

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

L. Casey Manning, Circuit Court Judge

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S.C. Supreme Court

FRED R. RUTLAND,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000381

APPENDIX

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1 MR. GREGORY: JUST TO MAKE SURE THAT I UNDERSTAND THE
2 CHARGES, YOU WILL CHARGE MURDER, VOLUNTARY MANSLAUGHTER,
3 INVOLUNTARY MANSLAUGHTER, SELF-DEFENSE, SELF-DEFENSE OF
4 OTHERS, MUTUAL COMBAT.

5 THE COURT: MUTUAL COMBAT, YEAH.

6 MR. MCMAHON: WAIT A MINUTE NOW. WAIT A MINUTE. I
7 DON'T KNOW OF ANY EVIDENCE OF VOLUNTARY MANSLAUGHTER OR
8 INVOLUNTARY MANSLAUGHTER. AS A MATTER OF FACT, FROM THE GIT
9 GO THEY SAID THIS WAS A PERFECT CASE OF SELF-DEFENSE. IT'S
10 EITHER MURDER OR NOT GUILTY. I KNOW OF NO EVIDENCE THAT SAYS
11 THERE WAS A---

12 THE COURT: WELL, THE ONLY THING IS EVERYBODY GETS
13 REVERSED IF THEY DON'T CHARGE MANSLAUGHTER.

14 MR. MCMAHON: NO, SIR. WELL, SIR, I'M CERTAINLY NOT
15 ARGUIN' WITH THE COURT.

16 THE COURT: YEAH.

17 MR. MCMAHON: BUT I'VE NOTICED HERE RECENTLY JUDGE PYLE
18 WHO HAS HAD QUITE A NUMBER OF CASES TO WHERE -- SEVERAL OTHER
19 CASES UP IN GREENVILLE COUNTY, UP IN THAT CIRCUIT HE HAS
20 DENIED CHARGING VOLUNTARY MANSLAUGHTER 'CAUSE HE'S ONLY -- HE
21 WAS ONLY -- THE JUDGE'S ONLY CHARGE WOULD HAVE HIM CHARGE
22 WHAT LAW APPLIES TO THE SPECIFIC FACTS OF THE CASE. I DON'T
23 THINK THERE'S ANY FACTS IN EVIDENCE OF VOLUNTARY MANSLAUGHTER
24 AND CLEARLY THERE ARE NOT EVIDENCE, JUDGE, OF INVOLUNTARY.
25 THAT WOULD BE CRIMINAL NEGLIGENCE. I SURE DON'T SEE ANY OF

1 CRIMINAL NEGLIGENCE.

2 THE COURT: NO, THERE'S NOT ANY OF THAT.

3 MR. GREGORY: YOUR HONOR, AS I SEE THE CASES ON MUTUAL
4 COMBAT, THAT IS VOLUNTARY MANSLAUGHTER. WHEN I DID MY
5 RESEARCH ON MUTUAL COMBAT I FOUND IT UNDER VOLUNTARY
6 MANSLAUGHTER, AND THAT THEY'RE ASKIN' THAT MUTUAL COMBAT BE
7 CHARGED, I THINK IT WOULD BE EQUALLY AS WELL TO CHARGE
8 VOLUNTARY MANSLAUGHTER.

9 MR. RIDDLE: YOUR HONOR, MUTUAL COMBAT DOES NOT GO TO
10 VOLUNTARY MANSLAUGHTER. MUTUAL COMBAT NEGATES THE PREMISE OF
11 SELF-DEFENSE. IF SOMEBODY IS PART AND PARCEL BRINGING ON THE
12 DIFFICULTY BECAUSE OF A MUTUAL COMBAT SITUATION HE CANNOT SET
13 UP A PLEA OF SELF-DEFENSE. IT HAS NOTHING TO DO WITH
14 VOLUNTARY MANSLAUGHTER.

15 MR. MCMAHON: JUDGE, IF YOU'RE GONNA CHARGE VOLUNTARY
16 MANSLAUGHTER---

17 THE COURT: YES, SIR.

18 MR. MCMAHON: I'LL WITHDRAW MY OBJECTION IF YOU INTEND
19 TO CHARGE MURDER AND VOLUNTARY MANSLAUGHTER.

20 THE COURT: I'M GONNA CHARGE MURDER AND VOLUNTARY
21 MANSLAUGHTER. I'M GONNA CHARGE MUTUAL COMBAT.

22 MR. MCMAHON: BUT YOU ARE NOT GONNA CHARGE INVOLUNTARY
23 MANSLAUGHTER.

24 THE COURT: NO.

25 MR. MCMAHON: AND YOU WILL CHARGE THE STATUTE AS FAR AS

1 POSSESSION OF A FIREARM DURING THE COMMISSION OF---

2 THE COURT: YES, SJR.

3 MR. MCMAHON: ---A VIOLENT CRIME. AND THEN YOU WILL
4 CHARGE UNDER STATE -VS- WHARTON POINTING AND PRESENTING, JUST
5 POINTING A FIREARM UNDER ANY OTHER PERSON -- EXCUSE ME --
6 THAT'S STATE -VS- WALSH.

7 THE COURT: ENHANCED PENALTY FOR POSSESSION OF A
8 FIREARM. ANY PERSON WHO -- LET'S SEE.

9 MR. RIDDLE: YOUR HONOR, I WOULD HAND UP STATE -VS-
10 WALSH WHICH IS 388 S.E. 2d 777. IT'S A 1988---

11 THE COURT: POINTING A FIREARM AT ANY PERSON. IT'S
12 UNLAWFUL FOR A PERSON TO PRESENT OR POINT AT ANY OTHER PERSON
13 ANY LOADED OR UNLOADED FIREARM.

14 MR. RIDDLE: YOUR HONOR, UNDER THIS WALSH DECISION IT
15 SPECIFICALLY OUTLINES WHAT THE ELEMENTS OF THAT OFFENSE ARE.

16 MR. MCMAHON: THANK YOU, YOUR HONOR.

17 THE COURT: WHAT ABOUT THE COMMISSION OF A CRIME, IT'S
18 MOSTLY IT'S JUST THE PENALTY IN THAT. YOU DON'T CHARGE THE
19 PENALTY TO THE JURY. ANY PERSON CONVICTED OF COMMITTING A --
20 ATTEMPTING TO COMMIT ASSAULT WITH INTENT TO KILL, ASSAULT OF
21 A HIGH AND AGGRAVATED NATURE. ASSAULT, PETTY LARCENY,
22 BURGLARY, ASSAULT AND RAVISH, POSSESSION OF A RIFLE, FIREARM
23 SHALL IN ADDITION TO THE PUNISHMENT PROVIDED BY THE CRIME
24 EXCEPT WHERE DEATH PENALTY A LIFE TERM BE PUNISHED THE FIRST
25 CONVICTION IN PRISON NOT MORE THAN ONE YEAR OR \$1000 OR BOTH,

1 THE SECOND -- I WON'T CHARGE THAT.

2 MR. RIDDLE: YOU WON'T CHARGE WHAT, YOUR HONOR?

3 THE COURT: THE USE OF A VEHICLE IN A -- USE OF A WEAPON
4 IN A VIOLENT CRIME. LET'S SEE THE INDICTMENTS. THAT CODE
5 SECTION, YOU DON'T CHARGE THAT CODE SECTION. YOU CHARGE THE
6 LAW BUT---

7 MR. RIDDLE: YES, SIR, I AGREE WITH THAT.

8 THE COURT: YEAH.

9 MR. RIDDLE: IF HE USED A FIREARM DURING THE COMMISSION
10 OF A VIOLENT CRIME WHICH IS NEITHER MURDER NOR VOLUNTARY
11 MANSLAUGHTER---

12 THE COURT: YEAH.

13 MR. RIDDLE: THEN HE IS GUILTY OF THAT SECTION AS WELL.
14 YOUR HONOR, I HAVE A SPECIFIC OBJECTION TO THE DEFENSE
15 REQUEST TO CHARGE NUMBER FOUR.

16 THE COURT: WHAT'S THAT? OH, THE SOUTH CAROLINA
17 VOLUNTARY MANSLAUGHTER IS USUALLY DEFINED AS THE UNLAWFUL
18 KILLING OF A HUMAN BEING IN SUDDEN HEAT AND PASSION UNDER
19 SUFFICIENT LEGAL PROVOCATION.

20 MR. RIDDLE: I HAVE NO PROBLEM WITH THAT PART OF IT,
21 YOUR HONOR. I DISAGREE STRENUOUSLY THAT SLIGHT PHYSICAL
22 AGGRESSION IS SUFFICIENT PROVOCATION TO REDUCE HOMICIDE TO
23 MANSLAUGHTER. THAT'S NOT THE LAW IN THIS STATE.

24 THE COURT: THAT'S NOT IN MY GENERAL CHARGE. I'M GONNA
25 CHARGE MY GENERAL CHARGE ON THAT, YEAH, I WON'T CHARGE IT.

1 MR. RIDDLE: ALRIGHT. SO YOU'RE NOT GONNA CHARGE
2 DEFENSE #4.

3 THE COURT: YEAH, I'M GONNA CHARGE IT BUT I'M NOT GONNA
4 CHARGE SLIGHT.

5 MR. RIDDLE: YES, SIR. THAT'S -- I MEAN YOU'RE NOT
6 GONNA USE THE BODY OF---

7 THE COURT: THAT'S RIGHT. I'M NOT GONNA USE THAT BOTTOM
8 LINE, YEAH. ALRIGHT. YA'LL READY. NOTE ALL THE MOTIONS
9 USUAL AND UNUSUAL WITHOUT PREJUDICIN' THE RIGHTS OF THE
10 DEFENDANT, AND WE'LL GO FORWARD AT THIS TIME. YOU WANNA PUT
11 THE MOTIONS IN THE RECORD NOW OR---

12 MR. GREGORY: LET'S JUST NOTE IT, YOUR HONOR.

13 THE COURT: ALRIGHT. NOTE ALL THE MOTIONS USUAL AND
14 UNUSUAL WITHOUT PREJUDICIN' THE RIGHTS OF THE DEFENDANT WITH
15 LEAVE TO SUBMIT 'EM. ALRIGHT. BRING THE JURY IN. (THE
16 FOLLOWING OCCURRED IN THE PRESENCE OF THE JURY.) YOU MAY
17 PROCEED.

18 MR. GREGORY: MAY IT PLEASE, YOUR HONOR? MADAM
19 FOREPERSON, LADIES AND GENTLEMEN OF THE JURY, WE'VE FINALLY
20 NOW REACHED THE STAGE OF THE PROCEEDINGS HERE WHERE THE
21 ATTORNEYS HAVE THE OPPORTUNITY TO SUMMARIZE TO YOU THE
22 POSITION OF THEIR PARTY. AS THE ATTORNEY FOR FRED RUTLAND I
23 ASK THAT YOU WEIGH AT THIS POINT AS YOU ARE OFFICERS OF THE
24 COURT AND ARE CHARGED WITH THAT RESPONSIBILITY AS BEING
25 JUDGES OF THE FACTS. HIS HONOR IS THE JUDGE OF THE LAW. YOU

1 ARE THE JUDGE OF THE FACTS. THE FACTS ARE WHAT CAME FROM
2 THIS WITNESS STAND AND WHAT DOCUMENTS AND EXHIBITS THAT HAVE
3 BEEN PRESENTED TO TRY TO BRING FROM OUTSIDE THIS COURTROOM
4 THE EVENTS THAT OCCURRED ON SEPTEMBER 4, 1992 INTO THE
5 COURTROOM IN SUCH A MANNER THAT YOU CAN APPRECIATE WHAT
6 OCCURRED ON THAT DAY.

7 NOW THE STATE HAS THE BACKING OF MANY POLICE OFFICERS,
8 SHERIFF DEPARTMENT OFFICIALS, THE SOLICITOR'S OFFICE, SLED.
9 YOU'VE HEARD FROM ALL OF THESE FOLKS DURING THE COURSE OF
10 THIS TRIAL. AT THIS TIME ALL FRED RUTLAND HAS IS ME AND YOU.
11 HE IS HERE IN DEFENSE. IT IS NOT UP TO HIM TO PROVE THAT HE
12 IS NOT GUILTY. LADIES AND GENTLEMEN, HIS HONOR WILL CHARGE
13 THAT THE STATE HAS THE BURDEN OF PROVING FRED RUTLAND GUILTY
14 AN THAT GUILT MUST BE PROVED BEYOND A REASONABLE DOUBT. WHAT
15 IS A REASONABLE DOUBT? AS YOU GET THE CHARGE FROM THE JUDGE
16 IN THIS CASE AS TO WHAT IS REQUIRED IN ORDER FOR THE STATE TO
17 PROVE THAT MR. RUTLAND BE FOUND GUILTY BY YOU OF MURDER, THE
18 STATE MUST PROVE THAT HE ACTED WITH MALICE AFORETHOUGHT,
19 MEANING THAT HE HAD TO HAVE SOME DESIGN OR PLAN OR PRIOR
20 KNOWLEDGE OF WHAT HE WANTED TO DO. MALICE AFORETHOUGHT IS
21 NOT SOMETHING THAT IS CONJURED UP ON THE SPUR OF THE MOMENT.
22 HIS HONOR WILL CHARGE YOU THAT VOLUNTARY MANSLAUGHTER IS A
23 SUDDEN HEAT OF PASSION PROVOCATION IN WHICH SOMEONE LOSES
24 THEIR LIFE.

25 NOW YOU WILL RECALL FROM MY INITIAL CONVERSATION WITH

1 YOU WHEN I PULLED THE COIN OUT OF MY POCKET AND I TOLD YOU
2 THAT EVERY STORY HAS TWO SIDES. YOU'VE GOT A HEAD AND YOU'VE
3 GOT THE TAIL. IN THIS PARTICULAR STORY, A TRUE STORY, THE
4 SOLICITOR'S OFFICE HAS PRESENTED A CASE THAT WOULD MAKE ONE
5 THINK THAT FRED RUTLAND CAME UP HERE FROM SUMMERVILLE WITH
6 THE SPECIFIC INTENT AND DESIRE TO KILL JIMMY PEELE. THEY'VE
7 GOT TO PROVE THAT TO YOU, LADIES AND GENTLEMEN, BEYOND A
8 REASONABLE DOUBT. THAT'S WHAT MALICE AFORETHOUGHT IS. IF
9 YOU WILL RECALL FRED RUTLAND'S WIFE DROVE HIM FROM
10 SUMMERVILLE UP HERE TO LEXINGTON SPECIFICALLY FOR THE PURPOSE
11 OF HELPING SALLY PEELE. THEY HAVEN'T PROVED TO YOU THAT SHE
12 BROUGHT HIM UP HERE, THAT SHE BROUGHT WEAPONS WITH HER. HE
13 CAME UP HERE AND WHO DID HE MEET WITH? HE MET WITH SALLY
14 PEELE, SOMEBODY THAT HE HAD KNOW, SOMEBODY THAT HAD WORKED
15 UNDER HIM, SOMEBODY THAT HE KNEW AND COULD APPRECIATE WHAT
16 HER PLIGHT WAS AT THIS TIME IN HER LIFE. WHY NOT, AND I KEEP
17 ASKING MYSELF THIS QUESTION, WHY DIDN'T SALLY PEELE JUST PICK
18 UP AND LEAVE THE DAY BEFORE, THE WEEK BEFORE, THE MONTH
19 BEFORE?

20 WHY DID SHE KEEP COMING BACK? IT WASN'T BECAUSE SHE WAS
21 WORKIN' AT THE BOW-WOW BOUTIQUE. SHE HAD A TEN YEAR-OLD
22 DAUGHTER, AND I'M SURE THAT THAT TEN YEAR-OLD DAUGHTER IS
23 MORE PRECIOUS TO HER THAN A MOSSBERG SHOTGUN. I'M SURE,
24 LADIES AND GENTLEMEN, THAT TEN YEAR-OLD DAUGHTER IS MORE
25 PRECIOUS THAN A 25 CALIBER PISTOL, STATE'S EXHIBIT. STATE'S

1 EXHIBIT TO SHOW THAT FRED RUTLAND HAD MALICE AFORETHOUGHT.
2 STATE'S EXHIBIT #23, LADIES AND GENTLEMEN, SALLY PEELE BOUGHT
3 THOSE WEAPONS; NOT FRED RUTLAND. WHY DID SHE BUY 'EM? SHE
4 WAS PLANNIN' TO LEAVE TOWN. SHE HAD FINALLY MADE UP HER
5 MIND.

6 SHE CALLED FRED RUTLAND THE DAY BEFORE AND SAID I'M
7 READY TO GO. COME HELP ME GET OUTTA HERE, AND THAT'S WHY HE
8 CAME TO LEXINGTON, LADIES AND GENTLEMEN. HE CAME HERE TO
9 HELP SOMEBODY THAT USED TO WORK FOR HIM. NO LAW IN THIS
10 WORLD WAS VIOLATED WHEN FRED RUTLAND DECIDED TO HELP SOMEBODY
11 THAT USED TO WORK FOR HIM. WHAT AN EMPLOYER. WHAT A WORK
12 PARTNER.

13 SO HE CAME. HIS WIFE BROUGHT HIM, AND THEY STARTED TO
14 PACK, BUT WHAT HAD HAPPENED THE DAY BEFORE? WHAT HAD
15 HAPPENED ON THE DAY THAT HE GOT THERE EARLIER THAT DAY? THE
16 TESTIMONY THAT YOU HEARD FROM BRUCE SHARPE WAS ALL ABOUT
17 COMIN' DOWN AND SITTING DOWN AND LOOKIN' AT A BOOK SO THEY
18 COULD PUT HER DISTRIBUTOR BACK TOGETHER. WELL, WHY DID THEY
19 HAVE TO PUT THE DISTRIBUTOR BACK TOGETHER? WELL, LADIES AND
20 GENTLEMEN, IT WAS BEATEN WITH A 4x4 BY JIMMY PEELE THAT DAY
21 WHILE SALLY PEELE WAS SITTING IN THE VEHICLE. IF THAT'S NOT
22 REASON ENOUGH TO WANT TO GET OUT OF DODGE, I'M SURE THAT THAT
23 CULMINATING FACTOR BROUGHT HER TO HER SENSES THAT SHE BETTER
24 GET OUT NOW. SHE CALLED MR. RUTLAND TO COME. HE DIDN'T COME
25 UP HERE TO KILL JIMMY PEELE, LADIES AND GENTLEMEN.

1 IF YOU FIND THAT THE STATE HAS MET THE BURDEN OF PROOF,
2 YOU'VE GOT TO FIND THAT FRED RUTLAND DID NOT ACT REASONABLY.
3 I THINK HE WAS PROBABLY THE MOST REASONABLE PERSON IN THE
4 WHOLE SCENARIO. ON THE SUBJECT OF THE TRAILER AND WHEN HE
5 WAS HOLDIN' THE SHOTGUN, HE ADMITS TO YOU, LADIES AND
6 GENTLEMEN, HE FIRED IT IN THE AIR. WHY WOULD HE FIRE IT IN
7 THE AIR. THERE'S BEEN NO TESTIMONY HERE THAT HE FIRED THIS
8 SHOTGUN AND HIT JIMMY PEELE. JIMMY PEELE WAS UNARMED AT THE
9 TIME, OF COURSE AFTER HE PUT THE SQUIRREL CAGE DOWN. THAT'S
10 WHY THE SHOTGUN CAME OUT. IN USIN' COMMON SENSE, IT DOES NOT
11 WORK TO SAY THAT FRED RUTLAND HAD MALICE AFORETHOUGHT TO KILL
12 JIMMY PEELE WHEN HE'S SITTIN' THERE WITH A SHOTGUN AND COULDA
13 SHOT HIM THREE, FOUR OR FIVE TIMES RIGHT THERE IN THE YARD AT
14 10:30 A.M. MR. PEELE CALLS 911. WHEN DID HE CALL? HE MUSTA
15 CALLED RIGHT AFTER THEY LEFT BECAUSE WHEN THEY GOT THERE,
16 NOBODY WAS THERE. LOOK AT THE TIME. I'M LOOKIN' AT THIS
17 EXHIBIT HERE #21. CALLER COMES IN AT 10:41. DISPATCHED AT
18 10:44. ARRIVES AT 10:48. CLEARED AT 10:53. NO ONE HOME.
19 SO WITHIN SEVEN MINUTES OF THE CALL JIMMY PEELE HAS GOTTEN
20 INTO THAT VEHICLE THAT HE HAD TO REPAIR THE DISTRIBUTOR ON
21 AND LEFT. NOBODY HOME. IF HE WAS SO SERIOUSLY UPSET ABOUT
22 THE SITUATION, LADIES AND GENTLEMEN, DON'T YOU THINK THAT HE
23 WOULD'VE STUCK AROUND AND TALKED TO THE OFFICERS OR WAS HIS
24 TELEPHONE CALL, HIS CALL A PLOY ON HIS BEHALF. WELL, WHERE
25 DID HE GO? NO QUESTION ABOUT WHERE HE WENT, LADIES AND

1 GENTLEMEN.

2 HE WENT TO RETRIEVE HIS NINE MILLIMETER TECH, AND I
3 THINK IT WAS RIGHT IRONIC FOR THE SOLICITOR TO CALL THIS THE
4 WEAPON OF CHOICE OR THE HOST WEAPON FOR TERRORISTS BECAUSE
5 THAT'S EXACTLY WHAT I THINK JIMMY PEELE WAS: A TERRORIST.
6 WHO IN THE WORLD, LADIES AND GENTLEMEN, WOULD WALK INTO THE
7 BOW-WOW BOUTIQUE WITH THIS BEHIND HIS BACK. I'VE SEEN SOME
8 BLACK DOGS IN MY LIFE, LADIES AND GENTLEMEN, BUT THIS ONE WAS
9 NOT COMIN' IN FOR A GROOMIN'. IF ANYBODY HAD MALICE
10 AFORETHOUGHT ON 1:30 SEPTEMBER 4, IT WAS JIMMY PEELE; NOT
11 FRED RUTLAND, BUT WE ARE NOT HERE IN THE TRIAL OF JIMMY
12 PEELE, LADIES AND GENTLEMEN. THIS IS NOT THE JIMMY PEELE
13 TRIAL.

14 THIS IS FRED RUTLAND. AND FRED RUTLAND WAS INSIDE THE
15 BOW-WOW BOUTIQUE ON BUSINESS. HE HAD A RIGHT TO BE THERE.
16 HE WAS A GUEST OF THE FOLKS RUNNING THE BOW-WOW BOUTIQUE
17 BECAUSE THEY HAD CALLED IN ADVANCE AND ASKED TO COME DOWN AND
18 TALK TO THEM ABOUT BUYING THE VEHICLE THAT WAS FOR SALE WHICH
19 WAS SITTING OUT HERE BESIDE THE BUILDING. THEY WERE IN
20 DISCUSSIONS ABOUT THAT VEHICLE WHEN MR. PEELE WALKS IN. NOW
21 HOW DOES HE WALK IN? OH, THERE WAS TESTIMONY ABOUT HOW HE
22 WALKED IN, AND WHAT DID HE DO WHEN HE GOT THERE? YOU'VE
23 HEARD ALL THAT TESTIMONY, LADIES AND GENTLEMEN. I HAVE
24 PREPARED SOMETHING HERE THAT I WANTED TO GO OVER WITH YOU. I
25 HAVE TEN REASONS WHY LISTENING TO THE TRIAL AND WRITING THESE

1 ACTION POINTS OUT HAVE DETERMINED THAT JIMMY PEELE WAS THE
2 AGGRESSOR IN THIS CASE: NUMBER ONE, HE PUT DRUGS IN HIS
3 SYSTEM SOMETIME ON OR BEFORE SEPTEMBER 4TH '92. HE HAD
4 VALIUM AND HE SMOKED MARIJUANA. WE DON'T KNOW WHEN HE DID
5 THIS.

6 WE HAVE A WITNESS THAT SAW HIM SMOKING MARIJUANA IN HIS
7 LIVIN' ROOM ABOUT 10:30 THAT MORNING. WE HAD A WITNESS THAT
8 SAID THEY WERE ROLLIN' A JOINT TOGETHER, THAT HE PUT DRUGS IN
9 HIS SYSTEM. THAT TO ME SHOWS THAT SOMEBODY IS NOT GONNA BE
10 OPERATING ON ALL EIGHT CYLINDERS. NUMBER TWO, HE MAKES FOUR
11 THREATS TO KILL FRED RUTLAND AT 10:40 A.M. AND IRONICALLY,
12 LADIES AND GENTLEMEN, THOSE THREATS WERE MADE WHEN HE WAS
13 STANDIN' THERE WITH NO WEAPON AT ALL AND FRED RUTLAND
14 CRADLING A SHOTGUN, AND HERE'S JIMMY PEELE TELLIN' FRED
15 RUTLAND HOW HE'S GONNA DO AWAY WITH HIM.

16 NUMBER THREE, JIMMY PEELE RETRIEVES HIS NINE MILLIMETER
17 PISTOL THE HOST WEAPON OF TERRORISTS AROUND THE WORLD FROM
18 BOBBY TINDAL SOMETIME AFTER 10:40 BECAUSE WHEN THE LEXINGTON
19 COUNTY SHERIFF GOT OUT THERE HE WAS GONE AT 10:48. WE KNOW
20 EXACTLY WHERE HE WENT: TO RETRIEVE HIS NINE MILLIMETER
21 PISTOL.

22 NUMBER FOUR, HE WAS ARMED WITH THE NINE MILLIMETER
23 PISTOL AND IS OBVIOUSLY LOOKIN' FOR FRED RUTLAND AND SALLY
24 PEELE AROUND LEXINGTON COUNTY BECAUSE, NUMBER FIVE, HE FINDS
25 THE VAN THAT THEY WERE IN PARKED OUT HERE IN FRONT OF THE

1 ROW-WOW BOUTIQUE AT ABOUT 1:30 THAT AFTERNOON, AND LISTEN TO
2 THIS FACT AND IT'S UNDISPUTED: HE PULLED HIS CAR UP; NOT AT
3 THE FRONT DOOR, BUT AROUND ON THE SIDE AND LEAVES THE MOTOR
4 RUNNIN'.

5 LEAVES HIS CAR ENGINE RUNNIN' AS HE GETS OUT OF THE --
6 AT THE ROW-WOW BOUTIQUE, ARMED WITH THE NINE MILLIMETER,
7 LOADED WITH A 32-BULLET CLIP. JIMMY PEELE THE AGGRESSOR. HE
8 COMES AROUND INTO THE FRONT OF THE ROW-WOW BOUTIQUE WITH THE
9 NINE MILLIMETER PISTOL BEHIND HIS BACK. HE POINTS THE NINE
10 MILLIMETER PISTOL AT SALLY PEELE. THEN HE POINTS THE NINE
11 MILLIMETER PISTOL AT FRED RUTLAND, AND HE TRIES TO FIRE THE
12 NINE MILLIMETER PISTOL AT FRED RUTLAND, AND IF YOU'LL
13 REMEMBER THE TESTIMONY, LADIES AND GENTLEMEN, IT WAS NOT
14 UNTIL FRED RUTLAND SAW JIMMY PEELE TURN THAT PISTOL TO HIM
15 AND START SQUEEZIN' THAT HE THEN BROUGHT THE 25 PISTOL THAT
16 HE WAS HOLDING OUT TO THE SIDE UP TO DEFEND HIMSELF. NOW I
17 MUST POINT OUT TO YOU THAT THE STATE HAS THE BURDEN OF PROOF.
18 THEY'VE GOT TO PRESENT YOU WITH THE EVIDENCE BEYOND A
19 REASONABLE DOUBT THAT JIMMY PEELE WAS NOT THE AGGRESSOR, AND
20 I HAVE FOUND TEN THINGS IN THE TESTIMONY THAT SHOW HE WAS THE
21 AGGRESSOR.

22 NOW THE OTHER SIDE OF THE COIN, LADIES AND GENTLEMEN:
23 WHY FRED RUTLAND ACTED IN SELF-DEFENSE. HE COMES TO THE ROW-
24 WOW BOUTIQUE ON LAWFUL BUSINESS AS A LAWFUL GUEST OF KIM
25 KESTNER AND HER HUSBAND DANNY. HE BELIEVES HIMSELF TO BE AND

1 HE IS IN IMMINENT DANGER WHEN JIMMY PEELE ENTERS THE BOW-WOW
2 BOUTIQUE BECAUSE JIMMY PEELE HAD THREATENED HIS LIFE FOUR
3 TIMES EARLIER THAT DAY. FRED RUTLAND TRIES TO RETREAT EVEN
4 THOUGH AS A GUEST HE DOESN'T HAVE TO BUT HE SEES NO ESCAPE.
5 AS YOU RECALL, HE SAID HE TURNED AROUND, LOOKED BACK INTO
6 THIS PART OF THE BUILDING; THERE WAS A LARGE GLARE IN HIS
7 FACE.

8 HE DIDN'T SEE; HE HAD NEVER BEEN TO THIS BUILDING
9 BEFORE; HE HAD ONLY TIME ENOUGH TO TURN AROUND AND THERE WAS
10 JIMMY PEELE STANDIN' IN THE OTHER DOORWAY, AND HOW WAS HE
11 STANDING, LADIES AND GENTLEMEN? THE DESCRIPTION WAS -- DOES
12 THAT LOOK LIKE THE POSITION OF A MAN COMING TO HAVE HIS DOG
13 GROOMED?

14 FRED RUTLAND IS NOT AT FAULT WHEN JIMMY PEELE DRAWS THAT
15 NINE MILLIMETER PISTOL, AND WHY? THIS GUN HE SAID WAS
16 STICKIN' OUT HERE ON THE SIDE TO LET JIMMY PEELE KNOW PLEASE
17 DON'T.

18 PLEASE DON'T. FRED RUTLAND ACTED IN SELF-DEFENSE. HE
19 TELLS JIMMY TO STOP AND HE WARNS HIM AND HE'S ARMED AND HE
20 SHOWS HIM. HE SEES JIMMY COCK THE PISTOL AND PUT IT UP TO
21 SALLY.

22 HE TELLS JIMMY TO STOP. THEN HE SEES JIMMY BRING THE
23 PISTOL OVER IN HIS DIRECTION, AND AT THAT TIME, LADIES AND
24 GENTLEMEN, THIS IS THE DEFENSE OF SELF-DEFENSE. HE ACTS AS A
25 REASONABLY PRUDENT PERSON WOULD HAVE DONE UNDER THOSE

1 CIRCUMSTANCES AND THE LAW OF SELF-DEFENSE AS WILL BE DEFINED
2 BY YOUR HONOR IS WHAT WOULD A REASONABLE PERSON HAVE DONE
3 UNDER THOSE CIRCUMSTANCES. HE FIRED THE GUN TO PROTECT
4 HIMSELF AND SALLY FROM IMMINENT DANGER. BEFORE YOU WERE
5 SWORN AS OFFICERS OF THE COURT IN THIS CASE, HIS HONOR ASKED
6 YOU A QUESTION WHEN EVERYBODY WAS SEATED OUT THERE AND THIS
7 WAS THE QUESTION: THE JUDGE WILL INSTRUCT YOU AT THE
8 CONCLUSION OF THE EVIDENCE, BUT BEFORE YOU CAN FIND THE
9 DEFENDANT GUILTY HIS GUILT MUST BE PROVEN TO YOU BEYOND A
10 REASONABLE DOUBT, AND THAT A MERE PROBABILITY OF GUILT IS NOT
11 ENOUGH.

12 IF AFTER REVIEWING ALL THE EVIDENCE YOU BELIEVE THE
13 DEFENDANT IS PROBABLY GUILTY BUT THAT THERE IS STILL ROOM FOR
14 A DOUBT, WITH A REASON BEHIND IT, WILL YOU BE ABLE TO VOTE
15 NOT GUILTY. AND YOU PROMISED YOU WOULD. LADIES AND
16 GENTLEMEN, I CAN THINK OF 32 REASONS WHY YOU SHOULD VOTE NOT
17 GUILTY.

18 THESE 32 REASONS ARE THE 32 BULLETS THAT JIMMY PEELE HAD
19 IN THAT BLACK CLIP OF THAT NINE MILLIMETER PISTOL THAT HE
20 BROUGHT INTO THE BOW-WOW BOUTIQUE AT 1:30 ON SEPTEMBER 4,
21 1992.

22 THESE 32 REASONS, LADIES AND GENTLEMEN, SHOW WHO THE
23 AGGRESSOR WAS THAT DAY. THESE 32 REASONS, LADIES AND
24 GENTLEMEN, SHOW THAT FRED RUTLAND ACTED IN SELF-DEFENSE; NOT
25 ONLY SELF-DEFENSE FOR HIMSELF, BUT SELF-DEFENSE OF OTHERS.

1 THERE WERE OTHER PEOPLE IN THAT ROOM, LADIES AND GENTLEMEN.
2 IF YOU WILL RECALL, FRED RUTLAND CAME TO LEXINGTON COUNTY,
3 AND HE CAME UP HERE FOR THE PURPOSE OF HELPING A CO-WORKER.
4 THAT'S THE KINDA GUY FRED RUTLAND IS. HE'S NOT A MURDERER.
5 IF HE WAS HE WOULD'VE KILLED FRED -- HE WOULD'VE KILLED JIMMY
6 PEELE WITH THAT SHOTGUN THREE HOURS EARLIER THAT DAY IF THAT
7 WAS HIS PURPOSE IN LIFE. 32 REASONS, 32 REASONS WHY JIMMY
8 PEELE WAS THE AGGRESSOR. NOW, LADIES AND GENTLEMEN, ISN'T IT
9 ODD -- ISN'T IT REAL ODD THAT THESE BULLETS HERE ARE A
10 DEFENSE EXHIBIT? THIS IS DEFENDANT'S EXHIBIT #1. THE STATE
11 HAS THE BURDEN OF PROOF TO PROVE THE TRUTH IN THIS CASE, TO
12 PROVE THAT FRED RUTLAND HAD MALICE AFORETHOUGHT. FRED
13 RUTLAND DOES NOT HAVE THE BURDEN OF PROVING HIS INNOCENCE.
14 HIS HONOR WILL CHARGE YOU THAT. SO WHEN THE STATE PUT UP THE
15 CASE AGAINST FRED RUTLAND, WHY DIDN'T THEY GIVE YOU THE WHOLE
16 LOAF OF BREAD? WHY DIDN'T THEY GIVE YOU THE BAD WITH THE
17 GOOD IF THERE IS ANY? LADIES AND GENTLEMEN, IF I MIGHT SAY
18 THIS, WHAT HAPPENS DURING THE TRIAL OF A CASE CONSISTS OF
19 WITNESSES TESTIFYING AND TELLING YOU WHAT THEY REMEMBER, WHAT
20 THEY SAW, WHAT THEY HEARD, WHAT THEY ACTUALLY THROUGH THEIR
21 SENSES PICKED UP EITHER SMELLING OR TASTING OR THE FIVE
22 SENSES, AND THE LAWYERS CALL THESE WITNESSES, AND THE STATE
23 CALLED DETECTIVE CATO, AND DETECTIVE CATO HAD THE PISTOLS,
24 AND HE HAD THE SPENT CASES AND THE SHOTGUN AND THE 25. HE
25 ALSO HAD THE MAGAZINE THAT THESE 32 BULLETS CAME OUT OF, YET

1 IN THE PRESENTATION OF THE CASE, YOU DIDN'T GET ALL OF THE
2 EVIDENCE, AND THEY RESTED. THEY WERE DONE. THEY FINISHED
3 WITH A WITNESS AND THAT WAS IT. THEY ONLY WANTED YOU, LADIES
4 AND GENTLEMEN, TO HEAR ENOUGH EVIDENCE SO YOU WOULD BE
5 OVERWHELMED WITH THE FACTS AND WANNA FIND FRED RUTLAND GUILTY
6 OF A HEINOUS CRIME, MALICE AFORETHOUGHT, MURDER, BUT ISN'T
7 THIS IMPORTANT? ISN'T THIS 32 GOOD REASONS THAT YOU SHOULD
8 HAVE BEEN GIVEN THE FULL LOAF OF BREAD WHEN DETECTIVE CATO
9 TESTIFIED.

10 LET ME POINT OUT SOMETHING ELSE. WHEN DAN KESTNER
11 TESTIFIED DID THEY ASK HIM ABOUT THE PEELE VEHICLE? NO. WE
12 GOT THAT OUT OF HIM ON CROSS-EXAMINATION, AND THE FACT THAT
13 THE MOTOR WAS STILL RUNNING. THEY HAD TALKED TO MR. KESTNER.
14 OBVIOUSLY THEY KNEW ABOUT IT. IT WAS NO SURPRISE, BUT DID
15 THEY TELL YOU THAT ON DIRECT EXAMINATION? LADIES AND
16 GENTLEMEN, THEY ARE CHARGED WITH THE RESPONSIBILITY OF
17 PRESENTING A CASE, AND THEY REPRESENT ALL OF THE PEOPLE THAT
18 LIVE IN THE STATE OF SOUTH CAROLINA, YOU AND ME AND EVERYBODY
19 HERE, BUT THEY ALSO HAVE THE RESPONSIBILITY OF TELLING YOU
20 THE WHOLE STORY. NOW ANOTHER BONE OF CONTENTION: THE
21 STATEMENTS.

22 I WANT YOU TO LOOK AT THIS, LADIES AND GENTLEMEN. THIS
23 IS THE STATEMENT OF FRED RUTLAND AT 14:05 WHICH WAS ROUGHLY
24 30 MINUTES AFTER THE SHOOTING, AND IF YOU WILL RECALL, IT WAS
25 DETECTIVE FRIER WHO CAME ON THE SCENE, PICKED FRED RUTLAND UP

1 AND TOOK HIM IMMEDIATELY TO THE JAIL BECAUSE HE WAS GONNA GET
2 A FRESH STATEMENT, ONE IMMEDIATELY AFTER THE EVENT, AND THEY
3 WENT DOWN TO THE STATION, AND THEY STARTED WORKIN' ON THAT
4 STATEMENT, BUT, LADIES AND GENTLEMEN, A TAPE RECORDING WAS
5 MADE, AND I WANT YOU TO SEE THIS. THIS IS STATE'S EXHIBIT
6 #8.

7 YOU WILL HAVE IT IN THE JURY ROOM WITH YOU. THIS
8 COMMENCES AT 2:30. THERE IS EXACTLY 25 MINUTES DIFFERENCE IN
9 THESE TWO STATEMENTS. NOW WHY -- AND I'M COMING BACK TO
10 COMMON LOGIC AGAIN -- WHY WOULD IT BE NECESSARY FOR DETECTIVE
11 FRIER TO WRITE DOWN IN HIS OWN HANDWRITIN' NOW WHAT HE GOT
12 OUT OF THE TAPED CONVERSATION WHEN YOU AIRFADY HAVE THE
13 TRANSCRIBED TAPED CONVERSATION? THE REASON IS, LADIES AND
14 GENTLEMEN, IS THAT DURING THIS 25-MINUTE PERIOD, DETECTIVE
15 FRIER WAS WRITING DOWN WHAT HE WANTED TO WRITE DOWN WHEN HE
16 WAS TALKING TO FRED RUTLAND. THAT'S WHY THERE'S 25 MINUTES
17 DIFFERENCE IN HERE. NOW THERE WAS SOME DISCUSSION ABOUT
18 GOIN' TO LOOK FOR A TAPE RECORDER AND A TAPE AND SO FORTH,
19 BUT THAT DOESN'T MAKE GOOD SENSE. WHY WOULD DETECTIVE FRIER
20 WHO WAS ANXIOUS TO GET A STATEMENT FROM FRED RUTLAND
21 IMMEDIATELY AFTER A SHOOTING FOOL AROUND HIS OFFICE LOOKING
22 FOR A TAPE RECORDER WHEN IT WAS SO IMPORTANT FOR HIM TO GET A
23 STATEMENT? HERE GO THE THREE-PAGE WRITTEN DOCUMENT DURING
24 THE 25-MINUTE PERIOD, BUT WHAT DID DETECTIVE FRIER TELL YOU?
25 THAT HE WROTE THIS STATEMENT AFTER HE GOT THE RECORDED

1 STATEMENT.

2 THAT DOESN'T MAKE SENSE. HE'S ALREADY GOTTEN IT
3 RECORDED.

4 IT'S BEING TRANSCRIBED. WHY DOES HE NEED TO RE-WRITE
5 SOMETHING THAT HE'S GOT HERE? WELL, LADIES AND GENTLEMEN,
6 FRED RUTLAND DID NOT WRITE THIS STATEMENT, AND FRED RUTLAND
7 TOLD YOU HE WAS VERY EMOTIONALLY UPSET AT THIS TIME, AND HE
8 WAS STILL EMOTIONALLY UPSET THREE DAYS LATER WHEN THIS
9 STATEMENT WAS OBTAINED, AND I KNOW THE STATE WENT TO EXTREME
10 LENGTHS TO GO OVER AND OVER AND OVER AND OVER AGAIN ABOUT THE
11 MIRANDA RIGHTS, AND MR. RUTLAND TOLD YOU THAT ALL HE WANTED
12 TO DO WAS COOPERATE, AND HE THOUGHT HE WAS COOPERATING
13 BECAUSE HE BELIEVED DETECTIVE FRIER. FRED RUTLAND KNEW THAT
14 HE HADN'T COMMITTED THE ACT OF MURDER. HE KNEW THAT HE
15 DIDN'T COME UP HERE TO KILL SOMEBODY. HE KNEW THAT HE HAD
16 DONE SOMETHING IN SELF-DEFENSE OF HIMSELF AND OTHERS, AND
17 ISN'T THIS IRONIC, BUT IT'S EXACTLY WHAT DETECTIVE FRIER TOLD
18 HIM.

19 YOU REMEMBER THIS. AFTER DETECTIVE FRIER ASKED HIM ON
20 THE WAY TO THE STATION HOUSE, WELL, WHAT HAPPENED. MR.
21 RUTLAND EXPLAINED AND MR. RUTLAND REMEMBERED HIM SAYING WELL
22 THAT'S AN EVIDENT CASE OF SELF-DEFENSE. HE WON MR. RUTLAND
23 OVER AT THAT TIME. HE WON HIS CONFIDENCE. HE SAID ALL WE
24 WANNA DO IS GET A STATEMENT AND THIS THING'LL BE OVER, BUT
25 DETECTIVE FRIER DID NOT HAVE IN HIS MIND WHAT FRED RUTLAND

1 HAD IN HIS MIND. FRED RUTLAND WANTED TO COOPERATE. HE
2 WANTED TO HELP. HE WANTED TO GIVE A STATEMENT, AND HE DID,
3 BUT LADIES AND GENTLEMEN, THESE 32 REASONS ARE DEFENSE
4 EXHIBITS.

5 THOSE 32 REASONS ARE WHY FRED RUTLAND ACTED IN SELF-
6 DEFENSE.

7 FRED RUTLAND PROTECTED THE HONOR OF NOT ONLY SALLY PEELE
8 WHO AT THE TIME WHEN THIS SHOOTING OCCURRED WAS MOVING IN
9 BETWEEN THESE TWO MEN. SHE WAS PUTTING HERSELF IN DANGER.
10 NOT ONLY WAS HE PROTECTING THE HONOR OF SALLY PEELE, BUT ALSO
11 OF KIM KESTNER. THIS IS A TERRORIST WEAPON USED FOR NOTHING
12 ELSE BUT TARGET PRACTICE. THAT'S THE TESTIMONY YOU HEARD.
13 YOU SIMPLY PULL THE TRIGGER: BAM, BAM, BAM, BAM, BAM, BAM,
14 BAM, BAM, BAM, BAM. 32 TIMES YOU CAN DO THAT, LADIES AND
15 GENTLEMEN.

16 I SUBMIT TO YOU, LADIES AND GENTLEMEN, THAT HUNCHES,
17 SPECULATION DO NOT PROVE A CASE BEYOND A REASONABLE DOUBT.
18 TWO WITNESSES APPEARED THIS MORNING AS A LAST DITCH EFFORT
19 FOR THE STATE TO LOCK UP A MURDER CONVICTION, A LAST DITCH
20 EFFORT, AND IT'S ALL BASED ON, LADIES AND GENTLEMEN, THE FACT
21 THAT FRED RUTLAND COMMITTED AN ACT OF SELF-DEFENSE. WHAT DID
22 THESE WITNESSES TESTIFY TO? DID IT -- WHAT DID IT AMOUNT TO?

23 WELL, MS. HUNT SAYS THAT SHE OVERHEARD A PHONE
24 CONVERSATION, BUT IT REALLY WASN'T A CONVERSATION. SHE HEARD
25 ONE PERSON TALKING BUT SHE DOESN'T KNOW IF THERE WAS SOMEBODY

1 ON THE OTHER LINE.

2 OH, THEY TRY TO SPECULATE THAT SHE MIGHTA BEEN TALKIN'
3 TO JIMMY PEELE, BUT WE KNOW THAT JIMMY PEELE LEFT HOME AT
4 10:48 BECAUSE WE'VE GOT PROOF FROM THE LEXINGTON COUNTY
5 SHERIFF'S DEPARTMENT THAT HE WAS NOT AT HOME.

6 WELL, DO YOU THINK THAT SHE WOULD'VE CALLED HIM OVER AT
7 BOBBY TINDAL'S HOUSE WHERE HE PICKED UP HIS TECH NINE?
8 ANOTHER HUNCH OR ANOTHER SPECULATION.

9 THE PROOF IS RIGHT HERE, LADIES AND GENTLEMEN. THERE'S
10 NO EVIDENCE, AND BEYOND A REASONABLE DOUBT MEANS A DOUBT WITH
11 A VALID REASON BEHIND IT.

12 NOW THERE IS -- AND I CAN'T CALL HIS NAME -- DAVID
13 JONES.

14 DAVID JONES. I BET DURING THE 14 MONTHS THAT HE'S SAT
15 IN THAT JAIL CELL UP THERE THAT HE'S HEARD A TON OF STORIES.
16 SO WHO DID HE GO TO SEE? DID HE GO TO THE SHERIFF? DID HE
17 GO TO THE SOLICITOR? HE WENT TO SOME PRIVATE INDIVIDUAL.
18 THE FATHER OF JIMMY PEELE. I WONDER WHAT THE PURPOSE OF THAT
19 VISIT WAS? LADIES AND GENTLEMEN, THE JUDGE AFTER WE FINISH
20 OUR STATEMENTS, IS CHARGIN' YOU THE LAW IN SOUTH CAROLINA,
21 AND I HAVE PUT ON A CHART WHAT THE LAW IS WITH REGARD TO
22 SELF-DEFENSE OF OTHERS. NOW I SUBMIT TO YOU THAT THE
23 DEFENDANT DOES NOT HAVE THE BURDEN OF PROOF TO COME INTO
24 COURT AND PROVE EITHER ONE OF THESE, BUT YOU AS OFFICERS OF
25 THE COURT AND AS JUDGES OF THE FACTS OF THE CASE CAN

1 DETERMINE THAT BASED ON THE EVIDENCE IT FALLS INTO THIS
2 CATEGORY, NOT THE MURDER CATEGORY. NOW SELF-DEFENSE IS A
3 COMPLETE DEFENSE THAT MUST BE PROVED BY A PREPONDERANCE OF
4 THE EVIDENCE IF ESTABLISHED BY A JURY A JURY MUST FIND -- IF
5 ESTABLISHED, A JURY MUST FIND THAT THE DEFENDANT IS NOT
6 GUILTY. THAT'S YOUR VERDICT.

7 IF THE 12 OF YOU UNANIMOUSLY AGREE THAT THE
8 PREPONDERANCE OF THE EVIDENCE HAS BEEN ESTABLISHED, THAT FRED
9 RUTLAND ACTED IN SELF-DEFENSE, YOU MUST FIND HIM NOT GUILTY.
10 NOW THERE ARE FOUR ELEMENTS THAT MAKE UP THE BASICS FOR
11 FINDING SELF-DEFENSE. THE DEFENDANT IS NOT AT FAULT IN
12 BRINGING ABOUT THE DIFFICULTY. THAT MEANS THAT THE VICTIM
13 MUST BE THE AGGRESSOR AT THE TIME OF THE HOMICIDE. THAT'S
14 WHY WE PREPARED THIS CHART TO SHOW YOU THE TEN REASONS WHY
15 JIMMY PEELE WAS THE AGGRESSOR. THE SECOND ELEMENT: THE
16 DEFENDANT MUST BE IN IMMINENT DANGER OR -- TO HAVE BELIEVED
17 THAT AT THE TIME HE ACTED HE WAS IN IMMINENT DANGER OF DEATH
18 OR SERIOUS BODILY INJURY. HE HELD THE GUN OFF TO THE SIDE
19 AND SAID NO JIMMY DON'T YOU DO IT. HE WAS NOT THE PERSON
20 THAT WAS THE AGGRESSOR. HE AT THAT POINT KNEW THAT WHEN THAT
21 TECH NINE CAME IN HIS DIRECTION AND THE TRIGGER FINGER WAS
22 MOVIN' THAT HIS LIFE WAS IN IMMINENT DANGER. THE THIRD
23 ELEMENT: THE DEFENDANT MUST SHOW THAT A REASONABLE PRUDENT
24 PERSON IN THE SAME OR SIMILAR CIRCUMSTANCES WOULD'VE ACTED OR
25 ENTERTAINED THE SAME BELIEF THAT CAUSED HIM TO ACT AS THE

1 DEFENDANT DID IN ORDER TO SAVE HIMSELF. IT IS NOT REASONABLE
2 TO THINK THAT FRED RUTLAND WOULD STAND THERE WITH THIS 25
3 PISTOL OFF TO THE SIDE AND LET MR. PEELE PULL THE TRIGGER AND
4 SHOOT HIM DEAD AS HE WAS STANDIN' THERE LOOKIN' AT HIM. THE
5 FOURTH ELEMENT IS THAT THE DEFENDANT HAD NO OTHER PROBABLE
6 MEANS OF AVOIDING THE DANGER OF LOSING HIS OWN LIFE OR
7 SUSTAINING SERIOUS BODILY INJURY THAT THE ACT AS HE DID IN
8 THIS PARTICULAR INSTANCE. IF HOWEVER THE DEFENDANT WAS ON
9 HIS OWN PREMISES OR A LAWFUL GUEST HE HAS NO DUTY TO RETREAT
10 BEFORE ACTING IN SELF-DEFENSE. IF YOU WILL RECALL, FRED AND
11 SALLY RUTLAND -- FRED RUTLAND AND SALLY PEELE WERE IN THE
12 BOW-WOW BOUTIQUE ON LAWFUL BUSINESS. THEY WERE PURCHASING AN
13 AUTOMOBILE.

14 JIMMY PEELE THE AGGRESSOR CAME THERE LOOKING FOR
15 TROUBLE.

16 NOW FRED RUTLAND ALSO HAS THE SELF-DEFENSE OF OTHERS
17 DEFENSE, AND THAT IS DEFINED AS IF ANOTHER PERSON'S LIFE IS
18 IN APPARENT JEOPARDY BY AN ASSAILANT WHO IS MAKING A
19 MALICIOUS AND UNPROVOKED ASSAULT WITH A DEADLY WEAPON THEN
20 ANY RELATIVE FRIEND OR BYSTANDER HAS THE RIGHT TO TAKE THE
21 LIFE OF SUCH ASSAILANT IN ORDER TO PREVENT A MURDER. DID
22 FRED RUTLAND FEEL AS A BYSTANDER, AS A FRIEND, THAT THE LIVES
23 OF SALLY PEELE AND KIM KESTNER WERE IN DANGER WHEN HE ACTED?
24 IF SO, HE HAS THE DEFENSE OF SELF-DEFENSE AND THE DEFENSE OF
25 OTHERS.

1 IT'S PROVIDED THAT THERE WAS NO OTHER REASONABLE MEANS
2 OF ESCAPE FOR THE PERSON SO ASSAILED. DID SALLY PEELE HAVE A
3 REASONABLE MEANS OF ESCAPE AT THAT TIME WITH THIS WEAPON
4 POINTED WITHIN I THINK IT WAS BETWEEN SIX AND NINE INCHES
5 FROM HER? WAS FRED RUTLAND REASONABLE IN BELIEVIN' THAT SHE
6 HAD NO REASONABLE MEANS OF ESCAPE AT THAT TIME? BOTH THE
7 PERSON ASSAILED AND THE PERSON COMING TO HIS DEFENSE, IN THIS
8 CASE HER DEFENSE, WERE WITHOUT LEGAL FAULT IN BRINGING ON THE
9 DIFFICULTY.

10 NOW I POINT OUT TO YOU, AND I'M SURE THE SOLICITOR WILL
11 PROBABLY ARGUE THIS POINT, BUT THEY WERE OUT ON THE PROPERTY
12 OF THE PEELE'S AT 10:30 THAT MORNING. WE GOT FRED; WE'VE GOT
13 JIMMY PEELE CALLIN' IN 911 SAYIN' PEOPLE ARE OUT THERE WITH
14 GUNS, BUT THAT WAS THREE HOURS AGO, LADIES AND GENTLEMEN, AND
15 WHO DROVE UP TO THE BOW-WOW BOUTIQUE AFTER THE VAN HAD
16 ALREADY BEEN PARKED HERE AND THEY WERE INSIDE? WHO CAME?
17 JIMMY PEELE. JIMMY PEELE. HE CAME UP. HE BECAME THE
18 AGGRESSOR.

19 HE BECAME THE PERSON THAT WAS BRINGING ABOUT THE
20 DIFFICULTY.

21 FRED RUTLAND WAS WITHOUT LEGAL FAULT IN BRINGING ON THE
22 DIFFICULTY AT THIS POINT. NOW THERE'S ANOTHER CHARGE, LADIES
23 AND GENTLEMEN, THAT WE NEED TO DISCUSS HERE AND THAT'S THE
24 CHARGE OF THE SHOTGUN OUT ON THE PROPERTY THREE HOURS LATER.
25 MR. RUTLAND IS CHARGED WITH POINTING THIS SHOTGUN AT JIMMY

1 PEELE, AND I SUBMIT TO YOU THAT ON CROSS-EXAMINATION THE
2 SOLICITOR DID A GOOD JOB IN TRYING TO ADMIT TO THAT FACT, BUT
3 FRED KEPT TELLIN' HIM WHAT HAPPENED, AND THAT'S ALL WE'RE
4 HERE TO DETERMINE, LADIES AND GENTLEMEN. WHAT HAPPENED. NOT
5 TO TWIST SOMEBODY'S WORDS OR MAKE THEM SAY SOMETHIN' THAT'S
6 NOT SO, BUT TO FIND THE TRUTH, AND HE TOLD YOU THE TRUTH. HE
7 SAID HE FIRED IT IN THE AIR, AND THEN HE SAID HE PUT IT DOWN
8 BESIDE HIS LEG, BESIDE HIS BEING. HE DIDN'T SAY HE POINTED
9 IT AT HIM. NOW THIS IS THE MAN WITH THE SHOTGUN WHO'S BEING
10 ASKED THESE QUESTIONS. THEY WILL ARGUE TO YOU THAT THEY HAD
11 AN EYEWITNESS. BRUCE SHARPE SAW HIM POINT IT AT HIM. WELL,
12 WHERE WAS BRUCE SHARPE WHEN HE WAS SUPPOSEDLY SEEING ALL
13 THIS?

14 WAS HE IN THE HOUSE? WAS HE IN THE CAR? OR WAS HE OUT
15 THERE IN THE AREA WHERE ALL THE CONVERSATION WAS GOING ON?
16 WHAT KIND OF ANGLE DID HE HAVE? THIS IS THE MAN THAT WAS IN
17 THERE ROLLING THE JOINT WITH JIMMY. I SUBMIT TO YOU, LADIES
18 AND GENTLEMEN, THAT MALICE AFORETHOUGHT MEANS THAT THE STATE
19 HAS TO PROVE THAT IT WAS IN FRED RUTLAND'S MIND EARLY ON TO
20 KILL JIMMY PEELE. IF THAT WAS NOT THE PERFECT OPPORTUNITY
21 WHEN HE HAD A LOADED SHOTGUN AND HAD JUST FIRED IT IN THE AIR
22 AND KNEW THAT IT WOULD WORK, IF THAT WAS NOT THE PERFECT
23 OPPORTUNITY, HE WOULD'VE DONE IT THEN, AND I SUBMIT TO YOU
24 THAT THAT SHOWS WHAT FRED RUTLAND WAS ALL ABOUT, THAT HIS
25 SIMPLE GOAL, HIS SIMPLE MOTIVE WAS TO HELP SALLY PEELE PACK

1 HER THINGS, GET IN HER CAR AND GO, AND THAT'S WHAT SHE WANTED
2 TO DO. SHE WANTED TO GET ALL OF HER BELONGINGS AND THEY WERE
3 SCATTERED ABOUT. SHE SAID THAT SHE WENT TO THE PAWN SHOP TO
4 GET THE SHOTGUN BECAUSE SHE WAS AFRAID THAT JIMMY MIGHT GO
5 GET IT. WHEN THEY WERE THERE THE PICKING UP OF THE PISTOL
6 WAS JUST SOMETHING THAT HAPPENED AT THE MOMENT, BUT SHE WAS
7 MOVING.

8 SHE WAS LEAVING TOWN. IT WAS HER CHANCE TO GO. SHE HAD
9 CALLED THIS FRIEND TO HELP HER, AND HE WAS THERE. NOW,
10 LADIES AND GENTLEMEN, THEY WERE ALMOST ABLE TO GET OUT OF
11 TOWN.

12 THEY HAD JUST BOUGHT THE CAR, BUT TIME RAN OUT. HAD IT
13 NOT, WE WOULD NOT BE STANDIN' HERE, SITTIN' HERE TALKIN'
14 ABOUT THIS TERRIBLE SITUATION, BUT I SUBMIT IT'S NOT FRED
15 RUTLAND THAT HAS TO COME INTO COURT AND PROVE TO YOU THAT
16 HE'S INNOCENT. HE IS CLOTHED WITH THE PRESUMPTION OF
17 INNOCENCE THROUGHOUT THIS TRIAL, LADIES AND GENTLEMEN. HIS
18 RIGHTS AS PROVIDED UNDER THE LAWS OF THIS STATE, JUST LIKE
19 THE LAWS GOVERN THE INTRODUCTION OF EVIDENCE IN THE TRIAL OF
20 THE CASE AND WHAT THE JUDGE CHARGES YOU WHEN WE FINISH
21 TALKING.

22 HE SAYS THAT FRED RUTLAND IS INNOCENT AS HE SITS RIGHT
23 THERE AND HE'S NOT GUILTY UNTIL ALL 12 OF YOU, ALL 12 OF YOU
24 HAVE TO CONCLUDE THAT HE IS GUILTY, AND THAT VOTE HAS TO BE
25 BASED ON THE FACT THAT THE STATE HAS PROVED ITS CASE BEYOND A

1 REASONABLE DOUBT. I SUBMIT THAT FRED RUTLAND AS HE SITS HERE
2 TODAY AND AS HE HAD HIS DAY IN COURT AND WAS ABLE TO TELL YOU
3 YESTERDAY WHAT HE RECOLLECTS. HAPPENED HAPPENED AS EXACTLY AS
4 HE TOLD YOU. THAT'S UNDISPUTED. HE IS HERE IN COURT
5 ADMITTING TO YOU THAT HE FIRED THE SHOTGUN, THAT HE FIRED THE
6 PISTOL, AND THAT'S BEEN HIS POSITION ALL ALONG. HE'S NOT
7 TRYIN' TO HIDE OR DODGE THAT WHATSOEVER. HE WAS HERE TO TELL
8 THE TRUTH AND TO BRING THIS MATTER TO A CONCLUSION, AND YOU
9 AS OFFICERS OF THE COURT WILL GO BACK INTO THE JURY ROOM AND
10 DELIBERATE UNTIL ALL 12 OF YOU DETERMINE WHAT THE TRUE FACTS
11 ARE, AND AT THAT POINT BRING BACK A VERDICT.

12 NOW I WILL NOT GET A CHANCE TO TALK TO YOU ANY FURTHER.
13 THIS IS THE LAST OPPORTUNITY THAT I HAVE TO TELL YOU WHAT I
14 WANT YOU TO HEAR ABOUT THIS CASE, WHAT I THINK THAT I'VE
15 COVERED THE POINTS AS BEST AS I CAN, AND I THINK THAT THERE
16 ARE SOME THINGS THERE THAT WE COULD TALK ABOUT ARE SELF-
17 EVIDENT, THAT ARE NOT SPECULATIVE, BUT I WANT YOU TO PAY
18 PARTICULAR ATTENTION TO THE ARGUMENT OF THE SOLICITOR, AND
19 DON'T BE MISLED BY SPECULATION, BY INNUENDO OR BY A HUNCH,
20 AND IF THEY DON'T PROVE WHAT THEY'RE TELLING YOU BEYOND A
21 REASONABLE DOUBT, IF THAT HAS NOT BEEN PROVED FROM THIS STAND
22 OR THESE EXHIBITS, THEN YOU FIND A VERDICT OF NOT GUILTY.
23 YOU FIND A VERDICT OF NOT GUILTY BECAUSE YOU KNOW THAT FRED
24 RUTLAND DID WHAT ANY REASONABLE PERSON WOULD'VE DONE UNDER
25 THE CIRCUMSTANCES AT 1:30 ON SEPTEMBER 4, 1992 WHEN HE

1 PROTECTED THE HONOR OF SALLY PEELE, KIM KESTNER AND HE ALSO
2 PROTECTED HIS OWN LIFE. THAT'S THE ISSUE, LADIES AND
3 GENTLEMEN.

4 THAT'S THE ISSUE. THAT'S THE ISSUE IN THIS CASE: DID
5 HE ACT AS A REASONABLE PERSON WOULD UNDER THE CIRCUMSTANCES,
6 AND THE CIRCUMSTANCES AS EXISTED AT 1:30 SEPTEMBER 4TH 1992?
7 I APPRECIATE YOUR FANTASTIC ATTENTION. THANK YOU.

8 THE COURT: IS EVERYBODY ALL RIGHT? ANYBODY NEED TO --
9 I CAN'T SEE RIGHT BEHIND YOU. ANYBODY NEED TO -- EVERYBODY
10 ALL RIGHT? ALRIGHT.

11 MR. MCMAHON: MAY I HAVE JUST A MOMENT, YOUR HONOR, TO
12 MOVE---

13 THE COURT: YES, SIR.

14 MR. MCMAHON: ---TO MOVE THESE CHARTS.

15 THE COURT: I'M GOING TO CHECK ONE THING IN MY NOTEBOOK
16 WHILE YOU'RE DOING THAT. (THERE WAS A BRIEF RECESS.) YOU
17 MAY PROCEED.

