

VOLUME TWO OF TWO

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Florence County

Benjamin H. Culbertson, Circuit Court Judge **S.C. Supreme Court**

TRACY WILLARD DANIELS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002572

APPENDIX

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**THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:
APPLICANT'S EXHIBIT #1 – TAPED INTERVIEW – McDOUGAL**

1 Q. All right. Now and again, these lights are shining
2 towards -- This is where Tracy and his friend would
3 generally cook at the grill that's left here on this pad;
4 right?

5 A. Yes.

6 Q. And these lights would obviously be further behind two
7 people that you were looking at. They would be coming from
8 this direction that way; right?

9 A. Right.

10 Q. And there are two of them or did you know?

11 A. I didn't know that.

12 Q. You seen a double where you screw two bulbs in one?

13 A. Yes.

14 Q. Okay. Now, the only other light that I'm aware of
15 that -- And there's been some mention about whether or not
16 something on a post here was -- which may have been on the
17 -- your side of the people. Could possibly have been a
18 lamp post. And some people have referred to it as a bird
19 feeder. Are you familiar with something that sticks up
20 right there?

21 A. Yes.

22 Q. Tell the jury is that a light or is that a bird
23 feeder?

24 A. I don't know.

25 Q. Okay. Let's get that straight.

1 MR. RUSSO: Your Honor, I object at this point. The
2 basis is I don't think that there's been any State's
3 witness that has testified that that's a light. I think
4 they all testified it's bird feeder. So I don't think ---

5 MR. DEBERRY: We can stipulate. It is a bird
6 feeder. We can stipulate that.

7 MR. RUSSO: We can stipulate that it's a bird
8 feeder.

9 THE COURT: Thank you. Go ahead.

10 Q. Now, so we have this light and we have this light.
11 The only other light that I'm aware of is the light that I
12 believe is facing Tracy's house is on the right there. And
13 I'll get a picture in a minute and show you that. However,
14 it's been -- I let you look at here is State's Exhibit
15 Number 12. You see a gold car there in State's Exhibit
16 Number 12?

17 A. Yes.

18 Q. That has the door open?

19 A. Yes.

20 Q. And you see it's obviously night there?

21 A. Yes.

22 Q. And do you remember that car being -- The Camaro you
23 were talking about was it -- As you saw it, do you know
24 whether or not it was in the -- pretty much the same as you
25 see this car?

1 A. It was in the driveway.

2 Q. Okay. And did you know that that was Donald's car
3 that comes over there on the weekends?

4 A. Yes.

5 Q. It is. Do you recognize it?

6 A. Yes.

7 Q. I think it's a gold -- somebody might have said a
8 Mazda?

9 A. I don't know.

10 Q. You don't know. All right. And is that to you the
11 way the area looked on the night that you were looking?

12 A. Close to it.

13 Q. Okay. And you see that the light -- The third light
14 that I'm talking about is to the right of the trailer door?

15 A. Yes.

16 Q. And you see the -- It looks like it's off; right?

17 A. Yes.

18 Q. Okay. Do you disagree with the fact that the light
19 would have been off that light or the other two
20 approximately on?

21 A. I don't recall seeing those lights on.

22 Q. Okay. All right. Now, you were looking at that
23 window and you could see the two people standing together
24 talking; right? And you just went through describing that
25 they were there. And they were handed the gun went back

1 and forth from each other?

2 A. Yes.

3 Q. Now, unlike the way you were standing here, close by
4 here where the jury can see you and so forth. And isn't
5 true that they were somewhere around 96 feet or so away
6 from you; is that right?

7 A. I don't know how many feet they were away from me.

8 Q. Okay. But however many feet it was you, you were
9 familiar with -- You know where you were. You were looking
10 through your door?

11 A. Right.

12 Q. And you know where Tracy's trailer is?

13 A. Right.

14 Q. You been living there for five years?

15 A. Right.

16 Q. Tell me how many feet would say it is from right here
17 to the -- into this room?

18 A. How many feet from here to the end of the room?

19 Q. To the end of the room.

20 A. I'm not good with inches and feet.

21 Q. That's all right go ahead?

22 A. Sixty feet.

23 Q. Okay. And so obviously there good ways past from you
24 to the end of this room as to where they were standing; is
25 that right?

1 A. Yes.

2 Q. Now, there's no question about it that Donald -- You
3 know his name to be Donald now; right?

4 A. Yes.

5 Q. You had seen him over there before with Tracy coming
6 over as Tracy's guest?

7 A. Yes.

8 Q. And did you know that Tracy was a plumber you knew
9 that; right?

10 A. Yes.

11 Q. And you know that Tracy -- Donald would come up there
12 the during the week and come there then they go out work
13 together?

14 A. I didn't know.

15 Q. You didn't know that?

16 A. No.

17 Q. Did you know that Tracy dated his mother?

18 A. I knew he was dating someone, but at that time I
19 didn't know that that was her son.

20 Q. Okay. And when this -- When Donald was over there and
21 you said that you saw him doing something with the gun as
22 far as the shells and dropping something and so forth. He
23 was a lot further than that car or that road and he had his
24 back turned to you; didn't he?

25 A. I could see part of his side. He wasn't completely --

1 His back wasn't completely turned.

2 Q. Okay. I'm going to walk over there. When you saw him
3 as you said he was this far according to your estimate and
4 maybe a third more then 90 something feet. This 60 feet
5 away right be a little further? You agree?

6 A. If I guessed right, yes.

7 Q. Okay. All right. And at that time was he turned
8 where you could see part of him to his left or to his
9 right?

10 A. To his right.

11 Q. And he had the gun in front of him?

12 A. You referring to Tracy or...

13 Q. Well, I'm gone start ---

14 THE COURT: You gone have to speak up. She ask you
15 were you referring to Tracy or.

16 Q. Okay. I'll try to make it clear. Start off you saw
17 Tracy come out of the house with the shotgun in a broken
18 position; is that right?

19 A. Yes.

20 Q. And Tracy walked up to Donald?

21 A. Yes.

22 Q. And Donald more or less had his back to you; is that
23 right?

24 A. Part of his back. I could see a little bit of his
25 side.

1 Q. Okay. But he -- Tracy -- Donald was looking at Tracy.
2 And Tracy was out of the trailer down the steps; right?

3 A. Right.

4 Q. And when Donald was looking this way you could see
5 part of his side?

6 A. Yes.

7 Q. You couldn't see his left hand at all; right?

8 A. No.

9 Q. And you could see when he came up the gun broken and
10 he stopped right in front of Donald?

11 A. Yes.

12 Q. Within a distance where he could hand him something?

13 A. Yes.

14 Q. And so would you say that they were within two feet of
15 each other or three feet of each other?

16 A. Yes.

17 Q. And you were looking through a window at that time
18 right?

19 A. Right.

20 Q. And after you saw Tracy hand the gun, did he shut it
21 before you handed it to Donald or did he hand it to him
22 first?

23 A. He handed it to him open.

24 Q. Handed it to him open. So then Donald's got it is
25 that; right?

1 A. Right.

2 Q. You could still see part of his side?

3 A. Yes.

4 Q. And then Donald -- What is the next thing he does with
5 a broken shotgun?

6 A. It appears he's taking the shell out.

7 Q. Is the barrel facing this way or is the barrel
8 refacing to my left?

9 A. The barrel's facing to your right.

10 Q. Okay. And so if the gun was broken, did he hold it
11 out where you could see that he was taken something out of
12 it or was -- behind his body?

13 A. He turned a little more to his right.

14 Q. He turned a little more?

15 A. Yes.

16 Q. You could see the shell?

17 A. No.

18 Q. So I would assume you saw it some type movement here,
19 but you couldn't really see the shells; is that right?

20 A. I could not see the shell.

21 Q. Okay. Can you assume that he was taking some shells
22 out or putting some shells in?

23 A. Taking it out.

24 Q. And what made you understand that he was taking a
25 shell out?

1 A. As Tracy was coming out with it open, it looked like
2 he was trying to take the shell out.

3 Q. That made you assume that one was still in there; is
4 that right?

5 A. Yes.

6 Q. And so you saw this person look like he was also
7 trying to get around?

8 A. Yes.

9 Q. And you heard anybody or heard anything through the
10 investigation that it was stuck in there?

11 A. No.

12 Q. But you saw two people take one shell. You know it's
13 a single shot shotgun or do you?

14 A. I found out after.

15 Q. Okay. You saw two people attempt to get the shell or
16 what you perceive to get the shell out; is that right or
17 attempting to get a shell out?

18 A. Yes.

19 Q. Could you tell if Donald actually got it out or did
20 you assume so?

21 A. I saw him drop something that was about size of the
22 shell and he picked it up.

23 Q. On this side or this side?

24 A. On his right side.

25 Q. The right side. You saw him drop something?

1 A. Yes.

2 Q. Then what did he do?

3 A. He picked it up.

4 Q. Okay. And the lighting, of course, is not as good as
5 it is here; right?

6 A. I could still see.

7 Q. Okay. I understand. Was the lighting -- Did you say
8 the lighting -- Would you say the lighting is good in here
9 right now? Can you see many hand?

10 A. No.

11 Q. And you saw him drop something?

12 A. Yes.

13 Q. You say you think it was a shell or you know it was a
14 shell?

15 THE COURT: Counsel, she's already answered that
16 about three times now.

17 MR. DEBERRY: I'm sorry.

18 Q. What did he do after he dropped it?

19 A. Reached down and picked it up.

20 Q. And then what?

21 A. When he stood up, he closed the gun.

22 Q. All right. And did he turned back around or did he
23 stay sideways?

24 A. He turned around just a little bit.

25 Q. Just a little bit?

1 A. Just a little.

2 Q. That's when he handed the gun back to Tracy?

3 A. No.

4 Q. What?

5 A. No.

6 Q. What did he do?

7 A. He stood there for a second with it closed. And then
8 he opened it back up before he handed it back to Tracy.

9 Q. And you -- When the shot went off, tell me if you
10 would how you described it before -- How close do you say
11 those pellets came to you? Show me with your hands?

12 A. With my hands? Where I was standing it was a couple
13 of inches.

14 Q. Okay. And immediately you ducked; is that right?

15 A. Yes.

16 Q. Okay. From then on until the police came, you didn't
17 see -- You never saw Tracy again; right?

18 A. Right.

19 MR. DEBERRY: That's all I have. Thank you, ma'am.

20 MR. RUSSO: Beg the Court's indulgence for just one
21 moment. No further questions, Your Honor.

22 THE COURT: You may step down thank you.

23 (The witness left the witness stand.)

24 MR. RUSSO: Your Honor, if there's no objection from
25 Mr. Deberry, we would ask that Mrs. Arion be excused?

1 MR. DEBERRY: No objection.

2 THE COURT: You're excused, Mrs. Arion, would you
3 like to go?

4 MRS. ARION: Yes.

5 THE COURT: Okay.

6 MR. RUSSO: May it please the Court, Your Honor, at
7 this time that would be it for the State. What I would
8 like to do we don't have any other witnesses. I just
9 wanted before we closed just want to kind of verify that we
10 got everything marked and in evidence. That would be the
11 close of the State's case assuming that everything that we
12 have is in evidence.

13 THE COURT: Well, maybe Mr. Deberry can help up you
14 with that. Everything we got up here, is there any problem
15 other than...

16 MR. RUSSO: All this is in, Your Honor. I just want
17 to make sure that we -- everything is up here that we...

18 THE COURT: Any question about that, Mr. Deberry?

19 MR. DEBERRY: Nothing. I think we've already handle
20 it this far as the motions and the objections and whatever.
21 I don't see anything else that needs to be done at this
22 time, Your Honor.

23 THE COURT: All right. Any matters of law at this
24 time?

25 MR. RUSSO: Well, Your Honor, just for the record

1 the State does rest in this case.

2 MR. DEBERRY: Yes, sir.

3 THE COURT: Ladies and gentlemen of the jury, if you
4 will step back to your room please.

5 (The jury was excused to the jury room.)

6 THE COURT: The juries secured.

7 MR. DEBERRY: Your Honor, please at this time the
8 defense would move -- First, of all, we renew all the
9 motions that we made at the beginning of the trial as if
10 set forth up here again. As far as the Brady motion and
11 all of the other motions that we made at that time. We
12 would renew them now, Your Honor.

13 THE COURT: All right.

14 MR. DEBERRY: Second thing, Your Honor, we would
15 request that at this time as well as throughout the trial.
16 That anything that may come to the State by way of
17 exculpatory evidence be produced to us and informed of it
18 in a timely fashion.

19 THE COURT: Is there anything not been produced that
20 we covered in the beginning of the trial?

21 MR. RUSSO: Not that I'm aware of, Your Honor. But
22 in this thing I do want to reiterate again, Your Honor. We
23 did serve a reciprocal Rule 5 on the defense. And other
24 than those medical records, which you have given us the
25 other day. We received nothing from them in response to

1 that.

2 THE COURT: He said there's nothing. All right.
3 Let's clear the record up then. Everything I've ruled on
4 all and motions that were made and everything, I stand by
5 my previous ruling so nothing to change.

6 MR. DEBERRY: Your Honor, at this time at the end of
7 the State's case, we would move for a directed verdict on
8 on the charge of murder in that there's insufficient
9 evidence that reasonable people could determine that this
10 was any more than a involuntary manslaughter or less. We
11 feel that the -- There's no evidence showing here
12 whatsoever of any -- of any motive. There's no showing of
13 any malice aforethought. That this is obviously a
14 situation where two people over there in a friendly
15 fashion. One is a guest of another. They were drinking.
16 They were both drinking and that ended up in an argument
17 that's been testified to by Ms. McDougal. And as a result,
18 this gun was discharged and a person died. We feel that at
19 best the evidence presented so far would amount to not
20 murder but at most a voluntary manslaughter in the case.

21 MR. RUSSO: If I may, Your Honor. I think the law
22 is clear that the jury can infer malice from the use of a
23 deadly weapon. I think also what Mrs. Arion testified to
24 to as to actions of the defendant prior to killing
25 Mr. Leffingwell. The jury can also infer malice in those

1 actions.

2 With regards to the voluntary manslaughter, Your
3 Honor, also as the court is aware that the law requires for
4 there to be some legal provocation and that mere words do
5 not comprise the level of mere provocation or to legal
6 provocation. Mere words don't rise to that level. And,
7 Your Honor, according to testimony from Mrs. Arion, there
8 was nothing at all other than mere words. So I think that
9 the jury can -- I think the jury has the facts they can
10 easily deliberate and find the elements necessary for
11 murder. Finally, Your Honor, the law does not require the
12 State to prove motive with regards to murder separate
13 malice aforethought.

14 THE COURT: Based on all the evidence before me,
15 especially that last witness of that testimony, I'd have to
16 deny that motion. Well, let's see. I guess we'll take a
17 brief recess because the jury is probably using the
18 restroom I know for the next 10 or 15 minutes.

19 MR. RUSSO: Your Honor, if we can take a short
20 recess. I was gone see if Mr. Deberry and I can speak with
21 you about a matter.

22 THE COURT: Sure.

23 (Court in recess.)

24 (Court reconvened.)

25 MR. DEBERRY: May it please the Court, at this time,

1 we would like to call for a proffer Dr. Peter J. Zavell.
2 Z-a-v-e-l-l.

3 PETER J. ZAVELL, being first
4 duly sworn, testified as follows:

5 IN CAMERA DIRECT EXAMINATION BY MR. DEBERRY:

6 Q. State your full name for the record?

7 A. Dr. Peter J. Zavell.

8 Q. Dr. Zavell, would you tell the court if you would --
9 You practice medicine here Florence?

10 A. Yes, I do.

11 Q. And where?

12 A. At Carolinas Hospital System.

13 Q. And how long have you been practicing medicine there?

14 A. Since July of 1998.

15 Q. And would you give us if you would your educational
16 background?

17 A. I went college at Harvard University. I went to
18 medical school at the University of Texas at Houston. I
19 did a residence -- At first an internship at the University
20 of Texas. And then I did a residency in emergency medicine
21 at John Hopkin's University in Baltimore. And I'm board
22 certified in emergency medicine by the American Board of
23 Emergency medicine.

24 Q. And have you ---

25 MR. DEBERRY: Your Honor, at thus time, we would

1 offer Dr. Peter J. Zavell as an expert in the field that
2 he's just testified that he studied in.

3 MR. Lawson: That emergency room medicine, Your
4 Honor, as I understand it.

5 A. That's correct.

6 Q. Do you have any other specialities other than that?

7 A. No, just emergency medicine.

8 MR. RUSSO: No, objection, Your Honor.

9 THE COURT: Okay.

10 Q. Dr. Zavell, have you had occasion to see or see and
11 treat a Donald Leffingwell?

12 A. I did.

13 Q. Would you tell the Court if you would -- First of all,
14 when you saw him, did you have other records that you used
15 in the course of business to use and determine how to treat
16 him and what to do with this patient?

17 A. I did. I had a prior medical record from two days
18 before from Dr. Eric Weinstein who was a colleague of mine,
19 but he's not with me now. He's in I forget near
20 Charleston, but he's in another emergency place.

21 Q. All right. And did you prior to coming here, did you
22 have an opportunity to gather both the records of
23 Dr. Weinstein had generated as well as the records that you
24 prepared back on December the 4th of 1999?

25 A. I did.

1 Q. And Dr. Weinstein's would be two days December the 2nd
2 two days prior; is that correct?

3 A. That's correct.

4 Q. After reviewing those records, are you prepared to
5 testify here today relative to the treatment that he
6 received on those two days?

7 A. I am.

8 Q. Okay. If you would tell us, if you would, what else
9 was the first encounter with Donald Leffingwell?

10 A. He is a 40 year old who told me he had a history of in
11 stage AIDS.

12 Q. I'm sorry what?

13 A. They told me that he had an history of in stage AIDS
14 or HIV related illness at the last part of it. Is the way
15 he said it to me. Told me he had a T-cell count of 40
16 which means it would be in the last stage. He also told me
17 that he came to see us because he didn't want to see
18 Dr. Mallow at the Pee Dee Hope Center for the Pee Dee which
19 is for indigent patients that have HIV. He told me as his
20 chief complaint he was agitated. That he couldn't sleep.
21 That he was having joint aching. And those are the main
22 things he told me in the beginning.

23 Q. Did he tell you why he didn't want to see the doctor
24 at the indigent facility?

25 A. He told me because he didn't want to see a female

1 doctor.

2 Q. All right. And tell us did you observe any character
3 -- any symptoms physical symptoms or anything that you
4 observed that would corroborate the problems he told you
5 that he was having?

6 A. I did not physically see any reason to suspect at that
7 point that he had HIV. Many times people don't have
8 physical outward symptoms of HIV.

9 Q. And tells us what did you do? Did you do ¹ At that
10 time did you have an opportunity to review Dr. Weinstein's
11 records of two days before December the 2nd?

12 A. I did.

13 Q. Tell us what you found there?

14 A. I found that he had a similar feeling about this
15 patient that he couldn't sleep. That he didn't like --
16 Didn't want to see a female as I've said. He told us about
17 how he contracted HIV. He felt was from his wife who had
18 died. He said he had cramping. And the only
19 immunocompromising illness he ever had was thrush and
20 Kaposi sarcoma which he said he had intermittently.

21 Thrush is a candida in the mouth which you can see
22 which you get an immunocompromising patients. Kaposi
23 sarcoma is a skin lesion that you can tell on the skin that
24 is related to HIV related disease immunocompromising
25 disease in general. He also told me that he had a little

1 bit of abdominal cramping, but no real pain on urination.
2 He told me the same thing. Dr. Weinstein had done a full
3 workup on him two days before for a quite a bit of these
4 related illnesses that he was talking about.

5 Q. Now, Doctor, you prescribed some medication for him;
6 is that correct?

7 A. I did.

8 Q. Tell us if prior to prescribing that what did you --
9 What did you take in consideration that he had already been
10 given?

11 A. Well, he had already been given 15 Xanax which is a
12 Benzodiazepines. And those are ---

13 Q. What kind of drug is that?

14 A. It's a drug for anxiety and antianxiety medicine.

15 Q. Is that the same as a Valium?

16 A. Correct.

17 Q. Is it a Valium?

18 A. It is not a Valium. That's the name of one of the
19 drugs diazepam. I think it's alprazolam which is another
20 class of the same drug. Some them have different effects.
21 Some are longer acting. Some are shorter acting. But
22 that's an older drug Valium. Xanax is a newer drug. And
23 he gave him that. I believe he also give him some either
24 Motrin or something. I have to look in the record here.
25 Let's see. Naprosyn which is an antiinflammatory medicine.

1 So he had already given him 15 of those. Mr. Leffingwell
2 told me that he had, I believe, seven left of those already
3 -- six or seven once again I have to look at my own record
4 here.

5 Q. Did you then assume that he took the balance of them
6 seven or eight?

7 A. I would assume so, yeah.

8 Q. And is that normal to take seven or eight in two days?

9 A. Well, they're -- Xanax is sometimes prescribed three
10 times a day sometimes two times a day. And if he said he
11 had six or seven left that would be about the amount you
12 would take if you took them at three times a day. I don't
13 know how many Dr. Weinstein prescribed and how often. I
14 don't have that record that would be in a prescription.

15 Q. Okay. Doctor, did you -- ask you to assume that this
16 individual was killed on the same day December the 4th.
17 And then an autopsy was performed. And the autopsy results
18 show that he had some amount alcohol as well as marijuana
19 and as well as the -- How do you pronounce that?

20 A. Benzodiazapine.

21 Q. Those three particular drugs in his system. Do you --
22 Can you help us in anyway in this regard. And I'll tell
23 you that the -- That he was killed at approximately six
24 o'clock p. m. on December the 4th. You saw him. Can you
25 tell when he was there?

1 A. I'm will have to look here. Time that he was in the
2 room was 9:05 in the morning. I probably saw him shortly
3 thereafter. I don't have an exact time when I saw him.
4 Let's see. I don't think there's anything in the nursing
5 record either that says the exact time but between nine and
6 ten I'm sure in the morning.

7 Q. And, Doctor, I would ask you to assume that at this
8 time it was alleged that he started some bazaar behavior
9 just before his death. And I'll ask you if you have an
10 opinion as to whether or not the fact that he had as he
11 stated -- What was it in stage AIDS; is that correct?

12 A. Uh-huh.

13 Q. The drug that you prescribed for him in addition to
14 marijuana and alcohol. Can you tell me what effects that
15 would produce?

16 A. Well, I'm not a pharmacological expert or pharmacist,
17 but alcohol and Benzodiazepines have been known to heighten
18 each others effects. And one of those are drowsiness and
19 sometimes also is increased sleep. Sometimes people can
20 also have paradoxical reactions to it and become more
21 agitated. But that's extremely which usually more
22 sleepiness and uninablility to do fine motor coordination.
23 That's the type of thing that happens with those when
24 they're combined. Now, as far as marijuana, I don't know
25 the effect with that and the other two.

1 Q. All right. And how about any effect that the -- of
2 having the in stage AIDS?

3 A. I'm not sure I understand your question there.

4 Q. Did the fact that this first person has in stage AIDS,
5 have in your opinion an effect his aggressiveness or his
6 behavior on this day?

7 A. There's a possibility. But in my opinion when I saw
8 this patient, patient did not have signs of any psychosis
9 or anything else that indicated to me that he had AIDS
10 psychosis which some people have from -- He was able -- He
11 was alert and oriented times three. He was able to tell me
12 person, place, and time. Where he was. He did have some
13 what we call at first I believed pressurized speech, which
14 means he couldn't get all his words out quick enough out of
15 his mouth.

16 However, when I asked him to stop that, he was able
17 stop that on his own. So that was what I thought, but I
18 don't believe so after I talked to him. He also said that
19 he was anxious. You know, that's another thing, but he was
20 able to tell me -- He's to able keep his memory well in a
21 since I gave him four things to remember and ten minutes
22 later he could remember three out of four. That's pretty
23 good. A lot of patients cannot remember more than two.
24 When somebody is really really agitated and has -- They a
25 lot of times cannot remember any of those things.

1 Especially, if they were psychotic or had manic depressive
2 illness that type of thing.

3 MR. DEBERRY: I think that's all I have. If you
4 would answer any questions the Solicitor may have.

5 THE COURT: Cross.

6 IN CAMERA CROSS EXAMINATION BY MR. RUSSO:

7 Q. Doctor, am I correct that you treated him in the ER
8 that morning; is that correct?

9 A. That's correct.

10 Q. Had you ever treated him prior to that time you saw
11 him on December the 4th?

12 A. I do not think so, no.

13 Q. All right. Now, I think you said you had at the time
14 you had the benefit of -- is it Dr. Weinstein?

15 A. That's correct.

16 Q. Dr. Weinstein's records from 12-2?

17 A. Uh-huh.

18 Q. And when you treated him on the 4th of December, you
19 had those records available?

20 A. That's correct.

21 Q. Now, isn't it true ---

22 A. I had his dictation available. His medical dictation,
23 but I didn't have the complete medical record including
24 nursing notes and other things. Didn't have all that.

25 Q. Okay. But now, there's a history in those medical

1 records and that's the typical thing -- you do history;
2 correct?

3 A. Correct.

4 Q. And isn't it true -- And if you need to refer please
5 do.

6 A. Sure.

7 Q. Isn't it true that in Dr. Weinstein's medical history
8 he states that he is HIV positive. I am not sure if he
9 makes the category of AIDS?

10 A. That's correct.

11 Q. So as far as you know Dr. Weinstein never diagnosed
12 this man as having -- And again, I'm a layperson and I'm
13 not sure how it's referred to medically but full blown
14 AIDS?

15 A. Correct.

16 Q. So when you took your medical history on the date you
17 saw him, that came from the patient; is that correct?

18 A. That's correct. And the medical record from
19 Dr. Weinstein that he wasn't sure if he had HIV.

20 Q. So when your history indicates -- And I apologize let
21 me find it.

22 THE COURT: Wait just a minute. I want to make sure
23 I heard that right. He was not sure he had HIV.

24 DR. ZAVELL: Who are we talking about, judge?

25 Dr. Weinstein wasn't sure? In his record what he says is,

1 he is HIV positive. I am not sure if he has the category
2 of AIDS.

3 THE COURT: Okay.

4 DR. ZAVELL: So what's what I meant.

5 Q. Now, in -- I'm referring now to, Doctor, where it says
6 emergency room record which I think is on the date which
7 you saw him?

8 A. Correct.

9 Q. All right. There's an emergency room -- I guess that
10 first paragraph in the history as well; is that correct?

11 A. Correct.

12 Q. And that was what you received information from the
13 patient; correct?

14 A. Patient and also from Dr. Weinstein's note.

15 Q. All right. But when it says a history of in stage
16 AIDS last T-cell count he told me was 40 that's simply from
17 the patient? You didn't get that from a doctor?

18 A. That's correct.

19 Q. Okay. So am I correct in saying that you yourself
20 have never done an examination and diagnosed this gentlemen
21 with AIDS; correct?

22 A. No.

23 Q. And you yourself have never done an examination and
24 found him to be HIV positive?

25 A. No.

PETER ZAVELL IN CAMERA CROSS EXAMINATION MR. RUSSO
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1 Q. The record that you received from Dr. Weinstein and
2 where he says he is HIV positive that's simply under the
3 history category?

4 A. Correct.

5 Q. Do you have any medical records from Dr. Weinstein
6 where he actually has a medical examination that shows a
7 result medically that this patient was HIV positive?

8 A. No, I don't. That would be a blood test.

9 Q. You don't have that?

10 A. I don't have that, yeah.

11 Q. Thank you. So as far as we know medically speaking
12 evidence wise medically speaking, you can't say whether or
13 not this patient had HIV or not?

14 A. I cannot say that.

15 MR. RUSSO: Thank you.

16 IN CAMERA REDIRECT EXAMINATION BY MR. DEBERRY:

17 Q. Doctor, if it was mention the last T-cell count he
18 told me was 40?

19 A. Uh-huh.

20 Q. Tell us can you shed some light on that? What does
21 that mean?

22 A. They changed this category a lot in terms of AIDS
23 related illnesses or HIV excuse me related illnesses. One
24 time if a T-cell count which is a type of lymphocyte that
25 proliferates during infection, if that is less than 500 at

1 one time, that would that mean you have AIDS. The AIDS
2 syndrome that you are setup for immunocompromising
3 illnesses and other disorders. I have heard now they've
4 changed it to 200. And they may have switched it for
5 lower, but it's now less than 200 is actually full blown
6 AIDS that's what they are.

7 Q. So 40 would be...

8 A. Would be low. It would be full blown AIDS.

9 MR. DEBERRY: Thank you.

10 MR. RUSSO: Just one quick one.

11 IN CAMERA RECROSS EXAMINATION BY MR. RUSSO:

12 Q. And, Doctor, that information that you have, you got
13 that from the patient not from any medical examination?

14 A. That and Dr. Weinstein's note.

15 Q. But Dr. Weinstein's notes doesn't mention anything
16 about T-cell count does it?

17 A. No -- Oh, I'm sorry I misunderstood you.

18 Q. Yes, sir. I apologize. I'm referring to
19 Mr. Deberry's question on his T-cell count ---

20 A. Right that was from the patient ---

21 Q. That was simply what the patient told you?

22 A. Uh-huh.

23 Q. And there's no medical substantiation for that count?

24 A. Not that I have.

25 MR. RUSSO: Thank you. Sir.

1 MR. DEBERRY: Your Honor, it's the defense's
2 position that we should be allowed to allow this testimony
3 of Dr. Zavell to go to the jury.

4 MR. RUSSO: Your Honor, we would obviously object
5 due to the fact that by his own testimony. Dr. Zavell
6 cannot testify to a degree of medical certainty that Donald
7 Leffingwell had HIV nor that he had AIDS. And I'm sure he
8 gave him wonderful medical care. But as far as for the
9 purposes of the trial, he cannot say to a degree of medical
10 certainty that this patient had AIDS or had HIV.

11 THE COURT: Doctor, let me ask you something.
12 Dr. Weinstein -- As a medical professional in Florence
13 County, would they consider or would you consider that he
14 sort of specialize in treatment of HIV and AIDS on indigent
15 people?

16 DR. ZAVELL: Dr. Weinstein himself, no. He's an
17 emergency medical doctor like myself.

18 THE COURT: Now, and who was the other doctor that
19 had been treating him?

20 DR. ZAVELL: Dr. Mallow. Now, Dr. Mallow runs the
21 Pee Dee Care Hope Center.

22 THE COURT: I had the wrong one. Dr. Mallow the
23 same question?

24 DR. ZAVELL: I would say that I never meet
25 Dr. Mallow, but she treats HIV patients all the time. So

1 probably she would be an expert in that.

2 THE COURT: So if I had a nurse on this jury that
3 practices here in Florence County and it came out that
4 Dr. Mallow had treated this individual, the nurse would
5 most likely know Dr. Mallow deals heavily with HIV?

6 DR. ZAVELL: Just a nurse in general or emergency
7 room nurse?

8 THE COURT: Oh, I'm not -- just a nurse.

9 DR. ZAVELL: That be hard for me to say to you.

10 THE COURT: I understand that.

11 DR. ZAVELL: But I would think that most of them
12 would know the -- If they were emergency medicine, we see a
13 lot of people that get treated at the Hope Center and they
14 know Dr. Mallow runs it and she's there all the time.

15 THE COURT: Okay. Thank you.

16 I thought I made myself clear about this whole
17 situation about the AIDS. The motion is denied, counsel.
18 And I don't think I want to hear anything else about HIV
19 and AIDS in this case. In other words, I think we've
20 wasted enough of the Court's time on this situation. I
21 thought I made myself clear how the only way it can come in
22 would be as to self-defense or whatever. So unless that
23 comes up, I don't want to hear it mentioned again.
24 Thank you, doctor.

25 DR. ZAVELL: Okay. Am I dismissed?

1 THE COURT: Yes.

2 (The witness left the witness stand.)

3 THE COURT: Anything else?

4 MR. RUSSO: Not from the State, Your Honor.

5 THE COURT: Ready?

6 MR. DEBERRY: Yes.

7 THE COURT: Bring them in.

8 (The jury returned to the courtroom.)

9 THE COURT: All right.

10 MR. DEBERRY: Your Honor, at this time we call
11 Sherry Daniels Cocker.

12 SHERRY DANIELS COKER, being first
13 duly sworn, testified as follows:

14 DIRECT EXAMINATION BY MR. DEBERRY:

15 Q. State your full name for the record?

16 A. My name is Sherry Daniels Coker.

17 Q. Sherry, if you would tell the jury what relation are
18 you to Tracy?

19 A. I'm his daughter.

20 Q. Okay. And you -- Where do you live?

21 A. Turbeville.

22 Q. And you're married?

23 A. Yes.

24 Q. And how far did you go in school?

25 A. To the 12th grade. Had some banking and computer

1 training beyond that.

2 Q. And I believe you're employed now; is that right?

3 A. That's right.

4 Q. And tell us what do you do?

5 A. Administrative assistant for the Citizens Bank
6 headquarters in Olanta.

7 Q. And how long have you been doing that?

8 A. I've been in banking since '93 and current position
9 for three years.

10 Q. And how long have you been married?

11 A. Since 1994.

12 Q. And you're married to who?

13 A. James E. Coker.

14 Q. And y'all have one child; is that right?

15 A. Yes.

16 Q. And she was born when?

17 A. June 28th of '99.

18 Q. June 28th of '99. So when this happened with your
19 father, your child was just ---

20 A. Six months old.

21 Q. All right. And on this night of prior to going to
22 that -- You need some water?

23 A. I'm fine. Thank you.

24 Q. You were -- Your mother and your father divorced over
25 20 years ago; is that right?

1 A. Yes, sir.

2 Q. And your mother lives where?

3 A. In Quinby right here in Florence.

4 Q. Right here in Florence. And your father was living
5 out on Callie Young Road been talked about during this
6 trial; is that right?

7 A. Yes.

8 Q. Now, tell me did your father have and were you aware
9 of a relationship that he had with Donald's mother Rose
10 Leffingwell?

11 A. Yes.

12 Q. And tell me approximately how long do you -- Did you
13 know that relationship had been going on?

14 A. At the time that this happened would have been six
15 years.

16 Q. Approximately six years up to the time that it
17 happened. And did you -- Could you tell us that -- Did you
18 know where he was actually -- He never married her; right?

19 A. That's right.

20 Q. Okay. Even though he never married her, do you know
21 where he lived most time during that -- during the six
22 years?

23 MR. RUSSO: Objection, Your Honor.

24 MR. LAWSON: Objection, Your Honor, relevance.

25 MR. RUSSO: He needs to show relevance.

1 MR. DEBERRY: I'm trying to ask her if she knows
2 where her daddy lived. I don't know why there would be an
3 objection, Your Honor.

4 MR. RUSSO: May we approach, judge.

5 (A bench conference was held in the presence of the
6 jury, but out of the hearing of the jury.)

7 THE COURT: I'm gone give you some leeway, counsel.
8 Let's don't get to far out.

9 Q. Did you -- Tell the jury if you would describe the
10 relationship that you saw and where did your dad live?
11 Where did you call him when you wanted to find him?

12 A. Rose Leffingwell's house.

13 Q. Okay. And where was that?

14 A. Hunter Street here in Florence.

15 Q. Here in Florence. And did you have occasions to visit
16 the two of them at her house?

17 A. Yes, sir.

18 Q. And did you have occasions when they were -- You would
19 be there during holidays like Christmas and present opening
20 and things like that?

21 A. Yeah.

22 Q. And did you get to know Rose Leffingwell?

23 A. Yes.

24 Q. Okay. And do you feel like that you're familiar with
25 Rose's and Tracy's relationship? Did you observe it and

1 see it and understand it?

2 A. Yes, sir.

3 Q. Describe it if you would?

4 A. Very very good at times. They enjoyed being together
5 and we enjoyed being around the two of them when they were
6 together.

7 Q. And did you tell me that is a six year period that you
8 referred to started six years before this happened?

9 A. That's right.

10 Q. Now, were you aware that Donald Leffingwell? When is
11 the first time that you knew Rose's son Donald?

12 A. Early part of '99.

13 Q. Okay. Does about March of '99 sound like the time
14 that he moved here from Connecticut?

15 A. Yes.

16 Q. And so from March of '99 up until December the 4th
17 that night. Did you on occasion see Donald Leffingwell?

18 A. On occasion.

19 Q. Okay. And did you know what -- Tell the jury if you
20 would what did your daddy do for a living?

21 A. He's a plumber, a master plumber.

22 Q. And did you know whether or not he also used Donald as
23 what you call day labor or as an assist to his plumbing
24 business?

25 A. Yes, sir.

1 Q. And when I say his plumbing business, tell the jury
2 actually what kind -- How would you describe is he a sole
3 proprietor or is he...

4 A. Sole proprietor. Works what we term out of his truck.
5 He has his own business.

6 Q. Okay. And he does service calls from people that call
7 him for plumbing and been doing that for how long?

8 A. For many years. He started his business in '76 or
9 '77.

10 Q. Okay. Now, did you -- Did you have an occasion to --
11 Tell us where were you on the night of December the 4th?

12 A. We had a Christmas party for the bank that I work with
13 in Lake City, South Carolina. We went there around seven
14 o'clock.

15 Q. Okay. And you had had a six-month-old child and you
16 took your child to?

17 A. My sister who lives in Coward.

18 Q. And that's also Tracy's daughter who's here; is that
19 correct?

20 A. That's right my older sister.

21 Q. She was the baby-sitter while you and your husband
22 went to the Christmas party?

23 A. Yes, sir.

24 Q. And at the Christmas party, did you receive a phone
25 call?

1 A. Yes.

2 Q. And that phone call informed you of what?

3 A. That we had a family emergency and Jo Ann wanted to
4 know if I could come home. She told me at first that my
5 daughter was fine, but I needed to come to her house when
6 she returned home.

7 Q. All right. And so you did what she asked you to do.
8 And you didn't know what -- what it was other than it was
9 an emergency; is that right?

10 A. Yes.

11 Q. Now, Sherry, tell us if you would, did your father
12 have a problem?

13 A. Yes.

14 Q. All right. If you would tell them that?

15 A. A drinking problem. For most of my life, he has had a
16 problem with alcohol since over 25, 30 years.

17 Q. Okay. And what -- Tells us what did you observe about
18 that? How bad was the drinking problem and...

19 A. We call very bad. He didn't drink on a regular
20 schedule or regular bases. When we could be around daddy,
21 it was wonderful to be with him. He was fun to be around
22 very caring, very concerned. But when daddy drank, you
23 didn't want to be around him because he -- It was not
24 pleasant to be around a drunk person.

25 Q. And did he -- Do you know if he ever -- Was there ever

1 a seasonal type pattern to this drinking that you observed?

2 A. Yes.

3 Q. Tell us about that?

4 A. He would usually drink in the later part of the year.

5 Around the holidays were very particular about calling

6 before we ever went to daddy's house. We called. Rose --

7 If he at wasn't Rose's house, then we could call his

8 trailer that he still kept and find him. We knew that if

9 he wasn't staying at Rose's house around the holiday, he

10 had been drinking. So we just wouldn't call.

11 Q. So you say if he wasn't around Rose -- Did you ever

12 see him drink at Rose's house?

13 A. No, sir. No, sir.

14 Q. And how do you remember that? Why is that?

15 A. That's one way that we knew we could see him. He

16 would not drink at her house. She wouldn't -- My

17 understanding she wouldn't allow it. And I didn't blame

18 her.

19 Q. What did you say?

20 A. I didn't blame her for that. We understood that.

21 Q. And tell us did you know whether or not your daddy

22 would have Donald over at his house on occasion for

23 weekends or supper or things of that nature?

24 A. At that time I didn't know how much time he spent

25 there.

1 Q. Okay. Did you know anything about the two of them
2 drinking habits together?

3 A. Not drinking together.

4 Q. Tell us what you did know?

5 A. I learned after my daughter was born in June -- I had
6 meet Donald in the early part of '99. After my daughter
7 was born in June, daddy mentioned on one of his visits to
8 see the baby that was ---

9 MR. LAWSON: Objection. That's hearsay, Your Honor,
10 if she's gone testify to what her father told.

11 THE COURT: There may be an exception to it.
12 Can you help me, Mr. Deberry?

13 MR. DEBERRY: I'm not sure.

14 Q. You were starting to say -- Don't go any further then
15 what you started to say?

16 A. He just told me ---

17 THE COURT: I'm gone have to send the jury out to
18 see. That's the only way I know how.

19 MR. DEBERRY: Okay.

20 THE COURT: Ladies and gentlemen, if you will step
21 out just a minute.

22 (The jury was excused from the courtroom.)

23 Q. You were getting ready to say he told you what?

24 A. He told me that Donald was working with him on
25 occasional days. That's the only way that I knew he worked

1 with my daddy.

2 MR. RUSSO: That's fine, Your Honor.

3 A. I'm sorry.

4 MR. Lawson: Talking about drinking together is what
5 he'd asked her.

6 MR. RUSSO: I thought the question had to do
7 something with drinking together.

8 Q. Let's go a little bit further. Tell me what else do
9 you know about the habits of what your daddy did with
10 Donald? You may not know anything?

11 A. I don't know much. He just come in March of '99. And
12 I knew that they had spent sometime together at Rose's
13 house until Donald found him an apartment. Daddy mentioned
14 that that he'd move out.

15 THE COURT: That's okay.

16 You can bring them back in.

17 (The jury returned to the courtroom.)

18 Q. Okay. Go ahead and tell us what your daddy said?

19 A. He said that he was giving Donald some day labor
20 letting him help him with his plumbing occasionally.

21 Q. And did you -- Have you had a chance to gather some
22 family pictures that you've brought with you?

23 A. Yes, sir.

24 Q. And tell us on what occasions were you able to find to
25 bring here to share with us?

1 A. Christmases that we spent at Rose's house with our
2 family there several different years. There's a picture of
3 Rose, daddy, my brother and Donald at my brother fiancée's
4 graduation.

5 Q. How did you -- How did you perceive Donald could fit
6 into the picture as far as your relationship between you
7 and Rose and your father?

8 A. It was Rose's son.

9 Q. Okay. And tell us how was the relationship between
10 you and Rose? How was that?

11 A. Very good.

12 Q. And how did you see her status in your family as
13 pertaining to your father?

14 A. We enjoyed being with Rose and with daddy. I thought
15 and still do think highly of her.

16 Q. And when Donald came to town, was he in anyway not
17 included or how was he accepted?

18 A. He didn't attend many of our dinners or get togethers.
19 We didn't have that many, of course, because of him only
20 being here since '99. He would not have been excluded. He
21 wasn't excluded from graduation. I didn't attend the
22 graduation because my baby was due at any time there.

23 Q. But you do have family pictures that show Donald as
24 included in there; is that right?

25 A. Yes, sir.

1 Q. Here for us to see?

2 A. Yes.

3 Q. Now, tell us if you would what -- Had you ever other
4 than the times that you've referred to. You really didn't
5 live here as close as your other sister; is that right?

6 A. That's right.

7 Q. And did you -- When is first time after you heard that
8 this had happened, that you were able to talk to your
9 daddy?

10 A. It happened on a Saturday. I couldn't talk him until
11 Tuesday.

12 Q. Okay. And he was locked up; is that right?

13 A. Yes.

14 Q. And tell the jury where's the first place you saw him?

15 A. The Effingham Law Enforcement Center.

16 Q. Okay. And describe that if you will?

17 A. We were able to find out that we were -- visitation
18 was allowed twice a day. And a person could only go every
19 other day. So we scheduled it so that I could go see him
20 on that Tuesday afternoon.

21 Q. All right. And you saw him?

22 A. I did.

23 Q. Describe for us if you would that first time that you
24 were able to see him after you heard this -- about this
25 awful thing?

1 A. My husband had gone with me on that visit to see him.
2 And he was very very upset still. And, of course, I was
3 too after all that had happened and seeing him there. So
4 it was a very emotional time. We only had 30 minutes. So
5 we tried to -- I can't really recall that much that we
6 would have said other than we were talking about ---

7 MR. RUSSO: Your Honor, I object to any
8 conversations which would be hearsay.

9 THE COURT: Unless, there's any exceptions, she
10 needs to stay away from hearsay.

11 MR. DEBERRY: But I believe -- Is it all right if
12 she says what they were talking about. She was getting
13 ready to say what they were talking about.

14 MR. RUSSO: That's hearsay.

15 THE COURT: She can say that from her own point of
16 view without quoting somebody.

17 Q. Tell us what you were talking about?

18 A. My main concern when I first saw him was to see if he
19 had been hurt in the altercation. I didn't know anything
20 other than what we had heard on the television news. We
21 couldn't get any other information. So I was concerned
22 that he may have been injured in whatever happened that day
23 and I wanted to see if he were.

24 Q. And you found out that was not the case it was Donald?

25 A. That's right.

1 Q. All right. And when is the next time that you saw
2 him?

3 A. Thursday after that Tuesday.

4 Q. Okay. And tell us about that?

5 A. I went alone to this visit. My husband was working.
6 And it was much like the first. He didn't -- I didn't feel
7 that I could ask very many questions not even knowing what
8 to ask him.

9 Q. I understand. And did you -- Tell us if you
10 eventually wondered anything about his ability to learn --
11 remember this incident?

12 A. I did.

13 Q. Okay. And what did you know as his daughter and
14 observing the problem with drinking over the past, I
15 believe, you said 20 years or more?

16 A. Yes, sir.

17 Q. What did -- Tell me about what you may have observed
18 about his memory as it related to his drinking problem?

19 A. He could not always remember exactly what he had done
20 when he was drunk.

21 Q. Okay. And when you tried -- And when you talked with
22 him about this incident, did you see anything unusual or
23 anything different from other times when you talk to him?

24 A. No, sir. Other than the fact he was just, you know,
25 traumatize about what had happened in my observing him.

1 Q. All right. Did you -- As time progressed and you
2 talked to him eventually he got out on bond; is that right?

3 A. Yes, sir.

4 Q. And you've had a chance to talk with him throughout
5 the year and a half since this occurred; is that correct?

6 A. Yes, sir.

7 Q. And have you had times to talk with him about
8 recalling the events of that night?

9 A. Yes, sir.

10 Q. And you have been able to observe his problem with his
11 memory in that regard?

12 A. Yes, sir.

13 Q. If you have tell us about it?

14 A. He remembered very very ---

15 MR. RUSSO: Your Honor, I'm gone object at this
16 point to the relevance.

17 MR. DEBERRY: I'll move on with something else.

18 Q. And did you -- Were you able to read a statement that
19 he or hear a statement that he'd given to the police that
20 night?

21 A. I was or have been since that time.

22 Q. And did you talk with him about the events that
23 happened that night?

24 A. Yes, sir.

25 Q. And did you -- Where there differences in the two?

1 A. Yes.

2 Q. And did you -- Tell us what if any changes have you
3 observed following this night? What have you observed as
4 being some major changes about ---

5 MR. RUSSO: Objection, Your Honor, to the relevance.

6 MR. LAWSON: That goes to character.

7 MR. RUSSO: That's goes to character and traits and
8 that's not a proper question.

9 THE COURT: I'm gone overrule the objection allowing
10 you a little bit of leeway on that, but like I told you a
11 few minutes ago now let's try to keep it hemmed up as much
12 as we can.

13 MR. DEBERRY: Okay.

14 Q. Okay. Tell us if observed some major changes?

15 A. The major change is that he is now a Christian and has
16 not had anything to drink since this happened. And I've
17 been able to spend a lot of time with him.

18 Q. Okay. And were you instrumental in getting a minister
19 to go and talk with him?

20 MR. LAWSON: Objection, Your Honor. There's a rule
21 and under the rule as it relates to religious comments that
22 is not an appropriate area of the examination in South
23 Carolina.

24 THE COURT: That's true. If it gets into contents
25 especially. She can either answer that yes or no, but

1 don't go into any detail.

2 Q. Were you instrumental in having your preacher at your
3 church Mr. Huth go to visit Tracy?

4 A. Indirectly.

5 Q. And since that time have -- You go to the same church
6 that Mr. Huth preaches at; is that correct?

7 A. Yes.

8 Q. And tell me is there anything else that you've seen
9 that is changed drastically about your daddy since this
10 incident happened?

11 A. These are the two major changes.

12 Q. Two major changes?

13 A. Which affected all of his life.

14 Q. And if you would the pictures that you have, one of
15 them you were referring to to in your testimony. Let's me
16 see?

17 MR. RUSSO: Your Honor, we haven't seen any of these
18 photographs. I don't know what we got here. I would ask
19 that they be available.

20 Q. This is the one testified Donald it; is that right?

21 A. Yes. And my brother's fiancée.

22 Q. Tracy and ---

23 A. My brother.

24 Q. Now, it's got 6-4-99 on the back of it. Did you write
25 that?

1 A. Yes.

2 Q. June the 4th.

3 MR. DEBERRY: Your Honor, we would move to introduce
4 this picture into evidence.

5 THE COURT: I assume that's without objection?

6 MR. RUSSO: That's without objection.

7 THE COURT: It's in.

8 (Photograph entered into evidence as Defendant's
9 Exhibit Number 1.)

10 Q. And tell me do you have -- What else do you have there
11 you gathered for us?

12 A. Christmases from different years. And I have others
13 over there, not all of them are taken off the pages, but
14 there are some there.

15 Q. Okay.

16 A. And this is the most recent picture that I have with
17 Rose is when she visited the baby.

18 Q. All right. I'm looking at a picture here looks like
19 you there; is that right?

20 A. That's right.

21 Q. And there's your daughter you're talking about?

22 A. Yes.

23 Q. And this is Rose Donald's mother?

24 A. Right.

25 Q. And this is who's house?

1 A. My home.

2 Q. At your home?

3 A. Yes.

4 Q. Another one with Rose and your daughter?

5 A. Same visit.

6 Q. Same visit?

7 A. Yes.

8 Q. And then I see one here looks like of Tracy and Rose?

9 A. At Rose's home.

10 Q. Rose's home with the Christmas tree obviously
11 Christmas time?

12 A. Right. We were there for Christmas.

13 Q. What year?

14 A. I don't have the year on that one.

15 Q. Okay.

16 A. The camera printed the year on this one.

17 Q. The camera printed the year on ---

18 A. This one.

19 Q. Okay. And that's Rose and Tracy?

20 A. Yes.

21 Q. And ---

22 MR. RUSSO: Your Honor, just to try to save some
23 time may we approach real quick.

24 THE COURT: Yes, sir.

25 (A bench conference was held on the record in the

1 presence of the jury, but out of the hearing of the jury.)

2 MR. RUSSO: I object to the introduction of these
3 photographs based on the fact that number one relevance.
4 And number two that State received response to Rule 5 in
5 agreement from the defense. And these photographs were not
6 available and were not provided to the State prior to this
7 moment. And based on that, I would object to them being
8 admitted.

9 THE COURT: Based on Rule 5, I have to sustain the
10 objection.

11 MR. DEBERRY: The defense's position is that the
12 witness brought the pictures to court since the trial
13 started and I have them available. I have now offered them
14 to him for a chance to look at them and see if he has any
15 element of surprise if he's prejudice in anyway by looking
16 at the pictures. Now, to decide whether or not timing of
17 the pictures has any bearing whatever. Timing of the
18 pictures has any bearing at the time of my providing him a
19 copy of the pictures has any bearing whatsoever on their
20 admissibility.

21 MR. RUSSO: Further, Your Honor, the State's
22 objection -- until now I'm looking now that day on 1995.
23 So number one there's relevance. And number two, if I'm
24 not mistaken again, none of these pictures involve the
25 victim. Again, it makes it irrelevant of the victim in any

1 of these photographs.

2 THE COURT: Also after hearing that and observing
3 the photographs being shuffled up here. I also sustain it
4 on the grounds of relevance.

5 (The bench conference has ended in the presence of
6 the jury, but out of the hearing of the jury.)

7 Q. Now, Sherry, did you also look in your family records
8 and things to see if you had any any cards or pictures that
9 you had received with the family of the Leffingwell's
10 between your family and there's any communication?

11 A. Yes.

12 Q. Okay. And had you received cards from the family in
13 the past?

14 A. I have.

15 Q. And what type cards?

16 A. Christmas for the most part.

17 Q. They would be from who?

18 A. From Rose to our family.

19 Q. Okay. And did you find any cards from Donald
20 Leffingwell?

21 A. Not to me.

22 Q. Okay. Did you find any cards at all?

23 A. There were some to my daddy.

24 Q. Okay. And those were Christmas cards; is that right
25 is what you stated?

1 A. The one that had his name on it was a birthday card.

2 Q. A birthday?

3 A. Yes.

4 Q. And how would you describe the relationship that you
5 observed between your daddy and Donald?

6 A. I didn't see the two of them together on many
7 occasions, but it was friendly. The visit that we had at
8 Rose's house. He introduced Donald to my husband and me
9 and we chatted.

10 Q. Do you know any reason that your daddy would have to
11 harm Donald Leffingwell, the person that he work with? Do
12 you know any?

13 A. No.

14 MR. DEBERRY: If you would answer any questions that
15 the prosecutor has.

16 CROSS EXAMINATION BY MR. RUSSO:

17 Q. Mrs. Coker, I think you had testified that on your
18 visit to see your father at the detention center, I think,
19 the Tuesday after this occurred; is that correct?

20 A. Yes, sir.

21 Q. That one of your main reasons was see is to see if
22 your father had been hurt; is that correct?

23 A. Yes, sir.

24 Q. And you found out -- You spoke with him about all
25 that; is that correct?

1 A. Spoke with -- him.

2 Q. Yes, ma'am. In other words, in determining whether or
3 not your father had been hurt or injured in this
4 altercation you spoke with him about that?

5 A. Yes.

6 Q. I'm not asking him what he told you. But based on
7 that conversation, you learned that he had not been hurt;
8 is that correct?

9 A. Not seriously, yes.

10 Q. In fact what you learned was on the injury he had was
11 to a cut in the webbing of his right hand; isn't that
12 correct?

13 A. Yes.

14 Q. You father got out on bond on the 13th of December
15 1999; is that correct?

16 A. Yes, sir.

17 Q. Okay. So nine days after this occurred and he was
18 back with your family -- not in your home but back with his
19 family; correct?

20 A. Right.

21 Q. Now, your father's relationship with Rose isn't it
22 true that at best it was extremely hot and cold?

23 A. That is true.

24 Q. And isn't it true and aren't you aware of times that
25 their relationship in fact became rather violent?

1 A. No, sir.

2 Q. Are you aware of an instance where your father ---

3 MR. DEBERRY: If, Your Honor, please can we approach
4 a minute.

5 (A bench conference was held in the presence of the
6 jury, but out of the hearing of the jury.

7 Q. Isn't it true, Mrs. Coker, that at the time this
8 occurrence in December of 1999, isn't it true that your
9 father was not seeing Rose Leffingwell? That they had
10 broken up. This is my term, I guess?

11 A. At that time I didn't know.

12 Q. Okay. When was the last time you saw your father with
13 Rose Leffingwell? Let me ask you this. Would you have any
14 reason to doubt if I told you that they had not seen each
15 other since that graduation period?

16 A. Yes.

17 Q. You seen them since then?

18 A. Yes, this was in June before my baby was born. And
19 she came to see my baby. The baby was born after June.
20 She was born June 28th after the graduation.

21 Q. All right. And Rose came to see you and your baby?

22 A. Right.

23 Q. All right. With your father?

24 A. The last occasion I think that I saw Rose before this
25 happened that I remember.

1 Q. Your own personal knowledge, okay. The last time you
2 saw your father with Rose was in -- I'm sorry June?

3 A. July or August.

4 Q. July or August of 1999?

5 A. Yes.

6 Q. So if I told you that your father and Rose had broken
7 up and were not seeing each other anymore, you wouldn't
8 know yes or no; would you?

9 A. No.

10 Q. Is that no you wouldn't know?

11 A. I'm sorry. I could not deny that. It was an on again
12 off again type relationship.

13 Q. Okay. So my question is that from July or August or
14 whatever of 1999 until this incident occurred in December,
15 you can't tell this jury whether or not your father was
16 seeing Rose Leffingwell or not, can you?

17 A. No.

18 MR. RUSSO: Thank you, Mrs. Coker, I have no further
19 questions.

20 MR. DEBERRY: Your Honor, that's all we have of this
21 witness.

22 THE COURT: You may step down thank you.

23 (The witness left the witness stand.)

24 MR. DEBERRY: We call Jo Ann Perdue to the stand.

25 JO ANN PERDUE, being first

1 duly sworn, testified as follows:

2 DIRECT EXAMINATION BY MR. DEBERRY:

3 Q. State your full name for the record?

4 A. Jo Ann Perdue.

5 Q. Jo Ann, if you would tell the jury what is your
6 relation to Tracy?

7 A. I'm his daughter. His oldest daughter.

8 Q. His oldest daughter. I believe he has two daughters
9 and ---

10 A. One son.

11 Q. One son Will. Tell us if you're married?

12 A. Yes.

13 Q. And you're married to who?

14 A. Jimmy Perdue.

15 Q. Where do you live?

16 A. In Coward.

17 Q. And you born and raised here in the Florence area; is
18 that right?

19 A. Well, I was mostly raised in this area.

20 Q. Okay. And tell use if you -- You work; right?

21 A. Yeah.

22 Q. Where you work?

23 A. A private ambulance service. I'm a EMT.

24 Q. You're an EMT and I believe your husband does the same
25 thing; is that right?

1 A. Right.

2 Q. Tell us did you have an occasion to observe -- I'm
3 gone go into a lot of repetition of what has already come
4 out. But your mother and father were divorced
5 approximately 20 years ago; is that right?

6 A. Yes.

7 Q. And about six years before this happened, did you
8 learn that your father had been become friends with Rose
9 Leffingwell?

10 A. Yes.

11 Q. Tell us what you observed about that?

12 A. Well, I knew they were real close and daddy stayed
13 over there with her. And most of the time when I called
14 him, I'd call her house first, you know, when I wanted to
15 talk with him or whatever. And we had some Christmases
16 over there and family gatherings.

17 Q. I'm sorry what did you say?

18 A. We had some Christmas celebrations over at her house
19 and some family gatherings like birthdays and things like
20 that.

21 Q. All right. And did you -- How long did you observe
22 this relationship between your daddy and Rose?

23 A. It was several years. I really don't know. It's
24 probably six or seven.

25 MR. RUSSO: Your Honor, again, I just want to object

1 to the relevance of this line of questioning.

2 THE COURT: Overrule. I'm gone give you some leeway
3 go ahead.

4 Q. Go ahead if you would, Jo Ann?

5 A. It's probably about 6 or 7 years.

6 Q. And at some point in time, did Donald come here from
7 Connecticut?

8 A. Yes.

9 Q. And can you tell the jury about when it was that he
10 came from Connecticut?

11 A. It was in -- around March spring time of '99.

12 Q. And that would have been about six months before this
13 thing happened in December; right?

14 A. About six months a little better.

15 Q. Six or nine whatever. Now, tell us what you observed
16 about the relationship between your daddy and Donald that
17 died?

18 A. Daddy gave him day work. He would tell me, you know
19 -- I'd see him on the road -- like a lot of times we pass
20 him in the ambulance. And, you know, I'd see Donald in the
21 truck with him. And daddy helped him to move into his
22 apartment.

23 Q. Well, tell me about that? You say he came here in
24 March of '99; right?

25 A. Right.

1 Q. And where did he live before he moved into an
2 apartment?

3 A. He lived at Rose's house for a while.

4 Q. Donald did?

5 A. Uh-huh.

6 Q. And then you say your daddy helped him move to an
7 apartment from Rose's house?

8 A. Right.

9 Q. Okay. What else did you see about your daddy -- The
10 relationship between Donald and your daddy?

11 A. Well, I knew that he worked with daddy some. My
12 daddy's a plumber and he gave Donald some day work.

13 Q. And tell us about your daddy's problem? What kind of
14 problem did he have?

15 A. He had a drinking problem.

16 Q. How bad?

17 A. He would drink pretty bad sometimes.

18 Q. Okay. And how long has he had that problem?

19 A. Basically, since I was a little girl. I really don't
20 know the number of years.

21 Q. Okay. And have you observed any change since this
22 thing occurred?

23 A. Yes.

24 Q. And how often do you see him since this happened?

25 A. I basically see him about every other day. I talk to

1 him every day on the phone at least twice.

2 Q. Has he been drinking since this happened?

3 A. No.

4 Q. Tell me the -- Have you ever been able to learn what
5 affect this alcohol has on your daddy as far as you talking
6 to him and the effect on his memory?

7 A. Well, he just gets, you know, real ill at times when
8 he's drinking. And sometimes I don't think he remembers,
9 you know, something maybe he said or did.

10 Q. Okay. Do you know any reason whatsoever that your
11 father had to hurt Donald Leffingwell, the fellow, that he
12 had over for supper that night?

