant must be without fault in bringing on the difficulty.
22 If the defendant's conduct was the type which was reasonably
23 calculated to and did provoke a deadly assault the defendant
24 would be at fault in bringing on the difficulty and would not
25 be entitled to an acquittal based on self defense.

1 If the defendant voluntarily participated in mutual
2 combat for the purpose other than protection the killing of
3 the victim would not be self defense. This is true even if
4 during the combat the defendant feared death or serious bodily
5 harm. However, if before the killing is committed the
6 defendant withdraws and tried in good faith to avoid further
7 contact and either by word or act makes that act known to the
8 victim he would be without fault in bringing on the
9 difficulty.

10 For mutual combat there must be a mutual intent and
11 willingness to fight. This intent must be shown by the acts
12 and circumstance and conduct of the parties surrounding the
13 combat. In addition, it must be shown that both parties were
14 armed with a deadly weapon.

15 Second, the defendant must have actually believed he
16 was in imminent danger of losing his life or sustaining
17 serious bodily injury, or he actually was in such imminent
18 danger.

19 A defendant must show that she believes she was in
20 imminent danger, not that he was actually in such danger
21 because he had the right to act on appearances and under the
22 circumstances as they appeared to her -- to him, he believed
23 he was in such danger.

24 A person may act on appearances and if the
25 appearances are such that a person of ordinary courage,

1 firmness, and prudence would have been justified in coming to
2 the conclusion that the necessity did then and there exist to
3 strike to save himself from serious bodily harm or death that
4 would be sufficient, although it turned out afterward that
5 there was no actual present danger, and that the necessity to
6 strike did not exist.

7 Third, if this defense is based upon the defendant's
8 belief of imminent danger, a reasonably prudent person of
9 ordinary firmness and courage would have entertained the same
10 belief. If the defendant actually was in imminent danger, the
11 circumstances were such as would warrant a person of ordinary
12 prudence, firmness and courage to strike the fatal blow or
13 save himself from serious bodily harm or losing his own life.

14 Four, the defendant had no other probable means of
15 avoiding the danger of losing his own life or sustaining
16 serious bodily injury other than to act as he did in this
17 particular instance. However, if the defendant was on his own
18 premise he had no duty to retreat before acting in self
19 defense. These are the elements of self defense.

20 If you have a reasonable doubt of the defendant's
21 guilt after considering all the evidence, including the
22 evidence of self defense, then you must find him not guilty.
23 On the other hand, if you have no reasonable doubt as to the
24 defendant's guilt after considering all the evidence,
25 including the evidence of self defense, you must find him

1 guilty.

2 Prior instances of violence by the victim may be
3 considered in determining whether the defendant actually
4 believed he was in imminent danger of death or serious bodily
5 harm or was actually in imminent danger.

6 Threats made by the victim may be considered in
7 determining whether the defendant actually was or believed he
8 was in imminent danger.

9 Words accompanied by hostile acts may, depending
10 upon the circumstances, establish self defense.

11 The relative size, ages and weights of the defendant
12 and the victim may be considered in determining the apparent
13 or actual need for force in self defense and the amount of
14 force needed.

15 Self defense is not available to a person that uses
16 language which is so contemptuous that a reasonable person
17 would expect it to bring on a physical encounter and which did
18 actually contribute to the physical encounter.

19 You've been selected to be fair and impartial
20 jurors, sworn to impartiality to try and determine the facts
21 of this case, and when you've complied with your oath to do so
22 then no one will have a right to criticize your verdict, and
23 you will have actually discharged your duty as jurors. You
24 are to determine this case according to the testimony that
25 you've heard from the lips of the sworn witnesses, along with

1 the other evidence introduced.

2 I charge you that as jurors you must decide the
3 issues in this proceeding without bias, without prejudice to
4 any party. You cannot allow yourself to be governed by
5 sympathy, by prejudice, by passion, by public opinion or any
6 other arbitrary factor.

7 Both the State and the defendant have a right to
8 expect that each of you will carefully impartially consider
9 all the evidence in the case, that you follow the law as I
10 have explained it to you.

11 Now, nothing I may have said or done during the
12 course of this trial has been in any way to indicate or -- to
13 express or suggest a view of the case, or an opinion as to the
14 facts, the weight of the evidence, the credibility of the
15 witnesses. If any of my actions or words have so seemed to
16 indicate you will disregard such and form your own opinion as
17 to those matters.

18 Ladies and gentlemen of the jury, there's been
19 testimony and questions about indictments. There's three
20 indictments. Indictments are not evidence. Anything
21 concerning the indictments or anything in the indictments are
22 not evidence. It's merely the means by which the individual
23 is brought before the Court for trial.

24 The grand jury process was brought over to this
25 country since 13 original colonies from England. The police

1 make arrest after investigation. After obtaining a warrant
2 from the magistrate, the warrants are then submitted to the
3 prosecutor, and in South Carolina we call them solicitors.
4 They prepare the indictment. The indictment is presented to
5 the grand jury. The indictment is then presented to the Court
6 for an individual to be tried. It's merely the procedure by
7 which the defendant is brought before the Court and it's not
8 evidence in any shape, fashion or form.

9 Now, I have prepared, Mr. Foreman and ladies and
10 gentlemen of the jury, I prepared three indictment forms.
11 I'll go over the longer one first. It has the caption of the
12 case, the case number, and it says we, the jury, find the
13 defendant, Barry Allen Evans, guilty of assault and battery
14 with intent to kill as to Billy Craft. We, the jury, find the
15 defendant, Barry Allen Evans, not guilty of assault and
16 battery with intent to kill as to Billy Craft. And I have
17 this written.

18 If you find the defendant, Barry Allen Evans,
19 guilty of assault and battery with intent to kill as to Billy
20 Craft you do not proceed any further. If you find the
21 defendant not guilty of assault and battery with intent to
22 kill then proceed below.

23 Now, below, we, the jury, find the defendant, Barry
24 Allen Evans, guilty of assault and battery of a high and
25 aggravated nature as to Billy Craft. We, the jury, find the

1 defendant, Barry Allen Evans, not guilty of assault and
2 battery of a high and aggravated nature as to Billy Craft.
3 And the second part includes the lesser charge of assault and
4 battery. First part is assault and battery with intent to
5 kill, second assault and battery high and aggravated nature.

6 The second verdict form, we, the jury, find the
7 defendant, Barry Allen Evans, guilty of possession of a weapon
8 during the commission of a violent crime. Second, we, the
9 jury, find the defendant, Barry Allen Evans, not guilty of
10 possession of a weapon during the commission of a violent
11 crime. In order to find the defendant guilty of possession of
12 a violent crime you have to find him guilty of assault and
13 battery with intent to kill.

14 The third verdict form is concerning the assault.
15 We, the jury, find the defendant, Barry Allen Evans, guilty of
16 assault with intent to kill as to Kevin Lavoie. We, the jury,
17 find the defendant, Barry Allen Evans, not guilty of assault
18 with intent to kill as to Kevin Lavoie. There's a place for
19 the foreman to sign it and date it today.

20 Now, ladies and gentlemen, your verdict has to be
21 unanimous. All 12 of you have to agree. I would ask you to
22 respect each other's opinions, listen to each other's
23 opinions. It's a collective reasoning process on all 12 of
24 you all's part.

25 Look at the evidence. If you want to listen to the

1 tapes let us know and I'll get the recorder back in the
2 courtroom where you can listen to the tapes that we played, or
3 we can bring you in the courtroom and play them again in the
4 courtroom.

5 It just depends on how you want to handle it with
6 the tapes, Mr. Foreman.

7 Please consider all the evidence in the case. Talk
8 about the case and arrive at a just verdict.

9 I'm going to ask you to go to the jury room, but
10 before you begin your deliberations wait until the bailiff
11 brings all the exhibits, the charge and the verdict form and
12 instructs you to begin your deliberations.

13 I have to go over my charge with the attorneys. I
14 may bring you back and change something, I may add something,
15 and I don't want you to start your deliberations until I have
16 had an opportunity to do that.

17 And the two alternates, if you all would just keep
18 your seat and stay in the courtroom.

19 Mr. Foreman, if you and the other members of the
20 jury, you may take your notepads with you to the jury room.

21 (WHEREUPON, the jury leaves the courtroom at
22 approximately 4:44 p.m.)

23 THE COURT: Any exceptions to the charge from the
24 State?

25 MR. MCELHANNON: None from State, Your Honor.

1 THE COURT: Any from the defendant?

2 MR. SMITH: Your Honor, I just want to make one
3 brief comment with regard to the verdict forms. They can find
4 on the 2 conditions that the State did not prove his guilt
5 beyond a reasonable doubt they are required to find him not
6 guilty or if they find self defense, and I think maybe that
7 might ought to be expressed to them. They got 2 ways. If
8 they didn't meet their burden of proof or if they find that he
9 did the act but the act was in self defense then they can find
10 him not guilty.

11 THE COURT: I'm not going to put those special
12 interrogatories in the form. It's in the charge. It was
13 rather lengthy but I'm sending the charge back. If they have
14 a question about it they'll feel free to read it in the
15 charge. So as far as doing those special interrogatories,
16 that motion is denied.

17 MR. SMITH: Thank you, Your Honor.

18 THE COURT: Anything else?

19 MR. MCELHANNON: No, Your Honor.

20 THE COURT: All right. Would you come with the
21 court reporter, make sure you got all the exhibits and put on
22 the record all exhibits are present, and I will ask the
23 bailiff to take the information to the jury and tell them to
24 begin their deliberations.

25 [PAUSE]

1 THE COURT: All the exhibits are there?

2 MR. MCELHANNON: Yes, sir.

3 MR. SMITH: Yes, sir.

4 THE COURT: Do you all want to sent that -- on those
5 tapes, are those tapes of other stuff or are they just what we
6 heard?

7 MR. MCELHANNON: Just what we heard.

8 THE COURT: So they can't play past that?

9 MR. MCELHANNON: Well, one of them can play past it.
10 We better do it -- if they want to listen to it better do it
11 here.

12 THE COURT: Which one?

13 MR. MCELHANNON: Janice Lavoie.

14 THE COURT: Well, then let's just say this. If they
15 want to listen to the tapes then I'll bring them in the
16 courtroom, we'll play it in the courtroom, if you can play
17 past them, okay.

18 You want to take the exhibits down to the jury room,
19 please, sir.

20 All right. It's quarter until 5:00. We'll stand in
21 recess awaiting the jury verdict.

22 (WHEREUPON, court was in recess while awaiting a
23 verdict from the jury.)

24 THE COURT: They've been deliberating for a little
25 over an hour. I'll bring them back in the morning at 9:30.

1 Let me ask you this. Do you want me to bring them
2 in the courtroom and tell them, or do you want me to go stick
3 my head in the door and tell them to go home, don't talk about
4 the case and be back at 9:30?

5 MR. SMITH: Yes, sir. That will be fine.

6 THE COURT: Will that be all right with you?

7 MR. SMITH: Yes, sir.

8 THE COURT: All right. We'll go do it. You all
9 have a good day. We'll see you at 9:30 in the morning.

10 (WHEREUPON, the trial of this case was recessed for
11 the day.)

12 Wednesday, October 8, 2008

13 (WHEREUPON, the jury was instructed to resume their
14 deliberations when all the jurors arrived in the jury room at
15 approximately 9:30 a.m.)

16 THE COURT: Everybody, they want to listen to the
17 cassettes.

18 Solicitor, if you'll make sure we got the tape ready
19 to go.

20 MS. HUEY: Yes, sir.

21 THE COURT: Can you mark this as Court's Exhibit
22 Number 1, please.

23 (WHEREUPON, Court's Exhibit Number 1, a note from
24 the jury, was marked and made a part of the record.)

25 THE COURT: We'll play both of them in the

1 courtroom.

2 Bring us the jury, please.

3 (WHEREUPON, the jury enters the courtroom at
4 approximately 10:15 a.m.)

5 THE COURT: All right. Mr. Foreman, members of the
6 jury, this is in reference to the question you presented to me
7 yesterday. And the question I have is shown as Court's
8 Exhibit Number 1, as far as the record is concerned. And this
9 is your answer. The State is not required to show that the
10 victim would have died and a murder conviction would have
11 resulted. This is by illustration, merely an example to
12 explain malice and criminal intent, and I will go into the
13 malice and criminal intent at this time.

14 A specific intent to kill is not an element of
15 assault with intent to kill but there must be a general intent
16 to commit serious bodily injury.

17 Intent means intended the results which actually
18 occurs not accidentally or involuntary. Intent may be shown
19 by acts and conducts of the defendant and other circumstances
20 in which you may naturally and reasonably infer intent.
21 Evidence of the character of the assault, the character of the
22 instrument used, the manner in which it was used, the purpose
23 to be accomplished and resulting wounds or injuries may be
24 considered in determining the intent with which the assault
25 was committed.

1 Intent may also be inferred when it is demonstrated
2 that the defendant voluntarily and willfully commits an act,
3 the natural tendency of which is to destroy another's life.

4 Malice is clearly defined in the initial charge. I
5 will tell you this about malice and criminal intent. Malice
6 is hatred, ill will or hostility towards another person. It
7 is an intentional doing of a wrongful act without just cause
8 or excuse and with the intent to inflict and injure under
9 circumstances that the law will infer an evil intent.

10 Malice aforethought may be express or inferred.
11 These terms express and inferred do not mean different kinds
12 of malice but merely the manner in which malice may be shown
13 to exist. That is either by direct evidence or by inference
14 from the facts and circumstances which are proved.

15 Express malice is shown when a person speaks words
16 which express hatred or ill will for another or when the
17 person prepared beforehand to do the act which was later
18 accomplished; for example, lying in wait for a person or any
19 other acts of preparation going to show that the deed within
20 the defendant's mind would be express malice.

21 Malice may be inferred from conduct showing a total
22 disregard for human life. Inferred malice may also arise when
23 the deed is done with a deadly weapon.

24 A deadly weapon is any instrument, article or
25 substance which is likely to cause a death or great bodily

1 harm. Whether an instrument has been used as a deadly weapon
2 depends on the facts and circumstances of each case.

3 The following are examples of instruments which may
4 be deadly weapons; a pistol, a shotgun, a rifle, a dirk, a
5 dagger, a knife, a slingshot, metal knuckles, a razor,
6 gasoline, a firebomb or Molotov cocktail, and lighter fluid.
7 A gun may be a deadly weapon even if it's not operating.

8 All elements of assault and battery with intent to
9 kill must be proven beyond a reasonable doubt. A reasonable
10 doubt is the kind of doubt that would cause a reasonable
11 person to hesitate to act. If you have such a doubt as to the
12 guilt of the defendant he would be entitled to a verdict of
13 not guilty.

14 Reasonable doubt may arise from the evidence which
15 is in the case or from the absence or lack of evidence in the
16 case. You alone must make the determination of whether or not
17 reasonable doubt exists as to the guilt of the defendant.

18 The term reasonable doubt should be given its
19 everyday plain and ordinary meaning. Proof beyond a
20 reasonable doubt is proof that leaves you firmly convinced of
21 the defendant's guilt.

22 There are very few things in this world that we know
23 with absolute certainty, and in criminal cases the law does
24 not require proof that overcomes every possible doubt. If
25 based on your consideration of the evidence you are firmly

1 convinced that the defendant is guilty of the crime charged
2 you must find him guilty. If on the other hand you think
3 there's a real possibility he's not guilty you must give him
4 the benefit of the doubt and find him not guilty.

5 I will give you a copy of the instructions in
6 written form to go in your deliberations. You are to refer to
7 the instructions to guide your decision making. You must
8 consider the instructions as a whole and not follow some and
9 ignore others.

10 Now, Mr. Foreman, ladies and gentlemen of the jury,
11 the court reporter is going to play the tape back that was
12 admitted into evidence for the 911 tape. We're going to play
13 2 tapes, 1 tape concerning Ms. Lavoie.

14 MS. HUEY: Janice Lavoie.

15 THE COURT: And what was the other gentleman's name?

16 MS. HUEY: Christopher Mark Durham.

17 THE COURT: Christopher Durham. We're going to play
18 both 911 tapes. Now, the Durham tape you can take back with
19 you in the jury room because that's the only thing on the
20 tape. On the Lavoie tape, if you want to listen to it again
21 you'll have to do it in the courtroom because there's other
22 911 information on it. And the only thing that's admitted
23 into evidence is the portion about Lavoie, so that you'll have
24 to listen to in the courtroom. But I will allow you to take
25 the machine and the Durham portion in the jury room, if you so

1 choose.

2 (WHEREUPON, State's Exhibit Numbers 1 and 2, 911
3 Tapes, were played for the jury.)

4 THE COURT: Hold on a second. Stop it.

5 Yes, sir? You can't hear?

6 THE FOREMAN: We can't hear. Can we hear it on the
7 big box? Because we can hear better with the big box.

8 THE COURT: Okay. All right. Put it on the big
9 box, and be ready to cut it off when you get to the end of it,
10 please, ma'am.

11 Do you need the big box moved over to you closer?

12 MR. FOREMAN: No, we can hear it fine.

13 (WHEREUPON, the playing of the 911 tapes for the
14 jury resumed.)

15 THE COURT: Mr. Foreman, if you want this tape in
16 and the big box in the jury room just let me know and I'll get
17 somebody, the bailiff to bring it to you.

18 THE FOREMAN: Can I ask a question?

19 THE COURT: Do you want the box and the tape in the
20 jury room? Do you?

21 THE FOREMAN: Yes, sir.

22 THE COURT: All right. If you'll proceed to the
23 jury room and I'll --

24 (WHEREUPON, a question from the jury was handed to
25 the Court.)

1 THE COURT: The answer to the question is no.
2 You're going to have to recall it from the evidence. You got
3 some photographs. You're going to have to look at all that is
4 in the thing. We're not going to redo the testimony. I redid
5 the tape because we had it, but no. The answer is no.

6 Thank you very much.

7 (WHEREUPON, the jury leaves the courtroom at
8 approximately 10:45 a.m.)

9 THE COURT: The question that the foreman wrote; is
10 it possible to get a diagram of all Billy Craft's wounds? If
11 not, can we have him show us the wounds, head, foot, etcetera?
12 And I told the jury no on that. I'll mark that as Court's
13 Exhibit Number 2.

14 (WHEREUPON, Court's Exhibit Number 2, a Note from
15 the Jury, was marked and made a part of the record.)

16 THE COURT: As far as the trial is concerned, we'll
17 stand at ease on this.

18 (WHEREUPON, the trial of this case was recessed
19 while awaiting a verdict from the jury.)

20 THE COURT: I understand we have a verdict.

21 Bring us the jury.

22 (WHEREUPON, the jury enters the courtroom at
23 approximately 12:30 p.m.)

24 THE COURT: Mr. Foreman, I understand you've reached
25 a verdict; is that correct?

1 THE FOREMAN: Yes, Your Honor, we have.

2 THE COURT: Would you hand the verdict forms to the
3 bailiff, please, sir.

4 Thank you, ma'am.

5 Madam Clerk, if you'll publish the verdict, please,
6 ma'am.

7 THE CLERK: Thank you, Your Honor.

8 Indictment 2008-GS-04-3493, The State of South
9 Carolina vs. Barry Allen Evans, the verdict of the jury, we,
10 the jury, find the defendant, Barry Allen Evans, not guilty of
11 assault and battery with intent to kill as to Kevin Lavoie.

12 Indictment 2008-GS-04-1541, The State of South
13 Carolina vs. Barry Allen Evans, the verdict, we, the jury,
14 find the defendant, Barry Allen Evans, guilty of assault and
15 battery with intent to kill as to Billy Craft.

16 Case 2008-GS-04-3496, The State of South Carolina
17 vs. Barry Allen Evans, verdict, we, the jury, find the
18 defendant, Barry Allen Evans, guilty of possession of a weapon
19 during the commission of a violent crime.

20 Mr. Foreman, ladies and gentlemen of the jury, if
21 these are your verdicts would you please indicate by raising
22 your right hand.

23 All hands are raised, Your Honor. The verdicts of
24 the jury.

25 THE COURT: Thank you very much.

1 Mr. Foreman, I have filled out on the indictment
2 form the verdict on each indictment and I've dated it today,
3 October 8th, 2008. I'm going to give it to the clerk and ask
4 you to please sign it, please, sir, if you would.

5 (WHEREUPON, the indictments were given to the
6 foreman.)

7 THE COURT: Any motions as to the jury from the
8 State or the defendant?

9 MR. SMITH: Nothing from the defendant, Your Honor.

10 MR. MCELHANNON: None from State, Your Honor.

11 THE COURT: Thank you very much. Do you have a
12 sentence sheet prepared?

13 MR. MCELHANNON: Yes, sir.

14 THE COURT: If you'll hand them up, please, sir.
15 Hand me the other one, please, sir, the sentence sheet on the
16 third indictment.

17 Thank you, sir.

18 I'll be glad to hear from you.

19 MR. SMITH: Your Honor, may it please the Court. We
20 respect the jury's verdict but we move for a judgment
21 notwithstanding the verdict and/or a new trial.

22 We believe that the photographs as well as the 911
23 tapes were highly inflammatory and the probative value was far
24 outweighed by the prejudicial value that those particular
25 items that were introduced by the State were.

1 Not only that Linda Evans was prominently on the
2 tape but we weren't able to cross-examine her in this case,
3 and as a result of that we think from certain extent the
4 testimony was untrustworthy with regard to even what Mr. Mark
5 Durham said what he did.

6 There was no mention on the tapes of the defensive
7 aspect that Mr. Barry Evans tried to do when Mark Durham drew
8 a gun on him or even when Mr. Lavoie brought the machete out
9 to the scene. And based on those, we would move for either a
10 judgment notwithstanding the verdict of not guilty on each one
11 of those other charges or a new trial. Thank you, Your Honor.

12 THE COURT: All right. Motion denied. I'll be glad
13 to hear you on sentencing.

14 MR. SMITH: Your Honor, may it please the Court.
15 Your Honor, as you know, Mr. Evans --

16 THE COURT: You may come around to the microphone up
17 here in front of it if you so please. Mr. Evans, you can come
18 around by the microphone.

