

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
Robin B. Stilwell, Circuit Court Judge

Case No.: 2011-CP-23-1209
Appellate Case No.: 2013-002652

Marlon Rivera, 311864,..... Petitioner,

v.

State of South Carolina,..... Respondent.

APPENDIX VOLUME II

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1 CHINESE, AND YOU CAN'T READ OR INTERPRET IT, AND YOU'RE
2 GIVEN A BRUSH AND SOME BRICE PAPER TO DO IT ON, AND YOU TRY
3 YOUR BEST TO COMPLY. SO IT WAS QUITE A TASK. I MEAN, THIS
4 WAS HIS FIRST DAY OF SCHOOL AND HE WAS GIVEN THE HOMEWORK OF
5 SIGNING YOUR NAME.

6 Q. AND I'D POINT OUT -- DID YOU NOTICE THAT HE SIGNED IN
7 SMALL LETTERS WHERE HIS NAME WAS TYPED IN SMALL LETTERS AND
8 BIG CAPITAL LETTERS WHERE HIS NAME WAS TYPED IN BIG CAPITAL
9 LETTERS?

10 A. YES. HE WAS USING WHATEVER RESOURCES HE HAD THAT WAS
11 ---

12 Q. SO BASICALLY COPYING?

13 A. EXACTLY. HE STATED MORE THAT HE WAS BEING COACHED OF
14 HOW TO MAKE THE LETTERS. THAT WAS HIS IMPRESSION.

15 Q. DID YOU FEEL THAT HIS WAIVER WAS KNOWINGLY AND
16 VOLUNTARILY MADE?

17 A. I CAN'T SEE HOW IT COULD BE SINCE I DON'T THINK HE
18 UNDERSTOOD WHAT IT WAS. AND I WOULD CONSIDER UNDERSTANDING
19 MEANING KNOWING WHAT THE CONSEQUENCES OF IT ARE. IF I WERE
20 IN A FOREIGN COUNTRY AND I WAS ACCUSED OF SOMETHING AND
21 GIVEN SOMETHING I COULDN'T READ AND ASKED TO SIGN IT, I
22 WOULDN'T DO IT UNLESS I FEARED THAT BY NOT DOING IT
23 SOMETHING WORSE WOULD HAPPEN.

24 Q. AND WHAT WOULD THE WORST -- DID YOU GO IN WHEN YOU
25 DISCUSSED -- TALKED TO HIM WHAT HE MIGHT HAVE EXPECTED WOULD

1 HAPPEN?

2 A. NO. I DIDN'T WANT TO UPSET HIM ANYMORE. I JUST ASKED
3 HIM DOES HE KNOW WHAT THIS MEANS AND WHAT WERE THE RESULTS
4 OF DENYING THIS WOULD BE.

5 Q. DID HE MENTION TO YOU ANY FORCE APPLIED TO HIM OR WAS
6 HE TOUCHED OR ANYTHING DURING ---

7 A. WELL, HE DID MENTION THAT ONE OF THE POLICEMEN -- THE
8 ENGLISH SPEAKING POLICEMAN AT ONE TIME GRABBED HIM BY THE
9 BELT, BELT BUCKLE, RAISED HIM OUT OF THE CHAIR, AND SAID
10 SOMETHING TO HIM. AND HE ASKED THE PUERTO RICAN POLICEMAN,
11 WHO SPOKE BOTH LANGUAGES, WHAT IS HE SAYING? HE SAYS, HE'S
12 CALLING YOU A LIAR. AND HIS COMMENT WAS, HOW DOES HE KNOW
13 I'M LYING WHEN HE DOESN'T UNDERSTAND SPANISH?

14 Q. SO HE WAS JUST CONFUSED BY THAT?

15 A. HE WAS CONFUSED, YOU KNOW. WHAT DID I SAY THAT WAS A
16 LIE AND HOW DOES HE KNOW?

17 Q. DID HE SEEM TO INDICATE TO YOU THAT HE WAS TRYING TO
18 COMPLY WITH WHATEVER THE OFFICERS ASKED HIM?

19 A. IT SEEMS AS THOUGH, YOU KNOW, THAT HE WAS -- OBVIOUSLY
20 HE DID ALL OF THIS. I WOULDN'T HAVE DONE IT.

21 Q. NOW I WANT TO GO FROM THE WAIVER TO THE ACTUAL
22 STATEMENT ITSELF. IN YOUR OPINION WAS THE STATEMENT
23 KNOWINGLY AND VOLUNTARILY MADE?

24 A. NO. ONE THING IS THAT THIS STATEMENT IS WRITTEN IN
25 ENGLISH. IT MEANS IT'S A TRANSLATION. THESE ARE NOT HIS

1 WORDS.

2 Q. WHAT MAKES YOU THINK THAT THOSE ARE NOT HIS WORDS?

3 A. HE DOESN'T SPEAK ENGLISH.

4 Q. AND BEYOND THE FACT THAT HE DOESN'T SPEAK ENGLISH ---

5 A. THEN THIS -- THESE ARE THE WORDS THAT THE POLICEMAN
6 RECORDED AS HIS STATEMENT. THE PROBLEM IS WITH TRANSLATING
7 CROSS CULTURES AND CROSS LANGUAGES. FOR EXAMPLE, IF YOU GO
8 TO ROME YOU WOULD SEE A BIG SIGN AT ST. PETERS,
9 INFORMATIONS. INFORMATIONS? BUT IT'S PLURAL IN ITALIAN.
10 IT'S ONLY SINGULAR IN ENGLISH.

11 AS ONE TEACHER BROUGHT FROM SPAIN TO TEACH IN
12 ELEMENTARY SCHOOL LAST YEAR, AND HE ANNOUNCED TO EVERYBODY
13 IN THE LUNCHROOM, I'M CONSTIPATED. THE KIDS WERE SHOCKED.
14 BUT CONSIPALO DOESN'T MEAN CONSTIPATED. IT MEANS CONGESTED.
15 SO EVEN WHEN THERE'S SIMILAR WORDS, THERE'S MISTAKES,
16 THERE'S IDIOMS, THERE'S ALL KINDS OF SLANG WORDS, THERE'S
17 STREET EXPRESSIONS. HE SAID THAT ONE OF THE PEOPLE WHO WAS
18 INVOLVED, THIS IS HIS VERSION, WITH THIS CRIME WHO ALSO SHOT
19 ---

20 MS. HODGE: I'M GOING TO OBJECT TO THESE STATEMENTS.
21 I'VE BEEN PRETTY LENIENT ---

22 THE COURT: YES, SIR. DON'T ---

23 MS. HODGE: --- NOT OBJECTING BASING HIS OPINIONS ---

24 A. ALL RIGHT. HE MIGHT USE A WORD TO DESCRIBE A PERSON
25 WHICH WASN'T THEIR NAME, JUST CALL THEM SKINNY OR WHATEVER,

1 GIVE THEM A NICKNAME. THAT'S ALL HE WOULD KNOW. THAT WOULD
2 BE SUFFICIENT FOR HIM.

3 Q. ONE THING IN THE STATEMENT, IT STATED THIS IS WHAT
4 HAPPENED, I WAS WEARING A DARK SHIRT. DID HE MAKE ANY -- IS
5 BLACK A PRETTY CLEAR CUT WORD ACROSS MANY LANGUAGES?

6 A. I REALLY DIDN'T BRING THAT UP. I DID READ ---

7 Q. I GUESS NOT WITH HIM. I'M JUST TALKING TO YOU ABOUT IN
8 THE STATEMENT IT TALKS ABOUT, I WAS WEARING A DARK SHIRT.
9 IF HE WANTED TO SAY I WAS WEARING A BLACK SHIRT, IS BLACK A
10 PRETTY CLEAR WORD ---

11 A. UM-HUM (AFFIRMATIVE).

12 Q. --- AND UNDERSTANDABLE?

13 A. I WOULD THINK SO.

14 Q. IT'S CERTAINLY NOT AS SUBTLE AS THE CONCEPT OF RIGHTS,
15 AND LAWYERS, AND ---

16 A. RIGHT.

17 Q. AND ---

18 A. HE HAD CONTRADICTIONS FOR WHAT WAS WRITTEN HERE. MY
19 QUESTION TO HIM WAS, WHY DIDN'T YOU CORRECT THEM? HE SAID,
20 I WASN'T PAYING THAT MUCH ATTENTION. AND I DON'T THINK
21 THAT'S UNUSUAL FOR SOMEBODY WHO'S NOT BEEN IN SCHOOL. YOU
22 KNOW, TO NOT BE ABLE TO PAY A LOT OF ATTENTION OR TO BE
23 UNDER DURESS AND NOT PAY ATTENTION. BUT THAT WAS HIS
24 REASONING FOR NOT CORRECTING SOME OF THESE STATEMENTS.

25 Q. AND WHAT LEVEL, DO YOU THINK, HE'S REALLY FUNCTIONING

1 ON INTELLECTUALLY AS FAR AS HIS ABILITY TO CORRECT AUTHORITY
2 AND ---

3 A. I DID NOT DO PSYCHO-SOCIAL AS IF IT WAS BEING ADMITTED
4 TO A HOSPITAL. I DID NOT ADMINISTER AN INTELLIGENCE TEST.
5 I DIDN'T DO EITHER OF THOSE, BUT I DID DO OBSERVATIONS ABOUT
6 HOW HIS FUNCTIONING WAS AND WHAT HIS REASONING WAS. AND IT
7 WAS PRETTY PRIMITIVE.

8 ONE OF THE PROBLEMS IS THAT A LITTLE CHILD WILL SAY,
9 WELL, THEN THE RABBIT WENT IN THE HOLE, AND THEN THE DOG
10 CAME, AND THEN A MAN CAME WITH A GUN. IT'S AND, AND, AND.
11 THERE'S NO CAUSAL -- THIS HAPPENED BECAUSE OF THAT. THERE'S
12 NO PSYCHOLOGICAL INSIGHT INTO WHAT HAPPENS. IT'S JUST ONE
13 THING AFTER THE OTHER.

14 THAT'S VERY CHARACTERISTIC OF YOUNG CHILDREN. HE DID
15 THIS ALL THE TIME. HE HAD NO EXPLANATIONS. HE HAD NO
16 NUANCES. HE HAD NO REAL DESCRIPTIONS. HE HAD NO FEELING
17 WORDS IN IT. HE JUST KIND OF RECITED THINGS.

18 THE SECOND THING IS SOMETHING CALLED CONCRETE
19 OPERATIONS. THIS IS A CHILD WHO IS A LITTLE BIT OLDER. IN
20 THE FIRST PRE-CONCEPTUAL FUNCTIONING PART A CHILD MIGHT SAY
21 THIS IS BIGGER THAN THAT, BUT THEY WOULDN'T KNOW THAT THAT
22 IS SMALLER THAN THIS. THEY WOULDN'T BE ABLE TO REVERSE IT.

23 THE SECOND STAGE, WHICH IS ABOUT EIGHT OR NINE YEARS
24 OLD, THEY'D BE ABLE TO MAKE THOSE DISTINCTIONS. BUT THEY
25 WOULDN'T BE ABLE TO THINK SOME ABSTRACT THINGS LIKE WE'D

1 SHOW THEM A PICTURE OF FLOWERS AND SAY THERE ARE FOUR ROSES,
2 THERE ARE THREE LILIES. SAY, ARE THERE MORE ROSES OR MORE
3 FLOWERS? AND THEY WOULD SAY MORE ROSES BECAUSE THERE ARE
4 FOUR OF THEM. THEY WOULDN'T PICK THE LILIES AND THE ROSES
5 THAT ARE ALL IN THE SAME CATEGORY OF FLOWERS.

6 SO HE'S ON THAT LEVEL. HE HASN'T GOTTEN TO THE LEVEL
7 OF ABSTRACT THINKING. IT'S VERY PRIMITIVE THE WAY HE, YOU
8 KNOW, REASONS, INNOCENT, IF YOU'D LIKE TO SAY, VERY SIMPLE.

9 Q. DID YOU FIND HIM TO BE STREET-WISE?

10 A. NO. OUTSIDE OF, YOU KNOW, HE HAD A STREET NAME OF ONE
11 OF THE PEOPLE THAT HE'D SHARED. BUT OTHER THAN THAT I
12 DIDN'T FIND HIM TO BE EXTREMELY SHARP, YOU KNOW. I DIDN'T
13 FIND HIM TO BE VERY SECRETIVE. HE WAS OPEN. HE WAS JUST
14 TALKING.

15 IN FACT, HE DEPENDED A LOT ON HIS BODY LANGUAGE IN
16 ORDER TO REMEMBER THINGS. HE'D HAVE TO LIKE ACT IT OUT AND
17 THEN SAY, AND THEN THIS HAPPENED, AND THEN THAT HAPPENED.
18 WE DIDN'T ASK HIM TO DO THAT. HE NEEDED THAT AS MEMORY
19 CUES. AND YOUNG CHILDREN DO THIS. WHEN YOU LEARN HOW TO
20 READ THERE'S A LOT OF BODY LANGUAGE IN IT UNTIL THEY CAN SIT
21 STILL AND JUST READ IT. SO THERE'S ANOTHER THING THAT WAS
22 KIND OF A PRIMITIVE WAY OF VERBALIZING THINGS. HE DEPENDED
23 ON BODY GESTURES TO REMIND HIM OF THINGS.

24 Q. NOW WHAT IS WRITTEN IN THAT STATEMENT IS WRITTEN IN
25 ENGLISH CLEARLY. SO MARLON COULDN'T READ IT BEFORE ---

1 A. HE COULD NOT READ IT.

2 Q. --- HE SIGNED IT?

3 A. NO. MORE THAN THAT, HE COULDN'T REVIEW IT. IF YOU
4 WRITE -- SAY SOMETHING AND THEN THERE'S A TRANSCRIPT OF IT,
5 YOU CAN GO OVER IT AGAIN AND SAY, OH, DID I SAY THAT? AND
6 CORRECT IT. HE COULDN'T EDIT IT.

7 Q. AND WHY COULDN'T HE EDIT IT?

8 A. BECAUSE HE CAN'T READ IT.

9 Q. BECAUSE HE JUST DIDN'T HAVE THE CAPABILITY TO SEE WHAT
10 WAS ON THERE?

11 A. EXACTLY.

12 Q. SO HIS SIGNATURE ON THAT PIECE OF PAPER IS BASICALLY
13 MEANINGLESS? IT COULD SAY I'M THE PRESIDENT OF THE UNITED
14 STATES, SIGNATURE, AND THAT ---

15 A. WELL, IT BASICALLY PROVES HE WAS THERE.

16 Q. NOW AS FAR AS WHAT THE STATEMENT SAYS, THE STATEMENT
17 SAYS, I SHOT TWO TIMES. NOW IS IT POSSIBLE THAT MARLON --
18 THAT COULD APPEAR ON THAT STATEMENT WHEN MARLON REALLY
19 DIDN'T SHOOT TWO TIMES?

20 MS. HODGE: I'M GOING TO OBJECT, YOUR HONOR.

21 THE COURT: I SUSTAIN THE OBJECTION TO THAT QUESTION.

22 Q. DOES THAT CONFESSION REFLECT THE KNOWING AND WILLING
23 CONDUCT OF MARLON?

24 A. I DON'T BELIEVE SO. I DON'T BELIEVE SO BECAUSE HE
25 DOESN'T HAVE THE LANGUAGE SKILLS IN ORDER TO GIVE A COMPLETE

1 REPORT. I THINK THAT HE IS VERY EASILY LED AND DISTRACTED.
2 HE HAD TANGENTIAL THINKING, WHICH MEANS THAT HE'D GO OFF ON
3 TRACKS AND YOU'D HAVE TO BRING HIM BACK, NO, THIS IS WHAT I
4 ASKED. SO HE HAD TO BE SELF CORRECTED AND WENT BACK TO THE
5 POINT AGAIN.

6 HE HAS SOME MAGICAL THINKING. MAGICAL THINKING WOULD
7 BE LIKE A LITTLE DOG WHO'S HIDING FROM YOU AND HE'S HIDING
8 UNDER THE COFFEE TABLE. YOU CAN SEE HIS TAIL. YOU KNOW
9 HE'S THERE, BUT HE DOESN'T SEE YOU. SO HE THINKS YOU CAN'T
10 SEE HIM. WELL, HE THINKS, IN HIS MIND, THIS IS WHAT
11 HAPPENED AND THAT'S IT. I MEAN, THEY CAN'T SAY IT DIDN'T.
12 I WAS THERE. I KNOW WHAT HAPPENED. AS IF HE BELIEVES IT,
13 ANYBODY'S GOING TO BELIEVE IT. IT'S TRUE, SO EVERYBODY'S
14 GOING TO BELIEVE IT. AND HE CANNOT IMAGINE THE OTHER
15 PERSON, THE AUDIENCE.

16 YOU KNOW, HE DOESN'T -- AND IF HE'D GONE TO SCHOOL, YOU
17 KNOW, THERE'S TEACHERS YOU CAN TALK TO TO KNOW WHAT
18 ASSIGNMENTS YOU GET. YOU HAVE TO INTERACT WITH A LOT OF
19 ADULTS. YOU SPEND THIRTY-FIVE HOURS A WEEK INTERACTING WITH
20 ADULTS TRYING TO PLEASE THEM. HE NEVER HAD THAT, YOU KNOW.
21 HE JUST HAS HIS OWN COHORT OR GROUP. THAT'S IT.

22 Q. SO HE COULD HAVE THOUGHT, WELL, ---

23 MS. HODGE: I OBJECT ---

24 THE COURT: YEAH, I SUSTAIN THE OBJECTION TO THE
25 STATEMENT. ALL RIGHT. ANYTHING ELSE NOW, MS. ROSS?

1 MS. ROSS: I BEG THE COURT'S INDULGENCE. I'VE GOT
2 NOTHING FURTHER.

3 THE COURT: ALL RIGHT, SOLICITOR.

4 CROSS EXAMINATION BY MS. HODGE:

5 Q. DR. TAYLOR, YOU HAVE GIVEN US GREAT INSIGHT AS TO THE
6 DEFENDANT'S FUNCTIONING CAPABILITIES AND PROVIDED A LOT OF
7 INFORMATION ABOUT WHAT YOU PERCEIVE FROM HIM. AND ALL OF
8 THIS TOOK PLACE IN A THIRTY MINUTE INTERVIEW, IS THAT
9 CORRECT?

10 A. THAT'S CORRECT.

11 Q. AND YOU ALSO DURING THIS TIME ADMINISTERED A
12 FUNCTIONING TYPE TEST TO HIM, IS THAT CORRECT?

13 A. NO. I OBSERVED HIM INTERACTING WITH MR. FREEMAN. AND
14 I OBSERVED HIS INTERACTION WITH ME AND HIS BODY LANGUAGE. I
15 DIDN'T ADMINISTER ANY TESTS TO HIM.

16 Q. YOU DID NOT ADMINISTER SOME TEST THAT YOU SAID IS
17 ADMINISTERED AT SCHOOLS, A KAUFMAN OR ---

18 A. NO. I SAID I DID NOT ADMINISTER THAT. THAT WOULD HAVE
19 BEEN AN INTELLIGENCE TEST. I ---

20 Q. OH, I'M ---

21 A. --- DIDN'T ADMINISTER THAT.

22 Q. --- SORRY. I MISUNDERSTOOD. SO YOU DID NOT GIVE HIM
23 AN IQ TEST?

24 A. NO, I DID NOT.

25 Q. FROM YOUR OBSERVATIONS, HIS INTERACTION WITH MR.

1 FREEMAN, THAT'S HOW YOU GLEANED ALL THIS INFORMATION?

2 A. THAT'S RIGHT. WHEN WE DO A STRUCTURED INTERVIEW, FOR
3 INSTANCE AT MARSHALL PICKENS, PART OF IT IS INFORMATION,
4 PART OF IT IS OBSERVATION. AND THAT'S CONSIDERED PART OF
5 THE INTERVIEW.

6 Q. NOW YOU WOULD NOT SAY THAT THE DEFENDANT OR YOU COULD
7 NOT SAY HE'S MENTALLY RETARDED?

8 A. NO, I COULDN'T SAY THAT.

9 Q. HE MIGHT NOT BE THE SMARTEST GUY, BUT HE'S NOT MENTALLY
10 RETARDED?

11 A. NO.

12 Q. AND HE DIDN'T HAVE NECESSARILY A PROBLEM WITH THE
13 TRANSLATOR, BUT MORE OF THE CONCEPTS THAT WERE BEING STATED,
14 IS THAT ACCURATE?

15 A. TRANSLATED ---

16 Q. IN HIS STATEMENT AND HIS WAIVER. HE DIDN'T RELATE TO
17 YOU A PROBLEM WITH ---

18 A. RIGHT, NO.

19 Q. --- COMMUNICATING WITH DEPUTY RIVERA, IT WAS THAT ---

20 A. NO.

21 Q. --- HE DIDN'T UNDERSTAND THE CONCEPTS?

22 A. HE DIDN'T UNDERSTAND THE CONCEPTS.

23 Q. AND IN YOUR OPINION IT WAS IMPORTANT FOR HIM TO
24 UNDERSTAND WHAT THE CONSEQUENCES OF THE STATEMENT BEFORE YOU
25 FELT LIKE HE REALLY UNDERSTOOD HIS STATEMENT?

1 A. YEAH, I DEFINITELY DO.

2 Q. AND DID HE STATE TO YOU HOW LONG HE HAD BEEN IN THE
3 UNITED STATES?

4 A. I DIDN'T ASK.

5 Q. AND THE INFORMATION THAT YOU USED TO FORM YOUR OPINION
6 ONLY CAME FROM THE DEFENDANT, IS THAT CORRECT?

7 A. UM-HUM (AFFIRMATIVE).

8 Q. AND YOU DID NOT REVIEW ANY FORENSIC EVIDENCE, ANY
9 WITNESS STATEMENTS TO SEE IF ANY OF IT CORROBORATED WHAT HIS
10 STATEMENT, IN FACT, DID SAY?

11 A. NO.

12 Q. AND ACCORDING TO YOUR INTERACTION WITH HIM HE ONLY KNEW
13 ONE LETTER OF THE ALPHABET, IS THAT CORRECT?

14 A. YES.

15 Q. THAT WOULD BE THE LETTER "M"?

16 A. UM-HUM (AFFIRMATIVE).

17 Q. FOR HIS NAME?

18 A. FIRST NAME.

19 Q. AND WHEN WE TALKED ABOUT THE CONCEPTS OF HIS RIGHTS
20 THAT YOU DON'T FEEL LIKE HE UNDERSTOOD AND YOU'RE A BI-
21 CULTURAL, I THINK YOU'VE BEEN QUALIFIED AS A BI-CULTURAL
22 EXPERT, WOULD YOU SAY THAT THE PERCEPTION IS AMONG OTHER
23 CULTURES, ESPECIALLY HONDURAS, WHERE THE DEFENDANT WOULD BE
24 FROM, THAT AMERICA IS A BETTER PLACE TO BE, THAT YOU GET
25 MORE THINGS, AND HAVE MORE RIGHTS AS OPPOSED TO, SAY,

1 HONDURAS?

2 A. I THINK THEY'RE AMBIGUOUS. THEY LIVE LIKE A SUB-
3 CULTURE. I DO GROUPS OF DOMESTIC VIOLENCE. YOU HAVE
4 DIFFERENT GROUPINGS YOU CAN PUT BASICALLY TWO LATINO PEOPLE
5 IN. THE HIGH FUNCTIONING GROUP OF MIDDLE CLASS,
6 SOCIOECONOMICALLY THE SAME PARODY AS WE ARE, AND THEN THE
7 COLOMBIANS, AND CUBANS, AND ARGENTINES.

8 NOW TWO DAYS AGO I TALKED TO A COLOMBIAN WHO SAID ABOUT
9 THE MEXICANS, AND THIS WOULD ALSO APPLY TO MEXICANS,
10 HONDURANS, NICARAGUANS, THAT THEY ACT AS IF THEY'RE STILL
11 USING THE SAME RULES AND ACTIONS THEY WOULD DO IN THEIR
12 COUNTRY, WHEREAS THE HIGH FUNCTIONING ONES WOULD KNOW WHEN
13 YOU'RE IN ROME, DO LIKE THE ROMANS DO. THEY CAN CULTIVATE.
14 THEY CAN MAKE SURE THAT THEY LOOK, SEE, AND ACT ACCORDINGLY.
15 WHEREAS THE OLD COUNTRIES SEEM TO BASICALLY -- HAVE NOT
16 CHANGED MUCH SINCE THEY ARRIVED. THEY ACT THE WAY THEY
17 WOULD ACT THERE.

18 Q. I UNDERSTAND THAT. AND MY QUESTION IS WOULD THEIR
19 PERCEPTION OF AMERICA NOT BE THAT THIS IS THE LAND OF
20 PLENTY, THAT THIS IS THE PLACE WHERE YOU HAVE A LOT BETTER
21 RIGHTS, YOU'RE TREATED A LOT BETTER THAN YOU MIGHT BE BACK
22 IN HONDURAS?

23 A. WELL, SOME COUNTRIES THAT ARE LOOKING LIKE EL SALVADOR
24 FOR A POLITICAL ASYLUM CERTAINLY WOULD.

25 Q. HOW ABOUT HONDURAS?

1 A. THAT COUNTRY, I'M NOT SURE.

2 Q. BUT PEOPLE COME HERE, WOULD YOU AGREE WITH ME, BECAUSE
3 THEY THINK IT'S BETTER HERE?

4 A. OH, I THINK THEY THINK -- I DON'T THINK THEY'RE SO
5 FIXED ON THEIR RIGHTS AS -- UNLESS THEY'RE EXILES AND
6 THEY'RE TRYING TO GO FOR A POLITICAL ASYLUM, THEY'RE MORE
7 FIXED ON THE ECONOMICS. IF THEY LOOK FOR A BETTER LIFE,
8 THEY THINK -- THEY VERY MUCH ARE INTERESTED IN THEIR
9 CHILDREN LIVING IN THIS COUNTRY. IN FACT, HALF OF THE
10 PARENTS THAT I FIND DURING THE PARENT/CHILD AND TEACHER
11 CONFERENCE IS FOR -- HALF OF THEM ARE MOVED, THANKING THE
12 TEACHERS, THANKING THEM FOR HELPING -- YOU MAKE IT ALL
13 WORTHWHILE. THEIR FOCUS IS ON THE NEXT GENERATION.

14 Q. COULD THE DEFENDANT FUNCTION IN HONDURAS WHERE HE IS
15 FROM? COULD HE GET AROUND ON A DAILY BASIS, YOU THINK, AND
16 COMMUNICATE WITH PEOPLE, AND LIVE NORMALLY IN HONDURAS?

17 A. WELL, YEAH, BECAUSE THEY WOULD HAVE SUPPORT GROUPS.
18 FOR INSTANCE, IF YOU SAW WELFARE PEOPLE IN NEW YORK, A LOT
19 OF PEOPLE ARE COMPLAINING, THEY'RE TAKING TAXIES TO GO TO
20 PICK UP THEIR CHECK. WHAT, ARE THEY CRAZY? NO. THEY CAN'T
21 READ THE STREET SIGNS. THEY HAVE TO GET THERE. SO THERE
22 ARE WAYS THAT PEOPLE HAVE OF ADAPTING. HOW WELL HE DID, I
23 HAVE NO IDEA. I DID NOT DO A PSYCHO SOCIAL ON HIM.

24 Q. I GUESS I COULD HAVE NARROWED MY QUESTION IN THAT JUST
25 AS YOU SAID, READING STREET SIGNS AND GETTING AROUND. HE

- 1 CAN'T READ IN SPANISH?
- 2 A. UH-UH (NEGATIVE).
- 3 Q. BUT IN HONDURAS, WHERE HE'S FROM, THINGS ARE PROBABLY
- 4 IN SPANISH, CORRECT?
- 5 A. THAT'S CORRECT.
- 6 Q. SO HE ---
- 7 A. PROBABLY WOULD HAVE TO ---
- 8 Q. THINK HE'D PROBABLY BE ABLE TO GET AROUND AND FIGURE
- 9 OUT SOME SPANISH?
- 10 A. I DON'T KNOW IF HE'D GO VERY FAR FROM HIS IMMEDIATE
- 11 ENVIRONMENT.
- 12 Q. WHAT IS THE WORD FOR PISTOL IN SPANISH?
- 13 A. PISTOLA.
- 14 Q. IS THAT A BIG LEAP TO MAKE FROM ENGLISH TO SPANISH, ---
- 15 A. NO.
- 16 Q. --- PISTOL, PISTOLA?
- 17 A. NO.
- 18 Q. WHAT ABOUT -- MS. ROSS ASKED YOU IF HE WANTED TO SAY HE
- 19 WAS WEARING A BLACK SHIRT WOULD IT HAVE BEEN EASY FOR HIM TO
- 20 SAY I WAS WEARING A BLACK SHIRT?
- 21 A. UM-HUM (AFFIRMATIVE).
- 22 Q. HOW ABOUT IF HE WAS WEARING A STRIPED SHIRT? WOULD IT
- 23 BE EASY FOR HIM TO SAY I WAS WEARING A STRIPED SHIRT?
- 24 A. (WHEREUPON THE WITNESS ANSWERED IN SPANISH).
- 25 Q. THANK YOU. I DON'T HAVE ANY OTHER QUESTIONS.

1 MS. ROSS: JUST BRIEFLY.

2 REDIRECT EXAMINATION BY MS. ROSS:

3 Q. BUT YOU DID SAY BASED ON MARLON'S SORT OF SIMPLICITY
4 THAT IT WOULD BE EASY TO LEAD HIM INTO SAYING WHATEVER THE
5 PERSON WHO IS WRITING THE STATEMENT WANTED HIM TO SAY?

6 A. YEAH, EXACTLY. IT WAS BOTH EASY TO LEAD HIM AND EASY
7 TO DERAIL HIM. HE'D HAVE TO GO BACK ON TRACK AND RETRACE
8 HIS STEPS IF HE WAS SPEAKING AND INTERRUPTED.

9 Q. THANK YOU.

10 THE COURT: THANK YOU. YOU CAN STEP DOWN. LADIES AND
11 GENTLEMEN, WE'LL SUSPEND AND PICK BACK UP TOMORROW MORNING
12 AT 9:00. PLEASE REMEMBER THAT WHEN YOU LEAVE DON'T TALK
13 ABOUT THIS CASE AMONG YOURSELVES OR WITH ANYONE ELSE. KEEP
14 YOUR BADGES ON. HAVE THEM ON IN THE MORNING. PLEASE BE
15 BACK AT 9:00 IN THE MORNING. THANK YOU.

16 (WHEREUPON THE JURY EXITED THE COURTROOM AT 5:14 PM)

17 THE COURT: ALL RIGHT. SEE YOU IN THE MORNING.

18 (WHEREUPON COURT WAS IN RECESS)

19 WEDNESDAY, OCTOBER 12, 2005:

20 THE COURT: BE SEATED. BRING OUR JURY PLEASE. HOLD
21 ON.

22 MS. ROSS: CAN I MAKE A FEW MOTIONS FIRST PLEASE? I
23 JUST WANTED TO -- I'VE GOT THE WITNESS STATEMENTS THAT I'D
24 LIKE TO PUT INTO EVIDENCE THAT CAME UP YESTERDAY WHEN IT WAS
25 SUGGESTED THAT THE INTERVIEWS AND NOTES OF CARLOS FREEMAN

1 WERE SUBSTANTIALLY DIFFERENT FROM THE WITNESS STATEMENTS.

2 WELL, HERE ARE THE NOTES OF CARLOS FREEMAN WITH THE WITNESS
3 STATEMENTS BEHIND THEM. AND I'D LIKE TO PASS THEM UP.

4 THE COURT: YOU'RE PROFFERING THAT FOR THE RECORD?

5 MS. ROSS: I'M PROFFERING THAT FOR THE RECORD.

6 THE COURT: OKAY.

7 MS. ROSS: AND I'D POINT OUT THAT THE TOP STATEMENT IS
8 THE STATEMENT OF YAMILETH CORRALES. SHE IS THE WITNESS THAT
9 I ATTEMPTED TO CALL TO THE STAND YESTERDAY. AND I WOULD
10 LIKE TO PROFFER THAT ALONG, IT'S CARLOS' NOTES, ALONG WITH
11 HER ACTUAL SIGNED STATEMENT THAT ---

12 THE COURT: ALL RIGHT. THAT'S FINE.

13 (WHEREUPON COURT'S EXHIBITS 4 & 5 WERE MARKED)

14 MS. ROSS: --- WES SMITH GOT AS WHAT SHE WOULD HAVE
15 SAID HAD SHE BEEN ABLE TO TESTIFY. AND I WOULD RENEW MY
16 OBJECTION TO THAT. CLEARLY THAT'S PART OF WHAT I WAS
17 TALKING ABOUT WHEN I SAID -- WANTED CO-COUNSEL OR SOMEONE
18 WHO SPOKE SPANISH, SOMEONE WHO COULD COMMUNICATE WITH
19 WITNESSES AS A LAWYER AND TELL THEM WHAT TO DO AND WHAT NOT
20 TO DO.

21 AND ALSO I BELIEVE MARLON RIVERA'S RIGHTS TO A FAIR
22 TRIAL HAVE BEEN SUBSTANTIALLY AFFECTED BY HIS INABILITY TO
23 CALL -- MY INABILITY TO CALL WITNESSES IN HIS DEFENSE. I'D
24 ALSO RENEW MY OBJECTION TO CARLOS FREEMAN BEING PERMITTED
25 [SIC] FROM TESTIFYING. HE WAS ON THE WITNESS LIST FROM THE

1 BEGINNING. NO OBJECTION WAS MADE WHEN HE STAYED IN THE
2 COURT.

3 I DIDN'T OBJECT TO WES SMITH STAYING IN COURT.
4 TRADITIONALLY THE WAY THINGS HAVE GONE IS THE LEAD
5 INVESTIGATOR REMAINS IN COURT EVEN AFTER A SEVERANCE MOTION
6 IS MADE. AND UNDER EQUAL TREATMENT I'D JUST RENEW MY
7 OBJECTION TO HIM NOT -- TO CARLOS FREEMAN NOT BEING ALLOWED
8 TO TESTIFY.

9 AND FINALLY, AT THIS POINT I'D LIKE TO MAKE A
10 CONTINUANCE MOTION BASED ON RULE 7 (B) OF THE RULES OF
11 CRIMINAL PROCEDURE. I'D BE HAPPY TO STATE NOW OR ON THE
12 STAND THAT THIS IS NOT INTENDED TO -- AS A DELAY.

13 I WOULD PASS UP FOR THE COURT THE SUBPOENA OF OLGA
14 BARRERAS. SHE WAS A BARMAID THAT WAS SERVED A FEW DAYS AGO
15 BY CARLOS FREEMAN. HE DEFINITELY DID DUE DILIGENCE TO TRY
16 TO ASSURE SHE'S HERE. WE'VE CALLED HER A NUMBER OF TIMES.
17 WE SERVED THE SUBPOENA. WE'VE BEEN DOING EVERYTHING WE
18 COULD TO GET HER HERE. AND THEN I'D PASS UP CARLOS
19 FREEMAN'S NOTES THAT OUTLINES SUBSTANTIALLY WHAT SHE WOULD
20 HAVE SAID HAD SHE BEEN ABLE TO TESTIFY.

21 THE COURT: ALL RIGHT. WE'LL MAKE THIS A PART OF THE
22 RECORD.

23 (WHEREUPON COURT'S EXHIBITS 6 & 7 WERE MARKED)

24 MS. ROSS: THANK YOU, YOUR HONOR. AND I WOULD ASK --
25 SO ARE YOU GRANTING OR DENYING ---

1 THE COURT: I'M GOING TO DENY YOUR MOTION FOR A
2 CONTINUANCE. THE TRIAL HAS ALREADY COMMENCED.

3 MS. ROSS: ALL RIGHT.

4 THE COURT: ALL RIGHT. ANYTHING ELSE?

5 MS. ROSS: NO, SIR.

6 THE COURT: BRING OUR JURY. ALL RIGHT, WE'RE READY TO
7 START. MR. PINEROS, WHEN WE WERE DOING THE FORMER TESTIMONY
8 WITH THE DEFENDANT THE COURT REPORTER WAS HAVING DIFFICULTY
9 WITH BOTH OF YOU TALKING AT THE SAME TIME. SO IF YOU'LL TRY
10 TO WORK WITH US AND NOT TALK AT THE SAME TIME AS THE
11 DEFENDANT IS.

12 MR. PINEROS: I WILL.

13 THE COURT: ALL RIGHT. BRING OUR JURY PLEASE.

14 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 9:27 AM)

15 THE COURT: GOOD MORNING.

16 THE JURY: GOOD MORNING.

17 THE COURT: ALL RIGHT. MS. ROSS.

18 MS. ROSS: MAY IT PLEASE THE COURT? THE DEFENSE WOULD
19 CALL MARLON RIVERA TO THE STAND.

20 THE COURT: COME AROUND.

21 (WHEREUPON THE FOLLOWING QUESTIONS AND ANSWERS WERE
22 INTERPRETED BY EFRAIN PINEROS)

23 MARLON RIVERA, BEING DULY
24 SWORN TESTIFIED AS FOLLOWS:

25 MADAME CLERK: PLEASE STATE YOUR FULL NAME FOR THE

1 RECORD.

2 MR. RIVERA: MARLON ANTONIO RIVERA.

3 DIRECT EXAMINATION BY MS. ROSS:

4 Q. MARLON, I WOULD LIKE YOU TO FIRST TELL THE JURY ABOUT
5 YOUR BACKGROUND.

6 A. I AM FROM HONDURAS.

7 Q. WHAT YEAR WERE YOU BORN THERE?

8 A. DECEMBER 3RD, 1974.

9 Q. HOW LONG DID YOU LIVE IN HONDURAS BEFORE YOU CAME HERE?

10 A. I LIVED ALL MY TIME IN HONDURAS, ALL MY LIFE.

11 Q. WHO DID YOU STAY WITH IN HONDURAS?

12 A. WITH MY GRANDMA.

13 Q. AND DID YOU GO TO SCHOOL WHEN YOU WERE A CHILD IN
14 HONDURAS?

15 A. NO.

16 Q. WHAT DID YOU DO WHEN YOU WERE A CHILD IN HONDURAS?

17 A. WHEN I WAS NINE YEARS OLD MY GRANDMA TOOK ME TO SCHOOL
18 AND REGISTERED -- AND SHE REGISTERED ME THERE. I ATTENDED
19 SCHOOL ONE DAY, YES, THE NEXT DAY ONE, NO. BECAUSE MY
20 GRANDMA USED TO MAKE TORTILLAS AND I WENT OUT AND SELL THEM.
21 WHEN WE HAD SOMETHING TO EAT I ATTENDED SCHOOL. AND WHEN WE
22 DIDN'T HAVE ANYTHING TO EAT I WENT TO SELL TORTILLAS.

23 Q. SO YOU WERE HELPING TO SUPPORT YOUR GRANDMOTHER AND
24 YOURSELF?

25 A. I WAS THE ONLY ONE THAT SUPPORT MY GRANDMA BECAUSE OF

1 ALL MY COUSINS AND MY BROTHERS. SO MY MOM GOT MY OLDER
2 BROTHERS AND MY MOM DIDN'T ALLOW ME TO -- MY GRANDMA DIDN'T
3 ALLOW ME TO LIVE WITH MY MOM. SO I WENT TO LIVE WITH HER,
4 WITH MY GRANDMA. I WAS THE ONLY ONE WORKING. AND I SOLD
5 THE TORTILLAS FOR HER -- MORE FOR HER -- DOING THAT WORK --
6 DOING THAT, SELLING THE TORTILLAS.

7 MY MOM AND MY GRANDMA HAD SOME DISCUSSIONS, SOME
8 ARGUMENTS BECAUSE MY MOM WANTED ME TO GO BACK WITH HER, AND
9 MY GRANDMA SAID THAT, NO, THAT SHE WASN'T GOING TO ALLOW TO
10 LET ME GO BECAUSE I WAS THE ONE HELPING HER SELLING THE
11 TORTILLAS AND THE OTHER THINGS. I GREW UP AND I WENT TO
12 WORK IN A SHOP. THEY PAY ME ONE LEMPIRA, THAT IS THE
13 CURRENCY FROM HONDURAS A DAY JUST TO DO ERRANDS, AT SIX
14 LEMPIRAS FROM MONDAY THROUGH SATURDAY..

15 THE COURT: ALL RIGHT. LET'S MOVE ON PLEASE NOW, MS.
16 ROSS.

17 Q. WHAT DID YOU DO WITH THE MONEY THAT YOU MADE?

18 A. I GAVE -- I USUALLY GIVE MY GRANDMA FOUR LEMPIRAS, AND
19 I KEPT TWO FOR MYSELF.

20 Q. NOW AT SOME POINT YOU CAME TO AMERICA TO STAY WITH YOUR
21 MOTHER.

22 A. SO SHE SAID, WELL, I'M ALMOST TO THE POINT OF DYING.
23 SO YOU'RE GOING TO HAVE TO GO AND LIVE WITH YOUR MOM. AND I
24 HAD NEVER LIVED WITH MY MOM.

25 Q. YOUR GRANDMOTHER TOLD YOU THAT?

1 A. THE GRANDMA TOLD HIM THAT.

2 Q. AND AT THAT POINT WAS YOUR MOTHER IN AMERICA?

3 A. YES. MY MOM WAS HERE IN THE UNITED STATES.

4 Q. SO YOU CAME HERE TO STAY WITH HER AND YOUR STEP-FATHER?

5 A. I TOLD MY GRANDMA THAT, YES, THAT I WAS GOING -- TO MY
6 MOM THAT I WAS GOING TO COME AND LIVE WITH HER, BUT THE
7 MONEY, I WAS GOING TO SEND SOME OF THE MONEY BACK FOR A
8 HOUSE. THE MONEY WAS TO HELP REPAIR THE HOUSE IN HONDURAS
9 WHERE MY GRANDMA LIVES.

10 Q. SO AFTER YOU CAME HERE AND WERE STAYING WITH YOUR
11 MOTHER AND STEP-FATHER WERE YOU SENDING MONEY BACK TO YOUR
12 GRANDMOTHER TO HELP HER?

13 A. WHEN I GOT HERE TO THE UNITED STATES THEY PAY ME SEVEN
14 DOLLARS AN HOUR. I EARNED THREE HUNDRED AND FIFTY-EIGHT
15 HUNDRED DOLLARS [SIC]. AND I USED TO SEND HER THREE HUNDRED
16 DOLLARS BACK TO HONDURAS.

17 Q. AND IN THE PLACE WHERE YOU WERE STAYING, THE
18 APARTMENTS, WITH YOUR MOTHER AND STEP-FATHER, WHO TOOK CARE
19 OF ALL THE BILLS AND ALL ---

20 THE COURT: NOW THIS HAS NO RELEVANCE TO THIS CASE.
21 LET'S MOVE ON, MS. ROSS.

22 MS. ROSS: YOUR HONOR, I THINK IT DOES, ---

23 THE COURT: LET'S MOVE ON PLEASE NOW.

24 Q. WHO HANDLED YOUR LIVING SITUATION AS FAR AS YOUR DAY TO
25 DAY LIVING SITUATION? WHO TOOK CARE OF MAKING SURE YOU HAD

1 ELECTRICITY?

2 A. MY STEP-FATHER WAS THE ONE RESPONSIBLE FOR EVERYTHING
3 IN THE HOUSE, TO PAY THE BILLS.

4 Q. AND I ASKED YOU THAT BECAUSE COULD YOU READ OR WRITE IN
5 ENGLISH?

6 A. I CANNOT READ ENGLISH, NEITHER SPANISH.

7 Q. AND HOW WERE YOU ABLE TO WORK?

8 A. I WORKED BY THE HOUR, AND THEY PAID ME CASH.

9 Q. HOW DID THEY -- HOW DID THEY TALK WITH YOU?

10 A. I WORK WITH HISPANICS.

11 Q. AND THEY TOLD YOU IN SPANISH WHAT TO DO AND HOW TO DO
12 IT?

13 A. WHEN I GOT HERE I DIDN'T KNOW HOW TO DO THE THINGS, BUT
14 THEY WERE TELLING ME HOW TO DO THE THINGS. SO I LEARNED.

15 Q. NOW I WANT YOU TO TALK NOW ABOUT THE NIGHT OF THE
16 SHOOTING LAST JULY, JULY, 2004. AND I WANT YOU TO TELL THE
17 JURY WHAT HAPPENED ON THAT NIGHT.

18 A. YES.

19 Q. I'D LIKE TO START WITH WHAT DID YOU GO OUT AND DO
20 EARLIER IN THE EVENING?

21 A. ONE SATURDAY I GOT MY MONEY FROM MY PAYMENT. I GOT
22 FOUR HUNDRED AND EIGHTY DOLLARS BECAUSE I WORKED FROM MONDAY
23 THROUGH SATURDAY. THE GUY THAT USED TO GIVE ME RIDES, HE
24 USED TO CHARGE ME TWENTY-FIVE DOLLARS TO HELP FOR THE GAS.
25 I GOT TO MY HOME THAT DAY AND I PAID HIM.

1 I WENT TO WAL-MART AND I BOUGHT SOME GROCERIES. I
2 BOUGHT ONE HUNDRED AND TWENTY-FIVE DOLLARS OF GROCERIES. I
3 GAVE MY MOM TWO HUNDRED DOLLARS. I KEPT THE REST OF THE
4 MONEY BECAUSE I WAS GOING TO SEND A HUNDRED DOLLARS TO MY
5 GRANDMA.

6 FROM THERE I WENT TO THE BARBER SHOP. FROM THERE I
7 TOOK A SHOWER, I CHANGED MY CLOTHES AND WENT OUT. I WENT TO
8 THE BARRINGTON PARK. THERE WERE SOME FRIENDS DRINKING. AND
9 THEY TOLD ME, DO YOU WANT A BEER? AND I SAID, OKAY. I GOT
10 -- I DRANK A BEER.

11 ANTONIO MENDOZA HAD SOME PROBLEMS WITH HILDA RIVERA. I
12 WENT WITH THE GUY TO -- IN HIS CAR TO THE -- TOWARD THE
13 RESTAURANT CALLED EL RANCHO. IN THAT RESTAURANT THERE WAS A
14 MR. MARIANO MENDOZA. HE WAS WELL DRUNK. WHEN THEY ARREST
15 HIM, ANTONIO GOT ARRESTED, HE WAS CARRYING A .22 PISTOL. HE
16 GAVE IT TO MARIANO MENDOZA, THE PISTOL.

17 I GOT THERE WITH TWO GUYS FROM HONDURAS. THEY CALL HIM
18 SKINNY. I NEVER KNEW HIM BY HIS PROPER NAME. WE WERE IN EL
19 RANCHO, AND WE DRANK TWO BEERS. AND HE SAID, LET'S GO,
20 LET'S GO. AND HE SAID, ARE YOU GOING HOME? AND MARIANO
21 TOLD ME JUST -- WILL YOU KEEP THIS GUN FOR ME? AND I
22 GRABBED THE GUN. I PUT IT BEHIND ON MY BELT.

23 Q. OKAY, ONE SECOND. WAS THAT THIS GUN?

24 A. YES.

25 Q. NOW WHO GAVE YOU THAT GUN?

1 A. MARIANO MENDOZA GAVE ME THAT WEAPON TO GO ON AND PUT IT
2 AWAY THAT NIGHT.

3 Q. WHAT HAPPENED THEN?

4 A. WE GOT OFF THE CAR. WE WENT TO THE RESTAURANT, DON
5 PEPE. MAURICIO, MR. MAURICIO WAS THERE. THERE WERE FIVE
6 BLACK MEN THERE. AND I KNEW THEM. THEY WERE IN THE BAR
7 SECTION. AND THERE WAS ANOTHER GUY THAT WAS WITH MAURICIO,
8 THE ONE THAT WAS TESTIFYING YESTERDAY HERE. AND THERE WAS
9 ANOTHER GUY WHOSE NAME WAS NORLY AND ANOTHER ONE WHOSE NAME
10 WAS OMAR. AND THERE WAS THE WAITRESS, THE WAITRESSES. AND
11 I GOT CLOSE, AND I BOUGHT TWO, THREE BEERS. I DRUNK ONE OF
12 THE BEERS.

13 ONE OF THE BLACK GUYS TOLD ME, MARLON, ---

14 MR. PINEROS: I'M SORRY, BUT I CAN'T UNDERSTAND WHAT
15 HE'S SAYING IN ENGLISH. HE SAID, GO HOME OR SOMETHING LIKE
16 THAT. AND HE TOLD HIM, YES.

17 A. AND THEN MR. DON PEPE CAME AND GOT EVERYBODY OUT
18 BECAUSE IT WAS 11:30. AND THE ONE CALLED EL FLACO OR THE
19 SKINNY CALLED ME TO GET A TACO. I WAS WITH MY BACK TOWARD
20 MAURICIO. AND HE CAME AND ATTACKED ME. THERE WAS A SOCCER
21 GAME GOING ON AND IT WAS ALREADY OVER. THE SOCCER GAME WAS
22 ALREADY OVER.

23 MAURICIO GOT UPSET BECAUSE I GOT CLOSE TO ONE OF THE
24 BLACK GUYS. HE STARTED JUST SAYING BAD THINGS TO ME, JUST
25 INSULTING ME. AND HE STARTED PUNCHING ME VERY HARD. AND I

1 TOLD HIM, HOLD ON A MINUTE, DON'T BOTHER ME BECAUSE I DON'T
2 LIKE PROBLEMS. AND HE KEPT JUST PUNCHING ME. AND HE'S KIND
3 OF SHORT AND VERY STOCKY. AND HE JUST HIT ME AGAINST ONE OF
4 THE WALLS, ON A COLUMN. AND HE PUSHED ME AGAINST A COLUMN
5 AND HIT ME ON -- I GOT HIT ON THE BACK OF MY HEAD.

6 AND HE CONTINUED DOING THE SAME AND PUSHED ME HARD AND
7 THREW ME TO THE GROUND AND START KICKING ME. I WAS ON THE
8 GROUND WHEN I GOT UP. AND THE GUN JUST SLIPPED OFF INSIDE
9 THE PANTS AND IT STARTED GOING DOWN THE LEG. AND I STAND
10 UP, GOT UP. AND I WAS GOING TO PICK UP THE PISTOL. AND HE
11 PUSHED ME DOWN BECAUSE HE WANTED TO GRAB THE GUN. AND I GOT
12 THE GUN FIRST, AND I SHOT DOWN. AND HE SAW ME WITH THE GUN.

13 AND THE GUY THAT WAS HERE YESTERDAY GRABBED HIM AND
14 THEY TOLD HIM, MAURICIO, JUST DON'T BOTHER HIM. AND I WAS
15 TELLING HIM. AND MAURICIO DIDN'T PAY ATTENTION TO WHAT I
16 WAS SAYING. AND HE KEPT PUNCHING ME, PUNCHING ME. AND I
17 JUST RAISED MY ARMS TO DEFEND MYSELF BECAUSE I HAD NEVER
18 FOUGHT ANYBODY BEFORE.

19 Q. ONE SECOND. WAS THIS BEFORE YOU HAD THE GUN OR AFTER
20 YOU HAD THE GUN? IN YOUR HAND?

21 A. THE GUN JUST FELL FROM ME. AND WHEN I GOT THE GUN HE
22 JUST KEPT INSISTING ON ATTACKING ME. AND HE SAID, NO, THAT
23 WEAPON IS A FAKE ONE. AND HE CONTINUED HITTING ME.
24 SOMEBODY GRABBED MAURICIO. AND THEY GOT ME TOO, SOMEBODY
25 GRABBED ME TOO. I DO NOT KNOW WHO GRABBED ME.

1 FROM THERE THE ONE THAT IS CALLED THE SKINNY CAME AND
2 GOT MY -- GOT THE WEAPON. AND HE SHOT THE WEAPON ONE TIME.
3 AND WHEN THERE WAS A SHOT, MAURICIO, NOTHING HAPPENED, AND
4 HE JUST CONTINUED ATTACKING ME. AND I GOT THE -- AND I SHOT
5 DOWN AGAIN TO THE GROUND. I SHOOT THE GUN TWICE TO THE
6 GROUND..

7 MAURICIO GRABBED THE GUN FROM ME -- MAURICIO GRABBED
8 THE GUN FROM MY HAND. HE SHOT -- THE SKINNY ONE GOT THE GUN
9 FROM ME AND HE SHOT MAURICIO. HE THEN GIVE ME THE GUN. AND
10 MAURICIO CONTINUED JUST AGAIN START ATTACKING ME. AND I
11 SHOOT AGAIN TO THE GROUND.

12 Q. ONE SECOND. SO DID YOU SHOOT AT THE GROUND, AND THEN
13 THE SKINNY GETS THE GUN AND SHOOTS AT MAURICIO, AND THEN YOU
14 SHOOT AT THE GROUND AGAIN?

15 A. YES. I ALWAYS JUST SHOT TO THE GROUND SO HE WILL GET
16 SCARED.

17 Q. AND SO YOU SHOT -- DID YOU SHOOT TWO TIMES?

18 A. YES, I SHOOT TWICE TO THE GROUND.

19 Q. AND BOTH TIMES WERE TO THE GROUND?

20 A. THE FIRST AND THE SECOND SHOT, YES, I SHOOT THEM TO THE
21 GROUND.

22 Q. WHEN THE SKINNY GOT THE GUN DID YOU GIVE IT TO HIM?

23 A. NO, HE GRABBED THE GUN FROM ME, FROM MY HAND. I WAS
24 HOLDING THE GUN AND HE -- I TOLD HIM, NO, I'M NOT GOING TO
25 GIVE YOU THE PISTOL. AND HE GRABBED IT FROM ME.

1 Q. AND WHEN MAURICIO CONTINUED TO ATTACK YOU HE SAID HE
2 THOUGHT THAT GUN WAS A TOY?

3 A. YES. HE SAID THE GUN IS JUST A TOY, IT WAS A FAKE ONE.

4 Q. SO GOING BACK TO AFTER YOU GOT THE GUN BACK WHAT
5 HAPPENED? WHAT DID YOU DO THEN?

6 A. I SHOT DOWN TO THE GROUND.

7 Q. I SEE YOU'RE DOING YOUR RIGHT HAND. DID YOU SHOOT WITH
8 YOUR RIGHT HAND?

9 A. YES, I DO WITH THE RIGHT HAND.

10 Q. SO YOU WERE RIGHT HANDED?

11 A. YES, I AM.

12 Q. WHAT DID YOU DO AFTER YOU GOT THE GUN BACK?

13 A. WHEN I GOT THE GUN I SHOOT DOWN TO THE GROUND BECAUSE
14 MAURICIO WAS TRYING TO ATTACK ME AGAIN AND HE HAD ALREADY
15 KICKED ME. AND EVERYTHING HAPPENED AND NOTHING HAPPENED.
16 AND FIFTEEN SECONDS LATER SOMEBODY SAY THAT SOMEBODY GOT
17 SHOT. AND I SEE THE SKINNY THAT HE TOOK OFF RUNNING. AND I
18 GOT RUNNING TOO. I WENT OUT RUNNING.

19 Q. NOW WAS THE PERSON WHO GAVE YOU THE GUN RELATED TO YOU?

20 A. NO. I HAVE NEVER SEEN HIM IN BARRINGTON PARK, AND I
21 DON'T KNOW HIM.

22 Q. ARE YOU TALKING ABOUT EL FLACO WHEN YOU SAY THAT?

23 A. YES.

24 Q. HOW ABOUT THE PERSON WHO ACTUALLY GAVE YOU THE GUN
25 EARLIER THAT DAY?

1 A. HE'S SAYING HOW ---
2 Q. THE PERSON WHOSE GUN THAT WAS WHO GAVE IT TO YOU
3 EARLIER THAT DAY?
4 A. WHAT IS THE QUESTION AGAIN?
5 Q. WHO WAS THE PERSON WHO GAVE YOU THE GUN TO HOLD EARLIER
6 THAT DAY?
7 A. MARIANO MENDOZA GAVE ME THE GUN.
8 Q. IS HE RELATED TO YOU?
9 A. YES, HE'S MY COUSIN.
10 Q. SO YOU HAD THAT GUN BECAUSE YOUR COUSIN GAVE IT TO YOU?
11 A. YEAH, HE GAVE ME THE GUN BECAUSE HE WAS DRUNK. SO HE
12 GAVE IT TO ME TO GO AND PUT IT AWAY.
13 Q. AND WHY DID YOU KEEP IT ON YOUR PERSON?
14 A. THAT SAME NIGHT WHEN HE GAVE ME THE -- WHEN HE GAVE ME
15 THE GUN I JUST PUT IT ON ME AND WE WERE THERE. AND ---
16 Q. DID YOU HAVE THE GUN INTENDING TO SHOOT SOMEONE THAT
17 NIGHT?
18 A. NO, I NEVER SHOT ANYBODY. SO, NO.
19 Q. WHEN YOU PULLED OUT THE GUN AND SHOT IT, WHEN YOU SHOT
20 IT, WERE YOU INTENDING TO HURT ANYONE OR HIT ANYONE?
21 A. NO. THE ONLY REASON WHY I WAS DOING IT WAS TO SCARE
22 MAURICIO THAT WAS ATTACKING ME.
23 Q. NOW WHAT -- DO YOU REMEMBER WHAT YOU WERE WEARING THAT
24 NIGHT? YOU SAID YOU SHOWERED AND GOT DRESSED. WHAT WERE
25 YOU WEARING?

1 A. AFTER THAT I GOT A SHIRT WITH LONG SLEEVES. AND IT WAS
2 BLUE WITH STRIPES -- WITH STRIPES, BLUE AND RED.

3 Q. WAS IT LIKE A BUTTON DOWN STRIPED SHIRT LIKE YOU'RE
4 WEARING NOW?

5 A. YES, WITH LONG SLEEVES AND IT HAS A COLLAR.

6 Q. DID -- SO IT WAS -- IT HAD LOTS OF DIFFERENT COLORS IN
7 IT, THE SHIRT?

8 A. ON THE BACK ON THIS PART HERE, IT WAS BLUE. AND ON THE
9 FRONT IT HAD SOME SQUARE PRINT.

10 Q. WHEN YOU SAY IT WAS BLUE, WAS IT SOLID BLUE ON THE
11 BACK?

12 A. YES. THE BACK AND THE SLEEVES WERE BLUE. AND THE ONLY
13 DIFFERENCE WAS HERE ON THE FRONT THAT IT HAD SQUARES.

14 Q. IT HAD SQUARES?

15 A. UM-HUM (AFFIRMATIVE).

16 Q. WHAT COLOR WERE THE SQUARES?

17 A. IT WAS GREEN, RED, ORANGE. I THINK THAT THAT'S IT,
18 WHAT THE SHIRT HAD.

19 Q. AND WHEN YOU SAY IT WAS SQUARES, WAS IT CHUNKS OF
20 DIFFERENT COLORS OR WAS IT STRIPES OF DIFFERENT COLORS
21 MAKING THE SQUARES?

22 A. WILL YOU PLEASE REPEAT ONE?

23 Q. WAS IT LIKE A RED SQUARE NEXT TO A BLUE SQUARE OR JUST
24 STRIPES MAKING THE SQUARES?

25 A. THE STRIPES MADE THE SQUARES.

- 1 Q. NOW AFTER YOU LEFT WHERE DID YOU GO?
- 2 A. AFTER THAT I WENT TO MY HOME.
- 3 Q. AND WHAT DID YOU DO THERE?
- 4 A. I DRUNK A GLASS OF WATER. I GOT MY SHIRT OFF BECAUSE
- 5 THE BUTTONS OF THE SHIRT, SOME OF THEM WERE MISSING. SO IT
- 6 WAS KIND OF OPEN. AND THIS PART OF THE POCKET WAS -- IT WAS
- 7 TORN BECAUSE OF THE FIGHT.
- 8 Q. SO YOU CHANGED YOUR SHIRT BECAUSE IT WAS TORN AND
- 9 BROKEN?
- 10 A. (AFFIRMATIVE NOD).
- 11 Q. WAS ANYONE ELSE AT YOUR HOUSE?
- 12 A. MY STEP-FATHER WAS THERE AND ALSO MY MOM.
- 13 Q. DO YOU KNOW WHERE YOUR MOTHER AND STEP-FATHER ARE NOW?
- 14 A. MY MOM AND MY STEP-FATHER WENT BACK TO HONDURAS.
- 15 Q. AND YOU WERE ARRESTED IN JULY OF 2004, CORRECT?
- 16 A. I DON'T KNOW HOW TO READ WELL. SO IT SAYS 2004 THE
- 17 18TH.
- 18 Q. BUT YOU'VE BEEN IN JAIL FOR ---
- 19 MS. HODGE: OBJECTION, YOUR HONOR.
- 20 Q. --- SOME TIME?
- 21 THE COURT: I SUSTAIN THE OBJECTION.
- 22 MS. ROSS: YOUR HONOR, I CAN TESTIFY WHETHER HE'S BEEN
- 23 ---
- 24 THE COURT: YOU CAN'T TESTIFY.
- 25 Q. SO HAS YOUR MOTHER COME TO SEE YOU?

1 A. YES, SHE DID -- SHE HAS.

2 Q. WHEN WAS THAT?

3 A. APPROXIMATELY FOUR OR FIVE MONTHS BECAUSE SHE SAID THAT

4 SHE WASN'T FEELING WELL. SO SHE WENT BACK.

5 Q. AND DID YOU TRY TO GET THE SHIRT THAT YOU WERE WEARING

6 THAT NIGHT TO BRING TO COURT?

7 A. NO.

8 Q. WHY COULDN'T YOU GET THE SHIRT TO COME -- TO BRING TO

9 COURT?

10 A. I DO NOT KNOW WHERE MY MOM PUT EVERYTHING OF MY

11 BELONGINGS.

12 Q. NOW AFTER YOU WENT HOME DID YOU GO ANYWHERE ELSE THAT

13 NIGHT?

14 A. YES. THAT NIGHT I EXPLAINED TO MY MOM WHAT HAD

15 HAPPENED. AND SHE ASKED ME, WHO GAVE ME -- WHO GAVE YOU THE

16 WEAPON. AND I TOLD HER, MARIANO. SHE SCOLDED ME. AND THEN

17 HE -- SHE WENT AND WOKE UP MY STEP-FATHER. AND THEN WE WENT

18 TO MY COUSIN WHOSE NICKNAME IS CHINO. WE WENT AND TALKED TO

19 HIM AND HIS WIFE. HIS WIFE WAS THE ONE WHO GOT UP. AND HE

20 GOT UP AND I WAS CARRYING THE GUN ON MY BACK. AND HE TOLD

21 ME, JUST LEAVE THE GUN HERE. AND I SAID, NO, I CANNOT LEAVE

22 IT HERE BECAUSE THIS GUN IS NOT MINE. SO I'M GOING TO TAKE

23 IT WHERE IT BELONGS. AND THIS GUN, IT WAS GIVEN TO ME FOR

24 ME TO PUT IT AWAY. AND I HAD TO TAKE THIS GUN BACK

25 TOMORROW.

1 Q. SO YOU WERE KEEPING THE GUN WITH YOU BECAUSE YOU HAD TO
2 GIVE IT BACK TO THE PERSON WHO'D GIVEN IT TO YOU BECAUSE IT
3 WAS THEIR GUN?

4 A. THIS GUY GAVE ME THE GUN TO PUT IT AWAY, BUT I WAS
5 SUPPOSED TO GIVE THE GUN BACK TO HIM THE FOLLOWING DAY.

6 Q. SO WHERE DID YOU GO AFTER THAT?

7 A. I CAME WITH MY MOM AND MY STEP-FATHER. WE WENT TO THE
8 HOUSE. HE ASKED ME, YOU DID IT? AND I SAID, NO, I DIDN'T
9 DO IT BECAUSE I JUST SHOOT TO THE GROUND AND I HAVEN'T
10 KILLED ANYBODY.

11 Q. NOW WHO ASKED YOU THAT?

12 A. MY STEP-FATHER WAS THE ONE WHO ASKED ME THAT. BECAUSE
13 HE TOLD ME IF YOU DID IT, SO I'M GOING TO TAKE YOU TO
14 ANOTHER PLACE. BUT I TOLD HIM, NO, I HAVEN'T DONE ANYTHING
15 WRONG.

16 Q. THEN WHERE DID YOU GO?

17 A. AFTER THAT I WENT TO WHERE THE POLICE WAS, WHERE THE
18 POLICE TAPE WAS.

19 Q. AND WHAT DID YOU DO THERE?

20 A. THERE WAS A PERSON OUTSIDE WHOSE NAME WAS ALOFITO. AND
21 HE TOLD ME, JUST THROW AWAY THAT GUN. AND I TOLD HIM, NO,
22 I'M NOT GOING TO THROW AWAY THAT GUN, I HAD TO GIVE IT BACK
23 TO THE PERSON IT BELONGS TO. AND I SAW THE TAPE AND
24 EVERYTHING AROUND. AND I ASKED ALOFITO, SO WHAT HAPPENED?
25 AND HE SAID ---

1 MS. HODGE: OBJECTION, YOUR HONOR, TO ---

2 THE COURT: I SUSTAIN THE OBJECTION.

3 MS. HODGE: --- ANYTHING THESE OTHER PEOPLE MAY SAY.

4 Q. HOW MANY PEOPLE WERE THERE WHEN YOU WENT BACK AND SAW
5 THE TAPE?

6 A. I WENT TO THE BACK PART. AND THEN I WENT ON THE OTHER
7 SIDE WHERE THE TREES ARE, AND I SAW FROM AFAR. AND I SAW
8 THE TAPE THERE.

9 Q. DID YOU EVER GO TO THE MEXICALI ACROSS THE STREET?

10 A. AFTER THAT I WENT TO BARRINGTON PARK AND WENT TO
11 MEXICALI.

12 Q. AND THAT'S SORT OF ACROSS THE STREET, RIGHT?

13 A. I SAID I WENT FOR THE BACK SIDE, THEN I WENT WALKING
14 THROUGH THE STREET.

15 Q. AND WHAT HAPPENED WHEN YOU GOT TO THE MEXICALI?

16 A. AND I WENT TO MEXICALI AND IT WAS CLOSED. AND I SAW A
17 GENTLEMAN THERE. AND I ASKED HIM, COULD YOU SEND ME SOME
18 CIGARETTES? HE JUST PAT ME AND HE SAID, DO YOU HAVE ANY
19 WEAPONS? AND I TOLD HIM, YES. AND HE SAID, IF YOU'RE
20 CARRYING WEAPONS YOU CANNOT COME IN. AND I WENT TO THE BACK
21 PART AND THERE WAS A RED CAR. I PUT THE GUN ON THE TOP OF
22 -- IN THE TOP PART OF A TREE.

23 AND THEN TWO LADIES ARRIVED FROM A -- GOT OUT OF A RED
24 CAR, A BRAND NAME CHEVROLET. AND ALSO ARRIVED A MAN THAT
25 WAS WITH THEM. ONE OF THE WOMEN, I KNEW HER. SHE'S FROM

1 COLOMBIA. AND WHEN THIS GUY SAW THE LADIES HE OPENED THE
2 DOOR. AND THEN THEY WENT IN. AND I COME IN TOO. AND HE
3 SAID, YOU DON'T HAVE ANY WEAPONS? AND HE SAID, NO, I DON'T.

4 AND I WENT TOWARD THE BAR SECTION WITH THEM, WITH THE
5 TWO WOMEN JUST CHATTING. I BOUGHT SOME CIGARETTES AND I
6 ASKED FOR A BEER. I WAS DRINKING THE BEER AND SMOKING A
7 CIGARETTE. AND FROM THERE I SAW A PERSON ON THE OUTSIDE.
8 AND HE WAS CALLING THROUGH A CELL PHONE. AND WHEN I SAW
9 THAT PERSON I RECOGNIZED THAT PERSON. AND THEN I SAW WHEN
10 THE POLICE WAS COMING. AND THE OWNER OF THE BAR TOLD ME
11 THIS, AND HE SAID, THE POLICE IS COMING. AND EVERYBODY JUST
12 SCATTERED AROUND.

13 AND THEN A POLICEMAN CAME IN, JUST ONE. I SAW THE
14 PERSON THAT WAS POINTING AT ME. AND HE HAD A WHITE -- I
15 CAN'T REMEMBER HOW HE WAS -- WHAT KIND OF CLOTHING HE WAS
16 DRESSED IN. AND THE POLICE CAME, AND HE HANDCUFFED ME.
17 WHEN HE PUT THE HANDCUFFS ON ME HE GRABBED ME AND HOLD ME
18 THERE WAITING FOR THE GUY THAT CALLED THE POLICE TO GO
19 AROUND. WHEN THE GUY THAT CALLED THE POLICE GOT OUT OF
20 SIGHT THEY TOOK ME OUTSIDE.

21 THEY ASKED ME QUESTIONS IN ENGLISH. AND I WASN'T
22 ANSWERING ANYTHING BECAUSE I DON'T KNOW -- I DIDN'T KNOW HOW
23 TO SPEAK ENGLISH. AND THEN CAME A TRANSLATOR. AND HE JUST
24 PAT ME AND HE SAID, DO YOU HAVE ANY WEAPONS? AND I SAID,
25 NO. AND HE SAID, YOU HAVE A PISTOL? AND I SAID, NO, I

1 DON'T HAVE ANY PISTOLS.

2 AND HE PAT ME AGAIN AND MADE ME TAKE OFF MY SHOES, MY
3 TENNIS SHOES. I DIDN'T HAVE ANY SOCKS. AND HE JUST CHECKED
4 THE TENNIS SHOES. I SAW A LADY DOING SOMETHING WITH GLOVES.
5 SHE WAS DOING SOMETHING TO ME.

6 Q. SO YOU REMEMBER THE LADY DOING SOMETHING ON YOUR HANDS?

7 A. I DON'T REMEMBER ANYTHING. I SAW HER WITH SOME GLOVES.

8 Q. DID SHE TOUCH YOUR HANDS?

9 A. I DON'T REMEMBER IF SHE TOUCHED MY HANDS OR ANYTHING.
10 I KNEW THAT IT WAS -- THEY DIDN'T TAKE THE HANDCUFFS OFF ME.

11 AND HE JUST PUT THE HANDCUFFS VERY HARD. AND I TOLD THE
12 POLICEMAN RIVERA, JUST LOOSEN THEM UP A LITTLE BIT. HE GOT
13 ME FROM MY ARM AND TOOK ME INTO THE PATROL CAR. THEY JUST
14 BRUNG ME HERE WHERE THEY DID THE INTERVIEWS. I DON'T KNOW
15 WHAT IS THAT CALLED.

16 Q. THEY TOOK YOU TO THE LAW ENFORCEMENT CENTER?

17 A. YES. I DON'T KNOW HOW -- HOW IS THAT CALLED.

18 Q. NOW WHEN THEY TOOK YOU INTO THE LAW ENFORCEMENT CENTER
19 DID THEY EVER TAKE YOUR PICTURE?

20 A. NO.

21 Q. YOU DON'T REMEMBER?

22 A. I DON'T REMEMBER. I DON'T REMEMBER ANY PICTURE.

23 Q. I'VE GOT A PICTURE THAT'S -- THAT THEY TOOK ---

24 MS. HODGE: YOUR HONOR, I'VE ACTUALLY NEVER SEEN THIS
25 PHOTO. IT WAS NOT PRODUCED TO ME THROUGH DISCOVERY.

1 Q. DID YOU LOOK SUBSTANTIALLY THE SAME THEN AS YOU DO NOW?
2 THE SAME HAIRCUT, THE SAME FACIAL HAIR?

3 A. I HAVE THE SAME THING HERE SINCE THEY TOOK THAT PICTURE
4 OF ME.

5 Q. AND BASICALLY SAME MUSTACHE, SAME SHORT HAIR?

6 A. SINCE I WAS A LITTLE BOY THEY ALWAYS -- I ALWAYS GOT A
7 HAIRCUT LIKE A GENTLEMAN.

8 Q. SHORT HAIR. BUT THE MUSTACHE CAME LATER, RIGHT?

9 A. MY BEARD AND MY MUSTACHE DOESN'T GROW MUCH. IT'S JUST
10 NORMAL LIKE THIS.

11 Q. I WANT TO GO TO WHAT HAPPENED WHEN YOU GOT TO THE LAW
12 ENFORCEMENT CENTER AND THEY STARTED ASKING YOU QUESTIONS.
13 I'M GOING TO SHOW YOU YOUR STATEMENT AND WHAT'S CALLED THE
14 WAIVER OF RIGHTS THAT YOU SIGNED. AND I WANT YOU TO TELL
15 THE JURY -- FIRST, BEFORE I FORGET, HOW YOU SIGNED THESE. I
16 NOTICED THAT THIS TIME YOU SIGNED IT WAS BIG LETTERS, AND
17 THIS TIME IT WAS SMALL LETTERS. WHY WAS IT LIKE THAT?

18 A. ON THIS ONE ON THE LEFT I'M HANDCUFFED.

19 Q. AND DID -- WHAT TIME DID YOU SIGN THIS ONE COMPARED TO
20 THIS ONE?

21 A. BOTH OF THEM, I SIGNED THEM AT THE SAME TIME.

22 Q. SO YOU WENT THROUGH AND DID ALL THE SIGNING ONE AFTER
23 ANOTHER AT THE SAME TIME?

24 A. FIRST WE DID THIS AND THEN WE STARTED DOING THIS.

25 Q. ONE RIGHT AFTER THE OTHER?

1 A. YEAH, ONE AFTER THE OTHER.

2 Q. HAD YOU BEEN TALKING TO THE POLICE BEFORE YOU SIGNED
3 THOSE TWO PIECES OF PAPER?

4 A. YES, I TALKED TO THEM.

5 Q. NOW DID -- I THOUGHT THESE TWO LETTERS LOOKED A LITTLE
6 DIFFERENT. WAS ---

7 MS. HODGE: OBJECTION, YOUR HONOR, ---

8 Q. --- THERE SOMETHING ---

9 MS. HODGE: ---- TO HER TESTIFYING.

10 Q. WAS THERE SOMETHING DIFFERENT ABOUT THE "M" AND THE "A"
11 IN THIS TIME YOU PUT YOUR MARK?

12 A. YES.

13 Q. WHAT HAPPENED THEN?

14 A. MR. RIVERA, HE SAID, SIGN. AND I TOLD HIM, I DON'T
15 KNOW HOW TO SIGN. I NEVER WENT TO SCHOOL. AND HE -- WHEN
16 HE TOOK ME TO THE POLICEMAN HE GOT HIS PEN OUT OF HIS
17 POCKET, HE PUT -- HE WROTE THESE TWO FIRST LETTERS. AND
18 THEN HE SAID, GRAB THE PEN AND SIGN THIS. AND I SAID, I
19 CANNOT DO IT BECAUSE I DON'T KNOW. AND HE TOLD ME, JUST
20 COPY FROM UP HERE TO DOWN HERE.

21 Q. SO HE WAS SAYING COPY THIS WHERE THEY WROTE OUT YOUR
22 NAME DOWN THERE?

23 A. WHEN I TOLD HIM THAT I DIDN'T KNOW HOW TO SIGN HE PUT
24 THAT "M" HERE, THAT "M" THERE AND THAT "M" HERE. AND HE
25 GRABBED ME FROM MY HAND AND HE TOLD ME, SIGN HERE. AND THEN

1 HE TOLD ME JUST SIGN A LITTLE BIT OVER -- UP HERE.

2 Q. AND WHEN HE SAID TO COPY ON THIS SHEET DID HE SAY TO
3 COPY UP HERE -- FROM UP HERE WHERE YOUR NAME IS TYPED?

4 A. AND HE WAS TELLING ME JUST PUT THIS LETTER. AND I PUT
5 THAT LETTER. AND THEN HE SAID, PUT THE NEXT -- HE TOLD ME
6 TO PUT THE NEXT LETTER TOO.