18 MR. MCMAHON: MAY IT PLEASE THE COURT? MADAM FORELADY
19 AND LADIES AND GENTLEMEN OF THE JURY, I WOULD LIKE TO BEGIN
20 BY THANKING EACH AND EVERY ONE OF YOU FOR THE ATTENTION AND
21 CONCENTRATION WHICH YOU HAVE SHOWN ALL PARTIES DURING THE
22 TRIAL OF THIS CASE. SHORTLY IT WILL BECOME YA'LL'S
23 RESPONSIBILITY TO RETURN VERDICTS ON EACH AND EVERY ONE OF
24 THESE INDICTMENTS SEPARATELY AND DISTINCTLY AS TO EACH CHARGE
25 AS TO WHICH MR. RUTLAND STANDS ACCUSED. AND I WILL BE THE

1 LAST PERSON YOU WILL HEAR FROM ON BEHALF OF THE STATE, AND ON
2 BEHALF, I SUBMIT TO YOU, OF THE VICTIM JIMMY PEELE. ONE OF
3 MY CHAPS, MY YOUNGEST CHAP IS A LITTLE BOY. HE'S NOT A
4 LITTLE BOY. I LOOK UP TO HIM NOW. I DON'T ARM WRESTLE HIM,
5 RACE HIM; I DON'T DO ANYTHING WITH HIM NOW. I HAVE TO LOOK
6 UP TO HIM, BUT THERE WAS A TIME IN HIS LIFE I GUESS BOTH
7 EMOTIONALLY AND PHYSICALLY HE HAD TO LOOK UP TO ME. AND HE
8 SAID DADDY WHATCHU DO. WHATCHU DO FOR A LIVIN'. I SAID WELL
9 I'M A -- I'M AN ATTORNEY; I'M A PROSECUTOR. THAT'S ALL I
10 EVER WANTED TO BE, A PROSECUTOR. I SAID THAT'S WHAT I DO.
11 HE SAID WELL WHAT -- WHAT DOES A PROSECUTOR DO DADDY. I SAID
12 WELL I PROSECUTE CASES; I PRESENT CASES ON BEHALF OF THE
13 STATE AND SO FORTH. Y'ALL HAVE HEARD ALL THAT. HE SAID WELL
14 WHAT TYPE OF CASES DADDY. I SAID WELL DIFFERENT TYPES. IT
15 CAN BE ALL KINDS. I SAID I TRY A LOTTA MURDER CASES. WELL
16 WHAT ARE MURDER CASES. I KINDA EXPLAINED IT TO HIM. HE SAID
17 WELL IN OTHER WORDS DADDY -- AND I THOUGHT THIS WAS JUST THE
18 INTELLIGENCE AND THE INNOCENCE OF A CHILD -- HE SAID IN OTHER
19 WORDS DADDY YOU SPEAK ON BEHALF OF THE VICTIM. I SAID YEAH
20 THAT'S REALLY WHAT I DO. I KINDA SPEAK FOR THOSE THAT AREN'T
21 HERE TO SPEAK FOR THEMSELVES. I CONSIDER THAT AN HONOR, A
22 PRIVILEGE AND RESPONSIBILITY, A GREAT RESPONSIBILITY AS I
23 KNOW YA'LL CONSIDER YA'LL'S JURY SERVICE TO BE. MAYBE WHEN
24 YOU CAME IN HERE ON TUESDAY IT WASN'T MUCH OF AN HONOR.
25 MAYBE -- MAYBE YOU DON'T THINK OF IT RIGHT NOW AS MUCH OF AN

1 HONOR, BUT IT IS. IT'S WHAT KEEPS US ALL FREE IN THIS
2 COUNTRY.

3 PROBABLY IT AND THESE GENTLEMEN WE HAVE AND LADIES THAT
4 WE HAVE OUT THERE WHERE THE RUBBER HITS THE ROAD SO TO SPEAK.
5 BUT IT'S WHAT KEEPS US THE COUNTRY THAT WE ARE, IN THE FREE
6 SOCIETY THAT WE LIVE IN. AND I'LL TELL YOU WHAT ELSE IT
7 DOES, AND IT'S REALLY WHAT THIS CASE IS ALL ABOUT I SUBMIT TO
8 YOU.

9 IT DETERMINES Y'ALL'S VERDICT WILL DETERMINE THE VALUE
10 OF LIFE. IT'S REALLY THAT -- THAT PURE AND SIMPLE. WHAT
11 VALUE WE ALL IN PRESENTING THE TESTIMONY AND WITH YA'LL IN
12 TAKING THAT TESTIMONY AND DECIDING WHAT IT PROVES TO YA'LL;
13 NOT WHAT IT PROVES; NOT WHAT IT PROVES TO MR. RIDDLE AND MR.
14 GREGORY OR HIS HONOR; WHAT IT PROVES TO YA'LL. WHAT IS THE
15 VALUE OF LIFE IN LEXINGTON COUNTY. WHAT VALUE DO WE PLACE ON
16 THAT LIFE? AND OF COURSE SOME PEOPLE WANT THAT SPOTLIGHT
17 TURNED, REFOCUSED ON MR. RUTLAND. BUT SEE, IT'S LIKE HIS
18 LAWYER SAID, WE'RE TRYIN' MR. RUTLAND; NOT JIMMY PEELE. HE
19 ALREADY TRIED JIMMY PEELE. HE ALREADY CONVICTED JIMMY PEELE.
20 JUDGE.

21 JUDGE RUTLAND. JURY. ONE JUROR. SENTENCE HIM. AND
22 EXECUTIONER.

23 HE'S ALREADY DECIDED THAT, AND WE'RE NOT TRYING JIMMY
24 PEELE, BUT I HAVE A LITTLE MORE TO SAY ABOUT THAT LATER.
25 THEY WANT YOU TO TRY JIMMY PEELE. THEY WANT YOU TO CONVICT

1 JIMMY PEELE. HIS HONOR IS GONNA TELL YOU THE LAW OF SOUTH
2 CAROLINA.

3 HE'S GONNA TELL YOU -- AND THIS KEEPS US FREE TOO, KEEPS
4 US FREE IF ANY OF US SITTING OVER THERE, FRIENDS OR
5 RELATIVES, HE'S GONNA TELL YOU THE STATE HAS THE BURDEN OF
6 PROVING ITS CASE BEYOND A REASONABLE DOUBT. NOW WHAT THAT
7 MEANS IS WHEN YOU SIT IN THAT JURY BOX, THEY DON'T -- AND
8 THEY HAND THOSE BUTTONS TO YOU, IT DOESN'T LIGHTEN UP. WELL
9 WHAT IS A REASONABLE DOUBT? WHAT IS THE LAW? HOW DO WE
10 PERFORM AS JURORS? WHAT DO WE DO TO PERFORM THIS IMPORTANT
11 FUNCTION?

12 WELL, WE DON'T HAVE COURSES IN BEING JURORS BUT I SUBMIT
13 EACH AND EVERY ONE OF Y'ALL HAVE BEEN PREPARING FOR THIS
14 MOMENT IN YOUR LIFE, YOUR ENTIRE LIVES BY YOUR BACKGROUND,
15 EDUCATION, EXPERIENCE AND YOUR HISTORY. EVERYTHING YOU BRING
16 COMES RIGHT IN THAT JURY BOX WITH YOU AND COMMON SENSE, AND
17 YOU DETERMINE THE CREDIBILITY, BELIEVABILITY OF THE WITNESSES
18 IN THIS VERY IMPORTANT CASE JUST LIKE YOU WOULD IN MAKING ANY
19 OF LIFE'S VERY IMPORTANT DECISIONS. YOU'RE ALREADY PREPARED.
20 THE JUDGE WILL TELL YOU HE'S PRESUMED TO BE INNOCENT. THAT'S
21 A PRESUMPTION OF INNOCENCE, AND THAT PRESUMPTION IS REMOVED
22 AT THE POINT IN TIME THE STATE HAS SUBMITTED EVIDENCE TO YOU
23 OF PROOF BEYOND A REASONABLE DOUBT OF GUILT. NOW HIS HONOR'S
24 GONNA TELL YOU THE ELEMENTS, HE'S GONNA GO THROUGH THE
25 SPECIFIC ELEMENTS OF EACH AND EVERY OFFENSE. MURDER,

1 POSSESSION OF A FIREARM DURING THE COMMISSION OF A VIOLENT
2 CRIME, POSSESSION OF A PISTOL DURING THE COMMISSION OF THE
3 MURDER OF HOMICIDE, POINTING AND PRESENTING A FIREARM. THE
4 POINTING OR PRESENTING OF ANY FIREARM LOADED OR UNLOADED AT
5 ANOTHER PERSON THAT'S THE INCIDENT DOWN ON SANDRA DRIVE
6 EARLIER THAT DAY WITH A SHOTGUN. HE'S GONNA TELL YOU ABOUT
7 THAT.

8 HE'LL TELL YOU THE ELEMENTS OF SELF-DEFENSE, THE FOUR
9 BASIC ELEMENTS OF SELF-DEFENSE. HE WILL ALSO TELL YOU UNDER
10 MURDER IS A GREATER CHARGE MURDER IS A LESSER CHARGE,
11 VOLUNTARY MANSLAUGHTER. MURDER IS THE UNLAWFUL KILLING OF
12 ANOTHER HUMAN BEING WITH MALICE AFORETHOUGHT EXPRESSED OR
13 IMPLIED.

14 HE'LL DEFINE EACH AND EVERY ONE OF THOSE TERMS MUCH
15 BETTER THAN I CAN, BUT IF YOU KILL ANOTHER PERSON WITH
16 EVILNESS, WITH SOCIAL DEPRAVITY, WITH A HEART FATALLY BENT ON
17 DOING MISCHIEF, SCHEMING AT THE TIME, IF THAT'S YOUR MOTIVE
18 TO KILL, TO DO AN UNLAWFUL ACT KNOWINGLY AND INTENTIONALLY,
19 TO FORM THAT PRIOR TO THE FATAL SHOT, THAT'S MALICE
20 AFORETHOUGHT.

21 NOW THERE'S ONLY ONE KIND OF MALICE; THERE'S ONLY ONE
22 KIND OF DEPRAVITY, BUT IT CAN BE EXHIBITED IN DIFFERENT WAYS.
23 EXPRESS MALICE IS WHEN I TAKE A WEAPON AND I SAY I'M GONNA
24 KILL YOU. I EXPRESS MY INTENTION AND I FOLLOW THROUGH.
25 IMPLIED MALICE IT'S NOT A DIFFERENT BUT AS I SAY, IT'S

1 EXHIBITED IN A DIFFERENT WAY. MALICE MAY BE IMPLIED FROM THE
2 USE OF A DEADLY WEAPON. IF ONE KILLS ANOTHER BY THE USE OF A
3 DEADLY WEAPON, YOU MAY IMPLY MALICE SUCH THAT WOULD GIVE RISE
4 TO THE CONDITION FOR MURDER. NOW IT IS A LESSER INCLUDED
5 OFFENSE. THE JUDGE WILL TELL YOU VOLUNTARY MANSLAUGHTER.

6 VOLUNTARY MANSLAUGHTER IS THE UNLAWFUL KILLING OF
7 ANOTHER HUMAN BEING WITHOUT MALICE. THE PRESENCE OR ABSENCE
8 OF MALICE DETERMINES WHETHER A HOMICIDE IS MURDER OR
9 VOLUNTARY MANSLAUGHTER.

10 VOLUNTARY MANSLAUGHTER IS THE KILLING OF ANOTHER IN
11 SUDDEN HEAT AND PASSION WITH SUFFICIENT LEGAL PROVOCATION.
12 IF YOU DECIDE THAT HE'S GUILTY OF AN UNLAWFUL HOMICIDE, BUT
13 YOU HAVE A REASONABLE DOUBT AS TO WHETHER IT'S MURDER OR
14 VOLUNTARY MANSLAUGHTER YOU MUST FIND HIM GUILTY OF THE
15 VOLUNTARY MANSLAUGHTER IF YOU MAKE THAT DECISION. THAT'S
16 ENTIRELY YOUR AREA. HIS HONOR WILL TELL YOU THAT.

17 NOW HOMICIDES MAY BE JUSTIFIED. THAT GETS INTO THE
18 ELEMENT OF SELF-DEFENSE, THE FOUR ELEMENTS OF SELF-DEFENSE
19 PRIMARY.

20 BUT I'LL TELL YOU SOME MORE LAW THE JUDGE IS GONNA TELL
21 YOU AND THAT'S THE LAW OF MUTUAL COMBAT. MUTUAL COMBAT
22 OCCURS WHEN TWO MEN -- I TOOK THAT LANGUAGE SOLELY FROM A
23 CASE.

24 I GUESS IT COULD BE TWO WOMEN. BUT TWO MEN ENGAGED IN
25 MUTUAL COMBAT DESIGNEDLY THEY BOTH GO TO THIS PLACE WITH THE

1 INTENTION OF MEETING TOGETHER AND DOING HIM HARM OF EITHER.
2 THEY MEET AND FIGHT. ONE IS KILLED. HE CANNOT SET UP SELF-
3 DEFENSE.

4 IN A CASE OF THAT KIND HE BROUGHT ON THE DIFFICULTY AND
5 CANNOT BE SAID TO BE WITHOUT FAULT IN BRINGING ON THE
6 DIFFICULTY.

7 TWO PEOPLE PRE-AGREE TO MEET AT A PARTICULAR LOCATION
8 FOR THE PURPOSE OF FIGHTING FOR THE PURPOSE OF DOING -- FOR
9 THE PURPOSE OF KILLING, IF THEY KNOW THAT A HOMICIDAL ACT MAY
10 WELL OCCUR, NEITHER ONE OF THEM IS WITHOUT FAULT IN BRINGING
11 ON THE DIFFICULTY. WHAT THAT MEANS IS THE PLEA OF SELF-
12 DEFENSE IS NOT AVAILABLE, IS NOT AVAILABLE TO ONE WHO KILLS
13 OR SERIOUSLY INJURES ANOTHER WHILE ENGAGED IN A MUTUAL
14 COMBAT.

15 NOW I'M GONNA APPLY THIS TO THE FACTS OF THIS CASE AS WE
16 GO THROUGH IT, AND I WANNA SAY ONE OTHER THING. IT'S KIND OF
17 -- I DON'T KNOW WHATCHU CALL IT. I'VE LOST MY WORD. IT'S
18 LIKE A (UNINTELLIGIBLE). IT'S HARD TO REMEMBER EACH AND
19 EVERY STATEMENT MADE, EACH AND EVERY ANSWER GIVEN BY THE
20 WITNESS.

21 I ASSURE YOU IF I MISSTATE SOMETHING IT IS NOT
22 INTENTIONAL JUST BY MEMORY. YOU APPLY THE FACTS AS YOU
23 RECALL THEM TO BE, AS YOU REMEMBER THEM TO BE. IF YOU NOTICE
24 YOU DON'T TAKE NOTES. IN SOUTH CAROLINA THEY DON'T ALLOW
25 JURORS TO TAKE NOTES BECAUSE THEY DON'T WANT SOMEONE WRITING

1 AND MAYBE MISSING SOMETHING WHILE THE PARTY'S STILL TALKING.
2 WELL, I COULD BE VERY RIGHT. I CAN TAKE NOTES. AND THAT'S
3 THE REASON FOR THAT. BUT I ASSURE YOU THAT IT WAS NOT BY WAY
4 OF MISLEADING ANY WAY. IF YOU REMEMBER IT DIFFERENTLY YOU
5 APPLY IT AS YOU RECALL IT TO BE. NOW MR. RUTLAND IS QUITE A
6 GUY.

7 QUITE A GUY. I TELL YOU I THINK THEY OUGHT TO ELECT HIM
8 PRESIDENT OF SISTER CARE BECAUSE HE IS JUST A GOOD SAMARITAN.
9 GETS UP HERE AND GOIN' TO HOUSTON FOR TEN DAYS SETTIN' HER UP
10 IN AN APARTMENT DOWN THERE. I SHOULDN'T HAVE INDICTED HIM; I
11 SHOULD'VE HAD AN AWARD CEREMONY FOR HIM. FOUR ELEMENTS OF
12 SELF-DEFENSE. THE DEFENDANT MUST BE WITHOUT FAULT IN
13 BRINGING ON THE DIFFICULTY. THIS IS THE LAW. THE DEFENDANT
14 MUST HAVE ACTUALLY BELIEVED THAT HE WAS IN IMMINENT DANGER OF
15 LOSING HIS LIFE OR SUSTAINING SERIOUS BODILY HARM OR HE
16 ACTUALLY WAS IN SUCH IMMINENT DANGER. IF HIS DEFENSE IS
17 BASED UPON THE BELIEF OF A REASONABLY PRUDENT MAN OF ORDINARY
18 FIRMNESS AND COURAGE WOULD HAVE ENTERTAINED THE SAME BELIEF.
19 IF THE DEFENDANT ACTUALLY WAS IN IMMINENT DANGER, THE
20 CIRCUMSTANCES WERE SUCH THAT WOULD WARRANT A MAN OF ORDINARY
21 PRUDENCE, FIRMNESS AND COURAGE TO STRIKE THE FATAL BLOW IN
22 ORDER TO SAVE HIMSELF FROM SERIOUS BODILY HARM OR LOSES HIS
23 LIFE.

24 THE DEFENDANT HAD NO OTHER PROBABLE MEANS OF AVOIDING
25 THE DANGER OF LOSING HIS OWN LIFE AND SUSTAINING SERIOUS

1 BODILY INJURY THAN TO ACT AS HE DID IN THIS PARTICULAR
2 INSTANCE.

3 THE LAW VALUES LIFE. KILLING MUST BE NECESSARY TO BE
4 APPROPRIATE TO BE SELF-DEFENSE. NOW THIS IS THE LAW OF SOUTH
5 CAROLINA, BUT I SUBMIT TO YOU HE DOESN'T AND HIS ACTIONS
6 DON'T COMPLY TO THE LAW OF THE STATE OF SOUTH CAROLINA. LET
7 ME TELL YOU WHY I SAY THAT. THERE ARE SEVERAL REASONS.
8 THERE ARE SEVERAL REASONS. FIRST OFF HE IGNORES AND DEFIES
9 THE LAW GENERALLY. GENERALLY. HE HAS A WEAPON FIRST OF ALL
10 THAT HE DOESN'T EVEN HAVE THE RIGHT TO POSSESS. THAT'S
11 DEFYIN' THE LAW. HE DOESN'T EVEN HAVE AN I.D. TO PURCHASE
12 IT.

13 NOW THEY WANT TO GET UP HERE AND SAY WELL SALLY PEELE,
14 SALLY PEELE SIGNED THIS FORM. SALLY PEELE BOUGHT THESE
15 WEAPONS.

16 THE ONLY MISTAKE IN THIS CASE IS I DIDN'T INDICT SALLY
17 PEELE.

18 THAT'S MY MISTAKE. THAT'S MY FAULT. THAT'S WHAT I
19 SHOULDA DONE. HE WANTS TO HIDE BEHIND SALLY PEELE. BUT I
20 WAS COMPLYIN' WITH THE LAW. WELL, WAS HE COMPLYIN' WITH THE
21 LAW WHEN HE JUMPED BOND AND HE WENT TO FLORIDA AND HIS BOND
22 FORM SAID DO NOT LEAVE THE STATE OF SOUTH CAROLINA? THAT'S
23 THE PERSON THAT'S GONNA COMPLY WITH THE LAW. THAT'S THE
24 PERSON THAT'S GONNA GET IN HIS AUTOMOBILE AND DEFY A COURT
25 ORDER AND GO TWO STATES AWAY. HE'S GONNA COMPLY WITH THE

1 LAW.

2 THAT'S WHAT HE'S GONNA DO. THAT'S WHAT HE'S HAVIN' YOU
3 BELIEVE.

4 THAT'S WHAT HE WANTS ALL OF YOU TO BELIEVE. WELL, SEE,
5 THOSE ARE ELEMENTS OF SELF-DEFENSE, BUT SEE HERE'S FRED'S
6 ELEMENTS OF SELF-DEFENSE. THEY'RE A LITTLE DIFFERENT THAN
7 THE LAW OF SOUTH CAROLINA. THEY'RE MUCH DIFFERENT, AND WHEN
8 YOU ANALYZE 'EM AND APPLY 'EM TO THE FACTS OF THIS CASE YOU
9 DON'T COME UP WITH VOLUNTARY MANSLAUGHTER. YOU SURE DON'T
10 COME UP WITH SELF-DEFENSE. YOU COME UP WITH MURDER. YOU
11 MUST BELIEVE -- YOU MUST DETERMINE THE BELIEVABILITY OF THE
12 WITNESSES.

13 YOU CAN BELIEVE ANY OF 'EM, ALL OF 'EM, NONE OF 'EM,
14 PART OF WHAT ONE SAYS, ALL OF WHAT ONE SAYS, NONE OF WHAT ONE
15 SAYS.

16 THAT'S WHAT YOU HAVE TO DECIDE. WELL, LET'S GO THROUGH
17 'EM A LITTLE BIT. LET'S GO THROUGH FRED'S ELEMENTS OF SELF-
18 DEFENSE.

19 DISCUSS THE PLANS A MONTH BEFORE. DETECTIVE FRIER --
20 WE'LL TALK A LITTLE BIT MORE ABOUT HIM LATER -- SAID --
21 DETECTIVE FRIER SAID HE TOLD ME THEY TALKED ABOUT IT A MONTH
22 OR SO BEFORE. HE TOLD ME THAT HE COULD TAKE CARE OF IT OR
23 GET SOMEONE THAT COULD. NOW THAT STATEMENT WHEN YOU START
24 TALKIN' ABOUT KILLIN' A MONTH BEFORE, THERE'S NO SOCIAL
25 JUSTICE IN YOUR HEART, LADIES AND GENTLEMEN. THE TRAIN'S ON

1 THE TRACK. HE'S THE TRAIN ON THE TRACK. LIKE MY DADDY SAID
2 YOU RUN UP AND DOWN THE TRACK LONG ENOUGH YOU GET HIT BY A
3 TRAIN.

4 HE'S THE TRAIN AND HE'S COMIN' TOWARD YOU. JIMMY PEELE.
5 JIMMY PEELE'S FATE WAS DECIDED A MONTH BEFORE. BUT IT'S NOT
6 JUST DETECTIVE FRIER. OH, NO. IT'S DAVID JONES. IT'S DAVID
7 JONES.

8 NOW YOU WILL HAVE TO BELIEVE THAT SOMEONE TOLD DAVID
9 JONES AND THEN HAD HIM GET UP HERE AND LIT. IN THE JAIL CELL
10 HE SAID WE TALKED ABOUT IT A MONTH BEFORE. I WAS GONNA DO IT
11 A MONTH BEFORE. THAT'S INCONSISTENT WITH SELF-DEFENSE. NOW
12 SELF-DEFENSE YOU ARM YOURSELF BEFOREHAND. IT JUST AMAZES ME.
13 THE GRIEVING WIDOW OUT THERE, THE GRIEVING WIDOW, SCARED TO
14 DEATH OF JIMMY PEELE. OH, I'M SCARED OF JIMMY PEELE. I'M
15 SCARED OF HIM. I'VE SEEN IT IN HIS EYES BEFORE. THIS IS
16 JULY, SEPTEMBER MISSIN' WORK AND ALL, BUT LOOK WHAT SHE BUYS
17 HIM FOR CHRISTMAS IN DECEMBER OF 1991. CHRISTMAS PRESENT. A
18 CHRISTMAS PRESENT. IF SHE WAS TRULY BATTERED AND BOUGHT THIS
19 FOR HIM IN 1991 SHE SHOULDA KILLED THE S.O.B. THAT'S WHAT
20 SHE SHOULDA DONE. NOW YOU KNOW THAT'S INCONSISTENT WITH
21 BUYIN' THIS. YOU KNOW IT IS. AND YOU KNOW WHAT THAT GOES
22 TO?

23 HER CREDIBILITY. HER BELIEVABILITY. BUT THEY JUST
24 GOIN' DOWN THERE AND FIX THE CAR AND LEAVE TOWN. GOOD
25 SAMARITAN FRED AND THE GRIEVIN' WIDOW. WELL, THEY JUST HAP -

1 - THEY CAN'T JUST TAKE THE DISTRIBUTOR CAP DOWN THERE. THEY
2 CAN'T JUST TAKE THE DISTRIBUTOR CAP DOWN THERE. THEY GOTTA
3 STOP OVER HERE AT THE PAWN SHOP BECAUSE THEY'RE WORRIED ABOUT
4 THIS SHOTGUN, THIS CHRISTMAS PRESENT. SO WHAT DO THEY DO?
5 WELL, ALL WE WANT TO DO IS BUY A SHOTGUN SO JIMMY COULDN'T
6 HAVE IT, SO JIMMY COULDN'T GET IT. WELL, THEY BUY THAT AND
7 THEY BUY FOUR FIVE DOUBLE AUGHT BUCKS THAT'LL KILL BEAR,
8 DEER, HOGS, WHATEVER. THEY BUY THIS. THEY BUY AMMO FOR
9 THIS.

10 A BOX OF AMMO I BELIEVE. I'M NOT SURE HOW MANY, BUT
11 THEY BUY AMMO FOR THIS, AND WHAT TIME WAS IT? 9:44 A.M.
12 9:44 A.M., AND THEY GO STRAIGHT FROM THE PAWN SHOP, THE GUN
13 SHOP TO JIMMY PEELE'S HOUSE, BUT YOU KNOW I KNOW OLD JIMMY'S
14 THE AGGRESSOR BECAUSE HE HAD MARIJUANA IN HIS SYSTEM. WHAT'S
15 JIMMY DOIN'? HE'S LOOKIN' AT A BOOK AND THEY ROLLIN' A
16 JOINT. NOW IF YOU FIND THAT MAKES HIM THE AGGRESSOR, IF YOU
17 FIND THAT MAKES HIM WORTHY OF KILLING, FIND HIM NOT GUILTY.
18 LET HIM AND HER GET THE SHOTGUN AND GUN AND WALK OUT OF THE
19 COURTROOM.

20 THAT'S TOTALLY IRRELEVANT, AND I SUBMIT TO YOU THIS: HE
21 HAD VALIUM AND MARIJUANA IN YOUR SYSTEM YOU COULDN'T KILL
22 NOBODY IF YOU WANTED TO. THE DOCTOR SAID THOSE ARE THE
23 DOWNERS.

24 THOSE ARE THE TYPE DRUGS THAT WILL MAKE YOU MELLOW.
25 THEY DON'T MAKE YOU AGGRESSIVE. BUT HE GOES THERE AND

1 SOMEHOW MAGICALLY, THE BEST I COULD GET OUT OF HIS TESTIMONY,
2 MAGICALLY THIS SHOTGUN GETS LOADED. I NEVER HAVE DECIDED AND
3 HE NEVER HAS DECIDED HOW OR WHO OR WHEN THE SHOTGUN GOT
4 LOADED.

5 AND SHE GETS OUT WITH THIS. SHE GETS OUT WITH THIS.
6 AND JIMMY'S IN THE HOUSE WITH HIS FRIEND LOOKIN' AT THE BOOK
7 WITH THE MAN THERE. I SUBMIT, I SUBMIT IN YOUR JURY ROOM IT
8 SHOULDN'T TAKE YOU FIVE MINUTES TO DETERMINE THE ISSUE ON
9 POINTING AND PRESENTING. I SUBMIT EVERYBODY IN THIS
10 COURTROOM WOULD AGREE HE'S GUILTY OF POINTIN' AND PRESENTIN'
11 INCLUDING MR. RUTLAND 'CAUSE HE SAID HE WAS. HE SAID HE WAS.
12 WE OUGHT TO GET HIM TO SIGN THE INDICTMENT GUILTY ON POINTING
13 AND PRESENTING THIS WEAPON THAT MORNING. LET'S LISTEN TO
14 THAT MORNING A MINUTE. VERY RARE OCCASIONS THAT I HAVE THE
15 OPPORTUNITY TO HEAR THE PEOPLE THAT I GET TO SPEAK FOR. VERY
16 RARELY DOES THE JURY GET TO HEAR IT. LET'S LISTEN TO THIS.
17 (A PORTION OF THE TAPE WAS PLAYED FOR THE JURY.) HE SOUNDS
18 IN A RAGE, DOESN'T HE? HE SOUNDS IN A RAGE. HE'S SCARED TO
19 DEATH.

20 (ANOTHER PORTION OF THE TAPE WAS PLAYED FOR THE JURY.)
21 WHY DO YOU THINK HE WASN'T THERE WHEN THE POLICE GOT THERE?
22 SIR, THEY'RE COMIN' BACK IN THE HOUSE. I GOT TO GO. BYE.
23 SCARED.

24 SCARED. FOR HIS LIFE. THEY'RE BOTH THERE WITH GUNS.
25 WHEN WE GOT -- WE GOT THE MAN'S VOICE THE VICTIM'S VOICE

1 RIGHT THERE, AND THE DEFENDANT AND HIS GIRLFRIEND AGREEING
2 WITH ALL THIS, AGREEIN' WITH ALL THAT. BUT THEY SAID HE'S
3 NOT THE AGGRESSOR. HE'S NOT THE AGGRESSOR 'CAUSE HE DIDN'T
4 KILL JIMMY THEN. WELL, SEE, THAT GOES TO THE NEXT ELEMENT.
5 YOU CAN'T HAVE A WITNESS ON THE VICTIM'S PROPERTY. STAND UP,
6 BRUCE.

7 THEY DIDN'T COUNT ON BRUCE BEIN' THERE YOU SEE. THANK
8 YOU.

9 YOU REMEMBER BRUCE SHARPE. HE WAS THE GENTLEMAN THERE
10 ON THE FLOOR WITH THE MANUAL WITH JIMMY. I SUBMIT TO YOU IF
11 THERE HAD NOT BEEN A VIC -- A WITNESS THERE, IF BRUCE SHARPE
12 HAD NOT BEEN THERE THERE WOULD HAVE BEEN NO KILLING AT THE
13 BOW-WOW BOUTIQUE. THERE WOULD HAVE BEEN A KILLING AT [REDACTED]
[REDACTED] [REDACTED] [REDACTED]. THEY HAD A WITNESS. THEY HAD A WITNESS. HE
15 THREATENED THE VICTIM. NOW HE COMES UP WITH ALL THESE
16 THOUGHTS THAT HE JUST PULLS OUT OF THE AIR THAT HE NEVER
17 BOTHERED TO TELL DETECTIVE FRIER THAT HE -- THAT HE SAID HE
18 TOLD ME HE WAS GONNA BLOW ME AWAY AND HE WAS GONNA F. ME UP
19 AND HE'S GONNA TAKE ME OUT. YOU'LL HAVE EACH AND EVERY ONE
20 OF THESE STATEMENTS BACK THERE. THE 4TH. THE 4TH. THE
21 TAPE.

22 THE 7TH. THE TAPE OF IT ACTUALLY; NOT JUST THE
23 TRANSCRIPT.

24 YOU'LL HAVE ALL THAT IN YOUR JURY ROOM. FIND OUT WHAT
25 HE SAYS THERE. JIMMY THREATENED HIM? AS A MATTER OF FACT HE

1 DOESN'T EVEN TELL DETECTIVE FRIER UNTIL THE MONDAY AFTER THE
2 KILLING WHAT HAPPENED. WHAT HAPPENED. THAT MORNIN'. AND
3 YOU WON'T FIND ANYTHING ABOUT SQUIRREL CAGE OR PHYSICAL
4 CONFRONTATION OR ANYTHING AND ON THE 7TH HE SAYS SALLY WAS
5 DRAGGING JIMMY AND IT'S RIGHT THERE BY A CORRECTION. SALLY
6 COMES OUT THE BACK DOOR AND A LITTLE CORRECTION LATER SORT OF
7 DRAGGING JIMMY. SHE CAN GIVE AS GOOD AS SHE CAN TAKE, AND
8 IT'S IN HIS STATEMENT. NOW HIS WORDS I SUBMIT TO YOU AND
9 THIS IS ONE OF HIS ELEMENTS OF SELF-DEFENSE: IF AT FIRST YOU
10 DON'T SUCCEED TRY AGAIN. TRY AGAIN. NOW THEY LEAVE AFTER --
11 AFTER WEAPONS, AFTER SHOT -- AND LIKE I SAY, I APOLOGIZE I
12 DIDN'T INDICT HER FOR THAT, FOR POINTIN' THAT GUN. BUT THEY
13 LEAVE AND THEY GO TO ROBIN'S AND THEY GO TO THE SCHOOL AND
14 THEY GO BACK TO ROBIN'S. IF AT FIRST YOU DON'T SUCCEED TRY
15 AGAIN.

16 NOW I SUBMIT TO YOU, LADIES AND GENTLEMEN, BASED ON
17 ROBIN HUNT'S TESTIMONY AND DAVID JONES' TESTIMONY THAT SALLY
18 PEELE SPOKE WITH BY TELEPHONE JIMMY PEELE AT ROBIN HUNT'S
19 HOUSE.

20 THEY ALL AGREE THEY WENT BACK THERE. JIMMY'S HOUSE.
21 ROBIN'S HOUSE. THE PHONE CALL. NOW LET ME TELL YOU WHY I
22 SAY IT. THERE'S A NUMBER OF REASONS. YOU KNOW OLD MR.
23 RUTLAND SAYS WELL I JUST HAPPENED TO PICK THIS GUN UP WHEN I
24 GOT OUT OF THE VAN AT THE BOW-WOW BOUTIQUE BECAUSE I WAS IN
25 FEAR OF MY LIFE, BECAUSE JIMMY HAD THREATENED ME SO MUCH.

1 BUT ISN'T IT INTERESTING THAT WHILE THEY WERE AT ROBIN'S
2 HOUSE THE SHOTGUN AND THIS GUN JUST LAID IN THE VAN. NOW
3 THEY HAD LEFT JIMMY IN SUCH A RAGE IN ROBIN'S VAN WHOSE HOUSE
4 HE HAD BEEN TO BEFORE 'CAUSE MR. RUTLAND SAID YEAH WE WERE
5 ALL OVER AT ROBIN'S HOUSE JULY 19TH ME AND JIMMY JUST LIKE A
6 FAMILY REUNION. WE WERE ALL OVER THERE. SO HE KNEW ROBIN'S
7 VAN.

8 HE KNEW WHO THEY WERE WITH AND HE KNEW ABSOLUTELY WHERE
9 TO GO AND THEY WERE IN SUCH FEAR OF JIMMY PEELE THAT THEY
10 LEFT ALL THEIR WEAPONS OUT IN THE VAN. NOW IS THAT
11 CONSISTENT WITH THAT FEAR? IS THAT CONSISTENT WITH SELF-
12 DEFENSE?

13 HE TOLD DAVID JONES ABOUT THE PHONE CALL. HE TOLD DAVID
14 JONES ABOUT THE PHONE CALL. WE KNEW HE WAS COMIN'. WE KNEW
15 HE WAS COMIN'. THAT'S WHY JIMMY PEELE WAS THERE. THEY WERE
16 NOT GONNA LEAVE TOWN WITH THAT ISSUE UNRESOLVED. I -- I
17 AGREE WITH THAT. THEY WASN'T GONNA LEAVE WITH THE ISSUE
18 UNRESOLVED ABOUT THE DAUGHTER, BUT MORE IMPORTANT THAN THAT,
19 THEY WERE NOT GONNA LEAVE TOWN WITHOUT THE ISSUE RESOLVED OF
20 JIMMY PEELE. THEY HAD TO TALK TO HIM SOME WAY. THEY HAD TO.
21 THAT'S THE PHONE CALL THAT ROBIN SAYS I HEARD HER SAY JIMMY
22 AND CHRISTINE. 45 MINUTES AT THE SHOP. AND THAT'S WHY JIMMY
23 PEELE COME TO THAT SHOP. AND I'LL TELL YOU WHAT: IF JIMMY
24 PEELE DIDN'T TAKE A WEAPON WITH HIM, HE'S A FOOL. HE'S A
25 FOOL.

1 NOW I SUBMIT YOU KNOW VIOLENCE ISN'T THE WAY TO SOLVE
2 YOUR PROBLEMS, BUT BASED ON WHAT HAD OCCURRED EARLIER THAT
3 DAY HE HAD EVERY RIGHT TO BELIEVE THEY WOULD BE ARMED, AND HE
4 HAD EVERY RIGHT TO BELIEVE HIS LIFE WOULD BE IN DANGER, BUT
5 IT HAD TO BE RESOLVED. SO THEY LEAVE THE WEAPONS IN THE VAN
6 AT THE HOUSE, BUT WHEN THEY GET TO THE BOW-WOW BOUTIQUE
7 FRED -- I DON'T CARE IF HE PUTS IT IN HIS PANTS, HIS BELT,
8 BEHIND HIS EAR OR WEARS IT LIKE AN EARRING. I DON'T CARE.
9 HE'S ARMED WITH THIS GUN, AND THIS GUN IS LOADED. AND I
10 SUBMIT HE KNOWS JIMMY PEELE'S IN ROUTE. NOW HE'S GONNA BE ON
11 NEUTRAL PROPERTY NOW YOU SEE. NEUTRAL PROPERTY. AND YOU
12 REMEMBER HE SAID HE WAS PACIN' AROUND BACK THERE, PACIN'
13 AROUND.

14 MAN I WAS ALL BACK IN THERE LOOKIN' AROUND. HE'S
15 SCOPIN' IT OUT. HE'S WANTIN' TO KNOW. HE'S TACTICAL.
16 TACTICAL!

17 HE'S GETTIN' PREPARED. HE'S GETTIN' READY FOR JIMMY
18 PEELE.

19 FOR JIMMY PEELE. BOBBY TINDAL IS A FIGMENT OF SALLY
20 PEELE'S IMAGINATION. SHE DIDN'T THINK HE HAD THAT GUN. I
21 BELIEVE THAT. SHE DIDN'T THINK HE HAD IT. DIDN'T HAVE IT.
22 MAKE AN ACCESSORY OUT OF HIM. THEY WERE GONNA KILL HIM
23 ANYWAY. THEY GOT LUCKY. THEY GOT LUCKY WITH THIS ONE. THEY
24 GOT LUCKY WITH THIS BECAUSE I TELL YOU WHAT, IF JIMMY PEELE
25 CAME IN THERE WITH MALICE IN HIS HEART, 32 BULLETS, MALICE IN

1 HIS HEART. 32 BULLETS IN HIS MAGAZINE, HE WOULDN'T SHOT
2 (UNINTELLIGIBLE) AND THIS WAS NEVER FIRED. THEY'RE THE
3 BENEFICIARIES OF THIS (UNINTELLIGIBLE) THEY THINK THEY ARE.
4 BUT HE GOT HIMSELF SET UP. HE LOOKED AROUND AND YOU LOOK ON
5 THAT DIAGRAM AND WHERE HE GOT IN THAT DOORWAY. HE GOT IN THE
6 POSITION OF FIRING APPROPRIATELY AND HE GOT READY WHEN HE
7 SEEN JIMMY PEELE COME BY THAT WINDOW. HE WAS READY. THEY
8 COULDN'T TAKE THE SHOTGUN IN. IT'S TOO AWKWARD, BUT THEY'RE
9 ON NEUTRAL PROPERTY NOW. NEUTRAL PROPERTY. I DON'T DOUBT
10 THAT JIMMY LOOKED AT SALLY. SHE'S A DIVERSION. I DON'T
11 DOUBT THAT. AND JIMMY CAME IN AND HE'S BACK THERE AND HE'S
12 READY.

13 HE'S READY. JIMMY NEVER SAID A WORD, AND THEY WANNA SAY
14 VOLUNTARY MANSLAUGHTER. NO, SIR. NO, MA'AM. SUFFICIENT
15 LEGAL PROVOCATION WALKIN' IN THERE TO MEET 'EM. REQUESTED
16 TO.

17 SUFFICIENT LEGAL PROVOCATION? NO, SIR. NO, MA'AM. HE
18 SHOT AS MANY TIMES AS IS NECESSARY TO KILL HIM. TWICE IN HIS
19 CHEST; ONE'S LOW AND ONE'S IN HIS BRAIN. SHOT HIM TO KILL
20 HIM AND SHOT AS MUCH AS HE'D HAVE TO. HERE IS WHERE FRED.
21 FRED.

22 OLD FRED SAID WELL I'M JUST A OLD BOY WANTIN'
23 (UNINTELLIGIBLE) TO KILL. I WENT TO WILL LOU GRAY SCHOOL AND
24 I DON'T KNOW THIS AND SCOTTIE OVERBORE ME AND I RAN TO
25 FLORIDA 'CAUSE YOU TOLD ME YOU WERE GONNA GIVE ME 30 YEARS.

1 FRED'S SLICK. YOU SAW HIM UP THERE ON THE WITNESS STAND.
2 YOU JUDGE HIS DEMEANOR, HIS CREDIBILITY, HIS ABILITY TO
3 RESPOND TO QUESTIONS APPROPRIATELY, THE DIFFERENCE IN HIS
4 DEMEANOR BETWEEN DIRECT AND CROSS-EXAMINATION. SEE, HERE'S
5 WHAT FRED WANTS TO DO. HE WANTS TO SHIFT THE BLAME AND HIDE
6 THE GUILT. HE WANTS TO BLAME JIMMY PEELE. HE WASN'T WORTH A
7 DAMN.

8 THAT'S WHAT HE TOLD DAVID JONES. HE LAUGHED ABOUT IT
9 OVER THERE WITH DAVID. JIMMY'S FAULT. I JUST CAME UP HERE
10 TO HELP HER. SEE, NOW JIMMY CAN'T DEFEND HIMSELF. JIMMY
11 CAN'T COME IN HERE AND TELL US HIS VERSION SO HE'S GONNA
12 BLAME JIMMY AND JIMMY HAD THIS GUN AND JIMMY -- AND THEN IF
13 YOU DON'T BUY THAT, WELL, LET'S BLAME DETECTIVE FRIER. HE
14 WROTE IT ALL DOWN. HE MADE ME SAY IT. HE MADE ME DO IT.
15 NONE OF THIS IS TRUE. 42 YEAR-OLD SUPERVISOR, CONSTRUCTION
16 SUPERVISOR FRED RUTLAND WAS JUST A DUPE OF DETECTIVE SCOTTIE
17 FRIER.

18 I MAKE A BIG DEAL OUT OF MIRANDA RIGHTS. YOU DURN RIGHT
19 I DO. AND THAT JUDGE IS GONNA CHARGE YOU THE LAW OF THE
20 CASE.

21 MIRANDA RIGHTS HAVE TO BE GIVEN. THEY HAVE TO BE GIVEN.
22 I KNOW IT; THE JUDGE KNOWS IT, AND THE JURY MUST DETERMINE
23 THAT THEY'VE BEEN GIVEN, AND YOU MUST THEN DETERMINE THAT THE
24 STATEMENT'S GIVEN FREELY AND VOLUNTARILY. IT'S ANOTHER ISSUE
25 THAT HAS TO BE DETERMINED. THAT'S WHY I GO THROUGH THESE

1 RIGHTS.

2 THAT'S WHY I WENT THROUGH IT. THAT'S WHY MR. RIDDLE
3 WENT THROUGH THIS MIRANDA CARD WITH DEPUTY GARNER, THE BIG
4 SERGEANT, BIG SERGEANT DEPUTY, MY FIRST WITNESS. THAT'S WHY
5 I GO THROUGH THE WRITTEN FORM, TO SHOW THAT HE WAS
6 APPROPRIATELY ADVISED, AND YOU LISTEN TO ALL THAT CRYIN'.
7 YOU LISTEN TO ALL THAT CRYIN' ON THAT TAPE. YOU KNOW WHAT
8 CRYIN' IS. RIGHT THERE IT IS; AIN'T NOTHIN' BUT CROCODILE
9 TEARS.

10 THAT'S ALL IT IS. IT'S NOT CRYIN' THROUGHOUT. IT'S NOT
11 SOMEBODY THAT'S OUTTA CONTROL OR OUTTA TOUCH WITH REALITY,
12 AND IT'S SOMEBODY THAT'S WHININ' AND YOU TELL ME HOW
13 DETECTIVE FRIER IS EVER OVERBEARIN' TO HIM, HOW HE EVER
14 MISTREATS HIM, HOW HE EVER PROMISES HIM ANYTHING. THIS IS
15 JUST A MADE-UP, MANUFACTURED DEFENSE. HE JUST GOT ME IN HIS
16 CONFIDENCE.

17 HE WANTS TO BLAME SCOTTIE, JIMMY FIRST, SCOTTIE SECOND.
18 HE WANTS TO BLAME ME. OH, I JUMPED BOND 'CAUSE YOU TOLD ME
19 YOU WAS GONNA GIVE ME 30 YEARS. IT'S YOUR FAULT SOLICITOR.
20 AND THE TACTICS THE WAY YOU TRIED THIS CASE. IT'S YOUR FAULT
21 SOLICITOR.

22 YOU DID IT. IT -- AND LET ME TELL YOU WHAT HE'S GONNA
23 DO NOW. HE'S GONNA GATHER UP ALL THIS BLAME AND HE'S GONNA
24 DUMP IT RIGHT OVER THERE ON YA'LL, AND HE WANTS YA'LL TO
25 SHARE THAT GUILT WITH HIM. SAY ALL THIS IS SAD. THIS IS

1 TRAGIC.

2 POOR OLD FRED RUTLAND. NOTHIN' ELSE COULD DO. WELL,
3 JIMMY PEELE HAD RIGHTS AND STILL GOT RIGHTS FOR SELF-DEFENSE.
4 AND SEE HERE HE'S FINE WITH THAT STRATEGIC MEMORY. I USED TO
5 CALL IT SELECTIVE MEMORY BUT HIS -- HE'S BETTER THAN THAT.
6 HE'S GOOD. STRATEGIC MEMORY YOU TALK -- HE'S THOUGHT THROUGH
7 THIS STUFF A LOT. SELECTIVE YOU JUST GET TO A BAD QUESTION.
8 OH, I DON'T REMEMBER. I DON'T REMEMBER WHO LOADED THE GUN.
9 I DON'T REMEMBER THIS; I DON'T REMEMBER THAT. I REMEMBER HIM
10 TELLIN' ME ABOUT SELF-DEFENSE. I DON'T REMEMBER THIS; I
11 DON'T REMEMBER THAT. I REMEMBER I WANTED A CIGARETTE. IT'S
12 VERY STRATEGIC. IT'S VERY PLANNED. HE'S GOT A, B, C, D, AND
13 YOU KNOW WHAT (UNINTELLIGIBLE) IF HE'S VERY PLANNED AND
14 ORGANIZED.

15 STEP A, B, C, D. AND HE BROUGHT ALL THESE INGREDIENTS
16 TOGETHER TO COMMIT THE ACT THAT HE INTENDED TO COMMIT.
17 THAT'S WHAT THAT TELLS YOU ABOUT FRED RUTLAND. YOU WILL HAVE
18 -- I'M NOT GONNA GO THROUGH THESE STATEMENTS AGAIN. YOU'LL
19 HAVE IN THERE WHOSE IDEA IT WAS TO BUY THE PISTOL, AT WHOSE
20 REQUEST, WHY HE BOUGHT THE PISTOL. THE SHOTGUN WAS AWKWARD.
21 HE SIGNED EACH AND EVERY ONE OF THESE FORMS VERY LEGIBLY. HE
22 INITIALED EACH AND EVERY ONE OF HIS RIGHTS. THOSE ARE THE
23 STATEMENTS THAT HE MADE. ON THE 7TH, STATEMENT OF THE 7TH,
24 HE SAYS I POINTED THE GUN AT JIMMY. HE SAID IT. SAYS THAT
25 SALLY HAD THE PISTOL. I POINT -- CLEARLY AND SPECIFICALLY --

1 I POINTED THE GUN AT JIMMY AS HE WAS COMING OUT OF THE
2 TRAILER.

3 NO SQUIRREL CAGE NO TIME. HE HAD THE OPPORTUNITY TO
4 READ IT. SCOTTIE READ IT TO HIM. HE INITIALED IT. HE
5 SIGNED IT. HE EVEN MADE A CORRECTION. YOU'LL SEE HIS
6 INITIALS THERE WHERE SOMETHIN' WAS CORRECTED. SOME
7 MISSPELLING.

8 LADIES AND GENTLEMEN, AGAIN, I THANK YOU FOR THE
9 ATTENTION THAT YOU HAVE GIVEN. I ASK THAT YOUR ATTENTION GO
10 CLEARLY AND BECOME FOCUSED ON THE TRUE FACTS OF THIS CASE AND
11 NOT ON THE PRODUCT OF WHAT THEY HAVE MANUFACTURED OR CREATED
12 WITH THE PASSAGE OF TIME AND WITH THE ABSENCE OF JIMMY PEELE.
13 THEY SET OUT ON A COURSE TO SOLVE THIS PROBLEM THAT THEY FELT
14 THEY HAD. THEIR PROBLEM WAS JIMMY PEELE. THAT WAS THEIR
15 PROBLEM.

16 AND THEY GATHERED TOGETHER THE TOOLS AND THE IMPLEMENTS
17 TO SOLVE THAT PROBLEM. THE PISTOL AND THE SHOTGUN. AND THEY
18 GOT IN TO A POSITION WHERE THEY'RE GONNA TAKE CARE OF THAT
19 PROBLEM, AND I WILL SUBMIT TO YOU BASED ON WHERE THAT WEAPON
20 WAS FOUND THAT JIMMY PEELE, JIMMY PEELE NEVER EVER PULLED
21 THAT WEAPON. KIM DIDN'T SEE IT. JIMMY PEEL WAS RIGHT-
22 HANDED. NOW THEY'RE GETTING IN HERE NOW AND SALLY SAID WELL
23 I SHOVED IT.

24 WELL, IF HE WAS RIGHT-HANDED AND THE WAY HE FELL, THAT
25 WEAPON WOULD'VE BEEN OVER HERE ON HIS RIGHT SIDE, AND IF YOU

1 LOOK AT THIS DIAGRAM THAT WEAPON IS WAY UP OVER THERE TO THE
2 LEFT, WAY OVER HERE, SO I GUESS SHE HAD TO SLING IT ALL THE
3 WAY OVER THERE. THAT WEAPON SHOULD BE OVER HERE. I TOLD YOU
4 THEY WERE THE BENEFICIARIES. REMEMBER SHE SAID I HAD TO
5 KINDA SLING HIM ON HIS BACK, HAD TO KINDA PUSH HIM OVER ON
6 HIS BACK, ABOUT C.P.R. THAT'S WHEN THEY SAW THAT WEAPON
7 'CAUSE YOU DON'T GO INTO A RAGE KILLIN' SOMEBODY CARRYIN' A
8 PACK OF CIGARETTES IN A PLACE. I DON'T SMOKE BUT I KNOW YOU
9 DON'T DO THAT. HE TOOK THE WEAPON IN CASE HE NEEDED IT FOR
10 SELF-DEFENSE. LITTLE DID HE KNOW, LITTLE DID HE KNOW HOW
11 MUCH HE NEEDED IT. RIGHTS HAVE TO BE BALANCED. RIGHTS HAVE
12 TO BE BALANCED IN OUR SOCIETY. JIMMY PEELE HAD A RIGHT TO
13 LIFE.

14 HE HAD A RIGHT TO LIFE, AND THEY GOT THIS WEAPON 'CAUSE
15 YOU KNOW WHAT HAPPENED? KIM SAID THIS ONE DIDN'T WORK AND I
16 HAD TO RUN BACK HERE. THEY'RE IN THERE BY THEMSELVES NOW.
17 YOU KNOW, THEY'RE OUT THERE BY THEMSELVES AND WANTIN' TO
18 THINK -- FOR YA'LL TO THINK THAT THEY'RE THE E.M.T. CREW OF
19 THE YEAR WITH THE MAN THEY JUST SHOT AND KILLED. THAT'S WHEN
20 THEY LOCATED THIS WEAPON. KIM KESTNER INDEPENDENT WITNESS.
21 KIM KESTNER NEVER EVER SAW JIMMY PEELE WITH IT EVER. SHE SAW
22 IT ON THE FLOOR AND IT'S ON SAFETY. IS THAT HOW YOU GO TO
23 KILL WITH A WEAPON ON SAFETY? I ASKED Y'ALL TWO DAYS AGO,
24 THREE DAYS, I DON'T EVEN REMEMBER HOW MANY DAYS AGO NOW,
25 WHENEVER IT WAS. I DON'T ASK JURORS TO RETURN A VERDICT OF

1 GUILTY OR NOT GUILTY. I ASK JURORS TO RETURN A VERDICT THAT
2 SPEAKS THE TRUTH, THAT DOES JUSTICE. WE WIN WHEN JUSTICE IS
3 DONE IN OUR COURTROOM. ALL OF US. ALL OF US DO. AND LIKE I
4 SAID, THIS CASE COMES DOWN TO THE VALUE OF LIFE. IF WE'RE
5 GONNA CHEAPEN LIFE TO THIS. CHEAP IS IN HIS STATEMENT. OR
6 IF WE VALUE LIFE. IT DIDN'T HAVE TO HAPPEN. YOU KNOW THAT'S
7 THE SAD THING. IT REALLY IS. I SHOULDN'T BE HERE. YOU
8 SHOULDN'T BE HERE, BUT IT HAPPENED FOR ONE REASON: FRED
9 RUTLAND.

10 FRED RUTLAND AND HIS LAWYER AND HIS MOTIVE AND HIS
11 DECISION; NOT JIMMY PEELE; NOT SCOTTIE FRIER; NOT ME AND NOT
12 YOU.

13 AND HE MUST FACE THE CONSEQUENCES OF THAT OR ELSE WE ALL
14 LOSE.

15 THANK YOU. THANK YOU, YOUR HONOR.

16 THE COURT: MADAM FOREMAN AND LADIES AND GENTLEMEN OF
17 THE JURY, IT'S NOW MY DUTY TO CHARGE YOU THE LAW IN THIS
18 CASE.

19 IT'S ALWAYS GRATIFYING FOR JURORS TO SHOW AN INTELLIGENT
20 INTEREST TO THE EVIDENCE BECAUSE THE LAW OF SOUTH CAROLINA
21 MAKES YOU AND YOU ALONE THE SOLE JUDGES OF THE FACTS. THE
22 TRUTH OR WANT OF TRUTH FROM THE TESTIMONY AND I'M NOT ALLOWED
23 TO INTIMATE TO YOU ANY OPINION THAT I HAVE ALONG THAT LINE.
24 THAT IS YOUR SPECIAL PROVINCE UNDER THE CONSTITUTION OF OUR
25 STATE, AND IF BY CHANCE YOU SHOULD GATHER ANY INFERENCE

1 WHATSOEVER FROM ANY REMARK OR ANY RULING THAT I MAKE AS TO
2 THE FACTS, YOU WOULD, OF COURSE, DISREGARD THAT. BY THE SAME
3 LAW I'M THE SOLE JUDGE OF THE LAW IN THE CASE. I CAN'T
4 INVADE YOUR TERRITORY; NOR CAN YOU INVADE MINE. YOU TAKE THE
5 FACTS JUST AS YOU FIND THEM TO BE AND APPLY IT TO THE LAW AS
6 I WILL HEREINAFTER GIVE IT TO YOU. NOW THIS DEFENDANT IS
7 CHARGED HERE WITH THREE INDICTMENTS. ONE INDICTMENT IS
8 MURDER.

9 ONE IS POSSESSION OF A FIREARM DURIN' THE COMMISSION OF
10 OR AN ATTEMPT TO COMMIT A VIOLENT CRIME AND THE OTHER IS FOR
11 POINTING AND PRESENTING A FIREARM. I WILL CHARGE YOU THE
12 ELEMENTS OF THOSE. NOW MURDER IN THE MURDER CASE THE CHARGED
13 THE DEFENDANT DID WILFULLY AND FELONIOUSLY AND WITH MALICE
14 AFORETHOUGHT TAKE THE LIFE OF ONE JIMMY PEELE; THEREFORE, THE
15 STATE OF SOUTH CAROLINA CHARGES THE DEFENDANT HERE COMMITTED
16 MURDER.

17 I CHARGE YOU THAT IS A CARDINAL AND IMPORTANT RULE OF
18 THE LAW OF EVIDENCE, THAT A DEFENDANT IN A CRIMINAL TRIAL NO
19 MATTER WHAT MAY BE THE ENORMITY OF THAT CRIME CHARGED AGAINST
20 THAT PERSON MUST ALWAYS BE PRESUMED TO BE INNOCENT OF THE
21 CRIME FOR WHICH HE HAS BEEN INDICTED UNTIL HIS GUILT HAS BEEN
22 PROVEN BEYOND A REASONABLE DOUBT. THIS PRESUMPTION OF
23 INNOCENCE DOES NOT CEASE WHEN YOU RETIRE, BUT IT ACCOMPANIES
24 THE ACCUSED FROM THE MOMENT OF HIS ARREST THROUGHOUT THE
25 ENTIRE TRIAL AND UNTIL THE JURY HAS REACHED A VERDICT OF

1 GUILT BASED UPON THE TESTIMONY TO THE EXCLUSION OF EVERY
2 REASONABLE DOUBT, AND IT IS THE SOLEMN DUTY OF YOU THE JURY
3 IF NOT CLEARLY CONVINCED BEYOND EVERY REASONABLE DOUBT TO THE
4 CONTRARY TO RECONCILE THE FACTS THROUGH THIS PRESUMPTION OF
5 INNOCENCE AND ACQUIT THE ACCUSED, AND OUR SUPREME COURT HAS
6 SAID IN ONE OF ITS DECISIONS THAT THIS PRESUMPTION OF
7 INNOCENCE ACCOMPANIES THE DEFENDANT FROM THE MOMENT OF HIS
8 ARREST, ARRAIGNMENT, CLOTHES HIM AS WITH A GARMENT UNTIL A
9 VERDICT OF GUILT HAS STRIPPED THE PRESUMPTIVE ROBE OF
10 RIGHTEOUS (SIC) FROM HIS PERSON AND HE IS ENTITLED TO
11 RECOGNITION AS A MEMBER OF THAT CLASS WHICH PRESUMPTION
12 ASSIGNS HIM TO THE INNOCENT AND NOT THE GUILTY. THIS LEGAL
13 PRESUMPTION OF INNOCENCE IS TO BE REGARDED BY THE JURY IN
14 EVERY CASE AS A MATTER OF EVIDENCE TO THE BENEFIT TO WHICH
15 THE PARTY ON TRIAL IS ENTITLED; THEREFORE, THE ACCUSED IN
16 THIS CASE IN THIS INDICTMENT FOR MURDER UNDER THE LAW IS
17 PRESUMED TO BE INNOCENT OF THE OFFENSE CHARGED AGAINST HIM.
18 THIS BILL OF INDICTMENT AND THIS PRESUMPTION OF
19 INNOCENCE IS NOT LEGAL OR JUDICIAL FICTION, BUT A VITAL AND
20 SUBSTANTIAL LEGAL RIGHT WHICH JUSTLY ENTITLES HIM TO AN
21 ACQUITTAL AT THE HANDS OF THE JURY IN EVERY STAGE THROUGH THE
22 TRIAL UNTIL THE FINDING OF THE VERDICT HAVING BEEN REMOVED BY
23 EVIDENCE IN THIS CASE SUFFICIENT IN FORCE TO CONVINCE EACH OF
24 YOU AND ALL OF YOU JURORS OF HIS GUILT BEYOND A REASONABLE
25 DOUBT.

1 SO I SAY TO YOU THAT THIS BURDEN PLACED UPON THE STATE
2 RESTS UPON THE STATE THROUGHOUT THE ENTIRE TRIAL TILL THE
3 STATE HAS SATISFIED YOU BY EVIDENCE OF THE DEFENDANT'S GUILT
4 BEYOND A REASONABLE DOUBT. NOW YOU HAVE BEEN SELECTED AS
5 FAIR AND IMPARTIAL JURORS SWORN TO IMPARTIALLY TRY AND
6 DETERMINE THE FACTS THAT ARE IN ISSUE AND IN DISPUTE IN THIS
7 CASE.

8 YOU COMPLY WITH YOUR OATH, THEN NO ONE WOULD HAVE A
9 RIGHT TO CRITICIZE YOUR VERDICT AND YOU WOULD HAVE FULLY
10 DISCHARGE YOUR DUTY AS JUROR. YOU SHOULD BE CAREFUL AS I'VE
11 TOLD YOU ON OTHER OCCASIONS NOT TO ALLOW YOURSELVES TO BE
12 INFLUENCED BY OPINIONS OR EXPRESSIONS OF OPINION IF ANY YOU
13 HAVE HEARD ON THE OUTSIDE BUT YOU ARE TO DECIDE THIS CASE
14 ACCORDING TO THE EVIDENCE THAT YOU HAVE HEARD COMING FROM THE
15 LIPS OF THE VARIOUS WITNESSES WHO HAVE TAKEN THE OATH IN
16 THESE TWO DAYS AND TESTIFIED ON THIS WITNESS STAND UNDER OATH
17 IN THIS JURY ROOM (SIC). AS I TOLD YOU THE CHARGE AGAINST
18 THIS DEFENDANT IN ONE OF THE INDICTMENTS IS MURDER. SAME LAW
19 AS TO REASONABLE DOUBT AND OTHER THINGS WILL FIT THE OTHER
20 INDICTMENTS BUT I WILL CHARGE YOU THOSE ELEMENTS LATER. HE
21 HAS PLED NOT GUILTY AND UNDER THE LAW AS I EXPLAINED TO YOU
22 HE IS PRESUMED TO BE INNOCENT OF THE CHARGES UNTIL HE HAS
23 BEEN PROVEN GUILTY BY EVIDENCE SATISFYING YOU OF GUILT BEYOND
24 A REASONABLE DOUBT. THE BURDEN IS UPON THE STATE TO
25 ESTABLISH BY EVIDENCE YOUR SATISFACTION BEYOND A REASONABLE

1 DOUBT THE GUILT OF THE PERSON HERE ON TRIAL CHARGED IN THESE
2 INDICTMENTS WITH MURDER, POINTING A FIREARM, POSSESSION OF A
3 FIREARM IN THE COMMISSION OF A VIOLENT CRIME. IF AFTER
4 CONSIDERIN' ALL THE EVIDENCE IN THE CASE YOU ARE LEFT WITH A
5 REASONABLE DOUBT IN YOUR MIND AS TO THE GUILT OF THE ACCUSED
6 IT WOULD BE YOUR DUTY TO GIVE THE DEFENDANT THE BENEFIT OF
7 SUCH DOUBT AND ACQUIT HIM BECAUSE YOU CAN ONLY CONVICT IF THE
8 EVIDENCE SATISFIES YOU OF GUILT BEYOND A REASONABLE DOUBT.
9 THAT -- THE NEXT I CHARGE YOU IF YOU ENTERTAIN A REASONABLE
10 DOUBT AS TO ANY MATERIAL ISSUE OF THE CASE YOU'RE TO RESOLVE
11 THAT IN FAVOR OF THE DEFENDANT, SO THAT ON THE WHOLE CASE
12 YOU'RE REQUIRED TO GIVE THE DEFENDANT THE BENEFIT OF EVERY
13 REASONABLE DOUBT. A REASONABLE DOUBT IS NOT A FANCIFUL,
14 WHIMSICAL OR IMAGINARY DOUBT, BUT IT IS A REAL DOUBT, THE
15 KIND OF DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO
16 HESITATE TO ACT. IT MAY GROW OUT OF THE TESTIMONY; IT MAY
17 GROW OUT OF THE LACK OF CERTAIN EVIDENCE OR THE PRESENCE OF
18 SOME EVIDENCE IN THE CASE HAVING SOME REASONABLE RELATION TO
19 THE QUESTION OF GUILT OR INNOCENCE ON THE ACCOUNT OF THE
20 AMOUNT OF CREDIBILITY OR WEIGHT YOU GIVE TO THE TESTIMONY OF
21 THE DIFFERENT WITNESSES IF ANY CIRCUMSTANCES IF ANY THERE ARE
22 ARE PROVEN IN THE CASE BEARING UPON THE QUESTION OF GUILT OR
23 INNOCENT.

24 NOW YOU'RE THE EXCLUSIVE JUDGES OF THE FACTS. IT IS FOR
25 YOU TO DETERMINE WHEREIN THE TRUTH LIES IN THIS CONTROVERSY.

1 YOU MAY BELIEVE ONE WITNESS AGAINST ALL OR ALL WITNESSES
2 AGAINST ONE. YOU CAN BELIEVE A PORTION OF A WITNESS
3 TESTIMONY AND DISBELIEVE ANOTHER PORTION. YOU MAY DISBELIEVE
4 A WITNESS'S TESTIMONY IN ITS ENTIRETY PROVIDED THERE'S A
5 SOUND REASON IN THE RECORD FOR SO DOING. YOU CANNOT DO THAT
6 ARBITRARILY, BUT USING YOUR GOOD JUDGMENT AND COMMON SENSE.
7 YOU DON'T LEAVE YOUR COMMON SENSE AT HOME WHEN YOU COME TO
8 SERVE ON A JURY. IT IS FOR YOU TO DETERMINE THE WEIGHT YOU
9 GIVE THE -- THE CREDIBILITY YOU GIVE THE TESTIMONY OF THE
10 DIFFERENT WITNESSES WHO HAVE TESTIFIED IN THE CASE.

11 NOW AS I'VE TOLD YOU, MURDER IS THE WILFUL, FELONIOUS
12 KILLING OF A HUMAN BEING BY A HUMAN BEING WITH MALICE
13 AFORETHOUGHT EITHER EXPRESSED OR IMPLIED. NOW IN THE CHARGE
14 OF MURDER IS ALSO THE LESSER OFFENSE OF MANSLAUGHTER.
15 MANSLAUGHTER IS THE FELONIOUS KILLING OF A HUMAN BEING BY A
16 HUMAN BEING WITHOUT MALICE IN SUDDEN HEAT AND PASSION UPON
17 SUFFICIENT LEGAL PROVOCATION. SO THAT YOU SEE THE DIFFERENCE
18 BETWEEN MURDER AND MANSLAUGHTER IS THE PRESENCE AND ABSENCE
19 OF MALICE. MALICE IS NOT PRESENT IN MANSLAUGHTER.