19 Solicitor, do you have anybody you would like for me
20 to hear from that I haven't already heard from as far as
21 testimony? Anything else they want to add I'd be glad to
22 hear.

23 MR. MCELHANNON: I think the victim would like to
24 speak, Your Honor.

25 THE COURT: Okay. That will be fine. Just bring

1 around whoever you want me to hear.

2 MR. SMITH: Your Honor, we'll let the victim go
3 first.

4 THE COURT: That will be fine.

5 Solicitor, what's his criminal record?

6 MR. MCELHANNON: Your Honor, he has a 1977 failure
7 to stop for a blue light, reckless driving; 1979, D. U. I.;
8 1981, D. U. I., disorderly conduct, 3 counts; '82, disorderly
9 conduct; '85, disorderly conduct; '87, disorderly conduct;
10 '89, disorderly conduct; '92, assault with intent to kill,
11 failure to stop, disorderly conduct; '93, D. U. S., unlawful
12 carrying of a pistol; '95, disorderly conduct; '97, assault
13 and battery high and aggravated nature; '99, criminal domestic
14 violence; 2000, disorderly conduct; 2001, D. U. I. and
15 disorderly conduct; 2002, financial transaction fraud, 10
16 counts; 2006, prowling.

17 THE COURT: Okay. Thank you very much. I'll be
18 glad to hear anything else you would like to tell me,
19 Solicitor, concerning sentencing, or hear anybody you would
20 like for me to listen to.

21 MR. MCELHANNON: Your Honor, on behalf of the
22 victim, and he'll speak for himself as well, but Mr. Evans has
23 a long history, 31 years of criminal history. He has some
24 violent charges, violent convictions in his past. This was a
25 horrendous act. He did cut Mr. Craft 26 times with a razor

1 blade. Mr. Craft is actually lucky to be alive and lucky to
2 be here today.

3 In 1997 he was actually charged with assault and
4 battery with intent to kill. He pled to a lesser included of
5 ABHAN and got 10 years suspended to 5 years probation on this
6 charge, and he's had 5 other criminal convictions since that
7 time. Your Honor, the State respectfully asks the Court to
8 give the maximum sentence in this case.

9 THE COURT: Okay. Thank you very much.

10 I'll be glad to hear from you, Mr. Craft.

11 MR. CRAFT: Your Honor, ever since I got cut up my
12 life has been different. I'm all the time working helping
13 people, and like the mission. I'm all the time nursing people
14 on drugs and alcohol and all like this. I'm all the time
15 helping people. That's what I was doing that day. I was
16 helping somebody and I got all cut up.

17 My testimony here was the truth. Mr. Fletcher has
18 took my name and slung my name all over the place when I've
19 been in church for 13 years.

20 And I don't appreciate that, Mr. Fletcher.

21 THE COURT: Mr. Fletcher is just doing his job.
22 I'll be glad to hear anything you want to tell me about
23 sentencing. I'm not going to listen to the trial again from
24 you.

25 MR. CRAFT: I know Barry Evans has done wrong. I

1 really don't have the heart to really tell you like how much
2 time to give this man. It would haunt me for the rest of my
3 life, I believe.

4 THE COURT: What would haunt you for the rest of
5 your life?

6 MR. CRAFT: If I was to say oh, give him a hundred
7 years. That would be wrong, I don't believe on my behalf, but
8 I'd rather just let the attorneys --

9 THE COURT: Well, the maximum I could give him would
10 be 25.

11 MR. CRAFT: I'd rather let the attorneys speak for
12 me, you know, on that part there. But I'll never be the same
13 again. I'll never be the same. I know it. When I get to
14 Heaven I'll be all right. And I just thank this Court and all
15 and --

16 (The defendant appears to be upset and unable to
17 speak.)

18 THE COURT: Mr. Craft, I'm sorry about your
19 injuries. I'm sorry that this incident ever occurred. You've
20 suffered, the defendant has suffered, everybody has suffered.
21 I'm awful sorry it happened. But I want to thank you for
22 being here. Anything else you would like to tell me?

23 MR. CRAFT: I'll probably think of a hundred things
24 when I get back to that seat over there.

25 THE COURT: Well, if you sit down back there and you

1 think of something raise your hand. I'll be glad to hear you
2 again, okay?

3 MR. CRAFT: I thank you.

4 THE COURT: Thank you very much, Mr. Craft.

5 Mr. Smith, I'll be glad -- I believe he referred to
6 you as Mr. Fletcher. I'll refer to you as Mr. Fletcher Smith.

7 MR. SMITH: Thank you, Your Honor. May it please
8 the Court. I know Mr. Evans -- that area in Anderson is a
9 pretty uncontrolled area. But Mr. Evans right here, the way
10 he grew up was kind of bad, Your Honor. Mr. Evans was a young
11 child and he saw his sister being raped by his stepfather.

12 And for most of his life he didn't feel like he was
13 man enough under those circumstances because he couldn't
14 protect his sister, and they had to suffer that abuse
15 throughout their lives.

16 And so he tried to get his life straight when he
17 went into the military. That worked for a while. He got a
18 job, worked pretty good. He's got a beautiful daughter right
19 there, and then had a relationship on and off again with the
20 woman named Linda Evans, who didn't testify.

21 And I think part of the problem in this whole
22 situation is that you had two men who she orchestrated, after
23 the same woman, and she knew that was a volatile situation
24 because these two men, it is undisputed were drug addicts, and
25 they used drugs together on occasion.

1 And the fact is -- we don't want to retry the thing,
2 but Mr. Craft has a violent history. He has cut people before
3 in his life, and this man has even been shot before by his own
4 wife, and he's been cut up. You can show the Judge where
5 you've been sliced up too, as well. So he's not asking to be
6 excused for any of it. The jury has spoken. We understand
7 all that. But the fact is there is some history as to why he
8 kind of went bad.

9 And we're asking the Court not to give him 25 years.
10 I think he understand he's going to have to do some time. But
11 the maximum sentence -- I don't even think Mr. Craft wants him
12 to get the maximum sentence, the victim in this case. And I
13 think that's what he was eluding to, that he would feel bad
14 for the rest of his life about Mr. Evans. And I think that's
15 very charitable on the part of Mr. Craft.

16 And Mr. Evans is sorry for the situation as it
17 occurred. He's very remorseful about it, but he understands
18 he has a drug problem.

19 And the other thing too, Your Honor, when I think
20 one of the judges here, you all ordered a competency
21 evaluation of Mr. Evans before the trial, and he told the
22 psychiatrist about his drug habit, his guilt and his feelings
23 of guilt in that regard.

24 And he also tried to help the State solve a murder
25 case that -- and gave testimony in that regard to try to

1 assist them in solving a murder. And we also have a letter
2 from at least two sheriffs deputies who were going to try to
3 help him with regard to these charges for his assistance in
4 this regard. The assistant solicitor had a right not to, I
5 guess to follow what the officers wanted, but they wanted to
6 do something to help him.

7 THE COURT: Okay.

8 MR. SMITH: So we ask not to give him the maximum
9 sentence, Your Honor.

10 THE COURT: Okay. Thank you, Mr. Smith.

11 Mr. Evans, anything you would like to tell me, or is
12 there anybody you'd like me to hear from, your son-in-law,
13 your daughter, anyone else? I'll be glad to hear from anybody
14 you would like for me to hear from.

15 THE DEFENDANT: I hate the whole situation happened.
16 I hate anybody got hurt. I can't change it. I was scared. I
17 was trying to defend myself. I was trying to run. But I do
18 hate that anybody got hurt and I hate the whole situation
19 happened.

20 THE COURT: You want me hear from your daughter, or
21 your son-in-law, or your sister?

22 Yes, ma'am, your name?

23 FEMALE SPEAKER: Annette Simmons.

24 THE COURT: Pardon?

25 MS. SIMMONS: Annette Simmons.

1 THE COURT: Simmons?

2 MS. SIMMONS: Yes, sir.

3 THE COURT: Okay. Annette Simmons.

4 MS. SIMMONS: This is my brother. Barry is not a
5 bad person. We've had a hard life.

6 THE COURT: Well, if you look at his criminal
7 history that wouldn't substantiate him not being a bad person.

8 MS. SIMMONS: I know that, Your Honor.

9 THE COURT: He's got a long lengthy criminal history
10 with some violence.

11 MS. SIMMONS: I know that.

12 THE COURT: And he's extremely fortunate he's not
13 here for murder charges rather assault and battery with intent
14 to kill.

15 MS. SIMMONS: I realize that, but I'm just asking
16 you to have mercy on him.

17 THE COURT: Pardon?

18 MS. SIMMONS: To have mercy on him, on his
19 sentencing. He's got a --

20 THE COURT: I mean, this wasn't an isolated cutting.
21 This was a butcher job, 26 cuts, and some of them right
22 severe, across the neck, across the stomach twice.

23 MS. SIMMONS: But I also realize --

24 THE COURT: I mean, he talks about he was protecting
25 himself. Generally one cut is enough to protect yourself.

1 MS. SIMMONS: Yes, sir.

2 THE COURT: Not butchering the person.

3 MS. SIMMONS: This has been going to happen for
4 years, this situation. It's been going on for years and
5 years. It was just a matter of time before it happened, and
6 just lucky for someone. Thank God nobody was killed. But all
7 this was provoked, all of it. You know, it's been a back and
8 forth thing. It's been terrible for this family. It's been
9 terrible for his daughter.

10 You know, Linda and Billy made some bad decisions
11 that day but it's going to change the rest of our lives.
12 Barry made a bad decision that day that's going to change all
13 of our lives for the rest of our lives. And I'm just asking
14 you to take all this into consideration.

15 THE COURT: Okay. Thank you so very much. I
16 appreciate you being here.

17 Anything else, Mr. Smith?

18 MR. SMITH: Nothing else, Your Honor, but appreciate
19 the --

20 THE COURT: Mr. Craft, did you think of anything
21 else you would like to tell me? I'll be glad to hear you.

22 MR. CRAFT: No, sir.

23 THE COURT: All right. Thank you so very much.

24 Anything else, Mr. Smith?

25 MR. SMITH: Nothing else.

1 THE COURT: Mr. Evans, do you have anything?

2 THE DEFENDANT: No.

3 THE COURT: Solicitor?

4 MR. MCELHANNON: No, Your Honor.

5 THE COURT: Okay, Mr. Evans. Indictment number
6 1541, that's assault and battery with intent to kill, you're
7 sentenced to the State Department of Corrections for a period
8 of 20 years. That's suspended upon the service of 14 years,
9 probation for 5 years.

10 Condition of probation, substance abuse counseling,
11 and random alcohol and drug testing. You're going to complete
12 an anger management course, and no contact with the victim,
13 Billy Craft. The probation will be tolled while you're in
14 jail. So when you get out of jail, after you've served your
15 14 years you're going to be on 5 years probation; do you
16 understand?

17 THE DEFENDANT: Yes, sir.

18 MR. SMITH: Yes, sir.

19 THE COURT: You understand that?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: And you'll have 6 years hanging over
22 your head after you get out. It's also a nonparolable
23 offense. You'll have to serve at least 85 percent; do you
24 understand?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Indictment number 3496, that's the
2 possession of a weapon during the violent crime, you're
3 sentenced to the State Department of Corrections for a period
4 of 5 years, and that's concurrent with the other indictment.
5 Since you received over 5 on the other indictment I'm not
6 going to run it consecutive. It will be concurrent; you
7 understand? Concurrent means it runs together.

8 MR. SMITH: Thank you, Your Honor.

9 THE COURT: Thank you very much.

10 (WHEREUPON, the trial was concluded.)

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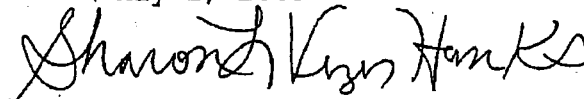
25

C E R T I F I C A T E

I, Sharon L. Vizer-Hanks, Official Court Reporter
for the 10th 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 the 6th, 7th and 8th day of October 2008.

I do further certify that I am neither of kin,
counsel nor have an interest to any party hereto.

May 1, 2009



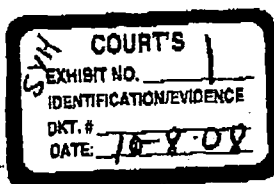
SHARON L. VIZER-HANKS

CIRCUIT COURT REPORTER

Question is shown as
Court's Exh. #1

Please clarify
the "intent to
kill" on pg A-24.

ie - if the victim would
have died, and a
murder conviction would
have resulted, then
if the victim survived,
then, by law, there
is no choice but to
convict with ~~a murder~~
assault w/ intent
to kill



BRK
foreman
~~currently in power~~

A TRUE COPY

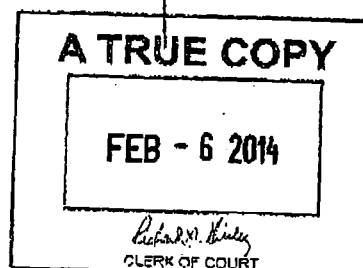
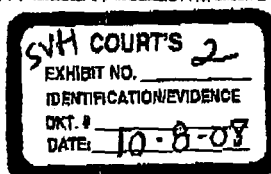
FEB - 6 2014

Richard M. Kelly
CLERK OF COURT

278

Is it possible
to get a diagram
of ~~all~~ of Billy Kraft's
wounds?

if not, can
we ~~have~~ have him
show us the wounds?
(head, feet, etc?)



A TRUE COPY

SEP - 5 2012

FILED-CLERK'S OFFICE
ANDERSON SC

STATE OF SOUTH CAROLINA

County of Anderson*Richard H. Harty*
CLERK OF COURTIn the Court of Common Pleas and General Sessions
SEP - 5 P 2:49COMMON PLEAS AND
GENERAL SESSIONSBarry Evans #331032
Full name and prison number (if any) of Applicant.

vs.

State of South Carolina
Name of Respondent.Anderson CountyAPPLICATION FOR
POST-CONVICTION RELIEF

2012-CP-04-02912

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 it clear to which question any such continued answer refers.

Since every application must be sworn to 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 applicant was convicted.

- Place of detention Tuger River Correctional Institute
200 Prison Rd Enoree S.C. 29335
- Name and location of Court which imposed sentence Anderson County
P.O. Box 8008 Anderson, S.C. 29622
- The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - 08-GS-04-1541
 - 07-GS-04-3496
 -
- The date upon which sentence was imposed and the terms of the sentence:
 - October 8, 2008 20 years Suspended to 14 years 5 years probation
 - October 8, 2008 5 years Run Concurrent
 -

5. Check whether a finding of guilty was made
- after a plea of guilty _____
 - after a plea of not guilty Found Guilty - 08-GS-04-1341, 07-GS-04-346
 - after a plea of nolo contendere _____
6. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
7. If you answered "yes" to (6), list
- the name of each Court to which you appealed:
 - South Carolina Court of Appeals
 - South Carolina Supreme Court
 - _____
 - the result in each such Court to which you appealed:
 - South Carolina Court of Appeals Affirmed Conviction
 - South Carolina Supreme Court Petition is denied
 - _____
 - the date of each such result:
 - April 11, 2011
 - July 13, 2012
 - _____
 - if known, citations of any written opinion or orders entered pursuant to such results:
 - UNpublished Opinion No. 2011-UP 147
 - NA
 - _____
8. If you answered "no" to (6), state your reasons for not so appealing:
- _____
 - _____
 - _____
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- INEFFECTIVE ASSISTANCE OF COUNSEL
 - INEFFECTIVE ASSISTANCE OF COUNSEL
 - Judicial Error
10. State concisely and in the same order the facts which support each of the grounds set out in (9):
- Failed to Research Case properly
 - Failed to Present Agreement which was written from
 - Judge Failed to Strike 911 Tapes (Detective Division)
Judge Failed to Strike Pictures
Judge Failed to Strike pictures Due to the
FACT witnesses were present, AS SAME AS
911 Tapes, THIS Inflamed the Jury.

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law? YES
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? _____
- (d) any other petitions, motions or applications in this or any other Court? NO

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. Court of Appeals South Carolina
- ii. South Carolina Supreme Court
- iii. _____
- iv. _____

(b) the name and location of the Court in which each was filed:

- i. Division of Appellate Defense Court of Appeals Columbia
- ii. South Carolina Commission Indigent Defense Columbia
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. Affirmed Conviction
- ii. Petition denied
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. April 11, 2011
- ii. July 13, 2012
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. unpublished opinion NO 2011-UP-147
- ii. NA
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

YES

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. Judicial Error.
- ii. Judicial Error.
- iii. _____

(b) the proceedings in which each ground was raised:

- i. Court of Appeals South Carolina.
- ii. South Carolina Supreme Court.
- iii. _____

15. If any ground set forth in (9) 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) Ineffective Assistance of Counsel. First Chanc To File
- (b) (PCR.)
- (c) _____

16. 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? _____

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. Fletcher Smith P.O. Box 10496, F.S. Greenville S.C.
- ii. " " " (29603.)
- iii. " " " "
- iv. LaNelle Cantey Durant 1330 Lady Street Suite 401
- v. Columbia S.C. 29801

(b) the proceedings at which each such attorney represented you:

- i. plea
- ii. Trial
- iii. Sentencing

18. State clearly the relief you seek in filing this application.

Time Served.

19. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA

VERIFICATION

County of Anderson

I, BARRY EVANS, 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.

Barry Evans

SWORN to and subscribed before me this

27th

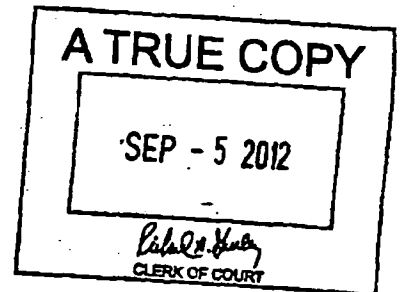
day of

AUGUST2012

Robert Jones
Notary Public

(L.S.)

My Commission Expires:

1-14-2019

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, BARRY EVANS, 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 therefor.

Barry Evans
Applicant

SWORN or affirmed to and subscribed before me this

27th day of AUGUST, 2012
Robert Jones
Notary Public

My Commission Expires

1-14-2019

FILED-CLERK'S OFFICE
ANDERSON SC
2012 SEP - 5 P 2:49
COMMON PLEAS AND
GENERAL SESSIONS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ANDERSON	)	Case No: 2012-CP-04-2912
	)	
Barry Evans, #331032,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

In response to the post-conviction relief application filed May 5, 2012, the Respondent would show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Anderson County. The Applicant was true billed indicted at the November 2007 term of the Court of General Sessions for Anderson County for weapons/possession of a weapon during violent crime (2007-GS-04-03496) and Assault/Assault and Battery with intent to kill (2008-GS-04-1541). He was represented by Fletcher Smith, Esquire and Lanelle Cantey Durant, Esquire. On October 6, 2008, the Applicant proceeded to trial after which he was found guilty on all charges. He was sentenced by the Honorable J.C. Nicholson, Jr., to confinement for five (5) years for weapons/possession of a weapon during violent crime (2007-GS-04-3496) and a period of twenty (20) years suspended upon the service of fourteen (14) years imprisonment to five (5) years' probation for assault/assault and battery with intent to kill (2008-GS-04-1541). All sentences to run concurrent.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The Court of Appeals affirmed Applicant's conviction and sentence. State v. Evans, Op. No. 2011-UP-147 (S.C. Ct. App. filed April 11, 2011). Applicant's petition for certiorari to the Supreme Court was denied July 13, 2012.

Attached herewith and incorporated herein by reference are the records of the Anderson County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and appellate records.

II.

In his application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. "Failed to research case properly."
 - b. "Failed to present agreement which was written from detective division."
2. "Judicial Error"
 - a. "Judge failed to strike 911 tapes."
 - b. "Judge failed to strike pictures."
 - c. "Judge failed to strike pictures due to the fact witnesses were present, as same as 911 tapes, this inflamed the jury."

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel “rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under prevailing professional norms.” Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel’s deficient performance must have prejudiced the Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent denies each allegation not expressly admitted, qualified or explained.

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

JOHN W. WHITMIRE
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

January 25, 2013

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

Barry Evans, # 331032)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent)

IN THE COURT OF COMMON PLEAS
IN THE TENTH CIRCUIT

2012-CP-04-2912

AFFIDAVIT 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:

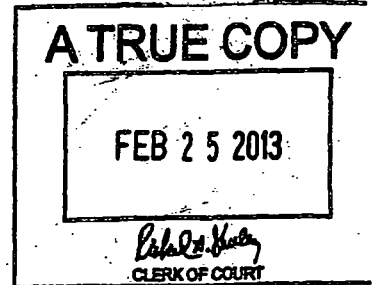
William Norman Epps, III Esquire
PO Box 2167
Anderson, SC 29622

DATED this 25th day of January, 2013


 Troyeshi Brailey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF ANDERSON) Case No.: 2012-CP-04-02912
)
 Barry Evans #331032,)
)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

**AMENDMENTS TO APPLICATION
 FOR POST-CONVICTION RELIEF**



TO: JOHN W. WHITMIRE, ASSISTANT ATTORNEY GENERAL

YOU WILL PLEASE TAKE NOTICE that the Applicant, by and through his undersigned counsel, hereby submits his amendments to his application for post-conviction relief.

Applicant amends statement number ten (10) in his Application for Post-Conviction Relief as follows:

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) The Applicant's trial counsel failed to research case properly and was ineffective in telling the jury during opening statements that they were going to prove certain aspects of Applicant's defense, such as that false charges were brought against the applicant and that the defense would prove that Applicant acted in self-defense.

(b) The Applicant's trial counsel was ineffective that he failed to object to the hearsay statements of Linda Evans "He's killing him" on pages 58, 73, 75 and 81 of the transcript.

(c) The Applicant's trial counsel was ineffective in failing to request a competency evaluation of Linda Evans who was under the State's subpoena power or otherwise

call her as a witness.

(d) The Applicant's trial counsel was ineffective in failing to object to the admittance of two (2) 911 tapes on the grounds of improper foundation and authentication.

(e) The Applicant's trial counsel was ineffective in failing to object to Billy Craft's testimony that Applicant previously beat him with an iron rod and jabbed it in him on page 120 of the transcript.