13 A. No.

14 Q. And do you -- How had you -- You've had a chance to
15 talk with your daddy after it?

16 A. Yes.

17 Q. Okay. When is the first time that you were aware of
18 it that this thing happened?

19 A. I heard about it that Saturday night. It happened on
20 a Saturday evening.

21 Q. Okay. When's the first time you were able to talk to
22 your daddy about it?

23 A. That Sunday morning.

24 Q. And that was in person or on the phone?

25 A. On the phone.

1 Q. Okay. Describe if you would what was that
2 conversation about?

3 MR. RUSSO: Objection to any hearsay, Your Honor.

4 MR. DEBERRY: I said what's that about. I asked her
5 what that conversation was about.

6 THE COURT: Oh, okay.

7 Q. What was that conversation about?

8 A. Basically, I just -- When she put him on the phone, I
9 wanted to find out how he was. If he was, okay. And most
10 of it I cried. And we didn't really get to talk that much.

11 Q. And then did you get the visiting him for the next
12 week or so that he was in jail?

13 A. Yes.

14 Q. And tell us about the first time that you saw him in
15 person when was that?

16 A. That was on that Monday evening.

17 Q. And you can see -- One person can see him every other
18 evening?

19 A. They let two people in.

20 Q. Okay. And tell us about that first visit?

21 A. When I first saw him, he was behind the glass and I
22 was talking with him. And we cried a lot then too. And I
23 don't remember what we was saying, but he lifted up his
24 hand and I noticed it was cut. And I asked him had he got
25 some treatment for it because it look, you know, pretty bad

1 to me.

2 Q. All right. And did you talk with him -- Did you --
3 Were you able to talk with him about what occurred on this
4 night?

5 A. A little bit. I remember him telling me ---

6 Q. Well, you can't -- We're not allowed to say what he
7 told, but you can say what you talk to him about. You can
8 say what you have said, okay?

9 A. Okay.

10 Q. And what did you talk to him about or what was the
11 conversation about?

12 A. A lot of it I wanted to make sure he was okay.

13 Q. Okay.

14 A. You know, I hated that this had happened. I can't
15 remember a whole lot of what we said because -- I mean I
16 was really upset and he was too.

17 Q. And tell me how did you -- How did you know how upset
18 he was? How could you tell?

19 A. He was almost just like shaking. He keep crying.
20 And, of course, I cry too right along with him.

21 Q. And you've had as you say you been able to visit with
22 him since he been out on bond ever since then; right?

23 A. Yes.

24 Q. Now, the relationship between your daddy and Rose how
25 would you describe that there were goods times as well as

1 bad times; were they? Did you know of times when they
2 would break up and wouldn't see each other?

3 A. Yes.

4 Q. And do you know when the time before this incident
5 happened that how long before that was it that he had seen
6 -- had been with his friend Rose?

7 A. He was there if I remember correctly earlier that
8 week.

9 Q. What did you say?

10 A. He was there earlier that week.

11 Q. Earlier that week. The same week that this happened?

12 A. Uh-huh.

13 Q. And how often would you see him or you said seen him
14 about every other day in the truck with Donald; is that
15 right?

16 A. Well, well not every other day did I see him in the
17 truck with Donald. You know, just sometimes we'd pass on
18 the road when I was in the ambulance and I often times see
19 Donald with him.

20 MR. DEBERRY: Answer any questions if you would the
21 prosecution has.

22 CROSS EXAMINATION BY MR. RUSSO:

23 Q. Mrs. Perdue, on Saturday of December the 4th of 1999
24 the incident date this incident occurred, did you see your
25 father that day?

1 A. No.

2 Q. Do you recall the last time you saw him prior to that
3 incident occurring?

4 A. I don't know for sure what day it was I saw him before
5 then.

6 Q. And let me clarify if I may. When you say saw him, I
7 guess what I'm referring to do you recall the last time
8 that you actually was with him speaking and him being with
9 him not necessarily just seeing him on the highway?

10 A. No, it was probably earlier that week or the week
11 before.

12 Q. Okay. All right. So you would not be able to give
13 any testimony at all with regards to whether or not he had
14 been drinking that day; can you?

15 A. No, I hadn't talk to him that day.

16 Q. And you said you believe you think that he had gone
17 over to Rose's house earlier that week?

18 A. Uh-huh.

19 Q. All right. And isn't it true that when he went over
20 there earlier that week that she ran him off?

21 A. I don't know.

22 Q. All you know is he went over there, but you don't know
23 the context?

24 A. I don't know the details.

25 MR. RUSSO: Thank you, Mrs. Perdue. I have no

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1 further questions.

2 THE COURT: Mr. Deberry.

3 REDIRECT EXAMINATION BY MR. DEBERRY:

4 Q. Do you know whether or not he had spent the night with
5 her Thursday night before this happened?

6 MR. RUSSO: Objection, Your Honor. She just said
7 she didn't know the details of it. She didn't know any
8 details. I mean, the question was asked and answered. I
9 guess he can ask it but...

10 THE COURT: Go ahead.

11 MR. DEBERRY: We call Mr. Carnell. We call him as a
12 witness.

13 THE COURT: Go ahead. If you want to ask her that
14 go ahead.

15 Q. Do you know whether or not he spent the night with
16 Rose Leffingwell on Thursday night before this thing
17 happened?

18 A. I'm not sure.

19 MR. DEBERRY: Okay. Thank you.

20 THE COURT: You may step down thank you.

21 (The witness left the witness stand.)

22 MR. DEBERRY: We call Jerry Carnell to the stand.

23 CLERK OF COURT: Place your left hand on the Bible
24 and raise your right hand. You swear the testimony you
25 give in this case ---

1 MR. RUSSO: Objection. I apologize go ahead. I'm
2 sorry.

3 MR. DEBERRY: You object to her.

4 MR. RUSSO: No, I don't object to Mrs. Gregg, Your
5 Honor.

6 THE COURT: I'll let her handle that situation.

7 MR. RUSSO: Yes, sir, I apologize.

8 May we approach.

9 (A bench conference was held in the presence of the
10 jury, but of the hearing of the jury.)

11 JERRY CARNELL, being first
12 duly sworn, testifies as follows:

13 DIRECT EXAMINATION BY MR. DEBERRY:

14 Q. State your full name state your name for the record?

15 A. My name is Jerry Carnell.

16 Q. Mr. Carnell, tell the jury you live here in Florence
17 and you got a business; is that right?

18 A. I own a rug shop for 28 years.

19 Q. You and your wife what's ---

20 A. Her name is Pat Carnell.

21 Q. And she works in there too; right?

22 A. Oh, yes, she's the boss.

23 Q. She's the boss. Tell us if you would, how do you know
24 Tracy Daniels seated over here?

25 A. Well, I'm in the floor covering business and many many

1 years ago Tracy was plumbing all these new house I was
2 doing. So I developed a relationship over the years, you
3 know, in the floor covering and him putting in the plumbing
4 for my clients.

5 Q. Okay. In addition to having a business relationship
6 with Tracy having developed, when do you think you first
7 meet him in that regard?

8 A. It's been so many years ago I'm not sure.

9 Q. You're not sure. Okay. But in addition to having
10 this business relationship with Tracy, do you also -- are
11 you familiar with Tracy as a personal friend?

12 A. Oh, yes.

13 Q. And do you know his reputation in the community as far
14 as truthfulness and honesty?

15 A. I sure do.

16 Q. And is that reputation good or bad?

17 A. I would say good.

18 Q. Okay. And would you believe Tracy would tell you the
19 truth under oath?

20 A. He sure has in the past.

21 MR. DEBERRY: Okay. Thank you, sir.

22 MR. RUSSO: Your Honor, I have no questions for this
23 witness.

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

25 (The witness left the witness stand.)

1 MR. DEBERRY: I got one more short witness that
2 we... We would call Mr. Hans Lischka.

3 HANS LISCHKA, being first
4 duly sworn, testified as follows:

5 DIRECT EXAMINATION BY MR. DEBERRY:

6 Q. State your full name for the record, please?

7 A. My full name is Johanes J-o-h-a-n-e-s Richard Lischka
8 L-i-s-c-h-k-a.

9 Q. Mr. Lischka, would you tell us are you residence of
10 here in Florence; is that right?

11 A. Yes, sir.

12 Q. For how long?

13 A. Thirty years.

14 Q. And you're retired from what?

15 A. Francis Marion College history professor.

16 Q. And tell us if -- How you got to know Tracy Daniels?

17 A. I meet Tracy Daniels 26 years ago. He was an insured
18 in the agency where my wife worked and she meet him there.
19 And we had a real bad plumbing problem and he came over and
20 fixed it and that's when I first meet him 1975.

21 Q. Okay. And since that time, describe if you would your
22 knowledge of Tracy, your connection, with him. And how
23 you've grown to know him?

24 A. Well, Tracy did all of our plumbing. And he would --
25 We would see about four or five times a year. And

1 gradually I got to know him and about his family. And he
2 talked about my family. And we would have a cigarette
3 together and a cup of coffee and just got to be friends.

4 Q. Okay. And in that regard did you learn -- Are you
5 aware of his reputation in the community for being a
6 truthful and a honest person?

7 A. Yes, sir, I think he's got a very good reputation in
8 that respect.

9 Q. Okay. And would you believe Tracy under oath?

10 A. Absolutely.

11 MR. DEBERRY: Thank you, sir, answer any questions
12 the prosecution has.

13 CROSS EXAMINATION MR. RUSSO:

14 Q. Sir, I apologize is it Lischkan?

15 A. Lischka.

16 Q. Lischka. Okay.

17 A. Right.

18 Q. Mr. Lischka, you were aware that Tracy had a pretty
19 bad drinking problem were you not?

20 A. No, sir.

21 Q. You were not aware of that?

22 A. No, sir.

23 Q. Did you consider him a close friend?

24 A. I consider him a good friend, yes.

25 Q. But you were unaware that he had drinking problem?

1 MR. DEBERRY: He's already answered that.

2 THE COURT: Sustained.

3 MR. RUSSO: Thank you, sir. I have no further
4 questions.

5 THE COURT: You may step down.

6 MR. LISCHKA: Thank you very much.

7 (The witness left the witness stand.)

8 THE COURT: Would y'all step over here for just a
9 minute.

10 (A bench conference was held in the presence of the
11 jury, but out of the hearing of the jury.)

12 MR. DEBERRY: We call Rev. Frederick L. Huth to the
13 stand.

14 FREDRICK L. HUTH, being first
15 duly sworn, testifies as follows:

16 DIRECT EXAMINATION BY MR. DEBERRY:

17 Q. State your full name for the record?

18 A. Fredrick Loyd Huth H-u-t-h, Jr.

19 Q. Mr. Huth, tell us your residence here of Florence?

20 A. No, sir, I'm a resident of Sumter County.

21 Q. Sumter County?

22 A. Yes, sir.

23 Q. And tell me what is your occupation?

24 A. I'm a pastor.

25 Q. And how long have you been a pastor?

1 A. Since '56, 1956.

2 Q. That's a pretty good while?

3 A. Yes, sir.

4 Q. And tell us if you would, you never new Tracy until
5 this unfortunate horrible incident happened?

6 A. No, sir. I never meet him.

7 Q. Is that correct?

8 A. I never meet him.

9 Q. And you never meet him except in the jailhouse; is
10 that right?

11 A. That was the first time.

12 Q. And by what occasion -- For what reason did you have
13 to go to seek out Tracy at the jailhouse?

14 A. His daughter Sherry had asked if I would go and visit
15 her father.

16 Q. Did you do that?

17 A. Yes, sir.

18 Q. And tell the jury what type relationship you would
19 have built with him since that time that you meet him in
20 the jailhouse after he been charged with a murder?

21 A. I don't know the exact relationship as far as time is
22 concerned. He was released on...

23 Q. December the 13th 1999?

24 A. I understood that he had to have special permission to
25 leave the county to come to our church. And he was granted

1 that permission. And he has been ---

2 MR. RUSSO: Your Honor, excuse me. I apologize,
3 Pastor. Your Honor, I would object based on the ruling of
4 Rule 610 of the rules of evidence. If there's an effort to
5 show religious beliefs or conduct in an effort to enhance
6 credibility I believe that's improper.

7 THE COURT: Okay. Once again, I'm gone allow him to
8 answer that question, but you heard the rules he just
9 quoted. So be careful after this one.

10 MR. DEBERRY: Okay.

11 Q. Okay. If you go ahead, you remember what I asked you?

12 A. My relationship with him since ---

13 Q. Would you describe -- Yeah, and tell us about your
14 relationship with him following the first time that you
15 meet him in the jailhouse after he had been charged with
16 murder. If you would, tell us about that relationship?

17 A. I had occasion to talk with him every Sunday since
18 then. With one exception, he was sick on one Sunday and
19 did not attend. I had an opportunity to talk with him five
20 to ten minutes before the service and sometimes as much 15
21 minutes or so after the service.

22 Q. All right. And that's been going on since December
23 the 13th 1999 with the exception of one Sunday?

24 A. Yes, sir.

25 Q. Is that right?

1 A. Yes, sir.

2 Q. Okay. And during that period of time, do you feel
3 like that you have learned about Tracy's reputation in the
4 community, had an opportunity to learn about that from your
5 association with him?

6 MR. RUSSO: Your Honor, I would object based on the
7 fact, if I'm not mistaken, the pastor is from Sumter, South
8 Carolina, and is not familiar with the reputation of an
9 individual who lives in Florence County other than from
10 what he's heard from the defendant himself.

11 MR. DEBERRY: He hasn't answered yet.

12 THE COURT: Go ahead. I'll overrule that. I may
13 have to step in, but go ahead.

14 Q. Have you had an opportunity through the relationship
15 that you described to this jury in regards to Tracy Daniels
16 to learn and get to know about his character for being
17 truthful and honest?

18 A. With me, he's certainly has.

19 Q. Okay.

20 A. There's no reason to question him.

21 Q. And do you think ---

22 MR. DEBERRY: That's all I have. I appreciate it.

23 THE COURT: Solicitor.

24 CROSS EXAMINATION BY MR. RUSSO: -

25 Q. Pastor, if I may your knowledge of - excuse me - your

1 knowledge that you have with regards Mr. Tracy Daniels is
2 being gathered through the Sunday's that he has attended
3 your church and your opportunity to speak with him before
4 and after the service; is that correct?

5 A. Yes, sir.

6 Q. You've not traveled to Florence and spent time with
7 him in Florence other than the time you went to the
8 detention center; is that correct?

9 A. That's true. May I say something to that.

10 Q. If it's responsive to the question, yes, sir?

11 A. I feel that I should give an answer as to why I have
12 not gone to his home.

13 Q. I'm not trying to be critical, Pastor. You may, yes.

14 A. I am well aware of the restrictions that have been put
15 on him under the bond arrangement. And I did not want to
16 give any cause or any reason for anyone to suspect there's
17 any infraction by gathering together, getting into a group
18 or that sort of thing.

19 Q. I appreciate that, yes, sir. But the fact remains is
20 though you've not been in Florence and talked with people
21 in Florence County; correct?

22 A. No, sir, only the family.

23 Q. All right. Other than the family? You haven't
24 talked to his neighbors?

25 A. No, sir.

1 Q. Haven't you talked to his business associates?

2 A. No, sir.

3 Q. So the extent of your knowledge as to his reputation
4 for truthfulness is solely based on your relationship with
5 him as he's attended your church in Sumter?

6 A. Yes, sir.

7 MR. RUSSO: Thank you. I have no further questions.

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

9 (The witness left the witness stand.)

10 THE COURT: Fire back up at 9:30.

11 MR. RUSSO: Yes.

12 THE COURT: Would 9:30 cause a problem with any
13 jurors.

14 (All jurors responded by saying no.)

15 THE COURT: All right. We're in recess until 9:30
16 in the morning. Remember my instructions about the press,
17 about anybody trying to contact you. We see you in the
18 morning at 9:30. Everybody else remain seated while the
19 jury departs.

20 (The jury was excused for the day.)

21 THE COURT: The juries clear. Tomorrow's Friday how
22 we looking on our timing, Deberry, we look all right.

23 MR. DEBERRY: I got Mr. Girndt and Tracy and the
24 junk-yard man. What's his name -- Ray Jones.

25 THE COURT: I figure be better go ahead and fire up

1 at 9:30 rather than crowd ourselves on a Friday evening.
2 We'll do whatever necessary, but I hate to run a jury way
3 into the evening on Friday unless we have to.

4 MR. RUSSO: Yes, sir.

5 THE COURT: We're in good shape. All right. See
6 everybody in the morning.

7 (Court adjourned for the day.)

8 (Court reconvened.)

9 THE COURT: Counsel, y'all ready?

10 MR. DEBERRY: We're ready, Your Honor.

11 MR. RUSSO: Yes, sir.

12 THE COURT: Counsel, if y'all will approach the
13 bench.

14 (A bench conference was held off the record.)

15 THE COURT: Bring out Mrs. Martin.

16 Mrs. Martin, if you come right around here let me
17 talk with you just a minute. How are you this morning?

18 MS. MARTIN: All right. What was the victim's
19 mother's maiden name because after my husband seen
20 something, he didn't discuss it. He just said might be
21 someone that stays in -- our neighbor's sister's boy. But
22 we don't know the family don't anything about them. I
23 don't know none of these people, but if that's who the
24 victim's mother brother -- And I don't think so, but I do
25 know them. And he did live right near us. So I would know

1 her brother if that's who it is.

2 THE COURT: You need or like to know the victim's
3 mother's maiden name?

4 MR. DEBERRY: She does not have a brother.

5 MS. MARTIN: She does not live in the area. But I
6 have to put my -- I didn't want to sit there during the
7 continuation and not let y'all know.

8 THE COURT: Whatever was said or whatever happened
9 in anyway affect your ability to continue to be fair and
10 impartial juror?

11 MS. MARTIN: None whatsoever affect my ability. I
12 just wanted to let y'all know.

13 THE COURT: Your name for the record?

14 MS. MARTIN: Millie Martin.

15 THE COURT: You can stay out here with us because
16 we're going to bring the rest of them out.

17 MR. DEBERRY: Your Honor, can we approach just a
18 moment.

19 (A bench conference was in the presence of everyone,
20 but held out of the hearing of everyone.)

21 THE COURT: Bring them in.

22 (The jury returned to the courtroom.)

23 THE COURT: Good morning, ladies and gentlemen.

24 JURORS: Good morning.

25 THE COURT: Counsel, waive polling of the jury this

1 morning?

2 MR. RUSSO: State waives, Your Honor.

3 MR. DEBERRY: The defense waives it, Your Honor.

4 THE COURT: You may proceed, Mr. Deberry.

5 MR. DEBERRY: Your Honor, we would like to call

6 Mr. Ray Jones.

7 THE COURT: Mr. Jones, come around please.

8 RAY JONES, being first

9 duly sworn, testified as follows:

10 DIRECT EXAMINATION BY MR. DEBERRY:

11 Q. State your full name for the record?

12 A. Ray Jones.

13 Q. Mr. Jones, if you don't mind if you would just give us
14 a little bit about your background for the juries sake?

15 You live here in Florence?

16 A. Yes, sir.

17 Q. And how long have you lived here?

18 A. Since '65.

19 Q. Tell us about yourself? What do you do?

20 A. Retired from the phone company.

21 Q. And how many years were you with the phone company and
22 did you do anything else while you were there?

23 A. I was with the phone company for 26 years. I am
24 retired. And I had a little car business on the side.

25 Spent about 15 years with the Big Brother Association.

1 Work all the time, a work alcoholic.

2 Q. Worked hard. Tell us if you would what is your
3 connection with Tracy?

4 A. Tracy has -- I been knowing Tracy probably about 15
5 years. He rented from me about nine.

6 Q. Okay. And do you have a used car or junk yard type
7 facility that may have been talked about in this trial?

8 A. Yes, sir.

9 Q. Okay. And I'll ask you to think back to the day that
10 this incident happened December the 4th 1999. You remember
11 that day?

12 A. Very well.

13 Q. Okay. And tell the jury if you would what do you
14 recall about that day as it pertain to Tracy and Donald
15 Leffingwell?

16 A. Maybe a little time before that day, I had a car that
17 this guy had bought some parts of off it. And I was out
18 there in the field with my forklift moving them around that
19 afternoon. And Tracy and this guy, which I don't know him.
20 I never seen him before maybe when he bought the other
21 parts, but I didn't know him. He came up and they were
22 looking for this particular car to buy another part of off.
23 And it's just like two people in harmony looking for a
24 part.

25 Q. Okay.

1 A. And it was about dusk dark and I was still on
2 forklift. And all these patrol cars came by and that's
3 what happened whatever happened. I didn't go down there or
4 nothing.

5 Q. I understand. And you have known Tracy for how long
6 you said?

7 A. Probably about 15 years.

8 Q. And did you -- Do you have any other details other
9 than the recollection that you said about how these two
10 gentlemen got along together that afternoon within -- What
11 period of time approximately what time do you think it was?

12 A. I want to say it was in the afternoon. I want to say
13 about 4:30, you know, around four, 4:30. They was around
14 there. It might been earlier. I mean, you know, you busy
15 you ain't clocking nothing. So it was in the afternoon I
16 know that.

17 Q. Anything else you observed about their demeanor or
18 anything of that nature?

19 A. No. I mean, it wasn't the type situation that
20 required results that it got. I mean it was like two
21 people friends, you know.

22 MR. DEBERRY: Thank you answer any questions the
23 prosecutor has.

24 CROSS EXAMINATION BY MR. RUSSO:

25 Q. Mr. Jones, what part were they looking to buy?

1 A. I'm just saying a door handle. I'm just saying a door
2 handle. I don't know.

3 Q. That's what you recall?

4 A. Yeah.

5 Q. And you think it may have been four, 4:30. But as far
6 as the time goes, you're not positive, of course?

7 A. No.

8 Q. Is that correct?

9 A. Yeah. Well, you know, you're out in a field you don't
10 look at the clock if you're a work alcoholic, too.

11 Q. I understand. Yes, sir.

12 MR. RUSSO: Thank you, Mr. Jones. I don't have any
13 further questions.

14 THE COURT: Thank you.

15 MR. DEBERRY: We ask that he be excused, Your Honor.

16 MR. RUSSO: No objection, Your Honor.

17 THE COURT: Witness is excused.

18 (Witness leaves the witness stand.)

19 MR. DEBERRY: Your Honor, at this time we ---

20 (A bench conference was held in the presence of the
21 jury, but out of the hearing of the jury.)

22 MR. DEBERRY: Your Honor, at this time we would call
23 Donald Girndt to the stand.

24 DONALD GIRNDT, being first
25 duly sworn, testifies as follows:

1 DIRECT EXAMINATION BY MR. DEBERRY:

2 Q. State your full name for the record?

3 A. Donald C. Girndt. Last name's spelled G-i-r-n-d-t.

4 Q. Mr. Girndt, would you tell us if you would first of
5 all give the jury your background as far as your
6 educational training and any training that you've had in
7 particular in the field of crime scene analysis?

8 A. Yes, I have an Associate and a Bachelor's Degree from
9 the University of South Carolina Associate in Law
10 Enforcement Criminal Justice and a Bachelor's in what's
11 referred to as general studies. I've attended the South
12 Carolina Criminal Justice Academy for basic police officer,
13 also basic photography, basic fingerprint identification,
14 evidence collection and other courses also that don't
15 pertain to that such as breathalyzer school. From there
16 I've gone on to advance courses at the FBI Academy at
17 Quantico, Virginia, and fingerprint analysis, blood stain
18 pattern analysis course at the University of Central
19 Orlando, Florida. Another advance course in blood stain
20 pattern interpretation at the State Law Enforcement
21 Division. A course in homicide investigation at Souther
22 Police Institute in Louisville, Kentucky, and various other
23 investigative workshops and courses that are put on by the
24 FBI and other agencies.

25 Q. And tell us if you would as far as your actual work in

1 this area, how long have you been working in the area of
2 crime scene analysis?

3 A. About 16 years. In 1994, I retired from the State Law
4 Enforcement Division. And from 1995 to the present, I been
5 self-employed as a forensic consultant primarily to defense
6 attorneys in the areas of fingerprint identification,
7 footwear identification, blood stain pattern interpretation
8 and crime scene analysis and evidence collection
9 techniques.

10 Q. Okay. And prior to 1994, how many years were you with
11 SLED?

12 A. I was with SLED a total of 12 years. From 1993 to
13 1994, I was assigned to the -- what's referred to as
14 regulator section. That's a section at SLED that monitors
15 activities with gun dealers and private investigators.
16 Prior to that 1985 to 1993, I was assigned to a combination
17 of firearms section at SLED and the latent fingerprint in
18 the crime scene unit. From 1985 to 1989, it was all part
19 of the firearms unit. And we received training in firearms
20 and in crime scene. In 1989, the laboratory split some of
21 the agents went on the firearms examiners and some stayed
22 to the crime scene unit. I stayed in the crime scene unit.
23 Prior to 1985 -- 1979 to 1985, I was with the Richland
24 County Sheriff Department as a sergeant in charge of the
25 uniform fugitive and warrant division. And from 1977 to

1 1979, I was with the Lexington County Sheriff's Department
2 uniform patrol division. From 1974 to 1977, I was again at
3 the State Law Enforcement Division in the communication
4 section. From 1969 to 1973, I was a sergeant in the Marine
5 Corp.

6 Q. Now, have you been qualified in courts of this state
7 as well as other states other adjoining states as an
8 expert. In this state as far as general sessions like this
9 such as Judge Burch. In the past, have you been qualified
10 as an expert in the field of crime scene analysis and
11 giving opinion testimony in other courts?

12 A. Yes, I have.

13 Q. And do you know approximately how many times?

14 A. Well, in all the various disciplines that I've listed
15 fingerprint identification, footwear identification, crime
16 scene analysis, and blood stain pattern interpretation. I
17 been qualified approximately 130 times in North Carolina,
18 South Carolina, Georgia, and Maryland and that includes
19 both general sessions court and federal district court.

20 MR. DEBERRY: Your Honor, at this time, we would
21 offer Mr. Girndt as an expert in the fields that he's
22 testified that he has experience in.

23 MR. RUSSO: I have no objection, Your Honor.

24 THE COURT: All right. So qualified.

25 Q. Now, Mr. Girndt, would you tell us if you would if you

1 were asked by me to review certain written documents that I
2 provided to you to look at in regards to this case?

3 A. Yes, I did.

4 Q. And if you'd tell us, did you have copies of the
5 incident reports that the officers generated as a result of
6 their investigation of this case?

7 A. Yes, I mainly asked to look at the primary documents I
8 asked to look at or the incident reports, statements,
9 autopsy reports and any crime scene photographs that may
10 have been generated.

11 Q. Okay. And in addition to those and did you get copies
12 of all the photographs that were available here and have an
13 opportunity to examine those photographs?

14 A. Yes.

15 Q. In addition to that, Mr. Girndt, did you have an
16 opportunity to examine the physical evidence and in
17 particular the shotgun that's in evidence?

18 A. Yes, I did.

19 Q. And would you tell us if also you had an opportunity
20 to view and go to the actual scene where Mr. Leffingwell
21 died and where Mr. Tracy Daniels lives and view that scene,
22 and take certain measurements there and go to the points
23 where things have been related to you had occurred? Did
24 you visit different places at the scene?

25 A. I did go to the scene. It had been altered somewhat

1 in that one of the mobile homes had been moved at that
2 time.

3 Q. And, Mr. Girndt, even though one of the mobile homes
4 had been moved Mary McDougal -- was there still an
5 impression or indication there where you can clearly see
6 that the mobile home had been prior to it being moved?

7 A. Oh, yes.

8 Q. And in addition to that even with the -- telling by
9 the ground or the grass where the mobile home was, did you
10 have pictures to show where it was prior to?

11 A. Yes, we had the original crime scene photographs.

12 Q. And now, after reviewing the written documents and
13 looking at the physical evidence and having an opportunity
14 to actually hold and examine and were able to move and
15 check out the gun?

16 A. Yes, I did look at the weapon.

17 Q. Okay. First of all, I'm gone ask you if you would
18 tell us. And I'm gone direct your -- The subject here and
19 the area of fingerprints. And tell us if you -- What you
20 observed about this particular investigation and the
21 preservation whether there be preservation or the lack
22 thereof of fingerprints? And tell the jury what you
23 discovered about that and why if you do think it's
24 significant?

25 A. Just in particular the fingerprint?

1 Q. Yeah.

2 A. Where usually in a case like this one of the -- where
3 a weapon was involved. There a number of things that
4 happened, of course, but the weapon is normally returned to
5 the laboratory. And in this particular case, this weapon
6 had some blood on it. Now, when we return it to the
7 laboratory one of the first things, is look at it for blood
8 stain pattern analysis to see not only that there's blood
9 on it, but what configuration that blood is in. The blood
10 falls into different categories for being analyzed. Once
11 that had been done or documented through photography, I
12 would call someone from the serology department to come
13 down. Serology is the department that collects -- actually
14 collects body fluids such as blood and semen and saliva and
15 that sort of thing to be analyzed. Once that's done, then
16 the weapon would be fingerprinted. This is ---

17 Q. Before you go into the fingerprinting, I want to ask
18 you -- You said that there were different types of blood
19 evidence that would be left or could be left. Tell us if
20 you would just give us -- describe that?

21 A. Well, blood normally for the analysis falls into three
22 different categories. There's low velocity blood, which is
23 blood that is simply dripped or flows. There's medium
24 velocity blood, which is blood that's normally projected as
25 a result of a beating and it comes in different sizes.

1 Such as two, three, and four millimeters when we measure
2 it. And then there's what's referred to as high velocity
3 blood impact spatter, which is normally result of a gunshot
4 wound. And that's usually much smaller although with a
5 larger type weapon. And you can generate all three types
6 of medium velocity, high velocity and following type blood
7 course from the wound.

8 Q. I'm handing you State's Exhibit No. 16 and Number 15.
9 And I'll keep Number 30 out here and Number 20?

10 MR. RUSSO: Your Honor, I can't hear.

11 Q. Thirty, and 20, 15 and 16?

12 MR. RUSSO: 15 and 16?

13 MR. DEBERRY: Yes.

14 Q. In addition to looking at these photographs,
15 Mr. Girndt, did you -- as it pertains to the blood, did you
16 you have an opportunity to physically see the gun for the
17 first time last week?

18 A. Yes.

19 Q. And at that time was there still evidence of blood
20 that you were able to see on the gun?

21 A. Yes.

22 Q. Okay. And in regards to the types of blood evidence
23 evidence or bloods that's left. I think you said there was
24 three different types; is that correct?

25 A. Yes.

1 Q. Okay. And tell us what you observed about blood on
2 that gun?

3 A. Well, State's 15 is primarily of the handle and the
4 trigger area. And it actually shows what is would be low
5 velocity blood. It's just blood that smeared on the
6 handle. And also State's 16 also shows some blood that
7 would be low velocity that's dripped on there and smeared
8 around the handle area. It's just a different view from
9 the top.

10 Neither one of these particularly shows the area
11 which I would be interested in, which would the end of the
12 barrel of the gun which may indicate what we refer to as
13 back spatter. There's two types of spatter associated with
14 firearm. One is called forward spatter and one is called
15 back spatter. If a bullet passes through a person and goes
16 out the other side and keeps continuing forward, that's
17 referred to as forward spatter. If a bullet goes in -- as
18 it goes in from the front for example, it displaces the
19 tissue and the blood and that tissue and blood is forced
20 out back toward the weapon that's called back spatter.

21 So what I would be looking for in this particular
22 instance is back spatter from the shotgun back onto the
23 shotgun, which may give me an indication along with other
24 things that's to the distance that it was because back
25 spatter normally only travels approximately three feet. So

1 that in conjunction with distance patterns - excuse me -
2 determination patterns that could be produced in laboratory
3 would give us an indication of what the distance was.

4 Q. Okay. And did you determine -- Did you find evidence
5 of blood that you found to be what you just referred to as
6 evidence of the type blood that you just referred to as
7 back spatter or back splatter?

8 A. Spatter.

9 Q. Spatter.

10 A. Well, I didn't see any on the weapon. Of course, it's
11 much too late to be analyzing it for that type of blood
12 because that type of blood usually would dry up and flake
13 off. So the weapons been handled, you know, numerous times
14 over the last year or so. There was one photograph that
15 shows the decedents left hand. And in the area of the
16 thumb and it indicates to me that there's blood in
17 particular there's no scale in it. By scale what I mean is
18 a ruler, a ruler to tell me what size it is. But what it
19 does show is directionality. And the directionality would
20 be away from the wound back toward the weapon.

21 Q. Tell us ---

22 MR. RUSSO: I just want to know what photos you're
23 referring to. What number please?

24 A. I'm sorry. State's 10.

25 MR. RUSSO: All right. Thank you, sir.

1 Q. If you would, tell us how do you determine when you
2 find blood as you talked about. Tell us what indications
3 are there that would help you in coming here and saying
4 from which direction the blood came from?

5 A. Well, the directionally has a distinctive shape to it.
6 It's like a tear drop and the bottom of the tear ---

7 Q. I'll let you give you an ---

8 MR. LAWSON: Your Honor, this is a State's Exhibit,
9 I don't know that's it's gone be admissible.

10 MR. RUSSO: Sorry, we got the back.

11 MR. DEBERRY: It's the back of the State's Exhibit
12 Number ---

13 THE COURT: Do you have a problem with him using the
14 back of it?

15 MR. LAWSON: We don't know what he's going to draw
16 that's the problem.

17 MR. RUSSO: I don't know what he's gonna draw and
18 then pursuant to cross whether it's gone be admissible or
19 not. So I rather it be on a separate sheet. If the judge
20 rules it's admissible, that's great but not...

21 THE COURT: We need that easel.

22 Q. All right. You can demonstrate here.

23 A. As far as directionality goes if I have a drop of
24 blood for example that's round, that indicates to me one or
25 two things. It's traveling straight across. Say if it's

1 on a wall, it's traveling straight across. But if it's on
2 the floor, it's traveling straight down and that would be
3 at 90 degrees. If I have a drop that goes like this, the
4 direction that it's traveling is this way. It's traveling
5 -- This particular one is traveling down. It's on a flat
6 surface when it's traveling across.

7 There's actually a mathematical formula what we do
8 is we can take the length in this divided into the width
9 and compared to sign table. Particularly a sign table and
10 that give us angle. We can actually tell when it's plus or
11 minus degree of what the source of the blood is. That's
12 usually on fixed object. This particular drop of blood
13 that I'm talking about today is on the hands so that's
14 rather -- We can actually -- When you get a degree on this
15 and what I have -- What most analyst have are ready made or
16 premade pieces of blotter paper where we already have these
17 angles. So I can go to a crime scene I put through the
18 blood go angles if I don't want to actually measure it at
19 the time. I can get a rough estimate of what it is. Of
20 course, if you see a round one, you know what that is.
21 They can be just about any angle and you can do it with a
22 sign table or conversion chart for that. So that's why
23 it's important. It gives us two things. It gives us
24 direction and velocity. By looking at the size of the
25 stain, we can tell if it's normally associated with beating

1 or if it's dripped blood or associated with gunshot.

2 Q. Okay. Now, did you -- I think I interrupted you. Do
3 you recall where you were when I took you away and asked
4 you to tell us about the direction of the blood and how you
5 were able to determine from which direction it may have
6 come from?

7 A. Yes, the direction of it on this blood is away from
8 the decedent and back toward the weapon and away from the
9 source of the blood which at this point is the wound to the
10 neck.

11 Q. Okay. And if you would tell the jury -- What picture
12 did you examine? And did you look at that under a
13 magnifying glass or some special device for looking at your
14 picture?

15 A. Yes, I did. State's 10.

16 Q. State's Exhibit Number 10. Tell the jury what you
17 found there that you thought to be of importance?

18 A. That's what I was referring to. That's the photograph
19 that shows the directionality. One thing that I determine
20 is that the hand would have to be in the vicinity of the
21 wound in order for that blood to have directionality and
22 travel back across to travel out in a way.

23 Q. So in State's Exhibit Number 10, it's showing a
24 picture of Mr. Leffingwell's left hand?

25 A. Left hand that's correct.

1 Q. And what part of that left hand did you find -- see
2 that there was evidence of a blood stain there?

3 A. It's in this area near the base of the left thumb. It
4 will be traveling out this way across.

5 Q. Okay. Now, did you also have a chance to talk with --
6 You said you had a chance to check the -- look at all of
7 the officer's incidents report; is that correct?

8 A. Yes.

9 Q. Okay. Now, do you have a -- Did you see any evidence
10 of any blood on the inside of the hand?

11 A. No.

12 Q. Okay. And did you -- Do you have any other -- Could
13 you tell us in what position that handle would have had to
14 have been in at the time of the gunshot wound in order to
15 receive that type blood on it in that direction?

16 A. I would say that it would be in the vicinity of the
17 wound. As I say this typical spatter only travels to about
18 three feet. So it could be closer. It could be further
19 away.

20 Q. And so there was no -- You found no blood on the
21 inside here; is that correct?

22 A. No, I didn't see any on the photographs.

23 Q. And hold your hand out again. And if you would hold
24 your hand out and just point with the place where you saw
25 the blood and which direction. And if you'll hold it sort

1 of down, so that the jury can see it?

2 A. Directionality, once again it's at the base here and
3 it's going away from the wound.

4 Q. Now, tell us if you would did you -- Had you reviewed
5 this -- What was done in this crime scene analysis by an
6 officer that have been involved here. Tell us what you,
7 what you found as far as the significance of the
8 fingerprints? The work they did or the lack thereof?

9 A. Well, one of the things I always look for are the
10 fingerprint report in incidences like this and a firearms
11 report which there wasn't one until last week. That was
12 ~~generated last week~~. But as far as the fingerprints go not
13 only is it important to identify who handled the weapon,
14 Although, we know in this particular case both individuals
15 handled it. But the -- What's significant is the
16 orientation of the fingerprints or the palm prints that
17 might be on it. By orientation I mean, you know, how were
18 they on the weapon. Were they on there properly like you
19 would hold the weapon or were they on there -- the way you
20 wouldn't expect them to be. So not only is identification
21 questioned but always orientation. For example, ---

22 Q. Let me just stop you just a minute there, Mr. Girndt.
23 If -- In this particular case and if determination was made
24 that we knew both people had held a gun therefore there
25 wasn't any need to do any fingerprints analysis. Tell us,

1 what if anything, you have to say about that assumption?

2 A. Well, there's certain things that we always do and we
3 always fingerprint the weapon. We always send the
4 firearms. We always collect blood that's located on them.
5 There is no -- There's just set protocol. It's just what
6 you do regardless.

7 Q. Did you find that those things were done here?

8 A. No. not in this particular case.

9 Q. Okay. Now, tell us if someone gave an explanation
10 that we didn't do fingerprints because we knew who
11 fingerprints we find on there? Is that -- How would you
12 describe that type?

13 A. Well, once again, it's the orientation that's
14 important. How are the fingerprints on there. You don't
15 ever know what's going to come up in these cases. So
16 that's one reason you go through and do it immediately
17 or when you get it back to the laboratory. And then your
18 results are your results. If somebody comes up and can
19 explain why the fingerprints are on there, on in that
20 manner then that's fine. If they can't, then you can
21 either corroborate what someone has said or you can deny
22 what they said based on the orientation of the
23 fingerprints.

24 Q. If some person had -- When you're talking about
25 orientation -- Let's use an example of a gun barrel. And

1 if this is the stock to open the barrel with, could you --
2 If the fingerprints were lifted from this barrel, would it
3 be -- would you be able to tell if the hand that put the
4 fingerprints on was in this direction versus this
5 direction. Would there be indications that would help you
6 there?

7 A. Oh, yeah.

8 Q. Would it be hard to be able to tell that there was
9 fingerprint this way maybe rather than this way?

10 A. No.

11 Q. Okay. And tell us what if you would -- Did you find
12 any indication that these fingerprints were taken on this
13 spoon that night?

14 A. No.

15 Q. Did you find any indication that there was even an
16 attempt to preserve these fingerprints?

17 A. No.

18 Q. And as you just said, you never know what may come up
19 and be important?

20 A. That's correct.

21 Q. And is that the reason that the fingerprints should
22 have been taken?

23 A. Yes.

24 Q. Now, tell us about the blood, preserving the blood.
25 If the analysis -- If you tested the blood and the blood

1 patterns as you say you're an expert in doing on this
2 stuff, do you think in this particular case that you under
3 normal procedure as a police officer or as an investigator.
4 What would you have done with blood here as far as
5 preserving it for a future jury to have information about?

6 A. Normally, you have to do that through photography
7 because the smaller bits of spatter will flake off and they
8 they ~~want~~ be there very long. So that's preserved through
9 photography. Also as preferred to in the serology
10 laboratory, you'd have someone collect samples of various
11 samples of blood from different parts of the weapon. I
12 notice that the weapon is gone now to the firearms
13 laboratory and it's been returned. And there's a part on
14 the stock where a blood sample has been taken off. So the
15 officer who had the weapon at SLED knew to do that
16 immediately when he saw it. So that's something that
17 should have done.

18 Q. Okay. And so again, if someone were to say that,
19 Well, we didn't do any blood test here because we knew
20 there was only two people at the scene. And if we took the
21 blood test, we knew who's blood it would be. What would
22 you have to say about that?

23 A. I would do it just as a matter of protocol just a
24 matter -- just to say you did it. I've scene a lot of
25 items come through the laboratory for fingerprints that I

1 knew I wasn't gone get any fingerprints off of, but I went
2 and did it anyway. So I didn't get the question or if I
3 did get the question I could say hey look.

4 Q. And so with the blood is there more to it. Do you
5 learn more if you have it examined correctly than just
6 who's blood it is. Do you learn things like ---

7 A. Right. For example, spatter pattern would tell you --
8 would help indicate along with other things again how close
9 a person was. Another thing that would have been done at
10 this particular time when the weapon was sent in, would
11 also have a what we call a swab, which just Q-tips swab
12 with saline solution on it and that's what they dissolve
13 the blood in. And that's what they carry it back to the
14 lab with and have them do it inside the barrel of the gun.
15 Of course, if there was blood present on the inside of the
16 barrel of the gun another indication of how close it would
17 be.

18 Q. Now, Mr. Girndt, would you tell the jury about your
19 examination of the shotgun. First of all, have you had an
20 opportunity to have it in your possession and to check that
21 shotgun out as far as what you could see about certain
22 functions of the it?

23 A. Yes, briefly, I didn't take it away from the Sheriff's
24 Department away from the courtroom or anything. I mean, I
25 looked at it briefly in the conference room.

1 Q. Okay. And did you -- Tell us if you would the type
2 gun and the -- what you would expect as far as ---

3 MR. RUSSO: Your Honor, I'm gonna object at this
4 point to the -- Mr. Girndt has not been qualified as an
5 expert in firearms. If we're gone go into some expert
6 testimony on firearms, he hasn't been qualified as an
7 firearms expert. So I would object to his opinion in
8 regards to firearms.

9 MR. DEBERRY: I was just gone ask him his' general
10 knowledge.

11 THE COURT: Up to this point, I'm gone overrule it,
12 but you pay close attention and renew your motion now as we
13 go forward if necessary. Go ahead.

14 Q. Mr. Girndt, did you tell us if you would what did you
15 find as you were examining this gun?

16 A. Well, I made an observation with this particular gun
17 that which is a single barrel. I don't know if it's been
18 out of the box or not, but a single barrel 12-guage shotgun
19 that has a hammer on it. And what I noted was that you can
20 pull a hammer back, not all the way back to the full cock
21 position, but pull it back and let it go and it will
22 operate the firing pen.

23 Q. Okay. Now, is there any question in your mind that if
24 you -- And once you said that there's a hammer on this gun;
25 is that correct?

1 A. Yes, sir.

2 Q. And normal operation a hammer would be pulled back
3 until ---

4 MR. RUSSO: Your Honor, I'm going to object at this
5 point. I don't think he's qualified to testify that a
6 partial pulling back of the hammer and release would
7 operate the firing pin that's expert testimony. He's not
8 qualified.

9 MR. DEBERRY: It's not expert testimony.

10 MR. RUSSO: It's absolutely what it is. It's going
11 to the functionality and the internal mechanisms of a
12 firearm and what would cause enough pressure for a firing
13 pin to actually explode a shell or not explode a shell. I
14 mean, he's going into -- He's not qualified to testify to
15 that.

16 THE COURT: If goes he that far, I would sustain
17 your objection. But as far as the dropping the hammer,
18 knocking the pin out, any layperson could pick the shotgun
19 up and pull the trigger on it backwards and let it go. So
20 therefore, I'm going to overrule the objection at this
21 point, but I'm listening.

22 MR. RUSSO: Yes, sir.

23 Q. Mr. Girndt, if you pull the hammer all the way back
24 until it clicks, what happens then? Does it stay there or
25 move?

1 A. It stays there.

2 Q. Okay. Mr. Girndt, if you pull that hammer back ever
3 so slightly from where it clicks and let it go, tell the
4 jury what happens with this particular gun?

5 A. My observation ---

6 Q. First of all, did you understand how old this gun is?

7 A. It's pre 1968.

8 Q. And why is that?

9 A. Because it doesn't have a serial number on it.

10 Q. And tell us about pulling it back ever so slightly
11 short of cocking it and letting it go and what you observed
12 about this gun right here?

13 A. My observation is that operate the firing pin and make
14 it come forward. So in light of that one of the things I
15 would ask for when the weapon went to the laboratory was
16 for the examiner to check that. And they have two methods
17 of doing that. One is that they actually take the shotgun
18 shell, take all the powder and the shot and everything out
19 of it and put it in there. So it actually just operates
20 the primer. And the other way ---

21 MR. RUSSO: I object, Your Honor, at this point,
22 he's going into expert testimony.

23 THE COURT: I'm going to have to sustain the
24 objection at this point. He's going into something else
25 that some expert does. I have to sustain the objection.

1 Q. Okay. The tell us without having to use any expert
2 just as a layperson. What can you tell us about that gun
3 as far as firing the pen when you pull it back short of
4 cocking it?

5 MR. RUSSO: Objection, Your Honor, unless this
6 gentleman has fired the gun.

7 THE COURT: I'm going to have to sustain the
8 objection on that. It's already been asked and answered
9 twice.

10 MR. DEBERRY: Well, if, Your Honor, please he's done
11 it. I mean, he's tried firing it. He can do it in front
12 of this jury.

13 MR. RUSSO: May we approach, judge.

14 THE COURT: He's already -- Wait a minute. Maybe, I
15 misunderstood. I thought he's already answered the
16 question twice. Did he partially pull it back and the pen
17 came out.

18 MR. DEBERRY: That's correct.

19 THE COURT: So it's been asked and answered.

20 Q. Now, can you tell us from your experience whether or
21 not -- Can you tell us how far the pen -- You saw the pen
22 protrude out after it was fired that way?

23 A. It significantly -- I mean, it's noticeable.

24 MR. RUSSO: I object, Your Honor. We're back into
25 expert testimony. He's just trying to go around the block

1 to get to it.

2 THE COURT: I'm gone overrule your objection on that
3 because that's a visual observation. Go ahead, counsel.

4 Q. And could you show us if the Court would allow it,
5 could you take that gun at this time and pull that trigger
6 back partially and let it go and see the firing pin come
7 out?

8 A. Yes.

9 Q. And have you done that before with this gun?

10 A. Yes.

11 Q. Now, in essence what does that mean if a -- If you can
12 do that in this scenario, will these two people standing by
13 each other, what does that mean to you?

14 MR. RUSSO: Objection, Your Honor.

15 THE COURT: Ladies and gentlemen of the jury, I'm
16 going to ask you to step back to your room please.

17 (The jury was excused to the jury room.)

18 THE COURT: All right. The problem here is now
19 you're getting into the pressure of the pin going into the
20 primer. And I don't have any idea in the world where
21 Mr. Girndt's qualified to testify to something like that.

22 MR. RUSSO: And also, Your Honor, part of my
23 objection also goes to he's not qualified as an expert. We
24 we've established that. Mr. Deberry keep going into these
25 things. And I object -- I don't want to have to keep

1 objecting because through his questions, he's trying to
2 place in the jury's mind that that little motion would fire
3 that weapon. And he's not qualified to testify to that.
4 And if he keeps trying to get to it and I have to keep
5 objecting, he's doing exactly what he's trying to do in
6 direct.

7 THE COURT: That's why I sent the jury out. We're
8 gone have to settle it right here and now. So pose your
9 question and we'll see where it goes.

10 Q. Mr. Girndt, you have some experience and you've
11 testified when you were with SLED with firearms. Your
12 department was part of the firearms department during the
13 years of what to what?

14 A. When I was there from '85 to '89.

15 Q. And have you had a chance to -- And is it called dry
16 fire when you fire with nothing in there?

17 A. Yes.

18 Q. And if you had a chance to test this gun without a
19 shell in there as far as pulling this hammer back and
20 letting it go?

21 A. Yes.

22 Q. And under normal circumstances with the new weapons,
23 are they designed where you have to both pull the trigger
24 as well -- You can't fan it like the old cow boys and it
25 will not go off?

1 A. My understanding is they're not designed the way this
2 weapon is.

3 MR. RUSSO: And I would object because that's
4 calling for expert testimony. He doesn't even know. It's
5 just from his understanding. He's got no training in these
6 firearms or none that's he's been able to speak of.

7 Q. Would a layperson or a person with your knowledge know
8 if a gun this day and time was designed where it could not
9 be fan like that and go off without also pulling the
10 trigger? Would that be something a layperson would know,
11 even a hunter?

12 A. I wouldn't, no. I wouldn't think so.

13 Q. I'm sorry what did you say?

14 A. I wouldn't think a person would know that.

15 MR. RUSSO: That would go to my objection, Your
16 Honor.

17 Q. Do you know that?

18 A. Not in my own personal knowledge, no..

19 Q. Well, Mr. Girdnt, have you had a -- When you test
20 fired this gun ---

21 MR. RUSSO: Your Honor, I would object to that
22 characterization.

23 MR. DEBERRY: We're proffering now.

24 MR. RUSSO: Well, Your Honor, it's a
25 mischaracterization. He's never test fired this gun.

1 Q. When you test fired this gun in a dry firing mood, did
2 you do that?

3 A. Yes.

4 Q. Did you find that the firing pen would come out of the
5 -- What do you call that thing that comes out of it?

6 A. The receiver.

7 Q. Did you find that the firing pen would come out of the
8 receiver without having to pull the trigger?

9 A. Yes.

10 Q. And in that regard, did you find that the firing pen
11 would come out in your opinion in a significant distance in
12 order to fire a shell?

13 MR. RUSSO: That's my objection.

14 THE COURT: That's all right. Let me him answer.

15 Q. Did it come out far enough to where you with your
16 knowledge of a shotgun that it would fire the shell?

17 A. It came far enough that I would question it and would
18 request that test to be done on it.

19 THE COURT: And he testified to that. So that's as
20 far as he can go. Am I right or wrong?

21 MR. GIRNDT: Yes, sir, I not gonna go any further.

22 MR. LAWSON: He already testified to that.

23 THE COURT: That he would call for a test.

24 MR. DEBERRY: Well, just before that now is it okay
25 that he say that in his opinion it came out far enough that

1 he felt the need to have it tested.

2 THE COURT: He already testified to that.

3 MR. RUSSO: He's testified to that. And I know Mr.
4 Deberry wants to ask it again. Your Honor, I would object
5 to it. It's been asked and answered.

6 MR. DEBERRY: Would you -- Let's -- I would like for
7 him to do it in showing the jury what he found. You want
8 me to do that while the jury's out here or you want to do
9 it just before they come out.

10 THE COURT: It doesn't matter to me about that.

11 MR. DEBERRY: Okay.

12 MR. RUSSO: I'd rather see what's going to happen
13 before we do more of this in front of this jury, Your
14 Honor.

15 THE COURT: Go ahead.

16 Q. You ready?

17 A. Sure. You gone bring it up here.

18 Q. You can just come down here a minute.

19 MR. RUSSO: Your Honor, while he's just getting
20 ready may I ask did he do a written report?

21 MR. DEBERRY: No.

22 COURT REPORTER: I can't hear.

23 MR. RUSSO: I don't think we're on the record, Your
24 Honor.

25 COURT REPORTER: We're not on the record?

1 MR. DEBERRY: Yeah, we're on the record.

2 THE COURT: Y'all speak up.

3 A. See I have the hammer back. I think I have it just
4 before it's gonna go full cock. I'll try it.

5 MR. RUSSO: Do a full cock and pull the trigger?

6 Q. All right. Do it -- Close it up and start over. All
7 right. Now, I want you to start over without pulling it
8 all the way back until it cocks the first time. Do you
9 know what I mean? Now, start all the way over. 'No just
10 close it up?

11 A. Close it up.

12 Q. Uh-huh. Okay. Now, try to pull it back without it
13 cocking. Keep it around to where the judge can see it.
14 You got to open it first.

15 MR. LAWSON: This guys a firearms expert and
16 Mr. Deberry is telling him how to open the gun.

17 Q. Now, do it. Is that as far as it ever came out?

18 A. It came out a little bit further.

19 Q. All the way out. Leave it right there.

20 MR. RUSSO: See here's the danger, Your Honor.
21 Here's the danger, Your Honor. That I'm getting into
22 because he's not qualified as an expert and that is
23 that ---

24 MR. DEBERRY: It doesn't take an expert to see that
25 thing came out.

1 MR. RUSSO: --- it's forcing us to then have to ask
2 him with -- that's with no resistance, no resistance. With
3 a shell in there is that enough pressure to discharge a
4 shell. And I can't ask him that because he's not an expert
5 but he's putting me in a position to have to force that
6 question.

7 THE COURT: Well, the problem we got there every
8 time we do that we need to close it and retry it.

9 MR. RUSSO: Right.

10 MR. DEBERRY: Right.

11 THE COURT: Right now I just want you to cock it --
12 Leave it just like it is. Cock it all the way back and
13 then pull it again.

14 MR. RUSSO: And pull the trigger. Cock it all the
15 way ---

16 THE COURT: Cock it all the way back. Now, pull it
17 again.

18 Q. Can anybody do that when it's pointing out?

19 A. Can I mention. I mean, it's just not the correct,
20 too. Is that when a shotgun shell is in there, of course,
21 it closes up this gap. So it's got less to travel. So
22 that's why I would ask for the test.

23 MR. RUSSO: It also has to puncture through the
24 metal casing into the primer.

25 A. My information is that these guns will fire like that.

1 And that's why I would request an official report. I mean,
2 I know that in the regular testing my working with
3 firearms, this is not one of the things that you would
4 normally ask for unless it came up.

5 THE COURT: All right. This is a ---

6 MR. RUSSO: He's wanting to testify from his
7 understanding that the weapon will fire that way if I'm not
8 mistaken. If he wants to say that, and I don't think
9 that's proper.

10 A. Say that -- That be one of the test ---

11 THE COURT: We okay. And I don't mind because of
12 the confusion, I don't mind you asking that question again
13 where he makes a point that he would send it to testing.
14 As far as the actual firearm, it is in evidence and the
15 jury is free to take it and test it themselves. Because if
16 I let you go forward with showing all that in front of
17 them, that creates more problems. So the easiest thing
18 that I can do and the safest thing I can do is at this
19 point is to say exactly what I said. The jury can test it
20 themselves since it's in evidence. And they're free to
21 handle it. You can encourage them to do that in your
22 closing arguments. What you saw and you can encourage
23 them. All right.

24 MR. DEBERRY: I'm gone let him do it so they will
25 know what we're talking about just like I ask him to do.

1 THE COURT: Yeah. Cock it open and shut it each
2 time.

3 MR. DEBERRY: And I want y'all to know when I have
4 an intermittent problem with my car and I take it to the
5 shop, there's never anything wrong with it but watch this.

6 MR. RUSSO: But, obviously, Mr. Girndt trying to
7 show the jury how to do it. The members of the jury panel
8 aren't going see that pen.

9 THE COURT: No, I'm not saying to him do it. I'm
10 just saying how to open the gun and pull the trigger back,
11 shut it back and cock it.

12 MR. RUSSO: Pull it back part way and let it go.

13 THE COURT: Yeah. Is what what you were saying?

14 MR. DEBERRY: No, I wasn't gone ask him to tell us
15 what he's talking about where he tested this gun and the
16 fire pen would come out as a layperson. And let him show
17 us how he did it right here in front of the jury. Then if
18 they want to repeat it, they can do it back there.
19 Otherwise, I don't think they'll ever figure out.

20 THE COURT: All right. On second thought, I
21 probably need to reconsider that position. You're probably
22 right on that, Mr. Deberry. You're taking the big gamble.

23 MR. DEBERRY: I'm taking a gamble I know it.

24 THE COURT: All I'm saying is I want that thing
25 closed each time rather than leaving it cocked.

1 MR. RUSSO: Here's another problem we've got, Your
2 Honor. We're outside the presence of the jury, okay. So
3 none of this is going to play. Unless, we're prepared to
4 send in to the jury 13 or 12 pairs of gloves, I don't think
5 it's safe and proper to ask a jury to handle this weapon
6 that has blood on it of another individual and that's a
7 problem. Give them 12 pairs of gloves if that's what you
8 want to do, but I'm just saying I don't think it would be
9 responsible to ask a jury to handle that weapon without
10 gloves.

11 THE COURT: They have a right to do it.

12 MR. RUSSO: Yes, sir.

13 THE COURT: But you got the health consideration. I
14 would send gloves back.

15 MR. RUSSO: You got Mr. Girndt he wouldn't do it.
16 Mr. Parnell wouldn't do it and I wouldn't ask the jury to
17 do it.

18 THE COURT: All right. Bring them in.

19 (The jury returned to the courtroom.)

20 Q. Mr. Girndt, if you would, would you get the shotgun
21 and tell us what are you talking about as far as your being
22 able bring it back short of cocking it and letting it go.
23 Tell us first of all what you observe before you show us?

24 A. Well, this particular gun to be fired properly you'd
25 hear a distinctive click when locked up. I can release the

1 trigger handle the trigger, okay. Now, this particular
2 weapon if the hammer doesn't go all the way back to the
3 lock position comes forward, I'll open it in just a second.
4 What I'm talking about is this. It doesn't go all the way
5 back to lock, it springs forward. You can see I'm not
6 operating the trigger. Right there it's locked, here it's
7 not locked and it comes forward. In the center of the
8 receiver back there is the firing pen, a little round hole.
9 It's a hole in here where the firing pen is operating on
10 the hammer comes forward and drives the firing pen forward.

11 Q. Show them and start over.

12 A. What I'm trying to demonstrate is that the hammer
13 before it gets into a lock position if you bring it back
14 and then let go again, you can see the firing pen comes
15 out. See the firing pen is that little nipple that little
16 nipple sticking out on the flat surface.

17 MR. RUSSO: Your Honor, he needs to speak up for the
18 court reporter.

19 THE COURT: You got to speak up, Mr. Girndt. I
20 couldn't hear that.

21 A. That flat surface that little nipple that metal is
22 sticking out there, the firing pen right there.

23 MR. RUSSO: It has been done, Your Honor, where you
24 indicated that he can -- So they would know how to do that.

25 THE COURT: While I'm thinking about it, let me

1 explain something to the jury. That firearm is in evidence
2 and you will have it back in the jury room with you. While
3 I've got it on my mind should you desire to -- any of you
4 desire to handle that firearm in anyway which is
5 permissible. I need to tell you to please use gloves just
6 as Mr. Girndt's did and also Mr. Parnell did. And they
7 will be provided for you back there in case any of you
8 should desire to handle any of the evidence such as that,
9 okay. So keep that in mind.

10 All right, Mr. Deberry.

11 Q. Mr. Girndt, a shotgun shell you've talked about the
12 firing pin and showed the jury where it comes forward. Can
13 you tell us what part of the pin -- point where -- Can you
14 look at the shotgun shell on the end like that and tell
15 whether or not a firing pin is struck it and has been shot?

16 A. Yes, this is the base of the shotgun ---

17 MR. RUSSO: Objection, Your Honor, he's not
18 qualified as a firearms expert.

19 MR. DEBERRY: It doesn't take an firearms expert
20 firing arms expert.

21 MR. RUSSO: If he just wants to show the jury that
22 there was a mark on the end of the shell, then show them
23 that.

24 MR. DEBERRY: That's what the firing pin that's
25 again or not.

1 THE COURT: I agree with you.

2 Q. So the jury -- If you would what is an indication of
3 that shotgun shell as to whether or not the firing pen has
4 hit it?

5 A. The center of the base is the primer. And the primer
6 has -- If it's an unfired shotgun shell, the primer would
7 have a smooth surface on it. This is a fired primer it has
8 as an indentation in from the firing pen. This would be as
9 you can see a round and a firing pen. And this particular
10 weapon is round also. So that's where it comes out and
11 struck the back of the shell.