20 NOW MALICE IS A TERM OF ART IMPORTING WICKEDNESS AND
21 HATRED AND A DETERMINATION TO DO WHAT ONE KNOWS TO BE WRONG
22 AND WITHOUT JUST CAUSE OR EXCUSE OR LEGAL PROVOCATION.
23 MALICE NEED NOT BE IN THE MIND OF A PERSON DOIN' THE KILLIN'
24 ANY PARTICULAR LENGTH OF TIME OR NOT BEFORE THE KILLIN' SO IT
25 IS IN THE MIND AT THE TIME OF THE KILLIN' OR AT THE TIME OF

1 THE ACT.

2 NOW IMPLIED MALICE. THE LAW SAYS THAT IF ONE
3 INTENTIONALLY KILLS ANOTHER WITH A DEADLY WEAPON THE
4 IMPLICATION OF MALICE MAY ARISE. IF FACTS ARE PROVED BEYOND
5 A REASONABLE DOUBT SUFFICIENT TO RAISE AN INFERENCE OF MALICE
6 TO YOUR SATISFACTION, THIS INFERENCE WOULD BE SIMPLY AN
7 EVIDENTIARY FACT TO BE TAKEN INTO CONSIDERATION BY YOU THE
8 JURY ALONG WITH THE OTHER EVIDENCE IN THE CASE AND YOU MAY
9 GIVE IT SUCH WEIGHT AS YOU DETERMINE IT SHOULD RECEIVE FROM
10 THE FACTS AND CIRCUMSTANCES SURROUNDING THE WHOLE CASE.

11 NOW THE SUDDEN HEAT AND PASSION UPON SUFFICIENT LEGAL
12 PROVOCATION WHICH MITIGATES THE FELONIOUS KILLING TO
13 MANSLAUGHTER, WHILE IT NEED NOT DETHRONE REASON ENTIRELY AND
14 SHUT OUT ALL KNOWLEDGE OR VOLITION, IT MUST BE SUCH AS WOULD
15 NATURALLY DISTURB AND SWAY THE REASON AND RENDER THE MIND OF
16 AN ORDINARY PERSON INCAPABLE OF COOL REFLECTION AND PRODUCE
17 WHAT ACCORDING TO HUMAN EXPERIENCE MAY BE CALLED AN
18 UNCONTROLLABLE IMPULSE TO DO VIOLENCE.

19 NOW THIS DEFENDANT HAS PLED -- HAS INTERPOSED THE PLEA
20 OF SELF-DEFENSE. I CHARGE YOU THAT THE RIGHT OF SELF-DEFENSE
21 IS FOUNDED ON THE LAW OF NATURE AND IS NOT SUPERSEDED BY THE
22 LAW OF SOCIETY. IT IS A RIGHT AND A DUTY WHICH EVERYONE
23 BRINGS INTO SOCIETY EXCEPT SO FAR AS THE LAWS OF SOCIETY HAS
24 CURTAILED IT. EVERY MAN HAS THE RIGHT AND IT IS HIS DUTY TO
25 DEFEND HIMSELF FROM AN ATTACK THREATENING HIM WITH DEATH OR

1 SERIOUS BODILY HARM AND MAY -- IT IS HIS DUTY TO HIMSELF AND
2 THOSE DEPENDENT ON HIM TO DO SO. THE RIGHT OF NECESSITY
3 RESTS UPON NECESSITY EITHER ACTUAL OR REASONABLY APPARENT.

4 IN ORDER TO ESTABLISH THE PLEA IN A HOMICIDE CASE THE
5 DEFENDANT MUST BE WITHOUT FAULT IN BRINGIN' ABOUT THE
6 IMMEDIATE FATAL DIFFICULTY, THAT AT THE TIME HE FIRED THE
7 FATAL SHOT OR DELIVERED THE FATAL STROKE HE IN GOOD FAITH
8 BELIEVED THAT HE WAS IN IMMEDIATE DANGER OF LOSIN' HIS LIFE
9 OR SUSTAININ' SERIOUS BODILY INJURY, THAT SUCH BELIEF IS
10 REASONABLE AND THAT A REASONABLE, CAREFUL AND A PRUDENT MAN,
11 A MAN OF ORDINARY FIRMNESS AND CIRCUMSTANCES SITUATED IN THE
12 SAME AND LIKE CIRCUMSTANCES WOULD HAVE REACHED A SIMILAR
13 CONCLUSION.

14 NOW WHERE BOTH THE DECEASED AND THE DEFENDANT ARE ON
15 COMMON GROUNDS, THAT IS WHERE BOTH HAVE A RIGHT TO BE, THEN
16 THE DEFENDANT MUST SHOW THAT HE HAD NO OTHER REASONABLE SAFE,
17 ADEQUATE, OBVIOUS MEANS OF ESCAPE OR TO ACT AS HE DID OR IT
18 WOULD -- AVOID DANGER OF LOSIN' HIS OWN LIFE OR SUSTAINING
19 SERIOUS BODILY INJURY EXCEPT TO ACT AS HE DID. IF A PERSON
20 ASSAULTED BEIN' WITHOUT FAULT AND BY THAT IT'S MEANT LEGAL
21 FAULT REASONABLE DOUBT FOR HIS DEATH (PHONETIC) AND GREAT
22 BODILY HARM UNLESS HE KILLS HIS ASSAILANT THE KILLING IS
23 EXCUSABLE AND THE ACCUSED IS ENTITLED TO BE ACQUITTED. THE
24 PARTY ATTACKED IS THE JUDGE OF HIS OWN PERIL AND CAN SAFELY
25 ACT UPON DEFENSE FACTS AND CIRCUMSTANCES SURROUNDING HIM AT

1 THE TIME AND THE SITUATION SHOULD BE DETERMINED FROM THE
2 STANDPOINT OF THE DEFENDANT, IT BEIN' FOR THE JURY TO SAY
3 WHETHER OR NOT HIS APPREHENSION OF IMMEDIATE DANGER OF DEATH
4 OR SERIOUS BODILY HARM WERE REASONABLE AND WOULD HAVE BEEN
5 FELT BY A MAN OF ORDINARY REASON AND FIRMNESS. WHETHER THERE
6 WAS SUCH A REASONABLE APPEARANCE OF DANGER AS WOULD JUSTIFY
7 THE KILLING IS A QUESTION OF FACT FOR YOU THE JURY AND IN
8 SOLVIN' IT THE JURY SHOULD CONSIDER THE CONDITIONS OF THE
9 PARTIES. IF THE APPEARANCE TO THE DEFENDANT AT THE TIME THE
10 FATAL SHOT WAS GIVEN WERE SUCH THAT HE COULD NOT REASONABLY,
11 SAFELY AVOID TAKING THE LIFE OF THE DECEASED AND A MAN OF
12 ORDINARY REASON AND COURAGE WOULD ARRIVE AT SUCH A CONCLUSION
13 IT'S NOT NECESSARY FOR HIM TO GO ANY FURTHER. HE SHOULD BE
14 ACQUITTED IF HE IS FREE FROM FAULT IN BRINGIN' ABOUT THE
15 IMMEDIATE FATAL DIFFICULTY. IF THE JURY CONCLUDE FROM THE
16 EVIDENCE IN THE CASE THE DECEASED MADE AT THE TIME OF THE
17 KILLIN' A HOSTILE DEMONSTRATION TOWARD THE DEFENDANT AND THE
18 DEFENDANT ACTUALLY BELIEVED THAT THE DECEASED WAS ABOUT TO
19 ENDANGER HIS LIFE AND CAUSE HIM TO SUSTAIN A SERIOUS BODILY
20 INJURY AND THAT IT WAS REASONABLY NECESSARY FOR HIM TO TAKE
21 THE LIFE OF THE DECEASED FOR HIS OWN PROTECTION AND IF
22 FURTHER IN THE OPINION OF THE JURY ALL THE CIRCUMSTANCES
23 UNDER WHICH THE DEFENDANT WAS PUT WERE SUCH AS TO JUSTIFY A
24 BELIEF IN THE MIND OF A PERSON OF ORDINARY REASON AND
25 PRUDENCE, THEN THE PLEA OF SELF-DEFENSE IS MADE OUT. THE

1 DEFENDANT MUST BE ACQUITTED.

2 NOW A PERSON ABOUT TO BE ATTACKED IS NOT BOUND TO WAIT
3 UNTIL HIS ADVERSARY GETS A DROP ON HIM OR DRAWS A BEAT ON HIM
4 TO USE A FAMILIAR SIGNIFICANT EXPRESSION BEFORE HE TAKES
5 STEPS TO PREVENT THEM FROM OCCURRING. A MAN IS NOT BOUND IF
6 HIS OWN LIFE IS IN DANGER OR IF HIS BODY IS IN DANGER OF
7 BEIN' SERIOUSLY INJURED TO WAIT UNTIL HE RECEIVES THAT FATAL
8 WOUND OR HIS GREAT INJURY INFLICTED UPON HIM BEFORE HE CAN
9 ACT IN HIS OWN DEFENSE. HE HAS A RIGHT TO ACT UPON
10 APPEARANCES IF THESE -- THESE APPEARANCES ARE SUCH AS TO
11 JUSTIFY A MAN OF REASONABLE FIRMNESS AND COURAGE IN THE
12 BELIEF THAT HIS LIFE WAS IN DANGER AND THAT HE WAS IN DANGER
13 OF RECEIVIN' SERIOUS BODILY INJURY AND THERE APPEARS TO BE NO
14 OTHER PROBABLE, REASONABLE, ADEQUATE OR OBVIOUS MEANS OF
15 ESCAPE OR THAT RETREAT WOULD PLACE HIM IN GREATER DANGER,
16 THEN HIS RIGHT -- HAS A RIGHT TO STRIKE IN SELF-DEFENSE.

17 IF TWO MEN ENGAGE IN MUTUAL COMBAT DESIGNEDLY, AND THEY
18 BOTH GO TO A PLACE WITH THE INTENTION OF MEETING THE OTHER
19 AND DOING HIM HARM OR INJURY, AND THEY MEET AND FIGHT, ONE IS
20 KILLED, HE CAN NOT SET UP SELF-DEFENSE. IN THE CASE OF THAT
21 KIND HE BROUGHT ON THE DIFFICULTY, AND CANNOT BE SAID TO BE
22 WITHOUT FAULT IN BRINGIN' ON THE DIFFICULTY.

23 AS A GENERAL RULE, THE PLEA OF SELF-DEFENSE IS NOT
24 AVAILABLE TO ONE WHO KILLS ANOTHER WHILE ENGAGED IN MUTUAL
25 COMBAT.

1 UNDER SOUTH CAROLINA LAW VOLUNTARY MANSLAUGHTER IS
2 DEFINED AS THE UNLAWFUL KILLING OF A HUMAN BEIN' IN SUDDEN
3 HEAT AND PASSION UPON SUFFICIENT LEGAL PROVOCATION. MERE
4 WORDS HOWEVER INSULTIN' ARE NEVER SERIOUS ENOUGH TO CAUSE A
5 LEGAL PROVOCATION. THERE HAS TO BE SOME OTHER TYPE OF ACT.

6 SECTION 16-23-410 POINTING A FIREARM AT ANY PERSON. IT
7 SHALL BE UNLAWFUL FOR ANY PERSON TO PRESENT OR POINT AT ANY
8 OTHER PERSON ANY LOADED OR UNLOADED FIREARM.

9 NOTHING CONTAINED HEREIN SHALL BE CONSTRUED TO ABRIDGE
10 (PHONETIC) THE RIGHT OF SELF-DEFENSE OR TO APPLY TO
11 THEATRICAL PERFORMANCES.

12 IT'S AGAINST THE LAW TO HAVE A FIREARM IN THE COMMISSION
13 OF A VIOLENT CRIME.

14 ASSAULT WITH INTENT TO KILL. ASSAULT OF A HIGH AND
15 AGGRAVATED NATURE. ASSAULT AND BATTERY WITH INTENT TO KILL
16 AND ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE.
17 BURGLARY, GRAND LARCENY, RAPE, ASSAULT WITH INTENT TO RAPE.
18 IT'S AGAINST THE LAW TO HAVE A GUN TO COMMIT ANY VIOLENT
19 CRIME.

20 ON THE OTHER TWO INDICTMENTS THAT I JUST READ THE LEGAL
21 DEFINITION, THE STATE'S REQUIRED TO PROVE THEM BEYOND A
22 REASONABLE DOUBT, AND AS I TOLD YOU, A REASONABLE DOUBT IS A
23 KIND OF DOUBT THAT WOULD MAKE A PERSON HESITATE TO ACT.

24 NOW YOU ARE THE SOLE JUDGES. AS I SAID, THE FACTS, THE
25 CREDIBILITY OF WITNESSES, BELIEVABILITY OF WITNESSES, TAKIN'

1 INTO CONSIDERATION THE INTEREST OF ANY WITNESS, DEMEANOR OF
2 THE WITNESS ON THE STAND. ANYTHING THAT'S IN THE RECORD THAT
3 WILL AID YOU AND ASSIST YOU IN EVALUATING THE TESTIMONY
4 BECAUSE YOU ARE THE SOLE JUDGES OF THAT.

5 MADAM FOREMAN, ON EACH INDICTMENT IS PRINTED THE WORD
6 VERDICT DOWN IN THE LEFT-HAND CORNER FACIN' YOU; MY RIGHT-
7 HAND CORNER RIGHT THERE. VERDICT COMES FROM THE LATIN PHRASE
8 WHICH MEANS TO SPEAK THE TRUTH. YOU WANT YOUR VERDICT TO
9 SPEAK THE TRUTH OF THIS CONTROVERSY BETWEEN THE STATE AND THE
10 DEFENDANT.

11 IN THE CASE OF MURDER ONE FORM WILL BE -- VERDICT WOULD
12 BE GUILTY. ANOTHER FORM OF THE VERDICT WOULD BE NOT GUILTY.
13 ANOTHER FORM ON THAT WOULD BE GUILTY OF VOLUNTARY
14 MANSLAUGHTER OR NOT GUILTY.

15 POSSESSION OF A FIREARM DURIN' THE COMMISSION OF A
16 CRIME, SAME PLACE. WHATEVER YOUR VERDICT IS, IT MUST BE
17 UNANIMOUS. ALL 12 MUST AGREE. THE MANNER IN WHICH I GIVE
18 'EM TO YOU HAS NOTHIN' WHATSOEVER TO DO WITH MY FEELIN'S.
19 IT'S JUST THAT I HAVE TO GIVE YOU THE FORMS OF VERDICT. ONE
20 WOULD BE GUILTY; THE OTHER NOT GUILTY.

21 ON THE POINTING AND PRESENTING A FIREARM, POINTING A
22 FIREARM, ONE WOULD BE GUILTY; THE OTHER WOULD BE NOT GUILTY
23 DEPENDIN' UPON YOUR VIEW OF THE FACTS AND CIRCUMSTANCES.

24 LET ME LOOK HERE AND SEE WHAT -- SEEMS LIKE I GOT
25 FINISHED PRETTY QUICK. I'LL SEE IF THERE'S -- WITHOUT

1 SENDIN' 'EM OUT IS THERE ANY ADDITIONS OR EXCEPTIONS THAT I
2 CAN STRAIGHTEN 'EM OUT BEFORE YOU GO OUT? FROM THE DEFENSE?

3 MR. MCMAHON: JUDGE, COULD WE APPROACH THE SIDE?

4 THE COURT: YES, SIR. APPROACH THE SIDE BENCH. I KNOW
5 I'VE LEFT OUT SOMETHIN'. I HAD IT OUT HERE AND I CAN'T FIND
6 IT. (THERE WAS A BENCH CONFERENCE OUT OF THE HEARING OF THE
7 JURY AND OFF THE RECORD.) MADAM FOREMAN, ANYTHING THAT I'D
8 SAY TO YOU NOW YOU'D PAY NO MORE CREDENCE TO IT THAN THE
9 OTHER, BUT I PROBABLY WILL GO OVER ONE THING OR TWO WITH YOU.

10 NOW I MIGHT HAVE INADVERTENTLY -- MURDER AND
11 MANSLAUGHTER ARE VIOLENT CRIMES. I DIDN'T READ THAT OUT IN
12 THE THING. I THOUGHT I'D EXPLAINED IT, BUT AS I TOLD YOU, A
13 REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD CAUSE A
14 REASONABLE PERSON TO HESITATE TO ACT. THAT'S THE TYPE OF
15 REASONABLE DOUBT YOU WANNA CONSIDER.

16 SO, MADAM FOREMAN, THERE ARE THREE -- THREE INDICTMENTS.
17 CONSIDER EACH ONE -- EACH ONE OF THESE INDICTMENTS
18 SEPARATELY. WHATEVER YOUR VERDICT IS IT MUST BE UNANIMOUS ON
19 EACH -- EACH ONE OF 'EM. I'LL -- WHATEVER IT IS, WRITE IT
20 OUT AND SIGN YOUR NAME AS FOREMAN. I'LL ASK THE 13TH JUROR
21 TO REMAIN SEATED. ALRIGHT. YOU MAY BEGIN DELIBERATIN'. I'M
22 GONNA LEAVE THAT OFF. WE'LL GET ALL THE EVIDENCE AND SEND IT
23 TO YOU, AND IF IT'S ALRIGHT WITH YA'LL IT'S ABOUT LUNCH TIME,
24 YA'LL WANT US TO SEND OUT AND GET YOU SOME LUNCH? THAT'D BE
25 BETTOR. ALRIGHT, WE'LL SEND SOMEBODY IN TO TAKE AN ORDER AND

1 THE BAILIFF WILL BRING ALL THE EVIDENCE IN. (THE JURY LEFT
2 OPEN COURT AND RETIRED TO THE JURY ROOM TO BEGIN
3 DELIBERATIONS AT 12:13.) NOTE: THE FOLLOWING OCCURRED IN
4 THE ABSENCE OF THE JURY.

5 MR. GREGORY: MAY IT PLEASE THE COURT?

6 THE COURT: YES, SIR.

7 MR. GREGORY: I WANT TO BRING TO THE COURT'S ATTENTION
8 TWO MATTERS.

9 THE COURT: YES, SIR.

10 MR. GREGORY: THE -- WE MET AT THE SIDEBAR, AND I ASKED
11 YOUR HONOR TO CHARGE WHAT I HAD PASSED IN DEFENDANT'S REQUEST
12 TO CHARGE #4.

13 THE COURT: YES, SIR.

14 MR. GREGORY: SLIGHT PHYSICAL AGGRESSION IS SUFFICIENT
15 PROVOCATION TO REDUCE HOMICIDE TO MANSLAUGHTER, AND I HANDED
16 UP TO YOUR HONOR THE CASE OF NORRIS -VS- STATE OF SOUTH
17 CAROLINA A FEDERAL DISTRICT COURT CASE REPORTED AT 309
18 FEDERAL SUP 1113, 1970 IN WHICH IT DESCRIBED AND WENT INTO
19 THE STATEMENT UNDER HEADNOTE TWO ON PAGE 1114 OF THAT
20 DECISION CITING AN OLDER SOUTH CAROLINA CASE AND I RE-REQUEST
21 THE COURT TO CHARGE THAT, AND IN ADDITION TO THAT CHARGE I
22 ALSO HANDED TO YOUR HONOR A CASE KNOWN AS PEOPLES -VS-
23 MATTHEWS REPORTED IN ILLINOIS 314 N.E. 2d 15, THAT'S 21
24 ILLINOIS APPEAL 3d 249 WHICH STATES THAT MUTUAL COMBAT SUCH
25 AS WILL UPON SUFFICIENT PROVOCATION REDUCE A KILLING

1 COMMITTED WITH A DEADLY WEAPON FROM MURDER TO MANSLAUGHTER AS
2 DEFINED AS ONE INTO WHICH BOTH PARTIES ENTER WILLINGLY OR IN
3 WHICH TWO PERSONS UPON A SUDDEN QUARREL AND IN HOT BLOOD
4 MUTUALLY FIGHT UPON EQUAL TERMS.

5 THE COURT: YES, WELL---

6 MR. GREGORY: I ASK THAT THE COURT CHARGE BOTH OF THOSE.

7 THE COURT: MARK THOSE EXCEPTIONS AND PUT 'EM IN THE
8 RECORD. I'LL GIVE HER---

9 MR. GREGORY: THANK YOU.

10 THE COURT: THAT ALSO DOES NOT REDUCE FROM MURDER TO
11 MANSLAUGHTER, EVERY HOMICIDE COMMITTED MUST BE FASHIONED
12 JUSTLY EXCITED BY LEGAL PROVOCATION. I USED TO USE THE
13 EXAMPLE OF SPITTIN' IN THE FACE. I DON'T KNOW WHY I DIDN'T
14 USE THAT, BUT I DIDN'T. ALRIGHT. WE'LL BE AT EASE.

15 MR. MCMAHON: YOUR HONOR, THERE'S ONE OTHER THING I'D
16 LIKE TO PUT ON THE RECORD.

17 THE COURT: YES, SIR.

18 MR. MCMAHON: I HAD NOTED FOR THE COURT STATE -VS-
19 MANNING 409 S.E. 2d 372 WHEREIN OUR SUPREME COURT SAID A
20 REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD CAUSE A
21 REASONABLE PERSON TO HESITATE TO ACT WHICH YOU DID RE-CHARGE
22 THE JURY.

23 THE COURT: YES, SIR.

24 MR. MCMAHON: I JUST WANTED TO MAKE SURE THAT THE
25 DEFENSE DID NOT REQUEST ANY OTHER TYPE OF CHARGE AS FAR AS

1 REASONABLE DOUBT. THAT IS A SUFFICIENT CHARGE BASED ON YOUR
2 INITIAL CHARGE ON REASONABLE DOUBT.

3 THE COURT: YEAH, WELL---

4 MR. MCMAHON: IF THEY WANTED ANYTHING FURTHER.

5 THE COURT: THAT WAS MY OLD CHARGE ON THAT WHIMSICAL AND
6 FANCIFUL.

7 MR. MCMAHON: YES, SIR, AND THAT'S WHY I'M ASKIN'---

8 THE COURT: YEAH.

9 MR. MCMAHON: IF THEY WANT ANYTHING -- WHATEVER THEY
10 WANT ON REASONABLE DOUBT UNDER MANNING---

11 THE COURT: YEAH, WELL, I THINK THAT--

12 MR. MCMAHON: ---SUITS ME FINE IS WHAT I'M SAYIN'.

13 THE COURT: OK. I THINK THAT COVERS IT.

14 MR. MCMAHON: ALL RIGHT, SIR.

15 THE COURT: WE'LL BE AT EASE. (THE FOLLOWING OCCURRED
16 SOMETIME LATER) DO YOU THINK I OUGHT TO WRITE ON THERE CAN'T
17 ANSWER AND SEND 'EM BACK OR JUST LET GERI TAKE 'EM AND SAY WE
18 CAN'T---

19 MR. MCMAHON: JUDGE, YOU KNOW THERE'S A REAL RECENT
20 CASE, I CAN'T CALL THE NAME OF IT, WHERE THE BAILIFF HAD SAID
21 SOMETHIN' TO THE JURY.

22 THE COURT: YEAH, I KNOW IT AND THAT---

23 MR. MCMAHON: IT MAY BE BEST IF YOU BRING 'EM OUT AND
24 JUST SAY YOU'VE GOT TO DECIDE THE CASE BASED ON THE EVIDENCE-

25 --

1 THE COURT: THAT'S ALREADY IN. THEY NEED A STRETCH.
2 BRING 'EM IN.

3 MR. GREGORY: I'LL AGREE WITH THAT WHOLEHEARTEDLY, YOUR
4 HONOR. (THE JURY RETURNED TO OPEN COURT AT 1:01. THE
5 FOLLOWING OCCURRED IN THE PRESENCE OF THE JURY.)

6 THE COURT: YA'LL NEED A LITTLE STRETCH. YOU SENT OUT
7 FOUR QUESTIONS AND I CAN'T ANSWER IT. YOU ALL HAVE TO DECIDE
8 THE CASE ON THE EVIDENCE THAT'S BEEN INTRODUCED. I CAN'T
9 ANSWER THESE QUESTIONS. WE CAN'T INTRODUCE ANYMORE EVIDENCE.
10 SO YA'LL'S LUNCH IS ON THE WAY. ALRIGHT. GO BACK. (THE
11 JURY LEFT THE OPEN COURTROOM AT 1:02 AND RETIRED TO THE JURY
12 ROOM TO CONTINUE DELIBERATING.)

13 (THE JURY RETURNED TO OPEN COURT AT 2:29. THE FOLLOWING
14 OCCURRED IN THE PRESENCE OF THE JURY.)

15 THE COURT: YOU ASKED ME TO CHARGE WHAT CONSTITUTES
16 MURDER, MANSLAUGHTER, MUTUAL COMBAT AND SELF-DEFENSE. MURDER
17 IS THE FELONIOUS KILLIN' OF A HUMAN BEIN' BY A HUMAN BEIN'
18 WITH MALICE AFORETHOUGHT EITHER EXPRESSED OR IMPLIED.
19 MANSLAUGHTER IS THE FELONIOUS KILLING OF A HUMAN BEIN' BY A
20 HUMAN BEIN' WITHOUT MALICE IN SUDDEN HEAT AND PASSION UPON
21 SUFFICIENT LEGAL PROVOCATION. SO YOU SEE THE DIFFERENCE
22 BETWEEN MURDER AND MANSLAUGHTER IS THE PRESENCE OR THE
23 ABSENCE OF MALICE. MALICE IS NOT PRESENT IN MANSLAUGHTER.
24 NOW MALICE IS A TERM OF ART IMPORTING WICKEDNESS, HATRED, THE
25 DETERMINATION TO DO WHAT ONE DID KNOW TO BE WRONG WITHOUT

1 JUST CAUSE OR EXCUSE OR LEGAL PROVOCATION. MALICE NEED NOT
2 BE IN THE MIND OF THE ONE DOIN' THE KILLIN' ANY PARTICULAR
3 LENGTH OF TIME BEFORE THE ACT OF KILLING IN ORDER TO RENDER A
4 KILLING MURDER. IF IT IS PRESENT IN THE MIND ANY LENGTH OF
5 TIME BEFORE THE ACT AND AT THE TIME OF THE ACT ACCOMPANYIN'
6 AND PROMPTIN' THE ACT THEN ITS PRESENCE WOULD BE SUFFICIENT
7 TO RENDER THE KILLING OF A HUMAN BEIN' MURDER.

8 NOW IMPLIED MALICE THE LAW SAYS THAT IF ONE
9 INTENTIONALLY KILLS ANOTHER WITH A DEADLY WEAPON THE
10 IMPLICATION OF MALICE MAY ARISE IF FACTS PROVED BEYOND A
11 REASONABLE DOUBT ARE SUFFICIENT TO RAISE AN INFERENCE OF
12 MALICE TO YOUR SATISFACTION, THIS INFERENCE WOULD SIMPLY BE
13 AN EVIDENTIARY FACT TO BE TAKEN INTO CONSIDERATION BY YOU THE
14 JURY ALONG WITH OTHER EVIDENCE IN THE CASE AND YOU MAY GIVE
15 IT SUCH WEIGHT AS YOU DETERMINE IT SHOULD RECEIVE.

16 MUTUAL COMBAT IF YOU ENGAGE IN MUTUAL COMBAT DESIGNEDLY
17 AND THEY BOTH GO TO THIS PLACE WITH THE INTENTION OF MEETING
18 ONE ANOTHER AND DOING HIM HARM OR INJURY AND THEY MEET AND
19 FIGHT AND ONE IS KILLED YOU CANNOT SET UP SELF-DEFENSE. IN A
20 CASE OF THAT KIND THE -- HE BROUGHT ABOUT ON THE DIFFICULTY
21 AND YOU CANNOT BE WITHOUT FAULT IN BRINGIN' ON THE
22 DIFFICULTY.

23 AS A GENERAL RULE, THE PLEA OF SELF-DEFENSE IS NOT
24 AVAILABLE TO ONE WHO KILLS ANOTHER WHILE ENGAGED IN MUTUAL
25 COMBAT.

1 THE RIGHT OF SELF-DEFENSE IS FOUNDED ON THE LAW OF
2 NATURE AND IS NOT SUPERSEDED BY THE LAW OF SOCIETY. IT IS A
3 RIGHT AND A DUTY WHICH EVERYONE BRINGS TO SOCIETY EXCEPT SO
4 FAR AS THE LAWS OF SOCIETY HAVE CURTAILED IT. EVERY MAN HAS
5 A RIGHT AND IT IS HIS DUTY TO DEFEND HIMSELF FROM AN ATTACK
6 THREATENIN' HIM WITH DEATH OR SERIOUS BODILY HARM. IT IS HIS
7 DUTY TO HIMSELF AND THOSE DEPENDENT UPON HIM TO DO SO. THE
8 RIGHT OF NECESSITY RESTS UPON NECESSITY EITHER ACTUAL OR
9 REASONABLY APPARENT. IN ORDER TO ESTABLISH A PLEA IN A
10 HOMICIDE CASE THE DEFENDANT HAS TO BE WITHOUT FAULT IN
11 BRINGIN' ABOUT THE IMMEDIATE FATAL DIFFICULTY, AT THE TIME HE
12 FIRED THE FATAL SHOT OR DELIVERED THE FATAL STROKE HE IN GOOD
13 FAITH BELIEVED THAT HE WAS IN IMMINENT DANGER OF LOSIN' HIS
14 LIFE OR SUSTAININ' SERIOUS BODILY INJURY, THAT SUCH BELIEF
15 WAS REASONABLE THAT A REASONABLE, CAREFUL AND PRUDENT MAN, A
16 MAN OF ORDINARY FIRMNESS AND COURAGE SITUATED IN LIKE
17 CIRCUMSTANCES WOULD HAVE REACHED A SIMILAR CONCLUSION.

18 WHERE BOTH THE DECEASED AND THE DEFENDANT ARE ON COMMON
19 GROUND, THAT IS WHERE BOTH HAVE A RIGHT TO BE, THEN THE
20 DEFENDANT MUST SHOW THAT HE HAD NO OTHER REASONABLE SAFE,
21 ADEQUATE OR OBVIOUS MEANS OF ESCAPE OR TO ACT AS HE DID.

22 DOES THAT COVER IT FOR YOU?

23 THE FORELADY: MAY WE HAVE A COPY OF THAT?

24 THE COURT: NO, I CAN'T LET YOU TAKE IT THAT THERE. I
25 CAN LET HER PLAY IT BACK TO YOU RIGHT NOW IF YOU WANT TO OR I

Did Van have tap on it at
the Bow Wow (License Plate -)
Are pictures at the scene of Van

Those fingerprints were on the 9 mil
gun?

Did Sallie's daughter go to Texas or Florida?

1 CAN SAY IT AGAIN. WHAT I SAY THE REASON WHY YOU CAN'T AND
2 YOU CAN'T TAKE NOTES IS SOMEBODY MIGHT SAY THAT WAS RIGHT AND
3 THE OTHER THING WAS WRONG.

4 THE FORELADY: PLAY IT BACK.

5 THE COURT: PLAY THAT LAST. PLAY IT BACK. (THE COURT
6 REPORTER PLAYED THE TAPE FOR THE JURY.)

7 (THE JURY LEFT THE OPEN COURTROOM AT 2:41 P.M. AND
8 RETIRED TO THE JURY ROOM TO CONTINUE DELIBERATIONS. THE
9 FOLLOWING OCCURRED IN THE ABSENCE OF THE JURY.)
10
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19 THE COURT: ANY ADDITIONS OR EXCEPTIONS?

20 MR. MCMAHON: NONE FROM THE STATE?

21 MR. GREGORY: WE PASSED UP AND YOU CHARGED INITIALLY THE
22 DEFENSE OF OTHERS UNDER SELF-DEFENSE, AND I THINK THAT SHOULD
23 BE INCLUDED IN THE DEFENSE OF SELF DEFENSE BECAUSE THE FACTS
24 SHOWED THAT THERE WERE OTHERS PRESENT.

25 THE COURT: ALL RIGHT. WELL I'LL LEAVE THEM LIKE THEY

1 ARE.

2 MR. MCMAHON: YES, SIR, AND OF COURSE THE JURY DID NOT
3 REQUEST THAT CHARGE.

4 THE COURT: YEAH, THEY JUST ASKED FOR THE SELF-DEFENSE.
5 OK. I'M GONNA LEAVE IT LIKE THEY ARE. BE AT EASE WHILE WE
6 WAIT ON THE JURY.
7

Can We Have a Copy of the
laws that constitute Murder
Manslaughter, Mutual Combat
and self defense

19

20 (THE FOLLOWING OCCURRED SOMETIME LATER.)

21 THE COURT: I JUST GOT A NOTE SAID WE WANT THE TAPE
22 PLAYED AGAIN, TAPE ON WHAT THE CHARGES ARE. ALRIGHT. (THE
23 JURY RETURNED TO OPEN COURT AT 3:05 P.M. THE TAPE WAS PLAYED
24 FOR THE JURY.)

25 THE COURT: ANYTHING ELSE? OK.

1 (THE JURY LEFT THE OPEN COURTROOM AND RETIRED TO THE
2 JURY ROOM AT 3:11 P.M. TO RESUME DELIBERATING.)
3 THE COURT: WE'LL BE AT EASE.

*We Want the tape played
a gain
tape on what charges
are*

19
20
21 (THE JURY RETURNED TO OPEN COURT AT 6:30 P.M. THE
22 FOLLOWING OCCURRED IN THE PRESENCE OF THE JURY.) MADAM
23 FOREMAN, I'M NOT GOIN' INTO WHAT YOU DISCUSSED. THAT'S
24 YA'LL'S BUSINESS. HAVE YOU REACHED A VERDICT ON ANY ONE OF
25 THE INDICTMENTS?

1 THE FORELADY: YES, SIR.

2 THE COURT: MS. FRANCES, AS A REASONABLE PERSON DO YOU
3 THINK THAT WE COULD FIND ANY 12 PEOPLE -- HATE TO DECLARE A
4 MISTRIAL BECAUSE IT'S NOT ONLY AN EXPENSE TO THE DEFENDANT,
5 IT'S AN EXPENSE TO THE DEFENDANT. I DON'T SEE THAT WE COULD
6 FIND 12 MORE INTELLIGENT PEOPLE THAN YOU ALL TO DECIDE THIS
7 FAIRLY. I KNOW THEY'RE CONTROVERSIAL AND IF YOU HAVE A WELL-
8 FOUNDED OPINION YOU SHOULDN'T CHANGE IT BUT WITH A SPIRIT OF
9 GIVE AND TAKE, DO YOU THINK AS A REASONABLE PERSON YOU MAY BE
10 ABLE TO REACH A VERDICT ON THE OTHER CASES?

11 THE FORELADY: I DON'T KNOW.

12 THE COURT: HOW ABOUT IT? DO YOU THINK SO? I JUST --
13 AS I SAY, OF COURSE YA'LL CAME BACK AND WE TOLD YOU WE CAN'T
14 COMMENT ON ANY FACTS. WE COULD TELL YOU ANY LAW THAT WE
15 CHARGED YOU BUT AND DON'T WANT TO KEEP YOU AWAY FROM YOUR
16 HOME AND FAMILIES BUT WE COULD STAY AND TRY TO REACH A
17 UNANIMOUS DECISION WITHOUT GIVIN' UP ANY WELL-FOUNDED
18 CONSCIENTIOUS OPINIONS BUT WITH A SPIRIT OF GIVE AND TAKE
19 LET'S HAVE A ROUND OF TALK AND LET EVERYBODY SAY WHAT THEY
20 WANT TO SAY AND SEE IF YOU CAN COME TO AN AGREEMENT. IF YOU
21 CAN'T, TELL US AND WE'LL TAKE WHAT YOU HAVE DONE AND---

22 THE FORELADY: OK.

23 THE COURT: OK. I'LL ASK YOU TO TRY IT BEFORE WE ORDER
24 ANY SUPPER, AND I'LL ASK YOU TO TRY. (THE JURY LEFT THE OPEN
25 COURTROOM AND RETIRED TO THE JURY ROOM TO CONTINUE

1 DELIBERATIONS AT 6:35 P.M. THE FOLLOWING OCCURRED IN THE
2 ABSENCE OF THE JURY.)

3 ANY ADDITIONS OR EXCEPTIONS TO ANYTHING I SAID?

4 MR. RIDDLE: NOTHING FROM THE STATE, YOUR HONOR.

5 MR. GREGORY: NOTHING FROM THE DEFENSE, YOUR HONOR.

6 THE COURT: ALL RIGHT. LET'S SEE THEN WE'LL GIVE 'EM A
7 FEW MINUTES. (THE FOLLOWING OCCURRED SOMETIME LATER.)

8 NO MATTER WHAT THE JURY DOES, EVERYBODY REMAIN QUIET. DON'T
9 SAY ANYTHING. BRING THE JURY IN. (THE JURY RETURNED AT 6:46
10 P.M. TO RENDER ITS VERDICT.)

11 THE CLERK: MADAM FORELADY, HAVE YOU REACHED A VERDICT?

12 THE FORELADY: YES, WE HAVE.

13 THE CLERK: PLEASE, PASS THEM UP BY THE BAILIFF.

14 INDICTMENT 92-GS-32-3398 THE STATE -VS- FRED RANDALL RUTLAND

15 INDICTED FOR MURDER, VERDICT, GUILTY OF MURDER. INDICTMENT

16 93-GS-32-586 THE STATE -VS- FRED RANDALL RUTLAND INDICTED FOR

17 POSSESSION OF FIREARM DURING COMMISSION OF OR ATTEMPT TO

18 COMMIT VIOLENT CRIME, VERDICT, GUILTY. INDICTMENT 93-GS-32-

19 1514 THE STATE -VS- FRED RANDALL RUTLAND INDICTED FOR

20 POINTING A FIREARM, VERDICT, GUILTY. THEY'RE ALL PROPERLY

21 SIGNED JUDY FRANCES AND DATED 5-8 -- 28-93. MADAM FORELADY,

22 LADIES AND GENTLEMEN OF THE JURY, IF THIS SO BE YOUR

23 VERDICTS, PLEASE, INDICATE SO BY RAISING YOUR RIGHT HAND.

24 ALL HANDS ARE RAISED, YOUR HONOR.

25 THE COURT: ALRIGHT. COME AROUND. NOTE THE SAME

1 MOTIONS THAT HE MADE EARLIER. CASE -- MR. RUTLAND, YOU HAVE
2 ANYTHING YOU WANNA SAY BEFORE I PASS SENTENCE?

3 THE DEFENDANT: NO, SIR.

4 THE COURT: CASE #3398 SENTENCE OF THE COURT IS YOU BE
5 CONFINED TO THE STATE DEPARTMENT OF CORRECTIONS FOR AND
6 DURIN' YOUR NATURAL LIFE. 1514 SENTENCE OF THE COURT IS YOU
7 BE CONFINED TO THE STATE BOARD OF CORRECTIONS FOR A PERIOD OF
8 TEN YEARS. CASE 586 POSSESSION OF A FIREARM DURIN' THE
9 COMMISSION OF A CRIME. IS IT FIVE? FIVE YEARS. MADAM
10 FOREMAN, LADIES AND GENTLEMEN OF THE JURY, THIS CONCLUDES
11 YOUR SERVICE ON THIS CASE. CONCLUDES YOUR SERVICE FOR THE
12 WEEK. I SAID WE GOT ONE THAT STAYED AND SHE WASN'T EVEN ON
13 IT. BUT I FOUND OUT HER SON FINISHED DUKE LAW SCHOOL AND SHE
14 NEVER HAD SEEN HIM IN COURT. I'M TOO OLD TO BE HER SON SO
15 SHE CAN CLAIM ONE OF THESE I GUESS. CLERK, YOU GOT THEIR
16 CHECKS?

17 THE CLERK: I SURE DO.

18 THE COURT: SHE HAS YOUR CHECKS. YOU LADIES GO TO
19 WACCAMAW POTTERY AND YOU MEN GIVE 'EM TO YOUR WIVES.

20 NOTE HIS MOTIONS IN THE RECORD AND HE CAN REDUCE 'EM TO
21 WRITING AND PRESENT 'EM TO ME AND THE COURT REPORTER.
22 ALRIGHT.

23 MR. GREGORY: YOUR HONOR, THE DEFENDANT ASKS FOR A NEW
24 TRIAL ON THE GROUNDS THAT SEVERAL CHARGES WERE PRESENTED AND
25 NOT CHARGED, SPECIFICALLY THE CHARGE OF SELF-DEFENSE OF

1 OTHERS IN ADDITION TO MOTIONS THAT WERE NOTED ON THE RECORD
2 AND NOT ARGUED AT THE TIME, THAT -- AND I'M NOT REFERRIN' TO
3 NOTES AT THIS POINT. A COUPLE OF REQUESTS WERE MADE TO
4 CHARGE. ONE BEING THE CASE THAT SLIGHT PROVOCATION WOULD
5 REDUCE A MURDER TO A MANSLAUGHTER, AND THE OTHER BEING THAT
6 MUTUAL COMBAT IS MANSLAUGHTER. I'M SURE THERE ARE SOME
7 ADDITIONAL THAT I WILL PASS UP.

8 THE COURT: I'LL GIVE YOU LEAVE TO PASS THOSE UP.

9 MR. GREGORY: WRITTEN DOCUMENT. THANKS.

10 THE COURT: I DON'T KNOW HOW LONG WE NEED TO DO IT.

11 MR. GREGORY: WELL, THE RULE SAYS NOW TEN DAYS.

12 THE COURT: TEN DAYS.

13 MR. GREGORY: THAT'S CORRECT.

14 THE COURT: TEN DAYS, YEAH. OK. I'LL BE IN PICKENS
15 WHEN THAT TIME COMES AROUND, YEAH.

16 MR. GREGORY: VERY GOOD. THANK YOU, SIR.

17 *****END*****OF*****TRANSCRIPT*****
18
19
20
21
22
23
24
25

COPY 577

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
THE STATE)
-V-)
FRED R. RUTLAND)
DEFENDANT)

IN THE COURT OF GENERAL SESSIONS

MOTION IN LIMINIE

MAY 21 12 01 PM '93
THOMAS
CLERK

The State, by and through the Eleventh Circuit Solicitor's Office, would respectfully move the Court for an Order in liminie prohibiting the introduction of evidence concerning any alleged prior physical altercations between the victim Jimmy Peele and his wife Sally Peele.

The grounds for the is motion are:

1) Any such testimony is not relevant to the issues presented in the instant case and merely an attempt to improperly place the victim's character in issue.

2) Any such testimony by the defendant Fred Rutland would be impermissible hearsay because it could only be based on prior statements made to the defendant by Sally Peele.

3) Any such testimony by Sally Peele would be inadmissible because any such alleged events are not sufficiently connected to the events surrounding the current charges to be relevant or probative.

Respectfully submitted,


C. Dayton Riddle
Assistant Solicitor

Lexington, South Carolina
May 27, 1993

STATE'S REQUEST TO CHARGE NO. 1

If two men engage in mutual combat designedly, and they both go to this place with the intention of meeting the other and doing him harm or injury, and they meet and fight, and one is killed, he cannot set up self-defense. In a case of that kind, he brought on the difficulty, and cannot be said to be without fault in bringing on the difficulty.

State v. Jones, 101 S.E. 647 (1919)

STATE'S REQUEST TO CHARGE NO. 2

As a general rule, the plea of self-defense is not available to one who kills another while engaging in mutual combat. State v. Jones, 113 S.C. 134, 101 S.E. 647 (1919); State v. Graham, 260 S.C. 449, 196 S.E.2d 495 (1973).

State v. Porter, 239 S.E.2d 641 (1977)

DEFENDANT'S REQUEST TO CHARGE No. IV.

That under South Carolina law, voluntary manslaughter is usually defined as the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation State v. Gardner, 219, S.C. 97, 64 S.E.2d 130 (1954). ~~Slight physical aggression is sufficient provocation to reduce homicide to manslaughter.~~

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS
FOR THE ELEVENTH JUDICIAL CIRCUIT

The State of South Carolina)

vs.)

Fred R. Rutland,)

Defendant.)

NOTICE OF MOTION AND
MOTION TO SUPPRESS
STATEMENTS OF SALLY PEELE

TO: THE HONORABLE DONALD MYERS, SOLICITOR FOR THE ELEVENTH
JUDICIAL CIRCUIT:

The undersigned attorney for witness Sally Peele in the above-captioned action now moves before the Court to suppress the following evidence: all statements made by witness Sally Peele taken by officers of the Lexington County Sheriff's Department.

Witness makes this motion based upon the following salient facts and points of law:

1. On September 4, 1992, after her husband had been shot and Sally Peele had tried to render CPR on him and, as a consequence, was spattered with her husband's blood and was in a state of shock and only interested in ascertaining the status of her husband's condition and either accompanying him in the ambulance the Lexington County Medical Center, or being taken there, she was immediately taken to the Lexington County Sheriff's Department by officers who informed her that she would be informed about her husband's medical condition and taken to the hospital to see him only after she had made a statement about the events of the shooting; and that time witness states that she was probably read her "Miranda rights" and obviously initialed the "Miranda rights" as they appear in written form at the beginning of the statement form which was being drafted by the interviewing officer who was taking her statement, she was in such a shocked and shattered

state of mind in not being able to ascertain the condition of her husband and not being allowed to wash her husband's blood off her hands and her person, that she does not remember being read her "Miranda rights", initialing the rights in written form above her drafted statement, signing or initialing the statement, or even what the statement contained or what she stated to the interviewing officer.

2. As the result of the foregoing, witness believes that the above circumstances establish that at the time that she was questioned by the interviewing officer, that she was not fully cognizant of and did not understand the protection afforded her under her "Miranda rights", since "(her) will had been overborne and (her) capacity for self determination critically impaired." As enunciated in State v. Morris, 415 S.E.2d 819 (S.C. App. 1991),

"(i)f the accused is advised of his Miranda rights and nevertheless chooses to make a statement, the burden of proof is still with the State to show that he knowingly and voluntarily waived his right to remain silent and that the statement was freely and voluntarily made. State v. Rochester", 201 S.C. 196, 391 S.E.2d 244 (1990). However, once a voluntary waiver of Miranda rights is made, that waiver continues until the accused either indicates he wants to revoke the waiver and remain silent or circumstances establish that his will has been overborne and his capacity for self determination critically impaired."

3. That during the time witness was making her statement, her next most pressing concern, after attempting to ascertain the condition of her husband, was that of contacting her daughter, Christine, the minor child of Sally and Jimmy Peele, in order to comfort her daughter in this time of familial tragedy; however witness was informed by officers of the Lexington County Sheriff's Department that she would only be allowed to contact her daughter after she had made a statement regarding the events of her husband's shooting and that she would be taken to her daughter only after she had made a statement.

4. That during the time she was being questioned by the interviewing officer in

a room within the Lexington County Sheriff's Department, another officer burst into the room and made a statement to the effect that the 9MM semi-automatic pistol which was husband had at the scene of the shooting had its safety catch on, a ploy which was obviously designed to rattle, intimidate, brow-beat, and cause emotional distress to the witness.

5. That a few days after the shooting of her husband, during a subsequent interview with an officer of the Lexington County Sheriff's Department, witness was informed that she could have her minor child taken away from her and would never be allowed to see her child again unless she made a further statement.

6. Witness's statements given to the Lexington County Sheriff's Department are also inadmissible on the grounds that they were made only after she was told she would not be allowed to see her child until she had given a statement; it was intimated by an officer of the Sheriff's Department that witness was under suspicion in some way because the safety catch of her husband's weapon was on; and the loss of her child was being held over her by officers in authority in order to induce her to make statements to them.

7. In State v. Peake, 352 S.E.2d 487 (S.C. 1987), in which Defendant Peake's conviction of murder was based in part on a statement he gave the investigating officer, Defendant's statement was ruled by the S.C. Supreme Court to be

"inadmissible where the investigating officer was in the position of apparent authority and his remarks to defendant were tantamount to a promise that the State would not seek the death penalty for murder if defendant gave a statement, and State failed to show that the defendant's subsequent custodial inculpatory statement was voluntary and not the result of the officer's promise of leniency."

The case at bar presents an even more flagrant example of investigating officers using their authority to gain statements from the witness, since witness only gave her statements

DEFENDANT'S REQUEST TO CHARGE No. I.

That under South Carolina law, *"any relative, friend, or bystander may take life of malicious assailant where there is no reasonable means of escape proper."*

See State v. Hays, 113 S.E. 362 at 363 (S.C. 1922), in which the trial judge's following instructions to the jury were held to be correct:

"In such case the right to take the life of such assailant upon such unprovoked assault extends to any relative, friend, or bystander who would likewise have the right to take the life of such assailant if such act was necessary to save the person so wrongfully assailed from imminent danger of being murdered by such assailant. In other words, if the assailant makes a malicious and unprovoked assault with a deadly weapon upon one person with apparent malicious intention to take the life of the person assailed and thereby commit murder, then, where the danger of the commission of such murder is imminent, any relative, friend, or bystander would have the right to take the life of such assailant if necessary in order to prevent the commission of such murder, provided there was no other reasonable means of escape for the person so assailed, and provided both the person assailed and the person coming to his defense were without legal fault in bringing on the difficulty."

See also State v. Bozeman, S.E.2d 144 (S.C. 1992).

DEFENDANT'S REQUEST TO CHARGE No. II.

That under South Carolina law, as stated in Robinson v. State, 417, S.E.2d 88

(S.C. 1992). "(s)elf-defense is comprised of four elements:

First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent [person] of ordinary prudence, firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a [person] of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense.

State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984). Self-defense is a complete defense; if established, a jury must find that the defendant is not guilty. *Id.*"

DEFENDANT'S REQUEST TO CHARGE No. III.

That under South Carolina law, as stated in State v. Chambers, S.C. App. Opinion No. 1906, filed November 30, 1992, "*a lawful guest attacked in the home of another person has no duty to retreat where the attacked is an intruder. See State v. Osborne, 202, S.C. 473, 25 S.E.2d 561 (1943).*

DEFENDANT'S REQUEST TO CHARGE No. IV.

That under South Carolina law, voluntary manslaughter is usually defined as the unlawful killing of a human being in sudden heat of passion upon a sufficient legal provocation State v. Gardner, 219, S.C. 97, 64 S.E.2d 130 (1954). Slight physical aggression is sufficient provocation to reduce homicide to manslaughter.

FORM 17 (12/87)

600

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

INDICTMENT FOR POINTING A FIREARM
AND CARRYING A PISTOL

At a Court of General Sessions, convened on May 24, 1993,
the Grand Jurors of Lexington County present upon their oath:

COUNT ONE — POINTING A FIREARM

That FRED RANDALL RUTLAND did
in Lexington County on or about September 4, 1992,
point or present a firearm, to wit: 12 gauge shotgun

at one Jimmy Peele

COUNT TWO — CARRYING A PISTOL

That _____ did
in _____ County on or about _____,
carry about the person a pistol.

Against the peace and dignity of the State, and contrary to the statute in such case made and
provided.

CD [Signature]
Asst. SOLICITOR

FORM 32 (12/87)

601

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on November 30, 1992,
the Grand Jurors of Lexington County present upon their oath:

That FRED RANDALL RUTLAND did in Lexington County on or about
September 4, 1992, feloniously, wilfully and with malice
aforethought, kill one Jimmy Peele by shooting the victim four (4)
times with a 25 calibre semi-automatic pistol.

Against the peace and dignity of the State, and contrary to the statute in such case made and
provided.

John M. Mc
SOLICITOR

602

WITNESSES

Frier, LCSD

The State of South Carolina,

County of LEXINGTON

COURT OF GENERAL SESSIONS

November TERM 1992

THE STATE

vs.

FRED RANDALL RUTLAND

ARREST WARRANT NO. D 494788

ACTION OF GRAND JURY
TRUE BILL

Clay J. ...
Foreman of Grand Jury 11/30/92

CDR # 116

Indictment for

MURDER

VERDICT
Guilty - Murder

Guilty 11/30/92

A TRUE COPY

Wanda H. ...
Lex. Co. C.C.P., G.S. F.C.

603

FORM 8 (12/87)

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

~~INDICTMENT FOR ASSAULT AND
BATTERY WITH INTENT TO KILL
AND POSSESSION OF FIREARM OR
KNIFE DURING COMMISSION OF OR
ATTEMPT TO COMMIT A
VIOLENT CRIME~~

At a Court of General Sessions, convened on February 1, 1993
the Grand Jurors of Lexington County present upon their oath:

COUNT ONE — ASSAULT AND BATTERY WITH INTENT TO KILL

That _____
did in _____ County on or about _____, with
malice aforethought commit an assault and battery upon one _____
_____ with intent to kill the said victim.

**COUNT TWO — POSSESSION OF FIREARM OR KNIFE DURING COMMISSION
OF OR ATTEMPT TO COMMIT A VIOLENT CRIME**

That FRED RANDALL RUTLAND
did in Lexington County on or about September 4, 1992, possess (n)
visibly display a firearm or visibly display a knife during the commission or attempted commission
of a violent crime, to wit: 25 calibre semi-automatic pistol
in violation of Code Section 16-23-490, *Code of Laws of South Carolina*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and
provided.

For M. E. Mack
Deputy SOLICITOR

604

WITNESSES

Frier, LCSD

Volume: No. _____
The State of South Carolina,
County of LEXINGTON

COURT OF GENERAL SESSIONS

February TERM 1993

THE STATE

vs.

FRED RANDALL RUTLAND

ARREST WARRANT NO. _____

Straight Indictment

ACTION OF GRAND JURY

TRUE BILL

E. M. [Signature]
Foreman of Grand Jury 2/25/93

VERDICT

[Signature]

Indictment for Assault and
Battery With Intent To Kill
and Possession of Firearm
or Knife During
Commission of or Attempt
to Commit Violent Crime

A TRUE COPY

[Signature]
Lex. Co. C.C.D.P., C.S. J.F. Co.

592
State of South Carolina 5/28/93

605

WITNESSES

Frier, LCSD

ARREST WARRANT NO.

Straight Indictment

ACTION OF GRAND JURY

TRUE BILL

Foreman of Grand Jury 5/20/93

VERDICT

Guilty

Foreman of Petit Jury *Guilty* *5/20/93*

The State of South Carolina,

County of LEXINGTON

COURT OF GENERAL SESSIONS

May TERM 1993

THE STATE

vs.

FRED RANDALL RUTLAND

Indictment for Pointing a

Firearm and Carrying

a Pistol

Donald V. Myers, Solicitor

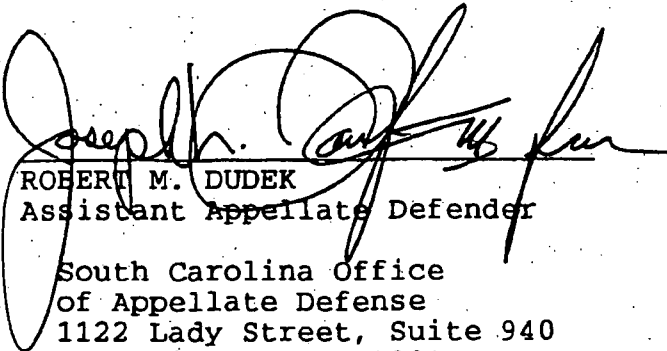
A TRUE COPY

Witnessed & Certified
Lex. Co. C.C.C.P. & C.S. J.F.C.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

August 15, 1994



ROBERT M. DUDEK
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS
FOR THE ELEVENTH JUDICIAL CIRCUIT

The State of South Carolina)

vs.)

Fred R. Rutland,)

Defendant.)

MOTION FOR A NEW TRIAL

FILED
JUN 7 9 40 AM '93
THOMAS H. OMEARFORD
CLERK OF COURT
LEXINGTON 50

Defendant, following the jury verdict of murder rendered against him in the above-captioned action at trial on May 28, 1993, now comes before the Court through his undersigned counsel to move for a new trial on the following grounds:

1. The trial judge erred in failing to grant Defendant's Motion to Suppress Defendant's Statements to the Lexington County Sheriff's Department.

In support, Defendant would cite State v. Morris, 415 S.E.2d 819 (S.C. App. 1991); State v. Peake, 352 S.E.2d 487 (S.C. 1987); and State v. Broome, 268 S.C. 99, 232 S.E.2d 324 (1977).

2. The trial judge erred in granting State's Motion in Limine "prohibiting the introduction or evidence concerning any alleged prior physical altercations between the victim Jimmy Peele and his wife Sally Peele" in that physical evidence existed as to such evidence of Jimmy Peele's prior abuse of his wife which supported Defendant's contention that Defendant, in shooting Jimmy Peele, acted in defense of others in order to protect the life of Sally Peele.

In support, Defendant cites State v. Hays, 113 S.E. 362 at 363 (S.C. 1922) and Robinson v. State, 417 S.E.2d 88 (S.C. 1992).

3. The trial judge erred in sustaining State's objection to the introduction into evidence of a bill of sale showing Jimmy Peele to be the owner of the 9mm pistol found at the scene of shooting.

4. The trial judge erred in refusing to charge the jury regarding involuntary manslaughter in that under South Carolina law, *"First involuntary manslaughter may be described as the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm. The second situation may be described as the killing of another without malice and unintentionally but while engaged in the doing of a lawful act with a reckless disregard of the safety of others."* Bozeman v. State, 414 S.E.2d 144 (S.C. 1992). See also State v. Barnett, 218 S.C. 415, 63 S.E. 2d 57 (1951); State v. McCall, ---S.C.--, 405, S.E.2d 414 (Ct. Ap., 1991).

5. The trial judge erred in refusing to charge the jury regarding South Carolina case law regarding voluntary manslaughter which states that slight physical aggression is sufficient provocation to reduce homicide to manslaughter. See Norris v. State, 309 F. Supp. 1113 (1970).

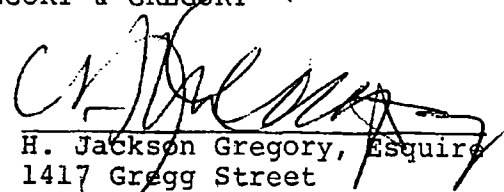
6. When during its deliberation, the jury returned for a further recital of instructions, the trial judge erred in refusing to re-charge Defendant's Request No. 1, regarding self-defense in defense of others.

7. When the jury rendered its verdict, the trial judge erred in failing to poll each juror individually in that it was obvious that one juror was very slow in raising her hand in assent to the verdict and, in fact, only raised her elbow.

8. In that the trial judge erred in failing to properly charge the jury as to "reasonable doubt" in instructing them that reasonable doubt is what makes one hesitate before he acts and that reasonable doubt is a doubt that would cause a reasonable man to hesitate to act.

In support, Defendant would cite State v. Hackett, 55 S.E.2d 696, 703, 215 S.C. 434 (1949); State v. Butler, 146 S.E. 418, 419, 148 S.C. 495 (1929); State v. Ferguson, 74 S.E. 502, 505, 91 S.C. 235 (1912); State v. Powers, 37 S.E. 690, 695, 59 S.C. 200 (1901); State v. Summer, 32 S.E. 771, 55 S.C. 32, 74 Am.St. Rep. 707 (1899); State v. Aughtry 26 S.E. 619, 623, 49 S.C. 285 (1897); State v. Senn, 11 S.E. 292, 295, 32 S.C. 392 (1890) and State v. Robinson, 4 S.E. 570, 571, 27 S.C. 615 (1888).

GREGORY & GREGORY

By: 

H. Jackson Gregory, Esquire
1417 Gregg Street
P. O. Box 2351
Columbia, SC 29202-2351
(803) 765-1112

Attorneys for Defendant

Columbia, South Carolina
June 6, 1993

CERTIFICATE OF MAILING

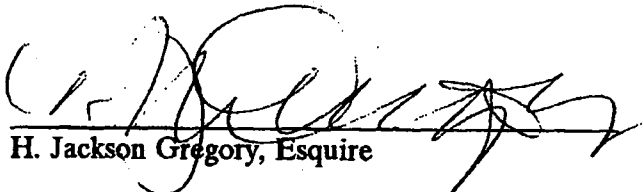
RE: State vs. Rutland

I, H. JACKSON GREGORY, Esquire, certify that I have this date mailed a copy of the following pleadings in the following manner to the Eleventh Circuit Solicitor's Office in franked envelope addressed as follows:

**The Honorable Donald Myers
Solicitor For the Eleventh Judicial Circuit
Lexington County Courthouse Annex
E. Main Street
Lexington, S.C. 29072**

Pleadings:

- a. Defendant's Motion For a New Trial.**



H. Jackson Gregory, Esquire

**GREGORY & GREGORY
Post Office Box 2351
1417 Gregg Street
Columbia, South Carolina 29202-2351
(803) 765-1112**

Attorneys for Defendant

Columbia, South Carolina

June 7, 1993.

CERTIFICATE OF MAILING

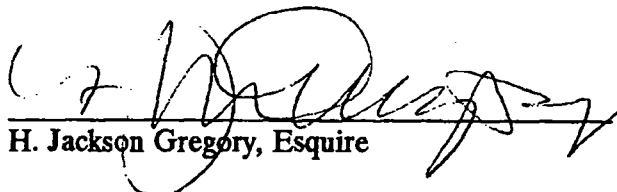
RE: State vs. Rutland

I, H. JACKSON GREGORY, Esquire, certify that I have this date mailed a copy of the following pleadings in the following manner to the Honorable Frank Eppes, Special Circuit Court Judge for the Eleventh Judicial Circuit, in a franked envelope addressed as follows:

**The Honorable Frank Eppes
Special Circuit Court Judge
For the Eleventh Judicial Circuit
Pickens County Courthouse
Pickens, S.C.**

Pleadings:

- a. Defendant's Motion For a New Trial.**



H. Jackson Gregory, Esquire

**GREGORY & GREGORY
Post Office Box 2351
1417 Gregg Street
Columbia, South Carolina 29202-2351
(803) 765-1112**

Attorneys for Defendant

Columbia, South Carolina

June 7, 1993.

**IN THE COURT OF GENERAL SESSIONS
FOR THE ELEVENTH JUDICIAL CIRCUIT**

THOMAS H. CONERFORD
CLERK OF COURT
LEXINGTON SC

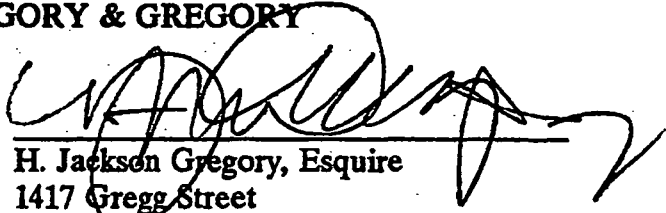
Defendant.

**MOTION FOR A NEW TRIAL
ON AFTER-DISCOVERED EVIDENCE
AND TO STAY THE TIME FOR
PERFECTING AN APPEAL
RULES OF CRIMINAL PROCEDURE, RULE 29**

A TRUE COPY
Almon H. Grayford
Loc. Co. C.G.C.P., G.S. & F.C.

1. Jimmy Peele entered the Bow Wow Boutique with a weapon;
2. Jimmy Peele aimed his weapon at both Sally Peele and Fred Rutland;
3. Fred Rutland attempted to warn Jimmy Peele not to shoot his weapon by presenting his own weapon and by saying "Don't Jimmy, don't";
4. if it had not been for the fact that his weapon's safety catch was on, Jimmy Peele would have fired his weapon;
5. she (Kimberly Kestner) believed her own life to be endangered by the presence of Jimmy Peele armed with a weapon on the aforesaid date; and
6. she believed that Fred Rutland acted not only in self-defense, but in the defense of all others present, including herself, when he shot Jimmy Peele.

GREGORY & GREGORY

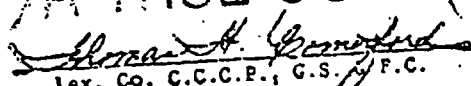
By: 

H. Jackson Gregory, Esquire
1417 Gregg Street
Post Office Box 2351
Columbia, South Carolina 29202-2351
(803) 765-1112

Attorneys for Defendant

Columbia, South Carolina

June 15, 1993.

A TRUE COPY

Lex. Co. C.C.C.P., G.S. F.C.