(f) The Applicant's trial counsel was ineffective in failing to object to Deputy Holbrooks hearsay testimony that Applicant ran into the backyard and jumped the fence on page 156.

(g) The Applicant's trial counsel was ineffective in failing to object to charge malice may be an afterthought on page 241 of the transcript, which was incorrect and confusing to jury.

(h) The Applicant's trial counsel was ineffective in failing to object to malice may be inferred from the use of a deadly weapon and general intent charge on page 242 of the transcript.

(i) The Applicant's trial counsel was ineffective in failing to object that ABHAN could give rise to malice charge and failed to object to the recharge of ABWIK on page 257 of the transcript.

(j) The Applicant's trial counsel was ineffective in failing to object to mutual combat and self defense charge pursuant to *State v. Taylor*, 589 SE 2d 1 (2003).

(k) The Applicant's trial counsel was ineffective in failing to object to the ABWIK or ABHAN jury charge.

(1) The Applicant's trial counsel was ineffective in failing to argue that Applicant

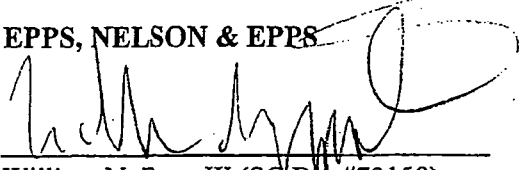
receive credit for time served on his sentence.

18. State clearly the relief you seek in filing this application.

That the applicant's request for post-conviction relief be granted and for a new trial.

This Motion is based upon the applicable law and Statutes of the State of South Carolina.

EPPS, NELSON & EPPS

By: 

William N. Epps III (SC Bar #73158)
230 West Whitner Street (29621)
Post Office Box 2167
Anderson, South Carolina 29622
Tel.: 864-224-2111
Fax: 864-224-3536
ATTORNEYS FOR APPLICANT

Dated: February 25, 2013

At: Anderson, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	THE COURT OF COMMON PLEAS
	)	2012-CP-04-02912
BARRY EVANS,	)	
	)	
APPLICANT,	)	
	)	
VERSUS	)	
	)	
THE STATE OF SOUTH CAROLINA,	)	
	)	DATE: MAY 8, 2013
RESPONDENT.	)	ANDERSON, SOUTH CAROLINA

POST-CONVICTION RELIEF HEARING

B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH

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

WILLIAM N. EPPS, III, ESQUIRE
ATTORNEY FOR THE APPLICANT

WALT WHITMIRE, ESQUIRE
ATTORNEY FOR THE STATE

FLETCHER SMITH, ESQUIRE
WITNESS

PROVIDED FOR: SCCID

FOR COPIES CONTACT: JO RICE
jrice@sccourts.ORG
OFFICIAL COURT REPORTER
SOUTH CAROLINA JUDICIAL DEPARTMENT

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EXHIBITS**COURT'S EXHIBIT**

C-1	Letter from Mr. Evans to Mr. Smith	42

1 MR. WHITMIRE: May it please the Court, Your Honor.
2 The State now calls Barry Evans v The State of South
3 Carolina, case number 2012-CP-04-2912. Mr. Evans is
4 confined to the State Department of Corrections pursuant to
5 orders of commitment by The Clerk of Court of Anderson
6 County. The indictment was true billed at the November,
7 2007, court of general sessions for Anderson County for a
8 weapons possession during a violent crime and assault and
9 battery with intent to kill. He was represented by
10 Fletcher Smith and on October 6th, 2008, Mr. Evans
11 proceeded to trial at which he was found guilty on all
12 charges. He was sentenced by Judge Nicholson to
13 confinement for five years on the possession of a weapon
14 during a violent crime and a period of twenty years upon
15 the service of fourteen for the ABWIK. A notice of appeal
16 was filed. The Court of Appeals confirmed Mr. Evans'
17 conviction, State v Evans, 2011 UP 147 filed April 11,
18 2007. Mr. Evans filed his application for post-conviction
19 relief on May 5th, 2012. Mr. Evans is present and
20 represented by Mr. Epps. At this time, the State turns
21 matters over to the Applicant.

22 THE COURT: All right. Mr. Epps?

23 MR. EPPS: Yes, sir, Your Honor. May it please the
24 Court. The Applicant would call Mr. Barry Evans.

25 THE COURT: First, if you would for my edification,

BARRY EVANS VERSUS THE STATE OF SOUTH CAROLINA

1 give me the grounds that he is asserting.

2 MR. EPPS: Yes, sir, Your Honor. Grounds Mr. Evans is
3 asserting in his post-conviction relief application is -- I
4 filed an amended application on February 25th, 2013 and the
5 grounds are as follows: That Applicant's trial counsel
6 failed to research the case properly, he was ineffective
7 during opening statements saying that they were going to
8 prove certain aspects of Applicant's defense.

9 THE COURT: You say, in opening?

10 MR. EPPS: Yes, sir. Yes, there was reference by
11 trial counsel in opening statements that they were going to
12 prove that the Defendant, or Mr. Evans, acted in self-
13 defense, prove that he was not guilty of assault and
14 battery with intent to kill.

15 Further, Mr. Evans alleges that trial counsel was
16 ineffective when he failed to object to hearsay statements
17 of Linda Evans, specifically, the statement that, "He's
18 killing him". On pages -- there are pages -- at least four
19 times in the transcript.

20 Number three, the Applicant, Mr. Evans, claims that or
21 alleges that trial counsel was ineffective in failing to
22 request a competency evaluation of Linda Evans who was
23 under the state's subpoena power and/or to otherwise call
24 her as a witness.

25 Also, the Applicant alleges trial counsel was

BARRY EVANS VERSUS THE STATE OF SOUTH CAROLINA

1 ineffective to object to the admittance of two 911 tapes,
2 that were then entered into evidence, on the grounds of an
3 improper foundation and authentication.

4 Also, the Applicant states the trial counsel was
5 ineffective in failing to object to Billy Craft's
6 testimony.

7 THE COURT: Of whose testimony?

8 MR. EPPS: Billy Craft was the victim. He was the
9 victim, Your Honor. And, I guess, a brief, kind of
10 briefly, this incident alleged out of an altercation that
11 happened in front of Mr. Evans' house. Mr. Billy Craft was
12 the victim. He was cut numerous times. During this
13 incident Mr. Evans was hit by a car driven by Ms. Linda
14 Evans. He was also charged with assault with intent to
15 kill a neighbor. I think his name was Mr. Kevin Lavoie.
16 He came out of his house with a machete and Mr. Mark
17 Durham, the son-in-law of Mr. Evans came out of his house
18 with a gun and this was a, it was a melee. And Billy Craft
19 was the victim and Billy Craft was the individual that was
20 the victim in this matter and subsequently, Mr. Evans was
21 found guilty of assault and battery with intent to kill and
22 possession of a weapon during a violent crime, so one of
23 his grounds for ineffective assistance of counsel is the
24 trial counsel's failure to object to Mr. Craft's testimony
25 that Applicant previously beat him with an iron rod and

1 jabbed him with it.

2 The Applicant also alleges that trial counsel was
3 ineffective for failing to object to Deputy Holbrooks who
4 testified for the State. His testimony was that the
5 Applicant ran to the back yard and jumped the fence. That
6 is a lie and there was no objection to that statement, Your
7 Honor.

8 The Applicant also objects to trial counsel or alleges
9 that trial counsel was ineffective in failing to object to
10 a charge of, malice may be an afterthought, which is
11 contained in the transcript. It's incorrect and would lead
12 the jury and that's on page 241 of the transcript. It's
13 written out, "afterthought".

14 Also, the Applicant alleges trial counsel was
15 ineffective in failing to object to; malice may be inferred
16 from the use of a deadly weapon and the general intent
17 charge on assault and battery of a high and aggravated
18 nature.

19 We also, the Applicant also alleges trial counsel was
20 ineffective in failing to object that ABHAN could give rise
21 to the malice charge and failed to object to the re-charge
22 of assault and battery with intent to kill in this matter.

23 The Applicant also alleges that trial counsel was
24 ineffective in failing to object to mutual combat as a
25 self-defense charge pursuant to State v. Taylor and in this

1 incident, Your Honor, mutual combat was charged within the
2 self-defense charge. Specifically, it was addressed in the
3 mutual combat charge and was contained in that, in that
4 self-defense charge and there was no objection.

5 The Applicant also alleges that trial counsel was
6 ineffective in failing to object to the ABWIK and ABHAN
7 jury charge.

8 And the last, Your Honor, the Applicant alleges that
9 trial counsel was ineffective in failing to argue that
10 Applicant receive credit for time served on the sentence.
11 He was given no credit for time served on the sentence. I
12 believe, from my understanding, he had to spend at least
13 five months prior to trial, a little over five months prior
14 to trial and that was not raised, it was not addressed, he
15 was not given credit for any time served prior to the trial
16 of this case.

17 THE COURT: All right. Let me say something to,
18 obviously, back here must be some of Mr. Evans' family. Is
19 that correct?

20 (People in audience nod heads)

21 THE COURT: We're glad to have you here. I noticed
22 the deputy said something to you, but just for our rules we
23 have here, do not attempt to touch him or hand him
24 anything. I know you won't, but I just thought I'd remind
25 you. Okay? All right. Call your first witness.

DIRECT EXAMINATION OF BARRY EVANS BY MR. EPPS

8

1 MR. EPPS: Thank you, Your Honor. We call Barry
2 Evans.

3 (After being duly sworn by the Clerk of Court,
4 **BARRY EVANS** testified as follows:)

5 CLERK OF COURT: If you would please take the witness
6 stand and state your name for the record.

7 MR. EVANS: Barry Evans.

8 DIRECT EXAMINATION

9 BY MR. EPPS:

10 Q Mr. Evans, how are you?

11 A Pretty good. Thank you, sir.

12 Q And you are the Applicant here on the application for
13 post-conviction relief. Is that correct?

14 A Correct.

15 Q And you were found guilty on or about October 8th,
16 2008, of assault and battery with intent to kill and
17 possession of a weapon during a violent crime?

18 A Yes, I was.

19 Q Okay. And the victim in that case, was the victim in
20 that case Mr. Billy Craft?

21 A Yes.

22 Q Okay. And who represented you in that matter, sir?

23 A Fletcher Smith.

24 Q Okay. And was Mr. Smith retained or appointed?

25 A He was retained.

BARRY EVANS VERSUS THE STATE OF SOUTH CAROLINA

1 Q He was retained. Okay. And when did you, do you know
2 when you retained Mr. Smith?

3 A Approximately, July...

4 Q July the ---

5 A Yeah. No, July -- I got out of jail February or
6 March. It was right after I got out of jail. I
7 stayed in jail about five months and as soon as I got
8 out of jail.

9 Q Do you know what year that was?

10 A 2008.

11 Q 2008? And you testified you spend at least five
12 months in jail prior?

13 A Yeah. I went to jail in September, 2007.

14 Q Okay. And then you received a bond, I assume, and got
15 out on bond. Is that correct?

16 A After five months. Yes, sir.

17 Q And how many times -- you went to trial October the
18 6th through the 8th of 2008. Is that correct?

19 A Yes, sir.

20 Q And how many times did you see, how many times did you
21 meet with Mr. Smith?

22 A Two or three times.

23 Q Okay. Did you meet with him personally or talk to him
24 on the telephone?

25 A I spoke with him on the phone line and went over to

DIRECT EXAMINATION OF BARRY EVANS BY MR. EPPS

10

1 his office one time.

2 Q How many times did you go to his office prior to going
3 to trial in 2008?

4 A Just the one time when I retained him.

5 Q Okay. Did he ever sit down with you and discuss
6 strategy or aspects of your case?

7 A No. There was no discussion like that.

8 Q Did you ever see, ever look at discovery in the case?

9 A No.

10 Q Did you ever, did you ever talk about strategy, did
11 you ever talk about the issue of self-defense? Did
12 you ever discuss that with Mr. Smith?

13 A No. There was no strategy discussed in the case. Mr.
14 Smith said he'd handle it.

15 Q Did you understand, did Mr. Smith tell you the
16 elements of self-defense?

17 A No.

18 Q Did Mr. Smith ever discuss with you the adoption of
19 mutual combat?

20 A I never heard of that before.

21 Q And very briefly, this, what you went on trial for was
22 an altercation that happened at your house. Is that
23 correct?

24 A Right.

25 Q Okay. And Ms. Linda Evans, is that your wife?

1 A Right.

2 Q Was it your wife or your ex-wife?

3 A My ex-wife.

4 Q And at the time, she was living where?

5 A

6 Q And that's where this incident took place, right?

7 A Right.

8 Q And where were you living?

9 A I was living up the street in a trailer.

10 Q And who were you living with?

11 A By myself.

12 Q Okay. Were you living with your girlfriend?

13 A No, that was a separate time.

14 Q Did you ever discuss with Mr. Smith any witnesses you
15 were going to call on your behalf?

16 A Yes. John Johnson and Tony Martin.

17 Q Okay. And Mr. Johnson testified at trial. Is that
18 correct?

19 A Yes, he did.

20 Q Okay. Was Mr. Martin there?

21 A No. Mr. Martin's sister died in Florida and about the
22 time of the trial he had to go to Florida because of
23 her death. She had died and he had to go to her
24 funeral.

25 Q And to your knowledge, was Ms. Linda Evans under

DIRECT EXAMINATION OF BARRY EVANS BY MR. EPPS

12

1 subpoena during your trial?

2 A Yes, sir.

3 Q And your case had come up previously. Is that right?

4 A Right.

5 Q And Ms. Evans had been subpoenaed on each and every
6 time. Is that correct?

7 A Right.

8 Q Okay. Now, when your trial started -- and you've had
9 the opportunity to look at the, the transcript is a
10 part of the record?

11 A Yes.

12 Q You've had a chance to look through the record,
13 right? And read the transcript.

14 A Right.

15 Q Do you remember at the beginning of your trial during
16 the opening statements that Mr. Smith told the jury
17 that they were going to, that ---

18 A He said that he would prove self-defense.

19 Q And you remember he told the jury he was going to
20 prove not guilty of assault and battery with intent to
21 kill. Right?

22 A Right.

23 Q Okay. Did you have a problem with that?

24 A Yes, because that put the burden on me instead of the
25 State to prove I was the defendant.

BARRY EVANS VERSUS THE STATE OF SOUTH CAROLINA

1 Q You said you had a problem. Did you ever discuss with
2 him regarding the concept of, you testified you never
3 discussed with Mr. Smith the concept of self-defense
4 or mutual combat. Right?

5 A No.

6 Q Did you have any knowledge that you did or did not
7 have to prove or disprove self-defense or whose burden
8 that was?

9 A Well, I've always assumed it was the State's burden to
10 prove your guilt. You're innocent until proven
11 guilty.

12 Q Do you think that could have affected your trial?

13 A Yes, sir.

14 Q And do you think it could have been different?

15 A Yes, sir.

16 Q And do you think those statements maybe put it in the
17 minds of the jury that you were having to prove these
18 charges, that you were having to prove defenses of
19 these charges at issue? Is that correct?

20 A Yes, sir.

21 Q Okay. Now, also, there was ---

22 THE COURT: Let me ask you this. Judge Nicholson's
23 charge, did he tell the jury that the State has to disprove
24 self-defense? In other words, that they have to prove
25 their case. Isn't that always in the charge to the jury?

DIRECT EXAMINATION OF BARRY EVANS BY MR. EPPS

14

1 MR. EPPS: Yes, sir. He did.

2 THE COURT: Okay. Thank you.

3 Q Now, also, during the course of your trial, the
4 neighbor testified. Is that correct?

5 A Which -- yes, sir. Yes, sir.

6 Q And did both of them, or who was that? Was that Ms.
7 Lavoie?

8 A Yeah. Kevin Lavoie and Janice Lavoie.

9 Q Okay. Now, Ms. Levoie's testimony, she made the
10 statement that Linda Evans stated that, "He's killing
11 him," referencing you in an altercation with Billy
12 Craft?

13 A Yes, sir. She did.

14 Q And did Mr. Smith object on the grounds -- did he
15 object to that statement coming in?

16 A No. He didn't.

17 Q Now, and there was an issue, there were two 911 calls
18 that came in. Is that correct?

19 A Yes.

20 Q Okay. Now, did -- when the 911, the first 911 call,
21 who got, who testified, how did that 911 call get in?
22 Do you remember?

23 A Yes. Janice Levoie.

24 Q Now, that Janice Levoie, she was your neighbor.
25 Right?

1 A Right.

2 Q Okay. So, she talked to the 911 operator and things
3 of that nature. Right?

4 A Right.

5 Q And was there any 911 operator or anyone from -- did
6 anybody come and testify to introduce that tape?

7 A No.

8 Q Was there any objection from your attorney, Mr. Smith,
9 regarding an objection to foundation and
10 authentication of the 911 tape?

11 A No. He didn't.

12 Q And that 911 came in through, that 911 tape came in
13 through your neighbor. Is that correct?

14 A Yes.

15 Q That 911 tape, that tape also had other people
16 talking, other statements on it. Correct?

17 A Yes.

18 Q Were there any objections to any other statements
19 contained on those tapes?

20 A No. There wasn't.

21 Q Now, also, Kevin Levoie testified also. Is that
22 right?

23 A Yes.

24 Q And he's the neighbor, he was Janice's husband.
25 Correct?

1 A That's right.

2 Q And, in fact, during this altercation he came out of
3 his house, did he come out of his house with a
4 machete?

5 A Yes, he did.

6 Q Okay. He came out with a machete. And did you go
7 after him in the yard with a stick or post or
8 something?

9 A He come over to my yard with the machete and I run and
10 grabbed a post.

11 Q Okay.

12 THE COURT: You did what, please?

13 MR. EVANS: He come after me in my yard with a machete
14 and I ran and grabbed a piece of fencepost laying there in
15 the yard. I grabbed it and held it up to block him hitting
16 me with the machete.

17 THE COURT: Okay.

18 Q And I think Mr. Lavoie also testified to Linda Evans
19 making the statement, "He's killing him. He's killing
20 him."

21 A Yeah.

22 Q And that was in reference between you and, the
23 altercation between you and Mr. Craft, right?

24 A Yes.

25 Q Was there any objection by Mr. Smith or did he allege

1 any objection to that statement?

2 A No. He didn't.

3 Q Did Mr. Lavoie make or say that or make the statement
4 that or testify that Linda Evans said, "He's killing
5 him"? He said that numerous times, correct?

6 A Possibly four or five times in the transcript.

7 Q Was there any objection to that testimony coming in?

8 A No.

9 THE COURT: Who testified to that?

10 MR. EPPS: Ms. Janice Lavoie and Kevin Levoie, which
11 were the neighbors.

12 THE COURT: Go ahead.

13 MR. EPPS: Thank you, Your Honor.

14 Q Now, there was an issue about Ms. Linda Evans
15 testifying. Is that correct?

16 A Yeah.

17 Q And to your knowledge, she was under the State's
18 subpoena. Right?

19 A That's right.

20 Q And it was brought out by the State Solicitor that she
21 was not going to testify for physical and mental
22 reasons. Correct?

23 A That's correct.

24 Q And there was a note from her family doctor advising
25 the Court. Right?

DIRECT EXAMINATION OF BARRY EVANS BY MR. EPPS

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1 A Yes.

2 Q Now, to your knowledge, Judge Nicholson, the trial
3 judge in that case, said that he would give Ms. Evans
4 a competency evaluation to see if she was fit to
5 testify. Is that right?

6 A (Nods head)

7 Q Okay. Did Mr. Smith, your attorney, ever ask that
8 competency evaluation be done?

9 A No.

10 Q Did he ever make any argument for Ms. Evans to
11 testify?

12 A No.

13 Q Now, Ms. Evans, now, Ms. Evans, in this case on that
14 day, did she hit you with her car?

15 A Yes.

16 Q During this altercation when was she running into you,
17 did she run into you with her vehicle?

18 A Yes, she did with her car.

19 Q Okay. And there have been previous statements of
20 hers, there has been previous testimony regarding her
21 testimony that "He's killing him". Did you think she
22 may have been a material witness, that you would need
23 her to testify in your case?

24 A Yes, sir. I figured it would help my case.

25 Q All right. To address the issue of her running into

1 you?

2 A That and the issue about the hearsay about "He's
3 killing him".

4 Q And nothing was ever raised, there was no objection
5 and no competency evaluation ever done. Is that
6 correct?

7 A No.

8 Q Okay. Now, and Mr. Smith never made an argument to,
9 to bring her in as a witness. Correct?

10 A No.

11 Q Also, was there another, during this what happened
12 that day, during this incident, did your son -- who is
13 Mark Durham?

14 A My son-in-law.

15 Q Your son-in-law. Did he come out of the house?

16 A Yes.

17 Q Did he have a gun?

18 A Yes, he did.

19 Q Okay. And did he testify to calling 911, also?

20 A Yes, sir.

21 Q Okay. And was a second 911 tape entered into
22 evidence?

23 A Yes, sir.

24 Q And was that 911 tape entered through Mark Durham?

25 A Yes, Mark Durham.

DIRECT EXAMINATION OF BARRY EVANS BY MR. EPPS

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1 Q And that was based on him, was that based on him
2 testifying that that was his voice on the tape?

3 A Yes.

4 Q Was any objection made by Mr. Smith regarding laying a
5 foundation or authenticating that 911 tape?

6 A No.

7 Q No objection was ever raised. Correct?

8 A Correct.

9 Q Okay. Now, do you think what we talked about now, do
10 you think that up until now the failure to object to
11 the 911 tapes, failure to object to Linda Evans'
12 hearsay, the statements, failure to object to or
13 address a competency evaluation of Linda Evans and
14 whether or not she was fit to testify, do you think
15 that was error on the part of Mr. Smith, your
16 attorney?

17 A Yes, sir. I do.

18 Q And do you think that could have, that there's a good
19 possibility that could have affected the outcome of
20 your trial?

21 A Yes, sir.

22 Q Now, also, Mr. Craft testified. Is that correct?

23 A That's correct.

24 Q And during his testimony, do you remember that he
25 testified that you had previously beat him with an

1 iron rod and jabbed it in him?