7 Q. AND THE SAME THING ON THIS SHEET, HE SAID, LOOK UP
8 HERE?

9 A. YES. I WASN'T GOING TO PUT ANY SIGNATURE OF MINE
10 BECAUSE I DON'T KNOW HOW TO PUT MY SIGNATURE. EVERY TIME
11 WHEN I HAVE ANY DOCUMENT OR SOMETHING THAT THEY ASK ME TO
12 SIGN I CANNOT DO IT. WHAT I DO IS JUST PUT MY INDEX [SIC]
13 OR THEY ASK ME TO PUT MY -- AND MR. RIVERA, I ASKED HIM, CAN
14 I DO THAT, JUST PUT MY FINGER AND YOU JUST GET MY -- INSTEAD
15 OF SIGNING BECAUSE I DON'T KNOW HOW TO SIGN.

16 Q. I WANT TO TALK ABOUT THIS SHEET FIRST, THIS IS CALLED
17 THE WAIVER, AND ASK YOU WHAT DID OFFICER RIVERA TELL YOU
18 BEFORE YOU SIGNED THIS?

19 A. HE READ ALL THIS.

20 Q. LET ME STOP YOU. YOU SAY HE READ ALL THAT. DO YOU
21 KNOW IF IT'S ACCURATE? CAN YOU READ ANY SPANISH? CAN YOU
22 READ WHAT'S ON THAT SHEET?

23 A. I DO NOT KNOW WHAT IS THERE.

24 Q. BUT HE LOOKED AS IF HE WAS READING IT TO YOU?

25 A. HE SAID, HOW IS THAT?

1 Q. YOU SAID HE READ IT TO YOU?

2 A. YES.

3 Q. AND THEN DID YOU UNDERSTAND WHAT HE WAS SAYING?

4 A. I DIDN'T UNDERSTAND ANYTHING, WHAT HE WAS SAYING.

5 Q. DID YOU KNOW WHAT HE WAS TALKING ABOUT WHEN HE WAS
6 READING THIS?

7 A. I DIDN'T KNOW ANYTHING -- WHAT HE WAS SAYING. HE READ
8 THIS AND HE READ ---

9 (WHEREUPON THE WITNESS AND THE INTERPRETER WERE
10 SPEAKING AT THE SAME TIME)

11 THE COURT: HOLD ON, HOLD ON, HOLD ON.

12 A. HE READ THIS AND HE DID IT VERY QUICK. AND HE'S JUST
13 MAKING THAT MOTION, LA, LA, LA, LA, LA.

14 Q. AND DID YOU UNDERSTAND ALL OF HIS SPANISH?

15 A. I UNDERSTOOD SOME, BUT THERE WAS SOME THAT IT WAS KIND
16 OF TWISTED AND I COULDN'T UNDERSTAND WHAT IT WAS.

17 Q. AND DID YOU UNDERSTAND IN AMERICA YOUR RIGHTS THAT YOU
18 MIGHT HAVE LEARNED SOMETHING ABOUT BY NOW?

19 A. JUST REPEAT THAT QUESTION PLEASE.

20 Q. DID YOU UNDERSTAND YOU HAVE A RIGHT TO A LAWYER BEFORE
21 YOU TALK?

22 A. NOW, YES, BECAUSE I HAVE BEEN IN JAIL. I HAVE LEARNED
23 MANY THINGS.

24 Q. BUT BEFORE WHEN YOU SIGNED THAT -- WHEN YOU SIGNED THAT
25 DID YOU THINK I CAN STOP EVERYTHING AND GET A LAWYER RIGHT

1 NOW?

2 A. I NEVER THOUGHT ABOUT HAVING AN ATTORNEY. THE ONLY
3 THING THAT I KNEW IS THAT I WAS GOING TO BE THROWN IN JAIL.

4 Q. HAD THE POLICE TOUCHED YOU AT ALL BY THIS TIME WHEN YOU
5 WERE IN THE ROOM WITH THEM?

6 A. YES, THEY DID.

7 Q. WHAT DID THEY DO?

8 A. I WAS THIRSTY. I WANTED -- ASKED THEM FOR WATER. I
9 WAS VERY NERVOUS. I WAS VERY NERVOUS BECAUSE ONE OF THE
10 POLICEMAN -- I WAS VERY NERVOUS BECAUSE THERE WAS A GUY AT
11 THE COMPUTER, HE CAME AND I WAS TALKING TO THE POLICEMAN
12 RIVERA AND TALKING ABOUT THE INTERVIEWS. I WAS HANDCUFFED
13 IN THE FRONT. I WAS SITTING DOWN. AND HE GRABBED ME FROM
14 MY BELT AND JUST RAISED ME UP LIKE THIS VERY HARD. AND MY
15 PANTS WENT UP. AND WHEN HE GRABBED ME I LOOKED AT HIM AND
16 HE SHOUT AT ME. AND SHOUT VERY HARD TO ME AND SAID, YOU
17 QUIT LYING. AND I WAS -- AND I LOOKED AT HIM AND HE WAS --
18 HIS FACE WAS RED. AND I GOT VERY NERVOUS.

19 Q. NOW WHEN YOU SAID HE SAID QUIT LYING DID YOU UNDERSTAND
20 WHAT HE SAID?

21 A. I DIDN'T UNDERSTAND. I ASKED POLICEMAN RIVERA WHAT IS
22 HE SAYING? AND I TOLD RIVERA, I'M NOT LYING. AND I TOLD
23 HIM, IF YOU THINK THAT I'M LYING THERE IS A GOD IN HEAVEN.
24 AND RIVERA JUST SHOT BACK TO ME AND HE SAID THAT HERE THERE
25 IS NOT ANY GOD. AND WHEN HE TOLD ME THAT I SAID, WELL, IF

1 YOU DON'T BELIEVE IN GOD THAT'S FINE, BUT I BELIEVE IN GOD.
2 AND I JUST STOPPED THERE AND I SAID THERE WERE PEOPLE THAT
3 THEY SAW -- THEY SAW WHAT HAPPENED IN THAT PLACE. THEN HE
4 STARTED MAKING MORE QUESTIONS, AND I ANSWERED THOSE
5 QUESTIONS, BUT I WAS VERY NERVOUS.

6 Q. WHEN YOU WERE TOLD THAT YOU WERE LYING WHAT WERE YOU
7 SAYING THAT YOU WERE TOLD WAS A LIE?

8 A. WE WERE TALKING ABOUT THE GUN, THE PISTOL. I WAS
9 TELLING RIVERA, YES, I SHOT THE GUN. AND THEN HE SAID, THEN
10 WHAT HAPPENED? I SAID, SOMEBODY TOOK THE GUN AND SOMEBODY
11 ELSE SHOT THE GUN. RIVERA ASKED ME, WHAT WERE YOU WEARING?
12 AND I TOLD HIM I WAS WEARING A BLUE SHIRT WITH STRIPES. AND
13 HE ASKED ME -- AND THE GUY THAT GRABBED THE GUN FROM YOU,
14 WHAT KIND OF SHIRT HE HAS. AND I TOLD HIM HE HAD -- HE WAS
15 WEARING A BLACK SHIRT. AND DO YOU KNOW HOW -- WHAT IS HIS
16 NAME? I SAID, NO, I KNOW HIM JUST BY THE NICKNAME OF
17 SKINNY. THEN I THINK THEY MAKE A PHONE CALL.

18 AND RIVERA TOLD ME, DO YOU KNOW THAT THE GUN IS ALREADY
19 HERE? AND I DIDN'T ANSWER ANYTHING. AND THEN AFTER A WHILE
20 HE SAID, THE GUN HAS TWO FINGERPRINTS. THEN I ANSWERED HIM,
21 IF THE GUN HAS TWO FINGERPRINTS IS BECAUSE IT HAS MY
22 FINGERPRINTS AND THE OTHER GUY THAT ALSO SHOT THE GUN. AND
23 THEN HE KEPT ASKING ME QUESTIONS.

24 Q. NOW WHEN YOU WERE TOLD YOU WERE LYING YOU SAID YOU SHOT
25 THE GUN TWO TIMES AT THE GROUND, ONCE, AND THEN ANOTHER

1 PERSON GOT IT, AND AGAIN.

2 MR. PINEROS: I NEED YOU TO GO SLOWER PLEASE.

3 Q. WHEN YOU WERE TOLD THAT YOU WERE LYING THAT WAS AFTER
4 YOU HAD SAID THAT YOU HAD SHOT THE GUN TO THE GROUND TWO
5 TIMES, ONCE, AND THEN EL FLACO SHOT, YOU GOT IT BACK, AND
6 THEN AGAIN?

7 A. YES.

8 Q. JUST LIKE YOU TESTIFIED TO TODAY?

9 A. THE SAME WAY THAT THE THINGS HAPPENED THAT TIME, I
10 REMEMBER THAT EVEN IF THAT WAS A YEAR AND THREE MONTHS.

11 Q. AND IN THIS STATEMENT THAT'S IN ENGLISH, WE'VE SINCE
12 GONE OVER THIS WITH YOU, THIS STATEMENT, RIGHT? CARLOS
13 FREEMAN?

14 A. CARLOS FREEMAN. THE OFFICER RIVERA TOLD ME THAT THESE
15 PAPERS, I WASN'T SUPPOSED TO GIVE THEM TO ANYBODY.

16 Q. BUT YOU KNOW NOW THAT THESE PAPERS SAY YOU SHOT TWO
17 TIMES? AND THEY SAY NOTHING ABOUT EL FLACO?

18 A. IN THIS PAPER IT SAYS THAT I SHOT TWICE, THAT I SHOT
19 TWICE. I SHOOT TWICE AND THAT I WAS WITH A BLACK SHIRT.

20 Q. AND THAT IS NOT WHAT YOU TOLD OFFICER RIVERA?

21 A. NOBODY -- I GOT THESE PAPERS ONLY WHEN THE ATTORNEY --
22 I CONTACTED THE ATTORNEY. AND NOBODY READ THAT TO ME
23 BEFORE. THESE PAPERS, NOBODY HAS SEEN THEM. JUST CARLOS,
24 AND THE ATTORNEY, AND ME, BUT I HAD BEEN WITH THEM.

25 Q. SO YOU HAD THE PAPERS FOR A WHILE BEFORE YOU EVEN KNEW

1 WHAT IT SAID?

2 A. I HAD THE PAPERS, YES, WHEN THEY PUT ME IN JAIL. I HAD
3 PUT THEM UNDER THE BED WHERE I WAS SLEEPING IN JAIL. I JUST
4 REALIZED WHAT WAS WRITTEN THERE UNTIL THE ATTORNEY AND MR.
5 CARLOS READ WHAT IT SAYS.

6 Q. AND BEFORE THAT YOU THOUGHT IT SAID WHAT YOU TESTIFIED
7 TO TODAY?

8 A. YES.

9 Q. NOW OFFICER RIVERA SAID THAT HE READ THIS TO YOU AND
10 YOU SIGNED IT.

11 A. I NEVER HEARD OR SEEN THAT HE SAID THAT HE WAS -- I WAS
12 -- HE WAS WEARING A BLACK SHIRT, ABOUT THE TWO SHOTS AND
13 THAT SOMEBODY GOT THE GUN AND SHOOT THE GUN TOO. IN THIS
14 PAPER IT DIDN'T SAY ANYTHING ABOUT THE SKINNY WITH THE BLACK
15 SHIRT.

16 Q. BUT WHEN YOU SIGNED IT YOU THOUGHT IT DID?

17 A. IF I GIVE SOME DETAILS I SUPPOSE THAT IT'S GOING TO BE
18 THERE WHAT I'M SAYING.

19 THE COURT: ALL RIGHT. LET'S MOVE ON PLEASE, MS. ROSS.

20 MS. ROSS: I BEG THE COURT'S INDULGENCE.

21 Q. AND TODAY WHEN YOU'VE TOLD WHAT HAPPENED -- WHEN YOU
22 TOLD THE JURY JUST NOW WHAT HAPPENED IS THAT THE TRUTH OF
23 WHAT HAPPENED?

24 A. YES, I'M TELLING THE TRUTH.

25 Q. AND YOU DIDN'T SHOOT WILFRIDO MONGE?

1 A. NO. THE ONLY THING THAT I DID IS JUST TO SHOOT TOWARD
2 THE GROUND. I SHOT THE GUN TWICE TO THE GROUND. IF I WANT
3 TO SHOT SOMEBODY I WOULD HAVE SHOT THE PERSON THAT WAS
4 ATTACKING ME. BUT ALL WHAT I DID WAS JUST SHOT -- SHOOT THE
5 GUN TO THE GROUND.

6 Q. AND YOU SHOT TO THE GROUND BECAUSE YOU WEREN'T TRYING
7 TO SHOOT ANYONE?

8 A. I SHOOT TO THE GROUND TRYING TO SCARE HIM BECAUSE HE
9 WAS FIGHTING ME AND HITTING ME. THEN THE SKINNY GOT THE GUN
10 AND HE -- AND HE ---

11 THE COURT: ALL RIGHT. WE'VE ---

12 MS. ROSS: JUST A FEW MORE QUESTIONS.

13 Q. AND WHEN YOU PICKED UP THE GUN IT WAS BECAUSE IT HAD
14 FALLEN THROUGH YOUR PANTS DURING THE FIGHT?

15 A. THE WEAPON, I DON'T GET IT FROM BEHIND. THE WEAPON
16 JUST FALL INTO -- THROUGH MY PANTS AND GO DOWN MY LEG. WHEN
17 I WAS GOING TO GET THE GUN THE SKINNY JUST ATTACKED ME. AND
18 THAT'S WHEN HE GRABBED THE GUN. I HAD THE GUN IN MY HAND
19 AND THE SKINNY JUST GRABBED THE GUN.

20 THE COURT: ALL RIGHT.

21 Q. NOW YOU SAID THAT THE SKINNY WAS ATTACKING YOU JUST
22 NOW. WASN'T IT MAURICIO WHO WAS ATTACKING YOU?

23 A. THE ONE WHO WAS ATTACKING ME, IT WAS MAURICIO. THE ONE
24 WHO SHOT THE SHOT, IT WAS THE SKINNY.

25 Q. THANK YOU.

1 THE COURT: ALL RIGHT. TAKE THE JURY OUT FOR A RECESS.

2 (WHEREUPON THE JURY EXITED THE COURTROOM AT 10:38 AM)

3 THE COURT: SOLICITOR, NOW CAN YOU GIVE ME SOME IDEA
4 ABOUT HOW LONG YOU THINK YOU'RE GOING TO BE ON CROSS?

5 MS. HODGE: I CAN'T IMAGINE MORE THAN TWENTY MINUTES.

6 THE COURT: AND DO YOU ANTICIPATE REPLY?

7 MS. HODGE: NO, SIR.

8 THE COURT: I'M TRYING TO ---

9 MS. HODGE: NO, SIR.

10 THE COURT: --- SCHEDULE LUNCH. OKAY. WE'LL TAKE A
11 SHORT RECESS. YOU CAN STEP DOWN NOW.

12 (WHEREUPON COURT WAS IN RECESS)

13 THE COURT: BRING THEM ON. TELL THEM TO HOLD UP. WE
14 DON'T HAVE OUR INTERPRETER BACK YET. OKAY. BRING THEM ON.

15 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 10:51 AM)

16 THE COURT: ALL RIGHT. SOLICITOR.

17 MS. HODGE: THANK YOU, YOUR HONOR.

18 CROSS EXAMINATION BY MS. HODGE:

19 Q. MR. RIVERA, YOU HAVE BEEN IN THE US FOR FOUR YEARS, IS
20 THAT RIGHT?

21 A. YES.

22 Q. HOW DID YOU GET HERE?

23 A. MY STEP-FATHER AND MY MOM JUST BROUGHT ME HERE.

24 Q. HOW?

25 A. I WENT THROUGH MEXICO AS A WETBACK (PHONETICS).

1 Q. WALKING, DRIVING, FLYING, TRAIN?

2 A. I TRIED THREE TIMES AND THEY SENT ME BACK FROM MEXICO.
3 I CAME IN A BUS AND WALKED THROUGH THREE TIMES. I ALSO WENT
4 ON THE TRAIN. AND I SLEPT IN THE BUSHES. AND WHEN I CAME
5 IN THE TRAIN I JUST STARVED. I DIDN'T HAVE WATER, NOTHING.
6 THEY CAUGHT ME -- I WAS CAUGHT IN MEXICO AND THEY SENT ME
7 BACK.

8 MY MOM SENT ME A HUNDRED DOLLARS AND I TRIED AGAIN. I
9 TRIED THREE TIMES. AND MY MOM HAD A FRIEND THAT WAS A
10 CHRISTIAN LADY. AND THE LAST TIME THAT THEY SENT ME BACK MY
11 MOM SENT ME TWO HUNDRED DOLLARS FOR ME TO GO BACK TO MY
12 HOUSE BECAUSE SHE THOUGHT THAT I WASN'T GOING TO BE ABLE TO
13 CROSS. BUT BEFORE I WENT BACK I CALLED MY MOM AND SHE SAID,
14 WELL, YOU NEED TO COME BECAUSE SISTER ELSA SAY THAT GOD HAS
15 GIVEN YOU THAT GIFT AND YOU'RE GOING TO BE ABLE TO COME.

16 Q. LET ME STOP YOU. HOW TRANSPORTATION-WISE DID YOU
17 PHYSICALLY GET HERE?

18 A. I WENT WALKING, AND A TRAIN, AND ALSO IN A BUS.

19 Q. SO IT TOOK THREE TIMES, BUT YOU DID GET HERE?

20 A. YES, I'M HERE.

21 Q. SO YOU WERE PERSISTENT IN GETTING HERE?

22 A. YES.

23 Q. YOU DID WHAT YOU NEEDED TO DO TO MAKE IT HERE?

24 A. YES.

25 Q. WHEN YOU WERE IN HONDURAS SPANISH IS THE PRIMARY

- 1 LANGUAGE?
- 2 A. IT'S THE ONLY LANGUAGE THERE IS THERE IN HONDURAS.
- 3 Q. AND THE STREET SIGNS, AND THE STORE SIGNS, AND THE
- 4 ITEMS ARE ALL WRITTEN IN SPANISH?
- 5 A. YES, EVERYTHING IS WRITTEN IN SPANISH.
- 6 Q. AND YOU MANAGED TO GET AROUND IN HONDURAS SEEING
- 7 SPANISH WRITTEN PLACES?
- 8 A. I DON'T UNDERSTAND WHAT YOU'RE SAYING.
- 9 Q. FOR INSTANCE, IF YOU NEEDED TO GET SOMEWHERE YOU COULD
- 10 LOOK AT A STREET SIGN IN SPANISH TO SEE WHERE YOU NEEDED TO
- 11 GO?
- 12 A. I NEVER WENT OUT OF MY COUNTRY. I JUST SPEND MOST OF
- 13 MY TIME RIGHT THERE WHERE I LIVE, AROUND WHERE I LIVE, USED
- 14 TO LIVE.
- 15 Q. WHEN YOU WENT TO -- I ASSUME YOU WENT TO THE STORE TO
- 16 PURCHASE ITEMS WHETHER IT BE FOOD, OR CLOTHES, OR THINGS
- 17 LIKE THAT?
- 18 A. IN HONDURAS?
- 19 Q. SI. YES.
- 20 A. YES. I USED TO GO TO A SECOND HAND STORE BECAUSE I
- 21 DIDN'T HAVE ENOUGH MONEY TO BUY ---
- 22 Q. AND THE STORE -- TO KNOW TO GO IN THE STORE, TO KNOW
- 23 WHAT KIND OF STORE IT WAS IT PROBABLY HAD A SIGN?
- 24 A. BY THE STREET.
- 25 Q. STREET. OKAY. BY THE STREET, THAT'S FINE. YOU KNOW

- 1 MATH AND NUMBERS?
- 2 A. I KNOW ABOUT NUMBERS, BUT IN MATH, ADDING AND
- 3 SUBTRACTING, I DON'T KNOW.
- 4 Q. YOU DON'T KNOW HOW TO ADD AND SUBTRACT?
- 5 A. NO, I DON'T.
- 6 Q. DO YOU KNOW HOW MUCH YOU SHOULD GET PAID IF YOU MAKE
- 7 SEVEN DOLLARS AN HOUR AND WORK TEN HOURS?
- 8 A. YES, BECAUSE IF I WORK FOR THREE HOURS I COUNT ON MY
- 9 FINGERS.
- 10 Q. DO YOU HAVE SEVENTY FINGERS?
- 11 A. NO, BUT I CAN COUNT BY FIVES. I HAVE FIVE HERE AND
- 12 FIVE HERE. AND I KNOW THAT FIVE AND FIVE AND IF I GET -- IT
- 13 WILL BE TWENTY.
- 14 Q. SO YOU KNOW FIVE PLUS FIVE IS TEN?
- 15 A. IT'S CLEAR I HAVE FIVE FINGERS HERE AND FIVE HERE, SO
- 16 THAT WILL BE TEN.
- 17 Q. SO YOU UNDERSTAND ADDITION?
- 18 A. I KNOW HOW TO ADD A LITTLE BIT. JUST TO DO SOMETHING
- 19 SMALL I KNOW HOW TO DO IT.
- 20 Q. DO YOU KNOW THE ALPHABET?
- 21 A. HE SAID THAT THE ALPHABET IS A PERSON THAT NEVER WENT
- 22 TO SCHOOL.
- 23 Q. SO YOU DO NOT KNOW THE LETTERS OF THE ALPHABET? SO
- 24 THAT'S WHAT YOU'RE TELLING US?
- 25 A. NO, I DON'T.

1 Q. AND DO YOU KNOW THE LETTER "M"?

2 A. THERE'S SOME LETTERS THAT I RECOGNIZE, YES, BUT
3 SOMEWHAT, NO. I DIDN'T KNOW BACK THEN, BUT WHEN I WENT TO
4 JAIL (WHEREUPON THE INTERPRETER STARTED ANSWERING IN
5 SPANISH).

6 Q. ENGLISH.

7 MR. PINEROS: SORRY ABOUT THAT.

8 Q. YOU WERE ON A ROLL. THAT WAS GOOD THOUGH.

9 A. I DIDN'T KNOW BACK THEN, BUT WHEN I WENT TO JAIL MY
10 ROOMMATE HAD A DICTIONARY AND WE GOT TOGETHER AND I LEARNED
11 HOW TO LEARN SOME.

12 MR. PINEROS: SORRY ABOUT THAT. JUST ABSENCE OF MIND.

13 A. HE SPEAKS SPANISH, A LITTLE BIT SPANISH.

14 Q. OH, THE ROOMMATE MUST SPEAK SPANISH?

15 A. HE'S AN AMERICAN. AND HIS NAME IS CASHEW (PHONETICS).

16 Q. ON THE DAY THAT YOU SIGNED STATE'S NUMBER 17 AND 16
17 YOUR TESTIMONY IS THAT YOU SIGNED THE "M"s?

18 A. THIS "M", YES, I SIGNED THAT "M".

19 Q. DID YOU SIGN THE "A"s?

20 A. I TOLD THE POLICEMAN I DON'T KNOW HOW TO SIGN. THE "M"
21 I KNEW BECAUSE WHEN I WENT TO SCHOOL THEY JUST TAUGHT ME.
22 AND I KNOW THE "M".

23 Q. JUST THE "M"?

24 A. THE "R", THE POLICE PUT IT ON THE PAPER AND HE SAID,
25 AND HE SAID, JUST COPY LIKE THIS, THIS WAY, THIS WAY, SO I

1 WILL SIGN WHAT HE WANT ME TO SIGN.

2 Q. DO YOU KNOW YOUR MIDDLE NAME?

3 A. MY NAME IS MARLON RIVERA, MARLON ANTONIO RIVERA. I CAN
4 PUT THE "M" AND THE "R". BUT I LEARNED THIS WHILE I WAS IN
5 JAIL.

6 Q. DO YOU REMEMBER WHEN AFTER THIS WAS OVER AND THE
7 OFFICERS TOOK YOU TO THE JAIL? DO YOU REMEMBER THAT?

8 A. (AFFIRMATIVE NOD).

9 Q. VERBALLY. TELL HIM TO SPEAK IT.

10 A. HE'S ASKING, DO YOU REMEMBER ABOUT THESE PAPERS?

11 Q. LET ME CLARIFY. WHEN THIS WAS OVER, PROCESS OVER, AND
12 THE POLICE OFFICERS WERE WALKING YOU TO THE JAIL, DO YOU
13 REMEMBER THAT?

14 A. YES, I REMEMBER. WE WENT WALKING TO THE JAIL.

15 Q. AND DO YOU REMEMBER WHEN YOU WERE PUT INTO THE JAIL,
16 THEY TOOK THE CLOTHES THAT YOU WERE WEARING?

17 A. YES.

18 Q. AND THEY TOOK A FEW ---

19 A. THEY TOOK MY CLOTHES AND THEY GIVE ME A SUIT THAT THEY
20 GIVE AT THE JAIL.

21 Q. AND ANYTHING YOU HAD, JEWELRY OR MONEY, THEY TOOK THAT?

22 A. YES. I HAD A WATCH. AND THE WATCH IS -- THE GLASS IS
23 BROKEN. AND I HAD A KEY FROM MY HOUSE.

24 Q. CIGARETTES?

25 A. AND I HAD SOME CIGARETTES. I HAD SOME MATCHES.

1 Q. DO YOU REMEMBER WHEN THEY TOOK YOUR CLOTHES THAT THEY
2 ASKED YOU -- THEY PUT IT DOWN ON A PIECE OF PAPER THAT THEY
3 TOOK YOUR CLOTHES?

4 MR. PINEROS: THEY TOLD HIM WHAT?

5 Q. THAT THEY PUT IT ON A PIECE OF PAPER? DOES HE REMEMBER
6 -- DO YOU REMEMBER THAT?

7 A. WHAT I GAVE THEM, I DON'T REMEMBER ANYTHING OF THAT.

8 Q. WELL, DID -- IS THIS -- DID YOU DO THIS? DID YOU MAKE
9 THESE MARKS?

10 A. WHEN I GAVE THEM THAT THESE MARKS -- I TOLD THEM THAT I
11 DIDN'T KNOW HOW TO SIGN. SO SOMEBODY TOLD ME THAT JUST COPY
12 FROM HERE TO HERE.

13 Q. SO LET ME STOP YOU THERE. YOU DID MAKE THESE MARKS?
14 COPIED FROM HERE?

15 A. YEAH, I COPIED THEM FROM HERE TO HERE.

16 Q. HAVE THESE MARKS OR THIS BEEN CHANGED SINCE THEN?

17 A. I DON'T -- I CAN'T TELL.

18 Q. DOES IT LOOK LIKE IT?

19 A. THE TRUTH IS THAT I DON'T REMEMBER.

20 Q. BUT YOU DO REMEMBER THEY WANTED YOU TO SIGN LIKE IT IS
21 ON TOP?

22 A. YES. RIGHT HERE IT SAID RIVERA. AND RIGHT HERE IT
23 DOESN'T SAY RIVERA BECAUSE MY NAME IS -- I REMEMBER THE NAME
24 BECAUSE I SEE IT ALL THE TIME THERE ON THAT BRACELET.

25 MS. HODGE: I'D LIKE TO MARK THIS AS STATE'S NEXT ---

1 THE COURT: ANY OBJECTION?

2 MS. ROSS: CAN I SEE WHAT YOU'RE TALKING ABOUT?

3 THE COURT: PUT IT IN WITHOUT OBJECTION.

4 MS. HODGE: I MOVE TO ADMIT, YOUR HONOR.

5 (WHEREUPON STATE'S EXHIBIT 18 WAS MARKED AND ADMITTED
6 AS EVIDENCE)

7 Q. IF YOU'LL LOOK AT STATE'S NUMBER 18. WHAT YOU'RE
8 SAYING, MR. RIVERA, IS THEY TOLD YOU TO COPY YOUR SIGNATURE
9 FROM HERE TO OVER HERE?

10 A. YES. RIGHT HERE WHERE IT SAYS MARLON AND IT'S
11 DIFFERENT BECAUSE ---

12 THE COURT: HOLD ON. SOLICITOR, CAN YOU ZOOM IT OUT

13 ---

14 MS. HODGE: YES.

15 THE COURT: --- SOME THAT ---

16 A. I COULDN'T COPY THAT WELL. RIGHT HERE IS RIVERA,
17 MARLON AND DOWN THERE IT DOESN'T SAY THAT.

18 Q. AND YOU SAID YOUR NAME IS MARLON ANTONIO RIVERA,
19 CORRECT?

20 A. YES.

21 Q. ANTONIO IS NOT WRITTEN UP HERE, IS THAT CORRECT?

22 A. NO. THE ONLY NAME THERE IS RIVERA, MARLON, WHICH I
23 HAVE HERE, THE WAY THEY PUT ME IN JAIL.

24 Q. AND OVER HERE IT SAYS MARLON ANTONIO? JUST MARLON
25 ANTONIO.

1 A. YES. SOMEBODY ASKED ME WHAT WAS MY NAME. AND I TOLD
2 THEM MY NAME IS MARLON ANTONIO RIVERA. I DON'T REMEMBER --
3 THEY PUT IT ON -- SOMEBODY WROTE IT FOR ME TO PASS IT IN
4 THERE.

5 Q. SO SOMEBODY FORGED ANTONIO ON HERE FOR HIM?

6 A. THEY ASKED ME IF MY NAME WAS MARLON ANTONIO RIVERA. I
7 TOLD THEM, YES. I DIDN'T CHECK ANYTHING OF WHERE IT SAYS
8 RIVERA. AND I SAID I CANNOT READ, I CANNOT PUT MY
9 SIGNATURE.

10 Q. THANK YOU.

11 A. I THINK THAT SOMEBODY PUT IT ON A PAPER AND I JUST
12 COPIED IT.

13 Q. THANK YOU. ONE MORE THING. I'M SORRY. ON STATE'S
14 NUMBER 16 AND THEN WE WILL MOVE ONTO A NEW SUBJECT. WE'RE
15 LOOKING AT QUESTION NUMBER ONE ON THE WAIVER OF RIGHTS. AND
16 WE'RE LOOKING AT YOUR INITIALS. ABOVE THE INITIALS DO YOU
17 KNOW WHAT THE FIRST LETTER IS?

18 A. YES.

19 Q. WHAT IS IT?

20 A. "S".

21 Q. DO YOU KNOW WHAT THE SECOND LETTER IS?

22 A. NO, I DON'T.

23 Q. DO YOU KNOW WHAT THIS WORD IS?

24 A. NO, I DON'T.

25 Q. THANK YOU. LET'S TALK ABOUT THE NIGHT OF THE SHOOTING.

- 1 YOU WERE DEFINITELY CARRYING THE PISTOL THAT NIGHT, CORRECT?
- 2 A. YES.
- 3 Q. AND YOU KNEW THE PISTOL HAD BULLETS IN IT, THAT'S
- 4 CORRECT?
- 5 A. NO.
- 6 Q. YOU DID NOT KNOW IT HAD BULLETS IN IT?
- 7 A. NO, I DIDN'T.
- 8 Q. DO YOU KNOW OR YOU DO KNOW, I'M SURE, THE CONSEQUENCES
- 9 OF FIRING A PISTOL?
- 10 A. NO, I DON'T.
- 11 Q. DO YOU KNOW PISTOLS, FIRED PISTOLS, COULD HURT
- 12 SOMEBODY?
- 13 A. YES.
- 14 Q. THAT THEY ARE DANGEROUS WEAPONS?
- 15 A. YES.
- 16 Q. THAT THEY MUST BE HANDLED CAREFULLY NOT TO HURT
- 17 SOMEONE?
- 18 A. YES.
- 19 Q. KNOWING ALL THAT YOU CHOSE TO PULL OUT THE PISTOL AND
- 20 FIRE IT?
- 21 A. THE TRUTH IS THAT I DID IT JUST BECAUSE I WAS NERVOUS
- 22 AND BECAUSE SOMEBODY WAS HITTING ME, BEATING ME.
- 23 Q. THE PERSON THAT WAS HITTING YOU, HE DID NOT HAVE A
- 24 PISTOL, DID HE?
- 25 A. NO.

- 1 Q. AND HE DIDN'T HURT YOU SERIOUSLY, DID HE?
- 2 A. HE JUST HURT ME WHEN HE PUSHED ME. AND I GOT HIT WITH
- 3 THE COLUMN, THE CORNER OF THE COLUMN.
- 4 Q. YOU DIDN'T GO TO THE HOSPITAL OR GET ANY MEDICAL
- 5 TREATMENT, DID YOU?
- 6 A. NO.
- 7 Q. YOU DIDN'T THINK THE PERSON YOU WERE FIGHTING WITH WAS
- 8 GOING TO KILL YOU, DID YOU?
- 9 A. I DIDN'T THINK ---
- 10 Q. JUST FIGHTING?
- 11 A. YES. HE WAS JUST FIGHTING AND HE WAS KICKING ME.
- 12 Q. SO JUST A TYPICAL FIST FIGHT TO START WITH?
- 13 A. HE HIT ME HARD. AND HE JUST THREW ME TO THE GROUND.
- 14 AND HE WAS EVEN ON THE GROUND JUST HITTING ME SOME MORE,
- 15 KICKING ME.
- 16 Q. NOW THIS EL FLACO, THE SKINNY ONE, HE'S A GOOD FRIEND
- 17 OF YOURS?
- 18 A. NO. IT WAS THE FIRST TIME THAT I WENT OUT WITH HIM.
- 19 Q. THIS WAS THE FIRST NIGHT YOU'D EVER HAD ANY DEALINGS
- 20 WITH HIM?
- 21 A. I SAW HIM ONE TIME IN THE PARKING LOT. AND HE WAS WITH
- 22 SOME FRIENDS. AND THEN WE JUST -- WE GREET EACH OTHER. AND
- 23 THEN THE SECOND TIME WAS ---
- 24 Q. WAS THIS NIGHT?
- 25 A. --- WAS THAT NIGHT.

1 Q. NOW YOU SAID THAT YOU WERE INSIDE OF DON PEPE'S AND
2 TALKING TO SOME BLACK FRIENDS?

3 A. YES.

4 Q. SO I ASSUME THEY SPOKE SPANISH?

5 A. YES. ONE OF THEM, HIS NAME WAS NORLY, AND THE OTHER
6 ONE WAS -- HIS NAME WAS OMAR.

7 Q. AND THESE WERE BLACK AMERICAN OR BLACK HISPANIC?

8 A. THE BLACK MEN WERE TALKING WITH MAURICIO. AND I WAS
9 TALKING TO THE HISPANICS.

10 Q. SO YOU WEREN'T REALLY TALKING WITH THE BLACK MEN?

11 A. NO. WHEN I WAS LEAVING THE BLACK MEN CALLED ME AND
12 SAID, ARE YOU LEAVING?

13 Q. AND YOU UNDERSTOOD THAT?

14 A. YES. YES, I DID. BECAUSE ONE OF THEM SPOKE A LITTLE
15 BIT OF SPANISH. AND HE SAID, LA CASA? AND I SAID, YES.
16 THEY ARE MY NEIGHBORS.

17 Q. OH, THEY'RE YOUR NEIGHBORS?

18 A. THEY LIVE IN THE FIRST FLOOR, AND I LIVE ON THE SECOND
19 FLOOR.

20 Q. AND IS THAT IN BARRINGTON PARK?

21 A. YES.

22 Q. AFTER YOU SHOT THE PISTOL TWO TIMES IN THE DIRECTION OF
23 -- OR THE GROUND TOWARDS MAURICIO A FEW SECONDS LATER IS
24 WHEN WILFRIDO SAID HE WAS HIT?

25 A. WILFRIDO DIDN'T SAY ANYTHING.

- 1 Q. SO YOUR TESTIMONY IS THAT WILFRIDO DIDN'T SAY ANYTHING?
- 2 A. NO, HE DIDN'T SAY ANYTHING.
- 3 Q. IN YOUR DIRECT QUESTIONING WITH MS. ROSS YOU SAID --
- 4 YOU SAID FIFTEEN SECONDS AFTER THE SHOT YOU HEARD SOMEONE IS
- 5 SHOT?
- 6 A. EL FLACO WAS THE ONE WHO SAID THAT.
- 7 Q. SO YOU KNEW SOMEBODY WAS SHOT?
- 8 A. YES.
- 9 Q. AND YOU KNOW YOU FIRED A PISTOL TWO TIMES?
- 10 A. YES.
- 11 Q. SO YOU GOT OUT OF THERE?
- 12 A. WHEN THE SKINNY SAID THAT THERE WAS A PERSON HURT, SO
- 13 HE TOOK OFF RUNNING, AND I TOOK OFF RUNNING TOO.
- 14 Q. BECAUSE YOU KNEW SOMETHING BAD HAD HAPPENED?
- 15 A. YES. OF COURSE, YES.
- 16 Q. SO YOU DID NOT STAY TO TALK TO THE POLICE?
- 17 A. I WAS VERY NERVOUS, AND I JUST TOOK OFF RUNNING.
- 18 Q. AND YOU DO NOT HAVE THIS SHIRT THAT IS BLUE WITH
- 19 STRIPES, WITH SQUARES, WITH DIFFERENT COLORS?
- 20 A. NO, I DON'T.
- 21 Q. YOU DON'T DISPUTE THAT YOU WENT TO THE MEXICALI LATER
- 22 AND PUT THE GUN IN A TREE?
- 23 A. YES. I WENT TO MEXICALI AND PUT THE WEAPON UP.
- 24 Q. AND YOU WENT TO YOUR COUSIN'S BEFORE THAT AND TOLD HIM
- 25 WHAT HAD HAPPENED?

1 A. YES.

2 Q. AND HE WANTED YOU TO LEAVE THE GUN, BUT YOU WOULDN'T
3 LEAVE THE GUN?

4 A. YES.

5 Q. AND YOUR REASON FOR THAT IS BECAUSE YOU WERE SUPPOSED
6 TO BE KEEPING IT FOR SOMEONE?

7 A. THE WEAPON WAS GIVEN TO ME. SO I DIDN'T LEAVE IT WITH
8 MY COUSIN BECAUSE I WAS RESPONSIBLE TO TAKE IT BACK TO THE
9 PERSON THAT GAVE IT TO ME.

10 Q. YOU SAY YOU DIDN'T KNOW IT HAD BULLETS IN IT, BUT YOU
11 TOOK IT OUT AND YOU ATTEMPTED TO FIRE IT?

12 A. I DIDN'T KNOW THAT THE WEAPON HAS ANY BULLETS BECAUSE
13 IT WAS GIVEN TO ME AND MERELY PUT IT BACK HERE. AND WHEN I
14 WAS IN THE MIDDLE OF THE FIGHT, WHEN THEY WERE ATTACKING ME,
15 I JUST -- I REALIZED THAT THE GUN HAD SOME BULLETS BECAUSE I
16 JUST SHOT THE GUN ---

17 Q. YOU PULLED THE TRIGGER?

18 A. --- AND PULLED THE TRIGGER.

19 Q. AND THAT'S WHEN YOU REALIZED IT HAD BULLETS?

20 A. YES. AND WHEN I SHOOT THAT'S WHEN I REALIZED THAT THE
21 GUN HAS BULLETS.

22 Q. SO IT WAS JUST FORTUNATE FOR YOU IT HAD BULLETS IN
23 THERE?

24 A. I THINK THAT A WEAPON HAS BULLETS, BUT I DIDN'T KNOW
25 THAT -- THAT SPECIFIC ONE HAS ANY BULLETS BECAUSE I JUST GOT

1 IT, AND IT WAS GIVEN TO ME, AND I PUT IT BACK HERE IN
2 BETWEEN MY PANTS AND MY BELT.

3 Q. BUT YOU TOOK THE BULLETS OUT AFTER THIS? YOU REALIZED
4 IT HAD BULLETS AND YOU TOOK THE BULLETS OUT AFTER THIS?

5 A. AFTER EVERYTHING HAPPENED, YES, I TOOK OUT THE BULLETS.
6 IT HAS TWO BULLETS. AND IT HAS THREE THAT DIDN'T HAVE
7 ANYTHING BECAUSE THREE SHOTS CAME OUT OF THOSE BULLETS.

8 Q. SO YOU DID, IN FACT, TAKE THE BULLETS AND THROW THEM
9 SOMEWHERE?

10 A. YEAH. I JUST GOT THE BULLETS AND I PUT IT ON THE EMPTY
11 SPACE AT THE BARRINGTON PARK AND ...

12 Q. GOT RID OF THEM?

13 A. GOT RID OF THEM, YES.

14 Q. AND AFTER YOU KNEW A MAN HAD BEEN SHOT AND THAT YOU HAD
15 FIRED A PISTOL AT LEAST TWO TIMES AND THAT YOUR FRIEND FIRED
16 IT AT LEAST ONE TIME YOU THOUGHT THE BEST THING TO DO WAS GO
17 TO THE MEXICALI AND HAVE A BEER?

18 A. TO MEXICALI, I NEVER WENT TO GET ANY BEERS. I WENT TO
19 GET SOME CIGARETTES.

20 Q. I'M SORRY. SO YOU THOUGHT THE BEST THING TO DO WOULD
21 BE TO GET SOME CIGARETTES?

22 A. ALL WHAT I WAS GOING TO DO IS JUST BUY THE CIGARETTES
23 AND THEN RETURN TO MY HOME.

24 Q. THANK YOU.

25 THE COURT: ANY REDIRECT?

1 MS. ROSS: JUST BRIEFLY.

2 REDIRECT EXAMINATION BY MS. ROSS:

3 Q. WHEN YOU THREW AWAY THE BULLETS YOU COULD HAVE JUST
4 THROWN AWAY THE GUN TOO IF YOU'D WANTED TO?

5 A. THE PISTOL, I COULD HAVE THROWN AWAY, BUT I THOUGHT,
6 WELL, I HAVEN'T KILLED ANYBODY. AND SOMEBODY TOLD ME TO
7 THROW AWAY THE PISTOL. AND I SAID, NO, I'M NOT GOING TO
8 THROW IT AWAY BECAUSE I HAVEN'T KILLED ANYBODY.

9 Q. NOTHING FURTHER.

10 THE COURT: THANK YOU. STEP DOWN.

11 MS. ROSS: YOUR HONOR, I'D LIKE TO CALL CARLOS FREEMAN
12 TO REBUT SOME TESTIMONY THAT WAS PUT FORWARD THROUGH ---

13 MS. HODGE: I OBJECT TO THAT.

14 THE COURT: NO, MA'AM, THAT WOULD NOT -- I CANNOT ALLOW
15 THAT. ALL RIGHT. ANYTHING ELSE?

16 MS. ROSS: NO, YOUR HONOR.

17 THE COURT: ALL RIGHT. ANYTHING IN REPLY, SOLICITOR?

18 MS. HODGE: NOTHING FROM THE STATE, YOUR HONOR.

19 THE COURT: ALL RIGHT. NOW, LADIES AND GENTLEMEN, THIS
20 CONCLUDES THE TESTIMONY IN THIS CASE. WHAT WE HAVE
21 REMAINING IS THE FINAL ARGUMENTS BY THE ATTORNEYS AND MY
22 CHARGE ON THE LAW. WE'LL DO THAT AFTER LUNCH. I'VE, AS YOU
23 KNOW, ORDERED LUNCH FOR YOU. AND I ANTICIPATE IT'LL
24 PROBABLY BE ABOUT NOON BEFORE IT GETS HERE.

25 THERE'S SOME MATTERS I NEED TO TAKE UP WITH THE

1 ATTORNEYS THAT DO NOT CONCERN YOU. SO I'M GOING TO ASK THAT
2 YOU RETIRE TO YOUR JURY ROOM AND BE AT EAST THERE, HAVE YOUR
3 LUNCH, AND THEN WE'LL PICK BACK UP AFTER LUNCH. SO PLEASE
4 BE AT EASE UNTIL YOUR LUNCH COMES AND ENJOY IT. THANK YOU.

5 (WHEREUPON THE JURY EXITED THE COURTROOM AT 11:27 AM)

6 THE COURT: ALL RIGHT. ANY MOTIONS, MS. ROSS?

7 MS. ROSS: YOUR HONOR, I'D LIKE TO RENEW MY DIRECTED
8 VERDICT MOTION. AGAIN, YOU'VE HEARD ALL THE TESTIMONY. AND
9 NOTHING PRESENTED SUGGESTING HEAT OF PASSION, EXCUSE ME,
10 MALICIOUS INTENT NECESSITATED BY MURDER. BASICALLY NONE OF
11 THE EVIDENCE PRESENTED TO YOU, EVEN THE STATEMENT OF --
12 ALLEGED TO -- ATTRIBUTED TO MARLON RIVERA TALKS ABOUT A
13 FIGHT. NOTHING SUGGESTS PREMEDITATION. NOTHING SUGGESTS AN
14 EVIL HEART OR MALICE. SO I WOULD RENEW MY MOTION FOR A
15 DIRECTED VERDICT AT THIS TIME ON THE MURDER CHARGE.

16 I WOULD ALSO RENEW ALL MY PRIOR MOTIONS AND OBJECTIONS
17 INCLUDING MY MOTION FOR A MISTRIAL WITH THE -- MY WITNESSES
18 NOT BEING ALLOWED TO TESTIFY, THE SEQUESTRATION ISSUE.
19 SOMEONE JUST HANDED ME STATE V. TISDALE AND STATE V. FULTON,
20 WHICH ARE TWO CASES THAT ADDRESS THIS ISSUE BOTH WHERE THE
21 STATE WAS ALLOWED TO PRESENT WITNESSES WHO HAD VIOLATED
22 SEQUESTRATION ORDERS.

23 THE COURT: OKAY. I DON'T NEED THOSE. I'M NOT GOING
24 TO CHANGE MY RULING.

25 MS. ROSS: ALL RIGHT.

1 THE COURT: GIVE IT TO THE COURT REPORTER.

2 (WHEREUPON COURT'S EXHIBITS 8, 9, 10 & 11 WERE MARKED)

3 MS. ROSS: AND THAT'S ALL MY MOTIONS. I'D JUST LIKE TO
4 GO OVER WHAT YOUR CHARGE WOULD BE.

5 THE COURT: SURE. ALL RIGHT. YOUR MOTION'S DENIED.
6 I'M GOING TO COVER YOUR REQUESTS ONE THROUGH THREE, BUT NOT
7 NECESSARILY IN THE MANNER THAT YOU'VE REQUESTED, BUT I'M
8 GOING TO COVER IT. NUMBER FOUR, I DO NOT CHARGE THAT A
9 REASONABLE DOUBT IS A DOUBT THAT WOULD CAUSE A REASONABLE
10 PERSON TO HESITATE TO ACT. I CHARGE REASONABLE DOUBT UNDER
11 VICTOR V. NEBRASKA.

12 MS. ROSS: AND IS THAT THE FIRMLY CONVINCED CHARGE?

13 THE COURT: VICTOR V. NEBRASKA IS WHAT I USE.

14 MS. ROSS: AND THAT'S THE LEAVES YOU FIRMLY CONVINCED?

15 THE COURT: YEAH.

16 MS. ROSS: OKAY.

17 THE COURT: AND I'LL COVER YOUR REQUEST NUMBER EIGHT.
18 NOW TELL ME WHY IN THIS CASE YOU ARE ENTITLED TO A CHARGE OF
19 SELF DEFENSE OR ACCIDENT.

20 MS. ROSS: WITH THAT SELF DEFENSE CHARGE ALL OF THE
21 EYEWITNESSES AND THE DEFENDANT ALL SAID THERE WAS A FIGHT
22 GOING ON, SOMEONE WAS ATTACKED. AND THAT WAS MARLON. WHEN
23 THE GUN CAME OUT SOME SAID THE GUN DROPPED OR ONE SAID WAS
24 GRABBED. WHEN THE GUN CAME OUT HE BECAME ARMED IN SELF
25 DEFENSE. HE WAS BEING ATTACKED, HE WAS BEING HELD. THERE

1 WAS NO EVIDENCE THAT HE HAD AN ABILITY TO GET AWAY. HIS
2 TESTIMONY ---

3 THE COURT: BUT HE DENIES BEING THE SHOOTER.

4 MS. ROSS: HE DOES DENY BEING THE SHOOTER. I GUESS MY
5 MAIN REASON OF WANTING THE SELF DEFENSE CHARGE WAS BASED ON
6 AN ACCIDENT CHARGE, AN ACCIDENT LAW, WHICH I HAVE.

7 THE COURT: WELL, HOW ARE YOU ENTITLED TO AN ACCIDENT?
8 HE WAS UNLAWFULLY ARMED WITH A PISTOL, WASN'T HE?

9 MS. ROSS: WELL, I'LL HAND YOU UP -- LET ME GET SOME
10 CASE LAW. AND I'M SORRY. I HAVEN'T MADE COPIES. DIDN'T
11 REMEMBER -- I HAVE, I BELIEVE, LISTED STATE V. BURRISS AND
12 STATE V. CROSBY. BOTH TALK ABOUT IF SOMEONE IS ARMED --
13 ARMS THEMSELF IN SELF DEFENSE THAT IS NOT ILLEGALLY ARMED
14 EVEN IF THE GUN WAS ILLEGAL, OR THEY WERE UNDER AGE, OR
15 DIDN'T HAVE A PERMIT FOR THE GUN.

16 IT STATES THAT AT THE POINT THAT THEY ARM THEMSELVES
17 THEY ARE ARMING THEMSELVES IN SELF DEFENSE, THE ACTIONS THAT
18 FOLLOW CAN BE ACCIDENT IF THE JURY FINDS THAT THE GUN
19 ACCIDENTALLY WENT OFF OR INVOLUNTARY MANSLAUGHTER IF THE
20 JURY FINDS THAT THE GUN WENT OFF IN A RECKLESS MANNER, BUT
21 NOT INTENTIONALLY AND, YOU KNOW, CERTAINLY WITHOUT HEAT OF
22 PASSION.

23 AND, THEREFORE, THAT'S THE BASIS I'D LIKE TO BE ABLE TO
24 HAVE THE CHARGE OF SELF DEFENSE TO SHOW THAT MARLON RIVERA,
25 AND I THINK THERE'S TESTIMONY TO THAT EFFECT, ARMED HIMSELF

1 IN SELF DEFENSE. THE GUN GOT INTO HIS HAND IN SELF DEFENSE
2 AND THEN THERE WHAT FOLLOWED WAS POTENTIALLY ACCIDENT
3 ACCORDING TO -- THE STATE'S FIRST WITNESS, I BELIEVE, SAID
4 THEY WERE ARGUING OVER THE GUN AND IT ACCIDENTALLY WENT OFF.
5 AND THERE WOULD BE THE ACCIDENT.

6 THE FIRING INTO THE GROUND WITH NO INTENT OF HURTING
7 SOMEONE IF THE JURY CHOSE TO BELIEVE THAT SOMEHOW THAT GUN,
8 I MEAN, THAT BULLET HAD RICOCHETED AND WAS THE ONE THAT
9 KILLED MR. MONGE, THEN THAT WOULD BE POTENTIALLY AN
10 INVOLUNTARY MANSLAUGHTER CHARGE. AND WE'D REQUEST THOSE
11 CHARGES AND ALSO THE SELF DEFENSE.

12 THE COURT: SOLICITOR, WHAT'S YOUR POSITION?

13 MS. HODGE: YOUR HONOR, THE REASON SHE WANTS SELF
14 DEFENSE IS OBVIOUSLY 'CAUSE THAT'S THE ONLY WAY TO GET IN
15 ALL THE REST OF THESE THINGS. AND I DON'T BELIEVE THAT SELF
16 DEFENSE APPLIES IN THIS CASE. THE DEFENDANT EVEN SAID
17 HIMSELF THAT HE WAS NOT IN FEAR FOR HIS LIFE, GREAT BODILY
18 INJURY, HE WAS IN A FIST FIGHT. I DON'T BELIEVE THAT HE'S
19 ENTITLED TO A SELF DEFENSE CHARGE.

20 OBVIOUSLY THE TESTIMONY ON HIS PART IS HE PULLED OUT
21 HIS GUN BASICALLY BECAUSE HE WANTED TO. I MEAN, IT WASN'T
22 BECAUSE HE THOUGHT HE WAS GOING TO BE KILLED OR NEEDED TO
23 DEFEND HIMSELF. YOU KNOW, THERE'S TESTIMONY FROM PEOPLE AT
24 THE SCENE AS TO EVERY TYPE OF THING. THERE'S NOTHING
25 CONSISTENT IN THAT. I DON'T THINK THERE'S ANY EVIDENCE

1 THOUGH THAT HE ACTED IN SELF DEFENSE. I THINK IT'S EITHER
2 -- HIS DEFENSE IS, I'M NOT THE SHOOTER, THIS GUY'S THE
3 SHOOTER. SO IT'S NOT ME, IT'S HIM.

4 MS. ROSS: BUT THERE IS EVIDENCE HE BECAME ARMED IN
5 SELF DEFENSE. AND AGAIN, THE STATE HAD ACCESS TO A NUMBER
6 OF EYEWITNESSES THAT THEY DIDN'T CHOOSE TO CALL WHO MIGHT
7 HAVE BEEN ABLE TO ---

8 THE COURT: WELL, MY QUESTION IS, SOLICITOR, IF HE
9 DENIES BEING THE SHOOTER IS HE ENTITLED TO A SELF DEFENSE
10 CHARGE?

11 MS. HODGE: I DON'T THINK HE IS SPECIFICALLY BECAUSE
12 WHEN I ASKED HIM IT'S GOT TO BE THAT HE FELT HE WAS IN FEAR
13 OF GREAT BODILY INJURY OR DEATH. AND HE'S SAYING HE WASN'T.

14 THE COURT: HIS TESTIMONY IS THAT HE SHOT IN THE GROUND
15 TWICE.

16 MS. HODGE: CORRECT.

17 THE COURT: AND THAT HIS FRIEND GOT THE GUN AND SHOT
18 THE MAN, SHOT THE VICTIM. HOW IN THE WORLD ---

19 MS. ROSS: THE ISSUE WAS WHETHER ---

20 THE COURT: --- CAN HE CLAIM SELF DEFENSE?

21 MS. ROSS: --- HE WAS ARMED IN SELF DEFENSE. AND THE
22 JURY COULD BELIEVE THAT THE SHOTS THAT WENT INTO THE GROUND
23 SOMEHOW ---

24 THE COURT: I THINK THAT'S JUST PURE SPECULATION.

25 MS. ROSS: WELL, I MEAN, YOU COULD ARGUE -- I WOULD

1 LOVE TO HAVE A CHARGE SAYING, I INSTRUCT YOU THAT NO BULLETS
2 THAT WENT INTO THE GROUND HIT THE VICTIM OR LED TO THE
3 VICTIM'S DEATH, BUT I AM CONCERNED THAT THE JURY MIGHT
4 SPECULATE THAT THAT'S WHAT HAPPENED AND, THEREFORE, I THINK
5 HE -- IF THEY BELIEVE THAT HE WOULD BE -- THAT'S A CLASSIC
6 INVOLUNTARY MANSLAUGHTER.

7 THE COURT: MS. ROSS, I MAY BE IN ERROR, BUT I DON'T
8 THINK HE'S ENTITLED TO A SELF DEFENSE OR ACCIDENT CHARGE.
9 AND I WOULD DECLINE THE CHARGE.

10 MS. HODGE: YOUR HONOR, I WOULD ALSO ASK THAT YOU WOULD
11 OBJECT TO THE INVOLUNTARY. I DON'T KNOW IF YOU WERE RULING
12 ON THAT AS WELL. INVOLUNTARY MANSLAUGHTER ---

13 THE COURT: NO, I'M NOT GOING TO CHARGE INVOLUNTARY.

14 MS. ROSS: AND I'D OBJECT. I THINK THAT SHOOTING INTO
15 THE GROUND IS CLASSIC INVOLUNTARY MANSLAUGHTER.

16 THE COURT: ALL RIGHT. NOW HOW ABOUT BE BACK AT 1:15?

17 MS. HODGE: 1:15, YES, SIR.

18 THE COURT: OKAY. WE'LL BE BACK AT 1:15.

19 MS. HODGE: YOU'LL INSTRUCT ON TRANSFERRED INTENT?

20 THE COURT: YEAH.

21 MS. HODGE: VOLUNTARY MANSLAUGHTER ALSO OR JUST MURDER?

22 THE COURT: MURDER.

23 MS. ROSS: ONE THING, WHEN YOU GIVE SOME INSTRUCTION AS
24 TO THE CONFESSION, ---

25 THE COURT: OH, YEAH, I'M ---

1 MS. ROSS: YOU NEED TO FIND BEYOND A REASONABLE DOUBT
2 THAT ---

3 THE COURT: SURE. I'M GOING TO COVER YOU FULLY ON
4 THAT.

5 MS. ROSS: THANK YOU. AND ONE MORE. MY REQUEST NUMBER
6 SIX, WE NEVER HAVE THE BURDEN CLEARLY OF CALLING ANY
7 WITNESSES OR PRESENTING ANY EVIDENCE OR SOMETHING TO THAT
8 EFFECT.

9 THE COURT: WELL, I CHARGE THAT WHEN THE DEFENDANT
10 DOESN'T TAKE THE STAND. I MEAN, WHY DO YOU NEED THAT CHARGE
11 NOW?

12 MS. ROSS: WELL, I THINK I JUST WANT TO ESTABLISH WITH
13 THE JURY THAT THE DEFENDANT HAS A RIGHT NOT TO PRESENT ANY
14 EVIDENCE. AND IF THEY DO, THEY DO. AND THEN IT GOES INTO
15 REQUEST NUMBER SEVEN STATING THAT ---

16 THE COURT: BUT YOUR REQUEST NUMBER SIX SAYS ---

17 MS. ROSS: AND THAT -- WHAT I MEANT GENERALLY BY THAT
18 OR WHAT I WAS ASKING FOR IS THE DEFENDANT HAS NO DUTY TO
19 CALL ANY WITNESSES OR PRESENT ANY EVIDENCE. AND THEN ---

20 THE COURT: SO YOU WANT THE FIRST SENTENCE?

21 MS. ROSS: YES.

22 THE COURT: AND NUMBER SEVEN I BELIEVE WOULD BE AN
23 IMPROPER CHARGE. SO I WOULD NOT CHARGE THAT.

24 MS. ROSS: AND I WOULD OBJECT TO THAT.

25 THE COURT: ALL RIGHT. PLEASE BE BACK AT 1:15.

1 (WHEREUPON COURT'S EXHIBIT 12 WAS MARKED)

2 (WHEREUPON COURT WAS IN RECESS)

3 THE COURT: BE SEATED. LET ME SEE THE CONFESSION JUST
4 A MINUTE PLEASE.

5 (PAUSE)

6 THE COURT: ALL RIGHT. YOU WAIVE OPENING ARGUMENTS,
7 SOLICITOR?

8 MS. HODGE: YES, YOUR HONOR.

9 THE COURT: AND YOU READY TO TALK TO THE JURY, MS.
10 ROSS?

11 MS. ROSS: YES, YOUR HONOR.

12 THE COURT: OKAY. BRING THEM ON PLEASE.

13 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 1:27 PM)

14 THE COURT: ALL RIGHT, MS. ROSS.

15 MS. ROSS: MAY IT PLEASE THE COURT? LADIES AND
16 GENTLEMEN OF THE JURY, WE'VE REACHED THE CLOSING STATEMENTS.
17 AND MARLON RIVERA HAS SPOKEN TO YOU AND TOLD YOU WHAT
18 HAPPENED. HE'S BEEN CHARGED WITH MURDER. AND THAT NOW,
19 AFTER CLOSING ARGUMENTS, WOULD BE YOUR DETERMINATION TO
20 DETERMINE WHETHER MARLON RIVERA IS GUILTY OF MURDER IN THE
21 FIRST DEGREE. BASICALLY, ONE OF THE MOST SERIOUS CRIMES WE
22 HAVE. PREMEDITATED, COLD BLOODED MURDER IS WHAT MARLON
23 RIVERA HAS BEEN CHARGED WITH. AND HE'S NOT GUILTY.

24 HE'S TALKED TO YOU AND THE STATE HAS HAD AN OPPORTUNITY
25 TO PRESENT THEIR EVIDENCE. THE STATE PRESENTED, I BELIEVE,

1 THIRTEEN WITNESSES. TWO OF THEM WERE NOT ASSOCIATED WITH
2 LAW ENFORCEMENT. NEITHER OF THEM WERE EYEWITNESSES AT THE
3 SCENE.

4 ELEVEN POLICE OFFICERS WHO SPOKE TO YOU TOLD YOU THAT
5 MARLON HAD HAD THE GUN. HE TOLD YOU THAT. AND THAT THERE
6 WAS GUNSHOT RESIDUE ON HIS LEFT, THE TOP OF HIS LEFT HAND.
7 HE'S RIGHT HANDED. THEY ALSO SHOWED YOU PICTURES. AND WHAT
8 THEIR CASE IS BASED ON IS THIS STATEMENT.

9 NOW IF THAT WAS THE WHOLE STORY I DON'T BELIEVE THAT
10 YOU COULD CONVICT MARLON RIVERA OF COLD BLOODED,
11 PREMEDITATED MURDER. IF THIS WAS THE WHOLE STORY, AND I
12 INVITE EVERYONE TO READ IT BACK IN CHAMBERS, THAT IS NOT
13 COLD BLOODED, PREMEDITATED MURDER. AND THAT'S WHAT MARLON
14 RIVERA IS CHARGED WITH.

15 BUT, LADIES AND GENTLEMEN, THAT IS NOT THE WHOLE STORY.
16 IT WAS LEFT UP TO THE DEFENSE, US, WHO DON'T HAVE ANY DUTY
17 TO PRESENT ANY EVIDENCE. WE HAVE THE RIGHT TO REMAIN SILENT
18 AND THE RIGHT TO EXPECT THAT THE STATE PROVES GUILT BEYOND A
19 REASONABLE DOUBT. AND THEY DID NOT.

20 WE CAN DO THAT AND JUST SIT. BUT INSTEAD, WE WERE
21 FORCED TO CALL THE FEW EYEWITNESSES THAT WE COULD FIND AND
22 GET UP ON THAT STAND TO TELL YOU WHAT HAPPENED. THOSE TWO
23 PEOPLE AND MARLON ARE WITNESSES THAT YOU HEARD FROM WERE THE
24 ONLY PEOPLE WHO WERE THERE EXCEPT, OF COURSE, FOR MR. MONGE,
25 WHO IS NOW DEAD. AND THAT IS HORRIBLE. AND I DON'T WANT TO

1 MAKE THE HORROR OF THE KILLING OF AN INNOCENT PERSON GO AWAY
2 BECAUSE IT IS HORRIBLE AND WRONG. BUT MARLON RIVERA WAS NOT
3 THE ONE WHO SHOT HIM. AND IT WOULD BE ALSO HORRIBLE TO
4 CONVICT THE WRONG PERSON OF MURDER, THE PERSON WHO DID NOT
5 SHOOT MR. MONGE.

6 YOU HEARD THE TESTIMONY AND THE EYEWITNESSES. FIRST WE
7 PRESENTED COURTNEY ROBLES. SHE WAS AT THE SCENE AND TOLD
8 THE POLICE AT THE SCENE WHAT HAPPENED. THERE WERE TWO OTHER
9 EYEWITNESSES THERE WHO HAVE NOT BEEN LOST, WEREN'T CALLED TO
10 THE STAND. BUT THE STORY -- AND OFFICER, I BELIEVE IT WAS
11 BENDIG, CAME AND TESTIFIED AND TOLD YOU THE STORY THAT WAS
12 INITIALLY TOLD TO LAW ENFORCEMENT WHEN THEY INITIALLY GOT
13 THERE WAS THERE HAS BEEN A SHOOTING. THERE ARE TWO
14 SUSPECTS. ONE IN A STRIPED SHIRT HAD THE GUN WITH THE
15 MUSTACHE. A SECOND PERSON WITH A BLACK SHIRT TOOK THE GUN
16 AND SHOT THE VICTIM. THAT WAS THE INITIAL STORY TO LAW
17 ENFORCEMENT. THAT WAS THE STORY THAT WES SMITH KNEW WHEN HE
18 QUESTIONED WITNESSES. AND THAT WAS BASICALLY WHAT THEY SAID
19 HAPPENED.

20 AND THEN WHAT HAPPENED IS SOMEONE CAME AND SAID, THE
21 SHOOTER'S AT THE MEXICALI. LAW ENFORCEMENT GO AND PICK UP
22 MARLON RIVERA. NOW THE STATE JUST WANTED YOU TO HEAR THAT
23 PART. THEY PUT UP AN OFFICER GARRETT AND SAID, SOME GUY, I
24 DON'T SPEAK MUCH SPANISH, BUT I SPEAK SOME, SOME GUY, ALVARO
25 FERNANDEZ, OFFICER RIVERA WAS CALLING HIM ALVARO FERNANDEZ

1 PORTUGUEZO OR SOMETHING, BUT IT'S ALVARO FERNANDEZ, SAID THE
2 SHOOTER WAS AT THE MEXICALI.

3 AND THEN I CAME IN, HE WAS NOT CALLED TO THE STAND BY
4 THE STATE OR CALLED TO TESTIFY. I CAME IN AND ATTEMPTED TO
5 SAY, WELL WAIT, THERE'S MORE TO IT THAN THAT. OBJECTION,
6 YOU'RE NOT ALLOWED TO TELL THE JURY THAT. THE STATE DIDN'T
7 WANT YOU TO HEAR WHAT ELSE ALVARO FERNANDEZ HAD TO SAY. AND
8 WHAT HE HAD TO SAY AND WHAT WAS READ INTO EVIDENCE WAS THAT
9 HE SAW TWO PEOPLE ARGUING OVER WHAT APPEARED TO BE A GUN.
10 ONE PERSON HAD THE GUN, AND THE OTHER PERSON TOOK IT FROM
11 HIM. I THEN HEARD TWO SHOTS. THAT'S WHAT ALVARO FERNANDEZ
12 SAID. HE ALSO SAID, TWO WERE ARGUING AND THEN ANOTHER COMES
13 AROUND AND BENDS DOWN. I DID NOT SEE WHO DID THE SHOOTING.
14 THAT'S WHAT ALVARO FERNANDEZ SAID. AND THE STATE AND THE
15 POLICE KNEW THAT. THEY KNEW WHEN THEY WERE PICKING UP
16 MARLON RIVERA THEY WERE PICKING UP ONE OF TWO SUSPECTS. AND
17 THERE WERE TWO SUSPECTS FROM THE BEGINNING, BUT MARLON WAS
18 THE ONE WHO WAS ARRESTED.

19 AND HOW COULD -- THE STATE WANTED YOU JUST TO HEAR, I
20 SAW THE SHOOTER AT THE MEXICALI. IT WOULD BE IMPOSSIBLE FOR
21 ALVARO FERNANDEZ TO KNOW WHO THE SHOOTER WAS, AS HE SAID
22 HIMSELF, I DID NOT KNOW WHO THE SHOOTER WAS.

23 A MORE LIKELY STORY, SOMEONE CALLED FROM THE MEXICALI,
24 MARLON RIVERA HAD BEEN PATTED DOWN, THEY FOUND A GUN, FOUND
25 IT SUSPICIOUS, AND THEN CALLED OVER AND SAID, SOMEONE WITH A

1 GUN IS AT THE MEXICALI. IT MAKES A LOT MORE SENSE THAN THE
2 SHOOTER, YOUR MAN. BUT THE STATE WANTS YOU TO HEAR THE
3 SIMPLE ONE SHOOTER, IT'S MARLON RIVERA, HE CONFESSED, END OF
4 STORY. AND IT'S NOT THE END OF STORY BECAUSE IT'S NOT THE
5 TRUTH. AND THE EYEWITNESSES TOLD YOU THAT WAS NOT THE
6 TRUTH.

7 THE STATE IS ASKING YOU TO CONVICT MARLON RIVERA OF
8 MURDER, PREMEDITATED, COLD BLOODED MURDER, THE MOST SERIOUS
9 OF CRIMES. THEY'RE ASKING YOU TO CONVICT MARLON RIVERA
10 WITHOUT GIVING YOU THE TOOLS THAT YOU NEED TO HAVE UNDER
11 YOUR OATH TO FIND HIM GUILTY BEYOND A REASONABLE DOUBT.
12 THEY'RE NOT GIVING YOU THAT. THEY'RE ONLY GIVING YOU PART
13 OF THE STORY, THE LITTLE PART THAT THEY WANT YOU TO HEAR,
14 NOT THE FULL STORY, THE EYEWITNESSES.

15 NOW I WAS OFTEN ATTEMPTING TO TRY TO GET INVESTIGATOR
16 SMITH TO ADMIT THERE WERE TWO SUSPECTS, TWO PEOPLE HAD THE
17 GUN. NO, IT WAS JUST ONE. ON AND ON, JUST ONE. AND I KEPT
18 SAYING, WELL, HOW ABOUT THIS EYEWITNESS? JUST ONE. ALL THE
19 WITNESSES WERE CONSISTENT WITH THIS STATEMENT. THAT SIMPLY
20 IS NOT TRUE. AND WE PUT UP WITNESSES, EYEWITNESSES WHO WERE
21 THERE WHO SHOWED YOU IT WASN'T TRUE. AND THESE WERE NOT
22 BIASED, THESE ARE NOT MARLON RIVERA'S FRIENDS. THE MAN WE
23 PUT UP -- THE WOMAN WAS JUST WALKING IN. SHE WASN'T EVEN
24 AROUND THERE. SHE WAS JUST WALKING IN THE PARKING LOT IF
25 YOU'LL REMEMBER, COURTNEY ROBLES. JUST HAPPENED TO BE

1 THERE. THE MAN WHO TESTIFIED ACTUALLY, I BELIEVE, WAS
2 FRIENDS WITH -- INDIRECTLY FRIENDS WITH A FRIEND OF THE
3 VICTIM, NOT FRIENDS OF MARLON.

4 NOW I WANT TO TALK A LITTLE BIT ABOUT THE CONFESSION
5 ITSELF. AND THERE WAS A LOT OF TALK ABOUT CAN MARLON WRITE?
6 IS MARLON REALLY ILLITERATE? IS HE LYING ABOUT BEING
7 ILLITERATE? HE'S REALLY JUST A STREET-WISE GUY. YOU SAW
8 HIM ON THE STAND. YOU CAN MAKE YOUR DETERMINATION. BUT I'D
9 SUBMIT TO YOU THAT DR. TAYLOR WAS TELLING YOU THE TRUTH WHEN
10 HE SAID THAT MARLON RIVERA IS NOT A STREET-WISE GUY.

11 NOW HE KNOWS HOW TO WALK DOWN THE STREET AND GO WHERE
12 HE NEEDS TO GO JUST LIKE MILLIONS OF ILLITERATE PEOPLE IN
13 THE WORLD KNOW HOW TO DO. HE KNOWS HOW TO COUNT CHANGE AND
14 DEAL WITH MONEY. THAT DOES NOT MEAN THAT HE CAN READ AND
15 WRITE. THAT DOES NOT MEAN THAT HE UNDERSTANDS HIS RIGHTS AS
16 AN AMERICAN CITIZEN, HIS RIGHT TO REMAIN SILENT. WE ALL
17 GREW UP WATCHING TV. MIRANDA RIGHTS, YOU HAVE THE RIGHT TO
18 REMAIN SILENT, YOU HAVE A RIGHT TO A LAWYER. YOU CAN STAND
19 UP TO THE POLICE AND NOT GET KILLED.

20 MARLON RIVERA'S BACKGROUND WAS DIFFERENT. HE EXPECTED
21 TO GET A BAG PUT OVER HIS HEAD AND PROBABLY BEATEN TO DEATH
22 IF HE DIDN'T COOPERATE AND TALK TO POLICE. THAT WAS HIS
23 LIFE EXPERIENCE, NO UNDERSTANDING OR COMPREHENSION OF WHAT A
24 RIGHT REALLY IS. THAT WAS NOT HIS EXPERIENCE OR
25 UNDERSTANDING. HIS WAS MUCH DIFFERENT.

1 NOW ONE THING I WAS JUST TRYING TO POINT OUT THAT I'D
2 URGE YOU TO LOOK AT BOTH OF THESE FORMS BACK WHEN YOU
3 DELIBERATE, BUT MARLON'S NAME IS SMALL LETTERS HERE. THAT'S
4 HOW HE COPIED IT DOWN HERE. BIG LETTERS HERE. THAT'S HOW
5 HE COPIED IT DOWN HERE. AND IT'S WEIRD BECAUSE THE "M" AND
6 "A" DOES LOOK A LITTLE BIT DIFFERENT. AND I'D JUST URGE
7 Y'ALL TO LOOK AT THAT AND DETERMINE FOR YOURSELF.

8 NOW ONE THING, TO BE LEGAL, OFFICER GARRET, RIVERA, AND
9 INVESTIGATOR SMITH ALL SAID, YOU HAVE TO WAIVE YOUR RIGHTS
10 BEFORE YOU CAN TALK TO THE POLICE AND GIVE A STATEMENT.
11 WELL, THE STATEMENT IS OUT. YOU CAN'T CONSIDER IT. NOW
12 MARLON TOLD YOU HE SIGNED THESE, BOOM, BOOM, RIGHT AT THE
13 SAME TIME. THIS WAS TYPED OUT. SO THERE HAD TO BE SOME
14 CONVERSATION OR INTERROGATION GOING ON BEFORE THIS WAS TYPED
15 OUT AND GOTTEN TO THE FORM WHERE HE COULD ACTUALLY PUT HIS
16 NAME ON IT, PUT HIS MARKS. AND THAT'S REALLY WHAT THEY ARE
17 ON IT.

18 AND I'D POINT OUT, THERE WAS SOME CONFUSION WHEN MARLON
19 WAS TESTIFYING. HE THOUGHT ALPHABET MEANT THE SAME THING AS
20 ILLITERATE. THAT'S WHAT HE WAS GETTING CONFUSED ABOUT. DO
21 YOU KNOW THE ALPHABET? YES, I'M ILLITERATE. DIDN'T EVEN
22 KNOW THE SPANISH DIFFERENCE BETWEEN THOSE WORDS, JUST DIDN'T
23 KNOW. BUT FOR THIS TO BE GOOD, THE WAIVER OF RIGHTS HAS TO
24 BE FREE AND VOLUNTARILY SIGNED FIRST, KNOWINGLY, WILLINGLY.
25 THAT MEANS HE HAD TO KNOW WHAT THAT MEANT WHEN HE SIGNED IT,

1 KNOW WHAT WAS GOING ON. NOW DR. TAYLOR TOLD YOU HE DIDN'T.
2 AND MARLON TOLD YOU HE DIDN'T.

3 AND STRANGELY OFFICER GARRETT AND RIVERA TOLD YOU
4 SOMETHING THAT I DON'T THINK THEY MEANT TO TELL YOU
5 NECESSARILY. AND THAT WAS -- INVESTIGATOR SMITH'S BEEN
6 SITTING IN THE COURTROOM THE WHOLE TIME WATCHING THIS FOLD
7 OUT. SO OFFICERS RIVERA AND GARRETT AREN'T. THEY'RE
8 OUTSIDE. THEY CAN'T SEE ALL THAT'S GOING ON. SO GARRETT
9 COMES IN AND HE SAYS THAT I BROUGHT A WITNESS, ALVARO
10 FERNANDEZ PORTUGUEZO TO THE LAW ENFORCEMENT CENTER AND HE
11 TALKED TO OFFICER RIVERA. THEY GOT A STATEMENT. AND THAT'S
12 THE ONE SAYING THERE ARE TWO SHOOTERS THAT I JUST READ FOR.

13 SO HE BRINGS HIM TO THE LAW ENFORCEMENT CENTER, THEY
14 TALK, DO A STATEMENT. HE TAKES HIM BACK, HE GOES TO THE
15 SCENE, HE LOOKS AROUND, HE FINDS THE GUN, IT'S MORNING, IT'S
16 DAYLIGHT, SOMEWHERE AROUND SIX OR 6:30, HE GETS SOMEONE TO
17 COME AND PHOTOGRAPH THE GUN, BRING IT BACK INTO EVIDENCE.

18 THEN HE GOES BACK AND HE SAYS THE INTERVIEW WAS
19 UNDERWAY. HE SAID, GARRETT SAID THAT INVESTIGATOR SMITH AND
20 OFFICER RIVERA WERE IN THE PROCESS OF INTERVIEWING MARLON
21 RIVERA. NOW HE ALSO SAID, I WAS THERE WHEN MARLON SIGNED
22 THIS WAIVER. AND HE SAID THE INTERVIEW PROCESS TOOK THIRTY
23 MINUTES. OKAY.