GREGORY & GREGORY
 ATTORNEYS AT LAW
 1417 GREGG STREET
 POST OFFICE BOX 2351
 COLUMBIA, SOUTH CAROLINA 29202-2351
 PHONE (803) 765-1112

FILED

JUN 21 8 31 AM '93

H. JACKSON GREGORY

June 16, 1993

THOMAS H. COMMERFORD
 CLERK OF COURT
 LEXINGTON SC

ROY R. GREGORY, SR.
 (1899-1973)
 NED GREGORY, SR.
 (1903-1983)

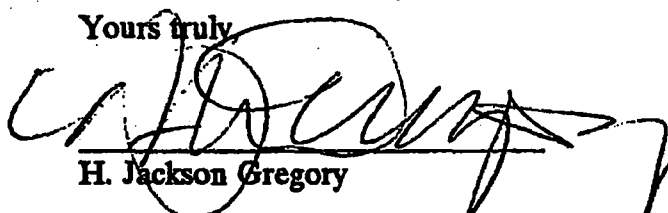
The Thomas Commerford
 Clerk of Court for Lexington County
 Lexington County Courthouse
 E. Main Street
 Lexington, S.C. 29072

RE: State vs. Fred R. Rutland

Dear Mr. Commerford:

Please find enclosed ORIGINAL of Defendant's Motion For a New Trial On After-Discovered Evidence And To Stay the Time For Perfecting an Appeal in the above-referenced General Sessions Court case heard before Judge Eppes in Lexington, S.C., which I have forwarded to Judge Eppes as of this date and by the enclosed certificate of mailing I am hereby serving upon you.

Yours truly,

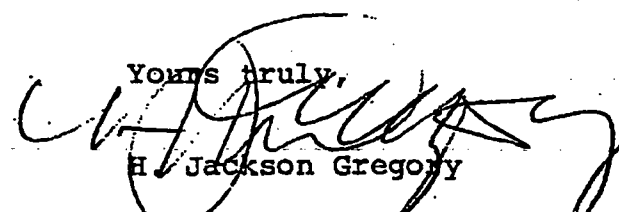

 H. Jackson Gregory

Enclosure

P. S. June 16, 1993

Also enclosed herewith please find original order of Judge Frank Eppes dated June 10, 1993 which I received June 14, 1993 denying my Motion for a New Trial. I enclose an extra copy for you to clock in and return to me in the envelop provided. Thanks.

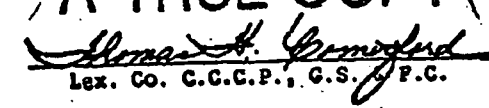
Yours truly,


 H. Jackson Gregory

Enclosures

cc: Donald V. Myers, Solicitor

A TRUE COPY


 Lex. Co. C.C.C.P., G.S. P.C.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Fred R. Rutland,

Appellant.

Appeal From Lexington County
Frank Eppes, Special Circuit Judge

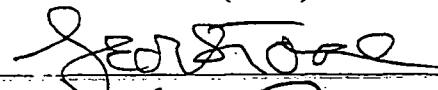
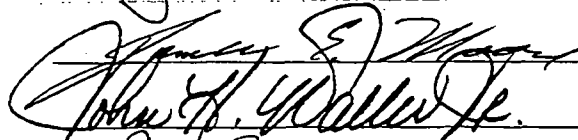
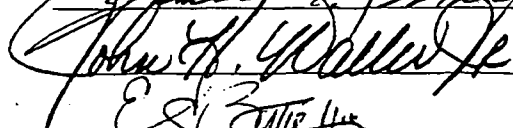
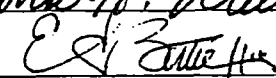
Memorandum Opinion No. 95-MO-263
Submitted July 5, 1995 - Filed August 25, 1995

AFFIRMED

Assistant Appellate Defender Robert M. Dudek, of S.C.
Office of Appellate Defense, of Columbia, for appellant.

Attorney General T. Travis Medlock, Chief Deputy
Attorney General Donald J. Zelenka, Senior Assistant
Attorney General Harold M. Coombs, Jr., Assistant
Attorney General William Edgar Salter, III, all of
Columbia; and Solicitor Donald V. Myers, of Lexington,
for respondent.

Per Curiam: Affirmed pursuant to Rule 220(b)(1), SCACR, and the following authorities: Issue 1: State v. Longworth, ___ S.C. ___, 438 S.E.2d 219 (1993) (where no request or contemporaneous objection to charge as given is made, insufficiency of jury charge not properly before the Court), cert. denied, ___ U.S. ___, 115 S.Ct. 105, 130 L.Ed.2d 53 (1994); Issue 2: State v. Sullivan, ___ S.C. ___, 426 S.E.2d 766 (1993) (appellant must object at first opportunity to preserve alleged error for review); State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980); Issue 3: State v. Williams, 303 S.C. 410, 401 S.E.2d 168 (1991) (issue not raised to and ruled upon by trial judge is not preserved for review); Issue 4: Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

 A.J.
 A.J.
 A.J.
 A.J.

Finney, C.J., not participating.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

The State,

Respondent,

V.

Fred R. Rutland,

Petitioner.

Appeal from Lexington County

Frank Eppes, Judge

Memorandum Opinion. No. 95-MO-263
(Filed August 25, 1995)

PETITION FOR REHEARING

Appellant respectfully asks for rehearing of Memorandum Opinion No. 95-MO-263, filed August 25, 1995, pursuant to Rule 221, SCACR. Appellant will address one issue as it was taken up in the opinion of this Court, making note to the briefs of the parties.

THE JUDGE'S FAILURE TO CHARGE DEFENSE OF OTHERS
Appellant's Issue I

This case involves the September 4, 1992, 1:45 p.m., shooting of Jimmy Peele (Peele) at the Bow-Wow Boutique in Lexington, South Carolina. R. p. 96, line 10 - p. 97, line 17. Appellant's defense was that he was protecting Sally Peele, his close friend and co-worker, from her abusive husband at the time he shot Peele.

In it's opinion, this Court procedurally barred the defense of

others issue stating: "where no request or contemporaneous objection to charge as given is made, insufficiency of jury charge not properly before the Court." Respectfully, this issue was squarely before the trial judge. A brief look at the evidence reveals appellant was entitled to an instruction on the defense of others, and that it was not procedurally barred for review by this Court. The instruction was requested, and its refusal was excepted to also.

The defense case showed an altercation occurred between Peele on the one hand, and appellant and Salley on the other. This happened earlier in the day.

This record reveals the relationship between Salley and Peele was a stormy one. There was evidence showing Peele learned Salley and appellant went to the boutique following their morning confrontation. Peele went into the small boutique armed with the intention of continuing the confrontation.¹ Appellant's brief at 5 - 16.

Salley Peele remembered saying "oh, my God," and she then heard appellant telling Peele not to shoot. R.p. 355, lines 20-25. It was at this point that appellant shot Peele. Appellant still told Officer Garner at the scene: "I'm sorry, please help him."² R. p. 99, lines 5-8; Appellant's brief at 5. Appellant also recalled that Detective Frier of Lexington County told him, "well,

¹ That the boutique was small, and Peele's showing up there was not totally innocent are fair inferences from the record.

² There was evidence Sally Peele was a battered woman, and that appellant made other attempts to protect her from Peele. See Appellant's brief at 16.

Fred, it sure sounds like an evident case of self-defense, maybe."
R.p. 431, lines 6-19.

During a colloquy at the end of a day of court, while discussing requests to charge, the judge observed in a colloquy with the attorneys: "anybody has the right to come to the defense of a member of their family. They have a right to come to their defense. They stand in the same shoes they stand in, but I don't think there are any shoes to stand in at this particular time accordin' to the facts thus far that this jury's heard." R.p. 307, lines 18-23; Appellant's brief at 17.

Appellant's attorney took exception to the judge's view of the evidence at that point. The judge then said he would charge the defense of others, but he still did not think the facts "up to now"... "warrant what you say about the third cleared party, so we'll [wait] start and see what you put up." The solicitor then said: "judge, I don't have any problem with defense of others. I don't have any problem that charge whatsoever." (emphasis added). R.p. 308, line 23 - p.309, line 13.-

Not only was the defense of others clearly discussed with the trial judge, appellant later excepted to the judge's failure to instruct it. R.p. 386, lines 21-24; Appellant's brief at 24. After appellant's exception to the charge, the judge said: "well, I'll leave them like they are." R.p. 586, line 25 - p. 587, line 1; Appellant's brief at 24.

The state did not even argue that this issue was procedurally barred. The state addressed the issue on its merits.

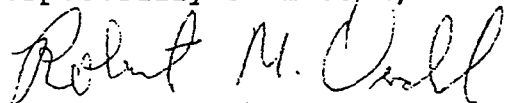
The state merely stated the charge as given was proper. It

also argued that any error was harmless beyond a reasonable doubt, "based on the unique facts of this case." Respondents brief at 7.

This issue was squarely before the court. The state takes the position that a friend can never avail himself of the defense of others. Appellant, of course, maintains that a friend is not required to stand idly by while his close friend is killed or be guilty of murder.³ The judge committed reversible error by refusing to instruct the jury on defense of others in this case. See Appellant's brief at 25.

As such, this Court is requested to reconsider it holding on this issue.

Respectfully Submitted,


Robert M. Dudek
Assistant Appellate Defender

This 8th day of August, 1995.

³ Appellant's request to charge is in the Record on Appeal at page 599-A.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
Frank Eppes, Judge

THE STATE,

RESPONDENT,

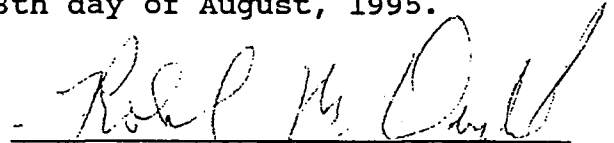
V.

FRED R. RUTLAND,

APPELLANT.

CERTIFICATE OF SERVICE

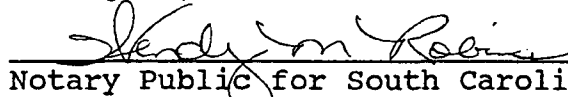
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above entitled case has been served upon opposing counsel this 8th day of August, 1995.



ROBERT M. DUDEK
Assistant Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 8th day
of August, 1995.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: 3/24/2003



The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

October 9, 1995

Robert M. Dudek, Esquire
Assistant Appellate Defender
SC Office of Appellate Defense
1122 Lady Street, Suite 940
Columbia, SC 29201

Re: The State v. Fred R. Rutland

Dear Mr. Dudek:

The Court has refused your Petition for Rehearing in the above case in the following Order:

"Petition for Rehearing
is denied.

s/Jean H. Toal _____ A.C.J.

s/James E. Moore _____ A.J.

s/John H. Waller, Jr. _____ A.J.

s/E.C. Burnett, III _____ A.J.

Chief Justice Ernest A. Finney, Jr.
not participating

October 9, 1995."

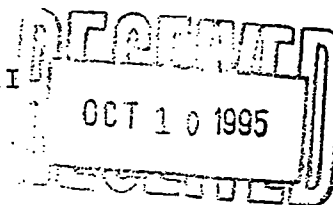
The remittitur in this matter is today being forwarded to the Clerk of Court for Lexington County.

Very truly yours,

CLERK

CND, Jr./dhp

cc: The Honorable William Edgar Salter, III
The Honorable Donald V. Myers



THE STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
COUNTY OF LEXINGTON)	FOR THE ELEVENTH JUDICIAL CIRCUIT
State of South Carolina,)	CASE NOS.: 92-GS-32-586
vs.)	92-GS-32-3398
Fred Randall Rutland,)	93-GS-32-1514
Defendant.)	NOTICE OF MOTION AND MOTION
_____)	FOR A NEW TRIAL BASED ON
	NEWLY/AFTER DISCOVERED EVIDENCE

NOTICE

TO: DONALD V. MYERS, ESQUIRE, SOLICITOR, FOR THE ELEVENTH JUDICIAL CIRCUIT, COUNTY COURTHOUSE, LEXINGTON, S.C. 29072

PLEASE TAKE NOTICE, that the undersigned will bring the above motion on for hearing before the Presiding Judge of the Court of General Sessions for Lexington County on the tenth (10th) day following service hereof, at 10:00 in the forenoon, or as soon after as the subscriber can be heard.

April 17th, 1996.

Ridgeville, South Carolina.

Fred Randall Rutland
 FRED RUTLAND, DEFENDANT, PRO SE
 SCDC #197903 STONO UNIT A56
 LIEBER CORRECTIONAL INSTITUTION
 P.O. BOX 205
 RIDGEVILLE, S.C. 29472-0205
 (NO TELEPHONE)

MOTION

COMES NOW, Fred Rutland, Defendant, pro se, and moves this Honorable Court for an Order granting the defendant a new trial in the above captioned criminal action. The movant would show unto this Honorable Court:

I.

JURISDICTION

This motion is brought as provided for in S.C. Code Ann. § 17-23-110 (1976); Rule 29(b) of the South Carolina Rules of Criminal Procedure; and State v. Irvin, 270 S.C. 539, 243 S.E.2d 195 (1978). The movant seeks an Order of this Court granting a new trial in the above entitled criminal action based on

evidence discovered since the trial; that will probably change the result if a new trial is had; that could not have been discovered before the trial with the exercise of due diligence; that is material to the issue of guilt or innocence; and that is not merely cumulative or impeaching.

II.

STATEMENT OF FACTS

The defendant was indicted by Grand Juries at 1992 and 1993 terms of the Court of General Sessions for Lexington County for murder; possession of a firearm during a violent crime; and pointing a firearm, indictment numbers 92-GS-32-3398, 93-GS-32-1514, and 92-GS-32-586. The defendant was represented at trial by Jack Gregory, Esquire. Trial by a judge and a jury was held on May 26-29, 1993. At trial, the defendant claimed actual innocence through self defense and defense of other. The defendant was found guilty as charged. Following the verdict, He was sentenced by the Honorable Frank Eppes to terms of life confinement for murder; ten (10) years for possession of a firearm during a violent crime; and five (5) years for pointing a firearm.

A timely Notice of Appeal was filed. On direct appeal, the defendant was represented by Robert M. Dudek, Assistant Appellate Defender, of the South Carolina Office of Appellate Defense. Following filing of briefs by both sides, the convictions were affirmed by the South Carolina Supreme Court in Memorandum Opinion 95-MO-263 (Filed August 25, 1995). A timely Petition for Rehearing was filed by appellate counsel; the Petition for Rehearing was denied.

Following the trial and defendant's commitment to the custody of the South Carolina Department of Corrections, it came to the defendant's attention that exculpatory evidence and testimony that was not available at the time of trial had become available, with such evidence relating to, and tending to prove the defendant's innocence.

The movant submits it has come to his attention that the following evidence is available, and that such evidence was not discoverable upon due diligence at the time of trial:

(a) Robbie (Robbin) T. Hunt is available and willing to testify that during the month of February, 1993 Kim Kestner informed her that she (Kim Kestner) told her that she was going to "change her statement" concerning the case, and would perjure herself at the trial of the defendant in exchange for payment of Five Thousand (\$5,000.00) Dollars to be received from Thomas Peele (the victim's father). Robbie (Robbin) T. Hunt will also testify that Danny Kestner told her that both his (Danny Kestner's) and Kim Kestner's "financial problems would be solved as soon as Fred Rutland went to jail." [Note: Danny Kestner is husband to Kim Kestner.] Robbie (Robbin) T. Hunt is also available to and desirous of retracting testimony made at trial where she testified that she overheard a telephone conversation between the victim's wife and the victim wherein the victim's wife was allegedly instructed to meet the victim at the shop (place of the shooting) in forty-five (45) minutes, following the call, with the defendant allegedly being privy to such information. Robbie (Robbin) T. Hunt will testify she was

actually unsure and confused at that time as to the actual day of the telephone conversation she testified to, and that she is now sure to a certainty that the telephone conversation did not transpire on the day of the shooting, and such confusion was caused by the passage of time between the incident and the making of a statement regarding the telephone call in question; her being pressured by authorities to make a statement; as well as her prescribed usage of a psychotropic drug during that timeframe adversely affecting her ability to recall the facts accurately at the time she gave made a statement and at the time she gave testimony.

It should be noted that Robbie (Robbin) T. Hunt, (though a long term friend of Kim Kestner,) is available and willing to testify to the fact of, and motivation for Kim Kestner's having committed perjury.

(b) Belinda M. Smith of West Columbia is available and willing to testify that she was, and is good friends with Kim Kestner; she is available and willing to testify that Kim Kestner told her of the shooting at 4:00 p.m. on the day of the shooting, and asked her to come and stay the night. She will testify that she went to Kim Kestner's apartment which is attached to the scene of the shooting; that she watched and assisted Kim Kestner complete the cleaning up of the scene of the shooting. She will testify further that at that time, Kim Kestner explained to her what had transpired and what Kim Kestner had witnessed at the time of the shooting; that Kim Kestner's description at that time, (just hours after the shooting,) differed

substantially from Kim Kestner's testimony at trial, as at that time Kim Kestner informed her that the victim (Jimmy Peele) drew a weapon, chambered a round as he as he entered the shop, while Kim Kestner later testified substantially differently at the trial, stating that she did not see the victim having a weapon. She is available to testify that Kim Kestner informed her at that time that Kim Kestner witnessed the victim (Jimmy Peele) point the loaded firearm at Sally Peele and then at Fred Rutland prior to her hearing the shots fired by Fred Rutland that apparently struck and killed the victim, while at trial Kim Kestner testified differently, stating she did not see the victim having a weapon (gun) at all.

Belinda M. Smith will testify further that Kim Kestner repeated these statements and acted the incident out again, describing what happened two (2) days later, this witnessed by Belinda M. Smith; Robbie (Robbin) T. Hunt; Robbie Hunt's sons; Sally Peele; Cindy "Doe", and others at Robbie (Robbin) T. Hunt's home in Lexington, South Carolina, and that her descriptions and statements describing the incident were the same as described above as recounted to Belinda M. Smith on the evening of the day of the incident, and substantially differing from what Kim Kestner testified to before jury at the trial of Fred Rutland.

She will testify further that Kim Kestner informed her that shortly prior to the trial of Fred Rutland, she [Kim Kestner] had a meeting with Thomas Peele (the victim's father.)

Belinda M. Smith will testify further that to her personal

knowledge, a member of the jury which convicted Fred Rutland at trial was a client and personal friend of Kim Kestner, and this was not brought out at trial, although the jury was questioned concerning whether they were acquainted with the witnesses or other parties involved in the trial.

Note:

Physical evidence of this relationship between the juror and Kim Kestner is available for the Court at this time.

(c) Charles Howard will testify that he was the victim's (Jimmy Peele's) close friend prior to the victim's death, and that the victim (Jimmy Peele) had come to Charles Howard's home shortly before the incident, and that the victim (Jimmy Peele) at that time showed Charles Howard a Tech 9 semi-automatic handgun and informed him that he was going to find Sally Peele and Fred Rutland. He will further testify that the victim appeared to him to be highly intoxicated through drugs and alcohol. He will further testify that he asked the victim (Jimmy Peele) to leave the gun with him [Charles Howard] so there would be no trouble, but that Jimmy Peele refused and left stating upon his departure that he was going to go and find Sally Peele and Fred Rutland. Charles Howard is also available to testify that the victim (Jimmy Peele) had made prior statements over the preceding two (2) weeks that he (Jimmy Peele) intended to shoot and kill Sally Peele.

III.

ARGUMENT

The defendant submits that Robbie (Robbin) Hunt's testimony is available to prove the testimony of Kim Kestner heard at the defendant's trial to be perjury. The defendant submits this testimony was not available at the time of the trial on diligent search, due to the feelings of the community including the victim's father; fear of retaliation for testifying; as well as the fact that this witness was using a psychotropic medication at the time of the trial which affected her ability to recollect, as evidenced by her inability to recollect at trial when the telephone call she testified to at trial transpired. The defendant submits if this testimony had been available at trial, he would have been found not guilty by the jury. See: Affidavit of Robbie (Robbin) Hunt attached hereto. The attached affidavit is brief and not all inclusive as to this witnesses' available testimony, as the defendant and this witness are laypersons in the law and lack the capacity to deliver a more thorough document for the Court's consideration.

The defendant submits the testimony of Belinda M. Smith further proves perjured testimony resulted in the defendant's conviction; it also will show an improper jury, where a juror was a friend and client of the lead witness for the State against the defendant, and failed to reveal this to the trial court during jury selection. The defendant has physical evidence of this relationship between the juror and this witness available for trial. The defendant submits he requires counsel's assistance in order to depose this witness. He has no way to

telephone this witness; he has been informed and believes she is available to testify as described herein.

Charles Howard's testimony was not available at the time of the trial due to the feelings of the community towards the defendant at the time of trial, as well as an apparent fear of retaliation if he had testified at that time. His testimony contradicts testimony that the victim was unarmed when he entered the shop at the time of the incident when the victim was shot, and will clearly establish the victim was armed with a gun at the time of the incident, and had gone to the shop with ill will, and motive to injure or kill the defendant.

The defendant, not being free to travel at will, and being a layman in the law, and this witness being a layman in the law, makes it necessary that the defendant have the assistance of counsel in order to perpetuate this testimony.

The defendant submits the newly discovered evidence meets the requisite standard requiring a new trial.

The defendant, a layman in the law, being presently confined and not free to travel at will, is not in a position to further investigate these matters, and to obtain depositions. One affidavit, (a brief affidavit of Robbie (Robbin) Hunt), is attached hereto; the defendant is not capable of obtaining further affidavits, as he lacks the means and capacity to do so. The defendant is informed and believes the witnesses listed in motion as available to testify are willing and able to testify as stated in the motion, and is informed and believes further and other witnesses with available exculpatory testimony are

available, requiring the defendant receiving Counsel's assistance to develop crucial facts and perpetuate testimony

available, requiring the defendant receiving counsel's assistance to develop crucial facts and perpetuate testimony.

IV.

RELIEF REQUESTED

BASED ON THE ABOVE AND FOREGOING, the defendant moves this Honorable Court for an Order granting the defenant a new trial.

This motion is based upon the common and statutory law of the State of South Carolina; Rule 29, SCRCrimP; affidavits attached hereto; and any other and further affidavits and matters properly placed before the Court at hearing.

IT IS SO MOVED.

I SWEAR that the contents of the above and foregoing are true and correct, excepting where stated to information and belief, and whereso stated, the subscriber has made diligent effort to ascertain the truth and believes these statements true.

April 17th, 1996.

Respectfully submitted,

Ridgeville, S.C.

Fred Randall Rutland

FRED RANDALL RUTLAND, DEFENDANT, PRO SE
SCDC #197903 STONO UNIT A56
LIEBER CORRECTIONAL INSTITUTION
POST OFFICE BOX 205
RIDGEVILLE, S.C. 29472-0205
(NO TELEPHONE)

SWORN AND SUBSCRIBED TO BEFORE
ME THIS 17th DAY OF APRIL, 1996.

Deborah A. [Signature]

NOTARY PUBLIC IN AND FOR
THE STATE OF SOUTH CAROLINA

MY COMMISSION EXPIRES: 10-23-96

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS
 FOR THE ELEVENTH JUDICIAL CIRCUIT

CASE NO.s 92-GS-32-3398; 93-GS-32-586 and 1514

State of South Carolina)

vs.)

Fred R. Rutland,)

Defendant.)

MEMORANDUM OF LAW IN SUPPORT
 OF DEFENDANT'S MOTION FOR A
 NEW TRIAL ON AFTER-DISCOVERED
 PURSUANT TO RULE 29(b), SCRCrimP

I. Standard To Be Met On After-Discovered Evidence.

There are certain well-settled criteria necessary to constitute grounds for granting of a new trial upon after-discovered evidence; and that according to State v. Clamp, 225 S.C. 89, 80 S.Ed 918 (1954), the decision on this question most often referenced by later cases, the movant must show (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial; (3) that it could not have been discovered before the trial by exercise of due diligence; (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching.

II. From the Trial Transcript.

A. Trial Arguments.

As defense counsel noted in his opening statement at trial, there was no disputing the fact that Fred Randall Rutland shot Jimmy Lee Peele on September 4, 1992; and as a result, Peele lost his life. What was in contention was whether or not Rutland acted in self defense in shooting Peele four times with a .25 caliber semi-automatic pistol when Peele came to the Bow Wow Boutique armed with a 9 millimeter semi-automatic weapon (*Trial Tr.*, pp. 92-94).

The State's opening argument asserted that the testimony showing that Peele was lured to the scene of the shooting and the circumstances of the shooting would demonstrate that

Rutland shot Peele without provocation and without justification (*Trial Tr.*, p. 90). In closing, the State submitted that based upon Rob(b)in Hunt's testimony showing that Peele's wife, Sally, told Jimmy Peele to go the Bow Wow Boutique; and that, therefore, as Rutland knew Peele was in route, Rutland was lying in wait for Peele in order to kill him (*Trial Tr.*, pp. 559-560). Moreover, based upon the testimony of eyewitness Kim Kestner that Jimmy Peele never pulled a weapon, the State concluded that Rutland and Sally Peele located Jimmy Peele's weapon on his body after he was shot in the process of attempting to give him C.P.R., and placed the weapon on the floor in the position it was found while Kestner went to another room to telephone for the police (*Trial Tr.*, pp. 565-566).

B. Charge to the Jury.

The Court charged the jury as to the elements of murder (*Trial Tr.*, p. 568), as to what constituted a reasonable doubt (pp. 570-571); as to the element of malice that defined that difference between murder and manslaughter (pp. 572-573); as to the four elements of self-defense (pp. 573-576); as to what constituted the legal definition of mutual combat so as to make the plea of self defense not available (p. 576); as to the definition voluntary manslaughter and the fact that there has to be some other type of act other than mere words to prove the sufficient legal provocation necessary to show voluntary manslaughter (p. 577); and recited the law on the two lesser charges (p. 577).

C. Jury Deliberation and Verdict.

In its six and a-half hour deliberation, the jury requested that the Court repeat the charges as to the what constitutes murder, manslaughter, mutual combat, and self defense on three separate occasions. On the first occasion the Court once again charged that the difference between murder and manslaughter

is the presence or absence of malice. Malice is not present in manslaughter. . . Malice need not be in the mind of the one doin' the killin' any particular length of time before the act of killing in order to render a killing murder. If it is present in the mind any length of time before the act and at the time of the act accompanyin' and promptin' the act then its presence would be sufficient to render the killing of a human bein' murder.

Now implied malice the law says that if one intentionally kills another with a deadly weapon the implication of malice may arise if facts proved beyond a reasonable doubt are sufficient to raise an inference of malice to your satisfaction, this inference would simply be an evidentiary fact to be taken into consideration by you the jury along with other evidence in the case and you may give it such weight as you determine it should receive (p. 583; l. 21 to p. 584, l 16);

The Court also again charged the definition of mutual combat; again instructed that as a general rule self-defense is not available to one who kills another while engaged in mutual combat; and again recited the four elements of self defense (pp. 584-585). On the next two occasions the tape of the these recited charges was played for the jury (pp. 586, 587).

After deliberating for approximately half an hour, the jury sent back four written questions to the Court, which as they pertained to the evidence that had not been introduced, the Court could not answer (pp. 582-583). However, for the purposes of this hearing on after-discovered evidence, three of the questions are noteworthy in providing an indication of the topics the jury was discussing. "Did Van have tags on its at the Bow Wow (license plates); Are pictures at the scene of Van"; and "Whose fingerprints were on the 9 mil gun?" (Trial Tr. p. 585-A).

After deliberating for more than six hours, at 6:30 p.m. the jury once again returned to court to announce, through its forelady, that while a verdict had been reached on at least one of the indictments, a verdict had not been reached on one or more of the other indictments. And upon hearing from the forelady that she did not know whether or not a verdict could be reached on the other cases, the Court asked the jury return to its deliberation one more time and attempt to reach a unanimous decision on the unresolved cases; and at 6:46 p.m., the jury returned its

verdict of guilty of murder and guilty on the lesser charges of Possession of Firearm During Commission of A Violent Crime and Pointing A Firearm.

D. Pertinent Trial Testimony.

1. As To Testimony of Rob(b)in Hunt:

State's witness Rob(b)in Thomason Hunt testified at trial that around 12 noon on September 4, 1992, the date Jimmy Lee Peele was shot at approximately 1:44 p.m. (*Lex. Co. Sheriff's Dept. Incident Report, dated 09/04/92, attached hereto as Exhibit "A"*); that Fred Rutland and Sally Peele were with her in Hunt's home; and that Hunt overheard Sally Peele's part of a telephone conversation that Sally was having with a person to whom she referred as Jimmy in which Sally told the party to meet her at the Bow Wow Boutique in about 45 minutes (*Trial Tr. pp. 499-500*).

Sally Peele, while testifying that she and Fred Rutland were at Rob(b)in Hunt's home on the date and at the time in question, denied that she made such a telephone call from Hunt's home to Jimmy Peele and in fact, termed the allegation "*ridiculous*" (*Trial Tr. p. 377-378*). Fred Rutland similarly testified that no telephone call was made to Jimmy Peele from Rob(b)in Hunt's home on the date and at the time in question (*Trial Tr. p. 492-493*); and that he had no reason to believe that Jimmy Peele was going to be at the Bow Wow Boutique (*p. 415*).

Inferences of Fact and Conclusions Of Law To Be Drawn From Testimony:

By the uncontradicted testimony of Sally Peele that it was at Robbin Hunt's house, "*around one o'clock*" in the afternoon on September 4, 1992, just prior to the drive to the Bow Wow Boutique, that Robbin Hunt made the statement about "*the Dodge up there at the shop*" owned by Kim or Danny Kestner that might be for sale; and that as a result, Sally asked Fred Rutland to go with her to look at the car with the idea of purchasing it so as to be able to leave

Lexington (*Trial Tr.*, p. 345).

It was Daniel (*Danny*) Kestner's uncontradicted testimony that it was about 1:30 p.m. on September 4th "when Sally and them had come over" to the Bow Wow Boutique (p. 108). While Sally Peele did use the telephone at the Bow Wow Boutique, Kimberly (*Kim*) Kestner, who was with Sally at all times while Sally was on the telephone on that occasion, testified that Sally only talked with the S.C. Highway Department (p. 133). Therefore, it is clear that as Jimmy Peele arrived at the Bow Wow Boutique some time before 1:44 when the 911 call regarding the homicide was made (p. 11), that he could not have been "lured" to the Bow Wow Boutique by Sally Peele unless Sally contacted him from Robbin Hunt's house.

Given the time factors involved, Robbin Hunt's testimony regarding the telephone call that Sally Peele allegedly made to Jimmy Peele was crucial in substantiating the State's contention that Sally Peele and Fred Rutland had "lured" Jimmy Peele to the Bow Wow Boutique so that Fred Rutland could kill him. This argument needed to be proven in order to successfully destroy any claim that Rutland made that he had complied with the first element of the four elements of self defense as set forth in State v. Davis, 317 S.E.2d 452 (1984): that defendant must be without fault in bringing on the difficulty.

The inference that defendant knew the victim was coming to the Bow Wow Boutique was also served as the foundation for the State's contention that as Rutland acted with "malice aforethought", he was guilty of murder. For the contention that Peele was "lured" there points to the allegation that the killing was maliciously done; and that it was not done in sudden heat and passion on sufficient provocation without premeditation, or malice so as to make Rutland guilty not of murder, but of voluntary manslaughter pursuant to decisions rendered in State v. Merriman, 287 S.C. 74, 337 S.E.2d 218 (1985); State v. Graham, 260 S.C. 449, 196 S.E.2d

495 (1973); State v. Mathis, 174 S.C. 344, 177 S.E. 318 (1934).

For if Fred Rutland was "*seeking the victim*", then, as was held in State v. Merriman, 337 S.E.2d at 224, the killing can be found to have been intentional and maliciously perpetrated. For even if Jimmy Peele came to the Bow Wow Boutique intending to kill Rutland, the doctrine of mutual combat would apply if Rutland knew Peele was coming; did nothing to withdraw or decline combat. If Rutland acted with sufficient premeditation and malice so as to preclude the argument that the act was done in sudden heat and passion upon sufficient provocation; then the act would be murder, not manslaughter, under State v. Graham, 196 S.E.2d at 496.

Sally Peele admitted on the stand that she and Fred Rutland had been lovers (*Trial Tr.. p. 364*). The .25 caliber pistol Rutland used to shoot Jimmy Peele along with the bullets had been purchased on the morning of September 4, 1992, by Sally Peele in the presence of Fred Rutland at a pawn shop (*pp. 381, 400*).

After the visit to the pawn shop where Sally Peele retrieved a Mossberg shotgun which Sally had given to Jimmy Peele as a Christmas present and Jimmy had pawned, Sally and Fred, along with Robbin Hunt (*pp. 334-335*), drove to the Peele residence so that Fred could fix Sally's car (*pp. 337-338*); whereupon Sally, who expected to find no one, sighted a car outside the residence she knew was owned by someone who had no permission to be there; and taking the .25 caliber pistol with her, she entered to find Jimmy (*pp. 339-340*). They had an altercation which they took outside the home (*pp. 341-343*); at which point Fred Rutland testified he shot a round from the shotgun up in the air in order to prevent Jimmy from harming Sally. A few minutes later, Rutland testified that Jimmy threatened to kill him (*pp. 406-411*).

On the stand Rutland admitted that he did not own the .25 pistol; did not have a permit to carry it; and only carried the loaded pistol in a concealed manner in his belt when he took it

from the van into the Bow Wow Boutique because of the threats Jimmy Peele had made against him earlier that day (pp. 414, 469, 477-479).

As a result of the above-stated uncontradicted facts presented in the instant case, if Rutland knew Jimmy Peele was going to the Bow Wow Boutique the circumstances presented would be virtually the same as those set forth in Graham, *supra*, and, therefore, as a plea of self defense would not be available, at best, Rutland would stand guilty of voluntary manslaughter. If Jimmy Peele had been "*lured*" there by Sally so that Fred Rutland could shoot him, then the circumstances of "*sudden heat and passion without premeditation*" which were available to the appellant in Graham, who, being armed, and went out to meet his armed adversary and both parties fired at each other, would not be present; and, therefore, a verdict of murder would be warranted.

However, without Robbin Hunt's testimony, there is nothing in the record to show that Rutland knew Jimmy Peele would be coming to the Bow Wow Boutique. If, indeed, as Fred Rutland and Sally Peele testified, that Jimmy Peele drew the Tech Nine upon entering the building (pp. 321-352; 421); and Fred, not having been in the building before; and therefore, having no perceptible exit other than the door through which Jimmy had just entered (p. 418), would at the most be guilty of manslaughter, if it were not proved that the four elements of self defense as set forth in State v. Davis, *supra*, had not be met.

2. As To Kim Kestner:

Lexington County Sheriff Investigator Charles Cato testified that when he arrived at the Bow Wow Boutique after the shooting of Jimmy Peele on September 4, 1992, that he found two weapons on the floor of the building: a .25 caliber weapon and a nine millimeter weapon; that both were loaded; and that the safety switch of nine millimeter weapon was in the "*on*" position

so it could not be fired (*Trial Tr.*, pp. 161-165).

As confirmed by testimony of State's witness, Danny Kestner, the only individuals at the Bow Wow Boutique on September 4, 1992, just prior to the time Jimmy Peele entered were Kim Kestner, Danny Kestner, Sally Peele, and Fred Rutland (*Trial Tr. p. 108, ll. 3-4*).

At the time Jimmy Peele drove up to the building, Danny Kestner was outside the building in a parked 1976 Dodge Charger looking under the seat in order to search for the car's title so that Sally Peele could purchase the car (*Trial Tr. pp. 116, 121*). As a result, Danny neither saw Jimmy Peele drive up nor enter the building. Only after hearing two shots, did Danny Kestner come out of the car and open the door to the building in time to see Jimmy Peele fall to the floor (*pp. 112, 121*). Danny Kestner saw nothing in Jimmy Peele's right hand at the time he saw Peele fall and remembered Peele as being right-handed (*pp. 112-113*). Seeing that Fred was coming over to help Jimmy, Danny turned; left the building; walked out in front to wait for the police to arrive; and was in the building no more than three minutes (*pp. 113, 122-123*).

Kim Kestner testified that prior to the entrance of Jimmy Peele, that she was in the main area of the business which is separated from the front office, reception area by a "hip high" half wall counter topped with lattice-work, which has a waist-high swinging gate to provide access to the main business area; and that from her vantage point, she could see out into the front office and through the window comprising half the front door; and could see a person coming in the front door "from the hips up" (*Trial Tr.*, pp. 128-131). That at the time she was standing at the grooming table engaged in grooming a puppy, while Sally Peele was finishing a conversation on the telephone which was on a counter beside the grooming table; and that Fred Rutland was standing in an interior doorway about two feet away from the grooming table (*pp. 136-138*,

156).

Kim Kestner testified that she saw Jimmy Peele *"from his mid waist up"* after opened the front door and walked into the building; but that until he went up to the swinging gate, she could not see his hands; and that when she did see his hands when he started to come through the swinging gate, at which point the only object she saw in his hands was a pack of Marlboro cigarettes, which he laid on the counter as he started to come through the gate (*Trial Tr.*, pp. 137-140); that Jimmy Peele did not speak, but stood in the entrance way 30 to 40 seconds, at which point Sally Peele said *"Oh my God,"* which caused Kim Kestner to duck behind the Chow puppy, at which point Kestner heard (*gun*)shots go off (pp. 154-155).

Kim Kestner then stated that she was looking towards Jimmy when Sally spoke (*the only words Kestner remembered being spoken there from the time Jimmy entered until after his death*); and Kestner thought that Sally Peele was moving between Jimmy and Fred when the shots were fired, but did not remember Sally blocking her view of Jimmy (p. 155). That as Jimmy came through the front door, Kim glanced at Fred Rutland and saw him put a pack of cigarettes in his mouth and reach behind him; and that Kim then *"glanced back at Jimmy and he appeared to be doin' the same thing."* (pp. 140-142). However, Kim could not tell whether or not Jimmy reached behind his back in response to Fred's action because she was looking at Fred at the time (p. 142); when Jimmy Peele was 10 to 15 feet away from Rutland (p. 145), and then she heard the shots, at which time she is squatting behind the chow puppy; and as she gets up she sees Fred and Sally *"walkin' towards Jimmy and they're getting on the floor to start C.P.R."*; that Jimmy is falling after she hears the shots and that the next time she sees Jimmy, he is on the floor (p. 142).

Kim Kestner's testimony is most noteworthy in stating that she never saw Jimmy Peele

with any weapon (pp. 142, 145); and that it was only after Fred and Sally went over to him and knelt down beside him (p. 157); and Kim had gone to the telephone by the grooming desk to dial 911, but as she could not get it to work, (p. 143), that she went to the back apartment area of the building where she lived with her husband and used another telephone, whose long cord she stretched almost to the front telephone to hear the dispatcher (pp. 147-148); and not until *"the dispatcher told me to go ask him to put his gun down. That's when I seen Fred's gun . . . looked like he was takin' it out of his back pocket or behind his pants . . . (and) he laid it on the floor."* (p. 144). And Kim Kestner testified that it was at this point and only at this point (when Fred Rutland placed his weapon on the floor) that she saw another weapon on the floor *"back here between this plant and this stereo stand (p. 144);* and that the this was the only time she *"saw both guns";* and that the gun Fred held in his hand was a little gun about the size of her hand, while a *"black oozie type gun"* lay *"eight to ten feet away"* from Jimmy Peele's body (pp. 158-159).

Sally Peele's testimony as to what occurred at the Bow Wow Boutique on September 4, 1992, contradicts Kim Kestner's testimony in various pertinent aspects. According to Sally Peele, she was on the telephone while *"Fred was up there in front of the gate . . . came by me; said Jimmy' here";* and that when she next *"glanced at Fred he was in the doorway . . . where the phone is"* (Trial Tr. pp. 360-361); and that when Jimmy Peele entered the building with his hands behind him; pulled the 9 millimeter gun with the clip affixed to it from behind his pants on her (Trial Tr. pp. 351-352); that she then said, *"'Oh my God'";* and started moving towards Jimmy, at which point she heard Fred say *"'Jimmy don't'"* (p. 355); that *"Fred was standing somewhere around the phone in the door way I believe";* that *"when Fred said the second time 'Jimmy please don't,'"* that she glanced at Fred and saw that Fred was *"holding the 25 pointing*

towards the floor . . . in his right hand"; that Jimmy was "in the lobby area right in front of the gate" (p. 356) ; and as Sally "started to move between the two men", she "heard shots"; and as she was standing two to two and a half feet away from Jimmy, looking at Jimmy, that "Jimmy fell"; and that while she was looking at Jimmy, she saw him holding the Tech Nine pointed at Fred; and that while earlier, Jimmy had been pointing the Tech Nine at her, that she shifted "when Fred showed him he had the 25"; and that as Sally demonstrated, Jimmy was then holding his gun "chest high straight out in front of" him; and that "it was a little lower initially . . . and as he keeps coming forward he's raising it up"; and that Sally "had no idea . . . that (Jimmy's) gun never went off" because "the shots in a concrete building are real loud and I saw Jimmy pullin' the trigger"; and that Sally saw Jimmy pulling the trigger at the time he held his gun "at Fred -- it was straight out" (pp. 357-358); and then "Jimmy fell. . . on his left side . . . right by the gate . . ."; at which point Sally "immediately went to Jimmy and rolled him on his back" and as she was doing so, "shoved . . . the nine millimeter pistol . . . out of the way to roll him over on his back" and then Sally "started C.P.R., stretched him out; started giving him mouth-to-mouth. Fred immediately was over there with me helpin'" (p. 359); and that then she told "Kim (to) call 911" as Fred was helping her perform C.P.R. on Jimmy: "He would to the chest; I would do the mouth; keepin' him breathin'" (p. 360).

On cross-examination, Sally Peele denied that Fred Rutland had his gun drawn before Jimmy Peele entered the building (pp. 379-380).

Fred Rutland testified that when he rode up to the Bow Wow Boutique with Sally Peele in Robbin Hunt's van on September 4, 1992, after Robbin made the suggestion that Kim had an old Dodge that she might sell to Sally, that Fred had never been to the Bow Wow Boutique before and "had no idea where it was" (p. 413); and that he picked up the 25 caliber pistol that

had been lying in the van because of the threats the Jimmy Peele had made to him moments before, although he had no reason to suspect Jimmy Peele was at the Bow Wow Boutique (pp. 414-415).

When he was in the Bow Wow Boutique, he was *"pacin' all over. I was nervous. . . I just walked a circle over here. The first time seen Jimmy's head was right here in the corner of this window . . . the one beside the front door"* (p. 416) . . . *"what I seen was that motion just the side of his head going down in a fast stepping motion"*; and then he heard the front door open; and at the time he heard the door rattle, *"leaving from . . . being here. I was in motion. . . out that door (p. 417) . . . where the gate is . . . to the back of the building I thought it was the back of the building. . . 'cause he was comin' in the front of the buildin'; but that he discovered "I didn't have nowhere to go. . . It was just all dark . . . except for a window"; that he was looking for "an exit. I didn't want a confrontation with him"; at which point, he "pulled that 25 out of my belt" (p. 418); that he was "in the dog pen area" when he pulled the pistol out of his pants and cocked it and that when he turned around he was "right in the doorway . . . between the grooming room and the dog pen room . . . maybe half a step inside the groomin' room" (p. 419); and that when he turned around, he (Jimmy) "stepped up in front of me . . . and squared off with me and Sally was just come up to the front of him"; which occurred when he said "'there's Jimmy'" and "Sally was here fixin' to turn around and talk to Kim. She was right at Kim's table, right at the end of it, and when I went thataway, Sally came thisaway. . . right in front of this opening and this counter at the end of this (lattice work) wall" (p. 420) . . . She wasn't in motion after Jimmy stopped"; and that what made her stop was the pistol *"in his hand. That's the first time I seen it when it cleared his back"*; at which point Jimmy *"cocked it and put it in her stomach"* (p. 421); at which point Sally was *"between a half foot and nine inches"**

away from Jimmy; and that he *"spoke to Jimmy before he stuck the pistol in Sally's stomach"* . . . *I said 'Don't Jimmy' and then 'What are you doin'.* Well as soon as he stepped past this wall (p. 422) . . . *he comes around like this immediately. . . it looks like somethin' you see on T.V. . . let's have a shoot-out or somethin' . . . I said "Jimmy, please don't . . . and I says, 'Damn it, Jimmy!'. . . He looks over there at me; he looks at the little pistol and pulls the trigger that quick. Comes off of her and when I see a gun do that, I think it's done shot!"* (p. 423). At this point Sally is standing about three feet from Jimmy and Fred shot him in the side with the 25 caliber and hit him at which point Jimmy *"had it (the 9 millimeter) stretched out; he looked down, and stuck it . . . right straight into my chest."* (p. 424) At which point Fred shoots Jimmy twice in the chest *"and then it was a final shot which I didn't shoot him in the head. I thought I was shot. I felt it. I was fallin' back with the 25. I was tryin' to get her away from . . . I seen I'd already stunned him and I was tryin' to get it away from Sally and Jimmy and it went off as it was goin' up in the air."* (p. 425); and that Jimmy still had the Tech Nine in his hand when he fell on his left side; that Fred did not know the safety switch was on the Tech Nine until *"yesterday"* (at the trial); and that in the process of rolling Jimmy over, Sally *"kicked the thing (Tech Nine) across the room out of his hand."* (p. 426).

Rutland further testified that he recalled that when he saw Jimmy coming up to the front door that he had just gotten his cigarettes from his pocket and was about to flip one in his mouth; *"and when I seen Jimmy pass that window, and when I turned and went back toward that room and I seen I had to pull my gun out I stuck 'em (the pack of cigarettes) in my mouth because I knew I had to have to hands to cock it to get a bullet in it 'cause I won't carry a gun with a bullet in it"* (p. 428).

During cross-examination, Rutland further stated that Jimmy *"pulled the trigger before I ever pointed the gun at him"* (p. 485).

Inferences of Fact and Conclusions Of Law To Be Drawn From Testimony:

Given the undisputed that Sally Peele and Fred Rutland had been lovers and the testimony given by Sally and Fred that Jimmy Peele had threatened both of them, Kim Kestner was the only eye-witness to the shooting to which the jury could turn for an independent, unbiased account the events that occurred when Jimmy Peele entered the Bow Wow Boutique on September 4, 1992.

Undoubtedly, from her vantage point in the room, even prior to ducking behind the dog she was grooming, Kim Kestner should have been able to see Jimmy Peele draw the Tech Nine from behind his back, load it, and point it at Sally Peele before Sally, in reacting to Jimmy's actions, said, "*Oh my God.*"

Based upon Kim Kestner's testimony, the prosecution could point to the fact in its summation that the evidence showed that "*Jimmy Peele never pulled that weapon. . . Kim Kestner independent witness. Kim Kestner never saw Jimmy Peele with it ever. She saw it on the floor and it's on safety*" (Trial Tr. 565-566). As a result, the State could logically conclude that as Jimmy's gun was found "*way up there to the left*", while, as Jimmy was right-handed, if he had dropped his gun, when he fell, it should have been found to the right of his body; that Sally and Fred only saw Jimmy's weapon after he was shot when they pushed him on his back; and then either one of them took it from Jimmy's body so that Sally could sling it to the left of Jimmy's body while Kim was out of the room. Ibid.

It is undisputed that Jimmy Peele said nothing at all after entering the building. Unless Jimmy Peele drew his weapon, Fred Rutland had no sufficient legal provocation to shoot him and the presence of malice can be inferred from the facts. As a result, Fred Rutland could not claim the act of shooting Jimmy Peele was one of voluntary manslaughter; and murder would be the only logical verdict.

On the other hand, if Jimmy Peele did draw his weapon; point it first at Sally Peele; then

refuse to heed Fred Rutland's verbal warnings and physical gestures that he, himself, was armed; but, instead, if Peele then proceeded to point the Tech Nine at Rutland and pull the trigger prior to Rutland pointing his gun at Peele and pulling the trigger, then, if Rutland did not have reason to anticipate Peele's arrival, the four elements necessary for a finding that Rutland acted in self defense under State v. Davis, supra, are present. For Rutland would have proven that: 1) he was without fault in bringing on the difficulty; 2) he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger; 3) he acted as a man of ordinary prudence, firmness, and courage would have acted under the circumstances in striking the fatal blow to save himself from serious bodily harm or losing his own life; and 4) he had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

Even if the jury believed that either by Rutland's action in firing the shotgun earlier that day; and/or by knowing that Jimmy Peele would come to the Bow Wow Boutique; and/or by taking the loaded .25 pistol into the Bow Wow Boutique and pulling it out from his belt and cocking it when he saw Jimmy Peele enter, that Rutland was not without fault in bringing on the difficulty, the elements making a case for voluntary manslaughter were certainly present if Jimmy Peele pulled the Tech Nine out; pointed it at Fred Rutland; and pulled the trigger before Fred Rutland, having entreated Jimmy not to do it, pointed his gun and fired. It is unquestionable, in light of the closing argument made by the prosecution, that Kim Kestner's testimony was the decisive factor in the jury returning its verdict of murder.

D. Effect of Testimony Upon Jury Deliberation.

Usually there is no indication in the record of a trial as to the effect of a specific item of testimony had upon a jury's deliberation. However, in the instant case, as a result of the written evidentiary questions the jury posed to the Court which the trial judge rightfully refused to answer; and the jury's repeated requests to have the charges reread, certain inferences can be

made regarding the effect that the testimony of Robbin Hunt and Kim Kestner had upon the jury's deliberation.

As noted above, two of the evidentiary questions the jury asked pertained to the van owned by Robbin Hunt in which Sally Peele and Fred Rutland drove to and parked outside the Bow Wow Boutique. From the 911 call Jimmy Peele made after Sally Peele, Fred Rutland, and Robbin Hunt arrived at the Peele residence on the morning of September 4, 1992, the tape of which was entered into evidence (*Trial Tr. pp. 249-250*) and played before the jury (*p. 556*); the jury learned that Jimmy Peele could accurately describe the van in which Sally and Fred were riding and remember that it had no license plates on it (*refer to transcript of tape, State's Exhibit 22*).

Obviously from the questions posed regarding the van, the jury wanted to know whether or not the van was in plain view outside the building so that Jimmy Peele could have discovered it on his own. Therefore, the question of whether Jimmy Peele was stalking his wife and Fred Rutland or whether Sally Peele telephoned him from Robbin Hunt's home in order to "lure" him to the Bow Wow Boutique, was obviously on the mind of the jury. Obviously not only Robbin Hunt's testimony regarding the telephone call Sally Peele made, but also the testimony of Sally Peele and Fred Rutland denying that such a call was made, was crucial in the jury's deliberation over the issue of whether or not Fred Rutland, in knowing Jimmy Peele would be coming to the Bow Wow Boutique, acted with malice aforethought.

Undeniably, Kim Kestner's testimony that she never saw Jimmy Peele with a weapon has a direct bearing on the evidentiary question asked by the jury as to whose fingerprints were on the Tech Nine. If Kim Kestner had seen Jimmy Peele draw the Tech Nine then the jury would have had no doubt that Jimmy had drawn the weapon and the State would never have been able to argue that Fred and/or Sally took the Tech Nine from Jimmy's body after he had been shot and threw it down near his body in order to manufacture evidence.

Did Fred Rutland know Jimmy Peele was coming to the Bow Wow Boutique? Did Jimmy draw his gun when he got there? These are the two material questions with which the jury was struggling and shown by the jury's repeated need to have the charges defining self defense, manslaughter, and murder reread. As a result of the foregoing, it is clear that any after-discovered evidence showing that Robbin Hunt now recants the testimony she made at trial and that Kim Kestner's testimony was at variance with accounts of the shooting she later gave to three witnesses, meets the five criteria warranting a new trial as set forth in State v. Clamp, *supra*.

III. Relevance of Supporting Affidavits.

A. Affidavits Regarding Testimony of Robbin T. Hunt.

By affidavit of January __, 1997, Robbin Hunt retracts the testimony she gave at the trial of Fred Rutland for the murder of Jimmy Peele held May 26-29, 1993, during which time Hunt testified that on September 4, 1992, when she, Sally Peele, and Fred Rutland were present at her home, that she overheard Sally Peele speak to a person on the telephone she called "Jimmy" and told the individual to meet her (*Sally*) at the shop (*meaning the Bow Wow Boutique*) in about 45 minutes.

Hunt now swears that when she gave her trial testimony, that she was under the influence of the prescription medication, Prozac, which she had been prescribed to alleviate the symptoms of depression; and that the effects of this drug altered her ability to recall dates and events correctly and also made her highly susceptible to suggestion. Hunt now swears that having been subpoenaed to testify, she was kept sequestered at the Solicitor's Office prior to testifying, whereupon she was drilled by an Assistant Solicitor in the particulars of the taped statement she had given LCSD Sgt. Harris on 10/23/92, which was transcribed and signed by her on 10/26/92, in which she had stated the above facts regarding the telephone call she overheard; and that when she told the Assistant Solicitor she was completely unsure that telephone conversation she

overheard that had taken place on 09/04/92, he convinced her that it could only have taken place on that date; and that as the result of her susceptibility to suggestion and her unwillingness to retract the particulars of her 10/26/92 statement to the LCSD.

Hunt now swears that the only telephone conversation she overheard Sally Peele making from Hunt's home on September 4, 1992, was one to the school in which the Peele's daughter, C.P. [REDACTED], was enrolled. She further states that at various times over the months prior to the shooting, she overheard telephone conversations in which Sally Peele argued with Jimmy; and that as Sally had been employed at the Bow Wow Boutique and Jimmy had been doing electrical work at the Bow Wow Boutique building, it was not uncommon for Sally and Jimmy to meet there. She also states that if she had overheard such a telephone call on September 4, 1992, that she would have mentioned it in the statement she gave to LCSD Detective Bill Allen on September 4, 1992, just after the shooting.

Hunt further states that the October 23, 1992, statement she gave to the Lexington County Sheriff's Department which purports to state that Sally Peele made such a telephone call on September 4, 1992, is a false record in that the statement which was transcribed from tape was an edited version of the tape that contained certain ellipses in which Hunt stated many times that she was unsure of the correct date; and that she signed said statement transcribed on October 26, 1992, because LCSD officers were attempting to implicate her in a drug-related investigation they were conducting against Sally Peele and Fred Rutland.

Hunt further states that on October 23, 1992, it was LCSD Sgt. Harris who first suggested to her that she could only have overheard the telephone conversation in question if it had taken place on 09/04/92; and that over the course of various untaped conversations she had with Harris and Detective Frier, she was pressured to become convinced that the conversation occurred on 09/04/92.

Finally Hunt states that as she has been under the influence of Prozac for a period of time

stretching from a couple of months prior to 09/04/92 until the present, she has never been certain and enver will be certain about what telephone conversations of Sally Peele's she overheard on 09/04/92. The accompanying affidavits of Robbin Hunt's treating psychologist, Dr. Anna S. Moreland-Heffler, and physician at the time, David P. Lyle, M.D., confirm the fact that Robbin Hunt was being treated for depression and had been prescribed Prozac during the time in question.

It should be noted that in her statement of September 4, 1992 (*Exhibit "B"*), Robbin Hunt makes no mention of this telephone call. Whatever pressure Robbin Hunt felt she was under when she gave her statements on October 23 and 26, 1992 (*Exhibits "C" and "D"*), it is undeniable that there was a change in the circumstances of her relationship with the Lexington County Sheriff's Department. For her 09/04/92 statement was given on a prepared form for a witness "*Not Under Arrest*", while her 10/23 and 10/26/92 statements show that they are in the nature of a "*Voluntary Statement of Suspect or Defendent*" and they were made after Ms. Hunt had been given her Miranda warnings.

The applicable standard as to recanted testimony as grounds for a new ground is set forth in State v. Porter, 269 S.C. 618, 239 S.E.2d 641, 643, which, in quoting State v. Whitener, 228 S.C. 244, 264m 89 S.E.2d 701; State v. Mayfield, 235 S.C. 11, 34-35, 109 S.E.2d 716, 729 (1959), states that "*Recantation of testimony ordinary is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.*" Similarly, it was held in State v. Wright, 269 S.C. 414, 237 S.E.2d 764 (1977), that where a defendant moves for a new trial on the basis of a recantation of testimony, the motion should be denied where the court does not find the recantation credible.

As Robbin Hunt's October 26, 1992, statement as transcribed, did not significantly conflict with Hunt's trial testimony, defendant agrees that he was not surprised by Hunt's false testimony at trial, and thus, one of the criteria set forth in Larrison v. United States, (CA 7, Ill.)

24 F.2d 82 (1928), has not been met. However, defendant submits that the "*Larrison test*" has never been held as controlling in South Carolina; but that rather the law in this State follows the standard set forth in Berry v. State, 10 Ga. 511 (1851), which enumerates the five criteria stated in Clamp, *supra*, as grounds for a new trial on after-discovered evidence. See 77, A.L.R.4th, 1031. As a result of the foregoing, defendant contends that where the recantation is found to be credible; and where it fulfills the five requirements set forth in Clamp, that it presents after-discovered evidence that must be considered as grounds for a new trial.

As it is undeniable that Hunt has been under the influence of Prozac from months before Jimmy Peele's death until the present; as it is undeniable that one of Prozac's contraindications is memory impairment; and as Hunt as offered credible reasons why she testified as she did even though at the time of her testimony, she was uncertain as to its veracity, Hunt's recantation should be taken as credible.

In considering the import of Hunt's affidavit, as her recantation is obviously after-discovered; could not have been obtained by due diligence prior to the trial; and is material and not merely cumulative or impeaching, the only one of the Clamp elements that may be in question is whether her testimony as changed by recantation could have changed the outcome of the trial, Defendant submits that if Hunt had not testified as she did, that the jury would have been much more likely to convict defendant of voluntary manslaughter than convict him of murder, as Hunt's testimony established the element of malice aforethought. Should the Court find otherwise, defendant further submits that Hunt's recantation, when taken together with the other submitted affidavits which bring into question the veracity of Kim Kestner's testimony, certainly shows that murder could not have been proven unless Hunt and Kestner testified as they did.

B. Affidavits Regarding Testimony of Kim Kestner and Danny Kestner.

1. Affidavits of Robbin T. Hunt.

On November 27, 1995, Robbin T. Hunt gave an affidavit stating that (1) during the

month of February, 1993, that Kim Kestner informed her that she (*Kim*) was going to change her statement in the Rutland trial because Thomas Peele (*Jimmy Peele's father*) had offered her \$5,000.00 to do so; (2) during the month of February, 1993, that Danny Kestner informed her that the Kestner's financial problems would be solved as soon as Fred Rutland went to jail; and (3) on September 3, 1992, Jimmy Peele threatened her life.

Alone, the evidence presented in this affidavit obviously does not meet the standard set forth in Clamp, as there is no reason why it could have not been discovered before the trial of May 26-29, 1993, by exercise of due diligence. However, Hunt's subsequent affidavit of January, 1997, states as she knew Kim Kestner had given a previous statement to the Sheriff's Department that she had seen Jimmy Peele draw his weapon, that Hunt did not take Kim Kestner's statement seriously at the time it was made; and that, therefore, Hunt could not know the materiality of any altered statement that Kim Kestner would give at trial until after Kestner testified. Furthermore, Hunt states that she was unaware of the nature of Kestner's testimony until after the trial, as Hunt was unable to hear Kestner testify because Hunt had been kept sequestered.

2. Affidavit of Belinda Joyce Smith.

The affidavit of Belinda Joyce Smith supports the statements made in Robbin Hunt's affidavits that 1) at trial Kim Kestner gave a different account of the event of Jimmy Peele's shooting than the account she had given at various times, including the day of the shooting, to various groups and individuals; and 2) Kim Kestner had a material reason to give a different account on the stand because she had been promised money to do so.

Given that Belinda Smith's account of Kim Kestner's 09/04/92 reenactment of the shooting some ten hours after it occurred represents the most timely and incisive description of the sequence of events that led up to the shooting, its veracity is unassailable. Belinda Smith has no reason not to render an accurate and independent account of what her long-time friend related.

As the former owner of the site of the shooting, Ms. Smith can be expected to have an accurate recall of Ms. Kestner's reenactment performed at the shooting site. Most importantly, at the time of the reenactment, on the night of the shooting, Kim Kestner had no reason to lie.

Belinda Smith witnessed Kim Kestner give the same reenactment of events a few days after the shooting when they were together at Robbin Hunt's residence. She was informed that this was substantially the same account that Kim Kestner had given to a newspaper reporter. Smith had no reason to believe that Kestner would give a different account of the events of the shooting on the stand. Smith, in fact, did not even learn that Kestner would testify that she did not see Jimmy Peele draw his weapon when he entered the Bow Wow Boutique until after Kestner had so testified. When Smith confronted Kestner later regarding the discrepancy, it was then that Kestner related that she had been paid by Thomas Peele to change her story. This Kestner admitted to Smith, not once, but on two separate occasions. Subsequently, as Smith relates, Kestner has changed her mind again and now states that she does not remember the events of the shooting and would be willing to undergo hypnosis in order to enhance her recall.

Obviously the significance of Belinda Smith's evidence regarding Kim Kestner's testimony could not have been discovered prior to trial, as Smith was not aware of the significance of what she knew until after the trial. As Kestner's trial testimony represented a complete reversal of her previous accounts that Jimmy Peele drew his weapon; and as shown above, this issue was extremely material to Rutland's murder conviction, all the elements of Clamp have been met to show that Smith's affidavit presents after-discovered evidence that Kim Kestner committed perjury on the stand and had a material reason to do so.

The account of the events of the shooting Kestner related to Smith that Jimmy Peele drew his weapon also matches those Kestner gave in the LCSD incident report (*Exhibit "A"*) in which she was listed as "*Complainant*"; and the 09/04/92 witness statement she gave to LCSD Det. Bill Allen (*Exhibit "E"*). Furthermore, the same information is contained in the 09/04/92 LCSD press

it is one thing for a witness to change her account of material events on the stand, but quite another for the witness to return to her previous account after the trial. It may well be that Kim

release regarding the shooting (*Exhibit "F"*). While these official reports can not be considered in themselves as after-discovered evidence; defendant would ask that the Court use the information presented therein as cumulative evidence to show that defendant had no reason to suspect that Kim Kestner was going to retract her "*official*" account that Jimmy Peele drew his weapon; but that, instead, she would testify that she never saw Peele draw his weapon.

The information presented by Smith's affidavit regarding Kim Kestner's reenactment that depicted Danny Kestner coming to the door of the shop to announce Jimmy Peele's arrival introduces unique after-discovered evidence that is certainly material, as this means there could have been a fourth eye-witness and second "*independent*" witness to what occurred when Jimmy Peele came through the door of the shop. As noted in Robbin Hunt's affidavits, Danny Kestner had the same material reason as his wife for not rendering an accurate account at trial: Thomas Peele's offer of a bribe which had to have occurred prior to 02/93. At this point there is not enough information to state with certainty whether Danny Kestner's honest account of the events of the shooting would have changed the trial verdict. However his testimony that he saw nothing; heard nothing; and witnessed nothing until after the shots were fired because he had his head down in the Dodge Charger strains believability when Danny should have been able to hear Jimmy drive up in a rural area because, as Danny testified, Jimmy's engine was "*pretty loud*" because of a "*lifter tap*" (*Trial Tr.*, p. 125).

3. Affidavit of Cindy Lou Wise.

Ms. Wise's affidavit is important in two respects. First, it adds a third voice to that of Robbin Hunt and Belinda Smith in affirming that in September, 1992, a few days after the shooting, that Kim Kester was still holding to her original story that Jimmy Peele drew his weapon. Next, and even more importantly, Wise's affidavit presents the only known information

some four hours before Peele's death. Sally Peele testified she decided to get the shotgun at that time because Jimmy and she *"had lost quite a few things through the pawn shop not pickin' 'em up on time and I also didn't wanna look at the shotgun from may another point of view"* (Trial Tr. p. 334).

The State used this visit to the pawn shop in its summation to imply that Fred Rutland and Sally Peele stopped at the pawn shop in order to procure a weapon to kill Jimmy Peele (Trial Tr., p. 555). How large a part this implication played in the jury's inference of malice on the part of the defendant is impossible to determine. However, Defendant submits that if this evidence provided by the affidavits of Robbin Hunt and Belinda Smith relating to the fact that a few days prior to the shooting, that Jimmy Peele had given Sally the pawn ticket for the shotgun and asked her to pick it up before it went off pawn, conclusively shows not only that Sally was merely following Jimmy Peele's directive when she went to the pawn shop, but also that she had reason to believe that the shotgun was on Jimmy's mind so that she had good cause to want to pick it up in order to prevent having to *"look at it from another point of point"*, i.e., at the end of the barrel while the shotgun was being held by Jimmy Peele.