2 A Yes, I do.

3 Q Was there any objection to that testimony coming in by
4 Mr. Smith?

5 A No, there wasn't.

6 Q Now, during, also during, now Deputy Holbrooks
7 testified during your trial. Is that right?

8 A Yes, he did.

9 Q Okay. And who was Deputy Holbrooks?

10 A He was one of the arresting officers.

11 Q He was one of the arresting officers?

12 A Yes.

13 Q Okay. Now, did Deputy Holbrooks during the trial of
14 your case testify that someone told him or made a
15 hearsay statement that you ran to a backyard and
16 jumped a fence?

17 A Yeah. He said they had got some kind of call about it
18 or something like that.

19 Q That you ran into the backyard and ran, jumped the
20 fence. Right?

21 A That's what he said.

22 Q Did Mr. Smith, your attorney, did he make any
23 objection to that hearsay statement coming in?

24 A No, he didn't.

25 Q Do you think that that, do you think he should have

DIRECT EXAMINATION OF BARRY EVANS BY MR. EPPS

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1 made an objection in that instance?

2 A Yes, I do.

3 Q He said it looked like you were running. Is that
4 correct?

5 A That's the way he made it look.

6 Q All right. Now, and also, at the beginning of the
7 trial, Mr. Smith, your attorney Mr. Smith, told the
8 jury that he was going to prove, that you were going
9 to prove that this was a case of self-defense. Is
10 that right?

11 A That's right.

12 Q Okay. Now, you had some witnesses. You testified in
13 your trial. Correct?

14 A Yes, I did.

15 Q And Mr. John Johnson testified during your trial. Is
16 that right?

17 A That's right.

18 Q Now, who is Mr. John Johnson?

19 A A neighbor. He lived right on the left.

20 Q And was he with you -- who was with you the day this
21 happened?

22 A I was over at John's house. Me and him and Tony
23 Martin were there and me and Tony left going to the
24 store crossing the yard.

25 Q And what happened? Briefly, did you go down to, why

1 did you go down to your house?

2 A I was walking -- to go to the store you have to walk
3 right by my house. He lived right next door. We was
4 walking down the road to go to the store.

5 Q And Mr. Johnson testified that Mr. Craft had a weapon.
6 Is that right?

7 A That's right.

8 Q Now, was there testimony regarding Mr. Craft selling
9 drugs to Linda Evans or the neighbors or the boys?

10 A That's right.

11 Q Did Mr. Smith, your attorney, ask or pose a question
12 to Mr. Johnson with regards of this being a case of
13 mutual combat between you and Billy Craft?

14 A Not that I remember.

15 Q If I told you he did in the transcript on page 79,
16 would you believe that to be the case?

17 A If that's what you told me.

18 Q Okay. And you testified. Is that correct?

19 A Yeah.

20 Q All right. And you testified to what happened and you
21 testified ---

22 A Can I say something?

23 Q Yes, sir.

24 A He testified that John Johnson and Mr. Craft pulled a
25 knife on me.

DIRECT EXAMINATION OF BARRY EVANS BY MR. EPPS

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1 Q You testified that, did you testify that you were
2 going down to talk to your daughter?

3 A Yes.

4 Q To see your daughter?

5 A Yes.

6 Q Okay. And you testified that Mr. Craft and Ms. Evans
7 cussed at you. Was that your testimony?

8 A Mr. Craft did. I don't want to say what he told me,
9 but he did.

10 Q Now, he started, it was your testimony that he brought
11 this on?

12 A Yeah. I was there with my daughter there. I went to
13 see what she was doing and he said, "Get out of here
14 or I'm going to blank you up," and he pulled a knife.

15 Q Okay. So, now, and then there was closing arguments
16 and now we're in the jury charges. Correct? We're at
17 the point in the trial where the judge is charging the
18 jury. And do you remember, it was in the transcript
19 on page 241 that the part of the, that the jury charge
20 was, that malice might be an afterthought?

21 A Yes.

22 Q An afterthought.

23 A Yes.

24 Q Not a forethought, but an afterthought. Now, with
25 that, was there any objection raised by Mr. Smith

1 regarding that charge?

2 A No, it wasn't.

3 Q Now, there was also a charge that malice may be
4 inferred from the use of a deadly weapon on page 242
5 of the transcript. Is that correct?

6 A That's correct.

7 Q Was there any objection, was there any objection by
8 Mr. Smith to that charge?

9 A No, there wasn't.

10 Q In fact, was there any objection by Mr. Smith on any
11 of the jury charges that were presented to the jury?

12 A No.

13 Q Okay. Now, so there was -- and obviously the judge
14 charged the jury on assault and battery with intent to
15 kill, assault and battery of a high and aggravated
16 nature and possession of a weapon during a violent
17 crime. Is that correct?

18 A That's correct.

19 Q Okay. Now, and also in the charge on 251 of the
20 transcript, Judge Nicholson charged that ABHAN could
21 give rise to malice. Is that right?

22 A That's right.

23 Q Okay. And did Mr. Smith object to that language?

24 A No, he didn't.

25 Q Now, was this case, was malice, obviously, if you are

DIRECT EXAMINATION OF BARRY EVANS BY MR. EPPS

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1 charged with assault and battery with intent to kill,
2 that's got the element of malice to it. Do you agree
3 with that?

4 A Yeah.

5 Q Okay. Assault and battery, high and aggravated nature
6 does not have an element of malice.

7 A That's right.

8 Q So, the issue of malice was essential to your case.
9 Do you agree with that?

10 A Yes, sir.

11 Q Okay. Whether or not you were guilty of, whether you
12 were guilty of assault and battery with intent to kill
13 or assault and battery of a high and aggravated
14 nature. Is that correct?

15 A That's right.

16 Q All right. Now, also during the jury charge on ABHAN,
17 did Judge Nicholson charge that you don't have to have
18 a specific intent to kill, you have to have a general
19 intent to injure somebody?

20 A Right.

21 Q Was there any objection by Mr. Smith as to the aspects
22 of that charge?

23 A No.

24 Q And also, they re-charged, they re-charged the ABHAN
25 and ABWIK charges to the jury. Correct?

- 1 A That's right.
- 2 Q The jury came back and wanted to hear, the jury came
3 back and had a few questions during the trial. Right?
- 4 A Right. They did.
- 5 Q And they wanted to hear the 911 tapes again. Right?
- 6 A Right. They didn't know how the charge, they asked
7 about the ABWIK charge.
- 8 Q So, Judge Nicholson re-charged ABWIK and ABHAN. Was
9 there any objection -- and that was re-charging
10 language of inferred malice, use of a deadly weapon
11 and the general intent charge of ABHAN. Was there any
12 objection to the re-charge?
- 13 A No.
- 14 Q Now, also, the judge, Judge Nicholson, charged the
15 jury with the law of self-defense. Is that correct?
- 16 A That's right.
- 17 Q Okay. And during the charge of self-defense, during
18 the charge of self-defense, the jury charge of self-
19 defense, did the judge also charge mutual combat?
- 20 A Yes.
- 21 Q Okay. And a part of, a part of self-defense, you
22 understand, the first element is that you are without
23 fault bringing on the altercation. Do you understand
24 that?
- 25 A Yes, sir.

DIRECT EXAMINATION OF BARRY EVANS BY MR. EPPS

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1 Q All right. And that self-defense was charged to the
2 jury, the four elements of self-defense, but during
3 the first element, Judge Nicholson also charged the
4 jury on the law of mutual combat.

5 A That's right.

6 Q And mutual combat is a mutual willingness to fight.
7 Is that right?

8 A Both want to fight.

9 Q It negates the use of, the defense of self-defense.
10 Is that right?

11 A That's right.

12 Q Was there any objection, any objection by Mr. Smith in
13 regards to the language used in that charge?

14 A No, there wasn't.

15 Q Okay. Now, I'm going to ask you again, the testimony,
16 what was testified to, did the failure of Mr. Smith to
17 object to hearsay statements, the failure to object to
18 the 911 tapes on the grounds of improper foundation
19 and authentication, the fact that he failed to object
20 to certain aspects of jury charges regarding ABWIK,
21 assault and battery with intent to kill, assault and
22 battery of a high and aggravated nature, and
23 particularly the failure to object to the charge of
24 self-defense and mutual combat that was mixed in with
25 that charge of self-defense, do you think that is

1 ineffective assistance of counsel?

2 A Yes, I do.

3 Q And do you think the failure to object to raise those
4 issues before the trial judge affected the outcome of
5 your trial?

6 A Yes, I do.

7 Q Now, I'm going to go back to the 911 tapes. Do you
8 remember anybody, whether it be the State or Mr.
9 Smith, particularly Mr. Smith, your attorney, was
10 there ever any question of Ms. Lavoie or Mr. Durham
11 regarding the actual 911 tape itself? Was there any
12 questioning of these persons on that aspect? On that
13 issue?

14 A No.

15 Q There was never any questioning whether the recording
16 device, the tapes received were capable of taping that
17 conversation that was entered into evidence? Was
18 there any questioning as to that?

19 A No.

20 Q Was there any testimony -- obviously there was no
21 operator from 911, no operator came to testify. Is
22 that correct?

23 A No. No professional.

24 Q Did anybody, anybody, testify that the actual
25 recording was authentic and correct?

DIRECT EXAMINATION OF BARRY EVANS BY MR. EPPS

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1 A No, they didn't.

2 Q Did anybody get asked if there were any changes,
3 additions, deletions that had been made to the
4 recording?

5 A No.

6 Q Okay. And did anybody talk about how they were
7 preserved in the manner that was shown to the Court?

8 A No.

9 Q Were all the people on the tape identified?

10 A No.

11 Q The only people identified were either Mr. Durham or
12 Ms. Levoie. Correct?

13 A Right.

14 Q Now, the jury came back and the jury found you guilty
15 of assault and battery with intent to kill and
16 possession of a weapon during a violent crime.
17 Correct?

18 A Correct.

19 Q All right. And they actually found you not guilty on
20 assault with intent to kill of the neighbor Kevin
21 Lavoie. Is that right?

22 A That's correct.

23 Q And you were sentenced, you were sentenced on assault
24 and battery with intent to kill, twenty years
25 suspended to fourteen years. Right? And five years

1 probation.

2 A Right.

3 Q And you were also sentenced to five years on the
4 weapons charge and that ran concurrent with the
5 assault and battery with intent to kill charge.

6 Right?

7 A That's right.

8 Q And you testified earlier that you spent five months,
9 at least five months or a little more, in jail prior
10 to you going to trial on these charges. Isn't that
11 right?

12 A That's right.

13 Q And you were in jail for these charges, that's the
14 charges you were arrested for and spent five months in
15 jail. Right?

16 A Yeah.

17 Q Did you get credit for that time served?

18 A I didn't.

19 Q All right. And that wasn't marked on your sentencing
20 sheet and you got no credit for that.

21 A No, it wasn't.

22 Q And Mr. Smith, he, did he raise that to the trial
23 judge that you should receive credit for the time that
24 you served?

25 A No, he didn't.

DIRECT EXAMINATION OF BARRY EVANS BY MR. EPPS

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1 Q Okay. Do you think that was fair not raising you
2 getting credit for the time you served, five months
3 before going to trial?

4 A No, that's five months of my life.

5 Q Yes, sir. Now, and you believe that, that the failure
6 to object to, number one, the statement coming out of
7 the gate that you were going to prove self-defense and
8 prove you're not guilty, the failure to object to
9 hearsay statements, failure to attack the foundation
10 and authentication of the 911 tapes, the failure to
11 object to or failure to get a competency evaluation or
12 address calling Linda Evans as a witness, who actually
13 tried to run you over during this incident, and the
14 failure to object to any jury charges is, in effect,
15 ineffective assistance of counsel.

16 A I think it was a failure.

17 Q And you think it affected the outcome of your, could
18 very reasonably have affected the outcome of your
19 trial?

20 A Yes, sir.

21 MR. EPPS: If Your Honor would give me a few minutes.

22 THE COURT: Yes, sir.

23 Q All right, Mr. Evans. At this time I have no further
24 questions. Please answer any questions opposing
25 counsel or the Court may have.

CROSS EXAMINATION OF BARRY EVANS BY MR. WHITMIRE

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1 THE COURT: Cross examination.

2 MR. WHITMIRE: May it please the Court.

3 CROSS EXAMINATION

4 BY MR. WHITMIRE:

5 Q Good afternoon, Mr. Evans.

6 A Good. How you doing?

7 Q Mr. Evans, didn't you testify at your trial?

8 A Yes, I did.

9 Q And you testified that you had a long history of
10 animosity with Billy Craft. Is that correct?

11 A I believe I said we had problems before that.

12 Q Problems before that?

13 A He pulled a gun on me.

14 Q I believe you said he pulled a .9mm on you on previous
15 occasions. And didn't you testify that Billy Craft
16 had a reputation of someone who would be carrying a
17 knife on him?

18 A Yeah.

19 Q At one point, didn't he marry your ex-wife?

20 A Yes, he did.

21 Q And you found Mr. Craft at the home that your ex-wife
22 was still living in. Is that correct?

23 A That's right.

24 Q And you guys got into a quarrel. Is that correct?

25 A That's right.

CROSS EXAMINATION OF BARRY EVANS BY MR. WHITMIRE

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1 Q And at trial, didn't Mr. Craft testify that you were
2 the one carrying a knife?

3 A Yeah, he did testify to that.

4 Q And you testified that it was him carrying the knife.

5 A That's right.

6 Q And there was testimony all over the place about who
7 had knives. Is that correct?

8 A Yeah, on both sides.

9 Q It's fair to say that you were expecting an encounter
10 with Mr. Craft when you saw him?

11 A I didn't even know he was there.

12 Q But if you did see him or when you did see him, when
13 you guys saw each other and were yelling at each
14 other, based on your past history?

15 A I would say there were other altercations.

16 Q And was it your testimony -- on page 196, Your Honor
17 -- at trial that you and Mr. Craft struggled and that
18 you cut him a little, once, on the hand? Right?

19 A With a knife, yes.

20 THE COURT: Speak up, please.

21 A Yes, sir. I got the knife from him.

22 Q But didn't you stab Mr. Craft or -- I apologize.
23 Strike that. Didn't you cut Mr. Craft twenty-six
24 times total?

25 A I don't know how many times it was while we was

1 struggling.

2 Q But it's your testimony that you felt, I believe it
3 was, isolated, and that you couldn't leave the scene.
4 Is that correct?

5 A That's right. We were down on the ground rassling and
6 I was getting the knife from him.

7 Q And you testified that your neighbor, Kevin Lavoie,
8 came in with a machete?

9 A That's right.

10 Q And your son-in-law Mark Durham pulled a gun on you?

11 A He come out of the house with a gun is what I said.

12 Q And your wife hit you with a car?

13 A That's right.

14 Q But didn't you keep stabbing Billy Craft as he lay
15 defenseless?

16 A No.

17 Q You stabbed him twenty-six times, though. Correct?

18 A I never stabbed him. I cut him, yes.

19 Q Did you have any cuts from that altercation?

20 A No, I didn't have any.

21 Q And didn't Kevin Lavoie testify that -- on page -- one
22 moment, Your Honor -- page 73. Didn't Kevin Lavoie
23 testify that he only brought the machete to get you
24 to, to get you to quit cutting Billy Craft? Do you
25 recall that?

CROSS EXAMINATION OF BARRY EVANS BY MR. WHITMIRE

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1 A He come over with the machete. I don't remember what
2 he said about it.

3 Q And didn't Christopher Durham testify on page 101 that
4 he only went to get a weapon when you would not get
5 off Billy Craft? Is that correct?

6 A He said he come outside with a weapon.

7 Q And recalling your testimony about Mr. Craft's past
8 violence, on your direct I believe it is, didn't you
9 say -- on page 198, starting at line 3, Your Honor --
10 "Billy cut Ralph Woods. He's always talking about
11 Ralph Woods, that he was such a badass. I showed him
12 when I cut him." Didn't you say that at trial?

13 A I didn't say I showed him. I don't recall saying
14 that.

15 Q And you gave all this information, your version of
16 events, to Mr. Smith in preparation for trial, didn't
17 you?

18 A He asked me if I was guilty of the charges and I told
19 him no. I paid him and left his office.

20 Q And you are claiming you encountered someone you had a
21 history of violence with in the past and now you are
22 just acting in self-defense? Is that what your theory
23 was with Mr. Smith? Wasn't it?

24 A Yes.

25 MR. WHITMIRE: Beg the Court's indulgence.

1 Q Addressing one issue right now, you are alleging today
2 that Mr. Smith was ineffective because you didn't get
3 five months credit for time served. Is that correct?

4 A That's one issue, yes.

5 Q And your trial was in October of 2008?

6 A That's right.

7 Q Are you aware that your SCDC sheet has you listed as
8 incarcerated since I believe it's 5/08?

9 A No, I'm not.

10 Q So, that's what your SCDC sheet reflects.

11 MR. WHITMIRE: It's in your packet, Your Honor.

12 Q So, you aren't getting credit for that as of now.

13 A When did that go on there? It wasn't on there at my
14 annual review.

15 Q Sir?

16 A It wasn't on there at my annual review.

17 Q I'll provide you a copy, Mr. Evans.

18 A I just had my annual review in October. My outdate is
19 August of 2020. That's what was stated on the report
20 at my annual review.

21 Q When they reflected the end date, that would be an
22 issue for SCDC to resolve. Wouldn't it?

23 A That's on the recording from my annual review in
24 October that my outdate is August of 2020. If
25 anything has changed since October at my annual

DIRECT EXAMINATION OF FLETCHER SMITH BY MR. EPPS

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1 review, I haven't been informed of it.

2 Q Do you recall, you testified earlier, didn't Mr. Smith
3 get an acquittal on the ABWIK charge of Kevin Lavoie?
4 Isn't that correct?

5 A The what?

6 Q Not guilty?

7 A It wasn't an ABWIK charge. It was assault with intent
8 to kill. So, the answer would be no.

9 MR. WHITMIRE: No further questions. I'll send you a
10 copy of your sentencing sheet.

11 MR. EVANS: I would appreciate that.

12 THE COURT: Redirect?

13 MR. EPPS: No redirect at this time, Your Honor.

14 THE COURT: All right. You may be excused. Thank
15 you. Call your next witness, please.

16 MR. EPPS: Yes, sir, Your Honor. I would call Mr.
17 Fletcher Smith.

18 (After being duly sworn by the Clerk of Court,
19 **FLETCHER SMITH** testified as follows:)

20 CLERK OF COURT: If you will take the witness stand
21 and state your name, please, sir.

22 MR. SMITH: Fletcher Smith.

23 DIRECT EXAMINATION

24 BY MR. EPPS:

25 Q Mr. Smith, how are you?

- 1 A Doing fine.
- 2 Q As we've been talking about, you represented Mr. Barry
- 3 Evans and his charges at trial in October of 2008.
- 4 Isn't that correct?
- 5 A Yes, it is.
- 6 Q And do you remember when, on or about, you were
- 7 retained?
- 8 A No, I don't. It was somewhere, I think Mr. Evans is
- 9 correct, sometime around July or something of 2008.
- 10 Q Okay. July of 2008?
- 11 A Yes, because earlier his wife came over and talked to
- 12 me. Somebody came and talked to me about representing
- 13 him and I started representing him.
- 14 Q And do you remember if he was out on bond at the time?
- 15 A He was out on bond or we got him out on bond. I don't
- 16 recall the sequence or details of him getting out on
- 17 bond, but I know he came to my office several times.
- 18 Q So, he had been in jail for a period of at least five
- 19 months prior to you representing him. Is that
- 20 correct?
- 21 A That's quite possible. Yes, sir.
- 22 Q How many times did you speak with Mr. Evans prior to
- 23 trial, from the time you were retained to the time you
- 24 went to trial?
- 25 A I didn't chart it, but he came to my office several

DIRECT EXAMINATION OF FLETCHER SMITH BY MR. EPPS

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1 times and also, when we talked about his defense, I
2 couldn't get him to come to the office on several
3 occasions before the trial and then right on the eve
4 of trial, he wrote me a letter on September 17, 2008,
5 telling me what his decision was going to be. He was
6 not a very reliable person coming in when he was
7 wanting to come in.

8 Q And did you ever discuss, did you ever sit down and
9 discuss with him strategy or defenses or ---

10 A Yes, sir.

11 Q When was that?

12 A Some time between the time we were getting ready to go
13 to trial and I'm thinking somewhere around July 14,
14 2008 or sometime before then we got notice from the
15 solicitor's office and sometime before that period of
16 time we actually sat down and went through the
17 discovery, as I recall. Before 2008, the solicitor's
18 office had sent a letter out saying they wanted to try
19 the case. He and I met at a certain point and went
20 over the discovery, talked about the facts and
21 circumstances of the case, then subsequent to that we
22 tried to get him to come in because that trial was
23 postponed and it was going to be held in October.
24 After that, he didn't come into the office and so he
25 sent me a letter on September 17th rather coming to

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1 the office as we requested. He said to me, he says,
2 "I know that the State will take your home and
3 property for narcotics being sold on your property and
4 I know that Billy was coming out there dealing
5 narcotics to Kevin Lavoie across the street from where
6 this incident occurred. Billy Craft sells Percoset
7 every month so he will have money in his pockets. I
8 came into my yard and Billy wants to jump me. He goes
9 to pull a knife and a handgun on me and there's a big
10 fight and now I'm being prosecuted by the State for
11 trying to stop narcotics being sold on my property."
12 This is what he tells me, that he's trying to stop
13 narcotic sales on his property and then when we do
14 have discussions on the eve of trial, his testimony is
15 a little bit different than what his letter is, so you
16 know, I didn't know what Mr. Evans was going to
17 testify to. It was a little different than what his
18 letter said and so what we tried to do, and you'll get
19 into this with the opening statement, but basically, I
20 want to defend him, but the client has got to
21 cooperate, come in and discuss his own case with you,
22 because he had that responsibility, too, but he
23 referred to a letter.

24 Q Okay. And that's fine. I don't have a copy. Do you
25 have a copy of that letter?

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1 THE COURT: I tell you what I'm going to do. I'm
2 going to get the Clerk to make a copy of that and I'm going
3 to make it Court's Exhibit #1 for this proceeding. Would
4 you make Mr. Epps a copy of that letter as well?