12 Q. How much of an indentation do you see on this shell
13 that's been fired?

14 A. Compare ---

15 MR. RUSSO: I object to that.

16 MR. DEBERRY: He can look at it visually.

17 THE COURT: He can visually examine it.

18 MR. RUSSO: That's exactly right, Your Honor. And
19 no more questions until you rule on my objection please.

20 THE COURT: We're okay up to now.

21 Q. Now, properly with a just from a layman's standpoint
22 as a firing pen or properly working gun supposed to go
23 forward without pulling the trigger?

24 MR. RUSSO: Objection, Your Honor.

25 THE COURT: Repeat that question. Don't answer it,

1 Mr. Girndt.

2 Q. . When a gun is in proper working condition is the
3 firing pen supposed to go forward without pulling the
4 trigger?

5 MR. RUSSO: Your Honor, he's not qualified as an
6 expert in firearms.

7 THE COURT: Sustained.

8 MR. RUSSO: And Mr. Deberry continues to ask him
9 questions in regards to that.

10 Q. What of that significance when you tested this gun and
11 found out that this thing would go forward just like you
12 did just then in front of this jury without pulling the
13 trigger, just merely like fanning it like that. What
14 significance did you put on that and, what if anything,
15 would you have done if you had examined this gun and found
16 this before this -- coming to trial before this jury?

17 A. I suspected that it may fire without pulling the
18 trigger. And I would have ---

19 MR. RUSSO: Objection, Your Honor. Objection.
20 Either approach or send the jury out, Your Honor.

21 THE COURT: Ladies and gentlemen of the jury, if you
22 will step back please.

23 (The jury was excused to the jury room.)

24 MR. RUSSO: I have an objection may I speak.

25 Throughout this trial, I live and die by your rulings, Your

1 Honor. And I obey your rulings when you give them, Your
2 Honor. I am tired Mr. Deberry going into questions after,
3 Your Honor, has already ruled in areas that are
4 objectionable. He ask this witness about -- When we talked
5 about outside the presence of the jury on whether or not he
6 would have required a test. Now, he's got this witness
7 saying in my opinion the gun would have fired. So I would
8 -- That was the witness's testimony and that's
9 objectionable and...

10 THE COURT: He did say it may fire.

11 MR. DEBERRY: And as a result of him thinking it may
12 fire, he would have had it tested. I don't know why in the
13 world he's objecting.

14 MR. RUSSO: He said in his opinion ---

15 MR. DEBERRY: It may fire.

16 THE COURT: He said may it fire. He said he may.
17 Forty-seven is the one that was in his hand. Forty-one was
18 the one in his hand.

19 MR. RUSSO: I don't know if it was noted.

20 MR. LAWSON: State's 41 is off the ground.

21 THE COURT: Forty-one is the one off the ground?

22 MR. RUSSO: That's what we believe, Your Honor.

23 THE COURT: Well, not that I'm an expert or
24 anything, but looks like 41 was hit harder than 47, but
25 they're about the same. I'm gone overrule your objection.

1 He did say may. And he said he would send it off. Did you
2 get that completed before you got ---

3 A. I believe what I said was I suspected that it would
4 fire and I would request the test or something to that
5 nature.

6 MR. LAWSON: I think he said that earlier, Your
7 Honor.

8 MR. RUSSO: And then he said requested the test.
9 Then I ---

10 MR. DEBERRY: That was after he showed it to the
11 jury after I let him see that before.

12 THE COURT: I was just trying to make sure he got
13 out what he was saying and it wasn't cut off short. Did
14 you complete your sentence.

15 MR. GIRNDT: I believe I did, sir.

16 MR. DEBERRY: So I can't ask him again?

17 THE COURT: Don't ask him again.

18 MR. DEBERRY: Your Honor, so now when they come out
19 -- can you read back what was the last question.

20 (A pause in proceedings.)

21 THE COURT: Bring them in.

22 (The jury returned to the courtroom.)

23 Q. Mr. Girndt, from your involvement and your work with
24 this case did you see any evidence that the prosecution had
25 this gun tested as to whether or not it was fired in the

1 manner that you demonstrated to the jury?

2 A. No, I don't.

3 Q. And is that one of the things that you would have done
4 particularly after your finding of the firing pen as
5 you've...

6 A. Yes.

7 MR. DEBERRY: Thank you, sir. Answer any questions
8 the prosecution has.

9 CROSS EXAMINATION BY MR. RUSSO:

10 Q. Mr. Girndt, you know ---

11 MR. DEBERRY: I'm sorry I forgot something.

12 DIRECT EXAMINATION CONTINUED BY MR. DEBERRY:

13 Q. At the scene, tell us if you would, Mr. Girndt, you
14 had a chance to visit the scene with me; is that correct?

15 A. Yes.

16 Q. And that was last week?

17 A. Yes.

18 Q. Okay. And you've seen the sketch here as far as the
19 distances. You've been to this scene and stood in this
20 position in this area here; is that correct?

21 A. Yes.

22 Q. And have you -- Tell me if you been back to this
23 position looking back this way?

24 A. Yes.

25 Q. And have you noticed the lights that were there at the

1 time?

2 A. Yes.

3 Q. Okay. And the platform that has been described here
4 is not really -- the picture might be better, but anyhow is
5 there a platform that's longer than the steps flat as you
6 first come off before the steps start back down?

7 A. Yes.

8 Q. Okay. Now, have you seen pictures of the door that
9 was taken -- that was on Ms. McDougal's -- in reviewing
10 your pictures did you see bullet evidence where the pellets
11 hit ---

12 MR. RUSSO: Your Honor, I object to the leading.

13 MR. DEBERRY: I don't think it's harmful.

14 Q. Have you seen those pictures?

15 THE COURT: You can say yes or no.

16 A. Yes.

17 Q. Now, how would you describe the elevation that the
18 person was standing here -- standing over here and where
19 you been yourself standing down here? What differences did
20 you observe there? Did you measure these steps here?

21 A. Measure to the second step, which I believe was the
22 first step down from the platform which I believe is 23
23 inches from the ground up.

24 Q. Okay. And did you get on that step and look over
25 towards that trailer where Ms. McDougal trailer had been?

1 A. Yes.

2 Q. Okay. Now, if you would look at the two marks
3 representing pellets that are on like a picture here of
4 Ms. McDougal's door, another pellet mark here on each side
5 of the door at 96. How many feet would you say that is
6 from where the evidence indicates that the shotgun was
7 shot?

8 A. I don't know if that's what it indicates. It just
9 indicates the distance from one set of steps to the other
10 set of steps of 96 feet.

11 Q. Okay. And does it also indicate where Mr. Leffingwell
12 -- How far away he was found from the steps?

13 A. Eight feet three inches.

14 Q. What if anything do you find, if you do, of
15 significance of the fact that this pattern was in that
16 position 80 feet plus minus of what?

17 A. Only that it opened up significantly.

18 Q. Okay. And as far as the fact it would have -- Did you
19 from your investigation find whether or not the pellets had
20 actually gone through Mr. Leffingwell before they went to
21 that trailer?

22 A. Yes, according to the autopsy report I believe all but
23 one pass through.

24 MR. DEBERRY: That's all I have if you would answer
25 any questions from the prosecution.

1 CROSS EXAMINATION BY MR. RUSSO:

2 Q. Mr. Girndt, you know Ira Parnell; don't you?

3 A. Oh, yes, sir.

4 Q. And you would agree with me that Ira is an expert in
5 firearms?

6 A. Absolutely.

7 Q. One of the top guys in the state; is that correct?

8 A. Yes.

9 Q. Now, if I told you that Ira Parnell did a
10 functionality and safety test on this weapon, you know
11 everything that he would have done in doing a functionality
12 test as well as a safety test?

13 A. Pretty much.

14 Q. You indicated -- Let me get you to do something. You
15 still have your gloves?

16 A. I have another pair.

17 Q. I'm sorry. I should have mentioned to you I
18 apologize.

19 A. That's okay. You want me to come there?

20 Q. Yes, sir, please if you would. And while you're -- if
21 you would get the shotgun please. Why you're doing that
22 I'm going to ask you -- just a minute ago you demonstrated
23 to the jury how you could partially hold the hammer back
24 and let it go; correct. I'm gone ask you if you would to
25 pick up the shotgun and bring it back over to where the

1 jury panel is. And what I'm gone ask you to demonstrate at
2 this point is to go ahead and -- Let me back up a little
3 bit because when you demonstrated for the jury the last
4 time, you didn't open it up all the way until it clicked.
5 You opened it partially. I'm gone ask you to close it back
6 and open it partially. Then I'm gone ask you to pull the
7 hammer all the way back until it sets. All right. I'll
8 get you to go near the jury panel and I'm gone ask you to
9 pull the trigger. Excuse me I can't see. If you want to,
10 you can start again.

11 MR. DEBERRY: Go ahead show it to them.

12 MR. RUSSO: Excuse me I'm handling this examination.

13 MR. DEBERRY: He ask them didn't they want to see
14 it.

15 Q. Mr. Girndt, close the gun please. Close the gun, open
16 it back partially, the hammer back all the way, and pull
17 the trigger. Show the members of the jury assuming that it
18 works, which I know it does because Ira Parnell said it
19 did. Thank you, sir.

20 Now, let me look -- Go ahead have a seat, sir.

21 Thank you. I don't think I have any other need for you to
22 have the gloves on if you like to go ahead and take those
23 off. I'm looking at this photograph 10 as you referred to
24 as the victim's hand. You have no way of knowing whether
25 or not that's blood or not, do you from the photograph?

1 Yes or no can you tell from a photograph -- And I'm not
2 asking you to guess. I'm asking you do you know that's
3 blood?

4 A. My experience would tell me that it's blood.

5 Q. Without seeing it up close and testing it?

6 A. Well, it has the two main ingredients, which is we got
7 a gunshot wound and a victim. I mean, it would be the type
8 of thing I would expect to find.

9 Q. So you're making assumptions; is that correct?

10 A. I am, but it looks like blood to me.

11 Q. You indicated that the stock part had blood on it
12 around the -- lack of a better term around where the
13 trigger area is?

14 A. On the grip, yes.

15 Q. Okay. And that would have been what you would term as
16 transfer blood; correct?

17 A. Yes, it could be transferred or smeared blood.

18 Q. Which means transferred from an individual to that
19 surface; correct?

20 A. That's one meaning of it, yeah.

21 Q. Now, isn't it true that often times when you do
22 fingerprint testing that often times that's not done
23 instantaneously with an investigation sometimes it's done
24 later on; correct?

25 A. It needs to be done within a reasonable amount of

1 time. For one -- For example, to transport the weapon for
2 fingerprinting, we don't use this type of box. This is a
3 storage box. Typically, what we do is take a cardboard --
4 square cardboard box and knots the ends of it. And then
5 lay the weapon in there -- cradle it in there so nothing
6 touches it. Then we return it to the laboratory for
7 fingerprinting. If it stays in that condition as long as
8 it's no adverse condition such as weather or gets wet or
9 anything like that, you can wait a reasonable amount of
10 time. I wouldn't wait 15 months to do it.

11 Q. But you could take prints off it -- Let me give you
12 some facts that for the purpose of -- The question I'm
13 asking you to assume are true. That this gun was placed in
14 this box and then with -- And I think you seen them but
15 with these tie down straps that was strapped into the box
16 and placed. All right. I'm going to ask you to assume that
17 that's true. Also that the gun was then stored and hasn't
18 been handled. All right. And that situation could you
19 still raise prints off that weapon?

20 A. There's no way to know. You'd have to look.

21 Q. Did you look?

22 A. Oh, that's for testing had to be done in the
23 laboratory.

24 Q. All right. And you were called here as an expert
25 witness for the defense; correct?

1 A. Yes.

2 Q. And is your role as their expert witness you -- I
3 think you said you are a consultant in the area of forensic
4 or excuse me -- crime scene investigation?

5 A. Yes.

6 Q. So you consult with the defense?

7 A. Oh, yes.

8 Q. And isn't it true that you could have requested that
9 that gun be tested for prints; isn't that true?

10 A. I didn't see the weapon until last Wednesday.

11 Q. All right. Well, let me ask this. When did you sign
12 on with the defense?

13 A. Just a week before when I was contacted.

14 Q. So you were hired last week in this case; correct?

15 A. Basically. A week before.

16 Q. And they're paying you to work for them?

17 A. The state's paying me.

18 Q. Excuse me?

19 A. The state.

20 Q. It's coming from the defense; correct?

21 A. It's coming ---

22 MR. DEBERRY: It's -- Your Honor, can we approach.

23 (A bench conference was held on the record in the
24 presence of the jury, but out of the hearing of the jury.)

25 MR. DEBERRY: I object to this line of questioning.

1 It's got nothing to do with this case where the money comes
2 from. He knew where it came from.

3 MR. RUSSO: Judge, when he said the state,
4 technically that I have a right to explain that this came
5 from the office of the defense. The witness was paid by
6 the defense.

7 THE COURT: You can get where it came from.

8 MR. RUSSO: He's got this big state meaning that in
9 this case if the State was paying him that is I have a
10 right to clear that up, judge.

11 THE COURT: Okay. Proceed. I note your objection.

12 (The bench conference is concluded in the presence
13 of the jury, but out of the hearing of the jury.)

14 Q. You were hired and are being paid as a defense
15 witness; correct?

16 A. Yes.

17 Q. Now, the blood that you allege is blood, and maybe it
18 will be, on the hand of the victim. You have no idea how
19 that got there; am I correct?

20 A. It's consistent with back spatter from a gunshot
21 wound.

22 Q. Would it also be -- All you've testified though is
23 that the hand was in the vicinity of the wound when the
24 wound occurred; correct?

25 A. Yes.

1 Q. And you have no way to tell this jury if that hand was
2 just simply up or if it was out or if it was down. Let me
3 ask you this spatter, back spatter. It doesn't go in one
4 linear straight line, does it?

5 A. No, it's usually several pieces. This particular
6 piece just ended up on his hand.

7 Q. And it's actually -- When you say it's spatter, so am
8 I correct, Mr. Girndt, that if I get a shotgun wound to my
9 neck bloods gonna spatter like this. It's gonna go out?

10 A. It comes out in a cone, yes.

11 Q. Okay. Which means some of it is going up, some of
12 it's going side ways, some of it's going down; correct?

13 A. Right.

14 Q. Some of it is going straight out possibly?

15 A. Right.

16 Q. So for the hand -- All you can tell is that the hand
17 which we see here was somewhere in the vicinity of that
18 cone of blood that came out?

19 A. That's right.

20 Q. Okay.

21 A. But this is just one of a couple things that needed to
22 be done here. You take all these things in conjunction
23 with one another. If you fingerprinted the weapon and the
24 prints were on there ---

25 MR. RUSSO: I object, Your Honor. He needs to

1 answer my question.

2 MR. DEBERRY: Well, he's got a right to explain.

3 MR. RUSSO: Excuse me, Mr. Deberry, let me finish.

4 MR. DEBERRY: I'll like for him to be able to finish
5 his answer.

6 MR. RUSSO: And he'll get to it when the judge rules
7 so.

8 I asked him about the blood on the hand and the
9 result of that. And now, his answer is going on into
10 fingerprinting and everything else. I'm asking him to
11 answer my question. We've talked about fingerprinting and
12 he made his comment that it should have been done.

13 MR. DEBERRY: May I be heard when he gets through.

14 THE COURT: Yes, sir.

15 MR. DEBERRY: Your Honor, he ask this witness a
16 question. And this witness got a right to explain his
17 answer. And if he didn't want to ask ask any questions, he
18 didn't have to ask. But he ask him a question. And I ask
19 the Court to allow this witness just to explain the answer
20 to the jury.

21 THE COURT: Is your addendum, Mr. Girndt, in
22 response directly related to the response to the question
23 that was asked of you?

24 MR. RUSSO: Which would have been the blood on the
25 hand, Your Honor, is the question.

1 MR. GIRNDT: Well, he ask me how I would associate
2 the hand in what position the hand would be in and ---

3 MR. RUSSO: Your Honor, if I may. And I don't think
4 that was the question. And I would ask if he needs for the
5 court reporter to repeat the question.

6 THE COURT: Okay. All right. Madame court
7 reporter, if you will repeat the question. Everybody's
8 confused now.

9 And if you will answer it directly. You may explain
10 it, but you can't go all off on some other tangent. I'm
11 not sure what just happened.

12 (A pause in proceedings.)

13 MR. DEBERRY: Your Honor, is he objecting to this
14 court reporter.

15 MR. RUSSO: I'm talking to the judge.

16 THE COURT: Wait a minute fellows. Now, I don't
17 want to have to lay down a rule that everything's got to be
18 directed to me. I'm not gone let this thing get out of
19 hand now.

20 What I need is the last question the Solicitor posed
21 to Mr. Girndt.

22 (A Pause in proceedings.)

23 (A bench conference was held on the record in the
24 presence of the jury, but out of the hearing of the jury.)

25 MR. RUSSO: I asked him a question about the hand

1 and he said that's right. And then he said but other
2 things needed to be done in this investigation. He went
3 into fingerprints which does not respond to my question
4 about the hand, but yet he goes back into fingerprinting
5 about it should have done. It just does not respond to the
6 question. I think you can explain your answer, but going
7 into jury evidence that was my objection.

8 MR. DEBERRY: He was taking other things in
9 consideration that's one of other things that he'd trying
10 to explain.

11 THE COURT: All right. I'm gone sustain the
12 objection to the answer and instruct the witness to respond
13 to the question and keep any additional response to the
14 questions relevant to what the question was and not get
15 into any other area unless some how ties in.

16 Go ahead.

17 Q. Now, the wound, you seen the photograph; correct?

18 A. Yes.

19 Q. And let me ask you this question. Then I see. You've
20 seen numerous photographs involving the actual injury;
21 correct?

22 A. Yes. In this particular case.

23 Q. Yes, sir. I'm sorry. This in this case. And based
24 on you experience as a crime scene investigator and viewing
25 various types of injuries, would you agree with me that

1 this injury was in close proximity to the gun which shot
2 the fatal shot?

3 A. Yes.

4 Q. And I believe according to your testimony you just on
5 your experience would say that it would have had to been
6 within three feet?

7 A. I don't think I offered that but, but I'd say that be
8 reasonable.

9 Q. But you did say that blood spatter is gonna be
10 confined within the area of probably not more than three
11 feet; correct?

12 A. The spatter itself, but you're talking about the
13 weapon itself.

14 Q. Okay. I understand, but according to your theory what
15 you call blood on that hand is a result of blood splatter?

16 A. Right.

17 Q. So that hand would have had to have been within three
18 feet of that injury; correct?

19 A. That's about arms length, yeah.

20 Q. Okay. Would you in your opinion -- And again, I'll
21 refer to the photographs which you have seen which are
22 rather voluminous of the injury. Would you agree with me
23 that that was a sever wound?

24 A. Yes.

25 Q. And I know that you can't say how much spatter there

1 would have been, but would you have -- In your opinion,
2 would you have suspected a rather large amount of spatter?

3 A. Yes.

4 Q. And I'll let you look at State's 1 just to refresh.
5 Would you -- You would anticipate a large amount of
6 spatter?

7 A. Yes, that's -- I would have and I would expect it to
8 be on the barrel of the gun.

9 Q. Okay. Now, when you looked at this gun and operated
10 this weapon, you never did it with a shell in it; did you?

11 A. No.

12 Q. And also when you examined this weapon and that was
13 upstairs in our office; correct?

14 A. Yes.

15 Q. And also during your examination of this weapon, you
16 never examined this weapon with a magnifying glass; did
17 you?

18 A. For?

19 Q. For anything. You're basic inspection of the weapon
20 was visual?

21 A. Right.

22 Q. Simply with your eyes and if you wore glasses?

23 A. Right.

24 Q. And as the expert consultant for the defense, you
25 could have requested that this that gun be tested with any

1 test you would have wanted; correct? You could have made
2 that request?

3 A. I couldn't have made that request.

4 Q. You could have advised your employer to make that
5 request?

6 A. Yes.

7 Q. You didn't do that, did you?

8 A. Yes, I did.

9 Q. Back to that blood spatter. You said you would have
10 expected it to have been on the barrel of the gun; correct?

11 A. Yes.

12 Q. Where else would you expected it to be?

13 A. It could have been on the shooter's clothing.

14 Q. Anywhere else?

15 A. The victim's clothing.

16 Q. Let me be a little more bit specific. Would you
17 expect to find a drop on the barrel, one drop or would you
18 expect to find a spattering on the barrel?

19 A. Well, depends on what the distance was.

20 Q. Well, I'm asking you what you would have expected
21 because you said you expected to find it on the barrel?

22 A. Yes. I would expect to find more than one.

23 Q. Would I be accurate in saying maybe a spattering?

24 A. Yes, once again depending on the distance the weapon
25 is. The greater the distance the more dispersed it is.

1 Q. Okay. Based on what you've viewed the photographs and
2 everything that you looked at, you feel this weapon was
3 close enough to where you would have expected, I think,
4 your testimony was finding spattering on the gun?

5 A. Right.

6 Q. Would you expect also to find spattering -- And when I
7 say spattering I'm referring to more than a drop on any
8 item right around the barrel?

9 A. Depends on where the item was for the hand for
10 example. It depend on how far down it was, may have been
11 protected up underneath the barrel for example.

12 Q. What about a hand just some where near the barrel?

13 MR. GIRNDT: Your Honor, we're getting back into the
14 other thing again.

15 MR. RUSSO: I'm asking about blood spattering, Your
16 Honor.

17 THE COURT: Make your question more specific please.
18 Restate it making it more specific.

19 MR. RUSSO: Well, I don't mean ---

20 THE COURT: I understand what you're doing, but you
21 need to pose the question to make sure you're right.

22 MR. RUSSO: I think he's answering my question,
23 judge. I don't need to hammer that. Beg the Court's
24 indulgence. Just a minute, Your Honor.

25 Q. Mr. Girndt, isn't it also possible that a wound of

1 this nature that you may not have blood spatter, back
2 spatter I guess I should say?

3 A. No, normally I would expect back spatter in this
4 particular situation because it's bare skin. Where you
5 don't expect back spatter is when you have a shot through a
6 particular thick clothing and in the clothing blocks some
7 of the back spatter. When you have a situation where you
8 have a bullet striking the skin, I think it be rare not to
9 have back spatter especially with a shotgun.

10 Q. And you would probably expect to find that also on the
11 ground; correct?

12 A. There maybe some. The problem with it is that a lot
13 of it is in the form of a mist in very small pieces of
14 blood. And they may be -- You may detect them on the grass
15 or you may not.

16 Q. So examining the ground may or may not reflect the
17 what we call back spatter; is that correct?

18 A. That may or may not. The best indicator would be the
19 weapon at this point.

20 Q. I'm gone ask you about the weapon here. And I think
21 we've established that you're not -- Your purpose isn't as
22 a firearms expert here. It's the other expertise areas
23 here you talked about. But we have talked about lay people
24 and what lay people's knowledge is with regards to this
25 type of weapon. I want to ask you your opinion. Other

1 than to discharge the weapon, the only reason to pull that
2 hammer back is to prepare to fire the gun; correct?

3 A. Unless, it was an accident.

4 Q. There's no evidence of that is there?

5 MR. DEBERRY: Your Honor, please. He asked a
6 question...

7 Q. But the actual -- The initial movement of putting your
8 thumb on that hammer and beginning to pull it back, is
9 basically to cock it; is that correct?

10 A. That's correct.

11 Q. To cock the weapon?

12 A. However, it appears it can be done unintentionally
13 also.

14 Q. So someone can unintentionally shoulder this weapon,
15 put their thumb on the hammer, and begin pulling it back.
16 That can all be unintentional?

17 A. I didn't say that. I said you may be able to operate
18 by dragging your hand across it.

19 THE COURT: While y'all going over that rather than
20 me sending the jury out for a matter. I'm gone ask counsel
21 and the witness to step right over here for just a minute.

22 (A bench conference was held in the presence of the
23 jury, but out of the hearing of the jury.)

24 THE COURT: Ladies and gentlemen of the jury, at
25 this time I need explain something to you about the record

1 here. We got a combination of tape recording and the
2 shorthand. And when the case is transcribed and you use
3 the two together because of the confusion that I had a few
4 minutes ago. I sustain an objection by the State
5 concerning the question if posed to Mr. Girndt that the
6 objection went to a response that was not responsive to the
7 particular question.

8 This time in retrospect while we're still here with
9 Mr. Girndt has dawned on me that I was incorrect in
10 sustaining that objection. I am going to overrule that
11 objection. And I'm gone allow Mr. Girndt at this time if
12 he would to go ahead and answer that question as he
13 intended to.

14 A. I believe the question dealt with the spatter on the
15 hand?

16 Q. Yes, sir.

17 A. The question was would I expect to see more than one
18 piece of spatter on the hand.

19 Q. Yes, sir.

20 A. The answer to that would be it depend on where the
21 hand was on the weapon or near the weapon. If it was on
22 the weapon, what I had start to talk about once again was
23 fingerprinting and the orientation of the fingerprints if
24 they were present on a weapon would help me to determine
25 how much spatter might be present or should be present.

1 That in conjunction with one other test that wasn't
2 conducted which is called the gunshot residue test, the
3 GSR. I don't know if anybody's testified about that, which
4 is simply a test that we take on both the subject and the
5 victim to see how much gunshot residue they may have on
6 their hands.

7 Under certain conditions it would indicate to us
8 what the position of the hands were, if they were forward
9 of the barrel when it fired or behind it when it fire; that
10 wasn't done in this case on the victim. So it's really --
11 It's a complicated question as to how much spatter you
12 would expect to see.

13 Q. Let me ask you this then ---

14 MR. DEBERRY: Wait a minute was he through?

15 Q. I think he was.

16 A. Yes.

17 Q. And, Mr. Girndt, I'm not gone ask you to go through
18 the pain of putting those gloves on again and stuff. I'll
19 just use this try use it as an example. If I'm
20 understanding you, if this was muzzling of the shotgun and
21 I think we got a left hand here. If the hand was up here,
22 you see a certain spattering or expect to see a certain
23 spattering. If the hand was down here, you'd expect
24 something different. If the hand -- I guess you're saying
25 depending on where it was; is that correct? If it was even

1 in this area?

2 A. Well, I would intend to believe it would be more the
3 way you're holding it now.

4 Q. Like this?

5 A. Yes, because what's happening the blood is coming
6 across the hand this way. As you turned it -- As you turn
7 your hand over this way to grab, it wouldn't be possible.

8 Q. But this photograph I'm looking at and I'm just
9 estimating. But this is in evidence. The jury can look at
10 it. We've got it right across here; is that correct?

11 A. Yes.

12 Q. And that general idea?

13 A. Yes, but I don't know -- have any idea where the hand
14 would have been on the barrel.

15 Q. Yes, sir, obviously. But, what you're saying though
16 is not knowing where the hand was would determine how much
17 spatter you would find?

18 A. Well, they're other different -- A lot of different
19 factors like I don't know how much ended up on the
20 clothing. I don't know how much ended up -- He was wearing
21 a black jacket here ended up on the sleeve that type of
22 thing.

23 Q. You said you would have expected to find spattering on
24 the barrel?

25 A. Some, yes.

1 Q. All right. Now, is that something that as you as the
2 crime scene investigator as you take position of this
3 weapon, you would visually inspect them am I right?

4 A. Yes, sir.

5 Q. And you would have expected to see the blood on the
6 stock where it was?

7 A. Well, I mean, if the person -- If you knew the person
8 been injured.

9 Q. Or if you just flat out saw blood there; right? You
10 seen the photograph.

11 A. I don't understand.

12 Q. And I apologize. The question may not be worded very
13 clearly. You do visual inspection of the weapon on the
14 scene?

15 A. Yes.

16 Q. And let me ask you this a better way. You said you
17 would expected to have seen blood spatter on the muzzle.
18 And I've said the muzzle and that maybe that's not
19 accurate, barrel?

20 A. Depending on the distance.

21 Q. Depending on the distance. But everything you've got
22 at your disposal, you would have expected to see that?

23 A. I think so it was fairly close.

24 Q. And that's something you would have expected to see as
25 you inspected this weapon on the scene before you actually

1 took it in your possession and processed it?

2 A. Well, give it the general over all inspection so I
3 would know what I need to do with it, yes.

4 Q. Right. But you would expect to see that?

5 A. Yes.

6 Q. Okay. So would you have to be an expert to see that?

7 A. I don't think so. It would be visual.

8 Q. It be visual. So if I told you that the forensic's
9 officer on the scene who was the first person to take hold
10 of this weapon, that he visually inspected this weapon and
11 did not see any blood on the end of the barrel, would you
12 have expected he would have seen it if it was there?

13 A. It depends. It depends on the size of the spatter.
14 How he looked, if he could interpret what he was looking
15 at. What happened to the weapon in between the time it was
16 fired and the time it was recovered. I mean, it's too many
17 variables.

18 Q. My exact point. Okay. But you also -- Also all you
19 can do is just examine the weapon as you find it. You
20 don't know what happened from the time it was fired until
21 the time you found it?

22 A. That's right.

23 Q. Your crime scene -- In your experience as an crime
24 scene investigator, you've had experiences am I correct
25 where you have had independent eye witnesses to a criminal

1 act; correct?

2 A. Yes.

3 Q. And you've interviewed those people?

4 A. I usually don't. I usually leave it to the
5 investigator.

6 Q. Somebody does?

7 A. Somebody does, yes.

8 Q. You have the benefit of that statement; correct?

9 A. Yes.

10 Q. Wouldn't you agree that an independent eyewitness to a
11 criminal act would be very helpful in determining whether
12 ---

13 MR. DEBERRY: Your Honor, please, I don't think
14 that's a proper line of questioning.

15 MR. RUSSO: Yes, it is, judge, he's an expert
16 witness.

17 THE COURT: Go ahead pose the question first before
18 I rule on it.

19 Q. In your experience as a crime scene investigator, you
20 you consider all things; correct?

21 A. I try to.

22 Q. Wouldn't you agree that an eyewitness to a crime would
23 be helpful in determining what occurred factually?

24 A. I agree that it's helpful, but it doesn't mean you
25 just drop the ball on everything else.

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1 MR. RUSSO: No further questions, Your Honor.

2 REDIRECT EXAMINATION BY MR. DEBERRY:

3 Q. Mr. Girndt, did you -- He asked you a number of times
4 would you expect to see blood on the barrel; is that right?

5 A. Yeah.

6 Q. And I asked you to look at this picture here that was
7 received from the prosecution, but I don't think a copy of
8 it has been put into evidence. I ask you to look at that
9 picture right there?

10 MR. RUSSO: May I see the picture you're showing
11 him.

12 MR. DEBERRY: Let me see if he can identify it.

13 Q. Have you seen that picture. And I'll just tell you
14 it's not in evidence ---

15 MR. DEBERRY: If, Your Honor, please at this time I
16 like to offer one of the photographs that the prosecution
17 has provided to me that is not in evidence.

18 MR. RUSSO: That's without objection.

19 (Photograph entered into evidence as Defendant's
20 Exhibit Number 2.)

21 Q. Mr. Girndt, there's been questions as to wouldn't you
22 expect -- many questions would you expect to see blood on
23 the barrel; is that correct?

24 A. Yes.

25 Q. Okay. Tell me what you saw in that picture that

1 wasn't in evidence until just that moment?

2 A. Well, there's some blood on the barrel.

3 Q. Okay. And tell me where on the barrel -- The picture
4 doesn't show the whole barrel, but as far as it shows the
5 barrel, how far do you see blood on the barrel?

6 A. Up to the forearm which is the wooden portion on the
7 bottom. And on the barrel at the receiver where the hammer
8 is.

9 Q. Okay. And how far do you see the blood on that barrel
10 where the picture stops? On the left side of the picture
11 how far do the blood go?

12 A. As far as the barrel goes.

13 Q. Okay. To the end of the picture; is that correct?

14 A. To the end of the picture, yes.

15 Q. And you've described seeing I think you said at first
16 three types of blood low velocity et cetra; right?

17 A. Yes.

18 Q. Do you see on this State's Exhibit Number -- You've
19 already testified that this type smear type, is what type
20 velocity?

21 A. Low.

22 Q. Okay. If you would tell me if you see blood on that
23 barrel, that indicates a different type of velocity?

24 A. You have a magnifying glass or I have one in my...
25 Well, it appears there may be some dripped or smeared

1 blood. I can't really discern a pattern to it. There is
2 some glare in the photograph and I couldn't really say.

3 Q. And again, did you find that there was any testing of
4 the blood on this weapon whatsoever by all of the
5 officers ---

6 MR. RUSSO: Objection, Your Honor, that's been asked
7 and answered about five times.

8 THE COURT: Sustained.

9 Q. Did you -- On redirect, it was brought out about the
10 GSR gunshot residue test on the victim?

11 A. Yes.

12 Q. Okay. Did ---

13 MR. RUSSO: Objection, Your Honor, that's been asked
14 and answered. May we approach.

15 THE COURT: He hadn't finished the question.

16 Q. On direct, did you hear questions pertaining to
17 gunshot residue test on the victim, Donald Leffingwell?

18 MR. RUSSO: Your Honor, that was in reference to
19 question which Mr. Girndt answered on cross examination.

20 THE COURT: Go ahead.

21 Q. Did you hear questions on his cross examination about
22 gunshot residue test performed on the victim, Donald
23 Leffingwell?

24 MR. RUSSO: Objection. It's a mischaracterization.
25 I asked a question and Mr. Girndt decided to go into that

1 area and that wasn't the question that was posed to him.

2 THE COURT: I guess he heard it if he answered it;
3 didn't he.

4 MR. DEBERRY: I'm just trying to get him oriented.

5 Q. You remember a minute ago when you talked about
6 gunshot residue on the victim; do you remember that?

7 A. Yes, but I wasn't asked the question.

8 Q. Okay. Do you remember the subject coming up from ---

9 A. Yes.

10 Q. --- the prosecution?

11 MR. RUSSO: Objection that's mischaracterization.

12 The prosecutor didn't bring it up. The witness brought it
13 up. I'm just trying to it straight, Your Honor.

14 MR. DEBERRY: Can I just ask him about gunshot
15 residue.

16 THE COURT: Just pose the question.

17 Q. I want to ask you about gunshot residue on the victim.
18 Did you see any evidence of any test that was done on the
19 victim rather than Tracy Daniels?

20 A. No.

21 Q. Okay. And tell us do you think that it would have
22 been prudent to have that test done and if so why in this
23 factual scenario?

24 A. It's always done unless there's some problem with the
25 body decomposition or something like that been in a

1 situation like this. We would also do a gunshot residue
2 kit on the victim. And I can't explain the results to you,
3 but the results may indicate through testing whether or not
4 the persons hands were in front of the weapon or behind the
5 weapon or if they were in this position or that position or
6 just what position they were in. So those results are
7 normally helpful to us in a doing crime scene analysis.

8 MR. DEBERRY: Thank you. That's all I have.

9 RECROSS EXAMINATION BY MR. RUSSO:

10 Q. When you were a crime scene investigator and you're
11 working a crime scene, did you take photos of areas that
12 had no evidence, had no evidentiary value?

13 A. Not that I'm aware of.

14 Q. Okay. You have an item that has blood on it. You
15 photograph that; correct?

16 A. Yes.

17 Q. Because that has evidentiary value?

18 A. Yes.

19 Q. You have an area where you have no blood nothing at
20 all looks unusual, you photograph that, too?

21 A. You take overall all photographs of the whole scene
22 and then you take individual photographs of items of
23 evidence.

24 Q. All right.

25 A. So there may be overall photographs that don't depict

1 any evidence in them, but they depict the scene.

2 Q. Right. Exactly. But then where you do have evidence
3 you go further and more closely photograph those items?

4 A. Right.

5 Q. Now, you said earlier about your gunshot residue where
6 they could tell you whether or not the position of the
7 hands would have been in front or behind the gun; correct?

8 A. Yes.

9 Q. But that's not true is it? That's inaccurate; isn't
10 it? You can get gunshot residue being behind the weapon;
11 can't you?

12 A. You can get some gunshot residue, but you would get
13 more if you were in front.

14 Q. Your answer was that the gunshot residue kit would
15 tell you whether or not the hands were in front or behind
16 the weapon?

17 A. The levels indicated could tell you that. You would
18 expect to have a lot more if you were in front of it.

19 MR. RUSSO: Nothing further, Your Honor.

20 THE COURT: You may step down. Thank you.

21 (The witness left the witness stand.)

22 THE COURT: Ladies and gentlemen, we're going to
23 take a 15 minute break at this time. Madam clerk will take
24 your lunch order for you because we gone send out for lunch
25 at the County expense to try to conserve time the best we

1 can. We will try to hold the lunch hour when we get to a
2 minimum so we can move on and hopefully we can get this
3 case to you before Sunday. Okay.

4 (The jury was excused to the jury room.)

5 (Court in recess.)

6 (Court reconvened.)

7 THE COURT: Mr. Deberry, you started off telling us.

8 MR. DEBERRY: Your Honor, please, I have been
9 furnished here by some member of the family I'm not sure if
10 it's Tracy's son or his daughter, but I got two photographs
11 here one shows Donald Leffingwell playing a guitar by
12 himself. The testimony would be that this was Tracy's
13 house. And Donald didn't come here until March of 1999 and
14 he died in December of 1999. That picture is during that
15 -- some time during that period of time. It's not on the
16 day or anywhere close to the date of the incident. It's
17 going to be offered for the sole purpose showing that these
18 people were conveniently friends and it's going to show
19 lack of any desire to kill this person.

20 MR. RUSSO: Which is not an element in the case.

21 MR. DEBERRY: And the second picture here is two of
22 them together playing the guitar. It's taken, I believe,
23 by the son. This last picture here looks like Tracy and
24 Rose Leffingwell together and the sign under there says
25 Nashville, Tennessee. They have told me before they gone

1 testify that the two of them were companions and friendly
2 and went on trips together. Another one is a regular
3 birthday card that is signed by Rose. That says Tracy I
4 love you. And it's dated 10-30-99. I would like to say
5 that I believe on cross examination that inferences made as
6 far as the prosecution indicated that they have been
7 separated or in some kind of a fight or argument or bust or
8 whatever you want to call it for an extended period of time
9 prior to this. And it was that situation as I recall it to
10 the jury. And I have now got a card that he received from
11 the defendant's mother dated 10-31-99, which is about about
12 33 days before this incident.

13 This is another card that they brought to me. And
14 they brought it to me in response to an insinuation that
15 that they Ms. Leffingwell and Tracy Daniels were on the
16 outs. So they were not together or not friendly. This is
17 another card that as they said show that something about
18 towards indicating something about having problems of
19 getting back together. The other card -- The last card is
20 another one I think is significant because it's got Rose's
21 signature on it. And it's dated October of '99 as well.

22 THE COURT: When did those come in your possession?

23 MR. DEBERRY: I saw them before today. She handed
24 them to me a few minutes ago. I could have had them. And
25 I didn't know -- I did not -- I could have anticipated,

1 yes, but I didn't know for sure how it was gone come about.
2 Tracy's gone testify that he and the defendant's mother
3 were friends and that he spent the night at her house on
4 Thursday. That question came about in this trial whoever
5 put it up. There's been evidence to the contrary.

6 THE COURT: All right. State your objection.

7 MR. DEBERRY: One further comment that in criminal
8 cases or technically provide people with things in timely
9 fashion. Things in a criminal case come up as you go. And
10 in addition to that to be technical of issues such as this
11 as docile. And this type evidence is somebody wants to put
12 up and show their relationship with deceit -- the deceases
13 family and insinuate that they are. Bringing this in
14 anyway by the timing of these things and what they would
15 have done have a recess and tear them apart, I don't see
16 it.

17 MR. RUSSO: Well, I will show it because I could
18 have prepared to have Rose Leffingwell here to testify ---

19 MR. DEBERRY: She's right here.

20 MR. RUSSO: We're not prepared to go forward on
21 that, Your Honor. Secondly -- Let me do my stuff. The
22 Merry Christmas card, I'm confident this card wasn't sent
23 the Christmas after he killed her son, which tells me this
24 was at best over a year ago which is irrelevant. There's
25 no relevance to this case of what his relationship was with

1 the victim's mother over year ago.

2 Of course, this picture there's no date on it.
3 There's nothing -- Again, Your Honor, we're talking
4 irrelevance. The relationship of that man to Rose
5 Leffingwell -- He didn't kill Rose Leffingwell. He killed
6 Donald Leffingwell. And there maybe some -- There may be
7 some relevance of the relationship with Donald Leffingwell,
8 but this stuff with his mother is irrelevant in my opinion.
9 All of this stuff can be testified to. There has been
10 testimony already, I guess, in his statement he talked
11 about how he and Donald were sitting around playing the
12 guitar. And all of this is an effort for the defense to
13 talk about motive and all this lack of and stuff. And
14 that's not a burden for the State to carry to show motive.
15 By rule, it should have been provided to us by
16 Mr. Deberry's own admission. He may have gotten it while
17 he was here, but he's already seen it beforehand and chose
18 not to provide it to us. And ---

19 MR. DEBERRY: I did not choose that.

20 MR. RUSSO: I'm saying we didn't get it for whatever
21 reason. And based on the relevance of it, Your Honor, and
22 remoteness in time or some of it. And -- And not receiving
23 it pursuant to our request. And the fact that the
24 defendant wants to testify that of all this occurred, he
25 has that right to do it.

1 THE COURT: All right. I'm gone overrule your
2 objection. I'm gone allow it in. Keeping in mind ---

3 MR. RUSSO: What about this card from Christmas over
4 a year ago.

5 THE COURT: Keeping in mind, according to what he
6 testifies to keep, you keep her here in the area on direct
7 to get her for rebuttal if he testifies different from what
8 you think it should be.

9 MR. RUSSO: She want be able to that.

10 THE COURT: Let me say this. Both of you need to
11 understand -- Mr. Deberry?

12 MR. DEBERRY: Sir, I'm sorry.

13 THE COURT: I realize how Rule 5 works. I also
14 realize that you're in the progress of a trial. The
15 evidence can come in as a result of what develops during
16 the trial. When I'm giving you the benefit of the doubt on
17 that, okay. And what I'm saying is if there's a problem
18 with any of it, y'all disagree with what's said or
19 whatever. You got her here. You need to keep her here in
20 case you need to call her up for rebuttal if it doesn't
21 agree with what y'all believe it should be. Okay.

22 MR. RUSSO: But, Your Honor, and I know you've
23 ruled, but I just wanted to -- I don't understand the
24 relevance of his relationship with Rose Leffingwell. How
25 that's relevant. Now, the picture of him and Donald

1 possibly there's relevance. I don't see the relevance over
2 here.

3 MR. DEBERRY: He's rule let's go.

4 THE COURT: It's family. It's knowing the family.

5 MR. RUSSO: Yes, sir.

6 THE COURT: I've ruled. Let's get to work come on.

7 MR. DEBERRY: What we have here is on the 10th floor
8 -- What we have is we're on the 10th floor courtroom and
9 that there's a one way glass. At one time referred to as
10 an attorney's room off the courtroom. The prosecution has
11 allowed to ask that the mother of the victim be allowed to
12 go into that room and view the trial from there for the
13 purpose of in case she wants to come back on reply.

14 The defense objects to that. She's got every right
15 be in the courtroom. There some kind of electronic
16 communication so you can hear back there. And I just think
17 it's opening a new area. I've never had anybody be in the
18 courtroom at the same time being outside of the courtroom
19 having some kind of limited hearing process and having a
20 one way vision process. It's new ground for me. I just
21 gone object to it. I never heard of it.

22 MR. RUSSO: How is it in anyway prejudice to ---

23 THE COURT: I'm just gone welcome Mr. Deberry to the
24 Twenty First Century. Objection overruled.

25 Bring them in.

1 (The jury returned to the courtroom.)

2 THE COURT: All right. Now, ladies and gentlemen,
3 we're ready to move on with the trial. After we broke, I
4 spoke with counsel. They reassured me that things are on
5 track time wise. And we've just talked casually about it
6 and I think we can complete the case by late evening to
7 avoid possibly going into the weekend. We'll just have to
8 judge that as it comes. Didn't want to cause any undue
9 concern.
10 Okay.

11 MR. DEBERRY: We call Will Daniels, Your Honor.

12 WILL DANIELS, being first
13 duly sworn, testified as follows:

14 DIRECT EXAMINATION BY MR. DEBERRY:

15 Q. State your full name for the record?

16 A. Tracy Willard Daniels, Jr.

17 Q. And you go by Will; is that right?

18 A. Yes, sir.

19 Q. And you're the third and last of the three of Tracy's
20 children; is that correct?

21 A. Yes, sir.

22 Q. Tell the jury, if you would, you live here in
23 Florence?

24 A. Yes, sir.

25 Q. And you're married?

1 A. Yes, sir.

2 Q. And you work where?

3 A. I work at Ellington Frame Works. I do frame and body
4 repair.

5 Q. And during let's say the last six years, have you been
6 in -- living in the same area here with your father and
7 been able to observe some of his activities in particular
8 his connection with the Leffingwell family?

9 A. Yes, sir.

10 Q. Would you tell us, if you would, if you had an
11 occasion to see and observe the relationship between Rose
12 Leffingwell to start with. Starting maybe five or six
13 years ago.

14 A. Once daddy had met her, I would go over to Ms. Rose's
15 house and speak to daddy and her the two of them together.
16 We celebrated certain occasions such as birthdays,
17 Christmas, Thanksgiving, and a lot of this took place at
18 Ms. Leffingwell's house.

19 Q. Okay. And how did you observe the feeling between you
20 and your family and Rose and her family?

21 A. It was great. I enjoyed being around Ms. Rose. She's
22 a very nice woman.

23 Q. And tell me how did -- Was there times when you'd be
24 aware that your father and Rose did not get along?

25 A. Yes, sir.

1 Q. And were there times when he lived there with her and
2 times when he lived back at his trailer?

3 A. Yes, sir.

4 Q. I believe he always had his trailer even though he
5 lived with her sometimes; is that right?

6 A. That's correct.

7 Q. And you're aware that they would have arguments and
8 maybe split up at times. There's no question about it?

9 A. No.

10 Q. Now, was there a time when you learned that her son
11 Donald move down here from Connecticut?

12 A. Yes, sir.

13 Q. And did you at times observed the relationship between
14 Tracy and Donald and have occasions to maybe be at his
15 house when Donald would be there?

16 A. Yes, sir.

17 Q. And how would you describe the relationship between
18 how you observed your father and Donald?

19 A. It was a good friend relationship. I would just pop
20 in out of the blue some evenings when I had a chance.
21 Well, daddy had called me and ask me to stop by and listen
22 to him play the guitar because he was an excellent guitar
23 player.

24 Q. Did both of them like to play the guitar?

25 A. Yes, sir.

1 Q. Did you see them enjoying that past time together?

2 A. Yes, sir.

3 Q. Did you have an occasion to take some pictures on
4 occasion?

5 A. Yes, sir.

6 Q. And are these two of the pictures that you -- that you
7 took right here?

8 A. Yes, sir, that's it.

9 MR. DEBERRY: We would like to move to introduce
10 these over your...

11 MR. RUSSO: Subject to objection.

12 THE COURT: Subject to objection.

13 (Photographs entered into evidence as Defendant's
14 Exhibit Numbers 3 and 4.)

15 Q. If you could just recall any other instances where you
16 observed Tracy maybe doing something for Donald or Donald
17 doing something for Tracy that would help us understand how
18 they got along?

19 A. There was an occasion at the place where I work. We
20 had some plumbing problems and I called daddy. And him and
21 Donald came out and repaired the problem. And they worked
22 fine together. If was me and my father working together.

23 Q. Okay. If you would answer any questions -- Do you
24 know any reason or did you ever see anything that would
25 give you an indication that your father would want to harm

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1 Donald, Rose's son?

2 A. . None.

3 MR. DEBERRY: Thank you.

4 MR. RUSSO: Thank you, Mr. Daniels, we don't have
5 any questions.

6 MR. DEBERRY: Now, we call Tracy Daniels to the
7 stand.

8 THE COURT: Come around and be sworn please.

9 TRACY WILLARD DANIELS, being first duly
10 sworn, testifies as follows:

11 DIRECT EXAMINATION BY MR. DEBERRY:

12 Q. State your full name for the record?

13 A. Tracy Willard Daniels.

14 Q. Tracy ---

15 MR. RUSSO: Excuse me, Your Honor, may we approach
16 on a matter.

17 (A bench conference was held in the presence of the
18 jury, but out of the hearing of the jury.)

19 THE COURT: Ladies and gentlemen, I over looked -- I
20 apologize for it. If y'all will step back and give me
21 about three minutes, please.

22 (The jury was excused to the jury room.)

23 THE COURT: Mr. Daniels, I need your undivided
24 attention just a minute please. You been called -- keep
25 your seat. You been called to be an witness in your own

1 behalf. I now advise you you have a right to invoke the
2 protections given to you by the Fifth Amendment to the
3 Constitution of the United States and the similar
4 counterpart provisions in the constitution in the State of
5 South Carolina. The Fifth Amendment to the Constitution
6 of the United States provides in part that no person shall
7 be compelled in any criminal case to be a witness against
8 himself.

9 This provision of constitutional law means that you
10 cannot be compelled or required to testify in this case.
11 It is a right and a privilege which the law extends to you.
12 It is a personal privilege and no one can waive this right
13 except you personally. You have a right not to testify,
14 but you also have a right to testify. I will grant you the
15 right to consult with your attorney before you make a final
16 decision in this regard. If you elect not to testify and
17 your failure to testify cannot be used by the State as an
18 inference of guilt, and your failure to testify cannot be
19 considered by the jury in it's deliberations.

20 If you elect to testify and waive the privilege
21 extended to you by the Fifth Amendment of the Constitution
22 of the United States, I advise you that you will then
23 assume the role of a witness in this case. And you will
24 then waive or give up your constitutional privilege against
25 self-incrimination. This means that if you voluntarily

1 take the witness stand and testify, you will then subject
2 yourself to the same rules that govern other witnesses and
3 you may be examined in cross examine -- or on any relevant
4 issue in the case. And you may be impeached at the same
5 extent as any other witness all of which are subject
6 however to the rules of procedure and evidence.

7 I further advise you that if you elect to take the
8 witness stand and testify, this decision on your part must
9 be made freely, voluntarily, and intelligently and with
10 knowledge of protections given to you by the Fifth
11 Amendment to the Constitution of the United States and with
12 knowledge of the consequences of your election to testify.
13 I ask you now do you wish to consult with your attorney at
14 this time about what I have just gone over with you?

15 DEFENDANT DANIELS: No, Your Honor.

16 THE COURT: Have you discussed with him whether you
17 should not or should not testify?

18 DEFENDANT DANIELS: No, Your Honor.

19 THE COURT: You have not discussed it with him at
20 all?

21 DEFENDANT DANIELS: Well, other than just being
22 called up. I didn't question whether I was gone testify or
23 not.

24 THE COURT: Do you understand what I just went over
25 with you?

1 DEFENDANT DANIELS: Maybe, I am confused. Yes, I
2 understand what you said, but I don't understand this
3 question either.

4 THE COURT: All right. Understand what I went over
5 with you about your constitutional rights just a minute
6 ago?

7 DEFENDANT DANIELS: Yes, sir, Your Honor.

8 THE COURT: You have any questions of me about what
9 I just went over with you?

10 DEFENDANT DANIELS: No, Your Honor.

11 THE COURT: All right. Before you make a final
12 decision as to whether you want to testify or not testify,
13 would you like to speak with your attorney?

14 DEFENDANT DANIELS: Yes, I'll speak with him.

15 THE COURT: All right. Mr. Deberry.

16 MR. RUSSO: John, while you're doing that. We got
17 another card here that Mr. Deberry indicates he intends to
18 use. I would have the same objection as to the others.

19 THE COURT: Noted.

20 MR. DEBERRY: I appreciate your accordance and time
21 to talk with him again. I have spoken with him briefly in
22 recess here as well numerous times before. I think he just
23 didn't understand exactly the fact you were questioning him
24 about it, but he says that he does understand it. He has
25 an absolute right to remain silent. And that you would

1 instruct the jury that that should not in anyway be used
2 against him. He has indicated to me today just a moment
3 ago as well as many times in the past that he fully intends
4 to take the stand and testify in his own behalf.

5 THE COURT: Mr. Daniels, any question of the Court
6 at this time?

7 DEFENDANT DANIELS: No, Your Honor.

8 THE COURT: And you do wish to testify or you do not
9 wish to testify?

10 DEFENDANT DANIELS: I do wish to testify.

11 THE COURT: All right. Counsel, let me speak to
12 y'all just a minute.

13 MR. RUSSO: To make it clear, Your Honor, that also
14 he would be subject to questions by the State and would
15 have to answer those questions.

16 THE COURT: Right.

17 You understand that?

18 DEFENDANT DANIELS: Yes, sir, Your Honor.

19 THE COURT: Bring them in.

20 (The jury returned to the courtroom.)

21 THE COURT: All right. Mr. Deberry, you may
22 proceed.

23 MR. DEBERRY: May it please the court.

24 DIRECT EXAMINATION CONTINUED BY MR. DEBERRY:

25 Q. Tracy, if you would start over if you would and tell

1 the jury what your full name is?

2 A. Tracy Willard Daniels.

3 Q. Tracy, tell us how long have you lived in this area in
4 the Florence area?

5 A. Around 30 years.

6 Q. And what -- You were married to the mother of the
7 three children that have all testified either yesterday or
8 today on your behalf; is that correct?

9 A. That's correct.

10 Q. And I believe you been divorced about 20 years or so?

11 A. That's correct.

12 Q. And tell us what is your occupation?

13 A. I'm a plumber. I have a plumbing business.

14 Q. And how long have you been in the plumbing business?

15 A. Around 25 years.

16 Q. How far did you go in school?

17 A. I finished high school and went to Tech for a while.

18 Q. Okay. And you live out on Callie Young Road; is that
19 correct?

20 A. That's correct.

21 Q. In a trailer?

22 A. That's correct.

23 Q. And how long have you lived out there?

24 A. I believe about 10 years somewhere around there.

25 Q. Okay. And about six years ago did you have an

1 occasion to meet and start a relationship with a person
2 name Rose Leffingwell?

3 A. Yes.

4 Q. Tell the jury about that?

5 A. I was doing some work through the rug shop and I went
6 around to send some fixtures back that they had to take out
7 to replace vinyl and just by going around to do the work we
8 had talked awhile and then later on we came to know one
9 another real well.

10 Q. Okay. And then if you would, tell us how that
11 relationship developed from that point?

12 A. Well, it wasn't long after then to where I was
13 spending most of my time with her. And, of course, I still
14 had the residence out there on Callie Young Road where I
15 live now.

16 Q. Okay. And how would you describe the early years of
17 your relationship with Donald's mother Rose?

18 A. It was a very good relationship.

19 Q. And what type things did y'all enjoy doing together
20 give us some example?

21 A. Well, we went on vacations like to the mountains. It
22 was a lot of different things that we just -- we went
23 together and shared. And but I have to think awhile to
24 recall all those.

25 Q. I understand. Now, Tracy, tell us did you have a

1 problem in your life?

2 A. Yes, I did.

3 Q. And tell the jury what that was?

4 A. It was drinking too much.

5 Q. And how long did you have the problem with drinking
6 too much?

7 A. Around 30 years.

8 Q. And do you still have that problem?

9 A. No, I do not.

10 Q. And since that time since this thing happened have you
11 had anything to drink whatsoever?

12 A. No, sir.

13 Q. And, Tracy, tell us what -- How did Rose come into
14 play and role did she play, if any, about your drinking
15 problem?

16 A. Well, she wouldn't allow it at her house and she was
17 really good for me to be there. I was all the time I was
18 spending was good time to be there because normally I was
19 drinking when I would go back to my house. If I stayed
20 with her, I was -- I wasn't doing the habit in her house.

21 Q. And could you go around her. Would she allow you to
22 even go around her after you been drinking?

23 A. No.

24 Q. Okay. Now, Tracy, at times, did you and Rose have
25 your differences and have disputes where you would move

1 back to your place things of that nature?

2 A. Yes.

3 Q. It was not a continuous loving and fine relationship.
4 It had problems; is that right?

5 A. Yes, it did.

6 Q. And how often would you say break up or go back. Can
7 you just describe the length of time for those periods?

8 A. Well, when I first meet her, I pretty much stayed
9 there all the time. But as later on there was some
10 problems that come up and I might go back home. I was
11 going home to my residence. I kind of felt like her house
12 was my home. It varies. It would just be sometimes a
13 short time and then sometimes it might be extended period
14 of time I stayed with her.

15 Q. Okay. How did you feel about her?

16 A. Pardon me.

17 Q. How did you feel towards her? What was your -- And
18 how do you feel about her today?

19 A. I loved her then and I love her now.

20 Q. And at some point in time, did you get to meet her
21 son?

22 A. Yes.

23 Q. And that was Donald; is that right?

24 A. That's right.

25 Q. Tell the jury about that?

1 A. He had lived in Connecticut to begin with. And then
2 he came -- I believe he came down in somewhere around March
3 in '99. After I meet him, he wanted to do some work.
4 Well, I call it day labor and he helped now and then. And
5 then it got to be pretty regular.

6 Q. Okay. Tell us about when he first came here, did he
7 come in here and live temporarily with his mother?

8 A. That's correct.

9 Q. And tell the jury what if any thing you did as far as
10 assisting him in that regard when he did get his own
11 apartment?

12 A. Well, I believe after he moved here it was just a
13 couple of weeks before he find an apartment. And whenever
14 he got ready to move, he asked me to go around and help him
15 move. So I took my truck and I went around to help him
16 move.

17 Q. Okay. And you gave him work. You gave him day labor?

18 A. That's correct.

19 Q. And, Tracy, did he know people in the area as far as
20 how to get things done for his -- various things that he
21 would need like getting car work done or things like that.
22 Was he familiar with the people in places to go in this
23 area?

24 A. No, I don't -- He didn't -- I think at one time before
25 years ago he lived here and he might had some contact for

1 something like, but normally whenever he needed a car part
2 or anything that I could help him with, I was glad to help
3 him with it.

4 Q. Okay. And as a matter of fact, when he got here, did
5 he eventually -- Did he get a car and if you would tell how
6 me went about getting his own car?

7 A. Yes, I had a friend of mine that had a old car and he
8 said he wanted to get rid of it. And I had told Donald
9 about it, but it really wasn't in good shape. He was
10 wanting I believe to start with \$200, but it was not a good
11 car. But I ask my friend since you want it moved and I
12 didn't want to use the word junk. But it was gone take
13 extended work on it. And he wanted it because he had one
14 before that particular model.

15 Q. Okay. Did you help him get that car?

16 A. Yes, sir.

17 Q. And did you provide the money to get that car?

18 A. Yes.

19 Q. And did eventually his mother give you the money back?

20 A. Yes.

21 Q. After that, did you help him as far as getting him to
22 places where ---

23 MR. RUSSO: I object to the leading, Your Honor.

24 THE COURT: Keep in mind that you're on direct now.

25 Q. After that, Tracy, what did you do, if anything, about

1 assisting him with getting the car running?

2 A. I had a friend that had a body shop. I mean, it's
3 Keith's Auto Parts. Anyway, he does mechanical work. And
4 it needed extensive work like struts and whatever. It was
5 gone be expensive. But when he got through with it, it was
6 gone be a nice car to have started with junk. And I
7 carried him down there and introduced him to him where he
8 could get him to do the work on it.

9 Q. And did you when -- Tell us how often -- How often
10 would he come over to your house on any time? First of
11 all, during the week he would come over for work only; is
12 that right or different?

13 A. Well, yes. Now, sometimes he had come over during the
14 week that I -- mostly on the weekends the only time because
15 sometimes if we played guitar all together during the week,
16 I didn't want any drinking going on, of course, going
17 around anything. But if anybody had drank -- If it's
18 going to be any drinking, it's going to be done on the
19 weekend.

20 Q. Okay. And he would come to your house on the
21 weekends?

22 A. That's correct.

23 Q. And what would y'all do customarily? Would y'all
24 drink together or what would you do on the weekends?

25 A. Well, it wasn't a set thing, but most of the time it

1 was. And we would mainly play guitar that was -- We just
2 get together and play guitar and he was a very good
3 guitarist. I was learning -- Actually learning from him
4 and he seem to be learning from me. It was two different
5 styles. And it was just a good set up to get with him and
6 we could play music.

7 Q. Okay. And other than working together and seeing each
8 other on the weekends and playing guitar and things like
9 that? How would you describe your relationship with Donald
10 and Donald's with you? How would you describe the two of
11 y'all?