While it is the case that this evidence could have been obtained prior trial, defendant would submit that he had no reason to believe it would be needed until the testimony of Kim Kestner and Robbin Hunt made the presence of malice a real issue at trial. Therefore, while this evidence, alone, would not be grounds for a new trial, the Court should consider it along with all other evidence presented herein in determining that if all the evidence now discovered would have been presented at trial that the question of malice would not have been an issue and as a result, the jury's only logical choice would have been between self defense and voluntary manslaughter.

E. Affidavit of Charles Howard.

Admittedly, there is nothing in Charles Howard's affidavit that could not have been

discovered with due diligence prior to trial. Howard relates the information he gave to Belinda Smith and Sally Peele the day after the shooting, as confirmed by Smith's affidavit: that on the day of the shooting, less than two hours before Peele's death, Jimmy Peele came to Howard's house with the Tech Nine; and that Peele related to Howard that he had just gotten the gun out of pawn because of the shotgun incident of that morning.

Therefore, in applying the Clamp standard, Howard's affidavit alone would not be grounds for a new trial. Yet when taken in the context of the Hunt and Smith affidavits, which can stand alone in presenting clear and convincing after-discovered evidence, Howard's affidavit does remove whatever doubt the jury may have had that Jimmy Peele did not arrive at the Bow Wow Boutique with a loaded weapon. The State's argument that either Sally and Fred planted the Tech Nine on the floor when they were giving Jimmy CPR was such that the jury could have had the impression that Jimmy never had a weapon at all. Defense counsel failed in its attempt to have the bill of sale Jimmy signed for the weapon introduced as an exhibit (*Trial Tr. pp. 352-353*); and the jury never heard any conclusive testimony that Jimmy had the weapon prior to entering the building. Howard's affidavit lays that question to rest and also presents by inference a picture of Jimmy Peele's state of mind on 09/04/92: that after the incident in which Fred Rutland fired the shotgun outside the Peele residence, that Jimmy Peele's response was to get the Tech Nine "*out of pawn for protection.*"

The time frame presented by Howard's affidavit also casts a serious doubt on whether Sally Peele could ever have made the telephone call to Jimmy Peele that Robbin Hunt testified she overheard. The 911 call Jimmy made after the shotgun incident was recorded at 10:41 a.m. on 09/04/92 and when the dispatched unit arrived at the Peele residence in Pelion at 10:48, no one was at home (*Trial Tr., pp. 248-249*). From Howard's affidavit it can be inferred that Jimmy Peele had left by that time in order to retrieve the Tech Nine. He then drives to Howard's house near Red Bank with the gun. At the same time Sally is supposed to have reach Jimmy

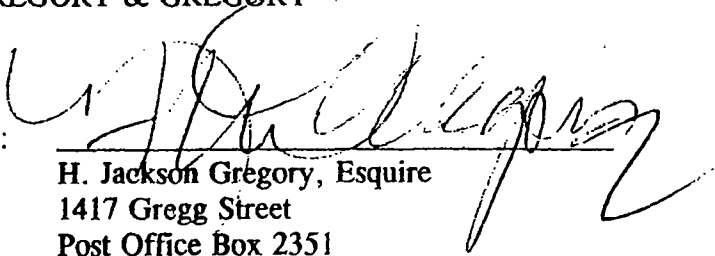
(ostensibly at the Peele home in Pelion), it is more probable that Jimmy is at Howard's house. Furthermore, it is far more likely after that after his visit with Howard that Jimmy Peele journeyed up Two Notch Road until he sighted Robbin Hunt's van at the Bow Wow Boutique and entered the building around 1:30 p.m.

IV. Conclusion.

When the evidence set forth in the affidavits of Robbin Hunt, Belinda Joyce Smith, Cindy Lou Wise, and Charles Howard is taken as a whole, there are more than enough grounds to warrant that this Court should grant Fred Randall Rutland a new trial on after-discovered evidence pursuant to Rule 29(b), South Carolina Rules of Criminal Procedure, as defendant as met the standard set forth in State v. Clamp, 225 S.C. 89, 80 S.Ed 918 (1954), by showing (1) that the evidence is such as will probably change the result if a new trial is granted; (2) that it has been discovered since the trial; (3) that it could not have been discovered before the trial by exercise of due diligence; (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching.

Respectfully submitted,

GREGORY & GREGORY

By: 

H. Jackson Gregory, Esquire
1417 Gregg Street
Post Office Box 2351
Columbia, South Carolina 29202-2351
(803) 765-1112

Attorneys for Defendant

Columbia, South Carolina

January 26, 1997.

**State of South Carolina
Office of the Solicitor
Eleventh Judicial Circuit**

COUNTIES
EDGEFIELD/LEXINGTON
McCORMICK/SALUDA
FAX (803) 359-8431



LEXINGTON COUNTY COURTHOUSE ANNEX
105 SOUTH LAKE DRIVE
LEXINGTON, SOUTH CAROLINA 29072-3490
TELEPHONE (803) 359-8352

DONALD V. MYERS

Solicitor

February 12, 1997

The Honorable William P. Keesley
Lexington County Courthouse
Lexington, South Carolina

HAND DELIVERED

RE: State v. Fred Randall Rutland

Dear Judge Keesley:

Enclosed please find a clocked copy of the affidavit of Thomas Henry Peele in connection with Mr. Rutland's motion for a new trial. In accordance with your letter to Mr. Gregory dated January 13, 1997, I am sending this to you for review. I spoke with Mr. Jackson earlier this week in reference to this case. At that time, I informed Mr. Jackson that if his affidavits contained any new matter I may ask the Court for an extension in order to deal with any matters not covered by the affidavits previously submitted and Mr. Rutland's motion.

By copy of this letter, I am providing Mr. Gregory with Mr. Peele's affidavit. Please let me know if you have any further questions in reference to this.

Sincerely,

C. Dayton Riddle, III
Deputy Solicitor

CDR/gh

COPY

647

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
STATE,)
v.)
FRED RANDALL RUTLAND)
DEFENDANT)

IN THE COURT OF GENERAL SESSIONS

AFFIDAVIT OF THOMAS HENRY PEELE

INDICTMENT # 92-GS-32-3398
92-GS-32-586, 93-GS-32-1514

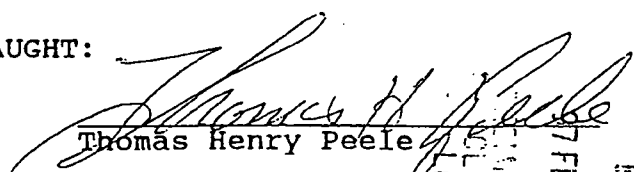
Personally appeared before me Thomas Henry Peele, who being placed under oath deposes and states as follows: That I am Thomas Henry Peele. I was born on May 25, 1942. I have lived continuously in Lexington County since approximately 1960. I am the co-owner, along with my brother, of Peele Electric Company in West Columbia.

My son, Jimmy Peele, was shot and killed by Fred Randall Rutland on or about September 4, 1992. This murder took place at a business known as the Bow-Wow Boutique, a dog grooming business, located on Two Notch Road in the county of Lexington.

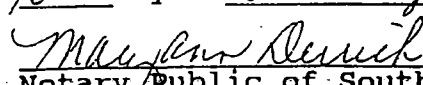
I was notified by Deputy Solicitor Dayton Riddle that a new trial motion based on after discovered evidence had been made by the defendant, Fred Randall Rutland. I was further notified that the defendant, Mr. Rutland, has alleged that I paid Kimberly Kestner, a witness for the State the sum of five thousand dollars (\$5,000) in order to perjure herself at Mr. Rutland's trial.

I, Thomas Henry Peele, do not know Kimberly Kestner, other than through her testimony in the Court of General Sessions. I did not meet with her prior to, during, or after the trial. I have not offered or attempted to pay her five thousand dollars (\$5,000) for any reason whatsoever. I have not paid her five thousand dollars (\$5,000) for any reason whatsoever.

FURTHER DEPONENT SAYETH NAUGHT:


Thomas Henry Peele

Sworn to and Subscribed before Me This

10th Day of February, 1996
Notary Public of South Carolina
My Commission Expires: 2-7-99

February 10, 1997

FILED
7 FEB 11 PM 4:27
CLERK OF COURT
LEXINGTON SC

GREGORY & GREGORY

ATTORNEYS AT LAW
1417 GREGG STREET
POST OFFICE BOX 2351
COLUMBIA, SOUTH CAROLINA 29202-2351
PHONE (803) 785-1112

H. JACKSON GREGORY

TOY R. GREGORY, SR.
(1890-1973)
NED GREGORY, SR.
(1903-1985)

February 17, 1997

The Honorable William P. Keesley
Administrative Judge of the
Eleventh Judicial Circuit
P.O. Box 369
Lexington, S.C. 29071

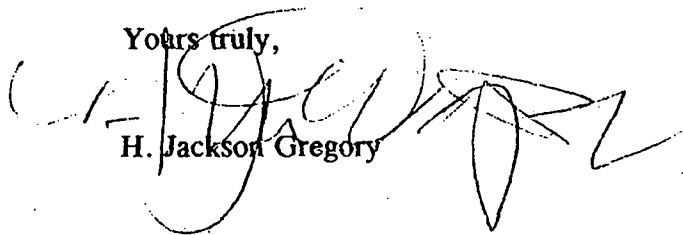
RE: State vs. Rutland; 92-GS-32-3398; 93-GS-32-586 and 1514
Motion For New Trial On After-Discovered Evidence

Dear Judge Keesley:

As per your Administrative Order in the above-captioned action, on Friday, February 14, 1997, I faxed copies of the affidavits of the following three potential witnesses to your Lexington chambers: Robbin Hunt, Belinda Smith, and Charles Howard. Today I faxed a copy of the affidavit of Cindy Lou Wise to the same location. I have also faxed copies of all four affidavits to opposing counsel, Assistant Solicitor Dayton Riddle.

I have also prepared a Memorandum of Law Supporting Defendant's Motion For A New Trial. Because of its length, I decided to mail it, rather than fax it, which I am now doing under cover of this letter. By copy of this letter to Assistant Solicitor Dayton Riddle, I am informing him of the above and forwarding him a copy of said Memorandum.

Yours truly,


H. Jackson Gregory

Enclosure

cc: Hon. Dayton Riddle
Asst. Solicitor for the Eleventh Judicial Circuit
105 S. Lake Drive
Lexington, S.C. 29072
Fred R. Rutland

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS
 FOR THE ELEVENTH JUDICIAL CIRCUIT

The State)

vs.)

Fred R. Rutland,)

Defendant.)

AFFIDAVIT OF CINDY LOU WISE

PERSONALLY APPEARS BEFORE ME Cindy Lou Wise, who, being sworn, deposes

and states the following:

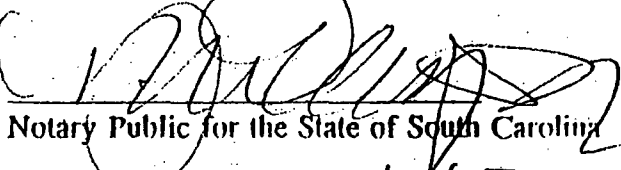
1. That her name is Cindy Lou Wise; she resides at Gilbert, S.C. 29054; and that her date of birth is
2. That affiant has known Kimberly (Kim) Kestner for over ten (10) years.
3. That in early September, 1992, after Jimmy Peele's death on 09/04/92, affiant was at Robbin Hunt's house at Lexington, S.C., and Kim Kestner and Danny Kestner were also there; and that affiant heard Kim Kestner say that on the day of the shooting, as Jimmy Peele walked into the Bow Wow Boutique, he pulled a gun and aimed it at everyone there; and that Fred Rutland, reacting to Jimmy's drawing of his gun, drew the gun of Sally Peele's which he had, and fired in self defense.
4. That after the trial of Fred Rutland, affiant was in the Crossroads Animal Clinic where Kim Kestner was working at the time; and ^{I over heard C.L.W.} Kim Kestner stated to affiant that Jimmy entered the Bow Wow Boutique with a strange look in his eyes and a gun in his hand.
5. That affiant was extremely surprised when she learned that Kim Kestner testified at Fred Rutland's trial that she did not see Jimmy Peele draw his gun when he entered the Bow Wow Boutique.

FURTHER AFFIANT SAITH NOT.

Cindy Lou Wise
Cindy Lou Wise

SWORN TO before me

this 17th day of FEB, 1997


Notary Public for the State of South Carolina

My Commission Expires: 1-1-2000

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS
FOR THE ELEVENTH JUDICIAL CIRCUIT

CASE NO.s 92-GS-32-3398; 93-GS-32-586 and 1514

The State)

vs.)

Fred R. Rutland,)

Defendant.)

AFFIDAVIT OF BELINDA JOYCE SMITH

PERSONALLY APPEARS BEFORE ME Belinda Joyce Smith who, being sworn,
deposes and states the following:

1. That her name is Belinda Joyce Smith and that she resides at Drive, Cayce, South Carolina 29033; and that her birth date is
2. That affiant has known Kimberly Oliver Kestner for approximately twenty (20) years and instructed her in the grooming of dogs.
3. That affiant has intimate knowledge of the physical lay-out of the Bow Wow Boutique on 09/04/92 as she owned the building located at [REDACTED] Lexington, S.C., from 1986 until sometime in 1993.
4. That on 09/04/92 at around 4:00 p.m. affiant received a telephone call from Kim Kestner who told affiant that Jimmy Peele had been shot and killed at the Bow Wow Boutique that afternoon after he had come in with a gun and that Kim Kestner was so upset that she wanted affiant to spend the night with her and affiant agreed.
5. That when affiant arrived at the Bow Wow Boutique at approximately 10:00 p.m. on 09/04/92, affiant found that Danny Kestner, Kim's husband was asleep in the bedroom in the living area the Kestners inhabited in the rear of the building; and affiant found Kim Kestner highly upset and still attempting to wipe Jimmy Peele's blood from the floor tiles where it was

still seeping up through the tiles; and that Kim Kestner then proceeded to act out for affiant Kestner's recollection of exactly how the shooting occurred and reported it occurring in the following manner:

- a. that prior to Jimmy Peele entering the building, at sometime after 1:30 p.m., Kim was grooming a small Chow puppy at the small grooming table by the window in the center of the main work room which was separated from the lobby/entrance area by a waist-high wall topped with lattice work almost to the ceiling; Sally Peele had just completed a telephone call from the small blue telephone next to Kim; and Fred Rutland was standing in the open doorway (which did not contain a door) to the dog bathing room; and Danny Kestner was outside attempting to find a title to the Dodge Charger owned by the Kestners that Sally Peele wanted to buy;
- b. that Danny Kestner then appeared at the front door to say that Jimmy Peele had just arrived, parked his car by the far side of the shop facing Cedar Crest, and "left his car running."
- c. that Jimmy Peele then came through the front door;
- d. that Kim Kestner could not see Jimmy Peele from his waist down because of the lobby area wall, but when Jimmy approached the entrance gate in the wall, Kim could see that Jimmy held a large black gun;
- e. that Jimmy then pointed the gun at Sally and as Sally started to move toward Jimmy, Jimmy did something to the gun as if loading it and attempted to fire the weapon at Sally;
- f. that Fred Rutland then pulled out a small gun and pointed in at Jimmy and begged him not to shoot;
- g. that Kim then saw Jimmy move the gun towards Fred and herself;

- h. that Kim then ducked down behind her grooming table for protection and then heard four shots;
- i. that Kim then saw Jimmy and Sally proceed to the lobby area to begin CPR on Jimmy's body;
- j. that Kim then tried to call 911 from the telephone in the grooming area, but the telephone would not work and so she had to use the one in the apartment area.

6. That on the night of 09/04/92 Kim Kestner also told affiant that when she saw Jimmy with the gun, she was afraid that everyone in the room was going to die, including herself and she said words to the effect that Fred had saved her life by shooting Jimmy.

7. That affiant is aware that the facts of the shooting that Kim Kestner relayed to her on the night of 09/04/92 were substantially the same as those that Kim told a number of people, including Robbin T. Hunt, Cindy Lou Wise, Sally Peele, when affiant was with these people and Kim Kestner at Robbin Hunt's home two days after the shooting, when Kim Kestner again acted out the incident; and that affiant is informed that it was the above description of the incident that Kim Kestner relayed to a reporter for The State newspaper in the time just subsequent to the shooting.

8. That as the result of the foregoing, affiant was extremely shocked when she learned that at Fred Rutland's trial in May, 1993, that Kim Kestner testified she did not see Jimmy Peele draw his gun on 09/04/92, as this completely contradicted both what Kim had previously told affiant and what Kim had previously told others.

9. That when affiant asked Kim Kestner why she had changed her story regarding the events of 09/04/92, that Kim told her that in the months after the shooting and before the trial that she had seen Thomas Peele, Jimmy's father, in a bar and that Thomas Peele had offered Kim Kestner money to change her story; and that Kim Kestner related this explanation

to affiant on more than one occasion.

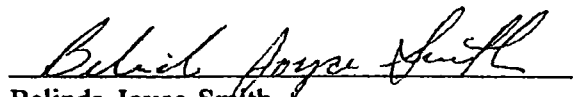
10. That on various subsequent occasions after the trial when affiant has spoken with Kim Kestner that Kim has stated that she can not now accurately remember what went on at the time Jimmy Peele was shot and that she would be willing to undergo hypnosis in order to attempt to recall exactly what occurred.

11. That affiant is informed and believes that one of the jury members who served at Fred Rutland's trial was a client of Kim Kestner's at the Bow Wow Boutique and that this jury member was seen talking to Kim Kestner and waving to the Peele family at the trial.

12. That on 09/05/92, the day after the shooting, that when affiant was in a car with Sally Peele at Dooley's store, that she conversed with a person known to her as Charles Howard whom she knew to be an acquaintance of Jimmy Peele; and that as she and Howard were talking about the events of Jimmy Peele's death, Howard told affiant that Jimmy Peele had come to Howard's home in Red Bank in the late morning of 09/04/92 and showed Charles Howard a black gun.

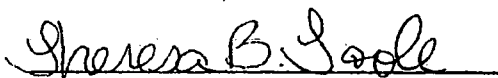
13. That affiant recalls being at Robbin Hunt's Lexington, S.C., home a few days before 09/04/92 at which time affiant, Robbin Hunt, Sally Peele, and Jimmy Peele were present; and that Jimmy gave Sally a "pink" pawn ticket and asked her to get a shotgun out of pawn.

FURTHER AFFIANT SAITH NOT.


Belinda Joyce Smith

SWORN TO before me

this 27th day of January, 1997


Notary Public for the State of South Carolina

My Commission Expires: 3/30/2000

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS
 FOR THE ELEVENTH JUDICIAL CIRCUIT

The State)
)
 vs.)
)
 Fred R. Rutland,)
)
 Defendant.)
 _____)

AFFIDAVIT OF CHARLES HOWARD

PERSONALLY APPEARS BEFORE ME Charles Howard, who, being sworn, deposes
 and states the following:

1. That his name is Charles Howard and that he resides in the Red Bank area of Lexington County at Lexington, S.C.
2. That affiant had been well-acquainted with Jimmy Peele for about ten years prior to Peele's death on September 4, 1992.
3. That on the morning of Jimmy Peele's death Jimmy had a car which apparently had a broken water pump towed to affiant's house so that affiant, ~~who is a~~ ^{help} ~~carpenter~~, could repair it.
4. That in the late morning of 09/04/92, Jimmy Peele drove to affiant's home to discuss the business of repairing the car.
5. That when Jimmy Peele entered affiant's home, affiant noticed that Peele had a large black gun with a magazine clip attached to it in the back of his pants and affiant asked Peele why he was carrying the gun.
6. That Jimmy Peele then replied that he had just gotten the gun "out of hock" that morning because he needed "for protection" as the result of an incident that morning in which a shotgun had been fired at him because of an altercation he had had with his wife, Sally.

7. That affiant never came forward with the above information at the trial of State vs. Rutland held in May, 1993, because no one asked him to testify and he was not aware the above information was pertinent.

FURTHER AFFIANT SAITH NOT.

Charles Howard
Charles Howard

SWORN TO before me

this 3rd day of ~~January~~ ^{Feb.}, 1997

Tom P. Johnson
Notary Public for the State of South Carolina

My Commission Expires: 12-15-97

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS
FOR THE ELEVENTH JUDICIAL CIRCUIT

CASE NOS. GS-92-3398; 93-GS-92-380 AND 1314

The State)

vs.)

Fred R. Rutland)

Defendant/)

AFFIDAVIT OF ROBBIN (ROBBIE) T. HUNT

PERSONALLY APPEARS BEFORE ME Robbin (Robbie) T. Hunt who, being
sworn, deposes and states the following:

1. That her name is Robbin (Robbie) Thomason Hunt; and she presently resides at
, South Carolina 29666.
2. That throughout 1992 and until April 12, 1993, when her home burned to the
ground, affiant resided at Lexington, South Carolina 29073.
3. That affiant is aware that during the General Sessions Court trial in the above cap-
tioned case held on May 26-29, 1993, that as a State's witness that she testified that some time a
little after 12:00 noon on September 4, 1992 that she was at her home with Fred R. Rutland and
Sally Peele, during which time she overheard part of a telephone call Sally Peele made in which
Sally identified the person to whom she was speaking as "Jimmy"; and that Sally told the person
to meet her at the shop in about 45 minutes, "the shop", which affiant understood to be the Bow
Wow Boutique.
4. That affiant now recants her testimony given at trial as set forth above for the fol-
lowing reasons.

- a. that on the day of her testimony affiant was under the influence of prescription medication, Prozac, and as a result, was unable to think clearly.
- b. Affiant has found, in the years following the date of her testimony, that Prozac (which she continues to take), or stress, has definitely affected her ability to remember specific times and dates. Affiant further feels that with the doubts she had then concerning times and dates (which doubts have been further exacerbated by her inability to remember specific time periods requiring her to write down duties relating to her job), that her testimony stating a specific time was not accurate.
- c. Affiant further states that the Assistant Prosecutor also knew that she was taking Prozac when she informed him that the Attorney for the Defense had been instrumental in getting her help for suicidal depression and knew of the medication she was on long before any of the instances which occurred in September, 1992. He (Assistant Prosecutor) also informed her to disregard any doubts she had.
- d. Affiant has never been certain that she had overheard such a telephone conversation on 09/04/92, as during the months previous to that date, Sally Peele had been a guest at affiant's home many times and at various occasions during those times Sally Peele had telephoned Jimmy Peele from affiant's home; argued with her husband over their daughter C.P. [REDACTED]; and told Jimmy "to meet her at the shop"; as it was not unusual for the Peele's to meet each other at the Bow Wow Boutique, which affiant owned, as Sally Peele had previously been employed there and Jimmy Peele had been doing electrical work on the building.

e. Affiant did inform both Sgt. Harris at the time of her 10/23/92 statement that she was taking Prozac and informed Detective Scotty Friar at various times that she believed it was affecting her memory.

f. that as noted in the 10/26/92 transcription of the 10/23/92 taped statement affiant gave to LCSD Sgt. Harris, both some months prior to and during the time of 09/04/92, affiant was taking Prozac on a daily basis and that affiant is informed and believes that this medication so affected her memory that throughout this period of time she could not precisely correlate events with the given dates in which they occurred.

g. that affiant was not desirous of testifying at Fred Rutland's trial as by May, 1993, affiant was staying in Charleston after her house was completely destroyed by fire on 04/12/93; and that arson was suspected and affiant was informed and believed that either the fire and/or the arson investigation by the LCSD was in some way connected to the circumstances surrounding Jimmy Peele's death and Fred Rutland's trial;

h. that as affiant was emotionally overwrought in May, 1993, she would not have testified had she not been contacted in Charleston by LCSD Det. Scotty Frier who informed her that she had been subpoenaed to testify and if she did not come voluntarily, they would send for her through the Charleston Sheriff's Department;

i. the ongoing arson investigation put even more pressure upon affiant to testify in line with her 10/23/92 statement to Sgt. Harris especially after Det. Frier remarked on the arson investigation upon her arrival in Lexington, S.C.

5., That regarding the taped statement affiant gave to LCSD Sgt. Harris on 10/23/92;

a. that affiant is informed and believes that the transcription of said tape that was made by the LCSD on 10/26/92 is a false record of said tape in that the transcription was an edited version of the tape that contained certain ellipses.

b. that affiant's uncertainty is evidenced by the corrections made on the 10/26/92 transcription in which she stated that the telephone conversation occurred "*before 12:00 noon*". Sgt. Harris did inform affiant to alter said statement so that it read "*after 12:00 noon*", even though at the time she made said alterations, affiant was completely uncertain that these alterations represented an accurate account of the events of 09/04/92.

c. affiant further states that members of the LCSD present at the taking of her statement were, or should have been, aware of both her emotional and mental state as the statement had to stop on one occasion when she completely broke down in tears.

6. That affiant is informed and believes that the only telephone call she is certain Sally Peele made from affiant's home on 09/04/92 was one Sally made to the school where her daughter, C.P. [REDACTED], was enrolled.

7. That if affiant should be called to testify at a future trial of Fred Rutland, she will swear that has never been and never will be certain of the times of the events that occurred on 09/04/92, as she was then and has been continuously taking Prozac on a daily basis as a result of depression which was diagnosed by Dr. Anna S. Moreland-Heffler, a psychologist who treated affiant in the summer of 1992 and recommended to affiant's then personal physician, David P. Lyle, M.D., that Prozac be prescribed for affiant's depression, which he did.

8. that affiant was the person who suggested to Sally Peele on 09/04/92 that Sally go to the Bow Wow Boutique to look over an automobile Danny and Kim Kestner owned, as Sally was desirous of obtaining transportation after Jimmy intentionally made Sally's brown Chevrolet

inoperative on 09/03/92 when affiant was present; and Sally had not been able to let Fred Rutland repair the Chevrolet on the morning of 09/04/92, as when Sally, Fred and affiant went to Sally and Jimmy's residence in Pelion for the purpose of attempting to repair the automobile, they encountered Jimmy Peele who they did not expect to find there, as Jimmy Peele had telephoned affiant in the early a.m. hours of 09/04/92 to say that his vehicle had broken down in Summerville, S.C.; and that this is one telephone conversation affiant does remember the time it occurred in that the call awakened her and Jimmy was very angry and verbally abusive.

9. That regarding the visit that affiant made with Fred Rutland and Sally Peele to the pawn shop in Lexington, S.C. on the morning of 09/04/92, that affiant is informed and believes that Sally Peele went to said pawn shop at the direction of Jimmy Peele as a few days prior to 09/04/92, Sally and Jimmy Peele were at affiant's home when affiant saw Jimmy give Sally a pawn ticket and tell her to get the shotgun out of pawn prior to the time it could not be redeemed by the pawn ticket; and that when affiant accompanied Sally Peele and Fred Rutland to the pawn shop on 09/04/92, that it was affiant who called their attention to the .25 caliber semi-automatic pistol as one on display in a case a "pink" pearl handle and affiant, being unfamiliar with firearms, commented on it. Sally Peele did eventually purchase a .25 caliber along with redeeming the shotgun.

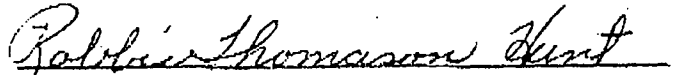
10. That regarding affiant's November 27, 1995 affidavit she gave in which she stated that during the month of February, 1993, Kim Kestner informed her that she (*Kim*) was going to change her statement in the Rutland trial because Thomas Peele (*Jimmy Peele's father*) had offered her \$5,000.00 to do so; and that Danny Kestner informed her that the Kestner's financial problems would be solved as soon as Fred Rutland went to jail:

- a. that at the time of Kestner's 02/93 statement, affiant did not really take Kim Kestner seriously, as affiant knew that Kim Kestner had given a statement to Lexington County

Sheriff's Department that Jimmy Peele had a weapon when he entered the Bow Wow Boutique on 09/04/92 and had reiterated that statement both to the press and a number of her friends and acquaintances in the ensuing days subsequent to Peele's death; even to describing to affiant that the weapon " [it] had a long handle (clip) that almost looked like a belt", and

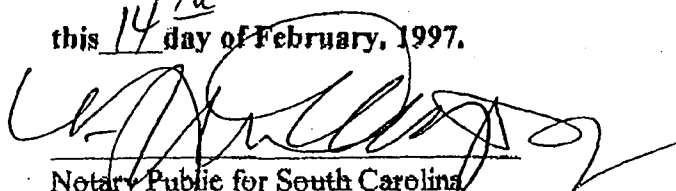
b. that as affiant was sequestered at the trial of Fred Rutland by the Prosecuting Attorneys office, she did not realize until after the trial that Kim Kestner did not testify in accordance with her prior statements after the shooting and before the trial that Kim Kestner had seen Jimmy Peele with a weapon.

FURTHER AFFIANT SAITH NOT.


Robbin (Robbie) Thomason Hunt

SWORN TO before me

this 14th day of February, 1997.


Notary Public for South Carolina

My Commission expires: 1-11-2000

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
 2001 JUL 24 A 10:47

The State of South Carolina)

-vs-)

Fred Randall Rutland,)

Defendant.)

RETURN TO MOTION FOR A NEW TRIAL
 BASED UPON NEWLY/AFTER-DISCOVERED
 EVIDENCE

The State of South Carolina, by and through the undersigned attorneys, hereby makes return to Defendant's Motion For a New Trial Based on After-Discovered Evidence and submits it should be denied for the following reasons:

I. PROCEDURAL HISTORY

The Lexington County Grand Jury indicted the Defendant at the November 1992 term of court for murder, in connection with the September 4, 1992, death of Jimmy Peele. (92-GS-32-3398). The Lexington County Grand Jury also indicted him at the February 1993 term of court for the possession of a firearm or knife during the commission of or attempt to commit a violent crime, in connection with this incident. (93-GS-32-586). He was later indicted at the May 1993 term of court for pointing a firearm, in connection with an unrelated September 4, 1992, incident involving the same victim. (93-GS-32-1514).

He received a jury trial on all of these charges before the Honorable Frank Eppes on May 26-29, 1993. Jack Gregory, Esquire, represented him at trial. Deputy Solicitor Knox McMahon and Assistant Solicitor Dayton Riddle, of the Eleventh Circuit Solicitor's Office, represented the

prosecution. Defendant relied upon a claim of self-defense and the trial judge charged the jury thereon. Tr. 573-76. The jury found Defendant guilty as charged. Judge Eppes sentenced him to life imprisonment for murder, ten years imprisonment for possession of a firearm during the commission of a violent crime and five years imprisonment for pointing and presenting a firearm.

On June 7, 1993, Defendant filed a Motion For a New Trial. Judge Eppes denied this motion on June 14, 1993. Defendant filed a Motion For a New Trial on After-Discovered Evidence and to Stay the Time For Perfecting an Appeal on June 21, 1993. (Respondent will provide a copy of this motion, which was dated and served on June 16, 1993, to the Court at the hearing).

The allegedly after-discovered evidence which he offered in support of his 1993 new trial motion was that prosecution witness Kimberly Kestner had perjured herself when she testified at trial that she did not see the victim (Jimmy Peele) enter the Bow-Wow Boutique on September 4, 1992, with a 9 mm. pistol; that she did not see the victim point this pistol at Defendant; and that she did not hear the Defendant say "don't Jimmy, don't" in an alleged effort to warn the victim not to shoot the pistol. In support of the motion, Defendant submitted a September 5, 1992, newspaper article from The State newspaper and affidavits from Wesley Bruce Vowell (dated June 12, 1993), Belinda Joyce Smith (dated June 15, 1993), and Cindy Lou Wise (dated June 15, 1993). Judge Eppes denied the motion for a new trial on after-discovered evidence on June 23, 1993. (A copy of that Order is attached as **Exhibit G** to the **Return**). Defendant timely appealed from denial of his motions for a new trial.

Defendant served and filed a timely Notice of Appeal. He did not raise any issue on direct appeal concerning Judge Eppes' rulings on his post-trial motions. On August 25, 1995, the South Carolina Supreme Court affirmed his convictions and sentences pursuant to Rule 220(B)(1),

SCACR, in an unpublished opinion. State v. Fred R. Rutland, 95-Mo-263 (S.C. S.Ct., Aug. 25, 1995). Defendant then filed the above-styled motion, which is dated April 17, 1996. Because one of the affidavits in support of this motion alleges possible impropriety by one of the attorneys who prosecuted Defendant, the Eleventh Circuit Solicitor's Office voluntarily recused itself and the South Carolina Attorney General's Office is representing the State.

II. EVIDENCE PRESENTED AT TRIAL

A. Prosecution's Evidence.

At the time of his death, Mr. Jimmy Peele (the victim) lived at [REDACTED] in Pelion, South Carolina. He had separated from his wife, Sally Peele, who had left him for Defendant. Mrs. Peele, a carpenter on construction crews for approximately fifteen years, had physically abused her husband throughout their marriage. She would also pick fights with other women.¹ There was absolutely no evidence presented through the State's witnesses that the victim physically abused his wife. Tr. 209-11; 213-15; 240-43; 253-54; 311-12; 314.

Defendant and Mrs. Peele went to a local pawn shop shortly after 9:00 A.M. on Friday, September 4, 1992, and she purchased a 12-gauge shotgun that her husband had previously pawned (State's Exhibit 19) and a .25 caliber semi-automatic pistol (State's Exhibit 12). She also purchased ammunition for both weapons. The lovers left the store at 9:44 A.M. Tr. 286-94.²

Defendant and Mrs. Peele later went to the victim's residence. They were unaware that Mr.

¹ Mrs. Peele is a strong woman. Her duties as a carpenter on a construction crew included pouring concrete foundations and "laying steel." Tr. 331, l. 25.

² She was shown how to properly load and unload the weapon safely in Defendant's presence. She was also told that it was illegal for her to carry the weapon in a vehicle or to conceal it on her person without a permit.

Bruce Sharpe, the victim's friend and neighbor, was also at the residence. Sharpe testified that he and the victim were preparing to smoke a joint shortly after 10:30 A.M. when they were interrupted by Mrs. Peele. She came into the house and pointed the .25 caliber semi-automatic pistol at the victim. He turned around and said, "Go ahead shoot me, bitch." (The victim had not previously told Mr. Sharpe that Mrs. Peele would be coming over to the house that morning). With this, Mrs. Peele backed out of the doorway and out of the house. Although unarmed, the victim followed her outside. Tr. 252-54; 268-72; 275-78; 283-84.³

As soon as the victim walked outside, Defendant jumped out of the van. He was armed with the 12-gauge shotgun. Defendant immediately ran up to the victim and pointed the weapon at him. The victim went back inside briefly and told Mr. Sharpe that he better leave. Mr. Sharpe went outside and tried to leave, but could not because the van was blocking in his car. So, he watched his friend and Defendant argue for several minutes. During the argument, Defendant fired the shotgun into the air. He then pointed the gun at the victim again. Shortly after this, Mr. Sharpe left the residence. He denied that the victim had been looking for trouble on the morning of September 4, or that the victim had been armed. Tr. 271-76; 279-84.

Following this incident, the victim made a frantic 911 call. However, Defendant and Mrs. Peele went to the house of Robbin Hunt, a woman who had been driving them around in her van that morning. Shortly after 12:00 P.M., Mrs. Peele telephoned a person whom she addressed as "Jimmy." She told "Jimmy" to meet her at the Bow-Wow Boutique in approximately forty-five minutes. From the names used in the conversation Hunt inferred that the person to whom Mrs. Peele

³ A reasonable inference from this evidence is that Mrs. Peele would have murdered her husband at the former marital home if Mr. Sharpe had not interrupted her.

had been speaking was the victim. (The State submits that this is the only reasonable inference from her testimony and that her present recantation, discussed infra, lacks credibility). Tr. 497-502; State's Exhibit 22.

Defendant and Mrs. Peele went to the Bow-Wow Boutique between 1:15 P.M. and 1:20 P.M. that day. They ostensibly inquired about whether or not Kim Kestner, a store employee, would sell her car to them. The Kestners were the only people present when Defendant and Mrs. Peele arrived. After the Kestners agreed to sell the vehicle, Mr. Kestner went outside to look for the title. Tr. 107-12; 117-20; 125-33.

Roughly five minutes after Mr. Kestner went outside, the victim entered the store. Mrs. Peele was making a telephone call in the middle section of the store when he entered. Kim Kestner was grooming a dog in the middle section of the store. Defendant was standing in the doorway which leads to the front of the building. From this vantage point, Defendant could clearly see the victim before he entered the building. Tr. 109-12; 146.⁴

Although Defendant could easily have left, he made no effort to do so. Instead, he reached behind his back as soon as the victim entered the store. The victim, who did not have anything in his hand, made a similar motion. Then, Mrs. Peele screamed, "Oh, God," and Defendant shot the victim four times.⁵ Even after the victim fell to the floor, he did not have a gun in his right hand. Mrs. Kestner then dialed 911. Tr. 112-13; 120-23; 136-45; 148-49; 153-54; 158-59.

⁴ Mr. Sharpe had brought a book to the victim, so that the victim could fix a "busted" distributor cap on his disabled car and leave South Carolina with his daughter.

⁵ The pathologist testified that the victim had been shot once in the abdomen, once in the head and twice in the chest. He died from a loss of blood caused by these wounds. A drug screen was positive for marijuana and Valium, but the pathologist could not determine whether the victim was under the influence of either drug at the time he was murdered. Tr. 295-303.

Sgt. Chris Garner, of the Lexington County Sheriff's Department, arrived at the store several minutes later. He saw the victim's car and the van Defendant had been driving parked on either side of the store. He also saw Mr. Kestner standing near the store. Mr. Kestner told him that the person who had been shot was in the building. Inside, Sgt. Garner found the .25 caliber semi-automatic pistol that Defendant had used to shoot the victim (State's Exhibit 12). He also found a 9 mm. pistol laying on the floor some distance away from the victim (State's Exhibit 13). As soon as Sgt. Garner entered the building, Defendant told him, "I shot him, I'm sorry, please help him." Defendant was then arrested. He later gave several statements which were introduced against him at trial. **R. 95-102; 105-06; 183-203; 223-24.**

Ballistics testing on State's Exhibit 12 revealed that the four bullets which killed the victim were fired by this weapon. **Tr. 160-71.** Also, the safety on the 9 mm. pistol (State's Exhibit 13) was on at the time of the shooting. **Tr. 95-99; 105-06.**

In State's Exhibit 3, Defendant claimed that he met Mrs. Peele approximately six months before the shooting. He also claimed that she was afraid of her husband because her husband was allegedly abusing her. So, Defendant came to Lexington County in order to help her get away from her husband. He admitted that Mrs. Peele and he spent the previous night in a local motel, and that they had bought both the shotgun and a .25 caliber semi-automatic pistol at a pawn shop early in the morning. They went to the Bow-Wow Boutique to buy a car from one of Mrs. Peele's co-workers. He claimed that he had carried the pistol into the shop and pulled it out when he saw the victim coming to the front door. He then allegedly shot the victim in self-defense, as the victim had tried to shoot him. However, he failed to mention the earlier confrontation with the victim at the victim's residence. **Tr. 204-12; State's Exhibit 3; State's Exhibit 7.**

Although Det. Frier investigated Defendant's claim that the victim allegedly abused his wife, he did not find any evidence to support this. Det. Frier also discovered that Defendant had failed to mention the incident occurring early on the morning of September 4. Therefore, he went back and took another statement from Defendant on September 7. (State's Exhibit 9).

When Defendant was asked why he had failed to mention the earlier incident, Defendant stated that:

On Friday morning I went with Sally to her house. Robbin drove us over there. Jimmy was home when we got there. Sally went into the house by herself. Sally took the pistol we had bought at the pawn shop. Sally comes out of the back door a little later sort of dragging him. When she comes out she and Jimmy were yelling at each other. I come from the van with the shotgun. I went about half way to the trailer. I pointed the gun at Jimmy as he was coming out of the trailer. I told Jimmy that I had told him that I would be here to help her. Jimmy did not have a gun that I saw. Sally was standing between me and Jimmy. She still had the pistol. Jimmy kept asking Sally to go into the trailer and talk to him. I told Sally she was not going back into the trailer with him. I shot the shotgun off once when I thought Jimmy was coming towards me. This took place before I had conversation with Jimmy when he first came out of the door. This happened before Jimmy tried to get Sally to go back into the trailer. Sally never did get any clothes or belongings. I stood in the driveway with the shotgun while Sally got into the van. I then got into the back of the van and we left. I'm not sure about the exact time frame when I shot the gun off. It may have been the first or second time that he came out of the trailer. When we had arrived, we did not know that Jimmy was home. We thought he was not home. If Sally had thought he was home she would not have gone inside.

Tr. 213-21; 240-43; State's Exhibit 9.

After giving the written statement, Defendant made an oral argument which he refused to allow to be reduced to writing. When asked whether Mrs. Peele and he had ever discussed plans to murder her husband **he admitted that they had such a discussion approximately a month before**

the murder. However, Mrs. Peele had persuaded him not to do so. He also admitted that he had spoken with an unidentified co-worker, while working down in Charleston, about having the victim murdered. Tr. 221-22; 236-37.

The prosecution also presented Mr. David Jones, who had been Defendant's cellmate following his arrest. The men discussed the murder of Mr. Peele over the course of five or six days. Defendant initially told Mr. Jones only that he had killed a man. He later told Mr. Jones that the victim deserved it and that he had offered to do the killing approximately a month earlier. He also told Mr. Jones that the victim "wasn't worth a damn." Tr. 503-08.

Defendant showed absolutely no remorse in these conversations. To the contrary, he was cocky and arrogant, almost boasting about what he had done: "He had killed Mr. Peele and he was going to run off with Mr. Peele's wife." With respect to the facts of the murder, Defendant said they had purchased the .25 caliber pistol on the morning of the murder and had gone to the Bow-Wow Boutique because "we knew he would be there." Tr. 503-08.

B. Defendant's Trial Evidence.

Defendant's trial evidence reasonably tended to show that he wanted to help Mrs. Peele leave her husband and Lexington County on September 4, 1992. However, they needed transportation because neither one of them owned a car. At the urging of Ms. Robbin Hunt, Mrs. Peele called Mrs. Kim Kestner, a friend and employee at the Bow-Wow Boutique, around 1:00 P.M. on September 4. She asked whether the Kestners would be willing to sell their car. Because Mrs. Kestner agreed to sell the car, Defendant and Mrs. Peele went to the store. Tr. 345-46; 413-15.

When they arrived, Defendant carried the .25 caliber pistol (State's Exhibit 12) into the store because the victim had repeatedly threatened his life several hours earlier. Despite this testimony,

he maintained that he had no reason to expect the victim to enter the store. The Kestners were the only people present in the store when Defendant and Mrs. Peele walked into it. Mrs. Peele and the Kestners soon agreed on a price for the sale of the car, and Mr. Kestner went outside to search for the car's title and to get his personal belongings out of the car. **Tr. 346-51; 415-16.**

Because the title to the car was not in Kim Kestner's name, Mrs. Peele telephoned the South Carolina Department of Highways and Public Transportation to find out how to get the title properly transferred to her. Meanwhile, Kim Kestner started grooming a small puppy while Defendant nervously paced around the store. **Tr. 246-51; 415-16.**

Through a window next to the front door, Defendant saw the victim prepare to enter the store as soon as Mrs. Peele finished her telephone call. Immediately, Defendant walked into the middle section of the store and warned Mrs. Peele that her husband was there. Seconds later, the victim walked up to her. Without saying a word, he reached behind his back, pulled out a 9 mm. semi-automatic pistol (**State's Exhibit 13**) and loaded it. He then pointed this weapon at his wife's stomach. Mrs. Peele was "scared to death" because her husband had a "strange" look in his eyes that she had seen before. Therefore, she merely said, "Oh, my God" and moved toward him. **Tr. 351-52; 355-56; 360-61; 378-80; 416-22; 475.**

Defendant testified that he was standing in the doorway between the middle and rear sections of the store when the victim entered the store. He allegedly did not want a confrontation with the victim. So, he looked around the rear of the store when he first saw the victim, but was unable to find an exit. Because he "didn't have nowhere (sic) to go," he pulled the .25 caliber pistol out of his belt and cocked it. He then turned around and walked into the middle section, or grooming area of the store, where the altercation took place. Even though he initially could not see whether the victim

was armed, he claimed that he "knew" the victim was armed and coming to hunt him and Mrs. Peele. As soon as Defendant saw the victim pull out the 9 mm. pistol, he pointed his own weapon to the floor. Defendant allegedly warned the victim by saying, "Don't Jimmy" and asked "what are you doing?" Nevertheless, the victim pointed the 9 mm. at Mrs. Peele and cocked it. Tr. 355-59; 363; 379-80; 422-28; 440-41; 480-84.

Defendant again warned the victim by saying, "Jimmy don't" and "please don't." When he said, "Damn it, Jimmy," the victim turned, squarely faced him and pointed the gun at him. Although Mrs. Peele initially attempted to step between the two men, she abruptly stopped when her husband pulled the trigger on the 9 mm. Defendant thought that the weapon had been fired. So, he pointed his pistol at the victim and shot the victim in the side. However, this did not stop the victim, who then pointed his weapon at Defendant's chest and pulled the trigger. When he did so, Defendant immediately shot him three more times. Two of these shots struck him in the chest and one struck him in the head. He then fell to the ground and later died. Tr. 355-59; 363; 379-80; 422-26; 428; 440-41; 484-85.

III.

To prevail on a motion for a new trial based upon after-discovered evidence, a criminal defendant must establish that the after-discovered evidence:

- (1) Is such that it would probably change the result if a new trial were granted;
- (2) Has been discovered since the trial;
- (3) Could not in the exercise of due diligence have been discovered prior to trial;
- (4) Is material; and

(5) Is not merely cumulative or impeaching.

State v. Spann, 334 S.C. 618, ___, 513 S.E.2d 98, 99 (citing State v. Prince, 316 S.C. 57, 447 S.E.2d 177 (1993)). To satisfy the first prong of this test, a criminal defendant must show that the after-discovered evidence is credible. Johnson v. Catoe, Op. No. 25304 (S.C. S.Ct., June 11, 2001), reh. den., July 19, 2001) (finding that defendant was not entitled to new trial or resentencing proceeding based on recent affidavit by mentally ill eyewitness confessing to murder because eyewitness was not credible); Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983) (evidence offered by defendant in support of new trial motion would not likely have changed the result if a new trial was given because it was not credible); State v. Morrison, 246 S.C. 575, 145 S.E.2d 15 (1965) (refusal to grant a new trial on ground of after-discovered affidavit by inmate who confessed and thought he had nothing to lose was not an abuse of discretion).

In support of his motion, Defendant relies upon his own affidavit, as well as affidavits from Robbin (Robbie) P. Hunt, Belinda Joyce Smith, Cindy Lou Wise, and Charles Howard. Hunt recants her trial testimony that she and Rutland were present at her house when Sally Peele made a telephone call to an individual she referred to as “Jimmy” and that Sally Peele told “Jimmy” to meet her at the “shop” in about forty-five minutes. **Hunt Affidavit at ¶¶ 3-4.** Hunt avers that the reasons for her recantation are that she was under the influence of prescription medication (Prozac) on the day of her trial testimony and was unable to think clearly (**Hunt Affidavit at ¶ 4 a**); that she has found in the years after her trial testimony that Prozac definitely affects her ability to remember specific times and dates, and that “with the doubts she had then concerning times and dates (which doubts have been further exacerbated by her inability to remember specific time periods requiring her to write down duties relating to her job) that her testimony stating a specific time was not accurate” (**Hunt**

Affidavit ¶ 4 b); that the Assistant Solicitor knew that she was taking Prozac and “also informed her to disregard any doubts she had” (**Hunt Affidavit at ¶ 4 c**).

Hunt claims that she has never been certain whether or not she overheard a telephone conversation as that to which she had testified occurring on September 4, 1992, and that it was not unusual for Sally Peele to call the victim from Hunt’s residence and tell him to meet her at “the shop.” (**Hunt Affidavit at ¶ 4 d**). Additionally, Hunt states that she informed Sgt. Harris and Det. Scottie Frier that she was taking Prozac and believed it was affecting her memory. (**Hunt Affidavit at ¶¶ 4 e and f**).

She alleges that she did not desire to testify at Defendant’s May 1993 trial. However, she believed that either a suspicious fire which completely destroyed her Lexington County residence or the arson investigation of the fire was “in some way connected to the circumstances surrounding Jimmy Peele’s death and Fred Rutland’s trial.” (**Hunt Affidavit at ¶ 4 g**). The ongoing arson investigation and comments made to her by authorities concerning the investigation, as well as her emotional state in May 1993, supposedly caused her to testify “in line with her 10/23/92 statement to Sgt. Harris. . . .” (**Hunt Affidavit at ¶¶ 4 h-i**). Hunt also claims that her October 26, 1992, statement to the Lexington County Sheriff’s Department was false and had been edited by the Sheriff’s Department. (**Hunt Affidavit at ¶ 5**).

If called to testify in a future trial of the Defendant, Hunt would swear that she has never been certain as to the times of the events that occurred on September 4, 1992. She would also testify that she was the person who suggested to Sally Peele on September 4 that Peele go to the Bow-Wow Boutique and inspect the automobile which the Kestners owned because the victim had allegedly rendered Sally Peele’s car inoperable and Sally had not been able to fix it. (**Hunt Affidavit at ¶¶**

7-8).

Finally, Hunt avers that Kim Kestner informed her in February 1993 that Kim planned to change her prior statement and perjure herself at Defendant's trial in exchange for \$5,000.00 from the victim's father, and that Danny Kestner informed her the Kestners' financial problems would be resolved as soon as Defendant went to jail. Hunt did not take Kim seriously at the time the statement was made, and she thought that Kim would testify in accordance with the prior statement which asserted that the victim was armed at the time of the shooting. Hunt did not discover until after the trial that Kim had not testified in accordance with the prior statement because she was sequestered by the Solicitor's Office. (**Hunt Affidavit at ¶ 10**).

Belinda Joyce Smith avers that she had a conversation with Kim Kestner concerning the facts of the shooting around 10:00 P.M. on September 4. Contrary to her trial testimony, Kim told Smith that the victim was armed with a "large black gun," which he pointed at Sally Peele. When Sally Peele moved toward the victim, the victim "did something to the gun as if loading it and attempted to fire the weapon at Sally." At that point, Defendant pulled out "a small gun and pointed it in at Jimmy and begged him not to shoot." However, the victim pointed the gun at Defendant and Kim. Kim ducked behind her grooming table for protection and immediately heard four shots. (**Smith Affidavit at ¶¶ 4-5**).

Smith further avers that Kim told her on the night of September 4 that Kim was afraid for everyone's safety and "said words to the effect that [Defendant] had saved her life by shooting Jimmy." (**Smith Affidavit at ¶ 6**). According to Smith, the information provided to her by Kim Kestner on the night of September 4, 1992, was substantially the same as that provided by Kim to a number of other individuals, including Hunt, Wise and Sally Peele; thus, she was shocked to learn

that Kim had testified differently at trial. (Smith Affidavit at ¶¶ 7-8).

When Smith allegedly asked Kim why Kim had testified differently at trial, Kim told her that the victim's father had offered her money to change her original statement prior to trial. (Smith Affidavit at ¶ 9). Now, Kim allegedly cannot remember accurately what transpired at the time of the shooting, but would be willing to undergo hypnosis to attempt to exactly recall what occurred. (Smith Affidavit at ¶ 10). Finally, Smith avers in ¶ 11 that one of the jurors at Defendant's trial was Kim's client at the Bow-Wow Boutique. Although Smith is silent as to whether she supposedly saw the juror, she states that this juror allegedly "was seen talking to Kim Kestner and waving to the Peele family at the trial." (Smith Affidavit at ¶ 11).

Cindy Lou Wise avers that she was in Hunt's home, along with the Kestners, at some point after the victim's murder. At the time, Wise heard Kim say that the victim "pulled a gun and aimed it at everyone [at the Bow-Wow Boutique]" on the day of the murder; and that Defendant drew a gun and fired in self-defense after the victim's actions. (Affidavit of Wise at ¶ 3). Wise further avers that she had a conversation with Kim at the Crossroads Animal Clinic sometime after Defendant's trial. On that occasion, Kim told Wise that the victim had "entered the Bow-Wow Boutique with a strange look in his eyes and a gun in his hand." (Wise Affidavit at ¶ 4). She was surprised to learn that Kim testified differently at trial. (Wise Affidavit at ¶ 5).

Charles Howard's February 3, 1997, affidavit avers that the victim came to his home late on the morning of September 4, 1992, in order to discuss the repair of an automobile belonging to the victim which apparently had a broken water pump. At that time, the victim was armed with a "large black gun with a magazine clip attached to it in the back of his pants." (Howard Affidavit at ¶ 5). When asked why the victim had the gun, the victim replied, "that he had just gotten the gun 'out of

hock' that morning because he needed (sic) it 'for protection' as the result of an incident that morning in which a shotgun had been fired at him because of an altercation he had with his wife, Sally." (Howard Affidavit at ¶ 6). Howard claims that he never came forward with this information at Defendant's May 1993 trial because no one asked him to testify and he was unaware of the supposed relevancy of this information. (Howard Affidavit at ¶¶ 6-7).

Initially, the State submits this Court should deny so much of Defendant's motion as asserts that he is entitled to a new trial based on evidence that Kim Kestner has told others that the victim was the aggressor based upon the law of the case doctrine. As discussed, Defendant's June 21, 1993, new trial motion was based on his allegation that he had recent discovered evidence that Kestner had perjured herself when she testified at the time of trial and that she had told other individuals that the victim was the aggressor. These affidavits are virtually identical to those affidavits now before this Court and, indeed, included affidavits from Smith and Wise. Although Judge Eppes denied the motion on June 23, 1993, Defendant did not appeal Judge Eppes' adverse ruling. An unchallenged ruling, right or wrong, is the law of the case. ML-Lee Acquisition Fund v. Deloitte & Touche, 327 S.C. 338, 489 S.E.2d 470 (1997); Dukes & Dukes, Inc. v. Hygrade Food Products Corporation, 236 S.C. 69, 113 S.E.2d 254 (1960) (where trial judge entered order denying motion for reference and there was no appeal or notice of appeal from the order, order became law of the case and was binding on courts and litigants alike; hence, subsequent order of reference by judge before whom case came on for trial was erroneous); Kerchner v. Singletary, 15 S.C. 535 (1881) (an order unappealed from is binding in subsequent stages of the same cause and there "can be no appeal from one Circuit judge to another").

The allegation that Kim Kestner has given inconsistent accounts of the shooting is also

barred by the analogous, well established rule that “[t]he prior order of one Circuit Judge may not be modified by the subsequent order of another Circuit Judge, except in cases when the right to do so has been reserved to the succeeding Judge, when it is allowed by rule of court or statute, or when the subsequent order does not substantially affect the ruling or decision represented by the previous order” Dinkins v. Robbins, 203 S.C. 199, ___, 26 S.E.2d 689, 690 (1943). See also Rule 63, SCRPC; Dukes & Dukes, Inc.; Charleston County Department of Social Services v. Father, Stepmother, and Mother, 317 S.C. 283, 288, 454 S.E.2d 307, 309 (S.C. Ct. App. 1995) (“There is a long-standing rule in this State that one judge of the same court cannot overrule another. . . . Accordingly, we hold a successor judge may not substitute his own judgment for that of the trial judge; nor may he grant a new trial under Rule 63 unless he articulates a valid reason to grant post-trial relief based on the record before him”) (citations omitted). Here, the allegations involving Kim Kestner do not fall within any exception and are barred. Id.

Even if this Court addresses the merits of all of Defendant’s allegations, he is not entitled to relief. Much of the “after-discovered evidence” offered in support of Defendant’s motion either was known to him at the time of his trial or could have been discovered by the exercise of due diligence. For instance, much of the supposedly “new” evidence centers around statements made by Kim Kestner both before and after trial which were inconsistent with her trial testimony. However, the State submits upon information and belief that a copy of Kim Kestner’s September 4, 1992, statement to the Lexington County Sheriff’s Department was provided to trial counsel before trial. This statement clearly indicates that during Sally Peele’s telephone call concerning the transfer of the license tag on the Kestners’ vehicle to her, “Jimmy Peele came in. He reached behind him and pulled a gun. I heard two shots and Jimmy fell. I called 911. Sally and the other guy, the guy that

shot Jimmy[,] were giving Jimmy CPR.” See Return, Exhibit 8.

Moreover, a September 5, 1992, newspaper article attached to Defendant’s June 15, 1993, Motion For a New Trial on After-Discovered Evidence and to Stay the Time For Perfecting an Appeal, which was considered and rejected by Judge Eppes, clearly states that

Shop employee Kim Kestner said Peele [the victim], 33, drew a TEC-9, a large automatic pistol. ‘Jimmy said nothing. He pulled his gun out and was fixing to shoot,’ [s]he said. ‘It scared me to death. I couldn’t understand why he was doing this.’ Rutland then drew a .25-caliber, according to the Lexington County Sheriff’s Department.

See The State, 2-B, Sept. 5, 1992, “Shooting at shop leaves man dead.”

Therefore, evidence that Kim Kestner had made inconsistent statements was readily available to Defendant before his May 1993 trial. A defendant is not entitled to a new trial based on after-discovered evidence if the evidence was either known to him at the time of trial or could have been discovered by the exercise of due diligence. Prince, 316 S.C. at 69, 447 S.E.2d at 184 (appellant not entitled to move for new trial based on affidavits of funeral home employees that victim’s body had been left unattended in open garage at funeral home for two days and one night after first autopsy; appellant failed to establish that this evidence could not have been discovered by due diligence, since other evidence showed that he attempted to discuss the handling of the body with funeral home employees before trial and he failed to proffer their testimony at trial, although obviously aware the body may have been mishandled); Hayden, 278 S.C. at ___, 299 S.E.2d at 855-56 (respondent - who claimed at trial that he was framed by SLED informant, SLED agent and another individual - failed to show that evidence the other individual’s testimony that other person conspired to frame respondent in exchange for immunity from state and federal authorities was discovered after trial or could not have been discovered before trial through the exercise of due diligence, where (1) alleged

setup was known by and available to respondent at the time of trial; (2) he refused the trial judge's offer to subpoena informant or other individual; and (3) he made no attempt to obtain the testimony of the SLED agent or informant); State v. Nixon, 275 S.C. 575, ___, 274 S.E.2d 406, 409 (1981) (in concluding that respondent was not entitled to a new trial based upon prosecution's failure to disclose taped statement of co-defendant that another co-defendant had offered THC to respondent but she had refused it, Court observed that "[r]espondent knew as well as anyone what transpired at the scene of the arrest. . . She should not be permitted to claim that she was surprised by the fact that Collins would make the statement to the investigating officer"); State v. Deese, 266 S.C. 534, ___, 225 S.E.2d 175, 176 (1976). Thus, even assuming *arguendo* that evidence concerning Kestner's alleged perjury is properly before this court, it is not after-discovered evidence, because it could have been discovered prior to trial by the exercise of due diligence. Id.

Likewise, Hunt gave statements to the Lexington County Sheriff's Department on September 4 (**Return, Exhibit B**), October 23 (**Return, Exhibit C**), and October 26, 1992 (**Return, Exhibit D**). Thus, anything she now maintains happened could have been discovered by Defendant prior to trial through the exercise of due diligence. As a result, it cannot serve as a basis for awarding Defendant a new trial. Id.

Moreover, to the extent Defendant claims he is entitled to a new trial based upon evidence that Kim told others that the victim was the aggressor, any such evidence does not warrant a new trial because it is merely cumulative to other evidence presented at trial. As discussed, Defendant's evidence reasonably tended to show that the victim was the aggressor. His evidence was that Defendant did not shoot the victim until after the victim had first pointed the weapon at Sally Peele and then at Defendant, and only after Defendant had warned the victim not to shoot. Also, trial

counsel's cross-examination of Kim Kestner elicited that she saw a 9 mm. weapon laying on the floor approximately eight or ten feet behind the victim. Tr. 158, l. 7 - 159, l. 9. Thus, the evidence now proffered in support of the new trial motion would be merely cumulative to evidence already presented to the jury and does not support a motion for a new trial. Spann. See also Johnson.

Similarly, Hunt's testimony that she was uncertain as to whom Sally Peele was speaking at the time or the date of her conversation would be merely cumulative to the evidence to which she testified at trial because trial counsel's examination of her established that Hunt did not know to whom Sally Peele was speaking when she asked the person to meet her at the Bow-Wow Boutique approximately forty-five minutes after the September 4, 1992, call. Tr. 501-02. Additionally, the proffered evidence would merely serve to impeach the testimony of both Hunt and Kestner. Again, this is insufficient to support a motion for a new trial based on after-discovered evidence. Id.

More importantly, this Court must bear in mind that "[r]ecantation of testimony is ordinarily unreliable and should be subjected to the closest scrutiny when offered as ground for new trial." State v. Porter, 269 S.C. 618, ___, 239 S.E.2d 641, 643 (1977) (trial judge did not abuse discretion in denying motion for new trial based on "after-discovered" evidence that two prosecution witnesses had recanted their testimony). This is because holding affidavits recanting trial testimony are sufficient to "require the granting of a new trial would be to open the door to fraud and perjury, as well as to invite interminable delays in the disposition of causes." State v. Parker, 249 S.C. 139, ___, 153 S.E.2d 183, 184 (1967) (upholding denial of new trial based on recantation); State v. Whitener, 228 S.C. 224, ___, 89 S.E.2d 701, 709-10 (1955) (recognizing that recantation of testimony is inherently unreliable and holding affidavit from prosecutrix at rape trial, recanting her trial testimony and averring she had been pressured to testify by police, was insufficient to support motion to

suspend appeal and transfer case to lower court for new trial motion).

Hunt's recantation in this case is especially unreliable for at least two reasons. First, she is a friend of Defendant and Salley Peele, and provided them with transportation on the day of the killing. Second, she told the Lexington County Sheriff's Department in her October 23, 1992, statement that she had not discussed Sally Peele's phone call which lured the victim to his death prior to that time "because Sally Peele's got a reputation for hurting people and she also has a reputation for burning things down . . . and people, everybody that knows Sally will hurt you." When asked if she was afraid, Hunt replied, "Most definitely, plus the fact I just finished telling you that she would tell that I knew about the drug things if I didn't go along with this . . . and I know you can lose your property if you're involved in drugs and I'm the only one (1) that's got property." (**Return, Exhibit C at 5**). Both her friendship and her fear cast doubts upon her post-trial recantation and other allegations.

Of course, to the extent Hunt now claims anything she says is truthful, she admits that she testified falsely at Defendant's trial. To the extent she does so, she provides further reason for this Court to find that her current allegations are equally incredible. Further, Defendant has not provided an affidavit from Kim Kestner or Danny Kestner admitting that Kim accepted a bribe in exchange for her testimony, or that either one of them testified falsely at Defendant's trial. Also, the victim's father, Thomas Henry Peele, avers in a February 10, 1996, affidavit (**Return, Exhibit H**) that he did not know Kim Kestner, apart from witnessing her trial testimony; that he did not meet with her prior to, during or after the trial; that he had not offered or attempted to pay her \$5,000.00 for any reason, whatsoever; and that he has not paid her \$5,000.00 for any reason whatsoever. On information and belief, Respondent further denies Hunt's spurious and malicious allegations of wrongdoing by

Deputy Solicitor C. Dayton Riddle, III. As a result, neither her recantation or any other aspect of her affidavit is credible. Id.; Johnson; Hayden.

Nor is the proffered evidence such that it would probably change the result if a new trial was granted, as required for relief under Spann and Johnson. Apart from the credibility problems that have already been discussed, Defendant has not presented this Court with any affidavit that someone else shot the victim. Also, the jury heard his various statements to police and, therefore, heard evidence emanating from his own mouth that he was, in fact, guilty of the crime charged. In his oral statement to police, Defendant admitted that he and Sally Peele had a conversation in which they discussed murdering the victim, approximately a month before the actual killing. However, Mrs. Peele allegedly persuaded him not to do so. Defendant also told police that he had spoken to an unidentified co-worker about having the victim murdered. **Tr. 221-22; 236-37.**

Further, David Jones, Defendant's former cellmate, testified that Defendant boasted to him about killing the victim, and said that he had offered to do the killing about a month earlier. He told Jones that the victim "wasn't worth a damn," and deserved to be killed. Defendant also told Jones that he and Sally Peele had purchased the .25 caliber pistol on the morning of the murder and went to the Bow-Wow Boutique because "we knew he'd be there." **Tr. 503-08.** None of this evidence is refuted by Defendant's current proffer. Cf. Johnson (Court agreed with special referee's finding that former eyewitness, who now claims responsibility for committing the murder, was not credible based upon the varying number of inconsistent statements previously given by the witness, the witness' mental health problems and a comparison of her confession with the known facts of the trial). Because this evidence of guilt is not affected by the evidence proffered in support of the new trial motion, and because Defendant either had this evidence before trial or could have discovered

it by the exercise of due diligence, he is not entitled to a new trial based upon evidence that is (1) of doubtful credibility, (2) is largely cumulative and (3) is merely impeaching.