5 CLERK OF COURT: Yes, sir.

6 (Whereupon, a letter from Mr. Evans to Mr. Smith is
7 entered into evidence as Court's Exhibit #1, without
8 objection)

9 MR. EPPS: And that's fine, Your Honor. I don't want
10 to object, I would just like a copy of that letter.

11 THE COURT: Sure. Go ahead.

12 MR. EPPS: Thank you, Your Honor.

13 Q You never asked to, did you ever sit and talk about
14 whether or not Mr. Evans would testify or not testify
15 and what that testimony would be?

16 A Yeah, we sat down and talked about what he would
17 testify to, because even, the trial is going to take a
18 few days and stuff like that so we actually talked
19 about what his testimony was going to be, but it was
20 different from what he told me in this letter and so
21 when we got in the trial, he testified different from
22 the letter, but I couldn't tell you what he's going to
23 testify to, because he didn't actually testify to what
24 was in this letter. Do you know what I'm saying? So,
25 it was always up in the air and I like Mr. Evans, I

1 think he's a good personality, but it was kind of up
2 in the air.

3 (Clerk of Court returns with copies of the letter)

4 MR. EPPS: Your Honor, may I take a moment to read
5 this?

6 THE COURT: Certainly. (Mr. Epps looks at document)

7 Q Mr. Smith, we've had a chance to review this letter
8 and Mr. Evans sent you this letter dated September
9 17th, 2008. Is that right?

10 A Yes, sir.

11 Q And a lot of it dealt with Billy Craft selling
12 narcotics to Ms. Evans and the neighbors?

13 A Yes, sir.

14 Q But he also said in that letter he came onto the
15 property and Billy Craft pulled a knife and gun on
16 him. Is that right?

17 A Yes, sir.

18 Q So, the only difference, if there was any difference,
19 it was the reason he was coming onto that property,
20 why he came on that property. Is that right?

21 A Yes, sir.

22 Q Okay. Your defense was, the strategy in this case was
23 self-defense.

24 A Right. And I won on self-defense and a not guilty
25 verdict because the not guilty verdict was the same

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1 charge, same everything, because the jury found him
2 not guilty with regard to the guy threatening him with
3 the machete.

4 Q The assault and battery with intent to kill.

5 A Right.

6 Q That's correct. They found him not guilty on assault
7 with intent to kill, but your testimony is that the
8 strategy on this for Mr. Evans' trial was self-
9 defense.

10 A Correct.

11 Q And as you stated in your opening statements, which is
12 on page -- do you have a copy of the transcript?

13 A Yes, I do.

14 Q Would you look on page 50, please.

15 A Okay. All right, sir.

16 Q If you look at page 50, lines 5 and 6. You told the
17 jury, "We are going to prove to you in this case that
18 he acted in self-defense on that day. Is that right?

19 A Yes, sir.

20 Q Okay. And did you discuss the elements of self-
21 defense with Mr. Evans?

22 A Yes. Duty to retreat and all that, I discussed it
23 with him. That was what our defense was going to be
24 because the whole point was, that was why he was
25 taking the knife away from the guy. When you look at

1 his testimony, this is basically what he said. He
2 took the knife from the guy and he was defending
3 himself from the knife attack on his own property, so
4 yes, that's self-defense. Now, the way we put self-
5 defense to him, I didn't talk in complete legal terms
6 to him, you know, but I said that this is our defense,
7 you have a duty to retreat, you are on your own
8 property, things of that nature and so it was
9 successful with regard to one of the victims in this
10 case, but it just wasn't successful with regard to the
11 other one. And I think the shocking part of it was
12 probably the cuts that Mr. Craft sustained and I don't
13 know if you've seen the pictures where he was cut from
14 ear to ear and even, you know -- it was kind of
15 shocking to the consciousness to actually see the
16 cuts, so the fact is, if the jury had believed that
17 Mr. Evans was acting in self-defense with regard to
18 Mr. Craft, they would have found him not guilty like
19 they did with regard to the other individual.

20 Q Well, let me ask you this. I want to just ask you
21 this. You stated to the jury that you were going to
22 prove that Mr. Evans acted in self-defense.

23 A Yes, sir.

24 Q Now, obviously, you know the burden is on the State to
25 disprove self-defense by beyond a reasonable doubt.

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1 You understand that, right?

2 A Correct.

3 Q And self-defense is no longer an affirmative defense
4 that has to be proved by a preponderance of the
5 evidence by the Defendant. Right?

6 A Yes, sir.

7 Q Do you not think that's a problem?

8 A No. Because if you understand my background, I win
9 more cases by taking the burden of proof and proving
10 it and the kick to it is, I went to the University of
11 Virginia seminar talking about Judge Histern who was a
12 federal prosecutor and a United States District Court
13 Judge. In criminal cases that the defendant relies on
14 in opening statements on the presumption of innocence
15 and things of that nature, the defendants usually
16 lose. The judge is going to direct anything the
17 lawyer does subsequently in his jury charge, so
18 anything that I may say in opening statement, the
19 judge is going to correct it two times. Whatever he
20 says in an opening statement is not fact. It's an
21 opening statement. These are opening arguments. And
22 number two, when we get down to the conclusion of the
23 trial, I can actually say to the jury, "We proved to
24 you that Mr. Evans was not the aggressor in this, that
25 so-and-so was and things of that nature and then I've

1 made a bond with the jury at that point and then at
2 that point when the judge actually charges the jury he
3 knocks out all the arguments that were made by counsel
4 and tells the jury that they can only believe what
5 comes from the witness stand. And it worked with
6 machete guy. It just didn't work with the other one.

7 Q I understand. Let me get your testimony correct. I
8 want to get it correct. Your strategy is, you take
9 the burden. Is that right?

10 A Yes, sir.

11 Q You tell the jury, you take the burden, so you are
12 saying you, in essence, you are shifting the burden
13 onto the defendant. Is that ---

14 A No ---

15 Q --- now, I'm going to ask you a question. You are
16 saying that it's our burden, we are going to prove
17 this to you and then the judge negates all that by his
18 charge. Is that correct?

19 A That's correct.

20 Q That, that, you are saying that settles any, or that
21 cures any ---

22 MR. WHITMIRE: Objection. Leading question.

23 Q Is it your testimony that any, any burden shifting
24 that may have occurred was by your making those
25 statements to the jury?

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1 A Yes.

2 Q Okay. You don't think that's a problem?

3 A I don't think it shifts the burden, because the judge
4 tells the jury throughout the course of the trial that
5 it's a burden of the State to prove the guilt of the
6 defendant beyond a reasonable doubt.

7 Q I understand that. I understand that. But you
8 testified on taking the burden.

9 A Right. But the burden doesn't hurt me because of the
10 fact -- now, if it was a civil case and the judge told
11 them whatever the lawyers say in opening statement,
12 ladies and gentlemen of the jury, this is an admission
13 of counsel and his client has shifted the burden onto
14 himself, then that would be one thing, but that's not
15 what we did in this case.

16 Q But you understand that you are looking at, that you
17 are taking that strategy and Mr. Evans is looking at
18 twenty years in prison for assault and battery with
19 intent to kill?

20 A Right.

21 Q Do you understand that?

22 A But if I had taken your strategy, he would have been
23 convicted on both of them.

24 MR. EPPS: I object to that statement, Your Honor.

25 It's not responsive to my question.

1 THE COURT: That's all right. I can ferret through
2 everything. Thank you.

3 Q All right. Now, I'm going to move on. Also, you
4 testified you told the jury on page 51, if you look on
5 lines 11 and 12, we are going to prove to you, ladies
6 and gentlemen of the jury, that he is not guilty of
7 assault and battery with intent to kill.

8 A Yes, sir.

9 Q Okay. I don't think anywhere, can you show me
10 anywhere in your opening statement that you said
11 anything about the neighbor?

12 A I didn't have to.

13 Q Did you say we're not going to, we're going to prove
14 to you that this was not assault but attempt to kill?

15 A No.

16 Q In fact, one of the indictment charges against Mr.
17 Evans in that trial was malicious injury to property.
18 Did you not move during the directed verdict stage to
19 dismiss the malicious injury to property charge?

20 A Whatever the record reflects.

21 Q And the State noted that they were not going forward
22 on that charge. Correct?

23 A I believe so.

24 Q All right. Now, let's go, the first witness that was
25 called by the State was Ms. Janice Lavoie. Right?

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1 A Yes, sir.

2 Q And she testified, she testified -- if you'll look at
3 page 58 or the transcript, please.

4 A Yes, sir.

5 Q And if you'll look at lines 5 through 11. Her
6 testimony was, and she's talking about Linda Evans,
7 right?

8 A Yes, sir.

9 Q She's talking about watching this incident go down as
10 it happened. Is that right?

11 A Yes, sir.

12 Q Okay. And she said, "Linda got out of the car, ran to
13 the middle of the road, then laid down and yelled,
14 'Help, help, he's killing him, he's killing him, call
15 911'". Is that right?

16 A Yes, sir.

17 Q Did you make any objection to that hearsay statement
18 coming in?

19 A No, because it's a hearsay statement that would have
20 come in under excited utterance.

21 Q Okay. But you didn't raise that objection or try to
22 raise it at all?

23 A I tried during the course of the trial not to make
24 superfluous objections and sometimes you can turn the
25 jury against you if you make objections that are

1 superfluous with evidence that you know will come in,
2 in the first place, and then if you are on appeal,
3 then it's harmless error with regard to that
4 particular with the judge. When it gets to appeal, of
5 course, they are going to say it was in the discretion
6 of the judge and usually that kind of stuff is going
7 to be upheld, so I didn't make an objection to that.

8 Q Well, that statement was stated, that hearsay
9 statement was stated at least four times during the
10 trial, I believe, from Ms. Janice Lavoie and Kevin
11 Lavoie. Is that correct?

12 A Yes, sir.

13 Q And that, specifically, was on page -- Janice was on
14 page 58, 73 was Mr. Kevin Lavoie. Is that right?

15 A You probably have it.

16 Q If you would look at page 73, please, lines 23 and 24.
17 Lines 3 and 4, I'm sorry. But he makes that same
18 hearsay statement, "Linda keeps screaming, 'He's
19 killing him, he's killing him'". Correct?

20 A Yes, sir.

21 Q It's said again on 75. Is that right? Lines 23 and
22 24.

23 A Yes, sir.

24 Q He says it again, that Linda said, "He's killing him,
25 he's killing him." Also, that statement was testified

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1 to by Mr. Kevin Lavoie on page 81, lines 7 and 8.

2 A Okay, sir.

3 Q Again, you didn't object to any of those statements
4 coming in?

5 A No, sir.

6 Q Do you think those statements coming in as hearsay
7 statements affected or had an effect on the trial to
8 the jury?

9 A Well, you know, I don't know. I can't read the jury's
10 mind, but my take on it was they found him not guilty
11 against Mr. Lavoie, there was probably a credibility
12 problem with the Lavoies. They were involved with
13 drugs. You know, I just don't think it was going to
14 determine it.

15 Q Well, you said you don't know, but yet, I think the
16 testimony previously was that they found him not
17 guilty and you thought self-defense worked on assault
18 with intent to kill. Was that your testimony?

19 A Yes.

20 Q But you don't know that.

21 A That's true.

22 Q Maybe the State didn't prove that charge beyond a
23 reasonable doubt. Right?

24 A That's a possibility.

25 Q And would you agree that ---

1 MR. WHITMIRE: Objection. Leading.

2 THE COURT: It's not leading. He's an adverse party,
3 but I'll ask that you move on. I'm familiar with all this.

4 MR. EPPS: Yes, sir.

5 Q The State had this Linda Evans under subpoena. In
6 fact, the State said they were not going to call her
7 because there were physical and mental reasons. Is
8 that correct?

9 A Yes.

10 Q And Judge Nicholson said that the doctor that wrote
11 that couldn't make that statement and he needed to get
12 a competency evaluation.

13 A That's true. But we didn't want her testifying for us
14 either.

15 Q She ran over Barry.

16 A That's true, but she would have done more damage to
17 Barry, and he knows it, than good for him in this
18 case. So, my strategy was not to call his wife to the
19 stand.

20 Q Well, if the State were to come in, "He's killing him
21 and she ran him over with the car, that they were
22 trying to kill him," and if there was an issue as to
23 her competency, you didn't think that might be
24 important in this case?

25 A No, not with her testifying.

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1 Q Did you talk to her?

2 A Yeah, I talked to Ms. Evans a lot in this case. See,
3 that's the point. She didn't want to testify at all
4 because she knew she was going to hurt her ex-husband.
5 I didn't subpoena her. The State was trying to force
6 her to testify and on the day she was up there, she
7 fell out while they were holding her incommunicado in
8 another room, so I most certainly didn't want Ms.
9 Evans testifying in Mr. Evans' case.

10 Q But there was a request by the judge to have a
11 competency evaluation. Correct?

12 A Yes.

13 Q And you never raised that, never objected, never asked
14 the Judge to order one. Correct?

15 A Well, she wasn't going to be my witness so it was no
16 need for me to ask for her to go for a competency
17 hearing. That wasn't my strategy. She would have
18 hurt, based on the discovery that we had, she would
19 have had to have testified that she ran into Mr. Barry
20 and held him against the wall of the side of the house
21 so he couldn't kill this man. That's what she would
22 have testified to. She didn't want to have to get up
23 there and say that she stopped him from trying to kill
24 him.

25 Q Okay. All right. And y'all had a bench conference

1 and nothing else was put on the record. Is that
2 right?

3 A Yes, sir. Nothing was put on there.

4 Q Now, there were two 911 tapes that came into evidence.
5 Did you object to any, did you object on the grounds
6 of proper foundation ---

7 A No, sir.

8 Q --- of the tapes?

9 A No, sir. I didn't.

10 Q Is there any reason why you didn't make that
11 objection?

12 A Those tapes would have come in anyway.

13 Q Now, do you know -- did the State ask questions
14 whether or not -- the 911 operator was not there.
15 Right?

16 A Not there.

17 Q They were not there to testify as to the tape or if
18 the -- whether they had been changed or anything of
19 that nature. Correct?

20 A Correct.

21 Q And the only way these tapes came in was because
22 Lavoie and Durham said, "Yeah, that's my voice on the
23 tape."

24 A That's correct.

25 Q And you thought that was a proper foundation and

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1 authentication of that tape, that 911 tape to come in?

2 A To foundate some evidence, different judges have
3 different standards, of course. If somebody can
4 recognize their voice on a tape, that's enough to
5 authenticate the tape. If, in fact, they did, and I
6 don't have the transcript in front of me, but the fact
7 they did authenticate that was their voice on the
8 tape, I don't see any problem with it coming in. It's
9 not some heavy burden they did, something to have to
10 authenticate it.

11 Q I understand that, but they didn't have the operator
12 there and there were no questions regarding whether,
13 about the recording device, whether the operator was
14 competent to operate the device, whether the recording
15 was an authentic record. Nothing of that nature,
16 correct?

17 A That is correct, but the caveat there is you spend
18 time raising an objection for something that people
19 already authenticated what their voice is. Why would
20 I have to bring somebody in when I know they knew how
21 to operate it or they would have realized they didn't
22 have the tape in the first place?

23 Q But that's not -- I understand ---

24 THE COURT: Hang on. Let me stop you. Do you have
25 any evidence that there has been tampering or anything done

1 to the tapes otherwise than what was actually presented in
2 court?

3 MR. EPPS: No, sir.

4 THE COURT: All right. Let's move forward.

5 MR. EPPS: Yes, sir.

6 Q One more quick question. Were there other voices on
7 that tape?

8 A I don't recall, sir. I mean, this has been about five
9 years ago. Possibly, it could have been other voices
10 on there.

11 Q But there never was any objection raised regarding any
12 hearsay statements obtained on those two tapes?

13 A Probably not, but you know, again, you've got people
14 with guns, people with knives, people running over
15 people, people excited out there. You've got excited
16 utterances, you've got exceptions to the hearsay rule
17 all the way out.

18 Q Okay. Mr. Smith, you also -- Billy Craft testified.
19 Right?

20 A Yes, sir. He testified.

21 Q And he testified that Mr. Evans attempted to beat him
22 with an iron rod and jabbed it in him, page 120 of the
23 transcript.

24 A Yes, sir.

25 Q Did you make any objection to that statement?

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- 1 A No, I didn't make an objection.
- 2 Q And do you remember Deputy Holbrooks testifying?
- 3 A I'm certain that he did. I see his name on the
- 4 transcript.
- 5 Q And do you remember when Deputy Holbrooks testified on
- 6 page, I think it's 156 of the transcript?
- 7 A Okay, sir.
- 8 Q One fifty-six of the transcript. I think it's lines
- 9 19 and 20.
- 10 A Okay, sir.
- 11 Q And Deputy Holbrooks testified that he was told by
- 12 John that Mr. Evans ran into the back yard and jumped
- 13 the fence. You didn't make any objection to that
- 14 statement. Did you?
- 15 A No, sir. I didn't.
- 16 Q Couldn't that be evidence of flight, detrimental to
- 17 Mr. Evans? Correct?
- 18 A It could have been. Yes, sir.
- 19 Q All right. Now, then that was the conclusion of the
- 20 State's case and you had two witnesses. Is that
- 21 right?
- 22 A I believe so. Mr. Evans and -- would you refresh my
- 23 recollection on that?
- 24 Q Mr. John Johnson?
- 25 A John Johnson. Correct.

1 Q Now, Mr. Tony Martin was a witness and with Mr. Evans
2 when this happened. Right?

3 A I don't know. I don't recall.

4 Q Okay. Tony Martin wasn't there?

5 A No.

6 Q He was out of town?

7 A Yes, sir.

8 Q Was he in Florida?

9 A He could have been. I don't know exactly where, sir.
10 Mr. Evans testified he was in Florida. I think he did
11 tell me he was in Florida.

12 Q Did you ever talk to Mr. Martin?

13 A No. I never talked to Mr. Martin.

14 Q But there was testimony that he saw what happened, he
15 was there.

16 A Yes. Quite possibly he saw it.

17 Q Do you think he could have been a material witness for
18 Mr. Evans?

19 A I don't know if he would be material. He could have
20 been a witness for Mr. Evans. How material, I don't
21 know.

22 Q Okay. But you didn't talk to him?

23 A No, sir.

24 Q And I think it's undisputed testimony when he came to
25 trial that he was there or he was with Mr. Evans when

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1 Mr. Johnson -- when this took place.

2 A Well, I don't know if it was disputed or undisputed,
3 but he was not there at the trial -- I didn't talk to
4 him. He wasn't at the trial available to be a witness
5 and I wouldn't have had an opportunity to speak with
6 him anyway because he was already in Florida.

7 Q In Florida as, he was in Florida for a funeral. You
8 didn't make a motion for a continuance or anything
9 like that. Right?

10 A Right. But I didn't see anything in this man's letter
11 indicating Mr. Johnson. Do you know what I'm saying?

12 Q Okay. But he didn't have to put it in a letter. Did
13 he?

14 A Well, I would have liked to have known all the
15 witnesses. I called exactly the people that he told me
16 to call and I talked to his wife and I talked to his
17 son-in-law, Mr. Durham, so I talked to all the
18 witnesses that could have, potential witnesses for his
19 case. I never did get to talk to this other
20 individual who was in Florida, nor did I know about
21 that individual, but I did talk to all these people on
22 the stand. I did talk to his wife. I talked to his
23 daughter and I talked to his daughter's husband, who
24 was the guy with the gun.

25 Q Okay.

1 A And I had discovery.

2 Q Okay. Now, on the direct, on Mr. John Johnson, he said
3 that Mr. Craft was the one who had the weapon, not Mr.
4 Evans. Is that right?

5 A Yes. That was his testimony.

6 Q Now, on page 179. If you would look on page 179,
7 please.

8 A Yes, sir.

9 Q One seventy-nine, if you look at lines 17 and 18, you
10 ask Mr. Johnson, you said, "Now, when they got in a
11 fight, there was a mutual combat between the two of
12 them." I assume that was Mr. Evans and Mr. Craft. Is
13 that right?

14 A Yes.

15 Q And at that point in time, that was after you had
16 raised the issue of mutual combat?

17 A Yes, I did.

18 Q Okay. Now, you are aware of the case of State versus
19 Taylor?

20 A Yes, sir.

21 Q Okay. And that basically says that any mutual self-
22 defense or mutual combat or mutual combat negates the
23 defense of self-defense. Is that correct?

24 THE COURT: There is also a case that says that mutual
25 combat and self-defense are not necessarily mutually

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1 exclusive.

2 MR. EPPS: Yes, sir. State versus Jackson.

3 Q But you raised mutual combat as an issue. Did you
4 know at the time that conflicted with the defense of
5 self-defense?

6 A Yes, sir. I knew -- well, yes, sir, I knew. Yes,
7 sir.

8 Q Okay.

9 A Well, not conflict, but it could be -- okay. These
10 people had a history of violence toward each other and
11 it centered around Mr. Evans right here. Mr. Evans
12 doesn't like the other guy and his wife and the other
13 guy didn't like Mr. Evans. And they have a history of
14 drugs. All these people like drugs. So, drugs, sex,
15 violence, all came into play in this thing and the
16 people who -- there was a fight between these two
17 individuals. Mr. Evans says the guy was trying to cut
18 Mr. Evans and the guy says Mr. Evans cut him and so,
19 to me, that was mutual combat.

20 Q But you realize you told the jurors that you were
21 going to prove self-defense.

22 A Yes, sir. And in my closing statement, I don't think
23 I mentioned mutual combat in my closing statement. I
24 don't believe I did. I think I did say I proved self-
25 defense.

1 Q Now, then I believe you go into the jury charge and if
2 you'll look at 241.

3 A Yes, sir.

4 Q Two forty-one, line 10. Malice may be an
5 afterthought.

6 A That's got to be a typo.

7 Q I understand. That's what's in the record.

8 A I mean the transcript. From my experience, I don't
9 know how well you know Judge Nicholson. He was a very
10 meticulous judge.

11 A Yes. Absolutely.

12 A I don't think he would have charged malice.

13 Q I understand. That's what is in the record. If it
14 was said by mistake or something to that effect, you
15 would have had an objection to that phrase. Right?