12 A. It was a good relationship.

13 Q. How did you feel about it?

14 A. I felt like he was a dear friend.

15 Q. Okay. Tracy, did you have any reason whatsoever in
16 your mind to want to hurt your friend?

17 A. No, I didn't.

18 Q. Did you want to hurt him?

19 A. No.

20 Q. Did you intend to hurt him?

21 A. No.

22 Q. Is there any question in your mind?

23 A. It's no question.

24 Q. Okay. Tell us as we get up to that particular day
25 there. You -- When is the first time on this Saturday on

1 December the 4th 1999 -- When is the first time -- tell the
2 jury you remember seeing Donald?

3 A. I can't be exact on the time, but it was somewhere
4 probably one, two o'clock.

5 Q. Okay. And what happened in that -- Where were you
6 when you saw him?

7 A. Well, he came out to my house. And where was I?

8 Q. Y'all, were. I just want to know where you -- He came
9 to your house and it's a Saturday afternoon?

10 A. That's correct.

11 Q. Tell us if you would just what you started doing then
12 and what the two of y'all did?

13 A. Well, he had ask me if I would go down to a junk yard
14 not too far down the road to get a part for his car. It
15 was a door handle. And before hand, we had gotten some
16 seats, interior seats part. And he knew it was down there,
17 but I told him I thought I had missed it. I thought was
18 not down there any longer, but he said it was. So I just
19 thought he probably still saw it down there and I didn't.
20 But anyway we went down and come to find out that the car
21 ---

22 Q. How did you go down there?

23 A. Drove my -- He rode with me in my truck.

24 Q. And this was a mission to do something for him to get
25 a part for his car; is that right?

1 A. That's correct.

2 Q. You drove him down there. Take it up from there?

3 A. Well, after we got down there, we found out that the
4 car was no longer there. And then we went right back to my
5 house. And he said, Well I want to go somewhere else and
6 get one because he didn't want to have to open the door all
7 that weekend reaching out the window. But anyway he went
8 by himself to another place not too far from my house, but
9 I ask him let's wait 'til Monday because I didn't even know
10 anybody that might have that particular part that he
11 wanted ---

12 Q. I'm sorry go ahead?

13 A. Excuse me.

14 Q. And you stayed there at the house while he went for
15 that part?

16 A. That's correct.

17 Q. Okay. And did he in fact -- Was he successful in
18 finding the part? Did he come back to your house with it?

19 A. Yes, he did.

20 Q. Okay. Tell the jury about getting the part back on
21 the car and what you saw there and what went on?

22 A. Well, he didn't carry any tools in his car, but I mean
23 he might have had a screw driver. But I believe about all
24 he needed to put it on with was a screw driver. So we got
25 the screw driver out and I went out to the car and he put

1 it on which it was a simply chore. It wasn't no problem.

2 Q. Now, were y'all having a drink?

3 A. Yes.

4 Q. And the both of you were drinking or just one or what?

5 A. The both of us.

6 Q. And do you know approximately what time you started
7 drinking?

8 A. I can't recall.

9 Q. And tell me what went on there after the trip to the
10 junk yard and then he left and came back. Tell us what you
11 were doing?

12 A. Well, we were just -- We were playing music to begin
13 with.

14 Q. That's fine just tell us what you were doing? Go
15 ahead.

16 A. And then as time went on I told him, I said I'm gone
17 cook some steaks because we need to eat.

18 Q. Why did you think you needed to eat? Was there any
19 particular reason other than maybe being -- Why did you say
20 that?

21 A. Well, drinking I think someone need to eat and I had
22 not eat that day and, too, I wanted him to eat.

23 Q. Why?

24 A. I wanted him to eat, too. So he agreed to that and we
25 went out and I cleaned the grill. And after the steaks had

1 thawed out, I put them on the grill.

2 Q. What part did he play in that, if any?

3 A. He had cleaned the grill rack. I normally clean it
4 good before we start cooking.

5 Q. Okay. All right. Was there anything unusual in this
6 stage where we are right now between you and Donald
7 whatsoever? Anything unusual?

8 A. Well, he seemed to be very tired and sluggish, ill.
9 He just -- I've seen him that way before, but he did seem
10 to be tired.

11 Q. And he was having a drink and you were having a drink;
12 right?

13 A. That's correct.

14 Q. Now, tell us what happened after that? How much
15 guitar playing? How long did this go on?

16 A. Well, we were playing -- Normally, he would bring his
17 guitar. That particular day he didn't have the guitar with
18 him. And I'd played some and he would play some. Probably
19 a couple of hours.

20 Q. And at any time did you stop drinking or were you
21 drinking throughout that period of time?

22 A. Well, I was drinking throughout that period of time.
23 Well, you meant just a period of time that...

24 Q. Did you have too much to drink?

25 A. Yes, I did.

1 Q. Is there any question in your mind about it?

2 A. No, question in my mind.

3 Q. And, Tracy, based on the 30 years of the problem that
4 you described when you would have to much to drink, were
5 you aware that you would do things that would be -- You did
6 not use good judgment when you had too much to drink?

7 A. That's correct.

8 Q. And on this day after you had too much too drink, did
9 Donald have too much to drink?

10 A. I thought he did. I don't know. I don't know what
11 too much is for anybody, but I thought he did.

12 Q. All right. Tracy, has been an indication in here
13 there was evidence of marijuana? Have you ever used any
14 illegal -- Have you used any drugs marijuana or any kind of
15 illegal drugs?

16 A. No.

17 Q. And would Donald have used any drugs in front of you?

18 A. Had he ever used ---

19 Q. Would he ever use any drugs in front of you?

20 A. No.

21 Q. And do you know why he wouldn't ever use drugs in
22 front of you?

23 A. Well, I think he would have felt like it would have
24 been just like doing it at his mother's house; that wasn't
25 the house.

1 Q. Okay. So you said that you realize you had too much
2 to drink and he appeared to have too much to drink; is that
3 correct?

4 A. That's correct.

5 Q. And was there any mention about his driving that
6 caused you to make some comment or show some concern?

7 A. Well, I told him I thought he shouldn't get on the
8 road because he had too much to drink.

9 Q. Do you think you were able to get on the road and have
10 too much -- and drive after the amount that you had to
11 drink?

12 A. No, I shouldn't have been on the road.

13 Q. Okay. Now, Tracy, at some point in time when y'all --
14 Were you inside your house when you were playing the guitar
15 or where you inside and out?

16 A. Well, at times it was concrete pad out there. We
17 bring the guitar out there and then it might back inside
18 the house.

19 Q. Did you at some point in time when you were inside the
20 house after you both -- You were aware you had too much to
21 drink. Did the subject of getting the shotgun out come up?

22 A. Yes.

23 Q. Tell the jury about that?

24 A. Well, he ---

25 Q. First of all, were you in any shape whatsoever to get

1 a shotgun out at this time?

2 A. No.

3 Q. How do you feel about the fact that you got that
4 shotgun out after you had been drinking this amount?

5 A. I think it's the biggest mistake I ever made in my
6 life.

7 Q. And you tell us what -- How did it come up and why did
8 the shotgun come out?

9 A. Well, it's a lot of deer the runs around out there and
10 he had seen them out there before. He asked about let's go
11 deer hunting later that evening.

12 Q. Okay.

13 A. And I had brought the gun in the living room and put
14 some shells up on the top of the entertainment center
15 planning maybe to go, but there again, I said well, I just
16 didn't -- I didn't know for sure whether or not we were
17 going. I just brought it in there.

18 Q. And looking back at it now, how would you describe
19 that action on your part of bringing that gun out while you
20 were in that condition?

21 A. I think it was very foolish.

22 Q. And how can you characterize your conduct in anyway as
23 far as being safe or reckless in anyway like that?

24 A. It was reckless.

25 Q. And, Tracy, had it not been for you getting that

1 shotgun out, do you think is there anyway -- any other way
2 in the world that Donald would have gotten shot, gotten
3 hurt in anyway that night?

4 A. No, I meant him no harm at all.

5 Q. Okay. You go forward and tell me you got the shotgun
6 out. You brought it out yourself; is that right?

7 A. That's right.

8 Q. And the shells were there available?

9 A. That's right.

10 Q. Okay. Now, what happened from that point?

11 A. Well, I had the steaks ready. And he had sit down in
12 the recliner and I said well the steaks are ready, are you
13 coming over to eat. And I thought he was just coming over
14 and whenever he came over, he had picked up a steak knife
15 and I grabbed his wrist and just hit his hand down on the
16 table. And I went out the door.

17 Q. Okay. Before that, had you seen him act in anyway
18 aggressive or anyway whatsoever before that -- before you
19 ask him to come sit down and eat?

20 A. No, that took me by surprise. By total surprise, I
21 wasn't looking for that. I thought he was ---

22 Q. Whose steaks were those?

23 A. Well, they were -- You mean mine or his or were we
24 gone share? There were two plates.

25 Q. Who bought them?

- 1 A. I did.
- 2 Q. And where did they come from?
- 3 A. Out of the freezer.
- 4 Q. And you were gone -- You prepared the two steaks one
- 5 for you and one for your guest; is that right?
- 6 A. I think that's right and they might have been -- There
- 7 might have been three because sometimes I might even cook
- 8 an extra steak sometimes.
- 9 Q. What would you do with that? Would y'all share it or
- 10 you eat two or he eat however...
- 11 A. Well, I just do that at times though where it be there
- 12 if somebody wanted to eat some.
- 13 Q. I understand. So up until the point were you asked
- 14 him to sit down, had you prepared the table?
- 15 A. That's correct.
- 16 Q. And how many plates were there?
- 17 A. There were two plates.
- 18 Q. And you had invited him to come over as planned to sit
- 19 down and eat; is that right?
- 20 A. That's right.
- 21 Q. And up until that exact moment had you observed
- 22 anything hostile or in anyway any thing abnormal about his
- 23 being aggressive towards you or anything in anyway?
- 24 A. No.
- 25 Q. Okay. After he did this, you said you went out of the

1 house?

2 A. Yeah, I went out. I just didn't want any more
3 confrontation. I didn't -- I decided the best thing if I
4 stayed out. I didn't want to go back in. And I just
5 thought if I waited long enough, maybe that he would just
6 leave.

7 Q. Okay. Now, Tracy, on this night shortly after and
8 then later on into recorded and transcribed statements, on
9 this particular night you gave statements reflecting back
10 as to what happened just like you're doing now; is that
11 correct?

12 A. That's correct.

13 Q. And tell me if you've had difficulty in that regard
14 and if you have just go ahead and explain it?

15 A. You mean in what regard?

16 Q. All right. You've given statements just like you
17 given now. You've given prior statements; is that correct?

18 A. That's correct.

19 Q. All right. And have you had any difficulty and if so
20 describe it as far as remembering what happened and going
21 through this horrible night?

22 A. Well, I had times to where I drink too much and maybe
23 not remember what had taken place. I just might not
24 remember.

25 Q. Okay. Tell me if you had any difficulty and if you

1 had to talk with people or had any problem about your
2 memory on this night?

3 A. On which night now?

4 Q. On night that this incident happened?

5 A. Well, I still didn't quite follow that question.

6 Q. Tracy, after this thing happened, did you remember
7 talking with me at a bond hearing?

8 A. Yes.

9 Q. Okay. And do you remember relating the event -- You
10 remember when it was told in here as to some of the events
11 that happened that night?

12 A. Yes.

13 Q. Okay. And did you remember those events and talked to
14 me about them in a bond hearing?

15 A. Yes.

16 Q. Okay. And were there some things, important things
17 that you didn't remember?

18 A. Yes.

19 Q. What was that?

20 A. Well, it was a lot of spaces during the day that
21 happened. And I just couldn't place back. So I didn't --
22 I couldn't figure what might have happened. I didn't know
23 the whole story.

24 Q. All right. And what did you do about trying to figure
25 out about the accuracy and the whole story? What if

1 anything, did you do to try to help yourself remember?

2 A. Well, I decided I just try to put the events back
3 together to my satisfaction. And I just concentrated and
4 try to go from beginning to end.

5 Q. Do you remember at what time making some comment that
6 you had shot the gun from the stoop or the top of your
7 steps to one of the officers?

8 A. No.

9 MR. RUSSO: Your Honor, at this point, obviously
10 this is critical testimony. I would ask that there not be
11 any leading. Let the witness testify.

12 THE COURT: Y'all come up here just a minute.

13 (A bench conference was held in the presence of the
14 jury, but out of the hearing of the jury.)

15 MR. DEBERRY: Your Honor, I think it would be just
16 fine to stop here.

17 THE COURT: All right. Lunch is here and rather
18 than to let it get cold. Counsel is in agreement that we
19 will stop right here. If y'all will step back to your
20 room, we'll bring it in.

21 (The jury was excused to the jury room for lunch.)

22 MR. RUSSO: Your Honor, if I may, this is out an
23 abundance of precaution and it maybe a little more radical.
24 But at this stage Mr. Daniels is now on the stand. He's
25 under oath. He's a witness that is currently undergoing

1 testimony. I would ask that he be placed -- And custody
2 may be a hard word. At least temporarily that he be
3 sequestered from all family members, from Mr. Deberry. I
4 mean, he's a witness on the stand now. He can't talk with
5 anybody about this case.

6 THE COURT: I think -- Mr. Daniels, I don't know
7 what kind of lunch arrangements they have, but it's all
8 right for you to eat lunch, but don't you discuss this case
9 with anyone, okay.

10 DEFENDANT DANIELS: Yes, sir.

11 MR. DEBERRY: If, Your Honor, please can I be heard.
12 I take position in this -- We're still on direct and
13 obviously I could talk with him as much as I wanted to
14 before he got up here. We now have a break now. And I
15 don't see how it can jeopardize the State's case in anyway
16 if I continue to talk with him. There's been no cross
17 examination.

18 THE COURT: It's not the point of cross. I'm not
19 sure I can block Mr. Deberry.

20 MR. RUSSO: Right. However, Your Honor, Mr. Deberry
21 had the benefit of a previous statement that was made. And
22 now, this witness has testified to some extent. And I
23 don't think it would be proper because he could go back.
24 And he's testified to some inaccuracies, changing things.
25 It's a weird situation, Your Honor. If we didn't maybe

1 have a prior statement that he's been testifying about and
2 has made some inconsistencies with it, it might be
3 different. I just don't understand -- He's a witness on
4 the stand. And he's half way -- Well, I don't know how
5 half. I don't know what length he is into his testimony,
6 but there's a lot of stuff that he's already said that I'm
7 going to question him about. And I think Mr. Deberry's
8 aware of that as well. And I just want to avoid any
9 improprieties in that matter. You know, we always want to
10 air on the side ---

11 THE COURT: I trust Mr. Deberry not to do something
12 like that.

13 MR. DEBERRY: I want to make sure that I understand.

14 THE COURT: In other words, it would be improper for
15 you to discuss with him to try to correct something that he
16 may have said that you didn't agree with.

17 MR. DEBERRY: As far as future questions that I...

18 (Court recessed for lunch.)

19 (Court reconvened.)

20 THE COURT: You ready?

21 (The jury returned to the courtroom.)

22 THE COURT: All right. Mr. Deberry.

23 MR. DEBERRY: Thank you, Your Honor.

24 Q. Tracy, I believe we were point where you and Donald
25 were at your trailer. And it was shortly after you had

1 asked him to come sit down where the two steaks or the two
2 or three steaks were prepared there; is that correct?

3 A. That's correct.

4 Q. And you said that he had made some abrupt movement
5 something uncharacteristic of him. Tell us if you would
6 start right there. What did he do? We'll back up just
7 little bit and then go forward?

8 A. Well, I thought he was gone sit down and eat. And he
9 picked up a knife and then I grabbed him by his arm and hit
10 it down on the table and the knife fell out and I went to
11 the outside.

12 Q. Okay. And then later on did you tell us what happened
13 after that?

14 A. I came back around to the trailer. We were in the
15 house and out of the house. It's just hard to remember
16 exactly what happened.

17 Q. Okay. Just tell us the best you can remember?

18 A. It's just a spot in there I don't know exactly. I
19 want to tell you the truth, of course, but I can't quite
20 put it together right there.

21 Q. If you need to take your time, take your time. Tell
22 us what you remember happened next?

23 A. Well, I had come back around and gone back in the
24 house. He come in and there was an argument which we
25 started arguing.

1 Q. Okay.

2 A. And I think we just started back drinking again. And
3 then before long wound up out in the yard with the gun. He
4 had gone out to his car as I remembered and just opened the
5 trunk of the car and shut it. I didn't know whether what
6 he done, of course, but I thought he was gone leave. But
7 he started coming back to the house and I carried the gun
8 out and it was open. And I handed it to him question
9 about ---

10 Q. Tracy, tell me something. You said that you carried
11 the gun out you heard Mary McDougal testify; right? You
12 heard her testify yesterday?

13 A. Yes.

14 Q. Okay. And you just said that you carried the gun out
15 and it was open; right?

16 A. Yes.

17 Q. What do you mean by open?

18 A. Well, it's got a lever on that you break it open with.

19 Q. Like you saw the man doing in here today?

20 A. Yeah.

21 Q. Okay. And it was open like that. So you could see
22 the shell if there was one in there?

23 A. That's right.

24 Q. Okay. Tell -- Why did you walk out in the yard where
25 Donald was with the gun open? What was your thinking if

1 you know?

2 A. Well, there was a fired shell in the barrel.

3 Q. Do you know how a fired shell got in there?

4 A. No.

5 Q. Do you have any recollection of the first shot?

6 A. No, I don't.

7 Q. Okay. So you say there was a fired shell in there and
8 you walked with it open; is that right?

9 A. That's right.

10 Q. And what did you do -- Tell the jury what did you do
11 with that shotgun when you walked out there with it open?

12 A. I handed it to him. I knew there was a -- It wouldn't
13 eject out of the chamber. And he said, Well let me hold it
14 I can get it out.

15 Q. So you gave it to him?

16 A. That's correct. And after several tries, he got it to
17 eject and it had fell to the ground. And I didn't know he
18 had another shell. He put the shell back in it. And then
19 handed it to me and said see if that will eject. And I
20 moved to one side to try to eject it and he pulled the gun.
21 He snatched it.

22 Q. Okay. Now, you were at the place where you said that
23 he tried to eject the gun several times. Let's back up
24 right to that point. Tell me what he was doing by trying
25 to eject it?

1 A. He was just breaking it open and close to try to get
2 it come out.

3 Q. And did it eventually eject?

4 A. Yes.

5 Q. And then what happened?

6 A. It just fell to the ground.

7 Q. All right. Then what did he do then?

8 A. He picked the shell up.

9 Q. Okay.

10 A. And then he put another shell back in it.

11 Q. And then what happened?

12 A. He handed it back to me and ask me to try ---

13 Q. Let's go a little slower right here. You say -- I
14 want to get it perfectly clear as best we can. Okay. It
15 fell to the ground and eventually ejected and fell to the
16 ground; is that what you said?

17 A. That's correct.

18 Q. And you said he leaned over and picked it back up?

19 A. That's right.

20 Q. All right. Is the gun still broken or is it closed,
21 if you remember?

22 A. It's still open.

23 Q. Still open. All right. Then what happened?

24 A. He'd put another shell in.

25 Q. And then what did he do. The gun still open or is it

1 closed?

2 A. As well as I remember it was closed and he handed it
3 back to me.

4 Q. All right. And what did he say to you?

5 A. He just ask me see if that shell would eject.

6 Q. All right. At this time were y'all arguing?

7 A. No.

8 Q. At this time were you mad at him?

9 A. No, I was not.

10 Q. And did you -- Did he do anything to indicate that he
11 was mad at you?

12 A. At that moment?

13 Q. Right.

14 A. No.

15 Q. If he had been like that, would you have handed him
16 the gun?

17 A. Pardon me. I didn't understand.

18 Q. If y'all had been arguing and he was threatening you,
19 would you have handed him the shotgun?

20 A. No, I would not.

21 Q. Okay. And you handed it to him. There wasn't any
22 argument going on at that time; is that right?

23 A. That's correct.

24 Q. And he handed it back to you?

25 A. That's right.

1 Q. All right. And your recollection when he handed it
2 back to you was again -- I'm sorry. But it was open or
3 closed?

4 A. It was closed.

5 Q. You sure?

6 A. As well as I remember it was closed.

7 Q. Okay. And he told you to do something. Go ahead from
8 there tell me what he was...

9 A. Well, he said see if that shell will eject. And it
10 just was one that had not been fired and wanted to see
11 whether or not it was -- that the loaded shell would eject.

12 Q. All right. And did you -- try to do what he asked you
13 to do?

14 A. Well, I started to and I just had it to one side. And
15 then I just -- The gun when it fired was aimed at him. I
16 just believe he grabbed it.

17 Q. You believe he grabbed it?

18 A. I do.

19 Q. And what happened instantly after the gun -- after the
20 gun fired what happened? And you say it was aimed at him
21 there's no question about that; right?

22 A. That's right.

23 Q. And it hit there's no question?

24 A. No question.

25 Q. And did you see the direction later and learned the

1 direction after the bullet went through him. The direction
2 that they went to Mary your neighbor's trailer?

3 A. Yes. At that time I didn't realize.

4 Q. I didn't mean at that time. But later on did you
5 learn where the shells then went through him ended up?

6 A. Didn't I realize where they ended up?

7 Q. Did you later see that trailer there. Mary's trailer
8 with the shot in it?

9 A. Oh, yeah.

10 Q. Okay. Now, Tracy, tells us what happened the instant
11 that you said that he -- You think that he grabbed the gun;
12 is that right?

13 A. That's right.

14 Q. All right. And where was your right hand at that
15 time?

16 A. It was just above the hammer I call it.

17 Q. Hold your hand up a little bit. It was what?

18 A. Like where you cock it.

19 Q. Yeah.

20 A. It was just above it.

21 Q. And show us if you would there's been talk about an
22 injury to your hand. Point on your hand, okay?

23 A. It's right in here.

24 Q. All right. Now, Tracy, did you have that gun in your
25 hand with the intent to fire it at that time?

1 A. No, I did not.

2 Q. Did you at any time intend to shoot Donald
3 Leffingwell?

4 MR. RUSSO: Your Honor, I object.

5 A. No, I didn't.

6 MR. RUSSO: Number one, it's just self-serving.
7 Number two, he's asked and answered it about three times
8 already.

9 THE COURT: Go ahead.

10 Q. Tracy, did you when you had that gun in your hand --
11 tell the jury what did it do the instant that it fired?
12 What happened to the gun?

13 A. It kicked out of my hand and wound up on the ground.

14 Q. All right. And after that did you -- At first after
15 at some point in time, did you actually know how you had
16 hurt your hand?

17 A. No, I did not.

18 Q. Okay. And you heard the pathologist I believe was the
19 first one to testify in here about recall. And this thing
20 I think he said use the word bite or something like that.
21 You heard that?

22 A. I heard that.

23 Q. Okay. Tell us how do you think at this instance right
24 now as you're talking, how do you think that your hand got
25 cut there?

1 A. Well, the gun whenever it kicked back to cock had torn
2 through right through there.

3 Q. That's what you think at this time?

4 A. Yes.

5 Q. At earlier times, did you think that some other that
6 you had hurt your hand some other way?

7 A. Yes.

8 Q. Are you unsure of it?

9 A. Well, I thought I might have been cut with a knife.

10 Q. Okay. And right now how do you feel that you got that
11 cut in the webbing of your hand?

12 A. From the hammer of that shotgun.

13 Q. Okay. Now, Tracy, after that shot, did you know that
14 it was bad? You knew what happened?

15 A. Pardon me.

16 Q. After the shot went off, did you know it had hit him?

17 A. Yes, I did.

18 Q. And did you know it had hit him fatally. Did you know
19 that it killed him?

20 A. I heard one question and then I heard part of another.

21 Q. I'm sorry. Did you know what happened as a result of
22 that shot that was fired to Donald?

23 A. At that moment?

24 Q. Yeah.

25 A. No.

1 Q. Okay. And at some point, did you know that it killed
2 him?

3 A. Yes, I did.

4 Q. Okay. And tell us what did you do then? What do you
5 recall doing right after this thing happened?

6 A. I picked the gun up and ejected a shell out and went
7 back in the house. I just went right back in the house
8 with the gun. And I went and called my sister. I was in
9 such shock I didn't feel like I could ---

10 Q. You called your sister and did you talk to her?

11 A. Yes, I did.

12 Q. And what did you tell her?

13 A. I told her that Donald had been shot.

14 Q. And that it just happened that instant; is that
15 correct?

16 A. That's correct.

17 Q. Okay. And you waited there in the house until the
18 authorities got there; is that right?

19 A. That's right.

20 Q. And after that, you heard it. You cooperated with
21 them and you gave a statement; correct?

22 A. Correct.

23 Q. There's things in that statement, Tracy, that are
24 different from what you're saying here today; is that
25 right?

1 A. That's correct.

2 Q. There's things in that statement that are different
3 than the way you thought and may have described them a year
4 ago half way between now and back at the time of this
5 thing; is that correct?

6 A. That's correct.

7 Q. Why is that?

8 A. Well, I just couldn't remember it. I just couldn't --
9 At the time when I gave that statement, I just couldn't
10 remember exactly how everything took place.

11 Q. Why would you tell -- Did you understand the
12 importance of the statement that you were giving to the
13 police?

14 A. Yes, I did.

15 Q. Did you understand that it was being recorded?

16 A. Yes, I did.

17 Q. And why would you have told them that you were as far
18 away as 12 to 15 feet like maybe you and I are apart right
19 now when he was shot?

20 A. I just can't answer that. I don't know why I was
21 talking feet, but I had no idea at the time. If I been ---

22 Q. Why, Tracy -- You don't know why you told them that;
23 is that right?

24 A. That's correct.

25 Q. And do you know -- Do you know why you told them that

1 there was only one shot fired?

2 A. Because I only recall one.

3 Q. Okay. And are you sure today as you talk that there
4 were two shots fired?

5 A. I know that now, yeah.

6 Q. Okay. And are you sure today that that was totally
7 wrong about the 12 to 15 feet?

8 A. I'm sure of that.

9 Q. Okay. And if you told Officer Fuleihan that you were
10 standing on the steps up on the platform, today do you know
11 whether or not you were standing on that platform when that
12 shot was fired or not?

13 A. No, I was not.

14 Q. Okay. Now, Tracy, there's been some talk about when
15 the last time that you and Rose Leffingwell were together
16 or that y'all were getting along fine back together from
17 maybe a break up or something like that. I ask you did
18 this evening with Donald have anything to do with you and
19 Rose being in an argument or anything?

20 A. No.

21 Q. And as matter of fact, when is the last time that you
22 had -- The last evening that you spent with Rose
23 Leffingwell before this incident happened this weekend?

24 A. It was the Thursday before this happened.

25 Q. Two days before this Saturday; is that correct?

1 A. That's correct.

2 Q. And the -- I hand you these. This was in December of
3 '99. And I hand you a card here and I ask you to look at
4 that and tell me if you can identify that card as something
5 you brought to me from your house?

6 A. It's a happy birthday card from 10-31-99.

7 Q. Okay. And that was a birthday card from who to who?

8 A. It was from from Rose to me.

9 Q. And what does it -- Does she say anything to you in
10 that card?

11 A. Yeah, above it says Tracy I love you. And it's signed
12 Darling Rose X O.

13 Q. Okay. And is there another card here pretty much the
14 same thing and when is that one dated?

15 A. It's 10-30-99.

16 Q. Is that from Rose, too?

17 A. That's correct.

18 Q. Tracy, look at these pictures and if you would tell us
19 this Defendant's Exhibit 3 and 4. And tell us what those
20 -- what do those show?

21 A. It's one picture of Donald playing the guitar. And
22 the other one was Donald and myself. Well, in one he's
23 playing the guitar by himself. And then in the other one
24 I'm playing my guitar and he's playing his.

25 Q. Okay. And this card here I ask if you -- And I hand

1 you this card and tell the jury if you would where did that
2 card come from?

3 A. This is from Donald.

4 Q. From Donald to who?

5 A. To me.

6 Q. And what's the occasion there do you know?

7 A. This was my birthday.

8 Q. And when is your birthday?

9 A. October -- Well, Halloween. It's [REDACTED].

10 Q. How did you feel about Donald? How was your feelings
11 -- Tell us -- Describe how did you feel about him an as a
12 person?

13 A. Well, he was a dear friend.

14 MR. RUSSO: Your Honor, I want to pose an objection
15 at this point, Your Honor. Those grounds already been
16 covered. They talked about this early on in the testimony
17 about his feelings for the victim and he's just going back
18 over it again. Asked and answered.

19 Q. Go ahead. I'm gone go into some other things here?

20 MR. RUSSO: Excuse me. Let the judge rule on the
21 objection.

22 THE COURT: Go ahead. I don't want ^{hear} ~~here~~ it again.

23 Q. Go ahead.

24 A. I do anything for him because he -- I thought so much
25 of Rose and I thought so much of him. I would just done

1 anything that I could possibly do for him.

2 Q. And tell me how do you feel about the fact that he's
3 gone?

4 A. It's just a disaster.

5 Q. And, Tracy, did you on that occasion on that night
6 have any any plans in your mind whatsoever to hurt Donald
7 --

8 MR. RUSSO: Objection, Your Honor, asked and
9 answered.

10 MR. DEBERRY: Your Honor, I object to him objecting
11 to this line -- This is ---

12 MR. RUSSO: It's a proper objection.

13 THE COURT: I'm going to overrule that. The jury
14 may have heard it or may not. I don't remember. I'll
15 overrule it go ahead.

16 A. I need to hear the question again now.

17 Q. I don't know if I can even remember the question. Did
18 you -- I just like for you if you could share with us
19 exactly what -- just what do you feel about looking back
20 right now as to how you reflect back about your friend
21 dying and dying at your hands?

22 THE COURT: That wasn't the question. The question
23 was did he have intent to harm him, I believe.

24 MR. DEBERRY: Okay.

25 Q. Tracy, looking at it from right now and from the time

1 that you -- after this happened, tell us about your
2 intention in regards to what happened? What was your
3 intent towards Donald?

4 A. Well, it was just started out a good day and wanted it
5 to just stay that way. There was no intent whatsoever. It
6 just turned out a diaster in a moment.

7 MR. DEBERRY: Okay. Answer any questions if you
8 would the prosecution may have.

9 MR. RUSSO: Before I begin, if Mr. Deberrÿ would
10 join me, I just want to ask a question with regards to my
11 here.

12 (A bench conference was held in the presence of the
13 jury, but out of the hearing of the jury.)

14 MR. DEBERRY: I'd move to introduce these over his
15 objection.

16 MR. RUSSO: Pursuant to my objection.

17 THE COURT: They're in subject to objection.

18 (Greeting cards entered into evidence as Defendant's
19 Exhibit Numbers 5, 6, 7, and 8.)

20 THE COURT: All right. Solicitor.

21 MR. RUSSO: All right. Thank you, Your Honor.

22 CROSS EXAMINATION BY MR. RUSSO:

23 Q. Mr. Daniels, by your own admission am I correct, that
24 back when this occurred I think according to your testimony
25 you had what you considered a drinking problem?

1 A. That's correct.

2 Q. And I think you heard testimony from other family
3 members that indicated you had a drinking problem; correct?

4 A. That's correct.

5 Q. And then you testified during your direct examination
6 that you limited your drinking to only on weekends, but you
7 didn't drink during the week; isn't that what you told the
8 jury?

9 A. Well, I don't know if I said I tried to do that. That
10 was my rule because when I worked I did not drink.

11 Q. And you work at least five days a week, if not more?

12 A. Well, I had the opportunity to work that many days a
13 week. I'm divorced.

14 Q. All right. So that would be according to your
15 testimony you didn't really have a drinking problem, you
16 just drank on weekends; correct?

17 A. Well, I drank on weekends, but at times I might would
18 have a drink during the week, too.

19 Q. Now, do you recall giving a statement to officer or
20 Deputy Scott Brown after you were taken into handcuffs by
21 the police?

22 A. No, sir, I don't know him.

23 Q. Okay. You recall giving a statement to a police
24 officer in your yard shortly after the police arrived and
25 put you in handcuffs?

1 A. You mean -- I remember a statement.

2 Q. Okay. But I'm asking about -- The police arrived;
3 correct?

4 A. That's correct.

5 Q. They had you handcuffed and you were on the ground;
6 correct?

7 A. That's correct.

8 Q. And then a couple of officers helped you off the
9 ground?

10 A. That's correct.

11 Q. Do you remember that?

12 A. That's right.

13 Q. And one of the officers read you what we call Miranda
14 rights; do you remember that?

15 A. I remember at the detention center.

16 Q. Okay. But my question is do you remember them that
17 night when you were in the yard?

18 A. Well, I only thought I had done that only one time,
19 but I do recall. I recall.

20 Q. You do recall?

21 A. Now, I do.

22 Q. Do you recall though, do you recall in the yard when
23 you were handcuffed and the officers had you in your yard?

24 A. Yes, I do.

25 Q. Do recall them reading you your Miranda; rights?

1 A. Oh, yes, sir.

2 Q. All right. Do you recall telling -- And I know you
3 don't know his name. But you recall telling the officer he
4 asked you what happened?

5 A. That's correct.

6 Q. You told him that Donald came to your house?

7 A. Yes.

8 Q. You didn't give a time. You just told him Donald
9 came to your house? Do you recall that?

10 A. That's right.

11 Q. And you stated that the two of you begin to argue;
12 right?

13 A. That's right.

14 Q. Then you told the officer that the victim threatened
15 to hurt you. Do you recall telling the officer that?

16 A. Yes.

17 Q. You also recall telling the officer that at that time
18 you shoved Donald out of your residence and shot him?

19 A. No, I don't recall that.

20 Q. Now, you don't recall it or you saying you didn't say
21 it?

22 A. Well, I'm saying that some of what I said at that time
23 I could not remember later.

24 Q. But let me just get you to answer my question on this.
25 According to the officer you told him, you shoved Donald

1 out of your house and you shot him. You don't remember
2 saying that or do you deny saying that?

3 A. I don't remember.

4 Q. All right. Do you recall when you told the officer
5 that you were standing on your doorstep when you shot him?

6 A. No, I don't remember that.

7 Q. Let me turn to a statement that you seem to have a
8 better recollection of. You recall when you were taken to
9 Effingham speaking with Investigator Phil Hanna?

10 A. Yeah, I remember that's the statement I mentioned
11 awhile ago and you told me not to mention it.

12 Q. Yes, sir. Okay. Now, you recall Investigator Hanna
13 reading you your Miranda rights?

14 A. Yes.

15 Q. And let me just for your clarification and
16 understanding, Mr. Daniels. My questions right now are
17 gonna focus on that statement at Effingham with
18 Investigator Hanna, okay. That's gonna be the statement
19 we're talking about here?

20 A. Yes, sir.

21 Q. All right. Now, would you agree with me that the
22 evidence in this case is shown that Donald was shot and
23 killed somewhere around six minutes to six on December the
24 4th? Would you agree that it was around that time?

25 A. Well, I been -- I'm little confused at what time it

1 was, but I just could not...

2 Q. All right. You been in this trial all week long. You
3 been sitting here; right? You've heard testimony?

4 A. Right.

5 Q. Would you have any reason to dispute the witnesses who
6 testified that 911 was called approximately four or five
7 minutes to six with regards to this shooting?

8 A. Yeah, I recall that, yes.

9 Q. All right. So would it be fair to say then that the
10 shooting occurred within a few minutes of that time?

11 A. Of what time?

12 Q. Of the time that 911 was called?

13 A. Yeah, that would be.

14 Q. That would be accurate?

15 A. Yes, sir.

16 Q. Okay. And I'm not trying to trick you, okay. I'm not
17 trying to nail you down on a specific exact time. I'm just
18 trying to get a time frame. Would you agree that Donald
19 was killed somewhere around six o'clock that evening
20 somewhere in that vicinity within 10 or 15 minutes either
21 way?

22 A. I don't believe I could pinpoint within 10 or 15
23 minutes.

24 Q. Okay. Do you recall what time you gave your statement
25 to Investigator Hanna out at the Effingham Detention

1 Center?

2 A. I believe it was sometime around midnight.

3 Q. Okay. If I told you that your statement reflects that
4 it was about 19 minutes after 12, would you disagree with
5 that? Nineteen minutes after midnight?

6 A. No, I wouldn't.

7 Q. Would you agree with that?

8 A. You ask me would I agree with or not agree with?

9 Q. Would you agree with that? Would you is what I'm
10 asking?

11 A. Am I agreeing with you? I don't understand the
12 question.

13 Q. You gave a taped statement you recall that?

14 A. Right.

15 Q. And the tape is in evidence. It can speak for itself,
16 but I'm just for purposes of trying to get a time frame
17 here. If the tape indicated that that interview began at
18 19 minutes after midnight, would you agree with that?

19 A. I would say that that would be about 19 minutes in
20 what I said be about midnight.

21 Q. Okay. All right. So this would have been
22 approximately a little over six hours after the shooting;
23 right?

24 A. That's right.

25 Q. And you gave Investigator Hanna a statement and you

1 were willing to cooperate with him and tell him what
2 happened; correct?

3 A. Correct.

4 Q. At that time you told him that when Donald first
5 called you it was probably around five o'clock?

6 A. I don't recall exactly what time he first called.

7 Q. But now this statement was taken about six hours after
8 this incident occurred and here we are now some 18 months
9 after it. And you're saying now that your memory's better
10 now than it was back then?

11 A. Well, yes, because I had a problem for a long time
12 even trying to get it back together. I wanted it for the
13 truth, but I was having a hard time with that.

14 Q. Okay. But earlier you said you tried to put the
15 events back to your satisfaction?

16 A. Yes, I wanted the satisfaction of the truth.

17 Q. Now, you're telling the jury that he came over around
18 one o'clock; isn't that correct?

19 A. Now, what are we talking about one o'clock come in.

20 Q. Earlier you told in your testimony, you told
21 Mr. Deberry that now you believe that Donald first came
22 over to your house that day around one o'clock. You
23 remember that?

24 A. Yes.

25 Q. I mean, do you remember. I don't want to put words in

1 your mouth?

2 A. From the testimony I just gave you, I said one
3 o'clock?

4 Q. I'm asking you do you remember?

5 A. Well, I guess I believe I did say somewhere around one
6 o'clock.

7 Q. Okay. And you testified and this is today. And this
8 is when you say everything back where it ought to be; that
9 you and he went to look for a part for his car?

10 A. That's correct.

11 Q. And then in your earlier testimony or let me - excuse
12 me - You heard Mr. Ray Jones who testified; is that
13 correct?

14 A. That's correct.

15 Q. And much as yourself, Mr. Jones -- You heard his
16 testimony that he couldn't say exactly when you were there,
17 but he thought it was somewhere around four, 4:30. Do you
18 recall that testimony?

19 A. I don't recall what he said about what time it was.

20 Q. What Mr. Jones said earlier today you don't recall
21 that?

22 A. Why should I. Why would have I specifically
23 remembered that?

24 Q. You're on trial here for murder, Mr. Daniels. I would
25 expect you to remember what was being said. And you can

1 just simply answer yes or no. Do you remember Mr. Jones
2 saying that he thought you and Donald came there somewhere
3 around four or 4:30, but he couldn't be sure?

4 A. Yeah, I believe that's right.

5 Q. You have any reason to doubt Mr. Jones?

6 A. No.

7 Q. You stated after you got a part, you went back to your
8 house; correct?

9 A. That's correct.

10 Q. And then you and Donald or I'm sorry. I think you
11 might have said Donald then put the car part on his car
12 which wasn't a big dial?

13 A. That's correct.

14 Q. Then I think you testified that you and Donald then
15 began to drink and play guitar?

16 A. No, he wanted to go somewhere else to get a part.

17 Q. Okay. So you didn't get the part at Ray Jones'?

18 A. No.

19 Q. Okay. You came back to your house; correct?

20 A. That's correct.

21 Q. And then Donald went on his own to get a part?

22 A. That's correct.

23 Q. Then you said that Donald came back and he put the
24 part on?

25 A. I didn't put the part on he did.

1 Q. No, sir, Donald put the part on?

2 A. Right.

3 Q. Right. Now, you said that after he put the part on,
4 you testified that you told Donald that you were going to
5 fix some steaks because y'all needed to eat; isn't that
6 right?

7 A. That's correct.

8 Q. And I think your testimony was that you pulled some
9 steaks out of the freezer to cook that night?

10 A. I don't believe I said I pulled them out, but they
11 were in the freezer.

12 Q. Okay. Did you take them out of the freezer?

13 A. Probably earlier that day I had taken them out.

14 Q. Well, I need to know. Did you take them out earlier
15 you say probably. I want to know?

16 A. Well, I can't remember what time of day I took them
17 out.

18 Q. You said that -- Now, did you and Donald play the
19 guitar before you cooked the steaks or after you cooked the
20 steaks?

21 A. Well, we played some before and probably cook.

22 Q. So the guitar playing though would have happened after
23 he put the car part on his car; right?

24 A. That's right.

25 Q. And before you cooked?

1 A. Yeah.

2 Q. Okay. I think you said in your earlier testimony that
3 if you played guitar a couple of hours is that what you
4 recall?

5 A. Well, during the whole day, I guess we played guitar a
6 couple hours.

7 Q. So would you agree with me that during the course of
8 the whole day all total you played the guitar a couple of
9 hours with Donald?

10 A. Yes.

11 Q. But the first time y'all played was after he had put
12 the part on his car; isn't that correct?

13 A. Well, I don't really remember.

14 Q. But, Mr. Daniels, you said that you have got
15 everything now to your satisfaction and you remembered
16 everything. And now you're telling me you don't remember.
17 What is it?

18 A. Well, I'm a little -- I'm just confused right this
19 moment.

20 Q. And I don't mean to do that. And if I'm contributing
21 to it, I apologize. I'm gone take it slow and I want you
22 to listen to my question. The first time you and Donald
23 played guitar that day according to your testimony in
24 reference to Mr. Deberry's questions was after Donald put
25 the part on his car. Now, is that correct or not?

1 A. As well as I remember that's correct.

2 Q. Do you know how long you played that first time before
3 you started cooking?

4 A. No, I didn't time it.

5 Q. Okay. And you recall what time you started cooking?

6 A. Really I do not.

7 Q. You stated that you cooked two maybe three steaks and
8 put plates out on the table; correct?

9 A. That's right.

10 Q. Now, you played some more guitar that evening was that
11 before you ate -- And I don't want to confuse you. After
12 he put the part on the car, y'all played some guitar;
13 correct?

14 A. That's right.

15 Q. Then you stopped playing guitar while you cooked. I'm
16 assuming; is that right?

17 A. Well, the guitar was out there by the grill at times
18 and we played some in the house.

19 Q. Okay. At any time did you stop playing guitar while
20 you cooked?

21 A. I just don't recall.

22 Q. All right. Well, let me ask you this. No question
23 you cooked some steaks; right?

24 A. That's right.

25 Q. And no question you put some plates out on the table

1 in preparation to eat?

2 A. Right.

3 Q. You went to eat and you called Donald to the table;
4 right?

5 A. That's right.

6 Q. And you said that he came to the table and picked up a
7 steak knife?

8 A. That's correct.

9 Q. Did he assault you with it?

10 A. He lunged at my throat with it, yes.

11 Q. Okay. But you didn't tell Mr. Deberry that when he
12 asked you, did you?

13 A. Well, I -- Yes, I did tell him.

14 Q. You told the members of this jury panel that he lunged
15 at your throat with a steak knife earlier?

16 A. Yes, I did. Maybe not to those very words.

17 Q. He didn't cut you though, did he?

18 A. Well, at that time I didn't know. I just didn't know.

19 Q. Well, tell me today. He didn't cut you with that
20 steak knife, did he?

21 A. No.

22 Q. Six hours after this occurred, you told Investigator
23 Hanna that he cut you with something, but you didn't know
24 what it was; isn't that correct?

25 A. That's correct.

1 Q. That wasn't true, was it?

2 A. Well, I know what it was now, but I didn't know what
3 it was then that I had been cut.

4 Q. Okay. But Donald -- Even now Donald never cut you
5 period; did he?

6 A. No, he didn't.

7 Q. You told Investigator Hanna -- He asked you how much
8 y'all had to drink. And you told him then you don't really
9 know what was left in the bottle, but you tried to control
10 your drinking. You recall telling him that?

11 A. I don't know if I told him. I probably did tell him I
12 tried to control my drinking.

13 Q. Did you tell Investigator Hanna you had too much to
14 drink that night? You didn't, did you?

15 A. Well, I can't remember everything I told him.

16 Q. Well, were you here in the courtroom when the tape was
17 played of your statement?

18 A. Yeah.

19 Q. You remember what day that was?

20 A. I been through so many proceedings I don't know what
21 day it was.

22 Q. Now, in your statement to Investigator Hanna, you went
23 into some fairly detail descriptions of what happened that
24 night. And I'm gone go through them and tell me if you
25 recall these. You said that after you finished grilling

1 out that Donald asked you about a shotgun you had bought
2 recently. You recall that?

3 A. Who ask me about it? You said Donald?

4 Q. Okay. When you were giving a statement to
5 Investigator Hanna?

6 A. Yeah, I was -- I didn't hear the question.

7 Q. I'm gone repeat it. You stated that after y'all
8 grilled out and ate, Donald had asked you about a shotgun
9 you had bought recently. You recall telling him that?

10 A. Well, I'm sound like I'm getting confused again which
11 I will be because I now that I've remembered it's not going
12 to be what I told him because ---

13 Q. I understand that. But the truth is, Mr. Daniels,
14 even today you don't remember, do you?

15 A. Well, I do remember. I know if I said that I had
16 bought a shotgun recently, I did not buy a shotgun
17 recently.

18 Q. You told him that you went and got it off the gun rack
19 in your bedroom and handed it to Donald. Do you remember
20 telling him that?

21 A. Well, not a new gun.

22 Q. Any gun. You remember?

23 A. Yeah, I remember telling him that.

24 Q. Then you said that you went to the bathroom and when
25 you came out of the bathroom, that Donald had taken his dog

1 and the gun and had gone outside. You remember telling
2 Investigator Hanna that?

3 A. I might have told him that.

4 Q. You remember a dog?

5 A. Yeah, I remember the dog, yeah.

6 Q. You said that when he came back in that he set the
7 shotgun down and that there was a shell in the gun that you
8 knew had been fired; is that true?

9 A. Well, there again this was confused. I know at one
10 time there was a shell in the gun but...

11 Q. Did Donald ever take that shotgun and go outside while
12 you stayed inside?

13 A. Well, I don't really know. It was just some things
14 that I can't recall there.

15 Q. You went into some pretty intense detail in this
16 statement, Mr. Daniels. And I'm not trying to be a
17 difficult person, but I'm looking for the truth of what you
18 know. Can I assume that everything in this statement is a
19 lie?

20 A. No, but some of it is not the truth.

21 Q. You said he brought the shotgun back in and you
22 unbridged it to see if the shell was still in it. You
23 remember that?

24 A. Then again unbridged. I thought I knew the word open
25 and closed on a gun. And I thought one was -- one and one

1 was the other.

2 Q. When you said that I unbridged to look in it what you
3 meant that you opened it. Is that what you meant when you
4 say unbridged? Is that what you mean is unbridged?

5 A. Right. That's what I would have...

6 Q. Okay. You remember telling Investigator Hanna that
7 the shell -- The empty shell that had been in the shotgun
8 was gone and that you noticed that the ~~sell~~^{shell} on the
9 entertainment center was now missing and was now inside the
10 gun. You recall telling him that?

11 A. No, I don't.

12 Q. You recall telling Investigator Hanna that you felt
13 that Donald had been drinking too much so you told him he
14 needed to spend the night with you because he didn't need
15 to be driving? Do you recall telling him that?

16 A. I probably would have told him that.

17 Q. I'm not asking you -- I'm asking you what you did?

18 A. I just don't -- I don't remember.

19 Q. Mr. Daniels, do you remember the events that occurred
20 on December the 4th of 1999?

21 A. Yes.

22 Q. Do you remember all of them?

23 A. All of them?

24 Q. Do you remember the details surrounding Donald
25 Leffingwell being killed?

1 A. Not all of them, no.

2 Q. Do you recall telling the investigator that you and
3 Donald were outside by the carport and that he cut you with
4 something out by the carport?

5 A. No, I don't recall that.

6 Q. Do you recall telling him that after that happened,
7 you ran back inside the house and Donald was outside the
8 house?

9 A. I was very confused with that statement. It's hard
10 for me now to remember all that. And I know after seeing
11 it and reading it that there was a lot in there that I just
12 didn't remember.

13 Q. Mr. Daniels, I'm gonna ask you please, sir, I want you
14 to show me how this gun fired. So I'm gone ask you if you
15 would to put those gloves on. Now, I want you if you would
16 back up a little. Let's say that this is your doorway here
17 and the steps coming down, okay. And you say you came out
18 of the house with the gun open; is that correct?

19 A. Yes.

20 Q. All right. If you would start from over here. For
21 example say this is your front door. I'm gone get you to
22 start from right there. And I'm gone get you to hold this
23 and come out of the house as you came out of the house.
24 And let's just say that I'm Donald show me what you did?

25 A. I walked up. There's a shell ---

1 Q. You telling him you couldn't get the shell out. Then
2 what did you do?

3 A. Well ---

4 Q. Just speak up if you would.

5 A. Okay. He said I can get it out.

6 Q. And then -- So what did you do?

7 A. I just handed it to him.

8 Q. All right. And he took it like this?

9 A. That's right.

10 Q. And then he fooled with it; is that correct?

11 A. Right.

12 Q. Did he get the shell out?

13 A. Yeah.

14 Q. All right. And you said I think he dropped it; is
15 that right?

16 A. The shell?

17 Q. Yes, sir.

18 A. Right.

19 Q. He bent over to picked it up?

20 A. Right.

21 Q. Okay. Then what did he do?

22 A. Well, he put another shell back in the gun.

23 Q. All right. Then what did he do? He closed it or
24 leave it open?

25 A. I can't really recall. He put another shell back in

1 it and handed it to me.

2 Q. All right. And what did you do?

3 A. I -- Well, he said -- Well, It was closed I think.

4 Q. He handed it to you?

5 A. I think that's correct.

6 Q. All right. He handed it back to you and he said go
7 ahead and try that or whatever?

8 A. Well, he said see if that shell will eject because the
9 other one had a problem.

10 Q. Fine. What did you do at that point?

11 A. I just started opening it.

12 Q. And what did he do?

13 A. And he reached and grabbed it.

14 Q. Where did he grab it?

15 A. I don't know. I just felt the tug and it was ---

16 Q. While he grabbed it and tugged it?

17 A. And then my hand was up here.

18 Q. What I want you to do now, please. I've got -- I'm
19 Donald I got the gun. I put a shell in and I closed it;
20 that's correct? And he says -- He hands it back to you and
21 he says here see -- something to the effect see if that
22 will work or see if it will eject; is that right? I don't
23 know the exact words, but something to that effect;
24 correct?

25 A. Right.

1 Q. And I want you to -- Now, I know you can't tell what
2 Donald did, but you know what you did. I want exactly what
3 you were doing with the gun. And how you were holding it
4 and how you were doing it?

5 COURT REPORTER: I can't hear him at all.

6 MR. RUSSO: He said he went to open it like that.

7 A. Donald opened it when I pushed the lever.

8 Q. All right.

9 A. And there he grabbed it and stepped back like that and
10 it's kinda like a tug a war just like this.

11 Q. Like I may have taken it and done like this?

12 A. Right.

13 Q. Have a seat if you would please. Why was he tugging
14 it out of your hands, Mr. Daniels, if you know?

15 A. What's that?

16 Q. You know why he was tugging it out of your hand?

17 A. Do I know why?

18 Q. Yes, sir.

19 A. No, I don't.

20 Q. Okay. Mr. Daniels, you've -- This case happened back
21 in December of 1999. And from that date to getting ready
22 for court, you've been doing a lot of work in your case; is
23 that correct along with your attorney and your family?

24 A. That's correct.

25 Q. You recall seeing a copy of the transcript of your

1 statement of your tape recorded statement?

2 A. Yes.

3 Q. Okay. And you've gone over that with your lawyer;
4 correct? You've reviewed this?

5 A. Yes, I have.

6 Q. How many times have you reviewed this? You've gone
7 over it in fairly detail, haven't you?

8 A. Well, no, I didn't. I didn't want it in my house. I
9 let my daughter keep it away from the biggest part of this
10 year.

11 Q. But you did review this transcript?

12 A. Well, I didn't.

13 Q. You didn't?

14 A. I didn't -- Wait a minute I wasn't finished.

15 Q. I'm sorry. I apologize.

16 A. I looked at it only a couple of times, but I did not
17 try to memorize anything.

18 Q. But you did -- And I'm asking I don't know. Did you
19 read it and look at it in detail or did you just glance
20 over it?

21 A. I'm gone say again. I avoided it. I didn't want to
22 look at it. I couldn't look at it.

23 Q. Mr. Daniels, how do you -- How would you define
24 reckless?

25 A. Reckless?

1 Q. Yes, sir.

2 A. Well, not using good judgment.

3 Q. Earlier when you described you said that my conduct
4 was reckless. Are those your words or those the words you
5 heard from someone else?

6 A. I'd heard the word before.

7 Q. I'm talking about in this context. Is that typically
8 how you describe your conduct?

9 A. Again, I didn't hear you. This noise behind me it's
10 kind of irritating me.

11 Q. I apologize. And always, please, if you don't hear my
12 question, don't feel bad about asking. I'll ask it again.
13 You described earlier in your testimony you said that your
14 conduct was reckless. And you were at that time referring
15 to getting the gun. Now, were those your words or words
16 that you heard someone else describing as far as your
17 conduct?

18 A. Well, I think that's what Mr. Deberry said that word.

19 Q. Now, you said in your earlier testimony and I think
20 you even said it here. When Mr. Deberry asked you to
21 describe what happened, you said I believe that Donald
22 grabbed the gun, but I'm not sure. You remember testifying
23 that way?

24 A. That's correct. But I wasn't sure exactly what
25 happened. I know that's what I want to know, but that's --

1 I want to know the truth.

2 Q. Okay. But what I'm asking though and is it true that
3 you can't tell the jury for sure that Donald grabbed the
4 gun. That's just the way you believe it happened or how
5 you would hoped it happened; is that correct?

6 A. That's what I believe.

7 Q. Okay. But do you believe it because you know it or
8 you just don't understand how else it could have happened?

9 A. I can't understand -- That's the only way I think that
10 cut -- Well, actually it was just hole in my hand I think
11 that's where it come from. I can't see no other way.

12 Q. Well, I mean -- And I don't have any reason to
13 disagree that that cut on your hand came from the recoil of
14 the gun. My question is you don't -- You can't say for
15 certain that Donald grabbed that gun; is that correct?

16 A. I said that's what I believe.

17 Q. Okay. But I'm asking you is that belief based on your
18 knowledge that you know he did it or that you just believe
19 it did because you can't believe anything else?

20 A. That's just all that's in my mind that I have that I
21 could believe. That's the only...

22 Q. After he was killed, you said you went back in the
23 house; correct?

24 A. That's correct.

25 Q. You didn't call 911, did you?

1 A. No, sir.

2 Q. You didn't know if he was dead or alive at that time,
3 did you?

4 A. No.

5 Q. You didn't call an ambulance, did you?

6 A. No.

7 Q. Now, this -- What you're telling the jury today is you
8 said that you got the gun down because you and Donald might
9 do some deer hunting and that was your reason for getting
10 it down; is that what you're saying occurred?

11 A. Right.

12 Q. But you never told the investigator that that night;
13 did you?

14 A. No, I didn't.

15 Q. Now, you realize at some point that the statement that
16 you gave the police -- You testified that you wanted to
17 cooperate with the police; correct?

18 A. That's correct.

19 Q. Because you wanted the truth to be known; correct?

20 A. I don't know if I -- You talking about cooperating
21 that night?

22 Q. I'm talking about just cooperating with the police.
23 You were willing -- You were cooperative?

24 A. Yeah.

25 Q. When you realized that the vast majority of your

1 statement to Investigator Hanna was a lie, did you go back
2 to the police to tell them the truth?

3 MR. DEBERRY: Your Honor, please, I object to that
4 characterization of the vast majority of the statement was
5 a lie. I don't think anybody's testified that that's
6 correct.

7 THE COURT: Rephrase your question.

8 Q. When you realize that there were several areas in your
9 statement that you the told police were incorrect were
10 wrong, did you make any effort to tell them any
11 differently?

12 A. No, I didn't.

13 Q. At any time either that night or at any time since,
14 have you ever told the police that it was an accident?

15 A. No, I didn't, but I felt it was an accident.

16 Q. But you didn't feel it was important to tell them
17 that?

18 A. Well, I just -- I had a hard time dealing with it. I
19 just didn't want to talk about it. I just wanted it as far
20 as out because I didn't know -- I wanted to try and get my
21 thoughts back together.

22 Q. They charged you with murder didn't they, Mr. Daniels?

23 A. That's correct.

24 Q. You didn't feel it was necessary to tell them it was
25 an accident?

1 A. Well, I know it was necessary, but I didn't tell them
2 that.

3 MR. RUSSO: Thank you, sir. I have no further
4 questions, Your Honor. If I may, judge, before Mr. Deberry
5 begins, I need for him to throw these away.

6 REDIRECT EXAMINATION BY MR. DEBERRY:

7 Q. Tracy, it came up just a minute ago. And I don't
8 think I asked you about it. When you walked out of that
9 house with that shotgun and you testified it was open or
10 breached; right?

11 MR. RUSSO: Your Honor, I didn't hear the question I
12 apologize.

13 MR. DEBERRY: I'm sorry. I'll move over.

14 Q. When you walked out of the house with the shotgun, I
15 believe, you testified it was in the breached or open
16 position; is that right?

17 A. That's right.

18 Q. And there was a shell in the there that had been
19 fired; is that right?

20 A. That's right.

21 Q. And at some point in time you said you walked up and
22 you handed it to Donald; right?

23 A. That's right.

24 Q. And at that time what kind of shell was in that gun?

25 A. It was a fired shell.

1 Q. It was a fired shell. And I don't know if I ever
2 asked you this before or not, but did you have a real shell
3 that had been fired with you when you came out of the house
4 with the gun?

5 A. No.

6 Q. And so the fired shell that we know that got in there,
7 where did it come from? Where did it have to come from?

8 A. The fired shell that I handed when I brought it out?

9 Q. I'm sorry. Maybe, I'm using the wrong term. Came out
10 with a spent shell one that had been fired; right?

11 A. Right.

12 Q. And when you came out with that gun and that fired a
13 spent shell, did you have a live shell with you on the time
14 it been fired?

15 A. No, I did not.

16 Q. And so where did that one that we know that live shell
17 that one that hadn't been shot that shot and killed Donald.
18 Where did it have to come from?

19 A. He would have had to put it in the gun.

20 Q. And who would have had to have it? Would you have it
21 with you?

22 A. No, I didn't have it with me.

23 Q. When you walked out of there with that gun and that
24 fired shell in the gun only, did you have any intention
25 whatsoever of shooting anybody?

1 MR. RUSSO: Object, Your Honor, asked and answered
2 numerous times.

3 A. No, I didn't.

4 THE COURT: Have you asked that before? Don't ask
5 that again move on.

6 Q. Tracy, did you have your hand fixed and finger on
7 trigger in the manner that you intended to pull ---

8 MR. RUSSO: Object, to the leading, Your Honor.

9 THE COURT: Rephrase your question, please.

10 Q. Did you have your hand in a position on that trigger
11 to pull it?

12 MR. RUSSO: Object to the leading.

13 THE COURT: Wait just a minute. Overruled.

14 Q. Did you have your hand on that gun and your finger on
15 the trigger with the intent to pull the trigger?

16 A. No, I did not.

17 Q. Is there any question in your mind about that?

18 A. No.

19 Q. And he's asked you to come up here and demonstrate
20 with the gun and so forth; is that right what saw we here a
21 moment ago?

22 A. That's right.

23 Q. And he grabbed it or did you see him or were paying
24 any attention when he grabbed it?

25 A. Yeah, I paid attention but...

1 Q. Let me ask a question. Did you see where when he was
2 demonstrating with you that he reached over and grabbed it
3 with his right hand? Did you happen to notice that?

4 A. No.

5 Q. Do you know whether or not that demonstration would
6 have been proper or whether or not Donald could have
7 grabbed it with his left hand like this? Do you know how?

8 A. Well, I don't know. I don't know which hand he
9 grabbed it, but the gun was grabbed.

10 Q. And did you mean to fire it?

11 A. No, I did not.

12 MR. DEBERRY: Thank you. Answer any questions he
13 may have.

14 RECROSS EXAMINATION BY MR. RUSSO:

15 Q. Didn't your earlier testimony be that you can't
16 testify under oath truthfully that he grabbed the gun?
17 It's just your belief; isn't that true?