IV.

Each and every allegation in the above-styled motion, which has not been expressly admitted, explained, qualified or denied is expressly denied.

WHEREFORE, having made return to the Motion For a New Trial on After-Discovered Evidence, the State would ask this Court to deny the same.

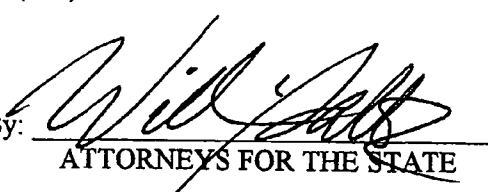
CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: 
ATTORNEYS FOR THE STATE

July 27, 2001.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS
 FOR THE ELEVENTH JUDICIAL CIRCUIT

The State of South Carolina)
)
 -vs-)
)
 Fred Randall Rutland,)
)
 Defendant.)
 _____)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of July, 2001, a copy of the State's Return to Motion For a New Trial Based Upon Newly/After Discovered Evidence was served on counsel for the Defendant by depositing same in the United States mail, postage prepaid, and addressed as follows:

David W. Farrell, Esquire
 1338 Main Street, Suite 900
 Columbia, South Carolina 29201-3219


 WILLIAM EDGAR SALTER, III
 ATTORNEY FOR THE STATE

COPY

2003-CP32-1982

STATE OF SOUTH CAROLINA

County of LEXINGTON

In the Court of Common Pleas

Fred R. Rutland # 197903

Full name and prison number (if any) of Applicant,

vs.

State of South Carolina

Name of Respondent.

APPLICATION FOR
POST-CONVICTION RELIEFFILED
MAY 29 P 4:00
THOMAS H. COMERT
CLERK OF COURT
LEXINGTON SCINSTRUCTIONS — READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention Lee Correctional Institution
990 Wisacky Highway, Bishopville, SC
2. Name and location of Court which imposed sentence Lexington General Sessions
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 92-GS-32-586 Poss F/A Durg Comm of Viol Crime
 - (b) 92-GS-32-3398 Murder
 - (c) 93-GS-32-1514 Pointing a Firearm
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 92-GS-32-586 Poss F/A Durg Comm of Viol Crime - 5 Yrs. - 5/29/93
 - (b) 92-GS-32-3398 Murder - Life - 5/29/93
 - (c) 93-GS-32-1514 Pointing a Firearm - 10 Yrs. - 5/29/93

5. Check whether a finding of guilty was made

- (a) after a plea of guilty _____
 (b) after a plea of not guilty ✓ _____
 (c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes _____

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

- i. South Carolina Supreme Court _____
 ii. _____
 iii. _____

(b) the result in each such Court to which you appealed:

- i. Conviction Affirmed _____
 ii. _____
 iii. _____

(c) the date of each such result:

- i. August 25, 1995 _____
 ii. _____
 iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. Memorandum Opinion No. 95-MO-263 _____
 ii. _____
 iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

- (a) _____
 (b) _____
 (c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of counsel - Counselor's representation

~~XX~~ fell below an objective standard of reasonableness, and but

~~XX~~ for counsel's error(s), there is a reasonable probability trial

result would have been different.

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

- (a) (See attachment) _____
 (b) _____
 (c) _____

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? _____
- (d) any other petitions, motions or applications in this or any other Court?
Yes

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. Motion for new trial based on after discovered evidence and
XK to stay time for perfecting appeal
- XK ii Motion for new trial based on after discovered evidence
- iv. _____

(b) the name and location of the Court in which each was filed:

- i. Lexington General Sessions Court
- ii. Lexington General Sessions Court
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. Motion denied
- ii. Motion withdrawn contemporaneously with filing on this petition
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. June 23, 1993
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) _____
- (b) _____
- (c) _____

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Yes
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. H. Jackson Gregory
- ii. Robert Dudek
- iii. David W. Farrell

(b) the proceedings at which each such attorney represented you:

- i. trial and motion 12(a)(i)
- ii. appeal
- iii. motion 12(a)(ii)

18. State clearly the relief you seek in filing this application.

Reversal and Remand

19. Are you now under sentence from any other court that you have not challenged?

No

ATTACHMENT "A"

GROUNDS FOR APPLICATION, WITH SUPPORTING FACTS

10(a). Trial counsel was materially ineffective in his cross-examination of State's Witness Kimberly Kestner. Kimberly Kestner was interviewed by State Newspaper reporter Bob Stuart the weekend of the shooting incident. In her interview with Stuart, she related a set of facts materially different from her trial testimony. This information was published in the State Newspaper on September 6, 2002, including direct quotes from Kestner. Trial counsel never questioned Kimberly Kestner or Bob Stuart prior to trial, and never questioned, challenged or impeached Kimberly Kestner's testimony in any way regarding discrepancies between her published comments and trial testimony.

10(b). Trial counsel was materially ineffective in failing to identify, locate, and obtain testimony from Witness Cindy Lou Wise. Ms. Wise was at a friend's house with Kimberly Kestner in late September 1992 and heard Kimberly Kestner relate a set of facts materially different from her trial testimony.

10(c). Trial counsel was materially ineffective in failing to identify, locate and obtain testimony from Witness Belinda Smith [O'Rear]. Ms. Smith [O'Rear] spent the night after the shooting with Kimberly Kestner and observed Kimberly Kestner both describe and act out the shooting incident in a manner materially different from her testimony at trial.

10(d). Trial counsel was materially ineffective in failing to identify, locate and obtain testimony from Witness Charles Howard. Mr. Howard observed Jimmy Peele on the day of the shooting in possession of a large black gun with magazine clip attached. Jimmy Peele stated to Mr. Howard that he had just gotten the gun "out of hock".

10(e). Trial counsel was materially ineffective in failing to adequately prepare for the trial of the case. Approximately one week prior to trial, Counsel contacted James Ervin, a paralegal to assist him with case preparation. Counsel stated to James Ervin 1) that he was unprepared for the trial, 2) that he had not worked on the case because he had not been paid and because he thought it would be a plea. During the course of the trial, James Ervin was still attempting to conduct a factual investigation of the events for counsel.

10(f). Trial counsel was materially ineffective in failing to advise petitioner of a potential conflict of interest and in failing to raise issue of bias and or motive in regards to State's witness Robin Hunt. Robin Hunt testified for the prosecution and was cross-examined by trial counsel. Robin Hunt had consulted with trial counsel about a pending arson investigation. The arson investigation concerned Robin Hunt's Lexington County residence. Trial counsel also handled a trust matter for Robin Hunt's son, Wesley Vowell. Trial counsel never explained this conflict to petitioner.

10(g). Trial counsel was materially ineffective by failing to make a contemporaneous objection to the trial judge's failure to include a charge on the defense of others.

10(h). Trial counsel was materially ineffective by failing to object at the first opportunity to the trial judge's charge on mutual combat.

10(i). Trial counsel was materially ineffective by failing to properly pressure issues regarding the testimony of Sally Peele for appellate review.

STATE OF SOUTH CAROLINA

County of

LEXINGTON

2003-CP32-1983

COPY

VERIFICATION

I, FRED R. RUTLAND, 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.

X Fred R. Rutland

SWORN to and subscribed before me this 28thday of May, 2003

Susan V. J. J. J. (L.S.)
Notary Public

FILED
2003 MAY 29 P 4:08
THOMAS H. COMBERFORD
CLERK OF COURT
LEXINGTON SC

My Commission Expires: 9/26/09

APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, FRED R. RUTLAND, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

X Fred R. Rutland
Applicant

SWORN or affirmed to and subscribed before me this

28th day of May, 2003

Susan V. J. J. J.
Notary Public

My Commission Expires 9/26/09

COPY

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON)

2003-CP32-1983

Fred R. Rutland,)

C/A NO. 03-CP-32-_____

Applicant,)

vs.)

**COVER SHEET FOR
CIVIL ACTIONS**

State of South Carolina,)

Respondent.)

The cover sheet and the information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated.

NATURE OF ACTION: (check one category for the main cause of action)

☐ TORT - Motor Vehicle	☐ CONTRACT - Debt Collection
☐ TORT - Professional Malpractice	☐ CONTRACT - Employment
☐ TORT - Unfair Trade Practices, and Other Economic or Business-Related Wrongs	☐ CONTRACT - Construction
☐ TORT - Products Liability	☐ CONTRACT - Wrongful Breach
☐ TORT - General or Other	☐ CONTRACT - General or Other
☒ PCR	☐ REAL PROPERTY
☐ GOV/ADM - Workers Comp.	☐ MINOR SETTLEMENTS
☐ GOV/ADM - General or Other	☐ DOMESTICATE FOREIGN JUDGMENT
	☐ OTHER

JURY DEMAND ☐ YES ☒ NO

Note: Information requested on this form is preliminary in nature, and for administrative purposes only. The response to this request for information on jury demand merely indicates a likelihood that a jury pursuant to applicable rules or statutes.

DOCKETING INFORMATION (Check one box.)

- ☐ This case is subject to **arbitration** (all cases with monetary damages less than \$25,000 are subject to arbitration, unless otherwise exempt).
- ☐ This case is subject to **mediation** (all cases not subject to arbitration must be mediated unless otherwise exempt).
- ☒ This case is exempt from ADR, and certificate is attached.

2003 MAY 29 P 4:07
THOMAS H. CONERFORD
CLERK OF COURT
LEXINGTON SC

FILED

David W. Farrell
David W. Farrell
Attorney for Applicant
1338 Main Street, Suite 900
Columbia, South Carolina 29201
(803) 256-7011

Date: 5-28-03

693

COPY

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

IF THE DOCKETING INFORMATION ON THE REVERSE SIDE OF THIS COVER SHEET INDICATES THAT THIS CASE IS SUBJECT TO MEDIATION, YOU ARE NOTIFIED THAT MEDIATED SETTLEMENT CONFERENCES ARE REQUIRED IN THIS CASE, AND THAT YOU ARE REQUIRED TO TAKE THE FOLLOWING ACTION(S):

1. The parties shall select a mediator within 120 days of the filing of this action, and the plaintiff shall file a "Stipulation of Mediator Selection" within 14 days thereafter. If the parties can not agree upon the selection of the mediator within 120 days, the plaintiff shall notify the court by filing a written "Request for the Appointment of a Mediator" within 14 days thereafter. The court shall then appoint a mediator from the court-approved mediator list.
2. A party must make any motion to dispense with or defer mediation, or to refer the case to an alternative dispute resolution (ADR) process other than mediation, no later than 10 days after the court order appointing a mediator. Please note that you are not required to wait for an order appointing a mediator before making this motion. It may be made at any time prior to the expiration of 10 days after the court order appointing a mediator.
3. The initial mediated settlement conference must be held within 60 days after either the Notice of Selection of Mediator or the court appointment of a mediator.
4. Motion of a party to be exempted from payment of mediator fees due to indigency should be filed with the court within 10 days after the settlement conference has been concluded.
5. The mediator shall report the results of the mediated settlement conference on the court-approved form.

Please Note: Attendance at a mediated settlement conference is mandatory. You must comply with the Supreme Court Rules regarding court-ordered mediation. Failure to do so may affect your case or may result in sanctions.

IF THE DOCKETING INFORMATION ON THE REVERSE SIDE OF THE COVER SHEET INDICATES THAT THIS CASE IS SUBJECT TO ARBITRATION, YOU ARE NOTIFIED THAT AN ARBITRATION HEARING IS REQUIRED IN THIS CASE, AND THAT YOU ARE REQUIRED TO TAKE THE FOLLOWING ACTION(S):

1. Within 20 days after the filing of the last responsive pleading or the expiration of the time for filing responsive pleadings, the plaintiff of the consenting parties, shall file either a "Stipulation of Arbitrator Selection" identifying the choice of an arbitrator or shall notify the court that the parties cannot agree upon an arbitrator by filing a "Request for Appointment of Arbitrator". Upon receipt of a "Request for Appointment of Arbitrator" the court shall appoint an arbitrator from the court-approved arbitrator list.
2. The parties may choose an arbitrator who is not on the court-approved list, or who is not certified, only if requirement of Arb. Rule 2(c) are met. The "Stipulation of Arbitrator Selection" form must be completed and signed by the parties and the proposed arbitrator, and approved by the court if the proposed arbitrator is not certified.
3. A party must make any motion to exempt or withdraw an action from arbitration at least ten (10) days before the arbitration hearing and made a showing that (1) the amount of the claim(s) exceeds \$25,000; or, (2) the action is excepted from arbitration under Arb. Rule 1(a); (3) there is a strong and compelling reason to do so. Please note that you are not required to wait for an order appointing an arbitrator before making this motion.
4. The arbitration hearing must be scheduled, with notice to the parties, to begin within 60 days after the filing of the "Stipulation of Arbitrator Selection" or "Order Appointing Arbitrator."
5. The right to proceed in forma pauperis is not affected by the Rules for Circuit Court Arbitration.

Please Note: Attendance at an arbitration hearing is mandatory. You must comply with the Supreme Court Rules regarding court-ordered arbitration. Failure to do so may affect your case or may result in sanctions (Arb. Rule 3).
ARB- (11/95)

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Fred R. Rutland,

Applicant,

vs.

State of Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2003-CP32-1983

C/A NO. 03-CP-32-____

COPY

**CERTIFICATE OF
EXEMPTION/WITHDRAWAL
FROM ARBITRATION**

I CERTIFY THAT THIS ACTION IS EXEMPT FROM ARBITRATION BECAUSE:

- _____ monetary relief requested in this case exceeds \$25,000;
 _____ this is a class action;
 _____ there is a substantial claim for injunction or declaratory relief requested in this case.
 _____ this case involves (check one or more of the following)
 _____ title to real estate;
 _____ wills, trusts and decedents' estates;
 _____ mortgage foreclosure;
 _____ partition;
 _____ this is a special proceeding or action seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 _____ monetary relief requested in this case is unspecified but exceeds \$25,000.
 _____ this case is a companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue;
 _____ this action is appellate in nature;
 _____ ☒ this is a post-conviction relief matter;
 _____ this is forfeiture proceeding brought by the State; or
 _____ this is a contempt of court proceeding.

Date:

5-28-03

David W. Farrell

Attorney for Applicant

THOMAS H. COMERFORD
CLERK OF COURT
LEXINGTON SC
2003 MAY 29 P 4:01

FILED

Note: Motion must be presented to the court, a hearing held, and a finding made, for exemption or withdrawal from arbitration for "strong and compelling reason" sought pursuant to Rule 1(d), Rules of Circuit Court Arbitration.

ARB- (11/95)

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

2003-CP-32-1983

Fred R. Rutland, #197903,

Applicant,

v.

State of South Carolina,

Respondent.

RETURN AND MOTION TO DISMISS

The Respondent, making its Return and Motion to Dismiss to the Application for Post-Conviction Relief filed May 29, 2003, would respectfully show this Court:

I.

The Lexington County Grand Jury indicted the Applicant at the November 1992 term of court for murder, in connection with the September 4, 1992, death of Jimmy Peele. (92-GS-32-3398). The Lexington County Grand Jury also indicted him at the February 1993 term of court for the possession of a firearm or knife during the commission of or attempt to commit a violent crime, in connection with this incident. (93-GS-32-586). He was later indicted at the May 1993 term of court for pointing a firearm, in connection with an unrelated September 4, 1992, incident involving the same victim. (93-GS-32-1514).

He received a jury trial on all of these charges before the Honorable Frank Eppes on May 26-29, 1993. Jack Gregory, Esquire, represented him at trial. Deputy Solicitor Knox McMahon and Assistant Solicitor Dayton Riddle, of the Eleventh Circuit Solicitor's Office, represented the prosecution. Applicant relied upon a claim of self-defense and the trial judge charged the jury thereon. The jury found Applicant guilty as charged. Judge Eppes sentenced him to life

imprisonment for murder, ten years imprisonment for possession of a firearm during the commission of a violent crime and five years imprisonment for pointing and presenting a firearm.

On June 7, 1993, Applicant filed a Motion For a New Trial. Judge Eppes denied this motion on June 14, 1993. Applicant filed a Motion For a New Trial on After-Discovered Evidence and to Stay the Time For Perfecting an Appeal on June 21, 1993.

The allegedly after-discovered evidence which he offered in support of his 1993 new trial motion was that prosecution witness Kimberly Kestner had perjured herself when she testified at trial that she did not see the victim (Jimmy Peele) enter the Bow-Wow Boutique on September 4, 1992, with a 9 mm. pistol; that she did not see the victim point this pistol at Applicant; and that she did not hear Applicant say "don't Jimmy, don't" in an alleged effort to warn the victim not to shoot the pistol. In support of the motion, Applicant submitted a September 5, 1992, newspaper article from The State newspaper and affidavits from Wesley Bruce Vowell (dated June 12, 1993), Belinda Joyce Smith (dated June 15, 1993), and Cindy Lou Wise (dated June 15, 1993). Judge Eppes denied the motion for a new trial on after-discovered evidence on June 23, 1993. Applicant timely appealed from denial of his motions for a new trial.

Applicant served and filed a timely Notice of Appeal. He did not raise any issue on direct appeal concerning Judge Eppes' rulings on his post-trial motions. On August 25, 1995, the South Carolina Supreme Court affirmed his convictions and sentences pursuant to Rule 220(B)(1), SCACR, in an unpublished opinion. State v. Fred R. Rutland, 95-Mo-263 (S.C. S.Ct., Aug. 25, 1995). Applicant subsequently filed a Motion for a New Trial based on after discovered evidence on April 17, 1996. The State made its Reply to this motion on July 27, 2001. On May 28, 2003, Applicant withdrew this motion and filed this application for PCR on May 29, 2003.

Attached herewith and incorporated herein by reference are the records of the Lexington County Clerk of Court regarding the subject conviction(s) and the Applicant's records from the Department of Corrections.

II.

In his Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
 - A. Trial Counsel was materially ineffective in cross-examining State's witness Kimberly Kestner;
 - B. Trial counsel was materially ineffective in failing to identify, locate and obtain testimony from witness Cindy Lou Wise;
 - C. Trial counsel was materially ineffective in failing to identify, locate and obtain testimony from witness Belinda Smith [O'Rear];
 - D. Trial counsel was materially ineffective in failing to identify, locate and obtain testimony from witness Charles Howard;
 - E. Trial counsel was materially ineffective in failing to adequately prepare for the trial of the case;
 - F. Trial counsel was materially ineffective in failing to advise petitioner of a potential conflict of interest and in failing to raise issue of bias and or motive in regards to State's witness Robin Hunt;
 - G. Trial counsel was materially ineffective by failing to make a contemporaneous objection to trial judge's failure to include a charge on the defense of others;
 - H. Trial counsel was materially ineffective by failing to make a contemporaneous objection to the trial judge's failure to include a charge on the defense of the others;
 - I. Trial counsel was materially ineffective by failing to object at the first opportunity to the trial judge's charge on mutual combat;
 - J. Trial counsel was materially ineffective by failing to properly preserve issues regarding the testimony of Sally Peele for appellate review.

III.

The Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Butler, Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

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, Id. 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.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the State 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.

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return and Motion to Dismiss, the Respondent requests that an evidentiary hearing be held solely on the issue of trial counsel's effectiveness.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

LAKESHA JEFFRIES
Assistant Attorney General

By: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

March 31, 2004.

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

)
) IN THE COURT OF COMMON PLEAS

2003-CP-32-1983

Fred R. Rutland, 197903

Applicant,

vs

State of South Carolina,

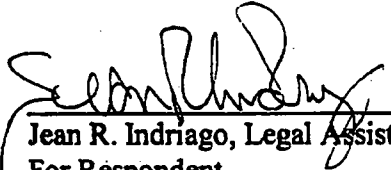
Respondent.

)
)
)
) AFFIDAVIT OF SERVICE BY MAIL
)
)
)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Jennifer N. Williams, Esquire
1735 Augusta Road
West Columbia, South Carolina 29169

DATED this 6th day of April, 2004.



Jean R. Indriago, Legal Assistant
For Respondent

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF LEXINGTON)

IN THE COURT
OF COMMON PLEAS

3 DOCKET NO. 2003-CP-32-1983
4

5
6 Fred Rutland,)
7 Applicant)

8 VS.)

TRANSCRIPT OF RECORD
9)

10 State of South Carolina,)
11 Defendant)

12 Wednesday, April 19, 2006
13 Lexington, South Carolina
14

15 B E F O R E:

16 THE HONORABLE L. CASEY MANNING, JUDGE.
17

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

19 Jennifer N. Williams, Esquire
Attorney for the Applicant

20 Sabrina C. Todd, Assistant Attorney General
21 State of South Carolina
Attorney for the Respondent
22
23
24

25 Brenda W. Sigwald, Circuit Court
P.O. Box 206, Jackson, South Carolina 29831

I N D E X

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
Post Conviction Relief				
Hearing	3			
David Farrell	5			
Jack Gregory	10	48	64	
Frank Heming	68			
Robbie Lankford	71	82		
Fred Rutland	85	91		
Charles Dayton Riddle	95	97		
Closing Arguments				
By Ms. Williams	107			
By Ms. Todd	112			
By Ms. Williams	115			
Reporter's Certificate	120			

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
A-1	Statement of Kimberly Kestner	29
A-2	Statement of Robin Hunt	29
A-3	Affidavit - Wesley Vowell	34
A-4	Affidavit - Belinda Smith	34
A-5	Affidavid - Cindy Lou Smith	34

1 POST CONVICTION RELIEF HEARING

2 THE COURT: Call the next case.

3 MS. TODD: The State would call Fred Rutland
4 vs. State. It's a Lexington County case, 2003-CP-32-1983.
5 Mr. Rutland is present and is sitting here with his
6 attorney Jennifer N. Williams.

7 Your Honor, may I approach on a case for
8 tomorrow?

9 THE COURT: Yes, ma'am.

10 (WHEREUPON there was discussion on scheduling
11 for a case the following day.)

12 THE COURT: All right. Fred Rutland. Are we
13 all ready?

14 MS. TODD: Yes, Your Honor. Mr. Rutland was
15 convicted in 1993 for the murder of Mr. Jimmy Peal. Two
16 members of the victims family are here today, Mr. Thomas
17 Peal, his father and Crystal Knight, his sister. The
18 applicant had both post-trial motions and a direct appeal.
19 He filed this PCR in May of 2003 and has raised a few
20 allegations of ineffective assistance of counsel and the
21 State would defer to the applicant at this time.

22 THE COURT: All right. Ms. Williams?

23 MS. WILLIAMS: Yes, Your Honor, may it please
24 the Court, Jennifer Williams on behalf of Mr. Rutland.
25 This application was filed due to the unique history of the

1 case. There had been a motion for a new trial. There had
2 been a motion for a new trial based on after-discovered
3 evidence. There has been an appeal on this case and
4 another motion for a new trial filed in 1997. I don't
5 think there's any question that this is a timely PCR
6 hearing.

7 Shortly after he withdrew his appeal in the
8 case, he did file the application for post conviction
9 relief stating ineffective assistance of counsel,
10 Attachment A sets out the various grounds more specifically
11 in this case and we would like to proceed with the
12 presentation of witnesses at this time to support the
13 allegations.

14 THE COURT: All right. You may proceed.

15 MS. WILLIAMS: We would call David Farrell to
16 the stand.

17 THE COURT: Come around Mr. Farrell.

18 MR. FARRELL: Good morning, Your Honor.

19 THE COURT: Good morning.

20 THEREUPON,

21 DAVID FARRELL,

22 after being duly sworn, testified as follows:

23 THE CLERK: Please have a seat and state your
24 name for the Court, please.

25 THE WITNESS: David William Farrell,

David Farrell - Direct Examination by Ms. Williams

1 F-a-r-r-e-l-l

2 **DIRECT EXAMINATION**

3 By Ms. Williams:

4 Q Mr. Farrell, what's your occupation?

5 A I'm an attorney in Columbia.

6 Q Okay. And do you know the defendant, Fred Rutland?

7 A Yes, I do. I was appointed by Judge Keesley, I
8 believe, to represent Mr. Rutland on a motion for a new
9 trial based on after-discovered evidence in the year
10 2000.

11 Q Okay. Do you know when that motion for a new trial was
12 filed originally?

13 A I do not recall, I believe it was filed by Mr. Rutland,
14 pro se.

15 Q And during the course of your representation of him,
16 did you begin to investigate this matter?

17 A Yes, I did.

18 Q And what did you discover in the course of your
19 investigation about the grounds for a new trial as
20 opposed to grounds for a PCR.

21 A Well, I recall there was an accusation that the
22 victim's father had eventually paid off a witness.
23 That, as far as I could determine was simply rumor.
24 After speaking with Mr. Rutland and reviewing the
25 transcripts and talking to some witnesses, I slowly

David Farrell - Direct Examination by Ms. Williams

1 came to the conclusion that he didn't really have much
2 of a motion based on after-discovered evidence, but
3 there were some issues that I felt would be appropriate
4 for PCR, so after discussing it with Mr. Rutland, we
5 withdrew the motion for a new trial based on
6 after-discovered evidence and filed a petition for post
7 conviction relief.

8 Q Do -- are you aware of who represented Mr. Rutland in
9 his original trial in 1993?

10 A Mr. Jack Gregory.

11 Q And are you aware of what charges Mr. Rutland was
12 charged with?

13 A It was a murder case.

14 Q Okay. During the course of your investigation into the
15 matter as his attorney, did you speak with anybody from
16 Mr. Gregory's office?

17 A I don't know if this person technically was from
18 Mr. Gregory's office but I spoke with a paralegal by
19 the name of James Irvin who I learned had assisted
20 Mr. Gregory in the preparation of the case.

21 Q And are you aware presently of Mr. Irvin's conditional?

22 A He is deceased.

23 Q Were there -- was there anything that concerned you in
24 reference to the information you received from him?

25 A Well, I'm not sure concerned is the right word. I

David Farrell - Direct Examination by Ms. Williams

1 thought that he raised some issues with his statements
2 that he made to me. He stated that he was
3 contacted ---

4 MS. TODD: Object to hearsay, Your Honor.

5 THE COURT: What's your position, Ms. Williams?

6 MS. WILLIAMS: Your Honor, during the course of
7 his investigation as the attorney for Mr. Rutland, I
8 believe this would fall more into the ---

9 THE COURT: Ask the question again, let me hear
10 it. Go ahead.

11 By Ms. Williams:

12 Q During the course of your investigation and in speaking
13 with Mr. Irvin what were your concerns?

14 A Well I asked Mr. Irvin what his involvement was in the
15 case and he told me.

16 Q Okay. And to your knowledge, was he actively involved
17 in the case?

18 A Yes.

19 Q And to your knowledge, did he feel he was prepared in
20 the case?

21 MS. TODD: Object to the hearsay?

22 THE COURT: Basis? In his opinion was somebody
23 prepared to do something, is that the question? What's
24 your objection?

25 MS. TODD: I object to the out-of-court

David Farrell - Direct Examination by Ms. Williams

1 statement, Your Honor.

2 THE COURT: Overruled. Answer the question.

3 By Ms. Williams:

4 A I don't think there's any indication that Mr. Irvin was
5 not prepared but there were allegations that Mr.

6 Gregory was not prepared. Mr. Irvin stated that he was
7 contacted just a short time prior to the trial and that
8 Mr. Gregory was very forthright to him and said that he
9 didn't expect this case to go to trial, that he thought
10 that it was going to be a plea that he hadn't received
11 all the money he had been promised and consequently he
12 was under prepared for the trial, which to the best of
13 my recollection Mr. Irvin said that he was contacted a
14 week and-a-half or ten days prior to the trial.

15 Q Okay.

16 A He indicated that ---

17 THE COURT: Now, this is a statement made to
18 this other gentlemen by Mr. Gregory?

19 MR. FARRELL: Yes.

20 THE COURT: And Mr. Gregory is here, so you can
21 cross-examine him. Go ahead. I mean he can be
22 cross-examined.

23 By Ms. Williams:

24 A He stated that a week before the trial they were still
25 familiarizing themselves with who the various parties

David Farrell - Direct Examination by Ms. Williams

1 were and that they were still conducting a factual
2 investigation during the course of the trial.

3 Q All right. And did you assist Mr. Rutland in preparing
4 his post conviction relief motion?

5 A Yes, I did.

6 Q And based on your understanding of the case, your
7 original position as attorney for the motion for a new
8 trial in the case, did you have an opportunity to
9 review all the evidence in the case?

10 A I had a copy of the solicitor's file. I had a
11 transcript. I had some affidavits that were prepared
12 for Mr. Rutland I believe at his direct request. And,
13 of course, I had I had access to Mr. Rutland.

14 Q And did you feel the grounds for the post conviction
15 relief were meritorious?

16 A Well, I certainly thought that the statements by Mr.
17 Irvin raised some issues.

18 Q Okay. Thank you, Mr. Farrell. I have no other
19 questions.

20 THE COURT: All right. Ms. Todd?

21 MS. TODD: I have no questions for this
22 witness.

23 THE COURT: All right. You may step down, Mr.
24 Farrell.

25 MS. WILLIAMS: We'd call Jack Gregory.

Jack Gregory - Direct Examination by Ms. Williams

1 THE COURT: Come around Mr. Gregory.

2 MR. FARRELL: May I be excused, Judge?

3 MS. WILLIAMS: I'm sorry, may Mr. Farrell be
4 excused?

5 THE COURT: I don't care, do y'all want to keep
6 him here?

7 MS. WILLIAMS: No, sir.

8 (WHEREUPON Mr. Farrell was released.)

9 THEREUPON,

10 JACK GREGORY,

11 after being duly sworn, testified as follows:

12 THE CLERK: Please have a seat and state your
13 name for the Court.

14 MR. GREGORY: My full name is Howell Jackson
15 Gregory, spelled, G-r-e-g-o-r-y.

16 **DIRECT EXAMINATION**

17 By Ms. Williams:

18 Q Mr. Gregory, what is your present profession?

19 A I'm sorry, I didn't hear that.

20 Q What is your present profession?

21 A I'm in the real estate business. I'm a broker in
22 charge of two real estate companies in Myrtle Beach,
23 South Carolina and I have a -- I also have a license, I
24 have an insurance agency there and a couple of other
25 businesses.

Jack Gregory - Direct Examination by Ms. Williams

1 Q Okay. Back in 1993, what was your primary profession?

2 A I practiced law. I practiced law for thirty years.

3 Q And do you know the applicant in this case, Mr. Fred
4 Rutland?

5 A I sure do.

6 Q And how did you become acquainted with him?

7 A I was introduced to him by a former legal secretary of
8 mine who had known Fred Rutland. Her name is Robin
9 Hunt. She's remarried now. I don't know her last name
10 at present.

11 Q And what were the circumstances of you being introduced
12 to Mr. Rutland?

13 A She was concerned concerning some activities that he
14 had been involved in.

15 Q Okay.

16 A And he needed legal representation.

17 Q All right. Did you agree to represent him in his
18 criminal charges?

19 A I did after visiting with him. He and I agreed in
20 writing that he would retain me to represent him in a
21 murder case. And he signed a retainer agreement for
22 \$1,000.

23 Q Okay. And what was your plan as far as what you were
24 going to be able to accomplish if a retainer had been
25 paid in full?

Jack Gregory - Direct Examination by Ms. Williams

1 A Well my plan was to put together a team and start out,
2 first of all, with the investigation of the facts.
3 There was a newspaper rendition of what happened and I
4 knew that the solicitor's office had obtained
5 statements from a lot of folks. So running down
6 parties and getting affidavits from them confirming or
7 denying whatever had been said was the first step. But
8 I needed to hire an investigator to do that. I
9 couldn't use my paralegal because we were a one-man
10 shop and we had a lot of things going on at that time.

11 Q Okay. And did your paralegal at that time, Ms. Robbie
12 Hunt, did she also have some personal knowledge about
13 some of the events that were involved in the charges
14 Mr. Rutland was facing?

15 A Well, at the time that this event occurred, which was
16 back in September of '93, Robbie Hunt was not working
17 for me at that time.

18 Q Okay.

19 A She was a former employee. James Irvin was my
20 paralegal at that time.

21 Q Did Mr. Rutland fulfill his obligation to you as far as
22 the retainer was concerned?

23 A Negative.

24 Q Did you have any resources by which to hire anyone to
25 complete an investigation in this case?

Jack Gregory - Direct Examination by Ms. Williams

1 A None other than the cash flow in my office. And we
2 were running on a shoe string at that time.

3 Q What was the extent of your meetings with Mr. Rutland
4 involving this case?

5 A Extremely cordial, informative and we just did not have
6 the manpower to fulfill the responsibility.

7 Q All right. And during the period of time that you
8 accepted -- how many times would you say that you met
9 with Mr. Rutland?

10 A To give you an exact number would be totally
11 impossible. I can't remember back that long ago to
12 tell you exactly how many times, but I was able to see
13 him whenever I needed to.

14 Q This event happened -- it actually -- the record
15 reflects that it was in September of 2002. The trial
16 was -- I'm sorry, September of 1992 and the trial was
17 in May of 1993. Was Mr. Rutland initially incarcerated
18 for a period of time before his trial?

19 A Yes, he was.

20 Q The -- were you present at his initial bond hearing?

21 A I really don't recollect that. I did see some
22 documents that he had a PR bond and then subsequently
23 Robbie Hunt signed some surety documents to allow him
24 to leave the premises of the jail.

25 Q Okay. And at some point were you aware that he was

Jack Gregory - Direct Examination by Ms. Williams

1 later picked up and returned to the detention center.

2 A Yes. I -- he'd gone to Florida and he was returned.

3 Q So there was a period of time of approximately eight
4 months between when -- eight or nine months between
5 when the incident occurred and when the case was called
6 for trial. To the best of your knowledge, how long was
7 Mr. Rutland gone and unavailable for you to communicate
8 with him?

9 A Actually, I didn't really sit down and start talking to
10 him about the matter until he came back from Florida,
11 whenever that was.

12 Q Okay.

13 A I guess it was just before the trial of the case.

14 Q Do you recall how much notice you had to prepare for
15 the trial of this murder case?

16 A Not a whole lot. Especially for a murder trial.

17 Q Uh-huh.

18 A No more than two weeks.

19 Q Okay. When you became aware that this was case going
20 to be called to trial, what if anything, did you do to
21 investigate the case?

22 A Well, once we got into it, we got a list of witnesses
23 and tried to run them down to talk to them. And being
24 shorthanded, we had to do it when we weren't running
25 the show of the firm.

Jack Gregory - Direct Examination by Ms. Williams

1 Q And when you say we, are you referring to Mr. Irvin?

2 A That's the only help I had at the time exactly.

3 Q So you and he were the only parties working on the
4 preparation of this murder trial; is that correct?

5 A That's correct.

6 Q During the course of -- in preparing for this trial,
7 you indicated that this -- there were a number of
8 witnesses that you were trying to track down. What if
9 anything was your experience in locating several of
10 these witnesses?

11 A Trying to find a needle in a haystack.

12 Q Uh-huh.

13 A They were just unavailable. It just seemed to me kind
14 of ironic that the solicitor calls the case and we try
15 to find time to go look witnesses up and we couldn't
16 locate them.

17 Q Okay.

18 A And that was very frustrating because we were wasting
19 time in which we could be doing research and some other
20 things.

21 Q When this case was called, you initially had a list of
22 several potential witnesses and quite relatively few of
23 them in Mr. Rutland's actual defense at the trial of
24 this case. What was the reason that the other
25 witnesses that you had initially listed were not

Jack Gregory - Direct Examination by Ms. Williams

1 contacted or were not called to testify?

2 A Well, after thirty years in the trenches, you
3 experience a lot of things and one was that if there's
4 a potential witness out there, you better put them
5 down, otherwise you may be excluded from calling them
6 if you spring it at the last moment. So every name
7 that we ran across that came anywhere close to this
8 case, we listed.

9 Q Uh-huh.

10 A So I'm sure we had a lot of folks named that we never
11 even talked to. And most of those were probably
12 because we tried to find them and couldn't.

13 Q Initially, you had approximately thirty-nine potential
14 witnesses for the defendant listed?

15 A Yes.

16 Q And one of those was your former legal assistant,
17 Robbie Hunt. During the -- was she also a witness who
18 gave a statement to police officers in this case about
19 the events leading up to the murders?

20 A Yes, she did. She had been with him shortly before the
21 event and had helped him get out on bond. So she was
22 aware of a lot of information.

23 Q Did you attempt to contact her before the trial of this
24 case to have her testify as a witness for the defense?

25 A Well, I sure did. I thought that I would be able to

Jack Gregory - Direct Examination by Ms. Williams

1 talk to Robbie because we worked closely with each
2 other for a couple of years and I couldn't find her. I
3 didn't know where she was. Nobody knew where she was.

4 Q Did that concern you that she wasn't going to be
5 available to testify in Mr. Rutland's behalf.

6 A Well absolutely, because I was counting on her
7 testimony.

8 Q Mr. Gregory, there were also a number of people who
9 were listed as potentially witnesses for you that ended
10 up being called by the State. Ms. Hunt was called on
11 after the defense presented their case as a witness but
12 not called by the defense; is that correct?

13 A Who is this, now?

14 Q Ms. Hunt was called on as a reply witness?

15 A I remember her testifying and I thought that she was in
16 the State's case in chief. I might be wrong about
17 that.

18 Q All right.

19 MS. TODD: The State is willing to stipulate
20 that she was a reply witness.

21 MS. WILLIAMS: Okay.

22 By Ms. Williams:

23 A Okay.

24 Q Kimberly Kestner was also initially listed as a
25 potential witness for the defendant. What if any

Jack Gregory - Direct Examination by Ms. Williams

1 information had she given to police officers that you
2 felt would be beneficial to Mr. Rutland?

3 A A couple of things. There was a newspaper account of
4 the facts in the newspaper. A reporter had actually
5 interviewed her and had quotes in the newspaper stating
6 that Jimmy Peal had come into the Bow Wow Boutique with
7 a .9 mm weapon and presented it in the effort to
8 threaten the lives of the folks that were in the
9 boutique. And then there was a statement that she gave
10 the police officer either that day or the day
11 afterwards that confirmed what she'd said what was
12 being quoted of her in the newspaper.

13 Q Okay.

14 MS. WILLIAMS: Your Honor, may I approach the
15 witness?

16 THE COURT: Sure.

17 MS. WILLIAMS: I'm handing him up what is part
18 of the initial record in this case, which is a newspaper
19 article from the State newspaper.

20 By Ms. Williams:

21 Q Mr. Gregory, do you recognize that article?

22 A Yes, I do. That was the article that Bob Stewart,
23 staff writer, wrote when he interviewed Kim Kestner.

24 Q And you were aware that this article was out -- was out
25 there that Kim Kestner had made a statement?

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1 A Yes.

2 Q And in that article, does it indicate whether or not
3 the alleged victim in this case, Jimmy Peal, had a
4 weapon or whether or not Ms. Kestner saw a weapon?

5 MS. TODD: Objection, hearsay, Your Honor.

6 THE COURT: Ask the question again, ma'am.

7 By Ms. Williams:

8 A Yes, I was ---

9 THE COURT: Stop. Ask the question again.

10 By Ms. Williams:

11 Q In the article is there reference that Ms. Kestner --
12 or did she make a statement in the newspaper article
13 regarding the -- whether or not the victim in this
14 case, Jimmy Peal, had a weapon?

15 THE COURT: Ma'am, what's your objection?

16 MS. TODD: I object to hearsay, Your Honor.

17 THE COURT: Has the paper been introduced into
18 evidence? The newspaper article?

19 MS. WILLIAMS: It's actually part of the
20 record, but we'll introduce it.

21 THE COURT: Well overruled then.

22 MS. WILLIAMS: I will introduce it again.

23 THE COURT: She's asking him a question about a
24 document that's in evidence, is that correct?

25 MS. TODD: It is a document that was submitted

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1 along with the motion for a new trial based on
2 after-discovered evidence. However, the State submits it
3 should not be considered as substantive evidence in the
4 case.

5 THE COURT: But this is non-jury, I would have
6 to look at it anyway and make a decision. She can proffer
7 it and you may continue.

8 MS. WILLIAMS: Yes, sir. All right.

9 THE COURT: And ask a question now, if it's in
10 the record, I've got to look at it anyway. Ask him the
11 question. Or do you just want to show it to me. I will be
12 happy to look at it.

13 MS. WILLIAMS: All right. Judge, we can do
14 that.

15 Please hand that up to the Court.

16 THE CLERK: Sure.

17 THE COURT: We'll take it as a proffer.

18 Are you done answering, Mr. Gregory?

19 By Ms. Williams:

20 A Yes, sir, my answer is that she did admit to the
21 newspaper reporter that she saw Jimmy Peal come into
22 the Bow Wow Boutique with a tech .9 weapon and
23 presented it in a threat to folks that were in the
24 building.

25 Q And Mr. Gregory, since you were representing Mr.

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1 Rutland, you also had the criminal trial against Mr.

2 Rutland, is that correct? As far as the discovery from
3 the State?

4 A Yes, we had statements that the State had taken from
5 several witnesses and under our Rule five motion had
6 obtained those statements and there was a statement in
7 there from Kim Kestner that basically confirmed what
8 the newspaper article had said.

9 Q So there was a sworn statement by Kimberly Kestner that
10 also indicated or that corroborated that the victim in
11 this case, Mr. Jimmy Peal, had a weapon when he walked
12 into the door; is that correct?

13 A That's correct.

14 Q All right. And as part of your discovery that you
15 received from the sheriff's department in this case,
16 did you also get an incident report where Ms. Kestner
17 was listed as a complainant in the case?

18 A Yes, yes, I sure did.

19 Q And was there also an indication that on the day that
20 this accident happened, again, it's documented that
21 Ms. Kestner made a statement concerning the victim
22 pulling a weapon out when -- prior to the murder
23 occurring in this case, or the shooting occurring in
24 this case?

25 A Exactly, it did reflect that. Yes, it did.

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1 Q Mr. Gregory, you had an opportunity to listen to
2 Ms. Kestner's testimony at trial; is that correct?

3 A That's right.

4 Q And her testimony is, again part of this record, but it
5 clearly omits, did not state anything about the victim
6 in this case having a weapon. . Indeed, Ms. Kestner
7 claims and makes emphatic statements that the victim in
8 this case had no weapon; is that correct?

9 A It was surprising, her testimony in the trial was 180
10 degrees from these documents that we've just discussed.

11 Q Okay. And Mr. Gregory, at no time in your
12 cross-examination of Ms. Kestner did you confront her
13 with any of these prior statements; is that correct?

14 A That's correct.

15 Q At no time, although you had a copy of her sworn
16 statement that she had given to law enforcement
17 centers, which gave a completely different testimony
18 about the events that happened before the shooting, you
19 did not cross-examine her on that prior sworn
20 statement?

21 A No, I sure didn't.

22 Q Were you aware that that could be used to impeach her
23 testimony as a witness in the case?

24 A Certainly it could be used, no question about that.

25 Q Okay. And in this case you were also aware of the

Jack Gregory - Direct Examination by Ms. Williams

1 newspaper article that had been printed after the
2 incident happened but prior to trial; is that correct?

3 A That's correct. That was several months back and we
4 were scrambling to find it, but we couldn't put our
5 fingers on it.

6 Q So although you knew of the existence of it, you did
7 not have it available to present at trial, is that
8 correct?

9 A That's correct.

10 Q And additionally -- and although you were aware of the
11 fact that an incident report had listed the initial
12 complainant, Kimberly Kestner, as indicating that the
13 alleged victim in this case Jimmy Peal had a weapon
14 prior to this shooting, you never questioned her about
15 that incident report, did you?

16 A No.

17 Q Now, Mr. Gregory, you also -- it's also been specified
18 that Ms. Hunt testified at trial as well. At any time
19 prior to trial were you able to talk with her or
20 discuss her potential testimony?

21 A Not really when I wanted to, which was right before the
22 trial, that week right before the trial. I couldn't
23 find her. I didn't know where she was. I later
24 learned that she was out of town.

25 Q Okay. When she was called as a reply witness, her

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1 testimony was fairly limited; is that correct?

2 A Yes, it was.

3 Q Indeed, was the only thing she testified about was an
4 alleged phone call that she overhears on the day of the
5 shooting; is that correct?

6 A That's right.

7 Q Now, were you aware and had you been provided with
8 sworn statements that Ms. Hunt had made at or about the
9 time that this incident happened?

10 A Yes, there were sworn statements from her.

11 Q And was she able to give some important information
12 that initially could have been used in Mr. Rutland's
13 defense in those statements?

14 A No question about it.

15 Q And ---

16 A The answer is yes.

17 Q Okay. And those things included that the alleged
18 victim in this case, Jimmy Peal, had not only
19 threatened Mr. Rutland and Sally Peal, another party in
20 these events, but also that he had threatened?

21 MS. TODD: Objection, Your Honor?

22 THE COURT: Rephrase your question. And then
23 you can dissect it.

24 MS. WILLIAMS: All right.

25 THE COURT: Let's move along Ms. Williams.

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1 MS. WILLIAMS: All right.

2 By Ms. Williams:

3 Q What information were you aware that Ms. Hunt had about
4 the problems between Mr. Rutland, Sally Peal and the
5 alleged victim, Jimmy Peal, in the case?

6 A She knew what the purpose of Mr. Rutland's visit to the
7 Columbia area back in '92 was all about and that was to
8 assist Sally Peal on getting out of town and that there
9 had been threats and prior violence by her husband,
10 Jimmy Peal; and during the course of Robbie's
11 involvement in assisting to accomplish this for Fred
12 and Sally, Jimmy had threatened to kill Robbie Hunt.

13 Q Okay. So -- and this was in a sworn statement by
14 Ms. Hunt that she had given to officers?

15 A Yes, that's ---

16 Q That was available to yourself and the solicitor's
17 office; is that correct?

18 A That's correct.

19 Q And I believe that Ms. Hunt also had indicated that she
20 had additional information concerning the events of the
21 day of the shooting; is that correct?

22 A That's correct.

23 Q And was this outlined in her statement to law
24 enforcement authorities?

25 A Yes, it was.

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1 Q And personally you had had conversations with Ms. Hunt;
2 is that correct?

3 A Not with -- I did, but it was not right at the time of
4 the trial, when that's the time I needed to be talking
5 to her and getting extremely serious about who was
6 going to testify and when and what they were going to
7 say.

8 Q Okay.

9 A I couldn't find her.

10 Q All right. And you had obviously talked with her
11 initially when this whole case was being investigated;
12 is that correct?

13 A Yes, off and on for eight months, nine months whatever.

14 Q And how did you feel as far as what type of witness she
15 would be on what behalf of Mr. Rutland initially when
16 you talked with her?

17 A She was a defense witness, no question about it.

18 Q Mr. Gregory, knowing that she had given a sworn
19 statement to law enforcement officers, you never
20 questioned Ms. Hunt at all on cross-examination about
21 this prior sworn statement, did you?

22 A No, I didn't.

23 Q And you never questioned Ms. Hunt about prior
24 conversations that you had had with her that were
25 potentially exculpatory toward Mr. Rutland, didn't you?

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1 A That's correct.

2 Q And in this case, there were a number of things that
3 could have been brought out that potentially would have
4 shown favorable light on Mr. Rutland, is that correct?

5 A That's correct.

6 MS. WILLIAMS: Your Honor, I'd like to approach
7 the witness?

8 THE COURT: Yes, ma'am.

9 By Ms. Williams:

10 Q Mr. Gregory, can you identify those documents I've just
11 handed you?

12 A These are witness statements. One is from Kimberly
13 Kestner and the other one from Robin T. Hunt.

14 Q And these were both crucial witnesses on behalf of the
15 State -- or called by the State; is that correct?

16 A That's correct.

17 Q And these are the statements you had available as Mr.
18 Rutland's defense attorney; is that correct?

19 A That's correct.

20 Q And these statements would have been available to
21 attack the credibility of both Ms. Kestner and Ms. Hunt
22 at that time, as far as the statements that were made
23 prior to law enforcement officers; is that correct?

24 A That's correct. They were also available for me to be
25 able to sit down and talk with these witnesses prior to

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1 going to trial and neither one of them were available
2 to me.

3 Q Okay. But you could have questioned them on the
4 difference in what their sworn statement was just after
5 this incident happened at the time; is that correct?

6 A That's right. All I had to do at that point in time
7 when this trial was ongoing was to rely on these
8 statements is to have knowledge of what these folks
9 would be testifying too.

10 Q Right.

11 A But the unfortunate event was that Kim Kestner's
12 testimony was exactly opposite of what her statements
13 were.

14 Q And you failed to bring that out on cross-examination;
15 is that correct?

16 A That's right.

17 MS. WILLIAMS: Your Honor, at this time, I
18 would ask that the statements be marked as exhibits and
19 admitted into evidence.

20 MS. TODD: Your Honor, I have the same
21 objection as before.

22 THE COURT: Overruled.

23 By Ms. Williams:

24 Q Mr. Gregory, when this case was called to trial ---

25 THE COURT: Stop, let's mark these exhibits

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1 now.

2 MS. WILLIAMS: I'm sorry.

3 THE COURT: Have they been marked?

4 THE COURT REPORTER: Not yet, I'm working on
5 it.

6 THE COURT: Well, let's mark them.

7 THE COURT REPORTER: Yes, sir. They're
8 Applicant's 1 and 2, Your Honor.

9 By Ms. Williams:

10 Q Mr. Gregory, obviously, you had some looming concerns
11 that you weren't able to contact these witnesses. At
12 any time when this case was called to trial did you
13 request a continuance in this matter?

14 A No, I didn't. I didn't realize that we were going to
15 get into the quick sand as we did, which is actually
16 what happened in this case. I felt with my experience
17 in trying cases, that looking at the big picture we
18 were in fairly good shape. The statements were pretty
19 much in our favor. We had some good defenses. I was
20 encouraged as to who the trial judge was. He was an
21 old personal friend of the family and I really felt
22 that if we waited until a later time that it might not
23 be as good as the present. But you've got to weigh all
24 those matters out when going into battle.

25 You just don't -- you just make those decisions

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1 and based on what I saw at that time, I felt very
2 comfortable about going to trial, even though we were
3 short handed. We hadn't had time to really prepare
4 that I wanted to -- didn't have the funds to do the
5 investigation that he had.

6 Q Uh-huh.

7 A So we moved forward. We had, I thought, good defenses.

8 Q Is it fair to say that you assumed that the witnesses
9 for the State would testify consistently with their
10 statements?

11 A Oh, absolutely. That was part of my decision of moving
12 forward.

13 Q And that in essence that could support Mr. Rutland's
14 self-defense in this case?

15 A Yes, his defense of self-defense and also the defense
16 of the defense of others.

17 Q All right. But knowing that you had some pretty
18 significant witness problems, at no time did you
19 request a continuance from the trial judge, Judge Eppes
20 in this case.

21 A No, I did not.

22 Q At any time did you bring it to his attention that you
23 were having difficulty locating witnesses that could be
24 crucial defense witnesses?

25 A No, I did not. We just kept trying to find these

Jack Gregory - Direct Examination by Ms. Williams

1 witnesses all through the course of the trial. The
2 trial lasted the whole week.

3 Q All right.

4 A There were also a number of other witnesses that
5 weren't available for trial that later came forward and
6 gave statements, Cindy Lou Wise, a Linda Smith O'rears,
7 a Charles Howard.

8 Q Tell me, when was it that you located these witnesses
9 or were you able to locate those other witnesses?

10 A You know, ironically after the trial was over, these
11 witnesses start falling out of the wood work and we
12 were able to tie down some affidavits that were
13 extremely helpful at that point. But that was after
14 the fact.

15 Q Okay. And these affidavits, they were also -- they
16 were filed initially with your motion for a new trial
17 based on after-discovered evidence; is that correct?

18 A That's correct.

19 Q How long after the trial did you file that motion?

20 A Off the top of my head, I really don't know.

21 Q All right.

22 A I think it was within a month or two.

23 Q Okay. The record indicates that it was in June of
24 1993. Would you have any reason to disagree with that?

25 A No, I wouldn't.

Jack Gregory - Direct Examination by Ms. Williams

1 Q What -- what were the importance to you of these
2 witnesses that later you were able to locate
3 approximately a month after the trial? What was the
4 response of their testimony and how did you feel it
5 would affect Mr. Rutland?

6 A Well, Mr. Rutland was given a curve ball at the trial
7 and it just helped put the matter back in the straight
8 perspective that it should have been. Kim Kestner's
9 testimony at the trial of the case in my opinion was
10 prosecutorial misconduct. They were sitting there
11 holding an affidavit from her saying one thing and she
12 gets on the stand under oath and says 180 degrees
13 something else.

14 Q All right. And at that time, no one from the
15 prosecution nor did yourself bring that up to the judge
16 in the case; is that correct?

17 A That's correct.

18 Q So, none of that came before the jurors and being able
19 to evaluate that witnesses credibility; is that
20 correct?

21 A That's true because the jury didn't have the statement,
22 Exhibit 1 here of Kim Kestner saying that Jimmy Peal
23 walked into the Bow Wow Boutique with a .9 mm tech
24 pistol.

25 Q Uh-huh. The affidavits that you filed as part of your

Jack Gregory - Direct Examination by Ms. Williams

1 motion for a new trial based on after-discovered
2 evidence, how would you characterize their -- if they
3 had testified at trial how would it have been for Mr.
4 Rutland?

5 A I think the jury would have stayed out longer and they
6 would have either been hung or they would have found in
7 his favor of self-defense and self -- defense of
8 others.

9 MS. WILLIAMS: Your Honor, may I approach the
10 witness?

11 THE COURT: Sure.

12 By Ms. Williams:

13 Q Mr. Gregory, do you recognize those documents?

14 A Yeah, these are the three affidavits that we obtained
15 in June of '93 of three witnesses.

16 Q All right. And those were witnesses that had
17 previously been potential witnesses for the defendant
18 that you had been unable to locate; is that correct.

19 A That's correct.

20 Q They were located at that time and gave sworn
21 statements?

22 A That's correct.

23 MS. WILLIAMS: Your Honor, again, I think this
24 is part of the record as a whole, but I would move to admit
25 these documents as exhibits.

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1 MS. TODD: I have the same objection.

2 THE COURT: Overruled. If it's in the record.

3 MS. TODD: I would also ask that we get the
4 names for the record of what those statements are.

5 THE COURT: They will be in the record -- if
6 they're in the record, they will be in the record when
7 they're admitted as evidence. You can call out the names
8 again. You've already done so. And you -- in your third
9 previous question, I think it was.

10 What are the names, Mr. Gregory?

11 MR. GREGORY: These are Wesley Vowell, Belinda
12 Joyce Smith and Cindy Lou Wise.

13 By Ms. Williams:

14 Q So Mr. Gregory, had you begun your investigation a
15 month before the trial, is it possible and probable
16 that you would have located these witnesses?

17 A Two or three months preferably, yes.

18 Q So had you had the resources and had you extended this
19 time on investigating this case, this is evidence that
20 you would have been able to discover and uncover prior
21 to trial; is that correct?

22 A Absolutely right, yes.

23 Q But unfortunately, that wasn't done until afterwards?

24 A That's right.

25 Q The motion for a new trial based on after-discovered

Jack Gregory - Direct Examination by Ms. Williams

1 evidence was denied; is that correct?

2 A Yes.

3 Q All right. And that was by trial judge, Judge Eppes?

4 The motion nor a new ---

5 A Yes.

6 Q The motion went before him?

7 A Yes.

8 Q And I believe part of this reason was because some of

9 these witnesses would have been or could have been

10 available at the time of trial; is that correct?

11 A Yes.

12 Q Did you ever in the course of your representation of

13 Mr. Rutland contact any extra witness or forensic

14 witnesses to exam any of the evidence in this case?

15 A No, we didn't and we didn't have the funds to hire them

16 or the time to get into all that.

17 Q Okay. During the course of this case, can you just

18 briefly describe for Judge Manning -- he may have

19 gathered this, but just the gist of the allegation?

20 A How about rephrase that for me.

21 Q Basically why was Mr. Rutland on trial? What happened

22 to -- that caused him to be on trial?

23 A He was accused of ---

24 THE COURT: Well I can help you out, he's

25 accused of shooting somebody four times wasn't he; is that

Jack Gregory - Direct Examination by Ms. Williams

1 right?

2 MS. WILLIAMS: Yes, sir.

3 MR. GREGORY: This is true. The way ---

4 THE COURT: I'm sorry he got convicted of
5 shooting somebody four times.

6 MR. GREGORY: Yeah, he was accused of homicide
7 and there was a big question about the facts leading up to
8 why it happened the way it did.

9 By Ms. Williams:

10 Q Okay.

11 A And probably the biggest mistake that I remember in the
12 whole trial was not objecting during final arguments
13 when the prosecutor made a statement of fact that
14 didn't exist in the transcript or the testimony or
15 anywhere. He just pulled it out of thin air.

16 THE COURT: What was it, Mr. Gregory?

17 MR. GREGORY: He accused my client, Mr. Rutland
18 over here, of throwing down the .9 mm pistol after he shot
19 Mr. Peal with a .25 caliber automatic.

20 By Ms. Williams:

21 Q So there was an allegation that this victim was not
22 armed when he came in the building but indeed this may
23 have been planted later on; is that correct?

24 A It was -- just twisted the whole trial 180 degrees the
25 way the facts existed.

Jack Gregory - Direct Examination by Ms. Williams

1 Q Mr. Gregory, prior to this trial in 1993; had you ever
2 been lead counsel in a murder case before?

3 A Not lead. I had been involved in a murder trial.

4 Q And do you recall what year that was?

5 A In the late 70's.

6 Q Okay. And coming into this, especially after the
7 State's opening argument, it became an issue as to
8 whether or not the victim had a gun; is that's correct?

9 A Oh, it sure did. And that jury argument pretty much
10 sealed the casket here.

11 Q You had all of the material that the State had moved
12 into exhibits in this case, was there any fingerprint
13 evidence taken off the .9 mm gun that was in question?

14 A No, there wasn't.

15 Q Did you ever question the investigating officer about
16 the fact that there was no fingerprints -- they didn't
17 even attempt to get fingerprints off of this gun when
18 they arrested him?

19 A I remember talking about that. Whether I asked the
20 question or not, of course the burden of proof is on
21 the State to prove beyond a reasonable doubt and I used
22 the theory that it -- had there been fingerprints of
23 Fred Rutland on that pistol, they would have been
24 screaming and hollering about it and talking about it
25 from now until doomsday.

Jack Gregory - Direct Examination by Ms. Williams

1 Q Did you think that it was possible that you could hire
2 an independent detective to go out and do fingerprint
3 analysis to see if Mr. Peal's fingerprints were on that
4 weapon?

5 A That's true.

6 Q And why ---

7 A Not enough time and no money.

8 Q Okay. So not enough time and not enough money -- and
9 to your knowledge did that also become an issue for the
10 jury as far as a question that they sent out asking
11 about this evidence?

12 A Yes, especially after that inflammatory jury arguments
13 that the solicitor made.

14 Q Okay.

15 A And it was my error not to object to it at that point
16 and even move to ask for a mistrial.

17 Q But you didn't objected at that time; is that true?

18 A I didn't.

19 Q And you didn't attempt to get any forensic evidence
20 that could support Mr. Rutland's and Ms. Kestner's
21 original statement and the statement that was
22 originally given to police officers that the victim was
23 armed with a weapon when he walked into the building;
24 is that correct?

25 A That's correct.

Jack Gregory - Direct Examination by Ms. Williams

1 Q Being able to support that evidence was, in fact,
2 crucial to a claim of self-defense or defense of
3 others; is that correct?

4 A It tanked the case.

5 Q Okay.

6 A It was very crucial.

7 Q During the course of the trial I believe that the
8 coroner also testified; is that correct?

9 A I don't remember, but I would assume so.

10 Q Okay. And were you given a copy of the coroner's
11 report as part of the evidence you had to review and
12 present on Mr. Rutland's behalf?

13 A I imagine so. They put him up. They had some
14 documents they had to share it with me. I just don't
15 specifically remember.

16 Q I believe the transcript of the trial indicated his
17 testimony was fairly brief and just pointed to the fact
18 that the victim was shot four times. Was this also an
19 indication in the autopsy report of the history that
20 Dr. Will McMaster had been given about what had
21 happened?

22 A I don't recall.

23 Q Okay. You had an opportunity at that time to
24 cross-examine Mr. McMaster about any of his findings as
25 well as his conclusions that he drew regarding the

Jack Gregory - Direct Examination by Ms. Williams

1 manner of death in this case; is that correct?

2 A Yes.

3 Q At any time during the course of your investigation did
4 you cross-examine him about his final summary that the
5 manner of death as homicide although self-defense is
6 certainly not ruled out by any of the autopsy findings?

7 A And the question is?

8 Q Did you ever ask him about this? Will McMaster? About
9 his report?

10 A I don't recall.

11 Q The record reflects that there were no questions to
12 that degree.

13 A Okay.

14 Q Certainly a statement of that nature by an expert
15 witness in this case could have assisted Mr. Rutland;
16 is that correct?

17 A Yes.

18 Q But that was not something that you inquired into on
19 cross-examination?

20 A No, it wasn't.

21 Q Now, during the course of this trial had you been
22 prepared with your jury charges and what you were going
23 to request the judge to charge in this case?

24 A Not to spend too much time on that and not enough time
25 running down witnesses ---

Jack Gregory - Direct Examination by Ms. Williams

1 Q Okay.

2 A --- but yes, we did present jury charges to the Court.

3 Q All right. And was it your understanding that defense
4 of others was going to be a jury charge that was
5 charged to the jury in this case?

6 A Well, we discussed it prior to the judge's charge. We
7 went over the list of defenses that we were going to
8 have. I even argued defense of others about five or
9 six times in my final argument.

10 Q Uh-huh.

11 A And the prosecutor, as well as I remember didn't object
12 to it, but it was not charged.

13 Q Okay. And did you make a contemporaneous objection
14 that that was not charged at the time of the jury
15 charges? Did you say, Judge, Judge, wait, wait, we got
16 to charge this one?

17 A I can't remember if I did or not, probably I didn't.

18 Q Okay. If the record reflects that there was no
19 objection made?

20 A I didn't make it.

21 Q And do you think that -- in fact, I believe you
22 indicated the prosecution wasn't going to have a
23 problem with that. On page 309 of the transcript it
24 shows -- Mr. McMann shows that he does not have a
25 problem with the defense of others charge; is that

Jack Gregory - Direct Examination by Ms. Williams

1 correct?

2 A Yes.

3 Q Why was that in court though? Now why would that have
4 been important to Mr. Rutland in this case? Defense of
5 others?

6 A Well, if you take Kim Kestner's statement and the
7 interview with the newspaper reporter ---

8 Q Uh-huh.

9 A --- and you take what Sally Peal was saying and what
10 Fred Rutland was saying, there were three people in the
11 room. I think Kim's husband was in there even, when
12 Jimmy Peal walks in with a tech .9, pulls it out and
13 points it at Sally and then points it at Fred.

14 Q Uh-huh.

15 A And Kim's afraid and ducks behind the counter.
16 Obviously, with other people around, he would have
17 defense of others in addition to self-defense as a
18 defense of the charge of murder in this case.

19 Q And in fact, the jury was extremely interested and
20 asked on two different occasions after the original
21 charge for self-defense and the charge of murder and
22 voluntary manslaughter to be charged again to them
23 because they were having a tough time understanding
24 that; is that correct?

25 A Yes.

Jack Gregory - Direct Examination by Ms. Williams

1 Q But defense of others was not presented?

2 A That's right.

3 Q So they didn't even have an opportunity to consider
4 that on appeal because that issue was not
5 contemporaneously raised, the appeal was not exacted,
6 is that correct?