16 A I probably would have. Yes.

17 Q Now, also, in the charge of ABWIK, assault and battery
18 with intent to kill, on page 242.

19 A Yes, sir.

20 Q Two forty-two, if you look at 15-22, that is assault
21 and battery with intent to kill, a specific intent is
22 not essential.

23 A Yes, sir.

24 Q All right. There's got to be some general intent.

25 A Yes, sir.

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1 Q Proof of a specific intent to take life is not
2 necessarily required as long as there is intent to
3 commit grievous bodily injury such had death occurred,
4 the offense could have been murder. Would you agree
5 that general intent is meant as general intent to
6 kill? Not a specific intent to kill, but a general
7 intent to kill. Do you agree with that?

8 A Yes.

9 Q Based on that charge and general intent to injure
10 someone or general recklessness, did you believe it to
11 be -- you didn't object to that charge.

12 A No, I didn't.

13 Q Do you believe you should have?

14 A No.

15 Q Why not?

16 A I didn't think it was an error.

17 Q Also, he charged that malice -- malice is the
18 question. Do you agree that the main issue in this
19 case, at issue in this case, was the presence or
20 absence of malice?

21 A I think it was one of the issues in this case.

22 Q You also got charged ABHAN, a lesser included offense
23 of ABWIK.

24 A Yes, sir.

25 Q So, malice is a big issue. Right?

1 A Yes, it's a big issue.

2 Q And also, the issue of self-defense?

3 A Yes, it's a big issue.

4 Q All right. Or the defense of self-defense. Now, the
5 judge in this case argued or charged that an
6 indication of malice may arise from the use of a
7 deadly weapon such as a knife, pistol, dagger or some
8 other weapon of that nature when used with the intent
9 to injure another calculated to produce a death or
10 serious bodily harm. That's page 242, lines 4-8.

11 A Okay, sir.

12 Q And that was charged again on a re-charge of ABWIK and
13 there was no objection to that charge. Correct?

14 A Right.

15 Q Okay. Have you ever previously objected to malice
16 being implied by the use of a deadly weapon?

17 A No, not before. The law has changed since ---

18 Q I understand the law, Belcher changed it, but there
19 was a case State versus Tate in 2002 and it was a
20 post-conviction relief case and I'll hand you a copy
21 if you would like to look at the copy. (Hands a
22 document to the witness)

23 THE COURT: I tell you what. While you are doing
24 this, it's two minutes to one. I'm going to take a break
25 now. We'll be back at 2:00. Mr. Smith, you can't talk

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1 about your testimony with anyone. We'll come back at 2:00
2 and finish up.

3 MR. SMITH : Yes, sir.

4 (Lunch Break)

5 THE COURT: Mr. Epps, are you ready to proceed?

6 MR. EPPS: Yes, sir, Your Honor.

7 CONTINUED DIRECT EXAMINATION

8 BY MR. EPPS:

9 Q Mr. Smith, how are you?

10 A Fine, thank you.

11 Q Did you have a good lunch?

12 A Well, yes, it was good.

13 Q I passed up the case of Tate versus State. Have you
14 had a chance to review that?

15 A Yes, I did.

16 Q And that case is pre State versus Belcher. Is that
17 correct?

18 A Yes, sir.

19 Q It was a 2002 case.

20 A Yes, sir.

21 Q And that case involved an individual going in a motor
22 hotel or motel and shooting the clerk and trying to
23 get out and shooting a dog and, I think, somebody else
24 in the leg. Is that correct?

25 A That's correct.

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1 Q And there was a jury charge regarding the, that you
2 can infer malice from the use of a deadly weapon in
3 that case. Right?

4 A Yes, sir.

5 Q And in that case, there was a failure to object
6 regarding that charge being an unconstitutional burden
7 shifting instruction. Is that right?

8 A Correct.

9 Q And, in fact, that court in 2002 finds that, and that
10 was the Supreme Court, found that charge was erroneous
11 as to the assault and battery with intent to kill
12 charge. Right?

13 A Correct.

14 Q All right. And basically granted the PCR, the
15 applicant's relief on that issue.

16 A Yes, sir, and the way I read the case is, when the man
17 shot inside the building he didn't know who he was
18 shooting at, so therefore, the unconstitutionality of
19 the charge did not spill over to the murder, because
20 the man actually pointed the gun at the woman, Ms.
21 DeBelli and shot and killed her, I guess, in an
22 attempted robbery. The Court also indicated in that
23 case the reason why it was harmless error and so the
24 constitutional issue, if it was a constitutional issue
25 on the one, I don't see how it could have been on the

1 other. The Court said it was harmless because it was
2 a substantial amount of evidence showing malice in
3 another way and so even though the charge may have
4 been erroneous with regard to the inferred malice, the
5 Court noted that the intention of shooting -- in my
6 case here, I think, is distinguishable because of the
7 fact I've got a guy that's been cut 26 times.

8 Q Okay. Let me ask you, to be clear, I mean, the Court
9 found there was no error as to the murder charge, but
10 it was error to fail to object to that inference of
11 malice through the use of a deadly weapon on the
12 assault and battery with intent to kill charge.
13 Correct?

14 A Yes, sir.

15 Q And it reversed the conviction as to assault and
16 battery with intent to kill.

17 A Right. But ---

18 Q Because malice was an issue with regards to that
19 charge.

20 A Yes, sir, but ---

21 Q Do you agree that malice ---

22 THE COURT: Hang on. Let him explain his answer.

23 A They said in that case, the defendant may have been
24 convicted of assault and battery of a high and
25 aggravated nature regardless of whether malice was

1 present and my reading of the judge's charge in my
2 case with Mr. Evans, the Judge, on page 244, when he
3 charges the jury he says, "In other words, the
4 presence or absence of malice alone would not
5 determine whether the Defendant is guilty of assault
6 and battery of a high and aggravated nature. So, the
7 Judge is telling the jury right then the absence or
8 presence of malice in the assault and battery with
9 intent to kill is not dispositive of whether the man
10 is guilty or innocent of the assault and battery of a
11 high and aggravated nature. As a matter of fact, he
12 says, "if you, the jury, find the Defendant is not
13 guilty of assault and battery with intent to kill, but
14 the State has proven beyond a reasonable doubt the
15 Defendant committed assault and battery in
16 circumstances of aggravation in the case, then the
17 Defendant would be guilty of assault and battery of a
18 high and aggravated nature." I think Judge Nicholson
19 went out of his way to specifically find these two
20 crimes are specifically different. In the other
21 cases, it doesn't appear that the trial judge, Judge
22 Epps, did that. He kind of comingled them together
23 and we don't have the benefit of the entire charge.
24 Otherwise, the Supreme Court, in my opinion, would
25 have said that the malice charge and murder charge

1 would have been not dispositive.

2 Q As you said, the charge was not contained in the case
3 and we don't, you don't know. Right?

4 A Right.

5 Q And also, you know that on page 244 with regards to
6 the charge on ABHAN, he also continued on with, he
7 also continued on with the language that malice is not
8 present with assault and battery of a high and
9 aggravated nature. Okay? We understand that, right?
10 It also went on the say that assault and battery
11 aggravated can also give rise to the inference of
12 malice.

13 A Where do you see that?

14 Q That's on page 244, lines four and five.

15 A Assault and battery, five and six.

16 Q Four and five.

17 A All right.

18 Q Do you agree with that concept?

19 A Yeah, I agree with that concept.

20 Q Okay. Did you think that, did you feel it necessary -
21 - you didn't object to any reference of assault and
22 battery of a high and aggravated nature giving rise to
23 the inference of malice?

24 A Well, the way I heard the charge and I may have made a
25 mistake when I was listening to it, because in this

1 last sentence he says, "In other words, the presence
2 or absence of malice alone will not determine whether
3 the Defendant is guilty of assault and battery of a
4 high and aggravated nature." It looks like he
5 corrected that part. It also looks like these are
6 typos, because when you look at two, he says,
7 "However, the presence of malice does not "present"
8 and I don't think he would have used the word
9 "present" in his charge, you know. And there's
10 another place where he says, "afterthought", so I
11 don't know if the record accurately reflects what the
12 Judge said in that part.

13 Q Let me ask you this: It's not contained in the
14 record, but did you request the charge on mutual
15 combat?

16 A No, I don't believe so. And the other thing that I
17 would like to clarify, too, I think, I didn't request
18 a charge, I don't believe, on mutual combat. I went
19 back and reviewed this transcript. I did object to
20 the first 911 tape and that's on page 60 and in pre-
21 trial motions, I also objected to it and when the
22 Judge made his first ruling, I didn't think it
23 necessary to object anymore to the 911 tapes, because
24 he later specifically remarked on the testimony
25 earlier, that the voice was sufficient ---

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1 Q I understand, but there was never any questioning of
2 the authentication. Correct?

3 A Correct. I mean, I objected to it, I'm certain.

4 Q I understand. I want to go back to, you stated in
5 your closing argument, in your closing argument on
6 page 215, you note to the jury that the Judge is going
7 to charge assault and battery with intent to kill,
8 assault and battery of a high and aggravated nature
9 and he's going to charge you on mutual combat and he's
10 going to charge you on self-defense. Right?

11 A Yes.

12 Q Okay. And then, you also state on 216 that we didn't
13 hide behind the standard of reasonable doubt. We
14 didn't hide behind the standard of presumption of
15 innocence. That was your statements to the jury.
16 Correct?

17 A Yes, sir.

18 Q Did you, did you find it necessary to state that to
19 the jury?

20 A Again, I think it was good strategy, because he was
21 found not guilty on one of the charges. Am I
22 incompetent to have the strategy that finds him not
23 guilty on one charge? I think that was pretty
24 competent because the jury found him not guilty, so we
25 can argue back and forth as to whether or not my

1 strategy is wrong, but I don't think it falls below
2 the standard of care.

3 Q Okay, but I'm asking you here about one of the charges
4 of assault and battery with intent to kill and
5 possession of a weapon during a violent crime.

6 Correct?

7 A Yes, sir.

8 Q Okay. Now, on the -- but you argued also in your
9 closing as well you argued in the beginning that your
10 defense was self-defense. Correct?

11 A Yes. But I think you have to, in argument, you have
12 to anticipate what your brother or sister on the other
13 side is going to say and so you want to make sure you
14 cover all the bases.

15 Q I understand that. So, you didn't request the charge
16 of mutual combat?

17 A I don't believe so. If it's in the record, I did. If
18 it's not in the record, I didn't. I didn't read the
19 entire ---

20 Q That portion was not in the record, so I didn't know
21 who ---

22 A We probably had a conference before we did the jury
23 instructions. Sometimes the judge will say, "I'm
24 going to charge this and this and this," and the
25 prosecutor and I say okay and then we go back to our

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1 respective, make our arguments and the judge charges
2 what he probably told us in the conference.

3 Q Okay. But you, you did request the charge or you
4 don't remember if you requested the charge?

5 A I don't think I did, but I think I addressed it in my
6 closing statement because I knew it was going to come.

7 Q All right. Did you note an objection to the charge?

8 A No, I didn't.

9 Q Okay. And when Judge Nicholson gave the charge of
10 self-defense, if you'll look on page 246, please.
11 Page 246.

12 A Okay.

13 Q Looking on line seven, that's when Judge Nicholson
14 charged the jury on the defense of self-defense.
15 Right?

16 A Line seven. Okay, well, I think he starts on page
17 246. On page 246 he says, "There are four elements
18 required by law to establish what is referred to as
19 self-defense. First, the Defendant must be without
20 fault in bringing on the difficulty."

21 THE COURT: I've read it. Let me just say this. I've
22 read the charge on this including mutual combat. I'm
23 denying your motion on that. That is almost verbatim to
24 the charge presently charged. I will let you address it,
25 but I don't need to hear any more testimony on that. Okay?

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1 MR. EPPS: Okay.

2 THE COURT: Would you go forward on your next issue,
3 please?

4 MR. EPPS: Yes, sir.

5 Q I believe the next issue was, after the jury came
6 back, the jury found Mr. Evans guilty of assault and
7 battery with intent to kill and possession of a weapon
8 during a violent crime and he was sentenced, correct?

9 A Yes, sir.

10 Q Did you raise an issue to the trial court, the issue
11 regarding Mr. Evans receiving credit for any time
12 served prior to the trial?

13 A No, sir. I don't believe I did.

14 Q Okay. All right.

15 MR. EPPS: Will the Court grant me one minute?

16 THE COURT: Yes, sir

17 (Mr. Epps confers with Mr. Evans)

18 Q All right, Mr. Smith. I have no further questions at
19 this time. Please answer any questions opposing
20 counsel may have.

21 A Yes, sir.

22 THE COURT: Cross examination.

23 MR. WHITMIRE: May it please the Court.

24 THE COURT: Yes, sir.

25 CROSS EXAMINATION

CROSS EXAMINATION OF FLETCHER SMITH BY MR. WHITMIRE

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1 BY MR. WHITMIRE:

2 Q A brief moment, Mr. Smith. I'm just going to ask you
3 a few basic questions for the record and I will follow
4 the questions on allegations, I believe. "K", "F",
5 and the Tate issue.

6 A I don't have those.

7 Q Oh, it's for the Court's knowledge. When were you
8 appointed or retained to represent Mr. Evans?

9 A I don't know the exact date. Mr. Evans requested, I
10 think it's in the file somewhere down the road, and I
11 gave him information. I'm sorry. I don't know.

12 Q Okay. And you investigated every possible witness
13 that Mr. Evans asked you to investigate?

14 A Every witness that he told me about, I talked to.

15 Q Did he offer you any defenses besides what is on the
16 record today that he wanted you to look at?

17 A No defenses.

18 Q And did you have a chance to discuss trial strategy
19 prior to trial?

20 A I did and Mr. Evans is pretty familiar with the court
21 system. This wasn't his first rodeo and so we
22 discussed strategy and self-defense and we felt self-
23 defense was going to be the key issue.

24 Q Regarding the issue of State v Tate that opposing
25 counsel submitted to the jury, the State v Tate issue

1 was presumption of innocence. Is that right?

2 A Correct.

3 Q And there's a difference or we wouldn't need Belcher?

4 A Right. And see, I let the judge make all those
5 decisions.

6 Q And you said harmless error analysis. And regarding
7 issue "F", the issue of flight. I believe the
8 allegation, again, the record, if you look at lines 21
9 through ---

10 THE COURT: What page?

11 MR. WHITMIRE: I apologize. One fifty-six and fifty-
12 seven, lines twenty-one through line seven.

13 A What line, sir?

14 Q Line sixteen on page 156 through line 9, I apologize,
15 on 157.

16 A Okay.

17 Q I believe the allegation was that you failed to object
18 to testimony regarding flight. Is this evidence of
19 flight, the context of the next paragraph?

20 A "Received a call that Mr. Evans was at the incident
21 location at . Along with a deputy responded
22 to that location and Mr. Evans jumped, ran into the
23 backyard and jumped the fence." Is that it?

24 Q Secured yard and it goes on and on and then starting
25 line two, he says, "Myself, I run around, I believe

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1 the left side of the house and Deputy Williams went
2 around the right side of the house and there was a
3 black car in the roadway, continuing, Mr. Evans showed
4 they were looking for him That's not evidence of
5 flight. Is it?

6 A No.

7 Q In fact, that would help your case because he was
8 trying to find them when they had bad information. I
9 missed the context and I apologize. And the last
10 thing I want to address with you, the allegation of
11 ABWIK and ABHAN. At the time, the old ABWIK charge
12 didn't require general intent?

13 A No, it didn't.

14 Q It wasn't a specific intent charge, was it?

15 A No, sir.

16 Q And ABHAN is a lesser included of ABWIK. Correct? Or
17 it was?

18 A Yes, sir. They've changed it now to attempted murder
19 or something.

20 MR. WHITMIRE: No further questions, Your Honor. I
21 appreciate

22 THE COURT: Any redirect?

23 MR. EPPS: No redirect, Your Honor.

24 MR. WHITMIRE: Yes, Your Honor.

25 MR. EPPS: Yes, sir, Your Honor.

1 MR. SMITH: Thank you, Your Honor.

2 THE COURT: Yes, sir. Any other witnesses?

3 MR. EPPS: One moment.

4 THE COURT: Yes, sir.

5 (Mr. Epps confers with Mr. Evans)

6 MR. EPPS: No further witnesses, Your Honor.

7 THE COURT: Are you calling any witnesses?

8 MR. WHITMIRE: The State rests, Your Honor.

9 THE COURT: Very good. Mr. Epps, briefly, I'll be
10 glad to hear from you.

11 MR. EPPS: Yes, sir, Your Honor. May it please the
12 Court. We request the Court grant the Applicant's
13 application for PCR on several grounds, Your Honor. I
14 believe that counsel, for one, was ineffective or could
15 have effectively or reasonably determined or reasonably
16 affected proceedings or the outcome by, number one, at the
17 outset, coming out of the gate telling the jury that,
18 "We're going to prove to you self-defense. We're going to
19 prove that Mr. Evans is not guilty." I believe, that, Your
20 Honor, specifically that we are going to stand behind his
21 closing argument, we're not going to stand behind
22 presumption of innocence, we're not going to stand behind
23 the reasonableness, the standard of reasonable doubt. That,
24 your Honor, we believe is a problem particularly when Mr.
25 Evans in this case was looking at ABWIK and assault with

1 intent to kill and looking at possession of a weapon during
2 a violent crime. Twenty years on assault and battery with
3 intent to kill plus a potential five year consecutive
4 sentence with possession of a weapon during a violent
5 crime. We believe that is error and as his testimony said,
6 as Mr. Smith said, "I'm not going to hide behind that. Put
7 the burden on me and let the judge fix it during the jury
8 charge." Your Honor, again, we believe, that that fell
9 below the standard of care. We believe that that fell
10 under the offense of substandard norms and believe that is
11 not good trial strategy. We believe that his failure to
12 object along with that, the failure object to hearsay
13 statements at least four times of Linda Evans saying, "He's
14 killing him," with the absolute no objection or not even an
15 objection pursuant to 403 so the trial court could do an
16 analysis, prejudicial to probative analysis pursuant to
17 403, that was never done and particularly with malice, he
18 testified that malice was a big issue in this case. Malice
19 was, in the assault and battery with intent to kill, malice
20 was the main issue. When you've got statements coming in
21 from Linda Evans and then the issue about competency
22 evaluation, by being on subpoena, by having her come into
23 court and have Judge Nicholson order a competency
24 evaluation regarding to testify and nothing was said about
25 that, done about that on the defense side. We believe

1 that's an issue, particularly hearsay statements that had
2 come in and what was, what was given to the jury at the
3 very outset of this case, again, the 911 tapes, I
4 understand that they came in because the neighbor and the
5 son-in-law identified their voices, but I don't believe --
6 in the transcript there was no objection and no analysis
7 regarding laying a proper foundation or authentication.
8 Absolutely, if I had a statement on a 911 tape from the
9 testimony it seemed like there was a whole bunch of
10 testimony on those tapes that could very well be
11 prejudicial and maybe were prejudicial with regards to Mr.
12 Evans and the trial of this case. We believe that he was
13 ineffective for not objecting to Billy Craft's testimony,
14 that the Defendant or Mr. Evans had beat him previously
15 with an iron and had jabbed it in him. We believe that
16 Deputy Holbrooks testimony was hearsay that somebody else
17 told him that he was running. He jumped over the fence and
18 ran, but that's evidence of flight and could be prejudicial
19 that the jury heard that. There as no objection to that.
20 We also, Your Honor, I believe in State versus Tate, that
21 even though this was prior to State versus Belcher, I think
22 this issue came up with the malice and it deals with malice
23 and Mr. Smith, respectfully, he testified they issued a
24 charge regarding malice. When you have a melee, you have
25 a, whether it was self-defense or what, you had people, you

1 had Mr. Craft who got very badly injured, you had the
2 neighbor coming out with a machete, the son-in-law coming
3 out from the house with a gun and Mr. Evans getting hit by
4 a car. So, the issue of malice, I think, is essential to
5 this case. It's central to the charge of assault and
6 battery with intent to kill and in Tate versus State in
7 2002, it basically said that was an impermissible jury-
8 shifting charge and counsel was ineffective in failing to
9 object to that charge because it effectively shifts the
10 burden to the defendant in that case and that was pre-
11 Belcher. The evidence did arise and they found out in the
12 context of a PCR that those charges, particularly murder
13 because in that case the gentleman walked up to a motel and
14 shot the clerk. Absolutely ---

15 THE COURT: I read that.

16 MR. EPPS: Yes, sir.

17 THE COURT: I'd like to hear the next part of your
18 argument.

19 MR. EPPS: Also, we think it's a -- and I'm going on
20 the record, on the record. The transcript states malice is
21 an afterthought. I'm going over what ---

22 THE COURT: Let me just stop you right here. The
23 charge, I'm going to discuss that in a minute. Any other
24 grounds other than the charge, I'll give you time to state
25 the grounds, other than the charge.

1 MR. EPPS: Yes, sir. I think on the charge ---

2 THE COURT: Other than the charge. Any other grounds
3 that you are moving for me to grant, other than the ones
4 you put on the record earlier and that were brought out in
5 the hearing of this matter? Now, I will give you an
6 opportunity to address the charge is what I'm trying to
7 tell you.

8 MR. EPPS: Yes, sir. Yes, sir.

9 THE COURT: Any other issues other than what I ---

10 MR. EPPS: Yes, sir. I guess we have to check with
11 the Department of Corrections whether or not he got credit
12 for the time that he served prior to the trial. It was not
13 brought up to the trial court or listed on his sentencing
14 sheet.

15 THE COURT: Okay. And I'm not trying to cut you off.
16 I'll give you time.

17 MR. EPPS: Yes, sir.

18 THE COURT: Mr. Whitmire?

19 MR. WHITMIRE: Your Honor, I would rest the record
20 unless there is anything in particular you would want to
21 hear.