18 A. I didn't understand what you just said.

19 Q. Didn't you just testify under oath that you could not
20 tell this jury that you know that he grabbed the gun that's
21 just your belief; isn't that what you said?

22 A. That's what I said. That's what I ---

23 Q. And is that the truth?

24 A. --- believe.

25 Q. Okay. There's so many details about that night that

1 you can't remember, but you do remember that Donald loaded
2 the gun? You remember that?

3 A. It had to be that way because I ---

4 MR. DEBERRY: All right. Let him finish please.

5 Q. Go ahead.

6 A. I didn't load the gun.

7 Q. So again, you're not testifying of what you know.
8 You're testifying about what you believe had to be the
9 case; is that right?

10 A. Well, that is what I believe.

11 MR. RUSSO: No further questions, Your Honor.

12 MR. DEBERRY: That's all, Your Honor.

13 THE COURT: You may step down. Thank you.

14 (The witness left the witness stand.)

15 THE COURT: All right. Ladies and gentlemen of the
16 jury, if you will step out, I got a matter of law at this
17 time.

18 (The jury was excused to the jury room.)

19 MR. DEBERRY: Your Honor, at this time we would move
20 at the end of all the State's evidence, we would renew all
21 the motions that we've made throughout the trial as if they
22 were set forth verbatim at this time. Also, Your Honor, at
23 this time we would move for a directed verdict on the count
24 of murder. And I understand that's the only count that's
25 been presented at this time; is that correct?

1 THE COURT: Single count indictment for murder.

2 MR. DEBERRY: We would move for a directed verdict
3 in that regard, Your Honor. We think that the testimony
4 feud in the like most favorable to the opposition. Would
5 be that there's at best here either a involuntary or
6 voluntary manslaughter scenario. We do not feel like based
7 on the testimony of Ms. McDougal, on the testimony of Tracy
8 Daniels, that there was any appreciable time of any hostile
9 premeditation. And it was a spur of the moment thing right
10 after the two of them were attempted to do something and
11 the time had cooled off. They -- There's absolutely no
12 indication that there was any planned or premeditated
13 action on the part of the defendant to commit murder.

14 MR. RUSSO: Your Honor, as I address the Court
15 before, premeditation is not an element for murder in South
16 Carolina. So I think the jury can from the evidence that
17 they have or find sufficient evidence to find that there
18 was malice aforethought. And that this individual did
19 possess that malice aforethought and then shot and killed
20 Donald Leffingwell. That's the element that the State
21 needs to prove. I think that there's plenty of evidence a
22 possible jury could find.

23 THE COURT: I'm gone have to deny the motion based
24 on the evidence before the Court.

25 MR. DEBERRY: Your Honor, at this time we would move

1 that the State charge involuntary manslaughter. It is ---

2 THE COURT: You mean the Court.

3 MR. DEBERRY: I'm sorry. Yeah, the Court. Would
4 charge involuntary manslaughter. I think that there's
5 sufficient evidence in the record here that would support
6 such a finding. Your Honor, there's evidence that
7 obviously from the defendant that he did not intend to fire
8 the weapon. There's evidence obviously to the contrary,
9 but he clearly has indicated that he did not intend to fire
10 the weapon, which I feel like that that's before the jury.

11 The conduct that he was involved in at the time was
12 obviously a criminal -- criminally negligent action and
13 that he was aware and the testimony will reflect that it
14 was a scenario where two people had too much to drink and
15 that a prudent person under no circumstances would take out
16 a gun and be passing a gun around in that atmosphere. Both
17 of them recalling from the testimony of Mr. Daniels had
18 absolutely no business handling a gun much less a loaded
19 gun and they were doing that. They were engaging in that
20 activity.

21 The action on their part as Mr. Daniels said that he
22 felt that his action in that he regard as far as getting
23 that gun out and handling it like that after they had been
24 drinking to that extent. The two of them amounted to
25 reckless conduct. He said that. Mr. Russo emphasized that

1 and ask him where he got that word from and he --
2 Nevertheless, it's in the record. He said it. It may have
3 at that time as I recall asking him to consider his conduct
4 to be negligent or reckless or how did consider it his
5 conduct to be. And I think the record reflects that he
6 said the word reckless. Said his conduct was reckless.

7 We think that that's sufficient. We only have to
8 have the slightest bit of evidence of involuntary
9 manslaughter in the record. There's evidence that his
10 conduct was reckless. There's evidence that the conduct
11 was unintentional. There's evidence that the pulling of
12 the trigger was unintentional and we feel that that ever so
13 slightly bit of evidence is there in the record and all
14 precautions we should charge involuntary manslaughter.

15 MR. RUSSO: Your Honor, based on everything
16 Mr. Deberry just said, I would think that they would not
17 be entitled to that charge. The law in South Carolina
18 requires that involuntary manslaughter involves the
19 unintentional killing that is accomplished by some means
20 of an intentional act.

21 MR. DEBERRY: No.

22 MR. RUSSO: I'm reading it.

23 MR. DEBERRY: No, sir. Never can involuntary
24 manslaughter be an intentional act.

25 MR. LAWSON: It's an unintentional killing.

1 MR. RUSSO: It's an unintentional killing, Your
2 Honor. But it is accomplished by an intentional act and
3 that's what the law says. And according to Mr. Deberry and
4 the evidence that was put in by the defense, this was
5 completely -- If you want to believe the defense side --
6 The jury tends to believe what the defense has said -- This
7 was completely an accident no intentional act and that's
8 what involuntary manslaughter requires, Your Honor.

9 MR. DEBERRY: Your Honor, it's just like driving a
10 car. It's an intent to get out the gun during this --
11 where they shouldn't have done it intent to drive a car and
12 ended up in an unintentional act that happened, an
13 unintentional firing of that gun after he got it out
14 intentionally just like you start to drive a car drunk
15 intentionally.

16 MR. RUSSO: While you're looking, Your Honor, may I
17 respond briefly?

18 THE COURT: Go ahead.

19 MR. RUSSO: Your Honor, if I'm mistaken, I
20 apologize. But I understand the entire defense this was an
21 accident. And that's not involuntary manslaughter because
22 involuntary manslaughter requires an intentional act. And
23 it's said over and over and over again that everything
24 involved here was unintentional.

25 MR. DEBERRY: I got some doubts here, Your Honor.

1 THE COURT: All right.

2 MR. DEBERRY: I've got a quote here that our cases
3 read that a person can commit involuntary manslaughter if
4 either of the following two test is satisfied. One is that
5 we have a unlawful none felonious act. Under this test,
6 the homicide this is quoted from State vs. Burris 334,
7 SC 256. Under this test the homicide is involuntary
8 manslaughter, if the unintentional homicide resulted while
9 one is engaged in the commission of some unlawful act not
10 amounting to a felony and not naturally tending to cause
11 death or great bodily harm.

12 Now, in this regard, Your Honor, that's one problem.
13 And if that's the case, there needs to be some unlawful act
14 that these two gentlemen are -- Tracy was involved in at
15 the time. I have searched for such. And the only statute
16 that I have found is statute of -- Well, I had -- He took
17 it. The only statute I found to see if it fit that's one
18 of the problems. And Section 23-31-400, it is unlawful --
19 And that's a South Carolina statute. Unlawful for a person
20 who is under the influence of alcohol or a control
21 substance to use a firearm in this state.

22 Now, if that only prong was the only prong that we
23 had to go by, that would be where the unintentional
24 homicide resulted while one is engaged in the commission of
25 some unlawful act by the use of a firearm not amounting to

1 a felony, which it does not and naturally intending -- and
2 not naturally intending to cause death or great bodily
3 harm.

4 The second prong, Your Honor, is the one of
5 recklessness. And our case law says that we have two ways
6 that we can have two instances where we can have
7 involuntary manslaughter. The recklessness of a prong is
8 under this test the homicide is involuntary manslaughter if
9 the homicide resulted from conduct that satisfies the test
10 of recklessness set forth in Statute 16-350 and that's our
11 regular -- that's our statute that conduct that is reckless
12 that willfully disregards the life and safety of a person,
13 Your Honor.

14 And you certainly meet that stature here of
15 recklessness. That is in the record. I don't see how we
16 can get around the fact that's in the record that we had a
17 homicide that Mr. Daniels said is unintentional and it
18 resulted while he was acting in a reckless disregard for
19 the safety of others by bring out a shotgun under those
20 circumstances where two people had had way too much to
21 drink.

22 MR. RUSSO: Your Honor, in response first of all
23 that Statute 23-31-400(b) where it says it's unlawful for a
24 person who's under the influence of alcohol or control
25 substance to use a firearm in the state. If you want to

1 believe the testimony from the defense, the defendant
2 wasn't using the gun. He was in possession of one, but he
3 wasn't using it. Even further to the regard of the
4 recklessness, Your Honor, according to the defendant he was
5 adamant that the gun -- that he did not have a shell in the
6 gun. It was empty. That he himself didn't carry a shell
7 out there. So really all of that just flies in the face
8 and doesn't support it. It's actually opposite. He by his
9 own admission he had -- was just simply in possession of
10 the gun. He was not using the gun. He also didn't have it
11 loaded. Didn't carry a live shell with him according to
12 his testimony which would eliminate the recklessness.

13 THE COURT: I have a problem with that, but what
14 about the second one. I got the two set out here.

15 MR. RUSSO: The second one being...

16 THE COURT: On recklessness. Read that again to
17 him, Mr. Deberry.

18 MR. DEBERRY: Under this test the homicide is
19 involuntary manslaughter, if the homicide resulted from
20 conduct that satisfies the test of recklessness set forth
21 in the Statute 16-3 and 50.

22 MR. RUSSO: I would like to see the statute. I
23 don't know what the statute says.

24 MR. DEBERRY: I had it last night and I can't find
25 it here. It's your regular statute.

1 THE COURT: Now, let me read you what my second
2 charge is.

3 MR. RUSSO: Yes, sir.

4 THE COURT: Involuntary manslaughter may also be
5 described as the killing of another without malice and
6 unintentionally but while engaged in the doing of a lawful
7 act with reckless disregard of the safety of the others.

8 MR. RUSSO: Okay. But, Your Honor, I don't see the
9 recklessness because according to Mr. Daniels he made sure
10 that he had an empty shotgun. He had it broken open.

11 MR. DEBERRY: He saw him load it and hand it back to
12 him. They were in concert there. They testified they were
13 tempting to see if the shell would eject. They were
14 passing it back and forth. They use the gun. We got --
15 They were using the gun. Your Honor, it's not to the
16 weight. It's only as to whether there's a slither of
17 evidence in here.

18 THE COURT: Let me think about it a minute. Y'all
19 just take a breather.

20 MR. RUSSO: Yes, Your Honor.

21 (Court in recess.)

22 (Court reconvened.)

23 THE COURT: Bring them in. Thank you, ladies of the
24 jury, we have now finished the evidentiary portion of the
25 trial. While y'all have relaxed back there a few minutes,

1 I had to gave counsel time to go ahead and prepare for the
2 next stage and that's exactly what they have been doing.
3 So we're moving into the final arguments. I believe that
4 Mr. Deberry requested that the State open on the law.
5 Therefore, Solicitor.

6 MR. RUSSO: Please the Court. Mr. Deberry.

7 THE COURT: Yes, sir.

8 MR. RUSSO: Madam forelady, ladies and gentlemen of
9 the jury, I'm gonna speak with you right now. It's gone be
10 very brief. I'm gone speak to you about the law in this
11 case. The law that you have to use in deciding this case.
12 Then I'm gone have a seat. Mr. Deberry is gone have an
13 opportunity to speak with you. Then I will have a second
14 opportunity to speak with you in a little more length.

15 The law in this case, ladies and gentlemen, this
16 defendant is charged with murder. Now, the judge is gone
17 charge you in depth about the law, but briefly please let
18 me share with you that in South Carolina the law in murder
19 is simply there are elements that have to be proven. And
20 those elements are that there was an unlawful killing of
21 another person with malice aforethought.

22 And the judge will charge you on what malice
23 aforethought is. And if you will listen to his charge, you
24 will see that the law does not require malice to be any
25 length of time or any great length of time prior to the act

1 occurring. It can be almost instantaneous with the act
2 occurring. But I would like for you to note and listen to
3 the judge and understand that in South Carolina no matter
4 what you may have believed from television or from any
5 other state where you may have been a resident at some
6 point. South Carolina does not require -- The State of
7 South Carolina to prove motive. That is not element of
8 murder. It is an unlawful killing of another with malice
9 aforethought. And that is the charge here today.

10 And the judge, of course, is gone charge you in
11 greater depths with regards to the law in this case.
12 There's also gonna be a charge with regards to voluntary
13 manslaughter, which is the unlawful killing of another in a
14 moment of rage or being out of control. He will also
15 charge you with regards to involuntary manslaughter. I'm
16 not gonna go into great depth with regards to all of these
17 charges.

18 The defendant is charged with murder and that is
19 what the State is asking you to make the decision on and
20 the law as the judge will charge it to you will be
21 obviously more lengthy than what I'm giving it to you, but
22 in essence it's those elements. Unlawful killing of
23 another with malice aforethought. And I'm gone have a seat
24 and Mr. Deberry's gone have an opportunity to speak to you
25 and then I'll have my last chance. Thank you.

1 MR. DEBERRY: May it please the Court. Ladies and
2 gentlemen of the jury, first of all I want to thank you for
3 the undivided attention that I saw you give this case.
4 When we started the first of this week, I told you that I
5 was afraid. I realize that I have a job to do for a person
6 and I realize that that person needed some help.

7 Ladies and gentlemen, I don't know how to describe
8 the feeling it is when you're in my shoes, but I want to go
9 back with you at the first time that I ever say Tracy
10 Daniels in the predicament that he was in and realize the
11 sad situation that occurred. At that time I had a client
12 you've got to know him a little bit. You've got to see the
13 type person and the type personality that he's got. And,
14 ladies and gentlemen, when I saw that face and when I
15 talked to that person, I knew that one day -- One day there
16 be 12 people sitting here. I didn't know what you'd look
17 like. But I knew that there be 12 people that would see
18 that face. And would observe that demeanor and I saw the
19 way he talked. I saw the way he came across. And I knew
20 that there was a uphill battle right then.

21 If there was ever a man that needed some help, Tracy
22 because I knew that he couldn't help himself. And it
23 didn't get better it got worse. You've got to bear in mind
24 that at that time at those initial times when I was talking
25 to Tracy I didn't know Mary McDougal. I didn't know she

1 existed and I hadn't seen her statement.

2 And, ladies and gentlemen, I had a man sitting in
3 front of me saying, Mr. Deberry, a man died and he was a
4 friend of mine. And I said well tell me about it Tracy.
5 And I had the statement. And I had the unpleasant job here
6 that I felt was my job to do was to look at what some other
7 people did wrong in investigations or felt to do that I
8 thought you as a juror should have the benefit of those
9 test being done. And it wasn't pleasant to stand here and
10 criticize people that I know and respect. But I felt there
11 was a duty to do that and I apologize if I bored you.

12 But, ladies and gentlemen, I felt that it was
13 needed. As I said, it didn't get better. I didn't know
14 what Mary McDougal said. But I read my client's statement
15 and I read Tracy Daniels' statement and cold chills went
16 over me. I had a client by his statement that said that he
17 came out of his trailer where he lived. And he came out
18 and took a shotgun after a lot of bad words had gone on and
19 a big fight had gone on. And he came out 12 to 15 feet
20 away no legal provocation, nobody charge him nothing. And
21 out of pure meanness and desire to murder pull up a gun and
22 shot somebody from 12 to 15 feet away. And I read that and
23 that wasn't coming from somebody that I -- that it wasn't
24 credible. It was coming from my own client. Believe me it
25 was unbearable.

1 Ladies and gentlemen, I made some -- I criticize .
2 these people in here from making a first impression,
3 forming those first impressions. I've cautioned you and
4 ask you please don't make first impressions try to keep an
5 open mind. I did that same thing. I read that statement
6 where my client said he did it. And he did it from 12 to
7 15 feet away. It wasn't easy.

8 And ladies and gentlemen, at that time, I assumed
9 that it was gone be a different story. I assumed -- I
10 didn't know about Mary McDougal, but thank goodness I don't
11 know where she came from, who brought her, but thank
12 goodness somebody got her to come home that night when she
13 did. Because let's see what we learn from Mary McDougal.
14 That we know cause that first impression that I had would
15 be wrong, dead wrong. Thank goodness for Mary McDougal and
16 what she saw.

17 Mary McDougal changed this thing from being 12 to
18 feet away a murder. Mary McDougal told us that that wasn't
19 the case. If it hadn't been for what Mary McDougal sought,
20 we would not have known that two people got close enough to
21 each other and were not arguing at this time. Two people
22 got close enough to each other to hand a gun back and
23 forth. And two people were close enough to be doing
24 something with a gun other than talking about I'm gone
25 shoot you.

1 Mary McDougal told me something that my client who
2 was there disputed. He had said that they were far enough
3 away for it to be murder. She said that they were close
4 enough and not only were they close enough for there to be
5 some other way that this thing occurred, not only were they
6 close enough but more importantly they weren't arguing.
7 There was no argument. They were at that time -- Yes, they
8 were drunk and they been arguing. They were arguing and
9 then they get all right. Then they argue again; that's how
10 people act when they had too much to drink.

11 But, ladies and gentlemen, what happened then was
12 she enlightened us. She made me think what -- I have a
13 client who has told me this. And we know that Mary
14 McDougal had no reason to dispute the fact that that gun
15 had been handed back and forth. Tracy never said that.
16 Tracy never said that at the time of this incident that
17 they were standing there handing the gun back and forth.
18 So what happened. I think that Mary McDougal was telling
19 us the truth. She was not drinking at the time. And
20 everything she said she told what she thought would be the
21 truth.

22 I know that I -- And I realize that those officers
23 thought maybe like I thought that there wasn't any need to
24 get fingerprints on that gun because it wouldn't come up.
25 And there wasn't any need to get any kind of other test

1 because it just wasn't necessary. They had formed that
2 first impression. And they have made some assumptions.
3 And they would assume that there were only be tracing blood
4 on a gun. They had assumed that if the fingerprints were
5 taken that they would be two people's fingerprints. And
6 the issue of the orientation or whatever that fellow used
7 about how the hand was on the gun the last time. It
8 wouldn't be important. They made that assumption.

9 Ladies and gentlemen, I can't prove to you that that
10 gun was grabbed like that. You know that I can't do that.
11 His Honor's gone tell you that no person accused of a crime
12 in this country is required to prove anything. The
13 burden's on the prosecution to prove everything to your
14 satisfaction beyond a reasonable doubt.

15 Now, as far as beyond a reasonable doubt I want to
16 tell you beyond a reasonable doubt is a legal term. I know
17 it sounds like some loop hole or something like that, but I
18 want to take a minute to talk with you about those words
19 beyond a reasonable doubt. And I when went to law school
20 and I heard those words and I was studying in those books,
21 I remember thinking the same thing that you may think about
22 it just some kind of legal phrase. But, ladies and
23 gentlemen, I want you to know that after I got out and I
24 started practicing law, I realize that those words, those
25 words meant an awful lot. Those words what separates this

1 country from other countries like Russia or Iran or some
2 other place. Those words are the corner stone of our
3 system of justice. And I'm gone tell you why.

4 You know, you're gonna hear from the judge that the
5 burdens on the prosecution to prove each and every element.
6 If you're in the mist trying to determine if you go to this
7 particular charge and I believe they're gonna be four here.
8 It's gone be murder. It's gone be involuntary
9 manslaughter. It's gone be voluntary manslaughter and not
10 guilty. Ladies and gentlemen, at each stage that you
11 consider something, you raised your hand and sworn that you
12 will consider each one just as carefully at the over all
13 picture.

14 Beyond a reasonable doubt what does it mean. Beyond
15 a reasonable doubt that means -- A reasonable doubt I've
16 heard judges say beyond a reasonable doubt is a doubt that
17 a honest juror in search of the truth has to hesitate.
18 That means that if you can't decide whether it should be
19 voluntary or involuntary and you have a reasonable doubt, a
20 doubt that you can give a reason for, then you've sworn
21 that you will come out with a verdict of the lessor. If
22 you can't decide between if you have a doubt between
23 involuntary and not guilty, you've raised your hand and
24 swore that you will not convict a person of a crime in this
25 country.

1 those scales if they don't go all the way over and erase
2 all reasonable doubt from your mind, if they don't go over
3 and lock in and you have raised your hand and swore that
4 you will not convict a person of that crime or that
5 particular elevated charge, not in this country.

6 Ladies and gentlemen, I know that we have an
7 intelligent jury. And I know that at times when I was over
8 here asking questions back to back and forth with the
9 prosecution in this case that were probably things that you
10 saw and observed that I missed. And I'm not gonna go back
11 through all of the facts and the things that came out of
12 this trial because I know that you were sitting there. And
13 there's a comfort to know that you were sitting there. And
14 you were watching carefully and that we have an intelligent
15 jury.

16 Ladies and gentlemen, in this particular case the
17 prosecution did go there. Nobody will talk on behalf of
18 Tracy Daniels when I sit down. I know that there some
19 things that could have been done. I know that there were
20 somethings that I failed to do. I'll tell you that this
21 has been a very very unusual case. And I feel like that
22 there was some things that maybe you want or you think that
23 should have been done weren't done. And I'm sure that the
24 prosecutor when he stands up here, he will as his job is he
25 will do a good job for the prosecution. And he will talk

1 Now, beyond a reasonable doubt means that the
2 prosecution has the burden and they've got to take every
3 element and prove to you to that measure. And I'm always
4 been afraid, ladies and gentlemen, that some of you may
5 have sat on a jury before and it could have been a civil
6 jury. Civil jury is cases that involve money or property
7 or something that we can get back something. Something we
8 can make more money we get it back. In that case, I've
9 always been afraid that maybe somebody in a case like this
10 could get it confused. But in a civil case, ladies and
11 gentlemen, it involves just money. Something we can
12 reproduce or replace.

13 The judge tells the jury that you're supposed to
14 weigh the evidence by what they call the greater weight of
15 the evidence or the preponderance of the evidence. And
16 you've seen those pharmaceutical scales. If they tilt ever
17 so slightly in favor of one side, then you're supposed to
18 come out with a verdict on that said.

19 But, ladies and gentlemen, when we are in a case
20 like this, we're in a criminal case where a person's rights
21 and their liberty are at stake. Their lives are at stake.
22 The burden is beyond a reasonable doubt and not by the
23 greater weight of the evidence. And that means that unless
24 the State and not the defense, unless the State proves
25 every element beyond a reasonable doubt. That means that

1 about things that I fail to do things that I should have
2 done for my client that I didn't get done. But all I can
3 do is trust that you, the jury, will follow the judge's
4 instructions. And you ^{would} ~~want~~ feel that Tracy had to prove
5 something.

6 And the reason the law is like that is because
7 people like Tracy can't always prove their innocence.
8 Sometimes when they're accused of crimes, there's a lot of
9 evidence against them. I don't think it's often that you
10 find that somebody is accused of a crime that says things
11 against themselves that aren't true. This is the most
12 unusual case.

13 In this case, ladies and gentlemen, we have a
14 situation where I realize that the prosecution can stand
15 here and say well he tried to insinuate this, that the gun
16 could have gone off accidentally. I can't prove that and
17 I'm gone be the first one to tell you. I cannot prove that
18 that gun fired accidentally. And if you expected me to do
19 it, I have failed. I have not proved to you -- I have not
20 to prove to you beyond any doubt that gun went off because
21 it was defect^{ive}~~ed~~. All I can tell you and all I have been
22 able to do or that I did with the witness to show you that
23 that firing pen, that firing pen would go forward without
24 pulling the trigger. And I can't prove that that's what
25 happened. But I felt that I had a duty when I found out

1 that it was like that, that you should know that it was
2 like that. And you need to know just in case in order to
3 be sure.

4 Now, ladies and gentlemen, I couldn't prove that
5 there was fingerprints on the gun that wasn't done. And it
6 wasn't brought in here and it wasn't testified. It's not
7 something that -- It's not something that I was required to
8 do. But I feel that I failed if you feel there's something
9 that should have been done that I didn't do.

10 Now, ladies and gentlemen, in a moment I'm gone sit
11 down. As I said the prosecution will have the last say so
12 here and I know Mr. Russo will do a good job. I'm gone ask
13 you if you would to think about every element of this case.
14 And as I said His Honor is going to charge you that there
15 are four different verdicts on your verdict form. One is
16 murder. What is murder. Murder is a person who has an
17 evil mind who with malice aforethought decides they gonna
18 kill somebody. They do it on purpose. Generally, when you
19 find that, you have people who have some reason to kill
20 somebody; that's murder. We don't have murder a case here.

21 The next thing we have, ladies and gentlemen, is
22 voluntary manslaughter. Voluntary manslaughter is the same
23 thing as murder. It is the intentional killing of a
24 person. For instance, if somebody takes a person and stabs
25 them in the heart and stabs them again and continuously

1 But, ladies and gentlemen, what we do have, what we do have
2 is somebody who took out a loaded gun at some point in time
3 it got loaded. Took out a gun and took out some shells
4 when they had absolutely no business bringing out a gun in
5 that condition. That's like putting a gun in the hands of
6 two two year olds playing, fighting or what have you. It
7 was a reckless and absolutely reckless disregard for the
8 safety of those two people for that gun to be there. It
9 wasn't intentional, but it wasn't unlawful. It was
10 reckless. It was a reckless disregard for the safety and
11 what ended up it was manslaughter. There's a manslaughter.

12 Now, if you find that the evidence in this case
13 supports that Mary McDougal had again -- I cannot prove
14 that she was wrong. All I can tell you is that Mary
15 McDougal may have made some of those same errors that I
16 made and these police officers made. She may have made
17 some assumptions. And when she gave that statement, I'm
18 sure that her mind went to the -- I'm supposed to tell them
19 what happened here I am the eyewitness. I'm supposed to
20 provide with them who had the gun and who got shoot. And I
21 don't think Mary McDougal knew the significance of the
22 final details, just as the officer didn't realize the
23 significance of some things and the test firing of the gun,
24 the fingerprints, and what have you.

25 I don't think Mary McDougal knew the significance

1 stabs them, but it was when they were mad. When they did
2 it while they were in the heat of passion and they were
3 mad, they can shoot them and they can shoot them again;
4 that's is still voluntary. That's an intentional act. But
5 it's not quite murder because it was done while they were
6 mad. It was done after the fellow slapped him in the face
7 or after he socked him in the face and broke his nose. And
8 the person shot him and he killed him and he meant to. And
9 he could shoot him as many times as he wants to and still
10 voluntary manslaughter. The next serious thing to murder
11 that's what voluntary manslaughter is.

12 I submit to you we don't have that in this case. We
13 don't have that voluntary intentional killing of a person.
14 We have thanks to Mary McDougal a period where two people
15 were standing there talking about getting a shell out of a
16 gun. You don't have voluntary intentional killing of a
17 person when somebody walks up to them and hands them the
18 weapon. You don't see that in those type cases. You don't
19 see that where people are sitting there talking and then
20 something happens.

21 So what do you really have here. Well, Tracy has
22 said that this gun he's not sure. And he's never gonna be
23 sure. And he wasn't sure when he gave that statement. He
24 wasn't sure when he talked to me. And he wasn't sure when
25 he was on that stand and he's gone die not being sure.

1 and just -- I can't prove it. But what if Mary McDougal
2 was looking, what if she was looking out of that window and
3 looking at almost a hundred feet away and she saw two
4 people and she saw them there and she could tell and let's
5 just look at it for a minute as far as the lighting and
6 think about it. Here we got good lighting, but ~~less~~^{let's} put
7 ourselves where she was that night. It was dark and it's a
8 hundred feet away. It's 96 feet to the beginning of her
9 steps. Then you got to get up the steps and inside where
10 she is. It's close to a 100 feet away and she's looking.
11 She can tell that the gun is being pass back and forth.
12 And she can tell that something fell to the ground. She
13 thinks that something was being loaded or shells were being
14 in or out something of that nature.

15 And, ladies and gentlemen, the lighting, all of the
16 lighting. And we know just from -- just from everyday
17 experiences. When you have a light on the other side of
18 you shinning this way, that doesn't put any light on the
19 subject that you're looking at, unless you're between the
20 light and the person. In this case, all the lighting was
21 behind and probably her vision was effected. I cannot
22 prove how much, but I can submit to you that it wasn't as
23 good as it was in this courtroom. It wasn't as close as it
24 was in this courtroom. And she assumed and she gave the
25 statement that day. I hoped -- I don't know if she is

1 exactly right or not and I can't prove it. But it's a
2 chance that that person had grabbed that gun. They weren't
3 fighting. They were passing it back and forth. Would you
4 pass it to somebody you thinks getting ready to shoot you.
5 Would Tracy pass it to him if there was an argument. Would
6 he pass it back to Tracy if you thought somebody was
7 getting ready to shoot somebody.

8 And could it have happened -- Could it have happened
9 at that left hand reached out and that person that was
10 intoxicated just like Tracy grabbed that gun. I don't know
11 and I can't prove how intoxicated he was. I can't tell you
12 how much marijuana he smoked. I can tell you that the
13 autopsy said he did have marijuana in his system. And he
14 had alcohol and he had other prescription drugs that he had
15 taken. It was in his body. I can't prove that that gun --
16 that he grabbed that gun. And that that blood is evidence
17 that it was grabbed with his left hand and the shell was in
18 the right. And he said let me try it and he grabbed it. I
19 cannot prove that, but if that were the case, that were the
20 case, that would be the accident the accident form on the
21 verdict that you should check. I can't prove it.

22 Ladies and gentlemen, at each step that you consider
23 as to which burden, if you will listen in your mind and
24 listen to the those words beyond a reasonable doubt. And
25 if you will consider the decision that you make at every

1 step of each stage in that verdict form, if you will
2 consider that decision that your gone make that meets --
3 gonna mean so much. One life has been ruined and another
4 one is in our hands. If you will consider those decisions
5 that you make at each step, each step just as carefully as
6 you would make some major decision in your life.

7 If you would treat it just as carefully as you would
8 want somebody to treat it for you and one of your friends
9 or one of your loved ones each step. And I know when you
10 come out of that jury room, you will come out with a
11 verdict that we will all be sitting here waiting for. And
12 it will be a verdict that we can all sleep on tonight.
13 Thank you.

14 MR. RUSSO: May it please the Court, Your honor.
15 Mr. Deberry. Madam forelady, ladies and gentlemen of the
16 jury, just as Mr. Deberry couldn't quite explain to you how
17 he was feeling having to represent the defendant. I wish I
18 could explain and describe to you my feelings of having to
19 represent the people of Florence County and the people of
20 South Carolina. What we have here today and what you've
21 heard this past week is that in our community a man
22 committed murder and the State went about it's duty to
23 prove that case.

24 Mr. Deberry went on and said thank goodness for Mary
25 McDougal. Thank goodness for Mary McDougal. If you didn't

1 have Mary McDougal, we wouldn't never really have known.
2 But I would submit to you although I'm very thankful for
3 Mary McDougal. Mary McDougal is the only person that you
4 had testify that can tell you that that was a lie when he
5 told the investigator that he was 12 to 15 feet away.

6 You heard the testimony of Dr. Nichols, the
7 pathologist. You heard his testimony. You saw the
8 photograph and you'll have it to take back in your jury
9 room. But you saw the wound. We're dealing with a
10 12-guage shotgun with double-ought (00) buck. You heard
11 from the pathologist that the wound was symmetrical, that
12 there was stippling or burn, powder burns all around the
13 neck of the wound area. And that with a shotgun of this
14 type shooting that type of load that it would have had to
15 have been within two to three feet to get that wound.

16 So we know through the forensic evidence that that
17 was the case even if we didn't have Mary McDougal. But
18 thank God we did have Mary McDougal. And I do thank the
19 Lord for that because Mary was able to tell us exactly what
20 happened that night and she knew and she was definitive and
21 she was sure. Because as the jury, you judge the
22 credibility and the believability of witnesses whether a
23 witness has something to gain, whether a witness has
24 something to loose and that comes from the witness stand.

25 Mary McDougal as Mr. Deberry has shared with you has

1 no interest in this matter. As a matter of fact, you heard
2 from her. I'm confident she wishes this had never -- that
3 she never had to watch this. She had to move within a
4 couple weeks after this happened. She had to take her
5 mobile home that she had set up home with for six years and
6 had to uproot herself and move because of this incident and
7 her fears. What Mr. Deberry wants you to do is on one hand
8 believe Mary McDougal and believe she saw what she saw, but
9 on the other hand, doubt her. You can't have it both ways.

10 The lighting, he's made an issue of the lighting.
11 Let me tell you something. It was light enough that she
12 could describe his clothing and she was accurate. It was
13 right. It was light enough -- Now, you heard Mary's
14 testimony. At no time did she ever go to the crime scene.
15 She remained in her trailer. But she was light enough
16 where she could describe he had an iron rod in his hand.
17 She didn't miss that, but it was too dark to see is what the
18 defense want you to believe. She was -- It was -- It was
19 silhouetted so she couldn't make out detail is what they
20 want you to believe.

21 Mr. Deberry in his argument made numerous references
22 too that he couldn't prove this. He couldn't prove that.
23 This could have happened. This may have happened and all
24 of this. But, ladies and gentlemen, your oath and your
25 duty is to take the evidence which you have been supplied

1 and apply that evidence to the law that the judge gives
2 you. So you need to consider the evidence in this case and
3 not things that are not in evidence.

4 Now, the lighting. You heard the testimony that the
5 light was one of the security lights which is some -- how
6 many feet up a pole that illuminates an area. Okay. Don't
7 be fooled into believing that it's like a light, like a
8 spotlight shinning behind somebody; that's not what we
9 have. But you judge the credibility and the believability
10 of Mary McDougal. She identified his clothing perfectly.
11 She identified an iron rod perfectly.

12 You know, there's another thing that she did. And
13 this really impressed me in going toward her believability
14 and her credibility. I'm not gone go through all of the
15 difficulty in putting on gloves and stuff. I'm gone use
16 these towels here. You saw Mr. Daniels said he came out.
17 The gun opened and he was carrying it like this and that's
18 what you would expect or like this or however; that's what
19 you'd expect. And he said he handed it to Donald
20 Leffingwell.

21 When Mr. Deberry was in the back of the courtroom
22 and he was going through that thing with Mary and I'll be
23 honest with you, it caused me a moment of a chill when he
24 said, Now, when he handed the gun to Donald Leffingwell,
25 what direction was the barrel pointing. And as she was

1 looking she said it was pointed to the right. And
2 immediately I had a little bit of a chill because if I'm
3 standing with my back this way and I'm right handed, I'm
4 not gonna have the barrel this way. I'm gonna have it this
5 way. Then I got to thinking, oh, wait a minute. If
6 somebody approaches me and they're holding the gun like
7 this and they hand it to me, the barrel is going to point
8 right. It was light enough for her to determine that
9 detail.

10 I submit to you, ladies and gentlemen, there was
11 plenty of light for Mary to see what she said she saw. And
12 her testimony this is the thing because trust me. Now
13 Mr. Deberry made reference that I may get up there and make
14 reference to things that he may not have done or whatever.
15 I'm not doing that because he's a super lawyer and I have
16 no criticisms ever for Mr. Deberry. He did everything he
17 needed to do in this case. But he's a good enough lawyer
18 'til I can assure you if Mary McDougal would have testified
19 from this witness stand contrary to the statement she gave
20 the night this happened, he would have questioned her about
21 it, but she didn't.

22 She is the only witness in this case who saw what
23 she saw. She testified or she gave a statement on the
24 night of the killing, the night of the murder within a
25 couple of hours she gives a statement to Investigator Hanna

1 and 18 months later she takes the stand and there's not one
2 inconsistency with her statement. It is exactly as she
3 told it before.

4 And I'm gone tell you, it's been told to me by my
5 dad. Son you tell the truth. You need to always tell me
6 the truth. Because son I'm gone tell you, if you tell me
7 the truth and I ask you later, you will tell me the same
8 thing. And then I ask you a week later, you tell me the
9 same thing because you told the truth. But son if you tell
10 me a lie, trust me you're never gonna be able to tell that
11 same lie a second time or the third time or the forth time
12 because it's a lie. Because you've made it up. And you're
13 not gonna remember what you said. And I would submit to
14 you that's the case here.

15 Mary McDougal's statement on December the 4th 1999
16 at approximately eight o'clock p. m. was verbatim to the
17 statement that she gave you from this witness stand earlier
18 this week -- yesterday. She was telling the truth. Did
19 she see what she saw. She saw what she saw and what did
20 you hear from her. I'm not gonna go through her whole
21 testimony. But you heard her say that there was an
22 argument. He went inside and she heard a gunshot blast.

23 Now, the defendant wants you to believe that that
24 gun was only shot one time. And he said that's all he
25 remembers is that it was shot one time. The gun was shot

1 twice.

2 You have the photographs. You have the evidence
3 with regards to the awning in his garage that has the
4 shotgun blast through it. You have the testimony from the
5 officer who examined that it -- that in his opinion as a
6 forensics officer it appeared that it was freshly peeled
7 back metal. There was no rust or anything on it. You
8 heard Mary say it was a shotgun blast. Are you sure, Mary.
9 I am sure.

10 She goes in her house and within according to her
11 and she maybe said not to exact but within about five
12 seconds -- five or six seconds she's at the back door and
13 what does she see. She sees the defendant on the steps
14 holding the gun up and down like this. And she sees the
15 victim on the ground over there where the grill is. And
16 what's consistent with what she says. She goes in her
17 bedroom to get the phone and when she comes back, the
18 defendant's gone and the victim is picking up the gas grill
19 putting the lid back on it.

20 Now, let's talk about that for a minute, ladies and
21 gentlemen. The evidence in this case is everything that
22 comes from a witness who's under oath and exhibits which
23 have been entered into evidence. Anything I say is not
24 evidence. Anything Mr. Deberry says is not evidence. But
25 I couldn't help and you heard my objections throughout the

1 trial. Mr. Deberry kept referring to the victim kicking
2 over the gas grill.

3 Let me share something with you. When I was in law
4 school, I had a law professor. Professor McInitch (sic)
5 was my criminal law professor. And he told me one time.
6 He said Tommy let me tell you something. If you get out in
7 private practice and you do criminal defense work, I'm gone
8 tell you three ways to win cases and you remember this.
9 And I've never forgotten it. If you're defending a person
10 and the law's on your side, argue the law. That's your
11 strength go with it argue it. If you have the facts on
12 your side but the law's not really on your side, argue the
13 facts. Hammer on the facts stay on the facts. He said if
14 the law's not on your side and the facts are not on your
15 side, you can still win a criminal case.

16 But the way you got to do it, is you got to kick up
17 enough dust and dirt and get the jury to look everywhere
18 but at your client. And if you can get a jury to look at
19 all this peripheral stuff and confuse them and keep them
20 away from the facts, you can win that case even though you
21 don't have the law and you don't have the facts. And I
22 would submit to you what your seeing here and what you seen
23 here this week is a situation where the defense does not
24 have the law on their side. They do not have the facts on
25 their side. But they've done a wonderful job of trying to

1 get you to look not at the back door of Tracy Daniels'
2 house, but at the back door of Mary McDougal's house.

3 Do you remember -- I'm confident you do. How many
4 times did we go over this pellet here. This pellet here.
5 This pellet here. This pellet here. How many times did we
6 listen to Mary McDougal's pellets in her house where they
7 are. Did you take measurements. Did you do this. Did do
8 you do that. See Mr. Deberry wants you to look at the back
9 door of Mary McDougal's house. Don't look at the front
10 door of Tracy Daniels house because if you look at the
11 front door of Tracy Daniels' house, you're gonna see that
12 his client murdered Donald Leffingwell.

13 So I'm gone kick up dirt over here and get you
14 looking over here. I am going to make a big deal about
15 this step and the height of this step and that measurement
16 and was it taken. Did you do that and did you do that.
17 The facts that you got to the extent that you believe the
18 testimony of the defendant if there's anything that you
19 believe. Was that he was on the ground. Mary McDougal
20 says he was on the ground. There's no evidence that he was
21 on that step. And I don't know where that came from other
22 than the defendant's first statement which was all false.

23 So see there's a lot of things you been asked to
24 look it. And you've gone through a trial that has lasted
25 as long as it's lasted and it was necessary. But what I'm

1 gonna ask you to do when you go back to your jury room, is
2 refocus your attention on the evidence in this case that
3 goes toward whether or not this man murdered Donald
4 Leffingwell. And I would submit to you pellets in Mary
5 McDougal's house doesn't do it. And even Mr. Deberry
6 doesn't believe that either because there was no argument
7 involving that. But he didn't want you looking. He didn't
8 want you looking here. He wanted you looking here.

9 Now -- You recall -- And, please, I'm gonna ask you,
10 ladies and gentlemen, because this is proper that if I say
11 something that a witness said from the stand and you
12 remember it differently, please go with your recollection,
13 okay. Because, you know, that's what you need to go by
14 what you recall hearing. But if you recall Scott Brown,
15 Officer Deputy Scott Brown he read Tracy's Daniels Miranda
16 rights right after this occurred and Tracy Daniels told him
17 what. That he and Donald got into an argument. That the
18 -- Donald Threatened him. That he went in the house. That
19 he got a shotgun out and he shot him. That's what he told
20 Scott Brown. Six hours later, he's in there with Phil
21 Hanna.

22 Now, see here's the only thing consistent about
23 anything he has told you is that statement and he gave a
24 taped statement. And there's a lot more detail in the
25 statement that he gave Investigator Hanna but essentially

1 what do you have. We got an argument. He threatened me.
2 I went inside I got the shotgun. I killed him. But a lot
3 more detail.

4 Let's talk about that statement. He has told you --
5 Of course, he told Investigator Hanna that he was
6 controlling his drinking. He told you today that he was --
7 drunk way to much. But you heard testimony from the
8 officers. And what did they tell you about his demeanor.
9 He was calm. They could smell an odor of alcohol, but he
10 didn't appear intoxicated. How many times have you ever
11 heard of testimony in DUI cases where someone supposedly is
12 intoxicated where it's a smell of a strong odor of alcohol.
13 There was slurred speech. He was not able to respond to my
14 questions in an appropriate manner those type things. You
15 don't have any of that here.

16 Officer Brown tells you I can smell an odor of
17 alcohol, but he answered all my questions. He was
18 co-operative. He did not appear intoxicated to me although
19 I could smell alcohol. Phil Hanna six hours later same
20 thing.

21 Now, here's the key. You have to consider all the
22 evidence. But what I'm going to ask you to do as you consider
23 all of this evidence, you will have available for
24 yourselves a tape player and the taped statement is in
25 evidence. This is a tape that was taken that night by

1 Investigator Hanna. Ask for the recorder, play it.
2 Listen. What you'll hear is a man who's speech, his
3 inflections, his tone, his awareness is every bit identical
4 that night as when he sat right here and talked to you
5 today. But he wants you to believe that he was so drunk,
6 he was not in control and he can't remember anything.

7 Let me tell you what you got to look at. Please
8 understand something and I think I've told you this. And
9 I'm gone say it again. There is no burden on the State to
10 prove premeditation. And there is no burden on the State
11 to prove motive. We don't have that burden. It doesn't
12 exist; that's in the movies.

13 Let me share with you. The first recorded murder or
14 killing in history was when Cain killed Abel. And who was
15 that, brother killing brother. And from that time on and
16 especially in this country and in this state, we now have
17 laws. We have a need for laws for criminal domestic
18 violence because some of the most violent things that occur
19 in this country occur among family members. You heard a
20 lot of stuff about how much he loves Rose Leffingwell and
21 he loves Donald and they're all family and stuff like that.

22 Ladies and gentlemen, don't let him steer you away
23 from the facts just because he had some relationship all be
24 it we don't really know what that was. Don't let that sway
25 you into believing that he can't commit murder; that has

1 nothing to do with it. See that's another piece of smoke
2 he wants you to look at and not look at the facts.

3 He's a good lawyer. He does a good job. But, you
4 know, when he went through the charge and the four counts
5 you're gonna hear from, I notice that he never said to you
6 when you consider whether it's voluntary or whether it's
7 involuntary or what. He said when you consider if it's
8 murder.

9 I will submit to you, ladies and gentlemen, you have
10 to look at this case based only on the facts and the
11 evidence that you got here. What did you hear this week.
12 You heard law enforcement get attacked over and over and
13 over and over again about what they didn't do. What they
14 didn't do. What they didn't do. This stuff that you heard
15 from Don Girndt about this hand. And I want go through all
16 the trouble to find it here. It's State's Exhibit 10.
17 You'll have it. You'll see it.

18 It's a left hand. It has a drop, a small drop right
19 here on the hand that may or may not be blood. I don't
20 know what it is. But Don Girndt wanted to be able to say
21 -- What did he say. I would have expected to see blood
22 spatter on that barrel. And this hand clearly was in the
23 vicinity of that barrel why do you see just one little drop
24 and not spatter on the hand. Well because it might have
25 been like this.

1 But I would submit to you, ladies and gentlemen,
2 without pulling the gun back out. If I'm holding a barrel
3 of a gun and I'm holding it like this, can you get a drop
4 of blood right there, you could. But does that mean you
5 can't get one here and you can't get one here and you can't
6 get one here and you can't get one here. See that's what
7 they want you to believe. He want you to believe there was
8 enough blood spatter to where we should have seen blood at
9 that barrel but only one drop on this hand. It's a red
10 herring something to take your eyes off the facts.

11 You got the testimony and you saw the little thing
12 when Mr. Daniels tried to show me about what happened. I'm
13 gonna submit to you you've got evidence in this case to
14 know beyond a reasonable doubt that it could not have
15 happened that way. You heard the pathologist testify. And
16 he told you that the entrance wound in the neck was ten and
17 half inches on the left anterior and an interior means
18 forward side. Ten and a half inches from the top of the
19 head to the exit wound. And he testified that to the
20 entrance -- entrance wound excuse me. He testified ten and
21 a half inches of the top of the head entrance wound. The
22 exit wound which was on the backside to the -- little to
23 the right side.

24 He testified was 12 inches from the top of the head.
25 Ten and a half here. Twelve here. Entrance, exit. Could

1 it possibly have been put in a barrel like this. No, could
2 not have been. The evidence, the physical evidence says
3 that's impossible. You don't pull a gun like this and jerk
4 it like this and have the shot enter here. And then
5 immediately head downward and head out the back. It
6 doesn't happen. It can't happen. Physically, it's
7 impossible.

8 But you heard Mary McDougal didn't you. Mary, did
9 you ever see any physical altercation between the two. No,
10 sir. Mary, at any time did you see Mr. Daniels take the
11 gun away from the victim. No, the victim handed it to him.
12 Mary, did you ever see the victim take the gun away from
13 Mr. Daniels. No, sir, he handed it to him. Then what did
14 you watch, Mary. When the victim handed the gun back to
15 Mr. Daniels, what did you watch. What did you see. She
16 said I saw him take the gun -- And first of all, she says
17 it was open.

18 This is the same lady that couldn't see well enough
19 to see an iron bar. The same lady that couldn't see well
20 enough to know the barrel was in the right position. She
21 said he snapped it closed. He took a step back excuse me
22 -- Let me -- She said he hand it to him. There was
23 something said. He snapped the gun closed. He took a step
24 back, raised it up. And she stood right down here and
25 showed you exactly what he did. Raised it up just like

1 this hesitated a moment and fired.

2 Now, that's what Mary saw, but the defense doesn't
3 want you to believe that part of her testimony. Only the
4 part where they were handing the gun back and forth. So
5 they don't want you to believe that he raised that gun up,
6 held it up, hesitated and fired. But that's what she saw
7 and that's what she told you.

8 And see, ladies and gentlemen, that's evidence in
9 the case. The defendant couldn't even tell you from his
10 knowledge that the defendant or that the victim, Donald
11 Leffingwell grabbed the gun. He can't even tell you that.
12 Did you not find it odd -- And again this goes to
13 believability and credibility which is your job. Did you
14 not find it odd that he could tell you certain things that
15 happened then and other things he couldn't remember. He
16 couldn't even remember testimony from 12 o'clock noon
17 today.

18 I don't mean to be critical. But, ladies and
19 gentlemen of the jury, your job is to take the facts and
20 apply the law and render a verdict. And that verdict
21 shouldn't be based on sympathy or any other emotions. And
22 I know it's hard to ask you to detach your emotions from
23 your decision, but you really need to attempt that.
24 Because you have the facts that you know them that have
25 been presented. And you have to be able to apply the law

1 to those facts.

2 And I got to tell you the defendant the story he has
3 given you today, is different from what he gave that night.
4 Dramatically different. And you'll have the tape, listen.
5 Please, please listen to see if that sounds like an
6 intoxicated person. What else have you got. His own
7 daughters told you that he had a drinking problem and that
8 it effected his memory and he's not able to remember stuff.
9 But he wants to come in here and have you believe now that
10 now he remembers. And now he remembers it was an accident,
11 but you know what he never told that before. And even when
12 he realized whatever it is -- revelation he came to that
13 his statement was full of inconsistencies, he never said it
14 was an accident until he took this stand.

15 But what did he say on the stand and I think this is
16 one truth that he did give you. If he gave you any, I
17 think this is one he gave you. After I sat down and began
18 to put this all together, and I wrote down exactly what he
19 said. I put the events back to my satisfaction. Of
20 course, when I asked him about it, it was all of a sudden
21 to my satisfaction until I felt I had the truth. But by
22 his own testimony, he doesn't know what the truth is. And
23 they want you to speculate on what it is.

24 See they want you to focus on law enforcement didn't
25 do this. They didn't do that. They didn't do this. Let

1 me give you a real brief scenario and I'll wrap this thing
2 up. If I go to a crime scene and I go to a call on a
3 burglary, and the call is that there's been a break-in in
4 the house and the jewelries been stolen. And when I get
5 there I see a window's been broken, there's some blood on
6 it. And inside there's a big jewelry box and it's torn
7 open and the jewels are missing. And I'm the investigator
8 and I go to that scene and that's all I've got. And in
9 that situation what do I need to do, I need to take
10 fingerprints. I need to take blood swipes. I need to do
11 all of this stuff.

12 Now, let's look at another situation. I get a call.
13 I'm a next door neighbor I just saw a break-in. The guy's
14 still over there. Law enforcement gets there and when they
15 get there, there's a broken window. There's blood on the
16 glass. There's a guy with a mask on, dressed in black, had
17 the black mask on trying to see close at night and he was
18 caught with a crowbar. And the jewelry box is broken open
19 and he's in it. And he's grabbed right there and law
20 enforcement gets there and they got him there.

21 I would submit to you, ladies and gentlemen, in this
22 situation -- And oh, he's got a cut. In that situation, is
23 it important, do you need to go back and get those prints
24 and get that blood, get all this stuff or do you need to
25 talk to witnesses who saw him break the glass and saw him

1 crawl in. See there are times that you need to take
2 fingerprints. There are times that you need to take blood,
3 but it's not everyday. And in this case, you got an
4 eyewitness. You got the defendant himself at that time
5 admitting to it. You heard Jason Dore, the forensic's
6 officer. Before he touched the gun, he examined it. There
7 was no blood on the barrel. So he grabbed it there and
8 picked it up. And then he photographed the areas where
9 there was blood.

10 Mr. Deberry's own expert was handed a photograph
11 that the defense put in. That blood there look at that and
12 tell me what you believe that is if it were a glass there.
13 And he couldn't say it was blood spatter. He had to tell
14 you the truth that it was smudged. It was transfer blood.
15 See there's so many areas this week that you were asked to
16 be asked to look at by the defense, but everyone has been
17 away from the facts.

18 Ladies and gentlemen, I'm about to sit down and the
19 judge will then charge you on the law. In South Carolina,
20 you can infer malice from the use of a deadly weapon. The
21 law allows you to. You don't have to do that, but you can
22 allow the use of a deadly weapon and give you an inference
23 of malice.

24 Let me tell you something. When a man takes a gun,
25 a shotgun, and he snaps it shut and he takes a step back

1 and he raised it to his shoulder and he puts his thumb on
2 that hammer and he pulls that hammer back and he fires that
3 trigger into the throat of another man, I'm telling you
4 that is not malice. And you can't have murder in South
5 Carolina because that is nothing but malice. That is
6 nothing but meanness. I can't tell you why he did it. But
7 that's not the State's burden to do. I don't have to tell
8 you why he did it.

9 There's a lot of people that would like to know why.
10 Rose Leffingwell would like to know why. Donald
11 Leffingwell would like to know why, but we want ever know.
12 But that doesn't take away the fact that this is not a
13 voluntary manslaughter. There's no heat of passion. The
14 defendant's own testimony that you believe any of it or
15 believe all of it. Whatever you believe of it. There is
16 no heat of passion. There's no anger.

17 This isn't involuntary manslaughter. This isn't
18 involuntary manslaughter. This is not an accidental
19 shooting. This was intentional and it was done with
20 malice. And the judge will tell you that malice does not
21 not have to be over a long period of time. Malice can be
22 instantaneous. Malice can be in the heart of somebody and
23 it can be in as quick as it takes to snap a gun shut, raise
24 it up and fire it.

25 You'll have all the evidence. Please keep in mind

1 the evidence is what you heard from the witness stand and
2 these items and the tapes and things you're going to have.
3 It's not what could have happened or what you suspect would
4 happen. Your burden and my burden is to prove this case
5 beyond a reasonable doubt. And the judge will charge you
6 on what a reasonable doubt is. It's not beyond any doubt.
7 It's beyond a reasonable doubt.

8 And, ladies and gentlemen, Mr. Deberry indicated
9 that if you hesitate to make a decision that that's
10 reasonable. I would submit to you and please go with what
11 the judge tells you. But I would submit that's not what
12 the law says. Because see the law tell you as members of
13 the jury that you need to deliberate. You need to talk
14 about it. You need to go over everything. If you do that,
15 and I'm confident you will. I have no doubt about that and
16 you take the evidence that you heard from this witness
17 stand and that you got to listen to the tape. Listen to
18 everything you got. Apply the law as the judge gives it to
19 you.

20 And, ladies and gentlemen, you can reach a verdict
21 in this case which does in fact speak the truth. This is a
22 murder plain and simple. A murder an unlawful killing of
23 another with malice aforethought. Thank God for Mary
24 McDougal. Thank God we had somebody who saw it. Thank
25 you.

1 MR. DEBERRY: Your Honor, can we approach just a
2 minute.

3 (A bench conference was held on the record in the
4 presence of the jury, but out of the hearing of the jury.)

5 MR. DEBERRY: I want the record to show I object to
6 the charge of voluntary manslaughter and ask that it on be
7 murder and involuntary manslaughter and not guilty.

8 MR. RUSSO: Remember that also on the record because
9 out there that the State has to ask the charge of voluntary
10 intoxicant that's what you said.

11 THE COURT: Based on the evidence before the Court,
12 as I said I charge murder, voluntary manslaughter and
13 involuntary manslaughter.

14 (The bench conference has concluded in the presence
15 of the jury, but out of the hearing of the jury.)

16 THE COURT: Inquiry. Anybody on the jury need a
17 brief break before I get into the charge. The charge
18 probably gone take 35 to 40 minutes. All right. We'll
19 take 10 minutes come back. We'll hold it to 10 minutes I
20 promise you that.

21 (Court in recess.)

22 (Court has reconvened.)

23 (The jury returned to the courtroom.)

24 THE COURT: Thank you. Madam forelady and ladies
25 and gentlemen of the jury, if I could have your attention,

1 I have followed very patiently along with y'all this case.
2 And I noticed that you have been very very attentively
3 listening to the presentation. I want to thank you for
4 doing that. I want to thank counsel for their presentation
5 of the case and the able arguments put forth on both sides.
6 And now, it becomes my duty as trial judge under the
7 constitution of this State to charge and instruct you, the
8 jury, the law applicable to the case.

9 It is your duty as jurors to accept and apply the
10 law as the Court will now state it to you. As jurors it's
11 your exclusive duty to decide all the issues of fact in the
12 case and for that purpose to determine the effect, the
13 value, the weight, and truth of the evidence. Both the
14 State and the defendant have a right to expect that you
15 will conscientiously consider and evaluate the evidence and
16 apply the laws of the case thereto to the end that both the
17 State of South Carolina and the defendant will receive and
18 obtain fair impartial trial in this case.

19 When I use the word defendant in my instructions to
20 you, I refer to Mr. Tracy Willard Daniels. The State of
21 South Carolina by the bill of indictment in this case
22 charges the defendant with offense known in the law as
23 murder. To this charge and to the indictment, the
24 defendant has entered a plea of not guilty. A plea of not
25 guilty by the defendant places the burden of proof on the

1 State to prove by evidence the guilt of the defendant
2 beyond a reasonable doubt before you the jury can find the
3 defendant guilty.

4 The defendant is presumed in law innocent of the
5 charge contained in the indictment. It is a cardinal and
6 fundamental rule of the law of evidence that a defendant
7 irrespective of the enormity of the charge against him will
8 always be presumed innocent of the crime for which he is
9 indicted, unless and until the guilt of the defendant has
10 been proved by evidence that satisfies you, the jury, of
11 his guilt beyond a reasonable doubt.

12 The presumption of innocence is not a mere legal
13 theory. It is not just a legal phrase. The presumption of
14 innocence is a substantial right which every accused is
15 entitled. Our supreme court has declared that the
16 presumption of innocence is like a robe of righteousness
17 placed about the shoulder of the defendant. And it remains
18 with him and assigns him to that class the innocent, until
19 that presumptive robe of righteousness has been stripped
20 from his person by evidence satisfying you, the jury, of
21 guilt of the defendant beyond a reasonable doubt.

22 The presumption of innocence accompanies the
23 defendant from the time of his arraignment and appearance
24 in this court and continues with the defendant throughout
25 every stage of the trial and continues with the defendant

1 after you retire to the jury room to deliberate your
2 verdict. The presumption of innocence continues in
3 existence to the benefit of the defendant until you the
4 jury reach the conclusion that the State has proved the
5 guilt of the defendant beyond a reasonable doubt.

6 As I told you the defendant is charged with the
7 offense of murder. And I will now read the indictment
8 to you. It alleges that Tracy Willard Daniels did in
9 Florence County on or about December the 4th 1999
10 felonious, willfully and with malice aforethought kill one
11 Donald William Leffingwell Jr., by means of shooting him
12 without any legal provocation and that the said Donald
13 William Leffingwell Jr. did die as approximate result
14 thereof and the said shooting was not in self-defense.

15 I charge you that the State is not required to prove
16 the guilt of the defendant beyond all doubt or beyond every
17 doubt but beyond a reasonable doubt. Bear with me with
18 just a second I miss placed part of my charge. I charge
19 you that the government has the burden of proving the
20 defendant guilty beyond a reasonable doubt. Some of you
21 have served as jurors in civil cases where you were told
22 that it is only necessary to prove that fact is more likely
23 true than not true.

24 In criminal cases, the government's proof must be
25 more powerful than that. It must be beyond a reasonable

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

12 I charge you that the defendant is entitled to every
13 reasonable doubt arising in the case. If upon any issue of
14 fact essential to conviction and a verdict of guilty, you
15 have a reasonable doubt as to how that issue should be
16 resolved, it would be your duty to resolve that reasonable
17 doubt in favor of the defendant.

18 A defendant, ladies and gentlemen, is not required
19 to prove his innocence, but the State is required in law to
20 prove every essential element of the offense charged
21 against the defendant by evidence which satisfies you the
22 jury of the guilt of the defendant beyond a reasonable
23 doubt before you can convict the defendant and find him
24 guilty.

25 If then upon the whole case, you have a reasonable

1 doubt as to the guilt or the innocence of the defendant, he
2 is entitled to that reasonable doubt and would be entitled
3 to an acquittal in a verdict of not guilty. But on the
4 other hand, if upon the whole case, you find that the State
5 has proved by evidence which satisfies you, the jury, of
6 the guilt of the defendant beyond a reasonable doubt, then
7 in such circumstances it would equally be your duty to
8 convict the defendant and find him guilty.

9 If you find the defendant guilty but you have
10 reasonable doubt as to whether the defendant be guilty of
11 the greater crime charged or the lesser crime charged, then
12 you would resolve that reasonable doubt in favor of the
13 defendant and write a verdict of guilty only as to lessor
14 charge. But, of course, you could not write a verdict of
15 guilty to any charge unless it's to that charge you find
16 all elements of the charge had been proven by the State
17 beyond a reasonable doubt. And that goes to what we call
18 lessor-included offenses where you have an original charge
19 and there are possible lessor-included offenses contained
20 therein. And I will give you a more detail instruction on
21 that when I get to the charge on the crime alleged, okay.

22 I instruct you at this time that the indictment in
23 the case is not evidence and cannot be considered by the
24 jury as evidence in the case. An indictment is simply the
25 formal written instrument which contains the charge against

1 the defendant and it serves as a formal document by which
2 the case processed into the court. During this trial each
3 of us -- you and I have certain duties to perform. As the
4 trial judge, it is my responsibility to preside over the
5 trial of this case. And I also have the duty to rule upon
6 or pass upon the admissibility of the evidence offered
7 during the progress this trial. You are to consider only
8 the competent evidence before you. And you are to
9 disregard and disabuse from your mind any testimony ordered
10 stricken from the record of this case during the progress
11 of the trial, if there be any. And you are to consider
12 only the testimony which has been presented from this
13 witness stand together with any exhibits admitted into the
14 record of this case and any stipulations of counsel made
15 into the record, if there be any.

16 Ladies and gentlemen, I charge you at this time that
17 what counsel may argue to you are their statements is not
18 evidence. The evidence is the testimony which comes from
19 the witness stand along with any exhibits that have been
20 introduced or admitted into evidence.

21 Now, I have the additional duty to charge you the
22 applicable law of the case. As the presiding judge, I am
23 the sole judge of the law of the case and it's your duty to
24 accept and apply the law as I state it to you. If you have
25 a preconceived idea as to what the law is or what the law

1 ought to be in this case and it should not agree with what
2 I tell you the law is, your obligated under your oath to
3 abandoned this preconception on your part because you are
4 sworn to accept the law precisely as I state it to you.

5 In every case tried in this court before a jury, the
6 jury becomes the sole and exclusive judge of the facts of
7 the case. You the jury are the judge of the facts in this
8 case. The Court is the judge of the law in the case. The
9 constitution of this state has declared that a trial judge
10 shall not intimate or state or comment upon or make any
11 statement to a trial jury about the facts and in a case.
12 Since you are the sole judge of the facts, you are not to
13 infer from anything that I've said during the progress of
14 this trial and ruling upon the admissibility of evidence or
15 otherwise or anything that I now say during the course of
16 this charge trial to you that I have an opinion about the
17 facts in this case. The law does not permit me to have an
18 opinion about the facts. That is a matter solely for you
19 the jury to determine.

20 As jurors it is your duty to determine as I have
21 stated to you the effect, the value, the weight, and the
22 truth of the evidence presented during the course of this
23 trial. Necessarily then, you must access the credibility
24 of the witnesses who have testified in this case.
25 Credibility is simply a legalistic term which means

1 believability.

2 It becomes your duty then to analyze and evaluate
3 the evidence and determine that evidence which convinces
4 you of it's truth. I charge you that in determining the
5 question of the credibility or believability of the
6 witnesses. You may believe one witness as against several
7 witnesses or several witnesses as against one witness. You
8 may believe a part of the testimony of a witness and reject
9 the remaining part of the testimony of that same witness.

10 You may believe the testimony of a witness in it's
11 entirety or reject the testimony of a witness in it's
12 entirety. You may consider whether any witness has
13 exhibited any interest, any bias or any prejudice in the
14 case. You may consider the demeanor of a witness. The
15 appearance of a witness from the witness stand. And you
16 may consider the opportunity or knowledge concerning those
17 things about which a witness testified. And in doing so
18 and exercising your mental processes and determining what
19 you consider to be true.

20 The law simply requires that you exercise your good
21 judgment, your common sense, your sense of logic and reason
22 and your experiences in life. You then apply these
23 attributes of ability to the evidence and determine what
24 you consider the truthful evidence to these true state of
25 facts as determined by you the jury. You take and apply

1 the law as I state it to you and thus arrive at a true
2 verdict in the case.

3 I'm now going to instruct you on the law applicable
4 to the indictment. I have read the indictment to you. The
5 charge in the indictment is that of murder. I'm going to
6 first read to you Section 16-3-10 of the code of laws of
7 South Carolina which states. Murder is the killing of any
8 person with malice aforethought, either expressed or
9 inferred.

10 Now, upon the principle and theory of our law than
11 any greater offense includes a lessor offense. The charge
12 of murder also includes the lessor offense of voluntary
13 manslaughter, even though the charge of voluntary
14 manslaughter is not written into the body of this
15 particular indictment but also includes the offense of
16 involuntary manslaughter.

17 I'm going to define for you the law of murder. Then
18 I'm going to define for you the law of voluntary
19 manslaughter and then that of involuntary manslaughter.
20 Murder is the unlawful killing of any person with malice
21 aforethought, either expressed or inferred. Hence in
22 order, in order to convict one of murder, the State must
23 not only prove the killing of the deceased by the
24 defendant, but that it was done with malice aforethought
25 and such proof must be beyond a reasonable doubt.

1 Malice aforethought is an essential element in the
2 crime of murder. What is malice. Malice is defined in the
3 law of homicide as a term of art. Malice does not
4 necessarily mean an actual intent to kill. This is a
5 technical term importing wickedness and excluding just
6 cause or legal excuse. It is something which springs from
7 wickedness, from depravity, from a depraved spirit, from a
8 heart devoid of social duty and fatally bent on mischief.
9 The words express or inferred malice do not mean different
10 kinds of malice but merely the manner in which the only
11 kind of malice known to the law maybe shown to exist; that
12 is to say either by direct evidence or by inference.

13 Malice may be expressed as where previous threats
14 of vengeance or lying in wait or other circumstances show
15 directly that an intent to kill was entertained. Malice
16 may be inferred where though no expressed intent to kill is
17 proved by direct evidence. It may be inferred from the
18 facts and circumstances which are proved. Malice may be
19 inferred from the willful, deliberate, and intentional
20 doing of an unlawful act without just cause or legal
21 excuse. In other words, in it's general signification,
22 malice means the doing of a wrongful act intentionally
23 without justification or legal excuse. But even in facts
24 proved or sufficient to raise an inference of malice, this
25 inference would be simply an evidentiary fact to be taken

1 into take into consideration by you, the jury, along with
2 all the other evidence in the case. And you may give it
3 such as you determine it should receive as to whether or
4 not malice has been proved beyond a reasonable doubt.

5 Why malice may be inferred from the use of a deadly
6 weapon where the circumstances relating to the homicide are
7 brought out in the evidence. This reference vanishes and
8 the burden is on the State to prove by evidence satisfying
9 the jury beyond a reasonable doubt.

10 I charge you that inferred malice, the law says that
11 where one intentionally kills another with a deadly weapon
12 or brutal force the implication of malice may arise if
13 facts proved beyond a reasonable doubt is sufficient
14 arising inference of malice to your satisfaction.

15 Let me charge you as to -- You heard me use the word
16 depravity or depraved heart. I charge you that malice is
17 an essential ingredient of murder does not necessarily
18 import ill will toward the individual that is injured, but
19 instead signifies a malignant recklessness of the lives and
20 safety of others or a condition of the mind which shows a
21 heart fatally bent on mischief.

22 I further charge you that under the law of South
23 Carolina, the person need not have any specific intent to
24 kill or injure another person to be guilty of murder.
25 Where there is evidence of such recklessness and wantonness

1 as to indicate a depravity of mind and disregard for human
2 life from which malice may be inferred.

3 Ladies and gentlemen, it can be observed that there
4 must be malice aforethought and while the law does not
5 require that malice shall exist for any particular length
6 of time before the commission of the act. It must be
7 aforethought. There must be a combination of the previous
8 evil intent and the act producing the fatal result. I
9 charge you the State is not required to prove a motive for
10 homicide.

11 I am now going to define for you the law of
12 voluntary manslaughter. I have already indicated to you,
13 ladies and gentlemen, and instructed you that an indictment
14 for murder includes the lessor offenses of voluntary
15 manslaughter and involuntary manslaughter, even though the
16 lessor crime of voluntary manslaughter is not physically
17 written into the bill of indictment. In other words, a
18 defendant indicted for murder may be convicted of voluntary
19 manslaughter or involuntary manslaughter if the evidence
20 warrants it.

21 Now, what is manslaughter. Manslaughter is the
22 unlawful killing of a human being without malice expressed
23 or inferred. You will notice then, ladies and gentlemen,
24 that an absence of malice is what distinguishes voluntary
25 manslaughter from murder. I have instructed you that

1 malice is an essential element of the crime of murder.
2 Malice is not an essential element of the crime of
3 voluntary manslaughter. The presence of malice and murder
4 and absence of malice and involuntary manslaughter is what
5 distinguishes these two offenses.

6 Manslaughter is divided into two classes involuntary
7 manslaughter and voluntary manslaughter. I will get to
8 involuntary in just a few minutes. What is voluntary
9 manslaughter. Voluntary manslaughter is the felonious taking
10 of a life of another human being in sudden heat and passion
11 upon a sufficient legal provocation. The law recognizes,
12 ladies and gentlemen, the fact that sudden heat and passion
13 may for the time or time being effect one self-control.
14 Temporarily disturbed the sway of reason and hence reduces
15 the crime of murder to that of voluntary manslaughter.

16 Where the homicide was done in sudden heat and
17 passion provided there was a sufficient legal provocation.
18 Sufficient legal provocation must be such as would be
19 calculated to cause a person of ordinary reason and
20 prudence sometimes described as the average person to
21 become enraged; that is to experience sudden heat and
22 passion and hence to loose control of himself temporarily
23 and frequently involve some physical aggression or assault.
24 Merely by way of illustration and illustration alone, I say
25 that when an unjustifiable assault is made with violence or

1 with circumstances of indignity upon a man's person, and
2 the party so assaulted kills the aggressor, the crime will
3 be reduced to manslaughter if it appears that the assault
4 was resented immediately. And the aggressor was killed in
5 the heat of blood.

6 For it will be observed that the killing must be in
7 sudden heat and passion. And if in fact passion had cooled
8 or if there was sufficient time between the provocation and
9 killing for passion to cool, the killing would not be
10 attributed to heat or passion but to malice. The
11 sufficiency of cooling time would depend upon whether there
12 was a time all circumstances being considered for a person
13 of ordinary reason and prudence to cool.

14 I charge you that no mere words however insulting
15 can excuse the killing and reduce the offense to
16 manslaughter. I further charge you that if an adequate
17 legal provocation does not exist, the killing even in the
18 heat of passion is murder and not manslaughter. It must be
19 passion justly excited by legal provocation.

20 I will now charge you as to the crime of involuntary
21 manslaughter. As I told you involuntary manslaughter is a
22 lessor-included offense of murder. Involuntary
23 manslaughter may be described as a killing of another
24 without malice and unintentionally but while one is engaged
25 in the commission of some unlawful act not amounting to a

1 felony and not naturally tending to cause death or great
2 bodily harm. Involuntary manslaughter may also be
3 described as the killing of another without malice and
4 unintentionally but while engaged in the doing of an
5 unlawful act -- that's the doing of a lawful act with
6 reckless disregard of the safety of others.

7 I'm gone now charge you to voluntary intoxication.
8 Voluntary intoxication where it has not produced permanent
9 insanity is never an excuse for or a defense to a crime
10 regardless of whether the crime is one involving general or
11 specific intent. A person who voluntarily renders himself
12 intoxicated is no less responsible for his acts while in
13 such a condition. If one involuntarily drinks intoxicating
14 liquors, wine or beer and becomes intoxicated to whatever
15 degree and if while in that condition the person commits an
16 act that would be a crime if it had been committed by a
17 sober person, the fact of drunkenness would not relieve the
18 intoxicating person from responsibility.

19 Also raised in this case, ladies and gentlemen, is
20 the issue of under the law known as a defense of accident.
21 I charge you an accident is an occurrence that happens
22 unexpectedly from the unnatural operations of nature alone
23 or results undesigned and unexpectedly from the main agency
24 alone or from the joint operation of both. The death of
25 the deceased was the result of a pure accident within the

1 meaning of that definition of course, the defendant could
2 be or could not be guilty of any offense.

3 However, the law does not allow one to excuse
4 himself by the defense of accident if, he, himself was
5 guilty of recklessness and such recklessness was the
6 proximate cause of the death of the deceased.

7 A homicide by accident, misadventure or misfortune
8 is excusable where it is accidentally committed while doing a
9 lawful act in a careful and lawful manner and without
10 unlawful intent. Homicide, by misadventure is the
11 accidental killing of another where the slayer is doing a
12 lawful act accompanied or unaccompanied - excuse me -
13 unaccompanied by any criminally careless or reckless
14 conduct. A homicide committed by accident is excusable.
15 For example, a homicide is excusable if death unfortunately
16 ensued where a parent was correcting his child and the
17 bounds of moderation were not exceeded in the manner. The
18 instrument or the quantity of the punishment where a person
19 was at work with a hatchet and the head flew off and killed
20 a bystander.

21 In order that a homicide by misadventure may be
22 excusable, the act resulting in death must have been a
23 lawful one. It must have been done with reasonable care
24 and due regard for the lives of persons of others and the
25 killing must have been accidental and without lawful intent

1 or evil design. All three elements must concur in the
2 absence anyone of them will involve guilt. It is not
3 excusable where it was the result of the unlawful act. An
4 act such as unlawfully striking another with the intent to
5 hurt. Although not with an intent to kill is not
6 excusable. Likewise, the homicide is not excusable if it
7 was the result of an act done with such recklessness as to
8 amount to criminal negligence.

9 If the testimony shows that a defendant voluntarily
10 and knowingly intending to hurt the person of another
11 struck him a dangerous blow, which was likely to result a
12 serious harm and death resulted, it is not an accidental
13 killing. Where the death of a human being is a result of
14 accident or the misadventure in the true meaning of the
15 term, no criminal responsibility attaches to the act of a
16 slayer. If it be shown that the killing was unintentional,
17 that it was done while the perpetrator was engaged in a
18 lawful enterprise, the homicide will be excused on the
19 score of accident.

20 An accident is an occurrence that happens
21 unexpectedly from the unnatural operations of nature alone
22 or result undesigningly and unexpectedly from the main
23 agency alone or from the joint operation of both. If the
24 death of the deceased was the result of a pure accident
25 within the meaning of that definition, of course, the

1 defendant could not be guilty of any offense. However, the
2 law does not allow one to excuse himself by the defense of
3 accident, if he himself was guilty of negligence and such
4 negligence was the proximate cause of the death of the
5 deceased.

6 You had one thing I need to backup and charge you on
7 concerning the testimony. In this case, we had expert
8 witnesses that were qualified. You've heard the testimony
9 of witnesses who had special knowledge, skill, experience,
10 training or education in a particular field and who have
11 given their opinion as an expert as to the matters in which
12 they may be skilled. In determining the weight to be given
13 such opinion, you should consider the qualifications and
14 credibility of the expert and the reasons given for his
15 opinion. You are not bound by such opinion, give it the
16 weight, if any, to which you deem it entitled.

17 All right. Give my just a second to make sure I've
18 covered everything I had ready to cover. I move on to the
19 closing part of the charge. Ladies and gentlemen, I charge
20 you that you're not partisans or advocates for the State of
21 South Carolina or the defendant. You do not serve as
22 jurors to reward friends or punish enemies. Obviously,
23 such a perverted system of justice would be intolerable.
24 You have been selected by both the State and the defendant
25 as fair and impartial jurors. It is your duty then by your

1 joint deliberations to determine the truth of the case,
2 given to the defendant the benefit of every reasonable
3 doubt on each and every issue. Then to the facts which you
4 determine to be true. You then take and apply the law
5 which has been given to you by the Court. And thus arrive
6 at a verdict which does speak the truth of the case or the
7 word verdict which has a Latin derivative means a true
8 saying. And when you have accomplished these
9 responsibilities, you will have satisfied your oath as
10 jurors. And you will have discharged your duty to the
11 court.

12 I will now instruct you in the forms of the verdict
13 in this case. There are four possible forms of verdict in
14 the case. You're not to give any weight whatsoever to how
15 they are listed. I'm gone read the verdict form to you.
16 It's got the caption on it. I'm not gone go over that with
17 you, but it's the verdict form. The possible forms of
18 verdict are as follows: We the jury find the defendant,
19 Tracy Willard Daniels, first possible form of the verdict
20 is guilty of murder. Second possible form of verdict is
21 guilty of voluntary manslaughter. The third possible form
22 of the verdict is guilty of involuntary manslaughter. The
23 forth possible form of the verdict is not guilty.

24 Whatever the verdict is, madam forelady, and I
25 charge you, ladies and gentlemen of the jury, that whatever

1 your verdict is, it has to be an unanimous verdict. All 12
2 of the deliberating jurors have to be in agreement on the
3 verdict whatever it is. Madam forelady, it will be your
4 responsibility to check the appropriate verdict, sign your
5 name to this verdict form and date it. And knock on the
6 door and let Mr. Bailiff know when you have reached a
7 verdict.

8 Now, I'm gone send you back in just a minute, but do
9 not begin your deliberations until I send the verdict form
10 along with the exhibits back to you. And when I do that in
11 a few minutes, I need the two alternates to remain in the
12 courtroom with me while the 12 of the rest of you go back.

13 Once again, I need to charge you if the State has
14 failed to prove the guilt of the defendant beyond a
15 reasonable doubt, your verdict will be not guilty. If
16 State has proved the guilt of the defendant beyond a
17 reasonable doubt, your verdict would be guilty of one of
18 those offenses that I have charged you on.

19 And I remind you once again concerning the issues of
20 lesser-included offenses. If you find the defendant guilty
21 but you have a reasonable doubt as to whether the defendant
22 be guilty of the greater crime charged or the lesser crime
23 charged, then you would resolve that reasonable doubt in
24 favor of the defendant and write a verdict of guilty only
25 as to the lesser charge.

1 Once again, if you could not write a verdict of
2 guilty to any charge unless it's to that charge, you find
3 all the elements of charge been proven by the State beyond
4 a reasonable doubt.

5 And that covers everything that I had planned to
6 cover with you. And I will now send you back. I've got to
7 check in with the attorneys one last time. We will send
8 the form back to you along with the exhibits in just a few
9 minutes.

10 (The jury retires to the jury room.)

11 THE COURT: All right. Anything concerning the
12 charge from the State?

13 MR. RUSSO: No, Your Honor.

14 THE COURT: From the defense?

15 MR. DEBERRY: No, Your Honor.

16 THE COURT: I think I charged everything I could
17 possibly charge.

18 MR. RUSSO: Your Honor, you didn't mention it to
19 them and it might be enough just for Mr. Propps to mention
20 to them when he takes a step back there. If they would
21 like a recorder, it's available.

22 THE COURT: I'm sorry. I forgot.

23 MR. RUSSO: Mr. Propps can do that. It doesn't
24 matter to me. I just like for them to know.

25 THE COURT: Well, I'll tell you what just ask madam

1 forelady to step forward here just a minute.

2 Madam forelady, I just need to remind you that
3 should you need the recorder for any reason, let Mr. Propps
4 know and we will have a recorder delivered back to the
5 room. And also I mentioned about the gloves. We have them
6 available if you need the gloves.

7 MADAM FORELADY: Okay.

8 THE COURT: You'll step back. Then I'm gone send
9 all this back to you as the attorneys check it off.

10 (The jury forelady returned to the jury room.)

11 THE COURT: Y'all step forward and check off the
12 exhibits.

13 While they're doing that to the alternates, I know
14 it's been along week. You will probably like to go back
15 there and continue on this case and deliberate the verdict,
16 but unfortunately the law will not allow me to let you go
17 back there. If I were to happen to slip up and allow one
18 of y'all to go back there, should you take part in
19 deliberations, we would have to try this case all over
20 again. That's how strict they are on that. I apologize
21 but that's the way the system works. That's the bad news
22 should you have wanting to go back there. But the good
23 news is your duty on this case is now over. And that all
24 12 of the regular jurors are still intact. And they will
25 handle it from here.

1 So with that said, I want to thank you for your
2 service this week. You will not have to serve as a juror
3 in the circuit court again in the year 2001, but after that
4 if you're drawn, I hope you'll be willing to help us once
5 again. Now, you can stay and make yourself at home and
6 relax and wait for a verdict or otherwise you're free to go
7 and enjoy the rest of the weekend and think about us while
8 we're still here. Thank you.

9 (The two alternates were excused.)

10 THE COURT: You may instruct them to begin their
11 deliberations.

12 (The jury began deliberating at 6:50 p. m.)

13 (Court reconvenes.)

14 THE COURT: We received a request from the jury says
15 may we see Mary McDougal's statement. Signed by the
16 forelady which, of course, is not in evidence. And
17 normally wouldn't come into evidence as a case such as
18 this.

19 Bring them in.

20 MR. DEBERRY: Wait. Your Honor, I just was gone
21 suggest that you write on there it's not in evidence and
22 not allowed and just send it back in.

23 THE COURT: Both of you in agreement, I can do that?

24 MR. RUSSO: I don't agree with that. I would ask
25 that the Court just to explain to the jury that she was a

1 live witness and that's the testimony. And if they would
2 like to hear it, they can listen to the tape if they want
3 to do that or if they want to hear her statement it's not
4 available because of that.

5 (The jury returned to the courtroom at 7:52 p. m.)

6 THE COURT: All the jurors are back in the courtroom
7 and I'm in receipt of your request, madam forelady. And
8 the question is may we see Mary McDougal's statement.
9 Ladies and gentlemen of the jury, the statement is not into
10 evidence. It would not be allowed into evidence in a case
11 such as this the way this case developed and stands, okay.
12 The only thing I could possibly help you with is to tell
13 you at this time should you want to rehear her testimony
14 from the stand and the reason is not allowed into evidence
15 because there was live testimony by her from the stand.
16 Should you want to hear her testimony that was given in
17 court, I can have madam court reporter retrieve that and
18 replay that for you out here, okay. So should you desire
19 that please let me know. Otherwise, that's the only
20 suggestion I have and I might be able to help you with. So
21 you may step back to your room and continue your
22 deliberations.

23 (The jury retired to the jury room to continue their
24 deliberations at 7:54 p. m.)

25 THE COURT: You satisfied.

1 MR. RUSSO: Yes, Your Honor.

2 THE COURT: I figure I better put a little
3 explanation with it because I'm sure it was running through
4 their mind is how the defendant's statements came in and he
5 testified from the stand. Of course, you attorneys know
6 why it develops that way they don't.

7 (Question from jury marked as Court's Exhibit Number
8 5.)

9 (Court in recess.)

10 (Court reconvened.)

11 (Question from jury marked as Court's Exhibit Number
12 6.)

13 (The jury returned to the courtroom at 8:03 p. m. to
14 hear recorded testimony of Mary McDougal.)

15 THE COURT: All right. Madam forelady, we're in
16 receipt of your request. We have located the tape on which
17 that testimony is on. We will begin that tape and play
18 that for you. Should we reach a point that you want us to
19 stop. And you heard what you may have wanted to hear, I
20 don't know how much from your request. I don't know how
21 much you want to hear whether all or part. Just, madam
22 forelady, let us know and we will do whatever you desire
23 concerning the stopping point, okay.

24 (The jury returned to the courtroom to continue
25 deliberations at 8:30 p. m.)

1 THE COURT: Court will stand at ease.

2 (Court in recess.)

3 THE COURT: Okay, gentlemen, I've in receipt of
4 another note from the foreperson. It sounds like we may
5 have kind of a problem. This is what it says. Can I,
6 Susan Erb, speak to the judge. I have a question about the
7 possibility of juror influence. So what I'm gone do rather
8 than have madam court reporter pack up and move back to
9 chambers, I am going to bring her out after instructing the
10 jury to cease their deliberations for right now bring her
11 right here to this corner. Counsel, y'all may have to
12 approach, the defendant may approach over here. If he
13 wants to hear, that's between you and him. We will see
14 what the problem is, okay.

15 Mr. Bailiff, if you'll open the door after you
16 knock, tell them to stop their deliberations for right now,
17 okay. And bring the madam forelady here.

18 Counsel, y'all may approach.

19 Madam forelady, you step over here please.

20 MADAM FORELADY: First of all, we're a good group.
21 We've gotten along all week. But right now some of us have
22 concerns that one of the members possibly maybe influenced
23 by her husband being present in the courtroom all week.

24 THE COURT: Okay.

25 MADAM FORELADY: And I don't know what to do.

1 THE COURT: Can you elaborate a little bit to help
2 in what you think the influence is?

3 MADAM FORELADY: No, sir, I can't say anything
4 specific. She has not said anything specific. It's just a
5 feeling. She's become emotional. She's upset. And we've
6 all got along well. No one has argued or anything.

7 THE COURT: So she has not said anything to you that
8 would lead you to believe that there has been some kind of
9 improper influence.

10 MADAM FORELADY: No, sir, not directly, no.

11 THE COURT: All right. If you will step back to the
12 jury room, do not deliberate any further until I send
13 message back to you. Thank you.

14 (The jury forelady returned to the jury room.)

15 MR. DEBERRY: I can't read it. I mean, I can't
16 understand it.

17 MR. RUSSO: I don't know what's proper in this
18 situation. I don't know I just gather was upset or
19 something. Is it proper to call that juror -- for you to
20 call that juror.

21 THE COURT: No, the only problem -- The only thing I
22 know to do right know right now is bring the jury out and
23 poll them on any communications they may have had with
24 anyone during the course of this trial. And the only other
25 option is to give them a Allen type charge. They have not

1 told us that they are hopelessly and deadlocked.

2 MR. RUSSO: That's right.

3 THE COURT: So the only option I know my experience
4 in this at this point would be polling to clear the air.

5 MR. DEBERRY: Your Honor, here's -- Was it on the
6 record what juror said, okay.

7 COURT REPORTER: This record right here, yes.

8 MR. DEBERRY: If Your Honor, please ---

9 THE COURT: While you're thinking, if y'all could
10 think of something that you think proper for me to ask her
11 if I get her back out here, we'll do it.

12 MR. RUSSO: My question as I'm sitting here was she
13 didn't give you any specifics. But what I was -- thought
14 might be appropriate to say well whatever is occurring is
15 it causing the deliberations to not be able to proceed is
16 that -- is that the problem.

17 MR. DEBERRY: Well, so if it is.

18 MR. RUSSO: Well, I don't know at this point.

19 MR. DEBERRY: You just curious. If she has ---

20 MR. LAWSON: All she's saying is that she's got a
21 feeling that this juror is having trouble. I mean, it's
22 not unusual for a juror to have problems with murder cases.

23 MR. DEBERRY: But it's a suspect in her mind is the
24 way I took it.

25 THE COURT: That's it.

1 MR. DEBERRY: To poll them, I think would not be
2 proper. First of all, you gone divulge if that girl came
3 out here. I don't think the way I got it. She came out
4 here she hadn't told anybody. She didn't let it out the
5 bag in there why she came out here. She came out here ---

6 MR. RUSSO: I got the impression that she wasn't the
7 only one that had the suspicion.

8 MR. DEBERRY: But it's suspicion only. If you ask
9 her -- You invited specifics and she didn't have any.

10 THE COURT: Okay. I'm not gone poll them yet
11 because I want the feed back from y'all. I'm gone get her
12 back out here. We gone fish a little deeper here and see
13 if you can pick up anything. I'm gone send back and tell
14 them to continue their deliberations. If she has further
15 problems or they become deadlocked, then to let me know.
16 So I can give further charge that's about the only thing.
17 If y'all can think of anything you want me to ask her, let
18 me know and I can send back in there and bring it back.

19 All right. Anything y'all can think of you want me
20 ask to her when I get her back out here?

21 MR. DEBERRY: I would suggest that like you say we
22 bring her back out and tell her to continue deliberations.
23 And if they continue to have trouble reaching a verdict, to
24 let you know. And you have a charge that suppose to try to
25 help out.

1 MR. RUSSO: And I realize that just a matter of
2 curiosity, I think knowing at this stage in interfering be
3 able to deliberate. Sure at this point, there's nothing we
4 can do but give some information as to whether what to do.
5 If she tells you, yeah, we're not able to. I don't know.

6 MR. LAWSON: I think until she says that there's
7 nothing said else. All she says it's a feeling ---

8 MR. DEBERRY: That she has a feeling I think what,
9 Your Honor, I suggest that's about all we can do.

10 THE COURT: Y'all be thinking. Bring her back out.

11 (The jury forelady returned to the courtroom.)

12 THE COURT: A couple of questions I need to ask you.
13 Are any of the other jurors aware of the request that you
14 sent out?

15 MADAM FORELADY: Yes, sir.

16 THE COURT: All of them?

17 MADAM FORELADY: Probably eight or so.

18 THE COURT: Is the juror that you're suspecting is
19 she aware of it?

20 MADAM FORELADY: No, I didn't want to further upset
21 her.

22 THE COURT: Okay. At the point that you sent that
23 message out, were y'all in active deliberation?

24 MADAM FORELADY: Eleven of us ---

25 THE COURT: Don't give me any break down please.

1 Just in response to the question?

2 MADAM FORELADY: I think we were still into
3 deliberations.

4 THE COURT: All right. I'm gone ask you to step
5 back and continue deliberations. Should you get to the
6 point that deliberations cease or stall, let me know. And
7 I can bring the jury back in for a further charge at that
8 time, okay. So if you will go back, y'all may continue
9 deliberations.

10 (The forelady was excused to the jury room to
11 continue deliberations at 9:17 p. m.)

12 (Question from jury forelady marked as Court's
13 Exhibit Number 7.)

14 (Court in recess.)

15 THE COURT: The jury sent a message out here they
16 reached a verdict. And I just want to commend everybody
17 here that has been here the week. The majority of the time
18 and your behavior. Had been any outburst that caused a
19 problem. I know emotions run high in a case like this.
20 Any case like this will have that. And I certainly hope
21 that we want have any problem from here on out no matter
22 what this verdict might be. Should you think that you
23 can't handle whatever this jury has done, I would just
24 simply ask that maybe you step outside the door or either
25 we can make arrangements to put you back here because we

1 don't need any disturbance. And I don't think we'll have
2 that. Always in a homicide case such as this we talk to
3 the people that are present about that situation. All
4 right. With that said, bring the jury with the verdict in
5 please.

6 (The jury returned to the courtroom with a verdict
7 at 10:00 p. m.)

8 THE COURT: All jurors have reported.

9 Madam clerk.

10 CLERK OF COURT: Madam forelady and members of the
11 jury, have you agreed upon a verdict.

12 JURORS: Yes.

13 THE COURT: All right. You may publish the verdict.

14 CLERK OF COURT: The State of South Carolina, County
15 of Florence in the court of general sessions. Indictment
16 2000-GS-21-977, State vs. Tracy Willard Daniels, defendant.
17 Verdict, we the jury find the defendant, Tracy Willard
18 Daniels, guilty of voluntary manslaughter. Susan Erb,
19 foreperson. It's dated May the 4th 2001.

20 Madam forelady and members of the jury, if this is
21 your verdict so say you now.

22 JURORS: Yes.

23 THE COURT: Anything further of the jury from the
24 State?

25 MR. RUSSO: Nothing, Your Honor.

1 THE COURT: From the defense?

2 MR. DEBERRY: Polling please.

3 THE COURT: All right. Madam clerk, if you will
4 proceed with the polling process.

5 CLERK OF COURT: As I call your name if you would
6 please stand up. I'll ask you if this is your verdict and
7 is it still your verdict and answer my question.

8 Arlena Daniels, is this your verdict and is it still
9 your verdict?

10 MS. DANIELS: Yes, ma'am.

11 CLERK OF COURT: Regina Morris -- You can be seated.
12 Is this your verdict and is it still your verdict?

13 MS. MORRIS: Yes, it is.

14 CLERK OF COURT: Linda Strickland, is this your
15 verdict and is it still your verdict?

16 MS. STRICKLAND: Yes.

17 CLERK OF COURT: Margaret Ceaser, is this your
18 verdict and is it still your verdict?

19 MS. CEASER: Yes.

20 CLERK OF COURT: Diane Conyers, is this your verdict
21 and is it still your verdict?

22 MS. CONYERS: Yes, it is.

23 CLERK OF COURT: Levance McIver, is this your
24 verdict and is it still your verdict?

25 MR. MCIVER: Yes.

1 CLERK OF COURT: Millie Martin, is this your verdict
2 and is it your still your verdict?

3 MS. MARTIN: Yes.

4 CLERK OF COURT: Franklin Williams, is this your
5 verdict and is it still your verdict?

6 MR. WILLIAMS: Yes, it is.

7 CLERK OF COURT: Brenda Bullard, is this your
8 verdict and is it still your verdict?

9 MS. BULLARD: Yes.

10 CLERK OF COURT: Joyce Flowers, is this your verdict
11 and is it still your verdict?

12 MS. FLOWERS: Yes.

13 CLERK OF COURT: Jerrold Johnson, is this your
14 verdict and is it still your verdict?

15 MR. JOHNSON: Yes.

16 CLERK OF COURT: Susan Erb, is this your verdict and
17 is it still your verdict?

18 MS. ERB: Yes.

19 CLERK OF COURT: That's it, judge.

20 THE COURT: Counsel, anything further of the jury at
21 this time?

22 MR. RUSSO: No, Your Honor.

23 MR. DEBERRY: No, Your Honor.

24 THE COURT: All right. With that said, ladies and
25 gentlemen of the jury, the next thing I have to do is ask

1 madam clerk if she will step around to madam forelady and
2 form the verdict on the back of this indictment by the
3 madam forelady if you would, you will need to write guilty
4 of voluntary manslaughter under where it says verdict.
5 Sign your name and date it just as you did on that sheet.
6 All right.

7 (A pause in the proceedings.)

8 THE COURT: I know it has been a long week for all
9 of you. It's been a long week for all court personal and
10 everybody involved in the case. I want to personally thank
11 you for your patience with the Court. I know that it can
12 be a tremendous task on you to serve on a jury especially
13 when we have to run overtime and into the late night hours.
14 I know that keeping you back there in that room without an
15 explanation for extended periods of time and be down right
16 aggravating. But that's the way the system operates. A
17 jury is the finder of facts. The judge is the judge of the
18 law.

19 When a matter of law comes up, I have to handle that
20 on my own outside of your presence. And the reason for
21 that is to basically to get the evidence ready or get it in
22 proper form to present to you the jury. The only way we
23 can do that sometimes is in the actual trial of the case
24 and that creates delays that keep y'all back there while
25 I'm out here doing this. I didn't want you to leave until

1 I explained that to you because it is a necessary and
2 important part of the trial process.

3 Now once again, I thank you for your patience with
4 the Court. I thank you for serving on this jury. You will
5 not have to serve on another jury in circuit court during
6 the calender year 2001. You would have the option the law
7 stays the same way it is that you can ask to be exempted
8 should you be drawn in 2002 or 2003. But should you be
9 drawn, I hope you would be willing to serve once again
10 because it is an important constitutional duty as well as a
11 right. And I think all of you are certainly aware of that
12 now having served on a case such as this. If you do not
13 receive a check for your jury expense within two weeks,
14 please contact the clerk's office. Should any of you need
15 an employment slip talk with madam clerk here before you
16 leave. And we'll try to take care of that.

17 Now, should anybody wish to talk with you about this
18 case, there is no prohibition against that. I will tell
19 you that you don't have to talk with anybody whether it be
20 press or whoever. If you choose not to talk with anybody,
21 all you got to do is tell them I rather not talk about it;
22 that ends it. Should anybody insist in talking with you
23 about it or cause you a problem in any way, I'm gone be
24 right here. As your administrative judge for a couple more
25 months, anyway. You let me know. But if you desire to

1 talk with someone about it, that's completely your
2 prerogative.

3 All right. With that said, it's getting late and I
4 know y'all tired of hearing me talk. I'll dismiss you at
5 this time. I hope y'all have a good night and a good
6 weekend. I hope to see you soon here in the Florence area.
7 And if you're drawn on jury service, please be willing to
8 serve once again.

9 All right. Bailiff and sheriff, if y'all would
10 escort -- Any of the jurors that would to stay for the rest
11 of the these proceedings, you're welcome to sit in the back
12 of courtroom. If you so desire otherwise, law enforcement
13 will assist y'all to your car because it is dark. I'm not
14 sure where you're parked, but I want everybody to be safe
15 and sound getting to their cars. So they are here to
16 assist you, okay. Jury's dismissed.

17 (The jury was excused.)

18 THE COURT: All right. Any matter for the record at
19 this time?

20 MR. DEBERRY: If, Your Honor, please, we would move
21 for -- to renew the previous motions that we've made. We
22 move for a directed verdict and we would also move for a
23 new trial.

24 THE COURT: I don't know of any reason at this time
25 that I would interfere with the verdict of the jury. I'll

1 have to deny those motions. All right. Hearing nothing
2 else you ready to proceed with sentencing?

3 MR. DEBERRY: Yeah.

4 THE COURT: You may come around. Anything from
5 State concerning the sentencing phase?

6 MR. RUSSO: Your Honor, the jury has spoken. We
7 certainly have no qualms or questions with regards to the
8 jury verdict. For the Courts information, as far as
9 Mr. Daniels and any prior record, Your Honor, I think he's
10 got a disorderly conduct conviction. Other than that, he
11 has no other prior record that I'm aware of. However, Your
12 Honor, after speaking with the family and after hearing all
13 the testimony, Your Honor, the State would ask -- We would
14 again also adhere obviously and will not question the
15 decision of the Court. We understand that sentencing is at
16 your discretion.

17 However, Your Honor, we would ask the Court based on
18 everything that we know about this case and about this
19 trial, the defendant showed -- I'm assuming that Mr.
20 Deberry on behalf of the defendant is going to ask for some
21 form of mercy from the Court. Your Honor, our position
22 would be that this defendant showed no mercy to Donald
23 Leffingwell when he ended his life. And we would ask the
24 Court to please take into consideration. And we would seek
25 and ask the Court to consider the 30 year sentence on this

1 charge.

2 THE COURT: All right. I will hear from the defense
3 and then come back to the victim's family, okay.

4 MR. RUSSO: Yes, sir.

5 THE COURT: Mr. Deberry.

6 MR. DEBERRY: May it please the Court. Your Honor,
7 of course, you've heard the full blown trial. You've heard
8 the testimony from both sides as far as to further
9 elaborate on this situation. I would like to tell you that
10 in the conferences that I've had with Tracy now for about a
11 year and a half. And every time he has shown remorse. I
12 always felt like that he would not express himself well to
13 the courtroom. And I don't think he expressed -- I think
14 that he came across in a way that's not really him. I know
15 that he was laboring under a lot of pressure. I know that
16 during this week that he had indicated to me he had little
17 or if any sleep at all.

18 I was concerned about the way he would come across
19 and he came across the way I was afraid that he would. And
20 it is not indicative of the way I've observed him truly
21 feel about this case. And truly feel about the people that
22 were involved especially Mr. Rose Leffingwell. He is on
23 every occasion told me how he felt about her. How he still
24 feels about her. And how he's sorry for what happened.

25 As you well know and you see this all the time. We

1 have got a man that's lived this length of time and never
2 -- He's not perfect as far as what he's done in his life,
3 but he's never been in this courtroom or a courtroom of
4 this nature. He's got a disorderly conduct or something in
5 '82 or something. Basically, he's got no record. He's
6 lived 56 years. And this one split second because he was
7 drinking he lost somebody that he liked, somebody was his
8 companion, somebody that was his co-worker, somebody that
9 was the son of Ms. Leffingwell that he thought a great deal
10 of practically lived with for period of time.

11 Your Honor, I would ask you to consider that fact.
12 I would ask you also to consider our minimal time that
13 people are eligible to get out at this time take that into
14 consideration with the age that he is in sentencing him.

15 THE COURT: All right. Mr. Daniels, anything you
16 like you to say?

17 DEFENDANT DANIELS: No, Your Honor.

18 THE COURT: Anything any of your family members
19 would like to say?

20 MRS. COKER: If I can, I would like to say that I'm
21 so terribly sorry for the lost her son and all that
22 happened and...

23 MR. DEBERRY: Your Honor, I would like to say all of
24 his children here have been have supportive. They have
25 been very helpful to me. And they have just really been an

1 ordeal for them. And they have certainly doesn't in anyway
2 compare with the Leffingwell's side of the situation, but
3 it has been tremendously hard on them, too.

4 THE COURT: All right. Ma'am, something else you'd
5 like to say?

6 MRS. COKER: I'm sorry. It really can't compare to
7 the trouble that we've been and what they have gone through
8 because Rose really lost two people she loved that night.
9 She cared about daddy and she lost her son. Daddy's gone
10 be punished for this for the rest of his life just by the
11 fact it happened while he had that gun in his hands. And
12 by the fact that he'll be away from his granddaughter that
13 he loves so much. And that way he'll -- I want to bring
14 comfort to Rose in anyway, but we'll feel some of that pain
15 and separation. But he loves that little one year old so
16 much. Please consider that emotional punishment that he's
17 gone have.

18 THE COURT: Anyone else?

19 MR. RUSSO: Your Honor, we have Rose Leffingwell who
20 is Donald's mother. We have his sister Donna. And if I'm
21 not mistaken, I think Donna is going to speak on behalf of
22 the family.

23 THE COURT: All right.

24 DONNA: Donald's family and my mother, myself.
25 First of all, we want to thank God. We want give our

1 thanks to the judge, to the Florence County Sheriff's
2 Department for all of their fine investigative work, the
3 State of South Carolina Solicitor's Office, specially
4 Mr. Russo and Mr. Lawson who have been just wonderful, Anna
5 Braddock, all the State's witnesses and finally the jury
6 who had the most important job.

7 My brother was three weeks old the first time I held
8 him. I was 12. He smiled at me. I saw that smile and
9 those twinkle blue eyes many more times during the next 40
10 years. He had addictions, but like all people with
11 addictions he had some dark days and some very good days.
12 He was a fighter and he never completely gave in to these
13 addictions.

14 My brother was one of four children. He had three
15 sisters and he developed a wonderful sense of humor. My
16 father and Donald formed an alliance in our family early
17 on. They adored each other. My brother copied everything
18 my dad did and said. My dad never liked going to a female
19 doctor either.

20 Donald was an intelligent man. He was a musician.
21 It was the best thing in his life. He played the guitar,
22 piano and just about any instrument he could put his hands
23 on. My parents sent him to music school for a while. He
24 liked impressing his sisters about how he been or the group
25 Cars with one of his teachers. My brother was a poet and

1 had opportunities during his life to hear songs he has
2 written and played and they were beautiful. They came from
3 his soul..

4 My brother was photographer. I have a picture that
5 he did of my daughter when she was two hanging in my home
6 today. It's absolutely beautiful.

7 Donald was my -- Donald was my brother. He was my
8 parents only son and he was also a father. He has two
9 children. He has a daughter 17 and a son 14. His daughter
10 will graduate from high school next year. He want see it.

11 As long as I live, I will never forget how to tell
12 them that their father had been murdered. Their only
13 parent. Their mother had died five years ago. Their only
14 parent had been killed. Then events such as this should
15 not be allowed in any child's life.

16 Donald could do anything he set his mind to do. His
17 opportunities were endless. He viewed everyday as an
18 adventure. He will also be remembered for his creativity,
19 his humor and his ability to light up a room with that
20 smile. He was a loving kind, caring, beautiful man.
21 Family was the center of his life. And it was from there
22 that he gathered his strength to fight these up hill
23 battles that life deals all of us.

24 Finally, the perm examples of my brother's life is
25 his dog, Bugger. My mother tells us how Donnie found that

1 dog with a broken leg. He took the dog home and set the
2 dog's leg. Nurse the dog back to health. My last
3 conversation with my brother was about dogs and our ability
4 to find a dog and to know you have found the right dog.

5 Bugger was his best friend constant companion for
6 many years. Bugger still looks for Donald. He looks for
7 Donald to come through the door today.

8 Please remember, Your Honor, Donnie mattered to many
9 people and he was a member of a family who loved him. He
10 was a bright star to his parents and a brother to his
11 sisters. He was a father to his children, a friend to
12 everyone whom meet him. And a joyous, kind, intelligent
13 man who made everyone feel better about life. The world
14 will always be a little sadder without him. This one
15 irresponsible event not only ended my brother's life, but
16 produced a ripple effect which tragically affected so many
17 lives.

18 And finally, we think when my brother put his dog in
19 the car that night and got out of the car and went back to
20 the trailer his sisters know what was going on. In our
21 family, we always had this game who had the last word.
22 That was our game. Someone -- We were known for having the
23 last word all of us. I want to say on behalf of my brother
24 tonight I want to thank everybody and I want to just say my
25 brother has had the last word. I give him the last word.

1 THE COURT: Thank you.

2 Well, this is the time that this job I've got is not
3 pleasure. My heart goes out to the Daniels' family. The
4 three children that stand before me out there I know in my
5 heart are good people. I fully understand that and my
6 sympathy and feelings certainly have to be with you as you
7 stand there in the situation that your father has put you
8 in.

9 My heart goes out more so to the victim's' family who
10 have had to sit through days probably of agony waiting for
11 this case to be disposed. All kind of worries and concerns
12 about when justice will be done. And I have a great deal
13 of feelings for the family that have to go through things
14 like that. The justice system works slow. It's meant to
15 be slow. You don't want important constitutional
16 safeguards to be run over and that means that things have
17 to be handled in a orderly process and it takes time.

18 Mr. Daniels, I agonize over these sentences. Some
19 people probably don't think that, but I do. Even if this
20 had been an accident, which it wasn't. Even if it had been
21 involuntary manslaughter which in effect is a reckless, I
22 guess, you could argue an accident, which it wasn't. And
23 taking that it as it is that it was a voluntary
24 manslaughter and you lost your temper. And you did a very
25 very foolish thing. There's one thing that I cannot help

1 but think about. Why no matter what happened, did you just
2 stand there and not try help a man that had just been shot
3 through the throat. Not even an effort to try to get to a
4 phone to call for help. I'm gone take into consideration
5 your age.

6 DEFENDANT DANIELS: May I speak, Your Honor?

7 THE COURT: Yes, sir.

8 DEFENDANT DANIELS: I ran right in the house ran to
9 the phone.

10 THE COURT: Who did you call?

11 DEFENDANT DANIELS: I called my sister.

12 MR. DEBERRY: He said all along he went straight in
13 there. He said there wasn't any question in his mind that
14 he died immediately. He said he ran straight in there and
15 called his sister and ask her to call authorities. He said
16 he didn't think he could talk.

17 THE COURT: All right. I'm glad you straightened
18 that out because I was deeply concerned about that, but
19 still you don't call a sister when I thought everybody in
20 this country knows what 911 is all about.

21 All right. I'm gone take into consideration your
22 age and the factors that I've heard in this thing. But,
23 you know, anything I do certainly not gonna suit everybody
24 here. And I just -- The way things is the way I see them
25 from a week worth of trial here. And based what the

1 evidence has presented showed to me, I'm gone sentence you
2 to the State Department of Corrections for a period of 26
3 years. I'm giving you some credit for your age and other
4 factors. Good luck to you.

5 MR. RUSSO: Thank you, Your Honor.

6 (The proceedings were concluded.)

7 (END OF REQUESTED TRANSCRIPT)

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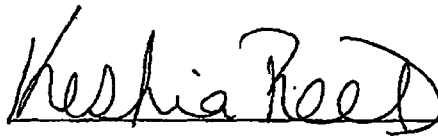
1 CERTIFICATE OF REPORTER

2
3 STATE OF SOUTH CAROLINA

4 COUNTY OF FLORENCE

5
6 I, Keshia Reed, Court Reporter and Notary Public
7 in and for the State of South Carolina At Large, do hereby
8 certify that the above-entitled cause was heard as
9 hereinafter set out; that I was authorized to and did
10 transcribe the said proceedings; and that the foregoing and
11 annexed pages, numbered 1 through 827, inclusive,
12 constitute a true and accurate transcription of my
13 stenographic report of the said cause taken during the said
14 hearing.

15 In witness whereof, I have hereunto affixed my
16 signature this 9th day of July, 2002.

17 
18

19 Keshia Reed, Court Reporter

20 My Commission Expires: 6-5-2010
21
22
23
24
25

829

WITNESSES

LT. J. LEE

FCSO

P. Hanna

PROS:

TAR

D/O:

12-04-99

ARREST WARRANT NO. G-195808 (1)

ACTION OF GRAND JURY

Foreman of Grand Jury

VERDICT

Guilty of voluntary manslaughter

TRUE BILL

Foreman of Petit Jury

Date:

DOCKET NO. 2000-65-21-977

RUSSO

The State of South Carolina,

County of

FLORENCE

COURT OF GENERAL SESSIONS

AUGUST

TERM

2000

THE STATE

vs.

TRACY WILLARD DANIELS

Indictment for

MURDER

PD-DeBerra

CERTIFIED: A TRUE COPY

Chris R. Spain

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

FORM 32 (12/87)

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on July 27, 2000

the Grand Jurors of FLORENCE County present upon their oath:

That TRACY WILLARD DANIELS did in FLORENCE County on or about December 4, 1999, feloniously, wilfully and with malice aforethought, kill one Donald William Leffingwell, Jr. by means of shooting him without any legal provocation, and that the said Donald William Leffingwell, Jr. did die as a proximate result thereof, and the said shooting was not in self defense.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

STATE OF SOUTH CAROLINA

831
IN THE COURT OF GENERAL SESSIONS
INDICTMENT/CASE#:

COUNTY OF FLORENCE
STATE VS.

TRACY WILLARD DANIELS

AKA: _____

Race: _____ Sex: 1 Age: _____

DOB: _____ SS#: _____

Address: _____

DL# _____ SID#: _____

00 -GS- 21 - 977

A/W#: G-195808

Date of Offense: 12-4-1999

S.C. Code §: 16-3-10

CDR Code #: 0/1/1/6

☐ CASE RESTORED

SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO: Voluntary Manslaughter - up to 30 yrs.
in violation of § 16-3-50 of the S.C. Code of Laws, bearing CDR Code # 0/2/1/7

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25-45

The 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:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 26 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.

☒ The Defendant is to be given credit for 9 days/months jail time.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

§14-1-206 (Assessments 100%)..... \$ _____

§14-1-211(A)(1) (Surcharge) \$ 100.00

§14-1-211(A)(2) (Surcharge) \$ _____

§56-5-2995 (DUI Assessment)..... \$ _____

3% to County (if paid in installments).... \$ _____

TOTAL \$ _____

PTUP _____
_____ days/hours Public Service Employment
Obtain GED _____
Attend Voc Rehab. or Job Corps _____
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol Testing _____
Fine may be pd. in equal consecutive weekly/monthly
pmts. of \$ 100.00 beginning 30 DAR
\$ _____ paid to Public Defender Fund.
Other: _____

PRESIDING JUDGE Paula B. [Signature]

Judge Code: 1/4/8

Sentence Date: 5/4/01

Court Reporter: K. Reed

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

CERTIFIED: A TRUE COPY
Clerk of Court
FLORENCE COUNTY, S.C.

Certified Copy Rec'd
Date 5-7-01
F.D.C. H. B. Smith

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF FLORENCE)

Tracy Willard Daniels SCDC #274866)
Full name and prison number (if any) of Applicant.)

v.)

State of South Carolina)

FILED

2006 SEP 19 A 10:25
IN THE COURT OF COMMON PLEASJONNE R. BELL
CCCP & GS
FLORENCE COUNTY SC

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Facility, Columbia, S.C.
2. Name and location of Court which imposed sentence Court of General Sessions, Florence South Carolina 2000-GS-21-977
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) Indictment #00-977, Convicted of Voluntary Manslaughter
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) May 4, 2001, sentence of 26 years

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Chris J. Bell
 CLERK OF COURT C.P. & G.S.
 FLORENCE COUNTY, S.C.

Revised 3/2003

(b) _____

(c) _____

FILED

6. Check whether a finding of guilty was made:

2006 SEP 19 A 10: 23

(a) after a plea of guilty _____

(b) after a plea of not guilty XX

(c) after a plea of nolo contendere _____

JONNIE R. BELL
CCCP & GS
FLORENCE COUNTY SC

7. Did you appeal from the judgment of conviction or the imposition of sentence?

YES

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. SC COURT OF APPEALSii. THE SUPREME COURT OF SOUTH CAROLINA

iii. _____

(b) the result in each such Court to which you appealed:

i. CONVICTION AFFIRMEDii. PETITION FOR WRIT OF CERTIORARI DENIED

iii. _____

(c) the date of each such result:

i. JUNE 22, 2004ii. DECEMBER 14, 2005

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in

custody unlawfully:

(a) Ineffective Assistance of Counsel

(b) _____

(c) _____

FILED

2005 SEP 19 A 10:23

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Defendant could not afford hired counsel at the time of original trial. Defendant and his family feel a hired criminal defense attorney, with more time to devote to pre-trial preparation, would have provided more effective representation.

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? None other than previously mentioned.

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No.

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

FILED

2006 SEP 19 A 10:23

DONNIE R. BELL
CCCP & GS
FLORENCE COUNTY SC

(a) Appellate Defender appointed by the Office of Indigent Defense did not include in his arguments for appeal; he chose those arguments without input from Defendant.

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? YES

(b) your trial, if any? YES

(c) your sentencing? YES

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. JOHN S. DEBERRY, as Public Defender, 209 Coit St., Florence, SC 29501

ii. ROBERT M. DUDEK, Assistant Appellate Defender, SC Office of Appellate

Defense, 1205 Pendleton St., Room 306, Columbia SC 29201

iii. _____

(b) the proceedings at which each such attorney represented you:

i. JOHN S. DEBERRY, ARRAIGNMENT/PLEA; TRIAL; SENTENCING

ii. ROBERT M. DUDEK, DIRECT APPEAL, WRIT OF CERTERATORIA

iii. _____

19. State clearly the relief you seek in filing this application:

Seeking a new trial.

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)

County of FLORENCE)

VERIFICATION

I, TRACY W. DANIELS, 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.

Tracy W. Daniels

SWORN to and subscribed before me this 8th
day of Sept, 2006

Edgar W. W. (L.S.)
Notary Public

My Commission Expires: July 29, 2007

FILED
2006 SEP 19 A 10:23
CORINNE R. DELOACH
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

CERTIFIED: A TRUE COPY

Corinne R. DeLoach

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Applicant

SWORN or affirmed to and subscribed before me this
_____ day of _____, 2____.

Notary Public

My Commission Expires: _____

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Tracy Willard Daniels, SCDC No. 274866,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

2006-CP-21-1566 MAY 16 PM 12:02

CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

RETURN

The Respondent, making its Return to the application for Post-Conviction Relief (PCR) filed September 19, 2006, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. The Applicant was indicted at the August 2000 term of the Florence County Grand Jury for murder (2000-GS-21-977). He was represented by John DeBerry, Esquire. On May 4, 2001, the Applicant proceeded to trial after which he was found guilty of voluntary manslaughter. He was sentenced by the Honorable Paul M. Burch to confinement for twenty-six (26) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Daniels, Op. No.2004-UP-394 (S.C. Court of Appeals filed June 22, 2004). The South Carolina Supreme Court denied the Applicant's Petition for Writ of Certiorari and the Remittitur was issued on December 16, 2005.

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CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *supra*. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. 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.

In addition, the Respondent submits that the right of an accused to effective assistance of counsel does not extend to the appointment of **counsel of choice**, or to special rapport or even a meaningful relationship with appointed counsel. Morris v. Slappy, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 1617-18, 75 L.Ed.2d 610 (1983). Thus, the Respondent submits that the allegation that a hired attorney could have done a better job is not cognizable in PCR.

IV.

The Respondent submits that the allegation that appellate counsel was ineffective is also without merit. The Respondent contends that the Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). Where ineffective assistance of appellate

counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

V.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against trial and appellate counsel. However, the allegations of ineffective assistance of counsel probably raise questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI.

The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VII.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VIII.

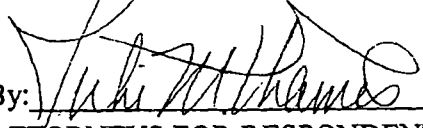
WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

HENRY DARGAN MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

JULIE M. THAMES
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

_____, 2007.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE) 2006-CP-21-1566

Tracy Daniels,	)	
	)	
Plaintiff,	)	Transcript of Record
	)	
vs.	)	PCR Hearing
	)	
The State of South	)	December 18, 2008
Carolina,	)	
	)	
Defendant.	)	

B E F O R E :

Honorable Benjamin H. Culbertson
 Florence County Courthouse
 Florence, South Carolina

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

Harry Devoe, Esquire
 Attorney for Plaintiff

Julie M. Thames, Esquire
 Attorney for Defendant

Grace L. Hurley, CVR-CM
 Circuit Court Reporter

Daniels v. State (12-18-08)

2

1	I N D E X	
2	John S. DeBerry	
3	Direct by Mr. Devoe.	18
4	Cross by Ms. Thames.	33
5	Redirect by Mr. Devoe.	38
6	Sherry Daniels Coker	
7	Direct by Mr. Devoe.	43
8	Cross by Ms. Thames.	50
9	Donna Fever	
10	Direct by Mr. Devoe.	52
11	Certificate.	59
12	(There were no exhibits marked during the hearing.)	
13		
14		
15		
16		
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18		
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22		
23		
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25		

1 (On the record, December 18, 2008.)

2 THE COURT: All right, let me go through this roster
3 right quick. Gentlemen, if you would please answer up when I
4 call your case. We have a court reporter here so we'll need
5 you to give a verbal response that you hear.

6 Case number 2007-CP-21-1610, Mark Dewitt.

7 MR. DEWITT: Right here, Your Honor.

8 THE COURT: All right, sir.

9 Case number 2006-CP-21-1566, Tracy Daniels?

10 MR. DANIELS: Right here, Your Honor.

11 THE COURT: Thank you.

12 Case number 2007-CP-21-619, Eric Tessner.

13 MS. THAMES: Your Honor, that's the one that was
14 continued. So, he is not present today.

15 THE COURT: Okay.

16 Case number 2008-CP-21-592, Daniel Crouch.

17 MR. CROUCH: Right here, Your Honor.

18 THE COURT: Okay, where is Mr. ---

19 MR. CROUCH: Right here, sir.

20 THE COURT: Okay, sir.

21 Case number 2007-CP-21-1843, Jahmell Williams.

22 MR. WILLIAMS: Right here, Your Honor.

23 THE COURT: Case number 2006-CP-21-1532, Kenyatta
24 Williams.

25 MR. WILLIAMS: Here, Your Honor.

Daniels v. State (12-18-08)

4

1 THE COURT: Case number 2007-CP-21-1240, Philip
2 Woods.

3 MR. WOODS: Right here, Your Honor.

4 THE COURT: Case number 2008-CP-33-351, Demetrius
5 Jones.

6 MR. JONES: Right here, Your Honor.

7 THE COURT: Case number 2007-CP-21-1538, Michael
8 Stuckey.

9 MR. STUCKEY: Right here, Your Honor.

10 THE COURT: All right, is there anybody who has
11 filed an application for post-conviction relief, the hearing
12 is today and I did not call their names?

13 (No response.)

14 THE COURT: All right, all right, gentlemen, I wanted
15 to get you out here to give you some preliminary instructions
16 and some information about what will be transpiring today.
17 Now, each of you has filed an application for post-conviction
18 relief in which you state that there were errors made either
19 at the trial of your case or during the course of your guilty
20 plea or during the course of your sentencing, and as a result
21 you have filed for certain relief before this Court. Now, we
22 will hear your case and if I find that there were no errors
23 made in your trial or no errors made in your guilty plea or
24 no errors made in your sentencing then you'll simply go
25 forward and finish serving the sentence that you have been

1 given. On the other hand, if I find that there were errors
2 made at trial or that there were errors made at your guilty
3 plea or that there were errors made at your sentencing then
4 there are really two types of relief I can grant. If it was
5 with the sentencing and it affected sentencing only then I
6 can correct that error and you can be re-sentenced or
7 corrections can be made in your sentencing. If it has to do
8 with your trial or your guilty plea then I can set aside your
9 sentence and set aside the guilty plea or set aside the trial
10 and grant you a new trial. However, if I grant that relief
11 then you're back to square one and that's what I need to
12 discuss with you to determine so that you can discuss with
13 your attorneys to determine whether or not it is in your best
14 interest to proceed with your application for post-conviction
15 relief. If you pled guilty to a lesser offense than what you
16 were originally indicted for and I set aside that guilty plea
17 then you will be facing the original charge for which you
18 were indicted. If there were - was a reduction in charges at
19 the trial then you would be facing the original charges for
20 which you were indicted. If you received a sentence that was
21 less than the maximum sentence and you go back and you plead
22 guilty again or you face a new trial and you're convicted
23 again then you're subject to receiving a greater sentence
24 than you received the first time if you received something
25 less than the maximum sentence. So, I'm not telling you this

Daniels v. State (12-18-08)

6

1 to deter anyone from seeking their application for post-
2 conviction relief or proceeding on their application for
3 post-conviction relief, but you do need to speak with your
4 attorney to determine if it is in your best interest because
5 there have been people that were successful in their
6 application and they were granted post-conviction relief, but
7 then in the final analysis they wound up getting more time
8 than what they originally had or they wound up facing a
9 stiffer sentence or a stiffer crime than what they were
10 originally pled guilty or originally faced because this does
11 not release you. What it does is it puts you back to square
12 one, and as I said, if there were charges nolle prossed or if
13 the charges were reduced, in other words, if you pled guilty,
14 if you were indicted for burglary first-degree and you pled
15 guilty to burglary second-degree, well, if I set aside that
16 guilty plea you're back facing that burglary first-degree
17 with a greater sentence. If you were charged or indicted
18 with a distribution of drugs charge or a possession with
19 intent to distribute a drugs charge but you pled guilty to a
20 possession charge, well, if you prevail here today you're
21 going to be facing that distribution charge again. So,
22 listen to your attorneys. Discuss this matter with your
23 attorneys and determine - if you want to proceed then we'll
24 go ahead and proceed and there's nothing wrong with that, but
25 you need to find out if it is in your best interest whether

1 or not you proceed with your application for post-conviction
2 relief.

3 Now, each of you has an attorney. Your attorneys are
4 well knowledged in this area. I don't know if any of you
5 have been to law school or if any of you are as versed as
6 they are but they do this for a living. They are well-
7 acquainted with the post-conviction relief process. So, put
8 a lot of faith in your attorney as to whether or not you
9 should proceed or not proceed. However, the final decision
10 will be left exclusively up to you as to whether or not you
11 want to proceed or not, okay?

12 Anything else I needed to go over with them before I let
13 them speak with their attorneys?

14 MS. THAMES: Not that I can think of, Your Honor.

15 *****OFF THE RECORD*****

16 (On the record.)

17 THE COURT: All right, this is case number 2006-CP-21-
18 1566, Tracy Daniels versus the State of South Carolina. The
19 matter is before the Court on an application for post-
20 conviction relief. Present at the call of the case is Mr.
21 Daniels with his attorney, Harry Devoe. Also present is
22 Julie M. Thames as attorney for the State. All right,
23 Mr. Daniels, if I could get you to stand for a moment,
24 please.

25 (Complies with request.)

Daniels v. State (12-18-08)

8

1 THE COURT: You were present earlier when I gave my
2 preliminary instructions regarding post-conviction relief and
3 the hearings we were having today?

4 MR. DANIELS: Yes, Your Honor.

5 THE COURT: All right, do you recall my instructions at
6 that time? Do you recall what I told you and advised you at
7 that time?

8 MR. DANIELS: Yes, Your Honor.

9 THE COURT: All right, is there any questions that
10 you want to ask me or ask your attorney about the preliminary
11 instructions I gave?

12 MR. DANIELS: Nothing I know of. I have just talked to
13 him and I feel satisfied with us being ready.

14 THE COURT: All right, all right, and do you want to
15 proceed with your application for post-conviction relief?

16 MR. DANIELS: Yes, your honor.

17 THE COURT: All right, sir, thank you very much. You
18 may be seated.

19 MR. DEVOE: Your Honor, if I could just add for the
20 record.

21 THE COURT: Yes, sir.

22 MR. DEVOE: One of the many reasons he wants to
23 proceed with this is that he is right now he maxes out his
24 sentence when he's 80 years old. So, he is convicted of

1 voluntary manslaughter, got a 26 year sentence. So,
2 therefore, he has nothing basically to lose by going ahead
3 with this, so.

4 THE COURT: All right, sir, all right, Mr. Devoe,
5 what is your client seeking relief on -- from the sentence,
6 the conviction, the guilty plea or what?

7 MR. DEVOE: Well, Your Honor, I think he's seeking
8 relief from the sentence and also - obviously you can't
9 relieve the sentence but it's a legal sentence under the
10 terms it's 26 years, could have been a 30 year sentence but I
11 think he's seeking relief from the fact that he was found
12 guilty of voluntary manslaughter.

13 THE COURT: Okay, was this a trial or a guilty plea?

14 MR. DEVOE: No, it was a trial, it was a one week
15 long trial.

16 THE COURT: All right, so, he is seeking for me to
17 grant a new trial - set aside the sentence, the conviction
18 and grant a new trial.

19 MR. DEVOE: That's correct, Your Honor.

20 THE COURT: All right, and what is the grounds?

21 MR. DEVOE: Let me sit down. The grounds, Your
22 Honor, would be ineffective assistance of counsel ---

23 THE COURT: Okay.

24 MR. DEVOE: --- in many different ways, and I

1 understand that the State's attorney is going to suggest I
2 did not amend the petition which I received from her actually
3 this morning, but I went over with her what my grounds were
4 going to be, what I was going to raise in the hearing today.

5 THE COURT: Okay, but he's basically claiming
6 ineffective assistance of counsel?

7 MR. DEVOE: That's correct.

8 THE COURT: All right, all right, Ms. Thames,
9 anything preliminary from the State before we proceed?

10 MS. THAMES: Just very briefly. I'm hoping this won't
11 be a problem. It turns out that the transcripts that I have
12 and that you have don't - are not complete. I had complete
13 transcripts recopied last week so that we would have them all
14 and they're not complete and I didn't - I mean, I read it all
15 and I read the complete transcript before I got here, but the
16 ones that were put in the packets today and I apologize for
17 that, I didn't realize that until late last night, that's
18 entirely my fault that I didn't check them.

19 Mr. Devoe does have a complete transcript. It's the
20 last hundred, 200 pages that are not included, which I think
21 are important to Mr. Devoe's argument today. I don't know if
22 we should see if we can make some copies of those last pages
23 and do it later or leave the record open and I apologize to
24 the Court for this.

1 THE COURT: All right, I don't really want to leave
2 the record open, I would like to proceed.

3 MS. THAMES: Okay.

4 THE COURT: Unless - we've got six more of these to
5 do today.

6 MS. THAMES: Yes, sir; yes, sir.

7 THE COURT: So, how long would it take for us to get
8 copies do you think?

9 MS. THAMES: Well, I don't know what, what facilities
10 they have available here.

11 MR. DEVOE: Your Honor, I gave this, I gave
12 Ms. Thames my copy of it about two hours ago.

13 MS. THAMES: Right, I looked at it, but isn't that
14 your only copy?

15 THE COURT: Yeah, but ---

16 MR. DEVOE: Yes.

17 MS. THAMES: Yeah, that, yeah, and I did look at it.

18 THE COURT: And I'm going to need a copy.

19 MS. THAMES: Right.

20 THE COURT: All right.

21 MS. THAMES: It's the Judge that doesn't, and I
22 certainly can forward it to you if you want to hear ---

23 THE COURT: Rather than do that I would rather
24 continue this hearing until we've got - if, if those 200

1 pages are vital to his application for post-conviction relief
2 then we're going to need to wait until those 200 pages are
3 available for the Court to take and review.

4 MR. DEVOE: Well, Your Honor, it's a vital part of it
5 that I'm going to refer to was just on the closing arguments.

6 MS. THAMES: Right.

7 THE COURT: Okay.

8 MR. DEVOE: And the fact that the family, the family,
9 sequence of families pitched the Judge, you know, for a
10 lenient sentence.

11 THE COURT: Well, I mean, is it -- is what's in the
12 transcript in dispute?

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

14 MR. DEVOE: No.

15 THE COURT: Well, then, can we just put in the record
16 the parts that you want the Court to consider or do you want
17 the Court to consider the whole 200 pages at the end?

18 MR. DEVOE: Well, I didn't approach with that
19 viewpoint, when allowed, the pages that I wanted in, but I
20 could refer to them, I suppose, as I went along.

21 THE COURT: Well, what I'm saying is you would have
22 to do more than refer to the page. You're going to have to
23 tell me what was said, what is contained in the transcript
24 that you claim supports the ineffective assistance of counsel

1 allegation and assuming that what was in there is not in
2 dispute then I would have the information in front of me.

3 MS. THAMES: And if it's just the closing argument
4 maybe we could get that out and get it - oh, you have more
5 than that? Ours stops at 627.

6 (Mr. Devoe and Ms. Thames confer.)

7 MS. THAMES: What about making copies of just those
8 pages, Your Honor? We might be able to get that
9 accomplished.

10 THE COURT: However you all want to do it. I mean, I
11 don't know how many pages you're talking about and certainly
12 whatever we can do without delaying the process because like
13 I say we've got six more PCR hearings we've got to do.

14 MS. THAMES: Yes, sir.

15 THE COURT: What we would do - if we could go ahead
16 and set this aside and make copies and come back and do it
17 later today we'll do that. I don't want to sit here and wait
18 while we make copies.

19 MS. THAMES: Right, right, I understand and I think we
20 have another one lined up.

21 THE CLERK: Judge, if they can mark the pages I can
22 have someone to copy it.

23 THE COURT: Okay, well, let's ---

24 All right, Mr. Devoe, you're going to need to speak up

1 for our court reporter if you can, please.

2 MR. DEVOE: I was just saying I could go in the other
3 room, show, point it out to her what pages we need copied for
4 this.

5 THE COURT: Okay.

6 MR. DEVOE: So, let's step aside and hopefully we can
7 be the next one up after this if it can be done in a hurry.

8 THE COURT: All right, well, let's go ahead then and
9 let you make the copies and we'll go ahead and go to another.

10 MS. THAMES: And I do apologize, Your Honor.

11 THE COURT: That's all right, that's all right.

12 MS. THAMES: I thought we had a complete transcript,
13 and I apologize to you, too, Mr. Devoe.

14 *****OFF THE RECORD*****

15 (On the record.)

16 THE COURT: All right, this is case number 2006-CP-
17 21-1566, the case of Tracy Daniels versus State of South
18 Carolina. The matter is before the Court on an application
19 for post-conviction relief. Present at the call of the case
20 is Mr. Tracy Daniels. Also present is Mr. Daniels's
21 attorney, Harry Devoe. Julie M. Thames is present
22 representing the State. All right, Mr. Daniels, if you'd
23 please stand.

24 (Complies with request.)

1 THE COURT: You recall my instructions to you from
2 earlier this morning?

3 MR. DANIELS: Yes, Your Honor.

4 THE COURT: Do you have any questions that you want
5 to ask me or ask your attorney about those instructions?

6 MR. DANIELS: No, sir, Your Honor. I had talked with
7 him before about it, and I feel like we're ready.

8 THE COURT: All right, sir, now, you have filed an
9 application for post-conviction relief. Do you want to go
10 forward on that application?

11 MR. DANIELS: Yes, Your Honor.

12 THE COURT: All right, you may be seated.

13 All right, Mr. Devoe, what is Mr. Daniels - he's
14 seeking?

15 MR. DEVOE: He's, Your Honor, as I explained to you
16 earlier he's seeking to vacate the sentence since he knows
17 that the sentence imposed on him was within the guidelines of
18 the sentence structure. I mean, he was found guilty of
19 voluntary manslaughter. He received a 26-year sentence and
20 he knows that the maximum sentence on that is up to 30 years.
21 We're not, we're not contesting the lawfulness of the
22 sentence. He's not.

23 THE COURT: All right.

24 MR. DEVOE: He wants to vacate the entire conviction

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1 and start over again.

2 THE COURT: All right.

3 MR. DEVOE: And I think I also said to Your Honor
4 that one of the reasons, the many reasons is that when he
5 received the sentence he was 55 years old.

6 MR. DANIELS: 57.

7 MR. DEVOE: 57 years old, I'm sorry, and he would max
8 out the sentence when he's 80 years old. It's virtually a
9 life sentence to him.

10 THE COURT: All right, now, the indictment against
11 him was for voluntary manslaughter?

12 MR. DEVOE: The indictment was for murder. He was
13 found guilty of voluntary manslaughter.

14 THE COURT: All right, so, he was found guilty of a
15 lesser included offense.

16 MR. DEVOE: Yes.

17 THE COURT: All right, so, he went to trial on the
18 murder charge.

19 MR. DEVOE: That's correct. It lasted for one week
20 that trial.

21 THE COURT: Okay, so, on retrial, he'll just be
22 facing ---

23 MR. DEVOE: Up to life, 30 years to life if he's
24 found guilty of murder.

1 THE COURT: Murder, okay.

2 MR. DEVOE: And he'd find zero if he's found guilty
3 of accident.

4 THE COURT: All right, all right, Mr. Daniels, if
5 you'd please stand.

6 (Complies with request.)

7 THE COURT: You understand that if you prevail here
8 today that I would set aside your conviction and sentence and
9 you would be facing the charge of murder again. Do you
10 understand that?

11 MR. DANIELS: Yes, Your Honor.

12 THE COURT: And that that would subject you to a
13 sentence of life in prison without the possibility of parole?

14 MR. DANIELS: Yes, Your Honor.

15 THE COURT: All right, and is that what you want to
16 do?

17 MR. DANIELS: Yes, sir, Your Honor.

18 THE COURT: All right, all right, you may be seated.
19 All right, Mr. Devoe, you can call your first witness or is
20 there anything preliminary?

21 MS. THAMES: Just before we get started I have the
22 rest of the transcript for you. We made copies ---

23 THE COURT: Oh, okay.

24 MS. THAMES: --- of the pages. This is the only one

1 that I have of these, but we made copies of the pages that
2 Mr. Devoe was referring to before, but since I found a whole
3 -- the rest of it I got that for Your Honor.

4 THE COURT: Thank you very much.

5 MS. THAMES: Yes, sir.

6 THE COURT: All right, Mr. Devoe, you can call your
7 first witness.

8 MR. DEVOE: Thank you, Your Honor, I'd call Mr.
9 DeBerry as the first witness.

10 THE COURT: All right.

11 Whereupon, John S. DeBerry was called to the stand, duly
12 sworn by the clerk and testified as follows:

13 THE CLERK: Please be seated and state your name for
14 the record.

15 MR. DEBERRY: My name is John S. DeBerry.

16 DIRECT EXAMINATION

17 BY MR. DEVOE:

18 Q Mr. DeBerry, if I understand the record you represented
19 Mr. Daniels from the very beginning of this case?

20 A I did.

21 Q Was there any period of - what was - actually, when were
22 you appointed to this case?

23 A I think December the 13th, 1999. I don't have the actual
24 appointment in front of me but I appeared at a bond hearing

1 before Judge Harwell and got a bond set for Tracy,

2 Mr. Daniels.

3 Q Did you appear there at that point as an appointed
4 lawyer or just as a friendly lawyer?

5 A That's a good question. I was both, a friend of his. I
6 knew Mr. Daniels from doing work at my house and I was also
7 appointed to be his lawyer, and I'm assuming that - I went to
8 the bond hearing. I just can't tell you what came first.

9 Q All right, well, at that bond hearing did Judge Harwell
10 make a comment that it seemed to him that a psychological
11 evaluation might be in order?

12 A I don't recall that.

13 Q You don't recall that. If he had done - if he had said
14 that would you remember that necessarily?

15 A I'm not sure. I don't recall him saying that but I just
16 don't. I'm sorry.

17 Q I'm sorry. Could you ---

18 A I just don't recall Judge Harwell saying that.

19 Q This case the trial lasted about a week; isn't that
20 correct?

21 A Yes, sir.

22 Q And the case took place about 18 months after the, after
23 the tragedy?

24 A That's correct.

1 Q And in that period of time was the State forthcoming
2 with its evidence to you in a timely fashion?

3 A In some ways, yes. I think that they, that they delayed
4 in some ways.

5 Q Well, for example, there's a -- the subject gun in
6 question was that provided to you in a timely fashion?

7 A They didn't send the gun off till the Friday before we
8 started the court.

9 Q The Friday before you started it. That would be ---

10 A That's correct.

11 Q --- almost a year and a half after the accident?

12 A That's correct, Your Honor, sir.

13 Q And they sent it off to where?

14 A It was in Columbia at the lab, at the SLED lab, if I'm
15 not mistaken.

16 Q Did they send it off because you had obtained an expert
17 witness to testify concerning the gun?

18 A Quite likely that that's the reason.

19 Q It was in response to your getting an expert versus them
20 doing it in a normal fashion; is that correct?

21 A Yes, assuming they were aware that I had gotten an
22 expert. I had gotten an expert with, money for him with an
23 ex parte order and I don't think I let them know - it's a
24 good chance they knew that I had an expert when they sent it

1 off that Friday before because I had to get my expert to look
2 at the shotgun and they knew I was looking. Yeah, they would
3 have known that I had an expert and that's probably, you're
4 correct, that's probably what precipitated them sending it to
5 SLED.

6 Q Your expert was Donald Girndt.

7 A That's correct.

8 Q G-I-R-N-D-T, correct?

9 A Correct.

10 Q He was an expert not in guns though; was he? I mean,
11 didn't Judge Burch refuse ---

12 A Burch.

13 Q --- Burch refuse to qualify him as an expert in guns?

14 A I can't, I can't say if he did or didn't.

15 Q Well, he qualified him as an expert in being a blood,
16 blood expert, for blood splatter from a gun, reverse
17 splatter, backwards splatter and all that sort of situation?
18 He did that; is that correct?

19 A As I recall.

20 Q But he refused to do it for him being a gun expert.

21 A We got out of that expert - I got out of that expert
22 what I wanted to go to the jury and that was the fact that
23 that gun was - would easily go off because it had a
24 hammerhead it could easily go, gone off if somebody had

1 jerked it or held it improperly or if there had been a
2 struggle with it. Now, as far as what he qualified as far as
3 projection or when you say gun expert I just don't know. He
4 served the purpose I feel like.

5 Q So, it was a fairly long sequence of appeals or
6 objections from the Mr. Russo, who was the solicitor, for you
7 trying to get in as an expert and I think Judge Burch upheld
8 those, upheld that in the transcript.

9 A If that's, that's what the transcript says that's what
10 happened.

11 Q My question was going to be to you is why didn't you
12 think of getting a gun expert to handle that one part of the
13 situation?

14 A The - I got the person that I thought I needed for the
15 factual situation. Why did I not get a gun expert if it had
16 something to do with the projectile or ---

17 Q It wasn't the projectile ---

18 A I don't know why, but I got what I thought I needed and I
19 thought he did a good job.

20 Q It wasn't, it wasn't the projectile part of it. It was
21 the way the gun operated or didn't operate.

22 A Okay.

23 Q You remember that part of it?

24 A I do.

25 Q Now and go on to that part of it, if that was so

1 important to you in the whole situation why when you argued
2 the case to the jury when you came down to the fact that and I
3 believe your theory in that part of the case was accident, the
4 whole, this whole unfortunate incident was an accident, him
5 firing the gun was an accident, is that what you recall?

6 A Yes, sir, well, yes.

7 Q That's yes?

8 A That's, that's a yes.

9 Q Okay.

10 MS. THAMES: Your Honor, I object to the leading nature
11 of the questions.

12 THE COURT: Overruled. Go ahead.

13 Q Well, if that was your theory of the case and I think
14 it's shown on page 757 of the transcript, that, that - you
15 have the transcript in front of you by the way?

16 A I don't.

17 (Ms. Thames and Mr. Devoe confer.)

18 MS. THAMES: May I approach?

19 THE COURT: Yes, ma'am.

20 Q May we rephrase that question? I think the arguing in
21 your closing that this situation would have been not murder
22 but either voluntary manslaughter or involuntary manslaughter
23 or accident and on page 757 I believe you're arguing the
24 accident situation. Do you want to check the transcript to
25 see if I'm correct?

1 A All right, I'm on page 757.

2 Q The only full paragraph in the transcript is that
3 concerns accident, I believe.

4 A Yes, I see what you're talking about.

5 Q Well, my question to you is why didn't you in the closing
6 argument emphasize what Donald Girndt said in his testimony a
7 couple of days before that and bring back to the jury the fact
8 that you believed it was an accident and this is why it was an
9 accident because the gun malfunctioned as proven by Mr. Girndt
10 that it could malfunction, when the hammer ---

11 A Yes, sir.

12 Q --- that it had to be cocked to make it fire, just a
13 little back and come forward again and fire the shot, the
14 shell.

15 A Yes.

16 Q Is that correct?

17 A That's correct.

18 Q In retrospect do you think it would have been better off
19 making that, stating that argument to the jury or the way you
20 stated it in the transcript?

21 A You know, hindsight is 20-20 but in this case I felt like
22 that if we could get an involuntary manslaughter verdict I
23 just didn't feel that we could get - there was no way in my
24 opinion that we were going to get a verdict of not guilty. I
25 was trying to weave in the possibility of accident and I

1 stated that here, but in my opinion as a lawyer I felt like
2 the best, best scenario would be ---

3 Q Well, when you say not guilty, I mean, it's - Mary
4 McDougall was a key witness for the State.

5 A I'm sorry?

6 Q Mary McDougall was a key witness for the State.

7 A That's correct.

8 Q She's the only eyewitness for the whole situation.

9 A That's correct.

10 Q All right, this happened around six o'clock at night ---

11 A That's correct.

12 Q --- in December, and it was pitch black outside except
13 for some lights.

14 A That's correct.

15 Q All right, did you ever have the lights checked to see
16 what kind of lighting was - actually was there when it was
17 dark outside?

18 A Checked by someone other than me?

19 Q Yes, checked by an expert.

20 A I did not.

21 Q Like how many lumens were created by a light poles ---

22 A I did not.

23 Q --- and things that were around in that situation?

24 A I didn't.

25 Q Did you ever - I believe you were given a tape of an

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1 interview that Ms. McDougall gave the night of the tragedy; is
2 that correct?

3 A Yes.

4 Q And you heard that tape?

5 A Yes.

6 Q And you gave it to your client and his family to listen
7 to; correct?

8 A I don't - I probably did.

9 Q And in that tape when she was testifying she made no
10 comment at all as far as I know on the fact that your client
11 took a step back before the gun was fired. Do you recall
12 that?

13 A I don't. I don't recall that she made a comment in the
14 tape or not. I believe I've read it in her written statement.

15 Q And her testimony taken 18 months later she made that
16 comment, a step back.

17 A I don't deny that.

18 Q But 15 months before, the night of the accident, she did
19 not make that comment.

20 A If she didn't I wish I had realized that and I wish I had
21 used that.

22 Q Well, do you think that might have caused a difference in
23 this whole situation?

24 A It could have.

25 Q I mean, she - nobody ever testified according to this

1 transcript that - well, no one testified that they ever saw
2 Tracy Daniels put a shell in the shotgun; is that correct?

3 A I don't think anyone testified to that effect.

4 Q And the testimony was that he was at the top of the
5 steps, came down the steps with his shotgun, had already fired
6 it once, and I think it hit the automotive ---

7 A Carport.

8 Q --- the automotive covering, what do you call that, that
9 ---

10 A Carport.

11 Q Carport, he came down the steps and they got together and
12 they passed that gun back and forth, open and close it, so on,
13 there's a - and a shell to get out, and I think that the
14 victim took a shell out of the gun.

15 A Yes.

16 Q Right.

17 A There was some evidence that it was difficult to get out.

18 Q Right. There's no testimony anywhere from anybody that
19 anybody saw or in any way that, even with fingerprints on the
20 shell that Mr. Daniels put a live shell back into that
21 shotgun, the passing back and forth; is that correct?

22 A That's correct.

23 Q And that when the gun was finally handed back to Mr.
24 Daniels he closes it and I guess he, unfortunately he,
25 unfortunately Mr. Leffingwell [spelled phonetically] was

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1 killed but how was he killed? I think that you've raised the
2 situation that the State had never taken the gun, traced it
3 for blood, whose blood it was at the time of the killing or
4 fingerprints?

5 A That's correct.

6 Q And that you denied your right to be able to figure out
7 whether or not Mr. Leffingwell had actually touched the gun
8 and pulled it towards him.

9 A That's correct.

10 Q So, the State's inattention to what they should have been
11 doing was detrimental to your client.

12 A I think it was.

13 Q But you didn't raise that in the closing arguments. I'm
14 curious as to why you didn't do that.

15 A May I should have done it. Maybe we would have had a
16 different result.

17 Q That would have led to the result of accident if that was
18 the way it worked. I think you said in that paragraph you
19 said you can't prove it; right?

20 A That's correct.

21 Q And the State couldn't prove it either; could they?

22 A They couldn't.

23 Q And whose obligation is to prove it?

24 A The State.

25 Q Why didn't you think of raising that, using that tape

1 during the trial?

2 A Why didn't I think of raising?

3 Q Mary McDougall, you said, you said in the closing
4 argument that she told the truth. You believed her.

5 A Yes, sir, my strategy at that point was to get the two of
6 them close enough together where they could be some pulling on
7 the gun to where it accidentally discharged and I - that was
8 my strategy. Obviously it didn't work. I firmly believe to
9 this day that at most Tracy Daniels should have been convicted
10 of involuntary manslaughter. There were two people there that
11 were close friends, two people that were sharing things with
12 each other, cooking together. It was just an injustice.

13 Q And I think we both agree on that.

14 A Yes.

15 Q Because I - my question is and I think you did a fine job
16 in most of the trial except in the areas that I'm bringing up,
17 it I think of where the jury I think could have gone the other
18 direction and found guilty of an accident or involuntary
19 manslaughter versus what they found him guilty of.

20 A Yes.

21 Q And I think when you said in the transcript that you
22 believe what Mary McDougall said I think you did but she had
23 18 months of lapse of memory to forget sort of things and that
24 tape might have restored her memory as to the fact she didn't
25 see him step back.

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1 A Right. You're correct.

2 Q And the fact that, you know, obviously, as you stated,
3 they were two friends drinking and fussing at each other that
4 night?

5 A There was more congenial and helping each other than
6 there was fussing.

7 Q A little fussing, a little help.

8 A Well, I think there was more congenial help being done by
9 Tracy for the fellow than anything else.

10 Q Well, I wouldn't object to that characterization I think.
11 Did Tracy take him over to find a part for his car ---

12 A He did.

13 Q --- a door handle I believe it was.

14 A Yeah.

15 Q In the early afternoon?

16 A He did.

17 Q And he was cooking, he was cooking for him?

18 A Yeah, and the other fellow cleaned the grill, the
19 deceased, and it was just a - it was a - at most in my opinion
20 an involuntary situation. It was either an accident or
21 involuntary. That was the absolute most and we had a
22 difficult time getting Judge Burch to charge involuntary
23 because he saw it either as a - he didn't want to charge
24 involuntary. He wanted murder or he was of the opinion that
25 it should have been a charge of murder or voluntary or not

1 guilty and he took a break when I begged for involuntary
2 manslaughter and came back out and I was relieved when he said
3 that he was going to give the jury the option of involuntary
4 manslaughter.

5 Q But he was very low key on the accident situation; wasn't
6 he? He was very low key in this being just simple accident.

7 A Did you say he was very low key?

8 Q I think Mr. - I think Judge Burch mentioned in passing
9 but only in passing that it might be accident, which would be
10 not guilty ---

11 A In his charge? Is that what you mean?

12 Q Yes, yes.

13 A I agree with that.

14 Q The other question that came up all through the trial
15 seemed to be what kind of lighting there was, what kind of
16 darkness there was at the time of the tragedy. Did you ever
17 think of even going to an almanac or the naval observatory and
18 finding out when sunset really was that day?

19 A I did and I think sunset that day was 5:10.

20 Q Actually it was 5:09, close, and this killing took place
21 at what time?

22 A It was close to six. It was dark, I believe. In fact I
23 know, I know it was dark. I mean, we're in December right now
24 about the same time as that.

25 Q All right, sir, it's three minutes later, December, this

1 date in December as it was in December 4th.

2 A I'm sorry?

3 Q Sunset is three days [sic] later now than it would be on
4 December 4th.

5 A Okay.

6 Q That's right. Any idea, any feeling why the police were
7 so hesitant to say it was dark? It just equivocating about it
8 was dusk, it was almost dark, that kind of situation.

9 A The question to me is why did they try to make it lighter
10 than it really was?

11 Q Yes.

12 MS. THAMES: Your Honor, I don't think he can answer
13 that question as to what the officers were thinking.

14 THE COURT: I sustain, calls for speculation.

15 Q After the Judge imposed the sentence of 30 years, did you
16 ever think about filing a motion to reconsider that sentence?

17 A I just don't remember.

18 Q Oh, you didn't do that as far as I know.

19 A Okay.

20 MS. THAMES: Your Honor, that's - he's not asking
21 questions. He already answered the question.

22 MR. DEVOE: No, I'm asking ---

23 BY MR. DEVOE:

24 Q Did you file a motion?

25 A I don't remember doing that.

1 Q But you filed an appeal in a timely fashion?

2 A Yes, sir.

3 Q But any idea why you didn't file a motion to reconsider
4 sentence?

5 A I don't remember. The record speaks for itself. I wish
6 I had.

7 Q But it doesn't speak at all for it. That's why I'm
8 asking you.

9 A I said I wish I had. I don't know.

10 Q In retrospect would you have done that?

11 A Yes, sir.

12 Q Do you think it might have helped more - oh, you don't
13 know about the gun expert; do you? You said you thought
14 Girndt was a gun expert; is that correct?

15 A I'd have to look at the transcript like but I, yes, since
16 it didn't work I wish we had gotten a gun expert, more than
17 one.

18 Q All right, please answer any questions that the Attorney
19 General might have.

20 MS. THAMES: May it please the Court?

21 THE COURT: Yes, ma'am.

22 CROSS EXAMINATION

23 BY MS. THAMES:

24 Q Mr. DeBerry, the gun expert, you did say that you thought
25 he had served his - the purpose that you wanted; is that

1 correct?

2 A That's correct.

3 Q And what was that purpose?

4 A The purpose was to show that that shotgun had a - it had
5 a hammerhead on it and that it could go off simply by somebody
6 jerking backwards on that hammerhead and then releasing it and
7 it could easily discharge without intent.

8 Q Okay, and you said that you - that it's possible that
9 they didn't send the gun out to get tested until you filed
10 your motion for your expert funds; is that correct?

11 A No, I don't think they knew that I got expert funds and
12 hired this man. I think that they - when I brought the man
13 here and got them to give me the gun, produce the evidence and
14 allow him to inspect it I think they found out then.

15 Q Okay, so, you had gone and looked - had - with Mr. Girndt
16 and looked at the gun; is that right?

17 A Yeah, I looked at it.

18 Q Okay, you - do you remember cross-examining the witnesses
19 as to that, as to the fact that they did not get it tested
20 until the week before trial?

21 A I do.

22 Q Okay, so, you brought that out in front of the jury?

23 A Sure.

24 Q Okay, and the other witnesses, in terms of the lighting
25 and things like that did you question the officers about

1 whether they could see, whether they were using their
2 headlights? Do you remember that sort of thing?

3 A I'd - I don't remember, but ---

4 Q Okay.

5 A --- it was dark and I think that I may have thought wrong
6 but I thought that the jury was aware that it was dark.

7 Q But you did try to bring out some of those
8 inconsistencies in your cross examination; didn't you?

9 A Certainly.

10 Q And you were - you had the opportunity to cross examine
11 each witness?

12 A Yes.

13 Q And again, your purpose in those was to bring out any
14 inconsistencies you could find?

15 A Yes, to do everything I could to try to help Tracy.

16 Q And you said, you testified that you knew Tracy
17 beforehand, you were friends?

18 A Yes, well, I'd known him for a long time and when I built
19 my house he was the plumber.

20 Q Okay, and you just said you did everything you could to
21 help him; right?

22 A Well, obviously, I could - maybe I could - I don't know.

23 Q Okay, but you worked hard in prepping for his trial?

24 A I tried.

25 Q And in conducting the trial?

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1 A Yes.

2 Q Okay, I'm sorry. Give me just one minute.

3 THE COURT: All right.

4 Q And you said that you had to fight pretty hard to get
5 that involuntary charge; right?

6 A As I recall I didn't think I was going to get Judge Burch
7 to charge it.

8 Q Right.

9 A And I felt very relieved and glad that finally he became
10 persuaded to charge it.

11 Q Okay, and he - do you remember what all he did charge?

12 A I think he charged murder, manslaughter, involuntary
13 manslaughter and not guilty.

14 Q Okay, by accident, not guilty and by - and he also
15 charged accident; did he not?

16 A Yes.

17 Q Or do you recall? Okay, wasn't one of the problems that
18 you were facing the fact that Mr. Daniels had given some
19 inconsistent statements?

20 A Yes.

21 Q Do you remember that? And do you remember what he - the
22 first thing he said? Do you remember the statements at all,
23 the context, contents of those?

24 A I do.

25 Q And he first told the officers, what did he first tell

1 the officers when he was first apprehended or first arrested
2 at the scene? Do you remember?

3 A You know, I feel like Tracy had been drinking a lot that
4 night.

5 Q Uh-huh.

6 A And I don't really recall but I remember maybe that's
7 because I didn't think it was - would have been accurate.

8 Q Okay, but - and then he gave a statement then later on at
9 the, at the law enforcement center; didn't he? Do you
10 remember that one?

11 A I'm not sure.

12 Q Okay, the record will reflect what those statements were,
13 and then he testified at trial, too; didn't he?

14 A He did.

15 Q Okay, and his testimony was there some - did the State
16 cross examine on some inconsistencies from his testimony from
17 his prior statements? Do you recall that?

18 A Yeah, Judge Russo did that.

19 Q Okay, so, that was - those were - that was a fairly big
20 hurdle for you to overcome; do you think?

21 A I think it was a - it was a big problem in our trial the
22 inconsistent statements.

23 Q Okay, and you say you thought, if I said this already I
24 apologize, you thought, you were hoping that - you thought
25 maybe the best thing you were going to get out of it was

1 involuntary; right?

2 A I really thought that.

3 Q The jury had several choices to make and that's not what
4 they saw; did they?

5 A Apparently not.

6 Q Okay. Thank you.

7 MS. THAMES: That's all I have, Your Honor.

8 THE COURT: All right, redirect?

9 MR. DEVOE: Thank you.

10 REDIRECT EXAMINATION

11 BY MR. DEVOE:

12 Q The inconsistent statements were, I think, mostly
13 consisted of Mr. Daniels insisting he fired the gun only once;
14 is that correct?

15 A I'm sorry. I can't hear very well.

16 Q The inconsistent statements being referred to, I believe,
17 is the statements that Mr. Daniels kept making that first
18 night that the gun was only fired once; isn't that correct?

19 A That's correct.

20 Q Right.

21 A He - I think he firmly believed that that - he never
22 heard but one shot that night and to me there was clear
23 evidence that there was two shots. I went out there and
24 looked at them.

25 Q Okay.

1 A And I really believe that he thought that all along and
2 that to me ---

3 Q Wasn't it clear evidence of fact he say he fired from the
4 porch of his trailer, but the evidence the State produced was
5 the shot took place from two to three feet away from the
6 victim; isn't that correct?

7 A But Mary, the girl, her testimony that the State produced
8 her and she said it was further.

9 Q The State's, Clay Nichols, the State's expert ---

10 A Uh-huh.

11 Q --- stated it was two to three feet away.

12 A Okay.

13 Q All right, Mary McDougall testified that they were next
14 to each other, passed that gun back and forth.

15 A Yes.

16 Q And she testified that he took one step back and fired,
17 but the tape you talked about testified that she - that he
18 stepped back at all, didn't mention it one way or the other.

19 A Right.

20 Q All right, so, that was an inconsistency where Mr.
21 Daniels apparently went catatonic, perhaps, during that part,
22 phase of his life between the steps, firing, from the step
23 down and I believe and this is in the transcript you saw that
24 the first shot went through that car shed.

25 A Yes.

- 1 Q All right, nowhere near Mr., Mr. Leffingwell.
- 2 A Sir?
- 3 Q Nowhere near the victim.
- 4 A That's correct.
- 5 Q So, the inconsistency wasn't that great to overcome
- 6 because the State's own witness said it was - the shot took
- 7 place very, very close to each other.
- 8 A Yes, sir.
- 9 Q As well as Clay Nichols who was the doctor.
- 10 A Yes, sir.
- 11 Q The expert, all right, I'm going to ask you also refer
- 12 back to page 616 of the transcript. This goes back to Donald
- 13 Girndt. Do you see line five on that page? So, the Solicitor
- 14 says and you can read it for me.
- 15 A Yes.
- 16 Q This concerns Donald Girndt we're talking about; right?
- 17 A That's correct.
- 18 Q And what does Mr. Russo say?
- 19 A He says on page - on line five he says, "Your Honor,
- 20 he's not qualified as an expert in firearms."
- 21 Q And the Court said what?
- 22 A Sustained.
- 23 Q Does that refresh your memory on Mr. Girndt's expertise
- 24 in firearms?
- 25 A It does.

1 Q Okay, so, he had to testify as a layperson on firearms;
2 didn't he?

3 A Yes.

4 Q All right, one other thing in this - at the end of the
5 trial when your client was found guilty and the Court asked
6 you to say some words for your client, do you recall that?

7 A I don't recall it. I'll look in the - end of the
8 transcript.

9 Q Yes, and the common practice in Florence County is what?
10 I mean, in a criminal trial when you're acting for the
11 defense, would you speak last when you're asking the Judge to
12 give him a lesser sentence or do you speak after the Solicitor
13 speaks or before he speaks I mean?

14 A I think it's before.

15 Q Because the question I was going to ask is did you ---

16 A But they would let, if I, if I - I think Judge Burch
17 would have let me talk at any time.

18 Q Pardon me?

19 A I think I could have, I could have talked with the Judge
20 at the sentencing phase at any time if it would have done any
21 good. I think I could have done that. I wish I had. You're
22 saying I did not do it; that's correct?

23 Q Well, you didn't do it. You spoke before the Solicitor
24 spoke and before the victim's family spoke.

25 A That's correct.

1 Q Now, you spoke first and you had Sherry Coker speak and
2 then the Solicitor spoke and then Rose, what is it Donner
3 [spelled phonetically], you spoke. The victim's sister was
4 here in the courtroom and wouldn't it have been more effective
5 to get a lower sentence if say Sherry Coker had been advised
6 to speak ahead of time to see what she was going to say than
7 have her speak last?

8 A I think that would have been better.

9 Q Last impressions?

10 A Yes, sir.

11 Q I have no further questions. Thank you.

12 THE COURT: All right, you may step down. You can
13 call your next witness.

14 MS. THAMES: Your Honor, can I just ask one more thing?

15 THE COURT: If it was something brought up new that
16 was not addressed on ---

17 MS. THAMES: Okay. It was just in follow-up to what he
18 asked, Your Honor.

19 THE COURT: Okay, go ahead and you can step down. You
20 can call your next witness.

21 MR. DEVOE: I'd call Sherry Coker to the stand.

22 Whereupon, Sherry Daniels Coker was called to the stand,
23 duly sworn by the Clerk and testified as follows:

24 THE CLERK: Please be seated and then state your name
25 for the record.

1 MS. COKER: My name is Sherry Daniels Coker.

2 THE COURT: All right, Mr. Devoe.

3 MR. DEVOE: Thank you, Your Honor.

4 DIRECT EXAMINATION

5 BY MR. DEVOE:

6 Q Sherry, what is your relationship to Tracy Daniels?

7 A I'm his youngest daughter.

8 Q And you live where?

9 A Turbeville, South Carolina.

10 Q And do you work?

11 A I work for the Citizens Bank in Olanta, South Carolina.

12 Q And what do you do there?

13 A I work in loan administration. I'm assistant vice
14 president.

15 Q You located in Olanta or in Turbeville?

16 A My office is located in Olanta.

17 Q Okay, at the conclusion of the trial of your father and
18 you were there every day at the trial?

19 A Yes, sir, in the courtroom.

20 Q Did you attend the bond hearing, also?

21 A Yes, sir.

22 Q You attended everything; didn't you?

23 A Yes, sir.

24 Q And you visit your father all the time now?

25 A Yes, sir.

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- 1 Q Every other week?
- 2 A Every other week.
- 3 Q And your sister does the other week?
- 4 A Right.
- 5 Q And didn't they move him from Broad River to Lee
- 6 Correctional so you could - it'd be easier for you to get to
- 7 see him?
- 8 A They did. They honored our hardship request after
- 9 several years.
- 10 Q And are you were familiar with the relationship between
- 11 the victim's mother and your father?
- 12 A Yes, sir.
- 13 Q And are you familiar with the help that your father was
- 14 trying to give Donald Leffingwell, the victim?
- 15 A I was through hearsay through Daddy telling me that.
- 16 Q At the conclusion of the trial had you been forewarned by
- 17 your father's attorney that you might be asked to say a few
- 18 words in favor of your father?
- 19 A The final day of the trial I remember Mr. DeBerry telling
- 20 us to try and be prepared if we have that opportunity to say
- 21 anything to the Judge that with it being such a emotional time
- 22 I didn't have advance notice to put together a statement that
- 23 I would have much preferred to have been able to do to say
- 24 more.
- 25 Q Were you told that you could even prepare a statement,

1 read it to the Court?

2 A I don't remember if we were specifically told we could
3 write it out or not. I'm sorry.

4 Q If you had been told that would you have done so?

5 A Feel certain I would have.

6 Q And I think you've at my request is you've prepared a
7 statement that you would have given to the Court at that time
8 if there had been enough forewarning to do so; is that
9 correct?

10 A Yes, sir.

11 Q At this time I would ask you to - do you have the
12 statement with you?

13 A Yes, I do.

14 MS. THAMES: Your Honor, I would object to that
15 statement. It's been prepared well after the trial.

16 THE COURT: I'm going to allow it. Go ahead.

17 MS. THAMES: All right.

18 Q If you'd read the statement.

19 A ``Thank you for allowing us to speak. I hope to convey
20 to you things that I feel I did not adequately express at the
21 original sentencing of my father, Tracy Daniels. The very
22 tragic events in which he was involved could just as easily
23 have resulted in his own accidental death. We have witnessed
24 his great sorrow over what happened that night and we, his
25 family, sorrow over it with him.

1 It was brought out during the trial that Tracy had no
2 prior criminal record. It was clear from the testimony that
3 he and the deceased had been drinking. I feel the jury was
4 not allowed to hear other things that we his family know to be
5 true. Had Tracy not been drinking earlier that day and that
6 night things would have ended differently. He was a law-
7 abiding citizen who worked hard to establish a good reputation
8 and his own residential plumbing business. He has a great
9 sense of humor. He loved his family and would do anything to
10 help someone in need. The anguished man the jury saw reliving
11 his horror of that faulty gun again being passed from his
12 hands to another man did not portray the Tracy Daniels we knew
13 to be competent and sensible, able to communicate well with
14 others under normal circumstances.

15 My daddy was a logical, caring and careful man when he
16 was sober, one that would never allow a gun near another man
17 who had been drinking. Donald's presence at daddy's house
18 that night was an example of his caring nature. As a master
19 plumber he gave Donald the chance to work with him to earn
20 some money. He tried to help Donald for the sake of his
21 mother Rose whom Tracy did care for very much.

22 The two men had spent other times together enjoying
23 music, playing guitars and singing. Unfortunately on this
24 night there had already been drinking before Donald came over
25 and by the evidence presented during the trial more alcohol

1 was consumed after he arrived. That is the part of the
2 continual punishment Tracy will experience for the rest of his
3 life, whether in prison or not. That question of what if he
4 had not even taken the first drink earlier that day, if he had
5 maintained clear, sober thinking he would have taken measures
6 to keep both himself and Donald safe from such potential harm.

7 My sister was not allowed to say it in the presence of
8 the jury during her testimony because it was termed hearsay,
9 but Tracy realized then how easily he could have been the one
10 to die in this very same accident. He said that at times he
11 wished he had been.

12 This accident occurred as the two men recklessly passed
13 around the shotgun proving to be faulty, that it could fire
14 accidentally. For his part of not being more careful with
15 that firearm he would even with good conscience have pled
16 guilty at trial to a charge of involuntary manslaughter
17 because he did not avoid drinking, which impaired his thought
18 process and careful nature. We feel the trial judge was
19 unnecessarily harsh in his sentencing because of the
20 mitigating circumstances in this case and it is our belief
21 that this incident did not warrant a sentence of 26 years,
22 which for him in essence was a life sentence."

23 These are words that I would not have said at the
24 sentencing phase, but may I say them also?

25 "My father's life in prison reflects that of a changed

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1 man, having been in prison for over seven years, caseworkers
2 often comment on the fact that Tracy has no disciplinary
3 write-ups on his record. He has tutored other inmates working
4 toward GED certificate. He has worked in the education
5 department. He actively encourages men to do what he does,
6 attend chapel services and character classes and take part in
7 every rehabilitative program made available to them that might
8 help them. He encourages each one that he can to prepare to
9 be good productive citizens when they are released. He writes
10 poetry that we share with others, including some warning
11 specifically about the dangers of alcohol. It is our hope
12 that one day he will no longer be an inmate and be able to
13 carry that message to young people in our local community.

14 Should Tracy ever be allowed to come home, even should it
15 be for a period of bond while a new trial might be in process,
16 he would use that time to be a productive member of society,
17 posing no flight risk or danger to anyone. He has a loving
18 group of family and friends right in this area to support him
19 that's evident by the number of people on his visitation and
20 telephone call lists and the volume of mail that he receives.
21 He has a job promised to him by Mr. Jerry Carnell of the Rug
22 Shop, a reputable business here in Florence. He could make his
23 own living. He has two granddaughters now ages six and nine
24 and two daughters he cherishes with whom he would most likely
25 live. Spare time would be spent with his family and helping

1 out around the homes of those who have supported him
2 faithfully while in prison. Tracy also longs for the
3 opportunity to actively work at the church of his dedicated
4 pastor who is here today, Reverend Fred Hooth, who has visited
5 him and mentored him over these seven years and written him
6 almost daily letters.

7 Many correctional officers have told my daddy, 'Tracy,
8 you don't need to be in here.' Even they can see this man
9 before you now is not a killer. He's not one of a violent or
10 even a quick temper. There's no way to go back and change or
11 ever make up for this terrible accident, but drinking will
12 never be a problem for him again. It has cost all of us far
13 too much. Whether he remains in prison or is allowed the
14 possibility of a new trial resulting in his coming home Tracy
15 will be striving to make a positive impact on the lives of
16 those around him and bring honor to God whom he now serves
17 faithfully and our prayer is that some relief can be given
18 through our judicial system that will give him the chance to
19 spend his remaining days productively, giving back to society,
20 trying to help others and I thank you sincerely for letting me
21 share this with you."

22 THE COURT: Any other questions?

23 MR. DEVOE: I have no questions, Your Honor,

24 THE COURT: All right, cross examination.

25 MS. THAMES: Thank you, Your Honor.

1 CROSS EXAMINATION

2 BY MS. THAMES:

3 Q Ms. Coker, you testified at the trial; didn't you?

4 A Yes.

5 Q And you testified that your father had a drinking
6 problem?

7 A Yes.

8 Q And he had, he had a relationship with the victim's
9 mother; correct?

10 A He did.

11 Q And did you testify that there were occasions when that
12 relationship kind of went sour?

13 A Yes.

14 Q And that was due to his drinking?

15 A That's correct.

16 Q And the behavior that he exhibited during the times that
17 he was drinking?

18 A Yes.

19 Q And on the night in question he was not with the victim's
20 mother but he was at his home and he had been drinking.

21 A He was at, at his home, yes.

22 Q So, that behavior was probably evident at that time and
23 that's why he wasn't with Rose?

24 A That's what we assume, yes.

25 Q- Okay, thank you. That's all I have.

1 THE COURT: Anything on redirect?

2 MR. DEVOE: Yes, sir.

3 REDIRECT EXAMINATION

4 BY MR. DEVOE:

5 Q At Rose's direction or request did he try to take care of
6 Rose's son?

7 A He did and may I clarify? As I recall I believe daddy
8 had been at Rose's house the night before. They were hanging
9 Christmas lights together I think. So he would have been
10 sober on that Thursday night.

11 Q And he - and as I understand he didn't drink at Rose's
12 house.

13 A That's correct.

14 Q She wouldn't let it happen.

15 A Right.

16 Q I have no further questions.

17 THE COURT: All right, you may step down. You can
18 call your next witness.

19 MR. DEVOE: I'm going to call Donna to the stand.

20 At this time Donna Jean Favor was called to the stand,
21 duly sworn by the clerk and testified as follows:

22 THE CLERK: Please be seated and then state your name
23 for the record.

24 MS. FAVOR: Donna Jean Favor.

25 THE COURT: All right, Mr. Devoe.

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1 MR. DEVOE: Thank you, Your Honor. I will tell Your
2 Honor that I have not talked to Donna ahead of time, but
3 calling her to testify and didn't think about it frankly until
4 a while back. I'm sorry about the shock.

5 DIRECT EXAMINATION

6 BY MR. DEVOE:

7 A Okay, yeah, okay.

8 Q I believe you're Donald's sister?

9 A Yes, I am. I'm his oldest sister.

10 Q And I believe you're the one that testified at the trial

11 ---

12 A Yes.

13 Q --- you wrote that - read that very poignant three or
14 four page letter.

15 A Yes.

16 Q Is that correct, and you now live in Florence?

17 A Yes, I live in Darlington.

18 Q All right, and you're a nurse?

19 A Yes, yes, I am.

20 Q And you're from my neck of the woods up North; is that
21 right?

22 A Yeah, I'm from the North, yeah, we're northerners, yes.

23 Q Up from my neck of the woods.

24 A Yeah, yeah, no, it's mine.

25 Q You're from Torrington, Connecticut.

1 A Yes, from Torrington, yep.

2 Q Since this whole tragic situation you wrote that letter
3 have you had a change of heart as to the kind of punishment
4 that you think that Tracy Daniels should have had?

5 MS. THAMES: Your Honor, I object. I don't think is
6 appropriate for PCR.

7 THE COURT: What's the relevancy of that?

8 MR. DEVOE: The relevancy, Your Honor, I think is that
9 perhaps she'd - she might have changed her mind at that time
10 if the attorney had talked to her about the whole situation.

11 THE COURT: Okay, no, I'll sustain the objection.

12 MR. DEVOE: Pardon me?

13 THE COURT: I sustain the objection. What she feels
14 now, all we're dealing with is whether or not his attorney was
15 ineffective at the time of the trial and the sentencing, and
16 ---

17 MR. DEVOE: It might have affected her not talking to
18 her ahead of time.

19 THE COURT: No, you asked her if she's had a change of
20 heart since he was sentenced, and she said yes.

21 MR. DEVOE: Well, I'll take that one. I'll ask her the
22 next question then.

23 BY MR. DEVOE:

24 Q If Mr. DeBerry had talked to you ahead of time during the
25 trial would you think you might have had a change of heart,

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1 get a little different attitude about the whole situation then
2 than you did?

3 MS. THAMES: I still object. I think that's, you know,
4 retrospect. That's nothing that's relevant, Your Honor.

5 MR. DEVOE: I'm trying to get back to where she might
6 have thought if he had been talking to her about the whole,
7 the family and everything ahead, ahead of her talk.

8 THE COURT: Yeah, I sustain. I mean, even if she
9 said, "I don't want him to go to jail at all," are you saying
10 that he would not have been convicted?

11 MR. DEVOE: No, I'm not talking conviction. I'm
12 talking about the sentencing.

13 THE COURT: Okay, if she'd said, "I don't want him to
14 go to jail at all," are you saying that he would not have
15 gone to jail?

16 MR. DEVOE: No, I'm saying he'd gotten less time, not
17 not go to jail.

18 THE COURT: All right, no, we're dealing with
19 ineffective assistance of counsel and whether or not this
20 witness's - I don't see how her - what she - I don't see how
21 that - first you're going to have to show that what she said
22 or what she did caused the Judge to sentence your client to 26
23 years.

24 MR. DEVOE: Your Honor, I can't show that. I can't
25 show that what Sherry Coker said or did would have changed it

1 either.

2 THE COURT: All right, well, I sustain the objection.

3 MR. DEVOE: All right, excuse you from the stand.

4 Thank you.

5 A That's it?

6 THE COURT: All right, cross examination?

7 MS. THAMES: Nothing, Your Honor.

8 THE COURT: You may step down.

9 A Thanks.

10 MR. DEVOE: We rest, Your Honor.

11 THE COURT: All right, does the State have any

12 witnesses?

13 MS. THAMES: No, Your Honor, we don't.

14 THE COURT: All right, all right, Ms. Thames, if you

15 would please prepare an order denies the Applicant's request

16 for post-conviction relief. I don't see where Mr. DeBerry's

17 representation rose to the level of ineffective assistance of

18 counsel to where it would have been a different result. As I

19 understand a lot is addressed in hindsight, but I don't know

20 that his representation varied from the standard that Mr.

21 Daniels would have received had he had another attorney. We

22 can always second-guess what we do at trial, but that does not

23 necessarily mean that our representation was so deficient that

24 it did not meet the standards of an attorney under the same

25 type of situation. I find that even though he didn't get a

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1 gun expert a lot of the testimony after reviewing the
2 transcript, a lot of the testimony as to what he wanted to get
3 into the record got into the record and got before the jury.
4 So, I don't see where the outcome would have been any
5 different had he even gotten a gun expert.

6 Anything else I need to address?

7 The sentencing issue, I mean, that was within the Judge's
8 discretion. It's within the guidelines and I don't see where
9 Mr. DeBerry's representation was so ineffective that it caused
10 your client to get more time than he would have gotten had Mr.
11 DeBerry taken some other action.

12 MR. DEVOE: Your Honor, I would ask you to address the
13 lack of using the tape to contradict Mary McDougall's
14 testimony.

15 THE COURT: Say that again now.

16 MR. DEVOE: The lack of use of the tape.

17 THE COURT: Okay, he had a - that was the one where
18 you all said that the transcript was different than what the
19 tape said.

20 MR. DEVOE: The tape was the night of the incident,
21 but did not mention stepping back.

22 THE COURT: Right.

23 MS. THAMES: The tape.

24 MR. DEVOE: The transcript of testimony was 18 months
25 later and the tape was not used to contradict Ms. McDougall's

1 testimony.

2 MS. THAMES: And the tape was not offered here today.
3 Mr. DeBerry's testimony was he didn't remember. I don't have
4 the tape. I haven't heard it.

5 MR. DEVOE: I can get it. I ordered the tape. I
6 should have - it's in my car.

7 MS. THAMES: There's always minor discrepancies.

8 THE COURT: Yeah, I don't see where that would have
9 made any difference. Number one the burden of proof is on the
10 Applicant to show that there was ineffective assistance of
11 counsel. Mr. DeBerry says he doesn't recall the tape saying
12 that.

13 MR. DEVOE: Obviously he said that, Your Honor.

14 THE COURT: All right, as I recall Mr. DeBerry's
15 testimony he said, "Had the tape said that, I don't know that
16 it said that, had it said that that was certainly different
17 than how she testified and I should have used it," but we
18 don't have the tape in front of us to show.

19 MR. DEVOE: Could I keep the record open, Your Honor,
20 to put the tape, introduce the tape into evidence?

21 THE COURT: No, we've got - I'm going to go ahead and
22 - even, even if the tape did say that the fact that he stepped
23 back I don't know would have made a difference, that one, one
24 issue.

25 All right, thank you very much.

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1 MS. THAMES: Thank you, Your Honor.

2 THE COURT: Thank you.

3 (Adjourned.)

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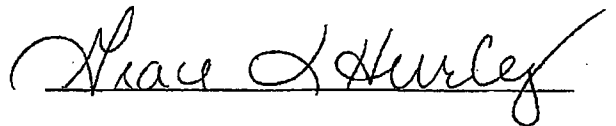
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C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the PCR hearing held in the case of Tracy Daniels versus the State of South Carolina, held in the Court of Common Pleas for Florence County, Florence County Courthouse, Florence, South Carolina, on December 18, 2008.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Grace L. Hurley, CVR-CM

Official Reporter

May 28, 2009.

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE

) TWELFTH JUDICIAL CIRCUIT

) 2006-CP-21-1566

Tracy Willard Daniels, SCDC No. 274866,

Applicant,

v.

ORDER OF DISMISSAL

State of South Carolina,

Respondent.

FILED
2009 FEB 16 AM 11:26
CONNIE REEL-SHEARIN
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, SC

Harry Devoe, Esquire, appearing for the Applicant.

Julie M. Thames, Assistant Attorney General, appearing for the Respondent.

This is a post-conviction relief (PCR) matter. The Applicant filed an application for PCR on September 19, 2006. The Respondent made its Return on May 15, 2007. The Applicant alleges he is being held in custody unlawfully due to ineffective assistance of trial and appellate counsel. An evidentiary hearing was convened at the Florence County Courthouse on December 18, 2008. The Applicant was present at the hearing.

I. PROCEDURAL BACKGROUND

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. The Applicant was indicted at the August 2000 term of the Florence County Grand Jury for murder (2000-GS-21-977). He was represented by John S. DeBerry, Esquire. On May 4, 2001, the Applicant underwent a jury trial pursuant to which he was found guilty of voluntary manslaughter. He was sentenced by the Honorable Paul M. Burch to confinement for twenty-six (26) years.

CERTIFIED A TRUE COPY

Connie Reel-Shearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

1/mc

A timely Notice of Appeal was filed and an appeal was perfected on Applicant's behalf. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Daniels, Op. No. 2004-UP-394 (S.C. Ct. App. filed June 22, 2004). The South Carolina Supreme Court denied the Applicant's Petition for Writ of Certiorari and the Remittitur was sent down on December 16, 2005.

I. APPLICABLE LAW

1. Ineffective Assistance of Counsel

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Where the application alleges ineffective assistance of counsel 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 upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also 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. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's

performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Id.* at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 688). 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." *Id.* at 117-18, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 689). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

2. Ineffective Assistance of Appellate Counsel

A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830 (1985). An Applicant asserting a claim of ineffective assistance of appellate counsel must prove both that counsel's performance was deficient and that the deficient performance prejudiced him. *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003). "To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal." *Id.* at 434, 581 S.E.2d at 835. Although a defendant is entitled to effective assistance of appellate counsel, counsel is not required to raise every non-frivolous issue presented by the record. *Tisdale v. State*, 357 S.C. 474, 594 S.E.2d 166 (2004). Indeed, an indigent defendant has no right to compel appointed counsel to press non-frivolous points requested by the client if counsel, as a matter of professional judgment, decides not to pursue those points. *Jones v. Barnes*, 463 U.S. 745 (1983). Appellate counsel has a professional duty to choose among potential issues according to

their merit. Id. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

III. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

Trial counsel testified that he was appointed to represent the Applicant on December 13, 1999. He testified that he appeared at a bond hearing in front of Judge Harwell but that he had known the Applicant prior to the incident and did not remember if he was at the bond hearing as a friend of the Applicant's or if was already representing him at that point. Trial counsel testified that he did not remember whether Judge Harwell suggested that the Applicant should be evaluated. He testified that he had known the Applicant for a long time and that he did not have any difficulty communicating with the Applicant. He testified that he had several discussions with the Applicant and that the Applicant was very emotional about what had happened but that he participated in the discussions and assisted with his defense.

Trial counsel testified that he received discovery from the State. He testified that the State did not send the gun to SLED be tested until the Friday before the trial began. Trial counsel testified he believed it was likely that the State sent the gun to be tested

when they did because trial counsel had gotten funds to hire an expert to test the gun on behalf of the Applicant. Trial counsel hired Donald Grindt to examine the gun. While Grindt was qualified as an expert in several areas including crime scene analysis, fingerprint identification, footwear identification, and bloodstain pattern interpretation, he was not qualified as a firearms expert. Trial counsel testified that in spite of not getting Grindt qualified as a firearms expert, he got out of Grindt what he wanted, that the hammer of the gun could go off if the gun was handled in the manner described by the witnesses. Trial counsel believed Grindt served the purpose he was hired for.

Upon being questioned about why trial counsel did not emphasize Grindt's testimony more in closing argument, trial counsel responded that perhaps he should have emphasized that testimony more but that hindsight is twenty/twenty. He testified that he felt that the jury was not likely to return a verdict of not guilty and completely exonerate his client, so he tried to weave in the possibility of an accident but focused on involuntary manslaughter because he thought that would be the most likely scenario the jury would believe.

Trial counsel testified that he thought he heard the tape of Mary McDougal, the next-door neighbor who witnessed the shooting, but he was not completely sure. He did not recall whether or not McDougal said on the tape that Applicant had taken a step back before the shot was fired. He testified that if she did not say that on the tape but did testify to that at trial, he wished he would have known of that discrepancy.

Trial counsel testified that no one testified that they saw the Applicant put the shell in the gun. He testified that one shot hit the carport and that the Applicant came down the steps of his home and gave the gun to the victim. He relayed that the testimony

at trial was that the Applicant appeared to be experiencing difficulty ejecting the shell but that the victim was able to eject it. The victim then gave the gun back to the Applicant and the Applicant shot the victim, but nobody saw a new shell being put into the gun after the first one was ejected.

Trial counsel testified that he brought to the jury's attention that the gun was not sent to SLED to be tested until the Friday before the trial began. He testified that he attempted to show through Grindt's testimony that the gun could have fired accidentally while being passed back to the Applicant. He also brought to the jury's attention that the pattern of the gun residue could indicate that the victim was actually holding on to the barrel of the gun when it was fired.

Trial counsel testified that part of his strategy was to show the jury that the Applicant and the victim were close friends, that they were cooking out together, and that there was more congenial interaction than fussing or fighting going on that evening. He testified that the testimony showed the two men were cooking on the grill, that the victim had actually cleaned the grill prior to cooking, and that they generally were getting along. Trial counsel testified that he tried to demonstrate to the jury through cross-examination that the investigation by law enforcement was not thorough. He attempted to establish reasonable doubt by showing what law enforcement did not do.

Trial counsel testified that he checked what the lighting conditions were that night and that he examined witnesses as to how much light was available at the time of the incident. He did not remember whether or not he filed a motion for reconsideration, but he did file the notice of intent to appeal.

Trial counsel testified that he requested a charge on involuntary manslaughter and that he had to argue vehemently but that he did finally convince the judge to give the charge, unfortunately, the jury did not agree. He testified that the testimony at trial showed that when the Applicant was not drinking, he was a very pleasant and mild mannered person but that when he was drinking he had a quick temper.

Applicant's daughter, Sherry Coker, testified on the Applicant's behalf. She testified that she lives in Turbeville, works in Olanta at a bank, and that she was present at the trial. She testified that she visits her father frequently and that the Department of Corrections honored a hardship request and transferred her father to a closer location so that it would be easier to visit him. She testified that on the last day of the trial, trial counsel advised her to be ready to speak. She testified she wished she had more time to prepare her remarks to the Court. She testified that her father was sober the night before the shooting but that when he drank he was not a pleasant person and that his drinking led to his separation from her mother.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records of the Florence County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, the Applicant's PCR application, the Respondent's Return to the application, the briefs from the direct appeal, the opinion of the South Carolina Court of Appeals, and legal

7/mk

arguments of counsel. Pursuant to S.C. Code Ann. § 17-27-80 (1985), this Court makes the following findings of fact based upon all of the probative evidence presented.

This Court finds the allegations that trial counsel's and appellate counsel's representation fell below reasonable professional norms are without merit. With regard to trial counsel, this Court finds no ineffective assistance of counsel. This Court finds trial counsel's testimony to be highly credible. He was very prepared for trial and did an excellent job in bringing inconsistencies to the jury's attention. His examination of Grindt brought to the jury's attention information that the gun could possibly have been fired just by handing it back and forth. Trial counsel also brought to the jury's attention the possibility that the victim may have been grabbing or pulling the gun when it went off. This Court finds trial counsel vigorously cross-examined law enforcement with the goal of demonstrating to the jury that the investigation was lacking.

This Court finds that trial counsel was not ineffective in failing to stress accident more in his closing argument. He believed that involuntary manslaughter was the most he could hope for and stressed that in closing. The fact that the jury came back with a verdict on voluntary manslaughter does not render trial counsel ineffective for failing to stress accident. He employed sound trial strategy. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995) (Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance). The fact that the jury did not return a verdict of guilty on involuntary manslaughter indicates that they did not buy the accident scenario.

This Court finds trial counsel was not ineffective with regard to the tape of McDougal. Trial counsel testified he was not sure if he heard the tape but that if there

were a discrepancy, he wished he had known about it. This Court finds even if there was a discrepancy in McDougal's testimony about whether the Applicant took a step before the shot was fired, this would not have changed the result of the trial.

This Court finds no ineffective assistance of trial counsel in failing to have the Applicant evaluated. The Applicant has not demonstrated that he was unable to assist trial counsel or that he was not competent at the time of the offense or at the time of trial. The Applicant himself testified that he met with trial counsel several times; he did not say that he had any difficulty understanding their conversations. Trial counsel testified that they had many conversations and that the Applicant was involved in the discussions and appeared to understand the context of those discussions. This Court notes that the Applicant has not alleged that he was incompetent at any stage of the proceedings; he merely alleged that trial counsel was ineffective in failing to have him evaluated. He has not made any showing of prejudice.

This Court finds trial counsel requested a charge on involuntary manslaughter, fought hard to get the charge and eventually succeeded. The fact that the jury came back with a guilty verdict on voluntary does not render trial counsel's performance in this regard deficient.

While the Applicant did not testify and no testimony with regard to ineffective assistance of appellate counsel was offered, the Applicant alleged in his application that appellate counsel chose which arguments to raise on appeal without input from the Applicant. This Court finds the Applicant has not demonstrated that he would have prevailed on appeal if not for appellate counsel's errors. Anderson v. State, supra. Nor

has he shown that any alleged ignored issues are clearly stronger than those actually raised on appeal. Gray v. Greer, supra.

V. CONCLUSION

This Court concludes that the Applicant failed to carry his burden of proof to show that trial counsel's or appellate counsel's representation fell below reasonable professional norms or that he was prejudiced by the alleged deficient representation. The Applicant's former trial counsel and appellate counsel rendered reasonably effective assistance under prevailing professional norms and demonstrated a normal degree of skill, knowledge, and professional judgment that is expected of an attorney in a criminal case. Strickland v. Washington, supra; Cherry v. State, supra. Additionally, the Applicant did not carry his burden to show a reasonable probability that the result at trial would have been different had trial counsel or appellate counsel done what the Applicant alleges should or should not have done. Cherry v. State, supra. This Court finds trial counsel's testimony to be more credible than that of the Applicant.

As to any and all allegations, which were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds that the Applicant failed to present any probative evidence regarding such allegations. These allegations are not supported by any law and were not addressed at the hearing. Accordingly, this Court finds that the Applicant waived the allegations and failed to meet his burden of proof regarding them. Accordingly, they are denied and dismissed with prejudice.

IT IS THEREFORE ORDERED THAT:

1. The post-conviction relief application is **DENIED AND DISMISSED WITH PREJUDICE**;

2. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures on appeal.
3. The Applicant is remanded to the custody of the Respondent for the completion of his sentence.

AND IT IS SO ORDERED.

Benjamin H. Culbertson

Benjamin H. Culbertson

Presiding Judge

Twelfth Judicial Circuit

Conway

South Carolina

Feb. 6

2009.

66-1566

Petitioner,

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Respondent.

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CORRIE REEL SHEARIN
CDDP & GS
SOUTHERN COUNTY, SC

L. S. Bates
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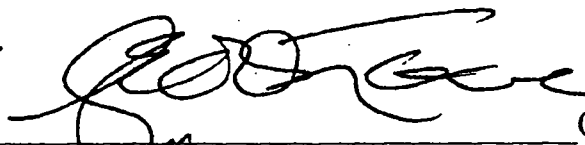
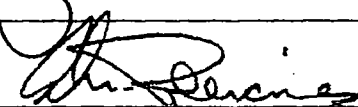
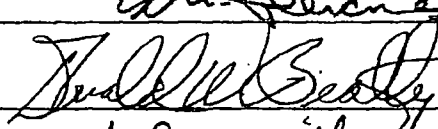
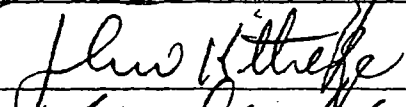
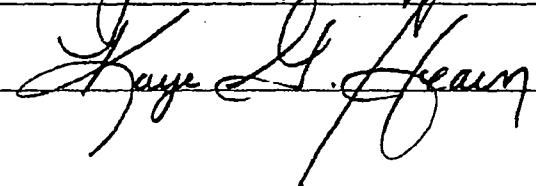
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**CLERK OF COURT C.P & G.S
FLORENCE COUNTY, S.C.**

hereby appointed to resume representation of petitioner for the purpose of the remand hearing and the initiation of any appeal.

IT IS SO ORDERED.


____ C. J.

____ J.

____ J.

____ J.

____ J.

Columbia, South Carolina

February 3, 2011

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE) 2006-CP-21-1566

Tracy Willard Daniels,)

Plaintiff,)

vs.)

State of South Carolina,)

Defendant.)

Transcript of Record

March 2, 2012

B E F O R E :

Honorable Benjamin H. Culbertson
Georgetown County Courthouse
Georgetown, South Carolina

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

Harry Leslie Devoe, Jr., Esquire
Attorney for Plaintiff

David A. Spencer, Esquire
Attorney for Defendant

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

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1	A-1	Taped Interview - McDougal
2	A-2	Transcript of McDougal Interview
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1 (On the record, March 2, 2012.)

2 THE COURT: All right, this is case number 2006-CP-21-
3 1566, the case of Tracy Willard Daniels versus State of South
4 Carolina. The matter is before the Court on a petition
5 seeking post conviction relief. Please give the court
6 reporter your name and who you represent.

7 MR. SPENCER: Your Honor, my name is David Spencer with
8 the Attorney General's Office here for the State of South
9 Carolina.

10 THE COURT: All right.

11 MR. DEVOE: Your Honor, my name is Harry Leslie Devoe,
12 Jr. I represent the, the petitioner, Tracy Willard Daniels.

13 THE COURT: All right.

14 MR. DEVOE: I could give the court reporter my card.

15 THE COURT: All right, that'll be good. Thank you.

16 All right, anything preliminary before we get started?

17 MR. SPENCER: Your Honor, if I could just have a moment
18 I just want to ---

19 (Mr. Devoe and Mr. Spencer confer.)

20 MR. SPENCER: Your Honor, I'm just, you know, and I
21 apologize. I've been trying to understand which direction Mr.
22 Devoe intends to go. Your Honor, as you're aware given the
23 procedural background, this is a matter that you had heard and
24 it was petitioned up to the Supreme Court, a petition for cert
25 from the denial of relief was filed with the Supreme Court and

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1 they remanded it down so a tape could be put into evidence and
2 my understanding of the order was that here would be limited
3 to the tape.

4 THE COURT: And I - that was my initial understanding
5 but it has been so long since we had this hearing, it took so
6 long for me to get the tape and the statement. I don't
7 remember anything about this case. That's why I said we
8 needed to go with a hearing de novo because I do not remember
9 one thing about this. As I understand my initial - the first
10 time I heard the case was how many years ago?

11 MR. DEVOE: Three and a half years ago, Your Honor.

12 THE COURT: Huh?

13 MR. SPENCER: Your Honor, and we did ---

14 MR. DEVOE: Three and a half years ago.

15 THE COURT: Three and a half years ago and then I've
16 been trying for the last since the Court's order remanding it
17 to me back in February of 2011 I've been trying to get a copy
18 of the tape and I just got it a month ago.

19 MR. SPENCER: And you ---

20 THE COURT: So it's been ---

21 MR. DEVOE: Too long.

22 THE COURT: --- three and a half years and I just
23 don't remember anything about the case.

24 MR. SPENCER: And Your Honor, if I just may be heard ---

25 THE COURT: Okay.

1 MR. SPENCER: --- you know, we do have the transcript is
2 what I gave you and what I had e-mailed you and have given to
3 Mr. Devoe also is the appendix from the PCR appeal, which
4 includes the PCR transcript of the hearing that you - that was
5 before you. So we have that record already.

6 THE COURT: But I'm not going to read that whole
7 transcript. Let's, let's go ahead with a hearing de novo.

8 MR. SPENCER: And it's, it's - and it's actually, Your
9 Honor, it's very - it's a very quick read, about 50 pages.

10 THE COURT: Well, do you want to read it to me? I'd
11 rather go with a hearing de novo.

12 MR. SPENCER: Okay, Your Honor, if I could just - I
13 would also just want to raise an objection and put on the
14 record the State has made since it's been remanded, instantly
15 from the time it's been remanded we've been trying to have Mr.
16 Devoe give us a copy of that tape and produce the tape. He
17 has - he had the tape or I should say his client's family had
18 the tape. The State did not have the tape. I did have a
19 transcript but as I understood it he was trying to get the
20 tape and I didn't, you know, I didn't know if the tape matched
21 the transcript or not, but I, you know, the first thing I did
22 was try and find out if the State still had a copy of the
23 actual tape and it did not, that the Prosecution, the
24 Solicitor's Office. I actually also tried to get it from Mr.
25 DeBerry. He didn't have it. He had given it to the

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1 Applicant's family. I had wrote Mr. Devoe, and Your Honor, I
2 wrote you on March 9th. It was remanded, I believe, in late
3 February, don't have the date right in front of me, I wrote
4 you in March indicating that I was trying to get a copy from
5 the Solicitor's Office. I wrote in April to Mr. Devoe, April
6 of 2011, asking for a copy of the tape or to make arrangements
7 that I could come and copy the tape. Mr. Devoe had been
8 trying to get it from the family. I sent a letter to him
9 which was confirming a phone call I had from him on June 28th
10 indicating that he was still trying to obtain the tape from
11 the family member. I think you had sent us a letter. I don't
12 seem to have a copy of it anymore that I either got the - got
13 right after I sent that letter or, or I think I got it after I
14 sent the letter out actually and I think I sent a letter about
15 the same day indicating what my conversations with Mr. Devoe
16 on the issue were. Mr. Devoe had contacted me, my
17 recollection was mid-July and indicated he had a tape and he
18 was going to send it. He didn't get me the tape. I wrote him
19 again in December 12th of 2011 and I didn't actually receive a
20 response until January on that tape, but I wrote him in
21 December 12th of 2011 asking again for the cassette tape or to
22 make arrangements for me to come out to his side of the state
23 to make a copy. You wrote a letter on December 20th
24 understandably concerned about the delay and I had - I sent
25 you a letter the very next day, the same day I received it on

1 December 21st indicating the status, you know, and that I had
2 been trying to get a tape and I had actually also I think in
3 that same letter because I think you had indicated that the
4 hearing should be de novo and I had sent a - I had also object
5 in that letter.

6 Your Honor, the delay has not been occasioned by the
7 State of South Carolina and as a matter of a fact the very
8 opposite, we've been trying to move things along the whole
9 time and ---

10 THE COURT: And I understand that, but as I
11 understand and I have - I don't have a cassette. So I haven't
12 been able to listen to the tape. I did read the transcript
13 and it seems like that it was a report taken from an
14 investigator on behalf of the State. Now I understand you're
15 saying it wasn't in you all's possession.

16 MR. SPENCER: Right.

17 THE COURT: But didn't it originate in you all's
18 possession?

19 MR. SPENCER: It may have originated in our
20 possession, but he was the one who wanted to put the tape in.

21 THE COURT: I understand, yeah.

22 MR. SPENCER: And I don't know what he had. I was
23 assuming, I was certainly hoping was the same thing that I had
24 a transcript for but I didn't know that, and so considering it
25 was his exhibit and it was with him that's why I was trying to

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1 get the tape. All along it was just a matter of, "Oh, we'll
2 just give them the transcript," yeah, I could have got that
3 earlier, but that's not what he had indicated to me, Your
4 Honor.

5 THE COURT: All right, well, let me ask, what was the
6 reason for the delay, Mr. Devoe, because I wrote for almost -
7 I know when I first got the order I wrote you February 16th,
8 2011 saying that I needed - I didn't have travel, I needed
9 the, the tape. We were going to have to schedule it for a
10 hearing. I didn't get any response from you. I wrote back
11 again on June, several months later in June, got a response
12 from Mr. Spencer, no response from you. I wrote again - well,
13 no, excuse me, I wrote in February. I wrote in March, wrote
14 in February, got a response. Wrote in March, wrote in June,
15 never heard anything, finally wrote again in December. What
16 was the reason for the delay?

17 MR. DEVOE: Well, part, part of the reason the delay
18 at the very end is I had a heart attack in September which put
19 me out of action about four months, but before that I had to
20 get the tape back from Tracy Daniels' sister's daughter, who's
21 not here today, and she got it back to me and I don't know the
22 exact time it was. It was - I didn't have it when you first
23 contacted me.

24 THE COURT: Yeah, but I mean, we're talking about from
25 February until September. So you're talking about ---

1 MR. DEVOTE: Six months.

2 THE COURT: Yeah, no, yeah, seven months.

3 MR. DEVOTE: Seven months.

4 THE COURT: Yeah, seven months and ---

5 MR. DEVOTE: I didn't have the tape at first in
6 February. I think I got the tape ---

7 THE COURT: But I mean, at the - as I understand you
8 wanted to introduce it into evidence at the first PCR hearing.
9 So where - how were you going to introduce it if you didn't
10 have it?

11 MR. DEVOTE: I had it then. At that point I handed it
12 back, I believe, to Sherry Coker for safekeeping. She's the
13 one who got me the tape and gave me the tape, but I don't know
14 where she got it from. She did not get it from the State. So
15 I don't know where she did get it from and she's not here
16 today. Her sister's here today, but she's not.

17 THE COURT: Well, how are you going to authenticate
18 the tape if she's not here and she's the one that had it?
19 We're here for a hearing ---

20 MR. DEVOTE: Well, I don't think there's any ---

21 THE COURT: --- de novo and if you want to introduce
22 it.

23 MR. DEVOTE: Well, I believe it's the same, well, I can
24 do it because of the fact I remember reading the tape
25 initially and it's the same transcript as it was before. I

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1 think - don't think the State's objecting that it's not an
2 authenticate tape.

3 MR. SPENCER: I mean if it's going to be de novo I'm
4 going to object, I mean, but if he wants to waive the de novo
5 and limit it to just the tape issue and I don't even mind he
6 wants to recall Mr. DeBerry. It's up to him, but you know,
7 my, my take on it is we're exceeding the scope of the Supreme
8 Court order by going into anything other than the tape.

9 THE COURT: And I agree with you that we're exceeding
10 the scope of the Court's order. The problem I have is if I go
11 strictly by the Court's order I don't remember anything about
12 this case and all I'm going to have is this tape and I'm going
13 to read the transcript of the tape and I'm not going to know
14 any of the other allegations, any of the other evidence
15 presented or anything like that unless you want me to sit down
16 and read through that transcript which you all are going to
17 sit here with me while I read through it.

18 MR. SPENCER: Well, you know, two things, Your Honor,
19 and let me - if you'll indulge me, Your Honor, I think we
20 could have a de novo hearing as to the tape issue and the
21 rulings on everything else can stand and that - there would be
22 no problem with that. We have an order already. The amended
23 order would just address the tape issue and we would have Mr.
24 DeBerry here to take the testimony on that issue. So that's,
25 that's one thing we can do. Your Honor, the second thing is

1 I'm about four hours away from home on Friday and no, no
2 ambitions to get back before closing time. Your Honor, I
3 would wait around here for you to read, review that transcript
4 if that was, you know, my convenience isn't what matters here
5 but if that would be convenient for you.

6 THE COURT: All right, how about that, just me reading
7 the transcript and then we'll take it from there.

8 MR. DEVOE: As Mr. Spencer has pointed out the
9 transcript is about, is about 50 pages long. I guess there
10 were some things - if it was de novo I could add to the
11 transcript but there's not that many things. I'm satisfied
12 for you to read the transcript.

13 THE COURT: All right, all right, so, where's the
14 transcript?

15 MR. SPENCER: It's in the - it starts on page 880 of the
16 appendix and I had handled - handed you a physical copy of
17 that and it goes to about nine ---

18 MR. DEVOE: Well, actually, the real, the real hearing
19 starts at 893.

20 MR. SPENCER: Yeah, that's true. That's a good point
21 because I think you gave some - you gave the Applicants in the
22 courtroom, you know, some information about what, you know,
23 getting what you ask for.

24 MR. DEVOE: The first ten pages, Your Honor, about 200
25 pages of the transcript were missing and we're going to go

1 copy it in order to fill out the transcript, full transcript
2 of the trial.

3 MR. SPENCER: We were missing pages of the trial
4 transcript?

5 MR. DEVOE: Yeah.

6 MR. SPENCER: Oh, okay, I didn't know we did.

7 THE COURT: All right, let's sit tight while I read
8 the transcript then.

9 MR. SPENCER: Oh, I had, I have the 12 pages, but ---

10 MR. DEVOE: Well, I have them now.

11 MR. SPENCER: Oh, you have them now, okay.

12 MR. DEVOE: Yeah.

13 (Court reviews transcript.)

14 THE COURT: All right, I've completed reading the
15 transcript and the only thing I see I guess we're dealing with
16 that at the end where Mr. Devoe asks me to address Mr.
17 DeBerry's failure to use the tape of Ms. McDougal's interview
18 as evidence. So we didn't have the tape there. Mr. Devoe
19 thought he had it out in his car and I guess the Supreme Court
20 is saying I should have allowed him to go out, get his car
21 [sic], bring it in and listen to the tape; is that correct?

22 MR. SPENCER: That's my understanding.

23 THE COURT: Okay, well, does anybody have a cassette
24 player?

25 MR. SPENCER: I don't have a cassette player, Your

1 Honor. I ---

2 THE COURT: See this is kind of the situation we're in
3 in the PCR. He makes reference to a tape or the initial
4 hearing he makes reference to a tape but he doesn't have the
5 tape with him and he says I ought to listen to it, but we
6 don't have it, we don't have a recorder and there's no way I
7 can listen to it.

8 MR. SPENCER: I do have and I have - I can come to Mr.
9 Devoe's aid on this, we can put in the transcript. I've
10 compared the transcript.

11 THE COURT: All right, that transcript that I - and
12 you sent me a copy of that transcript. You prepared that
13 transcript?

14 MR. SPENCER: No, Mr. Devoe did. I compared, I actually
15 compared the tape to the Solicitor's transcript and it seems
16 to match up pretty much and, you know, I've compared the two
17 transcripts to each other and they match up with the exception
18 of things like an um here or an and there. So I think the
19 transcript is suitable, is a suitable representation of the
20 statement and I wouldn't object to that.

21 THE COURT: All right, Mr. Devoe, what's your position
22 on that?

23 MR. DEVOE: My position would be, yes, I agree with
24 that. I think that my copy of the transcript was prepared by
25 Sherry Coker, who's not here today, off of the tape, and I -

1 but I've talked to the Solicitor about this or the Attorney
2 General and I'm satisfied that, that that's a correct
3 representation of the tape.

4 THE COURT: All right, and this - if you all can step
5 up here and take a look because this is what was sent to me
6 and I'm assuming that's what you all are referring to is this
7 - at the top it says, "Statement of Mary Louise McDougal as
8 taken by Investigator Phil Hanna, December 4th, 1999," is that
9 what you're referring to?

10 MR. SPENCER: That's, that's the copy that Mr. Devoe had
11 sent to me with the tape.

12 THE COURT: Okay.

13 MR. SPENCER: And I'm fine with that.

14 THE COURT: And - all right, so, we're fine with
15 putting this - well, we'll put the tape in.

16 MR. SPENCER: The tape, we can put the tape in so that
17 anyone who wants to listen to it can listen to it and review
18 in court.

19 THE COURT: And the transcript.

20 MR. SPENCER: Right.

21 THE COURT: Okay, all right, so, let's put the tape
22 would be - I don't recall us ---

23 MR. SPENCER: Applicant's or Applicant's, Plaintiff's
24 Number One.

25 THE COURT: Yeah, it would be Applicant's Exhibit

1 Number One and the transcript will be Applicant's Exhibit
2 Number Two, all right.

3 (Applicant's Exhibit Number One [Taped Interview of
4 McDougal] and Applicant's Exhibit Number Two [Transcript of
5 Interview of McDougal] admitted into evidence and
6 appropriately marked.)

7 MR. SPENCER: And I ---

8 THE COURT: Hold for one second.

9 MR. SPENCER: --- and not that I think I'm going to
10 necessarily take this - I'd just reserve my objection that I
11 made to the Supreme Court which is ordinarily after a ruling
12 you don't get the - it's the judge's discretion to put
13 something into evidence. That ship has probably sailed but
14 I'm just going to reserve that objection.

15 THE COURT: Well, and as I understand the nature in
16 reading the transcript it appears that Mr. Devoe's argument
17 was that Ms. McDougal during her initial interview failed to
18 say that the Defendant stepped back before firing the gun.

19 MR. SPENCER: That's my understanding.

20 MR. DEVOE: Several times.

21 THE COURT: And had - and Mr. DeBerry's opinion was
22 that she hadn't said that, if she had testified at trial
23 differently than her interview then he certainly would have
24 used that to impeach her testimony.

25 MR. SPENCER: Right.

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16

1 THE COURT: All right, so, I need to review that to
2 see whether or not ---

3 MR. DEVOE: But she did, but she did testify at trial
4 several places that she stepped back.

5 THE COURT: All right, so at trial she testified that
6 the Defendant stepped back and fired the gun.

7 MR. SPENCER: Yes, sir.

8 MR. DEVOE: That's right.

9 THE COURT: Or the Applicant in this case, the
10 Defendant in the criminal case stepped back and fired the gun.

11 MR. SPENCER: And I would like to point out, too, on
12 page eight of the transcript of her statement she indicates
13 twice, she indicates one time that then he held it up and shot
14 him and then another part on that same page he indicates or
15 she indicates, excuse me, that Mr. Daniels pointed the gun at
16 him.

17 THE COURT: Okay, and this is in her trial testimony?

18 MR. SPENCER: That's in - no, I'm - no, Your Honor.

19 THE COURT: Or in her statement?

20 MR. SPENCER: It's in her statement ---

21 THE COURT: Okay, all right.

22 MR. SPENCER: --- that she gave to law enforcement.

23 It's just ---

24 THE COURT: All right, let me see Exhibit Two.

25 MR. DEVOE: I also pointed out that on page two of

1 that, of that tape there's no evidence, was testimony that
2 Mary ever saw any shells be put back into the gun by Tracy
3 Daniels.

4 THE COURT: Okay.

5 MR. SPENCER: And Your Honor, I don't think that's
6 actually inconsistent with the trial testimony overall. I
7 think she admitted she couldn't see what was dropped but she
8 assumed they were shells or a shell.

9 THE COURT: All right, so, I guess as I understand
10 what's before me now is I need to go back and review Ms.
11 McDougal's testimony at trial, compare it to the statement and
12 then make a decision as to whether or not Mr. Daniels'
13 attorney was ineffective in not using the statement to impeach
14 her trial testimony.

15 MR. SPENCER: That's correct, Your Honor, and of course,
16 the State's position is there's not going to be prejudice or
17 deficiency but ---

18 THE COURT: Okay.

19 MR. SPENCER: --- I think that would be right.

20 MR. DEVOE: I would point out then in the trial
21 transcript in the closing the Solicitor again and again stated
22 that she - he stepped back.

23 THE COURT: And that's how she testified at trial.

24 MR. DEVOE: That's right.

25 THE COURT: Okay, so, then I'll need to take a look at

1 her statement to see how much it varies from her trial
2 testimony and to whether or not it rises to the level of
3 ineffective assistance of counsel for not using the tape. All
4 right.

5 MR. DEVOE: And I just reemphasize, Your Honor, there
6 is no testimony on that transcript you have nor in the trial
7 itself that either Tracy - neither Tracy nor the victim put
8 any shells back into the gun.

9 THE COURT: Well, I've read the statement that was
10 sent to me by the Solicitor and it says that you had somebody
11 it appeared took the shells out of the gun and then dropped
12 something and then reached over and picked something up and
13 then I can't really recall after that, that's when the gun was
14 given back to Mr. Daniels, and I'll have to go back and look.
15 I don't recall what it says after that.

16 MR. DEVOE: That statement is correct what you said so
17 far. That was the victim who did that according to Mary
18 McDowell's [sic], too.

19 THE COURT: Yeah, but, but her statement definitely
20 says that the victim gave the gun to the Defendant.

21 MR. DEVOE: That's right.

22 THE COURT: And then the Defendant raised the gun and
23 shot ---

24 MR. DEVOE: Closed the gun.

25 THE COURT: ---- the victim.

1 MR. DEVOE: Closed the gun and shot.

2 THE COURT: Well, I'll have to read - it's ---

3 MR. DEVOE: And either shot and I think testimony
4 would be that that defective gunshot, that was one of the, one
5 of the defense situations, the gun was defective.

6 MR. SPENCER: That's right, and you know, Mr. DeBerry
7 developed that testimony ---

8 MR. DEVOE: Yes.

9 MR. SPENCER: --- that the, you could push the hammer
10 and the gun would go off and that there are a couple of
11 things, obviously, Your Honor is going to have to review it.
12 If you review Mr. DeBerry's cross examination of Ms. McDougal
13 at one point on page 509 of the transcript he's demonstrating
14 I guess assume standing in the back of the courtroom is what
15 you get from it and he says, "Can you see my hand," and she
16 says no and she's supposed to be further back than it would be
17 from the back of the courtroom.

18 THE COURT: Okay.

19 MR. SPENCER: This must have been the big courtroom in
20 Florence I assume. So he's cross examining on these points,
21 and Your Honor, I also would ask you respectfully ask if you
22 could also review the closing statement and by Mr. DeBerry.

23 THE COURT: Well, that's, that's the hard, the hard
24 part I'm going to have is on the closing statement, I mean, as
25 I understand the Applicant's argument is that Ms. McDougal's,

1 the tape of her interview ---

2 MR. SPENCER: Right.

3 THE COURT: --- should have been used to impeach her
4 trial testimony. So I don't know where that comes in, I mean
5 if the, if you ---

6 MR. SPENCER: Well ---

7 THE COURT: --- if the closing argument was based
8 exclusively on the trial testimony ---

9 MR. SPENCER: And then the background on this is he -
10 his first statement has him 12 to 15 feet away from the
11 victim.

12 THE COURT: Whose statement?

13 MR. SPENCER: Mr. Daniels' statement and ---

14 THE COURT: Well, I'm not getting into that. I mean,
15 my - as I understand the sole issue ---

16 MR. SPENCER: Right.

17 THE COURT: --- to me is whether or not Ms. McDougal's
18 recorded statement should have been used by Mr. DeBerry to
19 impeach her trial testimony.

20 MR. SPENCER: And Your Honor, if you can just indulge
21 me, the purpose of that is Mr. DeBerry was turning Ms.
22 McDougal into his witness and you can get that from the trial,
23 trial strategy right out of the closing argument because he's
24 saying, "Thank goodness for Mary McDougal," and the reason is
25 is because the way that he developed the testimony was Mr.

1 Daniels, you know, was drinking and that caused his first
2 statement to, you know, that that caused his first statement
3 to be inaccurate and we know it was inaccurate because there
4 was stippling on the victim. This was developed by Mr.
5 DeBerry and the State, which indicates it's a closer range
6 thing and Mr. DeBerry had take what might be a negative as a
7 positive saying, "Well, listen, this actually establishes the
8 defense because this establishes they were close together. If
9 they'd been so far apart that would be bad, but they're so
10 close together and she can't see what's going on," well,
11 excuse me, "she can, she can see well enough to see them
12 trading the gun back and forth, and you know, thank goodness
13 for Mary McDougal because she establishes the defense of
14 what's really going on here which would be accident or
15 involuntary manslaughter." So I think that is critical, you
16 know, it's not that you want to attack her credibility, you
17 just want, you want to use that to bolster the defense, and I
18 think that's what Mr. DeBerry was doing and he does that also
19 in the opening, too, because he in the opening he makes a
20 statement on page 78, 79 of the transcript that Mary believes
21 what she saw. I think and I think he said something to the
22 effect that, that, you know, she's - something to the effect
23 she's a truthful witness and believes what she saw.

24 THE COURT: All right, what about that, Mr. Devoe? If
25 he's relying on her testimony as part of your client's defense

1 at trial why should he have used the statement to impeach her
2 testimony?

3 MR. DEVOE: Well, I think you can resolve this by
4 bringing Mr. DeBerry to the stand but I think that if he'd
5 remembered or had information concerning her initial testimony
6 that he would have, he would have gone after her on that to
7 make sure it's standing back was not so.

8 THE COURT: And would not have tried to use her in
9 support of an involuntary charge or whatever the case may be.

10 MR. DEVOE: Well, I think, I think it was good for an
11 accidental, an accidental verdict which was denied to him by
12 the presiding judge because I think not standing back and the
13 fact that he - there's no evidence anywhere that the - other
14 than the fact there was actual one in the gun anybody put that
15 shell in the gun and that it went off, whether it went off
16 because the gun was defective or because pull the trigger we
17 don't know. We - and no fingerprints taken of the shell ever
18 to see who put the shell in the gun, there's no indication,
19 there was testimony that Mr. Daniels put the shell in the gun
20 nor that the, you know, the victim put the shell in it. It's
21 just not there.

22 MR. SPENCER: Well, the shell issue's got ---

23 THE COURT: Well, the problem, the problem you've got,
24 I mean, and in this statement and this is what's kind of
25 raising me some concern, Ms. McDougal's statement the

1 interviewer asked, "And how long was it until he shut it and
2 said something? Do you remember? Can you tell me about, was
3 it immediately?" Then Ms. McDougal responded, "It was like he
4 handed the gun back to Tracy. Tracy was like calm with it and
5 then when it - he made a comment, as soon as he made the
6 comment that's when he snapped it shut, pointed it at him and
7 he fell." "And when you saw him shoot, when you saw Tracy
8 shoot the other gentleman what did you do then?" "I ducked
9 and tried to call 911." So you do - yeah, she doesn't say
10 that he steps back but you - it - part of her statement in
11 this interview, "It was like he handed the gun back to Tracy.
12 Tracy was like calm with it and then when he made a comment as
13 soon as he made the comment that's when he snapped it shut,
14 pointed it at him and he fell."

15 MR. DEVOE: Yet page two doesn't quite go along with
16 page eight on this transcript of the sequence. Page eight
17 you're saying Tracy made that comment. Page two doesn't say
18 that. I guess it does. I'm sorry. Tracy said something. It
19 does. I'm sorry.

20 THE COURT: "The guy had the gun and he closed it and
21 I think they talked for a minute and then he opened it back up
22 and handed it back to Tracy and then Tracy said something,
23 snapped it shut and shot him."

24 MR. DEVOE: But did not step back.

25 MR. SPENCER: You know, and at best that's just not, you

1 know, it's just not flushed out at this point. This is -
2 that's the initial tell me what happened, then, then the
3 investigator is going in for further details and it would just
4 be like every other trial that which usually doesn't go
5 anywhere where the Defense attorney, you know, drills the law
6 enforcement officer ---

7 THE COURT: Well, I've read ---

8 MR. SPENCER: --- "You don't have that in your report;
9 did you?" "I don't put everything in my report."

10 THE COURT: Well, and I've, I've read Ms. McDougal's
11 interview statement but I, I can't recall it's been so long
12 what her trial testimony was. So I'll have to go back and
13 read that. All right, all right.

14 MR. SPENCER: Thank you, Your Honor.

15 THE COURT: All right, Mr. Devoe, anything further you
16 want to present?

17 MR. DEVOE: Well, I think we're limited to this by the
18 Supreme Court statement unless we're going to redo the whole
19 PCR hearing.

20 THE COURT: No, no, that I got the transcript, now I
21 kind of and as I read through this I kind of recall part of it
22 but I've got it and I'll look back through it. All right,
23 anything further from the State?

24 MR. SPENCER: Nothing from the State, Your Honor.

25 THE COURT: All right, I'll take a look at it. I've

1 got to read Ms. McDougal's trial testimony again because I
2 just don't recall what it said and then I'll take a look at
3 the statement and see whether or not the statement should have
4 been used.

5 MR. DEVOE: Judge, I would ask you to read also the
6 closing argument by the State and we keep saying step back, he
7 stepped back.

8 THE COURT: But that still coincides with Ms.
9 McDougal's trial testimony.

10 MR. DEVOE: It does.

11 THE COURT: Okay, so it's not improper for them to say
12 that.

13 MR. DEVOE: But she would not, but she was not asked
14 about by Mr. DeBerry.

15 THE COURT: Okay, I understand what you're saying.
16 All right, thank you very much.

17 MR. DEVOE: Thank you.

18 MR. SPENCER: Thank you, Your Honor.

19 THE COURT: All right, thank you.

20 (Adjourned.)

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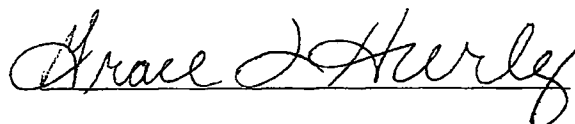
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C E R T I F I C A T E

I, the undersigned, Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Tracy Willard Daniels versus State of South Carolina, held in the Court of Common Pleas for Florence County, Georgetown County Courthouse, Georgetown, South Carolina, on March 2, 2012.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.



Grace L. Hurley, CVR-CM-M

Official Reporter

February 6, 2014.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	TWELFTH JUDICIAL CIRCUIT
	)	2006-CP-21-1566
Tracy Willard Daniels, SCDC No. 274866,	)	
Applicant,	)	
v.	)	AMENDED ORDER
State of South Carolina,	)	OF DISMISSAL
Respondent.	)	FOLLOWING REMAND

FILED
 2013 NOV 11 AM 10:42
 CONNIE REEL-SHEALIN
 CLERK OF COURT
 FLORENCE COUNTY, S.C.

This matter is before this Court by way of an application for post-conviction relief (PCR) filed on September 19, 2006. The Respondent made its Return on May 15, 2007. The Applicant alleges he is being held in custody unlawfully due to ineffective assistance of trial and appellate counsel. An evidentiary hearing was convened at the Florence County Courthouse on December 18, 2008. The Applicant was present at the hearing and represented by Harry L. Devoe, Jr., Esquire. The State was represented by Julie M. Thames of the Office of the Attorney General.

At the hearing, one of the issues Applicant raised was an allegation that trial counsel was ineffective for failing to cross-examine witness Mary McDougal with her taped statement to law enforcement. At the conclusion of the hearing, this Court indicated it was denying relief. At that point, Applicant requested a ruling on the allegation regarding cross-examination of McDougal. This Court noted it was not provided with the cassette tape and denied the allegation. At that point, counsel for Applicant sought to admit the tape, claiming it was in his car. This Court denied Applicant the opportunity to admit the tape after Applicant had already sought a ruling.

1/mtc

CERTIFIED: A TRUE COPY
Connie Reel-Shealin
 CLERK OF COURT C.P. & J.S.
 FLORENCE COUNTY, S.C.

On February 6, 2009, this Court issued an order denying the PCR application. Applicant appealed the Order. By order dated February 7, 2011, the Supreme Court vacated the order and remanded this matter for additional proceedings so that Applicant would be able to admit the tape into evidence. The State petitioned for rehearing, which was denied. Remittitur was issued on March 2, 2011.

A hearing was then held before this Court at the Georgetown County Courthouse on March 2, 2012. Applicant was present and once again represented by Mr. Devoe. The State was represented by David Spencer of the Office of the South Carolina Attorney General. A transcript of the tape was provided to this Court, along with the transcript of the prior PCR hearing.

This Court has considered these materials in conjunction with the materials originally provided in the first hearing and has determined that it must still deny relief.

I. PROCEDURAL BACKGROUND

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. The Applicant was indicted at the August 2000 term of the Florence County Grand Jury for murder (2000-GS-21-977). He was represented by John S. DeBerry, Esquire. On May 4, 2001, the Applicant underwent a jury trial pursuant to which he was found guilty of voluntary manslaughter. He was sentenced by the Honorable Paul M. Burch to confinement for twenty-six years.

A timely Notice of Appeal was filed and an appeal was perfected on Applicant's behalf. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Daniels, Op. No. 2004-UP-394 (S.C. Ct. App. filed June 22, 2004).

The South Carolina Supreme Court denied the Applicant's Petition for Writ of Certiorari and the Remittitur was sent down on December 16, 2005.

I. APPLICABLE LAW

1. Ineffective Assistance of Counsel

In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where the application alleges ineffective assistance of counsel 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 upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also 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. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). 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.” Id. at 117-18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 689). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

2. Ineffective Assistance of Appellate Counsel

A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). An Applicant asserting a claim of ineffective assistance of appellate counsel must prove both that counsel’s performance was deficient and that the deficient performance prejudiced him. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). “To prove prejudice, the applicant must show that, but for counsel’s errors, there is a reasonable probability he would have prevailed on appeal.” Id. at 434, 581 S.E.2d at 835. Although a defendant is entitled to effective assistance of appellate counsel, counsel is not required to raise every non-frivolous issue presented by the record. Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004). Indeed, an indigent defendant has no right to compel appointed counsel to press non-frivolous points requested by the client if counsel, as a matter of professional judgment, decides not to pursue those points. Jones v. Barnes, 463 U.S. 745 (1983). Appellate counsel has a professional duty to choose among potential issues according to their merit. Id. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

III. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

Trial counsel testified that he was appointed to represent the Applicant on December 13, 1999. He testified that he appeared at a bond hearing in front of Judge Harwell but that he had known the Applicant prior to the incident and did not remember if he was at the bond hearing as a friend of the Applicant's or if was already representing him at that point. Trial counsel testified that he did not remember whether Judge Harwell suggested that the Applicant should be evaluated. He testified that he had known the Applicant for a long time and that he did not have any difficulty communicating with the Applicant. He testified that he had several discussions with the Applicant and that the Applicant was very emotional about what had happened but that he participated in the discussions and assisted with his defense.

Trial counsel testified that he received discovery from the State. He testified that the State did not send the gun to SLED be tested until the Friday before the trial began. Trial counsel testified he believed it was likely that the State sent the gun to be tested when they did because trial counsel had gotten funds to hire an expert to test the gun on behalf of the Applicant. Trial counsel hired Donald Grindt to examine the gun. While Grindt was qualified as an expert in several areas including crime scene analysis,

fingerprint identification, footwear identification, and bloodstain pattern interpretation, he was not qualified as a firearms expert. Trial counsel testified that in spite of Grindt not being qualified as a firearms expert, trial counsel elicited the testimony from Grindt that he wanted -- the hammer of the gun could go off if the gun was handled in the manner described by the witnesses. Trial counsel believed Grindt served the purpose he was hired for.

Upon being questioned ~~'about'~~ why trial counsel did not emphasize Grindt's testimony more in closing argument, trial counsel responded that perhaps he should have emphasized that testimony more but that hindsight is twenty/twenty. He testified that he felt that the jury was not likely to return a verdict of not guilty and completely exonerate his client, so he tried to weave in the possibility of an accident but focused on involuntary manslaughter because he thought that would be the most likely scenario the jury would believe.

~~Trial counsel testified that he thought he heard the tape of Mary McDougal, the~~ next-door neighbor who witnessed the shooting, but he was not completely sure. He did not recall whether or not McDougal said on the tape that Applicant had taken a step back before the shot was fired. He testified that if she did not say that on the tape but did testify to that at trial, he wished he would have known of that discrepancy.

Trial counsel testified that no one testified that they saw the Applicant put the shell in the gun. He testified that one shot hit the carport and that the Applicant came down the steps of his home and gave the gun to the victim. He relayed that the testimony at trial was that the Applicant appeared to be experiencing difficulty ejecting the shell but that the victim was able to eject it. The victim then gave the gun back to the Applicant

and the Applicant shot the victim, but nobody saw a new shell being put into the gun after the first one was ejected.

Trial counsel testified that he brought to the jury's attention that the gun was not sent to SLED be tested until the Friday before the trial began. He testified that he attempted to show through Grindt's testimony that the gun could have fired accidentally while being passed back to the Applicant. He also brought to the jury's attention that the pattern of the gun residue could indicate that the victim was actually holding on to the barrel of the gun when it was fired.

Trial counsel testified that part of his strategy was to show the jury that the Applicant and the victim were close friends, that they were cooking out together, and that there was more congenial interaction than fussing or fighting going on that evening. He testified that the testimony showed the two men were cooking on the grill, that the victim had actually cleaned the grill prior to cooking, and that they generally were getting along.

~~Trial counsel testified that he tried to demonstrate to the jury through cross-examination~~
that the investigation by law enforcement was not thorough. He attempted to establish reasonable doubt by showing what law enforcement did not do.

Trial counsel testified that he checked what the lighting conditions were that night and that he examined witnesses as to how much light was available at the time of the incident. He did not remember whether or not he filed a motion for reconsideration, but he did file the notice of intent to appeal.

Trial counsel testified that he requested a charge on involuntary manslaughter and that he had to argue vehemently but that he did finally convince the judge to give the charge, unfortunately, the jury did not agree. He testified that the testimony at trial

showed that when the Applicant was not drinking, he was a very pleasant and mild mannered person but that when he was drinking he had a quick temper.

Applicant's daughter, Sherry Coker, testified on the Applicant's behalf. She testified that she lives in Turbeville, works in Olanta at a bank, and that she was present at the trial. She testified that she visits her father frequently and that the Department of Corrections honored a hardship request and transferred her father to a closer location so that it would be easier to visit him. She testified that on the last day of the trial, trial counsel advised her to be ready to speak. She testified she wished she had more time to prepare her remarks to the Court. She testified that her father was sober the night before the shooting but that when he drank he was not a pleasant person and that his drinking led to his separation from her mother.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records of the Florence County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, the Applicant's PCR application, the Respondent's Return to the application, the briefs from the direct appeal, the opinion of the South Carolina Court of Appeals, and legal arguments of counsel. Pursuant to S.C. Code Ann. § 17-27-80 (1985), this Court makes the following findings of fact based upon all of the probative evidence presented.

This Court finds the allegations that trial counsel's and appellate counsel's representation fell below reasonable professional norms are without merit. With regard

to trial counsel, this Court finds no ineffective assistance of counsel. This Court finds trial counsel's testimony to be highly credible. He was very prepared for trial and did an excellent job in bringing inconsistencies to the jury's attention. His examination of Grindt brought to the jury's attention information that the gun could possibly have been fired just by handing it back and forth. Trial counsel also brought to the jury's attention the possibility that the victim may have been grabbing or pulling the gun when it went off. This Court finds trial counsel vigorously cross-examined law enforcement with the goal of demonstrating to the jury that the investigation was lacking.

This Court finds that trial counsel was not ineffective in failing to stress accident more in his closing argument. He believed that involuntary manslaughter was the most he could hope for and stressed that in closing. The fact that the jury came back with a verdict on voluntary manslaughter does not render trial counsel ineffective for failing to stress accident. He employed sound trial strategy. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995) (Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance). The fact that the jury did not return a verdict of guilty on involuntary manslaughter indicates that they did not buy the accident scenario.

This Court finds trial counsel was not ineffective regarding McDougal's taped statement. Trial counsel testified he was not sure if he listened to the tape but if there was a discrepancy, he wished he had known about it. This Court has reviewed the transcript of the taped recording and determined it is nearly identical to her trial testimony. The purported discrepancy, that McDougal stated at trial she saw Applicant take a step back and raise the gun, is merely more detail than the written statement, and is

not a true discrepancy. Further, this Court believes that cross-examination on this point would not have altered the result of trial. Accordingly, this Court finds that Applicant did not meet his burden of proving counsel was ineffective in this regard.

This Court finds trial counsel was not ineffective in failing to seek an evaluation for Applicant. The Applicant has not demonstrated that he was unable to assist trial counsel or that he was not competent at the time of the offense or at the time of trial. The Applicant himself testified that he met with trial counsel several times; he did not say that he had any difficulty understanding their conversations. Trial counsel testified that they had many conversations and that the Applicant was involved in the discussions and appeared to understand the context of those discussions. This Court notes that the Applicant has not alleged that he was incompetent at any stage of the proceedings; he merely alleged that trial counsel was ineffective in failing to have him evaluated. He has not made any showing of prejudice.

This Court finds trial counsel requested a charge on involuntary manslaughter,
fought hard to get the charge and eventually succeeded. The fact that the jury came back with a guilty verdict on voluntary does not render trial counsel's performance in this regard deficient.

While the Applicant did not testify and no testimony with regard to ineffective assistance of appellate counsel was offered, the Applicant alleged in his application that appellate counsel chose which arguments to raise on appeal without input from the Applicant. This Court finds the Applicant has not demonstrated that he would have prevailed on appeal if not for appellate counsel's errors. Anderson v. State, supra. Nor

has he shown that any alleged ignored issues are clearly stronger than those actually raised on appeal. Gray v. Greer, supra.

V. CONCLUSION

This Court concludes that the Applicant failed to carry his burden of proof to show that trial counsel's or appellate counsel's representation fell below reasonable professional norms or that he was prejudiced by the alleged deficient representation. The Applicant's former trial counsel and appellate counsel rendered reasonably effective assistance under prevailing professional norms and demonstrated a normal degree of skill, knowledge, and professional judgment that is expected of an attorney in a criminal case. Strickland v. Washington, supra; Cherry v. State, supra. Additionally, the Applicant did not carry his burden to show a reasonable probability that the result at trial would have been different had trial counsel or appellate counsel done what the Applicant alleges should or should not have done. Cherry v. State, supra. ~~This Court finds trial counsel's testimony to be more credible than that of the Applicant.~~ b7c

As to any and all allegations, which were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds that the Applicant failed to present any probative evidence regarding such allegations. These allegations are not supported by any law and were not addressed at the hearing. Accordingly, this Court finds that the Applicant waived the allegations and failed to meet his burden of proof regarding them. Accordingly, they are denied and dismissed with prejudice.

IT IS THEREFORE ORDERED THAT:

1. The post-conviction relief application is **DENIED AND DISMISSED WITH PREJUDICE;**

11/mkc

2. The Court advises the Applicant and his attorney of record that any Notice of Appeal must be filed within thirty (30) days of service of the signed copy. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures on appeal.
3. The Applicant is remanded to the custody of the Respondent for the completion of his sentence.

AND IT IS SO ORDERED.

Benjamin H. Culbertson

Benjamin H. Culbertson
Presiding Judge
Twelfth Judicial Circuit

Georgetown, South Carolina

Nov. 1, 2013.

FILED
2013 NOV 11 AM 10:42
CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY
Chris R. Spain
CLERK OF COURT C.P. & C.S.
FLORENCE COUNTY, S.C.

STATEMENT OF MARY LOUISE MCDUGAL
AS TAKEN BY INVESTIGATOR PHIL HANNA DEC. 4, 1999

HANNA: It is December the 4th, 1999. The time now is 7:53 pm. The location of this statement is going to be [REDACTED], Effingham, S.C. 29541. This is going to be a statement in reference to the murder of the victim Donald Leffingwell. The person giving this statement is going to be Mary Louise McDougal, a white female, age 31. Her address is [REDACTED], Effingham, S.C. 29541. Her home phone number is [REDACTED]. Her work phone number is [REDACTED] ext. 66473. Her date of birth is [REDACTED]. Ms. McDougal will you please state your full name for me?

MCDUGAL: Mary Louise McDougal.

HANNA: OK Ms. McDougal, if you will, tell me what you saw and what you heard from the time that you got home this evening.

MCDUGAL: When I got home I was getting out of my car, cleaning my stuff out so I'd have room for my friends to ride with me to the Christmas party. And I heard Tracy and his friend over there arguing and fussing at each other. And then - Tracy was standing in his doorway and the guy was standing a little ways from the steps. And they were arguing. And then, I was getting ready to come back in and as I was coming up my steps, I heard him knock something over and I really didn't know what it was at the time. And then before I could get into my door I heard shotgun go off, a gun go off. So I came in, put my stuff up, and didn't turn on any lights. I grabbed the phone because I was going to call my landlord and ask him to come down here and calm him down. So I went on in the bedroom and looked out the back door and Tracy was standing there, but eventually he went back in.



The guy started picking up – he had apparently knocked over Tracy's grill. He picks it up and puts it back together because his top had fell off of it. He puts it on. He had a shovel in his hand and something else. He took the shovel, put it in the back of Tracy's truck and then come walking back out in the yard. And then Tracy comes to the door, with the gun and it was, the barrel was open on it. And Tracy came over to him and I was assuming things was calming down since he walked out with it open. And the guy dropped whatever it was he had in his hand and Tracy handed him the gun. And the guy, it looked like he was taking the shells out. And then he had dropped something; I don't know if it was a shell or what, but he picked it up and said something. And then he closed it. The guy had the gun and he closed it. And I think they talked for a minute and then he opened it back up and handed it back to Tracy. And then Tracy said something, snapped it shut and shot him. That's when I ducked. I pushed redial. I ended up getting some lady; I don't even know who she was. I got off the phone and I dialed 9-1-1 and called you.

HANNA: OK, let me start back over from the very beginning with you. Do you remember or can you remember approximately what time it was when you got home?

MCDUGAL: It was probably about a quarter to six.

HANNA: OK, And when you got home was it dark or daylight?

MCDUGAL: It was dark.

HANNA: All right; and after you pulled up in your yard, is that when you first saw, did you say Tracy?

MCDUGAL: Yes.

HANNA: Do you know his full name?

MCDUGAL: I just know Tracy Daniels, I don't know his middle name.

HANNA: OK; and how long have you known Tracy?

MCDUGAL: I'd say, five years, maybe. Maybe five years.

HANNA: OK; now on today's date, you got home and you saw Tracy and this other gentleman arguing. Is that correct?

MCDUGAL: Yes.

HANNA: And have you ever seen this other gentleman before?

MCDUGAL: Yes.

HANNA: Do you know his name?

MCDUGAL: No.

HANNA: How often have you seen him over there?

MCDUGAL: I've seen him over there; he comes over, usually on the weekends.

HANNA: OK. And have you ever seen them get into an argument or a fight before?

MCDUGAL: No.

HANNA: OK; but on tonight when you got home, were they fighting or were they arguing?

MCDUGAL: They were arguing.

HANNA: And while you was outside cleaning your car out you said you thought something - you heard something fall over?

MCDUGAL: That was when I was coming back in.

HANNA: OK

MCDUGAL: Or when I was coming in.

HANNA: Well, while you was cleaning your car out could you see them?

MCDUGAL: I could see the guy, and I could see Tracy from the waist down. His shed or whatever you want to call it was in the way.

HANNA: OK And when you looked at him, was Tracy in his doorway?

MCDUGAL: Yes.

HANNA: And where was the other gentleman?

MCDUGAL: Standing a few feet from the steps.

HANNA: OK. And as you walked back to come back to your house, is that when you heard something fall over?

MCDUGAL: Yes, I think I was on my steps, walking up the steps when I heard it.

HANNA: Alright, and as you came in your, came inside your house, is that when you heard the first gunshot?

MCDUGAL: No, I hadn't even gotten my door unlocked.

HANNA: OK. Tell me when you heard the first gunshot.

MCDUGAL: When I got to my door and was trying to put the key in the door I heard the first gunshot.

HANNA: Alright, and what'd you do then?

MCDUGAL: I came on in, shut the door, and threw my stuff down and grabbed my phone, hoping nothing else was gonna come of it but I was gonna call my landlord and ask him to come calm him down.

HANNA: Did you look out the window to see if they were all right back there?

MCDUGAL: Yes.

HANNA: And when you looked out the window, what did you see then?

MCDUGAL: They just kept standing there bickering and arguing, but after the first gunshot.

I'm sorry. That was before. After the shot was fired, it was like it calmed that guy down or something, because I mean like I said he started picking up the grill and puttin the stuff away that he had had in his hands. And I was looking, too, to see if he had a gun, 'cause I had saw that

stuff in his hands and I didn't know if he had a gun, too, or not. But he went to the door, fussin' at Tracy. I don't know what he was sayin' but he was still like he was fussin.

HANNA: OK. Let me back back up now. You walked in your house?

MCDUGAL: Umhum

HANNA: Just before you put your key in the door, you heard a gunshot. You came inside and looked out your window?

MCDUGAL: Out the back door.

HANNA: OK You looked out the back door window. Is that correct?

MCDUGAL: Yes.

HANNA: And when you looked out the back door, is that when you saw this person that you don't know his name, is that when he was picking these items up?

MCDUGAL: Yes.

HANNA: And what was he picking up?

MCDUGAL: The grill.

HANNA: OK. Did you see him actually pick the grill up?

MCDUGAL: Yes.

HANNA: OK and what else did he do?

MCDUGAL: He picked the lid for the grill up and put it back on it, walked over to Tracy's truck, put the shovel in the back of the truck, but he kept something else in his hand. I don't know what it was. And then walks back out in the yard.

HANNA: OK Now at this point, he's put the items back in the truck and you think he still might have something in his hand?

MCDUGAL: Yes.

HANNA: OK Was he holding this item up like he was threatening to hit Tracy with it or anything, that you saw?

MCDUGAL: No, it was down by his side; he was just holding it.

HANNA: OK And when he had it in his hand, were they arguing then?

MCDUGAL: Earlier when he had it in his hand

HANNA: OK

MCDUGAL: He was hollering at him through the door with it – I don't know if they were arguing. 'Cause he still had it in his hand when Tracy came back out with the gun open, but I don't know if they were arguing.

HANNA: All right. At this point, you're still looking through the backdoor window and you see Tracy come out in his doorway.

MCDUGAL: Yes.

HANNA: And when he come out of his doorway what did he have in his hand?

MCDUGAL: His gun.

HANNA: And this gun, was it opened or closed?

MCDUGAL: It was open.

HANNA: Allright. So he's walking out with the gun open. Now where is the other gentleman at now?

MCDUGAL: He's still standing in the yard.

HANNA: OK Now, then what takes place?

MCDUGAL: Tracy comes over to him and they're talking.

HANNA: Tracy comes down out of his house, down the steps and approaches the other gentleman?

MCDUGAL: Yes.

HANNA: And now what takes place?

MCDUGAL: The guy dropped whatever it is in his hand and Tracy hands him the gun. And then the guy looks like he's taking out the shell from the gun or something. I think he was taking out the shell. Then he dropped something and then picked it up. He closed the gun and stood there for a minute and said something and then opened it back up and handed it back to Tracy.

HANNA: Now when you said he dropped something and he picks - and he reached - did he reach down to pick up?

MCDUGAL: Yes.

HANNA: Was it the item that he had in his hand earlier or w -

MCDUGAL: No

HANNA: OK What do you -

MCDUGAL: I think it was the shell; I'm not sure.

HANNA: OK But he didn't pick up anything else?

MCDUGAL: NO

HANNA: Nothing big?

MCDUGAL: No

HANNA: After he stands back up with what you believe is the shell that come out the gun, he's got it in his hand?

MCDUGAL: I didn't see what he did with it.

HANNA: OK You don't know what -

MCDUGAL: No.

HANNA: Allright. Then what did he, what did the gentleman do then?

MCDUGAL: After he picked up whatever it was?

HANNA: Right

MCDUGAL: He closed the gun and stood there for a minute talking, and then opened it back up and handed it back to Tracy.

HANNA: OK. Now when you say talking, were they talking like casual talking or were they arguing?

MCDUGAL: I, I don't know, I couldn't hear.

HANNA: OK. But from what you could see, did it appear that they were arguing or was it casual?

MCDUGAL: It appeared to me that maybe things had calmed down and they were getting over it or something, and maybe, you know, it was gonna be okay. When he handed the gun back to Tracy, that's when Tracy said something, which I couldn't hear, he snapped it shut and then sho- held it up and shot him.

HANNA: OK And when he held the gun up and shot him, was he in his doorway or on the ground?

MCDUGAL: Tracy was on the ground behind him.

HANNA: Alright And when the gentleman handed the gun back to Tracy it was open?

MCDUGAL: Yes.

HANNA: And how long was it until he shut it and said something? Do you remember; can you tell me about - was it immediately?

MCDUGAL: It was like he handed the gun back to Tracy. Tracy was like calm with it, and then when he made a comment, as soon as he made the comment, that's when he snapped it shut, pointed it at him and he fell.

HANNA: OK And when you saw him shoot - when you saw Tracy shoot the other gentleman, what did you do then?

MCDUGAL: I ducked, and tried dialing my landlord and I got a wrong number, so I hung up and dialed 9-1-1. And I must've, it was in the dark, you couldn't see, I was feeling for the buttons and something, it didn't go through. So I had to dial again, and that's when I got 9-1-1. I went to my bedroom and hid in between my - right next to my bed, and stayed there.

HANNA: OK Did you ever see them actually fist fighting?

MCDUGAL: No.

HANNA: Is there anything else you can think of that I might not have asked you or that you remembered while we were talking about it?

MCDUGAL: The only thing I remembered while we were talking, and that's why I hesitated a while ago when I said when he was coming out with it open and you asked me was it open was: after I got in and got the phone and everything, and I looked out the window, Tracy was still standing in his door with the gun closed. But he was holding the gun to his side with the barrel straight up in the air, like he wasn't gonna use it or anything. It wasn't pointed at him. And then that's when I started shuffelin around and walking back and forth trying to stay away from it so he couldn't see me.

HANNA: OK But after, when he was standing up there with the gun pointed up in the air, uh, did he walk back inside?

MCDUGAL: When I came - I walked off, and when I came back, he wasn't at the door.

HANNA: He wasn't at the door anymore?

MCDUGAL: No

HANNA: OK And then while you watched, he came back to the door?

MCDUGAL: Yes; and that's when he came out with it open.

HANNA: OK Is there anything else you could, that might've come back to you that you remember?

MCDUGAL: That's it.

HANNA: Allright. This is gonna conclude the statement taken. The time is now 8:09 pm.

Thank you.