24 NOW THEN YOU HEAR FROM OFFICER RIVERA, WHO DOESN'T KNOW
25 THAT, 'CAUSE HE WASN'T IN THE COURTROOM, DOESN'T KNOW

1 NECESSARILY THAT OFFICER GARRETT, AFTER FINISHING THE
2 INTERVIEW WITH ALVARO FERNANDEZ, WENT BACK AND DID ALL THESE
3 OTHER THINGS. HE DOESN'T KNOW THAT. SO HE DOESN'T KNOW TO
4 SAY, SO AFTER AN HOUR, AN HOUR AND A HALF WE PULLED MARLON
5 RIVERA INTO THE ROOM. SO WHAT HE SAYS IS INTERVIEWED ALVARO
6 FERNANDEZ, TOOK HIM OFF, HE LEFT, AND THEN STARTED
7 INTERVIEWING MARLON RIVERA. WAS IT RIGHT AWAY? YEAH, RIGHT
8 AWAY. THAT'S WHAT HE SAID. HE SAID, THIS TOOK ABOUT TEN,
9 FIFTEEN MINUTES, WHICH DR. TAYLOR SAID WASN'T LONG ENOUGH TO
10 REALLY HAVE MARLON UNDERSTAND. HE SAID, DID THIS -- TOOK
11 TEN OR FIFTEEN MINUTES. THE WHOLE INTERVIEW TOOK ABOUT TWO
12 HOURS. SO THAT'S WHAT RIVERA SAID.

13 AND I'D SUBMIT TO YOU THAT THE COMBINATION OF THOSE
14 STATEMENTS IS TELLING -- IS SAYING THAT OFFICERS RIVERA AND
15 INVESTIGATOR SMITH WERE TALKING TO MARLON RIVERA ABOUT THIS
16 CASE. THEY WERE INTERVIEWING HIM FOR ABOUT AN HOUR AND A
17 HALF BEFORE OFFICER GARRETT WALKED IN, BEFORE THIS WAIVER
18 WAS EVEN SIGNED.

19 THERE WAS AN INCONSISTENCY IN THEIR TESTIMONY BECAUSE
20 THEY DIDN'T KNOW NOT TO PUT IT IN THERE BECAUSE THEY DIDN'T
21 KNOW WHAT HE -- EACH OTHER WAS SAYING. AND STRANGELY THAT'S
22 CONSISTENT WITH WHAT MARLON SAID, SIGN THIS AND THEN SIGN
23 THIS RIGHT AWAY. NOW TO ACCEPT THAT STATEMENT YOU HAVE TO
24 FIND BEYOND A REASONABLE DOUBT THAT MARLON KNOWINGLY AND
25 WILLINGLY WAIVED HIS CONSTITUTIONAL RIGHTS TO A LAWYER, TO

1 REMAIN SILENT, AND ALL OF THAT.

2 NOW SOMETHING -- THE STATE COULD HAVE EASILY HANDLED
3 THIS PROBLEM BY BRINGING IN AN INDEPENDENT WITNESS TO COME
4 IN DURING THE INTERROGATION PROCESS OR AUDIO VIDEO TAPE.
5 SOMETHING -- THEY COULD HAVE SHOWED YOU SOMETHING, BUT THEY
6 DIDN'T.

7 AND QUICKLY I'LL ADD TOO, I FORGOT, OFFICER GARRETT
8 ALSO -- I ASKED HIM WHETHER MARLON EVER HAD COFFEE? NO, HE
9 DIDN'T SEE THAT PART. HE DIDN'T SEE INVESTIGATOR SMITH PICK
10 MARLON UP BY THE BELT. HE DIDN'T SEE THAT PART EITHER
11 SUGGESTING AGAIN THAT EVEN THOUGH HE WAS HERE FOR THIS FIRST
12 SIGNING OF WAIVER OF RIGHTS HE MISSED SOMETHING. AND IT
13 SOUNDS LIKE HE MISSED SOME OF THAT INTERVIEW. AND I'M JUST
14 SAYING AN HOUR AND A HALF BECAUSE HE SAID IT WAS THIRTY
15 MINUTES WHEN RIVERA SAID IT WAS TWO HOURS. SO THAT'S WHERE
16 I'M GETTING AN HOUR AND A HALF.

17 SO I DON'T KNOW, BUT SOMETHING'S WRONG RIGHT THERE WITH
18 THE WAIVER. AND THEN YOU ADD MARLON'S TESTIMONY ABOUT NOT
19 UNDERSTANDING AND HIS DEMEANOR. AND I'LL LET Y'ALL JUDGE
20 THAT. AND THEN DR. TAYLOR, WHAT HE TOLD YOU AS WELL.

21 NOW THEN, OF COURSE, YOU HAVE TO GO TO THE CONFESSION
22 AND FIND THAT THE CONFESSION WAS KNOWINGLY AND VOLUNTARILY
23 MADE. AND YOU HAVE TO FIND THAT BEYOND A REASONABLE DOUBT
24 JUST LIKE YOU HAVE TO FIND THIS WAS KNOWINGLY AND
25 VOLUNTARILY MADE BEYOND A REASONABLE DOUBT AS WELL. AND YOU

1 ALSO HAVE THE CHOICE OF BELIEVING IT OR NOT BELIEVING IT,
2 BELIEVING WHETHER IT REFLECTS THE TRUTH OR NOT.

3 NOW WE DON'T DISPUTE THAT MARLON MADE THE MARK THERE.
4 HE TOLD YOU HE DID, THAT HE WROTE THAT. THE DISPUTE IS THAT
5 HE UNDERSTOOD WHAT WAS IN IT. NOW IN ENGLISH, EVEN HAVING
6 THIS AS A PIECE OF PAPER IS, I WOULD SAY, A HUNDRED TIMES
7 LESS MEANINGFUL THAN IT WOULD BE FOR SOMEONE WHO SPEAKS AND
8 UNDERSTANDS ENGLISH. I MEAN, I WOULD HAVE LOOKED AT IT AND
9 BE ABLE TO READ IT AND SIGN MY NAME. HE OBVIOUSLY WAS
10 INCAPABLE OF DOING THAT.

11 AND THE STATE IS SAYING, WELL, YOU'VE JUST GOT TO TRUST
12 WHAT THE OFFICER SAID, THAT I TRANSLATED THAT AND THAT'S
13 WHAT -- YOU'VE GOT TO TRUST WHAT THEY SAID. WELL, I'D
14 SUBMIT TO YOU THAT THAT'S NOT ENOUGH ESPECIALLY WITH THE
15 OTHER INCONSISTENCIES THAT HAVE COME UP SUCH AS THAT'S NOT
16 WHAT ANY OF THE EYEWITNESSES SAY. WHY WOULD SOMEONE SAY I
17 SHOT SOMEONE TWO TIMES WHEN THEY DIDN'T, WHEN ALL THE
18 EYEWITNESSES SAY SOMEONE ELSE SHOT OR WHEN HE SHOT DOWN THE
19 OTHER PERSON SHOT -- WHY WOULDN'T HE TELL WHAT HE TOLD
20 EVERYONE ELSE?

21 NOW EVEN IF YOU BELIEVE THE WITNESS THE STATE PUT UP
22 FIRST, THE COUSIN WHOSE HOUSE HE WENT TO, THAT MARLON WENT
23 TO WHERE THEY WANTED YOU JUST TO HEAR, I'VE KILLED SOMEONE.
24 WELL, THE FULL STORY WAS, WELL, ACTUALLY MARLON SAID HE WAS
25 FIGHTING WITH SOMEONE ELSE OVER A GUN AND THE GUN WENT OFF.

1 THAT'S WHAT HE TOLD HIS COUSIN. WHY WOULD HE TELL SOMEONE
2 ELSE THIS?

3 AND I'D SUBMIT TO YOU HE DIDN'T TELL SOMEONE ELSE THAT,
4 AND THAT WAS JUST CONVENIENTLY LEFT OUT. WE'LL USE THE PART
5 WHERE HE SAID HE SHOT TWO TIMES BECAUSE YOU ALL REMEMBER HIS
6 TESTIMONY. HE SHOT ON THE GROUND, SOMEONE -- AND I'M USING
7 MY LEFT HAND BECAUSE I'M LEFT HANDED AS INVESTIGATOR SMITH
8 SAID, BUT HE WAS RIGHT HANDED AND SAID IT WAS HIS RIGHT
9 HAND. I SHOT ON THE GROUND, SOMEONE TOOK THE GUN AWAY FROM
10 ME, EL FLACO, AND SHOT STRAIGHT AHEAD, I GOT THE GUN BACK, I
11 SHOT ON THE GROUND. AND PEOPLE WERE SAYING THEY THOUGHT A
12 TOY GUN. THIS IS WHY.

13 LADIES AND GENTLEMEN, YOU CAN DISREGARD THIS AS THE
14 WHOLE TRUTH. AND I SUGGEST YOU DO BECAUSE IT'S NOT WHAT THE
15 EYEWITNESSES SAID. AND IT'S NOT THE REAL TRUTH.

16 NOW --- AND I'M GOING TO FORGET A LOT OF THINGS THAT I
17 MEAN TO SAY. AND I WOULD ASK Y'ALL TO JUST THINK ABOUT THE
18 TESTIMONY AND THINK OF WHAT YOU SAW AND TRY TO THINK WHAT I
19 MIGHT HAVE SAID. CLEARLY HONDURAS AND PUERTO RICO ARE
20 DIFFERENT COUNTRIES, A LITTLE BIT DIFFERENT UNDERSTANDING OF
21 SPANISH, ROOM FOR MISUNDERSTANDING THERE.

22 I DON'T SPEAK ANY SPANISH, BUT I HEARD TALKING ABOUT
23 THIS BLACK SHIRT, I HEARD I THOUGHT NOIR, SOMETHING BLACK
24 SOUNDING. THERE'S A WORD -- THERE'S AN EASY WORD FOR BLACK.
25 THAT DIDN'T GET INTO THE STATEMENT. IT WAS JUST DARK. AND

1 I'D SUBMIT TO YOU THE REASON FOR THAT IS THERE WAS A
2 DISCUSSION ABOUT WERE YOU WEARING BLACK? NO, I WAS KIND OF
3 WEARING THIS BLUE WITH SORT OF STRIPY CHECK THINGS, ARGYLE,
4 I COULDN'T -- YOU KNOW, SOMETHING LIKE THAT.

5 I'D SUBMIT TO YOU THEY JUST WROTE DARK AND SAID, WELL,
6 THAT'LL LOOK ENOUGH -- THAT'LL MATCH UP TO WHAT COURTNEY
7 ROBLES TOLD US IN THE BEGINNING WITH THE DARK. BUT WHAT
8 THEY WEREN'T CONCERNED ABOUT MATCHING UP, BECAUSE THEY
9 DIDN'T WANT TO CONFUSE THE ISSUE, DIDN'T WANT TO HAVE TO
10 CALL HER AS A WITNESS AND HAVE HER TELL YOU WHAT HAPPENED IS
11 THAT THERE WERE TWO SHOOTERS. SHE SAID THERE WERE, YOU
12 KNOW, TWO SHOOTERS. EVERYONE SAID TWO DIFFERENT PEOPLE HAD
13 THE GUN. AND THAT'S NOT IN THERE. AND I'D SUBMIT BECAUSE
14 THIS ISN'T TRUTH.

15 NOW INVESTIGATOR SMITH ADMITTED THAT THE DEFENSE, US,
16 HAD GIVEN HIM THE NAME OF A NUMBER OF WITNESSES THAT HE
17 TALKED TO AND SUGGESTED AGAIN, AND ALL THEIR TESTIMONY WAS
18 JUST CONSISTENT WITH THIS, IT WAS NOT. YOU HEARD ONE OF
19 THEM. IT WAS NOT CONSISTENT WITH THAT. IT WAS THAT THERE
20 WAS ANOTHER GUNMAN, SOMEONE ELSE SHOT. AND HE JUST STUCK
21 WITH THAT.

22 WE ALSO GAVE INVESTIGATOR SMITH THE NAME OF WHO WE
23 SUSPECTED THIS EL FLACO PERSON WAS, GAVE HIM THAT NAME. HE
24 HAD A MUG SHOT. HE HAD --- HE'D BEEN ARRESTED BEFORE UNLIKE
25 MARLON RIVERA. YOU NEVER HEARD ABOUT -- HE'S NEVER BEEN

1 ARRESTED BEFORE. BUT THIS OTHER GUY HAD, HAD A RECORD.
2 NAH, WE'RE NOT GOING TO BOTHER TO FIND -- THEY DIDN'T FIND
3 HIM. THAT WOULD COMPLICATE THE ISSUE JUST LIKE THE
4 EYEWITNESSES WOULD COMPLICATE THE ISSUE.

5 AND THE STATE DID NOT PROVE THIS CASE BEYOND A
6 REASONABLE DOUBT. AND THAT'S THEIR DUTY TO GIVE YOU THE
7 TOOLS THAT YOU NEED TO MAKE A DETERMINATION. AND THEY
8 DIDN'T.

9 OFFICER BENDIG AT THE BEGINNING TALKED ABOUT THREE
10 WITNESSES. I TALKED A LITTLE BIT ABOUT THAT BEFORE. YOU
11 HEARD THEM ON THE STAND. WE CALLED THEM OR CALLED ONE OF
12 THEM, THE ONLY ONE WE COULD FIND TO GET UP THERE, WHICH IS
13 DIFFICULT WHEN YOU DON'T HAVE ANY MONEY, DON'T HAVE THE
14 POLICE FORCE. THEY HAVE THE ENTIRE POLICE FORCE AT THEIR
15 DISPOSAL. WE DO NOT. IT'S DIFFICULT TO FIND PEOPLE AND GET
16 THEM HERE, ESPECIALLY ALMOST A YEAR AND A HALF LATER.

17 SO WE GAVE YOU COURTNEY ROBLES. AND WHAT DID SHE TELL
18 YOU? WHAT HAPPENED? TWO GUNMEN, ONE PERSON HAD THE GUN.
19 HE WAS WEARING A STRIPED SHIRT. THERE WAS A FIGHT. HE WAS
20 FIGHTING SOMEBODY. ANOTHER PERSON TOOK THE GUN AWAY FROM
21 HIM AND SHOT THE VICTIM. THAT WAS HER TESTIMONY.

22 NOW SHE TOLD THE POLICE AT THE SCENE. SHE MET WITH THE
23 SOLICITOR PRIOR TO THIS A COUPLE OF WEEKS AGO, SHE SAID.
24 HAD MET WITH THE SOLICITOR, HAD HAD A SUBPOENA THE DAY
25 BEFORE YESTERDAY, MONDAY WHEN WE STARTED THIS, HAD A

1 SUBPOENA FROM THE STATE TO COME TO COURT. THE STATE SAYS,
2 GO HOME, WE DON'T WANT YOU. WE DON'T WANT THE JURY TO HEAR
3 WHAT YOU HAVE TO SAY BECAUSE IT'S NOT CONSISTENT WITH THIS.
4 AND WE WANT YOU TO BELIEVE THIS. THAT'S NOT THE WHOLE
5 STORY, NOT THE WHOLE TRUTH. AND I'D ASK YOU TO CONSIDER THE
6 WHOLE TRUTH BECAUSE IT SHOWS THAT MARLON RIVERA IS NOT
7 GUILTY OF MURDER.

8 THE BULLET THAT KILLED MR. MONGE DID NOT COME FROM THE
9 GUN WHEN MARLON RIVERA PULLED THE TRIGGER. THERE WAS
10 NOTHING TO SHOW A RICOCHET. THE BULLET WENT STRAIGHT IN
11 LIKE IT WAS SHOT LIKE THIS. IT WAS NOT THE BULLET. AND
12 EVEN IF IT WAS, WHICH IT WASN'T CLEARLY, WE DON'T HAVE THE
13 MALICE AFORETHOUGHT. WE DON'T HAVE THE PLANNING.

14 THERE'S NOTHING IN THE TESTIMONY THAT SHOWS THAT MARLON
15 RIVERA WENT OUT THAT NIGHT TRYING TO KILL SOMEONE WITH THIS
16 GUN. HE HAD THE GUN BECAUSE A COUSIN GAVE IT TO HIM. AND
17 HE'S SO SIMPLE, DIDN'T EVEN KNOW TO GET RID OF IT. HE HAS
18 TO GIVE IT BACK TO HIS COUSIN 'CAUSE THAT'S WHAT YOU'RE
19 SUPPOSED TO DO BECAUSE IT'S NOT HIS. HE HAD NO INTENT TO
20 KILL, NO MALICE, NO COLD BLOODEDNESS. HE HAD A LOT OF
21 NAIVETE, NOT SMART, NOT A GOOD IDEA TO HAVE A GUN ON YOU,
22 NOT A GOOD IDEA TO LET IT FALL OUT. SHOULDN'T HAVE HAD THE
23 GUN. WE KNOW THAT, BUT THAT DOESN'T MAKE HIM GUILTY OF
24 MURDER.

25 NOW WE ALSO TALKED TO -- YOU ALSO HEARD FROM NORBERTO

1. ORTIZ, THE SECOND GUY WHO TESTIFIED FOR US. HE WAS ANOTHER,
2 YOU KNOW, WITNESS. HE SAW WHAT HAPPENED AND HE TOLD YOU.
3 AND WE GAVE THE SOLICITOR HIS NAME AS WELL. HE WENT AND
4 TALKED TO THEM AND WAS TOLD, GO HOME, WE DON'T WANT YOU TO
5 TELL THE JURY WHAT YOU SAW. AND HE WAS SENT HOME.
6 AND THIS IS SOMETHING THAT'S BEEN CONSISTENT THROUGHOUT
7 THIS TRIAL OF THE STATE TRYING TO PREVENT YOU FROM HEARING
8 WHAT HAPPENED, PREVENT YOU FROM HEARING THE FULL STORY, WHAT
9 THE EYEWITNESSES SAY, AND USING THE FACT THAT LOTS OF THEM
10 HAVE DISAPPEARED. IT'S HARD. AND THERE'S A LANGUAGE
11 BARRIER. AND IT'S DIFFICULT FOR THE DEFENSE TO GET
12 WITNESSES AND FIND THEM. AND THE STATE USED THAT AGAINST
13 US. AND DON'T LET THEM GET AWAY WITH THAT. FORCE THEM --
14 HOLD THEM TO THEIR STANDARD OF PROOF BEYOND A REASONABLE
15 DOUBT.
16 AND THAT WASN'T HERE -- AND HERE IS AN EXAMPLE OF THE
17 POLICE -- ONCE THEY HAD THIS, I THINK INVESTIGATOR SMITH
18 SAID IT, ONCE HE HAD THE CONFESSION, BOOM, DONE DEAL, JOB
19 DONE. BUT IT WASN'T BECAUSE THAT'S NOT WHAT THE -- THAT'S
20 NOT WHAT HAPPENED. THAT'S NOT WHAT THE EYEWITNESSES SAID.
21 PROVING THAT THE BULLET CAME OUT OF THIS GUN DIDN'T REALLY
22 PROVE ANYTHING BECAUSE WE KNEW THAT ALREADY. MARLON HAD THE
23 GUN. HE SHOT THE GUN. BUT HE'S NOT -- THERE WAS ANOTHER
24 SHOOTER. THERE WAS ANOTHER PERSON THERE. NO EFFORT TO
25 BRING THAT TO YOU.

1 WHEN I SAT DOWN -- I GUESS WHAT I FEEL ABOUT THIS IS
2 THAT THE STATE ATTEMPTED TO SORT OF MANIPULATE THE SITUATION
3 SO YOU ONLY HEARD THINGS THAT WERE CONSISTENT WITH THIS. SO
4 THEY ENDED UP WITH A CASE WHERE NO EYEWITNESSES WERE PUT UP,
5 NO ONE FROM THE SCENE OF THE CRIME WAS PUT UP. AND THAT WAS
6 A MANIPULATION OF THE TRUTH. AND I'D ASK YOU NOT TO LET
7 THEM MANIPULATE YOU. HOLD THEM TO THE STANDARD OF PROOF
8 BEYOND A REASONABLE DOUBT OF MURDER OR FIND MARLON RIVERA
9 NOT GUILTY.

10 AND THOSE ARE YOUR CHOICES, MURDER, NOT GUILTY.
11 THEY'RE NOT GIVING YOU A CHOICE OF SOMETHING IN BETWEEN.

12 MS. HODGE: OBJECTION, YOUR HONOR. THAT'S NOT MY ---

13 THE COURT: I SUSTAIN THE OBJECTION. INSTRUCT THE JURY
14 TO DISREGARD THAT COMMENT BY THE COUNSEL.

15 MS. ROSS: YOU'VE GOT TWO CHOICES, MURDER, GUILTY OR
16 NOT GUILTY. NOW IN FINDING MARLON RIVERA NOT GUILTY THAT IN
17 NO WAY DIMINISHES THE TRAGEDY THAT HAPPENED. IT'S JUST
18 MAKING IT NOT EXACERBATED BY THE TRAGEDY OF CONVICTING THE
19 PERSON WHO WASN'T THE SHOOTER OF MURDER WHEN HE'S NOT GUILTY
20 OF MURDER.

21 THE JUDGE IS GOING TO GIVE YOU THE INSTRUCTIONS ABOUT
22 WHAT MURDER IS. IT'S -- I'M TRYING TO DESCRIBE IT. THIS IS
23 THE NUMBER ONE MOST SERIOUS CHARGE. IT'S NOT WHERE THERE
24 WAS AN ACCIDENT OR EVERYONE -- THERE WAS A HEAT OF PASSION,
25 THERE WAS A FIGHT. IT'S NOT WHERE THERE'S SELF DEFENSE.

1 IT'S NOT WHERE THE GUN WENT OFF AND SOMETHING HAPPENED.
2 THIS IS -- MURDER IS WHERE SOMEONE SAYS, I'M GOING TO KILL
3 THIS PERSON, GETS A GUN, GOES OUT AND KILLS THEM WITH THE
4 INTENT TO KILL THEM WITH MALICE, NOTHING BUT ILL-WILL AND
5 EVIL IN THEIR HEART. THAT'S WHAT MARLON RIVERA IS CHARGED
6 WITH. AND THAT'S WHAT HE'S NOT GUILTY OF.

7 NOW I'M GOING TO SIT DOWN, AND THE STATE'S GOING TO GET
8 UP AND TALK. AND I'M NOT ALLOWED TO GET BACK UP AND REBUT
9 ANYTHING THAT THEY SAY. BUT I WOULD ASK EACH OF YOU TO HOLD
10 THEM TO THEIR BURDEN OF PROOF AND MAYBE CONSIDER WHAT I
11 MIGHT HAVE TO SAY IN RESPONSE TO THE THINGS THAT THEY SAY.
12 AND THINK ABOUT THE EVIDENCE BECAUSE I THINK THE EVIDENCE,
13 ESPECIALLY THROUGH THE EYEWITNESSES, THE PEOPLE WHO WERE
14 ACTUALLY THERE, SPEAKS FOR ITSELF. AND THE EVIDENCE SHOWS
15 THAT MARLON RIVERA IS NOT GUILTY OF MURDER. THANK YOU.

16 THE COURT: SOLICITOR.

17 MS. HODGE: THANK YOU. MAY IT PLEASE THE COURT? FROM
18 THE VERY BEGINNING OF THIS CASE THE DEFENSE ATTORNEY WANTED
19 TO GIVE YOU A CATCHY PHRASE TO KIND OF KICK THINGS OFF
20 RIGHT, TWO WRONGS DON'T MAKE A RIGHT. SO, YOU KNOW, IF YOU
21 CONVICT MARLON RIVERA THAT'S NOT GOING TO BE RIGHT. AND IF
22 YOU DO CONVICT HIM THEN ALL IS GOING TO BE MADE RIGHT.
23 FIRST OF ALL, I THINK THAT'S EXTREMELY INSENSITIVE TO THE
24 VICTIM'S WIFE AND THEIR CHILDREN THAT SOMEHOW YOUR VERDICT
25 IS GOING TO MAKE EVERYTHING OKAY BECAUSE IT'S NOT. THAT'S

1 NOT -- NOTHING CAN BRING THE VICTIM BACK. SO IT'S NOT THAT
2 SIMPLE.

3 THE SECOND THING THAT'S WRONG WITH THAT STATEMENT IS
4 SHE CLAIMS CONVICTING THE DEFENDANT OF MURDER WOULD BE
5 WRONG. HOWEVER, THE STATE'S EVIDENCE WILL SHOW YOU THAT IT
6 IS, IN FACT, RIGHT. HE SHOULD BE CONVICTED OF MURDER
7 BECAUSE HE IS GUILTY OF MURDER.

8 AND TO FIGURE OUT THE VERDICT IN THIS CASE, WHICH IS
9 GOING TO BE YOUR JOB HERE SHORTLY, YOU ARE GOING TO NEED TO
10 BE -- USE THREE TOOLS TO LEAVE YOU FIRMLY CONVINCED IN YOUR
11 VERDICT. THE FIRST TOOL THAT YOU'RE GOING TO NEED IS THE
12 LAW. THE JUDGE IS GOING TO INSTRUCT YOU ON WHAT THE LAW IS.
13 I'LL GIVE YOU A VERY BRIEF INSTRUCTION AT THE END OF MY
14 PRESENTATION, BUT YOU'RE GOING TO GET THAT TOOL FROM THE
15 JUDGE. SO YOU'LL HAVE THAT.

16 THE NEXT TOOL YOU NEED IN YOUR VERDICT IS THE FACTS,
17 WHAT HAPPENED. THAT'S WHAT YOU, THE JURY, ARE SUPPOSED TO
18 DECIDE. HOW DO YOU DECIDE THE FACTS? YOU USE YOUR COMMON
19 SENSE. THAT'S WHY WE HAVE JURIES OF ORDINARY CITIZENS. WE
20 DON'T HAVE A PANEL OF ROCKET SCIENTISTS OR A PANEL OF JUDGES
21 TO SIT HERE AND SAY, OKAY, THIS IS WHAT HAPPENED. YOU, THE
22 JURY, ARE TO USE YOUR COMMON SENSE, YOUR PERSONAL
23 EXPERIENCES AND DETERMINE WHAT HAPPENED FROM WHAT THE
24 WITNESSES AND THE EVIDENCE TELL YOU.

25 SO, YOUR COMMON SENSE WOULD TELL YOU WHAT EVIDENCE

1 PRESENTED IS REASONABLE, WHAT IS REALLY REASONABLE IN THIS
2 CASE. BECAUSE, OF COURSE, YOU WEREN'T THERE, WE WEREN'T
3 THERE. YOU'VE GOT TO LOOK AT THE EVIDENCE AND SAY, WHAT IS
4 REASONABLE, AND WHAT WITNESSES THAT WERE PRESENTED ARE
5 BELIEVABLE OR CREDIBLE?

6 NOW HOW DO WE DO THIS? WELL, OUR COMMON SENSE TELLS
7 US, HEY, WE'VE BEEN LIED TO BEFORE OR WE'VE BEEN TOLD THE
8 TRUTH BEFORE. PEOPLE HAVE MOTIVATION. SO YOU'VE GOT TO
9 LOOK AT THAT. WHY IS SOMEBODY TELLING YOU WHAT THEY'RE
10 TELLING YOU? DO THEY HAVE SOMETHING TO GAIN OR TO LOSE?
11 YOU HAVE TO LOOK AT THEIR MANNER OF SPEECH AND BODY
12 LANGUAGE.

13 I KNOW THAT THERE HAVE BEEN SEVERAL WITNESSES THAT
14 DON'T SPEAK ENGLISH. SO YOU HAD TO RELY ON THE TRANSLATOR
15 TO FIGURE OUT WHAT THEY WERE SAYING. BUT YOU COULD LOOK AT
16 THEIR BODY LANGUAGE AND TELL IF WHAT WAS BEING TRANSLATED
17 WAS ACCURATE OR THE EMOTION BEHIND THE WORDS. AND WHEN
18 YOU'VE BEEN LIED TO OR WHEN SOMEBODY IS TRYING TO PULL ONE
19 OVER ON YOU, THEY HAVE A LITTLE DIFFERENT BODY LANGUAGE.

20 ALSO, HOW DO WE KNOW IF SOMETHING IS CREDIBLE OR
21 BELIEVABLE? IS IT CONSISTENT? IS THE PERSON'S STORY
22 CONSISTENT NOT ONLY IN ITSELF? ARE THEY CONSISTENTLY SAYING
23 THE SAME THING OR ARE THEY CHANGING UP? OH, WELL, IF YOU
24 POINT TO THIS. OH NO, NO, NO. WELL, THEN THIS HAPPENED?
25 OH, WELL, NO, NO, NO, THIS HAPPENED. THAT'S INCONSISTENCY

1 WITHIN ITSELF. BUT THEN THERE'S ALSO INCONSISTENCY WITH
2 EVERYTHING ELSE, ALL THE OTHER EVIDENCE PRESENTED.

3 SO THESE ARE SOME TOOLS THAT YOU CAN USE WITH YOUR
4 COMMON SENSE TO TRY AND DETERMINE WHAT HAPPENED BECAUSE
5 RIGHT NOW I'M SURE IT LOOKS LIKE A BIG OLD POT OF STEW TO
6 YOU. HOPEFULLY AFTER THE CLOSING ARGUMENTS AND THE LAW
7 WE'LL HAVE THAT CLEARED UP.

8 NOW THE STATE HAS PRESENTED TO YOU WITH ONE CONSISTENT
9 SET OF FACTS. ALL EVIDENCE CORROBORATES THE OTHER PIECES OF
10 EVIDENCE. CERTAIN PARTS OF THE STATE'S EVIDENCE ARE NOT
11 CAPABLE OF BEING MANIPULATED, ARE NOT CAPABLE OF LYING TO
12 YOU PER SE BECAUSE THEY'RE SCIENTIFIC OR FORENSIC.

13 NOW WE LOOK AT THE DEFENSE CASE, ALL DEFENSE WITNESSES
14 CONTRADICT EACH OTHER. THEIR EYEWITNESSES DON'T SAY THE
15 SAME THING. THEIR EYEWITNESSES -- I'M HAVING A HARD TIME
16 WITH THIS, AREN'T I? THEIR EYEWITNESSES, THERE WE GO, THERE
17 ARE TWO, THERE ARE ONLY TWO THAT THEY PRESENTED, HAVE
18 COMPLETELY OPPOSITE RECOLLECTIONS OF WHAT HAPPENED, AND ARE
19 NOT CONSISTENT WITH THE DEFENDANT'S ORIGINAL VERSION OF WHAT
20 HAPPENED, NOR WHAT HE TOLD HIS COUSIN. SO NOW HE'S GOT
21 ANOTHER VERSION OF WHAT HAPPENED.

22 THERE ARE ABOUT FOUR TO FIVE VERSIONS OF WHAT HAPPENED
23 ALL PRESENTED BY THE DEFENSE. THESE ARE PRESENTED TO YOU AS
24 CLASSIC DEFENSE TACTICS, SMOKE AND MIRRORS. THAT'S WHAT WE
25 CALL IT. LOOK A LITTLE OVER HERE. LOOK FOR THE LITTLE

1 SMOKE THERE. LOOK A LITTLE OVER HERE. GETS YOU CONFUSED,
2 GETS YOU OFF TRACK, GETS YOU GOING ON SOME WRONG PATH.

3 AND AS I WAS LISTENING TO THE DEFENSE'S CLOSING
4 ARGUMENT AND KIND OF -- I HAD TO WRITE SOME NOTES BECAUSE
5 THIS SMOKE AND MIRRORS THING, YES, IT'S THE INCONSISTENT
6 WITNESSES, BUT ALSO THERE WAS A MISSTATEMENT OF LAW. AND I
7 DID NOT WANT TO GET OFF TRACK ON IT RIGHT AT THIS POINT, BUT
8 I WANT TO SAY IT IN CASE I DO FORGET LATER. MURDER DOES NOT
9 REQUIRE PREMEDITATION. THAT IS A CLASSIC DEFENSE TACTIC TO
10 GET YOU TO THINK THE LAW IS SOMETHING THAT IT'S NOT. I'M
11 SORRY. THAT IS AN INCORRECT STATEMENT OF LAW.

12 YOU WILL HEAR THE LAW FROM JUDGE PYLE. AND YOU WILL
13 HEAR CLEARLY YOU DO NOT HAVE TO FIND PREMEDITATION. YOU
14 CAN. THAT IS A TYPE OF A MURDER. MANY THINGS FALL UNDER
15 THE CATEGORY OF MURDER AND MALICE. SO THAT IS, AGAIN, TO
16 MISLEAD YOU, TO TAKE YOU DOWN THE WRONG PATH, TO GET YOU
17 GOING SOMEWHERE ELSE.

18 AND THEN A MISSTATEMENT OF COURT PROCEDURES. YOU KNOW,
19 WE OBJECT. WE'RE ATTORNEYS THAT KNOW THE RULES OF COURT.
20 AND THAT'S WHY WE OBJECT, IF WE DON'T BELIEVE A RULE IS
21 BEING FOLLOWED. THAT'S HOW WE INTRODUCE EVIDENCES, UNDER
22 RULES, AND THAT'S HOW WE EXCLUDE EVIDENCES, UNDER RULES.
23 THE JUDGE DETERMINES IF THE RULE HAS BEEN MET OR NOT MET.
24 THE STATE DOESN'T DETERMINE THAT. WE DON'T WITHHOLD
25 EVIDENCE OR MAKE OBJECTIONS TO KEEP EVIDENCE OUT. WE ARE

1 DOING IT BECAUSE THAT'S WHAT THE RULES SAY. THE STATE IS
2 ENTITLED, THE VICTIM IN THIS CASE IS ENTITLED TO A FAIR
3 TRIAL ALSO, A TRIAL BY THE RULES.

4 IN ADDITION, THERE WERE SOME ARGUMENTS ABOUT THINGS
5 THAT ARE NOT IN THIS CASE, LIKE THE DEFENSE ATTORNEY
6 EXPLAINED TO YOU HOW THE DEFENDANT WAS CONFUSED BY THE WORD
7 ALPHABET AND ILLITERATE. WELL, YOU'RE SUPPOSED TO ARGUE
8 FROM TESTIMONY IN THE RECORD. THAT'S PROBABLY A DISCUSSION
9 THEY'VE HAD SINCE, AND THEN SHE'S UP HERE TELLING YOU THAT.
10 AGAIN, WHY ARE ALL THESE THINGS HAPPENING? BECAUSE THAT'S
11 WHAT THEY HAVE IN THIS CASE. THAT'S ALL THEY HAVE,
12 MISDIRECTION AND SMOKE AND MIRRORS.

13 THE STATE DOESN'T HAVE THAT LUXURY. I DO NOT HAVE THE
14 LUXURY, THE LAW ENFORCEMENT OFFICERS, THE SOLICITOR'S OFFICE
15 OF COMING IN HERE AND THROWING A BUNCH OF PEOPLE OUT THAT
16 SAY ALL DIFFERENT THINGS AND THEN HAVE A SEAT YELLING,
17 CONVICT PLEASE.

18 NO, THE STATE HAS GOT TO EXAMINE ALL OF ITS EVIDENCE
19 AND ITS WITNESSES FULLY. IT'S GOT TO DETERMINE
20 BELIEVABILITY, CREDIBILITY. IT'S ALSO GOT TO DETERMINE
21 CONSISTENCY. SO WE'RE NOT INTERESTED IN PROSECUTING THE
22 WRONG PERSON. WE'RE NOT INTERESTED IN PUTTING UP A BUNCH OF
23 EVIDENCE SAYING, HEY, WHOEVER IT JUST HAPPENS TO FALL ON,
24 GREAT, BECAUSE I'VE GOT TO GO HOME AT FIVE TODAY. WE WOULD
25 WANT THE RIGHT PERSON PROSECUTED. THAT'S WHY WE FIND

1 EVIDENCE THAT LEAD US TO THE RIGHT PERSON.

2 WHY WOULD WE WANT A MURDERER OUT IN THE COMMUNITY?

3 WHAT POINT WOULD IT SERVE US TO PROSECUTE MARLON RIVERA AND

4 LET SOME RANDOM SHOOTER PERSON OUT THERE IN GREENVILLE

5 COUNTY JUST RUN FREE? HEY, WHATEVER. THAT'S NOT THE WAY IT

6 WORKS. THAT'S NOT THE WAY THE STATE OPERATES. IT'S NOT THE

7 WAY LAW ENFORCEMENT IN GREENVILLE COUNTY OPERATES.

8 BECAUSE OF THAT BASIC PREMISE UNDERLYING THIS CASE NONE

9 OF THE STATE'S WITNESSES HAVE A MOTIVATION TO LIE TO YOU.

10 NONE OF THESE OFFICERS THAT TESTIFIED, SLED AGENTS, I THINK

11 SHE CLASSIFIED THEM AS ELEVEN POLICE OFFICERS. WELL, IT WAS

12 -- IT WAS VERY CLEAR A FEW OF THEM WEREN'T POLICE OFFICERS.

13 EDDIE HUCKS IS OUR PROPERTY AND EVIDENCE PERSON. AND

14 YOU COULD TELL HE WAS NOT A POLICE OFFICER. ALSO SEAN

15 COLLINS, HE'S A LABORATORY ASSISTANT. HE'S NOT A POLICE

16 OFFICER. ILA SIMMONS IS NOT A POLICE OFFICER. SHE'S A

17 CHEMIST THAT DOES TRACE EVIDENCE ANALYSIS. SHE'S NOT OUT IN

18 THE FIELD PROSECUTING PEOPLE OR ARRESTING PEOPLE. SO,

19 AGAIN, A LITTLE BIT OF A MISSTATEMENT.

20 BUT ALL THESE PEOPLE HAVE NOTHING TO GAIN OR LOSE.

21 TOMORROW THEY'RE GOING TO GO TO WORK JUST LIKE THEY DID

22 TODAY. IT DOESN'T MATTER WHAT YOUR VERDICT IS. THEY DON'T

23 HAVE ANYTHING TO GAIN OR LOSE. MYSELF OR INVESTIGATOR

24 SMITH, WE'RE NOT GOING TO GET A BIG BONUS OR GO ON A

25 VACATION BECAUSE OF WHATEVER YOUR VERDICT IS. WE HAVE NO

1 MOTIVATION TO LIE TO YOU OR PRESENT WRONG EVIDENCE TO YOU.

2 CAN'T SAY THAT FOR THE DEFENDANT THOUGH. OBVIOUSLY THE
3 DEFENDANT IS THE ONE WHO HAS EVERYTHING TO GAIN OR LOSE,
4 WHICH BRINGS US TO HE WOULD BE LYING THEN AND HE'S LYING
5 NOW. AND WHY? BECAUSE THIS IS THE IMPORTANT TIME. IF
6 YOU'RE GOING TO DO IT, NOW IS THE TIME TO DO IT BECAUSE WE
7 HAVE COME TO THE END OF THE ROAD. SO HE DOES HAVE A
8 MOTIVATION TO LIE AND TO TRY AND GET HIMSELF OUT OF THIS
9 TROUBLE.

10 THERE'S BEEN A LOT OF DISCUSSION ABOUT WHAT HE CAN
11 UNDERSTAND AND WHAT HE CAN'T UNDERSTAND. AND AS MS. ROSS
12 SAID, YOU VIEW THAT FOR YOURSELF. YOU SAW HIM ON THE STAND.
13 YOU SAW HE UNDERSTOOD WHAT WAS GOING ON. HE HAD ANSWERS FOR
14 EVERYTHING. HE KNEW EXACTLY WHAT WAS GOING ON TODAY, AND HE
15 KNEW WHAT WAS GOING ON THIS NIGHT.

16 HE WAS NOT CONFUSED ON THIS NIGHT ABOUT CARRYING A
17 WEAPON, PULLING OUT A WEAPON, DISCHARGING A WEAPON IN THE
18 DIRECTION OF A PERSON HE WAS HAVING A FIGHT WITH. I MEAN,
19 HE'S GOT IT GOING ON. HE KNOWS WHAT HE WAS DOING. AND HE
20 KNOWS THAT HE WAS IN TROUBLE BECAUSE HE DUMPED THE BULLETS
21 AND THE CASINGS.

22 GRANTED, HE'S NOT A ROCKET SCIENTIST. HE DIDN'T GET
23 RID OF THE GUN. MAYBE HE MIGHT NEED IT LATER. MAYBE
24 THERE'S SOME OTHER FIGHT HE MIGHT GET IN. I DON'T KNOW. HE
25 KNEW WHAT HE WAS DOING BECAUSE HE CHANGED SHIRTS. HE WAS

1 NOW A SUSPECT IN A MURDER. SO, LET ME GO CHANGE SHIRTS AND
2 GET OUT OF THE HOUSE. DON'T WANT TO BE WHERE I LIVE IN CASE
3 SOMEBODY CAN IDENTIFY AND TELL THEM WHERE I LIVE.

4 HE KNEW WHAT HE WAS DOING WHEN HE TALKED TO THE POLICE
5 OFFICERS. HE KNEW THEY WERE POLICE. HE KNEW A MAN HAD BEEN
6 SHOT. HE HAD SHOT A GUN. REGARDLESS OF WHAT YOU THINK THE
7 STORY WAS, HE AT LEAST KNEW SOMEBODY WAS HURT BY HIS SHOTS.

8 AND WHEN HE CAME IN AND HAD HIS, I'M SORRY, HAD HIS
9 RIGHTS READ TO HIM, EVEN THOUGH HE COULD NOT SPEAK OR READ
10 SPANISH, WHICH I THINK IS PROBABLY NOT COMPLETELY ACCURATE.
11 HE PROBABLY CAN'T READ A BOOK, BUT I'M SURE THERE'S SOME
12 WORDS HE CAN READ.

13 HE'S VERY SMART ABOUT MONEY. AND HE TALKED TO YOU
14 ABOUT, I WAS WORKING FOR SEVEN DOLLARS AN HOUR. AND THIS
15 WEEK I WORKED MONDAY THROUGH SATURDAY, SO I MADE FOUR
16 HUNDRED AND EIGHTY DOLLARS. AND THEN I HAD A HUNDRED AND
17 TWENTY-FIVE TO GIVE TO MY MOTHER. AND THEN I -- AND THE
18 REST OF IT I TOOK SO AND SO. HE KNEW ABOUT MONEY.

19 HE WAS SMART ENOUGH, OBVIOUSLY, TO KNOW HOW TO GET
20 HERE, PERSISTENT ENOUGH TO KNOW HOW TO GET HERE. IT WASN'T
21 LIKE HE WAS JUST, YOU KNOW, OUT THERE IN LA-LA LAND.

22 THE THING ABOUT HIM SIGNING HIS NAME, AS YOU'LL SEE ON
23 THE PIECE OF PAPER I INTRODUCED WITH HIM, STATE'S NUMBER 17,
24 I BELIEVE IT IS. IT'S WHAT'S CALLED A PROPERTY RECORD.
25 IT'S STATE'S NUMBER 18. I APOLOGIZE. AND WHEN YOU GET IT

1 BACK IN THE ROOM YOU'LL SEE IT'S WHERE THEY TAKE ALL OF YOUR
2 POSSESSIONS ONCE YOU GET TO THE DETENTION CENTER SO WHEN YOU
3 GET OUT YOU CAN GET THEM BACK. AND IT'S A LOG OF IT. AND
4 AT THE BOTTOM YOU'RE SUPPOSED TO SIGN THAT SAYS THEY'VE
5 TAKEN YOUR BELONGINGS.

6 NOW HE PROBABLY COULD NOT READ THIS, BUT UNDERSTOOD
7 THAT'S WHAT HE WAS SIGNING FOR. MAYBE HE DIDN'T. BUT THE
8 SIGNATURE IS THE IMPORTANT PART NOT BECAUSE IT SHOWS HE CAN
9 ACTUALLY WRITE, BUT IT'S BECAUSE IT SHOWS THAT HE'S TRYING
10 TO LIE TO YOU, TO TELL YOU, OH, I DIDN'T KNOW HOW TO SIGN MY
11 NAME ON THAT PIECE OF PAPER. WELL, SURE YOU DID. YOU
12 SIGNED IT RIGHT HERE. OH, WELL NO, I COPIED IT.

13 WELL, THIS SAYS MARLON ANTONIO. THERE'S NO ANTONIO UP
14 HERE. WHERE DID YOU COPY THAT FROM. YOU DIDN'T. IT'S AN
15 EFFORT TO LOOK REALLY DUMB, DUMB LIKE A FOX. YES, I'M GOING
16 TO SHOW YOU HOW I DIDN'T KNOW WHAT WAS GOING ON, I WAS
17 CONFUSED, I WAS SCARED, I WAS NERVOUS.

18 SOME OF THAT MAY HAVE BEEN TRUE, GRANTED. I'M SURE
19 ANYBODY WOULD BE A LITTLE NERVOUS AND A LITTLE SCARED. BUT
20 TO BLATANTLY LIE, THAT'S SO YOU WILL BE CONFUSED. IT'S ALL
21 FOR HIS ADVANTAGE.

22 THEN WE HAVE THIS DR. TAYLOR. HE WAS A VERY SWEET MAN.
23 BUT REALLY, WHAT WAS THE PURPOSE OF HIS TESTIMONY? AND WAS
24 IT CREDIBLE? HE'D BEEN, I MEAN, HE WAS WELL TRAVELED AND HE
25 KNEW A LOT OF LANGUAGES, BUT IF YOU LOOK AT WHEN DID HE COME

1 INTO THIS CASE? THE DAY BEFORE. HE IS A FRIEND OF MR.
2 FREEMAN'S FROM CHURCH, I BELIEVE HE SAID.

3 HE SPENT A TOTAL OF THIRTY MINUTES WITH THE DEFENDANT.
4 I'M PROBABLY TALKING TO YOU LONGER THAN THIRTY MINUTES. AND
5 HE SPENT LESS TIME THAN THAT AND CAME UP WITH SOME GREAT
6 EVALUATIONS ON THE DEFENDANT, THAT HE LIVED IN A MAGICAL
7 LAND WHERE HE WAS A PUPPY UNDER A TABLE AND NOBODY COULD SEE
8 HIM. YOU GIVE THAT WHAT WEIGHT YOU DETERMINE TO GIVE IT.

9 BUT THE THINGS THAT HE DESCRIBED THE DEFENDANT, AS WHEN
10 THE DEFENDANT TOOK THE STAND I EXPECTED A MUCH DIFFERENT
11 TYPE PERSON. IT WAS ALMOST COMPLETELY OPPOSITE OF HOW HE
12 DESCRIBED THE DEFENDANT. I EXPECTED A VERY SIMPLE, SIMPLE
13 TALKING, SIMPLE MINDED, SIMPLE ACTING PERSON. AND THE
14 DEFENDANT WAS VERY DELIBERATE. HE KNEW WHAT HE WAS DOING,
15 WHAT HE WAS SAYING, WHAT HE NEEDED TO GET ACROSS, WHAT HE
16 WANTED TO TELL YOU, WHAT HIS STORY NEEDED TO BE.

17 JUST WHEN YOU THINK ABOUT DR. TAYLOR'S EVALUATION PUT
18 IT IN THE CONTEXT, NOW YOU HAVE SEEN THE DEFENDANT AND KNOW
19 WHAT HE IS CAPABLE OF OR NOT CAPABLE OF AND WHY DID THEY
20 BRING HIM? THIS IS WHY THEY BROUGHT HIM. IT'S BECAUSE THEY
21 HAD TO DO SOMETHING ABOUT THE CONFESSION. THAT WAS THE
22 WHOLE PURPOSE OF TRYING TO GET DR. TAYLOR HERE. HOW ARE WE
23 GOING TO GET RID OF THE SMOKING GUN? WELL, WE'LL BRING DR.
24 TAYLOR IN HERE AND SAY HE DIDN'T HAVE A CLUE WHAT WAS GOING
25 ON. AND THEN WE'LL SAY HE DOESN'T UNDERSTAND ANYTHING,

1 ENGLISH, SPANISH, WRITTEN, SPOKEN, AND SAY THE WHOLE THING
2 IS JUST, YOU KNOW, IT'S COMPLETELY WRONG.

3 SO THAT'S THE DEFENDANT'S CASE ---

4 MS. ROSS: AND I WOULD OBJECT TO THAT COMMENT IN LIGHT
5 OF THE OPENING AND WHAT I HAD TO WORK WITH IN MY OPENING.

6 THE COURT: ALL RIGHT.

7 MS. HODGE: THE DEFENDANT'S WITNESS, MR. ORTIZ, WHAT
8 DOES HE SAY HAPPENED? THE DEFENDANT HAD THE GUN, NOT GOING
9 TO DISPUTE THAT, DEFENDANT WAS IN A FIGHT, HE PULLS THE GUN
10 EVEN THOUGH THE OTHER PERSON DOESN'T HAVE A WEAPON. THIS
11 GOES TOWARDS THE DEFENDANT AND HIS MIND-SET. THE STATE HAS
12 TO PROVE THE DEFENDANT ACTED IN MALICE.

13 IF YOU'RE IN A FIST FIGHT WITH A MAN WHY ARE YOU GOING
14 TO PULL OUT A PISTOL? YOU'RE NOT EVEN GETTING BEAT UP THAT
15 BAD. YOU DON'T HAVE ANY MARKINGS ON YOU. HE BUMPED YOU
16 INTO THE CONCRETE. BUT YOU KNOW WHAT? YOU SAID, AH HA, I
17 HAVE THIS PISTOL BACK HERE. I'LL SHOW HIM WHO'S THE BIGGEST
18 AND THE BADDEST. AND YOU PULL OUT YOUR PISTOL. THAT RIGHT
19 THERE IS YOUR MALICE. HE COULD HAVE JUST LEFT IT WHERE IT
20 WAS. HE COULD HAVE KICKED IT OVER TO THE SIDE. COULD HAVE
21 PICKED IT UP AND WALKED ON HOME. HE ONLY LIVED ACROSS THE
22 STREET. SO THAT'S UNDISPUTED FROM EVERYONE.

23 DEFENDANT PULLS OUT THE GUN, THEN SHOOTS TO THE GROUND.
24 HOW DO WE KNOW THAT THIS IS NOT TRUE? BECAUSE THE OFFICERS
25 TOLD YOU THEY INVESTIGATED THE SCENE. THAT'S WHAT THEY ARE

1 TRAINED TO DO. INVESTIGATOR SMITH WITH TWENTY-THREE YEARS
2 AND TWO HUNDRED AND SEVENTY-FIVE DAYS AND THREE HOURS HAS
3 THAT MUCH TIME AND EXPERIENCE THAT HE KNOWS WHAT TO LOOK FOR
4 ON A MURDER SCENE, ESPECIALLY WITH A SHOOTING.

5 LOOKED AT THE AREA, THERE WERE NO SHOTS. THE CONCRETE
6 IS PAINTED. IT WOULD HAVE CHIPPED UP. SOMETHING WOULD HAVE
7 HAPPENED. NO, THERE WAS NOTHING. THERE WERE NO BULLET
8 FRAGMENTS. THERE WAS NO DAMAGE TO THE CONCRETE. IF THERE
9 WERE TWO SHOTS DIRECTLY FIRED IN THE GROUND WHERE THE
10 DEFENDANT CLAIMS AND WHERE MR. ORTIZ CLAIMS WHY WAS THERE NO
11 EVIDENCE OF THAT?

12 THEN MR. ORTIZ SAYS THAT THIS -- I PUT MR. X BECAUSE I
13 WASN'T QUITE SURE OF EL FLACO, WHO THIS -- THE SKINNY, I
14 THINK IT MEANS SKINNY ONE IN SPANISH, I'M NOT EXACTLY SURE,
15 BUT I THINK THAT'S WHAT IT MEANS OR SKINNY, ASKS FOR THE GUN
16 FROM THE DEFENDANT. THIS IS WHAT THEIR WITNESS SAID. GIVE
17 ME THE GUN, I'LL SHOOT HIM. WELL, ALL RIGHT, HERE. SO NOW
18 HE'S PART AND PARCEL EVEN IF YOU BELIEVE THIS WITNESS THAT
19 THIS DEFENDANT SHOT INTO THE GROUND, HE IS NOW PART AND
20 PARCEL OF THIS MURDER IF THAT SECOND ALLEGED BULLET ---

21 MS. ROSS: I'D OBJECT TO THAT ---

22 MS. HODGE: --- SHOT BY ---

23 THE COURT: HOLD ON. WHAT'S YOUR OBJECTION, MS. ROSS?

24 MS. ROSS: THAT'S NOT IN THE INDICTMENT. AND THAT'S
25 NOT WHAT HE'S BEING ACCUSED OF.

1 THE COURT: ALL RIGHT. SUBJECT TO YOUR OBJECTION,
2 PROCEED.

3 MS. HODGE: IN THE LAW THERE IS A THEORY CALLED THE
4 HAND OF ONE IS THE HAND OF ALL. IF YOU ARE PRESENT, AIDING,
5 AND ABETTING YOU ARE JUST AS GUILTY. THAT'S IF, IF YOU EVEN
6 BELIEVE THIS, WHICH THE STATE CONTENDS IS NOT ACCURATE. IF
7 THE ---

8 MS. ROSS: AND I'D OBJECT ---

9 MS. HODGE: --- DEFENDANT GIVES THE GUN ---

10 MS. ROSS: --- TO THAT, YOUR HONOR. WE WENT OVER ---

11 THE COURT: HOLD ON.

12 MS. ROSS: --- THE INSTRUCTION ---

13 THE COURT: WELL, THAT'S A MATTER FOR THE JURY, MS.
14 ROSS. GO AHEAD.

15 MS. HODGE: THEN THE DEFENDANT GETS THE GUN BACK AND
16 SHOOTS AGAIN AT THE GROUND. SO NOT ONLY ONE TIME IS HE
17 USING MALICE AND SHOOTING, HE'S USING MALICE TWO TIMES.
18 KNOWING WHAT COULD HAPPEN WHEN YOU FIRE A GUN, GUNS ARE
19 DANGEROUS, KNOWING THERE'S BULLETS IN THE GUN NOW, FIRES IT
20 AGAIN. SO THAT'S EVEN IF YOU BELIEVE MR. ORTIZ, WHICH HIS
21 STORY IS NOT CONSISTENT WITH THE EVIDENCE, PHYSICAL EVIDENCE
22 IN THE CASE.

23 AND EVEN IF YOU BELIEVE HIM, THE VICTIM STATED THAT HE
24 WAS NOT SHOT UNTIL AFTER THE THIRD SHOT. SO IF MR. X,
25 MIDDLE MAN, IS THE REAL SHOOTER AND REAL KILLER WHY WASN'T

1 IT UNTIL AFTER THE THIRD SHOT THAT HE DIDN'T SAY HE WAS
2 SHOT?

3 THEIR WITNESS -- WELL, AND I'VE GONE THROUGH ALL THESE.
4 MAYBE HE IS JUST TRYING, AND WE DON'T KNOW, WE DON'T KNOW
5 EXACTLY THE RELATIONSHIP OF THE DEFENDANT AND MR. ORTIZ.
6 YOU KNOW, HE SAID THAT WE KNOW EACH OTHER, ACQUAINTANCES.
7 MAYBE THEY'RE A LITTLE MORE, MAYBE THEY'RE NOT. MAYBE HE
8 DOESN'T WANT TO DIRECTLY IMPLICATE, YES, IN FACT, THE
9 DEFENDANT WAS THE ONE WHO DID THIS. MAYBE THERE'S SOME FEAR
10 OUT IN THE COMMUNITY POINTING THE FINGER AT SOMEBODY. WHO
11 KNOWS? MAYBE HE'S JUST TRYING TO MINIMIZE THE DEFENDANT'S
12 INVOLVEMENT, BUT HE DOESN'T WANT TO LIE.

13 WELL, COURTNEY ROBLES IS THE NEXT SUPPOSED EYEWITNESS
14 OR EYEWITNESS THAT THEY BROUGHT UP. WHAT DID SHE SAY?
15 SOMETHING TOTALLY OPPOSITE OF WHAT MR. ORTIZ SAYS. TWO GUYS
16 FIGHTING, ANOTHER GUY COMES OVER, REACHES IN THE ONE GUY'S
17 POCKET, PULLS OUT A GUN, SHOOTS STRAIGHT TWO TIMES, AND
18 THAT'S IT. THEN THE VICTIM SAYS, I'M SHOT. SO WHERE IS
19 THIS SHOT INTO THE GROUND, GIVE ME THE GUN, SHOOT STRAIGHT
20 ON, GIVE ME THE GUN BACK, SHOOT INTO THE GROUND? WHERE IS
21 THAT? SHE DOESN'T SEE THAT SUPPOSEDLY. SHE SEES TWO GUYS
22 FIGHTING, TWO SHOTS STRAIGHT ON.

23 HOW CAN THAT BE WEAVED OR MORPHED INTO WHAT ORTIZ SAYS?
24 HOW CAN THAT BE WEAVED OR MORPHED INTO THE DEFENDANT'S
25 CONFESSION, INTO WHAT HE TOLD HIS COUSIN? IT WOULD BE

1 DIFFICULT TO DO. THAT'S WHY THE STATE DID NOT CALL THESE
2 PEOPLE. WE COULD NOT VERIFY THESE STORIES. AND THEY'RE
3 COMPLETELY OPPOSITE. WHY WOULD WE CALL THESE PEOPLE AS
4 WITNESSES?

5 I'M NOT SAYING THAT EITHER ONE OF THEM ARE LYING, PER
6 SE. MAYBE THEY'RE CONFUSED. MAYBE THEY, I DON'T KNOW,
7 HEARD SOMETHING IN THE COMMUNITY AND THOUGHT THEY SAW
8 SOMETHING. I DON'T KNOW. BUT THEIR STORIES DON'T JIVE WITH
9 EACH OTHER OR WITH THE PHYSICAL EVIDENCE.

10 THIS BRINGS US TO HUMAN ERROR. IT'S A REAL POSSIBILITY
11 WHEN YOU DEAL WITH EYEWITNESSES. THAT'S IN ANY KIND OF A
12 CASE. ALL OF US COULD WITNESS SOMETHING, GO BACK INTO A
13 ROOM AND START SAYING WHAT WE SAW. WE'RE ALL GOING TO SAY
14 SOMETHING A LITTLE DIFFERENT. NOT AS DRASTIC PROBABLY AS
15 WHAT THIS WAS, BUT BECAUSE OF OUR PERCEPTIONS AND THINGS
16 THAT HAVE HAPPENED TO US IN OUR LIVES, IT'S GOING TO BE A
17 UNIQUE STORY BY EACH OF US.

18 I THINK GIRLS MAYBE MORE THAN BOYS HAVE PLAYED THE GAME
19 WHERE YOU SIT IN A CIRCLE AND YOU WHISPER ONE THING IN ONE
20 EAR, GOES AROUND AND IT COMES BACK AND IT'S TOTALLY OPPOSITE
21 OF THE WAY IT STARTED AFTER IT'S PASSED THROUGH A FEW
22 PEOPLE. IT'S KIND OF THE SAME WITH OBSERVING EVENTS.
23 EVERYBODY'S GOT A LITTLE BIT DIFFERENT VIEW.

24 SO, WHO WOULD WE BELIEVE IF WE ALL WENT TO ONE ROOM AND
25 SAY, THIS IS WHAT I SAW, AND WE ALL HAD DIFFERENT VERSIONS?

1 WHO'S TO SAY, WELL, YOU'RE RIGHT, AND YOU'RE RIGHT, BUT
2 YOU'RE NOT RIGHT? THAT'S WHY WE LOOK FOR PHYSICAL EVIDENCE.
3 WE LOOK FOR FORENSIC EVIDENCE.

4 AND WHAT IS FORENSIC EVIDENCE? WELL, IN THIS CASE,
5 GUNSHOT RESIDUE. YOU HEARD ILA SIMMONS TESTIFY ABOUT THE
6 GUNSHOT RESIDUE THAT WAS FOUND ON THE DEFENDANT'S LEFT PALM
7 AND THAT THERE IS A CLOUD OF ---

8 MS. ROSS: OBJECTION, IT WAS ON THE BACK OF HIS LEFT
9 HAND.

10 THE COURT: WHAT'S YOUR OBJECTION?

11 MS. ROSS: IT WAS ON THE BACK OF HIS LEFT ---

12 MS. HODGE: I'M SORRY.

13 MS. ROSS: --- HAND. THAT WASN'T THE TESTIMONY.

14 MS. HODGE: YOU RECALL THE TESTIMONY ---

15 THE COURT: THAT'LL BE A MATTER FOR THE JURY TO
16 DETERMINE.

17 MS. HODGE: --- IF I MISSPOKE.

18 THE COURT: ALL RIGHT. GO AHEAD.

19 MS. HODGE: ON THE BACK HERE, LEFT. AND THERE'S A
20 CLOUD THAT EMITS. IT COMES OUT OF THE REVOLVER BARREL,
21 EXCUSE ME, OUT OF THE CYLINDER, AND OUT OF THE END OF THE
22 BARREL, AND OUT OF THE BACK TOO BECAUSE IT'S GOT A HAMMER
23 COCKED. SO IT'S POSSIBLE IF YOU'RE STANDING WITHIN THAT
24 CLOUD THAT YOU'RE GOING TO GET SOME ON YOU.

25 WHAT IS ALSO REASONABLE AND POSSIBLE IN THIS CASE IS

1 THAT NONE WAS FOUND ON HIS PALMS BECAUSE HE HAD CHANGED
2 CLOTHES, HE HAD HAD SOMETHING TO DRINK, HE WAS HOLDING A
3 BEER AT THE TIME OF HIS ARREST, HE HAD -- FOUR AND A HALF
4 HOURS HAD PASSED, THINGS GET ABSORBED IN THE SKIN. SO IT'S
5 VERY, VERY PRACTICAL THAT YOU HAVE IT ON THE BACK BECAUSE
6 THIS IS LESS DISTURBED THAN ON THE PALMS. AND IT DOESN'T
7 MATTER IF IT'S RIGHT OR LEFT HANDED, HIS HANDS ARE WITHIN
8 THAT CLOUD. SO THAT'S OUR FORENSIC EVIDENCE OF HIM SHOOTING
9 THE GUN, BUT THEY APPARENTLY SAY THEY DON'T DISPUTE IT
10 BECAUSE HE DID FIRE THE GUN IN THEIR TESTIMONY NOW.

11 FINGERPRINTS, WE ATTEMPT TO GET THOSE. AS DIANE
12 ORLANDO TOLD YOU, NOT ALL SURFACES ARE CAPABLE OF LIFTING
13 PRINTS. WE COULDN'T GET THEM IN THIS CASE. BUT IF WE COULD
14 THE DEFENDANT WOULD HAVE SAID THEY WERE HIS ANYWAY, AND HE
15 HANDLED THE GUN. SO ...

16 BALLISTICS, THAT'S WHERE THE BULLET AND THE GUN WERE
17 MATCHED UP. NOW WHEN A SUSPECT IS ARRESTED AND EVIDENCE IS
18 COLLECTED THE STATE HAS TO CORROBORATE THINGS AS I'VE
19 STATED. SO IF WE WERE JUST GOING TO GO ON THE DEFENDANT'S
20 CONFESSION AND SAY, OKAY SURE, YOU SHOT THE GUY, GREAT,
21 WE'RE GOING HOME, GOING TO BED. YOU KNOW, IT'S SIX IN THE
22 MORNING, I'VE BEEN WORKING ALL NIGHT, INVESTIGATOR SMITH.
23 WHY WOULD WE THEN TAKE THE RISK OF SENDING A GUN, JUST A GUN
24 FOUND IN A TREE, YOU KNOW, WE'RE NOT SURE IF WE COULD
25 CONNECT IT OR NOT TO THIS CASE, SENDING A GUN AND THE BULLET

1 FROM THE VICTIM'S HEAD TO BE ANALYZED IF WE REALLY DIDN'T
2 CARE, AND WE JUST WANTED OUR CONFESSION AND THAT'S IT, WHY
3 WOULD WE DO THAT? WELL, WE NEED TO CORROBORATE OUR
4 CONFESSION. WE NEED TO CORROBORATE WITNESS STATEMENTS.

5 IT WAS TESTED, IT CAME BACK. THE BULLET THAT ENTERED
6 THE VICTIM'S HEAD WAS FIRED FROM THAT GUN. AND HOW DO WE
7 KNOW THE DEFENDANT HAD THAT GUN? BECAUSE MR. ESTRADO CAME
8 IN HERE AND TOLD YOU THAT HE PATTED HIM DOWN AND HE CAME
9 BACK A FEW MINUTES LATER AND THAT THE GUN WAS THEN FOUND BY
10 THE OFFICER IN THE TREE A FEW MINUTES AFTER THAT. AND THEN
11 THE DEFENDANT, OF COURSE, HAS TESTIFIED, YEAH, I PUT THE GUN
12 UP IN THE TREE. SO -- BUT WE DIDN'T KNOW HE WAS GOING TO
13 SAY THAT TODAY. HE COULD HAVE SAID, NO, THAT WASN'T MY GUN.
14 THEREFORE, WE HAVE TO HAVE IT TESTED AND HAVE THIS EVIDENCE
15 TO BRING TO YOU GUYS.

16 AND AT THE AUTOPSY, THAT'S ALSO A WAY TO COLLECT
17 FORENSIC EVIDENCE. AND THAT WAS, OF COURSE, THE BULLET THAT
18 CAME OUT OF THE VICTIM'S HEAD, BUT ALSO, THE TRAJECTORY OR
19 THE PATH THAT THE BULLET TOOK. IT'S NOT REASONABLE THAT THE
20 DEFENDANT SHOT INTO THE GROUND AND THAT KILLED WILFRIDO
21 BECAUSE THE PATH OF THE BULLET WAS ALMOST DIRECTLY STRAIGHT
22 ON BETWEEN THE EYES. IF IT WAS A RICOCHET IT WOULD COME AT
23 AN ANGLE, IF IT EVEN WOULD PENETRATE AT ALL, UNLESS, OF
24 COURSE, WILFRIDO IS STANDING DIRECTLY OVER THE BULLET TO
25 RICOCHET UP, WHICH IS NOT REASONABLE EITHER.

1 SO THIS SHOT WAS FIRED DIRECTLY AT A PERSON. MORE
2 MALICE. NOT FIRED AT THE GROUND, AT THE PERSON. AND WE
3 KNOW THAT BECAUSE FORENSIC EVIDENCE TELLS US THAT. NOT
4 EYEWITNESS TESTIMONY THAT'S CAPABLE OF HAVING A LITTLE FUDGE
5 HERE AND THERE, BUT BECAUSE OF THE AUTOPSY. SO WE USE ALL
6 THESE THINGS TO CORROBORATE THEM.

7 AND THAT BRINGS US TO, AND I'LL START TO WRAP THIS UP
8 HERE, THE DEFENDANT'S CONFESSION. THEY WANT YOU TO BELIEVE
9 HE DIDN'T MAKE IT KNOWINGLY AND IT'S A FABRICATION ON THE
10 PART OF THE POLICE. WE'VE ALREADY GONE OVER, HE'S NOT
11 STUPID. USING YOUR COMMON SENSE IN THIS AREA, HOW COULD THE
12 POLICE MAKE SOME OF THIS STUFF UP?

13 WHAT I SPECIFICALLY MEAN, IN HIS CONFESSION HE STATES
14 HE GOT THE GUN FROM A GUY THAT GOT OUT OF JAIL OR, EXCUSE
15 ME, WAS ARRESTED AND WENT TO JAIL THE DAY BEFORE, ANTHONY
16 MENDOZA. HOW WOULD THE POLICE KNOW THAT IF THE DEFENDANT
17 DIDN'T TELL THEM THAT? I MEAN, HOW MANY PEOPLE ARE IN THE
18 JAIL? HOW MANY PEOPLE MAY HAVE HAD A GUN WHEN THEY WERE
19 ARRESTED?

20 WELL, TO BE SURE THAT THIS WAS ACCURATE AND THAT WE
21 COULD VERIFY HIS CONFESSION, INVESTIGATOR SMITH TOLD YOU, I
22 WENT AND I LOOKED IT UP. AND SURE ENOUGH THIS ANTHONY
23 MENDOZA WAS BOOKED INTO THE DETENTION CENTER THE DAY BEFORE.

24 NOW, YOU KNOW, DOES THAT MEAN HE HAD A GUN AND HE GAVE
25 THE GUN? NO, BUT THE DEFENDANT'S THE ONE THAT TOLD US THAT.

1 HOW WOULD WE KNOW THAT? WE'RE NOT MAKING UP THE CONFESSION.
2 WHY WOULD WE WANT TO? WE'VE ALREADY GONE OVER THAT. WHY
3 WOULD WE WANT A MURDERER OUT IN THE COMMUNITY?

4 HOW COME THE COUSIN SAYS THE SAME THING THAT THE
5 DEFENDANT'S CONFESSION SAYS? BUT THE POLICE DIDN'T EVEN
6 KNOW OF THE EXISTENCE OF THE COUSIN OR THAT THE DEFENDANT
7 WENT TO THE COUSIN'S. BUT IT'S REALLY COINCIDENTAL THAT THE
8 DEFENDANT'S INITIAL STATEMENT ABOUT WHAT HAPPENED IS JUST
9 LIKE HIS STATEMENT TO HIS COUSIN.

10 NOW IT'S COMPLETELY DIFFERENT. NOW IT'S, I SHOT INTO
11 THE GROUND AND EL FLACO CAME TO MY RESCUE, THIS RANDOM MAN
12 WHO APPARENTLY JUST LIKES TO GO AROUND GREENVILLE COUNTY AND
13 SHOOT PEOPLE JUST APPEARS AND THEN DISAPPEARS.

14 MS. ROSS: OBJECTION. WE -- DIDN'T DISAPPEAR. WE
15 ADDRESSED THAT.

16 THE COURT: I CAN'T HEAR YOU, MS. ROSS.

17 MS. ROSS: I'M SORRY, YOUR HONOR. OBJECTION. WE
18 ADDRESSED WHAT HAD HAPPENED WITH THIS OTHER PERSON. IT'S
19 NOT SOMEONE WHO JUST DISAPPEARS. WE GAVE THE NAME TO THE
20 INVESTIGATOR.

21 THE COURT: WELL, THAT'S A REASONABLE ARGUMENT. THAT'S
22 FOR THE JURY TO WEIGH.

23 MS. HODGE: WELL, MS. ROSS SAID SHE WASN'T GOING TO
24 REBUT WHAT I SAID, BUT I GUESS SHE'LL JUST KEEP MAKING
25 OBJECTIONS. DEPUTY RIVERA AND INVESTIGATOR SMITH, JUST LIKE

1 YOU GET TO DETERMINE THE DEFENDANT'S CREDIBILITY AND
2 MANNERISMS AND THINGS LIKE THAT, YOU DO THAT FOR THE POLICE
3 OFFICERS TOO. AND DID RIVERA AND DID INVESTIGATOR SMITH
4 SEEM LIKE PEOPLE TO YOU THAT WERE ALL ABOUT CONCOCTING
5 STORIES, AND FRAMING PEOPLE, AND ESPECIALLY MARLON RIVERA?
6 SO YOU HAVE TO TAKE THAT INTO CONSIDERATION USING YOUR
7 COMMON SENSE, OF COURSE, DID THEY SEEM LIKE THOSE KIND OF
8 PEOPLE?

9 AFTER THE CONFESSION DID THEY NOT CONTINUE TO
10 INVESTIGATE THE CASE? THEY PUT OUT TO RADIO STATIONS AND
11 NEWSPAPERS, AND NOT ENGLISH ONES, SPANISH ONES, HAD, THE
12 AREA OF THE SCENE, GONE BACK NUMEROUS TIMES TRYING TO LOCATE
13 WITNESSES, WENT TO THESE ALLEGED DEFENSE WITNESSES TO TALK
14 TO THEM BECAUSE IF THERE IS THIS OTHER PERSON, THIS EL
15 FLACO, WE WANT HIM ARRESTED AND OFF THE STREETS.

16 SO IF THEY'RE JUST TRYING TO FRAME POOR MARLON WHY ARE
17 THEY GOING OUT MONTHS LATER, MONTHS AFTER THAT CONFESSION
18 AND DOING ALL OF THIS EXTRA WORK? AND IF THEY ARE THOSE
19 KIND OF PEOPLE THAT JUST FELT, WELL, WE'D BETTER TRACK THESE
20 THINGS DOWN, SOMEBODY MIGHT GET MAD AT US, THEN WHY NOT PICK
21 JUST SOMEBODY THAT FIT THE DESCRIPTION? IF WE'RE ALL ABOUT
22 FRAMING PEOPLE, AND YOU CAN PICK AN EL FLACO, I'M SURE, OUT
23 OF GREENVILLE COUNTY AND SAY, HEY, YOU WERE THE ONE. WHY
24 NOT? BECAUSE THEY ALREADY HAD THE RIGHT PERSON IN CUSTODY.
25 THE RIGHT PERSON IS MARLON RIVERA.

1 WHAT EVIDENCE PROVES THAT? WHAT HIS COUSIN TOLD US,
2 YOU RECALL THAT TESTIMONY, THAT THE DEFENDANT CAME IN AND
3 SAID, I'VE GOT PROBLEMS, I'VE KILLED SOMEBODY. THEN HE GOES
4 ON TO SAY, WE WERE ARGUING OVER A GUN AND IT WENT OFF.
5 THAT'S ANOTHER CLASSIC THING THAT PEOPLE WHO SHOOT PEOPLE
6 SAY. YOU HEAR THAT CONSTANTLY. OH, THE GUN JUST WENT OFF.

7 WELL, YOU RECALL MARK STEPHAN, WHO ALSO IS NOT A POLICE
8 OFFICER THAT WE CALLED THAT'S, EXCUSE ME, THAT IS A
9 PROFESSOR AT BOB JONES. AND HE'D BEEN A PRIOR POLICE
10 OFFICER, BUT HE'S NOT CURRENTLY. YOU COULD HAVE THAT GUN
11 SITTING THERE FOR A HUNDRED YEARS AND IT WOULD NOT GO OFF.
12 GUNS DON'T GO OFF, BUT IT'S WHAT PEOPLE SAY TO MINIMIZE
13 THEIR GUILT, AND TO MINIMIZE THEIR CONSCIENCE.

14 IT'S KIND OF LIKE KIDS, YOU KNOW, IF THEY BREAK
15 SOMETHING IT'S LIKE, OH, I DIDN'T DO IT OR OH, I WAS -- I
16 BUMPED INTO THE TABLE ON ACCIDENT. THEY'RE MINIMIZING UNTIL
17 THEY'RE FINALLY PUT DOWN AND YOU DID THIS, I SAW IT OR YOUR
18 SISTER TOLD ME SO. AND THEN THEY'RE LIKE, OKAY, OKAY, YEAH,
19 I DID IT. SO WE START WITH MINIMIZATION, BUT IT'S ROOTED IN
20 WHAT REALLY HAPPENED.

21 THEN HE GIVES HIS CONFESSION, WHICH IS RIGHT ALONG WITH
22 THAT. NEVER TELLS OF SOME SECOND SHOOTER ACCORDING TO THE
23 LAW ENFORCEMENT. IF SO, I FEEL CERTAIN AND THEY TOLD YOU
24 THEY WOULD GO FIND THIS PERSON OR ATTEMPT TO. HE WAS IN
25 POSSESSION OF THE MURDER WEAPON. WE'VE ALREADY GONE OVER,

1 WE KNOW IT WAS THE MURDER WEAPON FROM THE AUTOPSY, THAT IT
2 WAS A STRAIGHT ON SHOT, THAT HE HAD GUNSHOT RESIDUE ON HIS
3 HAND.

4 AND I SUBMIT THAT THE DEFENDANT'S TESTIMONY ITSELF IS
5 SOME PRETTY STRONG EVIDENCE BECAUSE OF THE FACT THEY'RE
6 TRYING TO MISLEAD YOU INTO WHAT TYPE OF PERSON HE IS, BUT
7 THAT ONCE YOU SAW FOR YOURSELF HE'S NOT, IN FACT, THAT WAY,
8 I THINK THAT'S STRONG EVIDENCE GOING TOWARDS HIS GUILT.