22 THE COURT: Let me say this and then I'll give you
23 some instructions. First, your first basis was failure to
24 do research. There's no evidence of that and, in fact, the
25 evidence is that he properly, Mr. Smith, properly met with

1 Mr. Evans and Mr. Evans, himself, said he, in 2008, showed
2 up and told him what the case was about and even if you can
3 infer or not from the evidence that there is not any
4 research, you didn't show what would have occurred if they
5 had researched and that's his burden of proof. So, let me
6 preface my ruling. I'm not making a total ruling, but as
7 to all grounds other than the charges issues, I'm finding
8 that the Defendant, excuse me, the Applicant has failed to
9 meet his burden of proof. I will try to go over them and
10 you just need to sit still. Now, if I do not, I want the
11 State or Mr. Epps to be sure they are included in the
12 order.

13 The opening on self-defense, several things I read at
14 the closing from Mr. Smith why he says we are going to
15 prove self-defense and also reasonable doubt. The judge
16 clearly put the burden on the State and clearly charged
17 that the State had to disprove self-defense defense beyond
18 a reasonable doubt and he didn't have to prove anything, so
19 that's trial strategy and I don't think that falls below
20 the standards and no prejudice to it.

21 Failure to object to Linda Evans as hearsay, her
22 statement, "He's killing him." Obviously, that is excited
23 utterance. Obviously, he could have objected. At the same
24 time, that falls under that so even if that were to fall
25 under a standard that he should have met, the prejudice is

1 not there and it's uncertain that the outcome would have
2 been different if that had been done.

3 The failure to have Ms. Evans evaluated. That is
4 without merit, totally. Mr. Smith said that she was
5 against him, she wouldn't be favorable to him and the facts
6 brought out during the trial of the case clearly indicated
7 that she had animosity towards him and probably would have
8 benefitted, if anything, if she had not testified and the
9 fact he didn't have her evaluated is of no consequence
10 whatsoever.

11 The 911 tapes, an objection was made and
12 authentication was made by the person who made the call,
13 asked whether or not they were genuine and was it their
14 voice. The other part I'm trying to say is there was no
15 evidence presented in this case that they were altered or
16 somehow tampered with, et etcetera, so you are denied on
17 that basis.

18 Billy Craft's testimony about Ms. Evans, same thing.

19 Evidence of flight. I read the record. Mr. Evans,
20 himself, said he fled the scene and then he talked about
21 specifically, in detail, how his sister talked him into
22 turning himself in. The officer at first talked about
23 getting there and searching with the dogs. That is
24 evidence of flight, so it's all in the record and so I find
25 that is without merit.

1 And I think I've covered all the other grounds that
2 you've raised except the charges.

3 MR. EPPS: And the credit, Your Honor?

4 THE COURT: The credit. You know, that's a little
5 more hairy for me, but quite frankly, he was looking at
6 twenty-five years. They argued for twenty-five years and
7 the Judge gave him twenty suspended to fourteen. Granted,
8 probably, not probably, of course you ask for credit but
9 certainly, number one, it may be an administrative matter
10 within the Department of Corrections, but to the extent it
11 wasn't, there is just no evidence that the Judge did not,
12 would not, or could have, given that credit. Five months.
13 I'm not going to find that substantial enough to send this
14 down or give relief for post-conviction relief.

15 All right. Now, as to the charge on self-defense and
16 mutual combat. I have to look at the charge given by Judge
17 Nicholson and the current charge that we have and whether
18 or not, verbatim, the fact that the current charge brings
19 up things that would not be, not at fault in bringing about
20 the occurrence and mutual combat is one of the examples
21 given and he's not at fault for bringing on the occurrence
22 and that's in line with the first element of self-defense
23 and so, as given by Judge Nicholson, it is appropriate from
24 the totality of this charge. Okay? I do not want to hear
25 anything else about that. I'm denying your motion on that

1 aspect of the charge.

2 MR. EPPS: Yes, sir.

3 THE COURT: However, looking at the Belcher case, this
4 case was tried in 2009. Correct?

5 MR. EPPS: Yes, sir.

6 THE COURT: Excuse me. 2008. The remittitur or the
7 Court of Appeal's opinion was issued in 2011. From what I
8 can see in this case. I have the summary, but my hands are
9 not on it. If I read the Belcher case right, it's been
10 awhile and I looked at it over lunch, it says that this
11 case applies to all pending cases in the system. Okay? In
12 other words, if Mr. Evans' case was pending on appeal when
13 the Belcher decision was issued, then it would apply to his
14 case on appeal. Okay?

15 MR. EPPS: Yes, sir.

16 THE COURT: Let me say this, with regard to Tate, is
17 opposite to this case. I think it's more to, it's not the
18 inference, the presumption and it is a burden shifting in
19 this case, but that being said, I'm going to find that Mr.
20 Smith did not fall below the standards required of him at
21 the time based on the case law. I still want you to
22 address the issue of the effect of Belcher on this case
23 since it was, apparently, in the pipeline on appeal when
24 Belcher was issued. Okay?

25 MR. EPPS: Yes, sir.

1 THE COURT: As a matter of law and that would apply to
2 your ABHAN charge and ABWIK charge. ABWIK, ABHAN and what
3 else? AWIK and then ABHAN. Right?

4 MR. EPPS: Yes, sir. He may have charged simple
5 assault, assault and battery, too, but I mean ---

6 THE COURT: I want the State to address those same
7 issues to me. How long will you need to get that to me?

8 MR. WHITMIRE: Your Honor, whatever you say is fine.

9 THE COURT: Thirty days?

10 MR. EPPS: Thirty days. Yes, sir.

11 MR. WHITMIRE: Thirty days.

12 THE COURT: Do you understand what I'm saying? I am
13 denying your petitions on all grounds, except I want to
14 hear about this charge. Specifically, I find that Mr.
15 Smith's conduct was not below the objective standard based
16 on the existing case law, but I do want to know what effect
17 the Belcher case had on this since the charge appears to
18 violate the ruling in Belcher. Okay? And if you want to
19 address whether or not it, in fact, does violate Belcher,
20 you are free to do so. Okay? Either one of you.

21 MR. WHITMIRE: Your Honor, just briefly, although it
22 could have been presented at Appellate Review, it would
23 have required Mr. Smith to object in order to preserve the
24 issue and so if it would had gone up on direct appeal to
25 the Appellate Counsel, they would not have been able to

1 present it to the Court.

2 THE COURT: That's what I want you to put in your
3 brief.

4 MR. WHITMIRE: Thank you, Your Honor.

5 THE COURT: All right. I didn't read the appellate
6 case and I don't know what effect it does have. I'm asking
7 you to brief me. Thank you for a well prepared recitation.

8 MR. WHITMIRE: Thank you, Your Honor.

9 MR. EPPS: Thank you, Your Honor.

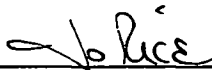
STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

CERTIFICATE

BE IT KNOWN THAT I, THE UNDERSIGNED JO RICE, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT REPRESENTS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE HEARING IN THE CAPTIONED CASE, RELATIVE TO APPEAL, BEFORE THE CIRCUIT COURT FOR ANDERSON COUNTY, SOUTH CAROLINA, SO GIVEN ON MAY 8, 2013 TO THE BEST OF MY SKILL AND ABILITY;

THAT I AM NOT RELATED TO NOR AN EMPLOYEE OF ANY OF THE PARTIES HERETO, NOR A RELATIVE OR EMPLOYEE OF ANY ATTORNEY OR COUNSEL EMPLOYED BY THE PARTIES HERETO, NOR INTERESTED IN THE OUTCOME OF THIS ACTION.

IN WITNESS WHEREOF I HAVE HERE UNTO SET MY HAND AND SEAL THIS 20TH DAY OF NOVEMBER, 2013.



JO RICE
OFFICIAL COURT REPORTER

382

Fletcher Smith Greenville, SC

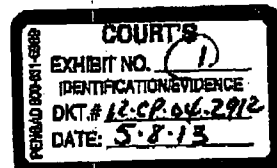
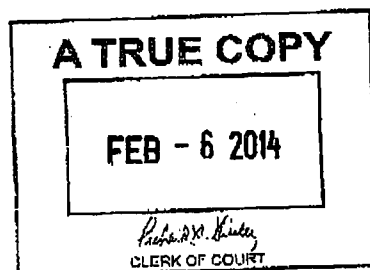
September 17, 2008

Mr. Smith,

On September 14, 2007, in which the incident between Billy Craft and myself took place, Billy had a bag full of pills on him. His car was not in my yard. When the police came to the scene none of these pills were picked up by the police. Linda Evans stated that they were under a blue Mazda in the yard. These pills were also observed by Mark Durham. Linda Evans called the police to come back to the scene and get the pills out from under the car. The police then refused to come back. My question is when these pills were turned in at the police department by Linda Evans, was there a bottle of percocet narcotics in the bag. I feel that these pills were all picked up at the pharmacy at the same time. Is there a way you can find out? He uses CVS on 916 Hiway 28 Bypass in Anderson, SC. (#864-224-7469) I know that the state will take your home and property for narcotics being sold on your property. I know that Billy was coming out there to deal narcotics to Kevin Lavoie across the street from where this incident occurred. Billy Craft sold his percocets every month so he would have more money in his pocket. I came into my yard and Billy wants to jump on me, he goes to pull a knife or gun on me, then there is a big fight. Now I am being prosecuted by the state for drying to stop narcotics being sold on my property. If had to be could they check to see if the percocets were in his system when he was at the hospital. Then this could show that he didn't take them, that he sold them each month. Also enclosed is a copy of a letter from The Supreme Court of South Carolina, Office of Disciplinary Counsel. I hope all of this can be used to help my case in some way. Thank you so much for all that you have done.

Sincerely your client,

Barry A. Evans

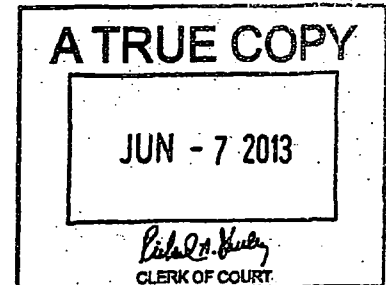


STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)
)
 Barry Evans #331032,)
)
 Applicant,)
)
)
)
 vs.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

Case No.: 2012-CP-04-02912

**MEMORANDUM IN SUPPORT OF
 THE APPLICABILITY OF STATE V.
 BELCHER**



The Applicant submits the following memorandum pursuant to this Court's request inquiring as to the applicability of *State v. Belcher*, 385 S.C. 597, 685 S.E.2d. 802 (2009) to this case.

Belcher was decided by the South Carolina Supreme Court on October 12, 2009. The Applicant's case was tried before a jury on October 6th through the 8th of 2008. The Applicant was convicted of assault and battery with intent to kill and possession of a weapon during a violent crime. Applicant was found not guilty of the charge of assault with intent to kill. A timely appeal was taken to the South Carolina Court of Appeals and they affirmed Applicant's convictions on April 11, 2011. Applicant then petitioned for a writ of certiorari to the South Carolina State Supreme Court and that petition was denied by Order dated July 13, 2012. The Remittitur was sent back to this Court by the South Carolina Court of Appeals on July 17, 2012 and was filed in the Anderson County Clerk's office on July 18, 2012. As such, Applicant's convictions were not yet final at the time that *Belcher* was decided. Therefore as set forth herein the rule announced in *State v. Belcher*, *infra* is applicable to Applicant in his request for post conviction

relief.

LEGAL ARGUMENTS AND AUTHORITY

Our State Supreme Court in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009) held that a jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide or assault and battery with intent to kill. *Id.* at 600, 685 S.E.2d at 804, n. 6.

The Court further held:

Because our decision represents a clear break from our modern precedent, today's ruling is effective in this case and for all cases which are pending on direct review or not yet final where the issue is preserved. *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) ("hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final"); *Harris v. State*, 273 Ga. 608, 543 S.E.2d 716, 717-18 (2001) (reversing a murder conviction and overruling precedent that had approved inference of intent to kill from use of a deadly weapon and applying the new rule "to all cases in the 'pipeline'—i.e., cases which are pending on direct review or not yet final"). Our ruling, however, will not apply to convictions challenged on post-conviction relief. *See generally Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). We reverse and remand for a new trial. *Id.* at 612-13, 685 S.E.2d at 810-11.

Belcher is clear that its ruling is effective for Applicant's case or would have been effective had trial counsel preserved the issue. While *Belcher* also holds that its rule will not apply to convictions challenged on post-conviction relief, an examination of *Teague v. Lane*, *supra*, as cited by the Court, is in regard to convictions which are final.

The Petitioner in *Teague* had filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois. The Supreme Court of the United States held in part:

Petitioner's first contention is that he should receive the benefit of our decision in *Batson* even though his conviction became final before *Batson* was decided. Before addressing petitioner's argument, we think it helpful to explain how *Batson* modified *Swain*. *Swain* held that a "State's purposeful or deliberate denial" to blacks of an opportunity to serve as jurors solely on account of race violates the Equal Protection Clause of the Fourteenth Amendment. 380 U.S., at 203-204, 85 S.Ct., at 826-827. In order to establish a prima facie case of discrimination under *Swain*, a defendant had to demonstrate that the peremptory challenge system had been "perverted." A defendant could raise an inference of purposeful discrimination if he showed that the prosecutor in the county where the trial was held "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be," has been responsible for the removal of qualified blacks who had survived challenges for cause, with the result that no blacks ever served on petit juries. *Id.*, at 223, 85 S.Ct., at 837.

In *Batson*, the Court overruled that portion of *Swain* setting forth the evidentiary showing necessary to make out a prima facie case of racial discrimination under the Equal Protection Clause. The Court held that a defendant can establish a prima facie case by showing that he is a "member of a cognizable racial group," that the prosecutor exercised "peremptory challenges to remove from the venire members of the defendant's race," and that those "facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." 476 U.S., at 96, 106 S.Ct., at 1723. Once the defendant makes out a prima facie case of discrimination, the burden shifts to the prosecutor "to come forward with a neutral explanation for challenging black jurors." *Id.*, at 97, 106 S.Ct., at 1723.

In *Allen v. Hardy*, the Court held that *Batson* constituted an "explicit and substantial break with prior precedent" because it overruled a portion of *Swain*. 478 U.S., at 258, 106 S.Ct., at 2880. Employing the retroactivity standard of *Linkletter v. Walker*, 381 U.S. 618, 636, 85 S.Ct. 1731, 1741, 14 L.Ed.2d 601 (1965), the Court concluded that the rule announced in *Batson* should not be applied retroactively on collateral review of convictions that became final before *Batson* was announced. The Court defined final to mean a case "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Batson*...." 478 U.S., at 258, n. 1, 106 S.Ct., at 2880, n. 1 (citation omitted).

Petitioner's conviction became final 2½ years prior to *Batson*, thus depriving petitioner of any benefit from the rule announced in that case..... *Teague v. Lane*, 489 U.S. 288, 294-96, 109 S. Ct. 1060, 1066-67, 103 L. Ed. 2d 334 (1989)

Because Applicant's convictions were not yet final, *Belcher* is applicable and Applicant's

trial counsel was ineffective in failing to object to the trial court's jury charge of malice may be inferred from the use of a deadly weapon. (Tr. at 242 and 258). It is undisputed that the transcript bears out evidence in this case that would reduce, mitigate, excuse or justify the assault and battery with intent to kill. The trial court charged the jury with assault and battery of a high and aggravated nature, self defense and mutual combat. (Tr. at 243-249). Contrary to Respondent's argument that at the time of trial, an objection to the charge lacked merit, challenges to the charge had been made many times previously, as recognized in *Belcher*. Several of the cases the State Supreme Court overruled in *Belcher* challenged the disputed charge. See *State v. Griffin*, 277 S.C. 193, 285 S.E.2d 631; *State v. Mattison*, 276 S.C. 235, 277 S.E.2d 598; *State v. Alford*, 264 S.C. 26, 212 S.E.2d 252; *State v. Maxey*, 262 S.C. 504, 205 S.E.2d 841; *State v. Deas*, 202 S.C. 9, 23 S.E.2d 820; *State v. Hardin*, 114 S.C. 280, 103 S.E. 557 (1920). *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). As noted also in *Belcher* other States that have addressed this issue have rejected the charge under similar circumstances. *Id.* at 610, 685 S.E.2d at 809, n. 7.

Applicant's trial counsel argued self defense to the jury and evidence was presented that, if believed, established self defense. The trial court twice charged the jury that malice may be inferred from the use of a deadly weapon. (Tr. at 242 and 258). Exceptions to that charge had been made many times as noted above and those cases were available to trial counsel. That, coupled with trial counsel telling the jury that the defense would prove that Applicant acted in self-defense and by not objecting to the disputed charges constituted representation below an objective standard of reasonableness.

In addition, Applicant was prejudiced by trial counsel's ineffective assistance in not objecting to the disputed jury charges. If not for counsel's error there is a reasonable probability

the result at trial would have been different. As further held in *Belcher*:

Errors, including erroneous jury instructions, are subject to harmless error analysis. See *Lowry v. State*, 376 S.C. 499, 510–11, 657 S.E.2d 760, 766 (2008). In many murder prosecutions, as *Belcher* concedes, there will be overwhelming evidence of malice apart from the use of a deadly weapon. Here, however, the error in charging that malice may be inferred by the use of a deadly weapon cannot be considered harmless. Evidence of self-defense was presented, thereby highlighting the prejudice resulting from the charge. It is entirely conceivable that the only evidence of malice was *Belcher's* use of a handgun. We need go no further than saying we cannot conclude the error was harmless beyond a reasonable doubt. *Id.*, at 611-12, 685 S.E.2d at 809-10.

As set forth above, evidence of self defense was presented. The evidence of malice in this case was not overwhelming. Further, the trial court's jury charge of malice may be inferred from the use of a deadly weapon constitutes a charge on the facts in violation of Article V, § 21 of the Constitution of the State of South Carolina ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."). Lastly, the disputed charges also impermissibly shifted the burden of proof to Evans to prove that his actions reduced the crime from assault and battery with intent to kill to assault and battery of a high and aggravated nature or prove that he acted in self defense. *Belcher* cites that:

The law, of course, today speaks in terms of "permissive inferences," not "presumptions." This transition resulted from the United States Supreme Court's pronouncement that the Due Process Clause of the Fourteenth Amendment is violated when a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant. See *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (holding that "burden-shifting presumption[s]" or "conclusive presumption[s]" deprive a defendant of the "due process of law" and are therefore unconstitutional); *Mullaney v. Wilbur*, 421 U.S. 684, 703-04 (1975) (holding that the "Due Process Clause" forbids a state from placing the burden on the accused to prove his actions reduced the crime from "murder to manslaughter"). *Id.* at 608, 685 S.E.2d at 807-808.

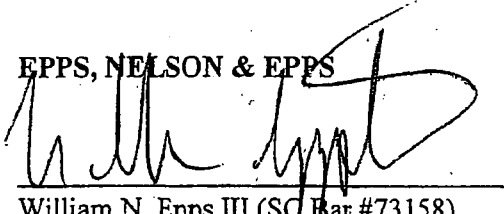
The erroneous malice instruction was not harmless error and the evidence presented, if

believed to reduce or mitigate highlights the prejudice resulting from the charges. It cannot be said beyond a reasonable doubt that the erroneous malice instructions did not affect the result of the trial or did not contribute to the verdict. The State got the benefit of the erroneous malice instruction and it did easily tip the scales in favor of the State. The charge took one fact, i.e. a knife, out of the trial and placed a special emphasis on it. Therefore, there is a reasonable likelihood that the erroneous charges did affect the jury's consideration in finding the Applicant guilty of assault and battery with intent to kill.

CONCLUSION

For the reasons stated, the Applicant respectfully requests that this Court grant his post-conviction relief and for a new trial.

EPPS, NELSON & EPPS

By: 

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230 West Whitner Street (29621)
Post Office Box 2167
Anderson, South Carolina 29622
Tel.: 864-224-2111
Fax: 864-224-3536
ATTORNEYS FOR APPLICANT

Dated: June 7, 2013

At: Anderson, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Barry Evans, #331032,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2012-CP-04-2912

BRIEF IN SUPPORT OF DISMISSAL
OF APPLICANT'S PCR APPLICATION

This Court held an evidentiary hearing in regards to the Application for Post-Conviction Relief filed by Applicant. Applicant was present and was represented by W. Norman Epps, III., Esquire. Respondent was represented by Walt Whitmire of the South Carolina Attorney General's Office. At the conclusion of the hearing, this Court requested Applicant and Respondent brief two issues related to State v. Belcher.

1. "Was trial counsel ineffective for failing to object to the charge on inferred malice in anticipation of a change in case law?"
2. "Was appellate counsel ineffective for failing to raise a Belcher argument on appeal?"

I.

Trial counsel was not ineffective for failing to make an objection to the charge on the inference of malice from the use of a deadly weapon in anticipation the case law would favorably change prior to Applicant's exhaustion of his direct appeal. On October 12, 2009, the South Carolina Supreme Court announced the jury charge that malice may be inferred from the use of a deadly weapon was improper. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The Belcher Court held "[the Court] is firmly convinced that "malice may be inferred by the use of a

deadly weapon” is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide.” Id. at 612, 685 S.E.2d at 810. The Belcher Court held its ruling did not apply retroactively in PCR. Id. at 613, 685 S.E.2d at 810.

Because Applicant’s trial occurred October 8, 2008, a year prior to the Belcher, Judge Nicholson’s charge that malice may be inferred with the use of a deadly weapon was valid. (Tr. 242). At the time of trial, an objection to the charge lacked merit. In Thornes v. State, the South Carolina Supreme Court stated, “This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.” Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). Reasonable assistance of counsel under the prevailing norms does not necessitate clairvoyance. Therefore, this allegation is without merit.

II.

Furthermore, appellate counsel was not ineffective for failing to argue Belcher. The Belcher Court noted its “ruling would be effective for all cases which were pending on direct review or not yet final **where the issue was preserved.**” Belcher, 385 S.C. at 597, 685 S.E.2d at 802 (emphasis added). However, because trial counsel did not object to the charge, the issue was not preserved for appellate review. “The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal.” State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003). “Imposing this preservation requirement is meant to enable the trial court to rule properly after it has considered all the relevant facts, law, and arguments.” On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000). “A contemporaneous objection is required to preserve issues for direct appellate review.” State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005). Issues not

raised and ruled upon in the trial court will not be considered on appeal. Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001). An appellate attorney cannot be found ineffective for failing to present an issue that has not been preserved for the appellate court's review. Legge v. State, 349 S.C. 222, 224, 562 S.E.2d 618, 620 (2002). Therefore, appellate counsel was not ineffective. Thus this allegation is without merit.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny and dismiss this Application for Post-Conviction Relief.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Senior Assistant Deputy Attorney General

WALT WHITMIRE
Assistant Attorney General

By: *[Signature]*
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

[Signature], 2013.