7 A That's exactly what the Supreme Court said. The issue
8 was not properly presented for their review.

9 Q And as Mr. Rutland's attorney, you would have been --
10 basically the best person to do it at that time?

11 A Absolutely.

12 Q The only one who you could speak up for him?

13 A I dropped the ball.

14 Q Okay. Mr. Gregory, there was also information
15 regarding the access that Jimmy Peal had to the weapon
16 in this case, the tech .9 mm that was alleged, and
17 during Sally Peal, who is Mr. Jimmy Peal's -- was his
18 lawful wife at that time, when you presented her as a
19 witness for you -- I believe it was a document that you
20 were actually going to enter into evidence, but it was
21 objected to and ---

22 MS. WILLIAMS: May I approach the witness, Your
23 Honor?

24 THE COURT: Yes, ma'am.

25 ///

Jack Gregory - Direct Examination by Ms. Williams

1 By Ms. Williams:

2 Q Do you recognize this document?

3 A Yes, I do.

4 Q And what is that document?

5 A It's basically a bill of sale in front of a notary
6 public where a man by the name of Chesley Ray Lee sold
7 to Jimmy Peal, one .9 mm tech 11 pistol, serial number,
8 and it's dated September 29, 1991.

9 Q Okay. And upon the objection that was made by the
10 State in this case, you didn't do anything to try to
11 lay a foundation to get that document in?

12 A Yeah, I didn't have Chesley Ray Lee present.

13 Q But you certainly had Ms. Peal there at the time; is
14 that correct?

15 A That's right.

16 Q And she being the spouse of the -- one of the
17 signatories on that certainly could have testified
18 whether or not her husband had signed that document; is
19 that correct?

20 A Yes, that's true because Jimmy Peal's signature is on
21 this document.

22 Q And I believe that in the transcript of the case,
23 there's also evidence that Peal indicated that she was
24 present when that document was signed; is that correct?

25 A That's correct.

Jack Gregory - Direct Examination by Ms. Williams

1 Q So there could have been some argument that could have
2 been made for the allowance of that document to come
3 into evidence; is that correct?

4 A That's correct.

5 Q And at that time, you chose not to make that argument,
6 is that correct?

7 A That's correct.

8 Q There was also some evidence that another witness by
9 the name of Charles Howard might have seen Mr. Peal
10 with that weapon. How did you become aware of that?

11 A I don't know if I had information of that discussion or
12 if it was written, a statement, but Charles Howard had
13 the tech .9 immediately before all these events
14 occurred and Jimmy Peal had obtained it from him and
15 that's how he had the pistol when he walked into the
16 Bow Wow Boutique.

17 Q Did you later speak with Charles Howard?

18 A We tried to run him down. We couldn't find him.

19 Q And this is information that Ms. Peal had given you?

20 A Yes.

21 Q And had you had potentially more time, that could have
22 been something that was ---

23 A Well, it goes along with the Kim Kestner's reversal of
24 memory here on the facts. We're thinking that's not a
25 really big issue that Peal did walk in there with the

Jack Gregory - Direct Examination by Ms. Williams

1 tech .9 and then halfway through the trial, we
2 discovered that that's a big issue. And trying the
3 case limited my time to try to find Howard during the
4 course of the trial because I'm in the courtroom eight
5 to ten hours a day and that leaves only nighttime to
6 try to locate him.

7 Q Okay. Did -- I'm going to go back to the jury charges.
8 When you were discussing jury charges with the judge in
9 this case, what was your position as to the
10 appropriateness of whether or not mutual combat should
11 be charged in that case?

12 A Well my thinking of the law is that mutual combat is
13 part of voluntary manslaughter.

14 Q At any time did you object to the charging of mutual
15 combat?

16 A Well, I felt as long as the judge was charging
17 voluntary manslaughter ---

18 Q Uh-huh.

19 A --- and he explained to the jury that that was part and
20 parcel of the same thing that they would have an
21 understanding. I didn't tell him not to charge mutual
22 combat, no, I didn't.

23 Q All right.

24 A He just said he was going to give his standard charge
25 and that's how he explained it to the solicitor and

Jack Gregory - Direct Examination by Ms. Williams

1 myself.

2 Q Okay.

3 A And you got to think, too, mutual combat assisted us in
4 our theory of the case that Jimmy Peal walked in with a
5 pistol, which was actually opposite of the evidence
6 that the solicitor ended up presenting; with the
7 testimony from Kim Kestner that said she didn't see a
8 pistol.

9 Q Okay. How long did you continue to represent Mr.
10 Rutland? Did you continue to represent him after the
11 trial of the case was over?

12 A Yes, I had an obligation to make sure that his appeal
13 was properly filed.

14 Q And after the appeal was filed, did you also then
15 motion for a new trial?

16 A Yes, I did because we then started finding these
17 witnesses as they were coming out of the woodwork.

18 Q Okay. And at some point in approximately 1997, a
19 motion for a new trial based on after-discovered
20 evidence was again filed. Based on the evidence that's
21 in the record, there was a time there when you no
22 longer represented Mr. Rutland. Mr. Gregory, do you
23 still have your license to practice law?

24 A No, I don't.

25 Q And when did you lose the right -- or when did you lose

Jack Gregory - Cross-Examination by Ms. Todd

1 your license?

2 A Back in '97.

3 Q Okay. So about the same time that that motion was
4 filed is about the same time you lost your license to
5 practice law; is that correct?

6 A That's correct.

7 MS. WILLIAMS: I don't have any further
8 questions, Your Honor.

9 THE COURT: Cross-examination.

10 **CROSS-EXAMINATION**

11 By Ms. Todd:

12 Q Mr. Gregory, what was your experience in practicing
13 criminal law at the time you represented the applicant?

14 A Well I practiced criminal law for thirty years.
15 Started out, I was the only defense attorney that was
16 being assigned cases in Lancaster County and that ran
17 for about a six-year period. I started out in '68 and
18 went to '74; and was appointed to represent a murder
19 client out of Pennsylvania who killed the local doctor
20 who treated everybody in the town. That was pretty
21 much the culmination of my criminal experience. I had
22 to file a motion to change venue and was successful in
23 getting it moved to Winnsboro County ---

24 THE COURT: Fairfield County, there is --
25 Winnsboro is not a county.

Jack Gregory - Cross-Examination by Ms. Todd

1 MR. GREGORY: You're absolutely right, Your
2 Honor.

3 THE COURT: Well at least not in this State.

4 MR. GREGORY: Well it's confusing with Kershaw
5 and Lancaster as well.

6 By Ms. Todd:

7 A But in any event, we got it down in Fairfield County
8 and Tom Leiden was hired by the family to handle the
9 case and I assisted him. And then from that point
10 forward, I didn't do as much criminal practice, but
11 handled a lot of traffic cases, DUIs.

12 Q Okay. Now, do you recall when you were actually
13 retained by the applicant?

14 A I had him give me a dollar, I think in the jail on one
15 occasion. I don't remember the date.

16 Q Okay. But you said that he was bonded out at some
17 point. Was there a long time between when he retained
18 you and when he bonded out?

19 A I really don't remember how much time elapsed but he
20 did sign a contract and that's what I was banking on
21 that we would have some funds to be able to do our
22 investigation and move forward on the case.

23 Q Okay. And how much actual funds did you receive from
24 the applicant?

25 A I don't recall receiving anything.

Jack Gregory - Cross-Examination by Ms. Todd

- 1 Q Other than the dollar?
- 2 A Yeah.
- 3 Q Now, when he was bonded out, he left the jurisdiction;
- 4 correct?
- 5 A That's what I learned, yes.
- 6 Q And that was actually presented at trial; was it not?
- 7 A Yes.
- 8 Q That he left the jurisdiction? And he left with Sally
- 9 Peal, did he not?
- 10 A Yes, I think so.
- 11 Q And that would have been a violation of the terms of
- 12 his bond, correct?
- 13 A Exactly. It was written on the document of the bond
- 14 that he was not to leave South Carolina.
- 15 Q And during that time, you were unable to get his
- 16 assistance in preparing for trial; correct?
- 17 A Yes.
- 18 Q Do you recall how long he was back before trial?
- 19 A It wasn't very long. I think they went after him.
- 20 When they brought him back they were ready to start
- 21 trying the case -- within a few days I would imagine.
- 22 Q Now, there was evidence presented at trial, was there
- 23 not, that the tech .9 was found at the scene?
- 24 A Yes.
- 25 Q And Kimberly Kestner actually testified she saw it on

Jack Gregory - Cross-Examination by Ms. Todd

1 the ground after the shooting?

2 A Right.

3 Q After the victim fell?

4 A Yes, yes, everybody saw it on the ground after Jimmy
5 died.

6 Q Okay.

7 A Actually it was not on the ground, it was on the floor
8 of the Bow Wow Boutique.

9 Q Thank you. You testified on direct examination that
10 you did not question Ms. Kestner regarding her prior
11 inconsistent statements to the police?

12 A Well, I think at the time we were looking for the
13 newspaper article and we couldn't find it so we didn't.

14 Q Okay. But I believe you also testified on direct
15 examination that you did not question her, impeach her
16 with her prior police statement that she saw Jimmy Peal
17 pull the gun?

18 A Yeah, I don't recall ---

19 Q Okay.

20 A --- discussing that with her on the stand.

21 Q Right.

22 A Because she ---

23 Q Why would you have not done that?

24 A Well she'd just taken an oath to tell the truth, the
25 whole truth, nothing but the truth, and she testified

Jack Gregory - Cross-Examination by Ms. Todd

1 that she didn't see anything.

2 Q Okay. And you had a police statement -- I don't know
3 if it's marked as Applicant's No. 1 or No. 2, but you
4 had a statement that she gave to the police that Jimmy
5 came in and pulled the gun; correct?

6 A Right.

7 Q You didn't impeach her with that?

8 A No, I didn't.

9 Q Why not?

10 A Oversight.

11 Q You sure about that? I mean you were expecting her to
12 testify completely differently than she testified?

13 A Absolutely.

14 Q You had this. You knew what you thought she was going
15 to say?

16 A Right.

17 Q She gets up and says something completely different and
18 you don't think to question her about her prior
19 inconsistent statements, it just doesn't occur to you?

20 A I focussed in on the newspaper article and that's what
21 we scrambled to find and we couldn't find it.

22 Q Okay. Now Ms. Hunt, when she testified, you did
23 cross-examine her, did you not?

24 A Yes, I think I remember asking questions.

25 Q About the phone conversations and she doesn't really

Jack Gregory - Cross-Examination by Ms. Todd

1 know who was on the other end of these phone calls;

2 correct?

3 A Right.

4 Q Now, she testified, did she not, that the other -- that

5 she overheard Sally on the telephone, right? This was

6 the day of the shooting; correct?

7 A I think so, I'm not sure.

8 Q Would you like to look at the copy of the transcript?

9 Would that help at all?

10 A I've got it right here. Tell me what page.

11 Q Okay. If you will turn to -- Robin Hunt's testimony, I

12 believe begins around 497, somewhere in that area.

13 A All right.

14 Q I believe, if you'll look to Page 501, she overheard

15 part of a conversation. She overheard Sally talking on

16 the telephone?

17 A That's right.

18 Q And she was talking to someone that she referred to as

19 Jimmy during the conversation?

20 A Heard a one-way conversation, yes.

21 Q Uh-huh. And she said to that person that she wanted to

22 meet them later at the Bow Wow Boutique?

23 A Had no earthly idea who might have been on the other

24 line, no.

25 Q Pardon me?

Jack Gregory - Cross-Examination by Ms. Todd

1 A She had no idea who was on the other end of the
2 telephone line.

3 Q I understand that you crossed her about that?

4 A Yeah.

5 Q But she had testified that it was Jimmy, had she not?
6 That she had used the name Jimmy? Yes, I'm sorry,
7 Sally Peal had used the name Jimmy while she was
8 talking on the telephone Page 499, maybe that will
9 help. Line 20, 21.

10 A Yeah. What name did she use? Jimmy.

11 Q And also it has in here she testified that she asked
12 that individual she was talking to on the telephone to
13 meet her at the Bow Wow Boutique, correct?

14 A To meet her anywhere, at the shop, referring to the Bow
15 Wow Boutique. Okay.

16 Q Okay. And then there was another phone call made to a
17 person referred to as C.P. [REDACTED] or C.P. [REDACTED]

18 A What page are you on?

19 Q Let's see here ---

20 A That's 503.

21 Q Uh-huh, I believe so.

22 A 502, 503.

23 Q And Ms. Hunt testified that Fred and Sally Peal had
24 gone to the school earlier and tried to get Christine
25 out of school?

Jack Gregory - Cross-Examination by Ms. Todd

1 A Yes.

2 Q Do you recall who C.P. [REDACTED] is?

3 A That's the child of Sally and Jimmy Peal.

4 Q Uh-huh.

5 A And the child was not at school.

6 Q Now, do you recall there being a trip that Sally Peal
7 and Mr. Rutland made to Texas being referred to in
8 evidence. They made a trip to Houston, I believe.

9 A Houston, yes.

10 Q And the reason that they had done so, the evidence that
11 was presented as to why they had gone there was that
12 Sally wanted to get away from Jimmy?

13 A Yeah, and I also think they were looking for work.

14 Q Right. And I think there was testimony, I believe from
15 Mr. Rutland that he actually -- he actually had quit
16 his job to help Sally leave Mr. Peal, correct?

17 A I don't know if it went that far, but I know that she
18 did work for him and he was aware of a lot of things
19 that were going on in her life and he may have quit his
20 job, I'm not sure.

21 Q Okay. Let's see if I can't find that for you. I may
22 have to come back to it in a minute it. She -- Sally
23 Peal had returned from Houston though, if you recall,
24 to -- because her daughter was here. She didn't want
25 to lose custody of her daughter; correct? She returned

Jack Gregory - Cross-Examination by Ms. Todd

1 for her daughter?

2 A Yes.

3 Q Okay.

4 MS. TODD: Excuse me, Your Honor, I misplaced
5 my paperwork here?

6 By Ms. Todd:

7 Q There was also testimony, was there not, that the
8 applicant, Mr. Rutland, and Sally Peal went to the
9 pawnshop to reclaim a shotgun, correct?

10 A That's right.

11 Q Now I believe that was the day of or the day before the
12 crime?

13 A Thereabouts, that's right.

14 Q And Sally Peal bought a pistol while there, at the
15 pawnshop?

16 A Yeah, that's where the .25 automatic was purchased.

17 Q And I believe there was some testimony that Mr. Rutland
18 hand encouraged her to do that, to buy that pistol?

19 A I don't know about all that, I just recall that that's
20 what happened.

21 Q Okay. Now, you said that Kim Kestner testified very
22 differently than what you expected, right?

23 A Yes.

24 Q You expected her to testify that Jimmy Peal came in and
25 pulled a .9 mm ---

Jack Gregory - Cross-Examination by Ms. Todd

1 A Yes.

2 Q --- gun. Now, Mr. Rutland's own testimony was that
3 when he saw Jimmy Peal coming in -- or coming in, he
4 pulled his gun before Mr. Peal pulled his, correct?

5 A I don't remember it that way.

6 Q Okay.

7 A I think Peal walked in with the tech .9 behind his back
8 and then when he pulled it out and presented it and
9 started pointing it around the room, that's when Fred
10 Rutland pulled the .25 automatic out of his hip pocket
11 or out of his back belt, behind his back and just held
12 it off to the side.

13 Q Uh-huh.

14 A And told Peal not to do it.

15 Q Uh-huh. That's your recollection?

16 A Yes. And then Peal moves the pistol, the .9 mm, from
17 pointing it at Sally to pointing it at Fred and then
18 Peal tries to squeeze the trigger on the .9 mm and the
19 gun was not going off, but Fred Rutland, holding the
20 .25, thinks that it is going off and then he starts
21 squeezing his trigger and four shots go off and there
22 all four coming from the .25.

23 Q Uh-huh.

24 A And none coming from the .9 mm.

25 Q Uh-huh.

Jack Gregory - Cross-Examination by Ms. Todd

1 A And that's when Jimmy falls to the floor and the .9 mm
2 falls to the floor, along with Jimmy.

3 Q Okay. Well, I understand it's been a long time since
4 this case was tried. If you would turn with me to Page
5 419 of the record.

6 MS. WILLIAMS: Your Honor, we'll stipulate that
7 anything's in the trial transcript ---

8 THE COURT: To State an objection, you have to
9 be specific.

10 MS. WILLIAMS: No, sir, I'm saying we'll
11 stipulate to any part of the transcript as accurate if she
12 would just like to direct the witness ---

13 THE COURT: Well, I'm going to let her try her
14 case.

15 Go ahead, ma'am, proceed.

16 By Ms. Todd:

17 A I'm on 459.

18 Q 459. If you will just browse through here where he's
19 saying that he saw -- he was walking to the back of the
20 building because he had seen -- and we might have to
21 turn pack to Page 457 -- he had seen Jimmy come up. On
22 page -- excuse me, on Page 456, where were you when
23 Jimmy got there, line 12?

24 A All right. I'm with you.

25 Q Okay. And he's testifying regarding where he is in the

Jack Gregory - Cross-Examination by Ms. Todd

1 store?

2 A Yes.

3 Q And he was walking -- he testifies on Page 418 that he
4 was walking to the back of the building because Jimmy
5 was coming in the front of the building and he wanted
6 to avoid confrontation?

7 A That's right.

8 Q And he said he pulled the .25 out of his belt?

9 A Okay.

10 Q Now would you agree with me that he actually pulled the
11 gun out -- according to his own testimony, before Jimmy
12 pulled his out?

13 A Yeah, looks like he couldn't exit the rear, so he was
14 going to be in the building and he pulls the .25 out.

15 Q Okay.

16 A Yeah.

17 Q There were four shots in the victim, correct?

18 A Yes.

19 Q One to the head, one to the abdomen, two to the chest?

20 A Yes.

21 Q Now, in addition to Mr. Rutland saying, testifying that
22 the victim pulled a gun on Sally Peal and then turned
23 it on him, Sally Peal also testified to that, correct?

24 A Yes.

25 Q So there were two witnesses who testified to the

Jack Gregory - Cross-Examination by Ms. Todd

1 defense version of events?

2 A Yes.

3 Q The applicant gave a statement, did he not, to
4 Mr. Friar, Kelly Friar of the Lexington County
5 Sheriff's Department?

6 A Yes.

7 Q And Mr. Friar testified at trial, correct?

8 A Yes.

9 Q And he testified during the second interview that Mr.
10 Rutland admitted that he had previously talked about
11 doing away with Mr. Peal, do you recall?

12 A I don't recall that.

13 Q Okay. If you would turn with me to Page 241?

14 A All right.

15 Q Let me see if I can find the exact quotation here.

16 MS. TODD: I beg the Court's indulgence, I'm
17 just having a hard time?

18 THE COURT: Let's take a break. Ten minutes.

19 MS. TODD: Thank you.

20 (WHEREUPON a short recess was observed.)

21 THE COURT: Let's try again. You ready
22 Mr. Williams?

23 MS. WILLIAMS: Yes, sir.

24 THE COURT: Ms. Todd, you may continue.

25 MS. TODD: Thank you, Your Honor, I apologize.

Jack Gregory - Cross-Examination by Ms. Todd

1 By Ms. Todd:

2 Q Mr. Gregory?

3 A Yes.

4 Q I have a hard time sometimes reading my own
5 handwriting. If you would turn with me to Page 221,
6 not 241. If you's look with me beginning on line 21,
7 the detective -- Detective Friar is testifying that
8 during an interview with the applicant, the applicant
9 said that a month earlier he had talked to Sally about
10 doing away with Jimmy or having something done to take
11 care of Jimmy. And moving over to Page 242, is that
12 correct?

13 A That's what it says, yes.

14 Q Now, there was some reply testimony, was there not,
15 from Mr. Jones who was eventually a jailhouse-snitch
16 who also testified that Mr. Rutland had said that;
17 correct?

18 A Yeah, I remember Jones testifying.

19 Q What do you remember about Mr. Jones' testimony?

20 A Jones was his roommate in jail.

21 Q Uh-huh.

22 A I don't remember specifically what was said, but I do
23 remember that when Jones got out of jail, he didn't go
24 to the solicitor's office, which I would think a
25 normal, reasonable follow up would be, he went to see

Jack Gregory - Cross-Examination by Ms. Todd

1 Jimmy Peal's father.

2 Q Uh-huh.

3 A And then ultimately ended up with the solicitor.

4 Q Right. But he did -- he did testify that -- Mr. Jones
5 did testify that he -- he said he had killed a man,
6 that's what he was doing in jail and that the man
7 deserved it. I'm looking at Page 506. The man
8 deserved it and he had offered to do it a month
9 earlier, line 17 through 19?

10 A Yes, I see that.

11 Q Okay.

12 A Yes.

13 Q But there were two different people that said that --
14 that testified at trial that the applicant had admitted
15 to talking about getting rid of Jimmy Peal a month
16 before he actually shot him to death?

17 A Yes.

18 Q Okay. You don't know what Ms. Kestner would have
19 testified to had you cross-examined her on her earlier
20 statements regarding the police statements, do you?

21 A Well, she got on the stand and said under oath that
22 this is what happened so I assumed she developed
23 amnesia.

24 Q But if you had impeached her, you don't know what kind
25 of explanation she would have given?

Jack Gregory - Cross-Examination by Ms. Todd

1 A No, I don't.

2 Q And you don't know what kind of explanation she would
3 have given had you presented her with the newspaper
4 article, do you?

5 A No, of course, when she made the statement to the
6 newspaper guy, she wasn't under oath, but she was under
7 oath at the time of the trial.

8 Q Would you agree with me, that sometimes, though,
9 newspaper articles aren't exactly accurate?

10 A More times than not.

11 Q Okay. Going back to Detective Friar again, didn't he
12 actually testify that his investigation revealed Sally
13 was the person who beat Jimmy and not the other way
14 around?

15 A That's not the way I recall it.

16 Q Okay. If you would look with me at Page 240 ---

17 THE COURT: Okay. It's in the record, she was
18 abusive all the time. It's in the record. What's next?
19 Go on.

20 MS. TODD: Okay. Thank you, Your Honor. Beg
21 the Court's indulgence.

22 Thank you very much, I have nothing further.

23 THE COURT: All right.

24 MS. WILLIAMS: Just briefly, Judge.

25 ///

Jack Gregory - Redirect Examination by Ms. Williams

REDIRECT EXAMINATION

By Ms. Williams:

Q Mr. Gregory, the main difference again in the testimony was whether or not the victim was armed when he came into the building; is that correct?

A That's correct, yes.

Q And that's the biggest difference between what Ms. Kestner initially told police officers, gave the sworn statement too, told newspaper reporters and what she then testified under oath; is that correct?

A Exactly.

Q And Ms. Kestner, although you and Sally both testified, both of you were charged in this event; is that correct?

A The defendant, Fred Rutland and Sally Peal were both charged with the crimes.

Q So -- connected with this incident?

A Yes.

Q So both of them are defendants, but the only impartial testimony would have been that of Kim Kestner; is that correct?

A She would have been the only third party witness.

Q She would have been the only eyewitness to this event other than the parties directly involved?

A Yes.

Jack Gregory - Redirect Examination by Ms. Williams

1 Q So it was extremely important if she gave a totally
2 different statement under oath to police officers?

3 A True because her viewpoint was an objective viewpoint.

4 Q That's correct but she didn't. And you didn't even
5 bring that up to the jury so that they could see that;
6 is that correct?

7 A That's correct.

8 Q And you could have? Not only could you have asked her
9 about that statement, you could have entered that
10 statement into evidence if she then said no this
11 statement is false; isn't that correct?

12 A That's correct.

13 Q So they could have seen a blown up blurb of her
14 statement just like they saw a blow up of Mr. Rutland's
15 statement that he gave, and he did give several
16 statements to law enforcement officers; is that
17 correct?

18 A That's correct.

19 Q All right. You indicated that a Mr. Jones gave some
20 information or indicated in the record about some
21 reference to being made by Mr. Rutland, the applicant
22 in this case, to getting rid of the victim in the case
23 ahead of time. Was it ever allowed out in court that
24 Mr. Jones himself was convicted of killing a person and
25 that that's what he was serving time for?

Jack Gregory - Redirect Examination by Ms. Williams

1 A I don't think that ever came out.

2 Q You wanted that to come in but that was overruled?

3 A Yes.

4 Q So the jury didn't hear that this person that was a
5 jailhouse-snitch was himself in jail for killing
6 someone ---

7 A Exactly.

8 Q --- at the time that he testified. And the statement
9 that Detective Friar gave indicating that Mr. Rutland
10 had made some admission to that effect, that was
11 supposedly the only thing Mr. Rutland didn't admit in
12 writing; is that correct?

13 A As far as I recollect, yes.

14 Q But Mr. Rutland did give several statements of
15 testimony to Mr. Friar regarding his involvement in
16 this case?

17 A Yes, he did.

18 Q And you indicated that essentially the reason why you
19 didn't cross-examine this critical you unbiased
20 witness, the only person other than the parties charged
21 and the party who was the victim in the case was
22 because it was basically an oversight on your part; is
23 that correct?

24 A Yes.

25 Q Thank you.

Jack Gregory - Redirect Examination by Ms. Williams

1 THE COURT: Anything further of this witness?

2 MS. TODD: No, Your Honor.

3 THE COURT: You may step down, sir.

4 Call your next witness.

5 MS. WILLIAMS: Thank you, Your Honor. I'd call
6 Frank Heming.

7 And, Your Honor, we'd ask that Mr. Gregory be
8 excused if there's no further questions.

9 MS. TODD: Your Honor, I'm not sure who else is
10 going to testify or whether anything they might -- it might
11 cause me to want to recall Mr. Gregory. I'd ask that he
12 remain in the courtroom.

13 THE COURT: Where you headed, Mr. Gregory, to
14 the beach?

15 MR. GREGORY: By the way of Manning, South
16 Carolina, Your Honor.

17 THE COURT: Do you have a cell phone?

18 MR. GREGORY: Yes, yes, sir, I do.

19 THE COURT: Well be nearby so we can call you.
20 Give it to Ms. Today -- your number.

21 THEREUPON,

22 FRANK HEMING,
23 after being duly sworn, testified as follows:

24 THE CLERK: State your name for the court and
25 spell it for the court reporter.

Frank Heming - Direct Examination by Ms. Williams

1 MR. HEMING: It's spelled Maurice,
2 M-a-u-r-i-c-e, Franklin, Heming, Heming, Jr.

3 THE COURT: Mr. Gregory, just don't leave the
4 county without letting us know.

5 MR. GREGORY: All right, sir.

6 THE COURT: Ms. Williams?

7 MS. WILLIAMS: May it please the Court.

8 **DIRECT EXAMINATION**

9 By Ms. Williams:

10 Q Mr. Heming, what is your profession?

11 A Right now I'm a private detective.

12 Q Okay. And how long have you been working in that
13 capacity?

14 A Since '98.

15 Q And prior to that what was your occupation?

16 A I was an investigator with the Lexington County
17 Sheriff's Department.

18 Q How did you become involved in Mr. Rutland's case or
19 looking into some information about Mr. Rutland's case?

20 A I was hired in 2001, in July of 2001, I was hired by
21 Dave Farrell just to locate some witnesses in the case.

22 Q And do you recall -- was it concerning Mr. Rutland?

23 A Yes.

24 Q Who were those witnesses that you were attempting to
25 locate?

Frank Heming - Direct Examination by Ms. Williams

1 A At the time he only wanted me to locate Ms. Robin Hunt.

2 Q Uh-huh.

3 A And Kim Kestner and there was Belinda Joyce Smith.

4 Q Okay. All right. And this was now approximately seven
5 years, eight years after the original events took
6 place?

7 A I didn't have a copy of the case or obtain any -- I
8 didn't have any knowledge much of the case, only what I
9 was supposed to do as far as witnesses, so I don't know
10 how long it was.

11 Q Okay. If this incident happened in 1992 ---

12 THE COURT: I'll take judicial notice of the
13 time the incident happened and when he was hired. How's
14 that?

15 MS. WILLIAMS: Thank you, Your Honor.

16 THE COURT: All right.

17 By Ms. Williams:

18 Q Mr. Heming, were you able to locate these witnesses
19 eight years after the incident occurred?

20 A Yes, ma'am.

21 Q And were you able to speak with Ms. Hunt about these
22 incidents?

23 A Yes, ma'am, I was.

24 Q And when I contacted you again, earlier this year,
25 2006, did I also make an attempt to notify some of

Frank Heming - Direct Examination by Ms. Williams

1 these witnesses or to contact some of these witnesses?

2 A Yes, ma'am.

3 Q And were you successful in getting some information as
4 to their whereabouts?

5 A At this time I have only located one and that's
6 Ms. Hunt. The others I haven't yet.

7 Q And now this is approximately fourteen years after the
8 initial incident happened, but you still were able to
9 locate Ms. Hunt in a relatively short period of time?

10 A Yes, ma'am. She had moved, but I did locate her.

11 Q As a witness?

12 A Yes.

13 Q Okay.

14 MS. WILLIAMS: Thank you. I don't have any
15 other questions.

16 THE COURT: Ms. Todd?

17 MS. TODD: I don't have any questions.

18 THE COURT: You may step down, sir.

19 Call your next witness.

20 MS. WILLIAMS: We'd call Robin Lankford.

21 THE COURT: Come around Ms. Langford.

22 MS. WILLIAMS: Who was previously Robin Hunt.

23 THE COURT: All right.

24 ///

25 ///

Robbie Hankford - Direct Examination by Ms. Williams

1 THEREUPON,

2 ROBBIE LANKFORD,

3 after being duly sworn, testified as follows:

4 THE CLERK: If you would have a seat and when
5 you're comfortable, state your name for the court and spell
6 it for the court reporter.

7 MS. LANGFORD: My name is Robbie, R-o-b-b-i-e
8 H. Lankford, L-a-n-k-f-o-r-d.

9 MS. WILLIAMS: Thank you, may it please the
10 Court.

11 **DIRECT EXAMINATION**

12 By Ms. Williams:

13 Q Ms. Lankford, did you previously go by the name of
14 Robbie Hunt?

15 A Yes, ma'am, every time I tried to tell somebody my name
16 was Robin -- or Robbie, they wound up calling me Robin
17 because of it being a girl's name so I just gave up.

18 Q Okay. All right. So and the last name Hunt belonged
19 to you at one time?

20 A Marriage.

21 Q Okay. In 1992, in September of 1992 when the
22 allegations that brings us around to the trial of
23 Mr. Fred Rutland occurred, did you know Mr. Fred
24 Rutland, the applicant in this case?

25 A Yes, I've met him a couple of times.

Robbie Hankford - Direct Examination by Ms. Williams

1 Q Okay. And how did you meet him?

2 A I met him one time I believe earlier because, I'm not
3 sure whether I met him or whether Sally had just
4 mentioned that he was a co-worker.

5 Q Okay.

6 A But then I met him in September when Sally had called
7 me and said that he was going to be bringing their
8 brown car back and could he just bring it to my house;
9 and I told her that was fine. And when I got up the
10 next morning or a couple of mornings later, I don't
11 remember the exact time, the car was there.

12 Q Okay. Did you have interaction shortly before the
13 incidents at the Bow Wow Boutique with both Sally Peal
14 and the applicant, Fred Rutland?

15 A They were with me primarily for the better part of two
16 days prior to the incident.

17 Q Okay. And did you accompany them --- there's some
18 testimony in the record ---

19 THE COURT: Stop just ask her the question but
20 don't set it up with testimony in the record. Just ask her
21 if she knows, please.

22 By Ms. Williams:

23 Q Did you accompany them to a pawnshop?

24 A Yes, I did, I took them.

25 Q All right. And what was your understanding about what

Robbie Hankford - Direct Examination by Ms. Williams

1 they were doing at the pawnshop?

2 A They said they had a pawn ticket for a shotgun that she
3 had given Jimmy as a Christmas present and they had
4 to -- she had to retrieve it that day or they would
5 lose it.

6 Q Okay. And were you aware that there was another
7 purchase of a .25 caliber pistol that day?

8 A Yes, ma'am, they bought the pistol that day.

9 Q Okay. And when you were there during the purchase,
10 what was your understanding of the purpose of that gun?

11 A Jimmy had been attacking Sally and chasing her around
12 and he also had come after me.

13 THE COURT: I'm sorry I didn't hear that.

14 Would you repeat that answer, please.

15 MS. LANKFORD: Which part?

16 THE COURT: All of it.

17 MS. LANKFORD: Okay. They purchased the pistol
18 for Sally's protection because Jimmy had been make threats
19 toward her and he had also made threats and come after me.

20 THE COURT: After you?

21 MS. LANKFORD: Yes, sir.

22 By Ms. Williams:

23 Q And tell -- how soon before the incident at the Bow Wow
24 Boutique were these threats made to you and to Sally?

25 A Two days before.

Robbie Hankford - Direct Examination by Ms. Williams

1 THE COURT: Let me stop and ask this, what was
2 the nature of the threats? What was said? I mean, what
3 does threat mean?

4 MS. LANKFORD: Well he told me he was going to
5 kill me, which I think is a threat. And he told Sally he
6 was going to kill her. He attacked Sally's automobile with
7 a two by four and destroyed the engine. He tried to run me
8 off the road when we were trying to walk to get a place to
9 call to get a ride home; so I would think that most of that
10 came under the heading of threat.

11 By Ms. Williams:

12 Q And when you gave a statement to law enforcement
13 officers, you told them about these threats that Jimmy
14 Peal had made against you just before this incident
15 occurred; is that correct?

16 A Yes, ma'am.

17 Q And that's part of the -- your written statement to law
18 enforcement officers?

19 A It has been all along.

20 Q Okay. And when this incident happened, when you were
21 indicating they were trying to locate this vehicle, did
22 you have knowledge of why they were trying to get a
23 vehicle, Fred and Sally?

24 A Oh, you mean when they went up to see Kim about buying
25 a car?

Robbie Hankford - Direct Examination by Ms. Williams

1 Q Uh-huh.

2 A Because they had no transportation. The brown car was
3 destroyed and it was my understanding that was Sally's.

4 Q Okay. And is that the -- what were they planning on
5 doing with the brown car?

6 A Leaving.

7 Q Okay. They were getting away from ---

8 A They were getting away from Jimmy because he was not
9 right.

10 Q And so your understanding when they went to the Bow Wow
11 Boutique was to purchase a vehicle from ---

12 A Kim Kestner.

13 Q Okay. And did you have any reason to believe that Fred
14 Rutland and Sally Peal might run into Jimmy Peal at the
15 Bow Wow Boutique?

16 A No, not really because the telephone call that I heard
17 Sally talking about, I was never 100 percent sure about
18 it -- but I was told that I could not say I was not 100
19 percent sure about it, so I didn't. I trusted Jack to
20 cross-examine me about it so I could offer into
21 evidence that I was unsure about it.

22 Q Okay. And we'll get to that a little more. Your
23 testimony at trial was fairly limited as far as the
24 solicitor's office asked you about a phone call you
25 supposedly had overheard where Sally was talking to an

Robbie Hankford - Direct Examination by Ms. Williams

1 unidentified person about meeting them at the shop in
2 45 minutes; is that correct?

3 A The initial conversation that I had with the sheriff's
4 department was that I had overheard Sally on the
5 telephone having a conversation regarding Jimmy and
6 C.P. [REDACTED].

7 Q Okay.

8 A That was the only conversation I ever heard her make.
9 I heard several conversations back and forth through
10 the house in attempting to locate C.P. [REDACTED]

11 Q Okay. And C.P. [REDACTED] was Sally and Jimmy's daughter?

12 A Uh-huh, yes.

13 Q To the best of your knowledge, were Sally and Fred in
14 anyway intending to go after Mr. Peal?

15 A No, ma'am, they were trying to get away from him.

16 Q And the purpose of going to the Bow Wow Boutique was to
17 get a vehicle to do that?

18 A Yes, ma'am.

19 Q And the -- did you talk with Kimberly Kestner, who was
20 actually at the boutique shortly after this incident
21 happened?

22 A Yes, ma'am, it took me a little while to get up there
23 because I had to walk, but when I walked in, Kim told
24 me what happened. She told me that Jimmy had come into
25 the shop carrying a gun and that ---

Robbie Hankford - Direct Examination by Ms. Williams

1 MS. TODD: I object, Your Honor to hearsay.

2 THE COURT: Sustained.

3 MS. TODD: Your Honor, I believe she's trying
4 the case.

5 THE COURT: Well, your objection has been
6 sustained.

7 MS. WILLIAMS: All right.

8 By Ms. Williams:

9 Q Can you tell me about when you spoke with Ms. Kestner,
10 how soon after the shooting that you spoke with her?

11 A The first time that afternoon?

12 Q Uh-huh. Approximately how many minutes or hours was
13 that after the incident?

14 A I would say probably about forty-five minutes or an
15 hour, maybe an hour and-a-half because like I said I
16 had to walk up to the shop.

17 Q And what was her state of mind?

18 A Excited.

19 Q Okay. Was she still concerned about everything that
20 had gone on?

21 A No.

22 Q Had the law enforcement left yet?

23 A No.

24 Q Okay. So the investigation was still in progress?

25 A Yes.

Robbie Hankford - Direct Examination by Ms. Williams

1 Q To your knowledge did she testify differently at trial
2 than what she told you that day?

3 A I did not hear her testify at trial. I can only go by
4 what's in the written record. It was like Mr. Gregory
5 said, 180 degree turn.

6 Q Okay. So you had spoken with her shortly after the
7 incident and what she testified to was totally
8 different?

9 A Yes, ma'am, she worked for me so I saw her on a daily
10 basis.

11 Q Okay. At any time did you have later, I guess,
12 dealings with Ms. Kestner?

13 A She told me two or three weeks later that Ms. Peal had
14 come to see her and offered her \$5,000 to change her
15 testimony. I told her then ---

16 Q All right.

17 MS. TODD: Object to hearsay.

18 THE COURT: Sustained.

19 MS. LANKFORD: She told me that.

20 THE COURT: Sustained.

21 By Ms. Williams:

22 Q The ---

23 THE COURT: And it wasn't in response to the
24 question, by the way. Go ahead.

25 ///

Robbie Hankford - Direct Examination by Ms. Williams

1 By Ms. Williams:

2 Q When this happened, did you walk up to the shop while
3 law enforcement officers were still there?

4 A Yes, ma'am.

5 Q Could you see the location of the vehicle that Fred and
6 Sally had driven in?

7 A My van, yes, ma'am, it was right in front.

8 Q Did you also observe the vehicle that the victim had
9 driven up in?

10 A Not until later. It was down on the other side.

11 Q Did it remain there a few days after the incident
12 happened?

13 A Yes, ma'am, it stayed there.

14 Q And where was that in comparison to the vehicle that
15 Mr. Rutland and Ms. Peal were in?

16 A I could not see the brown Chevrolet from the blue van.
17 The building was in the way. The building sat
18 caddy-cornered.

19 Q Uh-huh.

20 A And there was the front entrance and the van was pulled
21 in right at the front and the Chevrolet was pulled in
22 down to the side of the side street that was there.

23 Q The -- when this incident happened, did you -- well
24 after Mr. Rutland was charged, did you actually sign
25 off on his bond for him and help him get out of jail?

Robbie Hankford - Direct Examination by Ms. Williams

1 A Yes, ma'am.

2 Q At some point, you became dislocated from the Lexington
3 area?

4 A My house was burned down.

5 Q Okay. And where did you go at that time.

6 A I went to stay with friends in Charleston.

7 Q Were you contacted by Lexington County Sheriff's
8 Department about this trial?

9 A The day before they wanted me up here.

10 Q Okay. In the -- when you were preparing for trial, did
11 you tell them all of these incidents that had happened?
12 The threats that had happened?

13 A They had that in writing since right after the
14 incident, the death occurred. I mean, I'm very sorry,
15 but I talked to Jimmy that morning before he came up
16 and he indicated to me that he was on the coast and I
17 told him then, I said Jimmy y'all need to sit down and
18 talk about this. This has gotten completely out of
19 hand. I've known both of y'all for a long time. You
20 need to just sit down and talk.

21 Q Okay. When -- did you wanted to come back and testify
22 at trial?

23 A No, ma'am.

24 Q And when you were preparing to testify at trial, did
25 you feel pressured to testify one way or another?

Robbie Hankford - Direct Examination by Ms. Williams

1 A I was told that I should not say that I thought I heard
2 where Sally had said ---

3 THE COURT: The question was were you pressured
4 to testify one way or the other.

5 MS. LANKFORD: Yes.

6 By Ms. Williams:

7 Q Were you surprised when Mr. Jack Gregory didn't ask you
8 questions about all the other information you had about
9 this case?

10 A Yes, ma'am.

11 Q Okay. And in fact, were you surprised when he didn't
12 ask you about your prior statement that you had given
13 to law enforcement officers?

14 A Yes, ma'am.

15 Q If Mr. Gregory had asked you questions about the nature
16 of the relationship between Fred Rutland and Sally Peal
17 and the victim in this case, Jimmy Peal how would you
18 have described it to the jury if you were asked to
19 testify about that?

20 A My relationship with them?

21 Q The kind of dynamics between Mr. Peal and Fred Rutland
22 and Sally Peal during that day and that time when this
23 incident happened?

24 A Okay. I'm not exactly sure how to answer that except
25 they seemed to be trying to get away from him and he

Robbie Hankford - Cross-Examination by Ms. Todd

1 seemed to be trying to follow them all over the place.

2 Q Okay. Including to the Bow Wow Boutique?

3 A He even came to my house.

4 Q All right. And that would have been your testimony had
5 it been inquired to on cross-examination?

6 A Yes, ma'am.

7 Q Along with testimony consistent with your statement you
8 gave to law enforcement?

9 A Yes, ma'am.

10 Q Thank you, Ms. Lankford.

11 MS. WILLIAMS: I don't have anything further.

12 THE COURT: Cross-examination.

13 **CROSS-EXAMINATION**

14 By Ms. Todd:

15 Q Ms. Lankford, you were friends with Sally Peal?

16 A I was friends with Sally and Jimmy.

17 Q And -- but you were with, I believe you testified Mr.
18 Rutland and Sally for the better part of the two days
19 before?

20 A Yes, ma'am.

21 Q And you said that they were trying get away; correct?

22 A Yes, ma'am.

23 Q But they went earlier that day to the house while he
24 was there, correct?

25 A I'm sorry?

Robbie Hankford - Cross-Examination by Ms. Todd

1 Q They went to Jimmy's house earlier that day while he
2 was there?

3 A Yes, ma'am, as I said earlier, I had received a
4 telephone call from Jimmy indicating that he was on the
5 coast so they felt fairly comfortable going out there
6 trying to retrieve the brown Chevrolet and he was at
7 the house.

8 Q Okay.

9 A But none of us knew he was there.

10 Q While they were there, Mr. Rutland fired the shotgun in
11 the air, correct?

12 A Yes, ma'am.

13 Q And what -- did you know of the relationship between
14 Ms. Peal and Mr. Rutland?

15 A I just knew they worked together. I wasn't aware of
16 any other relationship with them if there was one.

17 Q Uh-huh.

18 A Until those couple of days. And I still can't tell you
19 100 percent that there was.

20 Q Okay. Ms. Hunt, you testified at the trial that as
21 y'all were leaving the residence in the van, Fred made
22 a comment that he was going to critical Jimmy?

23 A No, ma'am he said he wasn't going to kill him, he just
24 would have crippled him had he continued to come after
25 them.

Robbie Hankford - Cross-Examination by Ms. Todd

1 Q Okay. And you weren't there at the Bow Wow Boutique
2 when the shooting happened?

3 A No, ma'am.

4 Q Thank you.

5 MS. TODD: Nothing further.

6 THE COURT: Anything further of this witness?

7 MS. WILLIAMS: No, sir, Your Honor.

8 THE COURT: You may step down.

9 Can I see y'all for a minute?

10 MS. WILLIAMS: Yes, sir, Your Honor.

11 (WHEREUPON there was a bench conference out of
12 the hearing of the jury and the court reporter.)

13 (WHEREUPON a recess for lunch was observed.)

14 THE COURT: Now is everybody ready?

15 MS. WILLIAMS: Yes, sir.

16 MS. TODD: Yes, sir.

17 THE COURT: All right.

18 MS. WILLIAMS: Thank you. I would call Mr.
19 Rutland.

20 THE COURT: Come around Mr. Rutland.

21 THEREUPON,

22 FRED RUTLAND,

23 after being duly sworn, testified as follows:

24 THE CLERK: Have a seat and when you're seated,
25 state your name for the Court.

Fred Rutland - Direct Examination by Ms. Williams

1 MR. RUTLAND: My name is Fred Rutland.

2 MS. WILLIAMS: May it please the Court?

3 THE COURT: Yes, ma'am.

4 **DIRECT EXAMINATION**

5 By Ms. Williams:

6 Q Mr. Rutland, where do you presently reside right now?

7 A Pardon me?

8 Q Where are you living?

9 A Bishopville, Lee County Correctional Institution.

10 Q And what type of sentence are you serving?

11 A Life sentence.

12 Q And is that for the charges that we've been discussing
13 in this case?

14 A Yes, ma'am.

15 Q Okay. In 1992 when these charges occurred up through
16 1993, did you have any type of legal training during
17 that period of time?

18 A No, ma'am.

19 Q What is your educational background prior to being
20 incarcerated?

21 A I have a GED, high school certificate. That's about
22 it.

23 Q Okay. When Mr. Jack Gregory got involved in this case,
24 how did he become your attorney?

25 A He was -- Robin introduced him to me.

Fred Rutland - Direct Examination by Ms. Williams

1 THE COURT: Mr. Rutland, I'm going to ask you
2 to speak up, please, sir.

3 MR. RUTLAND: Through Robin Hunt.

4 By Ms. Williams:

5 Q Okay. And did you have any idea of his experience in
6 trying criminal cases prior to you being a client of
7 his?

8 A No, ma'am.

9 Q Did you retain him to represent you in this charge?

10 A I guess that's what you call it. He said he was going
11 to do it.

12 Q All right. And when you retained him, what did you do
13 as far as what types of meetings or conversations would
14 you have with him about the charges and the allegations
15 against you?

16 A Well, the night I got out of the county after Labor Day
17 weekend, a Monday night or Tuesday night, whenever this
18 was.

19 Q After this happened, this happened, again, in
20 September. You got out shortly after that?

21 A Four or five days later.

22 Q Okay. On bond?

23 A On bond. We had a meeting at night at Robin's and we
24 talked for a couple of hours and he was taking notes
25 and that's about the only time we talked about the

Fred Rutland - Direct Examination by Ms. Williams

1 case.

2 Q Okay. At some time, you left the State of South
3 Carolina and went to Florida; is that correct?

4 A Yes, ma'am, in probably late January '93.

5 Q And what was your reason for going to -- leaving the
6 state?

7 A Because I -- every time I saw Jack he wanted to know
8 how the money was coming.

9 Q Uh-huh.

10 A And I gave him all I could get ahold to and Hurricane
11 Andrew blew a lot of insurance money into Miami and I'm
12 pretty good at reconstruction, so I went down there to
13 do what I could.

14 Q And eventually, you were brought back to South Carolina
15 by law enforcement; is that correct?

16 A Yes, ma'am, the first of May.

17 Q Okay. The first of -- the first time around, first of
18 May. And your trial was called the 23rd of May? About
19 three and-a-half weeks later?

20 A Yes, ma'am.

21 Q After you were brought back to South Carolina in that
22 three-week period of time when you were incarcerated
23 here, how many times did you meet with Mr. Gregory in
24 preparation for the trial of your case?

25 A I think he came by the jail once or twice.

Fred Rutland - Direct Examination by Ms. Williams

1 Q All right. Did you trust that he had the legal
2 experience to represent you on this very serious charge
3 of murder?

4 A Well, I didn't know that -- I didn't know that I had an
5 option.

6 Q Okay.

7 A We were going to court. And I had to have a lawyer,
8 you know. And, you know, if I'd watched him in court,
9 I still wouldn't have known if he was good or not.

10 Q Did you think he was doing a pretty good job when he
11 was in court with you?

12 A I was shocked by quite a few things that was happening,
13 but I didn't know it was in his power to do anything
14 about it.

15 Q Okay. Did it concern you that -- well when you met
16 with him, did he go over some of the factual evidence
17 with you, the statements that had been made by the
18 witnesses, the law enforcement officers?

19 A No.

20 Q Did he go over the autopsy report with you or those
21 files with you?

22 A I don't believe I saw those until I made my direct
23 appeal ---

24 Q Okay.

25 A --- and got the evidence, the transcript and that stuff

Fred Rutland - Direct Examination by Ms. Williams

1 before the direct appeal was filed.

2 Q Okay.

3 A I think that's the first time I saw any of that
4 paperwork.

5 Q Did you talk with him about defenses in your case?
6 With what was going to be raised in your defense?

7 A Well he told me we was going -- he was going to try for
8 self-defense.

9 Q Uh-huh.

10 A And I didn't know about any other charge -- any
11 other ---

12 Q Did you talk with him about the defense of others also?
13 How Sally and other people were in the ---

14 A When we were in court we talked about it.

15 Q Okay. So prior to going into court, you had discussed
16 self-defense but not any other possible defenses that
17 you might have had?

18 A No, ma'am, I don't believe -- I believe all that was
19 while we were sitting at the table in the court
20 talking.

21 Q All right. When you came into court, did you feel that
22 you were prepared to go forward with your case?

23 A No, I was scared to death.

24 Q All right. What was -- I guess things happened fairly
25 quickly once you got back into town just about three

Fred Rutland - Direct Examination by Ms. Williams

1 weeks later, three and-a-half weeks later is when the
2 trial began. What concerns did you have when your case
3 was called to trial?

4 A Well, I was concerned about, you know, Jack's being
5 able to do it or not, but I didn't know what options I
6 had or -- I didn't -- I didn't know what to expect.

7 Q If you had realized that he was not going to be able to
8 get any witnesses for you, would you have considered
9 asking the Court to appoint you an attorney to handle
10 the case and investigate it?

11 A Yes, ma'am.

12 Q All right.

13 A If he wasn't going to do it, I would rather have had
14 someone that wanted to.

15 Q When you were involved in the trial of your case were
16 you surprised at any of the things that came out in the
17 courtroom?

18 A Yeah, it was a shocking outturn.

19 Q Okay.

20 A You know, everything was manipulated and lies and
21 complete change in testimony and nothing, you know,
22 questioned. You know, things I pointed out and he just
23 shunned off, you know.

24 Q Okay. Thank you, Mr. Rutland. I don't have any
25 further questions. Please answer any Ms. Todd may

Fred Rutland - Cross-Examination by Ms. Todd

1 have.

2 **CROSS-EXAMINATION**

3 By Ms. Todd:

4 Q Mr. Rutland, on the day ofk the shooting, the Bow Wow
5 Boutique, who was Mr. Peal pointing his gun at right
6 before you pulled your trigger?

7 A When he first pulled it out he was pointing it at
8 Sally.

9 Q Right before you pulled your trigger, before you fired
10 at him who was he pointing the gun at?

11 A Toward -- he had it and pulled the trigger pointing at
12 me before I fired.

13 Q Okay. And at all times when you were firing at him, he
14 was not pointing the gun at someone else?

15 A Like I said, at first he pointed -- when he first got
16 his gun out and loaded it, he pointed it at Sally.

17 Q Right.

18 A When he realized I had a gun and paid me any attention
19 at all, he turned the gun on me and turned the trigger.

20 Q Okay.

21 A And at that point I shot him in the side and says,
22 Jimmy, stop it.

23 Q Now, the incident ---

24 A And he continued to pull the trigger after he looked
25 down and then he looked back up he continued to pull

Fred Rutland - Cross-Examination by Ms. Todd

1 the trigger.

2 Q Okay. The incident that happened at the Peal
3 residence, was that the same day or the day before?

4 A Same day.

5 Q The same day. And after you shot the shotgun in the
6 air -- you shot the shotgun in the air, right?

7 A Right.

8 Q And after you did that, you did point the gun at him,
9 correct?

10 A No.

11 Q Okay.

12 A No, ma'am, I pointed it down in front of him.

13 Q In his direction?

14 A Not at him -- not even in his direction.

15 Q Not in his direction. Okay.

16 A Out in front of him.

17 Q Okay. Would you like to look at the statement that you
18 gave to the police?

19 MS. TODD: May I approach the witness, please,
20 sir?

21 THE COURT: Yes, ma'am.

22 By Ms. Todd:

23 Q If you would, please, identify that document if you
24 can?

25 A What do you want me to do to it?

Fred Rutland - Cross-Examination by Ms. Todd

1 Q Just -- does it appear to be a statement you gave to
2 the police?

3 A Yes, ma'am.

4 Q Okay. And if you would, look with me, right here, what
5 does that say?

6 A I came from the van with the shotgun.

7 Q No, right here.

8 A I pointed the gun at Jimmy as he was coming out of the
9 trailer.

10 Q Is that statement about the incident we were just
11 discussing?

12 A Yes, ma'am.

13 Q Okay.

14 A It's according to your definition of that.

15 Q Or -- those were your words, correct?

16 A I guess it's according to your definition of at.

17 Q Okay. And in your trial testimony, if you'd like to
18 look at that, Page 407, you were asked on line 21, did
19 you ever point the shotgun at Jimmy Peal, correct? You
20 were asked that?

21 A I guess so.

22 Q And your answer was?

23 A Yes, I did.

24 Q Okay.

25 MS. TODD: Beg the Court's indulgence. I have

Fred Rutland - Cross-Examination by Ms. Todd

1 nothing further.

2 THE COURT: Anything further on redirect?

3 MS. WILLIAMS: No, sir, Your Honor.

4 THE COURT: All right. You may step down, Mr.
5 Rutland.

6 MR. RUTLAND: Thank you, sir.

7 THE COURT: All right. Anything further,
8 Ms. Williams?

9 MS. WILLIAMS: Nothing further from the
10 applicant.

11 THE COURT: All right. Ms. Todd?

12 MS. TODD: Yes, Your Honor, the State would
13 call Mr. Dayton Riddle.

14 THE COURT: Who? Dayton Riddle. What's his
15 full name?

16 MS. TODD: Charles Dayton Riddle.

17 THE COURT: Charles Dayton Riddle. All right.

18 THEREUPON, .

19 CHARLES DAYTON RIDDLE,
20 after being duly sworn, testified as follows:

21 THE CLERK: Have a seat, state your name.

22 THE COURT: Mr. Riddle, why don't you go by
23 Charles?

24 MR. RIDDLE: I don't know, just that Dayton is
25 a family name and it's what my father goes by.

Charles Dayton Riddle - Direct Examination by Ms. Todd

1 THE COURT: Does Charles Riddle have something
2 to hide?

3 MR. RIDDLE: No, sir.

4 THE COURT: All right.

5 MR. RIDDLE: Charles Dayton Riddle, III.

6 **DIRECT EXAMINATION**

7 By Ms. Todd:

8 Q Mr. Riddle, were you involved in the prosecution of
9 this case?

10 A Yes, ma'am.

11 Q And did you interview witnesses related to this case?

12 A Yes, ma'am. Myself and Knox McMann.

13 Q Did you interview Ms. Kimberly Kestner?

14 A Yes, ma'am.

15 Q How about Robin Hunt?

16 A Yes, ma'am.

17 Q And you -- did you examine those witnesses at trial?

18 A Yes, ma'am.

19 Q Did Kimberly Kestner testify consistently with what you
20 expected her too, based on your interview?

21 A Yes, ma'am.

22 Q Did Robin Hunt testify consistently based on your
23 interview with her?

24 A Yes, ma'am.

25 Q Did you ever ask Ms. Kestner to say something different

Charles Dayton Riddle - Direct Examination by Ms. Todd

1 than she had ever said before?

2 A No, ma'am.

3 Q How about Ms. Hunt?

4 A No, ma'am.

5 Q What if anything, did you tell them about their
6 testimony?

7 A I told them just like I tell all the witnesses I've
8 got, basically they're three or four rules about
9 testifying. Number one, you tell the truth because if
10 you tell the truth, you can't get caught in a lie.
11 Number two, make sure you understand the question
12 because if you don't know what the lawyers' asking you,
13 you can't answer the question correctly. So if you
14 don't know or you don't understand, you stop what
15 you're saying and you say repeat it, rephrase it,
16 whatever you need so that you understand what's being
17 asked of you and then you answer it.

18 And the third thing is that you're not going to
19 know everything that anybody asks you, so if you don't
20 know, I don't know is an acceptable answer.

21 Q Was there anything in the law enforcement files that
22 gave you concern about Ms. Kestner's testimony?

23 A I don't know. I'm not sure. I'm in violation of rule
24 number two, I'm not sure I understand that question.
25 But what she told me, there was some inconsistencies

Charles Dayton Riddle - Cross-Examination by Ms. Williams

1 between that and what was in her written statement if
2 that's where you're going.

3 Q Absolutely?

4 A Okay.

5 Q And you were not concerned about putting up her
6 testimony and getting something inconsistent?

7 A No. I mean she would have been cross-examined about
8 that. Those statements had been turned over to Mr.
9 Gregory previously.

10 Q Thank you. I have nothing further.

11 THE COURT: Ms. Williams?

12 MS. WILLIAMS: Briefly, Your Honor.

13 **CROSS-EXAMINATION**

14 By Ms. Williams:

15 Q Mr. Riddle, did you -- you were given a complete
16 investigative file from the sheriff's department on
17 this case; is that correct?

18 A I guess you can say that, yeah. We were given what
19 they had.

20 Q Okay.

21 A That's never as complete as what we want to do by the
22 time we reach the courtroom door, but we were given
23 what the sheriff had compiled.

24 Q And what they had is basically what you turned over in
25 discovery when it's requested? All the information

Charles Dayton Riddle - Cross-Examination by Ms. Williams

1 that you have from the sheriff's department?

2 A I'm certain that that's what Mr. McMann turned over,
3 yes, ma'am.

4 Q Okay. And in this case are you aware that this
5 original incident report indicated that Ms. Kestner
6 reported the victim Jimmy Peal as first presenting a
7 weapon and this was -- this past time, 1:44 -- time
8 arrived 1:49 -- sometime within an hour after this
9 incident happened, several minutes?

10 A Can I see what you're referring too?

11 Q Sure.

12 MS. WILLIAMS: May I approach the witness, Your
13 Honor?

14 THE COURT: Yes, ma'am.

15 By Ms. Williams:

16 Q Is this a copy of the initial incident report you were
17 provided?

18 A It appears to be a copy of the original incident
19 report. I can't read the whole section off the
20 narrative off of this copy, but ---

21 Q And what does it have as complaining witness?

22 A It lists Kimberly Kestner as complainant.

23 Q And down there -- I know this -- to read some of this,
24 this is the best copy I could get, is a correct
25 representation of what it appears to say that the

Charles Dayton Riddle - Cross-Examination by Ms. Williams

1 complainant further states that she observed the victim
2 pulling out a firearm in which she then heard two
3 shots. The witness and subject ran over to the victim.
4 The victim fell to the floor. The subject then tried
5 to perform CPR on the victims -- on the victim. And
6 the most important thing there of course is that it
7 states that the complainant further states she observed
8 the victim pulling out a firearm?

9 A I agree it says that.

10 Q So shortly after this incident happens, one of the
11 first officers on the scene made a record of what the
12 complainant, Kimberly Kestner, had indicated which was
13 that the victim was armed in this case; is that
14 correct?

15 A Say that again. I was trying to read, I'm sorry.

16 Q Apparently one of those first officers at the scene
17 made a record of what Ms. Kestner stated initially
18 which was that the victim ---

19 A According to this, yes, ma'am.

20 Q And then she later gave a sworn statement or statement
21 to the law enforcement officers as a witness, which I
22 think is also in that packet of material?

23 A I know she had given a statement. I don't know if it's
24 in this packet, but I know she had given one. Here it
25 is, yes, ma'am.

Charles Dayton Riddle - Cross-Examination by Ms. Williams

1 Q And in that statement that she'd given to law
2 enforcement, what day was that statement?

3 A September 4.

4 Q So that's the same day that the shooting occurred?

5 A I need to look at the indictment. But if you tell me
6 it is, then I'll accept that.

7 Q I think it's on the incident report as well that this
8 is September 4th?

9 A Certainly it is, hold on just a minute. Same day as
10 the incident report, yes, ma'am.

11 Q And in that statement, she indicates to law enforcement
12 officers that the victim was armed upon entering the
13 location that the defendant, applicant and Sally Peal
14 were at; is that correct.

15 A That -- say it again because I was trying to read it
16 while you were ---

17 Q Does she indicate that Mr. Peal had a weapon in that
18 statement?

19 A One second.

20 Q Okay.

21 THE COURT: Mr. Riddle attended Clemson
22 University, Ms. Williams. Give him a moment.

23 MS. WILLIAMS: Yes, sir.

24 By Ms. Williams:

25 A She indicated in this statement that he had a gun is

Charles Dayton Riddle - Cross-Examination by Ms. Williams

1 that responsive?

2 Q Yes.

3 A Okay.

4 Q So the information that you had was the information
5 that was later provided to Mr. Gregory, gave all
6 indication that Ms. Kestner basically had indicated
7 that the victim in this case had had a weapon in his
8 hand, that she had seen ---

9 A I don't think either of these say in his hand. This
10 says that he had a gun and that he then pulled the gun,
11 but it doesn't say when that happened in reference to
12 Mr. Rutland having a gun.

13 Q Okay. She observed the victim pulling out a firearm
14 and then it says, which she then heard two shots. So
15 when the victim's pulling out his firearm is when
16 basically two shots were fired. So I would imagine by
17 pulling out he meant he did it with his hand and not
18 his toes or some other part of his body?

19 A I would agree with that.

20 Q So when she's referencing pulling out a weapon, she's
21 referencing to holding the weapon?

22 A Right. But you stated he had the gun in his hand.

23 Q I guess I drew that conclusion from the holding of the
24 gun.

25 A Right.

Charles Dayton Riddle - Cross-Examination by Ms. Williams

1 Q I think that would be a fair conclusion to draw, would
2 you agree with me?

3 A No, ma'am.

4 Q If someone is holding a weapon that they didn't have it
5 in their hand?

6 A No, ma'am, the conclusion that I take is that -- you're
7 drawing, is that he walks in with the gun in his hand
8 and then Fred Rutland pulls the gun and defends himself
9 and I don't think that's what this statement says
10 whatsoever.

11 Q Well it's completely different than what she testified
12 to at trial, which was that there was no weapon at all.
13 The only time she saw a weapon was when it was on the
14 floor; is that correct?

15 A I don't recall what she testified to at trial. I
16 haven't read that transcript.

17 Q Okay. Well the transcript is in evidence and ---

18 A Whatever it says, it says.

19 Q She indicates on more than one occasion that no, it was
20 not in his hand, no she didn't see it in his hand.
21 There's also a news release from the sheriff department
22 that was part of the file. Can you please ---

23 A Can you show me what it looks like so I can -- just
24 turn it around so I -- okay. I know what I'm looking
25 for now. It starts, Pelion man dies in shooting?

Charles Dayton Riddle - Cross-Examination by Ms. Williams

1 Q That's correct.

2 A Okay.

3 Q These are prepared by the sheriff's department; is that
4 correct?

5 A Uh-huh.

6 Q And on Friday, September 4, 1992, what was the
7 information the sheriff's department had that they
8 released to the media on this date? If you want, you
9 can read the whole thing, it's not very long.

10 A Oh, you just want me to read it out loud?

11 Q Yes, sir?

12 A Okay. Jimmy Lee Peal, 33, of 234 Sandler Drive in
13 Pelion, died Friday afternoon at Lexington Medical
14 Center from gunshot wounds he suffered during a
15 confrontation at the pet store. Fred Randall Rutland,
16 42 of 716 West Old Orangeburg Road in Summerville has
17 been charged with murder and is being held in the
18 Lexington County Detention Center according to Sheriff
19 James R. Metts. Metts gave this account of the
20 shooting incident.

21 Myrtle Sally Peal, estranged wife of the victim
22 was at the Bow Wow Pet Boutique at Two Notch and Cedar
23 Crest Roads about 1:30 this afternoon when Peal, who
24 apparently followed the couple entered the store and
25 drew a tech .9 automatic pistol which he had tucked in

Charles Dayton Riddle - Cross-Examination by Ms. Williams

1 into the back of his belt. Rutland drew a .25 caliber,
2 semiautomatic pistol and fired four times at Peal, who
3 did not fire his weapon. It's unknown at this time how
4 many bullets struck the victim. The paramedic unit
5 from Lexington County EMS took Peal to Lexington
6 Medical Center, where he was pronounced dead at
7 approximately 3 p.m. An autopsy has been ordered and
8 the investigation is continuing.

9 Q All right. So in the information that Mr. Gregory
10 received, it seems that the initial information and
11 everything that was written down from the sheriff's
12 department seemed to indicate that the victim in the
13 case was armed with a weapon when the incident
14 occurred?

15 A Sure.

16 Q Okay. And once the witness -- the main witness here --
17 who would you determine was the main witness in this
18 case?

19 A It was about four or five of them I would think.

20 Q Who was the only eyewitness to the crime other than the
21 parties charged or the victim?

22 A Kim Kestner.

23 Q Okay. So would you agree with me that her testimony is
24 very important?

25 A Sure I think her testimony is important.

Charles Dayton Riddle - Cross-Examination by Ms. Williams

1 Q And if there were some discrepancies that Mr. Gregory
2 could have pointed out in her testimony could have
3 affected her credibility in a way that the jury viewed
4 her testimony that that was certainly something that
5 would be important to bring out for a defense attorney?

6 A Maybe, yes, ma'am.

7 Q All right. But in this case, no one brought it to
8 court's attention that there had been statements which
9 could be seen as inconsistent with what the testimony
10 of this witness was?

11 A I haven't read the transcript.

12 Q Okay.

13 A And it's been since, what '93?

14 Q That's correct.

15 A And the transcript is the transcript.

16 Q Right. And on Page 142 of the transcript and this is
17 just for the record and 145 of the transcript, there
18 are clear indications that Ms. Kestner indicates that
19 she never saw Mr. Peal with a gun. It says, you never
20 saw Mr. Peal with a gun? No.

21 A I don't know.

22 Q Okay. But you would agree with me that if there was
23 any inconsistencies, it would be something important to
24 be pointed out at the jury for the credibility of a
25 witness?

Charles Dayton Riddle - Cross-Examination by Ms. Williams

1 MS. TODD: I'm not sure that's a proper
2 question for Mr. Riddle.

3 THE COURT: What's your objection then?

4 MS. WILLIAMS: He's a criminal attorney.

5 MS. TODD: There are no expert attorneys.

6 THE COURT: What's your objection?

7 MS. TODD: I don't know that it particularly is
8 Mr. Riddle's place to be saying what should have been done
9 at the trial.

10 THE COURT: And your objection is? What was
11 your question again, I will take care of it. What did you
12 ask Mr. Riddle?

13 MS. WILLIAMS: I asked him if it would be
14 important in a criminal matter to have inconsistencies
15 pointed out to a jury.

16 THE COURT: I think he's already answered that.

17 MR. RIDDLE: I thought I did about seven
18 questions ago.

19 MS. WILLIAMS: Okay. Thank you Mr. Riddle. I
20 don't have anything further.

21 THE COURT: Anything further of this witness??

22 MS. TODD: No, Your Honor.

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

24 Ms. Todd?

25 MS. TODD: Nothing further.

1 THE COURT: Ms. Williams?

2 MS. WILLIAMS: Yes, sir, if I could briefly
3 summarize some of the testimony today?

4 THE COURT: Sure.

5 **CLOSING ARGUMENTS**

6 MS. WILLIAMS: I don't doubt that Mr. Jack
7 Gregory earnestly felt that he could help Mr. Rutland in
8 this case, although I think it's clear from his testimony
9 that his criminal experience is rather limited to the
10 1970's and his experience with serious criminal cases was
11 limited to second sitting on a murder case in 1976, I
12 believe he said, which was roughly 15 years prior to
13 representing Mr. Rutland.

14 And I think that it's clear from the testimony
15 that he gave that he made some omissions that could be
16 considered to not rise to the standard that a criminal
17 defense attorney in this state should have ascertained as
18 farce witnesses being able to cross-examine them on prior
19 statements that they had given to law enforcement officers;
20 not requesting a continuance in this case when it was clear
21 that he did not have the availability of the witnesses that
22 could potentially help to exonerate or at least present a
23 complete story, a complete side of Mr. Rutland's case that
24 the jury in this instance missed.

25 The fact that he had knowledge of Kimberly

1 Kestner's incident statement and failed to bring it up,
2 that he had knowledge of a newspaper article which was
3 written shortly after this and failed to bring it up to
4 cross-examine her about which both were inconsistent with
5 her testimony I think showed that he failed to do something
6 very basic in criminal law and that is to impeach the
7 credibility of a witness who has given an inconsistent
8 statement in the past. His failure to do that along with
9 his failure to go into any of the evidence that Ms. Hunt
10 who is now Ms. Lankford could offer and that she indicated
11 that she could have proffered on the stand about the fact
12 that Mr. Rutland and Ms. Peal were trying to get away from
13 Jimmy Peal in this case and not the pursuers; that she had
14 had intimate contact throughout this time, leading right up
15 to the time that this incident happened; the fact that Mr.
16 Gregory failed to even cross-examine her and not only not
17 call her has a witness in Mr. Rutland's defense but failed
18 to cross-examine her on those very important points, which
19 could have again shown a different side of these are
20 events, a different side of what happened to the jury, it
21 potentially could have changed the outcome in this case.

22 In the application, there are several things
23 that are listed. Primarily it is not locating witnesses.
24 I think that the evidence shows and the motion for a new
25 trial that only four weeks after this trial, less than four

1 weeks after this trial, Mr. Gregory was able to track down
2 witnesses that could have -- that could have come in and
3 made statements against the credibility of some of the
4 State's witnesses; that could have given valuable
5 information to the jury. Simply because he didn't have
6 time to do it before and he felt that was a good enough
7 excuse. The standard that a criminal defense attorney has
8 however is not just you got to do with what you've got,
9 you've got to put up a good defense. If you don't feel
10 prepared, and you don't feel ready, the answer isn't just
11 that a client is going to suffer when he's charged with a
12 very serious offense such as murder and the other two
13 charges that he was charged with in addition to that crime.
14 Mr. Gregory couldn't offer you really any reason. The only
15 thing he could say was well, it was something that I guess
16 it just slipped my mind.

17 It wasn't this was a trial strategy that I
18 chose not to bring up these things. It wasn't that he had
19 thought about what he could do in the case specifically
20 with the witnesses and their changed testimony or the
21 witnesses that were not available and then became available
22 in the weeks after this, but he just said I guess it was my
23 omission, my bad, my fault; I didn't do it; maybe I should
24 have done it. And that certainly, again, is something that
25 a criminal -- a person charged with losing the liberty for

1 the rest of their life I think certainly deserves someone
2 who can't take that responsibility so lightly and simply
3 say because I didn't have the money to do it I didn't even
4 go so far as to ask the judge for a continuance in the
5 case. He certainly could have done that.

6 He had other options available to him. Any
7 time that someone is not paid for their services or doesn't
8 feel that they have been paid sufficiently for their
9 services and they had a fee contract, they can go before a
10 judge, they can ask to be excused, they can ask that the
11 defendant be found indigent so that there would be funds to
12 do testing.

13 The fact that forensics in this case were very
14 limited and Mr. Gregory also never asked the fact that the
15 fingerprints were never taken off of the .9 mm weapon that
16 was in question here, whether or not a victim was
17 brandishing this weapon could go straight to the ability of
18 Mr. Rutland to claim self-defense or defense of others.
19 The fact that he did not even question the State's
20 witnesses about their failure to do that, and it wasn't
21 that there were no fingerprints there, it was that they
22 never submitted this weapon for fingerprints so definitely
23 nothing in the criminal record that indicates that they
24 even tried to figure out if there were fingerprints on this
25 gun. Unfortunately, I've been notified by the Clerk of

1 Court that now the evidence in this case has been released.
2 Since 1995 it was released from the clerk's office and is
3 no longer available. So that evidence, that weapon, any of
4 that evidence wasn't available for me to look at or for me
5 to ask somebody else to look at at this late date, eleven
6 years after that. Again, I think that shows a failure of
7 Mr. Gregory to do what a prudent criminal offense attorney
8 would do in this very -- in a very serious charge and that
9 is to do some investigation into the matter to try to
10 ascertain whether or not there was not only witness
11 problems but forensic problems that could have been pointed
12 out; failing to question the coroner about a clear
13 statement that his findings did not rule out self-defense
14 in any -- and it simply again goes to -- I just don't
15 think -- I don't think he was familiar enough with the
16 territory to be able to delve in and to fully represent
17 someone.

18 Your Honor, Mr. Rutland has been incarcerated
19 for this crime since this happened -- since he was brought
20 back in 1993. He has tried for an appeal in this case and
21 it's something that PCR was a better remedy due to these
22 errors, due to the errors, again, not just the witness
23 problems, failing to investigate it to be able to challenge
24 evidentiary issues; also failing to request a charge on
25 defense of others when that wasn't presented although that

1 was agreed upon that that would be presented as a charge.
2 All of those things show that he fell below the standard
3 that a defense attorney should have in representing
4 somebody in a criminal charge of this degree. I think it's
5 clear from the testimony of Mr. -- Mr. Gregory as well as
6 Ms. Lankford who's the former Robin Hunt. They gave some
7 very critical evidence that could have changed the outcome
8 of this trial about the fact that Mr. Peal was, in fact, an
9 aggressor in this case, that he had threatened Sally Peal,
10 that he had threatened this other witness. These
11 statements were not unknown to the prosecutor, they were
12 not unknown to Mr. Gregory. However again, I think due to
13 inexperience in this arena, Mr. Arena chose not to even
14 question the witness about these things that could have
15 been very helpful to Mr. Rutland.

16 Again, time and time again, Mr. Gregory did not
17 indicate that he did this for any strategy or any trial
18 reason. It simply was, I didn't do it. I should have,
19 yeah, I messed up. And again, I would submit to Your Honor
20 that in a case this serious that that type of
21 representation simply does not rise to the standard and it
22 certainly could have affected the outcome of the case.

23 THE COURT: Thank you, ma'am.

24 Ms. Todd?

25 MS. TODD: Your Honor, there may be some

1 showing here deficient performance. However, the applicant
2 has failed to establish prejudice in this case. As to the
3 failure to impeach Kim Kestner, there's been no showing of
4 what she would have said in response to that. She's not
5 been presented here today. We don't know. So all the
6 affidavits that have been submitted regarding her testimony
7 and statements that she gave, we don't know why she
8 testified the way she did and she'd given the statements to
9 law enforcement that she did. We don't know what reason
10 she might have given for any inconsistencies.

11 As to the newspaper article, we don't have --
12 we don't have testimony here from the gentlemen that
13 allegedly took the quotes from her. We don't know -- we
14 don't have the witnesses who heard her say these things.
15 As to the failure to fully examine Robin Hunt, she wasn't
16 at the scene of the crime. The applicant has repeatedly
17 stated today through counsel that the key is Kim Kestner's
18 testimony about the gun and whether Jimmy Peal pulled a
19 gun. The applicant testified at trial that he pulled the
20 gun first. He pulled his gun first. Now, whether Kim
21 Kestner could have been impeached about that, maybe she
22 could have, but we don't know what her testimony would have
23 been.

24 And with Robin Hunt, she just doesn't know
25 anything about what happened that day. As to no request

1 for a continuance, it was a tactical decision on Mr.
2 Gregory's part. He testified to that today. He thought
3 everything was okay. He did not expect Ms. Kestner to
4 testify the way that she did. He expected the trial to go
5 differently than it did. He was concerned he was missing
6 some witnesses, but he was still working on that and he
7 thought he was okay. He said he thought that this was a
8 good time to do the trial. This was a good judge to do it
9 in front of.

10 As to no jury charge on defense of others, the
11 State would submit, the evidence, although there may have
12 been some agreement to have that charge, the evidence did
13 not support it. He went to the man's house earlier that
14 day, shot a shotgun up in the air and pointed the shotgun
15 at the victim. If you remember, as to that, he had a gun
16 pulled when the -- when the victim walked in. And as to
17 defense of others in particular, that goes to both defense
18 of others and to self-defense, but as to defense of others
19 in particular, the gun that Mr. Peal allegedly had was
20 pointed at Mr. Rutland and not at Ms. Peal at the time that
21 the applicant fired four rounds into Mr. Peal.

22 As to no prints being run on the gun, again,
23 there's no showing of prejudice and I know that the gun it
24 appears has been released from evidence, however, after it
25 was handled throughout that trial, you know, the State

1 would submit that there would be nothing remaining as far
2 as prints on that. As to no questioning regarding the
3 coroner's ruling out certain causes of death, there's been
4 no showing of what examination-question would have shown on
5 that.

6 And as to evidence about Mr. Peal being an
7 aggressor, the State would submit that there was evidence
8 about him being an aggressor, but also, you know, the
9 defendant pointed a gun at the victim the same day. He's
10 not an innocent party in this matter. The State just
11 submits that there's been no showing of prejudice in this
12 case.

13 THE COURT: Thank you, ma'am.

14 Anything further, Ms. Williams?

15 MS. WILLIAMS: Just briefly, Your Honor. The
16 statement, what exactly would the cross-examination show
17 really begs the question because the whole point is that
18 Mr. Gregory was not proficient enough in doing criminal
19 trials where he even understood the dynamics of testing
20 someone's credibility with prior inconsistent statements to
21 the point where he would use those to his advantage and to
22 his client's advantage, Mr. Rutland, in this case. It
23 really wouldn't have mattered what they would have said.
24 What somebody said on cross-examination, what would the
25 forensic psychologist said, what would have the witnesses

1 said, what would Kim Kestner said, the whole point is their
2 credibility would have been challenged at trial. The
3 credibility would have then become an issue for the jurors
4 at trial because it would have been made known to them that
5 there were inconsistencies in what the State was presenting
6 and what the evidence had been, not only in writing, but
7 the State had access to, but what information they turned
8 over to Mr. Gregory, the defense attorney. And that in and
9 of itself is what prejudices Mr. Rutland, the fact that Mr.
10 Gregory did not attack the credibility of witnesses when he
11 had the opportunity to, when there was ample evidence that
12 there is sufficient -- there is sufficient evidence to
13 attack their credibility and he just let it go. He just
14 failed to do that.

15 The fact that he could have testified, he could
16 have cross-examined her on the State's newspaper regardless
17 of whether or not he brought the reporter in. If she had
18 denied it, then maybe he couldn't have gotten it in but he
19 certainly could have cross-examined her on it and her
20 credibility again would have been attacked in front of the
21 jury and for the only witness in an eyewitness murder case
22 that can say what happened, I think her credibility is
23 crucial to this case and that in and of itself prejudiced
24 the outcome for Mr. Rutland for the potential for him to
25 have the jury understand the full facts of the case.

1 The other indication is that the -- she argues
2 that there's no prejudice because the evidence supports the
3 fact that Mr. Rutland had pointed a weapon at the victim
4 earlier in the day so represented in this so what does any
5 of this matter? Well it matters because it's un refuted
6 that the victim then sought out Mr. Rutland, the defendant,
7 at trial. That's un refuted.

8 THE COURT: How did the victim find out that
9 Mr. Rutland and Ms. Peal were at the Bow Wow in the first
10 place?

11 MS. WILLIAMS: The indication is that at least
12 in the evidence that was originally presented in the
13 discovery in the case, it appeared that he went there
14 pursuing them because he knew they were going to try to get
15 another vehicle to escape.

16 THE COURT: But my question is, how did he know
17 that?

18 MS. TODD: Your Honor, I don't know ---

19 THE COURT: Please, Ms. Todd, relax. Let me
20 ask Ms. Williams this question.

21 What's in the record that indicates that the
22 victim knew that his estranged wife and the defendant were
23 going to be at the Bow Wow in the first place?

24 MS. WILLIAMS: The only evidence that was
25 presented at trial was Ms. Hunt indicated that she might

1 have overheard a conversation between Ms. Sally Peal saying
2 that ---

3 THE COURT: That the victim was invited there
4 by his estranged wife?

5 MS. WILLIAMS: I think ---

6 THE COURT: That's the only reference in the
7 record; am I correct?

8 MS. WILLIAMS: That reference in the record
9 which is also missing from the initial statement that she
10 gave to the police officers and missing from the initial
11 report about any of this happening. I think when this is
12 first investigated, none of that came out until later on.
13 Ms. Hunt, who's now Lankford indicated she felt pressured
14 just to testify on that point which emphasized something
15 that, again, I think points the jury in one direction where
16 his not bringing up these other issues doesn't allow
17 them ---

18 THE COURT: So the answer is you're not sure?

19 MS. WILLIAMS: There's an indication that all
20 of these people were intimate, they were familiar with
21 where they worked. In my understanding and the
22 interpretation of the evidence, I don't think it would have
23 been hard for Mr. Peal to know where they were going to try
24 to get a car. They all knew each other, he knew the
25 Kestners, there's no question about that. Ms. Peal knew

1 the Kestners.

2 THE COURT: Well that's just supposition and
3 speculation isn't it? It doesn't matter. I was just
4 curious. Thank you, ma'am.

5 Yes, Ms. Today, you had something you wanted to
6 say earlier.

7 MS. TODD: I apologize, Your Honor. I believe
8 that Ms. Williams was referring to something being in the
9 discovery that I don't know to have been in discovery and
10 that was all.

11 THE COURT: Thank you both for your
12 presentation. I will take all the matters into account
13 I've heard for this case and let you know my decision in
14 due course.

15

16

17 * * * * * END OF TRANSCRIPT * * * * *

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1 STATE OF SOUTH CAROLINA)

2 COUNTY OF AIKEN)

CERTIFICATE OF REPORTER

3 **RECEIVED**

4 DATE

04/18/2007

5 
(SIGNATURE)

6 I, THE UNDERSIGNED, Brenda W. Sigwald, Official
7 Court Reporter for the Second Judicial Circuit of the State
8 of South Carolina, do hereby certify that I reported the
9 proceedings in the captioned case in the Court of Common
10 Pleas in and for the State of South Carolina on the 19th
11 day of April, 2006.

12 I FURTHER CERTIFY that the foregoing pages,
13 numbered 3 through 119, constitute a true, accurate and
14 complete transcript of said hearing.

15 I FURTHER CERTIFY that I am neither kin,
16 counsel, nor of interest to any party hereto.

17 IN WITNESS WHEREOF, I have hereunto set my hand
18 and seal at Aiken County, this 1st day of April, 2007.

19

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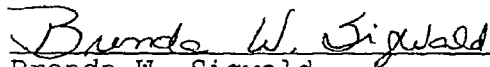
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Brenda W. Sigwald,
Court Reporter and Notary Public
For the State of South Carolina
My commission expires
February 25, 2010

LCE-421

I, ROBIN T. HUNT, am not under arrest, nor am I being detained for any criminal offenses concerning the events I am about to make known to DET. BILL ALLEN

Without being accused of or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the following information of my own free will, for whatever purposes it may serve.

I am 52 years of age, and I live LEXINGTON SC

BACK AROUND THE FIRST OF THE SUMMER SALLY TOLD ME ABOUT A RELATIONSHIP SHE WAS HAVING WITH FRED. AROUND JUNE OR JULY SALLY PEELE AND FRED WENT TO TEXAS TOGETHER. SALLY CALLED ME AND SAID HER AND FRED WERE IN A HOTEL AND OUT OF MONEY. SALLY CAME AND STAYED AT MY HOUSE. SALLY SAID JIMMY HAD THEIR CHILD. SALLY AGREED TO GO BACK WITH JIMMY. ALL THIS WAS IN JUNE OR JULY.

YESTERDAY, I MEAN THE DAY BEFORE YESTERDAY. FRED HAD JIMMY AND SALLY'S BROWN CAR. FRED WAS GOING TO BRING THE BROWN CAR TO MY HOUSE. YESTERDAY MORNING WHEN I GOT UP THE BROWN CAR WAS AT MY HOUSE. SALLY CAME OVER IN THE BLUE + WHITE CAR. SHE WANTED ME TO FOLLOW HER. I DROVE THE BLUE + WHITE CAR. SALLY WANTED TO STAY WITH ME A FEW DAYS. WHEN WE GOT TO SALLY AND JIMMY'S TRAILER. SALLY AND JIMMY WERE OUT SIDE TALKING. SALLY TOLD ME JIMMY HAD OVERDOSED ON VALIUM.

I have read each page of this statement consisting of page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct.

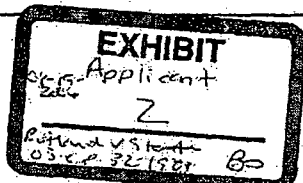
Dated at 800 OLD TWO NORTH RT, this 4 day of Sept 19 92.

WITNESS: Bill B. Allen

WITNESS:

x Robin T. Hunt
Signature of person giving voluntary statement

LCF-421



Pg 2 of 3 pgs

WHEN WE WERE IN THE CAR JIMMY CAME OUT OF THE TRAILER HE PICKED UP A BOARD AND CAME OVER TO THE CAR. JIMMY OPENED THE DRIVER'S DOOR. SALLY GOT OUT AND THEY FOUGHT OVER JIMMY OPENING THE HOOD. JIMMY OPENED THE HOOD AND STARTED HITTING THE ENGINE. JIMMY LEFT IN THE BLUE AND WHITE CAR. SALLY WAS TRYING TO FIX WHAT JIMMY BROKE. JIMMY CAME BACK, GOT OUT, AND CAME TOWARDS MY SIDE OF CAR WITH A BOARD. THIS TIME HE ATTACKED THE BREATHER. WE STARTED WACKING. ABOUT A 1/2 MILE JIMMY CAME DOWN THE ROAD. WE AD TO JUMPED OUT OF HIS WAY. JIMMY TRIED TO GET US IN THE CAR. WE DIDNT GET IN. WE CALLED A TAXI. YESTERDAY AFTERNOON WHEN WE GOT TO MY HOUSE JIMMY WAS THERE. HE WAS CURSING SALLY. HE TOLD SALLY IF HE COULDN'T HAVE HER NO ONE COULD. I TOLD JIMMY TO LEAVE OR I'D CALL LCSD. HE TOLD ME HE WOULD KILL ME TOO. SALLY LEFT MY HOUSE AT ABOUT MID-NIGHT I TOOK HER TO THE AIRPORT. THIS MORNING SALLY CALLED ME TO PICK HER UP AT A RESTAURANT

I have read this page, initialed corrections or changes, if any, and received a copy of this page. I certify that the facts contained herein are true and correct to the best of my knowledge.

x Robbin J. Hunt
Signature of person giving voluntary statement

rn to before me this ___ day of ___ 19__.

Notary Public of South Carolina

VOLUNTARY STATEMENT OF SUSPECT OF DEFENDANT

P 3 of 3 pgs

ON KNOX ABBOTT DR. THE KETTLE I THINK FRED AND SALLY WERE THERE. I TOOK SALLY AND FRED TO MY HOUSE. SALLY WANTED TO FIND HER DAUGHTER. I TOLD SALLY TO CALL MY ATTORNEY. SALLY WANTED TO FIND HER DAUGHTER FIRST AROUND MID-DAY SALLY BORROWED MY VAN.

I WENT WITH SALLY TO THEIR HOUSE, TRAILER, TO LOOK FOR HER DAUGHTER. JIMMY GRABBED SALLY. DAVID GOT THE RIFLE IN THE VAN. ~~FRED~~ ^{FRED} TOLD JIMMY "DON'T MAKE ME SHOOT YOU". JIMMY SAID ALL HE WANTED TO DO IS TALK TO SALLY. "ED DIDNT POINT THE GUN. FRED SAID "DON'T MAKE ME TAKE YOUR LEGS OUT FROM UNDER YOU." WHEN WE LEFT FRED SAID HE WASNT GOING TO KILL JIMMY. MAYBE JUST CRIPPLE HIM. THAT WHEN WE WENT BACK TO MY HOUSE.

ME, SALLY, AND FRED WENT TO THE LEXINGTON PAWN SHOP. SALLY AND FRED WENT IN AND GOT THE SHOT GUN.

THE LAST TIME I SAW JIMMY AND THE BROWN CAR AT SALLY AND JIMMY'S TRAILER IN PERION.

I have read this page, initialed corrections or changes, if any, and received a copy of this page. I certify that the facts contained herein are true and correct to the best of my knowledge.

Robert J. Hunt

Signature of person giving voluntary statement

Sworn to before me this day of 19 .

Notary Public of South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS
FOR THE ELEVENTH JUDICIAL CIRCUIT

The State of South Carolina)

vs.)

Fred R. Rutland,)

Defendant.)

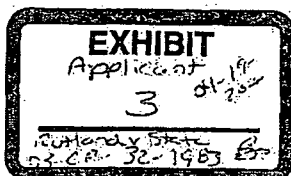
AFFIDAVIT OF WESLEY BRUCE VOWELL

PERSONALLY APPEARS BEFORE ME Wesley Bruce Vowell who, being sworn,
deposes and states the following:

I reside at [REDACTED], Lexington, South Carolina. My birth date is [REDACTED]
[REDACTED], and I am the son of Robbin Hunt. I desire to make a statement at this time regarding
the above-captioned matter because I believe an injustice was done when the Defendant,
Fred R., Rutland was found guilty of murder. That I would have come forward sooner and
with the foregoing information and given it at trial had I realized it would be of importance
and had I known that Kimberly Kestner's testimony would not accurately reflect what I
heard her relate regarding the events of Fred R. Rutland's shooting of Jimmy Peele on
September 4, 1992. I make this statement under no duress whatsoever and only in the
interest of justice.

That on the day or the day after the day in mid-September, 1992, when Fred R.
Rutland was released on bond, I was in my mother's kitchen at [REDACTED]. Present
were Fred Rutland, Sally Peele, Danny Kestner, and Kimberly Kestner.

Kim Kestner stated to Fred Rutland, "Thank you. You probably saved my life." She
told him that if "the safety had been off" of Jimmy Peele's gun "we all would have been
dead."



A TRUE COPY
Thomas H. Gromford
Lex. Co. C.C.C.P., G.S. F.C.

I also heard Kim Kestner state that she heard Fred Rutland warning Jimmy Peele to put down his 9mm pistol by saying, "Don't Jimmy, don't." She also stated that when she saw Jimmy Peele falling after being shot that she saw his (Jimmy's) 9mm pistol fall from his hand. She further stated that she saw both Fred Rutland and Sally Peele go to Jimmy Peele's body immediately after he had been shot and give him C.P.R.

FURTHER AFFIANT SAITH NOT.

Wesley Bruce Vowell
Wesley Bruce Vowell

SWORN TO before me
this 12th day of June, 1993.

James W. Brinn
Notary Public for the State of South Carolina

My Commission Expires: 6/4/95

A TRUE COPY

Blanca H. Grimsford
Lex. Co. C.C.C.P., G.S. P.C.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

**IN THE COURT OF GENERAL SESSIONS
FOR THE ELEVENTH JUDICIAL CIRCUIT**

The State of South Carolina

vs.

Fred R. Rutland,

Defendant.

AFFIDAVIT OF BELINDA JOYCE SMITH

PERSONALLY APPEARS BEFORE ME Belinda Joyce Smith who, being sworn,
deposes and states the following:

I reside at [REDACTED], West Columbia, South Carolina. My birth date is

██████████. I desire to make a statement at this time regarding the above-captioned matter because I believe an injustice was done when the Defendant, Fred R., Rutland was found guilty of murder. That I would have come forward sooner and with the foregoing information and given it at trial had I realized it would be of importance and had I known that Kimberly Kestner's testimony would not accurately reflect what I heard her relate regarding the events of Fred R. Rutland's shooting of Jimmy Peele on September 4, 1992. I make this statement under no duress whatsoever and only in the interest of justice.

That on the day of the shooting, September 4, 1992, I spent the night with Kimberly and Danny Kestner in their quarters at the Bow Wow Boutique. While Danny was asleep, Kim and I were in the main room in which the shooting occurred and she proceeded to act out for me her recollection of exactly how the shooting occurred. A TRUE CO

She said that when Jimmy came through the door of the Bow Wow Boutique and got to the c.

to a place in the hallway near the gate separating him from where she was, she could see the cold look in his eye and saw him pull the 9mm pistol from behind his back and aim it

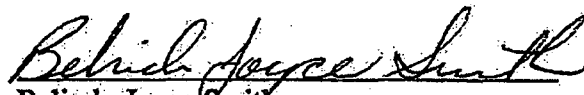
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at Sally Peele. Kim stated to me that when she heard Fred Rutland warning Jimmy Peele to put down his 9mm pistol by saying, "Don't do it, Jimmy," Jimmy then pointed his gun at Fred and then Fred, after warning Jimmy again, then fired his gun.

Kim also said that when she saw Jimmy with the big 9mm machine gun-type pistol, she was afraid that everyone in the room was going to die, including herself and she said words to the effect that Fred had saved her life by shooting Jimmy.

FURTHER AFFIANT SAITH NOT.


Belinda Joyce Smith

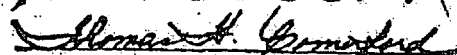
SWORN TO before me

this 15th day of June, 1993.


Notary Public for the State of South Carolina

My Commission Expires: 1-11-2000

A TRUE COPY


Lex. Co. C.C.C.P., G.S. F.C.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS
FOR THE ELEVENTH JUDICIAL CIRCUIT

The State of South Carolina)

vs.)

Fred R. Rutland,)

Defendant.)

AFFIDAVIT OF CINDY LOU WISE

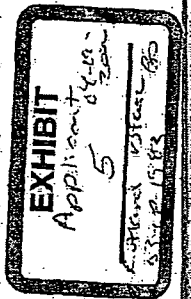
PERSONALLY APPEARS BEFORE ME Cindy Lou Wise, who, being sworn, deposes
and states the following:

I reside at [REDACTED], Leesville, South Carolina. My birth date is [REDACTED].

I desire to make a statement at this time regarding the above-captioned matter because I believe an injustice was done when the Defendant, Fred R., Rutland was found guilty of murder. That I would have come forward sooner and with the foregoing information and given it at trial had I realized it would be of importance and had I known that Kimberly Kestner's testimony would not accurately reflect what I heard her relate regarding the events of Fred R. Rutland's shooting of Jimmy Peele on September 4, 1992. I make this statement under no duress whatsoever and only in the interest of justice.

That some time in mid-September, 1992, after the shooting of Jimmy Peele by Fred Rutland, I was visiting Robbin Hunt's house at [REDACTED] Lexington, S.C., Present were Robbin Hunt; her two sons, Bruce and Bobby; my boyfriend ^{Paul} Danny Kestner and ^{clw} → and Belinda Smith Kimberly Kestner. I overheard Kim Kestner say that on the day of the shooting, as Jimmy Peele walked into the Bow Wow Boutique, he pulled a gun and aimed it at everyone there.

That Fred Rutland, reacting to Jimmy's drawing of his gun, drew the gun of Sally Peele's which he had, and fired in self defense.



A TRUE COPY
Thomas H. Gentry
Lex. Co. C.C.C.P., G.S. P.C.

After the trial of Fred Rutland, I was in the Crossroads Animal Clinic with my mother, my boyfriend, and Kim Kestner. At that time Kim said that Jimmy entered the Bow Wow Boutique with a strange look in his eyes and a gun in his hand.

FURTHER AFFIANT SAITH NOT.

Cindy Lou Wise
Cindy Lou Wise

SWORN TO before me

this 15th day of June, 1993.

[Signature]
Notary Public for the State of South Carolina

My Commission Expires: 1-11-2000

A TRUE COPY

[Signature]
Lex. Co. C.C.C.P., C.S. P.C.

ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Fred R. Rutland, SCDC # 197903,

Applicant,

V.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

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U.S. Supreme Court
ORDER DENYING
POST-CONVICTION RELIEF

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PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 29, 2003. Respondent made its Return on March 31, 2004. An evidentiary hearing into the matter was convened on April 19, 2006, at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Jennifer Niles Williams, Esquire. Respondent was represented by Sabrina C. Todd of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. He also offered the testimony of David Farrell, Esquire; trial counsel, Jack Gregory; Frank Heming; and Robbie Lankford (formerly, Robin Hunt). Respondent presented the testimony of Charles Dayton Riddle, III, Esquire. The victim's father, Thomas Peele, and sister, Crystal Knight, were also present during the hearing.

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. Applicant was indicted by the Lexington County grand jury in November of 1992 for murder

(92-GS-32-3398), in February of 1993 for possession of a firearm during the commission of a violent crime (93-GS-32-586), and in May of 1993 for pointing a firearm (93-GS-32-1514). He was represented by Mr. Gregory and underwent a jury trial on May 26-29, 2003. Applicant was convicted as indicted and sentenced by the Honorable Frank Eppes to life imprisonment for murder, 10 years for pointing a firearm, and 5 years for possession of a firearm during the commission of a violent crime. In a motion dated June 6, 1993, Applicant requested a new trial based on several allegations of trial court error. After that motion was denied, Applicant submitted a Motion for a New Trial on After-Discovered Evidence and to Stay the Time for Perfecting an Appeal. This motion was dated June 15, 1993 and filed on June 21, 1993. Judge Eppes denied the motion on June 23, 1995. Both of these post-trial motions were filed by Gregory on Applicant's behalf.

Applicant filed a Notice of Appeal on June 23, 1993. The South Carolina Supreme Court affirmed Applicant's convictions and sentences. State v. Rutland, Op. No. 95-MO-263 (S.C. Sup. Ct. filed August 25, 1995). Applicant's petition for rehearing was denied on October 9, 1995 and the case was also remitted on October 9, 1995.

In a pro se motion dated April 17, 1996, Applicant again moved for a new trial based on newly or after-discovered evidence. Because of allegations of impropriety by the prosecution, the State was represented on the motion by the South Carolina Attorney General's Office. The State made its return to the motion on July 27, 2001. On May 28, 2003, Applicant voluntarily withdrew his pending new trial motion with the intention of filing the current action and apparently with the understanding that the State would not seek to have this action dismissed on the ground it was barred by the applicable statute of limitations.

FACTUAL BACKGROUND

The case against Applicant arose from the shooting death of Jimmy Peele at the Bow Wow Boutique, a pet grooming salon. Peele's estranged wife, Sally Peele, was involved with Applicant, a married man with whom she had worked. (Trial tr. pp. 209-11.) Sally was a commercial carpenter and although she and Applicant contend she was abused by Peele, a detective testified his investigation revealed Sally actually abused Peele throughout their marriage. (Trial tr. pp. 311-13; pp. 240-43.) Earlier on the day of the shooting, Applicant and Sally went to a pawn shop where Sally purchased a shotgun, a pistol, and ammunition for both weapons. (Trial tr. p. 286-94.) Later, they went to the Peele residence. Sally went inside and upon encountering Peele, pointed the pistol at him. Sally backed out of the door after Peele verbally challenged her, and he followed her outside. (Trial tr. pp. 268-72.) Applicant then came out of a van, pointing a shotgun at Peele. (Trial tr. pp. 272-73.) Applicant fired a shot in the air and then pointed the gun again at Peele. (Trial tr. pp. 273-74.) Bruce Sharpe, a friend of Peele's, was present during the altercation and stated Peele was unarmed and not looking for trouble when Applicant and Sally arrived. (Trial tr. pp. 275-76.) Applicant, by contrast, made a comment about crippling Peele, which was overheard by Robin Hunt, a passenger who was with Applicant and Sally. (Trial tr. p. 497.) Peele then called 911 to report the incident. (Trial tr. pp. 244-45, 557.)

Applicant, Sally, and Hunt went to Hunt's home, where Hunt overheard Sally's end of a telephone call. Sally was talking to someone named "Jimmy" and arranged to meet him at the boutique. (Trial tr. pp. 498-502.)

Thereafter, Applicant and Sally arrived at the Bow Wow Boutique, purportedly to ask Kim and Daniel Kestner to sell them a car. After the Kestners agreed to sell the car, Mr. Kestner went

outside to look for the car title. (Trial tr. pp.107-12, 117.) Peele arrived, went inside, and was shot four times while Mr. Kestner was outside. At trial, Kim Kestner testified the only thing she saw in Peele's hands was a pack of cigarettes, but he did put the pack in his mouth and reach behind his back before Applicant shot him. (Trial tr. pp.137-42) After the shooting, Kestner saw Applicant with one gun and another gun on the floor. (Trial tr. pp.143-44.) She testified she never saw Peele with a gun. (Trial tr. p.145.) Applicant, however, testified Peele was armed when he entered the boutique; although they both stated Applicant drew his weapon first. (Trial tr. pp.417-23.)

The State presented evidence that Applicant admitted to a police detective that about a month before the shooting, he had talked with Sally about doing away with, or having something done to take care of, Peele. (Tr.60-61, Trial tr. pp.241-242.) David Jones, Applicant's cellmate in jail, testified Applicant said he was in jail for killing a man, that the man deserved it, and that he offered to do it a month earlier. (Trial tr. p.506) Jones further testified Applicant was cocky, arrogant and without remorse, almost boasting about killing Peele. Applicant also told Jones about buying the guns earlier in the day and about going to the boutique with the knowledge that Peele would also be there. (Trial tr. pp.506-08.)

The State's theory essentially was that Applicant and Sally lured Peele to the boutique with the intention of killing him and that they might have planted the gun after the shooting in an effort to establish self-defense. (Trial tr. p.558-61, 565-66.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony

accordingly. Set forth below are the relevant findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (2003).

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 proceedings. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). As discussed below, Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

General Lack of Trial Preparation

Applicant contends Gregory was ineffective in that he failed to adequately prepare for trial. This Court does not agree.

David Farrell testified he was appointed to represent Applicant on his pro se motion for a new trial based on after-discovered evidence.¹ Farrell testified he recalled an accusation that Peele's father paid off a witness, but determined that was simply a rumor. After investigating further, Farrell reached the conclusion that although there was not much to support an after-discovered evidence motion, Applicant had some legitimate PCR issues. (PCR tr. pp.5-6.) Farrell spoke with James Irvin, who worked for Mr. Gregory and assisted him in preparing Applicant's defense. Irvin, who was deceased by the time of the PCR hearing, told Farrell that Gregory contacted him approximately ten days before trial and said: (1) he had never been paid all the money he was promised, (2) he had not expected the case to go to trial, and (3) he was under-prepared. (PCR tr. pp.6-9.)

Gregory testified he practiced criminal law for 30 years. (PCR tr. p.11, 48.) His former legal secretary, Robin Hunt, introduced him to Applicant. (PCR tr. p.11.) Gregory recalled that while in jail, Applicant gave Gregory one dollar to retain him and later signed a retainer agreement. (PCR tr. p.11.) Gregory anticipated Applicant would provide additional money pursuant to their fee agreement to fund the investigation and preparation of the defense. However, when the Applicant

¹ Gregory was disbarred in 2000. In re Gregory, 340 S.C. 413, 532 S.E.2d 605 (2000).

failed to fulfill his financial obligation under the retainer agreement, the only resource Gregory had to complete an investigation was the limited cash flow from his office. (PCR tr. pp.11-13.) Additionally, after Applicant bonded out of jail, he left the jurisdiction with Sally Peele in violation of his bond. (PCR tr. pp.13-14, 50.) Authorities brought Applicant back to the jurisdiction shortly before trial. Thus during the months before trial, Applicant was almost completely unavailable to assist Gregory in preparing his defense. (PCR tr. pp.14, 50.)

According to Gregory, the defense received no more than two weeks' notice of trial. Once they received notice of trial, Gregory and Irvin, his paralegal, tried to find witnesses when they were not otherwise engaged in running the firm. Irvin was the only person helping him get ready for trial. Their efforts to find witnesses for trial, including Hunt, were unsuccessful. (PCR tr. pp.14-17.) Despite these difficulties, Gregory testified he was not concerned about going to trial when he did. He thought the police statements were pretty much in the defense's favor and that they supported both self-defense and defense of others. Additionally, he was confident in his trial skills and encouraged by the identity of the trial judge. With these things in mind, Gregory believed it was better to proceed to trial rather than to seek a postponement. Thus he did not seek a continuance or mention his difficulty in finding witnesses to the trial court, but rather simply kept trying to locate them. (PCR tr. pp.29-31.) After trial, several witnesses who were not available for trial came forward and gave statements. Gregory submitted their affidavits to support the defense's motion for a new trial based on after-discovered evidence. (PCR tr. p.31.)

Applicant testified at the PCR hearing that he bonded out of jail four or five days after the shooting. He met with Gregory at Hunt's home for a couple of hours. That was the only time they discussed the substance of the case before Applicant went to Florida. (PCR tr. pp.86-87.) When he

saw Gregory after that, Gregory would ask him about getting money for the defense. Applicant testified he probably left for Florida in late January 1993. Law enforcement brought him back in early May and his case was called to trial on May 23. (PCR tr. p.87.) Applicant did not feel prepared for trial when it began. (PCR tr. p.89.)

Although Gregory's trial preparation has been harshly criticized, his performance must be considered in light of the circumstances of his representation. Counsel believed the case would not go to trial and that much of the State's own evidence would support a claim of self-defense. Additionally, the case came to trial quickly, with no more than two weeks notice to the defense. Moreover, Applicant only paid him \$1 toward their retainer agreement and, rather than assist in the preparation of his defense, Applicant left the jurisdiction with the victim's wife while on bond.² Applicant has failed to establish that in the particular situation in which Gregory found himself, his performance during trial preparation fell below the standard of reasonableness under prevailing professional norms. Applicant has also failed to establish prejudice from Gregory's trial preparation in general. However, several specific allegations regarding trial counsel's performance are discussed below.

Additionally, this Court does not find trial counsel's decision to proceed to trial rather than requesting a continuance rises to the level of ineffective assistance of counsel. Based on Gregory's explanations, the presumption that his decision was professionally reasonable has not been overcome.

Cross-Examination of Kimberly Kestner

Applicant asserts Gregory was ineffective for failing to impeach State witness Kimberly

² This latter fact was even introduced at Applicant's trial. (Trial tr. pp.443-45.)

Kestner. Kestner testified at trial that she did not see a weapon in Jimmy Peele's hands at the boutique, but that she did see him reach behind his back before he was shot. (Trial tr. pp.139-42.) Kestner testified that after the shooting she saw two guns on the floor. She reiterated that she had not seen Peele with a gun. (Trial tr. pp.144-45.) Applicant complains Gregory should have impeached Kestner with her police statement in which she stated she saw Peele pull a gun just before the shooting and a newspaper article in which she was quoted as saying Peele pulled a gun and prepared to shoot without any explanation. As to his failure to impeach Kestner with the newspaper article, Gregory testified that the article was several months old and he was unable to locate it. He further explained he did not expect Kestner to testify at trial that she had not seen Peele with a gun. Gregory described his failure to impeach Kestner with her police statement as an oversight. (Tr. pp. 51-52.) He further testified he does not know what Kestner would have said had she been cross-examined on her statements to police or the media. (Tr. pp.62-63.)

This Court agrees with Applicant that Gregory's failure to impeach Kestner with her prior statements that she saw Peele draw a weapon constituted deficient performance. However, Applicant has not carried his burden of establishing prejudice in that he failed to present Kestner's testimony at the PCR hearing. Had he done so, Kestner might have denied the statements attributed to her, requiring they be proved through extrinsic evidence which Applicant also did not provide at his PCR hearing, or she might have provided some satisfactory explanation for the difference between her pretrial statements and her trial testimony. Without presenting Kestner's testimony, Applicant leaves this Court to speculate as to the impact the proposed impeachment of Kestner would have had at Applicant's trial. Applicant's request for relief on this issue is therefore denied.

Cross-Examination of Robin Hunt

Applicant contends Gregory was ineffective for failing to establish Peele was dangerous and that he threatened Sally in the days before the shooting. He maintains Gregory could have done this through examination of Robin Hunt. The State called Hunt as a reply witness at Applicant's trial, and she testified she was with Applicant and Sally when they went to the Peele residence on the day of the shooting. As they were leaving the home, Applicant said he would cripple Peele. (Trial tr. p.497.) Hunt testified the group went to her home, where she overheard Sally on the phone with someone named Jimmy, whom she asked to meet her at the Bow-Wow Boutique. (Trial tr. pp.498-501.)

Unlike Kestner, Applicant presented testimony of Hunt, now Robbie Lankford, at his PCR hearing. At the PCR hearing, she testified she also accompanied Applicant and Sally to the pawn shop to reclaim a shotgun and purchase a pistol. Sally wanted the gun for protection because Peele had been threatening and chasing her. She testified Peele had threatened to kill her and Sally, had attacked Sally's car with a 2 X 4, and had attempted to run them off the road when they were walking to call for a ride home. (PCR tr. pp.72-74.) Applicant and Sally went to the boutique to try to buy a car so they could leave the area together. (PCR tr. pp.74-75.) Her understanding was that Sally and Applicant were not planning to go after Peele, but rather were trying to get away from him. (PCR tr. p.76.) Gregory testified he was planning to call Hunt to testify to these matters, but was unable to locate her for trial. Nevertheless, when she testified as a State witness, he did not question her about these matters. He did, however, cross examine her on her inability to know who Sally Peele was talking to on the phone at her home or if there was another person on the phone with her. (Tr. pp. 52-54.)

Although her testimony at the PCR hearing portrayed Peele as an aggressor, this Court finds Hunt (Lankford) was not a credible witness. Although she claims to have been friends with both Peele and his wife Sally, she spent the last few days before the shooting with Sally and Applicant and helped Applicant after his arrest. Furthermore, Hunt was not present during the shooting and thus has no personal knowledge of how it took place. For these reasons, Gregory's failure to elicit testimony that Peele was threatening and aggressive in the days before the shooting and Sally and Applicant were simply trying to get away from him, though arguably deficient, was not ineffective. Applicant has failed to show his defense suffered because of the lack of this non-credible and biased testimony. This allegation is therefore denied and dismissed.

Failure to Locate Other Witnesses

Applicant next challenges Gregory's failure to secure the favorable trial testimony of several witnesses, including Cindy Lou Wise, Belinda Smith, and Charles Howard. However, Applicant did not present these witnesses at his PCR hearing and thus has failed to meet his burden of establishing counsel's ineffectiveness. As such, the allegations regarding these witnesses are denied and dismissed.

Gun Attributed to Peele

Although not raised as an issue by Applicant, Gregory testified he believed his biggest mistake was not objecting to the prosecutor's statement during closing argument that after shooting Peele, Applicant threw down the 9 mm pistol to make it appear that Peele was armed. (PCR tr. p.36.) Gregory notes there was no fingerprint evidence taken from the gun, but he did not question the investigating officer about that issue. Gregory stated there was a lack of time and money to hire an expert to independently test the gun for fingerprint evidence.

Although the prosecutor clearly suggested the gun might have been "planted" near Peele's body after the shooting, he did not assert as fact that Applicant threw down the 9mm gun attributed to Peele after shooting him with the other pistol. (Trial tr.pp.558-61, 565-66.) Thus Gregory's confession of deficient performance on this issue is not supported by the record. Further, the prosecutor's inference that the gun might have been planted was supported by evidence introduced at trial. For these reasons, this issue is denied and dismissed as without merit.

To the extent Gregory's testimony that the lack of fingerprint analysis can be construed as a claim that he was ineffective for not pursuing forensic evidence on that issue, Applicant has failed to establish Gregory's inaction prejudiced him and the issue must, therefore, be denied.

Jury Charges

Applicant alleges Gregory was ineffective for not objecting to the trial court's failure to issue a defense of others charge to the jury. He also asserts Gregory was ineffective for failing to object to the trial court's issuance of a mutual combat instruction.

Although the State did not object to it at trial, his Court concludes, based on the testimony offered at trial (as well as the PCR hearing), that a defense of others charge was not appropriate. (Trial tr. p.309.) According to Applicant's own testimony at trial and at the PCR hearing, Sally Peele was not in imminent danger at the time he fired the gun at her husband, Jimmy Peele. See Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998) (holding that a defendant is entitled to a defense of others charge only where there is evidence he was lawfully defending another person, i.e., the other person would have had the right to take the decedent's life in self-defense). Instead, Applicant explained that Peele was pointing his weapon at Applicant when Applicant began to fire at him. (PCR tr. p.91, trial tr. pp.419-24.) Additionally, Sally was not without fault in brining on the difficulty as she had

pointed a pistol at Peele earlier in the day.

Regarding the mutual combat jury instruction, Gregory explained he believed the charge was proper considering voluntary manslaughter was charged and thought it was helpful. Based on the evidence of the altercation between Applicant and Peele earlier in the day and the evidence Sally asked Peele to meet her at the boutique, this Court finds no fault in Gregory's decision not to object to the charge, particularly considering the verdict option of voluntary manslaughter given to the jury. On this issue, Applicant has failed to overcome the presumption that Gregory's exercised reasonable professional judgment. Additionally, although the jury convicted Applicant of murder rather than manslaughter, viewing counsel's decision through the hindsight of the jury's verdict is not appropriate. See Butler v. State, 286 S.C. 441, 444-45, 334 S.E.2d 813, 815-16 (1985) (quoting Strickland v. Washington). Based on the information available to him at that time, Gregory's decision was an exercise of reasonable professional judgment and Applicant has failed to overcome the presumption of effectiveness to which counsel was entitled. (PCR tr. pp.44-47.)

Any Other Allegations

As to any and all allegations that 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 Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings.

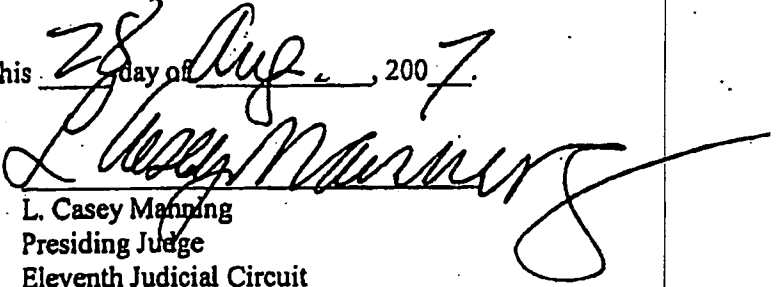
Applicant has failed to establish counsel was ineffective on any of the challenged issues. Therefore, this application for PCR must be denied and dismissed with prejudice.

This Court advises that if Applicant wants to secure appellate review of this Order, a notice of appeal must be filed and served within thirty (30) days from the receipt of this Order. Pursuant to Rule 71.1(g), SCRCP, PCR counsel must file a notice of appeal on Applicant's behalf if he wishes to pursue appellate review. Applicant and counsel are directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the current Application for Post-Conviction Relief be denied and dismissed with prejudice; and
2. That Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 28 day of Aug., 2007.


L. Casey Manning
Presiding Judge
Eleventh Judicial Circuit


Plumtree, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

FRED R. RUTLAND

Applicant,

vs.

STATE OF SOUTH CAROLINA

Respondent

2007 SEP 21 2:45:50

C/A NO.: 2003-CP-32-1983

BETH A. CARRIGG

CLERK OF COURT

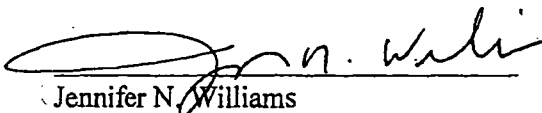
LEXINGTON

NOTICE OF MOTION AND MOTION
TO ALTER OR AMEND JUDGMENT

To: The State of South Carolina, by and through its' attorney Daniel E. Grigg

Please be advised that the attorney for Respondent provides this notice of motion and motion to alter or amend judgment pursuant to Rule 59 (e) of the South Carolina Rules of Civil Procedure. The Respondent received written notice on September 14, 2007 of the judgment and order issued by the Honorable L. Casey Manning and is requesting that a motion to alter or amend this judgment and order be heard on October 8, 2007 at 9:00 a.m. or as soon thereafter as may be set. The basis for this request is that the Respondent was not given the opportunity to provide a proposed order to his honor for consideration. Applicant is requesting this judgment and be set aside to provide counsel for the respondent the opportunity to provide a proposed order granting the relief requested in the Applicants PCR applicant for his honor to consider.

Respectfully submitted:



Jennifer N. Williams
1807 Hampton Street
Columbia, South Carolina 29201
(803) 252-5522
Attorney for the Applicant

Columbia, South Carolina
September 21, 2007

ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED IN THE COURT OF COMMON PLEAS

2013 AUG 13 A-11-01
2003 CP-32-1983

Fred R. Rutland, #197903,

BETH A. CAIR-RIFF
CLERK OF COURT
LEXINGTON, SC

Applicant,)

v.)

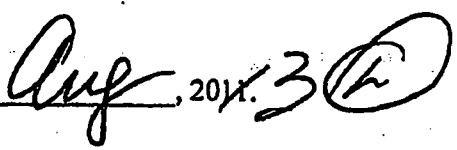
State of South Carolina,)

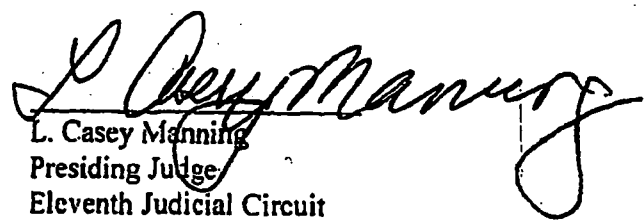
Respondent.)

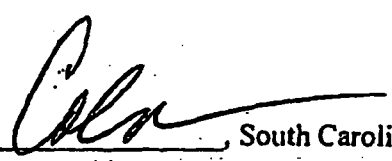
**ORDER DENYING MOTION TO
ALTER OR AMEND**

This matter comes before the Court by way of Applicant's Motion to Alter or Amend. The Respondent made its Return to this motion on October 4, 2007. The Order of Dismissal in this matter was signed by me on August 28, 2007.

Based upon careful reconsideration of all of the evidence in this case and upon full consideration of Applicant's motion, this Court is not persuaded to alter or amend the judgment. This Court further finds that oral argument would not aid in the reconsideration of the original judgment.

AND IT IS SO ORDERED this 6 day of Aug, 2013 


L. Casey Manning
Presiding Judge
Eleventh Judicial Circuit


South Carolina.

WITNESSES

Frier, LCSD

ARREST WARRANT NO. D 494788

ACTION OF GRAND JURY
TRUE BILL

Clayton
Foreman of Grand Jury 11/30/92

VERDICT
Guilty - Murder

Guilty 1st Degree 5/28/93
Foreman of Petit Jury Date:

DOCKET NO. 92-GS-32-3398

The State of South Carolina,

County of LEXINGTON

COURT OF GENERAL SESSIONS

November TERM 1992

THE STATE

vs.

FRED RANDALL RUTLAND

CDR # 116

Indictment for

MURDER

A TRUE COPY

Thomas H. Gentry
Lex. Co. C.C.C.P., G.S. & F.C.

A TRUE COPY

Thomas H. Gentry
Lex. Co. C.C.C.P., G.S. & F.C.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

INDICTMENT FOR
MURDER

At a Court of General Sessions, convened on November 30, 1992,
the Grand Jurors of Lexington County present upon their oath:

That FRED RANDALL RUTLAND did in Lexington County on or about
September 4, 1992, feloniously, wilfully and with malice
aforethought, kill one Jimmy Peele by shooting the victim four (4)
times with a 25 calibre semi-automatic pistol.

Against the peace and dignity of the State, and contrary to the statute in such case made and
provided.

[Signature]
SOLICITOR
A TRUE COPY
[Signature]
Lex. Co. C.C.C.P., G.S. F.C.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

Murder

IN THE COURT OF GENERAL SESSIONS

IND# 92 -GS-32- 3398)

ARRAIGNMENT

A.W.# D 494788)

THE DEFENDANT _____ IS PUT TO THE
BAR AND ARRAIGNED, AND UPON HIS/HER ARRAIGNMENT PLEADS GUILTY AS CHARGED.
ATTEST:

THOMAS H. COMERFORD, CLERK OF COURT
LEXINGTON COUNTY

DEFENDANT

DATE SIGNED _____

Verdict: Guilty

... SENTENCE ...

THE DEFENDANT Ired Randall Rutland IS COMMITTED TO
THE STATE DEPT. OF CORRECTIONS/COUNTY FOR A TERM OF life ~~MONTHS~~/YEARS
AND/OR TO PAY A FINE OF \$ _____; PROVIDED UPON THE SERVICE OF _____
MONTHS/YEARS AND/OR PAYMENT OF \$ _____ PLUS PAY/WAIVE COST AND
ASSESSMENTS AS APPLICABLE*, THE BALANCE IS SUSPENDED WITH PROBATION FOR
_____ MONTHS/YEARS.

RESTITUTION

FOR PHYSICAL INJURY \$ _____

YES / NO

PROPERTY DAMAGE \$ _____

TO BE PAID _____

TO THE CLERK OF COURT FOR _____ **

OTHER CONDITIONS _____

DATE 5/28/93

*COST AND ASSESSMENTS

NON-WAIVABLE \$ _____

NOT WAIVED \$ _____

TOTAL

\$ 0

Frank Egger
PRESIDING JUDGE

Thomas H. Comerford
THOMAS H. COMERFORD, CLERK OF COURT
LEXINGTON COUNTY

**PAY TO VICTIM'S COMPENSATION FUND IF SUBROGATED.

DATE 5-28-93

WHITE (CLERK OF COURT)

YELLOW (JAIL)

PINK (PROBATION)

GOLD (DEFENDANT)

LCF 652

72 C

Frier, LCSD

County of

LEXINGTON

February

TERM 1993

VS.

FRED RANDALL RUTLAND

Straight Indictment

TRUE BILL

Foreman of Grand Jury 2/25/93

2/25/93

VERDICT

July

850
Kalu / J. Maria
Taleman n/Politikuru
Date: 5/28/93

Date:

Indictment for Assault and Battery With Intent To Kill and Possession of Firearm or Knife During Commission of or Attempt to Commit Violent Crime

A TRUE COPY

Lex. Co. C.C.C.P., C.S. F.C.

A TRUE COPY

Thomas H. Gentry
Lex. Co. C.C.C.P., G.S. & F.C.

FORM 8 (12/87)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)

~~INDICTMENT FOR ASSAULT AND
 BATTERY WITH INTENT TO KILL
 AND POSSESSION OF FIREARM OR
 KNIFE DURING COMMISSION OF OR
 ATTEMPT TO COMMIT A
 VIOLENT CRIME~~

At a Court of General Sessions, convened on February 1, 1993,
 the Grand Jurors of Lexington County present upon their oath:

COUNT ONE — ASSAULT AND BATTERY WITH INTENT TO KILL

That _____
 did in _____ County on or about _____, with
 malice aforethought commit an assault and battery upon one _____
 _____ with intent to kill the said victim.

**COUNT TWO — POSSESSION OF FIREARM OR KNIFE DURING COMMISSION
 OF OR ATTEMPT TO COMMIT A VIOLENT CRIME**

That FRED RANDALL RUTLAND
 did in Lexington County on or about September 4, 1992, possess or
 visibly display a firearm or visibly display a knife during the commission or attempted commission
 of a violent crime, to wit: 25 calibre semi-automatic pistol,
 in violation of Code Section 16-23-490, *Code of Laws of South Carolina*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and
 provided.

A TRUE COPY

Thomas H. Gentry
 Lex. Co. C.C.C.P., C.S., P.G.

Wm. M. Mah
 SOLICITOR

STATE OF SOUTH CAROLINA)
 COUNTY OF LEXINGTON)

Possession of Firearm or
 Knife during Violent Crime
 IN THE COURT OF GENERAL SESSIONS

IND# 93 -GS-32- 586)

ARRAIGNMENT

A.W.# _____)

THE DEFENDANT Fred Randall Rutland IS PUT TO THE
 BAR AND ARRAIGNED, AND UPON HIS/HER ARRAIGNMENT PLEADS GUILTY AS CHARGED.
 ATTEST:

THOMAS H. COMERFORD, CLERK OF COURT
 LEXINGTON COUNTY

DEFENDANT
 DATE SIGNED _____

... SENTENCE ...

THE DEFENDANT Fred Randall Rutland IS COMMITTED TO
 THE STATE DEPT. OF CORRECTIONS/COUNTY FOR A TERM OF Five 5 ~~MONTHS~~ MONTHS/YEARS
 AND/OR TO PAY A FINE OF \$ _____; PROVIDED UPON THE SERVICE OF _____
 MONTHS/YEARS AND/OR PAYMENT OF \$ _____ PLUS PAY/WAIVE COST AND
 ASSESSMENTS AS APPLICABLE*, THE BALANCE IS SUSPENDED WITH PROBATION FOR
 _____ MONTHS/YEARS.

RESTITUTION

FOR PHYSICAL INJURY \$ _____

YES / NO

PROPERTY DAMAGE \$ _____

TO BE PAID _____

TO THE CLERK OF COURT FOR _____ **

OTHER CONDITIONS _____

DATE 5/28/93

*COST AND ASSESSMENTS

NON-WAIVABLE \$ _____

NOT WAIVED \$ _____

TOTAL \$ 0

Frank Egger
 PRESIDING JUDGE

Thomas H. Comerford
 THOMAS H. COMERFORD, CLERK OF COURT
 LEXINGTON COUNTY

*PAY TO VICTIM'S COMPENSATION FUND IF SUBROGATED.

F.D. Rutland DATE 5-28-93

WHITE (CLERK OF COURT) YELLOW (JAIL) PINK (PROBATION) GOLD (DEFENDANT)

WITNESSES

Frier, LCSD

ARREST WARRANT NO. _____

Straight Indictment

ACTION OF GRAND JURY
TRUE BILL

Emilia J. Jick
Foreman of Grand Jury

5/20/93

VERDICT

Guilty

Guilty A. J. Jick
Foreman of Petit Jury

Date:

DOCKET NO. _____ 1214

The State of South Carolina,

County of _____ LEXINGTON

COURT OF GENERAL SESSIONS

May _____ TERM 1993

THE STATE

VS.

FRED RANDALL RUTLAND

Indictment for Pointing a

Firearm and Carrying a

~~a Pistol.~~

Donald V. Myers, Solicitor

A TRUE COPY
Thomas H. Brimford
Lex. Co. C.C.C.P., G.S. & F.C.

A TRUE COPY

Thomas H. Brimford
Lex. Co. C.C.C.P., G.S. & F.C.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

INDICTMENT FOR POINTING A FIREARM
AND CARRYING A PISTOL

At a Court of General Sessions, convened on May 24, 1993,
the Grand Jurors of Lexington County present upon their oath:

COUNT ONE — POINTING A FIREARM

That FRED RANDALL RUTLAND did
in Lexington County on or about September 4, 1992,
point or present a firearm, to wit: 12 gauge shotgun

at one Jimmy Peele

COUNT TWO — CARRYING A PISTOL

That _____ did
in _____ County on or about _____,
carry about the person a pistol.

Against the peace and dignity of the State, and contrary to the statute in such case made and
provided.

Colleen E.
Asst. SOLICITOR

TRUE COPY

Lex. Co. C.C.C.P. C.S. F.C.

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IND# 93 -GS-32- 1514

A.W.# _____

Pointing a Firearm

IN THE COURT OF GENERAL SESSIONS

ARRAIGNMENT

THE DEFENDANT _____ IS PUT TO THE
 BAR AND ARRAIGNED, AND UPON HIS/HER ARRAIGNMENT PLEADS GUILTY AS CHARGED.
 ATTEST:

THOMAS H. COMERFORD, CLERK OF COURT
 LEXINGTON COUNTY

DEFENDANT
 DATE SIGNED _____

Verdict & Guilty

... SENTENCE ...

THE DEFENDANT Fred Randall Rutland IS COMMITTED TO
 THE STATE DEPT. OF CORRECTIONS/COUNTY FOR A TERM OF Ten 10 ~~YEARS~~ YEARS
 AND/OR TO PAY A FINE OF \$ _____, PROVIDED UPON THE SERVICE OF _____
 MONTHS/YEARS AND/OR PAYMENT OF \$ _____ PLUS PAY/WAIVE COST AND
 ASSESSMENTS AS APPLICABLE*. THE BALANCE IS SUSPENDED WITH PROBATION FOR
 _____ MONTHS/YEARS.

RESTITUTION

FOR PHYSICAL INJURY \$ _____

YES / NO

PROPERTY DAMAGE \$ _____

TO BE PAID _____

TO THE CLERK OF COURT FOR _____

OTHER CONDITIONS _____

A TRUE COPY***Thomas H. Comerford*
Lex. Co. C.C.C.P., G.S., F.C.DATE 5/28/93

*COST AND ASSESSMENTS

NON-WAIVABLE \$ _____

NOT WAIVED \$ _____

TOTAL \$ 0

**PAY TO VICTIM'S COMPENSATION FUND IF SUBROGATED.

DATE 05-28-93

WHITE (CLERK OF COURT)

YELLOW (JAIL)

PINK (PROBATION)

GOLD (DEFENDANT)

LCF 652

Frank Egger
PRESIDING JUDGE*Thomas H. Comerford*
THOMAS H. COMERFORD, CLERK OF COURT
LEXINGTON COUNTY