9 ONCE YOU DETERMINE THE FACTS, WHAT HAPPENED HERE,
10 YOU'VE GOT TO GO TO THE LAW. AND IF THE FACTS, AS YOU FIND
11 THEM, FIT THE LAW YOU MUST FIND THE DEFENDANT GUILTY. THE
12 LAW OF MURDER IN SOUTH CAROLINA IS THE UNLAWFUL KILLING OF
13 ANOTHER WITH MALICE AFORETHOUGHT EXPRESSED OR IMPLIED. A
14 LOT OF LEGALESE. IT SOUNDS LIKE A LOT OF LEGAL MUMBO JUMBO.

15 UNLAWFUL KILLING OF ANOTHER. WHAT DOES THAT MEAN? IT
16 SEEMS PRETTY OBVIOUS. UNLAWFUL MEANS THAT YOU ARE NOT
17 AUTHORIZED TO KILL SOMEBODY. YOU'RE NOT IN COMBAT. YOU'RE
18 NOT AN EXECUTIONER DOWN IN COLUMBIA FLIPPING THE SWITCH.
19 YOU ARE NOT DEFENDING YOURSELF FROM SOMEONE WANTING TO KILL
20 YOU. YOU ARE UNLAWFULLY -- YOU'VE GOT NO JUST CAUSE OR
21 EXCUSE KILLING ANOTHER PERSON, AND YOU DO IT WITH MALICE.

22 MALICE AFORETHOUGHT IS USUALLY TOGETHER IN A
23 DEFINITION. BUT MALICE IS RIGHT HERE, A TERM OF ART. IT
24 IMPORTS WICKEDNESS, EXCLUDES JUST CAUSE OR EXCUSE. NOW
25 THAT'S LEGAL TERMINOLOGY AS WELL. MORE BASIC, IT'S DOING A

1 WRONGFUL ACT INTENTIONALLY TO SOMEONE ELSE WITHOUT LEGAL
2 JUSTIFICATION. YOU'RE DOING SOMETHING WRONG, YOU KNOW IT'S
3 WRONG. YOU'RE IN A FIGHT WITH A GUY, YOU'RE PULLING OUT A
4 GUN, YOU KNOW YOU'RE NOT SUPPOSED TO BE DOING THAT, BUT YOU
5 DO IT ANYWAY, AND YOU SHOOT HIM. YOU DON'T HAVE LEGAL
6 JUSTIFICATION, AND YOU DON'T HAVE ANY EXCUSE. YOU'RE JUST
7 MEAN.

8 MALICE CAN BE EXPRESSED OR IT CAN BE IMPLIED. AND WHY
9 IS THAT? WELL, MALICE TALKS ABOUT YOUR STATE OF MIND. IT'S
10 VERY HARD TO GET INSIDE SOMEONE'S HEAD. IT WOULD BE HARD
11 FOR THE STATE TO PROVE WHAT'S GOING ON IN THE DEFENDANT'S
12 HEAD. SO YOU LOOK, IS THERE ANY EXPRESSED MALICE? DID HE
13 SAY, I'M GOING TO KILL YOU? BECAUSE THAT WOULD BE
14 EXPRESSED. YOU WOULD THEN KNOW WHAT'S GOING ON IN HIS HEAD.

15 PREMEDITATION CAN SHOW MALICE. IT IS NOT NECESSARY TO
16 FIND PREMEDITATION TO FIND MALICE, BUT IT CAN SHOW. AND
17 THAT'S YOUR CLASSIC EXAMPLE OF SOMEBODY LYING IN WAIT. YOU
18 KNOW, OH, I'M GOING TO KILL JOE BLOW. HE STOLE MY MOM'S
19 CAR. AND, YOU KNOW, THEY HIDE IN A BUSH AND WAIT FOR
20 SOMEBODY TO SHOW UP, AND THEY KILL THEM. THAT SHOWS SOME
21 EXPRESSED MALICE, BUT THAT'S NOT THE ONLY WAY TO SHOW
22 MALICE.

23 MALICE CAN BE IMPLIED. THE LAW GIVES YOU SEVERAL WAYS
24 THAT YOU CAN IMPLY THAT A PERSON IS ACTING WITH MALICE,
25 THEY'RE ACTING MEAN. AND ONE OF THEM IS THAT THEY ARE USING

1 A DEADLY WEAPON. WHY WOULD YOU BE CARRYING A LOADED GUN,
2 POINT IT, AND DISCHARGE IT IF YOU WERE NOT ACTING
3 MALICIOUSLY, IF YOU ARE NOT INTENDING TO HURT SOMEBODY? WHY
4 WOULD YOU DO IT? THAT'S WHAT IMPLIED MALICE MEANS. YOU CAN
5 LOOK TO THE ACTS AND THE CIRCUMSTANCES.

6 AGAIN, THE WAYS IT CAN BE FOUND, WRONGFULLY INTENDING
7 TO INJURE SOMEBODY, A WICKED OR DEPRAVED SPIRIT INTENT ON
8 DOING WRONG, USE OF A DEADLY WEAPON, AND THEN THIS ONE, IT
9 COULD BE JUST A RECKLESSNESS AND A WANTONNESS. IT INDICATES
10 THE DEPRAVITY OF THE MIND AND A DISREGARD OF HUMAN LIFE.
11 MAN, YOU DON'T CARE. YOU PULL OUT YOUR GUN, YOU START
12 SHOOTING, AND YOU JUST DON'T CARE WHAT HAPPENS. THAT IS
13 MALICE.

14 IF YOU FIND THAT THE FACTS FIT THE LAW, YOU MUST PLUG
15 THEM INTO THE LAW. AND IF YOU FIND THAT THEY FIT, THEN YOU
16 MUST FIND THE DEFENDANT GUILTY OF MURDER. AND THE JUDGE
17 WILL TELL YOU TO REACH THAT VERDICT YOU MUST BE FIRMLY
18 CONVINCED OF THE DEFENDANT'S GUILT. I ASK YOU TO REVIEW THE
19 EVIDENCE AS YOU REMEMBER IT, GIVEN THE LAW THAT THE JUDGE
20 INSTRUCTS YOU ON, AND YOU PUT THOSE TWO TOGETHER, THEN YOU
21 WILL FIND A VERDICT OF GUILTY IN THIS CASE. THANK YOU.

22 THE COURT: LADIES AND GENTLEMEN, AS YOU KNOW THE
23 DEFENDANT IN THIS CASE IS INDICTED FOR MURDER. MURDER IS A
24 STATUTORY OFFENSE. AND SECTION 16-3-10 OF OUR CODE OF LAWS
25 READS AS FOLLOWS: MURDER IS THE KILLING OF ANY PERSON WITH

1 MALICE AFORETHOUGHT EITHER EXPRESSED OR IMPLIED.

2 NOW WITH RESPECT TO MURDER THERE ARE TWO ELEMENTS. THE
3 FIRST ELEMENT IS THE KILLING OF ANOTHER. AND SECONDLY, THE
4 KILLING IS WITH MALICE AFORETHOUGHT, EITHER EXPRESSED OR
5 IMPLIED.

6 NOW WITH RESPECT TO THE FIRST ELEMENT, THAT IS THE
7 KILLING OF ANOTHER, I CHARGE YOU THAT ANY KILLING OF A HUMAN
8 BEING IS CALLED HOMICIDE. BUT ALL HOMICIDES ARE NOT
9 NECESSARILY UNLAWFUL. FOR EXAMPLE, WHERE ONE KILLS ANOTHER
10 IN SELF DEFENSE, THIS IS KNOWN AS EXCUSABLE HOMICIDE. OR
11 WHERE A POLICE OFFICER KILLS A FLEEING ARMED ROBBER, THIS IS
12 KNOWN AS JUSTIFIABLE HOMICIDE. AND NEITHER OF THESE
13 HOMICIDES IS PUNISHABLE BY LAW. AS A NECESSARY ELEMENT OF
14 MURDER THE HOMICIDE MUST HAVE BEEN UNLAWFUL, THAT IS WITHOUT
15 JUST CAUSE OR EXCUSE.

16 NOW WITH RESPECT TO THE SECOND ELEMENT, THAT IS MALICE,
17 THE STATUTE SAYS MALICE MAY BE EXPRESSED OR THAT IT MAY BE
18 IMPLIED. NOW MALICE IS A LEGAL TERM OF ART THAT IMPLIES
19 WICKEDNESS AND EXCLUDES A JUST CAUSE OR EXCUSE. MALICE
20 MEANS A CONDITION OF THE MIND OR HEART WHICH PROMPTS ANOTHER
21 TO TAKE HUMAN LIFE WITHOUT JUST CAUSE OR EXCUSE. OUR
22 SUPREME COURT HAS DEFINED MALICE BY SAYING IT SPRINGS FROM A
23 HEART DEVOID OF SOCIAL DUTY OR OBLIGATION AND IS ONE FATALLY
24 AND DELIBERATELY BENT ON MISCHIEF.

25 NOW TO PROVE MALICE IT IS NOT NECESSARY FOR THE STATE

1 TO PROVE THAT THE DEFENDANT HAD A FEELING OF HATRED OR ILL-
2 WILL TOWARD THE PERSON KILLED. THE STATUTE SAYS MALICE MUST
3 BE AFORETHOUGHT. AFORETHOUGHT SIMPLY MEANS DELIBERATE OR
4 PLANNED. IN OTHER WORDS, AFORETHOUGHT MEANS THAT MALICE
5 MUST HAVE BEEN IN THE MIND A SUFFICIENT LENGTH OF TIME TO
6 HAVE PRODUCED THE ACT THAT CAUSED THE DEATH. BUT NO LONG
7 PERIOD OF TIME IS REQUIRED OR MUST HAVE EXISTED. IF IT WAS
8 THERE LONG ENOUGH TO BRING ON THE ACT THAT CAUSED THE DEATH
9 IT WOULD BE SUFFICIENT AND POINT OF TIME.

10 NOW AS I TOLD YOU, THE STATUTE SAYS THAT MALICE MAY BE
11 EXPRESSED OR IT MAY BE IMPLIED. EXPRESSED MALICE IS WHERE
12 THERE IS SOME DIRECT PROOF OF MALICE AS FOR EXAMPLE WHERE A
13 PERSON BY WORD OF MOUTH STATES HIS HATRED OR ILL-WILL FOR
14 ANOTHER OR WHERE THERE IS EVIDENCE OF PREVIOUS THREATS OF
15 LYING IN WAIT OR MAKING PLANS TO TAKE HUMAN LIFE. THAT IS
16 EXPRESSED MALICE.

17 IMPLIED MALICE, ON THE OTHER HAND, MAY BE SHOWN FROM
18 THE FACTS AND CIRCUMSTANCES SURROUNDING AN INCIDENT OR AN
19 EVENT. IMPLIED MALICE EXISTS WHERE THERE IS NO ACTUAL
20 INTENT TO KILL A PERSON, BUT DEATH IS CAUSED BY CONDUCT
21 WHICH OUR LAW REGARDS AS SHOWING SUCH AN ABANDONED STATE OF
22 MIND AS WOULD BE THE EQUIVALENT OF AN ACTUAL INTENT TO KILL.
23 FOR EXAMPLE, THE LAW SAYS THAT IF ONE KILLS ANOTHER WITH THE
24 USE OF A DEADLY WEAPON AN IMPLICATION OF MALICE ARISES. IN
25 OTHER WORDS, YOU MAY INFER MALICE FROM THE USE OF A DEADLY

1 WEAPON.

2 HOWEVER, LADIES AND GENTLEMEN, I CHARGE YOU THAT THIS
3 INFERENCE OF MALICE FROM THE USE OF A DEADLY WEAPON IS ONE
4 OF FACT AND NOT OF LAW. IT IS SIMPLY AN EVIDENTIARY FACT TO
5 BE TAKEN INTO CONSIDERATION BY YOU, THE JURY, ALONG WITH ALL
6 OF THE OTHER EVIDENCE IN THE CASE AND IS TO BE GIVEN SUCH
7 WEIGHT AS YOU DETERMINE IT SHOULD RECEIVE. IT MAY AUTHORIZE
8 A CONVICTION, BUT THAT RESULT IS NOT REQUIRED.

9 NOW IF FACTS ARE PROVED SUFFICIENT TO RAISE AN
10 INFERENCE OF MALICE FROM THE USE OF A DEADLY WEAPON THIS
11 INFERENCE IS NOT CONCLUSIVE. AND IT IS ALWAYS FOR THE JURY
12 TO DETERMINE FROM ALL OF THE EVIDENCE IN THE CASE IF MALICE
13 HAS BEEN PROVED BEYOND A REASONABLE DOUBT.

14 I FURTHER CHARGE YOU, LADIES AND GENTLEMEN, THAT MOTIVE
15 IS NOT AN ESSENTIAL ELEMENT OF THE CRIME OF MURDER. AND THE
16 STATE IS THUS NOT REQUIRED TO PROVE A MOTIVE FOR MURDER.

17 LADIES AND GENTLEMEN, OUR LAW DOES NOT COMPEL A
18 DEFENDANT IN A CRIMINAL CASE TO TAKE THE WITNESS STAND AND
19 TESTIFY OR PRESENT EVIDENCE BECAUSE OUR LAW NEVER IMPOSES
20 UPON A DEFENDANT THE BURDEN OR DUTY OF CALLING ANY
21 WITNESSES, OF PRODUCING ANY EVIDENCE, OR OF TESTIFYING. AND
22 THIS IS BECAUSE THE BURDEN IS ALWAYS ON THE STATE TO PROVE
23 GUILT BEYOND A REASONABLE DOUBT AS I WILL LATER DEFINE THAT
24 PHRASE TO YOU.

25 LADIES AND GENTLEMEN, NO STATEMENT MADE BY A DEFENDANT

1 CAN BE CONSIDERED BY A JURY UNLESS IT FINDS BEYOND A
2 REASONABLE DOUBT THAT THE STATEMENT, UNDER THE TOTALITY OF
3 THE CIRCUMSTANCES, WAS FREELY AND VOLUNTARILY GIVEN AND IF
4 GIVEN WHILE THE DEFENDANT WAS IN CUSTODY THAT IT WAS GIVEN
5 AFTER AN EXPLANATION OF HIS OR HER MIRANDA RIGHTS, WHICH
6 WERE UNDERSTOOD BY HIM OR HER.

7 IN OTHER WORDS, I CHARGE YOU THAT A STATEMENT OF A
8 DEFENDANT CANNOT BE CONSIDERED AGAINST HIM UNLESS IT WAS
9 FIRST -- UNLESS HE WAS FIRST ADVISED OF HIS RIGHT TO REMAIN
10 SILENT, OF HIS RIGHT TO COUNSEL, AND OF THE FACT THAT ANY
11 STATEMENT MADE BY HIM COULD BE USED AGAINST HIM, ALL OF
12 WHICH MUST HAVE BEEN UNDERSTOOD BY HIM. A STATEMENT CANNOT
13 BE CONSIDERED AGAINST THE DEFENDANT IF IT WAS MADE THROUGH
14 FORCE, OR FEAR, OR UNDER DURESS OR COMPULSION OF ANY KIND OR
15 IF IT WAS INDUCED BY PROMISE OF LENIENCY OR A REWARD OF ANY
16 KIND.

17 NOW THE STATEMENT ADMITTED INTO EVIDENCE IN THIS CASE
18 MUST BE DISREGARDED BY YOU AND NOT CONSIDERED AGAINST THIS
19 DEFENDANT UNLESS THE STATE HAS SATISFIED YOU FROM THE
20 TESTIMONY BEYOND A REASONABLE DOUBT THAT IT WAS ACTUALLY
21 MADE BY THIS DEFENDANT AND SIGNED BY HIM. AND EVEN IF YOU
22 FIND THE STATEMENT WAS MADE BY THE DEFENDANT IT MUST STILL
23 BE DISREGARDED BY YOU AND NOT CONSIDERED AGAINST HIM UNLESS
24 THE STATE HAS ALSO SATISFIED YOU FROM THE EVIDENCE BEYOND A
25 REASONABLE DOUBT THAT IT WAS NOT EXTORTED BY FORCE, OR FEAR,

1 OR INDUCED BY PROMISE, BUT THAT IT WAS FREE, AND VOLUNTARY
2 IN EVERY RESPECT. AND, OF COURSE, IN ORDER TO CONSTITUTE
3 ANY EVIDENCE AGAINST THE DEFENDANT THIS STATEMENT MUST BE
4 BELIEVED BY YOU, THE JURY.

5 NOW, LADIES AND GENTLEMEN, I AM THE JUDGE OF THE LAW IN
6 THIS CASE. YOU ARE THE JUDGES OF THE FACTS. THE
7 CONSTITUTION OF OUR STATE DOES NOT ALLOW ME TO CHARGE YOU ON
8 THE FACTS OF THIS CASE, OR TO DISCUSS THE FACTS WITH YOU, OR
9 IN ANY WAY OR MANNER LET YOU KNOW WHAT MY PERSONAL FEELINGS,
10 IF ANY, ARE ABOUT THIS CASE. THAT IS BECAUSE YOU AND YOU
11 ALONE ARE THE JUDGES OF THE FACTS. THEREFORE, IF DURING THE
12 COURSE OF THIS TRIAL OR IF DURING THE COURSE OF MY CHARGE
13 YOU HAVE A FEELING OR YOU HAVE BEEN LEFT WITH THE IMPRESSION
14 THAT I HAVE A PERSONAL FEELING ABOUT THIS CASE ONE WAY OR
15 ANOTHER, THEN YOU DISREGARD THAT FEELING OR THAT IMPRESSION.
16 YOU AND YOU ALONE ARE THE JUDGES OF THE FACTS.

17 NOW IT'S YOUR DUTY AND YOUR DUTY ALONE TO WEIGH THE
18 TESTIMONY AND EVIDENCE PRESENTED IN THIS CASE AND TO PASS
19 UPON THE CREDIBILITY OR THE BELIEVABILITY OF THE WITNESSES
20 YOU HEARD TESTIFY. IN THIS CONNECTION YOU HAVE THE RIGHT TO
21 BELIEVE ALL THAT A WITNESS TOLD YOU OR YOU CAN DISBELIEVE
22 ALL A WITNESS TOLD YOU. YOU CAN BELIEVE A PART OF WHAT A
23 WITNESS TOLD YOU AND DISBELIEVE A PART OF WHAT A WITNESS
24 TOLD YOU. YOU CAN BELIEVE ONE WITNESS AS AGAINST SEVERAL OR
25 YOU CAN BELIEVE SEVERAL AS AGAINST ONE. YOU ALSO HAVE THE

1 RIGHT TO TAKE INTO CONSIDERATION ANY BIAS, OR PREJUDICE, OR
2 INTEREST YOU FEEL A WITNESS IN THE CASE MIGHT HAVE.

3 NOW AS I TOLD YOU, I AM THE JUDGE OF THE LAW IN THIS
4 CASE. AND I AM REQUIRED TO CHARGE THE LAW THAT APPLIES TO
5 THE FACTS IN THE CASE. IT'S NOT A QUESTION OF WHAT YOU FEEL
6 THE LAW MIGHT BE OR WHAT IT SHOULD BE. IT IS NOT
7 NECESSARILY WHAT THE LAWYERS MAY HAVE TOLD YOU IT IS BECAUSE
8 UNDER YOUR OATH YOU ARE REQUIRED TO TAKE THE LAW AS I GIVE
9 IT TO YOU, APPLY THAT LAW TO THE FACTS AS YOU DETERMINE
10 THOSE FACTS TO BE, AND TO WRITE YOUR VERDICT ACCORDINGLY.

11 IT IS ALSO MY DUTY TO SEE THAT THIS TRIAL IS CONDUCTED
12 ACCORDING TO THE RULES OF COURT AS WELL AS THE RULES OF
13 EVIDENCE THAT APPLY TO THE ADMISSIBILITY OF TESTIMONY AND
14 EVIDENCE AS I UNDERSTAND THOSE RULES TO BE. AND, THEREFORE,
15 YOU ARE NOT TO CONSIDER IN ANY WAY OR MANNER TESTIMONY OR
16 EVIDENCE THAT WAS RULED OUT BY ME AS BEING NOT ADMISSIBLE.

17 NOW, LADIES AND GENTLEMEN, IN THIS CASE AS IN ALL
18 CRIMINAL CASES THIS DEFENDANT COMES INTO THIS COURTROOM
19 PRESUMED TO BE INNOCENT. AND THIS PRESUMPTION CONTINUES AND
20 CARRIES THROUGH THE ENTIRE TRIAL UNTIL AND UNLESS IT IS
21 REMOVED BY EVIDENCE THAT SATISFIES YOU OF HIS GUILT BEYOND A
22 REASONABLE DOUBT. THE BURDEN IS ON THE STATE IN THIS CASE
23 TO PROVE THIS DEFENDANT GUILTY AND TO PROVE EACH AND EVERY
24 ELEMENT OF THE OFFENSE WITH WHICH HE IS CHARGED BEYOND A
25 REASONABLE DOUBT.

1 NOW SOME OF YOU MAY HAVE SERVED IN THE PAST ON CIVIL
2 CASES. AND IF SO YOU WERE MOST LIKELY TOLD THAT IT WAS ONLY
3 NECESSARY TO PROVE THAT A FACT WAS MORE LIKELY TRUE THAN NOT
4 TRUE. BUT IN CRIMINAL CASES THE STATE'S PROOF MUST BE MORE
5 POWERFUL THAN THAT. AS I'VE TOLD YOU, IT MUST BE BEYOND A
6 REASONABLE DOUBT.

7 NOW PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT
8 LEAVES YOU FIRMLY CONVINCED OF THIS DEFENDANT'S GUILT.
9 THERE ARE VERY FEW THINGS IN THIS WORLD THAT WE KNOW WITH
10 ABSOLUTE CERTAINTY. AND IN CRIMINAL CASES OUR LAW DOES NOT
11 REQUIRE PROOF THAT OVERCOMES EVERY POSSIBLE DOUBT.

12 IF, BASED ON YOUR CONSIDERATION OF THE EVIDENCE IN THIS
13 CASE, YOU ARE FIRMLY CONVINCED THAT THIS DEFENDANT IS GUILTY
14 AS CHARGED, THEN YOU MUST FIND HIM GUILTY. IF, ON THE OTHER
15 HAND, YOU FEEL LIKE THERE IS A REAL POSSIBILITY THAT HE IS
16 NOT GUILTY, THEN YOU MUST GIVE HIM THE BENEFIT OF THAT DOUBT
17 AND FIND HIM NOT GUILTY.

18 NOW, LADIES AND GENTLEMEN, UNDER THE OATH YOU TOOK IN
19 THIS CASE YOU SWORE TO TRY THIS CASE BASED ONLY AND SOLELY
20 ON THE TESTIMONY AND EVIDENCE PRESENTED IN THIS COURTROOM.
21 I'LL TELL YOU THAT IT IS YOUR DUTY TO LAY ASIDE ALL OUTSIDE
22 BIAS, PREJUDICE, OR OPINIONS AND TRY THE CASE BASED ONLY ON
23 THE LAW AND EVIDENCE PRESENTED IN THIS COURTROOM.

24 I TELL YOU THAT IT IS YOUR -- THE WORD VERDICT IS TAKEN
25 FROM THE LATIN WORD VEREDICTO THAT MEANS TO SPEAK THE TRUTH.

1 NOW YOU HAVE NO FRIENDS TO REWARD IN THIS CASE OR ENEMIES TO
2 PUNISH. I CHARGE YOU TO ABIDE BY YOUR OATH AND RETURN A
3 VERDICT THAT SPEAKS THE TRUTH.

4 YOU'LL HAVE IN THE JURY ROOM WITH YOU THE INDICTMENT IN
5 THIS CASE. THIS INDICTMENT DOES NOT CONSTITUTE EVIDENCE.
6 THIS INDICTMENT SIMPLY SETS FORTH THE ALLEGATIONS BY THE
7 STATE. AND THE INDICTMENT IS THE LEGAL DOCUMENT THAT BRINGS
8 THIS CASE INTO THE COURTROOM AND PRESENTS IT TO YOU FOR YOUR
9 DETERMINATION.

10 LADIES AND GENTLEMEN, THERE ARE ONLY ONE OF TWO
11 POSSIBLE VERDICTS IN THIS CASE, GUILTY OR NOT GUILTY.
12 WHATEVER THAT VERDICT IS IT MUST BE UNANIMOUS, THAT IS ALL
13 TWELVE OF YOU MUST AGREE.

14 MR. FOREMAN, THERE'S A PLACE ON THE BACK OF THE
15 INDICTMENT THAT SAYS VERDICT. NOW WHATEVER THE UNANIMOUS
16 VERDICT OF THE JURY IS, GUILTY OR NOT GUILTY, PLEASE WRITE
17 IT OUT IN THAT SPACE. AND THEN SIGN YOUR NAME ON THE LINE
18 WHERE IT SAYS FOREMAN OF THE PETIT JURY.

19 NOW AT THIS TIME I'M REQUIRED TO GO OVER MY CHARGE WITH
20 THE LAWYERS. I NEED YOU TO GO BACK INTO YOUR JURY ROOM, BUT
21 DON'T BEGIN DELIBERATING UNTIL I SEND WORD IN FOR YOU TO DO
22 SO. THANK YOU.

23 (WHEREUPON THE JURY EXITED THE COURTROOM AT 2:50 PM)

24 THE COURT: ALL RIGHT. ANYTHING FURTHER FROM THE
25 STATE?

1 MS. HODGE: NO, YOUR HONOR.

2 THE COURT: ANYTHING FURTHER FROM THE DEFENDANT?

3 MS. ROSS: YES, YOUR HONOR. I'D RENEW ALL MY
4 OBJECTIONS TO REFUSAL TO CHARGE ALL THE CHARGES THAT I HAVE
5 ON MY LIST THAT I HANDED UP. I'D ALSO ASK YOU TO CONSIDER A
6 SPECIFIC CHARGE STATING THAT THE JURY IS NOT TO CONSIDER THE
7 HAND OF ONE, THE HAND OF ALL, OR ACCOMPLICE THEORY IN THIS
8 CASE. THAT WAS NOT INDICTED. THAT IS NOT A PART OF THE
9 CASE. AND IT WAS IMPROPER, I BELIEVE, ---

10 THE COURT: I DIDN'T CHARGE HAND OF ONE.

11 MS. ROSS: I KNOW, BUT THE STATE REFERRED TO IT IN
12 THEIR CLOSING ARGUMENT. AND I ---

13 THE COURT: WELL, I TOLD THE JURY THAT THE LAW WAS AS I
14 TOLD THEM, NOT WHAT THE ATTORNEYS ARGUED. SO I WILL DECLINE
15 ---

16 MS. ROSS: AND, I MEAN, I'M JUST ASKING ---

17 THE COURT: I UNDERSTAND.

18 MS. ROSS: --- FOR A SPECIFIC ADDRESS TO THAT.

19 THE COURT: ALL RIGHT.

20 MS. ROSS: FURTHERMORE, AT THIS TIME, BASED ON THE
21 COMMENTS MADE IN CLOSING, I'D ASK FOR A MISTRIAL. FIRST THE
22 STATE STATED YOU ONLY HEARD FROM TWO EYEWITNESSES FROM THE
23 DEFENSE. NOW CLEARLY WE DON'T HAVE -- THEY CAN'T COMMENT ON
24 WHAT WE DID PUT UP OR DON'T PUT UP. AND THE ONLY REASON
25 THERE WERE TWO EYEWITNESSES AND NOT MORE WAS BECAUSE THE

1 STATE OBJECTED TO US PRESENTING AN EYEWITNESS BECAUSE SHE
2 HAD ACCIDENTALLY COME IN THE COURTROOM THAT I DIDN'T KNOW
3 ABOUT. SO IT'S THEIR FAULT WE DIDN'T HAVE MORE
4 EYEWITNESSES. AND THEN THEY WENT ON TO COMMENT THAT OUR
5 NUMBER OF EYEWITNESSES WAS SOMEHOW INADEQUATE, ONLY TWO.
6 THEREFORE, WE'D ASK FOR A MISTRIAL BASED ON THAT.

7 ALSO THERE WAS COMMENTS MADE ABOUT US, HOW WE HID THE
8 CONFESSION FROM THEM. CLEARLY IN LIGHT OF YOUR RULING ON
9 THE JACKSON V. DENNO AND ALLOWING THEM TO ADDRESS IT
10 YESTERDAY INSTEAD OF MONDAY THAT PUT ME IN A TERRIBLE
11 POSITION WHERE I COULDN'T GO AHEAD AND BRING OUT THE
12 CONFESSION MYSELF AND PRESERVE ANY KIND OF REALISTIC JACKSON
13 V. DENNO HEARING, WHICH I WOULD HAVE A RIGHT TO.

14 THEREFORE, THE ONLY REASON I COULDN'T BRING OUT THE
15 CONFESSION WAS BECAUSE OF THE STATE IN THAT RULING REGARDING
16 THE JACKSON V. DENNO HEARING. AND I THINK ITS MERITS -- IT
17 AFFECTED HIS TRIAL AND MERITS OF A MISTRIAL THAT THAT WAS
18 ALLOWED TO COME IN AND THAT COMMENT WAS ALLOWED TO BE MADE
19 TO THE JURY.

20 AND FINALLY, AS FAR AS ALLUDING TO THIS MYSTERY PERSON,
21 THE EL FLACO, THE SHOOTER, WAS NOT A MYSTERY PERSON. WE
22 TRIED TO TELL THE STATE WHO THEY WERE, AND THEY SIMPLY
23 IGNORED IT. SO AT THAT POINT TO GO AND COMMENT TO THE JURY
24 IN CLOSING THAT THERE WAS SOME MYSTERY PERSON WAS TOTALLY
25 IMPROPER AND ALSO AFFECTED THE FAIRNESS OF THIS TRIAL AND MY

1 CLIENT'S RIGHT TO A FAIR TRIAL. SO BASICALLY WE'D ASK FOR A
2 MISTRIAL BASED ON THOSE COMMENTS.

3 THE COURT: ALL RIGHT. AND YOUR MOTION IS DENIED. DO
4 YOU HAVE ALL THE EXHIBITS TOGETHER? ALL RIGHT. TAKE
5 EVERYTHING IN THERE WITH THEM AND TELL THEM TO DELIBERATE.
6 AND BRING THE ALTERNATE, MS. CAMPBELL, TO ME. THANK YOU,
7 FOLKS. IF YOU'LL BE AT EASE.

8 (WHEREUPON THE ALTERNATE ENTERED THE COURTROOM)

9 THE COURT: MS. CAMPBELL, SINCE OUR TWELVE JURORS HAVE
10 MADE IT THROUGH THIS CASE THIS WILL CONCLUDE YOUR SERVICE ON
11 THIS CASE. I'M NOT SURE WHAT THE BALANCE OF THE WEEK HOLDS
12 FOR YOU. AND WHAT I NEED FOR YOU TO DO NOW IS TO REPORT
13 BACK TO THE JURY ASSEMBLY ROOM, AND THEY'LL TRY TO GIVE YOU
14 SOME INDICATION AS TO WHAT COMES NEXT. THANK YOU SO MUCH.
15 APPRECIATE IT.

16 (WHEREUPON THE ALTERNATE EXITED THE COURTROOM)

17 (WHEREUPON THE JURY BEGAN DELIBERATING AT 2:56 PM)

18 (WHEREUPON COURT WAS IN RECESS)

19 THE COURT: THE JURY HAS ASKED TO REVIEW THE TESTIMONY
20 OF CASTRO, THE COUSIN, AND ALVARO FERNANDEZ. NOW I DON'T
21 BELIEVE ALVARO FERNANDEZ TESTIFIED.

22 (WHEREUPON COURT'S EXHIBIT 13 WAS MARKED)

23 MS. HODGE: NO, SIR. I BELIEVE THEY'RE PROBABLY
24 TALKING ABOUT THE EXCITED UTTERANCE AND THEN THE CROSS
25 EXAMINATION MS. ROSS DID ON BRIAN GARRETT WHERE SHE WENT

1 INTO HIS STATEMENT. THAT'S PROBABLY, I MEAN, THAT'S WHAT
2 I'M ASSUMING, AREN'T YOU, SUSANNAH, WHAT THEY'RE PROBABLY
3 WANTING TO HEAR?

4 MS. ROSS: YEAH. PART OF HIS STATEMENT CAME INTO
5 EVIDENCE. AND I BELIEVE I HAD THE STATEMENT AND READ IT AND
6 ALLOWED OFFICER GARRETT TO DOUBLE CHECK THAT. AND THAT WAS
7 THE INITIAL TESTIMONY OF OFFICER GARRETT ON, I BELIEVE IT
8 WAS ON MONDAY.

9 MS. HODGE: YEAH, I WOULD SAY THAT'S PROBABLY ---

10 THE COURT: OKAY. SUSAN, CAN YOU FIND THAT?

11 MS. HODGE: --- OFFICER GARRETT'S DIRECT AND CROSS.

12 THE COURT: WHERE IN GARRETT'S TESTIMONY DID YOU GET
13 INTO FERNANDEZ?

14 MS. ROSS: I BELIEVE IT WAS IN CROSS EXAMINATION.

15 THE COURT: I MEAN, WAS IT RIGHT AT FIRST OR DO YOU
16 REMEMBER ABOUT WHERE IT WAS?

17 MS. ROSS: I THINK IT WAS RIGHT AT THE FIRST. I THINK
18 HIS INITIAL CROSS EXAMINATION WAS VERY SHORT. SO ---

19 THE COURT: SO IT WAS DURING CROSS?

20 MS. HODGE: YES, SIR.

21 THE COURT: OKAY. JUST ---

22 MS. HODGE: I'M PRETTY SURE. RIGHT. PART OF IT WAS IN
23 DIRECT AND PART OF IT WAS IN CROSS.

24 (WHEREUPON THE COURT REPORTER WAS TALKING WITH THE
25 COURT ABOUT THE TESTIMONY TO PLAY FOR THE JURY)

1 THE COURT: ALL RIGHT. LET ME KNOW WHEN YOU'RE READY,
2 SUSAN.

3 (WHEREUPON COURT WAS IN RECESS)

4 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 3:48 PM)

5 THE COURT: MR. FOREMAN, YOU'VE ASKED TO REVIEW THE
6 TESTIMONY OF WITNESS CASTRO. AND I HAVE THAT SET UP TO PLAY
7 BACK TO YOU, AND FOR ALVARO FERNANDEZ. NOW ALVARO FERNANDEZ
8 WAS NOT A LIVE WITNESS IN THE CASE. HIS TESTIMONY CAME IN
9 THROUGH CROSS EXAMINATION OR HIS STATEMENT THROUGH CROSS
10 EXAMINATION OF OFFICER GARRETT. IS THAT WHAT YOU WANTED TO
11 HEAR?

12 MR. FOREMAN: YES, SIR.

13 THE COURT: OKAY. FIRST WE HAVE THE TESTIMONY OF MR.
14 CASTRO.

15 (WHEREUPON THE TESTIMONY OF NELSON CASTRO WAS PLAYED
16 FOR THE JURY)

17 THE COURT: COME AROUND PLEASE. AND YOUR NAME PLEASE, SIR,
18 THE INTERPRETER?

19 THE INTERPRETER: EFRAIN PINEROS.

20 THE COURT: ALL RIGHT, SIR. AND WE'LL NEED TO FIRST
21 ADMINISTER AN OATH TO YOU AND THEN TO THE WITNESS.

22 (WHEREUPON THE INTERPRETER, EFRAIN PINEROS, WAS DULY
23 SWORN)

24 NELSON CASTRO, BEING DULY
25 SWORN TESTIFIED AS FOLLOWS:

1 THE COURT: COME AROUND AND BE SEATED PLEASE.

2 DIRECT EXAMINATION BY MS. HODGE:

3 Q. MR. CASTRO, DO YOU SPEAK A LITTLE BIT OF ENGLISH?

4 A. A LITTLE BIT.

5 Q. DO YOU SPEAK SPANISH?

6 A. YES.

7 Q. DO YOU SPEAK SPANISH MORE FLUENTLY THAN YOU SPEAK
8 ENGLISH?

9 A. YES.

10 Q. SO WOULD YOU PREFER TO TESTIFY IN SPANISH?

11 A. IN SPANISH.

12 Q. AND THIS WILL BE TRANSLATED FOR YOU.

13 A. OKAY.

14 (WHEREUPON THE FOLLOWING QUESTIONS AND ANSWERS WERE
15 INTERPRETED BY EFRAIN PINEROS)

16 Q. DO YOU LIVE IN GREENVILLE?

17 A. YES.

18 Q. HOW LONG HAVE YOU LIVED HERE?

19 A. SEVEN YEARS.

20 Q. WHERE ARE YOU FROM ORIGINALLY?

21 A. HONDURAS.

22 Q. ARE YOU MARRIED?

23 A. YES.

24 Q. ANY CHILDREN?

25 A. YES.

- 1 Q. HOW MANY?
- 2 A. UNA. ONE. SORRY.
- 3 Q. AND DO YOU WORK?
- 4 A. YES.
- 5 Q. WHAT TYPE OF WORK DO YOU DO?
- 6 A. HE'S AN ORDER SELECTOR.
- 7 Q. FOR A COMPANY?
- 8 A. YES.
- 9 Q. WHAT COMPANY?
- 10 A. CNS.
- 11 Q. DO YOU KNOW THE DEFENDANT, MARLON RIVERA?
- 12 A. YES.
- 13 Q. HOW DO YOU KNOW HIM?
- 14 A. HE'S MY COUSIN.
- 15 Q. DO YOU RECALL THE LAST TIME YOU SAW MARLON RIVERA?
- 16 A. YES.
- 17 Q. AND WAS THIS BACK JULY OF LAST YEAR?
- 18 A. YES.
- 19 Q. JULY 18TH OF 2004?
- 20 A. I REMEMBER THE LAST TIME, BUT I DON'T REMEMBER
- 21 ACCURATELY WHAT WAS THE DATE.
- 22 Q. WHERE DID YOU SEE HIM LAST?
- 23 A. I SAW HIM LAST TIME AT HIS HOUSE.
- 24 Q. AT HIS HOUSE OR ---
- 25 A. YES, AT HIS HOUSE.

- 1 Q. AND HOW DID -- WERE YOU AT HIS HOUSE?
- 2 A. HE'S SAYING THE DAY OF THE ACCIDENT I WASN'T THERE. I
- 3 WAS AT MY HOME.
- 4 Q. SO YOU WERE AT YOUR HOME. AND DID THE DEFENDANT COME
- 5 TO YOUR HOME?
- 6 A. YES, HE DID.
- 7 Q. DO YOU REMEMBER WHAT TIME IT WAS?
- 8 A. IT WAS MORE OR LESS BETWEEN 1:30 AND 2:00 IN THE
- 9 MORNING.
- 10 Q. WHAT WERE YOU DOING AT THAT TIME?
- 11 A. I WAS SLEEPING.
- 12 Q. AND DO YOU KNOW WHAT DAY OF THE WEEK IT MIGHT HAVE
- 13 BEEN?
- 14 A. NO.
- 15 Q. DO YOU WORK EVERY DAY OF THE WEEK?
- 16 A. NO.
- 17 Q. DID YOU HAVE SATURDAYS OFF BACK THEN?
- 18 A. YES.
- 19 Q. HOW DO YOU KNOW WHAT TIME IT WAS?
- 20 A. I REMEMBER THAT I JUST TURNED AROUND AND LOOKED AT THE
- 21 CLOCK AND I SAW THAT IT WAS 1:30, 2:00 IN THE MORNING.
- 22 Q. AND DO YOU REMEMBER SOMEONE KNOCKING ON YOUR DOOR?
- 23 A. YES.
- 24 Q. DID YOU ANSWER THE DOOR?
- 25 A. NO.

1 Q. WHO DID?

2 A. MY WIFE DID.

3 Q. WHAT HAPPENED WHEN SHE ANSWERED THE DOOR?

4 A. HE'S SAYING HE TOLD ME THAT SOMETHING HAD HAPPENED TO
5 HIM.

6 Q. OKAY. LET'S COME BACK A LITTLE BIT. YOUR WIFE
7 ANSWERED THE DOOR?

8 A. HE SAID, YES, BUT MY WIFE SAID THAT HE TOLD ME THAT
9 SOMETHING ---

10 MS. ROSS: YOUR HONOR, I'D OBJECT TO HEARSAY.

11 THE COURT: OVERRULED. GO AHEAD.

12 Q. AND WHEN YOU SAY, HE, DO YOU MEAN THE DEFENDANT WAS AT
13 YOUR DOOR?

14 A. YES.

15 Q. WAS HE ALSO WITH HIS MOTHER?

16 A. YES.

17 Q. ANYONE ELSE?

18 A. AND THE HUSBAND OF HIS MOM.

19 Q. AND DID YOU GET OUT OF BED AND COME TO THE DOOR?

20 A. YES.

21 Q. DID YOU TALK TO THE DEFENDANT IN YOUR HOUSE THAT NIGHT?

22 A. YES. I TOLD HIM TO COME IN AND EXPLAIN TO ME WHAT
23 HAPPENED.

24 Q. AND WHAT DID THE DEFENDANT SAY?

25 MS. ROSS: AND I'D RENEW MY OBJECTION TO HEARSAY.

- 1 THE COURT: ALL RIGHT. PROCEED.
- 2 A. AND HE TOLD ME THAT HE HAD KILLED SOMEBODY.
- 3 Q. DID HE SAY SOMETHING ABOUT HAVING A PROBLEM?
- 4 A. EXCUSE ME. WILL YOU PLEASE ASK THE QUESTION AGAIN.
- 5 Q. DID HE -- DID THE DEFENDANT MAKE ANY MENTION THAT HE
- 6 HAD A PROBLEM?
- 7 A. YES. HE TOLD ME THAT HE HAS A PROBLEM.
- 8 Q. AND THAT HE HAD KILLED SOMEONE, IS THAT CORRECT?
- 9 A. YES.
- 10 Q. DID HE HAVE A WEAPON WITH HIM?
- 11 A. YES.
- 12 Q. WHAT DID HE HAVE?
- 13 A. HE SAID THAT HE HAD A PISTOL. I DON'T KNOW WHAT BRAND
- 14 NAME IS, BUT HE HAD A PISTOL.
- 15 Q. DID HE TELL YOU WHERE HE GOT THE PISTOL?
- 16 A. HE SAID THAT HE HAD TAKEN IT FROM SOMEBODY ELSE, THAT
- 17 SOMEBODY ELSE HAD -- HE HAD BORROWED IT, THE PISTOL FROM
- 18 THAT PERSON.
- 19 Q. DID HE SAY HE WAS CARRYING THIS PISTOL ON THIS EVENING?
- 20 DID THE DEFENDANT SAY HE WAS CARRYING THE PISTOL THIS
- 21 EVENING?
- 22 A. HE'S ASKING AT THE TIME WHEN THE THINGS HAPPENED?
- 23 Q. YES.
- 24 A. JUST TO REPHRASE THE QUESTION, HE'S ASKING.
- 25 Q. OKAY. WHEN THE DEFENDANT TOLD YOU HE HAD KILLED

1 SOMEONE DID HE SAY HE HAD THE PISTOL THAT BELONGED TO
2 SOMEONE ELSE?

3 A. HE DIDN'T -- ACTUALLY DIDN'T TELL ME THAT, BUT IT WAS
4 HIS MOM WHO TOLD ME THAT THE PISTOL BELONGED TO SOMEBODY
5 ELSE.

6 Q. AND THAT HE HAD GOTTEN THE PISTOL THE DAY BEFORE?

7 A. YES.

8 Q. DID HE SAY HOW IT WAS THAT HE CAME TO KILL SOMEONE?

9 A. HE SAID THAT THEY WERE WRESTLING WITH SOMEBODY ELSE,
10 AND THAT THE WEAPON WAS LOADED, AND THAT THE WEAPON JUST
11 WENT OFF BY ITSELF. THAT THE SHOT DIDN'T HIT THE PERSON
12 THAT HE WAS WRESTLING WITH, BUT IT HIT SOMEBODY ELSE THAT
13 WAS WATCHING.

14 Q. DID HE SAY THAT HE KNEW THE PERSON THAT GOT SHOT?

15 A. NO, HE DIDN'T SAY THAT HE KNEW THAT PERSON.

16 Q. HOW WAS HE ACTING THAT NIGHT?

17 A. HE LOOKED LIKE SAD FOR WHAT HAD HAPPENED.

18 Q. NERVOUS OR WORRIED?

19 A. HE WAS NERVOUS.

20 Q. WHEN HE TOLD YOU WHAT HAPPENED WHAT DID YOU SAY?

21 A. I INVESTIGATED ON THE PHONE. I CALLED SOMEBODY TO ASK
22 WHAT -- HOW THE THINGS HAD HAPPENED. AND THE PERSON TOLD ME
23 THAT HE DIDN'T KNOW.

24 Q. DID YOU ASK HIM TO LEAVE THE GUN THAT NIGHT?

25 A. YES.

- 1 Q. WHEN -- DID HE LEAVE THE GUN WITH YOU?
- 2 A. NO, HE DIDN'T.
- 3 Q. DID HE TAKE IT WITH HIM?
- 4 A. YES.
- 5 Q. HOW LONG WAS HE AT YOUR HOUSE AT THIS TIME?
- 6 A. IT WAS AROUND THIRTY, FORTY MINUTES THERE AT THEIR
- 7 HOUSE.
- 8 Q. AND DO YOU KNOW WHERE HE WENT WHEN HE LEFT?
- 9 A. HE LEFT WITH HIS MOM AND HIS -- THE HUSBAND OF HIS MOM.
- 10 AND THEY LEFT THEN. I DON'T KNOW WHERE THEY LEFT -- WHERE
- 11 THEY WENT.
- 12 Q. DO YOU HAPPEN TO REMEMBER WHAT MARLON WAS WEARING WHEN
- 13 HE SHOWED UP THIS NIGHT?
- 14 A. NO, I DON'T REMEMBER. I KNEW THAT HE WAS WEARING SOME
- 15 BLUE JEANS, BUT I DON'T REMEMBER THE SHIRT THAT HE WAS
- 16 WEARING.
- 17 Q. AT THE TIME DID THE DEFENDANT LIVE CLOSE TO WHERE YOU
- 18 LIVED?
- 19 A. LIKE AROUND TEN MINUTES DRIVE, A DRIVE OF TEN MINUTES.
- 20 Q. HOW ABOUT A BAR CALLED MEXICALI? HOW FAR WOULD THAT BE
- 21 FROM WHERE YOU LIVE?
- 22 A. LIKE AROUND SEVEN MINUTES DRIVE.
- 23 Q. WHEN THE DEFENDANT WAS LEAVING DID HE SAY ANYTHING TO
- 24 YOU, ANYTHING ELSE?
- 25 A. I'M SORRY?

- 1 Q. ANYTHING ELSE OTHER THAN WHAT HE'S TOLD US?
- 2 A. NO, HE DIDN'T SAY ANYTHING ELSE.
- 3 Q. DID HE SAY WHERE HE MIGHT BE GOING?
- 4 A. HE SAID THAT THEY WERE JUST LEAVING AND THAT HE WAS
- 5 GOING TO CONTINUE DRINKING.
- 6 Q. WHEN THEY LEFT DID YOU CALL THE POLICE?
- 7 A. NO.
- 8 Q. ANY REASON WHY NOT?
- 9 A. HE SAID THAT HE JUST DIDN'T CALL THE POLICE.
- 10 Q. NOW AT SOME POINT DID OFFICER WES SMITH COME TO TALK TO
- 11 YOU?
- 12 A. YES.
- 13 Q. DID HE COME WITH ANOTHER DEPUTY, RAMON RIVERA?
- 14 A. YES.
- 15 Q. DID RAMON RIVERA SPEAK SPANISH?
- 16 A. YES.
- 17 Q. WERE YOU ABLE TO UNDERSTAND HIM?
- 18 A. YES.
- 19 Q. AND DID YOU HAVE ANY PROBLEM COMMUNICATING WITH RAMON?
- 20 A. NO, JUST A WORD HERE AND THERE. BUT NO, NOT REALLY
- 21 MUCH.
- 22 Q. AND DID INVESTIGATOR SMITH EVER TRY TO TALK TO YOU?
- 23 A. HE SAID THAT HE WAS WITH RAMON AND THAT ONE DAY THAT HE
- 24 WENT TO MY HOUSE.
- 25 Q. AND WHEN HE TALKED TO YOU WITH RAMON, RAMON WOULD

1 TRANSLATE FOR YOU?

2 A. YES.

3 Q. AFTER THEY TALKED TO YOU DID THEY ASK YOU ABOUT THE
4 SAME THINGS I'M ASKING YOU?

5 A. YES.

6 Q. DID THEY ASK YOU TO WRITE A STATEMENT?

7 A. YES.

8 Q. IN YOUR OWN HANDWRITING?

9 A. YES.

10 Q. IN SPANISH?

11 A. YES.

12 (WHEREUPON STATE'S EXHIBIT 2 WAS MARKED FOR
13 IDENTIFICATION)

14 Q. I'M GOING TO SHOW YOU WHAT'S BEEN MARKED STATE'S NUMBER
15 2 FOR IDENTIFICATION. IS THIS YOUR HANDWRITTEN STATEMENT?

16 A. YES.

17 Q. IF YOU WOULD TAKE A MOMENT, READ IT, MAKE SURE THAT IT
18 IS ACCURATE.

19 A. YES, IT IS.

20 Q. HAS IT BEEN CHANGED OR ANYTHING?

21 A. HE SAID THAT NOTHING HAS BEEN CHANGED.

22 Q. IN YOUR STATEMENT DID YOU SAY THE DEFENDANT TOLD YOU HE
23 HAD PROBLEMS?

24 A. I'M SORRY, SAY THAT AGAIN.

25 Q. IN HIS STATEMENT DID HE SAY THE DEFENDANT TOLD HIM HE

1 HAD PROBLEMS?

2 A. HE SAID, YES, THAT THE PROBLEM THAT HE HAD HE SAID HE
3 HAD KILLED SOMEBODY.

4 Q. AND DID HE SAY THAT -- DID THE DEFENDANT SAY PER YOUR
5 STATEMENT ---

6 A. PRIOR?

7 Q. ACCORDING TO THE STATEMENT DID THE DEFENDANT TELL HIM
8 HE HAD BEEN IN A FIGHT AND TOOK OUT THE PISTOL?

9 A. REPHRASE -- EXCUSE ME. REPHRASE THAT, BUT JUST ---

10 Q. BREAK IT DOWN?

11 A. NO, JUST ---

12 Q. SHORTER?

13 A. SHORTER, YES, SO IT WILL BE MORE ACCURATE. YES.

14 Q. ACCORDING TO THE STATEMENT DID THE DEFENDANT TELL YOU
15 THAT HE WAS FIGHTING WITH SOMEONE ELSE AND THAT HE PULLED
16 OUT THE PISTOL HE HAD BEEN CARRYING AND THAT THE PISTOL
17 BELONGED TO A MR. ANTONIO?

18 A. THAT'S WHAT HE TOLD ME.

19 Q. AND DID HE THEN TELL YOU, AS IN YOUR STATEMENT, THAT
20 THE PERSON HE WAS FIGHTING WITH GRABBED THE PISTOL FROM HIM,
21 IS THAT CORRECT?

22 A. HE SAID THAT THE GUN JUST WENT OFF.

23 Q. THAT THE GUN JUST WENT OFF?

24 A. YES.

25 Q. BUT HE HAD PULLED THE PISTOL OUT?

1. A. YES, THAT'S WHAT HE TOLD ME.

2. Q. AND THAT IT HIT SOMEONE THAT WAS JUST LOOKING?

3. A. YES, THAT'S EXACTLY WHAT HE SAID.

4. Q. THANK YOU.

5. THE COURT: MS. ROSS.

6. Q. THAT'S ALL THE QUESTIONS I HAVE.

7. CROSS EXAMINATION BY MS. ROSS:

8. Q. MR. CASTRO, NOW THAT WE'RE LOOKING AT YOUR STATEMENT,
9. LET ME JUST MAKE SURE THIS IS THE SPANISH STATEMENT THAT YOU
10. WROTE YOURSELF. NOW I THINK IT'S DURANTE.

11. A. UM-HUM (AFFIRMATIVE).

12. Q. NOW IN THAT STATEMENT YOU SAID SOMEONE GRABBED THE
13. PISTOL AND SHOT IN THAT STATEMENT.

14. A. HE TOLD ME THAT -- HE SAID THAT WHEN THEY WERE
15. WRESTLING BOTH OF THEM WERE GRABBING THE PISTOL. AND WHAT
16. HE TOLD ME IS THAT THE OTHER ONE, ONE HAD GRABBED THE PISTOL
17. AWAY FROM HIM. AND IN THAT THE SHOT WENT OFF.

18. Q. SO BASICALLY HE SAID IT WENT OFF ACCIDENTALLY WHEN THE
19. OTHER MAN GRABBED THE PISTOL AND THEY WERE FIGHTING OVER IT?

20. A. THAT'S WHAT HE TOLD ME.

21. Q. AND IN THE STATEMENT YOU GAVE BEFORE, THE STATEMENT
22. DOES SAY SOMEONE GRABBED THE PISTOL AND THEY SHOT. YOU CAN
23. SEE THAT THAT'S WHAT THAT STATEMENT SAYS.

24. A. I DON'T REMEMBER TO SAY THAT -- TO HAVE SAID THAT.

25. Q. SO YOU THINK THEY MISTRANSLATED YOUR STATEMENT?

1 A. I THINK IT COULD BE THAT THEY DIDN'T TRANSLATE WELL,
2 BUT THAT'S WHAT HE TOLD ME.

3 Q. NOW DIDN'T HE ALSO SAY SOMETHING ABOUT HE'D BEEN
4 ATTACKED? DIDN'T MARLON SAY THAT HE'D BEEN ATTACKED AND WAS
5 IN A FIGHT?

6 A. NO, HE DIDN'T TELL ME THAT.

7 Q. WASN'T HE IN A FIGHT WHEN SOMEONE GRABBED THE GUN?

8 A. THAT'S WHAT HE SAID, THAT THEY WERE FIGHTING WITH THE
9 OTHER PERSON THAT THEY WERE WRESTLING.

10 Q. ONE SECOND. AND YOU SAY THAT MARLON HAD SAID THAT HE
11 HAD GOTTEN THAT GUN THE DAY BEFORE?

12 A. YES, THE DAY BEFORE.

13 Q. AND HE STILL HAD THE GUN WITH HIM AND HE LEFT WITH THE
14 GUN, THE SAME GUN?

15 A. THAT'S WHAT HIS MOM TOLD ME.

16 Q. ONE SECOND. I'VE GOT NOTHING FURTHER.

17 THE COURT: ANYTHING ELSE?

18 MS. HODGE: YOUR HONOR, REDIRECT? I DO HAVE BRIEFLY --
19 SINCE THERE HAS BEEN A QUESTION AS TO THE TRANSLATION OF THE
20 WITNESS' OWN STATEMENT WRITTEN IN SPANISH I'D ASK THAT THE
21 INTERPRETER READ ---

22 THE COURT: ALL RIGHT.

23 MS. HODGE: --- THE STATEMENT.

24 MR. PINEROS: A FEW MONTHS BACK I HEARD SOMEBODY

25 KNOCKING ON MY DOOR. I LIVE ON 29 SULFUR SPRING ROAD. I

1 OPENED THE DOOR, AND I LOOKED AT MARLON RIVERA WITH HIS MOM
2 AND -- WITH HIS MOM, ALEJANDRA, AND HER HUSBAND -- AND HER
3 HUSBAND. THEY CAME IN AND THEY TALKED TO ME. AND MARLON
4 TOLD ME THAT HE HAD SOME PROBLEMS.

5 HE SAID THAT HE WAS IN A CLUB -- IN A CLUB AND HE WAS
6 CARRYING A PISTOL THAT BELONGED TO MR. ANTONI. AND HE SAID
7 THAT DURING A FIGHT HE GOT THAT PISTOL OUT SO THE OTHER GUY
8 GRABBED THE GUN AND THE GUN WENT OFF. AND THE SHOT HIT
9 SOMEBODY THAT WAS -- SOMEBODY THAT WAS LOOKING.

10 HE SAID THAT HE WAS GOING TO COME BACK TO THE CLUB.
11 MARLON HAD THE PISTOL WITH HIM. I TOLD HIM TO LEAVE IT
12 THERE AT THE HOUSE, BUT HE DIDN'T WANT -- HE DIDN'T WANT --
13 HE DIDN'T WANT TO -- SHE DIDN'T WANT -- THE THREE OF THEM
14 LEFT. THE THREE OF THEM WERE TOGETHER DURING THE
15 CONVERSATION THAT WE HAD.

16 MS. HODGE: THANK YOU.

17 REDIRECT EXAMINATION BY MS. HODGE:

18 Q. TO CLARIFY, THE DEFENDANT TOLD YOU HE PULLED THE PISTOL
19 WITH THE MAN HE WAS FIGHTING WITH?

20 A. WOULD YOU PLEASE REPEAT IT?

21 Q. YES. THAT HE PULLED THE PISTOL OUT AT THE PERSON HE
22 WAS FIGHTING WITH.

23 A. HE SAID THAT THEY WERE FIGHTING AND THAT THE OTHER ONE
24 WANTED TO GET IT FROM HIM.

25 Q. SO THE PERSON HE WAS FIGHTING WITH WAS TRYING TO GET

1 THE PISTOL FROM HIM?

2 A. YEAH, THAT'S WHAT HE TOLD ME.

3 Q. NO THIRD PERSON TRIED TO GET THE PISTOL FROM HIM AND
4 THE GUY HE WAS FIGHTING WITH?

5 A. NO.

6 Q. HE NEVER -- MARLON NEVER TOLD YOU OF ANOTHER PERSON
7 GETTING THE GUN AND SHOOTING?

8 MS. ROSS: OBJECTION, ASKED AND ANSWERED. AND ALSO
9 SHE'S LEADING THE WITNESS.

10 THE COURT: THAT'S ALL RIGHT. GO AHEAD.

11 A. WOULD YOU REPEAT AGAIN?

12 Q. THE DEFENDANT NEVER TOLD YOU THAT SOME THIRD PERSON,
13 SOME OTHER PERSON, TRIED TO GET THE PISTOL FROM HIM AND THE
14 GUY HE WAS FIGHTING WITH?

15 A. NO, HE NEVER SAID THAT.

16 Q. DID HE EVER TELL YOU OF ANYONE ELSE HAVING THE GUN GO
17 OFF, ANY OTHER PERSON HAVING THEIR HANDS ON THE GUN BESIDES
18 HE AND THE ONE HE WAS FIGHTING WITH?

19 A. NO, HE DIDN'T TELL ME ANYTHING.

20 Q. AND IS YOUR COUSIN PRESENT IN THE COURTROOM TODAY?

21 A. WHAT COUSIN?

22 Q. MARLON RIVERA?

23 A. YES.

24 Q. AND WHERE IS HE?

25 A. HE'S THERE.

1 MS. HODGE: THANK YOU. THE RECORD WILL REFLECT HE'S
2 IDENTIFIED THE DEFENDANT.

3 THE COURT: ALL RIGHT.

4 MS. HODGE: THANK YOU.

5 THE COURT: ANYTHING ELSE, MS. ROSS?

6 MS. ROSS: YES.

7 RECROSS EXAMINATION BY MS. ROSS:

8 Q. MR. CASTRO, YOU WEREN'T THERE. YOU DIDN'T ACTUALLY
9 WITNESS THIS EVENT WITH YOUR EYES? YOU JUST ---

10 A. NO.

11 Q. THANK YOU.

12 (WHEREUPON THE CROSS EXAMINATION OF BRIAN GARRETT ON
13 MONDAY, OCTOBER 10, 2005 WAS PLAYED FOR THE JURY)

14 CROSS EXAMINATION BY MS. ROSS:

15 Q. NOW YOU TOOK A WRITTEN STATEMENT FROM MR. FERNANDEZ AT
16 THE SCENE?

17 A. CORRECT.

18 Q. AND IN THAT STATEMENT HE SAID ---

19 MS. HODGE: I'M GOING TO OBJECT TO THIS AS HEARSAY.

20 MS. ROSS: WELL, HE WAS EXCITED. HE OBVIOUSLY ---

21 THE COURT: GO AHEAD.

22 MS. HODGE: YOUR HONOR, THIS IS A TOTALLY SEPARATE
23 TIME. THIS WAS BEFORE WHEN HE WAS CALM, THEN HE CAME BACK
24 ---

25 THE COURT: I'M GOING TO ALLOW IT. GO AHEAD.

1 MS. ROSS: THANK YOU, YOUR HONOR.

2 Q. IN THAT STATEMENT HE SAYS HE SAW TWO PERSONS ARGUING
3 OVER A GUN, ONE PERSON HAD THE GUN AND THE OTHER TOOK IT
4 AWAY FROM HIM, AND THEN I HEARD TWO SHOTS, ISN'T THAT
5 CORRECT? AND I'LL SHOW IT TO YOU IF THAT HELPS.

6 A. THAT'S MY HANDWRITING. THAT'S THE STATEMENT AS I TOOK
7 IT. THAT'S CORRECT.

8 Q. AND THAT'S THE STATEMENT YOU TOOK FROM HIM AT THE TIME
9 RIGHT AFTER IT HAPPENED?

10 A. CORRECT.

11 Q. NOW YOU SAID LATER ON YOU WERE PRESENT WHEN A STATEMENT
12 WAS TAKEN FROM MR. FERNANDEZ DOWN AT THE LAW ENFORCEMENT
13 CENTER, CORRECT?

14 A. CORRECT.

15 Q. AND ISN'T IT TRUE IN THAT STATEMENT HE SAID PRETTY MUCH
16 THE SAME THING, I SAW TWO MALES ARGUING, I SAW ANOTHER MALE
17 WALKING AROUND BEHIND ONE OF THE SIDEWALKS, WALKING AROUND
18 BEHIND ---

19 MS. HODGE: YOUR HONOR, I'M GOING TO OBJECT ---

20 Q. --- THE ONES ARGUING ---

21 MS. HODGE: --- TO THIS STATEMENT AT THE LAW
22 ENFORCEMENT CENTER.

23 MS. ROSS: I THINK UNDER COMPLETENESS THEY BROUGHT IN
24 PART OF THIS STATEMENT ---

25 THE COURT: GO AHEAD.

1 MS. ROSS: --- AND I CAN GET IN THE REST OF IT.

2 THE COURT: GO AHEAD.

3 Q. I SAW ANOTHER MAN WALKING AROUND BEHIND THE ONES
4 ARGUING. IT APPEARED THAT THOSE WERE TOGETHER. THE MALES
5 WERE ALL HISPANIC, BUT HAD DARK SKIN. THEY WERE ALL AVERAGE
6 HEIGHT AND THIN. I THEN SAW THE ONE THAT HAD -- THE ONE
7 THAT WAS WALKING AROUND BEND DOWN AS IF HE WAS GRABBING
8 SOMETHING FROM HIS LEG. A MOMENT LATER I HEARD TWO SHOTS.
9 I DID NOT SEE WHICH PERSON DID THE SHOOTING, BUT I KNOW ONE
10 OF THEM DID. WAS THAT THE STATEMENT? I'LL LET YOU LOOK AT
11 IT.

12 A. IT LOOKS LIKE IT TO ME. CORRECT.

13 Q. BUT CLEARLY IN THAT STATEMENT HE SAYS, I DID NOT SEE
14 WHICH ONE OF THE TWO ARGUING AND THE ONE WALK AROUND BEHIND
15 DID THE SHOOTING, CORRECT?

16 A. THAT'S WHAT HE SAYS THERE. THAT'S WHAT THE STATEMENT
17 SAYS.

18 MS. ROSS: I HAVE NOTHING FURTHER AT THIS TIME, BUT
19 WOULD LIKE TO LEAVE OPEN TO RECALL THIS WITNESS.

20 THE COURT: OKAY. THANK YOU. PLEASE RETIRE AND
21 CONTINUE YOUR DELIBERATIONS.

22 (WHEREUPON THE JURY EXITED THE COURTROOM AT 4:23 PM)

23 MS. HODGE: YOUR HONOR, I BELIEVE MY REDIRECT
24 IMMEDIATELY AFTER THAT READS THE STATEMENT INTO THE RECORD,
25 THE ORIGINAL STATEMENT OF MR. FERNANDEZ INTO THE RECORD. I

1 DON'T KNOW IF SHE CAN LOOK FOR IT, BUT I'M PRETTY SURE I
2 READ THAT ---

3 THE COURT: CHECK IT OUT AND SEE.

4 (WHEREUPON THE REDIRECT EXAMINATION OF BRIAN GARRETT ON
5 MONDAY, OCTOBER 10, 2005 WAS PLAYED FOR THE COURT AND THE
6 ATTORNEYS FOR REVIEW)

7 THE COURT: THAT COMPLETES THE TESTIMONY.

8 MS. ROSS: AND I DON'T THINK IT WOULD MATTER, BUT WHAT
9 MR. FREEMAN WAS TELLING ME, WHEN HE WAS HEARING THE
10 INTERPRETER TRANSLATE THINGS, FOR WHAT IT'S WORTH, WHEN THE
11 SOLICITOR WAS ASKING ABOUT THE THIRD PERSON, THE ANSWER HE
12 SAID WAS I DON'T KNOW. AND THE INTERPRETER WAS SAYING, NO,
13 THERE WAS NOT A THIRD PERSON. SO WHAT OUR INTERPRETER AND
14 THE COURT INTERPRETER SAID, THERE WAS A DISCREPANCY BETWEEN
15 THOSE THINGS.

16 THE COURT: OKAY.

17 MS. ROSS: I JUST WANTED TO PUT THAT ON THE RECORD.

18 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 4:27 PM)

19 THE COURT: LADIES AND GENTLEMEN, I STOPPED IT TOO
20 FAST. THERE WAS A REDIRECT QUESTION BY THE SOLICITOR I
21 NEEDED TO PLAY FOR YOU. ALL RIGHT.

22 (WHEREUPON THE REDIRECT EXAMINATION OF BRIAN GARRETT ON
23 MONDAY, OCTOBER 10, 2005 WAS PLAYED FOR THE JURY)

24 REDIRECT EXAMINATION BY MS. HODGE:

25 Q. ON THE ORIGINAL STATEMENT THAT YOU TOOK FROM MR.

1 FERNANDEZ OUT ON THE SCENE, THE VERY FIRST TIME HE EVER
2 TALKED TO YOU, ACCORDING TO HIS STATEMENT IT SAYS, I WAS
3 ABOUT -- THE VICTIM WAS ABOUT TWENTY-FIVE FEET AWAY. AND I
4 SAW TWO PERSONS ARGUING OVER WHAT APPEARED TO BE A GUN. AND
5 ONE PERSON HAD THE GUN, AND THE OTHER PERSON TOOK IT FROM
6 HIM. AND I HEARD TWO SHOTS, IS THAT CORRECT?

7 A. THAT'S CORRECT.

8 Q. OKAY. THANK YOU.

9 THE COURT: THANK YOU. YOU CAN STEP DOWN.

10 (WHEREUPON THE PLAYBACK OF TESTIMONY ENDED)

11 THE COURT: OKAY. NOW PLEASE RETIRE AND CONTINUE WITH
12 YOUR DELIBERATIONS.

13 (WHEREUPON THE JURY EXITED THE COURTROOM AT 4:28 PM)

14 THE COURT: ALL RIGHT. WE'LL BE AT EASE. PLEASE STAY
15 CLOSE BY SO WHEN WE GET A VERDICT WE'LL BE HERE.

16 (WHEREUPON COURT WAS IN RECESS)

17 THE COURT: OKAY. BRING THEM ON.

18 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 5:28 PM)

19 THE COURT: LADIES AND GENTLEMEN, WE'RE GOING TO
20 SUSPEND FOR THE EVENING. WE'LL PICK BACK UP TOMORROW
21 MORNING AT 9:00. NOW WHEN YOU LEAVE DO NOT TALK ABOUT THIS
22 CASE AMONG YOURSELVES OR WITH ANYONE ELSE. IF ANYBODY
23 CONTACTS YOU, TRIES TO TALK TO YOU ABOUT THIS CASE, GET
24 THEIR NAMES AND ADDRESSES AND REPORT THAT TO ME.

25 AGAIN, I'LL ASK THAT YOU HAVE YOUR BADGES ON SO THAT

1 EVERYONE INVOLVED WITH THE CASE WILL KNOW THAT YOU ARE A
2 JUROR AND THEY SHOULDN'T TALK ABOUT THIS CASE IN YOUR
3 PRESENCE. SO WHEN YOU LEAVE HERE, NO MORE TALK ABOUT THIS
4 CASE.

5 AND, MR. FOREMAN, WHEN YOU GET BACK IN THE MORNING
6 START BACK. NOW IF BY CHANCE ALL TWELVE OF YOU ARE BACK
7 BEFORE NINE, THEN YOU CAN BEGIN DELIBERATING. JUST DON'T
8 START TIL ALL TWELVE OF YOU ARE BACK TOGETHER, OKAY? SEE
9 YOU BACK IN THE MORNING. THANK YOU.

10 (WHEREUPON THE JURY EXITED THE COURTROOM AT 5:29 PM)

11 THE COURT: OKAY. SEE YOU IN THE MORNING. THANK YOU.

12 MS. HODGE: YOUR HONOR, I WILL NOT BE HERE IN THE
13 MORNING. I'LL BE ON A PLANE TO SAN FRANCISCO, BUT ELIZABETH
14 TILLEY WITH OUR OFFICE WILL BE THE WARM BODY ---

15 THE COURT: OKAY.

16 MS. HODGE: --- TO SIT THERE.

17 (WHEREUPON COURT WAS IN RECESS AT 5:30 PM)

18 THURSDAY, OCTOBER 13, 2005:

19 (WHEREUPON ASSISTANT SOLICITOR MARK MOYER WAS PRESENT
20 FOR THE STATE)

21 (WHEREUPON THE JURY BEGAN DELIBERATIONS AT 9:00 AM)

22 THE COURT: THANK YOU. BE SEATED. I UNDERSTAND WE'VE
23 GOT A VERDICT. IS THERE ANYTHING BEFORE I BRING THE JURY?

24 MR. MOYER: NOT FROM THE STATE, YOUR HONOR.

25 MS. ROSS: NOTHING FROM THE DEFENSE, YOUR HONOR.

1 THE COURT: ALL RIGHT. BRING THEM ON PLEASE.

2 (WHEREUPON THE JURY ENTERED THE COURTROOM AT 1:23 PM)

3 THE COURT: MR. FOREMAN, IF YOU'VE REACHED A VERDICT
4 WOULD YOU HAND IT TO THE BAILIFF PLEASE, SIR. ALL RIGHT.
5 WOULD YOU PLEASE PUBLISH THE VERDICT.

6 MADAME CLERK: YOUR HONOR, THIS IS CASE 2004-GS-23-
7 7693, THE STATE VERSUS MARLON A. RIVERA, INDICTED FOR
8 MURDER. THE VERDICT IS GUILTY, SIGNED HARRY BATSON,
9 FOREPERSON. LADIES AND GENTLEMEN OF THE JURY, IF YOU AGREE
10 THIS IS THE VERDICT YOU REACHED IN YOUR DELIBERATION ROOM
11 PLEASE RAISE YOUR RIGHT HAND.

12 (ALL JURORS RAISED THEIR RIGHT HAND)

13 MADAME CLERK: THANK YOU.

14 THE COURT: ANYTHING FURTHER FROM THE JURY?

15 MS. ROSS: YES, YOUR HONOR. I'D ASK THAT WE POLL THE
16 JURY SPECIFICALLY TO WHETHER THEY FOUND BEYOND A REASONABLE
17 DOUBT THAT MARLON RIVERA WAS THE ACTUAL SHOOTER.

18 THE COURT: I WILL POLL THE JURY CONCERNING THEIR
19 VERDICT. OKAY. POLL THE JURY PLEASE.

20 MADAME CLERK: MR. BATSON, PLEASE STAND. DO YOU AGREE
21 THIS IS THE VERDICT YOU REACHED IN YOUR JURY ROOM?

22 MR. BATSON: I DO.

23 MADAME CLERK: THANK YOU. PLEASE BE SEATED. JENNIFER
24 MICHENFELDER, DO YOU AGREE THIS IS THE VERDICT YOU REACHED
25 IN YOUR JURY ROOM?

1 MS. MICHENFELDER: I DO.
2 THE COURT: IS IT STILL YOUR VERDICT?
3 MS. MICHENFELDER: YES.
4 THE COURT: AND IS IT STILL YOUR VERDICT?
5 MR. BATSON: IT IS.
6 THE COURT: ALL RIGHT.
7 MADAME CLERK: MR. MULLINAX, DO YOU AGREE THIS IS THE
8 VERDICT YOU REACHED IN YOUR JURY ROOM?
9 MR. MULLINAX: YES, MA'AM.
10 MADAME CLERK: IS IT STILL YOUR VERDICT NOW?
11 MR. MULLINAX: YES, MA'AM.
12 MADAME CLERK: THANK YOU. MR. BUTLER, DO YOU AGREE
13 THIS IS THE VERDICT YOU REACHED IN THE JURY ROOM?
14 MR. BUTLER: YES, MA'AM.
15 MADAME CLERK: IS IT YOUR VERDICT NOW?
16 MR. BUTLER: YES, MA'AM.
17 MADAME CLERK: THANK YOU. EVAN MINISH, SIR, DO YOU
18 BELIEVE THIS -- DO YOU AGREE THAT THIS IS THE VERDICT YOU
19 REACHED IN THE DELIBERATION ROOM?
20 MR. MINISH: YES, MA'AM.
21 MADAME CLERK: AND IS IT YOUR VERDICT NOW?
22 MR. MINISH: YES, MA'AM.
23 MADAME CLERK: THANK YOU. MR. NABORS, DO YOU AGREE
24 THIS IS THE VERDICT YOU REACHED IN YOUR DELIBERATION ROOM?
25 MR. NABORS: YES, MA'AM.

1 MADAME CLERK: IS IT YOUR VERDICT NOW?

2 MR. NABORS: YES, MA'AM.

3 MADAME CLERK: MS. GILLIAM, DO YOU AGREE THIS IS THE
4 VERDICT YOU REACHED IN THE DELIBERATION ROOM?

5 MS. GILLIAM: YES, MA'AM.

6 MADAME CLERK: IS IT YOUR VERDICT NOW?

7 MS. GILLIAM: YES, MA'AM.

8 MADAME CLERK: THANK YOU. MS. HARBAUGH, DO YOU AGREE
9 THIS IS THE VERDICT YOU REACHED IN THE DELIBERATION ROOM?

10 MS. HARBAUGH: YES, MA'AM.

11 MADAME CLERK: AND IS IT YOUR VERDICT NOW?

12 MS. HARBAUGH: YES, MA'AM.

13 MADAME CLERK: THANK YOU. ALEJANDRO CAICEDO, SIR, DO
14 YOU BELIEVE THIS IS -- DO YOU AGREE THIS IS THE VERDICT YOU
15 REACHED IN THE DELIBERATION ROOM?

16 MR. CAICEDO: YES, MA'AM.

17 MADAME CLERK: AND IS IT YOUR VERDICT NOW?

18 MR. CAICEDO: YES, IT IS.

19 MADAME CLERK: THANK YOU. MS. KOLTONSKI, DO YOU AGREE
20 THIS IS THE VERDICT YOU REACHED IN THE DELIBERATION ROOM?

21 MS. KOLTONSKI: YES, MA'AM.

22 MADAME CLERK: IS IT YOUR VERDICT NOW?

23 MS. KOLTONSKI: YES, MA'AM.

24 MADAME CLERK: THANK YOU. MR. CON, IS THIS THE VERDICT
25 YOU REACHED IN THE DELIBERATION ROOM?

1 MR. CON: YES, MA'AM.

2 MADAME CLERK: IS IT YOUR VERDICT NOW?

3 MR. CON: YES, MA'AM.

4 MADAME CLERK: THANK YOU. MS. ESCONTRIAS, DO YOU AGREE
5 THIS IS THE VERDICT YOU REACHED IN THE DELIBERATION ROOM?

6 MS. ESCONTRIAS: YES, MA'AM.

7 MADAME CLERK: IS IT YOUR VERDICT NOW?

8 MS. ESCONTRIAS: YES, MA'AM.

9 MADAME CLERK: THANK YOU.

10 THE COURT: THANK YOU, LADIES AND GENTLEMEN, FOR YOUR
11 SERVICE ON THIS CASE. AND SO FAR AS YOU'RE CONCERNED,
12 YOU'RE THROUGH FOR THE DAY. YOU DON'T HAVE TO COME BACK
13 TODAY OR TOMORROW.

14 SO I WANT TO TAKE THIS OPPORTUNITY TO THANK YOU FOR
15 COMING AND SERVING. I WANT YOU TO KNOW THAT WE ARE WELL
16 AWARE OF THE FACT THAT JURY SERVICE IS A BURDEN TO YOU. WE
17 KNOW THAT IT'S DIFFICULT FOR YOU TO TAKE TIME OFF FROM YOUR
18 JOBS AND FAMILIES AND SPEND IT WITH US ON JURY DUTY. BUT I
19 DO HOPE YOU UNDERSTAND THE IMPORTANCE OF BEING HERE THIS
20 WEEK. FOR WITHOUT YOUR PRESENCE WE SIMPLY COULD NOT GET OFF
21 FROM OUR DOCKET THE CASES THAT WE DO. IT IS A VERY
22 IMPORTANT SERVICE THAT YOU'VE PERFORMED FOR YOUR STATE AND
23 COUNTY THIS WEEK. AND I THANK YOU VERY MUCH FOR THAT
24 SERVICE.

25 NOW THE CLERK WILL MAIL A VOUCHER TO YOU FOR YOUR

1 SERVICE THIS WEEK. AND ATTACHED TO THAT VOUCHER WILL BE A
2 SLIP FOR YOU TO GIVE TO YOUR EMPLOYER IF YOU NEED THAT.
3 SHOULD YOU NEED ONE OF THOSE SLIPS TODAY THEN THE CLERK'S
4 OFFICE CAN SUPPLY YOU WITH ONE. DO I HAVE ANY MEMBER OF THE
5 PANEL WHO HAS ANY QUESTION I CAN TRY TO ANSWER FOR YOU
6 BEFORE LETTING YOU GO?

7 (NO RESPONSE)

8 THE COURT: OKAY. I'VE ENJOYED WORKING WITH YOU.
9 THANK YOU SO MUCH. YOU'RE FREE TO GO. I NEED YOU TO CHECK
10 BACK IN DOWNSTAIRS TO BE SURE THAT WE PAY YOU PROPERLY.
11 THANK YOU.

12 (WHEREUPON THE JURY EXITED THE COURTROOM AT 1:27 PM)

13 THE COURT: MS. ROSS, ANY MOTIONS?

14 MS. ROSS: YOUR HONOR, JUST A MOTION TO DIRECT THE
15 VERDICT, A MOTION OF ACQUITTAL NOT WITHSTANDING THE VERDICT,
16 MOTION FOR A NEW TRIAL. AND I'D RENEW ALL MY PRIOR MOTIONS
17 AND OBJECTIONS.

18 THE COURT: AND I WILL DENY YOUR MOTIONS.

19 MS. ROSS: THANK YOU. DOES HE HAVE TO SIGN?

20 THE COURT: NO.

21 MS. ROSS: I DIDN'T THINK SO.

22 THE COURT: ALL RIGHT. NOW I BELIEVE THE OPTIONS I
23 HAVE WITH RESPECT TO SENTENCING IS EITHER LIFE OR A
24 MANDATORY MINIMUM OF THIRTY YEARS, IS THAT CORRECT?

25 MR. MOYER: WELL, YOUR HONOR, I KNOW SOME JUDGES

1 CONSIDER THIRTY YEARS TO LIFE. AND I KNOW SENTENCES ARE
2 GIVEN OUT IN THAT RANGE. I KNOW THERE'S A DIFFERENCE OF
3 OPINION ON IT.

4 THE COURT: OKAY. MS. ROSS, ANYTHING YOU HAVE TO SAY
5 NOW?

6 MS. ROSS: YOUR HONOR, YOU'VE HEARD A LOT OF THIS. I
7 WOULD JUST ASK FOR MERCY ON YOUR BEHALF, SPECIFICALLY THE
8 MANDATORY MINIMUM ON THIS CASE. AS YOU KNOW MARLON RIVERA
9 HAS NO PRIOR CRIMINAL RECORD. THIS IS AN ABERRATION. AND I
10 DON'T THINK THIS IS A VIOLENT PERSON OR SOMEONE WHO ANYTHING
11 LIKE THIS WOULD EVER HAPPEN AGAIN WITH. SO I'D ASK FOR
12 MERCY.

13 MR. MOYER: MAY IT PLEASE ---

14 THE COURT: WAIT JUST ...

15 MS. ROSS: IT HAS BEEN DIFFICULT BECAUSE OF THE
16 INTERPRETATION PROBLEMS, A LOT OF WORD SORT OF OUT IN THE
17 COMMUNITY THAT THIS OTHER PERSON REALLY, IN FACT, WAS THE
18 SHOOTER. THAT WAS WHAT WITNESSES KEEP SAYING THAT THEY
19 HEARD. OBVIOUSLY, I RESPECT THE JURY VERDICT, BUT THAT WAS
20 WHAT WAS HEARD IN THE COMMUNITY.

21 THE COURT: MR. MOYER.

22 MR. MOYER: I BELIEVE ONE OF THE VICTIM'S RELATIVES ---

23 THE COURT: SURE. COME AROUND PLEASE.

24 MR. FREEMAN: YOUR HONOR, MY NAME IS CARLOS FREEMAN IV.

25 MS. BLANCA ROSA WROTE A STATEMENT TO READ TO THE COURT.

1 (WHEREUPON CARLOS FREEMAN IV, THE SON OF CARLOS
2 FREEMAN, IS INTERPRETING FOR MS. BLANCA GENORIO)

3 THE COURT: ALL RIGHT.

4 MR. FREEMAN: I TYPED IT UP IN ENGLISH.

5 THE COURT: AND YOU'RE GOING TO JUST READ IT TO ME?

6 MR. FREEMAN: YES, SIR.

7 THE COURT: SURE. THAT'S FINE.

8 MR. FREEMAN: YOUR HONOR, I RESPECTFULLY WOULD LIKE TO
9 INFORM YOU FINALLY JUSTICE HAS BEEN DONE IN THE CASE OF MY
10 HUSBAND, WILFRIDO SOLIS MONGE. WHILE THIS SITUATION
11 DESTROYED MY LIFE AND MY FOUR CHILDREN, WE HAVE IRREPARABLY
12 SUFFERED FOR FIFTEEN MONTHS. FOR THAT I ASK OF YOU TO GIVE
13 THE MAXIMUM SENTENCE FOR THE WRONG THAT HAS BEEN COMMITTED
14 BY MR. MARLON RIVERA. I WAIT FOR GOD AND YOURSELF TO MAKE
15 THIS POSSIBLE. THANK YOU FOR THE ATTENTION THAT YOU HAVE
16 OFFERED ME. ATTENTIONABLY, BLANCA ROSA AVILA GENORIO.

17 THE COURT: THANK YOU. MR. MOYER, ANYTHING FURTHER?

18 MR. MOYER: NOTHING FURTHER, YOUR HONOR.

19 THE COURT: MR. FREEMAN, WOULD YOU EXPLAIN TO MR.
20 RIVERA THAT HE TESTIFIED AT TRIAL, BUT AT THIS TIME HE HAS A
21 PERFECT RIGHT TO ADDRESS THE COURT CONCERNING THE SENTENCE
22 THAT I WILL IMPOSE. AND ASK HIM IF HE HAS ANYTHING HE'D
23 LIKE TO SAY BEFORE I SENTENCE HIM.

24 MR. FREEMAN: MAY I EXPLAIN THE CONCEPT?

25 THE COURT: YES, SIR.

1 (WHEREUPON MR. FREEMAN WAS TALKING WITH MR. RIVERA)

2 THE COURT: NOW BEFORE ANSWERING DO YOU NEED TO TELL
3 MS. ROSS WHAT -- JUST PRIVATELY.

4 (WHEREUPON MR. FREEMAN WAS TALKING WITH MS. ROSS AND
5 MR. RIVERA)

6 THE COURT: ALL RIGHT. MR. FREEMAN.

7 MR. FREEMAN: ALLOW ME TO GET THE ORDER STRAIGHT IN MY
8 HEAD ONE SECOND PLEASE. I ASK YOU GIVE ME THE MINIMUM. I
9 DID NOT SHOOT AT THE VICTIM, I SHOT DOWN. I UNDERSTAND THAT
10 THE JURY FOUND ME GUILTY. I WISH YOU TO GO WITH THAT WHICH
11 IS REALLY IN YOUR HEART.

12 THE COURT: OKAY. ANYTHING ELSE, SOLICITOR?

13 MR. MOYER: NO, SIR.

14 THE COURT: ANYTHING ELSE, MS. ROSS?

15 MS. ROSS: NO, YOUR HONOR.

16 THE COURT: HOW OLD IS MR. RIVERA?

17 MS. ROSS: I THINK HE'S TWENTY-FIVE.

18 MR. FREEMAN: THIRTY-ONE, WAS BORN IN 1974.

19 MS. ROSS: I'M SORRY, YOUR HONOR.

20 THE COURT: ALL RIGHT. MR. RIVERA, THE SENTENCE OF THE
21 COURT IS YOU BE COMMITTED TO THE DEPARTMENT OF CORRECTIONS
22 FOR A PERIOD OF THIRTY YEARS.

23 MS. ROSS: THANK YOU, YOUR HONOR.

24 (HEARING ENDED AT 1:38 PM)

25 (END OF REQUESTED TRANSCRIPT OF RECORD)

Voir Dire

Case No.: 2004-GS-23-7693

Date: October 10-13, 2005

Plaintiff/State: State

Judge: C. Victor Pyle, Jr.

Court/County: Greenville

Attorney: Kris Nudge

Defendant: Marlon Rivera

Attorney: Susanah Ross

Court Reporter: Susan Hudgins

Juror #	Name	Race	Sex	Strikes		Accept
				Court	Plaintiff Defendant	
177	Harry Batson	W	M			✓
118	Ronald Morgan	W	M		X	
114	Jennifer Mickenfelder	W	F			✓
121	Roy Mullinax	W	M			✓
10	Penelope Roswell	W	F		X	
19	Michael Butler	W	M			✓
56	Lisa Trajner	W	F		X	
116	Evan Minish	W	M			✓
122	Nicholas Nabors	W	M			✓
57	Philandra Gilliam	B	F			✓
104	Jane Maylin	W	F		X	
67	Sharon Greenwell	W	F		X	
119	Anne Morris	W	F		X	
75	Stephanie Ambush	W	F			✓
23	Alexandra Cicco	D	M			✓
63	Nancy Graham	W	F		X	

*For the Court column, please indicate who made the motion to strike the juror "for cause" with a "C" for Court, "P" for Plaintiff, or "D" for Defense.

Voir Dire

Case No.: 2004-GS-23-7693

Date: October 10-13, 2005

Plaintiff/State: State

Judge: C. Victor Pyle, Jr.

Court/County: Greenville

Attorney: Kris Hodge

Defendant: Marlon Rivera

Attorney: Suzannah Ross

Court Reporter: Susan Hudgins

[illegible]

*For the Court column, please indicate who made the motion to strike the juror "for cause" with a "C" for Court, "P" for Plaintiff, or "D" for Defense.

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APPLICANT'S EXHIBITS

1

Statement

23

24

1 THE COURT: Yes, ma'am.

2 MS. RATIGAN: Judge, we're going go a little bit out
3 of order than we normally would. We got appellate counsel
4 on standby in Columbia, he's going to testify over the
5 phone.

6 THE COURT: Okay.

7 MS. RATIGAN: So, we'll probably -- Jeff will
8 probably call him first. We've got a speaker phone
9 ready --

10 THE COURT: Okay.

11 MS. RATIGAN: Should be ready to go with all that.

12 THE COURT: Okay.

13 MS. RATIGAN: Your Honor, before I call the case, we
14 need to swear the interpreter.

15 THE COURT: Okay. All right.

16 (WHEREUPON, the interpreter was sworn.)

17 MS. RATIGAN: May it please the Court?

18 THE COURT: Yes, ma'am.

19 MS. RATIGAN: This is the case of Marlon Rivera vs.

20 The State of South Carolina. The docket number is

21 2011-CP-23-1209. Mr. Rivera was indicted for murder. He

22 was represented by Ms. Ross. The case was brought to

23 trial before Judge Pyle. Mr. Rivera was found guilty. On

24 October 13th, 2005 he received a 30 year sentence. An

25 appeal was filed at the Court of Appeals. Rob Dudek

1 perfected that. Court of Appeals reversed and remanded
2 the conviction in 2008. The State then filed an appeal at
3 the Supreme Court. And the Supreme Court then reversed
4 the Court of Appeals opinion in September of 2010.
5 Mr. Rivera's application is timely and The State is ready
6 to proceed. And I would note that counsel and I have
7 spoken and we're going to call appellate counsel first and
8 he will be testifying over the speaker phone.

9 THE COURT: Okay.

10 All right, Mr. Wilkes.

11 MR. WILKES: If we can get Mr. Dudek on the line.

12 THE COURT: Okay, let's do it.

13 (WHEREUPON, the following proceeding was held
14 via conference call.)

15 THE CLERK: Okay, can you hear me, Mr. Dudek?

16 MR. DUDEK: Yes, I can.

17 ROBERT DUDEK, after being duly sworn, testified
18 as follows:

19 THE CLERK: Thank you.

20 DIRECT EXAMINATION

21 BY MR. WILKES:

22 Q Bob, can you hear me okay?

23 A Yes, sir.

24 Q This is Jeff Wilkes. I'm going to ask you a few
25 questions on the appeal. Do you have the appeal briefs

ROBERT DUDEK-DIRECT BY MR. WILKES

1 with you?

2 A Yes, sir, I do.

3 Q Would you explain to the Judge the issues that were
4 taken up by the Supreme Court?

5 A Well, I won in the Court of Appeals or we won in the
6 Court of Appeals on the issue of Mr. Rivera being denied a
7 jury instruction on involuntary manslaughter. So, it was
8 the Attorney General who appealed that issue to the
9 Supreme Court on whether the Court of Appeals incorrectly
10 said the Judge erroneously failed to charge the jury on
11 involuntary manslaughter. The Supreme Court found by a
12 vote of three to two that the Court of Appeals incorrectly
13 reversed the trial Judge.

14 Q And how many issues were raised in the Court of
15 Appeals?

16 A In the Court of Appeals there were four issues
17 raised. Or actually five. Four and five were -- five
18 issues. Five was involuntary manslaughter should have
19 been instructed. And I also, you know, combined arguments
20 four and five, argued that Mr. Rivera was also entitled to
21 a jury instruction on accident given the evidence.

22 Q Okay. And of issues one, two, three and the accident
23 charge issue in five, those issues were not addressed by
24 the Court of Appeals once they found in favor on the jury
25 charge?

ROBERT DUDEK-DIRECT BY MR. WILKES

1 A That is correct.

2 Q Okay. And therefore, the Supreme Court, when it
3 reversed the one finding by the Court of Appeals, it did
4 not address issues one, two, three or half of issue five,
5 correct?

6 A That is also correct.

7 Q Now, relevant to Mr. Rivera's situation, do you think
8 that there was some strength in issues one, two, three or
9 the other half of issue five?

10 A Yes, I do.

11 Q And do you believe that had those issues been
12 preserved in a way that the Supreme Court could have
13 addressed, then that Mr. Rivera's outcome could have
14 possibly been different?

15 A Well, I certainly think issues one, two, three and
16 four were in my humble opinion all very meritorious
17 issues.

18 Q Now, I guess the ten million dollar question is,
19 was -- is there a procedure that could have been followed,
20 a petition or some sort of motion to preserve those to
21 force those issues into the jurisdiction of the Supreme
22 Court?

23 A Well, I think what should have -- in retrospect,
24 here's what should have been done. I don't want to get
25 hung up on your term in the jurisdiction of the Supreme

ROBERT DUDEK-DIRECT BY MR. WILKES

1 Court but in retrospect, and this has been done before,
2 and what I should have done is after I lost in the Supreme
3 Court, when they reversed the Court of Appeals, I should
4 have asked the Supreme Court to remand the case back to
5 the Court of Appeals to make findings and address issues
6 one through four that the Court did not address. Because
7 I won on the involuntary manslaughter instruction issue.

8 Q And not doing that, although it would have certainly
9 been unusual to have to do it, but by not doing it, that
10 is what prevented those issues from being addressed on
11 appeal?

12 A That is correct. If, you know, to the best of my
13 knowledge, if I would have asked the Supreme Court to
14 remand the matter back to the Court of Appeals to address
15 those issues, the Supreme Court would have done so. I
16 believe Rob Paycheck, out of this office, had done that on
17 a prior occasion in a similar case where he won in the
18 Court of Appeals, lost in the Supreme Court and then had a
19 remand back to the Court of Appeals to address issues that
20 previously were not addressed.

21 Q So, am I correct that those issues may still be
22 briefed and presented for appeal if this Court grants a
23 belated appeal on those issues under White v. State, I
24 think it is. Is that right?

25 A Well, White v. State is, you know, a case, I guess,

ROBERT DUDEK-DIRECT BY MR. WILKES

1 as you know which if you don't -- if you are denied your
2 direct appeal for whatever reason, your attorney doesn't
3 file one, that the Court can grant you a belated appeal
4 under White v. State where you would have your appeal just
5 like you normally would in the first instance. You know,
6 now I guess that certainly would be, again, one way that
7 it could be addressed would be by having a belated appeal
8 on those, you know, on those issues.

9 Q Let me ask you one other thing. On the issues that
10 we're talking about one, two, three and half of five, are
11 any of those issues -- or did The State raise a defense of
12 preservation from the trial court?

13 A Wow, I apologize, I really was not prepared for that
14 question. I frankly do not recall. I apologize for that.

15 Q That's okay. If there was, if there was -- if the
16 appellate brief of The State raised that, then they're
17 alleging failure of the trial counsel to make a timely
18 objection?

19 A Well, right. That would be correct. I mean, if any
20 of the issues I argued, you know, they said there was some
21 problem with trial counsel, then that could be ineffective
22 assistance of trial counsel issue. Say, you know, in
23 fairness, too, if The State had argued say that I changed
24 the argument on appeal that was different from what trial
25 counsel did at trial, you know, then it would obviously be

ROBERT DUDEK-DIRECT BY MR. WILKES

1 up to the PCR Court to decide if that was my deficiencies
2 or trial counsel. But I mean, I think if I'm
3 understanding you, the short and correct answer is that if
4 a procedural bar is raised, that an argument would not be
5 addressed or should not be addressed because of a
6 deficiency, then, you know, it's either that assuming that
7 the issues very meritorious, which I think all four of
8 these were, then that would either be trial counsel's
9 fault. Or my fault. Again, in my humble opinion.

10 Q And it is possible, I don't know if you have The
11 State's brief but I have a note that says, Issues two,
12 three and four actually were -- The State raised that
13 preservation of error issue. Does that sound possible?

14 A Well, yeah, I mean, I don't mean to be flip by saying
15 this but certainly the Attorney General's Office is never
16 seen a procedural bar they didn't want to try. So, I
17 mean, that's not unusual.

18 Q I understand.

19 MR. WILKES: Bob, I appreciate it. I think Karen
20 Ratigan is going to ask you some questions next. Thank
21 you, very much.

22 MR. DUDEK: Yes, sir.

23 MS. RATIGAN: Actually, I don't have any questions
24 for Mr. Dudek. We'd ask that he be allowed to go back to
25 his work.

1 THE COURT: Sure.

2 Mr. Dudek, have a great day, sir. Thanks for taking
3 the time.

4 MR. DUDEK: Yes, sir, thank all of you.

5 THE CLERK: Thank you.

6 MR. WILKES: Okay, if I could have just a second, I'm
7 going to figure out where I'm at since we're out of order.

8 THE COURT: Sure, I got you.

9 MR. WILKES: Judge, I know it will make no sense the
10 way I'm doing it but I'm going to go ahead and call my
11 independent witness so we can we can get rid of him and
12 get him out of here as well.

13 THE COURT: Okay. All right.

14 MR. WILKES: We call Juan Carlos to the stand.

15 THE CLERK: Mr. Carlos, please place your left hand
16 on the Bible and raise your right hand.

17 JUAN CARLOS, after being duly sworn, testified
18 as follows:

19 THE CLERK: Thank you. You may be seated. State
20 your name for the record.

21 (WHEREUPON, the following was answered through
22 the interpreter.)

23 THE WITNESS: Juan Carlos.

24 THE CLERK: Can you spell that?

25 THE WITNESS: J-U-A-N C-A-R-O-S-M-A-C-A-N-O.

1 THE CLERK: Thank you.

2 MR. WILKES: Are you ready?

3 THE COURT: Yes, sir.

4 DIRECT EXAMINATION

5 BY MR. WILKES:

6 Q Do you recall the shooting that happened in
7 Greenville that you witnessed a few years ago?

8 A Yes, about nine, years ago.

9 Q Tell me where that occurred?

10 A This occurred in Berea on Cedar Lane Road at a
11 business call La Rumba or is still called La Rumba.

12 Q And what were you doing there.

13 A I was a security guard there.

14 Q And where do you work now?

15 A I'm a painter and I repair computers.

16 Q Okay. Back when you were the security guard at that
17 establishment, tell me what happened on the evening of the
18 shooting?

19 A I was doing my job as a security man. There was a
20 lot of people in there. And then Marlon arrived. I know
21 Marlon or I knew Marlon since I started working here
22 because he use to come often to the bar. And I use to
23 tell him all the time behave, behave because I don't want
24 to have to take you out of the club.

25 Q Okay.

JUAN CAROSMACANO-DIRECT BY MR. WILKES

1 A So, we had sort of like a friendship. I remember
2 that I checked him that night as I use to always, you
3 know. And I found it. And I told him I don't want you
4 here with that, in here with that. I say go put it away
5 or go take it where you found it. Then he left.

6 Q Okay.

7 A When he came back again, he came back with another
8 person.

9 Q Okay.

10 A And then I check them both and they didn't have any
11 arms.

12 Q Okay. And did you know the other person?

13 A No, not at all.

14 Q Okay. Did they come back into the bar that night?

15 A Yes. Yes, they came into the bar.

16 Q Okay.

17 A Yeah and then once inside the bar this other guy
18 starting bothering Marlon. He was starting to trying to
19 hit him. He was trying to hit him. This was a guy that
20 was already in the bar, a Costa Rico man. And he was
21 bothering him and bothering him and bothering him. And
22 then he wanted to, you know, start fighting but the bar
23 was about to close. And then the owner told me just, you
24 know, take everybody out.

25 Q Okay. What happened after that?

JUAN CAROSMACANO-DIRECT BY MR. WILKES

1 A Everybody got out. There was a taco stand. And
2 everybody stay there at the taco stand. And I remember
3 Marlon eating some tacos. And then this person who was
4 inside the bar came to bother him and started bothering
5 him again. And then he started hitting him. Then I got
6 out and I told them, you know, you stay this guy away,
7 take him home because he's really drunk and, I mean, I
8 don't have any control over him. He continued to hit
9 Marlon. And then, when I was looking at them they were,
10 you know, struggling. Then Marlon threw the gun. He had
11 it in his shoe. But Marlon got the gun out just to scare
12 him. To scare this person. Because he wasn't going to
13 shoot him. He didn't have the courage.

14 And this person because he was so drunk, you know, he
15 continued to hitting him. And, you know, he was just
16 hitting him. And then they continued to struggle all the
17 way to the parking lot. And then, during the struggle the
18 gun fell down, he dropped the gun. Then this other guy
19 came, the one that was with Marlon. The pistol, the gun,
20 without thinking just pointed the gun and then fired the
21 gun. And hitting the drunk. He hit this other person
22 that was just a spectator.

23 Q Okay. And when you say he, the person shooting the
24 gun, it was not Marlon?

25 A No. No, Marlon -- no, not at all. During the

JUAN CAROSMACANO-DIRECT BY MR. WILKES

1 struggle Marlon lost the gun and he fell down on the
2 floor. And this other person that was with him, he was
3 the one that took the gun. He was trying to defend
4 Marlon.

5 Q Okay.

6 A And he was pointing the gun at this other person but
7 he didn't, you know, hit him, he hit the other person,
8 this other person.

9 Q And the person that was hit, that person wasn't
10 involved in the fight in any way, was he?

11 A No, he was just, you know, being there observing, a
12 spectator.

13 Q What happened after that?

14 A Yeah, when we saw this person fall down, everybody
15 start, you know, leaving. All the other people started to
16 run, this other person. I left the place. I saw when the
17 police came.

18 Q Did the police ever talk to you?

19 A No, not at all. They didn't. No, not that night,
20 not the next day, not the next week, not the next month,
21 they didn't talk to me at all.

22 Q Okay.

23 MR. WILKES: Very good. That's all the questions we
24 have, Your Honor.

25 THE COURT: Cross-examination.

JUAN CAROSMACANO-DIRECT BY MR. WILKES

1 MS. RATIGAN: Thank you.

2 CROSS-EXAMINATION

3 BY MS. RATIGAN:

4 Q So, you were friends with Marlon Rivera before this
5 happened?

6 A Marlon like an acquaintance because he use to come to
7 the bar often. And, you know, we sort of like a friendly,
8 you know, relationship. And I always use to tell him, you
9 know, behave, behave, you know, behave.

10 Q And the bar, was that the Mexicali?

11 A No, La Rumba. La Rumba.

12 Q Was Mr. La Strada your boss?

13 A No.

14 Q Okay.

15 A Pepe. No, Pepe was the owner. I knew him by Pepe.

16 I don't know what his real name is. But he was the one
17 that hired me, a Cuban guy.

18 Q Did you ever see Marlon fire the gun?

19 A No. No, he didn't fire the gun.

20 Q Okay. He didn't even shoot it into the ground?

21 A No, not at all. No, he didn't have the courage to do
22 that. He just wanted to scare this other person. But
23 since this person was so drunk he didn't even, you know,
24 really get scare or anything.

25 Q And the police never took your statement?

JUAN CAROSMACANO-CROSS BY MS. RATIGAN

1 A No, not at all. I stay there for one more month
2 working and then I got another job and that's when I left.

3 Q Did you ever call the police and tell them that you
4 saw the shooting?

5 A No, no. No, I didn't call the police.

6 MS. RATIGAN: That's all I have, Your Honor.

7 THE COURT: Redirect, sir?

8 MR. WILKES: We're done, thank you.

9 THE COURT: Thank you. I appreciate it.

10 MR. WILKES: May he be excused, Your Honor? Can he
11 be excused?

12 THE COURT: Sure, absolutely.

13 MR. WILKES: Thank you, I appreciate it.

14 Your Honor, we call Ms. Ross to the stand.

15 THE CLERK: Ms. Ross, place your left hand on the
16 Bible, raise your right hand.

17 SUSANNAH ROSS, after being duly sworn, testified
18 as follows:

19 THE CLERK: Please be seated. State your full name
20 for the record.

21 THE WITNESS: Susannah Corners Ross.

22 DIRECT EXAMINATION

23 BY MR. WILKES:

24 Q Ms. Ross, did you represent Mr. Rivera?

25 A Yes.

SUSANNAH ROSS-DIRECT BY MR. WILKES

1 Q And I'll just go straight to the issues if that's
2 okay. The most important, I guess, explain what happened
3 with Carlos Freeman, Ms. Corleft, the whole sequestration
4 thing and how we lost that testimony.

5 A Okay. And that's particularly rich in light of the
6 Supreme Court opinion where they suggested there wasn't
7 much testimony supporting Mr. Rivera's side of the story.
8 I can hand it up, Carlos Freeman introduced himself to our
9 office, volunteered to do work. He wanted to work with
10 the Hispanic community in Greenville and help them out.
11 That being said, I was happy to have him work because I
12 speak no Spanish and my client spoke no English or very
13 little at that time being from Honduras.

14 Mr. Rivera went and got a number of witnesses. And I
15 just looked at the list, I would say at least 12. Not all
16 who saw the thing, the event, but five who did, I believe,
17 somewhere around that number. And I made the decision to
18 provide those witnesses to The State in hopes to have them
19 dismiss the charges or reduce the charges. And that goes
20 to a no good deed goes unpunished. And I learned not to
21 do that again. But I provided the witnesses addresses,
22 statements, their information to The State in hopes that
23 they would not pursue the murder trial. They did and at
24 that point I lost a number of the witnesses that I had.
25 Had decided to change their story and they were not going

SUSANNAH ROSS-DIRECT BY MR. WILKES

1 to come forward. Some still did. And I think I had four,
2 three or four during the trial.

3 This one woman gave a voluntarily statement saying I
4 am Yalmeth Corlaes [ph], I made my myself present at the
5 court on 10/5. I arrived at that place. I asked a man if
6 this was the trial of Marlon and he told me to wait in the
7 smaller room. Afterwards, I went to the hallway. The
8 other witness arrived and we were outside when a lady went
9 by and asked whether this was the trial of Marlon. And
10 she told us to go in and enter. The lady opened the door
11 for us and then she went in and seated herself on the
12 right-hand side, in the part that was further in front of
13 the public near where the Solicitor was.

14 Sometime later Juan Carlos come and told me I had to
15 wait outside until they called me because I was a witness.
16 The lady had told us that we could go in. I believe that
17 the she wore a gray suit and had hair that was short and
18 was kind of white in color.

19 That lady was Diane Coler, the investigator on the
20 case, the Solicitor's investigator. Told my witness to
21 come in the courtroom and then stood up and objected to
22 her testimony. Or then whispered into Kris Hodge's ear
23 who then stood up and objected to her testimony. So, I
24 could not put that client up. That client's statement
25 substantiated other statements that Marlon was not the

SUSANNAH ROSS-DIRECT BY MR. WILKES

1 shooter. And, in fact, there was another Flaco [ph]
2 person who was the actual shooter in this case.

3 Q So, you lost a potentially key witness because of the
4 sequestration motion?

5 A Correct. And in hindsight, it was wrong of me to
6 make the motion because I think it harmed Marlon to the
7 point where he's sitting here today. Because that other
8 witness couldn't testify based on split of the Supreme
9 Court opinion and what they said. On the other hand, I
10 usually think that I can have my witnesses waiting outside
11 court and not have The State's investigator to instruct
12 them to go sit in the courtroom when there's a
13 sequestration order.

14 Q And that was the basis of them not being able to
15 testify?

16 A Correct.

17 Q Because they did come in and sit down?

18 A Correct.

19 Q Okay. Now, the testimony of Juan Carlos, who just
20 testified, is similar to Ms. Corales in that it's
21 beneficial to Mr. Rivera?

22 A Yes.

23 Q Okay.

24 A And I thought I provided you a copy of her
25 statement--

SUSANNAH ROSS-DIRECT BY MR. WILKES

- 1 Q You did.
- 2 A But it was. . .
- 3 Q But to your knowledge, is Ms. Corleft still in this
- 4 country?
- 5 A No. I have no idea.
- 6 Q Now, do you believe that the testimony of Ms. Corleft
- 7 or of witnesses with similar testimony would have made a
- 8 difference in Mr. Rivera's case?
- 9 A Absolutely.
- 10 Q Did -- and you said that Carlos Freeman was the
- 11 investigator that was working for your office at the time?
- 12 A Yes.
- 13 Q Did Mr. Freeman indicate any knowledge of Juan Carlos
- 14 to your knowledge?
- 15 A No. And I was trying to double check with the name.
- 16 If it's, in fact, Juan Carlos, he's not in the list that I
- 17 was provided by the investigator of witnesses.
- 18 Q He's not. You won't find him, I'm sure. All right.
- 19 Let me ask you briefly about the objections or lack of
- 20 objections on the issues of appeal. If I told you that
- 21 The State had raised an issue or defense based on a claim
- 22 that you did not object timely to issues two, three and
- 23 four in the appeal, would you agree that that could be
- 24 true?
- 25 A Yes.

SUSANNAH ROSS-DIRECT BY MR. WILKES

1 Q And I think the record will speak for itself whether
2 than us trying to hunt for it now. You had made a motion
3 to quash an indictment, do you recall that?

4 A Yes.

5 Q On the time and place of death requirement, I think
6 is what. . .

7 A I'll take your word for it. It's been a while since
8 I've read through the transcript but. . .

9 Q Well, the issue being the motion to quash -- the
10 timelines on the motion to quash on the whether or not the
11 face of the Indictment is sufficient, was raised after the
12 swearing of the jury, is that correct?

13 A I'm sure it is if that's in the record.

14 Q And again, would you agree that that normally has to
15 be done before the swearing of the jury?

16 A Yes.

17 Q Okay. Now, the testimony of Yamelth Corales, I think
18 it is, was never proffered for the Court. Do you -- was
19 there any reason that the testimony was not proffered? I
20 think you had the statement. Do you have a statement?

21 A Yes.

22 Q That relates to the actual events that she said she
23 observed?

24 A Yes.

25 Q And can I look at that, make sure we got the same

SUSANNAH ROSS-DIRECT BY MR. WILKES

1 one. And that's your only copy, isn't it?

2 A I'm not sure, it might be.

3 MR. WILKES: Your Honor, can we make a copy in here
4 of that so we don't take her only copy?

5 THE COURT: Can you make a copy?

6 THE CLERK: Absolutely.

7 MS. ROSS: Well, hold on.

8 THE CLERK: Need something else?

9 MS. ROSS: Yeah.

10 Is that a copy of -- was it Yamelth Corales?

11 MR. WILKES: That's the one.

12 MS. ROSS: Okay.

13 THE CLERK: These are your documents, right? That
14 I'm copying?

15 MS. ROSS: Yes.

16 THE CLERK: Okay. Here are the copies, okay. These
17 are the originals that you gave me.

18 (WHEREUPON, Applicant's Exhibit No. 1 was marked for
19 identification only.)

20 BY MR. WILKES:

21 Q If you'll look at Applicant's Exhibit 1, is that an
22 outline of Ms. Corales' statement to your investigator?

23 A Yes.

24 Q Now, at the time of the discussion in court about the
25 suppression of that witness, there's nothing in the

SUSANNAH ROSS-DIRECT BY MR. WILKES

1 record -- would you agree that there's nothing in the
2 record to inform the Judge of what her testimony would be?

3 A I would agree if it's not in there. I know I
4 attempted to proffer some testimony. But again, I'd have
5 to read through the 400 pages to figure out where I did
6 that. I know I tried to proffer some testimony, but if I
7 didn't proffer her testimony. . . .

8 Q And that Exhibit 1, would be the outline as you
9 understand her testimony would have been?

10 A Yes.

11 Q Okay.

12 We would offer that as Applicant's Exhibit 1, Your
13 Honor.

14 THE COURT: Any objection?

15 MS. RATIGAN: May I see it, please? I have no
16 objection, Your Honor.

17 THE COURT: Okay, the same is admitted as Applicant's
18 Exhibit No. 1 . . .

19 (WHEREUPON, Applicant's Exhibit No. 1 was admitted
20 into evidence.)

21 THE WITNESS: And I'll tell you what I did. I did
22 not attempt to proffer her testimony the day that she was
23 not allowed to testify. The next day on Page 450, I put
24 in the statements and attempted to proffer what those
25 statements would have been had she been allowed to take

SUSANNAH ROSS-DIRECT BY MR. WILKES

1 the stand. Which I agree is probably untimely. So, that
2 was what my recollection was about attempting to proffer
3 the statements.

4 MR. WILKES: If I can have just one second, Your
5 Honor.

6 THE COURT: Yes, sir.

7 BY MR. WILKES:

8 Q At any time during your -- during your
9 representation, did Mr. Rivera complain of not being able
10 to understand Carlos Freeman?

11 A You know, frankly, I wouldn't know because I don't
12 speak Spanish. That was -- the whole problem with this
13 case was that I don't speak Spanish. I had an interpreter
14 who was not Honduran but I thought was understanding my
15 client. Though, how was I to know. And I attempted to
16 put that on the record since I don't speak Spanish and
17 couldn't understand my client either. I felt satisfied
18 that he understood something when we went in and discussed
19 the case. But I can't -- I'm not in his mind so I don't
20 know how the translation was going. I'll tell you Carlos
21 Freeman during the whole trial was saying that the
22 translator from the State was improperly translating what
23 witnesses were saying. And getting the wrong gist out of
24 what they were saying. Which was important in this case
25 because we have witnesses, none of whom really speak

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1 English as a first language, and are saying things that
2 you heard earlier from the stand from your witness like,
3 And then he did this and then he did this again. And you
4 don't know exactly who they're talking about. And they're
5 very easy to trip up and confuse. Which I think The State
6 did a great job in confusing those witnesses. And I am
7 certainly not surprised that Mr. Rivera didn't understand
8 everything that was going on.

9 Q But did Mr. Freeman make any statement to you that
10 Mr. Rivera was not understanding him?

11 A I don't recall that.

12 Q Okay.

13 A But it was years ago.

14 Q Do you recall the forensic expert, Dr. Taylor?

15 A Not really, no.

16 Q Do you recall anything about the forensic expert or
17 interviewing the forensic expert?

18 A Not much.

19 Q Okay. If you can, do you remember the testimony
20 about the gunshot residue? It's on page 178--

21 A That will help me out.

22 Q -- of the transcript. If you'll look at -- I think
23 you can start at 177, Line 21.

24 A All right.

25 Q Do you recall Illa, I think it is, Simmons

SUSANNAH ROSS-DIRECT BY MR. WILKES

1 testifying?

2 A I do. I don't have an independent recollection of
3 what she looks like or anything but looking at this
4 transcript I do.

5 Q But Simmons testified to the gunshot residue test?

6 A Okay.

7 Q According to the transcript.

8 A Okay.

9 Q If you'll note, she's not the one that actually did
10 the gunshot residue testing.

11 A Okay.

12 Q I think on Page 178 you might see that a forensic
13 person Stone, last name is Stone, tested the gunshot
14 residue.

15 A Uh-huh.

16 Q If -- if the person that actually did the testing on
17 the gunshot residue was not present to testify, would that
18 not have been a valid objection to raise?

19 A It certainly would have been a valid objection.

20 Q And would you--

21 A And I don't see an objection in there.

22 Q And if there is no objection -- if Simmons testified
23 basically, as to hearsay, would that not -- I mean, that
24 would be objectionable, correct?

25 A Certainly. And I should have made that objection.

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1 That was not preserved for appeal. But I'll say I
2 reviewed the transcript, I did gosh, probably a year ago
3 looking to this, and noted there were a number of
4 objections that in hindsight I certainly could have made.
5 Starting with the objections in my opening where with the
6 experience I have now, this was my first murder trial, I
7 was not happy with the interpretation situation and not
8 being able to speak to my client. Just in the beginning
9 of my opening there was four sustained objections without
10 me ever hearing a basis. It was just objection,
11 objection, objection during my opening. At this point I
12 would have the experience and wherewith all to turn to the
13 Solicitor and stop those objections by making some
14 statements such as, What's the basis, Judge? I don't know
15 what I'm being objected to. Or something to shut that
16 down a little bit. And that started something during this
17 trial which permeated throughout where the Solicitor stood
18 and made an objection without setting any basis,
19 immediately sustained and we would move on. And I, you
20 know, let that happen. And it happened in some very
21 harmful places during the trial.

22 Q Your overall impression of the trial, given what we
23 know now, do you believe that Mr. Rivera got a fair trial?

24 A No. And I wrote a letter to the Court of Appeals
25 after the trial sort of laying out if you just read the

SUSANNAH ROSS-DIRECT BY MR. WILKES

1 transcript and it's a car wreck sort of from the beginning
2 from these objections with no basis being made, all
3 sustained. An example is that we had a Jackson v. Denno
4 hearing. We wanted a Hendrick hearing on his opening
5 statement -- I mean, on his confession. And The State
6 decided that their witness was having physical therapy and
7 couldn't be there on the day of trial. So, they were
8 allowed to do the Jackson v. hearing the next day after my
9 opening statement. So, the whole opening, I'm attempting
10 to, you know, walk the line and not give up my appeal. I
11 know this confession is coming in but I can't address it
12 because I might keep it out. And it was not my intended
13 opening statement, it was a whole new one based on the
14 fact that The State was allowed to decide whether the
15 confession was going to come in after opening.
16 Then the whole trial went like that. With my
17 witnesses being prevented from testifying. I had two,
18 beyond Ms. -- get her name right, Yalmeth, there was Ulda
19 Berras who somehow was there and was prevented from
20 testifying for one reason or another. The interpretation
21 situation was a diaster with witnesses saying things,
22 being intimidated by The State, in my opinion, saying
23 things very different from what we had heard before. And,
24 I think, the jury picked up on that whole situation that
25 Mr. Rivera was not being believed. Not being trusted.

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1 And the fact that he could not speak English or understand
2 English. And despite a number of witnesses who saw this
3 event and saw someone else shoot this innocent bystander.
4 I was not allowed to present a lot of that testimony.
5 And I didn't get the jury instructions that I think I
6 deserved. Especially self-defense when there's the, you
7 know, testimony all in the record.

8 Page 418, Ms. Artez says, Maraico attacked Marlon.
9 Said, I'm going to shoot him. Page 459 there were more
10 statements about, I'm going to shoot him.

11 This fight certainly happened. And for some reason
12 that was not preserved in whatever record the Supreme
13 Court looked at because they came in saying there was
14 really nothing to support self-defense here.

15 Q Let me ask you another question on the chain of
16 custody.

17 A Okay. Sorry. I get more of a chance -- I didn't
18 really do a good job with that chain of custody issue.

19 Q Well, if you look on Page 111 on Lines one through
20 four, the testimony laying the foundation for, I guess,
21 the chain testimony and where the GSR test was prior to it
22 being tested. If you look on Page 111, if I'm correct,
23 the testimony being that it was placed on a shelf in a
24 police office. That subsequently received no objection
25 from you as far as the chain being valid. In retrospect,

SUSANNAH ROSS-DIRECT BY MR. WILKES

1 would you think that the chain may have been
2 challengeable?

3 A Yes.

4 Q If it had not be kept in a secure enough location?

5 A Certainly.

6 MR. WILKES: If I can speak to my client for just one
7 second. And what I'm doing, Your Honor, as you know, I've
8 been appointed on this late. The PCR Application is 20,
9 however many pages it is. It's a very long PCR
10 Application and I'm trying to narrow it to. . .

11 THE COURT: I understand.

12 MS. RATIGAN: Judge, can we take a quick break?

13 THE COURT: Yeah, if we can take about a five minute
14 break.

15 You continue under oath.

16 MS. ROSS: I will not violate my sequestration order
17 for sure.

18 (WHEREUPON, a short break was taken.)

19 THE COURT: Okay, you ready to proceed?

20 MR. WILKES: Thank you, Your Honor.

21 BY MR. WILKES:

22 Q Ms. Ross, do you feel strongly about that case?

23 A I do.

24 Q Did I -- is there anything that I neglected to ask
25 you about as far as Mr. Rivera's case that you feel you

SUSANNAH ROSS-DIRECT BY MR. WILKES

1 could have done differently to give him a better chance at
2 a fair trial?

3 A Well, I think what happened is that when my
4 investigator found witnesses saying that he didn't do the
5 shooting, Mr. Rivera, who based on my recollection, he had
6 fumbled with the gun and when the police told him he shot
7 someone, he thought he had. Though he had not according
8 to these witnesses. And I think the basis for the
9 confession when he found the witnesses or when we found
10 the witnesses, he was like yet another person was shooting
11 too, I just thought they were telling me that I was the
12 one who killed someone. So, at that point he was not
13 entertaining a guilty plea and I was not advising it. I
14 certainly would have advised it if I thought that Judge
15 Pyle would deny jury instructions on involuntary
16 self-defense and denying my jury instructions like he did.

17 In hindsight, that was ineffective because I
18 misinterpreted what the correct jury instructions would be
19 in the case. Looking through, I went to just mark some
20 errors when I got the transcript, it was difficult to
21 read. But during my direct examination of Mr. Rivera, I
22 noted pages -- Pages 455, Page 164, Line 19 through 24,
23 467, Lines line 11 and through 20, there were objections
24 with no basis stated over and over again during my direct.
25 I was told to move on by the Judge. I was attempting to

SUSANNAH ROSS-DIRECT BY MR. WILKES

1 elicit a response from the Defendant who I could not
2 personally coach on how to testify on the stand, I
3 couldn't personally instruction them on how to do things
4 because I could not speak their same language. So, I
5 could have done that better to ask the Judge for some
6 allowance based on the language barrier and get the
7 message across to the jury that I needed to be able to
8 fully question my witnesses. Again, I couldn't put up two
9 witnesses because of objections that, again, didn't have
10 stated basis.

11 There was something on Page 518, in the closing,
12 where I said something to the fact of They aren't giving
13 you a choice.

14 The State objected.

15 And the Judge said, Disregard that.

16 And The State objected and said, It's not my choice,
17 it's your choice, Judge.

18 And so, you know, it was told to disregard that. I
19 failed to object on Page 522, Line 16, where The State
20 commented to the jury, during their closing, about my lack
21 of Defense witnesses. Which was rich since they had
22 actually prevented me from putting up two of my witnesses
23 and my investigator. Appeal Defense knew about this and I
24 put the objection on the record on Page 533 on that. But
25 it wasn't argued. There was a lot of me objecting during

SUSANNAH ROSS-DIRECT BY MR. WILKES

1 The State's closing because I'd been assured that they
2 were not going forward under the hand of one, hand of all
3 theory. That was not part of their case. And while I was
4 objecting on Page 531, The State had had a Power Point up
5 showing the jury the definition of the hand of one, hand
6 of all theory, that was being held in front of the jury.
7 So, I was attempting to object because that was a big part
8 of my objection because the Indictment had nothing about
9 the hand of all. I was trying to keep the State in
10 following their word going by the theory that Marlon was
11 the primary actor. They stated that was going to be the
12 theory of the case. So, there were a lot of mistakes.

13 I've been work being in Public Defender's Office for
14 16, 17 years now. And Mr. Rivera is, truly looking back,
15 the one that -- [indiscernible] when I'm convinced it
16 shouldn't have. And then a year later the Castle Doctrine
17 started coming into play. Which would have had more
18 effect on this case, the right to defend himself.
19 Certainly, attitudes have changed about that situation.
20 And also, seeing the witnesses that you found that I was
21 unable to find. So, I think Mr. Rivera's not guilty of
22 murder. And I think someone made an error. If not me or
23 appeal defense, an error was made somewhere. And someone
24 should take responsibility for it.

25 MR. WILKES: Thank you.

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1 No further questions, Your Honor.

2 THE COURT: Okay.

3 Cross-examination.

4 MS. RATIGAN: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MS. RATIGAN:

7 Q Try to go through chronologically so I don't get
8 myself confused. So, you were pointed through the Public
9 Defender's Office?

10 A Yes.

11 Q And did you file discovery motions?

12 A Yes.

13 Q Did you receive those materials from The State?

14 A Yes.

15 Q What did you get as part of discovery, do you
16 remember? I mean, I don't need specifics.

17 A I got mostly incident reports that included a
18 confession. Maybe one witness statement.

19 Q Okay. Autopsy?

20 A Yes, eventually. It was originally an ABWIK.

21 Q Did you receive the SLED GSR report?

22 A Yes.

23 Q And there was a firearms report as well, do you
24 remember receiving that?

25 A Yes, I'm sure I did.

SUSANNAH ROSS-CROSS BY MS. RATIGAN

- 1 Q Did you review all those materials independently?
- 2 A Yes.
- 3 Q Did you review them with your client?
- 4 A I did with Carlos Freeman. So, it would have been
- 5 the three of us.
- 6 Q Okay. Did you also have Mr. Freeman with you when
- 7 you went to speak to Mr. Rivera?
- 8 A I can't remember.
- 9 Q Okay.
- 10 A I think so.
- 11 Q As part of your normal practice with a non-english
- 12 speaking client, do you have an interpreter to go speak
- 13 with them?
- 14 A Yes.
- 15 Q Okay. And this individual who testified this
- 16 morning, Mr. Carosmacano, do you remember his name ever
- 17 coming up?
- 18 A No. I just looked through my Carlos Freeman record
- 19 and there are a number of -- 16 people he interviewed that
- 20 I have statements from and I did not recognize that name.
- 21 Q Now, based on the discovery, Mr. Rivera called it the
- 22 Mexicali, is that correct?
- 23 A Uh-huh.
- 24 Q Do you ever recall their being anything in there
- 25 about the bar called La Rumba?

SUSANNAH ROSS-CROSS BY MS. RATIGAN

- 1 A No.
- 2 Q Okay. Did Mr. Rivera tell you his version of what
- 3 had happened that night?
- 4 A Yes.
- 5 Q Okay. As part of your discovery did you receive a
- 6 statement from Mr. Castro, that would be Mr. Rivera's
- 7 cousin?
- 8 A Yes.
- 9 Q And didn't The State say that Mr. Rivera had admitted
- 10 to shooting somebody?
- 11 A Yeah. And I'm saying that that statement -- this was
- 12 a package from March 14th, 2005 that included a number of
- 13 statements that were the product of information that I
- 14 provided to The State.
- 15 Q Okay. But Mr. Castro did say that Mr. Rivera said he
- 16 shot someone?
- 17 A Right.
- 18 Q And did Mr. Castro in his statement ever say that
- 19 Mr. Rivera ever said that anyone else had fired the gun?
- 20 Do you recall?
- 21 A I don't recall.
- 22 Q Okay. And I believe the owner of the Mexicali Bar,
- 23 Mr. Estrado, testified; does that sound accurate?
- 24 A Yes.
- 25 Q And would it be fair to say that the basis of his

SUSANNAH ROSS-CROSS BY MS. RATIGAN

1 testimony, is that your client had come to the bar, was
2 ejected because of pat down and came back later because he
3 was clean; would that be correct to say?

4 A Yes.

5 Q And was there also a witness statement from a from a
6 Mr. Hernandez, do you recall?

7 A I don't recall independently but I'll take your word
8 for it.

9 Q Mr. Hernandez in his statement identified Mr. Rivera
10 as the shooter and also later said he saw him at the
11 Mexicali, does that sound familiar?

12 A Yes -- well, I don't have an independent recollection
13 of it right now. I'm not seeing it when I'm going through
14 my files, so.

15 Q But do you recall their being, at least, a couple of
16 statements from people identifying your client as the
17 shooter?

18 A Yeah.

19 Q Okay.

20 A But I'll say that I think they're identifying the
21 client having the gun.

22 THE COURT: Hold on two seconds.

23 MS. ROSS: Let me see if I can find what you're
24 talking about.

25 THE COURT: I know y'all are all pregnant with

SUSANNAH ROSS-CROSS BY MS. RATIGAN

1 curiosity about what that was about right? Apparently in
2 some part of this building there has been a strong odor of
3 natural gas. And some of the employees of the court house
4 have existed.

5 She -- it's emanating from her?

6 MR. WILKES: She did it. She said before this
7 hearing, this is the fourth or fifth time we've done this
8 hearing, she said there will be a bomb threat, there will
9 be a fire in the building --

10 THE COURT: She jinxed it?

11 MS. RATIGAN: I jinxed us all, Judge.

12 THE COURT: Well anyway, we're going to proceed.

13 MR. WILKES: Take that risk, Your Honor.

14 THE COURT: Yeah, I was just advised of the same and
15 I just wanted to let y'all know what it was. I didn't
16 want you to think it was something more salacious than
17 that.

18 Go ahead.

19 If anybody smells it, starts getting dizzy, think
20 you're going to die, let me know.

21 BY MS. RATIGAN:

22 Q I believe I asked you about a statement that
23 Mr. Hernandez had given to Investigator Garret, does that
24 sound familiar?

25 A Yes.

SUSANNAH ROSS-CROSS BY MS. RATIGAN

- 1 Q Okay.
- 2 A It is Fernandez?
- 3 Q Yes.
- 4 A Okay.
- 5 Q And your client had given a statement, correct?
- 6 A Uh-huh.
- 7 Q Okay. And part of the statement, he admitted that he
- 8 shot the gun?
- 9 A He did. And I just point out this Fernandez
- 10 statement, and it does stay, I saw two men arguing. I
- 11 then saw the one that was walking around the -- bend down
- 12 as he was grabbing something from his leg. A moment later
- 13 I heard two shots. I didn't see which person did the
- 14 shooting but I know someone did.
- 15 And these statements were a lot of those saying that
- 16 they saw -- they were confusing.
- 17 Q Okay. And part of your client's statement was that
- 18 he was fighting, he got mad and he went and grabbed his
- 19 gun. Does that sound accurate?
- 20 A Yes.
- 21 Q And wasn't there some testimony that he had said he
- 22 put the gun in a tree and a gun was later found in a tree
- 23 at the Mexicali?
- 24 A Yes.
- 25 Q And you reviewed all of this information with your

SUSANNAH ROSS-CROSS BY MS. RATIGAN

1 client?

2 A I did. And in talking to him about the confession,
3 he talked a lot about a translation and how he was saying,
4 I shot the gun. And they would write down, I shot the
5 person. And that was an issue throughout. But there was
6 the signed statement that came in and that speaks for
7 itself.

8 Q There was a translator present when he gave his
9 confession, correct?

10 A Yeah, Puerto Rican.

11 Q And he testified at the trial, is that correct?

12 A Yes.

13 Q Okay. And there was a question earlier about
14 proffering Ms. Corales' testimony, I believe you say you
15 tried to proffer it the next day?

16 A Yeah. She left after she was told to leave and I
17 tried to get her back the next day and I could not. So, I
18 did proffer her statement.

19 Q Was that through the testimony of your -- of
20 Mr. Freeman?

21 A Yes.

22 Q Okay. Now, regarding the chain of custody issue,
23 were there any -- did you have any reason to believe that
24 there was a problem with the chain of custody?

25 A I probably should have seen it, I just didn't.

SUSANNAH ROSS-CROSS BY MS. RATIGAN

1 Q But there was no glaring link in the chain as things
2 you could have challenged, would that be fair to say?

3 A Yes.

4 Q Okay.

5 A Going back to the statements I proffered.

6 Q Uh-huh.

7 A I think The State took statements as well, so I could
8 have proffered the statement made by the state, I just
9 can't remember.

10 Q Okay. And you put up Mr. Rivera to testify in his
11 own defense?

12 A Yes.

13 Q And he testified that he dropped the gun and someone
14 named Elfaco, grabbed the gun and shot it?

15 A Yes.

16 Q But when he gave his confession, did he mention
17 anyone else shooting the gun?

18 A No. Again, when we talked about the confession, he
19 told me about the someone else, immediately. He just
20 said, They didn't ask about this. They told me to sign
21 this.

22 At the time, just personal thoughts, I think he was
23 intoxicated when it occurred. He ran to his cousin. He
24 felt responsible for having the gun. But he just signed
25 anything that was put in front of him.

SUSANNAH ROSS-CROSS BY MS. RATIGAN

1 Q And part of his testimony was that he just shot into
2 the ground a couple of times?

3 A Yeah.

4 Q And didn't he testify, though, that they were just
5 fighting, he wasn't in fear of his life?

6 A I think the solicitor got that out of him in
7 cross-examination. And I think that was part of a
8 machismo thing. I tell ya, it was -- Kris Hodge -- and I
9 was seven or eight months pregnant but she went up and
10 said, But you weren't scared for your life, were you? How
11 could you be scared for your life?

12 And I think that might have been a machismo response
13 of, Of course, not, I wouldn't be. And there was a lot of
14 other testimony where he said he was quite scared.

15 Q Were your basic --

16 THE DEPUTY: Excuse me, Your Honor. They did detect
17 a gas leak across the street and they're asking us to go
18 home. Leave for the day, please.

19 THE COURT: How much more time do you have?

20 MS. RATIGAN: Like two questions.

21 THE COURT: Okay, let's go ahead.

22 MS. RATIGAN: I'll be real quick.

23 THE COURT: No problem.

24 BY MS. RATIGAN:

25 Q So, your basic trial strategy was just that he was

SUSANNAH ROSS-CROSS BY MS. RATIGAN

1 innocent?

2 A Yes. Or that it was self-defense. I mean, it was
3 difficult giving that story because he was armed in
4 self-defense, yet someone else took the gun and actually
5 shot the person. So, it was kind of a difficult theory to
6 grab on to. It was involuntary if his bullet shot
7 ricocheted -- his theory was that his bullet had shot and
8 ricocheted and somehow hit the person or, in fact, someone
9 else did it.

10 Q So, in your opinion that wasn't mutually exclusive,
11 it was just too --

12 A They said could have happened.

13 Q Okay.

14 MS. RATIGAN: Beg the Court's indulgence. That's all
15 I have, Your Honor.

16 THE COURT: Okay, Mr. Wilkes, any additional
17 questions for this witness?

18 MR. WILKES: None, Your Honor.

19 EXAMINATION

20 BY THE COURT:

21 Q Okay, let me ask you, Ms. Ross, I know that in
22 listening to your testimony there were some things about
23 this case which were regrettable for you both personally
24 and professionally. But the question I have is, Is there
25 anything that you did that you feel, in good conscious,

SUSANNAH ROSS-EXAMINATION BY THE COURT

1 was deficient? Not within the reasonable norms of
2 professional representation?

3 A I don't think I'm the one to answer that. I feel
4 somewhere something went wrong. This person, if I didn't
5 advise him to plea, that could have well been deficient.
6 But this was -- he got convicted. And just looking at the
7 witnesses testimony, the witnesses I spoke to, that I was
8 somehow unable to get their testimony in front of that
9 jury. I think he was wrongfully convicted because those
10 witnesses weren't heard.

11 Q Okay. What do you think you could have done to make
12 that different?

13 A Well, I think with more experience I would have stood
14 up more to Judge Pyle. I'm more familiar with him now and
15 would simply had laid a better record with my objections.
16 And made it clear from the beginning, Judge, I need to put
17 this on the record, my client's not getting a fair trial,
18 made more objections to The State not giving a basis for
19 objections. And just kind of slowed the whole trial down
20 and made sure I got my witnesses in and my case in.

21 Q Okay. All right.

22 A Because that didn't happen.

23 THE COURT: Okay. I understand. Good enough.

24 All right, Mr. Wilkes, how many more witnesses do you
25 intend to put up?

SUSANNAH ROSS-EXAMINATION BY THE COURT

1 MR. WILKES: We'll rest, Your Honor.

2 THE COURT: Okay, do you intend to call any
3 witnesses?

4 MS. RATIGAN: No, Your Honor. And I would propose in
5 light of the emergency, if you want some kind of summation
6 or memo or something, I can provide that. But if you are
7 comfortable with what you have, we can just kind of leave
8 it like it is. I just don't want to feel like anyone is
9 being rushed.

10 THE COURT: I understand. And I'll leave it in your
11 respective discretion. If you want to submit anything
12 additional, I'll be happy to receive it. I've got records
13 here, I've got the -- I have the briefs, the Appellate
14 briefs. And I'm going to take a look at it. Because as I
15 sit here right now I can tell you, Honestly, I don't know
16 what I'm going to do. I'm going to look at it. I'm going
17 to read the briefs and the transcript of record. Because
18 there are some things to me that are curious. And I just
19 need to determine whether those things that strike me as
20 odd and curious, rise to the level of deficient
21 representation. Which could have potentially changed the
22 outcome of the final disposition in this case. And as I
23 sit here right now I just don't know.

24 MR. WILKES: I can give you a 30 second summation or
25 I can send it in writing in a memo.

1 THE COURT: You can give it to me here if you want
2 to.

3 MR. WILKES: I can give it to you.

4 THE COURT: All right.

5 MR. WILKES: The testimony of Mr. Dudek was that he
6 failed to preserve the four boggle issues. To the extent
7 that they also needed a contemporaneous objection that
8 wasn't given. And that would be a clear instance of error
9 by counsel. So, that those are, I think, clearly
10 something that he's entitled to, to have a belated appeal
11 on those issues that were not properly preserved at trial
12 or properly preserved during the appeal process. Just
13 because it looked like Mr. Dudek was winning on one thing,
14 he allowed the Court to fall. That, I think, is clear.
15 And the other big issue that is just seems egregious is
16 the lack of the witnesses, the exclusion of witnesses.
17 Which is just extremely harsh in any criminal case. And
18 it was due to the motion of defense counsel making a
19 sequestration motion. And unfortunately, not controlling
20 the witnesses and allowing them to come in the courtroom.
21 Even though it was The State that asked them to come in,
22 still wherever the blames lies for it, it robbed
23 Mr. Rivera of very important testimony that he was
24 entitled to have. And that is the key elements on our
25 arguments. There's a few minor ones but those are the big

1 ones.

2 THE COURT: Okay. All right. Good enough. So, this
3 is the question I have, really. And that is, Does this
4 Court have the authority, essentially, to order a belated
5 appeal on issues that were not disposed of at the Court of
6 Appeals?

7 MR. WILKES: Absolutely.

8 MS. RATIGAN: Wrong.

9 THE COURT: Well, y'all might need to give me
10 something on this.

11 MR. WILKES: Absolutely.

12 MS. RATIGAN: Judge, the issue, if the Court has
13 found ineffective assistance of trial counsel, remedy for
14 that is a new trial.

15 THE COURT: Is that right?

16 MR. WILKES: So, take it to trial.

17 MS. RATIGAN: So, I mean, if there is nothing to have
18 ineffective assistance of trial counsel, I believe the
19 case of Sadderline (ph) versus State, they recommend a new
20 trial and not a new appeal because he's already had one
21 crack at it. The recommendation is just scrap it and go
22 all the way back to the beginning.

23 THE COURT: Will you send me that cite?

24 MS. RATIGAN: Uh-huh.

25 THE COURT: Just via email, copy Mr. Wilkes on it.

1 MS. RATIGAN: Okay.

2 THE COURT: You don't have to send me anything
3 formally.

4 MS. RATIGAN: I'll probably just have maybe a have
5 page or something that I'll send you just to make sure
6 I've covered everything. But I can email you the
7 Sadderline case tonight and copy Mr. Wilkes.

8 MR. WILKES: And I'll tell you that I've argued the
9 proper remedy as much as he's entitled to a remedy.
10 Whether it's a White v. State belated appeal or a new
11 trial. Probably not as critical as he's entitled to a
12 remedy. Because it's clearly ineffective to lose those
13 issues. Thank you, Judge.

14 THE COURT: All right, let's get go home before we
15 die.

16 (WHEREUPON, the proceedings were concluded.)

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STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of Greenville)

Marlon Rivera, #311864)

Full name and prison number, if any, of applicant.)

v.)

State of South Carolina)

Name of Respondent)

APPLICATION FOR

POST-CONVICTION RELIEF

2011-CP-23- 12 09

FILED FEB 17 11:09 AM
CLERK OF COURT
J. WICKENS
GREENVILLE CO. SC

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. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant 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.

1. Place of detention Perry Correctional Institution; 430 Oaklawn Road, Pelzer,
S.C. 29669

2. Name and location of Court which imposed sentence Greenville County General Sessions
Court; Greenville, S.C. 29601

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed;

(a) 04-GS-23-7693 Murder (16-3-10)

(b) _____

(c) _____

4. The date upon which sentence was imposed and the terms of the sentence:

(a) October 13, 2005 30yrs. Sentence

(b) _____

(c) _____

5. Check whether a finding of guilty was made
- (a) after a plea of guilty _____
 - (b) after a plea of not guilty ~~***~~ _____
 - (c) after a plea of nolo contendere _____
6. Did you appeal from the judgment of conviction or the imposition of sentence? Yes
7. If you answered "yes" to (6), list
- (a) the name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. South Carolina Supreme Court
 - iii. _____
 - (b) the result in each such Court to which you appealed:
 - i. Reversed and Remanded
 - ii. Petition for Rehearing is Denied
 - iii. _____
 - (c) the date of each such result:
 - i. Heard March 6, 2008 - filed March 18, 2008
 - ii. October 6, 2010
 - iii. _____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. Unpublished Opinion No. 2008-UO-187
 - ii. _____
 - iii. _____
8. If you answered "no" to (6), state your reasons for not so appealing:
- (a) _____
 - (b) _____
 - (c) _____
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) See Attached Page... and...
 - (b) "See Attached Memorandum of Law"
 - (c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) See Attached Page...and...

(b) "See Attached Memorandum of Law"

(c) _____

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law ?

"No"

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

"No"

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) "No"

(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. N/A

ii. N/A

iii. N/A

iv. N/A

(b) the name and location of the Court in which each was filed:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(c) the disposition thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(d) the date of each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

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.
- ii. See Attached Page...and...
- iii. "See Attached Memorandum of Law"

(b) the proceedings in which each ground was raised:

- i. Direct Appeal
- ii. See Whiteside v. Cherokee County School
- iii. Dist. No. One, 311 S.C. 335,340, 428 S.E.2d 886 (1993)

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) See Attached Page...and...
- (b) "See Attached Memorandum of Law"
- (c)

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea?
- (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 application with respect to this conviction, which you filed? No

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. Ms. Susannah Ross, Esq. (Preliminary Hearing & Trial)
- ii. Greenville County Public Defender's Office
- iii. Mr. Robert M. Dudek, Esq. (Appeal & Petition for Rehearing)
S.C. Division of Appellate Defense; S.C. Supreme Court

(b) the proceedings at which each such attorney represented you:

- i. Preliminary Hearing & Trial
- ii. Appeal & Petition for Rehearing
- iii.

18. State clearly the relief you seek in filing this application.

Vacate Sentence/ and or Grant a New Trial

19. Are you now under sentence from any other court that you have not challenged?

"No"

STATE OF SOUTH CAROLINA)
)
COUNTY OF Greenville)

VERIFICATION

I, Marlon Rivera, 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.

MARLON RIVERA

* Sworn to and subscribed before me
This 14th day of February, 2011.

[Signature] L.S.
Notary Public for South Carolina

My Commission Expires May 12th, 2014

APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Marlon Rivera, #311864, 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 proceeding or give security therefor.

MARLON RIVERA

Applicant

* Sworn to and subscribed before me
This 14th day of February, 2011.

[Signature] L.S.
Notary Public for South Carolina

My Commission Expires May 12th, 2014

(9) State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (A) Ineffective Assistance of Trial Counsel.
- (B) Ineffective Assistance of Appellate Counsel.
- (C) Prosecutor Misconduct.
- (D) The trial court erred when it erroneously charged the jury, that it may infer malice from the use of a deadly weapon.
- (E) The State failed to establish a complete chain of custody, in regards to forensic and other evidence, in violation of Rule 6, SCRCrimP.
- (F) The Judge erred by admitting Applicant's inculpatory statement to the police where it was undisputed that he could not read or write Spanish or English.
- (G) The Judge erred by admitting hearsay testimony of Investigator Wesley Smith, that was very prejudicial to the Applicant, in front of the jury.
- (H) The Court abused his discretion by ruling Interpreter and defense Investigator, Carlos Freeman could not testify as a defense witness.

(10) State concisely and in the same order the facts which support each of the grounds set out in (9). "See Attached Memorandum of Law".

(14) If you answered "yes" to (13) identify:

- (A) (1)(F) The Judge erred by admitting Applicant's inculpatory statement to the police where it was undisputed that he could not read or write Spanish or English.
- (2)(G) The Judge erred by admitting hearsay testimony of Investigator Wesley Smith, that was very prejudicial to the Applicant, in front of the jury.
- (3)(H) The Court abused his discretion by ruling Interpreter and Defense Investigator, Carlos Freeman could not testify as a defense witness.

(B) The proceedings in which each ground was raised:

- (1) Each ground (F) (G) and (H), was raised in the Applicant's Direct Appeal. See State v. Marlon Rivera, Unpublished Opinion No.# 2008-UP-187, Heard March 6, 2008 - filed March 18, 2008 - Reversed and Remanded- "(On other grounds)". The South Carolina Court of Appeals, stated the remaining issues on appeal are not dispositive and need not be addressed, (F) (G) and (H). See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (Appellate Court need not address remaining issues when resolution of prior issue is dispositive).
- (2) The State of South Carolina sought a Writ of Certiorari to the South Carolina Supreme Court of Appeals. The Court of Appeals decision in State v. Rivera, Op. No. 2008-UP-187 (S.C. Ct. App. filed March 18, 2008)..... was Reversed," by the Supreme Court, Opinion No.#26877, Heard April 8, 2010 - filed

September 7, 2010.

- (3) The Applicant filed a Petition for Rehearing to the South Carolina Supreme Court. The Petition for Rehearing was denied by the Supreme Court, on October 6, 2010. However, Applicant's Direct Appeal Appeal Attorney failed to seek a review through Writ of Certiorari to the United States Supreme Court!!!!

"MEMORANDUM OF LAW"

- (10) State concisely and in the same order the facts which support each of the grounds set out in (9):

Ground- (A) The Applicant asserts that he was denied his rights to Effective Assistance of Counsel. In violation of the Sixth (6th) Amendment of the United States Constitution; and Article 1, Sec. 14, of the South Carolina Constitution when trial Counsel:

(1) On October 10, 2005, after the jury had been sworn in trial counsel made a Motion to Quash the Indictment. The motion was made in reference to the 90 days requirement under Rule 3(c) South Carolina Rule of Criminal Procedure; and defects in the body of the indictment. Trial Counsel Motion to Quash the Indictment after the Jury had been sworn in. Clearly violated the statutory requirements of South Carolina Code Ann. 17-19-90 (2003) ("Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer or on motion to quash such indictment before the jury shall be sworn and not afterwards"). The South Carolina Supreme Court, had ruled months prior to Applicant's trial, in State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005);... ("We now conclusively hold that if an indictment is challenged as insufficient or defective, the defendant must raise that issue before the jury is sworn and not afterwards.") (See Volume 1, trial transcript p.22, Lines 10-19; and p.23, Lines 7-25). Trial counsel's untimely Motion to Quash the indictment, was both deficient and prejudicial towards the Applicant. Whereas the indictment issue preserved for appeal, and denied him a due process violation that could have vacated his sentence and conviction on direct appeal.

(2) Trial Counsel's Motion to Sequester the Witnesses; gave the State an undue advantage against the Applicant. Although, Mr. Carlos Freeman, was qualified by the Court as the defense Interpreter throughout the entire trial Mr. Freeman's, name appeared as a witness for the defense and his testimony was very vital and essential. In regards to showing the jury numerous inconsistencies in the States evidence and witness statements. Also would have exposed the fact, that the State withheld evidence in violation of Rule

5, South Carolina Rules of Criminal Procedure. The Motion to Sequester the witnesses was ill conceived; not very well thought out; or consented to by the Applicant. Neither was it a strategic or tactical trial court strategy, because it undermined Applicant's defense. See Currier v. United States, 160 F.Supp.2d 159,166 (D. Mass. 20010); and Holloway v. Horn, 161 F.Supp.2d 452 (D. PA. 2001). Trial Counsel Motion to Sequester the witness, caused the Applicant to suffer ineffective assistance of counsel because the motion deprived him of an Eye-witness who was at the scene, on July 18, 2004. The testimony of Ms. Yamileth Corrales, was not allowed because she entered the courtroom unaware of the Motion to Sequester the Witnesses. Trial Counsel (did not inform her of the motion), did not even know who she was, or had interviewed her as a defense witness. (Please see Volume II, trial transcript p. 414, lines 17-21; and p. 415, lines 1-8 !!!). The failure to investigate or interview a very vital defense witness before the day of trial, constituted counsel's performance as being constitutionally deficient and was very prejudicial. See Balton v. Cockrell, 294 F.3d 730,734 (5th Cir. 2002); Ainsworth v. Woodford, 268 F.3d 868 (9th Cir. 2001); Rios v. Rocha, 299 F.3 796 (9th Cir. 2002); However, the Motion to Sequester the Witnesses, gave the State an undue advantage against him, as trial counsel was ill prepared and failed to properly investigate. Because two vital witnesses was not allowed to testify for the defense, that would have exposed contradictions and inconsistencies in the State's case before the jury. Under Strickland v. Washington, 466 U.S. 668 (1984), such actions are called Deficient Performance and Prejudice.

(3) Trial Counsel rendered further Ineffective Assistance of Counsel, by allowing the State to manipulate defenses requested Jackson v. Denno, Hearl after Opening Statements had been given; the trial had begun, the State had called ten (10) witnesses to testify, the second day of the Applicant's trial. Trial Counsel's deficient performance at the Jackson v. Denno Hearing reflected an illprepared attorney, that neither had researched or investigated the proper laws that should have gotten Applicant's Involuntary Inculpatory Statement suppressed. In State v. Evans, 354 S.C. 579, 582 S.E.2d 207 (2003) the trial counsel suppressed the inculpatory statement Evans eventually gave finding Evans was in custody at the time and was not given her Miranda warnings. In making the custodial determination; the court found Evans was not free to leave; considered the fact that the interrogation occurred in a back office at the police station; considered the fact that the interrogation was three hours long; and was concerned with the officers' purpose in their method of questioning. The S.C. Supreme Court held the trial Court's Order reflected that the court objectively considered the totality of the

circumstances in determining that Evans was in custody. Evans, 354 S.C. at 583-84, 5821 S.E.2d at 410.

In Jenkins v. United States, 161 F.2d 99 (May 3, 1947), to constitute an arrest, there must be an actual or constructive seizure or detention of the person, performed with the intention to effect an arrest and so understood by the person detained. See also, State Ex. rel. Sadler v. District Court, 70 Mont. 278, 225 P. 1000, 1001, 1002; 6 C.J.S. Arrest, Sec. 1b, p. 571; 4 Am. Jur. p.5, sec. 2. However, the facts surrounding Applicant's arrest at the Bar (The Mexicali), clearly violated his Miranda Rights. "The purpose of the Miranda warnings is to apprise the defendant of his constitutional privilege not to incriminate himself while in the custody of the law enforcement." Evans, 354 S.C. at 583, 582 S.E.2d at 409. Miranda requires that warnings be given to a subject after he or she has been taken into custody or deprived of his or her freedom in any significant way. Id at 583, 582 S.E.2d at 410 (citing Miranda, 384 U.S. 436, 444 (1966)). The custodial determination is not based upon the subjective views of the suspect or the interrogating officers. State v. Easler, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997). "The relevant inquiry is whether a reasonable man in the suspect's position would have understood himself to be in custody." Bradley v. State, 316 S.C. 255, 257, 449 S.E.2d 492, 493-94 (1994). As a result of trial counsel's utter lack of preparation; "counsel's performance was deficient." Counsel inexplicably abandoned case law to support Applicant's Involuntary waiver of Miranda Rights, and Inculpatory Statement that should have been suppressed. Nevertheless, counsel use a Dr. Robert Christopher Taylor, who by his own testimony spent only "30" minutes the day before the Jackson v. Denno, Hearing with the Applicant. (See Volume II, page 256, lines 6-7.). Dr. Taylor, did not conduct any psychological, mental, Intellectual Evaluations, that would have shown the court Applicant was Illiterate, and did not understand what was taken place while in the custody of law enforcement.

On July 18, 2004, the Applicant should have been given his Miranda Rights, in the Mexicali Bar. When he was placed under arrest by Investigator Garrett placed in the back seat of his patrol car and handcuffed behind his back. Under oath, Investigator Garrett, admitted he did not advise Applicant of his Miranda Rights." (See Volume I, p. 84, lines 1-9). Counsel at trial failed to see that Investigator Garrett, committed Perjury under oath during his testimony. During direct examination by the Prosecutor, Investigator Garrett stated he did not give Applicant his Miranda Rights. Because if he was not going to question him... he will not advise him of his rights. (See the Supplemental Report of Investigator W.A. Smith, herein marked as Exhibit 1.. That shows Investigator Garrett, did question the Applicant without given

him his Miranda Rights. The Report was in counsel's possession, at the Jackson v. Denno, hearing, but counsel failed to spot the perjured testimony at trial. (See Volume I, trial transcript p.83, lines 1-24; and p. 84, line 1-12; Investigator Garrett perjured testimony.). The Applicant, was transported to the Sheriff's Department in the backseat of a patrol car, rendering him unable to return home on his own; had to wait in a back office at the Police Station; handcuffed behind his back for close to two (2) hours with Officer Will Lewis and was repeatedly interrogated by Officer Lewis. Applicant's Inculpatory Statement should have been Suppressed; and Counsel's Expert Dr. Robert Taylor, was not a well thought out Trial Court strategy. The Applicant was questioned in the back seat of a Patrol Car. In a backroom of the Police Station, by Officer Lewis while waiting close to two (2) hours, to be questioned by Investigator Smith and Officer Rivera. The United States Supreme Court ruled-"When Miranda warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." Moran v. Burbine, 475 U.S. 412, 424, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). See Oregon v. Elst 470 U.S. 298, 309 (1985). ("It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a voluntary and informed waiver is ineffective for some indeterminate period.").

The Applicant is from another Country; (Honduras), was Illiterate; a Spanis and could neither read or write English or Spanish; was verbally and physically assaulted; scared and nervous; resulted to using God, as his witness; coerced and under extreme duress. Therefore, signed and gave an Inculpatory Statement, while not knowing or understanding the nature of his Miranda Rights or the consequences of abandoning them. In Missouri v. Seibert, 540 U.S. 600, 613 (2004)- the United States Supreme Court held unconstitutional the police tactic of "question-fairly," where officers intentionally question a suspect until inculpatory information is given and then provide Miranda warnings prior to having the suspect repeat the inculpatory information. It was counsel's duty and obligation to the Applicant, to be fully prepared. Against the Prosecutor, again counsel rendered deficient and prejudicial performance, resulting in Applicant's Inculpatory Statement and waiver of Miranda Rights, being admitted into evidence!!!!

(4) Trial Counsel rendered Applicant ineffective assistance of counsel, by failing to apply for funds for a qualified; properly trained; licensed; certified; and professional investigators and expert services necessary to prepare to rebut the Prosecution expert testimony.

Also, failed to call a defense investigator to testify about numerous factual issues and witness testimony that were inconsistent with State's theory of the case or request that Applicant undergo Psychological, Mental, Social or Intellectual Evaluations.

(A) On October 10, 2005, trial counsel after the jury had been sworn and had been asked to exited the courtroom. When asked what kind of motion for the pre-trial proceedings do you have? A motion was made for a separate interpreter besides the one from the Public Defender's Office (Mr. Carlos Freeman), for the entire trial. Counsel stated, quote- ("This has certainly been the case or a main issue for me from the beginning in trying to communicate with my client, even with an interpreter. It's difficult. This is someone who is illiterate in Spanish and English, and I think he has a right to understand and know what's going on with his trial. I haven't been able to get the assurances that he truly does, because I can't directly communicate with him.")-unquote!!!! (Please see e.g. transcript of record, Volume 1, p.19, lines 13-25!!!).

"The test for competency to stand trial or continue trial is whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational understanding, as the proceedings against him." State v. Ball, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987) (citing Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed. 2d 824 (1960). The defendant bears the burden of proving his incompetence by a preponderance of the evidence. State v. Nance, 320 S.C. 501, 466 S.E.2d 349 (1996); and State v. Lee, 274 S.C. 372, 264 S.E.2d 418 (1980). See Gonzales v. Phillips, 195 F.Supp. 2d 893, 899-903 (E.D. Mich. 2001). "In light of Petitioner's inability to assist in his own defense confidence in the outcome of the trial is seriously undermined." The Court further held in the alternative that Petitioner's inability to communicate with his counsel warranted a presumption of prejudice under United States v. Cronk, 466 US. 648, 659 (1984). Trial counsel had a correlated duty to see that Applicant received effective assistance of counsel under both the sixth (6th) Amendment of the United States Constitution; and Article 1, Sec. 14, of the South Carolina Constitution. Nevertheless, by failing to request the funding for Applicant to be evaluated by Professional Mental, Social, Psychological, and Intellectual Expert Witnesses, constitutes a deficient and prejudice ineffective assistance of counsel claim. In which also violated Applicant's due process and equal protection rights under the Fourteenth (14th) Amendment of the United States Constitution; and Article 1, Sec. 3, of the South Carolina Constitution. Please see Drops v. Missouri, 420 U.S. 162 (1975).

(B) Trial Counsel rendered the Applicant ineffective assistance of counsel, that subjected him to a constitutionally deficient and prejudicial performance. Counsel had been appointed to represent Applicant, in July 2004, through the Greenville County Public Defender's Office. A Preliminary Hearing was held September 1, 2004, and Applicant's trial

However, from April 13, 2005 -thru- October 4, 2005, Greenville County Assistant Solicitor, Ms. Kris B. Hodge, just had given the discovery to counsel. In compliance with Rule 5(c) of South Carolina Rules of Criminal Procedure. Did forward Brady material, that contritions and that is inconsistent statements, by alledged witnesses. (See herein attached and marked as exhibit 2, Rule 5(c) S.C.R.Crim.P. form the Solicitor's Office, from March 14, 2005 - October 4, 2005). COounsel used as an Investigator, Mr. Carlos Freeman, who under oath during proffered testimony. Admitted that he "was not" a licensed Private Investigator or ever trained in Law Enforcement. (See Volume II, trial transcript, p. 387, lines 12-25). In Skaggs v. Parker, 235 F.2d 261, 269-270 (6th Cir. 2000), Cert. denied, 122 S.Ct. 322 (2001), "counsel ineffective for using 'Expert' who in fact had no academic training in the field of their testimony." Trial counsel, was Applicant's attorney for 15 months prior to trial, and failed to properly investigate (with a licensed or professional trianed private investigator), the States witnesses who gave conflicting statements. Applcant's Murder charge, may have been reduced to Involuntary manslaughter. See Avila v. Galaza, 297 F.3d 911 (9th Cir. 2002), cert. dismissed, 123 S.Ct. 1571 (2003), (trial counsel ineffective for failing to investigate and present available evidence). Trial counsel unexplained and unsupportable ineptness, prejudicially deficient performance also included the following: failure to attempt to interview any of the State's key forensic experts prior to cross-examining them at trial; choosing instead to prepare by reading their reports; failure to apply for funds for Expert services necessary testimony; to rebut the prosecutor's expert's testimony; and failure to call a properly trained and lincensed defense investigator to testify about numerous factual issues that were inconsistent with the State's theory of the case. Stouffer v. Reynolds, 214 F.3d 1231, 1232-1234 (10th Cir. 2000).

The trial court strategy, to use expert witness Dr. Robert Taylor, who had only met and observed Applicant "30" minutes the day before his trial. Is an ineptness and flagrant disrespect to the Applicant's Constitutional Rights under the fifth(5th), sixth(6th), and fourteenth(14th) Amendments of the United States Constitution. As well as Article 1, sec. 3 and Article 1, sec. 14, of the South Carolina Constitution. The choices counsel made was very ineffective, prejudicial, and a financial savings tactic, for the Greenville County Public Defender's Office!!!

(5) Applicant asserts that he suffered Ineffective Assistance of Counsel, when trial counsel failed to "object" to the Prosecutor's closing arguments to the jury. Ass well as trial judge's erroneous jury charge.

(A) Trial counsel may be found deficient for failing to object to trial court error. This includes, by the prosecution the making of improper arguments, Matthews v. State, 2001 WL 1887491 (S.C. Sup. Ct., decided June 17, 2002), and erroneous Jury instructions, Plyer v. State, 309 S.C. 408, 424 S.E.2d 477 (1992), (Counsel deficient for failing to object to improper charge on malice, which improperly shifted burden of proof from the State to defendant). See Sandstrom v. Montana, 442 U.S. 510, 524 (1979), (holding that burnden-shifting presumptions or conclusive presumptions 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").

(B) A Solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the juror's passions or prejudices, and its content should stay within the record and reasonable inferences to it." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). In reviewing a solicitor's closing argument, the court determine whether the comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Caldwell, 300 S.C. 494, 504, 388 S.E. 2d 816, 822 (1990). The opening statement by the Solicitor, states in part "That the victim Mr. Wilfrido Solis Monge, was minding his own business and hanging out. The Applicant was having an altercation with another man. Instead of hitting his intended victim, the person who he was fighting with. He hit Wilfrido who was standing in the wrong place at the wrong time." (See Volume 1, trial transcript, p. 34, lines 1-19). Both the State and Applicant, introduced evidence through witnesses testimonies, that the victim was an Innocent by-stander. There were evidence presented that showed the Innocent By-stander, was not an intended target for Murder, as the Applicant was indicted for. However, the State case at best, was nothing more than an accidental shooting or Involuntary Manslaughter!!!

(C) The Solicitor's statements in the Closing Argument and the trial court's erroneous jury charge;....."That Malice can be Implied by the use of a Deadly Weapon." The South Carolina Supreme Court recently held-"under our policy-making role in the common law, we hold that the 'use of a deadly weapon' implied malice instruction has no place in a murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill)." State v. Belcher, Opinion No. 26729, Heard May 14, 2009 - October 12, 2009.

One Appellate Court has described this charge as a "half-truth." Glenn v. State, 511 A.2d 1110, 1126 (Md. Ct. Spec. App. 1986). In discussing its meaning behind this observation, Glenn notes that malice includes the absence of justification, excuse, and mitigation. Glenn, 511 A.2d at 1122. When malice is viewed in light of these component parts, it becomes clear that inferring malice from the use of a deadly weapon is indeed only a "half-truth". The absence of justification, excuse, or mitigation cannot be inferred from the use of a deadly weapon alone. Other facts and evidence (or the absence of other facts and evidence) are required for the fulfillment of these component parts. See State v. Hopkins, 15 S.C. 153 (1881); State v. Leville, 34 S.C. 120, 13 S.E. 319 (1891); overruled on other grounds by State v. Torrence, 305 S.C. 45, 69 n.5, 406 S.E.2d 315, 328 n.5 (1991); and State v. Jackson 36 S.C. 487, 15 S.E. 559 (1892). 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. Sandstrom v. Montana, supra, and Mullaney v. Wilbur, supra, (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"). Errors, including erroneous jury instructions, are subject to harmless error analysis. Lowry v. State, 376 S.C. 499, 510-11, 657 S.E.2d 760 (2008). Evidence of an Accidental shooting, Involuntary Manslaughter, and Self-Defense was presented thereby highlighting the prejudice resulting from the charge.

Trial counsel's failure to object to both the Solicitor's Closing Argument and trial court's erroneous jury charge; was very prejudicial to the Applicant and caused Applicant to denied due process of law. Counsel's failure to make a contemporaneous objections to improper arguments, the matter is waived and not properly preserved for appeal. Applicant was prejudiced by counsel's deficient performance, and counsel's ineffective actions, can not be considered trial court strategy!!!!

GROUND- (B) The Applicant asserts that he was denied Effective Assistance of "Appellate Counsel", in violation of the Sixth (6th) Amendment of the United States Constitution. As well as Article 1, sec. 14, of the South Carolina Constitution.

(1) In assessing a claim of ineffective assistance of Appellate Counsel, Courts apply the Strickland Test to determine if Appellate Counsel was deficient for failing to raise an issue and whether the defendant was prejudiced from the failure to raise the issue. Smith v. Robbins, 528 U.S. 259, 288, 120 S.Ct. 746, 765, 145 L.Ed. 2d 756 (2000); Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). Additionally, in Ezell v. State, 345 S.C. 312, 548 S.E.2d 852 (2001).... "The South Carolina Supreme Court found, that the appropriate remedy for ineffective assistance of Appellate Counsel is a New Trial!!!

(2) The Applicant's Appeal resulted in the South Carolina Court of Appeals, ruling to "Reverse and Remand, his conviction." See State v. Rivera, Unpublished Opinion No. 2008-UP-187; Heard March 6, 2008- filed March 18, 2008. On Appeal the Applicant was represented by Mr. Robert M. Dudek, Deputy Chief Attorney for Capital Appeals, of the South Carolina Commission on Indigent Defense. The State filed for Writ of Certiorari to the South Carolina Supreme Court. On July 9, 2009, The Supreme Court "Granted" the State's Petition for a Writ of Certiorari, to review the Court of Appeal's decision in Applicant's APPEAL. The South Carolina Supreme Court, "Reversed", the Court of Appeals' ruling... State v. Rivera, Opinion No. 26877, Heard April 8, 2010 - filed September 7, 2010. Applicant's Petition for Rehearing was denied on October 7, 2010, by the South Carolina Supreme Court.

(3) Appellate Counsel is not required to raise every non-frivolous claim, Smith v. Robbins, Supra, but instead may select among them in order to maximize the likelihood of a favorable outcome. Applicant's appeal, became "final" the date his petition for rehearing to the South Carolina Supreme Court, was denied on October 7, 2010. However, Appellate Counsel was ineffective when he failed to spot a prejudicial issue, that denied Applicant due process of law. Both the Solicitor, in the Closing Argument and the Trial Judge, in the charge to the jury. "The evidence of the State's case was so overwhelming that the jury was bound to find the defendant guilty."

The instruction is confusing and prejudicial where evidence is presented that would reduce, mitigate, excuse, or justify the homicide. A jury charge is no place for purposeful ambiguity. See State v. Hopkins, 15 S.C. 153 (1881); State v. Levelle, 34 S.C. 120, 13 S.E. 319 (1891); and State v. Jackson, 36 S.C. 487, 15 S.E. 559 (1892)... Quoting from the South Carolina Supreme Court's new precedent ruling in State v. Belcher, Opinion No. 26729, Heard May 14, 2009 - Oct. 12, 2009!!!

(4) Generally, a party must make a contemporaneous objection to improper arguments or the objection is waived. However, our Supreme Court has held that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious, inflammatory argument results in clear prejudice." Toyota of Florence v. Lynch, 314 S.C. 368, 373, 523 S.E.2d 187, 189 (1994). An Appellant must prove both an abuse of discretion and resulting prejudice to warrant reversal. State v. Sierra, 337 S.C. 368, 373, 442 S.E.2d 187, 189 (Ct. App. 1999). In the case State v. Belcher, *supra*, the S.C. Supreme Court ruling is effective in this case, and for all cases which are pending on direct review or not yet final where the issue is presented and preserved. Applicant's case was pending on direct appeal, and did not become final until one (1) year after the ruling in State v. Belcher, *supra*. Appellate Counsel had an obligation to know or should have known that Applicant's case applied under Griffith v. Kentucky, 479 U.S. 314, 328 (1987) (holding 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). See Volume II, trial transcript p. 543, lines 23-25, p. 544, line 1, "(for the Solicitor's improper closing argument)" and Volume II, trial transcript p. 546, lines 17-25, page 547, lines 1-8,, ("for the erroneous jury charge, by the Court").

GROUND-(C) The Applicant was subjected to Prosecutor Misconduct at trial, that violated his Due Process Rights under the fourteenth (14) Amendment of the United States Constitution; and Article 1, sec. 3, of the South Carolina Constitution when:

(1) The Prosecutor's Closing Argument- "that Malice can be implied by the use of a deadly weapon," violated the United States Supreme Court's ruling - "which states that Due Process Clause of the fourteenth (14th) Amendment is violated when a jury charge creates a mandatory presumption and impermissibly shifts the burden of proof to the defendant. Sandstrom v. Montana, 442 U.S. 510, 524 (1979), (holding that "burden-shifting presumptions or conclusive presumptions deprive a defendant of the due process of law" and are therefore unconstitutional); also 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"). The South Carolina Supreme Court... addressed the Due Process Clause and unconstitutional charge on malice. Plyer v. State, 309 S.C. 408, 424 S.E.2d 477 (1992) (Improper charge on malice, which improperly shifted burden of proof from the State to defendant). By the prosecution's own admittance and theory in their case, as well as in their closing argument. Evidence of self-defense, involuntary manslaughter

manslaughter, and an accidental shooting was presented. Thereby highlighting the prejudice resulting from the charge. As in the case Lowry v. State, 376 S.C. 499, 510-11, 657 S.E.2d 760, 766 (2008), the prosecution's error cannot be considered harmless!!!

(2) The South Carolina Supreme Court ruling in Belcher v. State, reaffirms the Court's prior ruling when they stated, "we are firmly convinced that instructions to a jury 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." A jury charge is no place for purposeful ambiguity. It state further... Today we return to the rationale underlying State v. Hopkins, State v. Levelle, and State v. Jackson... and hold that where evidence is presented that would reduce, mitigate, excuse, or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon!!!

(3) In the Prosecutor's Opening Statement, the victim Mr. Wilfrido Solis Monge, was clearly portrayed as being in the wrong place at the wrong time; not the intended target; not the person Applicant was having the altercation with; and therefore eliminating a malice aforethought. (See Volume I, trial transcript p. 34, lines 12-19). No evidence was introduced by the prosecution to justify using in the closing argument that "malice may be inferred by the use of a deadly weapon." Belcher v. State, supra, State v. Hopkins, supra, State v. Levelle, supra, State v. Jackson, supra, and Plyar v. State, supra. In Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104, The Supreme Court stated, as long ago as clear that deliberate deception of a Court and jurors by the presentation of known false evidence is incompatible with "Rudimentary demand of justice." This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214 (1942). The burden-shifting tactic used by the Prosecutor in the closing argument, was unconstitutional and deprived Applicant of due process of law. Sandstrom v. Montana, supra and Mullaney v. Wilbur, supra.

(4) The Prosecutor is guilty of misconduct, by vouching for the credibility of a witness, as was done in the Applicant's case. See Volume II, trial transcript p. 530, lines 23-25, p. 531, lines 1-4. The United States prohibited the prosecutor from vouching for witness long ago. United States v. Young, 105 S.Ct. 1038 (1985); also State v. Shuler, 545 S.E.2d 805 (2001); and State v. Kelly, 540 S.E.2d 851 (2001).

GROUND-(D) The trial Court erred when it erroneously charged the jury that it may infer malice from the use of a deadly weapon. This erroneous jury charge violates the Applicant's due process rights under both the fourteenth (14th) Amendment of the United States Constitution and Article 1, sec. 3, of the South Carolina Constitution.

(1) The trial Court should have known, the law, 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. Sandstrom v. Montana, 442 U.S. 510, 524 (1979) (holding that "burden-shifting presumptions" or "conclusive presumptions" deprive a defendant of the "due

process of law" and are therefore unconstitutional); also see Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975).

(2) There were testimonies by both prosecution and defense witnesses that stated the vic (Mr. Wilfrido Solis Monge), was not an intended target, but an innocent by-stander in a crowd of people. The Applicant was having a physical altercation with someone else. In the case Belcher v. State, supra, the South Carolina Supreme Court ruled... "Under our policy-making role in the Common Law, we hold that the "use of a deadly weapon" implied malice instruction has no place in a Murder (or assault and battery with intent to kill) prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing (or the alleged assault and battery with intent to kill). State v. Hopkins, State v. Levelle, and State v. Jackson... The South Carolina Supreme Court, further said the burden shifting present in our earlier cases aside, the holding of Hopkins, and qualification set forth in Levelle, and Jackson, new more closely to what we believe is the proper application of the charge. Also see Plyer v. State, 309 S.C. 408, 424 S.E.2d 477 (1992) (Improperly charge on malice, which improperly shifted burden of proof from the State to defendant). "(See trial Court's improper charge on malice to the jury, Volume II, trial transcript p. 546, lines 17-25, and p. 547, lines 1-8)". The trial court's erroneous jury charge to the jury, constitutes an abuse of discretion and the resulting prejudice warrants a reversal. State v. Sierra, supra. The trial court's improper action, violated the Applicant's due process rights under the fourteenth (14th) Amendment of the United States Constitution; and Article 1, sec. 3, of the South Carolina Constitution.

GROUND (B) The State failed to establish a complete chain of custody. In regards to forensic and other evidence, and therefore violated the procedural requirements of Rule 6, South Carolina Rule of Criminal Procedure:

(1) The State presented Officer Diane Orlando, who work for Greenville County Forensics Division. Who respond to crime scenes, document and collect evidence. Basically preserving and packing evidence for further analysis. On July 18, 2004, Officer Orlando, was called to the crime scene. Where she collected evidence; she took photos of blood, collected blood samples, performed a gunshot residue test on the Applicant after he was arrested, and placed in the back of a patrol car. The chain of custody, was broken when Officer Orlando, placed all of the evidence in a temporary storage, on a designated shelf at her office at Law enforcement center. No one received it or signed it in.!!!

(2) This evidence stated and stayed in the temporary storage from July 18, 2004, until Officer Orlando took it to A Mr. Eddie Hucks, at Property and Evidence. Who took possession of evidence and signed it in on, July 22, 2004... four (4) days later. (See Volume I, trial transcript p. 157, lines 7)". "A party offering into evidence fungible items such as drugs, blood samples, etc., must establish a complete chain of custody as far as practicable." State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). When the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." Benton v. Pellum, 232 S.C.

26, 33-34, 100 S.E.2d 534, 537 (1957) (quoting Rodgers v. Commonwealth, 90 S.E.2d 257, 260 (VA. 1955)). The Applicant asserts the State failed to establish a complete chain of custody, when Officer Orlando, omitted a link in the chain of possession by failing to establish the identity of each custodian at least as far as practicable. State v. Governor, 362 S.C. 609, 612, 608 S.E.2d 474, 475 (Ct. App. 2005). Evidence was alleged to have been kept in a temporary storage, in an office at the Greenville County Law Enforcement Center. This is four (4) days that the collected evidence sits and could have been tainted. Therefore, the evidence should have been inadmissible, Officer Orlando's testimony that no one else could have touched said evidence, is lack of proof. See State v. Chisolm, 355 S.C. 175, 58 S.E. 2d 401 (Ct. App. 2003).

(3) Mr. Sean Franklin Collins, a criminalist in the crime laboratory, in Greenville County and also ~~XXXXXX~~ transport some types of evidence to the State laboratory. Under oath Mr. Collins testified that the evidence he picked up at property and evidence, and transported to SLED. He did not remember the name of the person who signed it out to him. (See Volume I, trial transcript p. 160, lines 1-25). Rule 6(b) SCRCrimP., states in part for the purpose of establishing a chain of physical custody or control of evidence entered under part A of his Rule, A certified or sworn statement signed by each successive person having custody of the evidence.

The evidence delivered by Mr. Collins was inadmissible because the State failed to establish a complete chain of custody. State v. Chisolm, quoting from State v. Sweet, and Benton v. Pellum. The unavailability of the clerk who signed the evidence out to Mr. Collins, made it impracticable to produce them as a witness at trial, and the State's failure to produce a sworn statement at trial violates the statutory requirements of Rule 6(B) SCRCrimP. and violated Applicant's due process rights under the fourteenth (14th) Amendment of the United States Constitution, and Article 1, sec. 3, the South Carolina Constitution. The State simply did not present proof of the chain of custody as far as practicable, and the evidence should not have been admitted at trial. See State v. Hatcher, Opinion No. 4604, Heard May 1, 2009 - filed August 5, 2009 and Raino v. Goodyear Tire & Rubber Co., 309 S.C. 255, 258, 422 S.E.2d 98, 100 (1992) (affirming trial court's suppressing of blood alcohol evidence when the identity of any party handling the blood was unknown); and State v. Cribb, 310 S.C. 518, 524, 426 S.E.2d 306, 309 (1992).

(4) The testimonies of Ms. Christine Barrickman, a forensic technician in the trace evidence department at SLED. Agent Ila Simmons, forensic laboratory trace evidence, who analyze gunshot residue, gunpowder residue, at SLED. Both failed to establish a complete chain of custody, in regards to who they received the evidence from, and clearly violated the requirement of Rule 6(B) SCRCrimP.; State v. Chisolm, supra; State v. Sweet, supra, and State v. Hatcher, supra. Agent Simmons, under oath admitted that she was not the initial analyzer of State's exhibits number 12 and 13 evidence. The person who did the analyze, was a Ms. Jennifer Stoner, who was ~~XXXX~~ on maternity leave. (See Volume II, trial transcript p. 177, lines 1-25, p. 178 lines 1-25, Agent Simmons testimony).

The state failed to get a certified or sworn statement from Ms. Jennifer Stoner, as required by Rule 6(B) SCRCrimP.; nor did the State provide who, how, or when Ms. Stoner received the evidence to make an analyzation for Agent Simmons to review her file. The State did not provide testimony from either of the intervening links in the chain, and the State did not submit the testimony of each individual who handled the evidence nor did the State comply with the Rule which allows for the admission of sworn statement in lieu of the appearance of chain of custody witnesses. State v. Chisolm, 355 S.C. 175, 584 S.E.2d 41 (S.C. App. 2003). The State failed to establish a complete chain of custody in the Applicant case. (See Applicant's Appeal Brief for remaining (3) issues).

CONCLUSION

Wherefore, the Applicant most humbly request that an the Court grant an evidentiary hearing ~~XX~~; that an attorney be appointed to him. S.C. Code Ann. & 17-27-60; and that each and every allegation be ruled upon as authorized under Padgett v. State, 324 S.C. 22, 484 S.E.2d 101 (1997); and Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992). Also, the Applicant reserves the ~~XXXX~~ right to amend under Rule 15(c) SCRCIV.P.!!!!

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Marlon Rivera,)
S.C.D.C. No. 311864,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
C.A. No. 2011-CP-23-1209

RETURN

In response to the post-conviction relief application filed February 17, 2011, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the October 2004 term of General Sessions for murder (2004-GS-23-7693). Susannah C. Ross, Esquire represented the Applicant.

After the State brought the case to trial, the Applicant was found guilty. On October 13, 2005, the Honorable C. Victor Pyle, Jr. sentenced the Applicant to thirty (30) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The Court of Appeals reversed and remanded the conviction. State v. Rivera, Op. No. 2008-UP-187 (S.C. Ct. App. filed March 18, 2008). The Respondent filed a petition for writ of certiorari at the South Carolina Supreme Court. The Supreme Court granted the petition and the parties briefed the

issues. On September 7, 2010, the Supreme Court reversed the Court of Appeals – reinstating the conviction and sentence. State v. Rivera, 389 S.C. 399, 699 S.E.2d 157 (2010).

Attached herewith and incorporated herein by reference are the records of the Greenville County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.

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 criminal 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

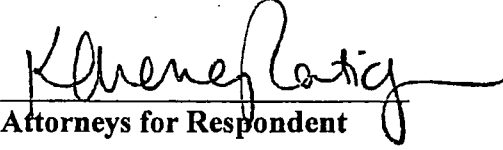
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P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

June 28, 2011

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Marlon Rivera,

Appellant.

Appeal From Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Unpublished Opinion No. 2008-UP-187
Heard March 6, 2008 – Filed March 18, 2008

REVERSED and REMANDED

Deputy Chief Attorney for Capital Appeals Robert M. Dudek, of Columbia; for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General S. Creighton Waters, all of Columbia; and Solicitor Robert M. Ariail, of Greenville, for Respondent.

PER CURIAM: Marlon Rivera appeals his murder conviction, arguing the trial judge erred in (1) admitting his statement to police, (2) admitting hearsay testimony, (3) refusing to allow an unsequestered witness to testify, and (4) failing to charge accident and involuntary manslaughter. We reverse and remand.

FACTS

This case involves the killing of Wilfredo Solis Monge. At approximately 12:30 a.m. on July 18, 2005, police officers arrived at the scene of a reported shooting in Greenville County. There were a number of people at the scene, most of whom only spoke Spanish. When police arrived, Monge was lying on the ground. After the paramedics took Monge to the hospital, detectives were called to the scene.

Police attempted to speak with witnesses at the scene and one witness informed the police the shooter was two blocks away in a nearby bar. Police accompanied the witness to the bar, where the witness subsequently identified Rivera as the person who shot Monge. Officers then placed Rivera in custody.

Officers took Rivera to the law enforcement center to be interviewed. Although Rivera does not speak English, a Spanish-speaking officer was present to inform Rivera of his rights and translate his statements. The officer explained Rivera's rights, and Rivera subsequently signed a written waiver of rights form. During the interview, Rivera gave a statement to police. The translated version of the statement indicates Rivera admitted to shooting Monge. After the interview, the Spanish-speaking officer and Investigator Smith escorted Rivera to the detention center.

At trial, the State offered evidence supporting Rivera's guilt, including Rivera's confession to police. The trial judge admitted the statement following a hearing on its admissibility. The State also offered evidence of

the statement made by Rivera while officers were escorting him to the detention center.

Additionally, the State offered the testimony of Nelson Castro, Rivera's cousin, who testified that on the night of the shooting, Rivera arrived at his residence and informed him he had killed someone. Castro further testified Rivera told him he was wrestling with someone else and the firearm "just went off by itself."

Upon taking the stand, Rivera denied shooting Monge. He also offered the testimony of several witnesses, including Carlos Freeman, who had been serving as his interpreter to corroborate the testimony of other witnesses. The trial judge refused to allow Freeman to testify because he had been in the courtroom for the entirety of the trial in violation of the sequestration order which Rivera himself requested.

After all of the evidence had been presented, Rivera requested the jury be charged on self-defense, accident, and involuntary manslaughter. The trial judge denied Rivera's request. Rivera was convicted of murder and sentenced to thirty years imprisonment. This appeal followed.

LAW/ANALYSIS

Rivera argues the trial judge erred by ruling Rivera was not entitled to a jury instruction on involuntary manslaughter. We agree.

"The law to be charged must be determined from the evidence presented at trial." State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006). "If any evidence supports a requested jury charge, the trial court should grant the request." State v. Ward, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007) (citing State v. Brown, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004)). "Due process requires that a lesser included offense be charged when the evidence warrants it but only if the evidence would permit a jury rationally to find the defendant guilty of the lesser offense." State v. Small, 307 S.C. 92, 94, 413 S.E.2d 870, 871 (Ct. App. 1992). "To warrant reversal, a trial court's refusal to give a requested

jury charge must be both erroneous and prejudicial to the defendant.” Patterson, 367 S.C. at 232, 625 S.E.2d at 245.

Rivera relies upon the testimony of Nelson Castro, a witness for the prosecution, who stated Rivera had told Castro the shooting occurred while Rivera was wrestling with another man and the gun accidentally discharged. During his testimony, Castro stated specifically: “He said that when they were wrestling both of them were grabbing the pistol. And what he told me is that the other one, one had grabbed the pistol away from him. And in that the shot went off.” This testimony is substantially different from that of Rivera himself. Rivera testified that during the fight the gun slipped inside of his pants and started falling down his pant leg until it fell out onto the ground. He then testified that both he and the assailant went after the gun, but he got it first and shot twice toward the ground in order to scare the assailant. He further stated that at that point another man whom he knew as “Skinny” grabbed the gun and shot one time in the direction of Mauricio and then gave the gun back. Once they realized someone had been hit by the gunfire they ran from the scene.

Rivera’s testimony at trial not only differs from Castro’s testimony but also differs substantially from the statement Rivera originally gave to investigating officers. Rivera’s statement to the officers admits to grabbing the weapon, pointing it at his assailant, and firing it two times. In his statement to investigators, Rivera fails to mention or identify anyone other than himself firing the weapon.

While Rivera’s testimony at trial differed from his signed statement, defense witnesses Courtney Robles and Norberto Ortiz corroborated Rivera’s trial testimony. Robles testified that a guy in a striped shirt was fighting a guy in a white shirt. Then a guy in a black shirt got the gun from the guy in the striped shirt and fired it towards the guy in the white shirt. She further stated that she could not remember specifics about these three men’s appearances other than their general characteristics and the clothes they were wearing. Ortiz, an acquaintance of Rivera, testified that Rivera only fired the weapon towards the ground and that another guy whom he did not know grabbed the weapon and fired it towards the man who had been fighting with Rivera.

Involuntary manslaughter is defined as (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. State v. Pittman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007).

While there are several inconsistent explanations for the fatal shot in this case, including the testimony by Rivera that he was not the actual shooter, Castro's testimony would support a jury finding the weapon discharged during a struggle over the weapon. Despite the disparity of evidence and conflicting versions of the facts presented by Rivera, all of the evidence including Rivera's inconsistent statements must be viewed in the light most favorable to the defendant. See State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001). Moreover, Rivera admits to firing the weapon towards the ground. The discharge of a firearm in a public area is evidence of recklessness in the absence of self-defense. "The fact that there may have been evidence showing the shooting was intentional did not negate the other inferences that could be drawn from all the evidence." State v. Mekler, 368 S.C. 1, 16, 626 S.E.2d 890, 898 (Ct. App. 2005), cert. granted (2007). Evidence a weapon discharged during a struggle is sufficient for submission of an involuntary manslaughter instruction to the jury. Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991). If the jury believed the testimony of Castro, it could find the gun was fired during a struggle between Rivera and another party and conclude Rivera was guilty of involuntary manslaughter. "To warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000). It is not our province on review to decide which testimony to believe; the jury must determine the facts and resolve any issues of credibility.

Here, there is some evidence supporting an involuntary manslaughter charge. The failure to submit this charge to the jury prejudiced Rivera and warrants a new trial.

CONCLUSION

The trial judge erred in failing to instruct the jury on involuntary manslaughter and Rivera was prejudiced by this error; thus, he is entitled to a new trial. Furthermore, in light of our disposition of the issue pertaining to the trial judge's refusal to charge the jury on involuntary manslaughter, the remaining issues on appeal are not dispositive and need not be addressed. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) (appellate court need not address remaining issues when resolution of prior issue is dispositive). Accordingly, Rivera's conviction is

REVERSED and REMANDED.

HEARN, C.J., PIEPER, J., and CURETON, A.J. concur.

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Petitioner,

v.

Marlon Rivera, Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 26877
Heard April 8, 2010 - Filed September 7, 2010

REVERSED

Attorney General Henry Dargan McMaster,
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McIntosh, Assistant Deputy Attorney General
Donald J. Zelenka, Senior Assistant Attorney
General S. Creighton Waters, all of
Columbia; and Solicitor Robert Mills Ariail, of
Greenville, for Petitioner.

Chief Appellate Defender Robert M. Dudek,
of South Carolina Commission on Indigent
Defense, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: In this case, the Court granted a writ of certiorari to review the court of appeals' decision in *State v. Rivera*, Op. No. 2008-UP-187 (S.C. Ct. App. filed March 18, 2008).

FACTS/PROCEDURAL BACKGROUND

At about 12:30 a.m. on July 18, 2005, law enforcement officers were called to the scene of a shooting outside a Greenville, South Carolina night club. Upon arrival, the officers found Wilfredo Solis Monge (Victim), lying on the ground. Victim was transported to the hospital, placed on life support, and later died.

Investigators interviewed witnesses at the scene of the shooting. One witness, Alvaro Fernandez (Fernandez), told police that the shooter, Marlon Rivera (Respondent), was at The Mexicali, a nearby night club. Officers went to The Mexicali with Fernandez, who identified Respondent. Officers arrested Respondent.

Investigation

During the investigation of this matter, Respondent and multiple witnesses gave conflicting and inconsistent statements concerning the events surrounding the shooting of Victim. First, while at the station the night of the shooting, Fernandez told police he saw two men arguing and a third man standing nearby. The third man, according to Fernandez, reached down and grabbed something at his leg. Fernandez heard two shots fired, but did not see who fired the weapon.

Second, Nelson Castro (Castro) told police that Respondent came to his house immediately after the incident and admitted to shooting Victim. Castro said Respondent told him he got in a fight in which he struggled over his gun with the person whom he was fighting. During this struggle, Respondent told Castro, the weapon accidentally discharged, striking an onlooker.

Finally, Respondent gave a confession to police the night of his arrest in which he admitted to shooting Victim. Respondent claimed that Victim harassed him for hanging out with African-Americans, grabbed his shirt, and the two began to fight. Respondent admitted he was mad because Victim harassed him and confessed that he pulled a gun from his pant leg. According to Respondent, he dropped the gun, picked it up, and shot at Victim two times.[1]

Trial

At trial, the State presented its case, including the above evidence. The defense presented several witnesses who told additional, conflicting versions of the events surrounding the shooting of Victim. First, Courtney Robles (Robles) testified that she witnessed a fight between two men that was broken up by a third man. The man who broke up the fight took a gun from one of the men involved, pointed it in the direction of one of the men in the fight, and fired. The bullet, she testified, struck Victim who was an onlooker not involved in the fight. Robles stated that she did not know the identities of the men involved.

Second, Norberto Ortiz (Ortiz) testified on behalf of the defense. Ortiz said that Respondent and Delman Mauricio Arias (Arias) were kicked out of the bar after they became unruly. Once outside, Arias attacked Respondent, who fired his weapon into the ground in order to intimidate Arias. Then, another onlooker took the weapon from Respondent and shot in the direction of Arias. Finally, Respondent regained control of the

weapon and fired another shot into the ground. At this time, according to Ortiz, the men realized that Victim, an onlooker, had been shot.

Third, Respondent took the stand and testified in his defense. Contrary to his confession, Respondent testified he shot his weapon into the ground in an attempt to scare Arias, who had attacked him. Further, Respondent stated that a third man grabbed the gun and shot at Arias. Respondent testified he then grabbed the weapon and shot at the ground. Respondent said he only fired the weapon because he wanted to scare Arias away. On cross examination, Respondent admitted he and Arias were simply fighting and he did not think Arias was going to kill him.[2] Respondent did not suffer serious injuries in the fight.

Defense counsel requested a charge on involuntary manslaughter, arguing that the jury could find from the evidence that Respondent lawfully armed himself in self-defense and shot his weapon with no intent of harming anyone. The trial court denied defense counsel's request, questioning the lawfulness with which Respondent was armed.

Respondent was convicted of murder and sentenced to thirty years imprisonment. The court of appeals reversed, finding that the trial court's failure to charge the jury as to involuntary manslaughter was error and prejudiced Respondent. Specifically, the court of appeals found that while there were several inconsistent explanations for the fatal shot, viewing the evidence in the light most favorable to Respondent, Castro's testimony supported a jury finding the weapon discharged during a struggle between Respondent and another party over the weapon. The court of appeals also found that Respondent's admission that he fired the gun towards the ground was evidence of recklessness in the absence of self-defense.

ISSUE

This Court granted a writ of certiorari and the State presents the following issue for review:

Did the court of appeals err in finding Respondent was entitled to a jury instruction on involuntary manslaughter?

ANALYSIS

The State argues the court of appeals erred because Respondent's brandishing of a weapon was unlawful conduct naturally tending to cause death or great bodily harm, thus he was not entitled to a charge on involuntary manslaughter.[3] We agree.

The law to be charged must be determined from the evidence presented at trial. *State v. Knoten*, 347 S.C. 296, 555 S.E.2d 391 (2001). Where there is evidence from which the jury could infer that the defendant committed a lesser offense, the trial judge must submit the lesser-included offense to the jury. *State v. Brown*, 360 S.C. 581, 602 S.E.2d 392 (2004); *State v. Hill*, 315 S.C. 260, 433 S.E.2d 848 (1993).

Involuntary manslaughter is defined as: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others. *State v. Mekler*, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008).

Respondent argues that sufficient evidence exists in the record from which a jury could find that Respondent was guilty of the second form of involuntary manslaughter: the unintentional killing of another while recklessly engaged in a lawful activity.[4] Respondent argues that he was in lawful possession of a firearm because he was acting in self-defense.[5] However, Respondent admitted at trial he was not in imminent fear of death or serious bodily injury.[6] Thus, the trial judge concluded that Respondent was not acting in self-defense and refused to charge the jury on those grounds. We agree with the trial court's conclusion and find that there is no evidence in the record indicating that Respondent was acting in self-defense. Thus, Respondent was not entitled to a charge on involuntary manslaughter. See *State v. Reese*, 370 S.C. 31, 36, 633 S.E.2d 898, 901 (2006) (finding that, in the absence of self-defense, pointing and presenting a firearm precludes an involuntary manslaughter charge).

CONCLUSION

There is no evidence in the record to support the conclusion that Respondent was lawfully armed, thus we reverse the decision of the court of appeals.

KITTREDGE, J., and Acting Justice James E. Moore, concur. BEATTY, J., dissenting in a separate opinion in which PLEICONES, J., concurs.

JUSTICE BEATTY: I dissent. The majority reverses the opinion of the Court of Appeals which held that the trial court erred in refusing a requested jury instruction on involuntary manslaughter. The majority reasons there is no evidence of self defense; therefore, Rivera did not arm himself lawfully and, as a result, a jury instruction on involuntary manslaughter was not warranted.

The record in this case is replete with testimony that Rivera was the victim of an unprovoked physical attack by Delman Mauricio Arias. The testimony also indicates that although Rivera had the gun on his person he did not present it until after he was beaten, knocked to the ground, and repeatedly kicked. Even then, the gun was unintentionally presented when it fell down Rivera's pant leg and onto the ground resulting in a scramble for the gun between Rivera and Arias. Rivera testified that he got control of the gun and fired it into the ground when Arias continued to advance. Furthermore, in response to the solicitor's question concerning why Rivera pulled the gun, Rivera testified "The truth is that I did it just because I was nervous and because somebody was hitting me, beating me." In my view, there is no question that there is evidence that Rivera lawfully armed himself in self defense.

The majority appears to infer that Rivera had no right to arm himself in self defense because he may not have believed that Arias was going to kill him. I can find no support for this position in our jurisprudence. What a person believes to be the threat level of bodily harm is irrelevant if the actual threat of imminent serious bodily harm is present. It is axiomatic that circumstances indicative of serious bodily harm or the imminent threat thereof yields the right to self defense and the right to arm oneself accordingly. See *State v. Slater*, 373 S.C. 66, 69-70, 644 S.E.2d 50, 52 (2007) ("To establish self-defense in South Carolina, four elements must be present: (1) the defendant must be without fault in bringing on the difficulty; (2) the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is

based upon his belief of imminent danger, defendant must show that a reasonably prudent person of ordinary firmness and courage would have entertained the belief that he was actually in imminent danger and that the circumstances were such as would warrant a person of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or the loss of his life; and (4) the defendant had no other probable means of avoiding the danger." (emphasis added)).

Being repeatedly beaten about the head and body, thrown to the ground, and repeatedly kicked constitute circumstances that give rise to the right to arm oneself in self defense. The law does not require a person to submit to a physical beating and to refrain from defending himself until the beating results in serious injury.

Moreover, the Court of Appeals opined an involuntary manslaughter instruction was required because there was testimony that the gun accidentally fired during a struggle for the gun. Not only is there evidence in the record to support that finding, but this Court's jurisprudence supports an involuntary manslaughter charge on similar facts. See, e.g., State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) (finding the defendant, who was convicted of murder, was entitled to a jury charge on involuntary manslaughter where the defendant was lawfully armed in self-defense, the defendant negligently handled the weapon prior to the shooting, and the defendant and the victim struggled over the weapon); State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003) (holding the trial judge erred in refusing to charge involuntary manslaughter where there was evidence that the defendant did not intentionally discharge the weapon given the defendant claimed he was trying to break up a fight between three women, one of whom was the victim's girlfriend, and the victim charged at the defendant prior to the shooting with his hands behind his back); State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999) (concluding the defendant, who was convicted of murder, was entitled to an involuntary manslaughter charge where there was evidence from which the jury could have inferred that the defendant was lawfully armed in self-defense given: the defendant, after being attacked and pushed to the ground by the victim and another man, pulled his weapon; the defendant fired twice in the ground, causing both assailants to back away; and the defendant grabbed the gun and accidentally fired the fatal shot when one of the assailants advanced toward him).

PLEICONES, J., concurs.

[1] Specifically, Respondent said:

This guy that I know but is not my friend approached me and asked me why I was hanging around with those black people. He then grabbed my shirt and started pushing me around. We struggled for a little bit. Finally the guy let go of me. I was mad because he hit me. I went to grab my gun but [it] fell down my pant leg. The gun fell on the ground and I grabbed it. I pointed it at him and shot two times. One of my friends said "Ok, you already shot him, let's go." . . . A little while later the police came and arrested me.

[2] The following colloquy occurred:

Prosecution: You didn't think the person you were fighting with was going to kill

you, did you?

Respondent: I didn't think . . .

Prosecution: Just fighting?

Respondent: Yes. He was just fighting and he was kicking me.

Prosecution: So just a typical fist fight to start with?

Respondent: He hit me hard. And he just [threw] me to the ground. And he was even on the ground just hitting me some more, kicking me.

[3] The State presents three specific arguments in support of its general thesis that the court of appeals erred in finding that Respondent was entitled to a charge on involuntary manslaughter. First, the court of appeals erred because Respondent's brandishing of a weapon was unlawful conduct naturally tending to cause death or great bodily harm. Second, assuming *arguendo* Respondent was lawfully armed, the court of appeals erred because it went too far in "cherry picking" facts from disparate accounts of the incident to synthesize a defense theory that would justify a jury charge on involuntary manslaughter. Third, assuming *arguendo* Respondent was lawfully armed, the court of appeals erred because, under the facts of this case, an intentional firing into the ground would not support involuntary manslaughter. We find no evidence in the record to suggest that Respondent was lawfully armed in self-defense. Thus, the State's second and third arguments are moot.

[4] Because the death at issue here occurred as a result of the discharge of a firearm, there is no evidence in the record to support a jury charge on the first theory of involuntary manslaughter: the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm.

[5] The elements of self-defense are:

First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.

State v. Davis, 282 S.C. 45, 46, 317 S.E.2d 452, 453 (1984).

[6] Contrary to the dissent's suggestion, nothing in the record supports a finding that

Rivera armed himself in self-defense.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARLON RIVERA,

APPELLANT

FINAL BRIEF OF APPELLANT

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The court abused his discretion by ruling interpreter and defense investigator Carlos Freeman could not testify because he remained in the courtroom with appellant throughout the trial, reasoning this violated the sequestration order. This ruling was fundamentally unfair. Freeman was relied upon as an interpreter by the defense during the trial, and therefore his presence was necessary in the courtroom.....25

4 & 5.

The court erred by ruling appellant was not entitled to an instruction on involuntary manslaughter or accident where the state elicited testimony that appellant told witness Nelson Castro that he had been wrestling with someone "and that the weapon just went off by itself." There was also evidence appellant was resisting an attack. Defense counsel correctly argued appellant was armed in self-defense under *State v. Burriss* and *State v. Crosby*, and that appellant was entitled an involuntary manslaughter instruction given this evidence. The same argument applies under *Burriss* on an accident instruction. Both issues were jury questions and the judge erred as a matter of law by reasoning inconsistent testimony meant appellant was not entitled to the other instructions.(Issues four and five) 27

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the judge erred by admitting appellant's inculpatory statement to the police where it was undisputed that appellant could not read or write Spanish or English, a police investigator acknowledged he physically pulled appellant up by the belt on his shackles during the interrogation while it was also undisputed the police called appellant a liar, and where appellant offered expert testimony of his fear and inability to understand the actions of the police given the cultural differences, language barrier, and the police behavior, since appellant's confession should have been suppressed given these circumstances?

2.

Whether the judge erred by admitting the hearsay testimony of Investigator Wesley Smith that Officer Rivera told him while appellant was being escorted to the detention center after giving his confession that Rivera told Smith appellant had told him the officers had been "too nice about it," and that in his country "they'd put a bag over the head and beat us," since this was hearsay testimony and prejudicial?

3.

Whether the judge abused his discretion by ruling interpreter and defense investigator Carlos Freeman could not testify because he remained in the courtroom with appellant throughout the trial, reasoning this violated the sequestration order, since this ruling was fundamentally unfair given that Freeman was relied upon as an interpreter by the defense during the trial, and that his presence was necessary in the courtroom?

4.

Whether the judge erred by ruling appellant was not entitled to an instruction on involuntary manslaughter where the state elicited testimony that appellant told witness Nelson Castro that he had been wrestling with someone "and that the weapon just went off by itself," where there was also evidence appellant was resisting an attack, since defense counsel correctly argued appellant was armed in self-defense under *State v. Burris* and *State v. Crosby*, and that appellant was entitled an involuntary manslaughter instruction given this evidence?

5.

Whether the judge erred by ruling appellant was not entitled to an instruction on accident where the state elicited testimony that appellant told witness Nelson Castro that he had been wrestling with someone "and that the weapon just went off by itself," where there was also evidence appellant was resisting an attack since defense counsel correctly argued appellant was armed in self-defense under *State v. Burris* and that appellant was entitled an accident instruction given this evidence?

STATEMENT OF THE CASE

Appellant was indicted by the Greenville County grand jury for the offense of murder, R. 464. His case came on for trial on October 10, 2005 before the Honorable C. Victor Pyle, Jr. and a jury. Susannah Ross represented appellant. Kris Hodge was the Assistant Solicitor. R. 1.

On October 13, 2005 the jury found appellant guilty of murder. R. 459, ll. 6 – 11.

Judge Pyle sentenced appellant to thirty years imprisonment. R. 463, ll. 20 -22.

This appeal follows.

STATEMENT OF FACTS

Prior to trial defense counsel moved for the appointment of a separate court interpreter. Defense counsel Ross noted that her interpreter, Carlos Freeman, had helped her throughout the case. "He's interpreting to my client what's happening, but he's not the state's interpreter for this case." R. 12, ll. 17 – 24. The judge denied the motion. R. 12, l. 25 – 13, l. 2.

The judge then asked Ross how she would be prejudiced by not addressing the confession issue during her opening argument. Ross answered that if the confession was going to come into evidence: "I would like to explain it, and talk about what happened, and the background of it, and the basis of it." Ross said it was important that the jury know the defense was going to "be up-front and bring this out if it's going to come in." The judge disagreed, and ruled Ross would not be prejudiced by not being able to address the confession issue in her opening statement. R. 12, l. 25 – 13, l. 14.

Defense counsel later moved for a mistrial arguing the solicitor exploited the defense's inability to comment on the confession in opening by implying the defense "hid the confession from them," during the state's closing argument. Counsel argued this was purposely unfair since the suppression hearing was not held until the second day of trial. R. 435, ll. 7-13.

Trial Testimony

Greenville County Sheriff's Deputy David Bendig testified that he was dispatched to an assault call on July 17, 2004 at about 12:30 a.m. R. 22, l. 23 – 23, l. 25. Bendig found a

male lying on the ground in the parking lot near the "Spanish Amigo Market in the strip mall." There were about twenty or thirty people scattered outside.¹ R. 24, ll. 2 – 15.

Bendig immediately acknowledged that "a language barrier existed." He remembered talking to Courtney Robles and Delman Araís at the scene. R. 27, ll. 1 – 14. These were the only people Bendig spoke with that morning. R. 27, ll. 8 – 23. As will be seen infra, there would be evidence that Araís attacked appellant and that appellant pulled a gun when attacked. R. 299 - 300.

Castro Testimony

Nelson Castro was the next state's witness. Interpreter Efraín Pineros was sworn in for Castro's testimony. R. 33, ll. 2- 6. Castro said that he spoke Spanish and "a little bit of English." R. 33, ll. 8 – 20.

Castro noted that appellant was his cousin. He recalled appellant coming by his house at 1:30 or 2:00 in the morning on the day in question. R. 34, l. 16 – 36, l. 12.

Castro then attempted to testify regarding what his wife told him that appellant allegedly told her. Defense counsel Ross's hearsay objection was overruled. R. 36, ll. 11 – 16.

Castro remembered that appellant had a pistol and that he said that he had killed somebody. R. 37, l. 4 – 38, l. 10. The solicitor elicited the following from Castro:

Q. And that he had gotten he pistol the day before?

A. Yes.

Q. Did he say how it was that he came to kill someone?

¹ There would later be evidence offered that the police at first did not know the victim had been shot in the face, and they only thought he was badly hurt from being beaten.

A. He said that *they were wrestling with somebody else, and that the weapon was loaded, and that the weapon just went off by itself.* That the shot didn't hit the person that he was wrestling with, but it hit somebody else that was watching.

Q. Did he say the he knew the person that got shot?

A. No, he didn't say that he knew that person.

Q. How was he acting that night?

A. He looked like sad for what had happened.

R. 38, ll. 11 – 22. (emphasis added).

On cross-examination Castro acknowledged appellant told him the gun "went off accidentally when the other man grabbed the pistol and they were fighting over it." R. 43, ll. 23 -25.

Carlos Estradeo was from Columbia. He was the owner of a small club near the club where the shooting occurred. Supp. R. 1, ll. 12 – 3, l. 19. Estradeo testified that people were "patted down" for weapons before they came into his club. Estradeo remembered that when appellant was patted down, seemingly after the shooting that Estradeo felt what he thought was a weapon. Appellant then left the club and returned ten or fifteen minutes later "and he didn't have anything." Supp. R. 4, l. 9 – 5, l. 16.

Investigator Brian Garrett testified there were about fifteen to twenty people outside the Hispanic club where the shooting occurred when he arrived at 3:00 a.m. Garrett said he tried to interview witnesses but none of them had any information that was useful. Supp. R. 12, ll. 15 – 23.

However, Garrett said that one alleged eyewitness, Elvaro Fernandez, returned about fifteen minutes later and was "kinda excited." Over defense hearsay objection, Garrett

testified that Fernandez told him he had seen the person who shot the victim and that he was in a nearby bar, the Mexiclia, down the street. Supp. R. 13, l. 12 – 16, l. 16.

Fernandez allegedly described the shooter as wearing a red shirt and blue jeans. Garrett went into the club and he told appellant “to put his hands behind his back in Spanish, and I placed him under arrest.” Supp. R. 16, l. 21 – 18, l. 12.

There was evidence that Garrett located the weapon the following morning in a tree outside the club. Supp. R. 48, l. 19 – 51, l. 14.

The pathologist, Dr. Eric Christensen testified that the decedent died on July 21, 2004, several days after he was shot. He died from a gunshot wound to the face. The decedent was taken off life support. Supp. R. 65, ll. 21 – 24; Supp. R. 67, ll. 6 – 21.

There were at least three theories of what occurred into this case. Each theory was backed by some evidence. As seen, Castro testified, on direct examination by the solicitor, that appellant told him the gun went off accidentally during the struggle. As will be seen infra, there was also evidence appellant was attacked by a Hispanic man because he was socializing with black people.

The state called Greenville County Crime Lab worker Mark Stephan to apparently attempt to dispel the gun went off by accident evidence. Supp. R. 71, l. 12 – 72, l. 16. Stephan testified that when he test fired the gun “it misfired several times. It did not fire when I pulled the trigger.” Supp. R. 78, ll. 15 – 24.

However, Stephan maintained that someone would have to pull the trigger for this particular gun to discharge. Stephan claimed the gun would not go off accidentally. Supp. R. 19, ll. 3 – 19.

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Garrett said after appellant gave his statement it was "typed in English." R. 75, ll. 16 – 22; See Appellant's statement; R. 466. Garrett claimed the statement was read back to appellant in Spanish and he did not have any changes. R. 75, l. 21 - 76, l. 3. As will be seen very shortly, this would be highly contested.

Garrett admitted in his report that he wrote when he arrived the other investigators were already interviewing appellant. R. 78, l. 13 – 79, l. 3. Garrett admitted, "I will Mirandize them as I am speaking to them." R. 79, ll. 2 – 24. "We'll discuss exactly what happened and then will Mirandize them in written form and get their signature and then do the actual interview and transfer it on to paper." R. 80, ll. 8 – 13. As will be seen infra, this would be defense counsel's secondary objection to appellant's confession being admitted.

Traffic Officer Raymond Rivera was used as an interpreter by the police department. R. 82, ll. 2 – 14. Rivera noted that there were different dialects of the Spanish language, and that that someone from Columbia would be different from someone from Puerto Rico or Spain. R. 82, l. 23 – 84, l. 21. The importance of this was that the defense would strongly maintain the police threatened appellant and took advantage him through coercive police conduct to obtain a confession.

Rivera remembered he was called into appellant's interview to translate for the other investigators. R. 84, ll. 14 – 23. Rivera also admitted he learned appellant could not read or write. R. 86, l. 21 – 88, l. 10.

Rivera recalled appellant had handcuffs "on a belt in the front." R. 95, ll. 17 – 23. Rivera said he did not write out appellant's statement in Spanish. "I translated it to English, and then I had them write in English." R. 97, ll. 2 – 3.

Immediately before translating or interviewing appellant Rivera interviewed alleged eyewitness Hernandez. Rivera admitted he was told that "one person had the gun and other person took it away from him and shot and then gave the gun back to one person." R. 98, ll. 2 - 11.

The next witness was Investigator Wesley Smith. Smith was the lead investigator on the case. He said he spoke "very very little Spanish." Smith distinctly remembered that "everything I ask him [appellant], his answer was, 'no problem.'" "No matter what I ask him." R. 100, l. 8 - 101, l. 9. Smith also said his ability to comprehend conversations in Spanish "is nil." R. 102, ll. 13 - 15.

On cross-examination, Garrett said he did not contact the foreign consulate for appellant upon his arrest because "I'm not required to do that." R. 109, l. 22 - 110, l. 4. Smith also admitted that the officers "confronted him [appellant]" and told him that he was lying to them." R. 112, ll. 5 - 6. Investigator Smith also acknowledged that he "picked him [appellant] up by the belt and pulled his belt back up, it is very loose" Smith claimed he did this so appellant could move his arms around: "I picked him up by the belt, I stood him up, moved it back up, and just told him to sit back down in a chair." R. 111, ll. 10 - 25.

Appellant then testified that he did not speak English and that he only went to first and second grade while living in Honduras. R. 114, l. 12 - 115, l. 8. Appellant said he only understood "a little bit" of Rivera's Spanish. Appellant testified that he "didn't understand anything about the statement before he was told to sign the paperwork." R. 115, ll. 9 - 22. The following occurred with appellant:

Q. Now when you made these signatures what did you understand that you were doing?

A. When I signed there I was nervous and I didn't know what was going on, what he was telling me, nothing what he was telling me *because he had me in a hold like this. And one of them said that I was lying. He grabbed me from the front and hold me up like this. And then they read the papers and I just didn't know what was going on.*

Q. All right.

A. I didn't understood anything. I didn't understand anything and they told me to sign. And they told to sign. And I told them that I didn't - - I didn't know how to sign. So they - - Mr. Rivera came. He said that he got my name there. And based on that, since my name was there that I would go ahead and sign down there.

I was handcuffed. And I said, I can't sign. And he said, just write down a name, write you. And this next page, he read that to me. I didn't understand anything. I was just kind of lost. I didn't know what was going on because when they got me - - when they got hold of me I was nervous.

And Mr. Rivera told me to sign. And he said - - and I asked him where. And I was very nervous. And I signed up there on the top. I signed on the other side too. And I signed down there. And he said, no, it's not there. It's not there. It's not down there. And then he said, what you need to do is sign down here.

And I said, well, I don't know how to sign. He came, he got his pen, and he put two of the first letters. I remember more or less a year ago. And the first letter he wrote - - there's a name. And there's the next letter that I don't know what it is. And then the next one. And he told me, do this, do that, but I didn't know how to copy my name. And I put - - I wrote down and "R" and other letters that I don't know what they are, what are their names.

R. 116, l. 4 - 117, l. 13. (emphasis added).

Appellant also said while Rivera was asking him questions another officer grabbed him and "raised me up and got me like that. And he told me that I was lying . . . he grabbed me from the belt up. He told me that I was lying. I asked Officer Rivera, what is he saying and he said that the officer was saying that I was lying." Appellant said he told Rivera he was not lying and that he was telling the truth. "If you don't believe me there's God in heaven that is a witness." Appellant said Rivera answered, "there is no God here." R. 118, l. 17-119, l. 8.

Appellant said he signed the document as instructed after he was "grabbed up" and called a liar. Appellant testified he was nervous because he did not know what the authorities were going to do with him after he was physically handled. R. 119, l. 19-120, l. 3.

Appellant stated after he was in jail he asked to speak to his attorney and the interpreter "because I didn't know what was written in the paper. I didn't know what the paper said." Appellant testified that when he was told what the police had written down he told them that was not what he had told them. "[T]here are things in that paper that Officer Rivera put them there. And that information I didn't give to him." R. 120, l. 18-23.

On cross-examination appellant said he was from Honduras and that he was able to get into the country and work with some people from Costa Rica. R. 121, l. 23-124, l. 6.

The defense then presented the expert testimony of Dr. Robert Taylor. Taylor spoke four languages and read in seven. R. 127, l. 21-129, l. 22. Dr. Taylor received his doctorate in theology from Gregorian University in Rome. He also had a master's degree in psychology and a master's in social work. R. 129, ll. 8-22.

Dr. Taylor was recognized as an expert in social work, and psychology with an emphasis on bi-cultural and bilingual interaction. R. 131, ll. 3 – 5.

Dr. Taylor explained that appellant was illiterate and could not read English or Spanish. He had never been to school. Both the signatures on the waiver were orchestrated for him, Dr. Taylor testified. Appellant knew how to sign the first letter of his name, but on the rest of it he had to be coached. Dr. Taylor explained, "it's as if I were arrested in China and given the characters of Chinese to sign my name in Chinese, a brush and an ink dispenser and was asked to sign it. That would be quite a task. He was given that to concentrate on. I don't believe he knows what a lawyer is." R. 132, ll. 6 – 10.

Dr. Taylor opined that appellant signed the waiver form and statement under duress. "He doesn't understand written Spanish." The waiver form was in Spanish. R. 132, l. 11 – 133, l. 6; See Waiver of rights. R. 467. Dr. Taylor also said appellant tried to comply with the officer's demands, and he noted that appellant was grabbed by the belt, raised up and called a liar. R. 133, l. 7 – 134, l. 5.

Dr. Taylor stated that appellant would not have known what a lawyer was the process the police employed in this case, and "we know from the interview he has no questions." R. 135, l. 13 – 136, l. 21.

The judge then ruled that the state had proved by preponderance of the evidence that appellant's statement was voluntarily tendered. He found there were no "coercive police tactics" employed. R. 139, l. 22 – 140, l. 17.

Defense counsel also added voluntariness was questionable where Garrett admitted he came in during an interview process, and then the waiver was signed. R. 140, l. 19 – 141, l. 3.

Garrett, Rivera and Smith then testified in the presence of the jury. R. 144, l. 1 – 154, l. 25.

Rivera's Testimony

Rivera testified, over objection that when appellant was being escorted to the jail he said "this is taking to long. In my country they would have put a bag on my head and beat me down or beat me up is what he said." R. 181, ll. 1 – 25.

Smith's Testimony

Investigator Wesley Smith testified, and repeated, that appellant kept saying "no problem no problem" to him that evening no matter what he was asked. R. 210, l. 20 – 211, l. 10.

Smith also testified if a bullet had hit the ground or concrete before hitting the decedent that the police would have been able to notice the damage. R. 207, ll. 1 – 23; R. 257, ll. 7 – 12. Smith acknowledged he was told by another witness, Alvaro Fernando Portugez, that he saw two men arguing that night and he saw another man walking around and that third men bent down as if he was grabbing something from his leg. A witness told Smith he did not see who did the shooting. R. 143, ll. 12 – 25; R. 144, ll. 12 – 17.

Appellant allegedly told the police that he was at a restaurant that night with some black friends. He told them he was carrying a gun that he had gotten from a friend, Antonio Mendoza, who had been arrested the day before. It was a .22 caliber gun. R. 179, ll. 10 – 21. In appellant's statement he said a man approached him and asked "why was he hanging around those black guys or those black people." The statement said the man grabbed appellant and started pushing appellant around. There was a struggle and the man let go of appellant. The statement said appellant was mad because the man hit him and he went to

grab his gun and it fell on the ground. Appellant's statement read: "I grabbed it [the gun]. I pointed it at him and shot two times." R. 180, ll. 1 – 7. Appellant's statement also said appellant put the gun in a tree after he went to the Mexicali. R. 180, ll. 8 – 23; Appellant's statement; R. 466.

Hearsay Objection

Over defense counsel's hearsay objection Smith was allowed to testify that while he and Rivera were escorting appellant to the detention center after his statement that Officer Rivera laughed and said appellant told him the police had been "too nice." "And then I [Smith] asked Rivera what he meant. He said, well, he [appellant] said [in] my country they put a bag over the head and beat us." R. 235, ll. 5 – 22.

The interpreter and sequestration

During the waiver of appellant's right to testify, or his decision to testify, Freeman interpreted appellant's words to the judge and vice versa. Freeman told the judge appellant told him "I wish to defend myself. The shoots the police said I did, I did not do. So I wish to defend myself." R. 259, l. 20 – 261, l. 25.

The solicitor then stated that she knew the defense was going to call interpreter Freeman as a witness. The solicitor said: "He [Freeman] obviously has been in here the entire time translating and he's been outside talking to the potential witnesses as well. So I would say that would exclude his testimony in this case." Defense counsel Ross countered that Smith was the defense translator and his presence was needed, and as investigator he was only substantiating things that were said. Ross argued Freeman was her interpreter and investigator and that there was no reason he should not have been in the courtroom particularly since Investigator Smith also sat in court the entire time. The judge ruled since

there was a motion to sequester he *had* "to grant [the solicitor] motion" to exclude Freeman's testimony. R. 262, l. 8 – 263, l. 13. (emphasis added).

The proffer

Ross then proffered Freeman's testimony. Freeman testified in camera that during his investigation he tried to find people who witnessed the incident and he provided their names to Investigator Smith. R. 264, ll. 10 – 23. Freeman testified that Smith told him there was no other person involved and that he was not interested in investigating any further. R. 265, l. 7 – 266, l. 9. The Freeman testimony would have countered Investigator Smith's, and other police testimony, that the police attempted to find and interview other witnesses, but they could not be located, were not cooperative, or had no information. See, e.g. R. 237, l. 21 – 254, l. 17.

Freeman also testified that when he later interpreted appellant's confession to him in the jail that appellant became very upset. Freeman testified he had to continue to calm appellant down because he "greatly surprised," and appellant said that he did not tell the police the things that were written down. R. 267, ll. 11 – 20.

Other testimony

Courtney Robles testified that she saw two men fighting that night. Robles was not sure how the physical action started. Robles thought the decedent may have been "one of the guys that had been fighting and somebody had just punched him in the eye because by the time they [the police] got there his eye was so swollen that you couldn't see the entry wound." R. 286, l. 23 – 287, l. 6.

Robles gave the police a statement, and she also said the police were "very rude. Very rude" to everyone that "was out there" that night at the Spanish club. R. 287, ll. 10-14.

Robles described how a man in a striped shirt was fighting with a man in a white shirt, and another man separated them, and a man in a black shirt took the gun from the man in the striped shirt and pointed straight ahead and shot. R. 283, l. 7 – 287, l. 14.

Norberto Ortiz testified that appellant had problem with Delman Maricio Arias, “and the guy that had some problems with a guy inside the place. And the guy that had the problems with Marlon and started just saying some bad words and insulting him. . . . Mauricio attacked Marlon.” Ortiz also noted that another unknown man got the pistol from appellant after appellant had shot the gun twice to scare the aggressor. The other person said “give me the pistol, I’ll shoot him.” Ortiz said he did not know which of the three shots hit the decedent. R. 297, l. 16 – 307, l. 15.

Lesser-Included Offense and accident

During the charge conference defense counsel Ross brought to the judge’s attention the cases of State v. Burris and State v. Crosby. The cases were made a court’s exhibit. See R.2. Ross argued that there was evidence appellant was armed in self-defense and a jury could find the gun accidentally when off and it was involuntary manslaughter or accident since there was no heat of passion. R. 378, ll. 9 – 22.

Defense counsel reminded the judge that a witness (Castro) had testified early in the trial that the gun went off accidentally and that given the entire evidence offered in this case that appellant was entitled to an instruction on involuntary manslaughter, and accident. R. 378, l. 9 – 379, l. 11. Counsel also requested a charge on self-defense. The solicitor argued there was testimony “as to every type of thing. There’s nothing consistent in that.” R. 379, l. 13 – 380, l. 13. The judge stated he was not going to charge involuntary manslaughter or accident, and the only jury options would be murder or not guilty. R. 381, ll. 7 – 22.

ARGUMENT

1.

The judge erred by admitting appellant's inculpatory statement to the police where it was undisputed that appellant could not read or write Spanish or English, a police investigator acknowledged he physically pulled appellant up by the belt on his shackles to his feet during the interrogation while it was also undisputed the police called appellant a liar. Appellant also offered expert testimony of his fear and inability to understand the interrogation given the cultural differences, the language barrier, and the physical and verbal abuse and intimidation. Appellant's confession should have been suppressed given all of these circumstances.

As seen, appellant could not speak English. He also could not read Spanish or English. He had gone to the second grade in Honduras before coming to America.

Appellant's statement was typed in English. This was obviously for the convenience of the police, and not to assure its reliability as coming from appellant. Further, defense counsel correctly argued that the Miranda warnings in this case were further suspect because Investigator Garrett openly admitted that he discussed what happens with the suspect "and then will Mirandize² them in written form and get their signature and do the actual interview and transfer it on paper." R. 79, l. 2-80; l. 13.

In State v. Navy, 370 S.C. 398; 635 S.E.2d 549 (Ct. App. 2006) this Court noted that the purpose of Miranda warnings is to apprise a defendant of his constitutional privilege not to incriminate himself while in the custody of law enforcement. State v. Evans, 354 S.C.

579, 582 S.E.2d 407 (2003). This Court, *citing* Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135 (1986), noted that Miranda warnings inserted during interrogation are likely to deprive a defendant of the knowledge essential to his ability to understand the nature of his rights and the consequence of abandoning them. Navy, of course, was an American and did not have any language or cultural problem. There was also not any allegation of physical abuse in State v. Navy. Appellant strongly submits this factor should also be considered when determining the voluntariness of the confession from a totality of the circumstances, and whether appellant's will was overborne, and police coercion employed.

The police brought in Traffic Officer Raymond Rivera to interpret the interrogation of appellant. Rivera, as seen, noted the different dialects in the Spanish language from people from various Spanish speaking countries. Rivera was from Puerto Rico. Appellant was from Honduras. R. 82, l. 2 – 84, l. 21. This was significant since the smallest interpretation or sentence structure can be important given the obvious importance of a defendant's statement.

Investigator Smith readily admitted that at one point he picked appellant up by his belt: "I picked him up by the belt, I stood him up, moved it back up, and just told him to sit back down in a chair." R. 111, ll. 10 – 25. Even given Smith malevolent explanation of his physical conduct with a suspect during an interrogation – literally jerking him out of his seat at the nicest -- it is easy to understand how this physical aggression would be interpreted by appellant who could not speak any English, and could not read any Spanish or English.

² Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

Appellant testified, and it was undisputed, that appellant was also told that he was lying. Dr. Taylor testified the liar allegation was also culturally much more traumatic to appellant, and an additional reason for appellant to fear given the physical encounter. R. 133, l. 7 – 137, l. 1; R. 316, l. 15 – 318, l. 18.

Appellant and Dr. Taylor both said appellant was coached and led into signing a statement where he didn't "understand anything and they told me to sign." R. 116, l. 4 – 117, l. 13. Again, appellant testified he was grabbed up and raised up and told he was lying. This is not a claim, it is undisputed. R. 118, l. 17 – 119, l. 8.

As seen, Dr. Taylor testified appellant was coached and the waivers were orchestrated for him. Dr. Taylor used the analogy of himself being arrested in China and given the characters of Chinese to sign his name in Chinese. Dr. Taylor opined appellant did not understand what was happening, that he did not understand his right to a lawyer given the nature of the waiver process, and particularly since appellant was only attempting to comply where the authorities were physically grabbing him by his belt, and calling him a liar.

A Court must consider totality of the circumstances, including the background, experience, and conduct of the accused when determining if the suspect's will was overborne or his capacity for self-determination compromised. See Johnson v. Catoe, 345 S.C. 389, 548 S.E.2d 587 (2001).

The physical grabbing and jerking up of appellant would have been improper in any case. However, when coupled with the indisputable fact that the police knew they were dealing with a very vulnerable defendant who could not speak English, and who could not

read or write English or Spanish, the physical conduct greatly exacerbated the situation. See State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001).

In State v. Hook, 348 S.C. 401, 559 S.E.2d 856 (Ct. App. 2001), this Court found under the totality of the circumstances that the conduct of law enforcement was egregious enough to render any statement Hook made to the probation officers involuntary. Although Hook was not advised of his Miranda warnings by the probation officer, however, there was no evidence in Hook of any physical misconduct by law enforcement. See Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461 (1936); Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745 (1963).

It is elementary that a confession induced by force, psychological or physical, or by direct or indirect threats is inadmissible. State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990). Here, two pieces of evidences are not in conflict. Appellant was physically handled by Investigator Smith, and he was called a liar. While calling appellant a liar may be acceptable under certain circumstances -- as a combination with physical aggression when it pertained to the very vulnerable appellant -- it was unacceptable. The police knew appellant could not understand English as he had replied "no problem, no problem" to whatever question or statement was given to him.

There was also evidence that appellant was very upset when his statement was later explained to him at the jail. Appellant testified he had not said the things that were attributed to him by the police. Interpreter Freeman's testimony on this subject, as argued infra was wrongfully excluded, but there was still evidence appellant reacted graphically when he learned what the police attributed to him. The problem is the testimony of a

defendant is never given great credence unless it is corroborated. Here, unless corroborated by Freeman.

Given the totality of the circumstances, the judge erred by refusing to suppress appellant's statement.

The judge erred by admitting the hearsay testimony of Investigator Wesley Smith that Officer Rivera told him while appellant was being escorted to the detention center after giving his confession that Rivera told Smith appellant had told him the officers had been "too nice about it," and that in his country "they'd put a bag over the head and beat us," since this was hearsay testimony and prejudicial.

The import of the hearsay testimony at issue here was obvious. The state wanted to place before the jury that appellant said the police were "too nice" to him, and thereby admitted he had not been mistreated. The hearsay testimony also planted in the mind of the jury that appellant was treated better than he would have been in a Spanish speaking country.

Hearsay is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. See Rule 801(c), SCRE; State v. Davis, Op. No.26229 (November 20, 2006) (Statement is hearsay if it does not fall into a hearsay exception).

The Supreme Court has held that improper admission of hearsay evidence constitutes reversible error where its admission is prejudicial to the defendant. State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985); State v. Holmes, 342 S.C. 113, 536 S.E.2d 671. Here, it is clear the hearsay testimony from Investigator Smith that Deputy Rivera allegedly told him appellant said the police were too nice to him and that he would have been beaten in his own country was prejudicial and it was calculated. It was meant to

counteract the defense that appellant was mistreated by the police. Appellant should be granted a new trial.

The court abused his discretion by ruling interpreter and defense investigator Carlos Freeman could not testify because he remained in the courtroom with appellant throughout the trial, reasoning this violated the sequestration order. This ruling was fundamentally unfair. Freeman was relied upon as an interpreter by the defense during the trial, and therefore his presence was necessary in the courtroom.

The judge abused his discretion by ruling interpreter Freeman would not be allowed to testify because the judge found him in violation of the sequestration order. Defense counsel noted that the state's lead investigator was allowed to remain in the courtroom and that Freeman was needed throughout the trial as an interpreter for appellant and the defense. It was undisputed appellant could not speak English. Although the record is confusing and dense on interpreters -- there appears to be another on at least one witness -- it is clear the judge initially denied the defense's request for a "state interpreter" thereby leaving appellant to rely on Freeman. It should be beyond any argument that Freeman's presence as an interpreter was much more necessary than just leaving the state's lead investigator in the courtroom as a courtesy.

Appellant understands that whether a witness should be exempted from a sequestration order is within the trial court's discretion. See State v. Tisdale, 338 S.C. 607, 527 S.E.2d 389 (2000). However, it is clear solicitor was not entitled to have Freeman sequestered as a matter of right. It is clear the judge thought he "had to" exclude Freeman's testimony. That was an error of law by the trial judge requiring reversal. See State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Harris, 275 S.C. 463, 272 S.E.2d 635 (1980).

Further, in State v. Fulton, 333 S.C. 359, 509 S.E.2d 819 (Ct. App. 1998) this Court held that the trial judge did not err by allowing two state witnesses to testify in reply even though they remained in the courtroom after their initial testimony although they were under the sequestration order previously. Here, the state clearly sought to gain an unfair advantage by excluding Freeman's testimony as the defense interpreter and investigator. Freeman's testimony was important to the defense which maintained that once the police had appellant's disputed confession, it, Smith in particular, showed no interest in investigating the case or any suspects any further. R. 264 – 267. The state in this case spent a huge amount of time offering testimony on why other evidence was not offered. Freeman's testimony also would have corroborated Robles' testimony on the arrogance or rudeness of the police regarding this case.

Freeman also would have testified that appellant was very surprised when he learned in jail the content of his statement, which, as seen was in English. Appellant maintained the police took advantage of him, and inserted things he never said into the statement. R. 267. Freeman's testimony was important to corroborate appellant's, a criminal defendants, assertion in this regard.

Defense counsel correctly argued that Freeman's presence was necessary in the courtroom because it was essential to appellant's ability to understand the testimony and to communicate. The judge clearly abused his discretion by excluding Freeman's testimony. See Rule 615(3), SCRE "a person whose presence is shown by a party to be essential to the presentation of the party's cause" should not be excluded as a witness. Appellant should be granted a new trial for all of the above reasons.

The court erred by ruling appellant was not entitled to an instruction on involuntary manslaughter or accident where the state elicited testimony that appellant told witness Nelson Castro that he had been wrestling with someone "and that the weapon just went off by itself." There was also evidence appellant was resisting an attack. Defense counsel correctly argued appellant was armed in self-defense under *State v. Burriss* and *State v. Crosby*, and that appellant was entitled an involuntary manslaughter instruction given this evidence. The same argument applies under *Burriss* on an accident instruction. Both issues were jury questions and the judge erred as a matter of law by reasoning inconsistent testimony meant appellant was not entitled to the other instructions.(Issues four and five).

As seen, the state elicited from Nelson Castro that appellant admitted he had been wrestling with another man and that the gun went off accidentally. There was clearly evidence that appellant was attacked by another man who was apparently angry that appellant was with his black friends. There was evidence appellant was hit and knocked to the ground. Appellant had armed himself in self-defense within the meaning of *State v. Crosby*, 355 S.C. 47, 584 S.E.2d 110 (2003), and *State v. Burriss* 334 S.C. 256, 513 S.E.2d 104 (1999).

Involuntary manslaughter

In *Crosby* the Supreme Court held that an involuntary manslaughter instruction was warranted even though at one point appellant admitted he intentionally pulled the trigger. In *Crosby* although there was conflicting evidence, there also was evidence the decedent was charging at Crosby when he pulled his pistol in self-defense and it discharged.

Similarly in State v. Burris 334 S.C. 256, 513 S.E.2d 104 (1999) the Supreme Court held that a person can be acting lawfully, even where he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. In Burris, the defendant was threatened and attacked by the victim with another male. There was evidence one attacker backed away but urged his accomplice to attack Burris again. Burris grabbed his gun and it fired. Burris stated it was an accident. However, at another point Burris said "the trigger was pulled or whatever," implying for the state that the trigger was pulled intentionally.

Regardless, it is elementary that where there is conflicting evidence, any evidence of the lesser-included offense, here involuntary manslaughter, entitles the defendant to an instruction on that lesser-included offense: State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). The trial court is only justified in refusing to charge a lesser-included offense when there is no evidence the defendant committed the lesser crime. State v. Chapman, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999); State v. Crosby; State v. Burris, supra.

Accident

"A homicide is excused when caused by the discharge of a gun . . . where the accused is lawfully acting in self-defense and the victim meets death by accident, through the unintentional discharge of the gun or the like." State v. Burris, 334 S.C. 256, 260, 513 S.E.2d 104, 107 (1999).

For accident, it must be shown that the killing was (1) unintentional; (2) that the defendant was acting lawfully, and (3) due care was exercised in the handling of the gun. State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994). "When the defense of excusable

homicide by misadventure is relied on, the principles of self-defense may be involved, *not for the purpose of establishing defense of self*, but for the purpose of determining whether accused was or was not at the time engaged in a lawful act, and it has been held that in such case the right, but not the law, of self-defense is involved.” State v. Burriss, 334 S.C. 256, 260, 513 S.E.2d 104, 107 (1999) *citing* State v. McCaskill, 300 S.C. 256, 387 S.E.2d 268 (1990); 40 C.J.S. Homicide §111(C) (1991).

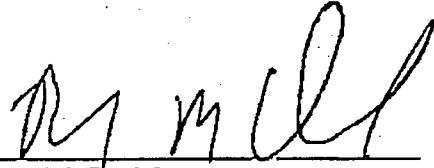
Appellant strongly submits it was a jury question on both involuntary manslaughter and accident. However, the solicitor and the judge made the same error here. They both could not understand how appellant could be entitled to any other instruction where “there’s testimony from people at the scene of every type of thing. There’s nothing consistent in that.” R. 379, ll. 3-25. The judge also noted the inconsistent testimony and made the same mistake of thinking the defense had to put forth a totally coherent defense or the jury was not entitled to consider any other possibility than murder or not guilty. State v. Knoten, supra. That was error. It should not be surprising such a disorganized environment on the night of the shooting produced different perceptions and memories. That is why we have juries.

Appellant should be granted a new trial since he was entitled to have the jury consider the options of involuntary manslaughter and accident.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed and this case remanded to the Greenville County Court of General Sessions for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', written over a horizontal line.

Robert M. Dudek
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT.

August 17, 2007

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Greenville County
Honorable C. Victor Pyle, Jr., Circuit Court Judge

THE STATE,

Respondent,

v.

MARLON RIVERA,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

- I. THE TRIAL COURT'S DECISION TO ADMIT APPELLANT'S CONFESSION CANNOT BE SAID TO HAVE BEEN SO MANIFESTLY ERRONEOUS AS TO AMOUNT TO AN ERROR OF LAW, WHERE THE OFFICER'S DESCRIPTION OF EVENTS PROVIDED AMPLE SUPPORT IN THE RECORD FOR THE COURT'S DECISION, ESPECIALLY GIVEN THAT APPELLANT WAS INTERVIEWED IN HIS NATIVE TONGUE AND THE TRIAL COURT SPECIFICALLY FOUND NO COERCIVE POLICE CONDUCT RELATED TO THE CONFESSION DESPITE APPELLANT'S ALLEGED CULTURAL OR INTELLECTUAL INFIRMITIES.
- II. THERE WAS NO REVERSIBLE ERROR IN ALLOWING INVESTIGATOR SMITH TO TESTIFY AS TO WHAT OFFICER RIVERA – WHO WAS ACTING AS AN INTERPRETER – TOLD HIM APPELLANT SAID, WHERE ANY ERROR WAS NOT PRESERVED, A TRANSLATOR DOES NOT COUNT AS A LAYER OF HEARSAY, AND IN ANY EVENT THE TESTIMONY WAS CUMULATIVE TO OFFICER RIVERA'S EARLIER RECITATION OF THE SAME CONVERSATION.
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- IV & V. THE TRIAL COURT PROPERLY REFUSED A CHARGE ON INVOLUNTARY MANSLAUGHTER AND ACCIDENT, WHERE THERE WAS NO EVIDENCE FROM ANY ACCOUNTS THAT APPELLANT WAS IN IMMINENT DANGER OF DEATH OR SERIOUS BODILY HARM, AND ALL THE OTHER ACCOUNTS DESCRIBED INTENTIONAL SHOOTINGS.

STATEMENT OF THE CASE

Appellant Marlon Rivera was indicted by the Greenville County Grand Jury for murder (04-GS-23-7693). Specifically, the indictments alleged that, on July 18th, 2001, Appellant killed with malice aforethought Wilfrido Monge by shooting him with a pistol. {R. 464-65}.

The Honorable C. Victor Pyle, Jr. conducted a jury trial from October 10th to 13th, 2005. At trial, Applicant was represented by Attorney Susannah Ross, and Assistant Solicitor Kris Hodge prosecuted the case for the State. On October 17th, 2005, the jury found Appellant guilty of murder, and Judge Pyle sentenced Appellant to thirty (30) years.

A timely Notice of Appeal was filed and served. This appeal follows.

STATEMENT OF FACTS

This case concerns the murder of an individual following an altercation outside of a club in Greenville. As with most of the people involved in this case, Appellant is a foreign national who does not speak much English.

A. Police respond to a shots fired call

At about 12:30 a.m. on July 18th, 2005, Deputy David Bendig arrived at the scene of a reported shooting at a strip mall in Greenville County. There were a number people there, most of whom only spoke Spanish. The victim, Wilfredo Solis Monge, was lying on the ground. {R. 23-27; 63}.

At first, police thought Monge has only been beaten up in a fight, and treated the incident as an assault. Monge was transported to the hospital, where it was discovered that he had a gunshot wound to the face. Police were notified, and detectives were called out to the scene. {R. 28-29; 36-37; 201}.

B. Appellant is identified by an eyewitness at a nearby bar

Police attempted to talk to witnesses at the scene to find out what happened. One of them was Alvaro Fernandez, who gave a statement and then left. About 15 minutes later he returned, excitedly saying in broken English and then Spanish that he had seen the shooter, who was 2 blocks down the street in a bar called the Mexicali. {R. 13-14; 209-210}.

Officers responded to the Mexicali, where they knocked on the door, which was locked. After a commotion occurred inside, police entered with Fernandez, who pointed out Appellant as the culprit. Fernandez identified Appellant by his red shirt and blue jeans.

Officers placed Appellant in custody, and Appellant cooperated and placed his hands behind his back as directed. {R. 15-18; 210}.

Meanwhile, officers spoke with Carlos Estrado, the manager of the Mexicali during the early morning hours of July 18th. Castro testified at trial through an interpreter that Appellant came to the bar, and Castro patted him down for weapons as he apparently does to all his clientele. Castro felt some sort of weapon on Appellant, and told him he could not come in with it. Appellant told Castro he would get rid of it and be back. Appellant returned about 10-15 minutes later, and Castro let him in the bar, where Appellant stayed until he was arrested. {R. 2-7}.

C. Statements are given and Appellant confesses

Appellant and Fernandez were taken to the law enforcement center to be interviewed. Fernandez stated he saw two men arguing, and a third man walking behind the ones arguing. The third man then reached down and grabbed something at his leg, and then Fernandez heard two shots. Fernandez did not see which of the men did the shooting. {R. 20; 26-28; 141-42; 163-65; 215}.

After being advised of and waiving his rights in Spanish by a Spanish-speaking deputy, Appellant gave a statement, in which he admitted shooting the victim. {R. 167-178}. He stated he received a .22 silver revolver from a friend of his the day before, after the friend was arrested for criminal domestic violence (an arrest the police confirmed). Appellant stated that the victim started harassing him for hanging out with black people, and then grabbed his shirt and pushed him. They struggled for a bit, but the guy let go of Appellant. Appellant was mad because the guy had hit him, so he pulled out the gun from

his pants leg. It fell to the ground, but he picked it up and shot the victim two times. Appellant's friend then said, "OK, you shot him, let's go", so Appellant put the gun in his pocket and left. {R. 179-180; 229-234}.

Appellant said he went to his apartment, changed shirts, and drank some water. He then went to the Mexicali, where he was patted down and the manager told him he could not come in with the gun. Appellant admitted he went and hid the gun in a tree, then returned to the bar where he was arrested. {R. 180; 233}.

Meanwhile, Deputy Garret returned to the scene to drop Fernandez off. After searching some more, he found a .22 pistol hidden in the branches of a tree in the parking lot. {R. 142}.

D. Appellant's admissions to his cousin

The State also presented the testimony of Appellant's cousin, Nelson Castro. Castro testified that during the early morning hours of July 18th, Appellant came to house between 1:30 and 2:00 a.m. Appellant was with his mother and his mother's husband, and Appellant told Castro he had a problem because he had killed somebody. Appellant had a gun with him that he admitted he had borrowed from someone. After about 30-40 minutes Appellant left, saying he was going to go drinking. {R. 33-40}. Appellant told Castro that "during the fight [Appellant] got that pistol out, so the other guy grabbed the gun, and the gun went off". According to Appellant, the "shot hit somebody that was looking". {R. 45}. Appellant did not tell Castro about any third party trying to get the gun from Appellant, only that the guy he was fighting tried to get the gun. {R. 46}.

E. The forensic evidence

The victim was alive when he arrived at the hospital, but was brain dead and ultimately removed from the life support systems. An autopsy revealed that he had a bullet wound right between the eyes on the bridge of the nose, and a small caliber bullet was recovered from his head. The fired bullet was conclusively matched to the revolver found in the tree and only had a flattening of the nose area which was consistent with hitting bone. {R. 78; 87-88}. A gunshot residue (GSR) test was performed on Appellant, and one round lead particle was found on the back of his left hand, which was consistent with firing a weapon. {R. 60-62}. Officers found no damage from any bullet on the painted surface where the shooting took place, and there was no indication that the bullet had ricocheted before hitting the victim. {R. 206-207; 256-257}.

F. The defense case

The defense first called Courtney Robles, who was at the scene when the shooting happened. Robles stated that she saw a man in a striped shirt and a man in a white shirt fighting. A third man in a black shirt and blue jeans separated the men that were fighting, and then took a gun from the waistband of the man in the striped shirt and pointed it in the direction of the guy in the white shirt. He fired, hitting the victim instead, who was not involved in the fight. The man in the dark shirt then handed the gun back to the man in the striped shirt and said "come on, the police are coming". They then left. {R. 283-284; 292-294}.

Robles stated that the guy in the white shirt stayed with the victim and gave his name to police. {R. 285}. Robles claimed that the patrol officers who initially responded

were very rude to her, but she admitted on cross that once police determined it was a homicide, the detectives were very polite in taking her statement. {R. 287; 294-295}.

The defense next called Norberto Ortiz, who also witnessed the incident. Norberto stated that Delman Mauricio Arias and Appellant had some problems in the bar while drinking beer and watching a soccer game. Arias was insulting Appellant. The manager told them to leave, and once outside Arias attacked Appellant. Appellant told Arias he did not want any problems, but Arias continued on, so Appellant pulled a gun from his pants leg. Appellant then fired the gun into the ground. Supposedly, Arias kicked Appellant, and then a different guy who was with Appellant stated, "I'm going to get the weapon; I'm going to shoot the guy". The guy asked for the gun from Appellant, and after Appellant voluntarily gave it to him, the guy shot at Arias. Appellant then took the weapon back, and Arias got close again. Norberto said that Appellant shot into the ground again to scare Arias, but Wilfrido cried out that he had been wounded. According to Norberto, Appellant was wearing a green shirt with a print on it, and the other man was wearing dark pants, and either a black or beige shirt. Norberto did not know which of the three shots hit Wilfrido. {R. 299-304; 307}.

Next, the defense called Robert Taylor, a social worker and Episcopal priest. Dr. Taylor testified that due to cultural issues, the language barrier, and Appellant's limited functioning, Appellant could not have understood what he was doing when he waived his rights and gave a statement to police. {R. 313-232}. On cross, Dr. Taylor admitted that he had only spent 30 minutes with Appellant and had administered no testing, and that all the information he used to form his opinion came from Appellant. Dr. Taylor also admitted

he did not ask Appellant how long he had been in the USA. {R. 324}.

Finally, Appellant himself testified. He stated that he did not go to school very often growing up in Honduras, because he had to sell tortillas to support his grandmother. When his grandmother got sick, he illegally came up to South Carolina to stay with his mother. Appellant stated he could not read English or Spanish, but he was quite specific in the amounts of money he was earning, saving, and sending back home. {R. 334-338; 361}.

According to Appellant, Antonio had given the pistol to Mariano Mendoza when Antonio was arrested. Appellant stated that he got to the bar with two other Honduran guys, and Mariano was there already drunk. Mariano asked Appellant to keep the pistol for him and Appellant agreed. {R. 338}.

Appellant stated they then went to Don Pepe's restaurant, where he started to talk with 5 black guys he knew. After the restaurant closed, Appellant was getting a taco when Mauricio attacked him from behind because he got close to one of the black guys. According to Appellant, Mauricio was insulting him, punching him very hard, and pushing him to a column. Eventually, Mauricio threw Appellant to the ground and started kicking him. As Appellant was getting up, the gun fell from his pants, and Appellant reached for it. Mauricio pushed him to prevent him from getting the pistol, but Appellant got it and "shot down". Appellant claimed Norberto grabbed Mauricio and told him to stop, but Mauricio kept punching Appellant. Supposedly, as he continued to attack Mauricio said out loud that Appellant's gun was fake, and some unknown person grabbed Appellant too. {R.339-340; 342}.

Appellant stated that after he shot at the ground, a man named "Skinny" or "El

Flaco" grabbed the gun and shot at Mauricio, after which Appellant grabbed the gun back and shot again at the ground. A few seconds later he heard a yell that someone had been shot, and when he saw Skinny run away, he ran away too. Appellant said the only reason he fired the gun is because Mauricio was attacking him and he wanted to scare him away. {R. 341-343}.

Appellant said he was wearing a shirt that had green, red, and orange squares. When he went home, he changed his shirt. {R. 344-345}. Appellant then told his mother, stepfather, and cousin what happened. {R. 346}. Appellant admitted hiding the gun in a tree before being allowed in the Mexicali, where he was arrested. {R. 348-349}.

At the law enforcement center, the officers supposedly wrote the first two letters of his name and then told Appellant to copy it. {R. 352}. Appellant claimed he did not understand it when the officer read him his rights, and he has only since learned of his rights after being in jail. {R. 354}. Appellant stated the officer lifted him up by his belt very hard and shouted at him with a red face that he was lying, and when Appellant protested that God in Heaven would know he was not lying, the officers told him there was no God here. {R. 355}. On cross, Appellant admitted he did not need any medical treatment from the fight, and that he only got hurt when he was pushed into a column. When asked if he thought Mauricio was going to kill him if they were just fighting, Appellant admitted they were just fighting, but said he had been thrown to the ground and was being kicked. {R. 370}.

ARGUMENT

I. THE TRIAL COURT'S DECISION TO ADMIT APPELLANT'S CONFESSION CANNOT BE SAID TO HAVE BEEN SO MANIFESTLY ERRONEOUS AS TO AMOUNT TO AN ERROR OF LAW, WHERE THE OFFICER'S DESCRIPTION OF EVENTS PROVIDED AMPLE SUPPORT IN THE RECORD FOR THE COURT'S DECISION, ESPECIALLY GIVEN THAT APPELLANT WAS INTERVIEWED IN HIS NATIVE TONGUE AND THE TRIAL COURT SPECIFICALLY FOUND NO COERCIVE POLICE CONDUCT RELATED TO THE CONFESSION DESPITE APPELLANT'S ALLEGED CULTURAL OR INTELLECTUAL INFIRMITIES.

Appellant's first ground on appeal is that the trial court erred in admitting Appellant's statement, where Appellant could not read or write English, the police pulled Appellant up by his shackles at one point, the police called Appellant a liar, and Appellant could not understand the interrogation given the language and cultural issues. However, there is ample support in the record for the trial court's decision from the officers' description of events, especially given that Appellant was interviewed in his native tongue and the trial court found no coercive police conduct causally related to the confession despite Appellant's alleged infirmities.

A. Events at trial

During the Jackson v. Denno hearing, Officer Garrett and Detective Smith testified that after Appellant was arrested, he did not appear to be intoxicated and appeared to understand the situation in which he found himself. In response to questions in English, Appellant would only respond "no problem". However, he spoke Spanish without an issue and at the normal rapid pace. {R. 69-71; 82-87; 100-103}.

Officer Ramon Rivera, who speaks fluent Spanish and stated he had no trouble understanding Appellant and that Appellant's responses were all appropriate with the questions made to him, testified that he went over each of Appellant's rights while reading

verbatim from a Spanish version of the standard form. He stated Appellant initialed after each right and appeared to understand. Officer Rivera stated there was neither threats, coercion, or promises made to Appellant, and that Appellant was allowed use of the bathroom and something to drink if he desired. Appellant never expressed a desire for a lawyer or to stop talking. {R. 87-93}. Officer Garrett and Detective Smith were also present and confirmed this appropriate treatment of Appellant. {R. 72-76; 102-107}. Detective Garrett noted that when the interview was completed, Appellant told Officer Rivera that it was taking entirely too long and that the officers were being too nice to him, because in his country officers would have already put a bag over his head and beat it out of him. {R. 107-108}.

On cross, Officer Rivera denied that he held Appellant's hand to make him sign his name. Officer Rivera stated that during the statement, Appellant was no longer cuffed behind his back, but that they had cuffed him in the front with a loose waist belt through which the handcuff chain goes. {R. 94-95}. Detective Smith stated:

I picked him up by the belt and pulled his belt back up, it was very loose, so he would be able to move his arms around, but he still be restrained. I picked him by the belt. I stood him up, moved it back up, and just told him to sit back down in the chair.

{R. 111}. Detective Smith specifically denied that this was done in the context of calling Appellant a liar, but admitted that he did accuse Appellant of lying when the police tried to get him to name his companion. {R. 112}.

The defense first called Appellant during the Jackson v. Denno hearing. He stated that he cannot read or write, that he only went as far as second grade, that he thought "nothing" was happening when he made the marks on the paper", that he did not

understand anything when Officer Rivera went through the items on the waiver form, and that he did not understand what his rights were. He complained that one of the officers grabbed him from the front and accused him of lying. He stated the did not understand and was nervous when ordered to sign the statement, and that Officer Rivera took his hand and made the first two letters, then told him to copy it at the bottom. {R. 114-119}. On cross, Appellant admitted that he pays for groceries with cash, and can pay rent and bills. {R. 122-123}.

Defense investigator Carlos Freeman testified that during a meeting Appellant was very excitedly talking and denying that he said what was in the statement as Freeman went over it with him. Appellant also mentioned the incident in which he was lifted up by police. {R. 124-126}.

Finally, social worker Dr. Robert Taylor testified that he did not believe the waiver was knowing and voluntary, based on Appellant's limited understanding of the rights, his illiteracy, his sensitivity to being jerked up and called a liar, and the cultural differences of experience with police in his home country and experience with police here. {R. 128-139}.

The trial court credited Officer Rivera's testimony, finding the waiver of rights to be valid. The court specifically made a credibility finding that Appellant was very street-wise. The judge concluded that Appellant was properly advised of his rights, and that his waiver and statement were voluntary and not the product of any coercive police conduct. {R. 140}.

B. General Rules

The trial court must initially make the determination of the voluntariness of a

statement based on the preponderance of the evidence standard. State v. Washington, 296 S.C. 54, 370 S.E.2d 611 (1988). First, if a statement was the result of custodial interrogation, the trial court must exclude it unless the defendant was advised of and voluntarily waived his Miranda rights. Miranda v. Arizona, 384 U.S. 436 (1966).

Second, once a voluntary waiver of Miranda rights is made, the waiver continues until revocation or the existence of circumstances indicating that the defendant's "will was overborne". State v. Franklin, 299 S.C. 133, 382 S.E.2d 911 (1989) (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)). The determination of voluntariness is made on the totality of the circumstances, including the background, experience, and conduct of the accused. Franklin, 299 S.C. 133, 382 S.E.2d 911.

The trial court's voluntariness determination will not be disturbed on appeal unless it is so manifestly erroneous that it shows an abuse of discretion amounting to an error of law. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998). Review for abuse of discretion on appeal is highly deferential. It does not require that the members of this Court even agree with the trial judge's decision, only that no reasonable person could possibly take the view of the trial court. See, e.g. State v. Duncan, 956 P.2d 737 (Kan. Ct. App. 1998). See also People v. Reigle, 566 N.W.2d 21 (Mich. Ct. App. 1997) (abuse of discretion exists when unprejudiced person, considering facts on which trial court acted, would say there was no justification or excuse for the ruling).

If the trial court finds by a preponderance of the evidence that the statement was voluntary, then the issue is submitted to the jury to make the voluntariness determination beyond a reasonable doubt. Washington, 296 S.C. 54, 370 S.E.2d 611.

C. There is support in the record for the trial court's decision that Appellant's statements were voluntary.

Of course, Appellant's testimony during the hearing on the admissibility of his statements differed markedly from that of the police officers. The state's evidence introduced at the Jackson v. Denno hearing, detailed above from Detective Smith and Officers Rivera and Garret, described a normal and permissible procedure for taking a statement pursuant to the constitutional guidelines.

The trial court's decision to credit the officers' version is sustainable on appeal. The preponderance standard, applicable here, is defined as "evidence which is . . . more convincing than the evidence which is offered in opposition to it". Black's Law Dictionary 1182 (6th ed. 1990). Further, appellate courts defer to the explicit or implicit credibility findings of a trial court, which had the opportunity to observe the witnesses. And, as noted before, an abuse of discretion standard of review looks to whether *any* reasonable person could have taken the view of the trial judge, or, put another way, whether any evidence supported the trial judge's decision. See, e.g. State v. Duncan, 956 P.2d 737 (Kan. Ct. App. 1998).

Here, simply believing either Officer Rivera's, Officer Garret's or Detective Smith's description of events over Appellant's would be enough to meet the preponderance standard. The trial court obviously did; thus, the decision is reasonable and supported by evidence in the record. See, e.g. State v. Howard, 296 S.C. 481, 374 S.E.2d 284 (1988) (where evidence on voluntariness was conflicting, trial court properly admitted statement under preponderance standard); State v. Howard, 295 S.C. 462, 369 S.E.2d 132 (1988) (where evidence is conflicting, trial court should submit voluntariness issue to jury unless

statement should be suppressed as a matter of law); State v. Adams, 279 S.C. 228, 306 S.E.2d 208 (1983) (where evidence was conflicting, trial court properly admitted confession for consideration by jury); State v. Middleton, 295 S.C. 318, 368 S.E.2d 457 (1988) (trial judge properly submitted conflicting evidence on the issue of voluntariness to the jury); State v. Atchison, 268 S.C. 588, 235 S.E.2d 294 (1977) (where conflicting evidence on issue of voluntariness, there was support in the record for trial court's decision to admit the statement and submit it to the jury); State v. Dorce, 320 S.C. 480, 465 S.E.2d 772 (Ct. App. 1995) (issue of credibility for trial judge where conflicting evidence on issue of voluntary consent).

D. Appellant's alleged cultural or intellectual infirmities are of no moment where the trial court specifically considered Appellant's background but found no coercive conduct by the police causally related to the confession.

A few further points need to be addressed. The first is Appellant's complaint as to his language barriers, his educational limitations, his cultural differences, and his idiosyncratic nervousness or sensitivity. Of course, the trial court specifically rejected these concerns by finding Appellant to be street-wise, and as set forth before, Officer Rivera noted he had no problems conversing with Appellant and Appellant's answers were all appropriate for the questions asked. Regardless, Appellant's specific personal limitations are not dispositive absent coercive police conduct causally related to the confession.

The test for determining legal voluntariness is whether the defendant's will was overborne or his capacity for self-determination critically impaired. Schneckloth v. Bustamante, 412 U.S. 218 (1973); State v. Register, 323 S.C. 471, 476 S.E.2d 153 (1996). "[W]hile mental condition is certainly relevant to an individual's susceptibility to police

coercion, mere examination of a confessant's state of mind can never conclude the due process inquiry". Colorado v. Connelly, 479 U.S. 157, 165 (1986). In making a voluntariness determination, courts do NOT have to "divine a defendant's motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision". Id. at 165-66. The bottom line is that: "Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law". Id. at 164. In Connelly, the United States Supreme Court noted that in each case where a confession was excluded as involuntary, "all . . . contained a substantial element of coercive police conduct". Id. at 141.

Here, the trial court specifically considered Appellant's background and found not only was he "street wise", but also that the statement "was not the result of any coercive police tactics". {R. 140 line 13}. Under Connelly, this is dispositive of the relevance of Appellant's personal or cultural idiosyncracies, where Appellant was interviewed in his native tongue and stated he understood the waiver. "When a defendant is advised of his rights in his native tongue and claims to understand such rights, a valid waiver may be effected." United States v. Hernandez, 913 F.2d 1506, 1510 (10th Cir. 1990). Whether his statement was not actually the truth due to Appellant's personal or cultural limitations was a question for the jury in its ultimate determination of credibility, not one for the trial court where it had already found no coercive police conduct causally related to the confession. State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957) (Legge, J., concurring) ("[E]ven though the jury may accept the confession as having been freely made, they are the sole judges of credibility, and may believe [the confession] in toto or in part or not at

all.”). See also State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000) (after a judge initially determines whether a defendant waived his rights and voluntarily gave a confession, it is for the jury to ultimately decide whether the confession was voluntary).

Indeed, other decisions have found similarly when faced with claims from foreigners who alleged their limited intelligence and cultural background precluded a valid waiver. State v. Amaya-Ruiz, 800 P.2d 1260 (Ariz. 1990) (citing State v. Rivera, 733 P.2d 1090 (1987), and State v. Montes, 667 P.2d 191 (1983) for the proposition that waivers were valid where the defendant was interviewed in Spanish, despite claims of low education, cultural differences, and lack of contact with the US judicial system).

Which brings up two final points made by Appellant in his brief in an attempt to show police coercion, both of which are inaccurate in light of the record. Perhaps understanding that he has to work with the police officers' version of events given the trial court's findings, Appellant first contends that Detective Smith admitted to “malevolent” conduct when he described lifting Appellant up. As noted before, Officer Rivera's testimony was that Appellant had been cuffed in the front so that he could sign the paper, and Detective Smith's testimony was only that he stood Appellant up by the “very loose” belt to adjust it up so that Appellant could “move his arms around”. Detective Smith specifically denied this was done in the context of calling Appellant a liar. {R. 95; 111-112}. The trial court obviously credited this testimony in finding no coercive police conduct, and thus there is support in the record for Appellant's claim under the highly deferential standard for review.

Finally, Appellant contends that Officer Garret admitted to interviewing subjects as to the subject matter before formally “Mirandizing” them, and that this makes the case akin to State v. Navy, 370 S.C. 398, 635 S.E.2d 549 (Ct. App. 2006), where this Court held that

Miranda warnings inserted in the middle of an interrogation might deprive the defendant of the ability to exercise his rights. However, Garret described no such mid-interrogation Mirandizing; he was merely answering questions as to how he could claim to have witnessed the written waiver when he stated he walked in as they were in the process of interviewing the subject. In response to this questioning, Officer Garret stated that "I believe they had probably read him his rights. He had not signed his waiver of rights." {R. 78}. Garrett also noted that "as an investigator a lot of times we'll interview a subject verbally, read them their rights first, talk to them, kind of get a brief interview, and then we'll actually put it on paper". {R. 80}. Garret specifically stated that even if such an initial oral interview was used it would be after the rights had been read – this is a far cry from Navy, which addressed a situation where a written custodial statement was first taken without Miranda waiver.

The trial court's decision here has support in the record and is sustainable on appeal.

II. THERE WAS NO REVERSIBLE ERROR IN ALLOWING INVESTIGATOR SMITH TO TESTIFY AS TO WHAT OFFICER RIVERA – WHO WAS ACTING AS AN INTERPRETER – TOLD HIM APPELLANT SAID, WHERE ANY ERROR WAS NOT PRESERVED. A TRANSLATOR DOES NOT COUNT AS A LAYER OF HEARSAY, AND IN ANY EVENT THE TESTIMONY WAS CUMULATIVE TO OFFICER RIVERA'S EARLIER RECITATION OF THE SAME CONVERSATION.

Appellant next contends the trial court erred in admitting alleged hearsay from Detective Smith that as he and Officer Rivera were taking Appellant to the magistrate's office, Appellant made a comment, and Rivera translated it as being a comment that the police were too nice and in Appellant's country the police would have beat Appellant. However, the issue is not properly preserved or presented on appeal. Regardless, a translator's recitation is merely a language conduit and does not count as a layer of hearsay, especially when at the time this statement was made there was no motive for Officer Rivera to lie to Detective Smith. Finally, any error was harmless as Officer Rivera had already testified to virtually the same conversation.

A. Events at trial

At trial, Officer Rivera testified that as he was taking Appellant down for booking following the taking of the written statement, Appellant stated, "Man, this is taking too long. In my country they would have put a bag on my head and beat me down or beat me up." {R. 181-182}. Defense counsel objected "to any hearsay what he said" prior to the testimony. Later, Detective Smith described the same events. He testified that as he and Officer Rivera were taking Appellant down to booking after they completed the statement, Appellant said something in Spanish and Officer Rivera laughed. Detective Smith asked Officer Rivera what Appellant said, and Officer Rivera said: "This is taking entirely too long, you guys are being too nice about it. In my country they'd put a bag over your head and

beat you.” {R. 235}. Defense counsel renewed her prior objection to hearsay, but made no specific argument as to double hearsay or the like.¹

B. Any issue as to an extra layer of hearsay, or to admissibility under Rule 403, is neither preserved for review nor properly presented on appeal.

On appeal, Petitioner only challenges the introduction of Investigator Smith’s recitation of what Officer Rivera told Smith Appellant just said. While he goes on in his brief as to why he thinks this hearsay was prejudicial, he does not specify in his brief exactly why the hearsay was inadmissible, other than to say the general statement that hearsay is inadmissible. {Brief of Appellant pp. 23-24}.

Appellant does not challenge Officer Rivera’s virtually identical recitation of the same exchange. Obviously, this is because Officer Rivera heard and understood Appellant’s statement in Spanish, and Appellant’s own statement is non-hearsay as the admission of a party-opponent, see Rule 801(d)(1)(2), SCRE, and indeed, while not necessary, also admissible as then-existing state of mind, Rule 803(3), SCRE. The statement was not offered to show that the process took too long, that police in Honduras actually would beat someone with a bag on his head, or even that the police were in fact “too nice” as an objective matter; it was offered to show Appellant’s state of mind that he was not at that moment suffering from the effects of alleged police mistreatment.

Thus, if Appellant is attempting to contend that *Detective Smith’s* recitation of the conversation had an extra layer of hearsay on it as it had to be filtered through Officer Rivera’s translation, then he has two problems: he made no such argument at trial, and he

¹ Detective Smith gave similar testimony during the earlier Jackson v. Denno hearing. {R.108}.

does not expressly make any such argument on appeal. At trial, Appellant only objected to "what he said" during Officer Rivera's testimony that "on the way down [Appellant] said something to . . ." {R. 181} – which of course would have to mean Appellant given the context of the sentence. During Detective Smith's subsequent testimony, Appellant only "renew[ed]" the prior objection to hearsay. {R. 235}. At no time did Appellant at trial mention the words "double hearsay", or "layers of hearsay", or in any way make it clear that the objection was to the additional layer of interpretation necessary for Detective Smith to recount the conversation. Since Appellant did not make that specific argument below and indeed does not discuss those concepts on appeal, he has neither preserved nor properly presented the only possible incarnation of a purely hearsay issue. State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996) (appellant cannot argue one ground at trial and another on appeal); State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981) (issue not argued in the brief is deemed abandoned); Solomon v. City Realty Co., 262 S.C. 198, 203 S.E.2d 435 (1974) (issue with only conclusory argument is deemed abandoned).

If he is trying to subtly turn this issue into one under Rule 403, SCRE, then that is not preserved either as that doctrine certainly was not mentioned. If he is simply objecting to Appellant's statement in and of itself, it is clearly admissible as non-hearsay under Rule 801(d)(1)(2), SCRE.

C. Officer Smith's testimony was properly admitted under the interpreter exception to the hearsay rule.

Even if Appellant is somehow deemed to challenge the extra layer of hearsay, the evidence was admissible. While there is some contrary authority, the majority rule is:

Provided the interpreter has a sufficient capacity, and there is no motive to misrepresent, the interpreter is treated as the agent of the party and the statement is admitted as an admission unless circumstances are present which would negate the presumption of agency.

State v. Robles, 458 N.W.2d 818 (Wis. Ct. App. 1990) (quoting 4 J. Weinstein & Berger, Evidence, § 801(d)(2)(C)([01]) (1984)). Except in unusual circumstances, an interpreter is "no more than a language conduit and therefore his translation [does] not entail an additional level of hearsay. United States v. Lopez, 937 F.2d 716 (2nd Cir. 1991). "Absent a motive to mislead, distort, or some other indication of inaccuracy, when persons speaking different languages rely upon a translator as a conduit for their communication, the statements of the translator should be regarded as the statements of the persons themselves without creating an additional level of hearsay." Lopez v. State, 636 S.E.2d 770 (Ga. Ct. App. 2006) (quoting Cassidy v. State, 149 S.W.3d 712, 715 (Tex. Ct. App. 2004)).

Robles went on to hold that merely because the interpreter is a police officer does not mean that the "language conduit" rule does not apply. Robles instead concluded that it must be established that the interpreter was unqualified, harbored a motive to falsify, or gave an inaccurate translation. Robles, 458 N.W.2d at 822.

Here, at the time Officer Rivera made the statement he had acted as a interpreter for Investigator Smith, primarily asking questions that Investigator Smith told him to ask. {R. 176}. The statement was casually made as the men were going down to booking, and Rivera laughed, finding it humorous. At the time Rivera made the statement, he had no motive to lie or falsify, as there had been no legal claim at that time that he had mistreated or mistranslated Appellant. There also has been no showing Officer Rivera was not fluent

in Spanish. See, e.g., People v. Hinojos-Mendoza, 140 P.3d 30, 38-39 (Colo. Ct. App. 2005) (non-testifying officer's primary language was Spanish, he had translated many conversations for his partner, and he had a motive to translate the drug deal accurately to aid in identifying and arresting the suspect).

Inasmuch as Appellant may be deemed to have made a Rule 403 claim, since the testimony was also directly relevant to a claim that Appellant was mistreated, the probative value could not have been substantially outweighed by any prejudicial effect. Indeed, any prejudice from Appellant's own statement would not be to him but to the Honduran police, who of course are not parties to this action.

D. Any error was harmless as the testimony was cumulative to Officer Rivera's description of the same exchange.

Even if there was a hearsay or relevance issue, any error was harmless as the testimony was cumulative to Officer Rivera's description of the very same exchange, of which Appellant makes no challenge on appeal. Officer Rivera's description was virtually identical, except that he did not mention to "too nice" comment. {R. 181-182}. However, that point is more than evident from the statement that in his country the police would have put a bag on his head and beat him up by now, and that small difference could not rise to the level of harmful error. State v. Ladner, 373 S.C. 103, 644 S.E.2d 684 (2007) (admission of improper evidence is harmless where it is merely cumulative to other evidence).

III. THERE WAS NO REVERSIBLE ERROR FROM THE TRIAL COURT'S EXCLUSION OF THE TESTIMONY OF DEFENSE INVESTIGATOR CARLOS FREEMAN FOR VIOLATION OF THE SEQUESTRATION ORDER, WHERE THE ISSUE IS NOT PRESERVED, THE RULING WAS NOT AN ABUSE OF DISCRETION, AND ANY ERROR WAS HARMLESS.

Appellant's next claim is that the trial court erred in refusing to let defense investigator Carlos Freeman testify due to the sequestration order. Appellant contends that this was fundamentally unfair since the defense was using Freeman as an interpreter for Appellant during trial. However, Appellant did not preserve the issue where he did not object at the time the sequestration order was issued, since he offered no new reason why Freeman's testimony should be admitted late in the trial. Moreover, for the same reason, the trial court did not abuse its discretion, as no new reason specific to Freeman's testimony was given in support for a late request for an exception to the sequestration order. Finally, since Freeman's proffered testimony was either inadmissible or cumulative, any error was harmless.

A. Events at trial

The beginning of the transcript reflects two court reporter's notes: (1) that Carlos Freeman sat beside Appellant throughout trial translating for the Appellant, and (2) that the official Spanish interpreter for witnesses was Efrain Pineros.

At the beginning of trial, defense counsel noted that it was difficult to communicate with her client due to the language issue, and asked for a Spanish-speaking attorney to be appointed to assist. The trial court asked whether Freeman was qualified to interpret, and he stated that he was. The court then denied the motion. {R. 3-4}.

Later, the trial court noted that the defense motion to sequester all witnesses would

be granted. The court stated that "all potential witnesses on the state and the defense will be sequestered", and defense counsel stated that she understood. {R. 4}.

The defense then made a number of motions, including one claim of trial by ambush in which it pointed out that Freeman had been out canvassing the area and had provided the names of some witnesses to the police. The police obtained different statements than Freeman did, and many of the witnesses would not talk to Freeman again. The court denied the motion. {R. 9-12}. At this point, the defense moved for a separate court interpreter, admitting though that she trusted the accuracy of Freeman's interpretation. She argued that despite this trust, he was not "the state interpreter for this case". The court denied the motion. {R. 12}.

Many of the witnesses in this case testified in Spanish, and court interpreter Efrain Pineros provided the English translation for this testimony. {R. 32-33; 114}.

During the Jackson v. Denno hearing, Freeman testified that Appellant was very nervous and excited in speaking about the confession, and kept interrupting denying he said certain things to police as the defense team went over the statement. {R. 124-126}.

Following the State resting and the denial of the usual motions, the prosecutor noted that Freeman was on the defense witness list, and that his testimony should be disallowed because he had been translating in the courtroom and outside talking to potential witnesses. The defense responded that the State's chief investigator had been in the courtroom. The trial court responded: "[The prosecutor is] entitled to that. But you made the motion to sequester. So I have got to grant that motion." The trial court noted that the rules allow the State's chief investigator to remain, to which the defense responded that Freeman was its chief investigator and translator. The court declined to allow Freeman to

testify. {R. 262-263}.

Defense counsel then proffered Freeman's testimony, in which he stated he tried to find people who had witnessed the incident; that he gave this information to Detective Smith; that a number of witnesses were saying a different person fired the shot; that in his conversations with Smith he believed the State was unaware of this person; that through extensive canvassing he ended up with the name of a possible suspect named Daniel Ariana Gonzales; that the defense obtained a photograph of Gonzales because he was in the criminal system at the time; and that Appellant had an incredulous reaction and had to be calmed down from continually saying "I didn't say that, that's not true", when the defense went over the statement with him. In Freeman's opinion, Appellant was greatly surprised. {R. 263-267}. On redirect, the court refused to allow Freeman to testify as to the differences among the versions in the statements he took, but the statements were made court's exhibits. {R. 278; 331}.

Later, the trial court declined to allow a different defense witness to testify based on the sequestration order. The court noted that the defense made the motion to sequester, that the defense had an investigator in the courtroom who could monitor witnesses, and that the trial court specifically instructed the defense at the beginning of trial that the sequestration order would apply to all state and defense witnesses. {R. 295-296}.

The next day, defense counsel renewed her objection to the exclusion of Carlos Freeman. She argued that "traditionally" the lead investigator remains in court even after a sequestration order is made, and contended that she did not object when Investigator Smith remained in the courtroom. She contended the alleged unequal treatment violated her client's right to a fair trial. {R. 331-332}.

B. General Rules

The trial court may order the sequestration of witnesses upon its own motion or by motion of any party. Rule 615, SCRE. A party is not entitled to have witnesses sequestered as a matter of right. The decision to sequester witnesses is left to the sound discretion of the trial judge. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981); State v. Harris, 275 S.C. 463, 272 S.E.2d 636 (1980); State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980); State v. Fulton, 333 S.C. 359, 509 S.E.2d 819 (Ct. App.1998) (allowing the State to recall a reply witness who was present in the courtroom during a portion of the trial). "Whether a witness should be exempted from a sequestration order is within the trial court's discretion." Gattison v. South Carolina State College, 318 S.C. 148, 456 S.E.2d 414, 415 (Ct. App.1995) (citing Constant v. Spartanburg Steel Prods. Inc., 316 S.C. 86, 447 S.E.2d 194 (1994)). See State v. Tisdale 338 S.C. 607, 616, 527 S.E.2d 389, 394 (S.C. Ct. App. 2000) (setting forth the above discussion).

A long line of cases has noted that as part of the trial court's discretion as to sequestration issues, the trial court may "permit a witness to remain in the court room for the purpose of assisting the prosecution and afterward to testify if the circumstances require it." State v. Lee, 255 S.C. 309, 314, 178 S.E.2d 652, 654 (S.C. 1971) (permissible to allow brother of victim who was in the car to remain with solicitor); State v. Sharpe, 122 S.E.2d 622, 624 (S.C. 1961) (permissible for sheriff to remain in courtroom); State v. Britt, 111 S.E.2d 669, 676 (S.C.1959) (permissible to let four officers remain in courtroom to assist solicitor). As defense counsel conceded, traditionally this means the State's chief investigator – as obviously since the defendant gets to remain in the courtroom to assist counsel in his defense, it is only fair that the State have its chief investigator in the

courtroom to assist the prosecution in presentation of the case. Cf. State v. Cabbagestalk, 281 S.C. 35, 35-36, 314 S.E.2d 10, 10 - 11 (1984) (noting that defendant made a motion to sequester all witnesses but the State's investigating officer and the defendant).

C. The issue is not preserved.

Undoubtedly, Appellant objected strenuously when during the defense case the court indicated it would not allow Freeman to testify. However, this was insufficient to preserve the issue. As the trial court noted, the defense made the motion to sequester at the beginning of trial, and the judge granted it to *all* state and defense witnesses. Whether or not this ruling includes the traditional exception for the defendant and the State's lead investigator – which defense counsel conceded it did at trial {R. 332} – the fact remains that the judge's ruling clearly applied to Freeman. At the time of making his motion, Appellant did not seek an exception to the ruling for Freeman, and thus it was too late when he attempted to raise the issue during the defense case. Cf. generally State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (must be contemporaneous objection to preserve issue). This is because Appellant offered no other justification for needing to call Freeman despite the lack of a timely request at the time of the motion other than the fact that the State got to keep its chief investigator in the courtroom. Cf. State v. Hall 268 S.C. 524, 529, 235 S.E.2d 112, 114 (S.C. 1977) (allowing State to call psychiatrist in reply who had been in courtroom not error despite sequestration order because "it was inferable that the solicitor did not know that he was going to call this witness until after the insanity defense had been interposed"). The fact that Appellant did not object to Detective Smith is simply another issue Appellant did not preserve – it does not somehow save the

preservation issue as to Freeman.

The objection was not contemporaneous where no new justification was offered.

D. The trial court did not abuse its discretion.

The trial court did not abuse its discretion here. As noted before, the defense made the motion, and the trial court explicitly stated it applied to all state and defense witnesses. As defense counsel conceded, Freeman was on the witness list from the beginning {R. 332}, and there was no express exception made for Freeman at the beginning. The only justification for the late request for an exception was that the State was allowed to keep its investigator in the courtroom; however, as noted before, the failure of the defense to object when Investigator Smith testified twice is irrelevant to a determination of whether there were specific circumstances about Freeman's testimony that supported the late request to be allowed to call him. See, e.g. State v. Hall, 268 S.C. 524, 529, 235 S.E.2d 112, 114 (1977) (allowing State to call psychiatrist in reply who had been in courtroom not error despite sequestration order because "it was inferable that the solicitor did not know that he was going to call this witness until after the insanity defense had been interposed"). Simply saying "the State got to" does nothing to show why the circumstances of the trial had developed in manner that Freeman's testimony became suddenly necessary.

Given the lack of specific circumstances relevant to Freeman's testimony that would support a late exception to the sequestration order, the trial court did not abuse its discretion in enforcing that order as given, particularly where the order was given at the request of the defense.

E. Any error in exclusion of Freeman's testimony was harmless.

Regardless, even if the trial court was so wrong as to have abused its discretion in excluding Freeman's testimony, the error was harmless as Freeman offered no evidence of consequence that would be admissible, or was not cumulative to other evidence.

Freeman first testified that after canvassing the area and talking to a number of witnesses he identified a different suspect. Freeman even went so far as to identify this alleged shooter by name. {R. 264-267}. Obviously, this is rank hearsay, inasmuch as it seeks to introduce what other people told Freeman right to the ultimate issue in this case, and it would be inadmissible. See Rule 802, SCORE. Having an investigator identify by name who others told him committed a crime is in no way akin to having an officer generally testify that based on information received he sought a search warrant or looked for a piece of evidence. Cf. German v. State, 325 S.C. 25, 27-28, 478 S.E.2d 687, 688-89 (1996) (holding testimony of undercover drug agent regarding tips that defendant was selling drugs and description of defendant were inadmissible hearsay given the statements specifically referred to defendant); State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 893-94 (1994) (finding officers' statements explaining why they began their surveillance of defendant's apartment were not hearsay);

As to Freeman's testimony about providing the information to the State and their alleged lack of knowledge of this information {R.265}, the defense was in fact able to elicit from Detective Smith that Carlos Freeman provided him with a list of witnesses, that Freeman provided the name "El Flaco", and that Freeman provided information on Daniel Ariana. Smith also testified that the information provided was in his supplemental report,

and agreed that the defense provided the names of additional witnesses as well as an additional suspect. {R. 249-250}. The defense elicited the information and thus there could be no prejudice. State v. Pipkin, 359 S.C. 322, 597 S.E.2d 831 (S.C. Ct. App. 2004) (excluded testimony harmless where cumulative to other evidence).

Finally, Freeman's testimony that Appellant denied aspects of the statement when they went over it at the jail, and that he was incredulous and surprised – which would be non-verbal assertions – is clearly inadmissible as hearsay. Rule 802, SCRE. Appellant had yet to testify at the trial when the statement was offered, but it clearly was offered as a prior consistent statement to Appellant's eventual testimony that the statement contained things he did not say. Obviously, Appellant had a motive to fabricate when he was sitting in jail faced with murder charges, so the verbal and non-verbal assertions could not have been admissible as prior consistent statements. Rule 801(d)(1), SCRE. See State v. Ard, 332 S.C. 370, 505 S.E.2d 328 (1998) (statement made to attorney when defendant was planning on turning himself in was made after he had a motive to lie, and was not admissible), rev'd on other grounds, Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002).

Since Freeman's testimony was either not admissible or elicited from other sources, there could have been no error from exclusion of his testimony based on a violation of the sequestration order.

IV & V. THE TRIAL COURT PROPERLY REFUSED A CHARGE ON INVOLUNTARY MANSLAUGHTER AND ACCIDENT, WHERE THERE WAS NO EVIDENCE FROM ANY ACCOUNTS THAT APPELLANT WAS IN IMMINENT DANGER OF DEATH OR SERIOUS BODILY HARM, AND ALL THE OTHER ACCOUNTS DESCRIBED INTENTIONAL SHOOTINGS.

Appellant finally contends that he was entitled to jury instructions on involuntary manslaughter and accident based on the testimony of his cousin Nelson Castro. Since there was no evidence from any accounts that Appellant was in imminent danger of death or serious bodily harm, and all the other accounts described intentional shootings, sufficient evidence for involuntary manslaughter or accident cannot be found.

A. Events at trial

Appellant is certainly correct that there were a number of versions of events presented from the various witnesses at trial. Given that Appellant himself testified at trial that when the gun fell out of his pants, he picked it up, fired down into the ground to scare Mauricio, then Skinny grabbed the gun and shot in the direction of Mauricio, and then Appellant took the gun back and fired into the ground again – it is not surprising that Appellant must now rely not on his own testimony but solely on what his cousin Castro said he related shortly after the murder.

In any event, during Castro's testimony, he was asked if in his statement to police he said that the person that Appellant was fighting with grabbed the pistol from Appellant. Castro replied that Appellant "said the gun just went off". Appellant told Castro he pulled the pistol out, and that it hit someone that was just looking. {R. 43}.

On cross, Castro testified that Appellant said as they were wrestling both of them were grabbing the pistol; the other one had grabbed pistol away from Appellant, and "in

that the shot went off". Castro agreed when asked if Appellant said the gun went off accidentally when the other man grabbed the pistol as they were fighting over it. {R. 43}. Castro specifically stated that Appellant did NOT tell him that he had been attacked, just that he was fighting with the other person and they were wrestling. {R. 44}. At this point, Castro's entire statement was read into evidence:

"A few months back, I heard someone knocking at my door. I live 29 Silver Spring Road. I opened the door, and I looked at Marlon Rivera with his Mom, Alashandra and her husband. They came in, and talked to me. And Marlon told me he had some problem. He said that he was in a club and he was carrying a pistol that he belonged to Mr. Antoni. And he said that during that fight **he got that pistol out**, so the other guy grabbed the gun, and the gun went off. And the shot hit somebody that was looking. He said that he was going to come back to the club. Marlon had the pistol with him. I told him to leave it there at the house, but he didn't want to. The three of them left, the three of them were together during the conversation that we had."

{R. 44-45} (emphasis added).

Of course, as noted during the Statement of Facts, Appellant told police that after he and the guy struggled, the guy let go of him. Appellant was mad, so he pulled out the gun, which fell to the ground. Appellant said he picked up the gun and fired twice.

During the defense case, Courtney Robles testified about the third man circling the two combatants, taking the gun from one of the combatants, and firing the shots. {R. 283-284; 292-294}. Norberto stated that Appellant was attacked by Arias. A third man asked Appellant for the gun, and after Appellant gave it to him voluntarily, the third man fired. Appellant then took the gun back and fired into the ground. {R. 299-304; 307}. Finally, as noted before, Appellant testified that Mauricio attacked him, that the gun fell out of his pants and he picked it up and fired it at the ground to scare Mauricio, that Skinny then took the gun and fired it at Mauricio, and that he then took the gun back and fired it into the

ground again. {R. 339-343}. On cross, Appellant admitted he did not need any medical treatment from the fight, and that he only got hurt when he was pushed into a column. When asked if he thought Mauricio was going to kill him or if they were just fighting, Appellant admitted they were just fighting, but said he had been thrown to the ground and was being kicked. {R. 370}.

Trial counsel requested a charge on involuntary manslaughter and accident, arguing that the jury could find from the evidence that Appellant lawfully armed himself in self-defense and that the gun accidentally went off after that. The defense also argued that if the bullet accidentally ricocheted it when Appellant fired it into the ground the jury could find involuntary manslaughter – terming it "classic involuntary manslaughter". The court questioned how Appellant could claim self-defense if he said he was not the shooter, and found the claim that the bullet ricocheted after striking the ground to be speculative. Thus, the court denied the charge. {R. 377-381}.

B. General Rules

If there is any evidence warranting a charge on involuntary manslaughter, then the charge must be given. State v. Cabrera-Pena, 361 S.C. 372, 605 S.E.2d 522 (2004); State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999). Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others. State v. Cabrera-Pena, supra; State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996). See State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006) (setting forth the above discussion).

As to the interplay of accidental discharge of a weapon and involuntary manslaughter or accident, State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) is instructive:

In Burriss, the question was, as here, whether the defendant was entitled to have the lesser-included offense of involuntary manslaughter submitted to the jury. According to Burriss, Kenneth and James were smoking crack laced marijuana cigarettes, "getting crazy or something," when they threatened to rob him. After being physically attacked and thrown to the ground, Burriss drew his gun and Kenneth ran into a house "like he was getting something." Burriss was afraid it was a gun. When James began moving threateningly toward Burriss, Burriss snatched his gun up and it fired, killing Kenneth. 334 S.C. at 263, 513 S.E.2d at 108. This Court found that "the evidence in the record supports Appellant's claim he was acting lawfully when the gun fired." Id. at 265, 513 S.E.2d at 109 (emphasis supplied).

The unlawful possession of a firearm does not preclude a charge of accident if the accused was engaged in a lawful activity at the time of the killing. State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994). However, the "unlawful possession of a firearm can under certain circumstances constitute an unlawful activity so as to preclude an accident defense if it is the proximate cause of the killing." Burriss, 334 S.C. at 262, 513 S.E.2d at 108 n. 5. The same reasoning applies in the context of involuntary manslaughter, and "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." Id. at 265, 513 S.E.2d at 109.

State v. Cabrera-Pena, 361 S.C. 372, 382-383, 605 S.E.2d 522, 527 (S.C. 2004). "If any evidence exists to warrant the jury charge of the lesser-included offense of involuntary manslaughter (or accident), then the charge must be given." State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999).

C. Since there was no evidence from any accounts that Appellant was in imminent danger of death or serious bodily harm, and all the other accounts described intentional shootings, sufficient evidence for involuntary manslaughter or accident cannot be found.

Here, the evidence simply fails to establish that Appellant had lawfully armed himself

in self-defense at the time of the shooting; thus, neither involuntary manslaughter nor accident could be required. Castro specifically denied that Appellant told him he had been attacked, and all Castro could say was that *Appellant* admitted *he* first produced the gun during the fight, and the men struggled over it. The mere fact of a fight does not establish that Appellant actually was in imminent danger of death or severe bodily harm, or that he had a reasonable belief of imminent danger of death or severe bodily harm. To hold otherwise would mean that any time there was a fistfight there was evidence of the imminent danger element as a matter of law. Cf. State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994) (no evidence of imminent danger where club owner intervened in the fight and escorted defendant out, despite defendant's testimony that owner was coming at him).

Thus, Appellant has to look to the testimony from others, or from his own trial testimony, to try to establish his right to arm himself in self-defense, based on a belief of imminent danger of death or serious bodily harm. The problem is that it does not exist anywhere else. In his statement to police, Appellant stated he had been let go by the person with whom he was fighting, but he was still mad and thus pulled out the gun. Courtney described a third man as doing an intentional shooting. Norberto also described an intentional shooting where both a third man and Appellant intentionally fired the gun. Finally, Appellant admitted intentionally shooting the gun twice, and specifically denied that he felt Mauricio was going to kill him. Obviously, intentional firing of the firearm precludes an involuntary manslaughter charge. See, e.g. State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003). Thus, the additional accounts would not support an involuntary manslaughter charge.

It would stretch the "any evidence" standard too far to require the trial court to synthesize the necessary elements together from conflicting and inconsistent accounts – drawing one element from one account and another from an inconsistent account, where none of them individually meet the test – in order to meet the "any evidence" standard. Regardless, even if a trial court is supposed to do this, there was no evidence that Appellant was in imminent danger of bodily harm or death, or that he had a reasonable fear of such – indeed, Appellant expressly denied that he thought Mauricio was going to kill him. None of the other accounts provide that necessary prerequisite, merely because they describe a fight.

Finally, to satisfy the legal defense of accident, it must be shown that the defendant used due care in the handling of the weapon. State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999). There is no evidence in Castro's statement that Appellant was using due care by having an unlawful firearm secreted on his person.

The charges were properly denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the conviction and sentence should be affirmed.

Respectfully submitted,

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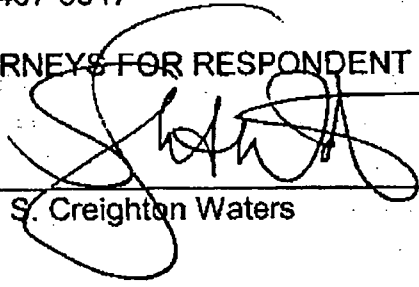
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BY: 

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August 14, 2007

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Greenville County
The Honorable C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 2008-UP-187(S.C. Ct. App. filed March 18, 2008)

THE STATE,

Petitioner,

v.

MARLON RIVERA,

Respondent.

BRIEF OF PETITIONER

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A. The Court of Appeals overlooked that nothing in Castro's testimony justifies Rivera pulling out his gun in the first place; accordingly, when he did he was acting unlawfully and in a manner naturally tending to cause death, which would preclude involuntary manslaughter under either definition. 8

B. The Court of Appeals overlooked that even though a lesser charge may be warranted from a prior account at odds with the defendant's version at trial, such an account or version itself must support the charge, and it goes too far to cherry pick individual facts out of disparate accounts to synthesize a defense theory. 12

C. Under these circumstances an intentional firing into the ground would not support involuntary manslaughter. 14

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ISSUE ON APPEAL

DID THE COURT OF APPEALS ERR IN FINDING THE JUDGE SHOULD HAVE CHARGED INVOLUNTARY MANSLAUGHTER, WHERE: (1) RIVERA'S ACCOUNT TO HIS COUSIN OF A STRUGGLE OVER THE GUN WAS INSUFFICIENT BECAUSE NO FACTS IN THAT ACCOUNT JUSTIFIED RIVERA'S POSSESSION OR PRESENTATION OF THE ILLEGAL HANDGUN; (2) IT GOES MUCH TOO FAR TO "CHERRY PICK" AND THEN SYNTHESIZE INDIVIDUAL PREDICATE FACTS FROM DISPARATE VERSIONS AS TO HOW THE SHOOTING HAPPENED IN ORDER TO JUSTIFY THE CHARGE; AND (3) AN INTENTIONAL SHOOTING INTO THE GROUND UNDER THESE CIRCUMSTANCES FITS NEITHER VERSION OF INVOLUNTARY MANSLAUGHTER?

STATEMENT OF THE CASE

Marlon Rivera was indicted by the Greenville County Grand Jury for murder (04-GS-23-7693). Specifically, the indictments alleged that, on July 18th, 2001, Rivera killed with malice aforethought Wilfrido Monge by shooting him with a pistol. {R. 464-65}.

The Honorable C. Victor Pyle, Jr. conducted a jury trial from October 10th to 13th, 2005. At trial, Applicant was represented by Attorney Susannah Ross, and Assistant Solicitor Kris Hodge prosecuted the case for the State. On October 17th, 2005, the jury found Rivera guilty of murder, and Judge Pyle sentenced Rivera to thirty (30) years.

A timely Notice of Appeal was filed with the South Carolina Court of Appeals. Deputy Chief Appellate Defender Robert Dudek was appointed to represent Rivera, and on August 17th, 2007, he filed a Final Brief of Appellant. The State filed a Final Brief of Respondent on August 14th, 2007. The case was argued on March 6th, 2008, and the Court of Appeals issued an opinion on March 18th, 2008 in which it reversed the conviction. {App. 86}.

The State filed a Petition for Rehearing on April 2nd, 2008, which the Court of Appeals denied by Order dated May 22nd, 2008. The State then filed with this Court a Petition for Writ of Certiorari dated June 23rd, 2008; Rivera filed a Return to the Petition for Writ of Certiorari filed September 22nd, 2008. This Court granted certiorari, and this Brief of Petitioner follows.

STATEMENT OF FACTS

This case concerns a murder following an altercation outside of a club in Greenville.

A. Police respond to a shots fired call

At about 12:30 a.m. on July 18th, 2005, officers arrived at the scene of a reported shooting to find the victim, Wilfredo Solis Monge, was lying on the ground. {R. 23-27; 63}.

At first, police thought Monge has only been beaten. At the hospital, it was discovered that he had a gunshot wound to the face. {R. 28-29; 36-37; 201}.

B. Rivera is identified by an eyewitness at a nearby bar

Alvaro Fernandez gave police a statement and then left. About 15 minutes later he returned, excitedly saying in broken English and Spanish that the shooter was down the street in a bar called the Mexicali. {R. 13-14; 209-210}. Officers entered the bar with Fernandez, who pointed out Rivera. {R. 15-18; 210}.

Carlos Estrado, the manager of the Mexicali, testified at trial through an interpreter that he patted Rivera down for weapons as Rivera tried to enter the bar. Castro felt a weapon on Rivera, and Rivera told Castro he would get rid of it and be back. Rivera returned about 10-15 minutes later, and Rivera stayed at the bar until he was arrested. {R. 2-7}.

C. The confession

At the station, Fernandez told police he saw two men arguing, and a third man walking behind the ones arguing. The third man then reached down and grabbed something at his leg, and Fernandez heard two shots. Fernandez did not see which of the men did the shooting. {R. 20; 26-28; 141-42; 163-65; 215}.

Rivera gave a custodial statement to police in which he admitted shooting the victim. {R. 167-178}. Rivera stated that the victim started harassing him for hanging out with black people, and then grabbed his shirt and pushed him. They struggled for a bit, but the guy let go of Rivera. Rivera was mad because the guy had hit him, so he pulled out the gun from his pants leg. It fell to the ground, but he picked it up and shot the victim two times. Rivera's friend then said, "OK, you shot him, let's go", so Rivera put the gun in his pocket and left. {R. 179-180; 229-234}.

Rivera admitted he hid the gun in a tree before he was allowed to enter the Mexicali. {R. 180; 233}. An officer found the hidden .22 pistol. {R. 142}.

D. Rivera's admissions to his cousin

Rivera's cousin, Nelson Castro, testified that Rivera came to his house between 1:30 and 2:00 a.m.. Rivera had a gun with him, and told Castro he had a problem because he had killed somebody. {R. 33-40}. Rivera told Castro that "during the fight [Rivera] got that pistol out, so the other guy grabbed the gun, and the gun went off. . . . The "shot hit somebody that was looking". {R. 45}. Rivera did not tell Castro about any third party trying to get the gun from Rivera, only that the guy he was fighting tried to get the gun. {R. 46}.

E. The forensic evidence

The victim was brain dead and ultimately removed from the life support systems. He had a wound right between the eyes on the bridge of the nose made by a small caliber bullet conclusively matched to the revolver found in the tree. {R. 78; 87-88}. A gunshot residue (GSR) test on Rivera found one round lead particle on the back of his left hand, which was consistent with firing a weapon. {R. 60-62}.

F. The defense case

The defense first called eyewitness Courtney Robles, who stated that she saw a man in a striped shirt and a man in a white shirt fighting. A third man in a black shirt and blue jeans separated the men that were fighting, and then took a gun from the waistband of the man in the striped shirt and pointed it in the direction of the guy in the white shirt. He fired, hitting the victim instead, who was not involved in the fight. The man in the dark shirt then handed the gun back to the man in the striped shirt and said "come on, the police are coming". They then left. {R. 283-284; 292-294}.

Norberto Ortiz stated that Delman Mauricio Arias and Rivera had some problems in the bar and manager told them to leave. Once outside, Arias attacked Rivera. Rivera pulled a gun from his pants leg and fired it into the ground. Supposedly, Arias kicked Rivera, and then a different guy who was with Rivera stated, "I'm going to get the weapon; I'm going to shoot the guy". The guy asked for the gun from Rivera, and after Rivera voluntarily gave it to him, the guy shot at Arias. Rivera then took the weapon back, and shot into the ground again to scare Arias. However, the victim Wilfrido cried out. Norberto did not know which of the three shots hit Wilfrido. {R. 299-304; 307}.

Robert Taylor, a social worker and Episcopal priest, opined that due to cultural issues, the language barrier, and Rivera's limited functioning, Rivera could not have understood what he was doing when he waived his rights and gave a statement to police. {R. 313-232}.

Rivera testified he illegally came to South Carolina to stay with his mother. {R. 334-338; 361}. As to the incident, Rivera said was getting a taco when Mauricio attacked him

from behind. Mauricio was insulting him, punching him very hard, and pushing him to a column. Mauricio supposedly threw Rivera to the ground and started kicking him. As Rivera was getting up, the gun fell from his pants, and Rivera reached for it. Mauricio pushed him to get the pistol, but Rivera got it and "shot down". Rivera claimed Norberto grabbed Mauricio and told him to stop, but Mauricio kept punching Rivera. {R.339-340; 342}.

Rivera stated that after he shot at the ground, a man named "Skinny" or "El Flaco" grabbed the gun and shot at Mauricio, after which Rivera grabbed the gun back and shot again at the ground. A few seconds later he heard a yell that someone had been shot, and when he saw Skinny run away, he ran away too. Rivera said he only fired the gun because Mauricio was attacking him and he wanted to scare him away. {R. 341-343}. On cross, Appellant admitted he did not need any medical treatment from the fight, and that he only got hurt when he was pushed into a column. When asked if he thought Mauricio was going to kill him or if they were just fighting, Appellant admitted they were just fighting, but said he had been thrown to the ground and was being kicked. {R. 370}.

Trial counsel requested a charge on involuntary manslaughter and accident, arguing that the jury could find from the evidence that Appellant lawfully armed himself in self-defense and that the gun accidentally went off after that. The defense also argued that if the bullet accidentally ricocheted it when Appellant fired it into the ground the jury could find involuntary manslaughter – terming it "classic involuntary manslaughter". The court questioned how Appellant could claim self-defense if he said he was not the shooter, and found the claim that the bullet ricocheted after striking the ground to be speculative. Thus,

the court denied the charge. {R. 377-381}.

G. The appeal before the Court of Appeals

On appeal, Rivera contended that since Castro had described the gun going off during a struggle, and since there was evidence Rivera had been attacked, then Appellant had armed himself lawfully and charges on involuntary manslaughter and accident were warranted regardless of inconsistent testimony. {App. 33-35}. The State responded that there was no evidence in Castro's account justifying a conclusion that Rivera had lawfully armed himself in self-defense, and that it would stretch the standard too far to require to require the trial court to synthesize the necessary elements together from pieces of conflicting and inconsistent accounts. {App. 80-82}.

The Court of Appeals found that involuntary manslaughter should have been charged, concluding that all of the evidence needed to be viewed in the light most favorable to the defendant, and finding that Castro's account of a struggle and accidental discharge was enough to support the instruction. Additionally, the court concluded that the intentional discharge of the weapon was "evidence of recklessness in the absence of self-defense". {App. 90}.

ARGUMENT

THE COURT OF APPEALS ERRED IN FINDING THE JUDGE SHOULD HAVE CHARGED INVOLUNTARY MANSLAUGHTER, WHERE: (1) RIVERA'S ACCOUNT TO HIS COUSIN OF A STRUGGLE OVER THE GUN WAS INSUFFICIENT BECAUSE NO FACTS IN THAT ACCOUNT JUSTIFIED RIVERA'S POSSESSION OR PRESENTATION OF THE ILLEGAL HANDGUN; (2) IT GOES MUCH TOO FAR TO "CHERRY PICK" AND THEN SYNTHESIZE INDIVIDUAL PREDICATE FACTS FROM DISPARATE VERSIONS AS TO HOW THE SHOOTING HAPPENED IN ORDER TO JUSTIFY THE CHARGE; AND (3) AN INTENTIONAL SHOOTING INTO THE GROUND UNDER THESE CIRCUMSTANCES FITS NEITHER VERSION OF INVOLUNTARY MANSLAUGHTER.

From reading the opinion, it seems the Court of Appeals found sufficient evidence for a charge on involuntary manslaughter from two conclusions: (1) that Rivera's cousin Castro testified that Rivera said the gun went off when he was wrestling with another man, and (2) that Rivera testified he fired the gun into the ground while standing amidst a crowd.

Respondent would respectfully submit the Court of Appeals erred: (1) in finding Castro's account alone justified involuntary manslaughter, when nothing in it supported Rivera's arming himself in self defense; (2) cherry picking individual predicate facts from disparate and conflicting accounts as to the shooting and grafting them onto Castro's account of what Rivera said, when in all other cases that applied the rule that a lesser offense should be charged even if inconsistent with the defendant's trial position, they relied on a complete account to the contrary; and (3) in finding that an intentional shooting in the ground could support involuntary manslaughter in these circumstances.

A. The Court of Appeals overlooked that nothing in Castro's testimony justifies Rivera pulling out his gun in the first place; accordingly, when he did he was acting unlawfully and in a manner naturally tending to cause death, which would preclude involuntary manslaughter under either definition.

With regard to the first situation, Castro's testimony about what Rivera allegedly told

him is insufficient to justify involuntary manslaughter. During Castro's testimony, he was asked if in his statement to police he said Rivera told him that the person that Rivera was fighting with grabbed the pistol from Rivera. Castro replied that Rivera "said the gun just went off". Rivera told Castro he pulled the pistol out, and that it hit someone that was just looking. {R. 43}.

On cross, Castro testified that Rivera said as they were wrestling both of them were grabbing the pistol; the other one had grabbed pistol away from Rivera, and "in that the shot went off". Castro agreed when asked if Rivera said the gun went off accidentally when the other man grabbed the pistol as they were fighting over it. {R. 43}. Castro specifically stated that Rivera did NOT tell him that he had been attacked, just that he was fighting with the other person and they were wrestling. {R. 44}. At this point, Castro's entire statement was read into evidence, which stated in pertinent part:

And Marlon told me he had some problem. He said that he was in a club and he was carrying a pistol that he belonged to Mr. Antoni. And he said that during that fight **he got that pistol out**, so the other guy grabbed the gun, and the gun went off. And the shot hit somebody that was looking.

{R. 44-45} (emphasis added).

Here, there is one crucial fact missing from what Castro said Rivera told him: facts justifying Rivera producing the gun in the first place. While it is true that a struggle between the defendant and the victim over a gun can support a charge of involuntary manslaughter, even if a third person is the one hit, see Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991), in each of these involuntary manslaughter cases involving allegedly unintentional discharge there was at least some justification in the defendant's possession

and production of the gun in the first place.¹

Indeed, this is the point of Burris – a person cannot just improperly produce a firearm in a situation without justification and claim involuntary manslaughter when the gun inevitably kills someone; unless the person lawfully armed himself in self defense, or there was some other innocent or legally permissible reason for possessing, producing, pointing, or presenting the pistol, then the defendant was acting unlawfully, feloniously, and in a manner naturally tending to cause death or great bodily harm – all of which would preclude

¹ See State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (2008) (evidence supported a charge of involuntary manslaughter, since: (1) evidence supported a finding defendant lawfully armed herself in self defense, where defendant testified victim was accosting her friend, defendant saw knife in victim's hand, and defendant said he was coming to get defendant's friend; and (2) victim maintained in her statements and at trial that she did not remember pulling the trigger, and did not mean for the gun to fire) (affirming State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005)); State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986) (cited in Casey for proposition that struggle over gun can support involuntary manslaughter, and relying on defendant's repudiation of statement in trial testimony that as he was putting the gun back in the car the victim grabbed it, causing it to fire); State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) (victim had threatened him with gun, which he took from her and which went off accidentally); State v. Tisdale, 378 S.C. 122, 662 S.E.2d 410 (2008) (defendant testified victim threatened him, attacked him, and then pulled a gun; the gun went off as they struggled but while the gun was still in the victim's hand); State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003) (victim was charging at defendant with hand behind his back when defendant fired, defendant said he closed his eyes and did not even know he had pulled the trigger); State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999) (defendant stated victim and victim's friend had threatened to rob him and had physically attacked him, victim ran inside to get something which defendant thought was a gun; but while defendant brought out his gun in self defense, it accidentally fired); Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) (victim threatened to cut defendant, and when victim approached car, defendant produced shotgun, which went off and hit victim when passenger grabbed it). Cf. State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006) (finding no basis for involuntary manslaughter where defendant claimed he pulled out gun, waved it around, and threatened to commit suicide; even if gun went off accidentally he had committed the felony of presenting a firearm).

involuntary manslaughter.² As Burriss noted, "unlawful possession of a firearm can under certain circumstances constitute an unlawful activity so as to preclude an accident defense if it is the proximate cause of the killing." State v. Burriss, 334 S.C. 256, 513 S.E.2d 104, 108 n.5 (1999). Indeed, this Court recently held that an involuntary manslaughter charge was properly denied, where, even though there was evidence the gun was not intentionally fired, the defendant "committed an unlawful act that would naturally tend to cause death or great bodily harm" by "by pointing the gun and waiving it in the air". State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009).

Here, nothing in Castro's account of what Rivera said justifies Rivera producing the weapon. Castro did not state that Rivera said he had been attacked without provocation, or that Rivera thought he was in reasonable fear of imminent serious deadly injury when he pulled out his gun, or that he had no other means to protect himself from such injury but to produce the gun. Simply because one gets into a physical altercation or wrestling match with someone does not entitle them to automatically arm themselves in self-defense unless the other elements are met. All Castro stated was that Rivera said he had a problem or fight with another person, and he specifically denied Rivera said he had been attacked. {R. 44}. That alone is insufficient to support a finding Rivera lawfully armed himself in self defense, if during that confrontation he took it to the next level by pulling out a weapon.

² See State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) (Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others). See also S.C. Code Ann. § 16-23-410 (Rev. 2003) (felony to point or present a firearm); S.C. Code Ann. § 16-23-30 (Supp. 2007) (criminalizing possession of a pistol in various circumstances).

Otherwise any fistfight or shoving match would legally justify pulling out a deadly weapon. See generally State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009) (no evidence supporting charge of involuntary manslaughter, even though there was evidence the gun went off accidentally, in case where there was evidence defendant and another man "bumped" each other and were arguing); State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994) (no evidence of imminent danger where club owner intervened in the fight and escorted defendant out, despite defendant's testimony that owner was coming at him).

It is respectfully submitted that it is improper to make the words "struggle over the gun" some talismanic incantation automatically justifying an involuntary manslaughter charge, when there was no valid basis for the defendant possessing or producing the weapon in the first place.

B. The Court of Appeals overlooked that even though a lesser charge may be warranted from a prior account at odds with the defendant's version at trial, such an account or version itself must support the charge, and it goes too far to cherry pick individual facts out of disparate accounts to synthesize a defense theory.

Thus, since it is not present in Castro's account, Rivera must look to the accounts of others and his own testimony to try to find sufficient facts to justify him producing the gun, so that Castro's account of an accidental shooting as the two struggled could support involuntary manslaughter.

Assuming for the moment without conceding Norberto's testimony or Rivera's testimony that another man attacked him might support him arming himself in self defense, it goes too far to "cherry pick" those predicate facts from their accounts and then "graft" it on to Castro's entirely disparate account of what Rivera said which has nothing at all in

similarity to do with how the firearm was actually discharged. While it is one thing to give a charge based on an account given by another witness or the defendant's own prior statement even though it conflicted with his later testimony or position at trial, it is quite another, as is necessary here, to cherry pick individual facts from disparate and conflicting accounts in order to synthesize a master theory, even though none of those conflicting accounts would support the charge individually. Indeed, among the relevant cases found that have applied this principle, all of them have relied on at least one cohesive account, and not one of them has simply picked out various disparate facts from various versions to get sufficient elements for the charge.³

It is respectfully submitted that the Court of Appeals misapprehended this distinction in applying the general rule that a previous account can support a jury instruction even if it conflicts with the position taken by the defendant at trial, by pulling out facts from various

³ See State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (2008) (defendant consistently maintained in statements and at trial that victim had returned yelling and screaming after being told to leave and had a knife in his hand, and that she did not remember pulling the trigger) (affirming State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005) (cert. granted) (relying on defendant's testimony at trial); State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008) (noting that while defendant had inconsistent stories, involuntary manslaughter was warranted because his trial testimony not only supported his right to arm himself but also that he had recklessly handled the gun); State v. Crosby, 305 S.C. 445, 409 S.E.2d 391 (2003) (relying on defendant's trial testimony and witness testimony, as well as portion of defendant's second statement); State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001) (relying on the version of events in defendant's second statement to support voluntary manslaughter); State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) (relying on defendant's testimony); Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) (relying on testimony of surviving eyewitness); State v. Gilliam, 296 S.C. 395, 373 S.E.2d 596 (1988) (court erred in denying voluntary manslaughter charge because defendant claimed self-defense; appellant's testimony that victim threatened at him and fired at him would also support provocation and passion); State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986) (relying on defendant's repudiation of his statement in his trial testimony, in which he claimed that as he was putting the gun back in the car the victim grabbed it, causing it to fire).

versions that independently are conflicting and insufficient for the charge. Here, Castro said Rivera claimed the gun went off as to two men were struggling over it; Rivera and Norberto described intentional shots that did not take place when the two men were actively grappling with each other in combat. Norberto or Rivera's description of how the fight started cannot be grafted onto the version Rivera told Castro of how the shot happened.

C. Under these circumstances an intentional firing into the ground would not support involuntary manslaughter.

Finally, it is respectfully asserted that the Court of Appeals erred in concluding that testimony Rivera fired the gun into the ground supports involuntary manslaughter, and in concluding that any of the accounts offered at trial support the lesser offense.

First, it should be noted that this particular contention was not properly presented on appeal, as Rivera in his brief before the Court of Appeals relied only on Castro's statement and did not mention any contention Rivera fired into the ground in support of his claim here. See State v. Bailey, 298 S.C. 1, 5-6, 377 S.E.2d 581, 584 (1989) (holding that an issue is not preserved for review when a party argues one ground in the trial and then an alternative ground on appeal).

Of course, as noted during the Statement of Facts, Rivera told police that after he and the guy struggled, the guy let go of him. Rivera was mad, so he pulled out the gun, which fell to the ground. Rivera said he picked up the gun and fired twice. Nothing in that would support involuntary manslaughter.

During the defense case, Courtney Robles testified about the third man circling the two combatants, taking the gun from one of the combatants, and firing the shots. {R. 283-

284; 292-294}. That of course would not support involuntary manslaughter, as it describes the actor being someone other than Rivera, and in any event, that actor clearly took intentional shots at another, and did not fire accidentally or merely discharge the weapon into the ground.

Norberto stated that Rivera was attacked by Arias. A third man asked Rivera for the gun, and after Rivera gave it to him voluntarily, the third man fired. Rivera then took the gun back and fired into the ground. {R. 299-304; 307}. Finally, Rivera testified: (1) that Mauricio attacked him; (2) that the gun fell out of his pants and he picked it up and fired it at the ground to scare Mauricio; (3) that Skinny then took the gun and fired it at Mauricio; and (4) that he then took the gun back and fired it into the ground again. {R. 339-343}.

These descriptions of an intentional shooting do not support involuntary manslaughter, if, as argued in the previous subsection, this court does not graft the predicate facts of these disparate versions onto the account of the actual shooting related by Castro. Rivera is not entitled to arm himself in self-defense, or for that matter *intentionally* shoot the gun, unless he was actually in a pure actual self-defense situation meeting all four elements – which has nothing to do with involuntary manslaughter. See State v. Burriss, 334 S.C. 256, 263 n.6, 513 S.E.2d 104, 108 n.6 (1999). See also See State v. Davis, 374 S.C. 581, 649 S.E.2d 132 (2007) (even if defendant lawfully armed himself in self defense with sledge hammer, there was no evidence he acted with reckless disregard under the second definition of involuntary manslaughter, because he intentionally hit the victim). Rivera denied he thought Mauricio was going to kill him. {R. 370}. Once he intentionally fired the weapon, assuming it was not justified by self defense situation,

his firing of the weapon was clearly an unlawful act, and also one naturally tending to cause death or great bodily harm.⁴ As such, the definition of involuntary manslaughter is not met under both Norberto or Rivera's versions. Said another way, since under either Norberto or Rivera's versions there was no factual issue as to whether the gun was fired unintentionally, once Rivera fired the gun, it was either self-defense or murder.⁵

⁴ Indeed, unless justified by self-defense, Rivera could not just intentionally fire the gun indiscriminately into the ground with a large crowd around without being fully responsible as a matter of law for hitting someone under the concept of "malignant heart" murder. Such action is not merely reckless. See State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957). See also Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998) (where defendant arms himself and shoots into crowd, not entitled to instruction on involuntary manslaughter); State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995) (involuntary manslaughter not warranted where defendant admitted shooting into ground at feet of victim). But see State v. Childers, 373 S.C. 367, 645 S.E.2d 233, 237 (2007) (Toal, C.J., concurring) (although not in the record, reason the trial court may have charged the jury on involuntary manslaughter was "perhaps because it was possible for the jury to believe that the defendant's initial returning of fire was justified, but ultimately find that the defendant was criminally reckless in firing multiple times over his shoulder as he retreated").

⁵ In State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996), the Court found involuntary manslaughter not warranted where the defendant admitted shooting into a crowd at Waffle House, as he could not have been acting lawfully in firing unless he was acting in self-defense. In Burris and State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008), this Court distinguished Pickens because there was no evidence in those cases creating a factual issue as to whether the gun was fired unintentionally. Here, of course, there is no dispute on that issue unless the disparate versions are grafted together.

CONCLUSION

Respondent would respectfully assert the Court of Appeals overlooked or misapprehended that the evidence in this case justified a charge on involuntary manslaughter. The opinion of the Court of Appeals should be reversed, and the conviction and sentence reinstated.

Respectfully submitted,

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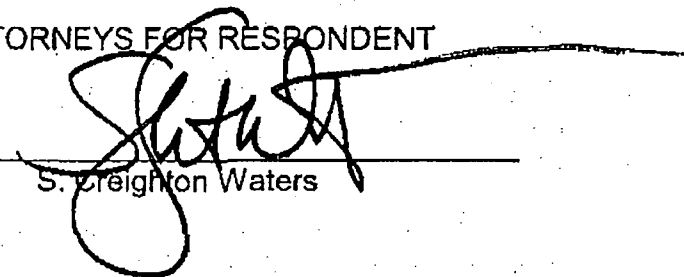
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BY: 

S. Creighton Waters

October 9, 2009.

IN THE SUPREME COURT

C. Victor Pyle, Jr., Circuit Court Judge

PETITIONER.

V

RESPONDENT

BRIEF OF RESPONDENT

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ISSUE PRESENTED

Did the Court of Appeals err in finding the judge should have charged involuntary manslaughter where: (1) Rivera's account to his cousin of a struggle over the gun was insufficient because no facts in that account justified Rivera's possession or presentation of the illegal handgun; (2) it goes much too far to "cherry pick" and then synthesize individual predicate facts from disparate versions as to how the shooting happened in order to justify the charge; and (3) an intentional shooting into the ground under these circumstances fits neither version of involuntary manslaughter?

COUNTER ISSUE PRESENTED

Whether the Court of Appeals properly held that evidence the "gun went off" accidentally while respondent was wrestling and both men "were grabbing the pistol" entitled respondent to an instruction on involuntary manslaughter even though the evidence conflicted as in State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001)?

STATEMENT OF FACTS

Procedural history

Respondent was indicted by the Greenville County grand jury for the offense of murder. R. 464. His case came on for trial on October 10, 2005 before the Honorable C. Victor Pyle, Jr. and a jury. Susannah Ross represented respondent. Kris Hodge was the Assistant Solicitor. R. 1.

On October 13, 2005 the jury found respondent guilty of murder. R. 459, ll. 6 – 11. Judge Pyle sentenced respondent to thirty years imprisonment. R. 463, ll. 20 -22.

On appeal respondent raised five grounds for reversal before the Court of Appeals. The Court of Appeals reversed in a unanimous per curiam opinion (Hearn, CJ., Pieper, J., and Cureton, A.J.) in State v. Rivera, 2008-UP-187 (March 18, 2008) because the trial judge refused to charge involuntary manslaughter. The Court therefore did not address respondent's remaining issues. App. 86-91

The state sought rehearing which was denied. App. 92-104. The state then filed a petition for writ of certiorari with this Court dated June 23, 2008. Respondent filed a return to the petition for writ of certiorari. The writ of certiorari was granted. A brief of petitioner was then filed, and this brief of respondent follows.

Relevant trial facts

Prior to trial defense counsel moved for the appointment of a separate court interpreter. Defense counsel Ross noted that her interpreter, Carlos Freeman, had helped her throughout the case. "He's interpreting to my client what's happening, but he's not the state's interpreter for this case." R. 12, ll. 17 – 24. The judge denied the motion. R. 12, l. 25 – 13, l. 2.

Greenville County Sheriff's Deputy David Bendig testified that he was dispatched to an assault call on July 17, 2004 at about 12:30 a.m. R. 22, l. 23 – 23, l. 25. Bendig found a male lying

on the ground in the parking lot near the "Spanish Amigo Market in the strip mall." There were about twenty or thirty people scattered outside.¹ R. 24, ll. 2 – 15.

Bendig immediately acknowledged that "a language barrier existed." He remembered talking to Courtney Robles and Delman Arais at the scene. R. 27, ll. 1 – 14. These were the only people Bendig spoke with that morning. R. 27, ll. 8 – 23. As will be seen infra, there would be evidence that Arais attacked respondent and that respondent pulled a gun when attacked. R. 299 - 300.

Castro Testimony

Nelson Castro was the next *state's* witness. Interpreter Efrain Pineros was sworn in for Castro's testimony. R. 33, ll. 2- 6. Castro said that he spoke Spanish and "a little bit of English." R. 33, ll. 8 – 20.

Castro noted that respondent was his cousin. He recalled respondent coming by his house at 1:30 or 2:00 in the morning on the day in question. R. 34, l. 16 – 36, l. 12.

Castro remembered that respondent had a pistol and that he said that he had killed somebody. R. 37, l. 4 – 38, l. 10. The solicitor elicited the following from Castro:

Q. And that he had gotten he pistol the day before?

A. Yes.

Q. Did he say how it was that he came to kill someone?

A. He said that *they were wrestling with somebody else, and that the weapon was loaded, and that the weapon just went off by itself.* That the shot didn't hit the person that he was wrestling with, but it hit somebody else that was watching.

Q. Did he say the he knew the person that got shot?

¹ There would later be evidence offered that the police at first did not know the victim had been shot in the face, and they only thought he was badly hurt from being beaten.

A. No, he didn't say that he knew that person.

Q. How was he acting that night?

A. He looked like sad for what had happened.

R. 38, ll. 11 – 22. (emphasis added).

On cross-examination, Castro acknowledged respondent told him the gun “went off *accidentally* when the other man grabbed the pistol and they were fighting over it.” R. 43, ll. 23 – 25.

Investigator Brian Garrett testified there were about fifteen to twenty people outside the Hispanic club where the shooting occurred when he arrived at 3:00 a.m. Garrett said he tried to interview witnesses but none of them had any information that was useful. Supp. R. 12, ll. 15 – 23.

There was evidence that Garrett located the weapon the following morning in a tree outside the club. Supp. R. 48, l. 19 – 51, l. 14.

The pathologist, Dr. Eric Christensen testified that the decedent died on July 21, 2004, several days after he was shot. He died from a gunshot wound to the face. The decedent was taken off life support. Supp. R. 65, ll. 21 – 24; Supp. R. 67, ll. 6 – 21.

There were at least three theories of what occurred into this case. Each theory was backed by some evidence. As seen, Castro testified, on direct examination by the solicitor, that respondent told him the gun went off accidentally during the struggle. As will be seen *infra*, there was also evidence respondent was attacked by a Hispanic man because he was socializing with black people.

The state called Greenville County Crime Lab worker Mark Stephan to apparently attempt to dispel the evidence that the gun went off by accident. Supp. R. 71, l. 12 – 72, l. 16. Stephan

testified that when he test fired the gun "it misfired several times. It did not fire when I pulled the trigger." Supp. R. 78, ll. 15 – 24.

However, Stephan maintained that someone would have to pull the trigger for this particular gun to discharge. Stephan claimed the gun would not go off accidentally. Supp. Supp. R. 19, ll. 3 – 19.

As will also be seen infra, there was also evidence that respondent shot the gun into the concrete or ground to scare his attacker. Stephan discounted that theory, saying the condition of the bullet taken from the decedent was consistent with the bullet being fired from the gun and then going directly into the bone, and not hitting something else first. Supp. R. 88, ll. 1 – 23.

There was another theory that the decedent was the unintended victim, but that the gun was intentionally shot. There was also evidence two or three men actually handled the gun in the confusion outside the club, and a third man may have fired the shot that hit the decedent. R. 98, ll. 2-11.

Investigator Smith testified if a bullet had hit the ground or concrete before hitting the decedent that the police would have been able to notice the damage. R. 207, ll. 1 – 23; R. 257, ll. 7-12. Smith acknowledged he was told by another witness, Alvaro Fernando Portugcz, that he saw two men arguing that night and he saw another man walking around and that third men bent down as if he was grabbing something from his leg. A witness told Smith he did not see who did the shooting. R. 143, ll. 12 – 25; R. 144, ll. 12 – 17.

Respondent allegedly told the police that he was at a restaurant that night with some black friends. He told them he was carrying a gun that he had gotten from a friend, Antonio Mendoza, who had been arrested the day before. It was a .22 caliber gun. R. 179, ll. 10 – 21. In respondent's statement, he said a man approached him and asked "why was he hanging around those black guys

or those black people." The statement said the man grabbed respondent and started pushing respondent around. There was a struggle and the man let go of respondent. The statement said respondent was mad because the man hit him and he went to grab his gun and it fell on the ground. Respondent's statement read: "I grabbed it [the gun]. I pointed it at him and shot two times." R. 180, ll. 1 - 7. Respondent's statement also said respondent put the gun in a tree after he went to the Mexicali, a restaurant and bar. R. 180, ll. 8 - 23; Respondent's statement; R. 466. Respondent argued before the Court of Appeals that his statement should have been suppressed because he was physically abused by the police when they questioned him. The Court did not reach that issue because it reversed on the present issue.

Courtney Robles testified that she saw two men fighting that night. Robles was not sure how the physical action started. Robles thought the decedent may have been "one of the guys that had been fighting and somebody had just punched him in the eye because by the time they [the police] got there his eye was so swollen that you couldn't see the entry wound." R. 286, l. 23 - 287, l. 6.

Robles gave the police a statement, and she also said the police were "very rude. Very rude" to everyone that "was out there" that night at the Spanish club. R. 287, ll. 10-14. Robles described how a man in a striped shirt was fighting with a man in a white shirt, and another man separated them, and a man in a black shirt took the gun from the man in the striped shirt and pointed straight ahead and shot. R. 283, l. 7 - 287, l. 14.

Norberto Ortiz testified that respondent had a problem with Delman Maricio Arias, "and the guy that had some problems with a guy inside the place. And the guy that had the problems with Marlon and started just saying some bad words and insulting him. . . . Mauricio attacked Marlon." Ortiz also noted that another unknown man got the pistol from respondent after respondent had shot

the gun twice to scare the aggressor. The other person said "give me the pistol, I'll shoot him." Ortiz said he did not know which of the three shots hit the decedent. R. 297, l. 16 – 307, l. 15.

Lesser-Included Offense and accident

During the charge conference defense counsel brought to the judge's attention the cases of State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003), and State v. Burriss 334 S.C. 256, 513 S.E.2d 104 (1999). The cases were made a court's exhibit. See R.2. Ross argued that there was evidence respondent was armed in self-defense and a jury could find the gun accidentally when off and it was involuntary manslaughter or accident since there was no heat of passion. R. 378, ll. 9 – 22.

Defense counsel reminded the judge that a witness (Castro) had testified early in the trial that the gun went off accidentally. Based upon evidence in this case respondent was entitled to an instruction on involuntary manslaughter, and accident. R. 378, l. 9 – 379, l. 11. Counsel also requested a charge on self-defense. The solicitor argued there was testimony "as to every type of thing. There's nothing consistent in that." R. 379, l. 13 – 380, l. 13. The judge stated he was not going to charge involuntary manslaughter or accident, and the only jury options would be murder or not guilty. R. 381, ll. 7 – 22.

Court of Appeals

The Court of Appeals wrote that:

Rivera relies upon the testimony of Nelson Castro, a witness for the prosecution, who stated Rivera had told Castro the shooting occurred while Rivera was wrestling with another man and the gun accidentally discharged. During his testimony, Castro stated specifically: "He said that when they were wrestling both of them were grabbing the pistol. And what he told me is that the other one, one had grabbed the pistol away from him. And in that the shot went off."

While there are several inconsistent explanations for the fatal shot in this case, including the testimony by Rivera that he was not the actual shooter, Castro's testimony would support a jury finding the weapon discharged during a struggle over the weapon. Despite the disparity of evidence and conflicting versions of the facts presented by Rivera, all of the evidence including Rivera's inconsistent statements must be viewed in the light most favorable to the defendant. See State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001). Moreover, Rivera admits to firing the weapon towards the ground. The discharge of a firearm in a public area is evidence of recklessness in the absence of self-defense. "The fact that there may have been evidence showing the shooting was unintentional did not negate the other inferences that could be drawn from all the evidence." State v. Mekler, 368 S.C. 1, 16, 626 S.E.2d 890, 898 (Cl. App. 2005) cert. granted (2007). Evidence a weapon discharged during a struggle is sufficient for submission of an involuntary manslaughter instruction to the jury. Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991). If the jury believed the testimony of Castro, it could find the gun was fired during a struggle between Rivera and another party and conclude Rivera was guilty of involuntary manslaughter. "To warrant a court's eliminating the offense of manslaughter it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 513 (2000). It is not our province on review to decide which testimony to believe; the jury must determine the facts and resolve issues of credibility.

App. 89-90.

ARGUMENT

The Court of Appeals correctly held it was error for the trial judge to refuse to charge the jury on involuntary manslaughter where the state elicited testimony that respondent told witness Nelson Castro that he had been wrestling with someone "and that the weapon just went off by itself." There was also evidence respondent was resisting an attack. Defense counsel correctly argued respondent was armed in self-defense under *State v. Burriss* and *State v. Crosby*, and that respondent was entitled an involuntary manslaughter instruction given this evidence. The judge erred as a matter of law by reasoning inconsistent testimony meant respondent was not entitled to the other instructions.

The Court of Appeals properly held in its *per curiam* opinion that respondent was entitled to an instruction on involuntary manslaughter. The Court of Appeals correctly observed that the state elicited from Nelson Castro that respondent admitted he had been wrestling with another man -- "both of them were grabbing for the gun" -- and that the gun went off accidentally.

There was clearly evidence that respondent was attacked by another man who was apparently angry that respondent was with his black friends. There was evidence respondent was hit and knocked to the ground. Respondent had armed himself in self-defense within the meaning of *State v. Crosby*, 355 S.C. 47, 584 S.E.2d 110 (2003), and *State v. Burriss* 334 S.C. 256, 513 S.E.2d 104 (1999).

In *Crosby* this Court held that an involuntary manslaughter instruction was warranted even though at one point respondent admitted he intentionally pulled the trigger. In *Crosby* although there was conflicting evidence, there also was evidence the decedent was charging at Crosby when he pulled his pistol in self-defense and it discharged accidentally or "went off." There is no meaningful distinction between this case and *Crosby*.

Similarly in State v. Burriss 334 S.C. 256, 513 S.E.2d 104 (1999) this Court held that a person can be acting lawfully, even where he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. In Burriss, the defendant was threatened and attacked by the victim with another male. There was evidence one attacker backed away but urged his accomplices to attack Burriss again. Burriss grabbed his gun and it fired. Burriss stated it was an accident. However, at another point Burriss said "the trigger was pulled or whatever," implying for the state that the trigger was pulled intentionally.

There was evidence here that respondent was attacked, that he was armed in self-defense, and that the gun went off. Respondent maintained that he was entitled to instructions on involuntary manslaughter and accident given all of the evidence in this case. The Court of Appeals held respondent was entitled to an instruction on involuntary manslaughter and therefore did not reach the other issues in this case. The shooting at the ground evidence was irrelevant to the issue given the Castro testimony the state elicited. Further, evidence the gun discharged accidentally does not mean that the defendant cannot be convicted of involuntary manslaughter and must be acquitted by reason of accident.

The judge's reasoning that the testimony was inconsistent, and therefore respondent was not entitled to an instruction on this lesser-included offense was erroneous. It is elementary that where there is conflicting evidence, any evidence of the lesser-included offense, here involuntary manslaughter, entitles the defendant to an instruction on that lesser-included offense. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001).

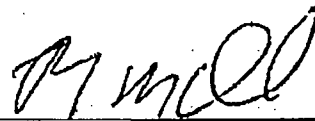
The trial court is only justified in refusing to charge a lesser-included offense when there is no evidence the defendant committed the lesser crime. State v. Chapman, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999); State v. Crosby; State v. Burriss, supra. In the final analysis respondent

was entitled to an instruction on involuntary manslaughter, and the opinion of the Court of Appeals should therefore be affirmed.

CONCLUSION

By reason of the foregoing argument, the opinion of the Court of Appeals should be affirmed.

Respectfully submitted,



Robert M. Dudek
Acting Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

This 8th day of January, 2010

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Greenville County
Honorable C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 2008-UP-187(S.C. Ct. App. filed March 18, 2008)

THE STATE,

Petitioner,

v.

MARLON RIVERA,

Respondent

PETITION FOR WRIT OF CERTIORARI

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THE COURT OF APPEALS ERRED IN FINDING THE JUDGE SHOULD HAVE CHARGED INVOLUNTARY MANSLAUGHTER, WHERE: (1) RIVERA'S ACCOUNT TO HIS COUSIN OF A STRUGGLE OVER THE GUN WAS INSUFFICIENT BECAUSE NO FACTS IN THAT ACCOUNT JUSTIFIED RIVERA'S POSSESSION OR PRESENTATION OF THE ILLEGAL HANDGUN; (2) IT GOES MUCH TOO FAR TO "CHERRY PICK" AND THEN SYNTHESIZE INDIVIDUAL PREDICATE FACTS FROM DISPARATE VERSIONS AS TO HOW THE SHOOTING HAPPENED IN ORDER TO JUSTIFY THE CHARGE; AND (3) AN INTENTIONAL SHOOTING INTO THE GROUND UNDER THESE CIRCUMSTANCES FITS NEITHER VERSION OF INVOLUNTARY MANSLAUGHTER. 7

- A. The Court of Appeals overlooked that nothing in Castro's testimony justifies Rivera pulling out his gun in the first place; accordingly, when he did he was acting unlawfully and in a manner naturally tending to cause death, which would preclude involuntary manslaughter under either definition. 7

B. The Court of Appeals overlooked that even though a lesser charge may be warranted from a prior account at odds with the defendant's version at trial, such an account or version itself must support the charge, and it goes too far to cherry pick individual facts out of disparate accounts to synthesize a defense theory.	11
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QUESTION PRESENTED FOR REVIEW

DID THE COURT OF APPEALS ERR IN FINDING THE JUDGE SHOULD HAVE CHARGED INVOLUNTARY MANSLAUGHTER, WHERE: (1) RIVERA'S ACCOUNT TO HIS COUSIN OF A STRUGGLE OVER THE GUN WAS INSUFFICIENT BECAUSE NO FACTS IN THAT ACCOUNT JUSTIFIED RIVERA'S POSSESSION OR PRESENTATION OF THE ILLEGAL HANDGUN; (2) IT GOES MUCH TOO FAR TO "CHERRY PICK" AND THEN SYNTHESIZE INDIVIDUAL PREDICATE FACTS FROM DISPARATE VERSIONS AS TO HOW THE SHOOTING HAPPENED IN ORDER TO JUSTIFY THE CHARGE; AND (3) AN INTENTIONAL SHOOTING INTO THE GROUND UNDER THESE CIRCUMSTANCES FITS NEITHER VERSION OF INVOLUNTARY MANSLAUGHTER.

STATEMENT OF THE CASE

Marlon Rivera was indicted by the Greenville County Grand Jury for murder (04-GS-23-7693). Specifically, the indictments alleged that, on July 18th, 2001, Rivera killed with malice aforethought Wilfrido Monge by shooting him with a pistol. {R. 464-65}.

The Honorable C. Victor Pyle, Jr. conducted a jury trial from October 10th to 13th, 2005. At trial, Applicant was represented by Attorney Susannah Ross, and Assistant Solicitor Kris Hodge prosecuted the case for the State. On October 17th, 2005, the jury found Rivera guilty of murder, and Judge Pyle sentenced Rivera to thirty (30) years.

A timely Notice of Appeal was filed with the South Carolina Court of Appeals. Deputy Chief Appellate Defender Robert Dudek was appointed to represent Rivera, and on August 17th, 2007, he filed a Final Brief of Appellant. The State filed a Final Brief of Respondent on August 14th, 2007. The case was argued on March 6th, 2008, and the Court of Appeals issued an opinion on March 18th, 2008 in which it reversed the conviction. {App. 86}.

The State filed a Petition for Rehearing on April 2nd, 2008, which the Court of Appeals denied by Order dated May 22nd, 2008. This Petition for Writ of Certiorari filed by the State follows.

STATEMENT OF FACTS

This case concerns a murder following an altercation outside of a club in Greenville.

A. Police respond to a shots fired call

At about 12:30 a.m. on July 18th, 2005, officers arrived at the scene of a reported shooting to find the victim, Wilfredo Solis Monge, was lying on the ground. {R. 23-27; 63}.

At first, police thought Monge has only been beaten. At the hospital, it was discovered that he had a gunshot wound to the face. {R. 28-29; 36-37; 201}.

B. Rivera is identified by an eyewitness at a nearby bar

Alvaro Fernandez gave police a statement and then left. About 15 minutes later he returned, excitedly saying in broken English and Spanish that the shooter was down the street in a bar called the Mexicali. {R. 13-14; 209-210}. Officers entered the bar with Fernandez, who pointed out Rivera. {R. 15-18; 210}.

Carlos Estrado, the manager of the Mexicali, testified at trial through an interpreter that he patted Rivera down for weapons as Rivera tried to enter the bar. Castro felt a weapon on Rivera, and Rivera told Castro he would get rid of it and be back. Rivera returned about 10-15 minutes later, and Rivera stayed at the bar until he was arrested. {R. 2-7}.

C. The confession

At the station, Fernandez told police he saw two men arguing, and a third man walking behind the ones arguing. The third man then reached down and grabbed something at his leg, and Fernandez heard two shots. Fernandez did not see which of the men did the shooting. {R. 20; 26-28; 141-42; 163-65; 215}.

Rivera gave a custodial statement to police in which he admitted shooting the victim. {R. 167-178}. Rivera stated that the victim started harassing him for hanging out with black people, and then grabbed his shirt and pushed him. They struggled for a bit, but the guy let go of Rivera. Rivera was mad because the guy had hit him, so he pulled out the gun from his pants leg. It fell to the ground, but he picked it up and shot the victim two times. Rivera's friend then said, "OK, you shot him, let's go", so Rivera put the gun in his pocket and left. {R. 179-180; 229-234}.

Rivera admitted he hid the gun in a tree before he was allowed to enter the Mexicali. {R. 180; 233}. An officer found the hidden .22 pistol. {R. 142}.

D. Rivera's admissions to his cousin

Rivera's cousin, Nelson Castro, testified that Rivera came to his house between 1:30 and 2:00 a.m. Rivera had a gun with him, and told Castro he had a problem because he had killed somebody. {R. 33-40}. Rivera told Castro that "during the fight [Rivera] got that pistol out, so the other guy grabbed the gun, and the gun went off. . . . The "shot hit somebody that was looking". {R. 45}. Rivera did not tell Castro about any third party trying to get the gun from Rivera, only that the guy he was fighting tried to get the gun. {R. 46}.

E. The forensic evidence

The victim was brain dead and ultimately removed from the life support systems. He had a wound right between the eyes on the bridge of the nose made by a small caliber bullet conclusively matched to the revolver found in the tree. {R. 78; 87-88}. A gunshot residue (GSR) test on Rivera found one round lead particle on the back of his left hand, which was consistent with firing a weapon. {R. 60-62}.

F. The defense case

The defense first called eyewitness Courtney Robles, who stated that she saw a man in a striped shirt and a man in a white shirt fighting. A third man in a black shirt and blue jeans separated the men that were fighting, and then took a gun from the waistband of the man in the striped shirt and pointed it in the direction of the guy in the white shirt. He fired, hitting the victim instead, who was not involved in the fight. The man in the dark shirt then handed the gun back to the man in the striped shirt and said "come on, the police are coming". They then left. {R. 283-284; 292-294}.

Norberto Ortiz stated that Delman Mauricio Arias and Rivera had some problems in the bar and manager told them to leave. Once outside, Arias attacked Rivera. Rivera pulled a gun from his pants leg and fired it into the ground. Supposedly, Arias kicked Rivera, and then a different guy who was with Rivera stated, "I'm going to get the weapon; I'm going to shoot the guy". The guy asked for the gun from Rivera, and after Rivera voluntarily gave it to him, the guy shot at Arias. Rivera then took the weapon back, and shot into the ground again to scare Arias. However, the victim Wilfrido cried out. Norberto did not know which of the three shots hit Wilfrido. {R. 299-304; 307}.

Robert Taylor, a social worker and Episcopal priest, opined that due to cultural issues, the language barrier, and Rivera's limited functioning, Rivera could not have understood what he was doing when he waived his rights and gave a statement to police. {R. 313-232}.

Rivera testified he illegally came to South Carolina to stay with his mother. {R. 334-338; 361}. As to the incident, Rivera said was getting a taco when Mauricio attacked him

from behind. Mauricio was insulting him, punching him very hard, and pushing him to a column. Mauricio supposedly threw Rivera to the ground and started kicking him. As Rivera was getting up, the gun fell from his pants, and Rivera reached for it. Mauricio pushed him to prevent him from getting the pistol, but Rivera got it and "shot down". Rivera claimed Norberto grabbed Mauricio and told him to stop, but Mauricio kept punching Rivera. {R.339-340; 342}.

Rivera stated that after he shot at the ground, a man named "Skinny" or "El Flaco" grabbed the gun and shot at Mauricio, after which Rivera grabbed the gun back and shot again at the ground. A few seconds later he heard a yell that someone had been shot, and when he saw Skinny run away, he ran away too. Rivera said he only fired the gun because Mauricio was attacking him and he wanted to scare him away. {R. 341-343}.

ARGUMENT

THE COURT OF APPEALS ERRED IN FINDING THE JUDGE SHOULD HAVE CHARGED INVOLUNTARY MANSLAUGHTER, WHERE: (1) RIVERA'S ACCOUNT TO HIS COUSIN OF A STRUGGLE OVER THE GUN WAS INSUFFICIENT BECAUSE NO FACTS IN THAT ACCOUNT JUSTIFIED RIVERA'S POSSESSION OR PRESENTATION OF THE ILLEGAL HANDGUN; (2) IT GOES MUCH TOO FAR TO "CHERRY PICK" AND THEN SYNTHESIZE INDIVIDUAL PREDICATE FACTS FROM DISPARATE VERSIONS AS TO HOW THE SHOOTING HAPPENED IN ORDER TO JUSTIFY THE CHARGE; AND (3) AN INTENTIONAL SHOOTING INTO THE GROUND UNDER THESE CIRCUMSTANCES FITS NEITHER VERSION OF INVOLUNTARY MANSLAUGHTER.

From reading the opinion, it seems the Court of Appeals found sufficient evidence for a charge on involuntary manslaughter from two conclusions: (1) that Rivera's cousin Castro testified that Rivera said the gun went off when he was wrestling with another man, and (2) that Rivera testified he fired the gun into the ground while standing amidst a crowd.

Respondent would respectfully submit the Court of Appeals erred: (1) in finding Castro's account alone justified involuntary manslaughter, when nothing in it supported Rivera's arming himself in self defense; (2) cherry picking individual predicate facts from disparate and conflicting accounts as to the shooting and grafting them onto Castro's account of what Rivera said, when in all other cases that applied the rule that a lesser offense should be charged even if inconsistent with the defendant's trial position, they relied on a complete account to the contrary; and (3) in finding that an intentional shooting in the ground could support involuntary manslaughter in these circumstances.

A. The Court of Appeals overlooked that nothing in Castro's testimony justifies Rivera pulling out his gun in the first place; accordingly, when he did he was acting unlawfully and in a manner naturally tending to cause death, which would preclude involuntary manslaughter under either definition.

With regard to the first situation, Castro's testimony about what Rivera allegedly told

him is insufficient to justify involuntary manslaughter. During Castro's testimony, he was asked if in his statement to police he said Rivera told him that the person that Rivera was fighting with grabbed the pistol from Rivera. Castro replied that Rivera "said the gun just went off". Rivera told Castro he pulled the pistol out, and that it hit someone that was just looking. {R. 43}.

On cross, Castro testified that Rivera said as they were wrestling both of them were grabbing the pistol; the other one had grabbed pistol away from Rivera, and "in that the shot went off". Castro agreed when asked if Rivera said the gun went off accidentally when the other man grabbed the pistol as they were fighting over it. {R. 43}. Castro specifically stated that Rivera did NOT tell him that he had been attacked, just that he was fighting with the other person and they were wrestling. {R. 44}. At this point, Castro's entire statement was read into evidence, which stated in pertinent part:

And Marlon told me he had some problem. He said that he was in a club and he was carrying a pistol that he belonged to Mr. Antoni. And he said that during that fight **he got that pistol out**, so the other guy grabbed the gun, and the gun went off. And the shot hit somebody that was looking.

{R. 44-45} (emphasis added).

Here, there is one crucial fact missing from what Castro said Rivera told him: facts justifying Rivera producing the gun in the first place. While it is true that a struggle between the defendant and the victim over a gun can support a charge of involuntary manslaughter, even if a third person is the one hit, see Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991), in each of these involuntary manslaughter cases involving allegedly unintentional discharge there was at least some justification in the defendant's possession

and production of the gun in the first place.¹

Indeed, this is the point of Burriss – a person cannot just improperly produce a firearm in a situation without justification and claim involuntary manslaughter when the gun inevitably kills someone; unless the person lawfully armed himself in self defense, or there was some other innocent or legally permissible reason for possessing, producing, pointing, or presenting the pistol, then the defendant was acting unlawfully, feloniously, and in a manner naturally tending to cause death or great bodily harm – all of which would preclude

¹ See State v. Tisdale, Op. No. 26495, 2008 W.L. 2168124 (S.C. 5/27/08) (defendant testified victim threatened him, attacked him, and then pulled a gun; the gun went off as they struggled but while the gun was still in the *victim's* hand); State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003) (victim was charging at defendant with hand behind his back when defendant fired, defendant said he closed his eyes and did not even know he had pulled the trigger); State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) (defendant stated victim and victim's friend had threatened to rob him and had physically attacked him; victim ran inside to get something which defendant thought was a gun; but while defendant brought out his gun in self defense, it accidentally fired); Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) (victim threatened to cut defendant, and when victim approached car, defendant produced shotgun, which went off and hit victim when passenger grabbed it); State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005) (cert. granted) (evidence supported a charge of involuntary manslaughter, since: (1) evidence supported a finding defendant lawfully armed herself in self defense, where defendant testified victim was accosting her friend, defendant saw knife in victim's hand, and defendant said he was coming to get defendant's friend; and (2) even though defendant testified she cocked the gun and wanted victim to stop, she also testified "the gun fired" when victim moved to the right, and she maintained in her statements she did not remember pulling the trigger, and did not mean for the gun to fire); State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986) (cited in Casey for proposition that struggle over gun can support involuntary manslaughter, and relying on defendant's repudiation of statement in trial testimony that as he was putting the gun back in the car the victim grabbed it, causing it to fire). Cf. State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006) (finding no basis for involuntary manslaughter where defendant claimed he pulled out gun, waved it around, and threatened to commit suicide; even if gun went off accidentally he had committed the felony of presenting a firearm).

involuntary manslaughter.² As Burriss noted, "unlawful possession of a firearm can under certain circumstances constitute an unlawful activity so as to preclude an accident defense if it is the proximate cause of the killing." State v. Burriss, 334 S.C. 256, 513 S.E.2d 104, 108 n.5 (1999). See also State v. Crosby, 355 S.C. 47, 584 S.E.2d 110, 112 (2003) ("a person can be acting lawfully, even though in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting").

Here, nothing in Castro's account of what Rivera said justifies Rivera producing the weapon. Castro did not state that Rivera said he had been attacked without provocation, or that Rivera thought he was in reasonable fear of imminent serious deadly injury when he pulled out his gun, or that he had no other means to protect himself from such injury but to produce the gun. Simply because one gets into a physical altercation or wrestling match with someone does not entitle them to automatically arm themselves in self-defense unless the other elements are met. All Castro stated was that Rivera said he had a problem or fight with another person; that alone is insufficient to support a finding he lawfully armed himself in self defense if during that confrontation he took it to the next level by pulling out a weapon. Otherwise any fistfight or shoving match would legally justify pulling out a deadly weapon. Cf. State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994) (no evidence of imminent danger where club owner intervened in the fight and escorted defendant out,

² See State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) (Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others). See also S.C. Code Ann. § 16-23-410 (Rev. 2003) (felony to point or present a firearm); S.C. Code Ann. § 16-23-30 (Supp. 2007) (criminalizing possession of a pistol in various circumstances).

despite defendant's testimony that owner was coming at him).

It is respectfully submitted that it is improper to make the words "struggle over the gun" some talismanic incantation automatically justifying an involuntary manslaughter charge, when there was no valid basis for the defendant possessing or producing the weapon in the first place.

B. The Court of Appeals overlooked that even though a lesser charge may be warranted from a prior account at odds with the defendant's version at trial, such an account or version itself must support the charge, and it goes too far to cherry pick individual facts out of disparate accounts to synthesize a defense theory.

Thus, since it is not present in Castro's account, Rivera must look to the accounts of others and his own testimony to try to find sufficient facts to justify him producing the gun, so that Castro's account of an accidental shooting as the two struggled could support involuntary manslaughter.

Assuming for the moment without conceding Norberto's testimony or Rivera's testimony that another man attacked him might support him arming himself in self defense, it goes too far to "cherry pick" those predicate facts from their accounts and then "graft" it on to Castro's entirely disparate account of what Rivera said which has nothing at all in similarity to do with how the firearm was actually discharged. While it is one thing to give a charge based on an account given by another witness or the defendant's own prior statement even though it conflicted with his later testimony or position at trial, it is quite another, as is necessary here, to cherry pick individual facts from disparate and conflicting accounts in order to synthesize a master theory, even though none of those conflicting accounts would support the charge individually. Indeed, among the cases that have

applied this principle, all of them have relied on one cohesive account, and not one of them has simply picked out various disparate facts from various versions to get sufficient elements for the charge.³

It is respectfully submitted that the Court of Appeals misapprehended this distinction in applying the general rule that a previous account can support a jury instruction even if it conflicts with the position taken by the defendant at trial, by pulling out facts from various versions that independently are conflicting and insufficient for the charge. Here, Castro said Rivera claimed the gun went off as to two men were struggling over it; Rivera and Norberto described intentional shots that did not take place when the two men were actively grappling with each other in combat. Norberto or Rivera's description of how the fight started cannot be grafted onto the version Rivera told Castro of how the shot happened.

C. Under these circumstances an intentional firing into the ground would not support involuntary manslaughter.

Finally, it is respectfully asserted that the Court of Appeals erred in concluding that testimony Rivera fired the gun into the ground supports involuntary manslaughter, and in concluding that any of the accounts offered at trial support the lesser offense.

³ See State v. Crosby, 305 S.C. 445, 409 S.E.2d 391 (2003) (relying on defendant's statement to police); State v. Knoten, 347 S.C. 296, 555 S.E.2d 391 (2001) (relying on the version of events in defendant's second statement to support voluntary manslaughter); State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999) (relying on defendant's testimony); Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) (relying on testimony of surviving eyewitness); State v. Patrick, 289 S.C. 301, 345 S.E.2d 481 (1986) (relying on defendant's repudiation of his statement in his trial testimony, in which he claimed that as he was putting the gun back in the car the victim grabbed it, causing it to fire); State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005) (cert. granted) (relying on defendant's testimony at trial).

First, it should be noted that this particular contention was not properly presented on appeal, as Rivera in his brief relied only on Castros' statement and did not mention any contention Rivera fired into the ground in support of his claim here.

Of course, as noted during the Statement of Facts in the brief, Rivera told police that after he and the guy struggled, the guy let go of him. Rivera was mad, so he pulled out the gun, which fell to the ground. Rivera said he picked up the gun and fired twice. Nothing in that would support involuntary manslaughter.

During the defense case, Courtney Robles testified about the third man circling the two combatants, taking the gun from one of the combatants, and firing the shots. {R. 283-284; 292-294}. That of course would not support involuntary manslaughter, as it describes the actor being someone other than Rivera, and in any event, that actor clearly took intentional shots at another, not accidental or unintended discharge into the ground.

Norberto stated that Rivera was attacked by Arias. A third man asked Rivera for the gun, and after Rivera gave it to him voluntarily, the third man fired. Rivera then took the gun back and fired into the ground. {R. 299-304; 307}. Finally, Rivera testified that Mauricio attacked him, that the gun fell out of his pants and he picked it up and fired it at the ground to scare Mauricio, that Skinny then took the gun and fired it at Mauricio, and that he then took the gun back and fired it into the ground again. {R. 339-343}. Here, even if Rivera could pull out the gun in the self-defense, he could not just fire it indiscriminately into the ground with a large crowd around without being fully responsible for hitting someone under the concept of malignant heart murder as a matter of law. See State v. Mouzon, 231 S.C. 655, 99 S.E.2d 672 (1957).

Moreover, while Rivera might have been entitled to *arm* himself in self-defense, he was not entitled to intentionally *shoot* the gun unless actually in a pure actual self-defense situation meeting all four elements — which has nothing to do with involuntary manslaughter. Rivera admitted intentionally shooting the gun twice, and specifically denied that he felt Mauricio was going to kill him. Once he intentionally fired the weapon, assuming it was not justified by self defense situation, his firing of the weapon was clearly an unlawful act, and also one naturally tending to cause death or great bodily harm. As such, the definition of involuntary manslaughter is not met under both versions. Said another way, once Rivera intentionally fired the gun, it was either self-defense or murder.⁴

⁴ See State v. Davis, 374 S.C. 581, 649 S.E.2d 132 (2007) (even if defendant lawfully armed himself in self defense with sledge hammer, there was no evidence he acted with reckless disregard under the second definition of involuntary manslaughter, because he intentionally hit the victim); State v. Childers, 373 S.C. 367, 645 S.E.2d 233, 237 (2007) (Toal, C.J., concurring) (trial court may have charged the jury on involuntary manslaughter "because it was possible for the jury to believe that the defendant's *initial returning of fire* was justified, but ultimately find that the defendant was criminally reckless in firing multiple times over his shoulder as he retreated" (emphasis added)).

CONCLUSION

Respondent would respectfully assert the Court of Appeals overlooked or misapprehended that the evidence in this case justified a charge on involuntary manslaughter. The opinion of the Court of Appeals should be reversed, and the conviction and sentence reinstated.

Respectfully submitted,

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Attorney General

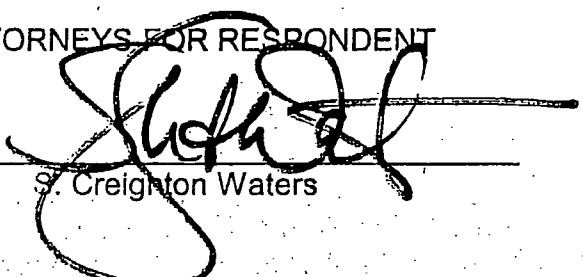
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BY: 

S. Creighton Waters

June 23, 2008.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

C. Victor Pyle, Jr., Circuit Court Judge

Opinion No. 2008-UP-187 (S.C. Ct. App. filed 3/18/2008)

04-GS-23-7693

THE STATE,

PETITIONER,

V.

MARLON RIVERA,

RESPONDENT

RETURN TO THE
PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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PETITIONER'S QUESTION PRESENTED

Did the Court of Appeals err in finding the judge should have charged involuntary manslaughter where: (1) Rivera's account to his cousin of a struggle over the gun was insufficient because no facts in that account justified Rivera's possession or presentation of the illegal handgun; (2) it goes much too far to "cherry pick" and then synthesize individual predicate facts from disparate versions as to how the shooting happened in order to justify the charge; and (3) an intentional shooting into the ground under these circumstances fits neither version of involuntary manslaughter?

STATEMENT OF FACTS

Procedural history

Respondent was indicted by the Greenville County grand jury for the offense of murder. R. 464. His case came on for trial on October 10, 2005 before the Honorable C. Victor Pyle, Jr. and a jury. Susannah Ross represented respondent. Kris Hodge was the Assistant Solicitor. R. 1.

On October 13, 2005 the jury found respondent guilty of murder. R. 459, ll. 6 – 11. Judge Pyle sentenced respondent to thirty years imprisonment. R. 463, ll. 20 -22.

On appeal respondent raised five grounds for reversal before the Court of Appeals. The Court of Appeals reversed in a per curiam opinion in State v. Rivera, 2008-UP-187 (March 18, 2008) because the trial judge refused to charge involuntary manslaughter. The Court therefore did not address respondent's remaining issues.

The state sought rehearing which was denied. The state is now seeking a petition for writ of certiorari. This return follows.

Relevant trial facts

Prior to trial defense counsel moved for the appointment of a separate court interpreter. Defense counsel Ross noted that her interpreter, Carlos Freeman, had helped her throughout the case. "He's interpreting to my client what's happening, but he's not the state's interpreter for this case." R. 12, ll. 17 – 24. The judge denied the motion. R. 12, l. 25 – 13, l. 2.

Greenville County Sheriff's Deputy David Bendig testified that he was dispatched to an assault call on July 17, 2004 at about 12:30 a.m. R. 22, l. 23 – 23, l. 25. Bendig found a male lying

on the ground in the parking lot near the "Spanish Amigo Market in the strip mall." There were about twenty or thirty people scattered outside.¹ R. 24, ll. 2 – 15.

Bendig immediately acknowledged that "a language barrier existed." He remembered talking to Courtney Robles and Delman Arais at the scene. R. 27, ll. 1 – 14. These were the only people Bendig spoke with that morning. R. 27, ll. 8 – 23. As will be seen *infra*, there would be evidence that Arais attacked respondent and that respondent pulled a gun when attacked. R. 299 – 300.

Castro Testimony

Nelson Castro was the next *state's* witness. Interpreter Efrain Pineros was sworn in for Castro's testimony. R. 33, ll. 2- 6. Castro said that he spoke Spanish and "a little bit of English." R. 33, ll. 8 – 20.

Castro noted that respondent was his cousin. He recalled respondent coming by his house at 1:30 or 2:00 in the morning on the day in question. R. 34, l. 16 – 36, l. 12.

Castro remembered that respondent had a pistol and that he said that he had killed somebody. R. 37, l. 4 – 38, l. 10. The solicitor elicited the following from Castro:

Q. And that he had gotten he pistol the day before?

A. Yes.

Q. Did he say how it was that he came to kill someone?

A. He said that *they were wrestling with somebody else, and that the weapon was loaded, and that the weapon just went off by itself.* That the shot didn't hit the person that he was wrestling with, but it hit somebody else that was watching.

Q. Did he say the he knew the person that got shot?

¹ There would later be evidence offered that the police at first did not know the victim had been shot in the face, and they only thought he was badly hurt from being beaten.

A. No, he didn't say that he knew that person.

Q. How was he acting that night?

A. He looked like sad for what had happened.

R. 38, ll. 11 – 22. (emphasis added).

On cross-examination Castro acknowledged respondent told him the gun "went off *accidentally* when the other man grabbed the pistol and they were fighting over it." R. 43, ll. 23 – 25.

Investigator Brian Garrett testified there were about fifteen to twenty people outside the Hispanic club where the shooting occurred when he arrived at 3:00 a.m. Garrett said he tried to interview witnesses but none of them had any information that was useful. Supp. R. 12, ll. 15 – 23.

There was evidence that Garrett located the weapon the following morning in a tree outside the club. Supp. R. 48, l. 19 – 51, l. 14.

The pathologist, Dr. Eric Christensen testified that the decedent died on July 21, 2004, several days after he was shot. He died from a gunshot wound to the face. The decedent was taken off life support. Supp. R. 65, ll. 21 – 24; Supp. R. 67, ll. 6 – 21.

There were at least three theories of what occurred into this case. Each theory was backed by some evidence. As seen, Castro testified, on direct examination by the solicitor, that respondent told him the gun went off accidentally during the struggle. As will be seen *infra*, there was also evidence respondent was attacked by a Hispanic man because he was socializing with black people.

The state called Greenville County Crime Lab worker Mark Stephan to apparently attempt to dispel the gun went off by accident evidence. Supp. R. 71, l. 12 – 72, l. 16. Stephan testified that

when he test fired the gun "it misfired several times. It did not fire when I pulled the trigger."

Supp. R. 78, ll. 15 – 24.

However, Stephan maintained that someone would have to pull the trigger for this particular gun to discharge. Stephan claimed the gun would not go off accidentally. Supp. Supp. R. 19, ll. 3 – 19.

As will also be seen infra, there was also evidence that respondent shot the gun into the concrete or ground to scare his attacker. Stephan discounted that theory saying the condition of the bullet taken from the decedent was consistent with the bullet being fired from the gun and then going directly into the bone, and not hitting something else first. Supp. R. 88, ll. 1 – 23.

There was another theory that the decedent was the unintended victim, but that the gun was intentionally shot. There was also evidence two or three men actually handled the gun in the confusion outside the club, and a third man may have fired the shot that hit the decedent. R. 98, ll. 2-11.

Investigator Smith testified if a bullet had hit the ground or concrete before hitting the decedent that the police would have been able to notice the damage. R. 207, ll. 1 – 23; R. 257, ll. 7-12. Smith acknowledged he was told by another witness, Alvaro Fernando Portugez, that he saw two men arguing that night and he saw another man walking around and that third men bent down as if he was grabbing something from his leg. A witness told Smith he did not see who did the shooting. R. 143, ll. 12 – 25; R. 144, ll. 12 – 17.

Respondent allegedly told the police that he was at a restaurant that night with some black friends. He told them he was carrying a gun that he had gotten from a friend, Antonio Mendoza, who had been arrested the day before. It was a .22 caliber gun. R. 179, ll. 10 – 21. In respondent's statement he said a man approached him and asked "why was he hanging around those black guys

or those black people.” The statement said the man grabbed respondent and started pushing respondent around. There was a struggle and the man let go of respondent. The statement said respondent was mad because the man hit him and he went to grab his gun and it fell on the ground. Respondent’s statement read: “I grabbed it [the gun]. I pointed it at him and shot two times.” R. 180, ll. 1 – 7. Respondent’s statement also said respondent put the gun in a tree after he went to the Mexicali. R. 180, ll. 8 – 23; Respondent’s statement; R. 466. Respondent argued before the Court of Appeals that his statement should have been suppressed because he was physically abused by the police when they questioned him. The Court did not reach that issue because it reversed on the present issue.

Courtney Robles testified that she saw two men fighting that night. Robles was not sure how the physical action started. Robles thought the decedent may have been “one of the guys that had been fighting and somebody had just punched him in the eye because by the time they [the police] got there his eye was so swollen that you couldn’t see the entry wound.” R. 286, l. 23 – 287, l. 6.

Robles gave the police a statement, and she also said the police were “very rude. Very rude” to everyone that “was out there” that night at the Spanish club. R. 287, ll. 10-14. Robles described how a man in a striped shirt was fighting with a man in a white shirt, and another man separated them, and a man in a black shirt took the gun from the man in the striped shirt and pointed straight ahead and shot. R. 283, l. 7 – 287, l. 14.

Norberto Ortiz testified that respondent had problem with Delman Maricio Arias, “and the guy that had some problems with a guy inside the place. And the guy that had the problems with Marlon and started just saying some bad words and insulting him. . . . Mauricio attacked Marlon.” Ortiz also noted that another unknown man got the pistol from respondent after respondent had shot

the gun twice to scare the aggressor. The other person said "give me the pistol, I'll shoot him."

Ortiz said he did not know which of the three shots hit the decedent. R. 297, l. 16 – 307, l. 15.

Lesser-Included Offense and accident

During the charge conference defense counsel Ross brought to the judge's attention the cases of State v. Burris and State v. Crosby. The cases were made a court's exhibit. See R.2.

Ross argued that there was evidence respondent was armed in self-defense and a jury could find the gun accidentally when off and it was involuntary manslaughter or accident since there was no heat of passion. R. 378, ll. 9 – 22.

Defense counsel reminded the judge that a witness (Castro) had testified early in the trial that the gun went off accidentally and that given the entire evidence offered in this case that respondent was entitled to an instruction on involuntary manslaughter, and accident. R. 378, l. 9 – 379, l. 11. Counsel also requested a charge on self-defense. The solicitor argued there was testimony "as to every type of thing. There's nothing consistent in that." R. 379, l. 13 – 380, l. 13. The judge stated he was not going to charge involuntary manslaughter or accident, and the only jury options would be murder or not guilty. R. 381, ll. 7 – 22.

ARGUMENT

The Court of Appeals correctly held it was error for the trial judge to refuse to charge the jury on involuntary manslaughter where the state elicited testimony that respondent told witness Nelson Castro that he had been wrestling with someone "and that the weapon just went off by itself." There was also evidence respondent was resisting an attack. Defense counsel correctly argued respondent was armed in self-defense under *State v. Burriss* and *State v. Crosby*, and that respondent was entitled an involuntary manslaughter instruction given this evidence. The judge erred as a matter of law by reasoning inconsistent testimony meant respondent was not entitled to the other instructions.

As seen, the state elicited from Nelson Castro that respondent admitted he had been wrestling with another man and that the gun went off accidentally. There was clearly evidence that respondent was attacked by another man who was apparently angry that respondent was with his black friends. There was evidence respondent was hit and knocked to the ground. Respondent had armed himself in self-defense within the meaning of *State v. Crosby*, 355 S.C. 47, 584 S.E.2d 110 (2003), and *State v. Burriss* 334 S.C. 256, 513 S.E.2d 104 (1999).

In *Crosby* this Court held that an involuntary manslaughter instruction was warranted even though at one point respondent admitted he intentionally pulled the trigger. In *Crosby* although there was conflicting evidence, there also was evidence the decedent was charging at Crosby when he pulled his pistol in self-defense and it discharged.

Similarly in *State v. Burriss* 334 S.C. 256, 513 S.E.2d 104 (1999) this Court held that a person can be acting lawfully, even where he is unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting. In *Burriss*, the defendant was threatened and attacked by the victim with another male. There was evidence one attacker backed away but

urged his accomplices to attack Burriss again. Burriss grabbed his gun and it fired. Burriss stated it was an accident. However, at another point Burriss said "the trigger was pulled or whatever," implying for the state that the trigger was pulled intentionally.

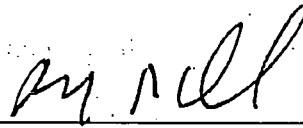
There was evidence here that respondent was attacked, that he was armed in self-defense, and that the gun went off. Respondent maintained that he was entitled to instructions on involuntary manslaughter and accident given all of the evidence in this case. The Court of Appeals held respondent was entitled to an instruction on involuntary manslaughter and therefore did not reach the other issues in this case. The shooting at the ground evidence was irrelevant to the issue given the Castro testimony the state elicited. Further, evidence the gun discharged accidentally does not mean that the defendant cannot be convicted of involuntary manslaughter and must be acquitted by reason of accident.

The judge's reasoning that the testimony was inconsistent, and therefore respondent was not entitled to an instruction on this lesser-included offense was erroneous. It is elementary that where there is conflicting evidence, any evidence of the lesser-included offense, here involuntary manslaughter, entitles the defendant to an instruction on that lesser-included offense. State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). The trial court is only justified in refusing to charge a lesser-included offense when there is no evidence the defendant committed the lesser crime. State v. Chapman, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999); State v. Crosby; State v. Burriss, supra.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR RESPONDENT.

This 22nd day of September, 2008

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
Hon. Robin B. Stilwell, Judge

RECEIVED

DEC 13 2013

Case No. 2011-CP-23-1209

S.C. Supreme Court

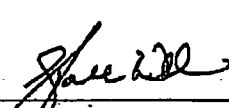
State of South Carolina, ... Respondent,

vs.

Marlon Rivera, 311864, ... Appellant.

NOTICE OF APPEAL

Marlon Rivera hereby appeals from the Judgment and Order of Dismissal signed by the Honorable Robin B. Stilwell, and entered November 8, 2013. The Judgment and Order under appeal were received by Appellant's counsel on December 11, 2013. A copy is enclosed herewith.



J. Falkner Wilkes (SC Bar #12893)
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 (facsimile)
Counsel for Appellant

Other counsel of record:
Office of the Attorney General
Karen Ratigan
PO Box 11549
Columbia, SC 29211
Counsel for Respondent

The Supreme Court of South Carolina

Marlon Rivera, Petitioner,

v.

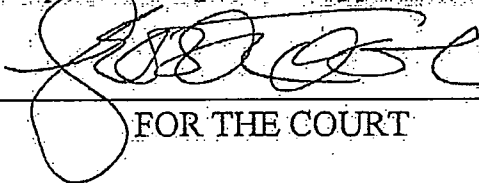
State of South Carolina, Respondent.

Appellate Case No. 2013-002652

ORDER

Petitioner has filed a notice of appeal from an order of the circuit court denying his application for post-conviction relief (PCR). The South Carolina Commission on Indigent Defense, Division of Appellate Defense, is currently representing petitioner in this matter. Lara M. Caudy, Appellate Defender, has moved for the appointment of counsel outside of the Division of Appellate Defense due to a conflict of interest arising from an allegation of ineffective assistance of appellate counsel that was raised to and ruled upon by the PCR judge. The State takes no position on the motion.

The motion is granted. The Division of Appellate Defense is hereby relieved as counsel and J. Falkner Wilkes, who represented petitioner before the circuit court in this matter, is appointed to represent petitioner. The Division of Appellate Defense shall remain associated for the limited purpose of paying for any necessary transcript(s) and providing copies of the petition, appendix and briefs.


CJ.
FOR THE COURT

Columbia, South Carolina

April 24, 2014

cc:

Karen Christine Ratigan, Esquire

Lara Mary Caudy, Esquire

J. Falkner Wilkes

RECEIVED

APR 24 2014

SC OFFICE OF
APPELLATE DEFENSE

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

MARLON RIVERA, ID#: 311864)
Defendant,)

Case no. 2011-CP-23-1209

Vs.)

MOTION TO
COMPELLING WITNESSES

STATE OF SOUTH CAROLINA)
Respondent.)

This matter came before the Court, in my concern of
the last hearing on February 12, 2013.

Hereby, the Marlon Rivera is come with the information
of the "witnesses." And have been addressed, pursuant of his
interviewed between his 'defense counsel at the hearing.' In
Proceeding "Case No. 2011-CP-23-1209."

I.
ISSUE OF FACTS

- (1). Defendant in this Matter have present the first issue of
the witnesses at the Cross Examination. Naming Ms. Ross,
see at, Page 171 Paragraph 17 issue of her excuse from
the court such witness? See at ¶ 24.
- (2). In this facts to Ms. Simmons on a Direct Examinations
Ms. Simmon it is a witnesses, "; see at Expert In trace
Evidence Analysis. Also see Ms. Hodge, at Pg. 173 ¶ 19.
- (3). Than, see a Cross Examination by Ms. Ross, Pg. 180, ; &
181, ¶ 12. see also witness Ms. Dekueyer, in Pg. 182, ¶
22; focus at Rebeca D. Reeves. (of the Court's Exhibits
1, & 2 were Marked).

- (4). Further, in such investigation of Mr. Smith Officer, in a Direct Examination by Ms. Hodge, Pg. 188 ¶ 5. & 17, facts of the Investigator, Mr. Wes Smith with Deputy Rivera Ramon. Rivera argues that facts of the defendant's waiver of the defendant Rights matter of his statements?
- (5). See at Redirect Examination by Ms. Hodge at ¶ 9 using a witness Deputy Mr. Ramon Rivera.
- (6). See, Ms. Hodge, at Pg. 219, ¶1, & 2. Issues of statement to Wesley Smith; being duly sworn testified, of the following[?] See also at Pg. 220 was had been interview a witness! The name "Albaro Fernandez." at ¶ 22-to-24.

II.

Pursuant, of Cross Examination by ms. Ross at Pg. 213, facts of the "Officer Rivera," holding an statement of [two] people, at the [Night], There is the name of Mr. Fernandez. See at ¶ 6-to-23, statement from a second witness, such last name is Portuguese, him rgues that the defendant was not there [?]

Furthermore, Mr. Marlon Rivera, with his counsel therein the provision, in his behalf of the S.C.Code Ann. § 15-27-155 a witness unable to speak. See at Rule 511 A.C.P. Rule 1, & 2 this create an obligation contained in a source such "interviewed with the communication facts?" See Edward v. State, 392 S.C. at 456, 710 S.E.2d at 64, the duty to investigate a potential witness is even more critical, when the witness requires that criminal defense attorney thorough, investigate potential alibi witnesses. See id.

III.

Therein, the defendant behalf have been present, and him belief that Mr. Ramon Rivera, With a [witness or may be a interpreter! See at [Exhibit(III). Pg.200] Defendant asking, to his defense counsel to investigate that. Under the § 15-27-15, this means is to such interpreter, prove a "Sertificate or his license," in his duty at the time of the interrogation, [Forward], of my next court date hearing Because of my transcript Record fall to any "Cross Examination By Mr. Carlos-Freemant, in conection a interpreter, on those issues. That, the Defendant, is Unknown if mr. Carlos F. had Licence to do so. In such Interrogation.

CONCLUSION

That, the Defendant, Marlon Rivera, "asking to his Counsel," that please move to amendment his post-Conviction Relif. Pursuant, of the S.C. R. Civ. P. Rule 71.1(c), and (e). Who must establish his grounds for Relief by a preponderance of the Evidence.

Thanking You

Respectfully Submitted

s/

Marlon Rivera, ID.#: 311864,
The Defendant.

Q4B Room 120 Perry Corr. inst.
430, Oaklawn Road
Pelzer, South Carolina, 29669.

IN THE COURT OF COMMON PLEAS

Case No. 2011-CP-23-1209

MOTION TO COMPELLING WITNESSES

Vs.

A F F I D A V I T

I, Marlonn Rivera, a living breathing man first duly sworn depose, say and declare by signature that the facts in this, present information above of the witnesses and the following facts are true, correct and complete to the best of my knowledge and belief. That,

the Defendant addressed it to his Counsel and was served with a copy of the requesting facts of such witnesses, and affidavit as appears from the Proof of Service on File.

Submitted on this _____ day of _____, 2013.

SWORN To Before Me this 26th day of

February, 2013.

Respectfully Submitted

Marlon Rivera
Marlon Rivera, # 311864.
Perry Corr. Inst. Q4B/120
430, Oaklawn Road
Pelzer, S.C. 29669.

NOTARY PUBLIC OF SOUTH CAROLINA

MY Commission Expires: March 7 2016

STATE OF SOUTH CAROLINA :
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

MARLON RIVERA, ID.No.:311864)

Case no. 2011-CP-23-1209

Defendant,)

Vs.)

PROOF OF SERVICE

STATE OF SOUTH CAROLINA)

Respondent.)

I, Marlon Rivera, declare under the such facts of the matter of witnesses, that on the below said date, defendant did deposit a true and exact copies of foresaid Exhibit (I-to-V) and (1-to-23), that I prove it, of such witnesses. Through Perry Corr. Inst. Mailroom's clerk, to be Forward, throughout in the U.S. Posted System with Sufficient Postage to: My [Attorney at Law]

Mr. J. Falkner Wilkes, Address is

114, Whitsett Street
Greenville, SC.29601

Respectfully Submitted

Marlon Rivera

Marlon Rivera, ID.No.311864

Defendant,

Perry Corr. Inst. Q4B/120
430, Oaklawn Road
Pelzer, S.C. 29669.

Submitted on this _____ day of _____, 2013.

Sworn To Before Me This 26th day of

February, 2013.

Steven T. Melanich
NOTARY PUBLIC OF THE SOUTH CAROLINA

My Commission Expires: January 7, 2016

WITNESSES

DOCKET NO. 2004-GS-23-007693
KBH
The State of South Carolina

County of Greenville

WESLEY SMITH

GCSO

07/22/04

COURT OF GENERAL SESSIONS

OCTOBER TERM 2004

THE STATE

vs.

MARLON A. RIVERA

ARREST WARRANT NUMBER

1-466277

ACTION OF GRAND JURY

TERMINED

Foreperson of Grand Jury

John H. McKeith

VERDICT

0116

Indictment for

MURDER

VIOLATION § 16-3-10

Foreperson of Petit Jury

Date:

534

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on

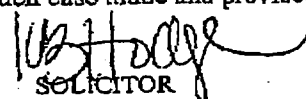
OCTOBER 19, 2004

the

Grand Jurors of Greenville County present upon their oath:

That MARLON A. RIVERA did in Greenville County, on or about the 18th day of July, 2004, unlawfully and with malice aforethought kill Wilfrido Solis Monge by means of shooting him with a pistol, and that Wilfrido Solis Monge died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Greenville
STATE VS.Marlon Rivera

AKA: _____

Race: H Sex: M Age: 30DOB: _____ SSN: 000-00-0000

Address: _____

DL#: _____ SID#: _____

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

2004GS2307693A/W#: 1466277Date of Offense: 07-18-2004S.C. Code §: 16-03-0010, 0020CDR Code #: 0116☐ CASE RESTORED
SENTENCE☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was

TO: Murder☒ CONVICTED OF or ☐ PLEADSin violation of § 16-3-10 of the S.C. Code of Laws, bearing CDR Code # 0116☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

J. Mark Young
Solicitor

Defendant

Marlon Rivera
Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv Surcharg)

§ 14-1-211(A)(2) (DUI Surcharg)

§ 56-5-2995 (DUI Assessment)

§ 35.13 (Public Def/Prob)

§ 73.3, 1B TP (Law Enforce. Funding)

§ 33.7, 1B TP (Drug Court Surcharg)

§ 50-21-114(BUI Breath Test Fee)

§ 56-5-2942(J) (Vehicle Assessment)

3% to County (if paid in installments)

TOTAL

Paul B. Wickens

Clerk of Court/ Deputy Clerk

Court Reporter: S. Hudson

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol testing _____

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, § 35.13 TP
Requires \$500 be paid to Clerk during probation.PRESIDING JUDGE Cliff GaltJudge Code: 01010710Sentence Date: 10/13/05

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

RECORD SUMMARY REPORT DATED 03/04/11

CO

RTVERA, MARLON - FBI #	SID# SC01559679	SCDC # 311844
OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE		
INSTITUTION ... PERRY CORR INST		DORM.....: Q2A0218B
SECURITY/CUST.: 3 MINIMUM IN		RACE.....: SEX...:M
CURR INCARC SENT...: 30 YRS 0 MOS 0 DYS		PROJ MAXOUT DATE: 07/15/2034
CENTRAL MONITORING.: NO		PROJ PAROLE DATE: 00/00/0000
SOCIAL SECURITY #....:		EWC JOB...: WARDKEEPER ASSISTANT
		EDUC PGM...: NO CURR EDUC PROGRA
		EWC LEVEL: 3F5 EEC LEVEL: B
		ASSIGNMENT...: WARD KEEPER WARD
CURRENT PROGRAM...: NO CURRENT PROGRAM		
AGE...: 36 DATE OF BIRTH...:		

PREVIOUS NUMBERS:

**** NO PREVIOUS NUMBERS ****

CURRENT OFFENSES	SENTENCE				SENTENCE	
	YRS	MOS	DYS	COUNTY	START	U/NU CATEG
MURDER	30	0	0	GREENVILLE	7/22/20	4 U 5

PRIOR COMMITMENTS OVER 90 DAYS:

INMATE HAS NO PRIORS

DETAINEES (HOLD, WANTED, NOTIFY):

CODE NOT IN TABLE

WANTED

ICE OFFICIAL

CATEG: :

NO DETAINEES

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

NO ASSAULTIVE DISCIPLINARY HISTORY

NON-ASSAULTIVE DISCIPLINARIES:

NO NON-ASSAULTIVE DISCIPLINARY HISTORY

HISTORY OF MOVEMENTS:

8/16/10	PERRY	INCARCERATED	ADMINISTRATIVE
8/16/10	KIRKLAND	INCARCERATED	MEDICAL
7/14/ 9	PERRY	INCARCERATED	ADMINISTRATIVE
7/14/ 9	KIRKLAND	INCARCERATED	MEDICAL
5/ 1/ 8	PERRY	INCARCERATED	ADMINISTRATIVE
5/ 1/ 8	KIRKLAND	INCARCERATED	MEDICAL
6/26/ 6	PERRY	INCARCERATED	ADMINISTRATIVE
6/26/ 6	KIRKLAND	INCARCERATED	MEDICAL
12/12/ 5	PERRY	INCARCERATED	ADMINISTRATIVE
10/17/ 5	KIRKLAND	INCARCERATED	R&E PROCESSING
10/17/ 5	PERRY	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB	START	END	TERMINATION	
DESCRIPTION	DATE	DATE	REASON	
WARDKEEPER ASSISTANT	09/17/09	0/ 0/ 0		J
WARDKEEPER ASSISTANT	09/03/09	9/ 3/ 9	LATERAL TRANSFER	L
TEACHER ASSISTANT	01/27/06	2/ 8/ 6	LATERAL TRANSFER	Y:

HISTORY OF EARNED EDUCATION CREDITS:

FFC	START	END	TERMINATION
DESCRIPTION	DATE	DATE	REASON
BONUS 12-14 HR/WK	01/05/10	0/ 0/ 0	
BONUS 4-7 HRS/WK	09/03/09	1/ 4/10	LATERAL TRANSFER
LVL 3 - PART TIME(NO EWC)	07/11/06	9/ 2/ 9	LATERAL TRANSFER
LVL 3 - FULL TIME(NO EWC)	02/09/06	7/10/ 6	INMATE REQUEST

***** END OF REPORT *****

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

AFFIDAVIT OF INDIGENCY

Case Name MARLON RIVERA #311864 v. State of South Carolina

Criminal Case No. 2004-65-23-7693 PCR CASE NO. 2011-CP-23-1209

Current Address: PERRY CORRECTIONAL INST., 430 OAKLAWN ROAD, PETER, S.C. 29669

Are you incarcerated? ☒ Yes (If "Yes") Where? PERRY CORR. INST.
☐ No

What were you convicted of? MURDER

What was your sentence? THIRTY (30) YEARS IMPRISONMENT.

Are you appealing from
a trial, ☐ a guilty plea ☒ a post-conviction relief hearing?

In what county was this trial/hearing/guilty plea held? GREENVILLE

Presiding Judge's name? ROBIN B. STILLWELL

Date of trial/guilty plea or post-conviction relief hearing AUG. 27, 2013

Were you represented by
☒ a court-appointed attorney ☐ public defender or ☐ retained counsel?

Name of attorney/public defender? J. FALKNER WILKES

If retained, how much did you pay for attorney fees? \$ N/A

If you still owe money to your attorney, how much? \$ N/A

1. Are you presently employed? Yes ☐ No ☒

a. If "yes," state the amount of your salary or wages per month, and give the name and address of your employer. NONE

b. If "no," state the name and address of last employment, date of termination of employment, and amount of your salary or wages per month. IMPRISONED SINCE 2004

2. List by name, age and relationship to you, any persons who are dependent upon you for support. Indicate beside each how much you contribute toward their support. NONE

3. Have you received within the past twelve months any money from any of the following sources?

a. Business, profession or form of self-employment?
Yes _____ No ☒

b. Rent payments, interest or dividends?
Yes _____ No ☒

c. Pensions, annuities or life insurance payments?
Yes _____ No ☒

d. Gifts or inheritance?
Yes _____ No ☒

e. Any other sources?
Yes _____ No ☒

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months. N/A

4. Do you own cash, or do you have any money in a checking or savings account?
Yes _____ No ☒

If the answer is "yes," state the total amount of the cash owned. \$ _____

5. Do you own any real estate, stocks, bonds, notes or other valuable property (excluding ordinary household furnishings and clothing)? Yes _____ No ☒

If the answer is "yes," describe the property and state the appropriate value of the items owned. _____

6. What kind of motor vehicle do you own? NONE

Is it paid for? Yes _____ No _____

If not, what are the monthly payments? \$ _____

7. How much do you owe (on liens, mortgages, other encumbrances or debts)? N/A

I do solemnly swear that the account by me delivered into this Court does contain a true and full account of all my real and personal estate, debts, credits and effects whatsoever without exception, which I, or any person in trust for me, have or at the time of my possession had, or am, or was, in respect, entitled to, in possession, remainder or reversion and that I have not at any time since charges were made against me or before, directly or time since charges were made against me or before, directly or indirectly sold, leased, assigned or otherwise disposed of or made over, in trust for myself or otherwise, other than is mentioned herein.

I understand that the State shall file a claim against me in an amount equal to the cost for representation, but that such claim shall not constitute a lien against my property, unless, the claim is reduced to judgment by the Order of the Court after giving me at least thirty days' notice.

Under penalty of perjury, I certify that the information give by me on this affidavit is true and correct, and I understand that I will be subject to civil and/or criminal penalties if I knowingly furnish false information.

I am financially unable to employ counsel.

This 26 day of November, 2013.

Defendant

I understand that I am entitled to at least thirty days' notice before a claim against me may be reduced to judgment, and I do hereby waive the right to such notice.

This 26 day of November, 2013.

MAYLON RIVERA
Defendant

SUBSCRIBED AND SWORN to before
me this 26 day of November, 2013

Lamara C. Powell
NOTARY PUBLIC FOR SOUTH CAROLINA

My commission Expires: September 25, 2023

POST CONVICTION RELIEF HEARING

RECEIVED
7/8/11

PCR

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

THIRTEENTH JUDICIAL CIRCUIT

STATE OF SOUTH CAROLINA

VS.

ORDER OF APPOINTMENT OF LEGAL
COUNSEL FOR INDIGENT DEFENDANT

Marlon Rivera
Inmate

SCDC# 311864

Perry Correctional Institute
Address

430 Oaklawn Rd
City/State/ZIP

Pelzer SC 29669
Telephone

PCR Case No. 2011 CP 23 01209

Original Attorney: Susannah C. Ross

* * * * *

The defendant contends that he is indigent and in need of services of an attorney as contemplated by law.

THEREFORE, Larry L. Plumblee, Attorney at Law,
is appointed as counsel for the defendant.

This 6 day of July, 20 11

Zach Kleber

Criminal Justice Coordinator

**RIVERA APPENDIX
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12-02