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
IN THE TENTH CIRCUIT

2012-CP-04-2912

Barry Evans, # 331032

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,

Respondent

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 Brief in Support of Dismissal in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

W. Norman Epps, III, Esquire
Post Office Box 2167
Anderson, SC 29622

DATED this 4th day of June, 2013


Troyeshi Brailey, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA)
 COUNTY OF ANDERSON)
 Barry Allan Evans,)
 S.C.D.C. No. 331032,)
 Applicant,)
 v.)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2012-CP-04-2912

RECEIVED
 SEP 3 2013
 SUPREME COURT
A TRUE COPY
 JUL 31 2013
Robert M. Kelly
 CLERK OF COURT

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 5, 2012. The Respondent made its return on January 25, 2013. An evidentiary hearing into the matter was convened on May 8, 2013 at the Anderson County Courthouse. The Applicant was present at the hearing and represented by W. Norman Epps, III, Esquire. J. Walter Whitmire, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, Fletcher N. Smith, Esquire. The Court had before it the trial transcript, the Anderson County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application and subsequent amendment, the return, the appellate records, and Court's Exhibit 1.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Anderson County Clerk of Court. The Applicant was indicted at the November 2007 term of the Anderson County Grand Jury for assault with intent to kill

(AWIK) (2007-GS-23-3493) possession of a weapon during commission of a violent crime (2007-GS-04-3496) and at the July 2008 term for assault and battery with intent to kill (ABWIK) (2008-GS-04-1541). He was represented by Fletcher N. Smith, Esquire.

After the State called the case to trial, the Applicant was found not guilty of AWIK and guilty of the other two charges. On October 8, 2008, the Applicant was sentenced by the Honorable J.C. Nicholson, Jr. to concurrent terms of five (5) years for possession of a weapon during commission of a violent crime and twenty (20) years suspended on the service of fourteen (14) years and five (5) years probation for ABWIK.

A notice of appeal was filed at the South Carolina Court of Appeals. LaNelle C. DuRant, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. State v. Evans, Op. No. 2011-UP-147 (S.C. Ct. App. filed April 11, 2011). The South Carolina Supreme Court denied the subsequent petition for writ of certiorari by order dated July 13, 2012.

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
 - a. "Failed to research case properly."
 - b. "Failed to present agreement which was written from detective division."
2. "Judicial error":
 - a. "Judge failed to strike 911 tapes."
 - b. "Judge failed to strike pictures."
 - c. "Judge failed to strike pictures due to the fact witnesses were present, as same as 911 tapes, this inflamed the jury."

In a document captioned "Amendments to Application for Post-Conviction Relief" and dated February 25, 2013, the Applicant raised the following allegations:

1. Ineffective assistance of trial counsel:

- a. "[F]ailed to research case properly and was ineffective in telling the jury during opening statements that they were going to prove certain aspects of Applicant's defense, such as that false charges were brought against the applicant and that the defense would prove that Applicant acted in self-defense."
- b. "[F]ailed to object to the hearsay statements of Linda Evans 'He's killing him' on pages 58, 73, 75 and 81 of the transcript."
- c. Failed "to request a competency evaluation of Linda Evans who was under the State's subpoena power or otherwise call her as a witness."
- d. Failed "to object to the admittance of two (2) 911 tapes on the grounds of improper foundation and authentication."
- e. Failed "to object to Billy Craft's testimony that Applicant previously beat him with an iron rod and jabbed it in him on page 120 of the transcript."
- f. Failed "to object to Deputy Holbrooks hearsay testimony that Applicant ran into the backyard and jumped the fence on page 156."
- g. Failed "to object to charge malice may be an afterthought on page 241 of the transcript, which was incorrect and confusing to jury."
- h. Failed "to object to malice may be inferred from the use of a deadly weapon and general intent charge on page 242 of the transcript."
- i. Failed "to object that ABHAN could give rise to malice charge and failed to object to the recharge of ABWIK on page 257 of the transcript."
- j. Failed "to object to mutual combat and self defense charge pursuant to *State v. Taylor*, 589 SE 2d 1 (2003)."
- k. Failed "to object to the ABWIK or ABHAN jury charge."
- l. Failed "to argue that Applicant receive credit for time served on his sentence."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing along with briefs related to inference of malice jury charge at issue. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by

S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

Initially, this Court notes trial counsel testified he was retained to handle the charges in this case. Trial counsel testified he received discovery materials and was aware of the facts and circumstances of the case. Trial counsel testified the Applicant would sometimes come into his office to discuss the charges and defense case but would also often miss appointments. Trial counsel testified he investigated any witnesses the Applicant mentioned to him. Trial counsel testified he discussed strategy and defenses with the Applicant and that the defense strategy was to argue self-defense. Trial counsel testified he spoke to potential defense witnesses. This Court finds trial counsel’s testimony is credible. This Court further finds trial counsel adequately

conferred with the Applicant, conducted a proper investigation, and was thoroughly competent in his representation.

A.

The Applicant stated trial counsel should not have told the jury in his opening statement that he would prove self-defense (and that the Applicant was not guilty of ABWIK) because it shifted the burden of proof to him.

Trial counsel testified he did not shift the burden of proof in his opening statement. Trial counsel testified he learned the technique he employed in his opening statement in a University of Virginia seminar. Trial counsel testified his opening statement did not prejudice the case because the trial judge instructed the jury that arguments are not evidence and issued the self-defense jury charge.

This Court finds the Applicant failed to meet his burden of proving trial counsel was deficient in his opening statement to the jury. In his opening statement, trial counsel said “[w]e’re going to prove to you in this case that [the Applicant] acted in self defense on that day.” (App.p.50). This Court finds this statement did not operate to shift the burden of proof to the defense. Rather, this Court notes trial counsel’s testimony that he learned this technique at a seminar and finds he employed it as part of his trial strategy in this case. See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel); see also Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (“Counsel’s strategy will be reviewed under an objective standard of reasonableness.”) (internal citation omitted). This Court also notes the trial judge properly charged the jury that the burden was on the State to prove the Applicant’s guilt and disprove the Applicant’s defense of self-

defense. (App.p.233; p.246). As such, this Court finds the Applicant failed to meet his burden of proving either that trial counsel's representation was deficient in his case or that he was prejudiced as a result.

B.

The Applicant stated Linda Evans did not testify for physical and mental reasons but that trial counsel did not ask to have her evaluated. The Applicant stated Linda would have been a helpful witness. The Applicant stated trial counsel should have objected when Kevin and Janice Lavoie testified Linda said, "he's killing him."

Trial counsel testified he spoke to Linda often in preparation for trial. Trial counsel testified they did not want her as a defense witness – because she would have done more to damage the case – and that the Applicant understood this. Trial counsel testified he did not request Linda be evaluated because she was not going to be a defense witness. Trial counsel testified he did not object to testimony that Linda said "he's killing him" because they would have been admitted as excited utterances.

This Court finds the Applicant failed to meet his burden of proving trial counsel improperly handled issues relating to his ex-wife, Linda Evans. Trial counsel testified he met with Linda several times in preparation for trial and that she would not have been a beneficial witness for the defense. Trial counsel testified the Applicant was aware of this. This Court finds trial counsel's testimony is credible, particularly because the evidence and testimony at trial indicated Linda hit the Applicant with her car that night. (App.p.75; p.184; p.196). Further, as the Applicant did not present Linda as a witness at the PCR hearing, this Court finds it cannot speculate as to what she may have testified about at trial. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (the South Carolina Supreme Court "has repeatedly held a PCR

applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis in original). Similarly, as the Applicant failed to present documentation or expert testimony about Linda's mental state, this Court cannot speculate as to any potential impact that an evaluation of Linda would have had on the Applicant's trial. See id.; cf. Dempsey v. State, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) (finding that, as the applicant failed to have an expert testify at the evidentiary hearing, "any finding of prejudice is merely speculative").

This Court finds trial counsel was not deficient in failing to object to Kevin and Janice Lavoie's testimony at trial that Linda said "[h]e's killing him." (App.p.58; p.73; p.75; p.81). Trial counsel testified there was no basis to object to this testimony because they were excited utterances. This Court agrees. An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE; State v. Stahlnecker, 386 S.C. 609, 622, 690 S.E.2d 565, 572 (2010). "Three elements must be met for a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." State v. Stahlnecker, 386 S.C. at 623, 690 S.E.2d at 573 (citation omitted). In the instant case, Linda said "[h]e's killing him." while the Applicant was stabbing the ABWIK victim. As this Court finds Linda's statement clearly satisfied Rule 803(2), SCRE, trial counsel did not err in not objecting to either Kevin or Janice Lavoie's testimony.

C.

The Applicant stated trial counsel should have objected when the 911 tapes were admitted at trial because they were admitted through witnesses and not the 911 operators.

Trial counsel testified that, while he did object to the admission of the first 911 tape, he did not object based on an improper foundation. Trial counsel testified that, while the 911 operator did not testify, the witnesses identified the voices on the 911 tapes.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the admission of the 911 tapes at trial because they were not authenticated by the 911 operators. Trial counsel objected to the admission of the first 911 tape at trial but the objection was overruled. (App.p.59). Janice Lavoie identified her voice as that on the first 911 tape and the tape was admitted into evidence over trial counsel's objection. (App.pp.59-61). Christopher Durham identified his voice as that on the second 911 tape and the tape was admitted into evidence subject to trial counsel's objection. (App.pp.102-03). This Court finds that, as both Janice Lavoie and Christopher Durham identified their voices on the 911 tapes, they were properly authenticated. See Rule 901, SCRE; State v. Aragon, 354 S.C. 334, 579 S.E.2d 626 (Ct. App. 2003). As such, this Court finds there was no reason for trial counsel to have objected because the 911 operators did not testify.

D.

The Applicant stated trial counsel should have objected when Billy Craft testified to a prior beating from the Applicant, who used an iron rod. The Applicant stated trial counsel should have objected when Deputy Craig Holbrooks testified that he jumped the fence because it looked like evidence of flight.

Trial counsel testified he did not object when Deputy Holbrooks testified the Applicant jumped over the fence. Trial counsel stated, however, that it was not evidence of flight because

the Applicant was looking for the police.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to testimony from both Billy Craft and Deputy Holbrooks. At trial, Craft (the ABWIK victim) stated the Applicant had previously "beat me with an iron rod and jabbed it in me." (App.p.120). This Court finds trial counsel did not err in failing to object to this testimony. Craft's testimony did not qualify as a prior bad act because it did not prove the Applicant's guilt for the crime charged. See Rule 403, SCRE. Further, this Court finds Craft's testimony did not prejudice the Applicant, as the State presenting overwhelming evidence of the Applicant's guilt through the testimony of numerous eyewitnesses. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). At trial, Deputy Holbrooks stated he was advised the Applicant was at the incident location and responded to that address. Deputy Holbrooks stated he was told "that [the Applicant] had jumped – ran into the backyard and jumped the fence" and that he found the Applicant in the car with a third party. (App.pp.156-57). The Applicant later testified that he was in the car with his sister when Deputy Holbrooks arrested him and that he was on his way to turn himself in. (App.pp.196-97). This Court finds there was neither error nor prejudice in the admission of this testimony at trial, as the Applicant explained during his trial testimony that he was not evading police but was actually looking for them so that he could turn himself in. See, e.g., State v. Shaw, 258 S.C. 236, 188 S.E.2d 186 (1972) (holding no prejudice resulted from the admission of evidence where defendants admitted their presence at the time of the offense).

E.

The Applicant stated trial counsel should have objected to the portion of the jury charge

that said malice may be an afterthought. The Applicant stated trial counsel should have objected to the portion of the jury charge that said malice could be inferred from the use of a deadly weapon. The Applicant stated trial counsel should have objected to the portion of the jury charge that said assault and battery of a high and aggravated nature (ABHAN) could give rise to malice. The Applicant stated trial counsel should have objected to the portion of the ABWIK jury charge that noted there must be a general intent to injure. The Applicant stated trial counsel should have objected to the trial judge's re-charge to the jury for both ABWIK and ABHAN.

Trial counsel testified the portion of the jury charge that said malice may be an afterthought must be a typographical error both because the trial judge was meticulous in his jury charges and because he would have objected to this. Trial counsel testified he did not believe there was an error in the ABWIK and ABHAN jury charges. Trial counsel testified he did not believe there was a problem with the portion of the jury charge that said ABHAN could give rise to malice – especially since the trial judge later instructed that the presence or absence of malice alone would not determine guilt. (App.p.244). Trial counsel testified he did not believe Tate v. State, 351 S.C. 418, 570 S.E.2d 522 (2002) was applicable because it noted there was a presumption of malice from the use of a deadly weapon and not an inference of malice. Trial counsel testified he did not object to the “general intent” language in the ABWIK jury charge because it was not an error.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the jury charges involving malice, ABWIK, and ABHAN. The trial judge charged the jury that “malice afterthought may be express or implied.” (App.p.241). This Court finds trial counsel did not err in failing to object to this language because it is clearly a typographical error in the transcript and the correct phrase should have read “malice

aforethought.” The trial judge charged the jury that “the circumstances that make an assault and battery aggravated can also give rise to any inference of malice.” (App.p.244). As our Supreme Court has recognized this concept, there was no reason for trial counsel to have objected to this language. See State v. Fennell, 340 S.C. 266, 275, 531 S.E.2d 512, 517 (2000).

The trial judge charged the jury that malice could be inferred by the use of a deadly weapon. (App.pp.241-42). Based on case law at the time, trial counsel was not deficient. Tate said presumption not inference. On October 12, 2009, the South Carolina Supreme Court announced the jury charge that malice may be inferred from the use of a deadly weapon was improper. State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). The Belcher Court held “[the Court] is firmly convinced that “malice may be inferred by the use of a deadly weapon” is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse or justify the homicide.” Id. at 612, 685 S.E.2d at 810. The Belcher Court held its ruling did not apply retroactively in PCR. Id. at 613, 685 S.E.2d at 810. Because Applicant’s trial occurred October 8, 2008 a year prior to the Belcher, Judge Nicholson charge that malice may be inferred with the use of a deadly weapon was valid. (Tr. 242). At the time of trial, an objection to the charge lacked merit. Reasonable assistance of counsel under the prevailing norms does not necessitate clairvoyance. See Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). Additionally, this Court finds the Applicant failed to prove appellate counsel was ineffective. “An appellate attorney cannot be found ineffective for failing to present an issue that has not been preserved for the appellate court’s review.” Legge v. State, 349 S.C. 222, 224, 562 S.E.2d 618, 620 (2002). The argument was not properly preserved for reasons stated above.

The trial judge charged the jury on the law of both ABWIK and ABHAN. (App.pp.240-45). This Court finds trial counsel did not err in failing to object to these jury instructions

because they were correct and proper charges. See Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004) (holding a trial court is required to charge only the current and correct law of South Carolina). After a jury question, the trial judge re-charged the jury on ABWIK, and reasonable doubt. (App.pp.257-60). This Court finds trial counsel did not err in failing to object to the re-charge because it was a correct and proper statement of the law. See id.; see State v. Peer, 320 S.C. 546, 553, 466 S.E.2d 375, 380 (Ct. App. 1996) (holding a trial court has a duty to give a requested instruction that correctly states the law applicable to the issues and is supported by the evidence).

F.

The Applicant stated trial counsel should have objected to the trial judge charging both mutual combat and self-defense to the jury.

Trial counsel testified he thought mutual combat could conflict with self-defense and did not mention mutual combat in his closing argument. Rather, trial counsel testified he told the jury he had proven the Applicant acted in self-defense.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have objected to the jury charges. The trial judge charged the jury on the law of self-defense and mutual combat. (App.pp.246-49). This Court, however, does not find trial counsel was ineffective in failing to object to these charges under State v. Taylor, 356 S.C. 227, 589 S.E.2d 1 (2003). These charges were not mutually exclusive because there were two different victims in this case – Kevin Lavoie (the AWIK victim) and Billy Craft (the ABWIK victim). As such, self-defense could apply to one charge and mutual combat could apply to the other. This Court finds the totality of these charges were correct and proper and trial counsel did not err in not objecting to their being charged to the jury. See State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394

(2001) (holding the law to be charged must be determined from the evidence presented at trial).

G.

The Applicant stated he was in jail for five months before being released on bond but that he has not received this credit for time-served.

This Court finds the Applicant failed to meet his burden of proving he was entitled to five months' worth of credit for time-served. Aside from two matters specifically mentioned in the statute, post-conviction relief is a proper avenue of relief only when the Applicant mounts a collateral attack challenging the validity of his conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000). A credit-related claim or challenge to other conditions of confinement are administrative matters and, thus, cannot be raised in a post-conviction relief proceeding. Id. at 369, 527 S.E.2d at 750. The Applicant complains the South Carolina Department of Corrections is not properly calculating his sentence or is otherwise withholding rightfully earned credits from him. The statutory right to sentence related credits is a protected "liberty" interest under the Fourteenth Amendment, entitling an inmate to minimal due process to ensure the state-created right was not arbitrarily abrogated. See Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963 (1974). Because the Department of Corrections' disciplinary and grievance procedures are consistent with the standards delineated in Wolff, inmates may seek review of such claims under the Administrative Procedures Act. Al-Shabazz, 338 S.C. at 369, 527 S.E.2d at 750. As such, this Court finds this is not a cognizable post-conviction relief issue and must be handled administratively.

H.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under

prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in his representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

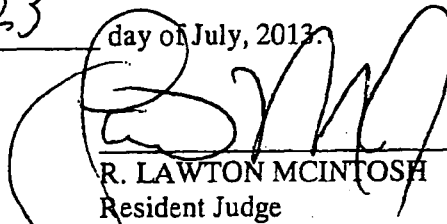
This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule

203, SCACR; Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 23 day of July, 2013.


 R. LAWTON MCINTOSH
 Resident Judge
 Tenth Judicial Circuit

Anderson, South Carolina

CLERK'S OFFICE
 JUL 31 P 2:21
 GENERAL SESSIONS

WITNESSES

HAYDEN G. ACSD

ARREST WARRANT NUMBER

Ref.
J870379

ACTION OF GRAND JURY
TRUE BILL

JUL 22 2008

Foreperson of Grand Jury *[Signature]*
Date: *[Signature]*

VERDICT

Guilty

[Signature]
Foreperson of Petit Jury
Date: *10/13/08*

DOCKET NO. 2008-GS-04-1541

The State of South Carolina
County of Anderson

COURT OF GENERAL SESSIONS

JUL 22 2008

THE STATE

VS.

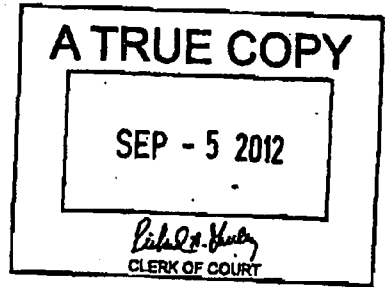
Barry Allan Evans

MSM

Indictment for

Assault / Assault and battery with intent to Kill
(ABWIK)

SC Code: 16-03-0620
CDR Code: 0014



RECEIVED
10-08-08/emp

STATE OF SOUTH CAROLINA)
COUNTY OF Anderson)

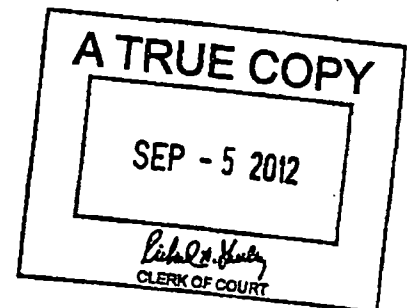
INDICTMENT

JUL 22 2008

At a Court of General Sessions, convened on _____, the Grand Jurors of
Anderson County present upon their oath:

Assault / Assault and battery with Intent to Kill (ABWIK)

That Barry Allan Evans did in Anderson County on or about
September 14, 2007, with malice aforethought, commit an assault and
battery upon one Billy Craft **by stabbing and cutting the victim with a
knife with intent to kill the said victim.** All in violation of Section 16-3-620,
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.

Scott McEllen
ASSISTANT SOLICITOR

WITNESSES

HAYDEN G. ACSD

The State of South Carolina

County of Anderson

COURT OF GENERAL SESSIONS

NOV 13 2007 Term 2007

ARREST WARRANT NUMBER

J870385

THE STATE

vs.

Barry Allan Evans

ACTION OF GRAND JURY TRUE BILL

NOV 13 2007

Foreperson of Grand Jury _____
Date: _____ Foreperson

VERDICT

10

MSM

Indictment for

Weapons / Poss. weapon during violent crime

SC Code: 16-23-0490

CDR Code:0549

A TRUE COPY

SEP - 5 - 2012

P. J. H. H. H.
CLERK OF COURT

10-08-08/emp

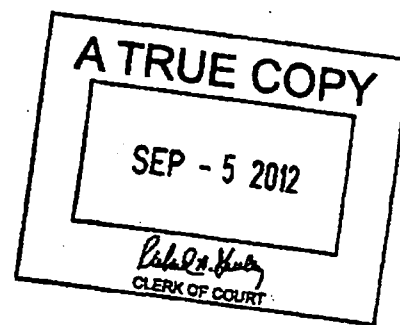
STATE OF SOUTH CAROLINA)
COUNTY OF Anderson)

INDICTMENT

At a Court of General Sessions, convened on NOV 13 2007, the Grand Jurors of Anderson County present upon their oath:

Weapons / Poss. weapon during violent crime

That Barry Allan Evans, did in Anderson County on or about September 14, 2007, while committing the crime of Assault and Battery with intent to kill, a crime of violence, have in his possession a knife, all in violation of Section 16-23-490, Code of Laws of South Carolina, (1976, as amended).



Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR